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Introduction

This is a book about the logic of medieval Islamic legal theory (*uṣūl al-fiqh*), a yawn-inducing subject even for seasoned scholars of Islamic Studies. Indeed, legal theory manuals lend themselves to a study that is, in a word, boring. This is unfortunate, because as recent studies demonstrate,¹ legal theory manuals are the sites of some of the most wildly creative, deeply personal, and intensely ideological Islamic legal thought in the medieval period. These exciting aspects of legal theory, however, are buried deep within abstruse discourses on hermeneutics, defenses of historical juridical opinions and attacks on competing legal schools. So deeply are they buried that most scholars assume that legal theory manuals have little to offer in the way of creative articulations of Islamic law (*sharīʿa*). As a result, medieval legal theory is usually written off as nothing more than a self-consciously reified regurgitation of sectarian rules set down

¹ Such studies include Anver Emon, *Islamic Natural Law Theories* (Oxford University Press 2010); David Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law* (American Oriental Society 2011); Bernard Weiss, *The Spirit of Islam* (University of Georgia Press 1998); and many of the essays in Bernard Weiss (ed), *Studies in Islamic Legal Theory* (Brill 2002). The heterogeneity amongst assumed uniformity was noticed earlier in Wael B Hallaq, 'The Primacy of the Qur'ān in Shāṭibī's Legal Theory' in *Islamic Studies Presented to Charles J. Adams* (Brill 1991) 69ff; but works dedicated to the re-evaluation of *uṣūl al-fiqh* emerged only recently; Wolfhart Heinrichs, 'Qawā'id as a Genre of Legal Literature' in *Studies in Islamic Legal Theory* (Brill 2002) 365. A similar genre re-evaluation has already taken place with regard to other Islamic sciences, most notably in *fiqh* studies. Baber Johansen, writing in the context of *fiqh* wrote, '... contrary to the received wisdom in this field, Islamic law retained its vitality and continued to evolve and change throughout its history. This position differs fundamentally from the views set forth by such eminent authorities as Schacht, Coulson, and Chehata, who hold that by the 10th century the essentials of Islamic legal doctrine (in particular that of the Hanafi school) were already fully formulated and that, with the exception of some minor points, this doctrine remained fixed forever.' Baber Johansen, 'A Response to Ann Elizabeth Mayer's Review of *The Islamic Law on Land Tax and Rent: The Peasant's Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods*' (1992) 24 *International Journal of Middle East Studies* 553.

by ancient legal thinkers, never to be challenged or changed, and wholly disconnected from any lived reality.

Part of this impatience with legal theory is certainly borne of disappointment from a genre that sounds so intriguing yet appears so moribund. Legal theory, one might think, should be a thought-provoking, creative enterprise. Even the name of the genre, *uṣūl al-fiqh*, literally ‘the foundations of jurisprudence,’² suggests a forum for enumerating the higher ethical ideals to which jurisprudence should adhere. Legal theory works could theoretically establish procedural principles that would serve as a check on Islamic jurisprudence (*fiqh*), so that any derived injunction could be examined to see whether or not it violates a foundational ethical concern. But legal theory works do not function in any such way. In fact, they encourage a cynical reading by virtue of their very arrangement.³

A brief glance at any medieval legal theory text written after the 9th century would surely encourage intrepid researchers looking for creative articulations of Islamic doctrine and law to look elsewhere. To begin with, most legal theory manuals look exactly the same in terms of their structure. Within any given legal school, scholars typically address the exact same subjects under the same topic-headings. Furthermore, they generally come to the same conclusions about those subjects; so that a 16th-century jurist from the Shāfi‘ī legal school writing in Baghdad will

² Islamicists have translated ‘*uṣūl al-fiqh*’ into English in multiple ways, including ‘the roots of law,’ ‘the principles of jurisprudence,’ and ‘source methodology.’ I believe that Joseph Lowry’s translation of ‘legal hermeneutics’ is the most accurate given the use of technical terms within *uṣūl al-fiqh* works to interpret revealed texts for the purpose of arguing for legal norms; Joseph Lowry, *Early Islamic Legal Theory: The Risāla of Muḥammad ibn Idrīs al-Shāfi‘ī* (Brill 2007) 1. Nevertheless, I have chosen to use the term ‘legal theory’ for two reasons. First, ‘legal theory’ is utilized in modern secular debates about the function of norms in the articulation of law. Second, ‘legal theory’ is regularly used by Islamicists to refer to *uṣūl al-fiqh*; Lowry himself uses ‘legal theory’ in the title of his own work on Shāfi‘ī’s *uṣūl*. ‘Legal theory’ appears to be the standard translation for ‘*uṣūl al-fiqh*’ and I see no compelling reason to divert from it.

³ Indeed, such a cynical reading has dominated much of both the historical and modern discussions surrounding *uṣūl al-fiqh*; see Muḥammad Abū Zahra, *Uṣūl al-Fiqh* (Dār al-Thiqāfat al-‘Arabiyya 1957) 18–20; George Makdisi, ‘The Juridical Theology of Shāfi‘ī: Origins and Significance of Uṣūl al-Fiqh’ (1984) 59 *Studia Islamica* 5, 35–6; Brannon Wheeler, *Applying the Canon in Islam: the Authorization and Maintenance of Interpretive Reasoning in Hanafi Scholarship* (SUNY Press 1996) 113ff; Sherman Jackson, ‘Fiction and Formalism: Toward a Functional Analysis of Uṣūl al-Fiqh’ in *Studies in Islamic Legal Theory* (Brill 2002) 178–81.

come to the same conclusion about the inability of prophetic practice to abrogate the Qurʾān as an 11th-century Shāfiʿī jurist writing in Cairo. At first blush, legal theorists appear to simply copy and perpetuate the works and ideas of their predecessors. Modern scholars have taken note of this mimesis in legal theory manuals and concluded that legal theory was a way for a legal school to establish and defend its particular doctrines while simultaneously attacking competitors. It was assumed, therefore, that legal theory had nothing to do with the lived practice of the community; rather, it was basically a forum for erudite scholars to prove, at the highest intellectual level, the superiority of their legal school.

For the legal theory genre to be, in essence, a glorified chat room for scholars to push their agendas casts doubt on the ethical integrity of the entire Islamic juridical enterprise; not least because of the missed opportunity to formulate innovative principles upon which Islamic jurisprudence could be founded. If it is true that legal theory manuals did not enumerate ethical principles to which jurisprudence should adhere, then jurists were theoretically free to derive jurisprudence without concern for higher ethical ideals. Certainly, jurists may have used their own, personal ideals according to which they derived jurisprudence, but those ideals were not explicitly captured and enumerated in any corresponding work of legal theory.

Some modern scholars have argued that a lack of a functional legal theory was actually of great benefit to Islamic jurisprudence. Freedom from theoretical constraints would allow Islamic jurisprudence to respond to changing times and places without needing to conform to ethical postulates which may themselves be context-specific.⁴ This may well be an accurate description of Islamic jurisprudence, but such depictions of Islamic law paint legal theory manuals in an unflattering light. What was the point of writing a work of legal theory if it neither argued for ethical standards in the derivation of

⁴ Mawil Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice* (Edinburgh University Press 2004) 114; William J Donaldson, *Sharecropping in the Yemen: A Study of Islamic Theory, Custom and Pragmatism* (Brill 2000) 49; Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill 2000) 327.

jurisprudence nor functioned in any meaningful way for jurists when articulating jurisprudence in their own milieu? If they were merely perpetuating the traditions of their legal school, then that suggests a willful hypocrisy on the part of the legal theorists. It would seem that legal theorists were writing under the guise of a genre that binds jurisprudence to moral principles, knowing that it would practically never do so, to provide a moral façade to what is essentially evangelism and polemics.

However, this indictment of legal theorists rests on certain assumptions about how legal theory manuals were meant to function. These assumptions, despite being inaccurate, were perpetuated by jurists themselves, especially in their introductions, in an attempt to summarize the methodology of their legal school in rational terms. Presenting one's legal school as dispassionate and calculating gives the particular injunctions promoted by that school an air of sagacity, as though all their injunctions necessarily followed from the dictates of basic logic. Hence, the common assumptions that jurists perpetuated about how legal theory and legal theory manuals were 'supposed' to work served a rhetorical function. It was in the interest of jurists to assert that legal theory was supposed to function in a way that connected individual injunctions to higher ethical principles, even if legal theory manuals did not function, and were not intended to function, in such a manner.

Jurists regularly suggested that legal theory manuals demonstrated the logical connections between the particular principles and injunctions promoted by their legal school. These rhetorical, though mythical, connections were usually presented as rational syllogisms. Legal theorists supposedly utilized these syllogisms in one of two ways. The first way, ascribed to the Ḥanafī school of law, holds that inherited legal injunctions conform to a certain logic and that that logic can be ascertained through a careful study of jurisprudence. That is, an astute jurist can *induce* a principle by analyzing inherited jurisprudence. For example, grape wine is categorically forbidden in almost all Islamic jurisprudential works. This inherited jurisprudence, then, forms the

foundation of the syllogism that leads to the principle. Once induced, the resulting principle can be used in novel circumstances to derive new injunctions. The syllogisms that move from injunction to principle conform to the following format,

Grape wine is forbidden (Injunction)
Grape wine is an Intoxicant (Case)
Intoxication is forbidden (Principle)

From the injunction prohibiting the consumption of wine made from grapes, the Ḥanafī jurist is, theoretically, able to induce a principle that explains the injunction, which can then be used as a principle in other circumstances involving other types of intoxicants. Ḥanafī legal theory manuals are presumed to describe the precise procedures through which principles can be accurately induced from injunctions. In practice, these manuals do not serve this function, despite rhetoric—often propagated by Ḥanafī scholars themselves—to the contrary.

The second way that legal theorists purportedly used syllogisms is ascribed to the Shāfi‘ī school of law and involves *deducing* injunctions from principles. In this model, early Shāfi‘īs determined the principles that underlay Islamic jurisprudence and used those principles to derive their law. In our example of grape wine, they would start with the principle, ‘intoxication is forbidden’ to formulate the following syllogism:

Intoxication is forbidden (Principle)
Grape Wine is an Intoxicant (Case)
Grape wine is forbidden (Injunction)

Theoretically, one could substitute the term ‘grape wine’ in the case with any similar intoxicant, such as ‘apple wine’ or ‘heroin’ to derive an injunction that would similarly judge that intoxicant to be illicit. Once again, Shāfi‘ī works of legal theory do not actually describe how a jurist should deduce injunctions from principles. Rather, both Ḥanafī and Shāfi‘ī legal theory manuals discuss broad ideas in light of the principles and injunctions already laid down by seminal historical figures in their

respective legal schools.⁵ What one quickly finds is that legal theory manuals are dedicated neither to the induction of principles nor the deduction of injunctions, for both are considered already resolved. What is actually happening in legal theory manuals is far more exciting and has greater ramifications for the way Islamic law is conceptualized.

To engage the logic of legal theory manuals, one must first be disabused of the notion that legal theory is about ‘discovering’ either the principles or injunctions of one’s legal school. By the time legal theory coalesced as a genre, legal schools had already achieved a level of fixity regarding central principles and injunctions. To work within a legal school, indeed to maintain a standard criterion by which laws are deemed valid, requires a jurist to adhere to established tenets of a legal school, not to contravene them. In the words of a modern scholar of legal theory, jurists needed to abide by the maxim: ‘Thou shalt not controvert established and binding rules of law.’⁶ In works of legal theory, then, jurists were less concerned about *discovery* and more concerned about *justification*.

Legal theorists used the genre of legal theory to justify inherited principles and injunctions; and here we must be careful not to confuse justification with apologia. To apologize for the law is to explain the

⁵ It is understandable that Ḥanafī and Shāfi‘ī legal theories are presumed to work according to inductive and deductive syllogisms, rhetoric aside. If one breaks down their argument into their constituent parts, Ḥanafīs seem to argue from injunctions and Shāfi‘īs appear to argue from principles. It is a bit difficult to explain without using technical terms, but after reading chapter 4, the following should be intelligible. In the example of grape wine, Shāfi‘īs argued that the *wasf* that characterized the ‘*illa* of wine’s impermissibility was intoxication. The practical effect (*ta’tthir*) of the *wasf* was that wine adversely affects an individual’s ability to use his intellect. Thus, the transitivity of the *wasf* extends the prohibition to all other drinks that impede the intellect. Ḥanafīs, on the other hand, note that in the juridical texts, grape wine is considered unclean, whereas other drinks that may cause intoxication are not similarly unclean. Therefore, the *wasf* of intoxication is not transitive to all other cases. Since the ‘*illa* is not transitive, it cannot be the actual ‘*illa* intended by the texts. Ḥanafīs therefore argue that grape wine is specifically forbidden by the definitive texts, though other types of intoxicants are forbidden by more speculative texts; ‘Abd al-‘Azīz al-Bukhārī, *Kashf al-Asrār ‘an Fakhr al-Islām al-Bazdawī* (Muḥammad Baghdādī ed, Dār al-Kitāb al-‘Arabī 1997) 3:542–3. See also Kathryn Keuny, *The Rhetoric of Sobriety: Wine in Early Islam* (SUNY Press 2001), 126, end-note 23. In the above arguments, the disagreement is not about how to reason—whether from principles or injunctions, though at first glance one might think so—but it is about transitivity and the identification of a correct ‘*illa*.

⁶ Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press 1978) 195. The dichotomy I posited above between discovery and justification was inspired by MacCormick (n 5) 15–18 and 62–5.

reason for its existence in the canon. To justify law is to argue for its proper definition, application, and continued relevance. Apologia is a defense of validity; justification is a contention about the proper application of law.⁷ In essence, to justify a law is to explain not why that law exists, but why it is to be applied. Each jurist has his own particular justifications for why laws are to be applied, and those justifications speak to how the jurist conceives of Islamic law as a whole. The jurist, however, must engage in a sort of balancing act, because though he may justify law in a unique manner, he must be sure to uphold central inherited principles and injunctions; else he would undermine the very foundations of his legal school.

The process of justification in Islamic legal theory follows a type of logic that involved neither the induction of principles nor the deduction of injunctions. Rather, legal theory's logic is most accurately described by the term 'abduction' coined by CS Peirce. Abduction, in its simplest form, involves 'studying facts and devising a theory to explain them.'⁸ In the process of abduction, facts are neither created nor posited; they are accepted, explained, and justified. In the same way, legal theorists did not question or innovate principles or injunctions; they were 'facts' and part of the inherited legacy of their legal school. To question these facts or to abandon them would defeat the purpose of being in a legal school in the first place. In legal theory manuals, jurists analyzed previously established principles and injunctions—the 'facts' that were practically

⁷ There is an instructive parallel here between my use of apology and justification and Martti Koskenniemi's idea of 'apology and utopia.' In Koskenniemi's conception, law can become an apology for politics if it demonstrates a close connection (a 'concreteness') between normative legal texts and State behavior. When texts retained their normativity they moved closer to a vision of utopia. As we will see in the Conclusion of this text, in medieval Islamic societies there tended to be a strong distinction between normative legal texts and social praxis. Thus, my use of the term 'justification' is closer to what Koskenniemi intends with the term 'utopia'; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 17, 58. Wael Hallaq argues that legal theory served the dual purpose of discovery and justification; *A History of Islamic Legal Theories* (Cambridge University Press 1997) ix. Hallaq, however, uses the term 'justification' in the sense of 'apologia.' My use of the same term is intended in a different manner.

⁸ Charles Sanders Peirce, *Pragmatism as a Principle and Method of Right Thinking* (SUNY Press 1997) 218.

unchangeable—and justified them to help jurists abduce cases.⁹ The justifications that lead to such abductions, when taken together, represent a theoretical approach to Islamic law that determines the appropriate application of inherited principles and injunctions in a legal theorist's legal school.

In our earlier example, the forbidding of both grape wine and of intoxicants are settled matters in the Ḥanafī and Shāfi'ī schools of jurisprudence. Whether one goes from principle to injunction or vice versa seems to make no difference. What is not immediately clear, however, is *why* they are to be forbidden. The justification that occurs in works of legal theory is an attempt to explain why the principles and injunctions of one's legal school are to be applied. To suggest that this is mere defense of a legal school is to miss the point of Islamic jurisprudence as a project. Islamic jurisprudence claims to represent the divine will and touches all aspects of individual and communal life, from ritual purification to governmental regulations. To explain the 'why' of Islamic jurisprudence is to attempt nothing short of explaining why God speaks to humans and what God expects of them.

Interestingly, the 'why' that is hypothesized on the basis of inherited principles and injunctions is unique to each individual legal theorist. The 'why's do not conform to any predetermined boundaries imposed by teachers, geography, or legal schools. Two jurists from the same legal school, in the same geographic area, in the same time period, and with the same teachers might come to very different conclusions about why the principles and injunctions of their legal school are to be applied.

⁹ It is likely that Peirce would himself approve of reading medieval legal theory manuals in light of his theory of abduction. He was convinced that medieval religious scholarship was consciously engaged in the kind of semiotics that assumes a logic of abduction which was abandoned by modern thinkers (William Pencak, 'Charles Peirce's Understanding of the Four Ages and of His Own Place in the History of Human Thought' (1991) 179 *Semiotica* 23, 29; Susan Petrilli and Augusto Ponzio, 'Peirce and Medieval Semiotics' in Vincent Colapietro and Thomas Olshewsky (eds), *Peirce's Doctrine of Signs* (Mouton de Gruyter 1996) 351ff. This should not be surprising if Peirce is correct that the origin of abduction was Aristotle; Peirce, *Pragmatism as a Principle and Method of Right Thinking* (n 2) 217—though in Peirce's conception this was actually retroduction; Peirce, *Reasoning and the Logic of Things* (Kenneth Ketner ed, Harvard University Press 1992) 141, a kind of prototype for abduction—since Aristotelean logic pervades medieval Latin and Muslim religious scholarship.

When jurists justify the inherited principles and injunctions, they are explaining the functional logic of their school's legal doctrines, and ultimately making a case for the proper function and purpose of Islamic law as an enterprise.

On first read of a classical legal theory manual, however, the 'why's are not forthcoming. They are buried deep within discussions on the nature of language, the applicability of prophetic reports, the limits of human reason, and the like. In almost all of these discourses, the principles and corresponding injunctions are already determined by preceding seminal jurists of legal schools. Reproducing these principles and injunctions gives the legal theory manual a veneer of continuity and, for the receiving community, authority within the legal school. There is no doubt that the jurists writing these manuals intended to keep their bolder assertions covert, so as to give novel ideas an air of historical legitimacy and avoid stigmatization within one's own legal school. But that makes it all the more difficult to determine the 'why' of Islamic law for which jurists are arguing. It is therefore understandable that most scholars, upon encountering the unchanging façade of legal theory, would assume that legal theory manuals are reified, uninteresting, uncreative tracts serving the twin causes of propaganda and polemics.

The present book, in fact, began out of an argument about the supposed homogeneity of legal theory manuals. In traditional Islamic religious schools, or, *madrāsas*, legal theory is accorded a deep, yet distant veneration by those who teach and study the genre. The philosophical discourses and abstruse disquisitions on issues of linguistics and logic found therein are treated with a respect that borders on reverence. In a *madrasa* modeled on the Dār al-'Ulūm Deoband in India, I studied legal theory with a teacher who described the subject as 'the most hallowed of all sciences' (*ashraf al-'ulūm*). To him, this meant that legal theory could not be studied at all until all other Islamic sciences had been mastered, and even then the student must only study legal theory to memorize the principles laid out therein, not to engage or even understand them. This seems contradictory; legal theory, by definition, is supposed to provide a methodology upon which inherited Islamic law is predicated and novel Islamic law is derived. If one is not taught how principles are to be used,

then one cannot derive injunctions that address novel circumstances. However, since the intricate details of Islamic jurisprudence have been extensively—and by my teacher’s account exhaustively—elucidated by Muslim jurists, legal theory was assumed to be a scholastic rather than practical enterprise. I found this attitude in many seminaries across the Muslim world, and that legal theory was among the least studied of the Islamic sciences.

While conducting research on Zaydī legal theorists in Sana’a, Yemen, I fell in with local scholars of Shāfi‘ī jurisprudence. Together we studied several Shāfi‘ī legal theorists, and especially the legal theories of the eminent jurists Abū Ḥāmid al-Ghazālī (d. 505/1111) and Abū Ishāq al-Shirāzī (d. 476/1083). I was struck by the Yemeni scholars’ incredulous response to any suggestion that these two giants of Shāfi‘ī jurisprudence held any significantly different opinions on legal theory. They took great pains to explain that any differences were in appearance only, and that the two were actually in harmony on every matter, as were all Shāfi‘īs. Their insistence on this point kept the study at a superficial level, and I figured that they were reluctant to take sides when jurists whom they held in such high esteem disagreed. So I went to a local bookshop to find legal theory works of Ḥanafī jurists whose differing theories we could discuss without the need to homogenize. I settled upon the works of two renowned Ḥanafī jurists: the *Taqwīm al-Adilla* of Abū Zayd ‘Ubayd Allāh b. ‘Umar al-Dabūsī (d. 430/1039) and the *Muḥarrar fī Uṣūl al-Fiqh* of Muḥammad b. Aḥmad b. Abī Sahl al-Sarakhsī (d. 483/1090). A cursory glance at the two texts suggested that they were in consonance on most key issues, but if there were significant differences then perhaps they could be teased out through careful study and discussion. I returned to the scholars with renewed hope.

Within the first few days of discussing Dabūsī’s *Taqwīm al-Adilla*, one scholar in particular had many objections. He asked if I was sure that Dabūsī was an actual Ḥanafī jurist, since his explanations for the positions he held, though couched in familiar language and promoting accepted positions, were unfamiliar and, according to the Yemeni scholar, unbecoming a Ḥanafī. I assured him that Dabūsī was one of the leading Ḥanafī jurists of his time and among the most celebrated in the

medieval period, and so we agreed to continue discussing his theory. The next day, after having read more of Dabūsī's approach to legal theory, the scholar asked if I had not mistaken this Dabūsī with some other Dabūsī, who was perhaps a real Ḥanafī scholar. He explained that this was an understandable mistake; people regularly mistook the great Mālikī jurist Abū Bakr b. al-ʿArabī (d. 543/1148) with the mystic Muḥyī al-Dīn Ibn ʿArabī (d. 638/1240), the latter whom the scholar insisted was a disbelieving apostate (*kāfir murtadd*). I eventually persuaded him that this was indeed the correct Dabūsī, leaving aside for the moment Ibn ʿArabī's membership in the believing community.

The following day, in the middle of the discussion, the scholar closed his books, stood up, and refused to continue discussing Dabūsī. He protested that this Dabūsī character was clearly trying to undermine Islam with deviant opinions and that he was obviously out of line with the Ḥanafī tradition, which the scholar claimed to know well. In a bid to blacklist Dabūsī from being discussed in the mosques of Sana'a, he conferred with other scholars from his mosque and neighboring mosques, describing the ideas that Dabūsī had put forth in *Taqwīm al-Adilla*. He reported back that all of them agreed that Dabūsī was a dangerous threat to Islam in general and of true Ḥanafism in particular, no doubt an agent provocateur working for the enemies of Islam. He was more than happy, however, to move the discussion to the works of Sarakhsī, whom he praised as a true scholar and Ḥanafī.

The most noteworthy aspect of this whole interchange is that the works of Dabūsī and Sarakhsī are, at first glance, practically indistinguishable. Several of their chapters appear copied one from the other. They certainly owed much credit to their predecessor Abū Bakr al-Jaṣṣāṣ (d. 370/981), upon whose legal theory manual the two later jurists based much of their work. In fact, they often used the same terms and similar arguments as al-Jaṣṣāṣ to describe their own legal positions and principles. Yet, their justifications for *why* the principles and legal positions were to be applied reflect a deep divergence between their works. These justifications are located in their nuanced definitions of terms used to describe the principles and injunctions. By justifying a shared term in a slightly—or sometimes not so slightly—different way,

the shape and application of Islamic law can change without disturbing the injunctions or principles.

In the above example of grape wine, the principle and the injunction are given and set; any attempt to change them would be immediately branded a departure from the boundaries of the legal school. However, there is a third element in the syllogism, the case, which is normally overlooked, but is completely up for grabs. Depending on how one justifies the terms within the principle or injunction, the case may be abducted to be more or less restrictive.

Justification is the main task of legal theory manuals; and here the difference between apology and justification is important. If one were trying to apologize for the injunction forbidding grape wine, one might point to Q. 5:90–91, or several prophetic reports that include the prohibition to explain why the latter exists in the juridical tradition. The concern of legal theory, however, is to justify how and why the prohibition—already enshrined in the tradition—should be applied. Whereas apology looks back to rationalize the tradition, justification looks forward to argue for the tradition's proper application.

Arguing for the way in which the received tradition should be applied requires a bit of guesswork on the part of the legal theorist when he engages in abduction. The legal theorist must justify inherited principles and injunctions by defining key terms such that they lead to particular conclusions. Using the example of the prohibition of grape wine, let us assume that we are moving from the injunction to the principle, the way the Ḥanafī model is 'supposed' to work. When justifying the prohibition in this model, a jurist might surmise that grape wine should be prohibited because it is a fermented drink. The jurist might then understand the principle that prohibits intoxicants as referring to other types of fermented drinks. The premises of the abductive syllogism would then look like this:

Grape wine is forbidden because it is a fermented drink (Injunction)
 Fermented intoxicants in general are forbidden (Principle)

This leaves the jurist free to hypothesize about the application of jurisprudence regarding fermented intoxicants. The jurist might conclude

that the prohibition of intoxicants applies narrowly to fermented drinks, and perhaps does not apply to other mind-altering substances like heroin or coffee. The jurist might then define what constitutes fermentation; whether the drink needs to be only a little fermented or if it needs to have progressed significantly in the fermentation process.

Alternatively, a jurist might justify the terms in the injunction and the principle differently to produce a different result. A jurist might surmise, for instance, that grape wine should be forbidden because it causes drunkenness (*sukārā*). The jurist might then understand the principle that prohibits intoxicants as referring to any drug that induces a state of, or like, drunkenness, making the premises of the abductive syllogism:

Grape wine is forbidden to prevent drunkenness (Injunction)

Intoxicants that cause a state of drunkenness are forbidden (Principle)

A jurist might then hypothesize that the application of the principle and injunction should be understood as forbidding all types of drugs, depending on how he defined 'drunkenness.' If drunkenness were defined as inebriation, then the prohibition would include all forms of fermented drinks, opiates, hard stimulants, hallucinogens, and the like. If, however, drunkenness were defined more generally as an altered state of mind, the prohibition might apply expansively to include caffeine and tobacco.

In both of the above examples, the injunctions and principles are maintained: grape wine is forbidden, as are intoxicants. However, the way in which jurists justified the key terms in the premises affected the abductions they might make about how the law is to be applied. In a sense, jurists were free to justify these terms as they saw fit; so long as they did not change the literal wordings of the premises, they could interpret at will. And indeed they did. When analyzing medieval works of *uṣūl al-fiqh*, one finds that jurists had very different justifications for why inherited jurisprudence—both its principles and injunctions—was to be applied. What is more, one finds that these justifications have a sort of coherence. When examining the justifications provided by a legal theorist in the aggregate, one finds that they were effectively arguing for a larger worldview, or narrative, within which one should situate the role and function of Islamic law as a whole.

In order to understand that larger narrative, it is necessary to get a feel for the justifications and abductions that jurists made in their legal theory manuals. The primary task of this book is to provide a glimpse into the methods that legal theorists employed for expressing disparate abductions about the application of Islamic law while simultaneously giving the appearance of uniformity. For this purpose, I have enlisted the works of the aforementioned Dabūsī and Sarakhsī to illustrate how two scholars from the same legal school, from the same geographic area, with the same intellectual heritage, and living in the same era might produce two legal theory manuals that look similar, but are poles apart in their arguments about the function of Islamic law.

Three chapters are devoted to uncovering their particular conceptions of three major sources of Ḥanafī law: the Qur’ān, the *sunna*, and opinion (*ra’y*). A chapter is dedicated to each source, and in each chapter we will closely examine three central concepts that shed light on how the source should be used in law. I have purposely avoided some of the vaguer topics, which were nonetheless extensively surveyed in legal theory manuals, like differentiating general (*‘āmm*) and specific (*khāṣṣ*) terms or commanding (*amr*) and forbidding (*nahy*). Instead, I focus on subjects that directly relate to the nature of the legal source under study. The aim is to give the reader a taste for legal theory without getting so involved in theoretical debate that we lose sight of the practical ramifications of the theory itself.

This book by no means captures the full extent and argument of legal theory works. One will not become an expert in legal theory by having read it. But it will give one the *feel* of a legal theory work. The idea is to immerse the reader into a mode of argumentation and thereby enter the world of legal theorists by understanding the way they used complex technical terms. Each chapter also includes a *Brief Review* section and *Conclusion* that covers how the terms affect the understanding and application of the source under study.

By the third chapter, we start to see how Dabūsī and Sarakhsī structured their arguments to argue for larger, coherent worldviews. We will find that by justifying terms in the received principles and injunctions differently, they were able to argue for different cases. These cases, when taken

together, present an argument for the relative authority and application of each source to the contemporary community. One begins to perceive that the two jurists understood the project of Islamic law in divergent ways. Their individual conceptions of the way in which God intended humans to apply divine law are clearly distinct, and their arguments, as a whole, suggest that Islamic law should be either a paradigmatic model for emulation or a set of ordinances designed for universal imitation. By examining their approaches to the sources of Islamic law, we can grasp their argument about the purpose of Islamic law as a whole. This underlying argument is the most exciting aspect of medieval legal theory manuals, both in the varied conceptions of Islamic law that it uncovers and in its diversity within contexts of assumed uniformity.

Before jumping into a close study of Dabūsī and Sarakhsī's works, a quick note about the context of the legal theories studied in this book. Although the development of Islamic law until the 11th century when Dabūsī and Sarakhsī wrote their tracts is important and interesting, it is not the subject of this book. One does not even need to know the biographies of the two legal scholars to enter their arguments, though brief biographies are provided in the appendix. It is enough to know two major facts for the purpose of this study. First, these contemporaneous and collocated scholars traced their legal pedigree to the Baghdad school of Ḥanafism, particularly in the persons of Abū al-Ḥasan al-Karkhī (d. 340/951) and Abū Bakr al-Jaṣṣāṣ (d. 370/981). Secondly, later Ḥanafī scholars considered Dabūsī and Sarakhsī to be the systematizers of Ḥanafī thought. They and their contemporary Abū al-Ḥasan al-Pazdawī (d. 482/1089) were regularly referred to as 'the three shaykhs' of the Ḥanafī school.¹⁰ They are credited with providing the foundations upon which later Ḥanafī thought was based. All the more striking, then, that the thrust of their legal thought was so different.

My hope is that close attention to Dabūsī and Sarakhsī's arguments will disclose to the reader the narratives of law that these jurists were weaving, and that the reader will begin to enter those narratives and

¹⁰ This is not to be confused with 'the three Imāms' regularly quoted in Ḥanafī texts. 'The three Imāms' refers to Abū Ḥanīfa, Muḥammad al-Shaybānī, and Abū Yūsuf.

interact with them. The study of legal theory is difficult—at times tedious—and requires one to juggle several complicated ideas at once. But it is deeply rewarding when read with an eye toward the narrative being presented. Patient study of the way jurists manipulated complex technical language will uncover unique and creative conceptions of Islamic law that stretch our assumptions about the boundaries of Islamic legal thought.

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