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# Article

## “Reasonable Doubt” in Islamic Law

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*Legal interpretation takes place in a field of pain and death.*

– Robert M. Cover<sup>1</sup>

INTRODUCTION

Doubt pervades most laws,<sup>2</sup> becomes alarming when it arises in criminal law,<sup>3</sup> and seems especially discomfiting in the context of Islamic criminal law. In the high-stakes area of American criminal prosecutions, dubious facts or ambiguous laws can result in unjustified deprivations of life, liberty, or property.<sup>4</sup> Criminal prosecutions in early Islamic contexts bore similar risks, which were compounded by the idea of a divine lawgiver who had outlined a set of fixed criminal laws and harsh punishments.<sup>5</sup> In this system, there was no legislature to update the law, no high court to authorize departures from it, and no prosecutor charged with proving facts beyond a reasonable doubt.<sup>6</sup> These features made—and continue to make—doubt in Islamic criminal law not only concerning but also ubiquitous.

In the face of harsh punishment in various other legal traditions, those charged with enforcing criminal laws acknowledged doubt and sought to allocate its burdens fairly in matters of both fact and law. For example, Late Antique Roman jurists developed the legal canon *in dubio pro reo*, which

1. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (footnote omitted).

2. On the “open-textured” and thus indeterminate nature of general rules, standards, and principles when applied to ordinary cases, see H.L.A. HART, *THE CONCEPT OF LAW* 125-28 (2d ed. 1994). On the discomfort with doubt that textualism seeks to alleviate, see Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 FORDHAM L. REV. 799, 802 (2002), which discusses psychological comforts derived from perceptions of textualist “plain meaning” as providing “predictive stability,” and notes that “[i]t is reassuring to believe that the words on a page provide order, and order is unquestionably comforting.”

3. For an overview of American criminal law, see generally JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* (6th ed. 2012). Recognition of the special nature of criminal law led the United States Supreme Court to make federal criminal law exclusively legislative and to require criminal legislation to be clear. See *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (“Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given . . . of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.”); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (barring federal common law crimes).

4. See, e.g., *United States v. Bass*, 404 U.S. 336, 348 (1971) (noting an “instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should” (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, reprinted in HENRY J. FRIENDLY, *BENCHMARKS* 196, 209 (1967))).

5. For an accessible overview of Islamic criminal law, see generally RUDOLPH PETERS, *CRIME AND PUNISHMENT IN ISLAMIC LAW* (2005), which describes Islam’s three categories of offenses: (1) fixed, nondiscretionary crimes and penalties, including four agreed-upon offenses: illicit sexual relations, false accusations of illicit sexual relations, theft, and intoxication; and three of disputed status: apostasy, blasphemy, and highway robbery; (2) the laws of murder and personal injury; and (3) discretionary penalties.

6. See BERNARD WEISS, *THE SPIRIT OF ISLAMIC LAW* 38, 101-09 (1998) (identifying a “textualist-intentionalist bent” among Muslim jurists to describe their historical reliance on text to determine divine legislative intent, and illustrating the jurist-centric textualist-intentionalism in the interpretation of the law of theft based on the Qur’ān and related sources).

requires judges to acquit in cases of factual doubt.<sup>7</sup> Medieval English and Continental European judges and jurors regularly avoided convictions when they had doubts about the fairness of punishment.<sup>8</sup> Contemporary civil lawyers in France and Germany also frequently appeal to the *présomption d’innocence* (presumption of innocence) and to *Unschuldsvermutung* (innocence-presumption), respectively, as requirements for acquittal in cases of doubt.<sup>9</sup> Likewise, the United States Supreme Court has directed judges and juries to convict only if presented with factual proof of criminal culpability, proved beyond a reasonable doubt.<sup>10</sup> The Court also continues to apply the ancient rule of lenity, albeit haltingly, as a principle instructing judges to construe ambiguous penal statutes narrowly.<sup>11</sup> In all these ways, judges in disparate legal systems have regularly devised strategies to avoid doubt’s harmful consequences in criminal law.

By contrast, a now popular notion of Islamic law favors a decidedly strict textualist account of Islamic legal theory that leaves little room for discretion or

7. See Konrad Moser, “IN DUBIO PRO REO”: DIE GESCHICHTLICHE ENTWICKLUNG DIESES SATZES UND SEINE BEDEUTUNG IM HEUTIGEN DEUTSCHEN STRAFRECHT 77 (1933), cited in George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 881 n.5 (1968).

8. See JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT 334-36 (2008); see also JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 334-35 (2003) (describing common truth-defeating techniques that prosecutors, jurors, and judges used to mitigate the application of capital punishment for petty crimes in eighteenth- and nineteenth-century England).

9. Fletcher, *supra* note 7, at 880-81 nn.2-3 (describing these presumptions as modern Continental restatements of the ancient Roman law maxims *in dubio pro reo* and *nulla poena sine culpa*).

10. *In re Winship*, 397 U.S. 358, 362-63 (1970) (“[P]roof of a criminal charge beyond a reasonable doubt is constitutionally required. . . . The standard provides concrete substance for the presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’”) (citations omitted).

11. For the Court’s earliest citation of the lenity rule, see *United States v. Wiltberger*, 18 U.S. 76, 95 (1820), stating that “[t]he rule that penal laws are to be construed strictly is perhaps not much less old than construction itself.” For recent applications, see, for example, *Burrage v. United States*, 134 S. Ct. 881, 891 (2014), which applied the rule of lenity to reverse a sentencing enhancement against a defendant for distributing cocaine that “result[ed]” in death, where the prosecution could not prove that the defendant was the but-for cause of death; and *United States v. Santos*, 553 U.S. 507, 512 (2008), which applied the rule of lenity to a money-laundering statute that left in doubt whether the statute’s prohibition on using “proceeds” from unlawful activity applied to “profits” or “receipts” from illegal gambling activities. For recent rejections, see, for example, *Abramski v. United States*, 134 S. Ct. 2259, 2272 n.10 (2014), a 5-4 decision in which the majority concluded that the rule of lenity did not apply to defeat the Court’s defendant-disfavoring construction of a gun law provision because, “[a]lthough the text creates some ambiguity, the context, structure, history, and purpose resolve it”; and *United States v. Hayes*, 555 U.S. 415, 429 (2009), a 7-2 decision rejecting the rule of lenity on the grounds that the text, purpose, and the drafting history clarify that “Congress defined ‘misdemeanor crime of domestic violence’ to include an offense ‘committed by’ a person who had a specified domestic relationship with the victim.” Last Term, Justice Scalia registered his frustration with the Court’s halting and inconsistent application of the rule in strong terms: “If lenity has no role to play in a clear case such as this one, we ought to stop pretending it is a genuine part of our jurisprudence. Contrary to the majority’s miserly approach, the rule of lenity applies whenever, after all legitimate tools of interpretation have been exhausted, ‘a reasonable doubt persists’ [about the criminality of an act] . . . .” *Abramski*, 134 S. Ct. at 2281 (Scalia, J., dissenting) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)). For further analysis, see Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420 (2006) (identifying a narrowed rule of lenity in recent years through a review of the Rehnquist Court); and Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197 (1994) (discussing Justice Scalia’s support for lenity as a textualist tool for statutory interpretation).

doubt. To be sure, the textbook version of Islamic legal theory posits an absolute form of legislative supremacy—*divine* legislative supremacy—whereby God is the sole lawgiver.<sup>12</sup> In this scheme, God “legislated” a comprehensive scheme of laws in the seventh century through a combination of scripture (Qur’ān) and prophetic practice (Sunna). The Qur’ān and Sunna—the latter as contained in collections of prophetic reports called *ḥadīth*—comprise Islam’s foundational legal texts.<sup>13</sup> These texts specify a set of fixed criminal laws, violations of which trigger severe penalties ranging from corporal to capital punishment.<sup>14</sup> In the most strictly textualist version of this theory, divine legislative supremacy meant applying Islamic criminal laws *broadly*.<sup>15</sup> On this account, a combination of strict textualism and divine legislative supremacy left no obvious mechanism or need for Muslim judges to acknowledge, much less accommodate, doubt.

This popular account does not match the historical record. A close look at the sources for Islamic legal history suggest that, when adjudicating criminal cases, medieval Muslim judges and jurists faced the same factual and legal doubts that afflicted judges in other legal traditions. With different institutional structures and greater interpretive authority, these medieval Muslim judges and jurists carved out a pronounced role for doubt, and in the process, further defined and updated Islamic criminal law. They packaged their doctrine in the form of a statement calling on judges to “avoid criminal punishments in cases of doubt.”<sup>16</sup> I call this statement Islamic law’s *doubt canon*: a doctrine that came to be oft-repeated as a broadly recognized legal maxim.<sup>17</sup> The historical record shows that the doubt canon was applied more frequently than the early foundational texts, read alone, seem to require. The strict textualist approach to doubt in Islamic law stood in contrast to a more prevalent tendency to construe criminal laws *narrowly*—lenity style—whenever ambiguities arose from application of old texts to new facts, or to *avoid conviction and punishment*—

12. See, e.g., MUHAMMAD BĀQIR AL-ŠADR, LESSONS IN ISLAMIC JURISPRUDENCE 73-86 (Roy P. Mottahedeh trans., 2003); MUHAMMAD B. IDRIS AL-ŠĀFI’I, ISLAMIC JURISPRUDENCE 102-05 (Majid Khadduri trans., 1961).

13. Muslims regard the Qur’ān as the first source of Islamic law and understand Muḥammad to be the last prophet to have received revelations directly from God, which he recorded in the Qur’ān. Muslims take Muḥammad’s life example (Sunna) to be a second source of Islamic law. The Sunna was recorded in thousands of disparate reports of the Prophet’s words and actions, called *ḥadīth* (and for mainstream Shī’ī Muslims, the Sunna also includes reports from the series of twelve Imāms who succeeded the Prophet). For further discussion of the sources of Islamic law, see MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 16-55, 58-60 (3d ed. 2003); and HOSSEIN MODARRESSI, AN INTRODUCTION TO SHI’I LAW: A BIBLIOGRAPHICAL STUDY (1984).

14. See PETERS, *supra* note 5.

15. See *infra* Subsection I.A.2.

16. See *infra* Section II.B.

17. For a comparison between legal canons in Islamic law and American law, see Intisar A. Rabb, *Islamic Legal Maxims as Substantive Canons of Construction: Ḥudūd-Avoidance in Cases of Doubt*, 17 ISLAMIC L. & SOC’Y 63 (2010) [hereinafter Rabb, *Islamic Legal Maxims*]. Elsewhere, I have referred to the doubt canon as “the Islamic rule of lenity,” when emphasizing the aspects of *legal ambiguity* inherent in the concept of *shubha*. See Intisar A. Rabb, *The Islamic Rule of Lenity*, 44 VAND. J. TRANSNAT’L L. 1299, 1327-51 (2011) [hereinafter Rabb, *Islamic Rule of Lenity*]. By contrast, this discussion is more comprehensive. I seek here to show the expansive definition and historical legal-institutional implications of *shubha* as factual, legal, and moral doubt.

reasonable doubt style—whenever evidence of the facts was questionable to proving the claim.<sup>18</sup> In sum, as we will see, doubt became the framework for key concepts and institutional functions undergirding the entire system of Islamic criminal law.

Now it should be noted at the outset that the Islamic doctrine of doubt came to have a meaning that was considerably different and far more expansive than the Anglo-American doctrine of reasonable doubt. The Arabic word for the concept, *shubha*, was a term of art that referred to doubt and ambiguity of all types. That is, the Islamic doctrine of doubt referred to legality principles and mitigating factors as diverse as the presumption of innocence, the rule of lenity, doctrines of mistake of fact and mistake of law, and mercy.<sup>19</sup> Rather than the Anglo-American idea of a principally fact-based standard of proof, the Islamic doctrine covered *factual doubt*, *legal doubt*, and even *moral doubt* about the propriety of punishment.

Moreover, it is worth mentioning the extent to which the doubt canon pervaded both legal circles and popular legal consciousness. The canon appears in the earliest works of Islamic law with roots in the seventh and eighth centuries.<sup>20</sup> One jurist living in the ninth century claimed that the doubt canon was one of only a handful of principles on which all Muslim jurists had come to a consensus.<sup>21</sup> In the tenth century, judges and jurists began to invoke the canon regularly in legal treaties, judicial manuals, and reports of court cases and other proceedings.<sup>22</sup> By the eleventh century, the canon was so well entrenched that it appeared in literature as popular as the *Arabian Nights*.<sup>23</sup> A century later, it appeared in a noteworthy historical chronicle famously set to verse by a twelfth-century Muslim historian writing from modern-day Portugal: “The rule of ‘avoiding punishment in cases of doubt’ / Is a *ḥadīth* reported by all scholars of reputable clout.”<sup>24</sup> Thereafter, the canon is featured in treatises collecting legal maxims that proliferated in the thirteenth through sixteenth centuries in virtually every Islamic legal school from every major center of the

18. See *infra* Subsection I.A.2.

19. For a more expanded discussion of the various types of “doubt” that the doubt canon entailed, see *infra* Subsection III.B.3.

20. See, e.g., ABŪ YŪSUF, KITĀB AL-KHARĀJ 303 (Dār al-İslāh 1981) (citing seventh-century jurist Ibrāhīm al-Nakha’ī’s citation of the canon on anonymous authority).

21. See IBN AL-MUNDHIR, AL-İJMĀ’ 113 (Dār al-Jinān 1986).

22. See, e.g., 2 ABŪ BAKR AL-RĀZĪ JAṢṢĀS, AḤKĀM AL-QUR’ĀN 108 (Muḥammad al-Ṣādiq Qamḥawī ed., Dār Iḥyā’ al-Turāth al-‘Arabī 1986) (citing the doubt canon as a prophetic report in conjunction with a discussion of Qur’ānic legal rules); 1 AL-QĀDĪ AL-TANŪKHĪ, NISHWĀR AL-MUHĀDARA WA-AKHBĀR AL-MUDHĀKARA 135 (‘Abbūd al-Shālji ed., Dār Ṣādir 1971) (describing a famous episode of a reported incident through which Abū Yūsuf is said to have become a judge for using the doubt canon—cited as a prophetic report—to benefit the ‘Abbāsīd caliph Hārūn al-Rashīd); see also *infra* note 50; *infra* Section II.B.

23. 2 ALF LAYLA WA-LAYLA night 298, at 527 (Dār Ṣādir 1999). For an English account of this story involving an Iraqi governor’s invocation of the canon, and related stories from other sources of medieval popular Arabic literature, see Maribel Fierro, Idra’ū al-ḥudūd bi-l-shubuhāt: *When Lawful Violence Meets Doubt*, 5 HAWWA: J. WOMEN MIDDLE E. & ISLAMIC WORLD 208, 208-09 (2007).

24. 7 ABŪ AL-ḤASAN B. BASSĀM AL-SHANTARĪNĪ, AL-DHAKHĪRA FĪ MAḤĀSIN AHL AL-JAZĪRA 357 (Iḥsān ‘Abbās ed., Dār al-Thaqāfa 1979) (“Inna dar’a ‘l-ḥudūdi bi ‘l-shubuhāt / la-ḥadīthun rawāhu kullu ‘l-thiqāt.”).

Muslim world.<sup>25</sup>

Surprisingly—given its ubiquity—the doubt canon was not always well-known to Islamic law. In fact, it turns out that the canon was not at all known to the earliest Muslim jurists as a prophetic statement. The emergence and growth of reasonable doubt during that period suggests that Muslim jurists’ interpretive moves were doing more work than their legislative supremacy claims would suggest. The earliest written sources for Islamic law contain no clear textual directives for “reasonable doubt,” and certainly not in the form of the doubt canon endowed with a prophetic pedigree. It is only the later sources, some *four centuries* after the Prophet’s death (after the tenth-century “closing of the doors of interpretation”), that identify a prophetic-textual basis for doubt, as a legal canon so solid that it came to be regarded as a prophetic report. Despite indications that early Muslim jurists did not regard the doubt canon as a *ḥadīth* in the seventh through ninth centuries, by the tenth and eleventh centuries, Muslim jurists spoke about the doubt canon as if it had been a foundational text from the beginning. Yet, some contemporary sources assume reasonable doubt doctrines were always present in Islamic law, and others completely deny that it exists. Which is it? My examination of the principal legal and historical sources from the long founding period of Islamic law (seventh to eleventh centuries) explores what happened in the interim.

My central claim is that Muslim jurists generated a textual doctrine of doubt in response to the changing socio-political context of the violent eleventh century at a time when they were systematizing the law. In doing so, they sought to define the boundaries of Islamic legitimacy for enforcing criminal punishments in an attempt to decrease dubious caliph-ordered executions. Such executions had always been problematic but were cast into relief with the breakup of the Muslim empire and the accompanying need for jurists to further systematize Islamic law.<sup>26</sup> Remarkably, these jurists used claims of doubt to depart from the outcomes that Islam’s foundational legal texts seemed to authorize. Even more remarkably, they did so while claiming fealty to the text, as faithful agents of a divine lawgiver who established the criminal laws in the first place. That is, in view of Islam’s strongly textualist ideal, these jurists hid their role in constructing these doctrines under cover of textualism and divine

25. See, e.g., 2 AL-‘IZZ B. ‘ABD AL-SALĀM, AL-QAWĀ’ID AL-KUBRĀ 279-80 (Nazih Kamāl Ḥammād & ‘Uthmān Jumu’a Ḍumariyya eds., Dār al-Qalam 2d ed. 2007) (citing and listing various applications of this standard formulation of the canon); IBN NUJAYM, AL-ASHBĀH WA’L-NAZĀ’IR 142 (Muḥammad Muṭī’ al-Hafiz ed., Dār al-Fikr 1983) (same); 4 SHIHĀB AL-DĪN AL-QARĀFĪ, ANWĀR AL-BURŪQ FĪ ANWĀ’ AL-FURŪQ 1307 (Dār al-Salām 2001) (same); JALĀL AL-DĪN AL-SUYŪTĪ, AL-ASHBĀH WA’L-NAZĀ’IR FĪ QAWĀ’ID WA-FURŪ’ AL-SHĀFI’IYYA 236-38 (Muḥammad al-Mu’taṣim bi-llāh al-Baghdādī ed., Dār al-Kitāb al-‘Arabī 1998) (same); see also INTISAR A. RABB, DOUBT IN ISLAMIC LAW: A HISTORY OF LEGAL MAXIMS, INTERPRETATION, AND ISLAMIC CRIMINAL LAW (2014) [hereinafter DOUBT IN ISLAMIC LAW] (reviewing in Chapters 6 and 8 the history of Islamic substantive, procedural and interpretive doubt after the eleventh century, in Sunnī and Shī‘ī contexts, respectively).

26. Notoriously difficult to define, Islamic legitimacy as I use it most closely aligns to Richard Fallon’s helpful categories from American law of the legal, sociological, and moral criteria by which jurists successfully assert their authority to define law. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005). For further analysis in the Islamic legal context, see *infra* Section I.B.

legislative supremacy. How could Muslim jurists both claim to be textualists and depart from the texts? Why did they? In the course of answering these questions, my goal is to systematically uncover the *means* and *motives* by which Muslim jurists managed to convert a practice-based doctrine of doubt into a textual rule.

First, the means. I claim that Muslim jurists *canonized*, *textualized*, and *generalized* the Islamic doctrine of doubt based on judicial practice. That is, they identified a doctrine of doubt in early cases, which—with repetition as a matter of judicial practice—became a legal canon in its oft-repeated, standard form. This process represented the “canonization” of doubt. Muslim jurists then converted the judicial practice of avoiding punishments in doubtful cases into a legal text requiring it. To accomplish this “textualization” of doubt, they claimed that Muhammad himself had uttered the statement calling on judges to “avoid criminal punishments in cases of doubt.” By giving it a prophetic pedigree, these jurists rendered the canon into a normative legal text. Having given the canon a textual basis of authority, these jurists then engaged in sustained interpretive activity around punishment-mitigating doctrines and heightened procedures for both capital and ordinary crimes, which together represented the “generalization” of doubt. With a vastly expanded scope, the doubt canon became a unifying “text” that jurists used to define crime and to determine when it was proper for judges to enforce or avoid Islam’s harsh punishments.

Next, the motives. What explains this radical transformation of the Islamic doctrine of doubt from judicial practice into binding legal text? The answer, I will argue, has to do with the systematization of Islamic jurisprudence accompanying the socio-political context surrounding the breakup of the Islamic empire in the eleventh century. At the time jurists were systematizing Islamic criminal law, they also witnessed rampant executions at the hands of new local rulers seeking to solidify control of the central Muslim lands (present-day Iran, Iraq, and surrounding lands). The risk of unjustified political executions exacerbated existing moral anxieties on the part of the jurists responsible for outlining the boundaries of legitimate punishment. As the basis of Islamic law shifted from past practice to a system of texts, doctrines of doubt would be helpful to Muslim jurists seeking to reinforce their interpretive authority over law, ameliorate their anxieties over excessive punishment, and perhaps to lessen the rates of punishment. Moreover, a textual basis for doubt could provide a stronger argument against punishment whenever judges could claim to be beset by factual or legal doubt. That is, a textual rule allowed Muslim jurists to argue that their push against punishment came not from personal anxieties surrounding executions but from the divine law itself. In this way, even if they could not stop excessive punishments, at the very least they could decline to authorize executions. They could accomplish this by using the doubt doctrine to draw the contours of *legitimate* punishment narrowly.

Part I examines the *Case of Mā’iz*, a landmark case from Islamic law’s founding period that vividly illustrates the debates surrounding interpretation of

Islam's foundational legal texts related to criminal law. Part II presents the means by which Muslim jurists canonized, textualized, and generalized the doubt canon. Part III explores the motives for which these jurists converted the judicial canon into a foundational text. In the end, I conclude that Muslim jurists operating in the eleventh century were systematizing the law and needed a textual doctrine of doubt to solidify their authority, ameliorate their moral concerns at authorizing punishment on dubious grounds, and check the political ruler's arbitrary and excessive use of punishment. Even if the jurists could not prevent executions, the newly textual status of the doubt canon rendered it a powerful tool for them to argue against the legitimacy of punishment as a tool for state violence and social control.

\* \* \*

Before discussing the medieval cases and controversies in Islamic legal interpretation that led to its doctrines of doubt, it may be worth mentioning a note about their modern relevance. The surprising turn of events that led to the construction and prevalence of doubt in Islamic criminal law is like a modern-day U.S. constitutional amendment that passes without going through any legislation or ratification process and that history forgets was not a part of the original document.<sup>27</sup> The forgotten history of doubt in Islamic law is crucial to understanding the most pressing questions surrounding the reemergence of Islamic law as state law in modern constitutional and criminal contexts. To be sure, the Islamic state is on the rise, again.<sup>28</sup> Since the 1970s, leaders of some thirty-eight Muslim-majority countries have incorporated Islamic law into their constitutions as "a source" or "the source" of state law—including at least one in the aftermath of the Arab uprisings, which began in 2010.<sup>29</sup> During that time, the legislatures of over a dozen countries enacted Islamic criminal law codes.<sup>30</sup>

27. For an insightful analogy in the American context comparing the statutory approach of an early U.S. Supreme Court case to constitutional amendment, see *infra* note 70.

28. See generally NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* (2008) (analyzing the increasing popularity of calls for *shari'a* as a basis for state law in Middle Eastern contexts); RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* (2010) (surveying the increasing role of Islamic and other religious laws as modern state laws).

29. See Dawood I. Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions*, 54 VA. J. INT'L L. (forthcoming 2015) (providing an empirical review of all Islamic law constitutional clauses); Intisar A. Rabb, *We the Jurists: Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527 (2008) (providing a qualitative review of one such clause in the context of three common types of Islamic constitutionalization). For developments after the Arab uprisings, see S.A. Arjomand, *Middle Eastern Constitutional and Ideological Revolutions and the Rise of Juristocracy*, 19 CONSTELLATIONS 204 (2012); Karim Mezran, *Constitutionalism and Islam in Libya*, in *CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY* 513 (Rainer Grote & Tilmann J. Röder eds., 2012); Intisar A. Rabb, *The Least Religious Branch? Judicial Review and the New Islamic Constitutionalism*, 17 UCLA J. INT'L L. & FOREIGN AFF. 72 (2013).

30. Penal codes based on Islamic Law include Afghanistan, PENAL CODE of 1976; Brunei, SYARIAH PENAL CODE of 2014; Iran, QĀNŪN-I MUJĀZĀT-I ISLĀMĪ-YI ĪRĀN [ISLAMIC PENAL CODE] of 1991, as amended in 1996 and 2013; Kuwait, QĀNŪN AL-JAZĀ' [PENAL CODE], Law No. 16 of 1960, as amended by Law No. 31 of 1970; Libya, QĀNŪN AL-'UQŪBĀT [PENAL CODE] of 1953, as amended by Law No. 70 of 1973 and Law No. 4 of 2002; Maldives, PENAL CODE ACT NO. 1/81 of 1961, as amended in 2014; Oman, QĀNŪN AL-JAZĀ' [PENAL CODE] of 1974; Pakistan, PENAL CODE of 1860, amended by Hudood Ordinance, Law Nos. 7 and 9 of 1979; Qatar, QĀNŪN AL-'UQŪBĀT [PENAL CODE], Law No. 14 of 1971, as replaced by Law No. 11 of 2004; Sudan, PENAL CODE of 2003; United Arab Emirates,



Just as Islamic law arises regularly in constitutional politics, Islamic criminal law is increasingly on the agenda in parliamentary and provincial politics.<sup>31</sup>

A major feature of Islamic constitutional and criminal law is the significant degree to which its partisans seek to deploy history for present use. The new Islamic constitutions and codes require many judges in the Muslim world to apply Islamic law in their decisions.<sup>32</sup> These judges tend to appeal to conceptions of Islamic law drawn from its foundational texts and understandings from the ever-authoritative founding period.<sup>33</sup> At least one American firm operating in the Muslim world has appealed to classical rules of Islamic criminal law to address liability in a wrongful death action.<sup>34</sup> Local

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QĀNŪN AL-‘UQŪBĀT AL-ITTIHĀDĪ [UNIFORM PENAL CODE], Law No. 3 of 1987; Yemen, [QĀNŪN] AL-JARĀ’IM WA’L-‘UQŪBĀT [CRIME AND PUNISHMENT CODE], Law No. 12 of 1994; as well as provinces in Malaysia (Kelantan), SYARIAH CRIMINAL CODE (II) ACT OF 1993 [STATE OF KELANTAN]; Nigeria (ten northern Nigerian states between 2000 and 2001: Bauchi, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Sokoto, Yobe, Zamfara), BAUCHI STATE PENAL CODE of 2001; GOMBE STATE PENAL LAW of 2001; JIGAWA STATE PENAL CODE, Law No. 12 of 2000; KADUNA STATE PENAL CODE of 2002; KANO STATE PENAL CODE of 2000; KATSINA STATE PENAL CODE of 2001; KEBBI STATE PENAL CODE, Law No. 21 of 2000; SOKOTO STATE PENAL CODE of 2000; YOBE STATE PENAL CODE, Law No. 8 of 2001; ZAMFARA STATE PENAL CODE, Law No. 10 of 2000; see also 4 PHILIP OSTIEN, SHARIA IMPLEMENTATION IN NORTHERN NIGERIA, 1999–2006: A SOURCEBOOK (2007) (citing and reproducing these Nigerian state penal codes where available); HAUWA IBRAHIM, PRACTICING SHARIAH LAW, app. D (2012) (providing the text of the Sokoto and Zamfara State Shariah Penal Laws of 2000); and Indonesia (Aceh), QANUN JINAYAT [PENAL CODE] OF 2009, as amended in 2014. Non-codified practices have been reported informally in Algeria (in 1993), parts of Iraq controlled by the so-called Islamic State of Iraq and the Levant (since 2014), Northern Mali (since 2012), the Swat Valley Region of Pakistan (since 2004), Somalia (since the 1990s), and Syria (since 2013).

31. For analysis, see generally Rudolph Peters, *The Islamization of Criminal Law: A Comparative Analysis*, 34 DIE WELT DES ISLAMIS 246 (1994). For country-specific studies, see ASMA JAHANGIR & HINA JILANI, THE HUDOOD ORDINANCES: A DIVINE SANCTION? (1988); Mohammad Hashim Kamali, *Punishment in Islamic Law: A Critique of the Hudūd Bill of Kelantan, Malaysia*, 13 ARAB L.Q. 203 (1998); Ziba Mir-Hosseini, *Criminalising Sexuality: Zinā Laws as Violence Against Women in Muslim Contexts*, 8 SUR – INT’L J. HUM. RTS. 7 (2011); Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective*, 18 MICH. J. INT’L L. 287 (1996); Abdel Salam Sidahmed, *Problems in Contemporary Applications of Islamic Criminal Sanctions: The Penalty for Adultery in Relation to Women*, 28 BRIT. J. MIDDLE E. STUDS. 187 (2001).

32. See, e.g., CLARK B. LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI‘A INTO EGYPTIAN CONSTITUTIONAL LAW (2006); Clark B. Lombardi, *Egypt’s Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally “Islamic” State*, 3 J. COMP. L. 234-53 (2008).

33. E.g., Case No. 45 of Judicial Year 28, 12 SCC 1359 (Sup. Const. Ct. 2009) (Egypt) (citing legal canons and Islamic principles in upholding personal status law reforms requiring that marriages be registered to be recognized as valid); Case No. 23 of Judicial Year 20, 12 SCC 307 (Sup. Const. Ct. 2007) (Egypt) (citing Qur’ānic verses and historical juristic interpretations of family law provisions to uphold an Art. 2 “sharī‘a clause” challenge to alimony requirements of personal status law reforms); Case No. 62, Judicial Year 19, 12 SCC 92 (Sup. Const. Ct. 2006) (Egypt) (citing and applying Qur’ānic verses and legal canons on contractual performance to uphold a challenged property law statute). I have used SCC as the English initials for the name of the Supreme Constitutional Court and its reporter, *al-Maḥkama al-Dustūriyya al-‘Ulyā*. For a translation and analysis of one SCC case, see Nathan J. Brown & Clark B. Lombardi, *Translation: The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)*, 21 AM. U. INT’L L. REV. 437 (2006).

34. See Rob Quinn, *U.S. Firm Calls for Islamic Law in Lawsuit: Blackwater Boss Seeks Sharia Law to Dodge Afghan Crash Suit*, NEWSER (June 19, 2008, 7:51 AM), <http://www.newser.com/story/30373/us-firm-calls-for-islamic-law-in-lawsuit.html> (describing Blackwater’s request to apply Islamic law in a federal suit for the deaths of three U.S. soldiers in Afghanistan, as the firm would escape liability under classical Islamic “criminal” law rules of personal injury). The suit ultimately settled.

politicians have incorporated classical Islamic criminal law rules into state and regional codes, usually in attempts to assert power as well as an Islamic identity based on the popular notion of Islamic law as a text-based system of harsh criminal rules.<sup>35</sup> Criminal defense lawyers operating in these regimes have appealed to classical Islamic criminal law precepts—including the doubt canon and the *Case of Mā'iz*—to defend their clients, usually in attempts to bring more pragmatic understandings of Islamic law to bear.<sup>36</sup>

In all of these modern manifestations, Islamic law reveals itself to be both a textualist and an originalist legal tradition. That is, any invocation of Islamic law in a modern constitution or code generally contemplates an appeal back to Islam's foundational texts and its founding period.<sup>37</sup> Yet, the scholarly and judicial reviews of the history of doubt in Islamic law have been impressionistic at best and overlooked at worst.<sup>38</sup> This Article explores the

35. The overwhelming majority of modern Islamic criminal law codes exclude the doubt doctrine based on what seems to be an ahistorical textualist view of Islamic law adopted by the parliamentarians who enacted them for political gains. See Vanja Hamzić, *Nigeria, in CONTROL AND SEXUALITY: THE REVIVAL OF ZINĀ LAWS IN MUSLIM CONTEXTS* 119 (Vanja Hamzić & Ziba Mir-Hosseini eds., 2010) (arguing that “the introduction of *hudūd* laws came as a consequence of political crisis and opportunism characterized by patriarchal oppression and the misuse of religion as a means of societal control”) (citations omitted). The very texts of the codes suggest that, in a departure from historical Islamic legal practice, the modern parliamentarians drafting them likely consulted foundational and other early texts—which typically do not include the doubt canon. Neither trained in Islamic law nor in Islamic history, these politicians attempted to construct new laws based on the Qur'ān and *ḥadīth* as well as basic abridgements of legal works, failing to account for the judicial practices that historically incorporated doubt or to the developed works of substantive Islamic criminal law and legal maxims, which included the doubt canon as central and counted the doubt canon as a foundational text. For a list of codes, see *supra* note 30. One exception to that rule is a recent reform to the Iranian Penal Code, which incorporated the doubt canon after much wrangling between textualist and pragmatic jurists, the latter of which—trained as specialists in classical Islamic law and often in history—in conjunction with secularly trained comparative lawyers and criminal law experts, demanded it. The juristic, parliamentary, and popular debates giving rise to the recent Iranian criminal law reforms are the subject of another study. For the relevant provisions, see QĀNŪN-I MUJĀZĀT-I ISLĀMĪ-I IRĀN [IRANIAN ISLAMIC PENAL CODE] 1392 [2013], arts. 120-21.

36. A prominent example is the case of Amina Lawal, a woman convicted in 2002 of adultery and sentenced to death under Nigeria's penal code. Lawal's lawyers successfully appealed to overturn the conviction based on citation to the *Case of Mā'iz*, the doubt canon, and other procedural lessons that were regular features of historical Islamic legal practice. See IBRAHIM, *supra* note 30, at 148-83 (describing the role of the defense counsel at trial and on appeal); OSTIEN, *supra* note 30, at 52-82 (providing case transcripts of the Amina Lawal proceedings); Philip Ostien & Albert Dekker, *Sharia and National Law in Nigeria, in SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT* 589-93 (Jan Michiel Otto ed., 2010) (describing the adoption and application of Islamic criminal law in Northern Nigeria).

37. Cf. FELDMAN, *supra* note 28, at 4-5 (comparing Muslims' “active and continuing engagement with the constitutional past” to the way in which “Madison, Jefferson, and Hamilton continued to shape the American constitutional tradition from beyond the grave [such that] it is impossible to understand arguments about the American Constitution today without taking these founding fathers into account”).

38. I am aware of five articles and four monographs on the Islamic doubt doctrine (besides my own), all of which are recent, and almost all of which (with the exception of the article by Maribel Fierro) are Arabic or Persian catalogs of the legal doctrine that do not analyze its history or social context. The articles are Muḥammad Bahrāmī, *Barrasī va taḥlīl-i fiqhī va ḥuqūqī-i qā'idah-i 'tudra' al-ḥudūd bi'l-shubahāt*, 5-6 DĪDGĀHHĀ-YI HUQŪQĪ 19 (1997-8); Muḥammad Mūsawī Bujnūrdī, *Dū qā'idah-i fiqhī: Qā'idah-i 'tudra' al-ḥudūd bi'l-shubahāt*, 8 FASLNĀMAH-I DĪDGĀHHĀ-YI HUQŪQĪ 11 (1986-87); Fierro, *supra* note 23; Muḥammad Muḥammadī Gilānī, *Āshinā'ī bā qā'idah-i 'al-ḥudūd tudra' bi'l-shubahāt*, 5 MAJALLAH-I QADĀ'Ī VA-HUQŪQĪ-I DĀDGUSTARĪ-I JUMHŪRĪ-I ISLĀMĪ-I IRĀN 15-16 (1996-97); Riḍā Ustādī, *Qā'idah-i dar'*, 34 FIQH-I AHL-I BAYT 46 (2005) (Part I); and 37 *id.* at 71-94

history in question.

# I. THE RECURRING CASE OF MĀ‘IZ AND QUESTIONS OF ISLAMIC LEGITIMACY

This section examines the debates about the famous *Case of Mā‘iz*, and why these debates—and the jurists who engaged them—mattered so much historically to definitions of Islamic law and governance. I argue that medieval Muslim jurists’ debates about Mā‘iz were their attempts to define the proper boundaries of Islamic legal interpretation, institutions, and legitimacy.<sup>39</sup> On the interpretive level, jurists’ internal debates about Mā‘iz reveal disputes about how best to resolve uncertainty and doubt at the level of adjudication. On the institutional level, the debates point to the scope of juristic competence to resolve doubt. And on the level of legitimacy, the debates suggest that Muslim jurists strategically used doubt and claims of their institutional competence to resolve it as tools for asserting their own authority and thereby defining the classical Islamic constitutional structure for *legitimate* applications of criminal law.<sup>40</sup>

Throughout this discussion, it is important to bear in mind that, in historical Islamic contexts, there were no constitutionally defined institutions of law and governance.<sup>41</sup> But to say that the institutions were not defined top-down by a formal constitution is not to say that these institutions did not exist. An *informal* constitutional arrangement unfolded whereby a class of scholar-jurists assumed the power to interpret *sharī‘a* as a system of law, and monarchical rulers called caliphs assumed the power to enforce it.<sup>42</sup> Between them were judges, whom the caliph appointed and who looked to the jurists for formulations of law.<sup>43</sup> From this arrangement, scholars commenting on Islamic

(Part II). The monographs are ‘AQILA HUSAYN, AL-SHUBAHĀT AL-MUSQĪTA LI’L-HUDŪD (Dār Ibn Hazm 2003); SA‘ĪD MANŠŪRĪ, QAVĀ‘ID-I FĪQH: BAKHSH-I JAZĀ‘Ī—FĪQH-I TAṬBĪQĪ-YI QĀ‘IDAH-I DAR’ (Tadbīr 1997); MUHAMMAD HASAN AL-RABBĀNĪ, QĀ‘IDAT AL-DAR’ (Mu‘assasat al-Nashr al-Islāmī al-Tābi‘a li-Jāmi‘at al-Mudarrisīn 2007); and SA‘ĪD B. MISFIR AL-DAGHGHĀR AL-WĀDĪ‘Ī, ATHAR AL-SHUBAHĀT FĪ DAR’ AL-HUDŪD (Maktabat al-Tawba 1998).

39. Cf. Fallon, *supra* note 26, at 1849-51 (outlining an “overall” legitimacy that combines legal, sociological, and moral criteria for judicial authority).

40. Other scholars have recognized the link between jurists and legitimacy. *E.g.*, FELDMAN, *supra* note 28, at 2; WAEEL B. HALLAQ, AUTHORITY, CONTINUITY, AND CHANGE IN ISLAMIC LAW 159-83 (2001). But none have examined closely how jurists used interpretation to define institutional roles, the elaboration of that process in significant part through criminal law, or the reasons that explain or justify both moves. This section seeks to take up that task in the course of arguing that Muslim jurists used specific interpretive maneuvers to expand their power over criminal law and limit that of the executive through defining the contours of legitimate punishment.

41. In fact, there were no constitutions until Muslim-majority countries adopted American- and European-style constitutions at the turn of the twentieth century (in the Ottoman Empire in 1876 and in Iran in 1906), and then again after the post-World War II colonialism in large parts of the Muslim World. Even where there were constitutions, there was a weak tradition of constitutionalism and few inroads to democracy until the 2010 uprisings in the Arab world. *See* NATHAN BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD (2002).

42. FELDMAN, *supra* note 28, at 2.

43. *See* WAEEL B. HALLAQ, SHARĪ‘A: THEORY, PRACTICE, TRANSFORMATIONS 176-81 (2009). To be sure, several other officials exercised criminal law jurisdiction outside of the scheme. However, this tripartite scheme provided the main pivots for law and order, and—as elaborated below—even in those contexts, the caliphal officials were in principle subject to juridical articulations of law that set the upper limits of punishment.

governance structures have discerned distinct institutions of law and governance, and a separation of powers of sorts between them.<sup>44</sup> What remains to be explored is precisely *how* Muslim jurists defined the boundaries of those powers organically and—in some respects—from the bottom up. Here, I aim to demonstrate, using the illustrative example of Māʿiz, how these definitions of institutional power and institutional relations took shape through Muslim jurists' interpretive debates over criminal law. In short, through these interpretive debates, Muslim jurists used reasonable doubt to define their own power vis-à-vis other institutions.

### A. *Early Debates on Approaches to Islamic Criminal Law*

Why so much ado about Māʿiz? For starters, the *Case of Māʿiz* is a rather complicated basis for an early precedent, as it is not entirely clear what happened. As a text, it contained a “foundational uncertainty” that sparked debates over its meaning and precedential value for criminal law.<sup>45</sup> Here is the full account:

#### 1. *The Recurring Case of Māʿiz*

Māʿiz was a zealous new convert, who apparently had repeatedly committed adultery (*zinā*). He came to the Prophet to confess, begging to be punished. The Prophet initially sent Māʿiz away, declining to hear the case. Māʿiz came back a second time and a third, each time renewing his confession and requesting punishment, each time with the same result. On the fourth time, the Prophet finally spoke. He asked some of Māʿiz's neighbors about the defendant's state of mind. The Prophet then suggested that Māʿiz had not committed adultery within the full meaning of the term, but perhaps had merely “kissed or winked or looked at” another woman. Māʿiz insisted that he was of sound mind and had committed adultery within the full meaning of the term.<sup>46</sup>

In this case, the Prophet eventually pronounced a verdict of guilt, but did not punish him. In fact, he said nothing about punishment. Not waiting for specific instructions from the Prophet, the townspeople took the matter into their own hands and enforced the harsher of the two punishments: death by stoning. When the townspeople informed the Prophet that they had carried out

44. FELDMAN, *supra* note 28, at 2, 4, 68 (noting an “institutional separation of scholars and state”).

45. For use of this term to refer to analogous problems that arise in constitutional and international law, which also lack legislatures to specify and update legal norms, see Darryl Levinson & Jack Goldsmith, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1794 (2009).

46. See 9 IBN ABĪ SHAYBA, MUṢANNAF nos. 21254, 29240-41 (Ḥamad b. ʿAbd Allāh al-Jumuʿa & Muḥammad b. Ibrāhīm al-Laḥīdān eds., 2007). In addition to this pre-canonical collection of *ḥadīth*, which records the earliest known version of the case, the *Case of Māʿiz* also appeared in the two main canonical collections of prophetic reports. See 4 MUḤAMMAD B. ISMAʿĪL AL-BUKHĀRĪ, ṢAḤĪḤ no. 6824 (Muṣṭafā al-Dhahabī ed., Dār al-Ḥadīth 2000) [hereinafter BUKHĀRĪ]; MUSLIM B. ḤAJJAJ AL-QUSHAYRĪ, ṢAḤĪḤ, nos. 4198-4206 (Abū Ṣuhayb al-Karamī ed., Bayt al-Afkār al-Dawliyya 1998) [hereinafter MUSLIM].

capital punishment, he exclaimed in dismay that they “should have let Māʿiz go!” If Māʿiz had repented, the Prophet added, “God would surely have accepted his repentance,” which would have absolved him of punishment.<sup>47</sup>

Adultery in Islamic law was a serious moral infraction, with high criminal stakes. The Qurʾān prohibits fornication and adultery (both called *zinā*) and directs judges to “flog those guilty of *zinā*, whether male or female, with 100 lashes each.”<sup>48</sup> In addition, though stoning was not a Qurʾānic punishment, early Muslims understood the Sunna as also authorizing death by stoning for adultery convictions.<sup>49</sup> If his confession were to be believed, Māʿiz had violated the Islamic law against adultery and would be liable for punishment.

From his concluding statement, it appears that the Prophet had been reluctant to punish Māʿiz, and on one reading, he had never intended to enforce the punishment at all. Even though he had convicted Māʿiz, he had “doubt” (as most later Muslim jurists would term it), perhaps about whether the law covered the act of the defendant, whether the procedures deployed to assess the defendant’s act and his intent were sufficient to prove that he had committed *zinā*, or whether punishment was warranted. It was quite possible that Māʿiz would repent from the crime, or that he already had done so through confessing and then attempting to flee, in which case the Prophet may have preferred to avoid punishment. On these grounds, the Prophet—who of all people should have been beholden to follow God’s commands—was willing to set aside a strict reading of the text.

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This case sparked tremendous debate amongst Muslim jurists.<sup>50</sup> These

47. See IBN ABI SHAYBA, *supra* note 46. The other ninth-century sources collecting prophetic reports of early “cases” like these are replete with similar stories of individual confessions and hesitance to punish. See, e.g., BUKHĀRĪ, *supra* note 46, no. 6823 (reporting that a man came to the Prophet confessing to having committed a serious crime multiple times, until the Prophet responded that his joining of congregational prayers indicated repentance, so God had forgiven him).

48. See THE QURʾĀN 17:32 (prohibiting *zinā*—defined as fornication or adultery); *id.* at 24:2 (specifying a punishment of flogging or home imprisonment).

49. On the introduction of reports about stoning as a Qurʾānic punishment, see Hossein Modarressi, *Early Debates on the Integrity of the Qurʾān: A Brief Survey*, 77 *STUDIA ISLAMICA* 5-10 (1993).

50. The case featured in the criminal law section of all the extant major collections of prophetic reports (which provided the raw materials for the later tenth- and eleventh-century systematization of law), from the eighth century through the eleventh century. See BUKHĀRĪ, *supra* note 46; see also 1 ABŪ AL-HASAN AL-MĀWARDĪ, *KITĀB AL-HUDŪD MIN AL-HĀWĪ AL-KABĪR* 206 n.1 (Ibrahim b. ʿAlī Sanduqī ed., 1995) (listing other major *ḥadīth* sources, including ʿAbd al-Razzāq, Aḥmad b. Hanbal, Dārimī, Abū Dāwūd, Tirmidhī, Ibn Mājah, Ibn al-Mundhir, Ṭahāwī, Ṭabarānī, al-Ḥākim al-Naysābūrī, and Bayhaqī). The case also featured in the criminal law chapters of all major legal treatises (where the debates played out) from the eighth century through the present day. For a sampling of those discussions in legal treatises, in chronological order by author, see ABŪ YŪSUF, *IKHTILĀF ABĪ ḤANĪFA WA-IBN ABI LAYLĀ* 156 (Abū ʿI-Wafāʾ al-Afghānī ed., Matbaʾat al-Wafāʾ 1938); ABŪ YŪSUF, *KITĀB AL-ĀTHĀR* 157 (Abū ʿI-Wafāʾ ed., Lajnat Ihyaʾ al-Maʾārif al-Nuʾmāniyya 1936); 7 MUḤAMMAD B. IDRIS AL-SHĀFIʿĪ, *UMM* 498 (Aḥmad Badr al-Dīn Hassūn ed., Dār Qutayba 1996); 2 JAṢṢĀS, *supra* note 22, at 108; 3 *id.* at 263-64; 11 ABŪ AL-ḤUSAYN AḤMAD B. MUḤAMMAD AL-QUDŪRĪ, *TAJRĪD: AL-MAWSŪʾA AL-FIQHIYYA AL-MUQĀRANA* 5891, 5949-50 (Muḥammad Aḥmad al-Sirāj & ʿAlī Jumʿa Muḥammad eds., Dār al-Salām 2004); MĀWARDĪ, *supra*; 12 IBN ḤAZM, *AL-MUḤALLĀ BIʾL-ĀTHĀR* 18-22 (ʿAbd al-Ghaffār Sulaymān al-Bindārī ed., Dār al-Kutub al-ʿIlmiyya 1988); 2 BURḤĀN AL-DĪN AL-MARGHĪNĀNĪ, *AL-HIDĀYA SHARḤ BIDĀYAT AL-MUBTADIʾ* 735-36 (Muḥammad Muḥammad Tāmir &

debates emerged in large part because the jurists could not agree on the precise factual account or the normative significance of the case. They generally agreed on the eventual outcome: Mā'iz was punished despite the Prophet's objections.<sup>51</sup> They also agreed that the case was important: its provenance in the founding period with the Prophet presiding as a judge made it a source of normative guidance for future generations. But they disagreed about which outcome (punishment or release), and therefore which interpretive approach, was correct.<sup>52</sup>

## 2. *The Interpretive Debates about Mā'iz*

Muslim jurists devised two interpretive approaches to the *Case of Mā'iz*, which produced opposite normative outcomes. In essence, the precedential rule arising out of the *Case of Mā'iz* differed radically depending on whether jurists evaluated the case according to textual as opposed to contextual or pragmatic criteria. The first option, enforcing punishment, seemed to accord best with the text. The second option, avoiding punishment, seemed to depart from the text and be responsive to extratextual context. Yet most jurists—claiming to be textualists—understood the case to require the second, extratextual option: avoiding punishment. What was the basis for their claim and the tenor of the debates by which the strictly textualist jurists begged to differ?

One interpretive approach, which I call “strict textualism,” advocated looking only at the Qur'ānic text to determine matters of guilt and punishment. According to this approach, the townspeople were correct to punish Mā'iz. He had violated the textual prohibition against adultery, as the Prophet had concluded in his pronouncement of guilt. The townspeople were merely enforcing the sanction they believed (however incorrectly) to be required by the Qur'ānic text. Even though an American or civil lawyer might expect the *judge* to order punishment, on their account, all that strict textualists needed to authorize punishment in the early Islamic context was the conviction itself. The punishment was provided for in the divine text, which superseded the authority of the judge (including the Prophet acting as a judge). In other words, the idea

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Hāfiz 'Āshūr Hāfiz eds., Dār al-Salām 2000); and IBN ABĪ AL-QĀSIM, AL-WĀḌIH FĪ SHARH MUKHTAṢAR AL-KHIRAQĪ 413 ('Abd al-Mālik b. 'Abd Allah b. Duhaysh ed., Dār Khidr 2000). For a similar discussion in a well-known treatise of Islamic political theory, see IBN QAYYIM AL-JAWZIYYA, AL-ṬURUQ AL-ḤUKMIYYA FĪ 'L-SIYĀSA AL-SHAR'IYYA 87 (Muḥammad Jamīl Ghāzī ed., Maṭba'at al-Madanī 1978).

51. To be sure, there are some questions about what happened: whether the Prophet authorized punishment and then regretted it, whether Mā'iz had in fact repented verbally or through trying to escape once the punishment had commenced, or whether the Prophet's reasons for rebuking the townspeople was out of mercy. Gaps in the “record” of this kind were typical for early cases, which were reported in the *ḥadīth* literature with extremely sparse details about the litigants' conversations, the outcome of the case, and the reasoning. These gaps helped provide the jurists with room for interpretive maneuvering, that is, filling in the gaps about what happened with normative rules about what should have happened based on the doctrines that they later devised—as this Article aims to illustrate through tracing the evolution of the doubt doctrine from and as applied to the *Case of Mā'iz*. For further notes on the historiography of cases in early Islamic legal sources, see *infra* note 148.

52. For example, compare QUDŪRĪ, *supra* note 50, at 5949-50 (demonstrating the pragmatic textualist approach of a Hanafī jurist) with 12 IBN ḤAZM, *supra* note 50, at 18-22 (exemplifying the strict textualist approach of a Zāhirī contemporary of Qudūrī).

of divine legislative supremacy was represented in the text rather than in judicial discretion—even that of Prophetic authority. This explained why the people had carried out the punishment to the objection of the Prophet. This approach gave rise to the strict textualist rule that judges should *enforce* punishments whenever caliphal officials could provide judges with some evidence that a crime had been committed.

The second approach, which I call “pragmatic textualism,” suggested that even Qur’ānic textual rules were qualified by extratextual concerns that affected whether both convictions and punishments were warranted in particular cases.<sup>53</sup> Jurists adopting this view read the Qur’ānic text in the context of the Prophet’s objection to punishment to conclude that the objection should have carried the day. For them, the Prophet had identified countervailing considerations—having to do with repentance and rehabilitation, mercy, and antipathy toward the death penalty on dubious grounds—which should have prevented punishment. This approach gave rise to the contextualist rule that judges should *avoid* punishments whenever such countervailing considerations threw the propriety of punishment into “doubt.”

a. *The Case for Enforcing the Punishment: Strict Textualist Readings of the Case of Mā‘iz*

For the jurists who maintained that the townspeople had properly enforced the punishment against Mā‘iz, it was God himself who had required the punishment. God was the sole legislator. The dictates of His texts therefore bound both the Prophet and the townspeople. That is, not even the Prophet could depart from the rule requiring punishment. The strict textualists looked to the *Case of Mā‘iz* alongside other early cases both to justify their interpretive approach to that case and to distill specific textualist legal precepts about when to enforce or avoid punishment.

Their argument was colorfully advanced by the Muslim jurist known as

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53. I use this term to reflect the concept of pragmatic, practical, or dynamic statutory interpretation elaborated by William Eskridge. See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 275-306 (1994) (noting the ongoing use of legal canons as a feature of dynamic interpretation); William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 671 (1999) (describing the eclectic approaches to statutory interpretation deployed by judges and scholars as pragmatic); see also William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 42 321, 322 n.3 (1990) (“By ‘practical reason,’ we mean an approach that eschews objectivist theories in favor of a mixture of inductive and deductive reasoning (similar to the practice of the common law), seeking contextual justification for the best legal answer among the potential alternatives.”). To be sure, John Manning has insisted that modern textualism is different from old formalist textualism, in that the modern version accommodates “contextual readings of statutory text” by recognizing that “language has meaning only in its social and linguistic context.” John Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2455 (2003); see also John Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108-15 (2001) (“[M]odern textualists acknowledge that language has meaning only in context.”). Acknowledging Manning’s inclusion of semantic and social context as his version of what Eskridge labeled the “new textualism,” Eskridge called Manning’s approach “contextualist textualism.” See William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2051 (2006) (reviewing ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006)); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621-91 (1990).

Dāwūd al-Zāhirī—that is, “Dāwūd the Textualist”—who established the strict textualist school of Islamic law.<sup>54</sup> To begin with, he argued, God required judges to appeal only to the Qur’ān and authentic, clear reports of the Sunna without permitting human interpretation.<sup>55</sup> His approach to criminal law was to apply each rule according to the plain meaning of the text. Whenever a crime was established, judges were to enforce the associated punishment.<sup>56</sup> Further, a judge was not to express personal preferences or exercise any discretion in such cases.<sup>57</sup> Considerations of mercy, moral concerns, or contextual facts were irrelevant.

For proof, textualist judges looked to the Qur’ān itself, which commanded in the context of adultery prohibition and punishment: “do not let mercy dissuade you from imposing the punishment.”<sup>58</sup> Textualists also looked to reports of other early cases that more clearly showed instances where the Prophet acknowledged that even he was required to apply the punishments specified in the Qur’ānic texts, without exercising discretion of his own. For example, in the *Case of the Makhzūmī Thief*, Muḥammad had convicted a woman for theft. In that case, the elite members of society petitioned the Prophet to avoid punishment and let the convict go. The petitioners were members of Muḥammad’s family, as was the woman convicted of stealing. The Prophet responded that even *his* hands were tied from pardoning the woman, where the evidence proved her guilt. “Would you intervene on a matter involving God’s laws?” he asked. “I swear by God that even if Faṭīma [my own daughter] had stolen, I would cut off her hand!”<sup>59</sup> Here, the Prophet was

54. For an outline of his textualist legal theory, as presented in his son’s law manual, see Devin Stewart, *Muḥammad b. Dāwūd al-Zāhirī’s Manual of Jurisprudence*, al-Wuṣūl ilā Ma’rifat al-Uṣūl, in *STUDIES IN ISLAMIC LEGAL THEORY* 99, 139-54 (Bernard G. Weiss ed., 2002), which notes that Dāwūd made inferences from textual indicators, but rejected the use of analogy, equity, and other forms of interpretation used by other Muslim jurists of his time. For a fuller account of his jurisprudence, see ‘ARIF KHALIL MUHAMMAD ABŪ ‘ID, IMĀM DĀWŪD AL-ZĀHIRĪ WA-ATHARUH FĪ ‘L-FIQH AL-ISLĀMĪ (Dār al-Arqam 1984). Note that this brand of Islamic textualism differs from “first-” and “second-generation” American textualism—though the former provides an analytical hook by which to grasp analogous Islamic legal debates in the Zāhirī school. See John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010) (outlining the tenets of old and new, or second-generation, textualism); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420-21 (2005) (same).

55. Stewart, *supra* note 54, at 157-58 (arguing that allowing “interpretation” would permit each judge to rule according to “whim, [giving a ruling] opposite that determined by the fancy of [the next judge]”).

56. MUHAMMAD AL-SHAṬṬĪ, *RISĀLA FĪ ‘L-MADHHAB AL-IMĀM DĀWŪD AL-ZĀHIRĪ* 25 (Matba‘at Rawḍat al-Shām 1912) (collecting legal opinions attributed to Dāwūd b. ‘Alī from various works, including the strict enforcement of criminal punishment even in cases where a criminal defendant who confessed to a crime subsequently retracted the confession).

57. See Stewart, *supra* note 54, at 156-57 (quoting Dāwūd al-Zāhirī making a case against interpretation by quoting Qur’ān 4:105, “We have revealed the Book unto you with the truth so that you may judge between mankind by that which God shows you. Do not be a pleader for the treacherous,” and commenting that God did not say, “by that which you think for yourself” or “by that to which your preferences and perceptions lead you”).

58. THE QUR’ĀN 24:2. For analysis in a medieval legal-exegetical treatise on the import of Qur’ānic verses about issues of law, see 3 ABŪ BAKR IBN AL-‘ARABĪ, *AḤKĀM AL-QUR’ĀN* 334-35 (Dār al-Fikr 1978).

59. The term for “God’s laws” here is *ḥudūd Allāh*. The early, Qur’ānic meaning of the term referred simply to “Islamic law.” The term later came to mean “Islamic criminal law.” For reports of this case, see 8 ABŪ BAKR AL-BAYHAQĪ, *SUNAN* no. 17004 (Muḥammad ‘Abd al-Qādir ‘Aṭā’ ed., 1994);



referring to the Qur’ānic punishment for theft.<sup>60</sup> Together, the *Case of Mā’iz* and the *Case of the Makhzūmī Thief* were both foundational cases that textualist judges understood to mean that even the Prophet’s authority was restricted to text. Like him, all judges were bound to a version of divine legislative supremacy that required them to follow the strict meaning of the texts.<sup>61</sup>

Two centuries later, as other jurists were systematizing doctrines in their respective schools of law, Dāwūd’s famous disciple Ibn Ḥazm further elaborated the Islamic legal school of strict textualism. Ibn Ḥazm began with the common point that the Qur’ān and Sunna were the *only* valid sources of law. For him, these sources specified that judges were to enforce criminal punishments whenever the evidence established that a crime had been committed. Not even the Prophet could diverge from the strict dictates of the text.<sup>62</sup> Thus, the *Case of Mā’iz* shed no light on whether and how the judges should handle doubt. Precisely because the meaning behind the Prophet’s rebuke of the townspeople for punishing Mā’iz was unclear, his statement was not normative. According to Ibn Ḥazm, to interpret the Prophet’s statement as doubt about the propriety of punishment, as most jurists did, was mere speculation. For him, the case itself did not suggest any legal role for doubt at all. The only relevant question for criminal liability was whether there was proof in court that a defendant had violated a textual prohibition.<sup>63</sup> Neither doubt nor any other contextual consideration was relevant for the strict textualists, because none of the authentic prophetic texts had mentioned those factors.<sup>64</sup> In short, Ibn Ḥazm and his strict textualist followers saw themselves as arguing for text over spirit.

b. *The Case for Avoiding the Punishment: Pragmatic Textualist Readings of the Case of Mā’iz*

Strikingly, most Muslim jurists used the *Case of Mā’iz* to conclude that punishment should have been avoided. For them, several considerations should have overridden the apparent textual commands supporting punishment, and Mā’iz should have thus been released. Accordingly, they read this case to support a prospective rule of avoiding punishments in similar cases of doubt. Moreover, they invoked the *Case of Mā’iz* to support the doubt canon that called on judges to “avoid criminal punishments in cases of doubt.”<sup>65</sup> In effect,

BUKHĀRĪ, *supra* note 46, no. 6788; MUSLIM, *supra* note 46, no. 1688; 4 AḤMAD B. SHU’AYB AL-NASĀ’Ī, *AL-SUNAN AL-KUBRĀ* 330 (Ḥasan ‘Abd al-Mun‘im al-Shalabī ed., 2001); and 4 ABŪ DĀWŪD AL-SIJISTĀNĪ, *SUNAN* nos. 4373-74 (Muḥammad ‘Abd al-‘Azīz al-Khālīdī ed., 1996).

60. THE QUR’ĀN 5:38. For problems that Muslim jurists faced in interpreting the verse and determining the associated punishment, see WEISS, *supra* note 6, at 104-09.

61. See 8 IBN ḤAZM, *supra* note 50, at 252.

62. 12 IBN ḤAZM, *supra* note 50, at 18, 22.

63. *Id.*

64. For Ibn Ḥazm’s rejection of the prophetic origin of the doubt canon, see *id.* at 47-63. For discussion, see Rabb, *Islamic Legal Maxims*, *supra* note 17, at 111-13.

65. E.g., MARGHĪNĀNĪ, *supra* note 50; MĀWARDĪ, *supra* note 50, at 206; QUDŪRĪ, *supra* note 50, at 5949-50. For further discussion, see Rabb, *Islamic Rule of Lenity*, *supra* note 17, at 1327-49.

they argued for spirit over text.<sup>66</sup>

Against strict textualist accusations to the contrary, the jurists who read the *Case of Mā'iz* to support a rule for avoiding punishment asserted that they were more faithful to the divine legislative intent. That is, the intent behind the adultery rules was not strict obedience designed to resolutely elicit punishment, but to elicit moral consciousness—which would be served by repentance (signifying rehabilitation) as much as it would be by punishment. One example is the prominent Ḥanafī jurist, Qudūrī, a contemporary of Ibn Ḥazm. Qudūrī argued that the *Case of Mā'iz* stood for the proposition that crimes could only be established by confessions if the defendant freely confessed four separate times that he or she had committed the crime.<sup>67</sup> Moreover, for Qudūrī, the case indicated that if a defendant retracted his or her confession even once before the punishment was completed, the permission to enforce the punishment would drop. The same would be true if one of four witnesses—a Qur'ānically required burden to prove an adultery charge—perjured him or herself before the punishment was carried out. Applying these rules to Mā'iz, Qudūrī argued that Mā'iz's attempted escape was tantamount to a retracted confession, and perhaps to repentance as well.<sup>68</sup>

This reading, against the accusations of “spirit over text,” explained why the Prophet blamed the townspeople for not letting Mā'iz go. This reading also clarified that the proper judicial response to a criminal case where there was a conviction accompanied by possibilities for repentance was to avoid punishment. In defending this view, Qudūrī and the majority of medieval Muslim jurists in effect claimed, like Dāwūd and Ibn Ḥazm, to be textualists devoted to the principle of legislative supremacy. Further, most jurists asserted that the strict textualists, not they, had impermissibly used the text to justify an outcome that the divine lawgiver had not intended. The divine intent, they held, was not punishment for punishment's sake, but punishment only when there was no “doubt,” on a contextual assessment, that punishment was in fact due.<sup>69</sup>

These jurists' arguments about how to determine the divine legislative intent—if not through the strict textualist means—are drawn out more fully in Parts II and III. For now, suffice it to say that the *Case of Mā'iz* was about both sets of jurists' antipathy toward doubt—that of the strict textualists and the pragmatic textualists alike. Though their strategies for resolving doubt differed, both framed their arguments about the fate of Mā'iz as a search for legislative intent.

66. This formulation recalls language from *Church of Holy Trinity v. United States*, 143 U.S. 457 (1892), which presented a conflict between a strictly textual reading and a purposive reading that went beyond the text of an immigration and labor statute. See *Holy Trinity*, 143 U.S. at 459 (“[W]e cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”). For the significance of the spirit-versus-text controversy and the analogous importance of *Holy Trinity*, see *infra* note 70.

67. QUDŪRĪ, *supra* note 50, at 5949-50.

68. *Id.*

69. The looming question would be how to define doubt, which was expansive, as described further below in Subsection III.B.3.

### 3. The Significance of *Māʿiz*

The *Case of Māʿiz* became iconic in Islamic criminal law.<sup>70</sup> It is not that the case by itself created the doctrine of doubt that lies at the heart of the story about interpretation in Islamic law. To be sure, it was a part of the series of early landmark cases on which Muslim jurists drew to outline a doctrine of doubt—common law fashion—over the course of several centuries, until they textualized the doctrine in the tenth and eleventh centuries. But the *Case of Māʿiz* itself was illustrative rather than generative of that end.

So why did debates about *Māʿiz* matter so much? They were significant because they went to issues of constitutional structure and legitimacy. I contend that the *Case of Māʿiz* demonstrates how jurists used interpretation to define criminal law. They also used it to define institutions of law and governance, organically and bottom-up.

Here is how. Recall that, in historical Islamic contexts, an *informal* constitutional arrangement unfolded featuring a type of separation of powers: the class of jurists assumed the power to interpret Islamic law, the caliphs asserted the executive power to enforce it, and judges shuttled between the two.<sup>71</sup> Neither judges nor jurists possessed the prerogative to make law, which Islamic legal doctrine yields exclusively to a divine Legislator (who legislated *once* in the seventh century). Thus, Islamic textualism debates are framed in terms of legislative supremacy—a super-strong version of *divine* legislative supremacy that requires a limited role of judges in order not to derogate from divine directives. Islamic textualism also comes with a heavy intentionalist imperative, prompting jurists to focus on *legal texts* to discover divine *legislative intent*. These observations—read alongside the *Case of Māʿiz*—suggest that, whenever Muslim jurists interpreted texts alongside cases like that of *Māʿiz*, they defined their own role against that of other political actors.

70. For a sense of the importance of this case to Islamic interpretation debates, consider the discussion surrounding *Holy Trinity*, and the conflict between text and extratextual context, in American statutory interpretation debates. See, e.g., Frederick Schauer, *Constitutional Invocations*, 65 FORDHAM L. REV. 1295, 1307 (1997) (“*Church of the Holy Trinity v. United States* is not only a case, but is the marker for an entire legal tradition, a tradition . . . emphasizing . . . that there is far more to law than the plain meaning of authoritative legal texts . . .”) (citations omitted); cf. ESKRIDGE, *supra* note 53, at 209 (labeling the case a “sensation” that inaugurated a trend of judicial use of legislative history); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 88 (2006) (observing that most judicial and academic commentaries on legislative history and statutory interpretation theory begin with *Holy Trinity* as “the leading case in the legislative history debate,” known for “endorsing countercontextual interpretive techniques”); Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 3, 18-23 (Amy Gutman ed., 1997) (describing *Holy Trinity* as the “prototypical case involving the triumph of supposed ‘legislative intent’ . . . over the text of the law”); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1835 (1998) (observing that *Holy Trinity* “elevated legislative history to new prominence by overturning the traditional rule that barred judicial recourse to internal legislative history”). For discussion of the interpretive process in *Holy Trinity* as a constitutional amendment akin to the textualization process I trace in describing the history of doubt in Islamic law, see John Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1686 (2004).

71. FELDMAN, *supra* note 28, at 2; see also *supra* note 42 and accompanying text.

Unlike the modern American context, where three branches are in dialogue with each other in contests over institutional functions, medieval Islamic legal contexts lacked an active legislature or other defined branches with which jurists would communicate institutionally.<sup>72</sup> Instead, through *textual* interpretation, jurists defined and adopted institutional roles separated not by constitutional structure but by function. For example, in the exercise of their *juridical-cum-judicial function*, they assumed an institutionalist stance that they claimed was wholly subordinate to a divine legislator.<sup>73</sup> Yet, their claims to textualism cloaked other *legislative functions* that jurists also assumed, as outlined in the next Part.

Moreover, Muslim jurists debated the fate of Māʿiz against the backdrop of divine legislative supremacy and with texts that were far from static or clear. Questions of authenticity and meaning that arose from the dynamic nature of the sources—that is, the texts in which the *Case of Māʿiz* and related early cases were recorded—left ambiguities that pragmatic jurists took to demand interpretation. Accordingly, debates between jurists about Māʿiz played out in the legal sources, including collections of prophetic reports about criminal law, legal treatises, manuals for judging, advisory opinions about how to resolve hard cases in criminal law, and collections of legal maxims about doubt, as well as in historical sources, including judicial biographies and historical chronicles that offer anecdotal evidence of criminal trials and punishment.<sup>74</sup> In short, debates about Māʿiz persisted in many of the extant sources for legal theory and legal practice (which were general in nature and anecdotal at best) from the ninth century through the present. For the jurists writing during the early founding period, in the lead-up to the eleventh-century systematization of Islamic law, there was only one legitimate way to resolve the debate about Māʿiz. They had to answer the broader question: what did God require? In this way, despite (or perhaps because of) the fact that they could not simply ask the lawgiver to update or clarify the law, what emerges from their treatment of the case is that the jurists debating the fate of Māʿiz framed their debates as a quest for divine legislative intent.

All in all, debates about Māʿiz and other interpretive controversies were especially significant in Islamic law because Muslim jurists enjoyed an outsized role in making authoritative pronouncements of law. Their pronouncements distinguished the Islamically legitimate from the illegitimate, and in the process, defined a delicate “constitutional” balance between key institutions of Islamic law and governance.

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72. On the dialogic nature of the communication between courts, Congress, and executive agencies, see, for example, sources cited *supra* note 70.

73. For an elaboration of a similar idea in American statutory interpretation, see Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594 (1995), noting that, when judges interpret text, they are implicitly defining their own role “by defining the goal and methodology of the interpretive enterprise, and by taking an institutional stance in relation to the legislature.”

74. See generally RABB, *supra* note 25.

B. *The Role of Muslim Jurists in Defining Structures of Islamic Law and Governance*

How did scholars—who had no official religious designation and no military might to back them—gain control over definitions of Islamic law? Moreover, how did they come to define the very structures of legitimate Islamic law and governance in medieval contexts? How did their definitions govern or extend from the *Case of Māʿiz* and other early judicial practices over which these jurists commented and presided?

The process of jurists assuming interpretive authority over Islamic criminal law—in tandem with the rest of Islamic law—was gradual. As other historians have recognized, the expansion of the jurists’ role came in response to the new sociopolitical realities of a quickly expanding empire.<sup>75</sup> Less well studied is how those processes played out. In this Article, I propose that the expansion of their power unfolded to track expanding institutional functions of jurists, and did so in three stages.<sup>76</sup>

The assertion of scholarly control over Islamic law and questions of legitimacy began with the death of the Prophet, who had embodied both religious and political leadership. Under him, religious law and governance were questions of *religious morality*.<sup>77</sup> When he died, the religious and political functions split. The jurists took over questions of religion and law, and caliphs took over matters of governance.<sup>78</sup> The general populace saw Muslim jurists as the legitimate interpreters of Islamic law and understood the caliphal authority to enforce the juristic interpretations as a power derivative of Islamic law.<sup>79</sup> Definitions of Islamic law and governance thus became matters of *institutional competence*, each institution tasked with carrying out functions best suited to the expertise or effective power of its members.<sup>80</sup> Criminal law, as one of the few areas of public law, was an area of shared jurisdiction between jurists and caliphs. In this area, Muslim jurists attempted to use their popularly recognized authority to interpret Islamic law to outline the legitimate types of crime that the community would recognize and the legitimate types of punishment that the executive could enforce.<sup>81</sup> In this sense, although the caliphs often skirted norms of legitimacy by punishing expansively in their jurisdiction of political authority, the jurists continually attempted to use Islamic law as an *institutional*

75. As detailed below, this picture emerges from the amalgamation of a wide array of prosopographical sources, historical chronicles, and reproductions of documentary evidence, such as judicial appointment letters, caliphal edicts, and reports of prophetic and post-prophetic events. See *infra* Subsections I.B.1-3.

76. See, e.g., *infra* notes 82-96 (religious morality), 97-114 (institutional competence), 115-123 (institutional constraints).

77. See *infra* Subsection I.B.1.

78. For an accessible treatment of this well-known scheme, see, for example, HALLAQ, *supra* note 43, at 197-220, describing the relationship between political authorities, jurists, and judges in early Islamic political theory (*siyāsa sharʿiyya*).

79. *Id.*

80. See *infra* Subsection I.B.2.

81. See *infra* Subsection I.B.3.

*constraint* against executive overreach. As I argue below, each of these stages is crucial to understanding the jurists' role and significance in interpretive debates over episodes like the *Case of Mā'iz* and related questions of Islamic legitimacy.

### 1. *Islamic Law as Religious Morality*

The earliest Muslims conceived of Islamic law as a unified system of religious morality over issues of both law and governance embodied in the person of the Prophet. As noted above, they took Islamic law to consist of direct commands from God that Muḥammad had delivered in the text of the Qur'ān and through the example of his divinely inspired life.<sup>82</sup> Accordingly, the earliest Muslims looked to Muḥammad for religious guidance on how to conduct their affairs in all spheres of life, private and public. His guidance took the form of moral directives, political leadership, and dispute resolution, as in the *Case of Mā'iz*.<sup>83</sup> As leader of the young community of Muslims, Muḥammad combined power over all spheres of law and governance during his lifetime.<sup>84</sup>

With Muḥammad's death in 632, the functions of legislation, governance, and adjudication ceased to be combined in a single person. His death caused a crisis of succession and leadership, which would radically change the political organization of the young Muslim community.<sup>85</sup> A series of four caliphs took over political leadership.<sup>86</sup> However, these first four caliphs did not assert the divine connection to God that the Prophet had claimed, and therefore could not assert the exclusive prerogative to define Islamic law.<sup>87</sup> Rather, these caliphs exercised political authority by virtue of most Muslims having agreed to "elect" a single leader after the Prophet and therefore follow caliphal leadership in military and economic affairs.<sup>88</sup>

The extent of these caliphs' religious authority depended on their

82. See HUGH KENNEDY, *THE PROPHET AND THE AGE OF THE CALIPHATES: THE ISLAMIC NEAR EAST FROM THE SIXTH TO THE ELEVENTH CENTURY* 45 (2d ed. 1986).

83. When Muḥammad migrated from Mecca to Medina in 622, he became the head of a fledgling Islamic state. The people of Medina had invited him to be their head and agreed to implement his new religious law. This migration (*hijra*) was an all-important event in the history of Islamic law and governance. Tellingly, the Islamic calendar does not begin when the Prophet first received revelation as a member of a persecuted fringe group in Mecca. It begins After Hijra (AH)—that is, after his migration to Medina some 300 miles north—precisely because he had become the head of state. In Mecca, Muḥammad had gained only charismatic religious authority over followers with whom his message of morality and ethics resonated. But in Medina, he gained political and legal authority as well. For a general overview of law and governance during Muḥammad's lifetime, see HALLAQ, *supra* note 78, at 27-71; and KENNEDY, *supra* note 82, at 50-81.

84. For overviews of the legal structure during the Prophet's lifetime and immediately after, see SUBHĪ MAḤMĀSĀNĪ, *THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM* 15-16 (Farhat J. Ziadeh trans., 1961) (1946); and Roy P. Mottahedeh, *Introduction to ŠADR*, *supra* note 12, at 4-14.

85. The events following the Prophet's death have been labeled the first "crisis of Muslim history." MAHMOUD M. AYOUB, *THE CRISIS OF MUSLIM HISTORY: RELIGION AND POLITICS IN EARLY ISLAM* 7 (2003).

86. See KENNEDY, *supra* note 82, at 50-81.

87. See WAEL B. HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* 38-39 (2005).

88. See KENNEDY, *supra* note 82, at 50-81.

scholarly competence in articulating norms drawn from their association with the Prophet himself.<sup>89</sup> To be sure, the caliphs issued religious and legal directives in addition to appointing judges and leading the military. Yet, their command over issues of religious law was constrained.<sup>90</sup> For example, one of Muḥammad’s former companions successfully challenged the second caliph, ‘Umar b. al-Khaṭṭab, in an arbitration proceeding over the destruction of borrowed property. Even though the decision was against him, the caliph was so impressed with the arbiter’s reasoning and scholarly acumen that he appointed him a judge.<sup>91</sup> This and other anecdotes suggest that early Muslims understood the first four caliphs to be leading members of the learned circles of the Prophet’s former companions and family members, without definitive authority over matters of religion and law.<sup>92</sup>

The assassination of the fourth caliph ‘Alī just 40 years after the Prophet’s death inaugurated a dramatic shift in leadership from religious to monarchical rule. A man by the name of Mu‘āwiya was the governor of Syria—then, a garrison outpost—and distant cousin of the slain third caliph. Seeking to avenge his cousin’s death, Mu‘āwiya rallied troops to march against ‘Alī, whom he accused of taking insufficient measures to bring the assassin to justice. Ultimately, Mu‘āwiya succeeded in wresting control from ‘Alī, who was killed in battle by a defector from his troops. Mu‘āwiya established the first of a series of monarchical dynasties called caliphates that presided over the Muslim world in some form or another until the end of the Ottoman Empire in 1924.<sup>93</sup>

The new caliphate was forced to acknowledge that it had little basis to assert authority over definitions of law. Like the first four successors to the Prophet, the heads of the new dynasties assumed the title of caliph, which literally meant “deputy” or “representative.”<sup>94</sup> The term had connoted a sense of prophetic religious morality under the first four caliphs, who were themselves learned scholars of the prophetic life. But as military-backed rulers,

89. See HALLAQ, *supra* note 87, at 34-39 (describing shifting bases of Islamic legal and political authority following the Prophet’s death in year 632).

90. See, e.g., 10 ABŪ AL-‘ABBAS AL-QALQASHANDĪ, *ṢUBḤ AL-A‘SHĀ FĪ ṢINĀ‘ĀT AL-INSHĀ’* 21, 79, 359 (al-Mu‘assasa al-Miṣriyya al-‘Āmma 1981) (providing evidence that the caliphs appointed judges and instructed them with general policies on judging, such as the famous letter from the second caliph, ‘Umar b. Khaṭṭab, to Abū Mūsā al-Ash‘arī); AL-SHARĪF AL-RADĪ, NAHJ AL-BALĀGHA letter 53, at 426-45 (Ṣubḥī al-Ṣāliḥ ed., 1967) (explicating judicial and governing policies sent from ‘Alī to Mālīk al-Ashtar upon his deployment to Egypt to take over as governor). ‘Umar also instituted lasting changes over his ten-year rule (634-644), significantly to public law. See MAḤMAṢĀNĪ, *supra* note 84, at 110-14 (listing his directives concerning alms-tax, divorce, slave law, theft crimes, sex crimes, and discretionary punishments).

91. WAKĪ, AKHBĀR AL-QUDĀT 357 (Sa‘īd Muḥammad al-Laḥḥām ed., ‘Ālam al-Kutub 2001) (recounting the judicial appointment story of Shurayḥ).

92. See HALLAQ, *supra* note 87, at 29-56. For a contrary view, see PATRICIA CRONE & MARTIN HINDS, *GOD’S CALIPH: RELIGIOUS AUTHORITY IN THE FIRST CENTURIES OF ISLAM 2-3* (1986), arguing that caliphs after Abū Bakr saw themselves as not just political authorities but also religious authorities.

93. For a survey of Muslim dynasties, including a list of Umayyad and ‘Abbāsīd rulers, see CLIFFORD E. BOSWORTH, *THE NEW ISLAMIC DYNASTIES* (2d ed. 2004).

94. 2 IBN MANZŪR, *LISĀN AL-‘ARAB* 299-303 (Dār Ṣādir 1997).

the new caliphs did not claim to be scholars of the Prophet's life, nor therefore could they assume authority over definitions of Islamic law. That is, caliphs did not—and, no doubt, could not—assume sweeping religious authority over even criminal law. That much was evident from their episodic but always failed attempts to control the jurists.<sup>95</sup> Stripped of any scholarly competence under Mu'āwīya and his successors, the term “caliph” largely lost its religious meaning. The historical sources portray the early caliphate as having transformed from an office of moral leadership concerned with establishing a just social order to one of tribal loyalties based on “might makes right.”<sup>96</sup> Political leadership had shifted to the new caliphs, who no longer shared any part of the religious morality of the Prophet, aside from the symbolic title of “successor.” Instead, as the next section will elaborate, religious leadership—and the moral ability to define Islamic law—had shifted almost entirely to the jurists.

## 2. *Islamic Law as Institutional Competence*

Within half a century of Islam's advent, leadership had gone from a charismatic prophet to a militaristic caliph, with stark consequences for questions of legitimacy in Islamic law and governance. Under the new caliphate, the scholars insisted that their continuous study of the Prophet's life provided them with a special *institutional competence* to discern the meaning of Islamic law. That is, these jurists increasingly asserted the power to “say what the law is.”<sup>97</sup> They were willing to cede political leadership to the caliphs, but for religious matters, they conceived of *themselves* as the “heirs to the prophet.”<sup>98</sup> In the eyes of the populace, the scholars were correct.<sup>99</sup> The scholars' stance resonated with the political and spiritual sensibilities of enough factions that the jurists were ultimately successful in their claim to the

95. See MUHAMMAD QASIM ZAMAN, *RELIGION AND POLITICS UNDER THE EARLY 'ABBĀSIDS: THE EMERGENCE OF THE PROTO-SUNNĪ ELITE 82-85* (1997) (detailing the failed proposal of the vizier Ibn al-Muqaffa' to place law under the authority of the caliph by attempting to capture the jurists).

96. AYOUB, *supra* note 85, at 54-57 (arguing that this transformation to tribal loyalty began with 'Uthman); cf. LOUISE MARLOW, *HIERARCHY AND EGALITARIANISM IN ISLAMIC THOUGHT 14-16* (1997) (detailing a social egalitarian bent during the early Islamic period that became explicitly hierarchal during 'Uthmān's time and that Mu'āwīya's assumption of leadership based on bloodlines ended “the opportunity for social equalising” on the basis of piety criteria).

97. See CHIBLI MALLAT, *THE RENEWAL OF ISLAMIC LAW: MUHAMMAD BAQER AS-SADR, NAJAF AND THE SHĪ'Ī INTERNATIONAL* 79 (1993) (“[T]he quintessential constitutional question is about who ultimately holds the power to ‘say what the law is.’ In view of the centrality of the *sharī'a* in the definition of an Islamic state, this issue represents the essential problem of contemporary Islamic law.”). Here, Mallat was referencing Chief Justice John Marshall's famous exposition of the judicial power under the U.S. Constitution in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). For a long-view survey of the major themes that have arisen in American constitutional interpretation based on Justice Marshall's famous formulation, see CHARLES FRIED, *SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT* (2004).

98. For discussions of this ḥadīth in the context of Sunnī law, see FELDMAN, *supra* note 28, at 26. For Shī'ī law, see LIYAKAT N. TAKIM, *THE HEIRS OF THE PROPHET: CHARISMA AND RELIGIOUS AUTHORITY IN SHĪ'ITE ISLAM* (2006).

99. For the early development of this shift, see generally ZAMAN, *supra* note 95.



institutional competence to define Islamic law.<sup>100</sup> In this way, the religious morality once articulated by the Prophet had turned to the institutional competence to determine that morality in legal terms by the jurists.<sup>101</sup>

The caliphs and jurists depended on one another. The jurists, armed only with popular perceptions of religious legitimacy but no military weapons, relied on caliphal enforcements of their proclamations of law. Likewise, the only way for caliphs to recover enough religious legitimacy to ensure political stability was to establish a working relationship with the jurists.<sup>102</sup> The two camps settled on an arrangement whereby the caliphs ceded most interpretive authority to the scholars, while retaining control over judicial appointments and law enforcement.<sup>103</sup> In turn, these scholars developed the law largely independently of state involvement and control.<sup>104</sup> Early judges (who were not themselves scholarly experts) were to consult the learned circles of jurists.<sup>105</sup> This arrangement made Islamic law both “jurists’ law” and state law.<sup>106</sup> The judiciary provided “a mechanism for enforcing [Islamic law] by the state. . . . Judicial authority came from the caliph, but the law to be applied came from the scholars.”<sup>107</sup>

The “founding period” (seventh to eleventh centuries) saw important developments in Islamic law, as the jurists defined Islamic law in progressively more corporate and systematic terms. In corporate terms, the informal scholarly circles of the earliest period coalesced around key figures from the eighth and ninth centuries to form distinct schools of legal interpretation.<sup>108</sup> There were

100. This led to an uneasy balance with the government over law as well as more intense discussions in legal-religious circles about what the law was. See Mottahedeh, *supra* note 84, at 6-8.

101. On the moral and “epistemological” basis for juristic authority and legitimacy, see HALLAQ, *supra* note 40; cf. ARON ZYSOW, *THE ECONOMY OF CERTAINTY: AN INTRODUCTION TO THE TYPOLOGY OF ISLAMIC LEGAL THEORY I* (2013) (“From a very early period . . . Muslims came to treat the question of legitimacy along explicitly epistemological lines.”).

102. See HALLAQ, *supra* note 40, at 1-24.

103. HALLAQ, *supra* note 43, at 197-221 (describing this tripartite scheme as a “Circle of Justice” in which jurists, caliphs, and judges formed co-equal arcs necessary to complete the circle).

104. For accounts of the early schools, beginning in the Umayyad reign and lasting until the formalization of legal doctrine under the early ‘Abbāsids, see generally HARALD MOTZKI, *THE ORIGINS OF ISLAMIC JURISPRUDENCE: MECCAN FIQH BEFORE THE CLASSICAL SCHOOLS* (Marion H. Katz trans., 2002); and NURIT TSAFRIR, *THE HISTORY OF AN ISLAMIC SCHOOL OF LAW: THE EARLY SPREAD OF HANAFISM* (2004).

105. HALLAQ, *supra* note 87, at 52 (noting that “the sources are frequently unclear as to whether or not these specialists were always physically present in the court, but [that] we know from the beginning of the second century (c. 720 AD) judges were encouraged to seek the counsel of these learned men and that, by the 120s/740s, they often did”).

106. FELDMAN, *supra* note 28, at 27 (citing JOSEPH SCHACHT, *INTRODUCTION TO ISLAMIC LAW* 5 (1964) (“[I]t was created and developed by private specialists; legal science and not the state plays the part of a legislator, and scholarly handbooks have the force of law.”)) (on the application of the term “jurists’ law” to Islamic law).

107. On parallel developments in the Shī‘ī context, see, for example, HOSSEIN MODARRESSI, *CRISIS AND CONSOLIDATION IN THE FORMATIVE PERIOD OF SHĪ‘ITE ISLAM* 29 (1993), noting that the early mainstream Imāmi Shī‘ī community believed the authority of the Imāms to have been founded on them being learned and pious scholars; WILFERD MADELUNG, *RELIGIOUS SCHOOLS AND SECTS IN MEDIEVAL ISLAM* (1985); WILFERD MADELUNG, *THE SUCCESSION TO MUHAMMAD: A STUDY OF THE EARLY CALIPHATE* (1997); and compare Etan Kohlberg, *al-Usul Al-Arba’umi’a*, 10 *JERUSALEM STUDS. IN ARABIC AND ISLAM* 128-66 (1987).

108. For a comparison of these schools to corporations, see SHERMAN JACKSON, *ISLAMIC LAW*

hundreds of these schools in the first half of the founding period.<sup>109</sup> By its end, the multitude of schools had boiled down to four main Sunnī schools, a minority Sunnī strict textualist school and a principle Shīʿī school, also with a textualist strand.<sup>110</sup> The head Sunnī scholars, now regarded as the “founders” of the surviving schools, all lived during the first half of the founding period:<sup>111</sup> Abu Ḥanīfa of the Ḥanafī school, Mālik of the Mālikī school, Shāfiʿī of the Shāfiʿī school, and Ibn Ḥanbal of the Ḥanbalī school. The Zāhirī strict textualist school—though it eventually died out—was started by Dāwūd the Textualist. The main Shīʿī school traced back to this period as well: Jaʿfar al-Ṣādiq, the Sixth Imām—with whom most of the proto-Sunnī scholars happened to have studied—articulated the core doctrines and principles of interpretation for Shīʿī law.<sup>112</sup>

Alongside the founders of the legal schools, another group of scholars devoted themselves to collecting reports of the prophet’s words and actions, which formed the basis for the Sunna. These scholars sifted through tens of thousands of prophetic reports in an attempt to distinguish false from authentic, and therefore normative, statements of law.<sup>113</sup> Together, books outlining each school’s doctrines and the prophetic reports containing the Sunna would provide the raw materials for more systematic treatises on Islamic law.

By the eleventh century, jurists had begun organizing the ad hoc rules and multiple texts from the Prophet and early scholars into sophisticated treatises of law. These jurists drew on this amorphous body of school doctrines and prophetic reports to produce Islam’s definitive works of legal doctrine (*fiqh*), legal theory (*uṣūl al-fiqh*), and political theory (*siyāsa sharʿiyya*).<sup>114</sup> Through this process, each legal school distinguished its doctrines and methodological approaches through debates about the meaning of a common set of “texts”: the Qurʾān and the Sunna. It was these treatises that laid down the definitive doctrinal and methodological rules of Islamic law, including criminal law and doubt.

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AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHĀB AL-DĪN AL-QARĀFĪ (1996).

109. See GEORGE MAKDISI, *THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST* 2 (1981) (estimating up to five hundred such proto-Sunnī schools, most of which died out by the end of the ninth century).

110. See MAḤMAṢĀNĪ, *supra* note 84, at 63-66; MODARRESSI, *supra* note 107, at 52-55.

111. See, e.g., MAḤMAṢĀNĪ, *supra* note 84, at 17-19 (calling this period the Golden Age, which accompanied the major translation movement from Greek into Arabic, the flowering of literature, and the patronage of arts and sciences).

112. See Mottahedeh, *supra* note 84, at 8-9.

113. For discussions of the collection and authentication process of prophetic reports (*ḥadīth*) in the Sunnī context, see JONATHAN BROWN, *THE CANONIZATION OF AL-BUKHĀRĪ AND MUSLIM: THE FORMATION AND FUNCTION OF THE SUNNĪ ḤADĪTH CANON* 9 (2007), listing the six canonical Sunnī compilations of *ḥadīth*—reports of the Prophet’s words and practices. In the Shīʿī context, see MODARRESSI, *supra* note 13, at 4-5, listing the four canonical Shīʿī compilations of reports of the Prophet and Imāms’ words and practices.

114. For a history of the legal theoretical works in the Sunnī context, see WAEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNĪ UṢŪL AL-FIQH* 33 (1997). For the Shīʿī context, see MODARRESSI, *supra* note 13, at 7.

### 3. *Islamic Law as Institutional Constraint*

The division between political and religious leadership shaped a constitutional structure for the premodern Muslim world necessary for stability and legitimacy, but was threatened by political developments in the eleventh century. From the rise of Islam until the rise of independent Muslim-majority nation states after World War I, this common constitutional structure provided that a “Muslim ruler governed according to God’s law, expressed through principles and rules of the *sharī‘a* that were expounded by scholars.”<sup>115</sup> In the eleventh century, as local rulers wrested power from the caliph, they threatened to disturb the delicate balance between political and religious rule. These developments made it important for jurists to reiterate their vision of the proper institutional roles of jurists, caliphs, and judges to ensure legitimate and stable rule. In short, these developments prompted leading Muslim jurists of that time to use the Islamic law of doubt to more concretely articulate rules of constitutional constraint. That is, in significant part through claims of doubt, I contend that these jurists sought to place constraints on executive power.

One of the leading scholars of that time was the prominent figure Abū al-Ḥasan al-Māwardī, who undertook the task of restating the proper relationship between spheres of politics and law. He was both a distinguished jurist of the Shāfi‘ī school and a high-ranking government official working principally in Baghdad, which was the seat of the Muslim empire. He served as diplomat for two ‘Abbāsid caliphs just as the dynasty began to break up into smaller principalities in the eleventh century.<sup>116</sup> In fact, one of his tasks was to help the caliphs negotiate new power relationships with regional leaders to whom the caliph was forced to yield significant power.<sup>117</sup>

Māwardī wore two hats: that of the jurist articulating the domain of law, and that of the government official delineating the domain of politics. The written result was his famous work of Islamic political theory, *al-Aḥkām al-sultāniyya* (The Ordinances of Government).<sup>118</sup> In it, he drew on the early history of contested political and legal authority in an attempt to memorialize the constitutional scheme of legitimate power distribution so important to helping preserve the integrity of the empire. Through it, Māwardī aimed to articulate an Islamic legal theory that gave a wide scope of interpretive power to jurists and placed constitutional constraints on the caliph.

Māwardī’s starting point was the derivative authority of the caliph to enforce Islamic law according to its juristic-scholarly articulation. The jurists had won the argument of who possessed the religious morality and institutional

115. FELDMAN, *supra* note 28, at 2.

116. For a review of his life and works, see H.A.R. GIBB, *Some Considerations on the Sunnī Theory of the Caliphate*, in *STUDIES ON THE CIVILIZATION OF ISLAM* 141-65 (Stanford J. Shaw & William R. Polk eds., 1962). For a comprehensive study of his work, see Henri Laoust, *La Pensée et l’action politiques d’al-Māwardī*, 36 *REVUE DES ÉTUDES ISLAMIQUES* 11 (1968) (Fr.).

117. See GIBB, *supra* note 116.

118. ABŪ AL-HASAN AL-MĀWARDĪ, *AL-AḤKĀM AL-SULTĀNIYYA WA’L-WILĀYĀT AL-DĪNIYYA* 250 (Muḥammad Fahmī al-Sirjānī ed., 1978).

competence to interpret Islamic law. Accordingly, the earlier constitutional scheme continued to hold sway: the caliph's rule was legitimate so long as he agreed to uphold *sharī'a*—which included the Qur'ānic directive to “command right and forbid wrong,” as defined by the jurists.<sup>119</sup> By Māwardī's time, it was a recognized point of consensus that only jurists trained in the interpretive methods of one of the recognized schools of law were qualified to define Islamic law.<sup>120</sup>

Within that framework, Māwardī was at pains to more fully detail the spheres of political and religious-legal authority over public law, including criminal law. He acknowledged that criminal law was a part of public law, necessary to ensure public safety. Public law ordinarily fell in the caliph's jurisdiction. But Māwardī defined the meaning of public law *narrowly*, portraying it as a short list of *duties* required of the caliph to justify his rule. Instead of yielding all authority over public law to the caliph, Māwardī insisted that this was an area of *shared* jurisdiction. Jurists still maintained the prerogative to articulate the criminal law rules, and the caliphs were still to enforce them.<sup>121</sup>

Māwardī's point to the power-seeking local rulers called the Seljūqs was this: a separation of powers had obtained between the executive authorities and the jurists.<sup>122</sup> Maintaining that separation was crucial for the survival of the premodern Muslim state itself.<sup>123</sup>

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What I have elucidated so far is a general theory of Islam's constitutional structure of separated powers, defined from the bottom up, in ways quite different from the constitutionally defined branches of American law and government. The *Case of Mā'iz* reflects the phenomenon of bottom-up definitions of institutional relationships through interpretations of criminal law. Included in the collections of foundational texts and often cited in the juristic assertions of interpretive authority, this case illustrates the process and significance of legal interpretation at the intersection of law and politics, which historically were often linked through criminal law.

As the foregoing discussion should make clear, the debate over the *Case of Mā'iz* encompassed an area of law that had a public face of constitutional

119. See generally MICHAEL A. COOK, COMMANDING RIGHT AND FORBIDDING WRONG IN ISLAMIC THOUGHT (2001) (detailing the understandings and applications of this directive in Islamic history).

120. See Intisar A. Rabb, *Islamic Legal Minimalism*, in STUDIES IN ISLAMIC LAW AND TRADITION 256-74 (Michael Cook et al. eds., 2012) (noting that mainstream Sunnī communities required trained jurists to interpret Islam's foundational legal texts).

121. See MĀWARDĪ, *supra* note 118, at 250 (including enforcement of *ḥudūd* laws in a short list of ten public duties that the executive authority of the state must fulfill).

122. See FELDMAN, *supra* note 28, at 44-48 (describing the jurists' relationship with the executive as the classical Islamic separation of powers scheme).

123. For an analogous meditation by a Seljūk scholar and vizier who, like Māwardī, wrote as an officer of the state as well as a prominent Shāfi'ī jurist, see generally IMĀM AL-ḤARAMAYN AL-JUWAYNĪ, GHİYĀTH AL-UMAM FĪ ILTIYĀTH AL-ZULAM (Khalīl al-Manṣūr ed., Dār al-Kutub al-'Ilmiyya 1997). For an analysis, see Rabb, *supra* note 120.

proportions. Criminal law questions were “public” in that they required input from jurists to articulate the law, political rulers to enforce the law, and judges to mediate between the two.<sup>124</sup> They were “constitutional” in that jurists used criminal law, in part, to constitute their own power and to negotiate relations between these major institutions of Islamic law and governance. In other words, during Islam’s founding period, Muslim jurists had quickly gained vast power to define Islamic law by successfully asserting a superior institutional competence to articulate religious morality. They used this power to impose constitutional constraints on the legitimate exercise of caliphal-executive power.

As other historians and scholars of Islamic law have acknowledged, these stages demonstrate the centrality of Muslim jurists and their interpretive debates to questions of Islamic legitimacy in institutions of law and governance.<sup>125</sup> Some historians have further clarified that criminal law was the locus of considerable contestation among jurists and political authorities.<sup>126</sup> What other scholars in the field have not yet grasped is *how* jurists asserted that power to define institutional relationships specifically through criminal law, and *why*. The following discussion seeks to address both how and why by examining the means and motives by which Muslim jurists used specific interpretive maneuvers to expand their power over criminal law and limit that of the executive.

## II. THE CONVERSION OF “REASONABLE DOUBT” FROM JUDICIAL PRACTICE TO LEGAL TEXT

In arguing that Muslim jurists used criminal law to expand their own power and limit that of the caliph, I return to the central idea that the jurists’ power was itself constrained to certain interpretive ideals. From their internal debates, it is clear that Muslim jurists believed their definitions of law to be legitimate only if they could plausibly claim adherence to foundational texts and to the divine legislative supremacy ideal.<sup>127</sup> The illustrative example is the *Case of Mā’iz*. All Muslim jurists believed that the option of avoiding punishment was legitimate, in the *Case of Mā’iz* and in subsequent cases, only if that outcome represented divine legislative intent. But identifying avoidance of punishment as the divine intent was not easy to accomplish through debating the case alone. Islamic legal theory maintained that the divine legislative intent was best represented through foundational texts, but the case itself contained a foundational ambiguity as to what had happened. Jurists vehemently debated whether the Prophet’s pronouncement of guilt but his preference to avoid

124. Criminal law was unlike Islamic ritual law or family law, which could often be settled privately. For overviews of ritual law and family law, see HALLAQ, *supra* note 78, at 271-95.

125. E.g., HALLAQ, *supra* note 40, at 166-83 (recognizing in general terms that jurists used the power of their perceived legitimacy to help define institutional roles).

126. For an excellent study of the intellectual currents and enforcement mechanisms of criminal law among Seljūq jurists and rulers, see CHRISTIAN LANGE, JUSTICE, PUNISHMENT AND THE MEDIEVAL MUSLIM IMAGINATION 39 (2008).

127. See *supra* note 49 and accompanying text.

punishment set a precedent for punishment avoidance, especially given other foundational texts that seemed to require enforcing punishments.<sup>128</sup> If textualism and divine legislative supremacy were so central to the jurists' claims of legitimacy, how did they introduce doctrines of doubt that generally required judges to avoid punishment in cases like that of Mā'iz?

In a move astonishing for both its boldness and its near invisibility, the jurists transformed the doubt doctrine from reports of early practices into a legal text. This move was astonishing because it would seem wholly opposed to the values of Islamic textualism and divine legislative supremacy. It was also astonishing because the transformation of the canon from a judicial practice to a legal text was so effective that few later jurists were even aware of the dubious nature of the prophetic pedigree for the doubt canon.<sup>129</sup>

Instead, most Muslim jurists largely adopted the doubt canon as a core prophetic principle of Islamic law, which they used to resolve debates about Mā'iz and other criminal defendants. This resolution unfolded in three stages. First, these jurists read the *Case of Mā'iz* to introduce doctrines of doubt as a matter of early judicial practice, e.g., "avoid criminal sanctions in cases of doubt": the canonization of doubt.<sup>130</sup> Second, these Muslim jurists actually converted this canon into a *foundational text*, which, as a prophetic report, carried the full force of divine legislation: the textualization of doubt. Third, they then managed to establish the doubt canon as the central principle of interpretation to govern questions of doubt that arose in Islamic criminal law: the generalization of doubt. I address the first two processes below, and the third in Part III.

#### A. *The Canonization of Doubt Through Early Judicial Practice*

The process of articulating doctrines of doubt first came through juristic readings of early judicial practices. The authors of the eleventh-century legal treatises systematically emphasized early precedents in favor of avoiding punishment.<sup>131</sup> For them, the point was to demonstrate that the facts were not always what they seemed, which was another way of saying that criminal cases frequently produced factual doubts. These doubts were enough to require heightened procedures before warranting convictions and punishment. From reviewing dozens of early cases, jurists concluded that extensive doubts permeated criminal cases. Additional procedures could alleviate those doubts and, when applying the rule of "no punishment" in cases of doubt, these added procedures served as tools for judges to avoid punishments in many cases. In

128. *Id.*

129. Only the traditionalist, strict-textualist jurists—the Zāhirīs and some Ḥanbalīs—were consistently attuned to the non-prophetic pedigree of the doubt canon. This realization caused many of them to reject the doubt canon both as a *ḥadīth* (in prophetic attribution) and as a substantive canon (in legal application). See IBN HAZM, *supra* note 50. For further discussion, see Rabb, *Islamic Legal Maxims*, *supra* note 17, at 106-13 (detailing Ibn Ḥazm's objections to the doubt canon, which turned out to be largely ineffective).

130. See Rabb, *Islamic Rule of Lenity*, *supra* note 17, at 1327.

131. See *infra* Subsection III.B.3.

the jurists’ estimation, the trend of judicial practices from the founding period illustrated how often the founding figures avoided punishment. This frequent avoidance helped them determine how Māʿiz should have fared retrospectively and how criminal defendants should be treated prospectively. Consider the following three cases.<sup>132</sup>

### 1. Case of the Mysterious Pregnancy

One report hails from eleventh-century Yemen, a generation after Māʿiz. The local judge Abū Mūsā al-Ashʿarī was asked to preside over a criminal case where a woman, who was either married or previously married, was accused of committing adultery.<sup>133</sup> Recall that *zinā* in this context was a capital crime, as early Muslims had come to understand it.<sup>134</sup>

The woman’s situation looked suspicious. She was pregnant and seems to have been unmarried—likely having been previously married—but the pregnancy was not from her (former) husband. The woman swore an oath that she had not committed a sex crime. Instead, she claimed that she woke up one night to find a man on top of her, whom she did not know, and who fled soon after.<sup>135</sup> Essentially, she claimed to have been raped.<sup>136</sup>

Judge Abū Mūsā was perplexed. If the woman had admitted to adultery, the textual rule might have guided him to convict. But she had not, leaving him as nonplussed as she presented herself to be. He needed to consult a more informed and authoritative jurist. Accordingly, the judge wrote to the caliph-cum-jurist ʿUmar in Medina, asking how he should proceed. In response, ʿUmar summoned Abū Mūsā along with the accused woman and a few witnesses from her town. The woman recounted the facts, and repeated her denial. As the Prophet had with Māʿiz, ʿUmar asked the witnesses about her character and mental state. They vouched for her and praised her generously. The facts did not decisively resolve the case.

The situation was as follows: The woman had neither admitted to being guilty nor was she known to be of bad moral character. For Abū Mūsā and ʿUmar both, it was clear that some sex crime had taken place. But it was not clear that the woman was culpable. To the contrary, the woman may not have been a perpetrator of adultery, but rather a victim of rape.<sup>137</sup> ʿUmar remarked

132. For a collection of twenty-five early criminal cases demonstrating trends of alternate avoidance and enforcement of Islamic criminal punishment, see RABB, *supra* note 25, app. A.

133. See IBN ABĪ SHAYBA, *supra* note 46, no. 28,970; WAKĪʿ, *supra* note 91, at 71-72.

134. See *supra* note 49.

135. It is unclear from the facts recounted in the report whether she was married and who brought the accusation, the sources mention that she was a *ṭhayyib* (non-virgin), which placed her in a category of female offender for which jurists of the eleventh century understood the case to be a sex crime that would require stoning. Her husband (if indeed she had been married), or another family member, would have made the accusation. See IBN ABĪ SHAYBA, *supra* note 46, no. 28970.

136. A common strategy for Muslim women of this period to contest adultery accusations in other contexts appears to have been to claim that they were raped. See, e.g., Delfina Serrano, *Twelve Court Cases on the Application of Penal Law Under the Almoravids*, in DISPENSING JUSTICE IN ISLAM 473, 475, 491 (citing 11 IBN ḤAZM, *supra* note 50, at 291-93).

137. In another version of the story, ʿUmar says to the woman, “perhaps you have been raped.”

that he feared God's wrath "if [he] sentenced this woman to death." Instead of punishing her, he fed her, clothed her, and instructed her people to treat her well.<sup>138</sup>

Later Muslim jurists took this case to be one of *legal doubt*, for which heightened procedures were required, which in turn helped determine whether the law against fornication and adultery covered the acts of someone who had not formed the criminal intent to violate the law. 'Umar's questioning about her mental state and character paralleled the Prophet's questioning of Mā'iz. In this case, was the pregnancy, without a confession or witnesses, sufficient to convict of adultery? The answer was no. The doubt about the law's application to the woman who claimed to have been raped, jurists concluded, explained why 'Umar avoided punishment, using procedure to lead to that result.

## 2. Case of the Falsely Accused Butcher

Similar evidentiary doubts emerged in reports about an early murder in Medina. The *Case of the Falsely Accused Butcher* presented the question of whether the Qur'ānic rule of retaliation, which permitted the death penalty for anyone convicted of murder, applied to a man who claimed after conviction that the evidence was false.<sup>139</sup>

During the reign of the Muslim community's fourth caliph 'Alī, a type of early police force in the small Arabian town of Medina was out patrolling. Members of this patrol came across a man in the town ruins holding a blood-stained knife and standing over the corpse of a man who had just been stabbed to death. The patrol arrested the man with the knife. Upon arrest, he immediately confessed: "I killed him."

The suspect was brought before 'Alī, the beloved cousin and son-in-law of the Prophet Muḥammad (who had died less than three decades before in 632). 'Alī was the fourth caliph according to the Sunnī account of successors to the Prophet and the first Imām in the competing Shī'ī account, and a revered founding figure in both communities. He presided over criminal trials in his capacity as leader of the young Muslim community from 656 to 661, as had the Prophet before him. Upon hearing the defendant's story, 'Alī reportedly sentenced him to death, in accordance with the Islamic law of retaliation for homicide and personal injury: a life for a life.

Before the sentence was carried out, another man rushed forward, telling the executioners not to be so hasty. "Do not kill him. *I* did it," he announced. 'Alī turned to the condemned man, incredulously. "What made you confess to a

See 12 SHIHĀB AL-DĪN AL-QARĀFĪ, AL-DHAKHĪRA FĪ FURŪ' AL-MĀLIKIYYA 60 (Dār al-Gharb al-Islāmī 1994). For a similar version in an earlier source, see 7 'ABD AL-SALAM B. SA'ĪD SAHNŪN, AL-MUDAWWANA AL-KUBRĀ 2444 (Dār Ṣādir, n.d.) (equating sex with a sleeping woman to rape).

138. IBN ABĪ SHAYBA, *supra* note 46, no. 28,970. For discussion of the jurists' antipathy toward capital punishment read into scenarios like this one, see *infra* Section III.B.

139. For the Qur'ānic rule of retaliation, see THE QUR'ĀN 2:178-79; *id.* at 4:92; and *id.* at 5:45. For a discussion of the Islamic "reforms" to the ancient Near Eastern practice, see PETERS, *supra* note 5, at 40.



murder that you did not commit?!” he asked. The man explained that he thought ‘Alī would never take his word over that of the patrolmen who had witnessed a crime scene wherein all signs had pointed to him as the perpetrator. In reality, the man explained, he was a butcher who had just finished slaughtering a cow. Immediately after the slaughter, he needed to relieve himself, so he entered the area of the ruins, bloody knife still in hand. Upon return, he came across the dead man and stood over him in concern. It was then that the patrol encountered him. Figuring that he could not plausibly deny having committed the crime, he confessed to the “obvious” and decided to leave the matter in God’s hands.

The second man offered a corroborating story. He explained that *he* was the one who had murdered a man for his money and then had fled upon hearing sounds of the patrol approaching. On his way out, he passed the butcher entering the area and then watched the events unfold as the butcher had described them. Once the butcher was condemned to death, however, the second man felt compelled to step forward. He did not want the blood of *two* men on his hands.<sup>140</sup>

This case presented yet a new set of doubts. Whereas the previous case addressed *legal doubt* arising from questions of criminal intent and thus criminal culpability, this case highlighted problems of *factual doubt*. That someone was criminally culpable was clear. There was a dead man in the town ruins who was brutally stabbed to death. But the conflicts between circumstantial evidence and competing confessions created doubt about who was culpable. There was a problem in the evidence, which seemed impossible to resolve. The lack of certain proof against either defendant may then have caused ‘Alī to avoid punishment.

Later jurists read this case to support the rule that judges should avoid enforcing the death penalty even when the ordinarily acceptable forms of evidence seemed dispositive.<sup>141</sup> Typically, murder convictions required either a confession or two eyewitnesses, preferably corroborated by knowledge of the witnesses’ credibility or by circumstances pointing to the reliability of the testimony.<sup>142</sup> Here, there was the perfect trifecta of evidence: a confession, testimony of multiple eyewitnesses, and corroboration by strong circumstantial evidence. Yet, even then, there was doubt. There was a plausible alternative

140. IBRĀHĪM B. HĀSHIM AL-QUMMĪ, QADĀYĀ AMĪR AL-MU’MINĪN ‘ALĪ B. ABĪ ṬĀLIB 88-89, 238 (Fāris Ḥassūn Karīm ed., Mu’assasat Amīr al-Mu’minīn 2003). Both Sunnī and Shī’ī scholars have cited this episode as an example of clever doubt jurisprudence. For Sunnī treatments, see, for example, IBN QAYYIM AL-JAWZIYYA, *supra* note 50, at 82-84 (quoting Qadāyā ‘Alī and Ajā’ib (referring to the ninth-century works by Ibrāhīm b. Hāshim al-Qummī and others called Qadāyā Amīr al-Mu’minīn or ‘Ajā’ib aḥkām Amīr al-Mu’minīn, now published as MUḤSIN AL-AMĪN AL-‘ĀMILĪ, ‘AJĀ’IB AḤKĀM AMĪR AL-MU’MINĪN ‘ALĪ B. ABĪ ṬĀLIB (Markaz al-Ghadir li’l-Dirāsāt al-Islāmiyya 2000))). For Shī’ī treatments, see, for example, 2 AL-ḤURR AL-‘ĀMILĪ, WASĀ’IL AL-SHĪ’A 172 (Mu’assasat Āl al-Bayt li-l-ḥyā’ al-Turāth 1956); 7 MUḤAMMAD B. YA’QŪB AL-KULAYNĪ, KĀFĪ 289 (‘Alī Akbar al-Ghaffārī ed., 1957) (quoting the story from Ibrāhīm b. Hāshim al-Qummī as received through that author’s son, ‘Alī b. Ibrāhīm al-Qummī).

141. See *infra* Section III.B.

142. See PETERS, *supra* note 5, at 12-17.

story told by a second man who confessed to the crime, and no eyewitnesses or reliable confessions. Because of pervasive problems in certain types of proof, jurists read this case as support for avoiding capital punishment altogether.

### 3. Case of the Absentee Husband

Another set of doubts appeared in reports of a third case, which combined the judgments of the second and fourth caliphs-cum-scholars, 'Alī and 'Umar, respectively. The reports of this case noted that a man had gone traveling for two years and returned to find his wife pregnant.<sup>143</sup> The husband accused his wife of adultery. When he brought the case to 'Umar to adjudicate, 'Umar determined that the woman was guilty of adultery and sentenced her to death. When 'Alī heard about the decision, he rushed to 'Umar, saying, "[I]f this is your decision as to the woman, then what will happen to her (unborn) son?" 'Alī managed to convince 'Umar to delay the sentence until the woman gave birth. Once the son was born, he convinced 'Umar to postpone the sentence until the baby was no longer reliant on nursing for sustenance. During this time, perhaps as 'Alī had intended, the husband claimed paternity of the child, effectively rescinding the earlier accusation of adultery.<sup>144</sup>

'Umar observed this turn of affairs with surprise and regret. He had initially sentenced the woman to death. If he had carried out the punishment, he would have been at fault, because the husband claimed the child and dropped the basis for criminal liability and punishment. 'Umar expressed his appreciation to 'Alī and retracted the punishment order.<sup>145</sup>

This case depicts 'Alī using various procedural strategies in advising 'Umar in order to avoid enforcing punishment even after the adultery conviction. The husband's eventual "admission" of paternity—however dubious—eventually served to cancel the punishment order altogether. Later jurists read 'Alī to have special insight or "judicial acumen" that events might take this turn.<sup>146</sup> Indeed, he perhaps engineered matters to achieve this outcome. These later jurists read this case as yet another instance of the imperative for judges to identify contextual factors as bases for what might be regarded as *moral doubt* about the propriety of punishment, which demand the use of procedural strategies to avoid punishment.<sup>147</sup>

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These cases are important not for their historical accuracy, but for the uses to which later jurists put them.<sup>148</sup> Pragmatic jurists writing at the end of

143. QUMMĪ, *supra* note 140, at 119 (citing variants in later Shī'ī sources, including works by prominent eleventh- to fourteenth-century Shī'ī jurists Mufīd and al-'Allāma al-Ḥillī, as well as works by prominent Sunnī scholars Bayhaqī, Bāqillānī, and Ibn Ḥajar).

144. *Id.*

145. *Id.*

146. See IBN QAYYIM AL-JAWZIYYA, AL-ṬURUQ AL-ḤUKMIYYA FĪ 'L-SIYĀSA AL-SHAR'ĪYYA 3, 43-80 (Dār al-Kutub al-'Ilmiyya 1995).

147. *Id.*

148. Reports of these cases from the seventh century are available in written literature only from the eighth to ninth centuries at the earliest. Rather than taking them as verbatim reports of what

the founding period in the eleventh century and afterward read these early cases to express doctrines of doubt.<sup>149</sup> They then used these cases to support their view in the *Case of Māʿiz* that the Prophet’s comment that the townspeople should have avoided punishing Māʿiz was a normative rule based on the doctrine of doubt. In that case, the Prophet had tried to deter Māʿiz from confessing, had come up with alternative explanations of the defendant’s actions that did not fall within the ambit of the law in order to excuse Māʿiz, and then had censured the people for carrying out the criminal punishment against him. In short, one could characterize their treatment of the *Case of Māʿiz* as reflecting an understanding that the Prophet had expressed factual, legal, and moral doubt.

Drawing on that precedent, Muslim jurists interpreted the *Case of the Mysterious Pregnancy* to be an instance of *legal doubt*, with ʿUmar displaying an immediate willingness to ascribe no fault to the pregnant woman who signaled she had no criminal intent and thus was not covered by the scope of the law against fornication and adultery. They further interpreted the *Case of the Falsely Accused Butcher* as one of *factual doubt*, wherein ʿAlī declined to punish the man who had confessed to committing murder, when he was no longer certain of the criminal culpability of either defendant where there were two competing confessions. And they interpreted the *Case of the Absentee Husband* as one of *moral doubt*, where ʿAlī and ʿUmar managed to avoid punishing a woman for adultery through procedural delay tactics where the context of her husband’s acceptance of the child and the child’s reliance on the mother militated against the propriety of capital punishment. In sum, the judge in each case found (or created) some type of factual, legal, or moral doubt—sometimes in combination—that called criminal culpability into question. These various types of doubt provided the basis for avoiding criminal punishment in each case.

Read together, these early cases represented judicial practices that resonated in juristic circles as normative, even if they were not as airtight as arguments based on text. For the later jurists considering these early cases, the outcomes pointed to an overall tendency of early Muslim judges and founding figures to avoid punishment through heightened procedural and other requirements, even where there were solid indications that some crime had taken place. Having distilled this understanding from early judicial practices, the jurists expressed it frequently in the form of the doubt canon: avoid criminal punishments in cases of doubt.<sup>150</sup>

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actually happened, I argue that the case reports indicate ideas that the later generations of scholars came to associate with Islam’s earliest period. In a related context, Roy Mottahedeh has used sources from the Būyid dynasty in the late ʿAbbāsīd era to uncover the symbolic importance and practice of taking oaths in processes through which local rulers gained political legitimacy. See ROY P. MOTTAHEDEH, *LOYALTY AND LEADERSHIP IN AN EARLY ISLAMIC SOCIETY passim* (1980).

149. E.g., QUDŪRĪ, *supra* note 50, at 5949-50.

150. See, e.g., MUḤAMMAD AMĪN AL-ĀSTARĀBĀDĪ, *AL-FAWĀʾID AL-MADANIYYA* 326 (Muʿassasat al-Nashr al-Islāmī 2003); 9 SULAYMĀN B. KHALAF AL-BAJĪ, *MUNTAQĀ* 168-71, 175-76, 232 (Maktabat al-Thaqāfa al-Dīniyya 2004); 6 ABŪ HAMĪD AL-GHAZĀLĪ, *AL-WASĪT* 443-46 (Dār al-Salām 1997); 2 IBN AL-ʿARABĪ, *supra* note 58, at 604; 2 IBN ʿABD AL-BARR, *KĀFI* 1069-73 (Maktabat

Yet as a statement of judicial practice, the doubt canon would have limited reach. For staunchly textualist jurists, judicial practices would have little normative weight, as they were neither Qur'ānic nor prophetic statements. For maximal authority and legitimacy, any canon had to be rooted in a foundational text.<sup>151</sup> That move came next for the doubt canon.

#### B. *The Textualization of Doubt Through Juristic Interpretation*

Once the jurists had expressed the doctrine of doubt in the form of an oft-repeated canon located in early judicial practices, the jurists' next move was to turn the canon into a text. My claim is that the jurists literally asserted that the divine lawgiver had laid down the rule through the Prophet himself. They did not do so based on any one text or at any one identifiable moment. Rather, they did so based on their interpretations of the early *ḥadīth* literature alongside judicial practices that seemed to consistently pursue a policy of punishment avoidance in cases of doubt, including the *Case of Mā'iz* and other early cases. By the end of the tenth and eleventh centuries, interpreting these cases in the aggregate, virtually all Muslim jurists came to conceive of the doubt canon as a foundational text issued by the Prophet himself.<sup>152</sup> This move represented a radical change from the early conceptions of the doubt doctrine as *judicial practice*; this later conception of doubt had been transformed into a *rule of text*.

A study of the legal literature from the first three centuries of Islam's advent reveals that no jurist understood direct statements about doubt to have been prophetic in origin. To be sure, they knew of the doubt canon expressed through its standard formulation: "avoid criminal punishments in cases of doubt." Yet, they regarded it as statement of judicial practice, not as a prophetic *ḥadīth*. It simply was not a foundational legal text.<sup>153</sup>

In this vein, the founders of Islam's multiple legal schools tended to cite the doubt doctrine in their treatments of criminal law without claiming it to be a prophetic directive. Abu Ḥanīfa's circle in Iraq expounded the doubt doctrine early on in the form that has been popularized amongst most subsequent jurists:

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al-Riyāḍ al-Ḥadīthah 1980); 2 IBN RUSHD AL-ḤAFĪD, *BIDĀYAT AL-MUJTAHID* 632 (Dār al-Kutub al-'Ilmiyya, 1996); 16 IBN RUSHD AL-JADD, *BAYĀN* 324 (Dār al-Gharb al-Islāmī 1988); 9 ABŪ BAKR B. MAS'ŪD AL-KĀSĀNĪ, *BADĀ'Ī AL-SANĀ'Ī* 4150 (Zakariyyā 'Alī Yūsuf 1968); MĀWARDĪ, *supra* note 50, at 207-15; 9 SHAMS AL-A'IMMA AL-SARAKHSĪ, *MABSŪT* 66 (Abū 'Abd Allāh Muḥammad Ḥasan Ismā'īl al-Shāfi'ī ed., Dār al-Kutub al-'Ilmiyya 2001); ABŪ ZAYD AL-DABŪSĪ, *KITĀB AL-ASRĀR*, in Salim Özer, Debbusi'nin "*El-Esrar fi'l-Uṣul ve'l-Furu'*" Adli Eserinin Tahkik ve Tahlili 151, 1229 (1997) (unpublished Ph.D. thesis, Erciyes Üniversitesi) (on file with author).

151. For approaches to early Islamic history and historiography in other contexts, see generally FRED M. DONNER, *NARRATIVES OF ISLAMIC ORIGINS: THE BEGINNINGS OF ISLAMIC HISTORICAL WRITING* (1998), which argues that early Islamic sources present a "kernel" of historical truth; TAYEB EL-HIBRI, *REINTERPRETING ISLAMIC HISTORIOGRAPHY: HĀRŪN AL-RASHĪD AND THE NARRATIVE OF THE 'ABBĀSĪD CALIPHATE* (1999), which identifies early Arab historical writing as moralizing rather than presenting a register of facts; R. STEPHEN HUMPHREYS, *ISLAMIC HISTORY: A FRAMEWORK FOR INQUIRY* (1991), which surveys major contemporary approaches to the field; and CHASE F. ROBINSON, *ISLAMIC HISTORIOGRAPHY* 118-23 (2003), which notes that political patronage colored historical narratives and, where independence was lacking, often presented facts best suited to legitimate the sponsoring regime.

152. Rabb, *Islamic Legal Maxims*, *supra* note 17, at 100-06.

153. For a more in-depth survey, see *id.* at 5.

“avoid criminal punishments in cases of doubt.”<sup>154</sup> His prominent disciple, Abu Yūsuf—who, in the eighth century, became the first chief judge of the Islamic empire—included the canon in his treatise on public law.<sup>155</sup>

The leaders of schools elsewhere in Iraq, Central Arabia, Egypt, Spain, and the other major centers of the growing Islamic empire recognized practices driven by the doubt doctrine as well.<sup>156</sup> In Medina, Mālik invoked it, to avoid capital punishment in a case of alleged adultery.<sup>157</sup> In Andalusia, Mālik’s student Ibn al-Qāsim used claims of doubt to avoid punishments also in cases of alleged adultery.<sup>158</sup> In Egypt, Shāfi‘ī applied the doubt doctrine as well. Shāfi‘ī’s application of the doubt doctrine is particularly striking, because his work of legal theory emphasizes the need to rely only on textual sources of law.<sup>159</sup> Yet he too recognized and tried to accommodate the persistence of factual doubts in the evidence. He also advocated applying the doubt canon where witness testimony conflicted as to the specific facts of a crime.<sup>160</sup>

The same doctrine of doubt also featured in the proto-Shī‘ī legal circles in Kufa, Iraq. The doubt canon appears, without prophetic authority, in a work of ‘Alī’s judgments collected in the ninth century. In one case, a man gave his wife a slavewoman and then had sex with her. When the woman complained to ‘Alī, accusing her husband of illicit sexual relations, ‘Alī resolved the matter by avoiding capital punishment.<sup>161</sup> Moreover, when he was still caliph, ‘Alī advised his faithful companion Mālik al-Ashtar to apply the doubt canon when sending him to be governor of Egypt.<sup>162</sup>

In sum, all of the founding jurists invoked doctrines of doubt to avoid

154. One of Abū Hanīfā’s two most prominent students, Shaybānī, attributed instances of the doubt canon’s application to his teacher, who in turn drew on opinions of the seventh-century jurist Ibrāhīm al-Nakha‘ī. See MUHAMMAD B. ḤASAN AL-SHAYBĀNĪ, *KITĀB AL-ĀTHĀR* 136 (Khadija Muḥammad Kāmil ed., *Idārat al-Qur’ān wa’l-‘Ulum al-Islāmiyya* 1998).

155. Abū Yūsuf included discussions of the doubt canon in his treatise on taxation, which contains sections on criminal and other areas of public law. See ABŪ YŪSUF, *KITĀB AL-KHARĀJ* 303-05 (Muḥammad Ibrāhīm al-Bannā’ ed., *Dār al-Isḥāḥ* 1981).

156. E.g., 7 ‘ABD AL-RAZZĀQ, *AL-MUṢANNAF FĪ ‘L-ḤADĪTH* 210 (Ḥabīb al-A‘zamī ed., *al-Maktab al-Islāmī* 1972) (reporting on avoidance practices in Medina of the Umayyad caliph ‘Umar b. ‘Abd al-‘Aziz (r. 717-720) for alleged sex crimes); WAKĪ’, *supra* note 91, at 617 (reporting cases in which the Syrian Umayyad judge Faḍāla b. ‘Ubayd al-Anṣārī avoided punishment).

157. See 2 MĀLIK B. ANAS, *AL-MUWAṬṬA’* 393 (Bashshār ‘Awwād Ma‘rūf ed., *Dār al-Gharb al-Islāmī* 1996) (holding, for example, that judges were not to punish in a case where a man permitted his slavewoman to have sex with another man, even though giving the permission and the act were illegal).

158. See 16 SAḤNŪN, *supra* note 137, at 236 (noting Mālik’s position that judges should avoid punishment for adultery in a case of alleged infidelity where there were disputes about whether the marriage was consummated, and thus completed legally).

159. See generally SHĀFI‘Ī, *supra* note 12 (elaborating a jurisprudence based on his call for authentic foundational texts as the most authoritative bases for law).

160. SHĀFI‘Ī, *supra* note 50, at 52-53 (invoking the doubt canon to avoid corporal punishment in cases of theft, though requiring the thief to pay a fine in such cases).

161. See QUMMĪ, *supra* note 140, at 253-54.

162. See IBN SHU‘BA, *TUḤAF AL-‘UQŪL* 126, 128 (‘Alī Akbar al-Ghaffārī ed., *Maktabat al-Ṣadūq* 1376). This source is dubious, and the doubt canon does not appear in the version of the letter recorded in RADĪ, *supra* note 90. Yet this version indicates a certain regard for the doubt canon in the Shī‘ī communities that Ibn Shu‘ba frequented in the tenth or eleventh century, during a period when the canon was growing in importance.

punishment, but none understood the doubt canon to be a prophetic statement. Moreover, the scholars who were devoted to authenticating the many reports of prophetic statements never conferred on the canon in its standard form any stamp of authenticity and therefore never included the reports in their collections.<sup>163</sup> However, with the breakup of the empire and the need for increased juristic authority to ameliorate excessive political policies, all this would change.

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Remarkably, after the tenth century, virtually every Muslim jurist invoked the canon not as a requirement of judicial practice, but as a *prophetic statement*.<sup>164</sup> That is, during this period, the majority of jurists—the Ḥanafī, Mālikī, and Shāfi‘ī, as well as Shī‘ī schools, all of whose founders had deployed the doubt canon without prophetic attributions—now came to regard the canon as prophetic.<sup>165</sup> The need to avoid capital punishment, I argue, had grown so urgent that jurists needed a doubt doctrine of unassailable authority to justify avoiding punishment. They gained one by attributing the canon to the Prophet directly.

The *textualization of doubt* was a stroke of organic genius. If the doubt canon was a prophetic directive, it would become a *foundational text* that elevated its authority to a position above jurists, caliph, and judges. With a firm textual basis, the canon would stamp Muslim jurists’ doubt jurisprudence with an incontrovertible mark of authority. Specifically, a textual rule could more readily justify the normative outcome as one of avoiding punishment in the *Case of Mā‘iz*. More generally, a textual rule would offer a direct expression of divine legislative intent, expositions of which enjoyed unquestioned legitimacy. All of this occurred just when jurists needed to bolster their authority—which, ironically, was accomplished through claims of doubt—in the violent eleventh century.

### III. THE DEPLOYMENT OF “REASONABLE DOUBT” TO LIMIT EXECUTIVE POWER

It was not inevitable that the doubt canon would come to dominate criminal law. Jurists and caliphs alike could have just as well used the divine legislative supremacy ideal to emphasize their subordination to the law and its dictates of criminal law *enforcement*—as had the Prophet in the *Case of the Makhzūmī Thief*.<sup>166</sup> Likewise, the *Case of Mā‘iz* could have been read to emphasize the validity of capital punishment and the imperative of law enforcement, despite the harsh consequences and what might have been the

163. For a more detailed survey, see Rabb, *Islamic Legal Maxims*, *supra* note 17, at 69-77, which suggests that these developments reflected a shift in early understandings of legal validity in Islamic law, from reliance on practice to authoritativeness of text.

164. The earliest reliable juristic attribution of the doubt canon to the Prophet is that of the Ḥanafī jurist Jaṣṣās, 3 *supra* note 22, at 330. Such attributions increased in the eleventh century.

165. See *supra* note 150; see also Rabb, *Islamic Legal Maxims*, *supra* note 17, at 100-06.

166. See *supra* note 59 and accompanying text.

Prophet’s personal inclinations toward mercy. Dāwūd al-Zāhirī and other textualist jurists had made these very arguments.

Yet the vast weight of the Islamic legal tradition was on the opposite end of the scale. Māwardī and other mainstream jurists of his time had extracted a principle of avoiding punishment from the early precedents and used them to make the Islamic doubt canon *the* organizing principle of criminal law. In light of the legislative supremacy and textualist ideal, I have detailed *how* criminal law went in this surprising direction. I will now advance an argument as to *why*. In brief, I argue that the jurists’ early canonization of doubt and their later textualization and generalization of the doctrine in the eleventh century came in response to the political culture of violence that accompanied the breakup of the Muslim empire at a time when Muslim jurists were keen on systematizing Islamic law.

#### A. *The Systematization of Islamic Law in a Political Culture of Violence*

The early cases, by requiring more procedure, had put on display some of the moral concerns of the early juristic community as they were systematizing Islamic law. That is, the jurists responsible for articulating the law used doubt to express concerns about draconian punishments in the political sphere that percolated in the background of, and were subject to, the developing norms of Islamic law. The local rulers who seized control in the central Muslim lands of the eleventh century (and in the later ‘Abbāsīd period) asserted power primarily through military force and punishment as a means of social control.<sup>167</sup> As I argue here, their excesses prompted the jurists to constrain the caliphal reach over Islamic criminal law. That is, as jurists began to systematize the law, they did so against this early legacy of political violence and arbitrariness, which continued—and indeed increased—after the ‘Abbāsīd grip on absolute power began to loosen.

To be sure, previous regimes were known for excess. Mu‘āwīya’s use of military force to depose ‘Alī and establish the Umayyad dynasty became standard practice for dynastic regime change in the premodern Muslim world. The dynasty following his, that of the ‘Abbāsīds, rose to power on the heels of an army that marched from the East to take control from the Umayyads in 750.<sup>168</sup> The Umayyad and ‘Abbāsīd dynasties both indulged in disparate and excessive applications of punishment.<sup>169</sup> Their excesses prompted the jurists

167. See generally LANGE, *supra* note 126 (detailing the particularly violent Seljūq use of punishment for social control).

168. See generally MOSHE SHARON, BLACK BANNERS FROM THE EAST: THE ESTABLISHMENT OF THE ‘ABBĀSĪD STATE—INCUBATION OF A REVOLT (1983) (examining the revolt that brought the fall of the Umayyads and rise of the ‘Abbāsīds); MOSHE SHARON, REVOLT: THE SOCIAL AND MILITARY ASPECTS OF THE ‘ABBĀSĪD REVOLUTION: BLACK BANNERS FROM THE EAST II (1990) (same).

169. See JONATHAN P. BERKEY, THE FORMATION OF ISLAM: RELIGION AND SOCIETY IN THE NEAR EAST, 600-1800, at 84-85 (2003) (noting that while some of the opposition came from a stance championing Arab ascendancy, most of the opposition was religious, as diverse pockets of scholars and other members of the elite became increasingly distressed at reported caliphal divergences from Qur’ānic and prophetic principles of justice).

not only to distinguish themselves from the caliph, but to form a “pious opposition” against him, seeking to restrict as much as possible the caliphal reach over Islamic law writ large.<sup>170</sup>

Major developments in the eleventh-century political center of the Muslim empire led to significant changes in the administration of criminal justice and juristic responses to it. Namely, break-off local dynasties wrested ever more control from the central ‘Abbāsid caliph. Notable amongst them were the Seljūqs, a group of Central Asian warriors who assumed power over Iraq and greater Persia in 1055.<sup>171</sup>

Under the Seljūqs, violence became more excessive and public. Executions were especially rampant, accompanied by floggings, public shaming parades, and imprisonment.<sup>172</sup> The term that Māwardī had devised for “political governance” (*siyāsa*) to demarcate the jurisdiction of the caliph from that of the jurists had transformed. By the Seljūq period, this term for “political governance” had come to mean “punishment” or “execution.”<sup>173</sup> A prominent jurist of the time remarked that the “sultāns of today rely on punishment [*siyāsāt*] and awe,”<sup>174</sup> that is, the type of awe surrounding kings, induced by the threat or application of severe punishment.<sup>175</sup>

The sultān-appointed and jurist-advised judges played a significant role in the administration of criminal justice. Some scholars have suggested that the political officials were able to skirt the jurist-advised ordinary courts and transfer criminal justice administration to officials who fell solely under the authority of the caliph.<sup>176</sup> Moreover, they have suggested that the caliph had free jurisdiction over crimes that carried discretionary penalties. In particular, these scholars have pointed to the “extraordinary” courts of equity over which the caliphal officials presided, as well as to law enforcement officials who sometimes presided over discretionary penalties.<sup>177</sup> But more likely, as

170. See Mottahedeh, *supra* note 84, at 6-8.

171. See BOSWORTH, *supra* note 93, at 185-88; see also WILFERD MADELUNG, RELIGIOUS TRENDS IN EARLY ISLAMIC IRAN 54-93 (1988).

172. LANGE, *supra* note 126, at 39 (discussing the chronicles of Ibn al-Athīr and Ibn al-Jawzī).

173. See, e.g., NIZĀM AL-MULK, SIYĀSATNĀMAH 172 (Hubert Drake ed., 1962) (equating *siyāsāt* to punishment); cf. LANGE, *supra* note 126, at 42 (citing Bernard Lewis, *Siyāsa*, in IN QUEST OF AN ISLAMIC HUMANISM 3, 4-7 (A.H. Green ed., 1984)).

174. ABŪ ḤĀMID AL-GHAZĀLĪ, BOOK OF COUNSEL FOR KINGS 148 (F.R.C. Bagley trans., 1964); see also ANN K.S. LAMBTON, STATE AND GOVERNMENT IN ISLAM: AN INTRODUCTION TO THE STUDY OF ISLAMIC POLITICAL THEORY 124 (1981).

175. See MOTTAEDEH, *supra* note 148, at 185.

176. See 1 IBN KHALDŪN, MUQADDIMA 455-58 (Franz Rosenthal trans., 1958). Following Ibn Khaldūn, see EMILE TYAN, HISTOIRE DE L'ORGANISATION JUDICIAIRE EN PAYS D'ISLAM 603 (1960).

177. E.g., KNUT VIKOR, BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW 191 (2005) (“The sultan makes his verdict freely; he is not bound by the Sharī’a rules in any way . . .”). While an evaluation of the actual operation of *maẓālim* courts and other types of executive law-enforcement institutions like the *shurṭa* police force is beyond the scope of this paper, it is perhaps sufficient to note that the Islamic legal theory through which Muslim jurists constructed rules for legitimacy required that caliphal officials justify their rules with respect to the maximum standards that jurists set in the fixed criminal law. See Mathieu Tillier, *Qāḍīs and the Political Use of the Maẓālim Jurisdiction*, in PUBLIC VIOLENCE IN ISLAMIC SOCIETIES: POWER, DISCIPLINE, AND THE CONSTRUCTION OF THE PUBLIC SPHERE, 7TH-18TH CENTURIES CE 42 (Christian Lange & Maribel Fierro eds., 2009) (detailing the use of *maẓālim* and *shurṭa* jurisdictions); Emile Tyan, *Judicial Organization*, in LAW IN



Māwardī had intimated, there were spheres of shared jurisdiction between the ordinary courts on the one hand and the extraordinary, political institutions on the other, a scheme wherein even caliphal officials’ exercises of discretion were supposed to be subject to juristic articulations of law.<sup>178</sup>

One example of this type of shared jurisdiction was the police role in criminal prosecution and law enforcement.<sup>179</sup> The police were an arm of the caliphal power whose main job was to secure public safety, prosecute crime, and enforce criminal punishments upon conviction in ordinary courts.<sup>180</sup> To be sure, the police did not always bring their charges through the courts, and they often imposed outsized punishments. For example, when a man of one neighborhood in Baghdad killed his sister and her lover, the police rode out and destroyed the entire quarter.<sup>181</sup>

But as exemplified in the articulation of the doubt canon during this time, episodes like these fueled, rather than quashed, juristic opposition to excessive and illegitimate punishment. Such incidents provided a powerful public symbol of excessive punishment, which jurists could highlight as illegitimate executive overreach in a way likely to garner the sympathies of the populace. Such instances also pushed the jurists to make clearer statements of criminal law and procedure to which the caliph and police force would have done well to adhere, at least in part, in order not to compromise their legitimacy.

In this vein, the other official who played a role in criminal law enforcement—the market-inspector (*muhtasib*)—“declined in people’s estimation when rulers neglected [the office] and conferred it on men of no repute, whose goal was to make profit and get bribes.”<sup>182</sup> As the name would suggest, the inspector monitored the quality of goods and guarded against price-fixing in the marketplace. Alongside the police, the inspector also had punitive authority, usually over non-capital crimes. The inspector sought to curb “undesirable” social practices like open alcohol consumption and singing through punishments such as detention, flogging, and public humiliation (by parading offenders around town).<sup>183</sup> Like the judges—who sometimes rotated to the position of *muhtasib*—the inspectors were formally limited by the

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THE MIDDLE EAST: ORIGIN AND DEVELOPMENT OF ISLAMIC LAW 259 (Majid Khadduri & Herbert J. Liebesny ed., Lawbook Exchange 2008) (1955) (same).

178. MĀWARDĪ, *supra* note 118, at 250.

179. See 1 MUḤAMMAD ‘ABD ALLĀH AL-BĀTALYAWSĪ, *AL-İQTİDĀB Fİ SHARḤ AL-KUTTĀB* 159 (Muṣṭafā al-Saqqā & Hāmid ‘Abd al-Majīd eds., al-Hay’a al-Miṣriyya al-Ḥamī li’l-Kitāb 1961); 12 IBN AL-JAWZĪ, *AL-MUNTAẒAM FĪ TA’RĪKH AL-UMAM WA-L-MULŪK* 124 (Muḥammad ‘Abd al-Qādir ‘Aṭā’ & Muṣṭafā ‘Abd al-Qādir ‘Aṭā’ eds., 1992); 13 *id.* at 316; HUGH KENNEDY, *THE ARMIES OF THE CALIPHS: MILITARY AND SOCIETY IN THE EARLY ISLAMIC STATE* 13-14 (2001).

180. See Intisar A. Rabb, *Police*, in *THE PRINCETON ENCYCLOPEDIA OF ISLAMIC POLITICAL THOUGHT* 427, 427-28 (Gerhard Böwering et al. eds., 2012); see also LANGE, *supra* note 126, at 48-51 (detailing the role of the police under Seljūq rule).

181. 17 IBN AL-JAWZĪ, *supra* note 179, at 99; see also LANGE, *supra* note 126, at 52.

182. MĀWARDĪ, *supra* note 118, at 258; cf. Henry F. Amedroz, *The Ḥisba Jurisdiction in the Ahkam Sultaniyya of Māwardī*, *J. ROYAL ASIATIC SOC’Y* 77 (1916).

183. See LANGE, *supra* note 126, at 56 (describing *ḥisba* activity under the Seljūqs); cf. KRISTEN STILT, *ISLAMIC LAW IN ACTION: AUTHORITY, DISCRETION, AND EVERYDAY EXPERIENCES IN MAMLUK EGYPT* (2011) (describing *ḥisba* activity in Mamlūk Egypt).

jurists' articulation of Islamic law.<sup>184</sup> That is, for maximum legitimacy, the jurist-defined Islamic criminal laws provided the upper limits of the discretionary punishments that the inspector possessed the authority to enforce.<sup>185</sup>

Punishment on the part of the political rulers implicated questions about the legitimacy of the caliphs' rule. Even if the jurists were not in agreement with the severity of punishment—and they were not—“[t]he overwhelming persuasive power of public punishment” left no question about the rulers' *authority*.<sup>186</sup> The difficulty lay in the rulers' claim to *legitimacy*, attacks against which were the only real arrow in the jurist's quiver. At the same time, Muslim jurists knew that they relied on the new rulers' enforcement power for the rule of law. They therefore did not seek to completely delegitimize Seljūq rule, but to constrain it.<sup>187</sup> This explains why they needed to convert the doubt doctrine into a textual rule.

#### B. *The Generalization of Doubt in Response to Excessive Punishment*

The jurists' appeal to the newly textual authority of the doubt canon reflected moral anxieties stemming from the ongoing political culture of violence combined with the factual uncertainty of criminal culpability in many cases, both of which were exacerbated by the breakup of the empire in the eleventh century. That is, the clear and present danger of death in the quick-to-punish political context planted serious anxieties among many of the jurists, who worried about frequent executions of dubious justification at precisely the moment when they were trying to better articulate and systematize Islamic law.

Still, why should the jurists have understood doubt to include heightened criminal procedures when the burdens of proof in Islamic criminal law were already so high? The answer has to do with the nature of the punishments that were of most concern. If jurists could deploy doubt doctrines to require procedures that tended to avoid capital punishment rather than authorize it, they could ameliorate any anxieties over authorizing execution on dubious grounds. Conceivably, they could also thereby restrict the rates of capital punishment. In

184. E.g., MU'AYYAD AL-DAWLĀ, 'ATABAT AL-KATABA 52 (Muḥammad Qazvīnī & 'Abbās Iqbāl eds., 2005) (reproducing an appointment diploma of *ḥisba* jurisdiction for a judge).

185. See, e.g., LANGE, *supra* note 126, at 58 (citing 'ABD AL-RAḤMĀN B. NAṢR AL-SHAYZARĪ, NIḤYĀT AL-RUTBA FĪ ṬALAB AL-ḤISBA 9 (Matba'at Lajnat al-Ta'lif wa'l-Tarjama wa'l-Nashr, 1946)); 'ABD AL-RAḤMĀN B. NAṢR AL-SHAYZARĪ, THE BOOK OF THE ISLAMIC MARKET INSPECTOR (Ronald P. Buckley trans., 1999). Of course, adhering to this upper-limit was not always followed in practice. See, e.g., STILT, *supra* note 183, at 89-106; TYAN, *supra* note 176, at 649 (relating a number of examples from historical sources from other periods of *muhtasibs* exceeding the extent of punishments prescribed by the *hadd* penalties).

186. LANGE, *supra* note 126, at 43 (arguing further that such coercive power left “no doubt” about the ruler's legitimacy). While the author is correct to note that the authority was left virtually unquestionable, my reading of the sources suggests that the legitimacy, by contrast, was questionable—for which the jurists responded with a doctrine of doubt.

187. As Christian Lange has observed, Muslims much preferred the draconian criminal justice system of the Seljūk dynasty to the utter chaos that reigned when those authorities lost power in Khurāsān for some time beginning in 1153 until the Mongol invasion a century later. See LANGE, *supra* note 126, at 244-46.

other words, where the stakes were life or death, using the doubt canon to assure *more procedure* was the juristic attempt at alleviating their own anxieties and ameliorating widespread practices of capital punishment.

### 1. *Moral Anxieties Revealed: Death Is Different*<sup>188</sup>

Muslim jurists historically had been skittish about any involvement with political authorities, which they deemed unseemly and corrupting for people of moral conscience. The Muslim jurists’ general skittishness toward judging, I suggest, was exacerbated in capital contexts, which principally explained the rise of the doubt doctrine in Islamic law.

Though some jurists certainly served as state-appointed judges and assumed other government posts, they were a distinct minority. Many who were nominated for official judgeships or other positions stubbornly refused to serve, preferring to remain independent of the political apparatus.<sup>189</sup> The sources are replete with instances of their recoil at being nominated to judge. Famously, Abu Ḥanīfa was said to have endured torture for his refusals.<sup>190</sup> The main chronicle for the early history of judges opens with prophetic cautions against judging.<sup>191</sup> This inclination against judging represented just some of the moral anxieties surrounding judging in accordance with God’s law, and the consequences of not getting it right. When it came to the death penalty, Muslim jurists feared answering in the afterlife for wrongful deaths occasioned by their allowance of punishment that was not in fact warranted.<sup>192</sup> Moreover, against

188. The American experience with the death penalty—from which I draw the title of this section—well articulates the “difference” of death. When placing a moratorium on the death penalty in 1972, the Supreme Court cited the need for procedure, in light of the fundamentally different nature of the death penalty, and the need to avoid executions that were so arbitrary as to be “wanton and freakish” in nature. *Furman v. Georgia*, 408 U.S. 238, 295 (1972) (Brennan, J., concurring) (imposing what was to become a four-year moratorium on the death penalty). In his concurrence, Justice Brennan explained that this outcome had to do with the fact that “[d]eath is a unique punishment, . . . in a class by itself.” *Id.* at 286-89 (Brennan, J., concurring); *see also id.* at 306 (Stewart, J., concurring) (“The penalty of death differs from all other forms of criminal punishment, not in degree but in kind.”). When capital punishment was reinstated in the 1970s, the Court subjected it to heightened procedures above that of ordinary crimes. *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (“[The] penalty of death is different in kind from any other punishment” and “unique.”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (“[The] penalty of death is qualitatively different from a sentence of imprisonment, however long.”). For an analysis of the consequences of America’s constitutional and procedural *regulation* rather than abolition of the death penalty, see Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211 (2012).

189. *See, e.g.*, ABŪ ‘ABD ALLĀH MUḤAMMAD B. AL-ḤĀRITH AL-KHUSHANĪ, QUDĀT QURTUBA 79-93 (Yāsir Salāma Abū Ṭa’ma ed., Dār al-Samī‘ 2008) (listing instances of ten judges who refused the judgeship); WAKĪ’, *supra* note 91, at 24-25.

190. For a discussion of this and his extreme antipathy toward the ruling authorities and censure of judges like his rival Ibn Abī Laylā who “colluded” with them, *see* MUḤAMMAD ABŪ ZAHRA, ABŪ ḤANĪFA: ḤAYĀTUH WA-‘ĀSRUH, ĀRĀ’UH WA-FIQHUH 37-48 (Dār al-Fikr al-‘Arabi, 2d ed. 1965).

191. *See* WAKĪ’, *supra* note 91, at 19 (introducing biographical reports on judges with the “[section] mentioning [ḥadīth and other] reports announcing the gravity of assuming a judicial post over people and that whoever assumes [such a post] has been [metaphorically] slaughtered without a knife”).

192. *See* Baber Johansen, *Vom Wort- zum Indizienbeweis: Die Anerkennung der richterlichen Folter in islamischen Rechtsdoktrinen des 13. und 14. Jahrhunderts* [From Proof by Word to Proof by Indicia: The Recognition of Judicial Torture in Islamic Legal Doctrines of the Thirteenth and Fourteenth

the backdrop of excessive executions in the Seljūq culture of political violence, Muslim jurists were signaling through increased rules of procedure that they had come to see the death penalty as *different* from punishments for ordinary crimes.

Notably, the landmark cases to which the jurists appealed in order to insert heightened procedures from the early judicial practices were capital crimes. That fact, I suggest, sparked the doubt doctrine as a rule of more procedures than Islamic criminal law ordinarily required. Procedures for non-capital crimes—including theft, intoxication, and sexual slander—ordinarily required two witnesses or a voluntary confession.<sup>193</sup> A conviction for ordinary crimes warranted punishment that ranged from public flogging to hand amputation: harsh, but not deadly. By contrast, the Qur’ān required four eyewitnesses to sex crimes, where Muslims understood the penalty to be death.<sup>194</sup> In this way, convictions for capital crimes—sex crimes and murder—typically required more procedures.

By itself, this increased witness requirement for sex crimes did not lead to the doubt doctrine, which was nowhere contained in the early canonical texts. Only when combined with early judicial practices did this thinnest Qur’ānic rule of increased procedure lead to a textual rule of generalized and procedural doubt. In the *Case of Mā’iz*, the Prophet had exclaimed “if only you would have let him go.” This statement served to enlarge the space for punishment-avoiding procedures where anxieties and considerations of mercy (such as possibilities of repentance) were enough to avert punishment even where there was a determination of guilt. Moreover, in the eleventh century, the Muslim jurists analyzing the three early cases read alongside the *Case of Mā’iz* determined that more procedure—far beyond an increased witness requirement—was necessary for capital crimes of adultery, rape, and murder.<sup>195</sup> That is, jurists added a vast matrix of procedures to the four witness requirement by repeatedly citing the early judicial practices *and* the textual rule of doubt to avoid punishment in *capital* contexts.<sup>196</sup> Multiple confessions, judicial investigations into mitigating circumstances, avoidance of textual ambiguity, and other procedures became folded into the Islamic doctrine of

Centuries], 28 IUS COMMUNE 2, 11-12 (2001) (noting medieval Muslim jurists’ fears of the legal and physical consequences of punishment for false convictions, namely, the doctrine that the judge responsible would suffer the same punishment in the afterlife that he had falsely inflicted in this life); cf. LANGE, *supra* note 126, at 101-15 (noting the connection between this-worldly sins and fear of other-worldly punishment).

193. 2 ABŪ AL-HASAN AL-MĀWARDĪ, ADAB AL-QĀDĪ 14-16 (Ri’āsat Dīwān al-Awqāf 1972).

194. For the four-witness requirement for sex crimes, see THE QUR’ĀN 4:15, and for the related four-oath procedure of mutual imprecation (plus a fifth invoking God’s wrath if found to be lying) for spousal accusations of *zinā*, called *li’ān*, see *id.* 24:7, 9. Another procedure contained in the *ḥadīth* corpus, but not in the Qur’ān, was the elaborate process of swearing multiple oaths to assign liability for homicide where the evidence proving a *crime* was inconclusive. On the fifty-oath procedure called *qasāma* (after which, capital punishment could not apply), see Rudolph Peters, *Murder in Khaybar: Some Thoughts on the Origins of the Qasāma Procedure in Islamic Law*, 9 J. ISLAMIC L. & SOC’Y 132 (2002).

195. See *supra* Section II.A.

196. See *supra* notes 131-163 and accompanying text.

doubt. In this way, the jurists outlined rules of heightened procedures as necessary for the smooth functioning of criminal law, at least initially, because of the *final* nature of capital punishment.

Demonstrating the jurists’ preference to avoid rather than enforce punishment, the canon assumed formulations that sounded like the old Blackstonian quote that it is better to let ten men go free than to punish one unjustly.<sup>197</sup> Thus one version stated: “Avoid *hudūd* punishments against Muslims to the extent possible; if there is any way out, then release [the convict], as it is better that the Imam make a mistake in pardoning than in punishing.”<sup>198</sup> The second caliph, ‘Umar, reportedly said when acting in his capacity as a judge: “If you come to me [with a criminal dispute], question to the utmost extent possible, for I would rather make a mistake in pardoning than a mistake in punishing.”<sup>199</sup> Muslims understood these early figures and these varied formulations to be expressing a policy that *more procedure* before punishment was warranted in capital cases. Explicitly, they elaborated and justified this policy though the textual basis of the doubt canon. But implicitly, the historical and legal records suggest that the policy was motivated by the extent to which the jurists’ own moral anxieties indicated that politically favored sentences of *death* were jurisprudentially *different*.

In Seljūq times, judges thus used this sort of doubt to support a textually grounded doubt canon. Together, these judicial practices and the textual canon could allow a morally anxious judge to claim—in the face of pressures from political officials to issue execution orders on doubtful facts—that his hands were constrained by the Islamic law of doubt.<sup>200</sup>

The juristic expression of their anxieties came through decreased legitimization of punishments until and unless there was factual certainty of a crime. Such certainty was exceedingly rare. Only increased procedures could yield the level of factual certainty that could alleviate their moral anxieties, and otherwise the procedures would permit—and indeed require—avoidance of punishment altogether. In this way, more procedure allowed jurists to acknowledge the persistence of doubt and to increase the scope of their authority to regulate punishment. Their hope likely was that the additional

197. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*358 (“[I]t is better that ten guilty persons escape than that one innocent suffer.”).

198. 10 ‘ABD AL-RAZZĀQ, *supra* note 156, at 66; BAYHAQĪ, *supra* note 59, at 413; 4 DĀRAQUTNĪ, SUNAN 62-63 (Mu’assasat al-Risāla 2004); IBN ABĪ SHAYBA, *supra* note 46, at 360; 5 TIRMIDHĪ, SUNAN 112-13 (al-Maktaba al-Salafiya 1965).

199. BAYHAQĪ, *supra* note 59, at 414; cf. IBN ABĪ SHAYBA, *supra* note 46, at 359.

200. Notably, although medieval Muslim jurists used the doctrine of doubt to express their discomfort with the arbitrariness of capital punishment, they were careful to note that they were not attempting to vitiate criminal punishment altogether. Instead, these jurists took criminal law prohibitions to be justified—Bentham style—as rules aiming to *deter crime*. See, e.g., MĀWARDĪ, *supra* note 50, at 99 (“*Hudūd* are punishments by which God deters (*zajara bihā*) people from committing prohibited [acts] and encourages them to follow [His] commands.”). They also acknowledged a retributive justification for criminal sanctions for defendants like Mā’iz, who requested criminal punishment believing it to provide this-worldly divine retribution that would expiate his sins and result in forgiveness. *Id.* at 100. For an analogous meditation on contemporary criminal law responses to mass atrocities, see MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 9-24 (1998).

procedures would lower the rate of execution, or at least perceptions of its legitimacy. Put differently, even if they could not stop punishment, jurists could at least remove the imprimatur of religious-legal legitimacy for punishment that only they could confer.

## 2. *Moral Anxieties Compared: Death Is Dramatically Different*<sup>201</sup>

These types of moral concerns about judging and doubt were not unique to medieval Muslim jurists and judges. Their Christian counterparts in England and continental Europe were themselves morally anxious when it came to dealing with doubt, and likewise created procedures designed to allay those concerns. Shared across these disparate contexts, morality-based responses to doubt were clearly regular features of criminal law in medieval religious communities, even when their precise motives and means markedly differed.

As comparative legal historian James Whitman has argued, the reasonable doubt doctrine that eventually emerged out of medieval Christian contexts was “designed [not] to make it more difficult for jurors to convict, [but to make it] *easier*, by assuring jurors [as well as witnesses and judges] that their souls were safe if they voted to condemn the accused.”<sup>202</sup> In the modern scheme, finding facts particular to criminal elements became the equivalent of establishing guilt “beyond a reasonable doubt,” without special regard for truth or moral concern about the soul of the one responsible for convicting a defendant.<sup>203</sup> This observation is significant inasmuch as it radically differs from modern understandings of reasonable doubt as a safeguard for defendants’ rights. It is also significant in the extent to which it sheds light on the differing trajectories of doubt rooted in the medieval Islamic and Christian worlds.

Despite the historical, institutional, and contextual differences between the two legal systems, medieval European and English approaches to doubt display significant parallels to the Islamic jurisprudence of doubt. For example, medieval European and English judges and jurors initially declined to punish in the face of doubt out of concern for their own souls. They feared—in addition to the legal and physical consequences that sometimes obtained from demonstrably false verdicts—the spiritual consequences of unjust verdicts,

201. I use this title to express the continuing death-is-different theme articulated in modern American law, to refer to the extra procedures derived by medieval Christian and Islamic legal actors in cases of capital punishment. See *Schriro v. Summerlin*, 542 U.S. 348, 363 (2004) (Breyer, J., dissenting) (emphasizing that capital punishment requires extra procedural cautions not just because death is different, but because of the “dramatically different nature of death”).

202. WHITMAN, *supra* note 8, at 4, 11; *id.* at 194 (“The underlying concern was not with protecting the defendant at all. It was with protecting the jurors.”); cf. Charles Donahue Jr., *Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law*, in *ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE* 127, 132-34 (Morris S. Arnold et al. eds., 1981).

203. For more on the somewhat contrasting notions that modern American liberalism relies on constitutional due process values to align questions of reasonable doubt with defendants’ rights, but that the reasonable doubt doctrine emphasizes fact-based inquiries that sometimes obscure truth within the context of procedural norms such as the exclusionary rule that may otherwise prejudice defendants, see WHITMAN, *supra* note 8, at 203, 207, 334-36.

particularly when criminal convictions triggered punishments of death.<sup>204</sup> Heightened procedures for criminal trials thus grew out of a world of moral anxieties facing judges about the very act of judging.<sup>205</sup> The idea was that God Himself was “the great avenger of justice.”<sup>206</sup>

Promoting that view, the Church defined a complex rubric of procedures that formed part of its moral “theology of doubt,” which episodically shifted to allow legal actors to alternately avoid and enforce punishment. Initially, the Church introduced procedures designed to absolve the misgivings of legal actors of the Middle Ages concerned about the stakes of getting convictions wrong. An example was the use of the Ordeals, by which God became the divine arbiter of right and wrong. When the Church abolished the Ordeals at the Fourth Lateran Council in 1215, it aimed to transform judges from “ministers of bloodshed” to “ministers of the law.”<sup>207</sup> On the Continent, these developments occasioned an almost immediate shift from judges to witnesses as the bearers of moral responsibility for punishing serious crime. Following rigorous canonical procedure provided cover for the thirteenth-century European judge, who could assert whenever he condemned a defendant to death: “It is the law that kills him, and not I.”<sup>208</sup> In England, the Church developments occasioned a shift from judges to jurors as the bearers of this same moral responsibility, accompanying the rise of the jury in the same century. The English judge could make a similar claim about the law, deflecting both responsibility and doubt. The shift of doubt and moral responsibility from judges to witnesses and jurors in many criminal cases meant that “royal jurisdiction [had] finally displaced divine jurisdiction.”<sup>209</sup>

This shift had been workable for a few centuries, when generalized procedures shielded the newly responsible legal actors from personal responsibility for the harshest consequences of their decisions. But when the state instituted procedures that again placed moral responsibility for specific punishment decisions on English jurors in the sixteenth and seventeenth centuries, the latter found their consciences taxed once again and devised new strategies to avoid corporal and capital punishment in the face of doubt.<sup>210</sup>

Over the course of these several centuries, multiple punishment avoidance strategies manifested whenever judges, witnesses, or jurors perceived their own moral responsibility for conviction in the face of doubt.

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204. See 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 573 (Routledge 1996) (1883) (“[Medieval judges often dreaded] the responsibility—which to many men would appear intolerably heavy and painful—of deciding . . . upon the guilt or innocence of a prisoner.”).

205. See WHITMAN, *supra* note 8, at 11 (noting the work of “anthropologists and historians of religion [demonstrating that] . . . anyone in the premodern world involved in the killing of another person subjected himself to the risk of bad luck, bad karma, bad fate, or some kind of vengeful divine retribution”) (citations omitted).

206. *Id.* at 11, 192-93, 198-99.

207. *Id.* at 90.

208. *Id.* at 94, 105.

209. *Id.* at 138.

210. *Id.* at 161-63.

For example, witnesses often refused to testify, and judges found strategies to avoid findings of guilt in ordinary crimes that they did not feel warranted capital punishment.<sup>211</sup> Juries also expanded the scope of the old “benefit of clergy” doctrine, allowing first-time offenders in fourteenth-century ecclesiastical courts to receive lighter sentences in formulations available to literate members of the Church.<sup>212</sup> Moreover, prosecutors frequently “downcharged” crimes or “downgraded” the value of stolen goods to arrive at more lenient sentences than the statute would ordinarily require.<sup>213</sup> And judges regularly barred criminal convictions or construed criminal laws narrowly when they had doubt about the relationship between the evidence and criminal culpability or fairness of punishment for an alleged crime.<sup>214</sup>

Taken together, the procedural manifestations of doubt took on multiple forms that persist in modern American criminal law: the criminal law void-for-vagueness doctrine and its “junior version,” the rule of lenity;<sup>215</sup> the presumption of innocence;<sup>216</sup> the principle of legality;<sup>217</sup> the rule against federal common law crimes;<sup>218</sup> doctrines of mistake to absolve criminal liability;<sup>219</sup> and of course heightened standards and burdens of proof—including reasonable doubt. Possessed of only a general awareness of the roots of reasonable doubt and lenity, Justice John Marshall famously stated in his nineteenth-century invocation of the American rule of lenity: “The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself.”<sup>220</sup>

211. JEROME HALL, *THEFT, LAW AND SOCIETY* 92-96 (1935) (noting that judges used to “invent technicalities in order to avoid infliction of the capital penalty”).

212. See LEONA CHRISTINE GABEL, *BENEFIT OF CLERGY IN ENGLAND IN THE LATER MIDDLE AGES* (Octagon Books 1969) (1929); see also JOHN HAMILTON BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 513-15 (4th ed. 2002) (1971) (overview); J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660-1800*, at 141-45 (1986) (examples); John Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 37-41 (1983) (further examples).

213. LANGBEIN, *supra* note 8, at 334-35 (citing, inter alia, BLACKSTONE, *supra* note 197, at 239); see also LEON RADZINOWICZ, *A HISTORY OF ENGLISH LAW AND ITS ADMINISTRATION FROM 1750*, at 83-106, 138-64 (1948).

214. For the development of these reasonable doubt practices in English common law and in continental European law, see WHITMAN, *supra* note 8, at 334-36. As for the development of lenity practices, there is debate about when lenity became prevalent, but agreement that it was in full force by the eighteenth century. See LANGBEIN, *supra* note 8, at 335 (noting that the rule predated the eighteenth century but did not become prevalent until then); WHITMAN, *supra* note 8, at 185-200; Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 750 nn.12-13 (1935) (tracing the consistent use of the rule of lenity back to mid-seventeenth-century England).

215. See HERBERT PACKER, *THE LIMITS OF CRIMINAL SANCTION* 95 (1977). For recent applications, see *supra* note 11.

216. See *Taylor v. Kentucky*, 436 U.S. 478 (1978) (labeling the term the “assumption of innocence”); *Coffin v. United States*, 157 U.S. 432 (1895) (tracing the concept back to Roman law, canon law, and early common law); *Cummings v. Missouri*, 71 U.S. 277 (1866).

217. See *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (stipulating that the criminal law texts and punishments must be clear before a criminal defendant may be punished for violating the law).

218. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). For further analysis, see Dan M. Kahan, *Lenity and Federal Common Law Crimes*, SUP. CT. REV. 345 (1994).

219. See DRESSLER, *supra* note 3, at 153-65 (mistakes of fact); *id.* at 167-80 (mistakes of law).

220. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). On the reasonable doubt doctrine, see *In re Winship*, 397 U.S. 358, 362-63 (1970) (“[P]roof of a criminal charge beyond a reasonable doubt is constitutionally required . . . . The standard provides concrete substance for the



While medieval Muslims and Christians shared moral concerns and devised punishment-avoidance procedures to alleviate doubt, it is clear that the shape of, impetus behind, and goals targeted by their respective doubt-based procedures were quite different. The differences between medieval Islamic and Christian treatments of doubt have to do with differences in theology and institutional structure. In contrast to the prominent role medieval Muslim jurists played in constructing the law, their English and European counterparts were not autonomous or even first actors in that task. The latter group had more scholastic and less singular power to legitimately define law. Moreover, it was two competing and highly centralized institutions that defined law for English and European judges: the Church and the Crown. The Crown eventually won the jurisdictional battle over criminal procedure, but by then, the Church had developed a moral theology that absolved most legal actors of the consequences of doubt—which together led to procedures that would allow doubt to facilitate rather than bar convictions.<sup>221</sup>

In contrast, medieval Muslim judges and jurists—lacking a centralized authority in the form of a unified church or state to define the law—continued to see doubt as a matter of moral concern. This perspective, in turn, informed the scope of what they saw as their divinely delegated power to define Islamic law, theology, and morality in criminal law and other arenas. Wracked by doubt and quite aware of their institutional position as exponents of Islamic law in “pious opposition” to the state, particularly in matters of criminal punishment, I argue that Muslim jurists pursued at least three goals when defining a jurisprudence of doubt. They used doubt to alleviate a deep sense of moral concern with false convictions, to rein in rather than work with the political rulers in punishment, and to construct a version of Islamic law in line with their ideals of divine legislative supremacy. With no moral theology to absolve doubt and no state to assert absolute control over punishment or the authorization of punishment, medieval Muslim jurists had both moral and institutional reasons to deploy a procedure-laden, robust doctrine of doubt.<sup>222</sup>

As in the Christian historical context, Islamic doctrines of doubt meant much more than the modern notion of uncertainty about facts in evidence. Further, similar to the English and European doctrines of doubt that reflected a cautionary stance toward criminal law generally and the death penalty particularly, Islamic doctrines of doubt came to be expansive. As the next section details further, Islamic doubt came to encompass everything from

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presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’” (quoting *Coffin v. United States*, 156 U.S. 432, 454 (1895))).

221. WHITMAN, *supra* note 8, at 131 (“[T]he kings of England were involved in political conflicts both with the church and with a recalcitrant, and sometimes rebellious, feudal nobility. In the early days of the development of English law, those conflicts expressed themselves largely as conflicts over jurisdiction.”).

222. The modern situation is quite different. It was only much later that the breakdown of traditional moral and institutional structures would lead to the wholesale dismissal of doubt in most modern Islamic criminal law contexts—a fact underscored by this examination of its otherwise forgotten history. For further discussion see RABB, *supra* note 25, at 320-21.

questions of fact and law to issues of the propriety of punishment and mercy.

### 3. *Moral Anxieties Expanded: A General Jurisprudence of Doubt*

In the Islamic context, the execution-averse anxieties behind the jurists' doctrines of doubt quickly spread beyond the capital context. Jurists advised judges to apply the doubt canon to ordinary crimes as well. Further, they interpreted doubt expansively to include rules for more procedure as well as to adjust the substantive definitions of crimes. All this created what I call a generalized "jurisprudence of doubt" that would come to dominate Islamic criminal law.

The unifying "text" for diverse jurists to rally around was the doubt canon and expansive definitions of "doubt" itself—over which jurists had long asserted interpretive authority. In addition to calling for more procedure, most jurists saw in the doubt canon numerous manifestations of doubt. That is, Islamic doctrines of doubt meant procedural and evidentiary requirements of proof beyond a reasonable doubt. They also meant an Islamic rule of lenity to cover interpretive doubt or ambiguity. Muslim jurists further used the doubt canon to avoid punishments for any acts whose criminality was doubtful in light of the "interpretive differences" across schools.<sup>223</sup> They also read the doubt canon to require judges to avoid punishment where defendants claimed mistake-of-law or mistake-of-fact.<sup>224</sup> Additionally, they read it to require operation of the principle of legality and the presumption of innocence.<sup>225</sup> In short, Muslim jurists relied on the doubt canon and used it to advocate avoidance of punishment broadly on both procedural and substantive grounds.

Much of the jurists' generalization of doubt jurisprudence occurred in the context of Islam's unique system of legal pluralism. Although Muslim jurists had assumed the authority to interpret the law, they never agreed on how conflicting texts should be interpreted. Unlike most modern contexts, these jurists historically operated in a system where no high court issued a single decision in the face of competing interpretations. Instead they opted to accommodate multiple interpretations. This doctrine constituted Islam's system of legal pluralism: "the [institutional] ability to countenance a plurality of equally authoritative legal interpretations."<sup>226</sup> Under this system, any rule that

223. QARĀFĪ, *supra* note 25 (labeling this type of difference "doubt in interpretive approach").

224. They systematically articulated these doctrines in new works dedicated to legal maxims under the Mamlūk dynasty in Egypt and Syria, which rose with the complete collapse of the 'Abbāsīd caliphate. For example, the Shāfi'ī jurist Suyūṭī identifies three additional types of doubt: mistake-of-law, mistake-of-fact, and interpretive difference. SUYŪṬĪ, *supra* note 25, at 237. Compare the Mālikī jurist, Shihāb al-Dīn al-Qarāfī, who identified those three categories of doubt. QARĀFĪ, *supra* note 25, at 1307-09. Notably, the concepts had existed before in the *fiqh* treatises of the late 'Abbāsīd era. *See, e.g.*, GHAZĀLĪ, *supra* note 150, at 443-44 (identifying mistake of fact, mistake of law, and "doubt in the interpretive approach to permissibility"); 7 YAḤYĀ B. SHARAF AL-NAWAWĪ, RAWḌA 306-12 (al-Maktab al-Islāmī 1991) (identifying interpretive doubt as "doubt in the juristic perspective or interpretive approach"); *see also* 11 'ABD AL-KARĪM AL-RĀFĪ'Ī, AL-'AZĪZ 145-47 (Dār al-Kutub al-'Ilmiyya 1997) (same).

225. *See, e.g.*, RABB, *supra* note 25 (describing these notions as elaborated in Shī'ī contexts).

226. *See* JACKSON, *supra* note 108, at 142 (quoting the definition of legal pluralism advanced

was valid in one Sunnī school was to be recognized as valid in all.

In criminal law, this legal pluralism presented a challenge. How were jurists to handle interpretive diversity? Islamic criminal law doctrine held that the Lawgiver prohibited crime through clear statements, and the doubt canon required factual certainty before implementing punishment. Yet differences in interpretation could create uncertainties in substantive definitions of crime as well. That is, jurists from different schools of interpretation could regard the same act as a crime in one school but not a crime in another school.

Without a path to uniformity, some jurists constructed a doctrine of *interpretive doubt* as a means to accommodate, if not resolve, conflicting interpretations of law. This type of doubt differed from the dueling interpretive approaches to the *Case of Mā'iz* between strict textualists and pragmatic textualists. In that duel, early Muslim jurists disagreed on whether they were to strictly adhere to the dictates of the text, or were instead to look beyond the text for contextual clues on how to pragmatically read the text. They were arguing about whether the text alone mattered or whether the text should be interpreted within a particular context to give it proper effect. By contrast, interpretive doubt arose among one segment of the dueling approaches, the pragmatic jurists, who had decided that context mattered but admitted to the problem of textual ambiguity that arose whenever they considered context. Over time, they increasingly concluded that the foundational texts did not clearly address new factual scenarios that judges were likely to encounter. Nor did those texts clearly prohibit all undesirable conduct.<sup>227</sup>

Consider, for instance, the interpretive difference concerning valid forms of marriage. The early Islamic historical sources suggest that the Prophet initially allowed “temporary marriages,” wherein a couple specifies a date upon which their union would dissolve automatically without divorce proceedings.<sup>228</sup> But later Sunnī jurists accepted that the second caliph ‘Umar had subsequently outlawed the practice.<sup>229</sup> The disputed status of this form of marriage, if deemed invalid, could have stiff consequences in criminal law. Sex in an

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by distinguished Egyptian jurist Shihāb al-Dīn al-Qarāfī during his tenure as a judge in the multiple legal school-jurisdictions of thirteenth-century Mamlūk Egypt).

227. For medieval Muslim jurists’ definitions of textual ambiguity, see, for example, 4 MUṢṬAFĀ MUHAQQIQ DĀMĀD, QAWĀ’ID-Ī FĪQH 54 (Sāzīmānī Muṭālī’-i va Tadvīn-i Kutub-i ‘Ulūm-i Insānī-i Dānishgāhā 2001), which defines textual ambiguity as uncertainty as to whether a legal text covers a new set of facts because of silence concerning the new facts, generality in the import of a statement, or conflicts between the legal text at issue and another equally authoritative legal text; and 2 IBN ‘ABD AL-SALĀM, AL-QAWĀ’ID AL-KUBRĀ 279-80 (Nazīh Kamāl Ḥammād & ‘Uthmān Jumu‘a Dumayriyya eds., 2007), which describes textual ambiguity as texts that suggest both prohibition and permissibility.

228. There is evidence that temporary marriages continued well into the first century of Islam in the Meccan school of Ibn ‘Abbās and in the proto-Shī‘ī circles in Medina and Kufa. This rule continues as a valid form of marriage in Shī‘ī law today, perhaps drawing from the Meccan school. See Wilferd Madelung, ‘Abd Allāh b. ‘Abbās and Shī‘ite Law, in LAW, CHRISTIANITY, AND MODERNISM IN ISLAMIC SOCIETY: PROCEEDINGS OF THE EIGHTEENTH CONGRESS OF THE UNION EUROPÉENNE DES ARABISANTS ET ISLAMISANTS 13, 15-16 (Urbain Vermeulen & J.M.F. van Reeth eds., 1998).

229. For a discussion of first-century temporary marriage rulings and reports of ‘Umar’s prohibition, see MOTZKI, *supra* note 104, at 142-46. For the settled Sunnī position of prohibition, see, for example, 11 MĀWARDĪ, *supra* note 50, at 449.

*invalid* marriage would open a couple to accusations of *extramarital* sex—where penalties ranged from flogging to death. In view of these stakes, jurists interpreted the doubt canon to support a presumption that allowed for laws deemed invalid in one school to absolve criminal liability of anyone accused of violating that law if it were deemed valid in another school. For them, though illegal, temporary marriage could not expose parties to criminal charges of extramarital sex. To do otherwise would unfairly impose criminal liability where the perpetrator did not have clear notice of the law in an area where even the jurists could not agree on the content of the law.<sup>230</sup>

Interpretive doubts were plentiful and only resolved through consistent interpretation of authentic texts. These sorts of doubts arose even more abundantly in the realm of prophetic reports than they did with respect to the Qur'ān. Disagreements about the authenticity and varied wording of the prophetic reports produced enormously diverse interpretations. Without a single authoritative corpus of these prophetic reports, each school of law resolved questions about the definitions of law through varied interpretive approaches particular to their own schools. As one scholar of Islamic legal studies has argued, it was arguably “*consistency*, or the ability to demonstrate an undifferentiated commitment to a stable and unchanging *theory* of interpretation, [that provided] the criterion” to judge the validity and legitimacy of diverse legal opinions.<sup>231</sup>

In this process, the prophetic pedigree of the doubt canon did significant work in framing the debate and turning the doubt doctrine into a widely accepted legal maxim. Further, it allowed the majority of jurists to easily render the doubt canon into a core principle of criminal law to govern not only capital punishment, but ordinary punishment as well. Through the canon, jurists sought to insert softening principles into the legal corpus. With a textual origin for the rule, they could assert that the doubt canon had always been part and parcel of a scheme intentionally designed by the divine Lawgiver, and that it bound judges who aimed to adhere to the ideal of divine legislative supremacy.

In the ensuing generations, writing in the thirteenth- to fourteenth-century Mamlūk era, the jurists authored multiple works on legal interpretation organized around legal canons that set forth policies for particular areas of law.<sup>232</sup> These collections of legal canons identified the doubt canon as the guiding principle of Islamic criminal law, for both capital and non-capital punishments. Importantly, the doubt canon was all-encompassing, covering substance as well as procedure. Unlike American criminal law, where rules of reasonable doubt and lenity, for example, form two of many different principles of criminal law, Islamic doctrines were swept under a single header of “doubt.” The sweep coincided with—and, I argue, served as a mechanism to

230. See, e.g., QARĀFĪ, *supra* note 25, at 1309 (noting that “only astute jurists can discern [many debatable Islamic legal] rules” and that even they often disagree).

231. See Sherman A. Jackson, *Fiction and Formalism: Toward a Functional Analysis of Usul Al-Fiqh*, in *STUDIES IN ISLAMIC LEGAL THEORY*, *supra* note 54, at 178.

232. See *supra* note 17. These discussions are elaborated in RABB, *supra* note 25.

bolster—the jurists’ institutional claims of the authority to define Islamic law.

This narrative of the canonization, textualization, and generalization of the Islamic doubt canon rule provides a powerful illustration of the way jurists defined their own power and placed it in opposition to the policies of a caliphal executive. The more the politics of power drove political officers to disregard the jurist-defined moral imperatives, the more concerned the scholarly classes became with insisting on those imperatives and clarifying the law.<sup>233</sup> Punishment by government officials during this period was “fundamentally arbitrary, informal, and unpredictable.”<sup>234</sup> It is this backdrop of excessive punishment generally and rampant executions particularly that drove the attempts of jurists of that time to rein in the excesses through claims of doubt. The historical record does not allow us to conclude with any certainty whether jurists were effective in their attempts. Yet, I argue that their interpretive maneuvers reveal the jurists’ interest in defining the precedents and principles from the authoritative founding period that would clarify the legal requirements for and against punishment. They did so with a clear sense of their own authority as the class popularly possessed of the institutional competence to define issues of law and morality. In the big picture of the premodern Islamic constitutional structure, the caliphs needed the support of these jurists in order for the populace to perceive them as legitimate rulers. Thus, even if the jurists could not directly prevent excessive punishments, they could prevent rulers from trying to legitimate the punishments under the rubric of Islamic criminal law.

#### CONCLUSION

The history of Islamic notions of doubt reveals how central social-political and institutional contexts were to Muslim jurists’ constructions of Islamic law in this purportedly textualist legal tradition. I have argued that Muslim jurists developed a textual doctrine of doubt in response to the eleventh-century political context of excessive state violence that accompanied the breakup of the empire and weakening of institutional structures for which they sought to systematize the law. These jurists managed to convert a *judicial practice* expressing a preference for recognizing doubt in order to avoid dubious punishments into a *foundational text* requiring it.

This process puts on display the mechanisms by which Muslim jurists, all self-proclaimed textualists, assumed multiple institutional roles, hidden under cover of textualism and deference to divine legislative supremacy. Early in Islamic history, Muslim jurists had adopted a judicial power to define Islamic law. They gradually assumed a legislative power to update the law by introducing new texts in the form of a legal maxim—the doubt canon—that they claimed had been issued by the Prophet Muḥammad. They then deployed this canon liberally in their efforts to limit executive power over criminal law

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233. Mottahedeh, *supra* note 84, at 6-8.

234. LANGE, *supra* note 126, at 42.

enforcement or at least define the contours of legitimate punishment. All of these interpretive strategies responded to the changing institutional contexts in which the jurists operated and the institutional relations that they helped define. In short, Muslim jurists used interpretation instrumentally to specify legal outcomes and to define their own institutional roles.

Further, this process helps demonstrate the significance of the controversy surrounding the *Case of Mā'iz*. That case represents a radical tension in Islamic law between Muslims jurists' formal appeal to textualism and their functional appeal to varied tools of interpretation to define institutional roles. Muslim jurists operated in a world where they only implicitly acknowledged that institutional context mattered to definitions of law. Explicitly, their only legitimate basis of authority—as religious exponents of law—was to appeal to Islam's foundational legal texts and to the ideal of divine legislative supremacy. A look at the changing societal and institutional contexts enables us to uncover the significance of the debates about the *Case of Mā'iz* and the subsequent emergence of the doubt doctrine. When factual and political contexts created morally complex realities, these jurists drew on early judicial practices to canonize, textualize, and generalize robust doctrines of doubt.

The growth of the Islamic doctrine of doubt, and its transformation from a practice-based canon into a textual rule of expansive scope, reveals the close link between textual interpretation, social context, and institutional legitimacy in medieval Islamic law and society. In the end, Islamic criminal law was less about what the “text” said, and more about how Muslim jurists assumed institutional power to actively construct Islamic law when confronting myriad contexts about which the text did not say much.