Introduction

This book is about doubt in Islamic law. Specifically, it is a history of the concept of doubt in Islam's system of criminal law, a concept that reveals much about the nature and complexities of Islamic law itself – also known as *sharīʿa*. This history calls into question a popular notion about Islamic law – which some have upheld and promoted and others have criticized and opposed. The notion is that Islamic law is a divine legal tradition that has little room for discretion or doubt, particularly in Islamic criminal law.

Despite its contemporary popularity, that notion turns out to have been far outside the mainstream of Islamic law for most of its history. Instead of rejecting doubt, medieval Muslim scholars largely embraced it. In fact, these scholars – the expert jurists who articulated the main contours and rules of Islam's legal system – held doubt so closely that it came to be at the heart of Islamic criminal law. Moreover, these scholars embraced doubt in ways that helped them construct the system of Islamic law, which they simultaneously claimed to have divine origins. This account examines that process of construction-through-interpretation by exploring some of the thorniest issues in Islamic law: those involving Islamic criminal law. More often than not, the difficult interpretive questions of crime and punishment facing Muslim jurists were characterized by doubt.

AN EARLY EPISODE OF DOUBT

One early episode in Islamic legal history illustrates the problems posed by doubt. Not long after Islam's advent in the seventh century, a type of early police force in a small Arabian town was out patrolling. Members of this patrol came across a man in the town ruins holding a blood-stained knife

and standing over the body of another man who had apparently 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 ʿAlī, the beloved cousin and son-in-law of the Prophet Muḥammad (who had died less than three decades before in 632). ʿAlī was the fourth caliph according to the Sunnī account of successors to the Prophet and the first Imām in the competing Shīʿī account. 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, ʿAlī 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. ʿAlī turned to the condemned man incredulously. "What made you confess to a murder that you did not commit?" he asked. The man explained that he thought ʿAlī 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 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 just 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.[1]

[1] Ibrāhīm b. Hāshim al-Qummī (mid-third/ninth century), *Qaḍāyā Amīr al-Muʾminīn ʿAlī b. Abī Ṭālib*, ed. Fāris Ḥassūn Karīm (Qum: Muʾassasat Amīr al-Muʾminīn, 1382/2003), 88–89, 238 (paraphrased). Both Sunnī and Shīʿī scholars cite this as an example of exemplary *ḥudūd* jurisprudence. See, for example, Ibn Qayyim al-Jawziyya (d. 751/1350), *al-Ṭuruq al-ḥukmiyya fī ʾl-siyāsa al-sharʿiyya*, ed. Muḥammad Jamīl Ghāzī (Cairo: Maṭbaʿat al-Madanī, 1978), 82–84 (quoting *Qaḍāyā ʿAlī* and *ʿAjāʾib* [*aḥkām Amīr al-Muʾminīn* = *Qaḍāyā ʿAlī*, as given in the edition of Muḥsin Amīn al-ʿĀmilī, *ʿAjāʾib aḥkām Amīr al-Muʾminīn ʿAlī b. Abī Ṭālib* (Qum?: Markaz al-Ghadīr li'l-Dirāsāt al-Islāmiyya, 2000)]);

This episode, which we may call the *Case of the Falsely Accused Butcher*, depicts the difficulties that medieval Muslim judges faced when attempting to apply Islamic criminal law without the benefit of being able to discern the *facts*, the *law*, or the *morality* of punishment with any certainty. As for the facts, confession or witness testimony typically sufficed to establish guilt in Islamic criminal law.[2] But here, ʿAlī was presented only with circumstantial and contradictory evidence. As for the Islamic law of homicide, the Qurʾān and other foundational texts contained clear rules that retaliation applied to intentional murder.[3] But those rules did not cover the case before ʿAlī. As for the morality (and, consequently, legitimacy) of punishment, given scriptural commands to punish and despite uncertainties about the law and the facts, ʿAlī had to decide whether to enforce punishment or avoid it. He chose to avoid punishment.[4]

The question is why. The answer is shrouded by a tangled web that took Muslim jurists centuries to weave and, therefore, takes serious historical

Muḥammad b. Yaʿqūb al-Kulaynī (d. 329/940–1), *Kāfī*, ed. ʿAlī Akbar al-Ghaffārī (Tehran: n.p., 1377/1957–8), 7:289 (quoting the story from Ibrāhīm b. Hāshim al-Qummī, as received through that author's son, ʿAlī b. Ibrāhīm al-Qummī). For a detailed account of the role and debates surrounding ʿAlī against the first three caliphs in the question of succession to the Prophet, see Wilferd Madelung, *The Succession to Muḥammad: A Study of the Early Caliphate* (Cambridge: Cambridge University Press, 1997).

[2] For a basic overview of Islamic criminal procedure, see Ṣubḥī Maḥmaṣānī, *Falsafat al-tashrīʿ fī ʾl-Islām*, 5th ed. (Beirut: Dār al-ʿIlm liʾl-Malāyīn, 1980; orig. 1946), 325–76 (English trans. Farhat Ziadeh, *The Philosophy of Jurisprudence in Islam* (Leiden: Brill, 1961)). See further Part III.

[3] For an accessible overview of Islamic substantive criminal law, see generally Rudolph Peters, *Crime and Punishment in Islamic Law* (Cambridge: Cambridge University Press, 2005) (describing Islam's three categories of offenses: (1) *ḥudūd* – fixed, nondiscretionary crimes and penalties, including four agreed-upon offenses, namely, illicit sexual relations, false accusations of illicit sexual relations, theft, and intoxication, as well as three offenses of disputed status, namely, apostasy, blasphemy, and highway robbery; (2) *qiṣāṣ* – the laws of murder and personal injury; and (3) *taʿzīr* – discretionary penalties). See further Chapter 1.

[4] The story (likely apocryphal) is not clear about the outcome in the case, but it conveys the impression that ʿAlī released the first man and pardoned the second, without further analysis as to why. That analysis was left to later Muslim jurists. On a strict textualist analysis of foundational texts establishing confession as probative evidence, the story could mean that when the second man confessed, ʿAlī might have made a determination of his guilt with certainty. But on a pragmatic analysis, the story could mean that even that confession had become subject to doubt given that the butcher's confession had initially yielded the same degree of certainty but moments later was reversed by the retraction and competing confession. Muslim jurists citing this and other cases as precedent for issues of doubt in matters of fact, law, and the moral propriety of punishment sought to explain why ʿAlī and other founding figures chose to, as they termed it, embrace doubt and avoid punishment in such cases.

work to unravel. To cut to the center first: Muslim jurists made doubt – and avoidance of punishment on its basis – a central pillar of Islamic criminal law. As myriad episodes like the *Case of the Falsely Accused Butcher* entered the corpus of early Islamic legal literature, perhaps carefully selected or constructed by later jurists as episodes worthy of preservation for their instructive fact patterns, Muslim jurists *retrospectively* explained such cases with reference to doubt. Taking cases such as that one as a precedent, those jurists then *prospectively* promoted a surprisingly extensive tendency of extending the benefit of the doubt to the accused. They packaged that tendency in the form of a directive calling on judges to "avoid criminal punishments in cases of doubt: *idraʾū ʾl-ḥudūd biʾl-shubahāt*."[5] I call this statement Islamic law's "doubt canon" – one of many Islamic legal maxims that were rooted in past cases and gained the status of an oft-repeated principle of interpretation that medieval Muslim jurists sought to apply to future cases.[6]

For the reader familiar with American criminal law, it is important to note here that the Arabic term for "doubt" in this canon, *shubha*, was a term of art. It assumed a much more expansive meaning than the common conception of reasonable doubt in American law. Rather than representing a principally fact-based standard of proof, the Islamic doctrine covered factual uncertainties, legal ambiguities, and even extralegal considerations that I call "moral doubt." Moreover, the Islamic doctrine of doubt corresponds to analogous American doctrines as seemingly disparate as the principle of legality; the presumption of innocence; legal ambiguity and the corresponding rule of lenity; the requirement for proof beyond a reasonable doubt and lesser standards of proof; *mens rea* requirements;

[5] Multiple treatises collecting Islamic legal maxims – a rich body of legal literature so far underexplored in both Sunnī and Shīʿī law – typically analyze criminal law doctrine through this doubt canon as did *fiqh* works before them. See, for example, Ibn ʿAbd al-Salām (d. 660/1262), *al-Qawāʿid al-kubrā*, 2nd ed., ed. Nazīh Kamāl Ḥammād and ʿUthmān Jumuʿa Ḍumayriyya (Damascus: Dār al-Qalam, 2007), 2:279–80; Shihāb al-Dīn al-Qarāfī (d. 684/1285), *Anwār al-burūq fī anwāʾ al-furūq* (Beirut: Dār al-Maʿrifa, 197-?), 4:1307, no. 240; Jalāl al-Dīn al-Suyūṭī (d. 911/1505), *al-Ashbāh waʾl-naẓāʾir fī qawāʿid wa-furūʿ al-Shāfiʿiyya*, ed. Muḥammad al-Muʿtaṣim biʾllāh al-Baghdādī (Beirut: Dār al-Kitāb al-ʿArabī, 1998), 236–38; Ibn Nujaym (d. 970/1563), *al-Ashbāh waʾl-naẓāʾir*, ed. Muḥammad Muṭīʿ al-Ḥāfiẓ (Damascus: Dār al-Fikr, 1983), 142.

[6] For a comparison between legal canons in Islamic law and American law, see my "Islamic Legal Maxims as Substantive Canons of Construction: *Ḥudūd*-Avoidance in Cases of Doubt," *Islamic Law and Society* 17, 1 (2010), 63–125. Elsewhere, I have called the statement "the Islamic rule of lenity," when emphasizing the aspects of legal ambiguity inherent in the concept of *shubha*. See my "The Islamic Rule of Lenity: Judicial Discretion and Legal Canons," *Vanderbilt Journal of Transnational Law* 44 (2011), 1299–1351.

mistake, ignorance, impossibility, and other potentially mitigating circumstances; and even mercy. In addition, the concept of *shubha* covers notions particular to Islamic law, such as "contractual doubt" and "interpretive doubt."[7]

This expansive meaning of doubt in Islamic law is doubly perplexing because doubt seems somehow misplaced in a religious legal tradition that posits God as a divine Lawgiver who asserts absolute supremacy over the law and who "legislated" a series of harsh criminal sanctions.[8] Indeed, given the ever-present specter of doubt, Muslim jurists obsessed over devising an "economy of certainty."[9] But if Islamic law is a textualist legal tradition requiring Muslims to apply the rule of God rather than the discretion of men (as Islamic theorists maintain that it is), how did doubt – about textual meaning as well as matters that were atextual and otherwise uncertain in nature – come to be so central and confer so much discretion on the jurists? Moreover, why did this occur? The remainder of this book seeks to untangle the means and motives behind the growth of doubt in Islamic criminal law, historically and in comparative perspective.

THE SIGNIFICANCE OF DOUBT

Before discussing those means and motives, it is worth considering why doubt is so significant as a subject of inquiry today beyond the counter-intuitive fact of its existence in popular and theoretical perceptions of Islamic law. I suggest three main reasons, each related to the relevance of doubt's history to the present.

One reason has to do with contemporary developments in the Muslim world, where Islamic law is spreading not only in constitutions and civil codes, but in criminal matters as well. Since the 1970s, more than thirty-eight countries have introduced constitutions with a clause declaring Islamic law to be "a source" or "the source" of state law.[10] During this

[7] For a detailed discussion of the various types of "doubt" folded into the doubt canon, see Chapters 5 and 6.

[8] See Chapter 1, Section B.1.

[9] Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Atlanta, GA: Lockwood Press, 2013), 1 ("From a very early period … Muslims came to treat the question of legitimacy along explicitly epistemological lines. Certainty and probability were the fundamental categories with which they approached every question of law. This concern with epistemology sets Islamic law apart from other legal systems that treat the problem of legitimacy in institutional terms.").

[10] See my "We the Jurists: Islamic Constitutionalism in Iraq," *University of Pennsylvania Journal of Constitutional Law* 10 (2008), 527–79, at 527, n. 1; and for updates, my "The

same period, at least a dozen states have adopted Islamic penal codes as well – in countries ranging from Iran, Pakistan, and Saudi Arabia to provinces in Malaysia, Northern Nigeria, and now Syria.[11] More recently, in the wake of the tumultuous Arab uprisings that began in 2010, there is great uncertainty about the fate of democracy and the rule of law, in no small part because of the raging battles between authoritarian secularist regimes and rebel Islamists who promote ill-defined or ill-conceived versions of Islamic law to oppose them.[12]

Least Religious Branch? Judicial Review and the New Islamic Constitutionalism," *UCLA Journal of International and Foreign Affairs* 17 (2013), 72–132, at nn. 1 and 17.

[11] One example is the draft criminal code of the Maldives, written in consultation with Professor Paul Robinson at the University of Pennsylvania Law School based on early Islamic legal sources, submitted to the Maldivian Government in 2006 for review, and passed into law in 2014. See Paul Robinson et al., "Codifying Sharīʿa: International Norms, Legality & the Freedom to Invent New Forms," *Journal of Comparative Law* 2, 1 (2007), 1–53. Other Islamic penal codes include those of Afghanistan (2004), Brunei (2014), Iran (1979, 1981, rev. 2013), Kuwait (1960, 1970), Libya (1972), Oman (1974), Pakistan (1979, as well as uncodified applications in the Swat Valley), Qatar (2004), Sudan (1983, 1991), United Arab Emirates (1988), and Yemen (1994), as well as provinces in Malaysia (Kelantan, 1993), Nigeria (multiple Northern states, 1999–2000), and Indonesia (Aceh, 2009). Non-codified practices are reported in Algeria (since 1993), Egypt (since 2012), Iraq (in 2014), Northern Mali (since 2012), Somalia (since the 1990s), and Syria (since 2011). For general discussion, see further M. Cherif Bassiouni, "Crimes and the Criminal Process," *Arab Law Quarterly* 12 (1997), 269–86; Rudolph Peters, "The Islamization of Criminal Law: A Comparative Analysis," *Die Welt Des Islams* 34 (1994), 246–74. For country-specific studies, see, for example, Ziba Mir-Hosseini, "Criminalising Sexuality: Zinā Laws as Violence Against Women in Muslim Contexts [in Iran]," *Sur* 8, 15 (2011), 7–34; Philip Ostien, ed., *Sharia Implementation in Northern Nigeria, 1999–2006: A Sourcebook* (Ibadan, Nigeria: Spectrum Books, 2007); Abdel Salam Sidahmed, "Problems in Contemporary Applications of Islamic Criminal Sanctions: The Penalty for Adultery in Relation to Women [in Sudan]," *British Journal of Middle Eastern Studies* 28 (2001), 187–204; Mohammad Hashim Kamali, "Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia," *Arab Law Quarterly* 13 (1998), 203–34; Asifa Quraishi, "Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective," *Michigan Journal of International Law* 18 (1996–97), 287–320; A. Jahangir and H. Jilani, *The Hudood Ordinances* [of Pakistan]: *A Divine Sanction?* (Lahore: Rhotac Books, 1988).

[12] See, for example, Said A. Arjomand, "Middle Eastern Constitutional and Ideological Revolutions and the Rise of Juristocracy," *Constellations* 19 (2012), 204–15; Malika Zeghal, *Constitution-Drafting and Islam in Tunisia* (forthcoming); Karim Mezran, "Constitutionalism and Islam in Libya," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tillmann J. Röder (Oxford: Oxford University Press, 2012), 513–33; Alex Warren and Lin Noueihed, *The Battle for the Arab Spring: Revolution, Counter-Revolution and the Making of a New Era* (New Haven, CT: Yale University Press, 2012). For a comparison of pre- and post-revolutionary activity, see further Nathan Brown, *When Victory Is Not an Option: Islamist Movements in Arab Politics* (Ithaca, NY: Cornell University Press, 2012) (examining the inability of Islamists to participate in politics before the Arab uprisings); and Nathan Brown, *Arab Constitutions in the 21st Century: A New Beginning or an Unhappy Ending?*

The emergence of such ill-conceived versions of Islamic law in recent times has prompted, more than anything, fears of its punishments. In fact, those punishments have come to define the face of "*sharīʿa*" itself – often left untranslated in order to highlight the exoticism and danger that it can evoke in the popular imagination. On this view, *sharīʿa* is no more than a religious code that expresses the will of an angry and vengeful god intent on oppressing women, amputating hands, and executing apostates. Indeed, reports of summary executions and other violence on the part of state actors in Iran, Northern Nigeria, and Saudi Arabia disproportionately meted out to women and religious minorities fuel this perception. Furthermore, reports of violence by non-state actors in Afghanistan, Mali, and Syria seem to reflect a view that enforcing Islamic criminal punishments as expansively as possible is a religious obligation with early Islamic origins that authorizes extralegal violence. On that view, it is no wonder that *sharīʿa* inspires fear of its spread not only in the Muslim world but throughout the globe. In the light of history, however, these views present a distortion of the theory and practice of Islamic criminal law, a distortion ironically adopted by the most vociferous proponents and opponents of "*sharīʿa*" alike.

In point of fact, new Islamic constitutions and codes do require many judges in the Muslim world to apply Islamic law in their decisions,[13] in ways deeply connected to Islamic legal history. Some judges in these Islamic constitutional countries tend to appeal to conceptions of Islamic law drawn from its foundational texts and from understandings of Islam's ever-authoritative "founding period," which stretched from the seventh to the eleventh century.[14]

(New Haven, CT: Yale Law School Dallah Albaraka Lectures on Islamic Law and Civilization, 2014).

[13] See, for example, *Constitution of the Arab Republic of Egypt*, art. 2 (1971, 1980, 2011, 2012, 2014) (including two additional clauses in the 2012 version – arts. 4 and 219, expanding the role of *sharīʿa* – which ultimately failed to appear in the subsequent version, although Article 2 survived). For analysis of the formation and execution of Egypt's "article 2" jurisprudence, see Clark Lombardi, "Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally 'Islamic' State," *Journal of Comparative Law* 3 (2008), 234–53; Clark Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa into Egyptian Constitutional Law* (Leiden: Brill, 2006).

[14] For example, *Egyptian Supreme Constitutional Court Case No. 62*, Judicial Year 19, 12 SCC 92–110 (Nov. 2006) (citing and applying Qur'ānic verses and legal canons on contractual performance to uphold a challenged property law statute); *Case No. 23*, 12 SCC 307–13 (Apr. 2007) (citing Qur'ānic verses and historical juristic interpretations of family law provisions to uphold an Art. 2 "*sharīʿa* clause" challenge to alimony requirements of personal status law reforms); *Case No. 45*, 12 SCC 1359–72 (Nov. 2009) (citing legal

As I use the phrase, the founding period for Islamic law begins with the legal developments articulated and attributed to the Prophet and other authoritative figures during Islam's first three centuries (seventh–ninth centuries): the "early founding period," or simply, the "early period." Authoritative figures during this first phase included the Prophet's companions for Sunnīs, his family members – especially the Imāms – for the Shīʿa, the associates of each group, and other learned scholars who took charge of matters of Islamic law and religion. Some of these scholars were the early jurists whom Islamic legal historians later dubbed the "founders" of Sunnī Islam's multiple legal schools. The founding period ends with a second phase that saw the systematization and "textualization" of Islamic substantive law, legal theory, and core legal maxims during the next two centuries (tenth and eleventh centuries): the "late founding period."[15] This second phase

canons and Islamic principles in upholding personal status law reforms requiring that marriages be registered to be recognized as valid). For an annotated translation of one SCC case, see Nathan J. Brown and 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)," *American University International Law Review* 23 (2006), 379–436 (analysis), 437–60 (translation). For an analysis suggesting that these judges continued this approach after the regime change of July 3, 2013, see Nathan Brown, "Egypt: A Constitutional Court in an Unconstitutional Setting" (unpublished paper presented at New York University Law School Constitutional Transitions Colloquium, Oct. 23, 2013).

[15] Rather than the more common but contested term among Islamic law specialists, "formative period," I use "founding period" to refer to legal developments from the beginning of Islam through the systematization and textualization of Islamic substantive law, legal theory, and core legal maxims for the reasons stated here. On the contested definitions and alternative designations of the "formative period" particularly as applied to Sunnī law, see, for example, Noel Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964) (dating that period to the beginning of the fourth/tenth century); Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993) (identifying the rise of the short law compendium, the *mukhtaṣar*, and the beginning of the period of *taqlīd* as the end of the formative period at the fourth/tenth to fifth/eleventh centuries); Mohammad Fadel, "The Social Logic of *Taqlīd* and the Rise of the *Mukhtaṣar*," *Islamic Law and Society* 3, 2 (1996), 195–233 (noting that the rise of the *mukhtaṣar* in Mālikī law did not occur until the seventh/thirteenth century and offering a different account of its meaning: as a "codification" and systematization of Islamic law into a system of knowable rules between non-binding common law and civil law); Jonathan Brockopp, *Early Mālikī Law: Ibn ʿAbd Al-Ḥakam and His Major Compendium of Jurisprudence* (Leiden: Brill, 2000) (dating the formative period to a time between the third/ninth and fifth/eleventh centuries with the rise of the *mukhtaṣar* and with jurists self-consciously referring to themselves as members of eponymically named schools of law); Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005) (revising Joseph Schacht's placement of the end of formative period in the third/ninth century, placing it in the fourth/tenth century, and defining it as "that historical period in which the legal system arose from rudimentary beginnings and then developed to the point at which its constitutive features had acquired an identifiable shape").

coincides with the so-called closing of the gates of *ijtihād*, a phrase that Sunnī Muslim jurists created to signal the settling of their legal schools and to suggest that they were applying God's rule rather than human interpretive discretion.[16] The history of doubt demonstrates that at least one significant foundational text and legal maxim was still in formation and flux during this founding period, suggesting that others were as well.

After this period, it is not that interpretation ended as the theory of closed gates suggests. Rather, Sunnī jurists sought to close the canon of foundational texts in their efforts to systematize Islamic law and place it more on a foundation of shared *textual* bases of authority than it had been in the previous era – when regional or judicial practice, charismatic authority, and local norms often prevailed. Put differently, the so-called gate-closing of Islam's late founding period signified the moment when Sunnī Muslim jurists – in the process of their attempts at systematizing Islamic law and legal theory – turned increasingly to the authority of texts and authoritative modes of interpretation, by which they simultaneously added to the textual corpus in textualizing legal maxims such as the doubt canon.

While the centuries of Islam's founding may now seem quite remote, the notion that Muslims look to that period as a source of legal authority should not sound strange to anyone familiar with the American legal tradition. Americans frequently appeal to the Founding Fathers from the eighteenth century to make arguments about the meaning of the U.S. Constitution today. Similarly, given the enormous weight of Islam's early period for defining power and authority in the Muslim world today, anyone interested in uncovering the possibilities and perils of Islamic law in modern times is best served by understanding its history. In short, inasmuch as harsh punishment presents the most barbed and thus challenging face of Islamic law, to understand Islamic criminal law's past is to better grasp its present. This book pursues that task.

A second reason relates to the importance of doubt in the structure of criminal justice more broadly, not only for Islamic law but also for

[16] The phrase led many modern historians incorrectly to accept that fiction as an actual end of interpretation in Islamic law. For further discussion of the "gates of *ijtihād*" and the "regime of *taqlīd*," see Chapter 5, nn. 90–93 and accompanying text. See also, for example, Baber Johansen, "Legal Literature and the Problem of Change: The Case of the Land Rent," *Islam and Public Law*, ed. Chibli Mallat (London: Graham and Trotman, 1993), 29–47 (repr. in Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999), 446–64) (arguing that legal change after this period came through commentaries and *fatāwā* literature, while the basic texts of the law treatises preserved the traditional opinions).

American law when both are examined comparatively. As comforting as certainty may be, in law it is much too often elusive.[17] Doubt pervades "open-textured" laws and becomes alarming when it arises in criminal law.[18] In this high-stakes area of law, the criminal process could result in unjustified deprivations of life, liberty, or property flowing from dubious convictions.[19] A challenge to any system of criminal law, doubt – if unheeded by operation of the doubt canon in Islamic law – could result in the wanton loss of life or limb. In short, attention to doubt in Islamic and other comparative contexts is important because criminal law tends to center on certainty, which is often in short supply, and because the stakes of getting criminal law decisions wrong are so high.

Before authorizing punishment, other legal traditions typically require knowledge of a crime's commission beyond a reasonable doubt. Roman law began with the legal maxim stipulating that there could be "*nulla poena sine lege*: no punishment without law."[20] Roman law further

[17] See Frederick Schauer, "An Essay on Constitutional Language," in *Interpretive Law and Literature: A Hermeneutic Reader*, ed. Sanford Levinson and Steven Mailloux (Evanston, IL: Northwestern University Press, 1988), 133–54 (describing the difficulty of achieving certainty in legal interpretation). On the "psychological comforts" derived from popular perceptions that textualist "plain meaning" rules necessarily lead to certain, predictable results, see Peter Linzer, "The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule," *Fordham Law Review* 71 (2002), 799–839.

[18] H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994) (orig. 1961), 125–28 (highlighting inevitable indeterminacies in general rules, standards, and principles that, "however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate"). See also Friedrich Waismann, "Verifiability," *Proceedings of the Aristotelian Society*, Supplementary Volume 19 (1945), 119–50 (introducing the term "open texture," popularized by Hart, to describe potentially unlimited uncertainties of meaning that arise from an inability to anticipate every possible application of a statement).

[19] See, for example, *United States v. Bass*, 404 U.S. 336, 349 (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* (Chicago: University of Chicago Press, 1967), 196–234, at 209). For the earliest iteration of this theme in U.S. federal law, see *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (barring federal common law crimes).

[20] For a standard history, see Adolf Schottlaender, *Die geschichtliche Entwicklung des Satzes*: Nulla poena sine lege (Breslau: n.p., 1911). For more recent comparative studies, see Georges Martyn, Anthony Musson, and Heikki Pihlajamäki, eds., *From the Judge's Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal Trials* (Berlin: Duncker und Humblot, 2013); Stefan Vogenauer and Stephen Weatherill, eds., *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Oxford; Portland, OR: Hart, 2006), esp. 1:584–89 (early continental usage of the principle of legality and *in dubio pro reo* as "benign interpretation") and 2:729–30, 839–41 (early English interpretations).