The Economy of Certainty

An Introduction to the Typology of Islamic Legal Theory

By Aron Zysow

Resources in Arabic and Islamic Studies

THE ECONOMY OF CERTAINTY

RESOURCES IN ARABIC
AND ISLAMIC STUDIES

series editors

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Aron Zyzow

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Cover image: From an elegant copy of the compendium on Ḥanafī law, the *Kitāb Majmaʿ al-baḥrayn wa-multaqā al-nayyirayn* by Ibn al-Sāʿatī (d. 694/1294 or 1295). Source: Wikimedia Commons.

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Series Editors' Preface

We are extremely pleased to be able to publish for the first time Aron Zysow's *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory*, a lightly revised version of his now classic 1984 Harvard University Ph.D. dissertation of the same title. For anyone working in the history of Islamic thought generally, and the history of Islamic legal thought and theology in particular, Zysow's work remains fundamental. It is still challenging and fresh, and most would agree that it has yet to be surpassed as an account of Islamic legal theory.

This edition includes a foreword by Robert Gleave of the University of Exeter, a new preface, and addenda by the author at the end of each chapter and to the bibliography. We also provide a table of page correspondences between this volume and the 1984 dissertation.

We would like to express our gratitude to Asiya Toorawa for time-consuming word-processing; to Elias Saba for careful editorial work and for preparing the indices; to Rob Gleave for writing an illuminating foreword; and to a generous anonymous donor for financial assistance. Above all, we are indebted to Aron Zysow for agreeing to let us publish this important work, and for taking the time to provide a new Preface, furnish very useful addenda, and attend to many details. Billie Jean Collins continues to provide us with encouragement and a venue for the publication of important work in the fields of Arabic and Islamic Studies—for this too we are most grateful.

Joseph E. Lowry
Devin J. Stewart
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Foreword

The continued importance of "The Economy of Certainty" to the study of Islamic legal theory is a tribute to the precision employed at its inception; the work's persistent relevance to the research into *uṣūl al-fiqh* makes its publication here more than welcome: it is, to use the language of *uṣūl*, imperative. Originally presented as a doctoral dissertation at Harvard University, "The Economy of Certainty" has retained its position as "essential reading" on many university curricula since its submission in 1984. In many disciplines, thirty-year old research borders on being antique; however, when read today, Zysow's presentation retains both its originality and its authority. Indeed, his characterization of the *uṣūl* discipline has been confirmed by research since he submitted "The Economy of Certainty"; Zysow's account might in fact be said to have *controlled* many subsequent lines of enquiry. Grand expositions of a discipline deserve to be written after, not before, the slog of discrete, detailed studies; in this case the order was reversed. It can be frustrating to spend much time reading up on an element of *uṣūl al-fiqh* and reach what one thought was an original observation, only to find Zysow has already expressed the idea, with typical prescience, deep in the 541 pages of "The Economy of Certainty." Certainly, I can recall no doctoral thesis so widely and continuously cited in the field of Islamic legal studies.

Ironically, the influence of "The Economy of Certainty" can be credited, in part, to its remaining in thesis form and its lack of formal publication. The conclusions of any thesis are understood to be provisional, exploratory and unofficial, even when the thesis has a wide scope (as indicated by a subtitle such as "An Introduction to the Typology of Islamic Legal Theory"); theses invite further research, either by the authors themselves, or by those who have had the tenacity to dig out a thesis and digest its findings. A thesis is not designed, in truth, to convince anyone beyond the examiners; and it is usually intended to be read by no more than a few dogged enthusiasts. These qualities have meant that subsequent researchers have felt free to use Zysow's ideas as a platform for their own research, or have been influenced by his approach without always given him due reference, or have explored the same questions, along the same lines as those found in "The Economy of Certainty," without fearing any accusation of duplication because it remained a thesis rather than a series of articles or a single volume.

Had "The Economy of Certainty" been available as a published monograph, scholarly interaction with Zysow's conclusions and analysis may well have taken on a different character. Even with the advent of the Portable Document Format (in which "The Economy of Certainty" has, for some time now, been available almost on demand), its status as a thesis has given it a certain cachet, enhanced rather than diminished by the protracted period it has remained unpublished. Its release here as a monograph, albeit in a lightly revised form and with additional thoughts from the author after each chapter and additional references, will undoubtedly alter that dynamic. People may now stumble across "The Economy of Certainty" serendipitously whilst browsing through a library (be it actual or virtual) and it will no longer be the preserve solely of those who seek it out. Publication will popularize it (as much as *uṣūl al-fiqh* can ever be popular), and it will lose some of its exclusivity thereby. This is not an argument against publication: the time is right—indeed, it has been for some time—for "The Economy of Certainty" to be more widely, and permanently, available. As a thesis and as an intellectual resource, "The Economy of Certainty" has influenced the field of *uṣūl* studies, perhaps to maximal effect, such has been its widespread distribution amongst devotees. Now, as a book, it will not only raise the assessment of *uṣūl* within the academic study of Islam, but also contribute to the understanding of the Muslim intellectual tradition more broadly as scholars in cognate fields are introduced to the sophistication both of *uṣūl*, and of Zysow's examination. Zysow himself, of course, has already exerted an influence in Islamic studies more generally. The penetrating critique and depth of understanding in "The Economy of Certainty" in relation to both *uṣūl* scholarship (and pre-1984 scholarship on *uṣūl*) has also been much in evidence in Zysow's engaging contributions to seminars and conferences and in his subsequent publications (see, for example, Zysow 2002, 2008).

The sustained standing of "The Economy of Certainty" within the field over three decades does not, however, indicate an intellectual catalepsy extinguishing any dynamism in the study of *uṣūl al-fiqh*. Whilst *uṣūl* remains an exclusive niche relative to the study of *fiqh* or actual legal practice, there has, in the intervening years, been a steady increase in the number of scholars engaged with Islamic legal theory both on its own terms, and in relation to various other disciplines of Islamic thought. Many of these, particularly in Anglophone scholarship, have been directly and obviously influenced by a reading of "The Economy of Certainty." For example, there has been an ongoing debate around the function or role of *uṣūl al-fiqh*. Wael Hallaq, who published widely on *uṣūl*-related topics in the 1980s, following the submission of "The Economy of Certainty," has argued eloquently and passionately for what might be termed the "practicality" of *uṣūl al-fiqh* (Hallaq 1984, 1992, 1997). For Hallaq, *uṣūl al-fiqh*'s function is best displayed when an *uṣūlī* writer devises or proposes a workable method of deriving practical law from the sources. Indeed the criterion for assessment of an *uṣūl* discussion, or even an *uṣūl* author, is the link with social reality and legal practice. This chimes with what many *uṣūl* writers themselves claim. The rhetoric of *uṣūl al-fiqh*—that is, its internal justification for its existence—is regularly linked by *uṣūl* writers themselves to the derivation of legal

norms (*fiqh*). Works of *uṣūl al-fiqh* are written (supposedly self-consciously) to describe the method whereby *fiqh* can be known. Furthermore Hallaq has argued that *fiqh* and social reality are themselves intimately linked, creating a seamless coherence to Islamic legal literatures from *uṣūl* to the implementation of law.

Other scholars have modified, developed or rejected Hallaq's characterization or developed wholly independent descriptions (Ahmed 2006; Lowry 2007). According to some, *uṣūl al-fiqh* serves, *ex post facto*, to justify existing *fiqh*—it is retrospective, rather than creating new law, explaining how we know what we know of the law (Jackson 2002). For others, *uṣūl al-fiqh* serves to "theologize" the *fiqh*—that is, make it more than simply law but religious law, as it links the law to revelatory texts (Weiss 2010). For yet others, *uṣūl* writers were concerned with the beauty and intellectual coherence of their own system rather than its practicality (Calder 1996). For all these scholars (and the various amalgam and hybrid positions spawned as scholarship develops), Zysow's "The Economy of Certainty" proved an essential starting point and conduit to understanding legal theory, and the examination of *uṣūl*'s purpose or role was possible only subsequently. Only after understanding *uṣūl* can one speculate as to its purpose: "The Economy of Certainty" enabled that primary understanding, and so academics felt able to speculate on the meta-question of function. Indeed, one could argue that those working in *uṣūl* are able to ask such questions because reading Zysow gave them a firm grasp of the basic geography of the principal questions animating *uṣūl al-fiqh*. It is not that "The Economy of Certainty" described all *uṣūl al-fiqh*, and that there was no need for further research: rather the framework of "The Economy of Certainty" is sufficiently ambitious and firmly established in the texts of *uṣūl* that one can legitimately turn to grander issues, and then do so on a firmer footing.

Zysow's reading for "The Economy of Certainty" was broad and, considering the material available at the time, quite extraordinary; consequently, his understanding of what is typical (and what is not; see p. 2) enabled readers to move on to other questions with sufficient confidence that the groundwork had been done. "The most basic patterns" (p. 2) of *uṣūl al-fiqh* have, for now, been adequately, described and presented in this accomplished piece of *recherche fondamentale*. His method was to focus on ʿAlāʾ al-Dīn al-Samarqandī (d. 539/1144), a scholar whose *Mīzān* he had studied in manuscript form, and for whom, one suspects, Zysow has enormous respect. Al-Samarqandī was a Central Asian Ḥanafī who did not conform to all the doctrines of his contemporaries. He reflected a community of Samarqand–based scholars who ploughed their own furrow, devising clever, theologically informed answers, to established *uṣūl* questions. A critique of "The Economy of Certainty" could be that Zysow's reliance on Samarqand makes its utility as a general account limited: but al-Samarqandī's originality (and his often lucid expressions of the central issue at stake in a problem) is set against the range of views and arguments across the various theological trends and movements. Whenever al-Samarqandī is not the most informative source, Zysow presents the views of an alternative author who discusses the issue more appropriately.

Before "The Economy of Certainty," one really had to resort to Goldziher's *The Ẓāhirīs* for an account of *uṣūl al-fiqh*, an account that had its own problems as a general description of legal theory (Goldziher 2008 [1971], German original published in 1884). After "The Economy of Certainty," the field of Islamic legal theory (at least in the English-speaking research community) was opened up to informed speculation as to the nature of the discipline itself. Zysow himself touches on the issue of *uṣūl*'s nature and purpose in his introduction to "The Economy of Certainty" (though questions of the *uṣūl*'s purpose do not form the primary focus of his enquiry). In some brief comments, he states first that "the study of these systems of legal theory is an end in itself" (p. 4) for the intellectual historian of Islam. This validation alone might be enough: *uṣūl al-fiqh* can be treated, as it was in many institutions of medieval Muslim learning, as a self-justified area of study, without immediate reference to its function or purpose in the broader "hierarchy of the Islamic religious sciences," let alone in wider society. Zysow was clearly aware, however, that this would not be enough for some. *Uṣūl* can be studied as an independent discipline, but for many writers, both in a Western academic and in a Muslim educational context, mere intellectual curiosity was an insufficient basis to justify a whole science. *Uṣūl* should also be studied because it is a science connectied with other sciences: Zysow specifically mentions scholastic theology (*kalām*) and law (or jurisprudence, *fiqh*). The study of *uṣūl* can help the historian of Islamic theology, for *uṣūl al-fiqh* (even in its so-called "legal" expressions) was intensely theological. *Uṣūl* was, at times, "theology-in-use," and this led to theological compromise as it encountered the law. With regard to the debated *uṣūl-fiqh* relationship, Zysow sees "no reason to doubt" (p. 5) the fact that jurists saw *uṣūl* as informing their derivation of the law; having said that, Zysow also states that the legal theorists were "conscious enough of the limitations of their attempt to reconstruct their own practices." These are not categorical statements arguing for any of the various views which emerged subsequently in the field concerning the relationship between *uṣūl* and *furūʿ*, and between *uṣūl* and legal practice (*furūʿ* is not, of course, practice, despite the temptation to view it as such). However, with characteristic foresight, Zysow's comments recognize the issues which will inevitably emerge in the study of *uṣūl* once the basic ground is marked out, namely, what the point of this legal theory might be—surely more than an intellectual game. A pressing issue at this stage for Zysow is procedural: "Before we can begin to determine how far the practice of the Muslim jurist diverges from his theory, we must first have a far better grasp on what that theory is" (p. 5).

Any debate over the rationale for studying *uṣūl al-fiqh* (beyond the "value in itself" argument of the purist academic) is premature when we do not yet have a decent grasp of the theory itself. For Zysow, if one wants a pragmatic reason to study *uṣūl*, it can be found in *uṣūl*'s ability to reveal how Muslim jurists conceived of the law before they carried out any actual legal derivation: that is, *uṣūl* aims to present a unified theory of how the law of God operates ("system and method" as Zysow puts it, p. 5). The notion of a unified system of law, in which each piece and procedure fits with another perhaps reflects the theological commitment to a single, unified deity. Most importantly, becoming aware

of such a notion enables us to understand how Muslim legal thinking is imbued with religious concerns. This is true of the Central Asian Ḥanafī *uṣūlī*s who form the primary focus of Zysow's analysis in "The Economy of Certainty," even though they are normally classed as "jurist-*uṣūlī*s" (*fuqahāʾ*). Jurist-*uṣūlī*s supposedly had an eye fixed squarely on the theory's ramifications for *fiqh* derivation, as opposed to the "theologian-*uṣūlī*s" (*mutakallimūn*) such as the Shāfiʿīs, who were more concerned with the theological implications of *uṣūl*.

What then are the patterns which run through *uṣūl* discussions, according to Zysow? The primary one is signalled in the title of the work itself: epistemology. For each question or issue (*masʾala*) of legal theory, there is an underlying epistemological question. So, the question of reports of the Prophet's words and acts (*akhbār*) and their ability to act as a source of law (*ḥujjiyya*) is, essentially, a question of knowledge. Theology might establish that the Prophet must be obeyed, but how knowledge of his exemplary action might be gained is the pressing issue of legal theory. Zysow examines the position of various Ḥanafī thinkers, often setting them against other theological and legal groupings, and positioning the issue within a broader set of concerns about religious doctrine generally. Theological truth is known with certainty, and the extent to which this mechanism of knowledge acquisition can be applied to *fiqh* is the focus of *uṣūl* discussions. The general position is that such gold-standard knowledge was not necessary, and legal derivation could proceed with less than certain knowledge of an individual report's authenticity: the resultant legal opinions and rulings were always colored by the fact that their origins (relative to *mutawātir* sources forming the bedrock of theological doctrine) were, relatively speaking, epistemologically compromised. The distinctive Ḥanafī position on these matters was to require varying the acceptable level of certainty for legal derivation depending on the content of the report: matters of "general [legal] concern" (p. 41) require a higher standard (*mashhūr*; though still less than *mutawātir*) than reports on the legal specifics. It was, Zysow argues, their theology, and the epistemology developed within that intellectual context, which explained the Ḥanafīs' distinctive legal views on the authenticity of prophetic reports.

Once a record of a speech act or an action (i.e., a text) is established as a potential source of law, understanding the legal significance of the words or action becomes crucial. Hence, Zysow next turns to "Interpretation." Here, once again, epistemology takes center stage. "How does one know what was said or done?" at some time past was a challenge to legal certainty; "how does one know what was meant?" is, in many ways, an even greater test of a coherent legal theory. Zysow establishes the *optimism* of the Ḥanafīs: words, when used by a Prophet, mean what they appear to mean, and it takes significant evidence to shift one's assessment of the apparently intended meaning to something else. One can know intended meaning from the natural workings of language, without the need for analogy. Analogy is not invalid, but it should not be used to replace the meaning to be found in the language system itself. This linguistic optimism (perhaps) contrasts with the greater incorporation of ambiguity (and perhaps a hint of pessimism

as to the self-sufficiency of language) in the Shāfiʿī system. In many elements, Zysow notes how the Central Asian Ḥanafī views represent a departure from, or radical development of, those of the Iraqi Ḥanafī founders of the school, or how one group of Central Asian Ḥanafīs adopted the Iraqi position, but others developed something new and distinctive. Among the Central Asian Ḥanafīs, Zysow is particularly impressed by the school of Samarqand (using al-Samarqandī as the principal source), who are committed to a theological distinction between belief and action, and carry this through to their legal-linguistic philosophy. Since the law is focused on regulating action, language's outward, natural, obvious meaning is sufficient to establish duties of performance. For example, a verb in the imperative mood, ordering a person to perform an action, does not indicate that the action is an obligation under the law; it might, however, indicate that the person should treat the action as if it is obligatory. Thus, he or she must perform the action, but it does not mean he or she need be committed to believing that the action is (in the mind of God, as it were) obligatory. Zysow returns again and again to the sophisticated connection between theology and legal theory found in the Samarqandī school, hinting at how it takes the well-worn paths of *uṣūl* debate to a new level, beyond the Shāfiʿī-Ḥanafī polemics of the earlier period, which by the thirteenth century had arguably become arid and predictable.

Theological and epistemological themes are also present in the exposition of the doctrine of consensus (*ijmāʿ*) being a source of legal knowledge. Whilst some have promoted *ijmāʿ* as the basis for all legal enquiry, Zysow rightly corrects such a portrayal. The sources of law, and their interpretation are not established by some consensus in the post-Prophetic period. Rather, consensus is "declaratory," confirming one opinion amongst many as the law, or discovering a new opinion where the sources are silent. The sources of law are established as reliable records of legal and theological messages by *tawātur*—their recurrent transmission within the community over time; *ijmāʿ* plays no role here. *Ijmāʿ* is, in fact, most akin to prophecy, and as the Prophet's mission was limited to certain areas of human life, so was consensus to be limited.

Zysow's respect for theologically informed *uṣūl al-fiqh* is demonstrated by his detailed exposition of analogical reasoning and debates among the Central Asian Ḥanafīs about whether speculation over the "causes" of legal rulings (a crucial part of the process of transferring rules from known to novel cases) constituted an (inadmissible) assessment of the workings of the divine mind. To avoid this theological problem, the Ḥanafīs opined that it was the ability of a reason to act as an effective cause of a rule which one was assessing, and the ultimate reason for the causal chain operating as it does is not available for rational scrutiny. This Zysow calls "the doctrine of effectiveness" (*taʾthīr*, p. 188), and that this cause is effective in bringing about that rule is the result of explicit designation by the Lawgiver (who effectively declares this to be the case) or by consensus (which, as we have seen, can act in a similar manner to Prophecy in revealing the workings of the law). The alternative notion of "appropriateness" ("it seems appropriate for this to be the cause of that") is debunked by the Ḥanafīs as thoroughly unconvincing,

personal and, most damningly, failing to be a revelation-based method of elaborating *uṣūl*. The most dangerous and radical expression of this trend is the theory of Najm al-Dīn al-Ṭūfī, in which the overall aim of the law is postulated as producing benefit for God's subject, and any individual law perceived to be at variance with that aim can be adjusted or discarded. Similarly, preference (*istiḥsān*) and the specialization of the cause (*takhṣīṣ al-ʿilla*), in which an analogy is rendered legally inoperative by other considerations (an "explicit" text, a consensus, a stronger analogy), seek to avoid any appeal to ultimate motives or benefits of law (see Opwis 2010). Once again, Zysow turns to al-Samarqandī for a sophisticated expression of the doctrine. His account has to be read to be fully appreciated, but it involves a nuanced accommodation of effectiveness to anti-specialization. When Zysow writes that "its very subtlety ensured that this accommodation would have no following" (p. 254), one detects a level of intellectual sympathy. Sometimes a discipline is not quite ready to encounter another level of sophistication and fully internalize its implications. This could be said both of al-Samarqandī's doctrine of effectiveness and also, perhaps, of Zysow's own presentation in "The Economy of Certainty."

In the final exposition, Zysow tackles *ijtihād*, aware of the sensitivity of the topic and the investment of Muslims in the modern period in its potential as a panacea for Islamic religion and law. There is, perhaps, nowhere else in his account of *uṣūl al-fiqh* that Zysow is better able to express his deep interest in and sensitivity to the epistemological dimensions of *uṣūl* than in this account of fallibilism (*takhṭiʾa*), infallibilism (*taṣwīb*), and probability. For the *uṣūlī*s the problem was acute, as the number of juristic opinions was multiplying with each generation, and a theoretical framework to encompass as many acceptable views as possible became essential. For Zysow, those arguing for some version of *taṣwīb*—saying that every qualified jurist is "correct" in his *ijtihād*—were pragmatic. That is, by arguing in this way, certainty is attained, but it is also emptied of singular content. Those arguing for *takhṭiʾa*—that one jurist is correct, and the others are justified but wrong in their *ijtihād*—had the advantage of supporting the institutional structure of the medieval law schools. One could accept their existence without accepting they they all were right and the that the truth was multiple. This gave the *takhṭiʾa* position the edge amongst the "solidly Ḥanafī" (p. 277) region of Central Asia, where Ḥanafī school tradition was dominant, whereas in other more mixed areas, *taṣwīb* survived. I do not think Zysow is necessarily entertaining a social cause for the persistence or demise of an *uṣūl* doctrine, but his comments on how infallibilism may have helped in the political unification of the Zaydīs, or on its rejection by various reformer movements (p. 275), reveal an interesting set of contexts in which certain doctrines might thrive, whilst others might perish.

Zysow's analysis in these chapters follows, approximately, the logical order of their exposition in works of *uṣūl*. From the outset, though, he postulates two broad categories of legal theory: those that incorporate probability (and hence uncertainty) into the theory, and those that reject this, and continually demand certainty. This is the major division proposed in his "typology" of *uṣūl* writers and it is, of course, an epistemological crite-

rion of classification. For the first group, there is commitment to the "formal" framework in which norms are created (in particular, the skills of the jurist and his employment of *ijtihād*). Zysow contrasts these "formalists" with "materialists" who argue that "every rule of law must be certain in order to be valid" (p. 3)—that it is the material content of the law, which is of prime importance, rather than the formal mechanisms of its creation. The majority of legal theorists in the history of *uṣūl al-fiqh* writings have been formalist in this sense. Examples of materialists include Twelver Shiʿism and Ẓāhirism and these are examined in some brief remarks in Zysow's Epilogue. In both cases, I would argue, materialism gave way to formalism in time. Ẓāhirism did not survive long enough as a vibrant intellectual tradition to fully formalize, but one can see the tendency already in Ibn Ḥazm (d. 456/1064) (Sabra 2007 and 2008). Twelver Shiʿism, notwithstanding the re-emergence (though not, as is sometimes portrayed, total dominance) of the materialist Akhbārism in the sixteenth–nineteenth centuries, eventually became thoroughly formalist, with a highly technical valorization of probability and *ijtihād* (Gleave 2000). Zysow suggests that the Twelvers moved from materialism to formalism, but there may have been juristic dispute and a theoretical encounter with probability before the demand for certainty found in the early Imāmī *uṣūl* writers.

Whatever the detailed critiques of Zysow's typology of materialist/formalist systems of legal theory, it has not (yet) been fully utilized in subsequent studies of *uṣūl*. This may be because it revolves too much around epistemological principles when the debate within the field of Islamic legal studies (at least since the emergence of the journal *Islamic Law and Society* in 1994) has emphasized the link between theory and practice rather than the internal operation of *uṣūl*. It may be because it has had a restricted readership (rectified, somewhat, by the present publication). Two additional actors, though, might be more pertinent here. First, there is the inherent problem with a classification system in which the vast majority of items fall into one category: most *uṣūl* writings have been unswervingly formalist, hence their extensive coverage in Zysow's work (materialist systems receive an eloquent, but nonetheless much briefer epilogue). Second, there is the rise of formidable "materialist" tendencies in modern Islamic thought. Whether because of increased exchange with alternative systems of legal thought, or as a rejection of them, the notion that a legal rule is merely probable, or the result of an individual scholar's fallible legal reasoning, is proving less persuasive both intellectually and popularly. *Uṣūl* scholars were products of educational systems which lost their authority and status during colonial domination in the Muslim world, a trend that continued during the subsequent era of national states.

Along with the loss of educational institutions, there has been the attempt to dismantle the intellectual institution of the *madhhab* in the name of reform. Rather like al-Samarqandī, Zysow's subtlety in expressing the materialist/formalist distinction may have restricted the potential influence of his ideas in the current climate. What the typology has done, though, is to introduce to the field of Islamic legal theory, a potentially fruitful exchange of the ideational structures of Western legal theory (formal and mate-

rial sources of the law; references to Kelsen, Hart and others, and so on). Employing these tools of analysis in the dissection *uṣūl al-fiqh* has proved popular, and developed into an interesting subfield within *uṣūl* studies. It perhaps could only have been due to someone with Zysow's interdisciplinary interests and training (jurisprudence, legal theory, Rabbinics, Jewish law) that the possibilities of alternative frameworks for understanding *uṣūl al-fiqh* could have emerged. It is because of this that "The Economy of Certainty" casts a long shadow over the years of subsequent research. It has been read and reread by those working on *uṣūl*, and now, hopefully, those working in linked fields of enquiry will be able to benefit from Zysow's masterly account of the epistemological and theological factors which make *uṣūl al-fiqh* such a distinctive and absorbing theory of law.

Robert Gleave

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Author's Preface

The publication of my 1984 Harvard doctoral dissertation "The Economy of Certainty" brings with it what can only be described, however blandly, as mixed feelings. While I am happy to present the work in this new more accessible version, I had long hoped to produce a totally expanded and revised book of the same name, a book that would have far surpassed its predecessor in scope, depth of analysis, and insight. That work, I have rather lately come to realize, while perfect in every respect, would most likely have been perfectly unreadable. There are limits to what can go into the making of a single book. Moreover, years of teaching have finally succeeded in making it clear to me that a balance between historical research and conceptual exposition is no easy achievement.

The *uṣūl al-fiqh* landscape has undergone enormous changes in the decades since this book was written. There is now a steadily growing academic literature on Islamic legal theory in Western languages, and interest on the part of graduate students in the discipline is probably at an all time high.[1] There are now, wonder of wonders, even courses on *uṣūl al-fiqh* at American universities (I have taught a few myself). The most dramatic change, however, has come from the Muslim World. A veritable flood of new text editions and re-editions as well as an enormous number of book-length studies and articles have put research in the field upon a far firmer footing. [2] The advent of the internet has now made it possible to amass without travel or cost an impressive *uṣūl al-fiqh* library, including publications of the utmost rarity, and even copies of manuscripts. The internet also provides a vital link among scholars worldwide, professional and amateur, who are interested in legal theory and its vast literature and who daily freely share their knowledge.

1. A landmark event was the September 1999 conference in Alta, Utah, papers from which were published in the volume, *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: Brill, 2002). A second Alta conference was held in September 2008, and a further volume of papers, dedicated to Professor Weiss, is scheduled to appear.

2. The variety of work exceeds easy categorization. There is even a codification of the discipline, Muḥammad Zakī ʿAbd al-Barr's *Taqnīn uṣūl al-fiqh* (Cairo: Maktabat Dār al-Turāth, 1409/1989), an apparently unprecedented effort as the author notes (pp. 8–9).

These developments are only in very small measure reflected in this edition of *The Economy of Certainty*. Its present publication has provided me with a welcome opportunity to correct some obvious mistakes and to append short notes to each chapter. It has not been possible, however, to undertake the considerable work (the drudgery, to be blunt) that would have been involved in updating the references to manuscripts that have since been published in one or more editions.[3] The original bibliography has been slightly expanded and corrected but otherwise reflects the state of research several decades ago. In this preface and in the additional notes I make rather selective reference to recent scholarship, limited almost exclusively to that in Western languages, in the hope of meeting the needs of those who may happen to first approach Islamic legal theory through this book and reasonably expect such guidance.[4]

"The Economy of Certainty" was an effort to catalog and map a broad range of opinions in Islamic legal theory rather than to focus on any single theorist or tradition.[5] For this purpose I naturally enough turned in the first instance to the classical treatises on the subject that were available. These treatises typically report the opinions of what is after all a rather restricted number of jurists and theologians. Indispensable as these general treatises are for a more or less systematic orientation in the field, they are far from exhausting its riches. Issues of legal theory are touched upon in many areas of Islamic learning, including the exegesis of the Qurʾān and *ḥadīth*, theology, and philology, not to mention the substantive law itself. The study of legal theory along historical lines needs to be put into contact with the history of these other disciplines, and the opinions of those who appear marginally or not at all in the standard treatises of *uṣūl al-fiqh* must be reflected in the on-going work of cataloging and mapping.[6]

3. These include two editions of the work that plays so large a role in this book, al-Samarqandī's *Mīzan al-uṣūl* (ed. Muḥammad Zakī ʿAbd al-Barr [Doha: Maṭābiʿ al-Dawḥa al-Ḥadītha, 1404/1984]; ed. ʿAbd al-Malik ʿAbd al-Raḥmān al-Saʿdī [Mecca: Wizārat al-Awqāf, 1407/1987]). Other editions have appeared bearing the name of al-Samarqandī's *al-Mīzān* that are in fact the work of Muḥammad ibn ʿAbd al-Ḥamīd al-Usmandī, first published under the title *Badhl al-naẓar* by Muḥammad Zakī ʿAbd al-Barr (Cairo: Maktabat Dār al-Turāth, 1417/1997).

4. Editors' note: These references to recent scholarship appear in an addendum after the main bibliography.

5. Recent valuable studies of individual legal theorists include Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996) and Joseph E. Lowry, *Early Islamic Legal Theory: The* Risāla *of Muḥammad ibn Idrīs al-Shāfiʿī* (Leiden: Brill, 2007). Lowry's translation of the *Risāla* has now appeared in the Library of Arabic Literature series: *Al-Shāfiʿī, The Epistle on Legal Theory*, ed. and trans. Joseph E. Lowry (New York: New York University Press, 2013).

6. For classical law there is now Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th–10th Centuries C.E.* (Leiden: Brill, 1997); for the formative period of theology, the monumental work of Josef van Ess, *Theologie und Gesellschaft im 2. und 3. Jahrhundert Hidschra*, 6 vols. (Berlin: de Gruyter, 1991–1997) has important discussions of developments in legal theory. For theology the writings of Richard Frank, Daniel Gimaret, Wilferd Madelung, and now Sabine Schmidtke and her colleagues in

Whatever the precise relation between Islamic legal theory and Islamic law, the fact is that the great treatises of classical law of all the schools make constant reference to the terms and concepts of *uṣūl al-fiqh*.[7] *Uṣūl al-fiqh* has long been an indispensable part of the training of every Muslim jurist. While the passing years have witnessed an enormous growth in academic work on Islamic law by Western scholars in many disciplines, it is my distinct impression that many of these scholars have not taken the trouble to learn even the rudiments of legal theory from its original sources. Instead they rely on the summaries of the experts. Without doubt such re-statements have their use (I certainly hope that "The Economy of Certainty" has been and will continue to be useful).[8] But it is my conviction that even the best second-hand accounts cannot substitute for the careful study of even a short classical work on *uṣūl al-fiqh*.[9]

Berlin, are particularly noteworthy. A survey of the Muʿtazilī contribution to *uṣūl al-fiqh* is prefaced by Sabine Schmidtke and Hasan Ansari to their facsimile edition of Ibn al-Malāḥimī's *al-Tajrīd fī uṣūl al-fiqh* (Tehran: Markaz-i Dā'irat al-Maʿārif-i Buzurg-i Islāmī, 2011). A study with a very significant theological component is A. Kevin Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought* (Albany: State University of New York Press, 1995). Joseph E. Lowry, "The Legal Hermeneutics of al-Shāfiʿī and Ibn Qutayba: A Reconsideration," *Islamic Law and Society* 11 (2004) 1–41, and Scott Lucas, "The Legal Principles of Muḥammad b. Ismāʿīl al-Bukhāri and their Relationship to Classical Salafī Islam" *Islamic Law and Society* 13 (2006) 289–324, address figures not prominent in the *uṣūl al-fiqh* treatises.

7. Ahmad Atif Ahmad, *Structural Interrelations of Theory and Practice in Islamic Law: A Study of Six Works of Medieval Islamic Jurisprudence* (Leiden: Brill, 2006) introduces the genre of *takhrīj al-furūʿ ʿalā al-uṣūl* works.

8. A superb short introduction, accurately described by its title, is Bernard G. Weiss, *The Spirit of Islamic Law* (Athens, GA: University of Georgia Press, 1998). An introduction along historical lines is Wael B. Hallaq's comprehensive *A History of Islamic Legal Theories: An Introduction to Sunnī uṣūl al-fiqh* (Cambridge: Cambridge University Press, 1997). Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd ed. (Cambridge: Islamic Texts Society, 2003) is heavily based on modern Arabic textbooks. An academic study focused on the modern period is Birgit Krawietz, *Hierarchie der Rechtsquellen im tradierten sunnitischen Islam* (Berlin: Duncker & Humblot, 2002)

9. Translations into Western languages of works of classical legal theory are sadly lacking. There is a French translation of the very short and popular introductory text of al-Juwaynī, *al-Waraqāt* with the commentary of al-Ḥaṭṭāb by Léon Bercher, *Les fondements du fiqh: Kitab al-Warakat fi uçoul al-fiqh: le livre des feuilles sur les fondements du droit musulman* (Paris: Iqra, 1995). An English translation of *al-Waraqāt* by David R. Vishanoff is available on his University of Oklahoma website. An annotated French translation of a classical intermediate-length text, Abū Isḥāq al-Shīrāzī's *Kitāb al-Lumaʿ* is available in Éric Chaumont's *Traité de théorie légale musulmane* (Berkeley: Robbins Collection, 1999), which contains a valuable *uṣūl al-fiqh* bibliography (pp. 367–401) covering both primary and secondary literature. Chaumont's critical edition of the Arabic text of *Kitāb al-Lumaʿ* was published in *Mélanges de l'Université Saint-Joseph* 53 (1993–1994). The fullest exposition of classical Sunnī *uṣūl al-fiqh* in any Western language is probably Bernard G. Weiss's T*he Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidi*, rev. ed. (Salt Lake City: University of Utah Press, 2010). The first of the three levels of the Twelver Shiʿi jurist Muḥammad Bāqir al-Ṣadr's *al-Durūs* has appeared in two English translations, *Lessons in Islamic Jurisprudence*, trans. Roy Parviz Mottahedeh (Oxford: Oneworld, 2003) and *Principles of Islamic Jurisprudence: Shiʿi Law*, trans. Arif Abdul Hussain (London: ICAS: 2003). The ultimate and quite

There are, of course, those who will need no special encouragement to pursue the study of *uṣūl al-fiqh* either because its practical significance is immediately obvious to them or because they quickly come to fall under its spell. I number myself among the latter, and it is precisely the bearing of the questions of *uṣūl al-fiqh* on so many fields of thought that has kept my interest alive. Those with a philosophical bent, for example, will find that *uṣūl al-fiqh* touches upon epistemology, the philosophy of language, moral theory, and the philosophy of science. For scholars to fail to attend to such obvious connections is not only for them to miss an opportunity to bring an apparently arcane corner of Islamic studies into the wider fold of human learning but equally to impoverish Islamic studies.[10]

difficult test of such translations is whether they are intelligible to a reader without knowledge of the original. With few exceptions, such as "analogy" for *qiyās* and "consensus" for *ijmāʿ*, there is currently little uniformity in the renderings of even common technical terms, and such uniformity is unlikely to emerge. In any case, it is questionable whether agreement in the translation of technical terms in works of *uṣūl al-fiqh* should even be a goal, the point being to capture the sense of such terms, not to imprison them.

10. It is worth noting that Islamic legal theory left its mark on medieval Jewish law, both Rabbinite and Karaite, and the surviving Jewish texts documenting this influence are apt to shed important light on *uṣūl al-fiqh*. See David E. Sklare, *Samuel b. Ḥofnī Gaon and His Cultural World: Texts and Studies* (Leiden, Brill, 1996) and Gregor Schwarb, "*Uṣūl al-fiqh* im jüdischen *kalām* des 10. und 11. Jahrhunderts: Ein Überblick," in *Orient als Grenzbereich?: Rabbinisches und außerrabbinisches Judentum*, ed. Annelies Kuyt and Gerold Necker, Abhandlungen für die Kunde des Morgenlandes 60 (Wiesbaden: Harrassowitz, 2007), 77–104.

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Professor Wolfhart Heinrichs made every effort to arrange for the publication of this book many years ago, and my unreasonable resistance in no way reflects on the respect in which I hold him.

For hope and inspiration I thank Sarah, Esther, and David, a threefold blessing.

I dedicate this book to my mother and to the memory of my father. I wish I could offer them far more.

Abbreviations

Āmidī: al-Āmidī. *al-Iḥkām fī uṣūl al-aḥkām.*
Asnawī: al-Asnawī. *Nihāyat al-sūl fī sharḥ minhāj al-wuṣūl.*
Badakhshī: al-Badakhshī. *Manāhij al-ʿuqūl fī sharḥ minhāj al-uṣūl.*
Baḥr: al-Zarkashī, *al-Baḥr al-muḥīṭ*
Bājī: al-Bājī. *al-Minhāǧ fī tartīb al-hiǧāǧ.*
Bazdawī: al-Bazdawī, Fakhr al-Islām. *Uṣūl al-fiqh.*
Bukhārī: al-Bukhārī. *Kashf al-asrār ʿan uṣūl Fakhr al-Islām al-Bazdawī.*
Burhān: al-Juwaynī. *al-Burhān fī uṣūl al-fiqh.*
Dabūsī: al-Dabūsī. *Taqwīm al-adilla fī uṣūl al-fiqh.*
Dharīʿa: al-Sharīf al-Murtaḍā. *al-Dharīʿa ilā uṣūl al-sharīʿa.*
Fawātiḥ: al-Anṣārī, ʿAbd al-ʿAlī. *Fawātiḥ al-raḥamūt sharḥ musallam al-thubūt fī uṣūl al-fiqh.*
Fuṣūl: al-Mufīd. *al-Fuṣūl al-mukhtāra min al-ʿuyūn wa'l-maḥāsin.*
Ḥujaj: al-Bazdawī, Abū'l-Yusr. *Kitāb Maʿrifat al-ḥujaj al-sharʿiyya.*
Ḥuṣūl: Ṣiddīq Ḥasan Khān. *Ḥuṣūl al-maʾmul min ʿilm al-uṣūl.*
Ibn ʿAqīl: Ibn ʿAqīl. *Le livre de la dialectique d'Ibn ʿAqīl.*
Iḥkām: Ibn Ḥazm. *al-Iḥkām fī uṣūl al-aḥkām.*
Intiṣār: al-Khayyāṭ. *Kitāb al-Intiṣār.*
Irshād: al-Shawkānī. *Irshād al-fuḥūl ilā taḥqīq al-haqq min ʿilm al-uṣūl.*
Jamʿ: al-Subkī, Tāj al-Dīn. *Jamʿ al-jawāmiʿ.*
Jaṣṣāṣ: al-Jaṣṣāṣ. *al-Fuṣūl fī al-uṣūl.*
Jawāmiʿ: al-Nāṭiq bi'l-Ḥaqq. *Kitāb Jawāmiʿ al-adilla fī uṣūl al-fiqh.*
Lumaʿ: al-Shīrāzī. *al-Lumaʿ fī uṣūl al-fiqh.*
Madkhal: Ibn Badrān. *al-Madkhal ilā madhhab al-Imām Aḥmad ibn Ḥanbal.*
Maḥṣūl: al-Rāzī. *al-Maḥṣūl fī uṣūl al-fiqh.*
Manār: al-Nasafī, Abū 'l-Barakāt. *Sharḥ al-Manār wa-ḥawāshīhi min ʿilm al-uṣūl.*
Mankhūl: al-Ghazālī. *al-Mankhūl min taʿlīqat al-uṣūl.*
Māwardī: al-Māwardī. *Adab al-qāḍī.*
Mīzān: al-Samarqandī. *Mīzān al-uṣūl fī natāʾij al-ʿuqūl.*
Mughnī: ʿAbd al-Jabbār. *al-Mughnī fī abwāb al-tawḥīd wa'l-ʿadl.*
Musawwada: Ibn Taymiyya. *al-Musawwada fī uṣūl al-fiqh.*

Mustaṣfā: al-Ghazālī. *al-Mustaṣfā min ʿilm al-uṣūl.*
Muʿtamad: al-Baṣrī. *Kitāb al-Muʿtamad fī uṣūl al-fiqh.*
Nasafī: al-Nasafī, Abū 'l-Barakāt. *Kashf al-asrār fī sharḥ al-Manār.*
Nuʿmān: al-Nuʿmān ibn Muḥammad. *Kitāb Ikhtilāf uṣūl al-madhāhib.*
Qarāfī: al-Qarāfī. *Sharḥ tanqīḥ al-fuṣūl fī ikhtiṣār al-maḥṣūl fī al-uṣūl.*
Qawāṭiʿ: al-Samʿānī. *Qawāṭiʿ al-adilla.*
Rawḍa: Ibn Qudāma. *Rawḍat al-nāẓir wa-junnat al-munāẓir.*
Sarakhsī: al-Sarakhsī. *Uṣūl al-Sarakhsī.*
Shifāʾ: al-Ghazālī. *Shifāʾ al-ghalīl fī bayān al-shabah wa'l-mukhīl wa-masāʾil al-taʿlīl.*
Tabṣira: al-Nasafī, Abū 'l-Muʿīn. *Kitāb Tabṣirat al-adilla.*
Talwīḥ: al-Taftāzānī. *al-Talwīḥ.*
Taqrīr: Ibn Amīr al-Ḥājj. *al-Taqrīr wa'l-taḥbīr.*
Taysīr: Amīr Bādshāh. *Taysīr al-taḥrīr.*
Ṭūsī: al-Ṭūsī. *Kitāb ʿUddat al-uṣūl.*
ʿUdda: Abū Yaʿlā. *al-ʿUdda.*