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To Most Likely Know the Law:

Objectivity, Authority, and Interpretation in Islamic Law

Anver M. Emon*

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 sitting under a tree dispensing justice according to considerations of individual expediency.”¹ For scholars of Islamic law and jurisprudence, Justice Frankfurter’s comment is indeed infamous as it raises through a stark, if not racist and bigoted, image fundamental questions about legal objectivity and authority, the standards of justice, and the role of the adjudicator or interpretive agent in meting out justice.²

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¹ Terminiello v. Chicago, 337 U.S. 1, at 11; 69 S.Ct. 894, 899 (1949).

² For studies on Islamic law that invoke Frankfurter J’s comment to inspire theoretical questions about Islamic law and interpretation, see Lawrence Rosen, The Justice of Islam (Oxford: Oxford University Press, 2000); idem., The
A contrary popular image of Islamic law is that it is so highly determinate as to prevent effective interpretive engagement with source-texts and the contingencies of a particular conflict. Whether one considers popular claims about Shari’a as consisting of medieval, archaic, or backward rules, or descriptions of its doctrine as reflecting God’s rule and will, the conception of Shari’a is reduced to highly determinate rules that are meant to be applicable for all times.3

These two popular stereotypes of Islamic law are less real than perceived. In fact the academic literature in the Islamic legal field has offered such substantive analysis of Islamic legal interpretation and jurisprudence that describing the two positions above as stereotypes is de rigueur.4 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,5 women suffer oppression through the application of Islamic family law,6 and civil unrest occurs in the name of applying Shari’a,7 the popular perceptions of Shari’a seems far removed from the scholarly debates about legal history and theory.

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3 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, no. 2 (February 2009): 391-425.
7 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, no. 24 (December 10, 2007), p. 50; Zeray W. Yihdego,
This article does not take its cues from the popular perception of Shari’a, but it is mindful of the way in which those popular perceptions nonetheless animate debate about Islamic law and the Muslim world. This article adopts a comparative approach to law and legal interpretation in order to expand the audience of readers to include those interested in how different legal systems contend with conceptual questions about objectivity and legal authority when contending with the dynamics of legal interpretation. The focus is on the Islamic legal tradition, but the study is framed conceptually in a manner that should be familiar to those working in the Common Law tradition. Indeed, the opportunity to understand comparatively can offer insights not only into other traditions, but also into the underlying assumptions we take for granted when studying our own. Whether we come to the study of Law from specializations in Common Law or Islamic Law, we would miss an important opportunity if we failed to recognize how the boundaries that divide these legal systems are not as concrete as some might expect. Developing a conceptual vocabulary through which we can discuss common issues in the law is of paramount interest as different legal systems increasingly come into contact with one another, and as legal professionals require new ways of moving between systems without losing coherence in legal meaning.

This study focuses on the implications of interpretation on the objectivity and authority of the law. As argued below, premodern Muslim jurists developed a jurisprudence of Shari’a that acknowledged the inevitability of interpreting in the law. This should not be surprising if we assume legal systems generally require a degree of interpretive agency. The question for premodern Muslim jurists, though, was how to legitimate interpretive agency and offer standards of evaluation. As will be shown, Islamic jurists theorized about the authority of each

interpretation in a 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. The ways in which both religious and secular legal scholars problematize objectivity and interpretation is not so different as to render “religious” legal systems different in kind to other systems.

The Concept and Authority of Fiqh

Many modern writers on Islamic law have made a keen effort to distinguish conceptually between the terms “Shari’a” and “fiqh”. They argue that the former is the ideal law in the “mind of God” -- perfect, just, and true. The latter, fiqh, captures the human effort to understand and comprehend the Shari’a, while at the same time embodying the imperfection in the human capacity to know God’s intentions with certainty. The imperfection inherent in the concept of fiqh is not something new, though. Rather, as discussed below, premodern Muslim jurists recognized that human beings, being finite creatures, are completely unsuited to the task of knowing with certainty and objectivity the eternal and the infinite. Their limited capacities render their interpretations of law vulnerable to debate and rebuttal upon the identification of new evidence. Such fallibility certainly contributes to a pious humility before the infinitude of God. But such pieties cannot at the same time serve to dismiss the authority of fiqh as precedent

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8 Khaled Abou El Fadl, Speaking in God’s Name (Oxford: Oneworld Publications, 2001), 32.
in an Islamic rule of law system, despite debates about the continued meaningfulness of centuries-old precedents over time.

The jurisprudential challenge in understanding what Shari’a is, both in the premodern period and in contemporary states, requires understanding the authority of fiqh rules within a premodern juridical framework and a modern international state system. Authority in Shari’a is far from a simple matter.\(^9\) For some it rests in 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 could resort, akin to the role of stare decisis in the Common Law.\(^10\) Others might suggest that authority in Shari’a involves more than a mere resort to doctrinal precedent, and arises out of recourse to institutions of adjudication through which Shari’a doctrine is applied to cases in controversy.\(^11\) As a contribution to the above approaches to authority in Islamic law, I will focus on the authority of juristic interpretations of the law.

Objectivity and Authority in Interpretation: The Jurisprudential Stakes

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\(^9\) 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, no. 2 (2007): 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.

\(^10\) Hallaq, *Authority, Continuity*.

How we interpret the law will depend on how we understand what the law is. If the law is a body of facts independent of the human mind, we might speak of law in formalistic terms, suggesting that the interpreter finds or discovers the law. On the other hand, if the law is tied to institutional and historical contexts, we might consider the law to allow for constructive creativity within the limits of a tradition. In other words, whether the law is separate from the interpreter or is tied to an interpretive engagement with doctrine, institution, and history, theories of legal interpretation will assume different contours.

Brian Leiter and Jules Coleman offer three models of objectivity in law. 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 inaccessible to 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.” However as the authors note, minimal objectivity is problematic because it allows for the possibility of global or large-scale error, and cannot contribute insights to rational disagreement on issues not settled by convention.

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14 From an Islamic theoretical perspective, the idea of a global error on a matter 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, the efficacy of *ijma* as a mode of legal reasoning has been criticized for its methodological ambiguities, and some have also suggested that a claim of
The authors proffer that “modest” objectivity is a superior conceptual approach to the determinacy and authority of law and adjudication in the Common Law. “Modest objectivity 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.” 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 human understanding. It relies on notions of expertise and interpretation. Furthermore, it allows for the possibility that there may be errors in making legal determinations in the light of deficiencies in one’s epistemological circumstances.

The authors contend that the moderate conception of objectivity is implicit in the interpretive theory of Ronald Dworkin, although this is not the place to argue if indeed this is the case. The reference here to Dworkin’s theory of interpretation is not meant as an endorsement of his “law as integrity”. His account is certainly well known, and many have criticized ambiguities in his theory. This study remain agnostic on such debates, and defers to those better positioned to critique Dworkin. Rather, Dworkin’s interpretive theory is referred to here to better appreciate the jurisprudential stakes in debates on determinacy, interpretation and

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15 Coleman and Leiter, “Determinacy,” 616 et seq.

16 Coleman and Leiter, “Determinacy,” 621.

authority in the law. A focus on the stakes, I suggest, will help facilitate a comparative analysis.

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? One might look to prior 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.

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 a practice, which can then serve ‘as a kind of plateau on which further thought and argument is built’.” Further thought and argument will lead to specific, and perhaps even controversial, *conceptions* about what behavior constitutes courtesy. *Conceptions* are the interpretive products that arise from engaging the *concept* of courtesy in a historical moment. *Conceptions* thereby are not the core values of a legal system. They are contingent interpretations with an authority that is limited by the context and history

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18 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,” 550. The acceptability of a judicial decision for Dworkin may depend on the political theory of the society over 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.


Dworkin’s distinction is significant for his interpretive theory of law. Dworkin is principally concerned with explaining and justifying the constructive role interpretation plays in the law. “[C]onstructive interpretation 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.” This approach to interpretation relies on an assumption of a practice that is understood and accepted, and that can be evaluated in terms of its overall excellence as a mode of analysis. As Dworkin states, “[I]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.” In any legal system, there must be a certain amount of agreement on what is legal before proceeding with legal interpretation. A pre-interpretive agreement on the basic, fundamental elements of a legal system is therefore essential to an intelligent discussion of the authority of any legal interpretation.

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22 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?”


26 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 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.” *Laws Empire*, , 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 British jurisprudential controversies, a subtext to his theory of interpretation is that it is specific to Anglo-American legal traditions.
Once the preinterpretive agreement has been reached, the need for an interpretive methodology becomes apparent. Dworkin addresses three possible theories of legal interpretation: conventionalism, pragmatism, and law as integrity. According to Kress, Dworkin’s, “[c]onventionalism…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.”27 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 nothing to do with legal interpretation, but instead 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 pre-interpretive 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.”28 Such an interpretive theory does not vociferously disregard past political acts. Rather the past is significant, but only to the extent that relying on the past benefits present society. Consistency with past political decisions is not beneficial for its own sake; instead the social benefit arising from diachronic consistency justifies relying on past political acts. In practice, therefore, the pragmatic jurist may rely on precedent.29 But if society benefits by disregarding the past, a pragmatist theory would justify such a departure. In either case, past precedent and legal rights are not, by themselves, constraints on the pragmatist interpretation of law.

27 Kress, “The Interpretive Turn,” 843.
28 Dworkin, Law’s Empire, 95.
29 Dworkin, Law’s Empire, 162.
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. First, the legislature renders the total set of laws morally coherent. Second, the judiciary presumes the law is morally coherent.\textsuperscript{30} 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 construct it from the bench.\textsuperscript{31} Rather, “we understand legal reasoning…only by seeing the sense in which …[judges] do both and neither.”\textsuperscript{32}

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.”\textsuperscript{33} Law as integrity is an interpretive approach that considers all past political acts as embodying a cohesive set of moral principles, and applies those principles consistently to current and future disputes.\textsuperscript{34} 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. A judge is not straight jacketed into prior legal decisions in a conventionalist sense; nor is the judge 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. First, law as integrity requires that the law have purposes that are generally

\textsuperscript{30} Dworkin, \textit{Law’s Empire}, 176.  
\textsuperscript{31} Dworkin, \textit{Law’s Empire}, 225.  
\textsuperscript{32} Dworkin, \textit{Law’s Empire}, 225.  
\textsuperscript{33} Dworkin, \textit{Law’s Empire}, 225.  
\textsuperscript{34} Kress, “The Interpretive Turn,” 844.
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.\textsuperscript{35}

Second, from these general concepts, however derived, a judge adjudicates a given case and offers particular conceptions of the law. Third, the objectivity and authority of any conception is not a function 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 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.\textsuperscript{36} The notion of “fit” assumes a shared preunderstanding of the law as institution, the relevant sources of legal authority, and standards of evaluation in the light of the given legal and political system. 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.

\textit{The Boundaries of Islamic Legal Interpretation}

Premodern Muslim jurists generally acknowledged the need to interpret in 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 the 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 19th century for those seeking to reform and modernize Islamic law.\(^{37}\)

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.\(^{38}\) *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’alin*), as opposed to the foundation or base.\(^{39}\)

These terms assume 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.

\(^{37}\) From the late 19th century onward, debates on *ijtihad* concerned whether the “door of *ijtihad*” or the license to interpret in the law had been closed in the 10th 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, no. 3 (1994): 238-257. The historical validity of this alleged closure has been substantially questioned and critiqued in the scholarly literature. Wael B. Hallaq, “Was the Gate of Ijtihad Closed?,” *International Journal of Middle East Studies* 16, no. 1 (1984): 3-41. However, modern self-proclaimed reformers nonetheless 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).


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 neither to dispute nor interpretation. In fact, for some such as the Maliki jurist al-Qarafi (d. 1285 CE), the *usul* are so fundamental that one is effectively compelled (whether by nature, reason or otherwise) to believe them. He stated: “The fundamentals of faith are of great importance and as such God most high compels [belief] in them as opposed to others” (*shara’a Allah ta’ala fiha al-ikrah dun ghayriha*).\(^40\) 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*).”\(^41\) 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. Universal accessibility to the *usul* is possible because all rational people share the capacity to reason. Therefore, “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.”\(^42\) 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, sing. dalil*). Not all evidence can lead us to epistemic certainty; but the

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\(^{41}\) Al-Qarafi, *Sharh Tanqih*, 439. The modern scholar Wahba al-Zuhayli goes so far as to state that one who errs in knowing 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*). Wahbah al-Zuhayli, *al-Wasit fi Usul al-Fiqh al-Islami*, 2nd ed. (Beirut: Dar al-Fikr, 1969), 401.

technical term “dalil” specifically refers to evidence conveying certainty and clarity. 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.

The 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 concern issues “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.” Likewise, al-Shirazi held that a dalil provides certain and compelling (adilla qati‘a or adilla mujiba) evidence that is not subject to dispute. As such, the fear that idiosyncrasy or contingencies may be masked as core values is discounted.

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. Al-Khatib al-Baghdadi considered as core values the obligations of prayer and alms-giving, and the prohibition from illicit sexual activity and consuming alcohol as core values. Al-Shirazi focused on the theological disputes about the

45 Al-Shirazi, al-Tabsiira, 496-7; idem, Sharh al-Lum’a, 2:1044.
46 Al-Juwayni, Kitab al-Irshad, 144; idem., Kitab al-Ijtihad, 24.
createdness of the Qur’an and the characteristics of God when describing the core values.\(^{48}\) Not all these issues are strictly legal; in fact many jurists considered the *usul* to consist of fundamental matters in faith or belief (*usul al-din, usul al-‘aqa‘id, usul al-diyanat*),\(^{49}\) although not exclusively so. Despite the debates 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 a view contrary to such core values is sinful, but does not render someone corrupt (*fasiq*) or an unbeliever (*kafir*).\(^{50}\)

The view that the *usul* are clear and determinate was not without 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.\(^{51}\) Little historical information could be found about al-‘Anbari. He was a jurist from Basra and served as a *qadi* or judge; he was later appointed chief judge in 156/733 and was considered a trustworthy and reputable jurist (*faqih thiqqa*).\(^{52}\) Muslim jurists invoked him as foil for their position on the scope of *ijtihad*.*\(^{53}\)

By analyzing their refutation of al-‘Anbari’s position, we can appreciate how the debates on *usul*


\(^{51}\) Another premodern Muslim mentioned as assuming a similar position as al-‘Anbari is al-Jahiz (d. 864). However al-Jahiz’s issue 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*, 439.


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 knowledgable than them and adhere to their views (*taqlid*), none of which could be deemed true with any sort of certitude. But if this were so, no knowledge could be either determinate enough to ground subsequent interpretations, or sufficiently immune from the contingencies of history. Arguing polemically, 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. To validate conflicting views on foundational values threatens the truth claims about a religious tradition. Al-Shahrastani, worried about the implications of al-ʿAnbari’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.

Because of these implications, narratives about al-ʿAnbari 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 ʿUbayd Allah b. al-Hasan [al-ʿAnbari], 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-ʿAnbari] 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.”

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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 a respected 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*, the *usul* as core values help to guide the legal system’s development, aims and aspirations. Without these core values, a legal system may suffer from a lack of direction; furthermore, without core values, the legal system is vulnerable to critiques about its authority and legitimacy.

But to castigate al-‘Anbari does 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.”  

Abu Hanifa may have been a renowned jurist, highly respected and revered. But even he had limitations in his capacity to know things. Consequently, while the debates on *usul* raise questions about authority, shared knowledge, and a

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foundation for the law, al-Jahiz’s remarks remind us about the indeterminacy that nonetheless exists because of human fallibility.59

The Particularity and Vulnerability of Furu’

The discussion on the 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 less than clear and certain evidence (zann).60 In fact, as al-Shirazi propounded, the difference between the usul and furu’ is the epistemic nature of the evidence for each of them. “For the furu’ there is no dispositive evidence (adilla qati’a)…but there is dispositive evidence for the usul.”61 Consequently there is greater license for disagreement and diversity of views in furu’ matters, but not so in the case of usul.62

Furthermore, furu’ issues are those that one can adopt by adhering (taqlid) to a scholar’s view without investigating all the relevant evidence for himself or herself. For example, matters concerning specific rituals or particular transactional details (al-‘ibadat wa’l-mu’amalat) are peripheral since they concern matters not everyone knows or can be expected to know. Indeed, to expect people to have a fully formed view on these peripheral matters is to ignore 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

60 Al-Shirazi, al-Tabsira, 402.
61 Al-Shirazi, al-Tabsira, 497.
62 Al-Shirazi, al-Tabsira, 497.
expertise] would undermine the enjoyment of life, and disrupt agricultural and livestock 
production. So it is necessary to limit [the obligation to investigate].  

More importantly for this study, the *furu'* comprise those issues on which interpretation 
(*ijtihad*) is allowed. In contrast, the *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, 
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.

*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, as opposed to offering 
certitude, thus making legal indeterminacy inevitable. 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 at the same time that are equally legitimate? If they are all legitimate, does that mean God has no specific will? If God has no specific will, then what justifies obedience to the Shari’a as developed through 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? In other words, the jurisprudential stakes in the debate on interpretation in Shari’a are more broadly linked to a theology of God and 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?

There are two historical schools of thought on the above question. 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 each will be discussed in turn. As will become apparent further below, the question separating both

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66 See Khaled Abou El Fadl, *Speaking in God’s Name: Islamic Law, Authority and Women* (Oxford: Oneworld Publications, 2001), 147-150, for a general introduction to these schools of thought.
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 theology 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 \textit{mukhatti'a} school held that not all jurists are correct on \textit{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 \textit{hadith} narrated from 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.”\textsuperscript{67} Notably, in the \textit{hadith} collections of Ibn Majah and Abu Dawud, this \textit{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.”\textsuperscript{68} 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.”69 If someone is ignorant, he receives no reward whatsoever for his effort and has likely committed a sin.70 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).71 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 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 -- will be 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.72 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.\textsuperscript{73} A jurist who exercises \textit{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 \textit{mukhatti’a}, the jurist is bound by his \textit{ijtihad} as long as he attains \textit{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 their theory of law, the \textit{mukhatti’a} school granted limited authority to the jurists’ interpretive products, but rendered any adjudication necessarily vulnerable to reconsideration.

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

For the \textit{musawwiba}, to frame the question about being “right” as about attaining the “correct” answer misses the point. Instead they framed their position 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 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].”75 The legal
determination is authoritative not because it corresponds to a pre-existing rule or truth in the
mind of God, but rather because of the quality of investigation by which we reach ghalabat al-
zann.76

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 ijithadic
opinion.77 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).78 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

76 Al-Basri, al-Mu’tamad, 2:373-4. See also al-Ghazali, al-Mustasfa (Baghdad), 2:363.
lacks appropriate diligence, his legal conclusions will lack legitimacy, authority, and justification.79

Interestingly, jurists of the mukhätt’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.80 The premodern jurist al-Ghazali recognized this as an unavoidable outcome to 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 the Muslim army and exterminate the Muslim lands it protects. According to al-Ghazali, the Muslim soldiers can fire on the enemy, and thereby kill the innocent human shields, only so long as they are so confident as to be nearly certain that the enemy would otherwise over-run 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.81 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 pursuant to standards of analysis that link any legal analysis to the core values of the Shari’a – which the mukhätt’a jurists considered to be determinate, objective, and universally accessible.82 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

79 Al-Basri, al-Mu’tamad, 2:381-2. For the same view, see also Ibn al-Najjar, Sharh al-Kawkab al-Munir, 4:492.
80 Al-Asmandi, Badhl al-Nazar fi al-Usul, 695, 707.
81 Al-Ghazali, al-Mustasfa, 1:644-45.
82 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: Mohammad Hashim Kamali, Principles of Islamic Jurisprudence, 3rd ed. (Cambridge: Islamic Texts Society, 2005); Ahmad al-Raysuni, Imam al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law, trans. Nancy Roberts (Herndon, Virginia: International Institute of Islamic Thought, 2005); Muhammad al-Tahir Ibn Ashur, Treatise on Maqasid al-Shari’ah, trans. Mohamed el-Tahir el-Mesawi (Herndon, Virginia: International Institute of Islamic Thought, 2006).
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*).”

*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 point of general agreement, though, they worked through their respective theologies of God and law to reach comparable, but 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, but humans may not be able to access that special knowledge. Yet although human beings may not know what God has in mind, that cannot stop them from adjudicating; otherwise no legal system would exist. But what does law in the mind of God mean, and what is its relationship to the humanly generated ruling? Ultimately for both schools of thought, *ijithadic* opinions are authoritative. Both agreed that jurists must abide by their *ijithadic* 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.

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84 For those who considered God to have no specific intent as to the law, they too had to consider God’s theology in relation to human affairs and the march of time and legal development.
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). 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. 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. Ijithad for the mukhatti’a is about finding God’s law; knowing that one may not do so; admitting human 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; there is no hukm mu’ayyan they said. Rather the jurist analyzes an issue to the best of his ability, attains a standard of epistemic excellence, and reaches a preponderance of opinion (ghalabat al-zann). 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

85 This Arabic phrase features in the dialectically framed debate on this issue. For an example, see al-Juwayni, Kitab al-Talkhis, 3:357-60.
86 Al-Juwayni, Kitab al-Talkhis, 3:357-60;
“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*). For the musawwiba, there is only one al-ashbah; all others are wrong. 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 tense in their formulation is significant. For the musawwiba, God’s will tracks the *ijithad* of the jurist. Certainly some *ijtihadic* products are better than others, and so they 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, and 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 tense 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.

**Conclusion**

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The notions of al-ashbah and hukm muʻayyan give an air of objectivity to the law and in legal analysis. Yet the ambiguity of God’s will left jurists of both schools with a question about the authority of an ijithadic opinion, which may be extensively researched but which cannot be claimed to coincide with God’s will. As such, both groups 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. 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. In this sense, both groups argued toward the same end-result: the authority of juristic determinations, subject to a system of evaluation that assumes the fallibility of ijithadic conclusions. Their conceptions of objectivity were neither strong nor minimal, to recall Leiter’s 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.

Both may have had different theological concepts of God, but neither could avoid the fact of interpretation. Instead, they theorized about the boundaries of interpretation (i.e. core values) and the nature of authority on legal matters that were far from unambiguous. Despite the theological difference between both groups, we can see in both 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 render fiqh rules as the equivalent of God’s will would constitute considerable hubris. In both theories of ijtihad, the authority of ijtihad is conceptualized in the 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 certainly understand and appreciate how their jurisprudential architecture of *ijithad* 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.