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## To Most Likely Know the Law: Objectivity, Authority, and Interpretation in Islamic Law



*Abstract: This article addresses the implications of interpretation on objectivity and authority in Islamic law. Premodern Muslim jurists developed a jurisprudence that acknowledged the inevitability of interpreting in the law. Their jurisprudence concentrated on how to legitimate interpretive agency and offer standards of evaluation for a legal system whose ultimate authority rests on a theological commitment to God as sovereign. The issues of objectivity and authority in the law are hardly unique to the Islamic legal tradition.*

*Indeed, if there is a distinct contribution that this study offers, in addition to explicating the various Islamic legal theories, it is that however a legal system's sovereign is understood, similar questions about objectivity and authority will arise in legal systems. Whether the sovereign is God or the state, the issue of interpretation remains of central concern.*

### 1. INTRODUCTION

In his dissent in *Terminiello v. Chicago*, U.S. Supreme Court justice Felix Frankfurter emphasized the importance of limiting the court's extent of inquiry by a curious and perhaps now infamous reference to a stereotype of the Muslim judge. He said: "This is a court of review, not a tribunal unbounded by rules. We do not sit like a *kadi* under a tree dispensing justice according to considerations of individual expediency."<sup>1</sup> For scholars of Islamic law and jurisprudence, Justice Frankfurter's comments raise, through a stark if not racist and bigoted image, fundamental questions

<sup>1</sup> *Terminiello v. Chicago*, 337 U.S. 1, at 11; 69 S.Ct. 894, 899 (1949).

about legal objectivity and authority, standards of justice, and the role of the adjudicator or interpretive agent in meting out justice.<sup>2</sup>

A popular perception of Islamic law that lies contrary to the image presented by Frankfurter is that it is so highly determinate as to prevent effective interpretive engagement with source-texts and the contingencies of particular conflicts. Whether one considers popular claims about *Shari'a* (the body of Islamic law) as consisting of medieval, archaic, or backward rules, or descriptions of its doctrine as reflecting God's rule and will, *Shari'a* is often reduced to highly determinate rules that are meant to be applicable for all times.<sup>3</sup>

The two popular stereotypical understandings of Islamic law recounted above are less real than perceived. In fact, academic literature offers such substantive analysis of Islamic legal interpretation and jurisprudence that even describing these stereotypical positions as prevalent is *de rigueur*.<sup>4</sup> Nonetheless, the stereotypes remain, and for reasons that are not unjustified. As news accounts relate how, in the name of Islamic law, apostates from Islam are threatened with execution,<sup>5</sup> women suffer oppression through the application of Islamic family law,<sup>6</sup> and civil unrest occurs

<sup>2</sup> For studies on Islamic law that invoke Justice Frankfurter's comment to inspire theoretical questions about Islamic law and interpretation, see Lawrence Rosen, *The Justice of Islam* (Oxford: Oxford University Press, 2000); Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (1989; reprint, Cambridge: Cambridge University Press, 1990); John Makdisi, "Legal Logic and Equity in Islamic Law," *The American Journal of Comparative Law* 33 (1985), pp. 63–92. See also David S. Powers, *Law, Society and Culture in the Maghrib, 1300–1500* (Cambridge: Cambridge University Press, 2002), which appreciates Rosen's framing but offers a nuanced approach to adjudication with a focus on the social history surrounding particular adjudications.

<sup>3</sup> For examples of such views about *Shari'a*, see Anver M. Emon, "Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation," *Canadian Bar Review* 87:2 (February 2009), pp. 391–425.

<sup>4</sup> See Powers, *Law, Society and Culture*; Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001); Hallaq, "Was the Gate of *Ijtihad* Closed?" *International Journal of Middle East Studies* 16:1 (1984), pp. 3–41; Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005); Yasin Dutton, *The Origins of Islamic Law: The Qur'an, the Muwatta' and Madinan 'Amal* (Richmond, U.K.: Curzon Press, 1999); Khaled Abou El Fadl, *Speaking in God's Name* (Oxford: Oneworld, 2001).

<sup>5</sup> On the Afghan apostate case, see Anver M. Emon, "On the Pope, Cartoons, and Apostates: *Shari'a* 2006," *Journal of Law and Religion* 22:2 (2006–2007), pp. 303–321.

<sup>6</sup> For an analysis and critique of Islamic family law and practice, see Annelies Moors, "Debating Islamic Family Law: Legal Texts and Social Practices," in Margaret L. Meriwether and Judith Tucker, eds., *Women and Gender in the Modern Middle East* (Boulder: Westview Press, 1999), pp. 141–176; Mahnaz Afkhami, ed., *Faith and Freedom: Women's Human Rights in the Muslim World* (Syracuse: Syracuse University Press, 1995); Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics*, 2nd ed. (Boulder: Westview Press, 1995), esp. pp. 79–122.

in the name of applying Shari'a,<sup>7</sup> popular perceptions of Shari'a and the information feeding them seem far removed from the scholarly debates about legal history and theory.

This article does not take its cues from popular perceptions of Shari'a but is mindful of the way these nonetheless animate debates about Islamic law and the Muslim world. It adopts a comparative approach to law and legal interpretation in the hope of appealing to readers interested in how different legal systems contend with conceptual questions about objectivity and legal authority and with the dynamics of legal interpretation. The focus is on the Islamic legal tradition, but the study is framed in a manner that should be familiar to those working in the common law tradition, too.

Through a comparative approach we may gain insights not only into other traditions, but also into the underlying assumptions we take for granted when studying our own. By analyzing Islamic legal debates from the ninth through fourteenth centuries,<sup>8</sup> I will demonstrate that whether we come to the study of law from specializing in common law or premodern Islamic law, we miss an important aspect of our field if we fail to recognize how the boundaries dividing these legal systems are not as concrete as one might expect.

While the legal traditions may be separated by centuries, the issues that compel jurisprudential analysis and speculation are nonetheless similar, if not entirely shared. Developing a conceptual vocabulary through which we can discuss common legal issues is of paramount importance in today's world, as different legal systems increasingly come into contact with one another, and legal professionals require new ways of moving between systems without losing coherence in legal meaning.

This study focuses on interpretation and its implications for questions regarding the objectivity and authority of the law. As argued below, premodern Muslim jurists from the ninth through fifteenth centuries developed a jurisprudence of Shari'a that acknowledged the inevitability of interpreting within the law. This should not be surprising if we take into account that legal systems generally require a degree of

<sup>7</sup> The year 2006 witnessed in Somalia the rise of the Union of Islamic Courts (UIC) and its takeover of Mogadishu. See Alex Perry, "Remember Somalia?" *Time* 170:24 (December 10, 2007), p. 50; Zeray W. Yihdego, "Ethiopia's Military Action Against the Union of Islamic Courts and Others in Somalia: Some Legal Implications," *International and Comparative Law Quarterly* 56:3 (2007), pp. 666–676.

<sup>8</sup> The focus on sources from the ninth through fourteenth centuries reflects my interest in a genre of literature, namely *usul al-fiqh*. That genre animates much research on the epistemological possibilities that can be derived from research into Islamic legal history. However, all too often, such studies elaborate the premodern tradition without also addressing compelling issues in legal philosophy that are shared across traditions.

interpretive agency, whether they are premodern or modern. Certainly the language, style, and legal content of distinct systems will differ. But I suggest that concerns about determinacy, authority, and reason are significant features of legal systems, whether common law, rabbinic law, or, as in this case, Islamic law. The question for premodern Muslim jurists was how to legitimate interpretive agency and offer standards of evaluation. I will demonstrate that Islamic jurists theorized about the authority of legal interpretations by contextualizing each one in a system whose ultimate authority rested on a theological commitment to divine sovereignty. Issues of objectivity and authority dealt with by these jurists are hardly unique to the Islamic legal tradition. Hence, in addition to explicating various Islamic legal theories, this study offers an understanding that however a legal system's sovereign is understood, similar questions about objectivity and authority will arise. Whether the sovereign is God or the state, the matter of interpretation is crucial. The ways in which both religious and secular legal scholars understand problems of objectivity and interpretation are not so different as to render "religious" legal systems unique.

## 2. THE CONCEPT AND AUTHORITY OF "FIQH"

Many modern writers on Islamic law have made keen efforts to distinguish conceptually between the terms "Shari'a" and "*fiqh*." They have argued that the former is the ideal law in the "mind of God"—perfect, just, and true—whereas the latter, *fiqh*, captures the human effort to understand and comprehend Shari'a while at the same time embodying the imperfection in the human capacity to know God's intentions with certainty.<sup>9</sup>

The imperfection inherent in the concept of *fiqh* is not new. Rather, as discussed below, premodern Muslim jurists recognized that human beings, since they are finite creatures, are completely unsuited to the task of knowing the eternal and the infinite with certainty and objectivity. Interpretations of law therefore remain vulnerable to debate and rebuttal upon the identification of new evidence. The fallibility of human interpretation certainly contributes to a pious humility before the infinitude of God, but at the same time, pieties cannot serve to dismiss the authority of *fiqh* as precedent in an Islamic rule-of-law system, despite debates about the continued meaningfulness of centuries-old precedents over time.

The jurisprudential challenge of understanding Shari'a in premodern and contemporary times can be met only if the authority of *fiqh* is

<sup>9</sup> Abou El Fadl, *Speaking in God's Name*, p. 32.

understood within both a premodern juridical framework and a modern international state system. Authority in Shari'a is far from a simple matter.<sup>10</sup> One understanding is that it rests on the fact that Islamic legal rules have gained precedential value in the light of the doctrine of *taqlid*. While some have characterized *taqlid* as blind adherence to the law, Wael Hallaq has convincingly argued that *taqlid* is elemental to establishing a sense of objective, authoritative rules to which one can resort—akin to the role of *stare decisis* in common law.<sup>11</sup> Others have argued that authority in Shari'a involves more than a legislative fallback position and doctrinal precedents, and that it resides in the recourse of jurists to institutions of adjudication through which Shari'a doctrine is applied.<sup>12</sup> In the hope of contributing to this latter approach to authority in Islamic law, I will focus on the authority of juristic interpretations.

### 3. OBJECTIVITY AND AUTHORITY IN INTERPRETATION: THE JURISPRUDENTIAL STAKES

How we interpret the law necessarily depends on how we understand what the law is. If the law is understood as a body of facts independent of the human mind, law might be best spoken of in formalistic terms, and the interpreter might be described as *finding* or *discovering* the law. If, however, the law is tied to institutional and historical contexts, this may allow for constructive creativity within the limits of a legal tradition. In other words, theories of legal interpretation will assume different contours if law is understood as separate from the interpreter or, alternatively, as tied to an interpretive engagement with doctrine, institution, and history.

<sup>10</sup> In fact, some would argue that in the age of globalization and international information systems, authority in Islamic law has gone beyond considerations of the text and notions of expertise. See Peter Mandaville, "Globalization and the Politics of Religious Knowledge: Pluralizing Authority in the Muslim World," *Theory, Culture & Society* 24:2 (2007), pp. 101–115. In this study, the focus on texts and legal expertise is deliberate given how texts play an important role in the construction, transmission, and perpetuation of a tradition that occupies the life world, moral framework, or prejudices of the modern reader seeking meaning. This focus does not deny that other signs or sources may contribute to one's construction of meaning, legal or otherwise. Rather, the focus in this study is intended to show how, in the context of Islamic law, text and context contribute to meaning.

<sup>11</sup> Hallaq, *Authority, Continuity and Change*.

<sup>12</sup> Powers, *Law, Society and Culture in the Maghrib*, pp. 23–94. Other theorists remark how theories of interpretation do not adequately diminish the scope of indeterminacy in the law, and emphasize the need for more effective institutional design. Michael C. Dorf, "Legal Indeterminacy and Institutional Design," *New York University Law Review* 78:3 (June 2003), pp. 875–981.

### 3.1 Leiter and Coleman on Objectivity in Law

Brian Leiter and Jules Coleman offer three models of objectivity in law.<sup>13</sup> For instance, a strong notion of objectivity might presume that legal facts exist without reference to human construction and without the effort of human investigation. The problem with this sense of objectivity, they argue, is that it does not indicate how anyone can ever know such objective legal facts. If legal facts exist independently of the human intellect, and do not depend for their existence on the evidentiary tools used by humans to arrive at them, how can they ever be known? Strong objectivity renders the law potentially beyond human comprehension.

Perhaps, instead, the law is only “minimally objective.” According to Leiter and Coleman, minimal objectivity considers the law to be a product of community usage. “According to minimal objectivity, what seems right to the majority of the community determines what is right.”<sup>14</sup> However, as the authors note, minimal objectivity is problematic because it allows for the possibility of global or large-scale error<sup>15</sup> and cannot contribute insights to rational disagreement on issues not settled by convention.<sup>16</sup>

The authors proffer that “modest objectivity” is a superior conceptual approach to the determinacy and authority of law and adjudication in common law. “Modest objectivity,” they write, “allows the possibility that everybody could be wrong about what a rule requires; what seems right even to everyone about what a rule requires may not be right. Only what seems right to individuals placed in an epistemologically ideal position determines what is right.”<sup>17</sup> The rightness of a legal decision is linked to how we identify those in the best position to understand and decide legal rules. This conception of objectivity moves away from the communal determination of legal facts and the independence of legal facts from

<sup>13</sup> Jules Coleman and Brian Leiter, “Determinacy, Objectivity, and Authority,” *University of Pennsylvania Law Review* 142 (1993), pp. 549–637.

<sup>14</sup> Coleman and Leiter, “Determinacy,” p. 608.

<sup>15</sup> From an Islamic theoretical perspective, a global error would face the challenge of *ijma'*, or rule by consensus. The authority of this mode of legal argumentation is based on a tradition from the prophet Muhammad, who says that his community will never agree on an error. Notably, *ijma'* as a mode of legal reasoning has been criticized for its methodological ambiguities, and some have also suggested that a claim of *ijma'* is akin to taking judicial notice of facts so obvious as to be beyond dispute. Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd ed. (Cambridge: Islamic Texts Society, 2003), pp. 228–263.

<sup>16</sup> Coleman and Leiter, “Determinacy,” p. 616ff.

<sup>17</sup> Coleman and Leiter, “Determinacy,” p. 621.

human understanding. It relies on notions of expertise and interpretation and allows for the possibility that there may be errors in legal determinations due to deficiencies in the epistemological circumstances of the decision maker.

The authors contend that this moderate conception of objectivity is implicit in the interpretive theory of Ronald Dworkin. Here I endorse neither this contention nor Dworkin's well-known and much contested idea of "law as integrity."<sup>18</sup> I refer to his interpretive theory in order to illustrate the jurisprudential *stakes* in debates on determinacy, interpretation, and authority in the law.<sup>19</sup> Focusing on the stakes, I suggest, will help facilitate a comparative analysis.

### 3.2 Dworkin's Interpretive Theory

To explain his interpretive theory of law as integrity, Dworkin writes about the fictitious community of Courtesy. The residents of Courtesy strive to be courteous. But what is courteous behavior? Some might look to precedent or communal consensus to answer this question. Others might first determine the content of courtesy, as a core value, to ensure that any subsequent interpretation corresponds with that content. This latter approach—the interpretive approach—is Dworkin's preferred understanding of legal interpretation.<sup>20</sup> Under the interpretive approach, courtesy is understood to capture values so core to a community that no one disagrees about them. These values constitute what Dworkin calls a *concept*. "Dworkin claims that members of a community such as Courtesy will often agree about the most general and abstract propositions about

<sup>18</sup> For a well-informed critique of Dworkin's position, see, for example, Stephen R. Munzer and James W. Nickel, "Does the Constitution Mean What It Always Meant?" *Columbia Law Review* 77:7 (1977), pp. 1029–1062.

<sup>19</sup> This is not to suggest one should rely on Dworkin's paradigm of law as integrity as if it were portable to any legal system. Importantly, the underlying political liberal presumptions arising from his interpretive theory cannot be ignored or taken for granted. Coleman and Leiter, "Determinacy," p. 550. The acceptability of a judicial decision for Dworkin may depend on the political theory of the society in which a given rule-of-law system operates. As Chabal and Daloz remind us, Western liberal models of state and society may not provide either effective or analytically meaningful models of comparative analysis. Patrick Chabal and Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument* (Bloomington: Indiana University Press, 1999). Likewise, Dworkin's Anglo-American common law context may provide an overly thick backdrop to his theory of interpretation. Consequently, while his theory raises significant points of interest concerning interpretation more generally, the comparative method requires caution to avoid superimposing one theory on another.

<sup>20</sup> Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986), p. 47; Ken Kress, "The Interpretive Turn," *Ethics* 97:4 (1987), p. 839.

a practice, and these can then serve ‘as a kind of plateau on which further thought and argument is built.’”<sup>21</sup> Further thought and argument will lead to specific—and perhaps even controversial—*conceptions* about what behavior constitutes courtesy. *Conceptions* are not core values of a legal system but are, rather, the interpretive products that arise from engaging *concepts*. They are interpretations contingent upon an authority limited by the context and history from which they arose. They may certainly be dispositive for a given case, but they will nonetheless be a part of history rather than constitute transcendent values of the legal system.<sup>22</sup>

Dworkin’s distinction between abstract *concepts* and the particular *conceptions* that are derived from them is significant for his interpretive theory of law.<sup>23</sup> Dworkin is principally concerned with explaining and justifying the constructive role interpretation plays in the law. “Constructive interpretation,” he writes, “is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.”<sup>24</sup> This approach to interpretation relies on an assumption of a practice that is understood and accepted and can be evaluated in terms of its overall excellence as a mode of analysis. As Dworkin states, “Law cannot flourish as an interpretive enterprise in any community unless there is enough initial agreement about what practices are legal practices so that lawyers argue about the best interpretation of roughly the same data.”<sup>25</sup> A preinterpretive agreement on the most fundamental elements of a legal system is therefore essential to an intelligent discussion of the authority of any legal interpretation.<sup>26</sup>

<sup>21</sup> Kress, “Interpretive Turn,” p. 840, quoting Dworkin, *Law’s Empire*, p. 70.

<sup>22</sup> See also Alasdair C. MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame: University of Notre Dame Press, 1989), which discusses the transcendent value of justice amidst its particularization in shifting historical periods.

<sup>23</sup> Critics argue that Dworkin fails to adequately define and clarify the dichotomy between concept and conception. Munzer and Nickel, “Does the Constitution Mean What It Always Meant?”

<sup>24</sup> Dworkin, *Law’s Empire*, p. 52.

<sup>25</sup> Dworkin, *Law’s Empire*, p. 91. See also Kress, “Interpretive Turn,” p. 839.

<sup>26</sup> One may not share this agreement and still engage in an interpretation of the law. As Dworkin asserts, nothing is “by definition” true in law (Dworkin, *Law’s Empire*, p. 92). Dworkin suggests that what is necessary in an interpretive approach to the law is argument. However, he admits that without the preinterpretive agreement, such arguments may be absurd. Interestingly, Dworkin also states: “We all enter the history of an interpretive practice at a particular point; the necessary preinterpretive agreement is in that way contingent and local.” Dworkin, *Law’s Empire*, p. 91. One wonders whether this position can be understood as an argument against general theories of the law that cut across legal systems. In other words, it is not clear whether Dworkin would allow for the possibility of a general theory of law and legal interpretation that applies to different legal systems. For instance, given Dworkin’s constant reference to American and

Once preinterpretive agreement has been reached, the need for an interpretive method becomes apparent. Dworkin addresses three possible theories of legal interpretation: conventionalism, pragmatism, and law as integrity. According to Kress, Dworkin's conventionalism "maintains that past political acts justify coercion by—and only to the extent that—they provide notice so that citizens need not be surprised by governmental action."<sup>27</sup> It affirms the idea of legal rights as the outer bounds within which any interpretation of the law must fall. If no law exists to direct a court on a legal issue, the judge must utilize discretion to craft a new legal right. The justification for such a new legal right, though, has to do not with legal interpretation but instead with political or moral considerations. Dworkin rejects the conventionalist approach as relying too heavily on social facts without reference to the underlying purposes of the law as understood from the shared preinterpretive perspective.

A pragmatist interpretive theory of the law maintains that "judges do and should make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable for its own sake."<sup>28</sup> Such an interpretive theory does not vociferously disregard past political acts; while consistency with past political decisions is not beneficial for its own sake, the past is significant to the extent that diachronic consistency benefits present society. In practice, therefore, the pragmatic jurist may rely on precedent,<sup>29</sup> but he may also disregard the past if this is deemed more beneficial. In either case, precedent and legal rights are not, by themselves, constraints on the pragmatist interpretation of law.

Dworkin himself suggests that a third interpretive theory of the law, namely, law as integrity, is the better approach. Two assumptions underlie the idea of integrity. The first is that the legislature renders the total set of laws morally coherent. The second is that the judiciary presumes the law is morally coherent.<sup>30</sup> Judicial statements of the law are therefore not backward-looking (conventionalist) or forward-looking (pragmatist) but instead incorporate both elements. Legal practice is an "unfolding political narrative" in which judges do not simply *find* the law or creatively

British jurisprudential controversies, a subtext to his theory of interpretation is that it is specific to Anglo-American legal traditions.

<sup>27</sup> Kress, "Interpretive Turn," p. 843.

<sup>28</sup> *Ibid.*, p. 95.

<sup>29</sup> *Ibid.*, p. 162.

<sup>30</sup> *Ibid.*, p. 176.

construct it from the bench.<sup>31</sup> Rather, “we understand legal reasoning... only by seeing the sense in which... [judges] do both and neither.”<sup>32</sup>

According to law as integrity, “propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”<sup>33</sup> Law as integrity is an interpretive approach that considers all past political acts to embody a cohesive set of moral principles and applies those principles consistently to current and future disputes.<sup>34</sup> The moral principles arising from past political acts bind the judge or legal interpreter. They are *concepts* that contribute to *conceptions* of the core principles of the legal system. Judges are not straitjacketed into prior legal decisions in a conventionalist sense; nor are they pragmatically free to create new legal rights without regard to the constraints of the past. Rather, in law as integrity, the judge is constrained by a broader view of the past that allows for changes in the law without causing outright rebellion against the prevailing legal regime.

Dworkin’s law as integrity, as a theory of legal decision making, offers significant points for observation. It requires that the law have purposes that are generally agreed upon. These purposes or *concepts* will certainly vary from society to society. How one identifies them is unclear. Perhaps as in the case of John Finnis’ basic goods, such general *concepts* are *per se nota*, or intuitively known, and merely corroborated by empirical data.<sup>35</sup> Then, from these general *concepts*, however derived, a judge adjudicates a given case and offers particular *conceptions* of the law. Finally, the objectivity and authority of any *conception* is a function not of pure pragmatism or mere convention, but rather of the judge’s awareness of his office within the legal system.

For Dworkin, the integrity of the law depends in part on whether legal interpreters ensure that their *conceptions* of the law “fit” within the institution of the law, designed as it is in relation to the political and constitutional framing of the sovereign.<sup>36</sup> The notion of “fit” assumes a shared preunderstanding of the law as institution, the relevant sources of legal authority, and standards of evaluation in light of the given legal and

<sup>31</sup> Ibid., p. 225.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid., p. 844.

<sup>35</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1993 [1980]), pp. 33–36.

<sup>36</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), pp. 81–130, esp. p. 107.

political systems. By adhering to shared *concepts*, judges maintain fidelity to the legal system; but by recognizing the contingency of any *conception*, judges are in a position to change the law without undermining the integrity and authority of the legal system. These elements of Dworkin's theory are significant for this study because they illustrate the stakes that legal interpretation raises concerning objectivity and authority in the law.

#### 4. ISLAMIC LEGAL INTERPRETATIONS: THEIR FORMS AND BOUNDARIES

As mentioned above, premodern Muslim jurists generally acknowledged the need to interpret as inherent to the law. Not all legal issues had a clear resolution in a source-text, and consequently, experts in the law would need to reason to a rule of law in light of text and context. This process of reasoning was called *ijtihad*. *Ijtihad* was a topic of considerable debate in the premodern period and has been a focal point since the late nineteenth century for those seeking to reform and modernize Islamic law.<sup>37</sup> A preliminary question on *ijtihad* concerns the scope of interpretive license. To what extent is a jurist allowed to interpret, and what are the bounds beyond which he or she cannot go? Are some values, like Dworkin's *concepts*, so fundamental as to be beyond interpretation and critique? How do those values aid legal interpretation and respond to apprehensions about objectivity and authority in the law?

Premodern Muslim jurists circumscribed the scope of interpretation by distinguishing between two types of values: those that are core (*usul*) and others that are peripheral (*furu'*). Linguistically, *usul* is the plural of *asl* and refers to the base or foundation of something (*asfal al-shay'*), such as the base of a mountain or tree. It is what something else sits atop for support and stability.<sup>38</sup> *Furu'* is the plural form of *far'* and refers to something that rises to new levels or branches out. It refers to the extreme points (*a'alīn*) as opposed to the foundation or base.<sup>39</sup> These terms assume

<sup>37</sup> From the late nineteenth century onward, debates on *ijtihad* concerned whether the "door of *ijtihad*" or the license to interpret in the law had been closed in the tenth century, when jurists somehow declared that all issues had been decided and there was no need for *de novo* legal analysis. On the debates, see Shaista P. Ali-Karamali and F. Dunne, "The *Ijtihad* Controversy," *Arab Law Quarterly* 9:3 (1994), pp. 238–257. The historical validity of this alleged closure has been substantially questioned and critiqued in the scholarly literature. Hallaq, "Was the Gate of *Ijtihad* Closed?" Nonetheless, modern self-proclaimed reformers consider their calls for a new *ijtihad* to be novel and perhaps even edgy. See, for example, Irshad Manji, *The Trouble with Islam Today: A Muslim's Call for Reform in Her Faith* (New York: St. Martin's Press, 2004).

<sup>38</sup> Murtada al-Zabidi, *Taj al-'Urus min Jawahir al-Qamus*, ed. 'Ali Shiri (Beirut: Dar al-Fikr, 1994), 14:18; Ibn Manzur, *Lisan al-'Arab*, 3rd ed. (Beirut: Dar Sadir, 1994), 11:16.

<sup>39</sup> Al-Zabidi, *Taj al-'Urus*, 11:336–339; Ibn Manzur, *Lisan al-'Arab*, 8:246–849.

a particular salience within the *usul al-fiqh* genre, which literally means the foundations or sources of law but has also been translated as Islamic jurisprudence or legal theory. In this genre of legal literature, premodern Muslim jurists gave the terms *usul* and *furu'* technical meanings that have serious consequences for the scope of interpretation and moral agency, given a systemic angst about objectivity and authority in the law.

#### 4.1 Is Every Opinion on Core Values (“Usul”) Correct?

According to Muslim jurists, the *usul*, or core values, are those that are universal and are subject to neither dispute nor interpretation. In fact, for the thirteenth-century jurist al-Qarafi (d. 1285 CE) and others, the *usul* are so fundamental that one is effectively compelled, whether by nature, reason, or otherwise, to believe them. Al-Qarafi stated: “The fundamentals of faith are of great importance, and as such God most high compels [belief] in them as opposed to others” (*shara’ Allah ta’ala fiha al-ikrah dun ghayriha*).<sup>40</sup> In fact, he asserted a consensus on the view that “God does not excuse [one] for being ignorant in the fundamentals of faith [*usul al-din*].”<sup>41</sup> The Shafi’i jurist al-Shirazi (d. 1083) held more broadly that the *usul* are things that people must know and believe for themselves without relying on external authorities such as jurists to tell them what they are. He considered universal accessibility to the *usul* possible because all rational people share the capacity to reason. Therefore he found that “it is obligatory on everyone to know these core values and be certain about them. Knowledge and certainty do not arise by following the views of others.”<sup>42</sup> Rather, they arise out of the shared capacities of our human nature.

To identify the *usul*, jurists focused on the kinds of evidence that we can and must access. The Hanbali jurist Ibn ‘Aqil (d. 1119) emphasized that core values are founded on clear and certain evidence (*adilla*, singular *dalil*). Not all evidence can lead us to epistemic certainty; but the technical term *dalil* specifically refers to evidence conveying certainty

<sup>40</sup> Shihab al-Din al-Qarafi, *Sharh Tanqih al-Fusul fi Ikhtisar al-Mahsul fi al-Usul* (Beirut: Dar al-Fikr, 1973), p. 439.

<sup>41</sup> Ibid. The modern scholar Wahbah al-Zuhayli goes so far as to state that one who errs in a fundamental tenet of faith, such as belief in God or the prophet Muhammad, not only errs but is a disbeliever. An error in a lesser matter will render someone a corrupt innovator (*mubtadi’ fasiq*). Al-Zuhayli, *al-Wasit fi Usul al-Fiqh al-Islami*, 2nd ed. (Beirut: Dar al-Fikr, 1969).

<sup>42</sup> Abu Ishaq al-Shirazi, *al-Tabsira fi Usul al-Fiqh*, ed. Muhammad Husayn Hitu (Damascus: Dar al-Fikr, 1983), p. 401.

and clarity.<sup>43</sup> Abu al-Ma'ali al-Juwayni (d. 1085) held that we know the *usul* by reference to reason only, to source-texts only, or to both reason and source-texts. These sources, depending on the issue, can convey certitude and thus contribute to core values on which no debate is allowed and for which no interpretation is required.

An epistemic focus on the quality of evidence is necessary in order to claim that the *usul* are determinate, objective, and universal. For al-Juwayni, *usul* values play out "on which disagreement is prohibited, in the light of the totality of religious knowledge [*shar'*], and where believing anything else is considered ignorant. [Such a value] falls within the *usul*, whether it is based on rational proofs or not."<sup>44</sup> Likewise, al-Shirazi held that a *dalil* provides certain and compelling (*adilla qati'a* or *adilla mujiba*) evidence that is not subject to dispute.<sup>45</sup> As such, this discounts the fear that idiosyncrasy or contingencies may be masked as core values.

While premodern jurists espoused the determinacy and universality of the *usul*, they nonetheless had a hard time conveying the content of such core values. Al-Juwayni wrote that such core values have to do with the nature of God's speech (*kalam Allah*), theoretical concerns about the good and the bad, the authority of God, the eternity of the Qur'an, and legal issues that have clear and certain evidence.<sup>46</sup> Al-Khatib al-Baghdadi considered the obligations of prayer and alms-giving and the prohibition of illicit sexual activity and alcohol consumption as core values.<sup>47</sup> Al-Shirazi focused, rather, on the theological disputes about the createdness of the Qur'an and the characteristics of God when describing the core values.<sup>48</sup> Not all these issues are strictly legal; in fact, many jurists considered the *usul* to consist mainly of fundamental matters of faith or belief (*usul al-din*, *usul al-'aqa'id*, *usul al-diyana*t).<sup>49</sup> Despite the debates

<sup>43</sup> Ibn 'Aqil, *al-Wadih fi Usul al-Fiqh*, ed. George Makdisi (Beirut: Biblioteca Islamica, 1996), 1:15.

<sup>44</sup> Al-Juwayni, *Kitab al-Ijtihad min Kitab al-Talkhis*, ed. 'Abd al-Hamid Abu Zunayr (Damascus: Dar al-Qalam, 1987), p. 25. See also al-Shirazi, *al-Tabsira*, p. 496; Abu Ishaq al-Shirazi, *Sharh al-Lum'a*, ed. 'Abd al-Majid Turki (Beirut: Dar al-Gharb al-Islami, 1988), 2:1043; Abu al-Fath al-Shahrastani, *al-Milal wa'l-Nihal*, ed. Amir 'Ali Mahna and 'Ali Hasan Fa'ur, 5th ed. (Beirut: Dar al-Ma'rifa, 1996), 1:238–239, focusing in particular on the universal uniformity of *usuli* values based on reason.

<sup>45</sup> Al-Shirazi, *al-Tabsira*, pp. 496–497; al-Shirazi, *Sharh al-Lum'a*, 2:1044.

<sup>46</sup> Al-Juwayni, *Kitab al-Irshad ila Qawati' al-Adilla fi Usul al-'Itiqad* (Beirut: Dar al-Kutub al-'Ilmiyya, 1995) p. 144; al-Juwayni, *Kitab al-Ijtihad*, p. 24.

<sup>47</sup> Al-Khatib al-Baghdadi, *Kitab al-Faqih wa'l-Mutafaqqih* (Cairo: Zakariyya 'Ali Yusuf, 1977), p. 252.

<sup>48</sup> Al-Shirazi, *Sharh al-Lum'a*, 2:1044.

<sup>49</sup> Al-Juwayni, *Kitab al-Irshad*, p. 144; al-Juwayni, *Kitab al-Ijtihad*, p. 25; al-Qarafi, *Sharh Tanqih*, p. 439; al-Shirazi, *al-Tabsira*, p. 496; al-Shirazi, *Sharh al-Lum'a*, 2:1044.

on content, the significant point for our purposes concerns the characteristics of the core values: universally accessible to all, singular and uniform in the light of the evidence used, and determinate. The universalism of the *usul* immunizes them from indeterminacy, hence contributing to their status as core values. In fact, some premodern jurists such as Bishr al-Marisi and members of the Zahiri school felt that to hold views contrary to such core values was sinful but did not render someone corrupt (*fasiq*) or an unbeliever (*kafir*).<sup>50</sup>

The view that the *usul* are clear and determinate has always had its detractors. 'Ubayd Allah b. al-Hasan al-'Anbari (d. 785) held that there can be differences of opinion over the *usul* and that all competing views about core values are correct.<sup>51</sup> There is little historical information available about al-'Anbari. He was a jurist from Basra and served as a *qadi*, or judge; he was later appointed chief judge in 733 and was considered a trustworthy and reputable jurist (*faqih thiqqa*).<sup>52</sup> Muslim jurists invoked him as a foil for their position on the scope of *ijtihad*.<sup>53</sup> By analyzing their refutation of al-'Anbari's position, we can appreciate how the debates on *usul* and *ijtihad* are directly related to theoretical concerns about the objectivity and authority of the law.

Al-Khatib al-Baghdadi argued that if all *usul* are subject to dispute, then the laity may need to consult those more knowledgeable than they and adhere to their views (*taqlid*), none of which could be deemed true with any sort of certitude.<sup>54</sup> But if this were so, no knowledge could be either determinate enough to ground subsequent interpretations or sufficiently immune to the contingencies of history. Arguing polemically,

Modern scholars would also include the beliefs about God as the creator, the dispatch of prophets to humanity and their veracity, and the createdness of the Qur'an. See al-Zuhayli, *al-Wasit*, pp. 638–639.

<sup>50</sup> Sayf al-Din al-Amidi, *al-Ihkam fi Usul al-Ahkam*, 2nd ed. (Beirut: al-Maktab al-Islami, 1981), 4:182.

<sup>51</sup> Another premodern Muslim mentioned as assuming a position similar to that of al-'Anbari is al-Jahiz (d. 864). However, al-Jahiz seems to have focused more on whether one could be held to know such *usul*, even after one has expended his full efforts to know them. According to al-Qarafi, the *usul* are the kinds of values that one is compelled by God to know. In other words, they may be values intuitively known universally. Al-Qarafi, *Sharh Tanqih*, p. 439.

<sup>52</sup> Khayr al-Din al-Zirikli, *al-A'lam*, 12th ed. (Beirut: Dar al-'Ilm li'l-Malayin, 1997), 4:192; Abu al-Faraj 'Abd al-Rahman Ibn al-Jawzi, *al-Muntazam fi Ta'rikh al-Muluk wa al-Umam*, ed. Muhammad 'Abd al-Qadir 'Ata and Mustafa 'Abd al-Qadr 'Ata (Beirut: Dar al-Kutub al-'Ilmiyya, n.d.), 8:298; Ibn Hajar al-'Asqalani, *Taqrib al-Tahdhib*, ed. Muhammad 'Awwama (Beirut: Dar Ibn Hazm, 1999), p. 433.

<sup>53</sup> See, for instance, al-Shahrastani, *al-Milal wa'l-Nihal*, 1:240; al-Shirazi, *Sharh al-Lum'a*, 2:1043–1044; al-Juwayni, *Kitab al-Ijtihad*, pp. 26–27.

<sup>54</sup> Al-Baghdadi, *Kitab al-Faqih*, p. 250. See also al-Shirazi, *al-Tabsira*, p. 401.

al-Shirazi stated that claims about fundamental values cannot be indeterminate or in opposition with one another. Rather, “it is necessary that one be correct and another false, just as Muslims state: ‘Verily God most high is one, and has no partner;’” unlike the Christians, who consider God embedded in the Trinity.<sup>55</sup> To validate conflicting views on foundational values threatens the truth claims about a religious tradition. Al-Shahrastani (d. 1153), worried about the implications of al-‘Anbari’s view, held that without core values, one could not distinguish between honesty and deceit, truth and falsity, and, importantly, the truth of Islam over other faiths.<sup>56</sup>

Because of these implications, narratives about al-‘Anbari unsurprisingly place him in unflattering intellectual positions. In one story, al-Husayn b. al-Hasan al-Marwazi said that he heard ‘Abd al-Rahman b. Mahdi tell the following story:

We were at a funeral prayer with ‘Ubayd Allah b. al-Hasan [al-‘Anbari], and he was overseeing the legal affairs. At a certain point, he sat down when a seat arrived, and others sat around him. I asked him a question, but he got it wrong [*fa ghalita fiha*]. ‘Abd al-Rahman corrected him. [Al-‘Anbari] bowed his head for an hour and [thereafter] raised it, saying, “Thus I humbly take it back, thus I humbly take it back. Being wrong in the truth is better than being the leader of falsehood.”<sup>57</sup>

This story suggests that al-‘Anbari could consider his views wrong as opposed to being one among multiple possibilities. It goes further by suggesting he would dislike being cited for a falsehood. He shows his humility, recognizes his error, and ultimately is rehabilitated in this story. Nonetheless, the narrative does not tell the reader what the question was or what al-‘Anbari’s error was. In fact, the question was never a sincere question at all, since ‘Abd al-Rahman knew the answer already. Perhaps in an apocryphal manner the story implicitly invokes for the reader the *usul* position that al-‘Anbari is known for endorsing, castigates the position, but nonetheless maintains respect for al-‘Anbari as an eminent jurist and pious judge.

At stake in the debate on *usul* is a concern for a base or foundation of values from which one can derive more particular values. Like Dworkin’s *concept, usul*—as core values—help to guide the legal system’s development, aims, and aspirations. Without these core values, a legal system

<sup>55</sup> Al-Shirazi, *al-Tabsira*, pp. 496–497.

<sup>56</sup> Al-Shahrastani, *al-Milal wa’l-Nihal*, 2:238–239.

<sup>57</sup> Ibn al-Jawzi, *al-Muntazam* 9:298.

remains vulnerable to critiques about its authority and legitimacy and may suffer from a lack of direction.

But castigating al-'Anbari did not stop others from critiquing claims that the *usul* are determinate and universally accessible. For example, al-Jahiz (d. 864) upheld the validity of competing claims about core values, principally because he was unconvinced that we all share the same capacities to know these core values in a determinate fashion. He wrote that someone was once asked about the famous jurist Abu Hanifa, to which the following response was given: “[Abu Hanifa] was the most knowledgeable person about things that do not exist and the most ignorant of people about things that do exist.”<sup>58</sup> Abu Hanifa may have been a renowned jurist, highly respected and revered. But even he had a limited capacity to know things with certainty. Consequently, while the debates on *usul* raise questions about authority, shared knowledge, and a foundation for the law, al-Jahiz's remarks remind us of the indeterminacy that necessarily follows from human fallibility.<sup>59</sup>

#### 4.2 *The Particularity and Vulnerability of “Furu’*”

The discussion of *usul* sets the stage for defining the *furu’*, which are legal rulings subject to dispute and interpretation, much like Dworkin's *conceptions*. Effectively, the *furu’* are legal rulings that are not universally held and that are founded upon evidence that is less than clear and certain (*zann*).<sup>60</sup> In fact, as al-Shirazi propounded, the difference between the *usul* and *furu’* is the epistemic nature of the evidence they require. “For the *furu’* there is no dispositive evidence [*adilla qati'a*]... but there is dispositive evidence for the *usul*.”<sup>61</sup> Consequently, there is greater license for disagreement and diversity of views in *furu’* matters, but not so in the case of *usul*.<sup>62</sup>

Furthermore, *furu’* issues are those that one can adopt by adhering (*taqlid*) to a scholar's view without investigating all the relevant evidence for oneself. Matters concerning specific rituals or particular transactional details (*al-'ibadat wa'l-mu'amalat*), for example, are peripheral, and to expect people to have a fully formed view on such matters is to ignore

<sup>58</sup> Abu 'Uthman 'Amru b. Bahr al-Jahiz, *al-Bayan wa'l-Tabyin* (Beirut: Dar Ihya' al-Turath al-'Arabi, 1968), 2:192.

<sup>59</sup> On this implication of al-Jahiz's position, see al-Amidi, *al-Ihkam fi Usul al-Ahkam*, 4:178.

<sup>60</sup> Al-Shirazi, *al-Tabsir*, p. 402.

<sup>61</sup> *Ibid.*, p. 497.

<sup>62</sup> *Ibid.*

their limited capacities as well as the impossibility of having a society where members do nothing but study these less-than-core values. As al-Khatib al-Baghdadi remarked, “if we did not permit *taqlid* in these matters... everyone would need to know them [on their own]. Requiring such [individual expertise] would undermine the enjoyment of life and disrupt agricultural and livestock production. So it is necessary to limit [the obligation to investigate].”<sup>63</sup>

More importantly for this study, *furu'* comprise those issues on which interpretation (*ijtihad*) is allowed, whereas *usul* are presumed to be so widely known and accepted that there is no need for interpretive engagement. In fact, there is no need for specialists to determine the *usul*, since they are equally accessible by all. The *furu'* do not enjoy such a status. Consequently, a jurist can engage in *ijtihad* on a peripheral matter, and the laity can adhere to a jurist's conclusions, even though uniformity across multiple jurists is lacking. Diversity in *furu'* does not undermine the authority of *furu'*. Rather, legal pluralism in the *furu'* is to be expected,<sup>64</sup> thereby implicitly emphasizing the importance of core values for providing the bounds of legitimate legal debate and offering a key element to the understanding of objectivity and authority under Islamic law.

#### 4.3 Are All Jurists Correct on the “Furu”?

The authority of the *furu'*, given their plurality, is premised on the impossibility of certitude, given the nature of the evidence jurists can rely upon to reach their legal conclusions. The evidence for *furu'* rules is generally understood to be probabilistic, thus making legal indeterminacy inevitable.<sup>65</sup> Importantly, this evidentiary premise spurred theological debates about the way in which God's will operates as an organizing, legitimizing, and authorizing principle in law and political society. If the law is supposed to reflect God's will as sovereign, how can there be multiple opinions on the same matter that are equally legitimate? If they are all legitimate, does that mean God has no specific will? If God has no specific will, what justifies obedience to the Shari'a as developed through

<sup>63</sup> Al-Baghdadi, *Kitab al-Faqih*, p. 252. See also al-Shirazi, *al-Tabsira*, p. 402.

<sup>64</sup> For studies on the Islamic schools of law, see George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981); Dutton, *Origins of Islamic Law*; Hallaq, *Origins and Evolution of Islamic Law*; Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th–10th Centuries, C.E.* (Leiden: Brill, 1997).

<sup>65</sup> Al-Amidi, *al-Ihkam fi Usul al-Ahkam*, 4:180; Muhammad al-Asmadi, *Badhl al-Nazar fi'l-Usul*, ed. Muhammad Zaki 'Abd al-Barr (Cairo: Maktabat Dar al-Turath, 1992), pp. 694–698.

juristic analyses? If God has a will on specific rules of law, but humans cannot know that will because of their finite capacities, can Shari'a exist in a manner meaningful to humanity? And if so, in what sense and form does God meaningfully exert authority over humanity? If God has a specific will and humans can access it, how does one distinguish between the products of human idiosyncrasy and divine inspiration? The jurisprudential stakes in the debate on interpretation in Shari'a, then, are more broadly linked to theology than the nature of divine sovereignty over the world.

Jurists reflected upon these stakes concerning the diversity of *furu'* by asking a deceptively simple question: Is every jurist correct? (*hal kullu al-mujtahid musib?*). Where there is juristic disagreement (*ikhtilaf*), is one view right, and the others wrong? If so, in what sense is an opinion right or wrong? Or perhaps all are right; but if so, what does that mean about the nature of the law and the link to the divine will that gives it authority and legitimacy?

Historically, there were two schools of thought on the above set of questions.<sup>66</sup> One school, called the *mukhatti'a*, argued that not all jurists are correct. Instead, there is only one right answer. The other school, called the *musawwiba*, held that all jurists are correct: there is no single right answer; rather, the authority of the interpretive result is a function of the epistemic excellence of the interpreter. Both schools had their authorities to justify their respective positions, and they will be discussed in turn. As will become apparent further, the question dividing the schools of thought is whether God has a specific rule of law (*hukm mu'ayyan*) in mind. To suggest that God has a specific rule of law in mind at all times assumes a particular understanding of God and his role in human history. But however the two groups distinguish themselves theologically, both are constrained by the need to ensure the continued authority of the law, in part by expounding on the objectivity required to ensure that the law remains an authoritative basis for ordering society.

Adherents of the *mukhatti'a* school held that not all jurists are correct on *furu'* issues. Given a diversity of legal views on an issue, one is right, and the rest are wrong. In large part, they justified their view by reference to a *hadith* narrated by the prophet Muhammad: "When a judge decides on a legal ruling and gets the right answer, he receives two rewards. If he adjudicates but gets the wrong answer, he gets one reward."<sup>67</sup> Notably, in

<sup>66</sup> See Abou El Fadl, *Speaking in God's Name*, pp. 147–150, for a general introduction to these schools of thought.

<sup>67</sup> For various accounts of this tradition, see Ibn Majah, *al-Sunan*, ed. Muhammad Nasir al-Din al-Albani and 'Ali al-Halabi al-Athari (Riyadh: Maktabat al-Ma'arif, 1998),

the *hadith* collections of Ibn Majah and Abu Dawud, this *hadith* is juxtaposed with a second one in which Muhammad says: “There are three types of judgments: one leads to heaven, and two lead to hell. The one leading to heaven [involves] one who knows the truth and decides in accordance with it. One who knows the truth but deviates from ruling [according to it] goes to hell, and one who ignorantly adjudicates for the people goes to hell.”<sup>68</sup>

This second tradition is significant because it sets up the importance of epistemic excellence in adjudication. If one adjudicates “correctly” but is ignorant, the judgment is condemned, as is the adjudicator. As Ibn Qayyim al-Jawziyya stated, “whoever adjudicates in a state of ignorance will go to hell, even if his judgment is right.”<sup>69</sup> If someone is ignorant, he receives no reward whatsoever for his effort and has likely committed a sin.<sup>70</sup> That does not mean the opinion’s authority cannot be rehabilitated by another who exerts due diligence. But the emphasis on expertise in the second *hadith* glosses the first *hadith* on *ijtihad* to highlight the issue of authority. Hence, the first *hadith* about *ijtihad* already assumes that those who are rewarded for their *ijtihad*, whether “right” or “wrong,” are those with knowledge and expertise whose due diligence contributes to the authority of their legal rulings.

Indeed, Ibn Majah linked the second *hadith* to the first one when he wrote: “when the judge exerts interpretive analysis, he goes to heaven” (*inna al-qadi idha ijtahada fa-huwa fi al-janna*).<sup>71</sup> In other words, when the knowledgeable judge adjudicates, even if he gets the wrong answer, he will get one reward and even go to heaven. The two traditions are

2:522; Abu Bakr b. al-‘Arabi, *Aridat al-Ahwadhi bi Sharh Sahih al-Tirmidhi* (Beirut: Dar al-Kutub al-‘Ilmiyya, 1997), 6:56–57; al-Mubarakfuri, *Tuhfat al-Ahwadhi bi Sharh Jami’ al-Tirmidhi* (Beirut: Dar al-Kutub al-‘Ilmiyya, n.d.), 4:463; Ibn Qayyim al-Jawziyya, *Awn al-Ma’bud: Sharh Sunan Abi Dawud* (Beirut: Dar al-Kutub al-‘Ilmiyya, 1998), 9:353–357; al-Nawawi, *al-Minhaj: Sharh Sahih Muslim b. al-Hajjaj*, ed. Khalil Ma’mun Shiha, 3rd ed. (Beirut: Dar al-Ma’rifa, 1996), 12:239–241; Badr al-Din al-‘Ayni, *Umdat al-Qari Sharh Sahih al-Bukhari*, ed. ‘Abd Allah Mahmud Muhammad ‘Umar (Beirut: Dar al-Kutub al-‘Ilmiyya, 2001), 25:100–101; Ibn Hajar al-‘Asqalani, *Fath al-Bari: Sharh Sahih al-Bukhari*, ed. Muhammad Fu’ad ‘Abd al-Baqi (Beirut: Dar al-Ma’rifa), 13:318–320.

<sup>68</sup> Ibn Qayyim al-Jawziyya, *Awn al-Ma’bud*, 9:353; Ibn Majah, *al-Sunan*, 2:522. For reference to this tradition, see also al-Nawawi, *al-Minhaj*, 11/12: 240; Ibn Hajar al-‘Asqalani, *Fath al-Bari*, 13:319.

<sup>69</sup> Ibn Qayyim al-Jawziyya, *Awn al-Ma’bud*, 9:353.

<sup>70</sup> Al-Nawawi, *al-Minhaj*, 11/12:240; Badr al-Din al-‘Ayni, *Umdat al-Qari*, 25:100–101; Ibn Hajar al-‘Asqalani, *Fath al-Bari*, 13:318–319; Ibn Qayyim al-Jawziyya, *Awn al-Ma’bud*, 9:353–354; al-Mubarakfuri, *Tuhfat al-Ahwadhi*, 4:463. For a list of qualifications that enable one to engage in *ijtihad*, see Ibn Qayyim al-Jawziyya, *Awn al-Ma’bud*, 9:354.

<sup>71</sup> Ibn Majah, *al-Sunan*, 2:522.

merged based on the assumption that the judge is learned and not ignorant. One can know the truth or deviate from the truth. But for Ibn Majah, what determines whether one goes to hell or heaven—and by implication whether the ruling is authoritative—is whether the judge performs *ijtihad* with due diligence.

The *mukhatti'a* school argued that there is only one right answer; all others are incorrect. Relying on the tradition above about God granting two rewards to one who is right and one reward to the jurist who is wrong, they argued that the *hadith* assumes the existence of a right answer, even if human interpreters cannot know what it is.<sup>72</sup> The significance of this position is that a jurist's conclusion has limited authority and cannot necessarily be assumed to coincide with God's law. Rather, the jurist adopts an epistemic humility. We can still adjudicate disputes, but we can never be sure our answers express God's will.<sup>73</sup> A jurist who exercises *ijtihad* with diligent analysis is rewarded for doing so and in fact garners for his opinion sufficient authority for the purpose of legal ordering. According to the *mukhatti'a*, the jurist is bound by his *ijtihad* as long as he attains *ghalabat al-zann*, or a high degree of likelihood that his interpretation approximates the "correct" answer. By incorporating human fallibility and humility before God within its theory of law, the *mukhatti'a* school granted limited authority to the jurists' interpretive products but rendered any adjudication necessarily vulnerable to reconsideration.

The *musawwiba* school held otherwise, asserting that all jurists are "right" in their interpretation of *furu'* issues. According to the jurist al-Basri, for instance, *fiqh* issues generally fall within the category of *furu'*, because there is no evidence to provide certainty and clarity on these types of matters. He said: "most *furu'* are not addressed by the Qur'anic text, a continuous transmission [*akhbar mutawatira*], or a consensus [*ijma'*]. Rather, singular [probabilistic] transmissions address them."<sup>74</sup> While the first three sources he noted can offer epistemic certitude under Islamic legal theory, the last one does not.

For the *musawwiba*, to frame the question about being "right" as being about attaining the "correct" answer misses the point. They framed

<sup>72</sup> Muhammad b. al-Najjar, *Sharh al-Kawkab al-Munir*, ed. Muhammad al-Zuhayli and Nazir Hammad (Riyadh: Maktabat al-'Abikan, 1993), 4:489–490.

<sup>73</sup> Al-Badakhshi, *Sharh al-Badakhshi Manahij al-'Uqul* (Beirut: Dar al-Kutub al-'Ilmiyya), 3:276; al-Qarafi, *Sharh Tanqih*, pp. 438–441; Fakhr al-Din al-Razi, *al-Mahsul fi 'Ilm Usul al-Fiqh*, 3rd ed. (Beirut: Mu'assasat al-Risala, 1997), 6:34.

<sup>74</sup> Al-Basri, *al-Mu'tamad fi Usul al-Fiqh* (Beirut: Dar al-Kutub al-'Ilmiyya), 2:373. For a similar argument, see also al-Jassas, *Usul al-Jassas: al-Fusul fi al-Usul*, ed. Muhammad Muhammad Tamir (Beirut: Dar al-Kutub al-'Ilmiyya, 2000), 2:377.

their position, rather, in terms of what makes a legal conclusion authoritative. A jurist is required to investigate whatever evidence exists to reach a standard of knowledge that can justify applying a rule of law. The lack of dispositive evidence does not mean that a jurist has no authority to interpret, or that the jurist's interpretive conclusion lacks authority. Instead, while the evidence may not provide certainty as to a truth claim, it is sufficient to justify a legal determination to which one must adhere. Al-Amidi summarized the *musawwiba* position as follows: "every *mujtahid* is correct in legal matters. The rule of God [*hukm Allah*] on the matter is not unitary, but rather arises from the considered opinion of the jurist [*zann al-mujtahid*]. Hence, the rule of God in the case of each jurist is the product of his *ijtihad* that leads him to a preponderance of opinion [on the subject]."<sup>75</sup> The legal determination is authoritative not because it corresponds to a preexisting rule or truth in the mind of God, but rather because of the quality of investigation by which we reach *ghalabat al-zann*.<sup>76</sup>

*Ghalabat al-zann* is the standard for evaluating whether a particular legal conclusion is authoritative or not. It is not a prescription for idiosyncrasy in the law. Rather, as al-Basri explained, a jurist's considered opinion on a matter is authoritative because of an epistemic excellence in investigation, which thereby grants legitimacy and authority to his *ijtihadic* opinion.<sup>77</sup> He is not and cannot be required to adjudicate pursuant to knowledge that he is epistemically unable to grasp. Rather, for *musawwiba* jurists such as 'Abd al-Jabbar, as long as we achieve a high degree of confidence in our conclusion, our respective determinations are sufficiently authoritative as a matter of law. He stated: "Any act is good when we reach a preponderance of opinion" (*ghalabat al-zann*).<sup>78</sup> The notion of legal authority therefore acknowledges and incorporates human fallibility and epistemic frailty. This is different from opening the door to idiosyncrasies in the law. Indeed, if a jurist is careless in his investigation or lacks appropriate diligence, his legal conclusions will lack legitimacy, authority, and justification.<sup>79</sup>

<sup>75</sup> Al-Amidi, *al-Ihkam fi Usul al-Ahkam*, 4:183. See also 'Abd al-Aziz b. Ahmad al-Bukhari, *Kashf al-Asrar 'an Usul Fakhr al-Islam al-Bazdawi*, ed. Muhammad al-Baghdadi, 3rd ed. (Beirut: Dar al-Kitab al-'Arabi, 1997), 4:33; Abu Hamid al-Ghazali, *al-Mustasfa min 'Ilm al-Usul* (Baghdad: Maktabat al-Muthanna), 2:363.

<sup>76</sup> Al-Basri, *al-Mu'tamad*, 2:373–374. See also al-Ghazali, *al-Mustasfa*, 2:363.

<sup>77</sup> Al-Basri, *al-Mu'tamad*, 2:381–382. See also al-Juwayni, *Kitab al-Ijtihad*, p. 31.

<sup>78</sup> 'Abd al-Jabbar, *al-Mughni*, ed. Taha Husayn, 16 vols. (Cairo: Wizarat al-Thaqafa wa-al-Irshad al-Qawmi, al-Idarah al-'Ammal lil-Thaqafa), *al-Taklif*: 89, 265.

<sup>79</sup> Al-Basri, *al-Mu'tamad*, 2:381–382. For the same view, see also Ibn al-Najjar, *Sharh al-Kawkab al-Munir*, 4:492.

Interestingly, jurists of the *mukhatti'a* school similarly held that although they believed in a correct answer, and although it could not necessarily be known, jurists must have the authority to develop the law.<sup>80</sup> The premodern jurist al-Ghazali recognized this as an unavoidable outcome of the theoretical debate. For instance, suppose a Muslim army faces an enemy who uses innocent Muslims as human shields. The Muslim army is unsure whether, by not firing on the human shields, the enemy will defeat it and exterminate the Muslim lands it protects. According to al-Ghazali, the Muslim soldiers may fire on the enemy, and thereby kill the innocent human shields, only so long as they are nearly certain that the enemy will otherwise overrun Muslim lands. In other words, the Muslim army commanders must reach either “certainty or a degree of likelihood that approximates certainty” (*al-qat'aw zann qarib min al-qat'*) concerning the threat the enemy poses.<sup>81</sup> In other words, even if we believe that God has a specific rule of law in mind, and even if we are unable to know the rule in God's mind, to abide by Shari'a requires that we nonetheless have the authority to regulate society in conformity with standards of analysis that link to the core values of the Shari'a—which the *mukhatti'a* jurists considered to be determinate, objective, and universally accessible.<sup>82</sup> *Ghalabat al-zann* represents the standard of evaluation that both grants authority to the *fiqh* rulings and preserves humility before an infinite God. As al-Juwayni said: “The Lord made the *ghalabat al-zann* of each jurist [a sufficient standard of] knowledge for adjudicating by one's considered opinion. No disagreement arises on this [point].... [This] is the secret of the issue (*sirr al-mas'ala*).”<sup>83</sup>

#### 4.4 Objectivity and Authority Amidst Uncertainty

Despite their differences, the *mukhatti'a* and *musawwiba* agreed that, assuming the interpreter's expertise and due diligence, the interpretive product is sufficiently authoritative as a matter of law. To get to this

<sup>80</sup> Al-Asmandi, *Badhl al-Nazar fi al-Usul*, pp. 695, 707.

<sup>81</sup> Al-Ghazali, *al-Mustasfa*, 1:644–645.

<sup>82</sup> For an example of how jurists agreed about core values in the Shari'a, see discussions on the *maqasid al-shari'a*, or purposes of the law: Kamali, *Islamic Jurisprudence*; Ahmad al-Raysuni, *Imam al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law*, trans. Nancy Roberts (Herndon, Va.: International Institute of Islamic Thought, 2005); Muhammad al-Tahir Ibn Ashur, *Treatise on Maqasid al-Shari'ah*, trans. Mohamed el-Tahir el-Mesawi (Herndon, Va.: International Institute of Islamic Thought, 2006).

<sup>83</sup> Al-Juwayni, *Kitab al-Talkhis fi Usul al-Fiqh*, eds. 'Abd Allah al-Nibali and Shabbir Ahmad al-'Amri (Beirut: Dar al-Basha'ir al-Islamiyya, 1996), 3:352. See also al-Baghdadi, *Kitab al-Faqih*, p. 247.

point of general agreement, though, they worked through their respective theologies of God and law to reach comparable, yet distinct, legal theories of interpretation, objectivity, and authority. If Shari'a is about upholding the will of God, and yet the authority of adjudication is based on the epistemic excellence of the fallible human agent, God is effectively outside the day-to-day affairs of a Shari'a rule-of-law system. God might have something in mind,<sup>84</sup> but humans may not be able to access that special knowledge. Yet, although human beings may not know what God has in mind, that must not stop them from adjudicating; otherwise, no legal system can exist.

But what does law in the mind of God mean, and what is its relationship to the humanly generated ruling? Ultimately, both schools of thought found *ijtihadic* opinions to be authoritative. Both agreed that jurists must abide by their *ijtihadic* opinions on matters of *furu'*, and that such opinions are suitable for adjudication and adherence by the laity. While their disagreement may have centered on theology, we will nonetheless see how their first principles of theology led them to jurisprudentially comparable conclusions about the objectivity and authority of the law.

The *mukhatti'a* argued that for every issue, God has a specific rule of law in mind, or what they called the *hukm mu'ayyan*. The idea of a specific rule of law in the mind of God arguably gives Shari'a a formalistic nature that conceptualizes *ijtihad* as a process of *finding* or *discovering* God's law (*'uthur 'alayhi*).<sup>85</sup> Jurists attempt to discover God's law but are not obligated to find it. Jurists only can do their best, exert extensive analytical effort, and reach a preponderance of opinion (*ghalabat al-zann*) about what God might want.<sup>86</sup> These epistemic requirements, if fulfilled, grant the *ijtihadic* product the authority of law, although with a certain ambiguity about whether it is truly God's law or not. In other words, "rightness" (*musib*) has two valences for the *mukhatti'a*: it can refer to finding the law intended by God, and it can refer to the authority of an *ijtihadic* product that justifies the coercive use of rule-of-law institutions to maintain social order and cohesion. *Ijtihad* for the *mukhatti'a* is about finding God's law, knowing that one may not do so, admitting human

<sup>84</sup> For those who considered God to have no specific intent as to the law, they too had to consider theology in relation to human affairs and the march of time and legal development.

<sup>85</sup> This Arabic phrase features in the dialectically framed debate on this issue. For example, see al-Juwayni, *Kitab al-Talkhis*, 3:357–360.

<sup>86</sup> *Ibid.*

imperfection, and being satisfied with *ghalabat al-zann* as a basis for legal authority.

Adherents of the *musawwiba* school argued alternatively that God does not have a specific rule of law in mind; that there is no *hukm mu'ayyan*. Rather, the jurist analyzes an issue to the best of his ability, attains a standard of epistemic excellence, and reaches *ghalabat al-zann*, a preponderance of opinion. This phrase seems to imply a standard of evaluation, but it does not refer to any particular opinion. Indeed, “rightness” for the *musawwiba* is less about reaching a particular opinion and more about the authority of a legal conclusion as tied to the quality of the investigation and analysis.

Yet despite their rejection of the *mukhatti'a*'s strong objectivity—to recall Coleman and Leiter—the *musawwiba* had their own objective standard by which they judged the “correctness” of a particular legal opinion. For many *musawwiba* jurists, a ruling is correct when it most closely approximates (*al-ashbah*) the divine intent, *had God provided determinate evidence for the underlying issue*. As is often formulaically expressed, the *al-ashbah* rule is what God would have ruled had he legislated on the matter (*lau nassa Allah 'ala al-hukm, la-nassa 'alayhi*).<sup>87</sup> For the *musawwiba*, there is only one *al-ashbah*; all others are wrong.<sup>88</sup> Despite their focus on authority and epistemic excellence, even the *musawwiba* could not ignore the relationship between objectivity and authority. They could not simply put aside the desire to reach the “correct” answer. But their use of the subjunctive in their formulation is significant. For the *musawwiba*, God's will tracks the *ijtihad* of the jurist. Certainly some *ijtihadic* products are better than others, so the *musawwiba* developed the concept of *al-ashbah* to reflect their unavoidable interest in objectivity and correctness. Yet, while the *al-ashbah* may be unitary, it is only a hypothetical rule, not a rule that has some metaphysical existence in the mind of God. It is the rule that would have existed had God actually ruled. But he did not. The *musawwiba* use of the subjunctive reflects the interconnectedness of objectivity and authority in the law, while at the same time authorizing *ijtihad* as an important mechanism for responding to lacunae in the law. Their use of the subjunctive also illustrates that the jurisprudential difference between the *mukhatti'a* and the *musawwiba* may be more a difference in degree than a difference in kind.

<sup>87</sup> Al-Basri, *al-Mu'tamad*, 2:371.

<sup>88</sup> *Ibid.*

## 5. CONCLUSION

The matter of interpretation is one that Muslim jurists have had to contend with since the early years of the development of Islamic jurisprudence. The two schools of thought noted above developed in response to crucial questions that cross the fields of theology and law. They contended with how particular understandings of God influenced the nature of law and the scope of interpretive authority. Their debates on *ijtihad* illustrate the theoretical link between reason, authority, and objectivity in the law. They developed notions such as *al-ashbah* (approximation) and *hukm mu'ayyan* (God's specific rule of law) to give an air of objectivity to Islamic law and legal analysis. Yet the inaccessibility of God's will and the inevitability of human fallibility left jurists of both schools with a question about the authority of an *ijtihadic* opinion, which may be extensively researched but which cannot be claimed to coincide with God's will. The jurists of both schools of thought theorized about the theology of God and the law, recognized the inevitability of indeterminacy in the law, and upheld the authority of *ijtihadic* rulings amidst the reality of human fallibility. All recognized that the *ijtihadic* product must carry some weight, lest Shari'a fail to offer guiding principles for those seeking to live good and fulfilling lives. Both groups argued toward the same end result: the authority of juristic determinations, subject to a system of evaluation that assumes the fallibility of *ijtihadic* conclusions. Their conceptions of objectivity were neither strong nor minimal, to recall Leiter and Coleman's categories. Adopting a middle ground, both groups were keenly interested in asserting a standard of objectivity that could withstand the inevitability and fallibility of interpretation in the law.

While they may have had different theological concepts of God, neither group could avoid accepting the necessity of interpretation. Instead, they theorized about the boundaries of interpretation (that is, core values) and the nature of authority on legal matters that were far from unambiguous. Despite the theological difference between them, both groups expressed the inevitability of juristic creativity in constructing the law, and the disquiet such creativity can pose to the authority of the law. Concerns about objectivity and epistemic fallibility led jurists of both groups to acknowledge the vulnerability of *fiqh* to critique. Indeed, given the finitude of evidence and its limited proof value, to equate *fiqh* rules with God's will would constitute considerable hubris. In both theories of *ijtihad*, its authority is conceptualized in light of the divine will, human fallibility, expertise, and the need for guiding principles to animate the Shari'a and delimit the scope of interpretation. We can certainly criticize

the jurists for assuming the existence of core values while at the same time debating their content. Importantly, we can also understand and appreciate how their jurisprudential architecture of *ijtihad* contended with the stakes of objectivity and authority, which are common features in legal systems generally, and which continue to animate debates today about legal interpretation.

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