

**CROWDSOURCING SHARI‘A: DIGITAL FIQH AND CHANGING DISCOURSES OF TEXTUAL
AUTHORITY, INDIVIDUAL REASON, AND SOCIAL COERCION**

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By

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ABSTRACT

The relationship of textual authority and individual reasoning forms the basic dynamic found in the work of classical Islamic jurists. Using primary sources drawn from websites, blogs, and online messageboards, I will explore the ways in which digital *fiqh* alters the prescriptive discourses of this basic interaction. I will argue that the Internet's tendency to democratize knowledge and encourage the formation of “echo chamber” communities of like-minded individuals, combined with the lack of functional systems of shari‘a in the modern nation-state, will create a new normative discourse of *fiqh* in which personal knowledge and moral reasoning outweigh classical constructions of text-based authority. In practical terms, popular Muslim conceptions of shari‘a will become more individualistic, less likely to be derived from classical discourses, and more deeply rooted in personal experience and opinion. This process represents a reversion to the prescriptive discourses employed by the earliest Muslim jurists, who worked in sociopolitical circumstances surprisingly similar to those of contemporary digital Muslim communities.

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Many thanks,
Sarah Cowles Smith

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INTRODUCTION

The relationship of textual authority and individual reasoning forms the basic dynamic found in the work of classical Islamic jurists. The work of the mufti, who acts as one of the primary contributors to substantive law, embodies the encounter of authority and human reason in *fiqh*. Using primary sources drawn from websites, blogs, and online messageboards, I will explore the ways in which digital *fiqh* alters the prescriptive discourses of this basic interaction. I will argue that the Internet's tendency to democratize knowledge and encourage the formation of “echo chamber” communities of like-minded individuals, combined with the lack of functional systems of shari‘a in the modern nation-state, will create a new normative discourse of *fiqh* in which personal knowledge and moral reasoning outweigh classical constructions of text-based authority. In practical terms, popular Muslim conceptions of shari‘a will become more individualistic, less likely to be derived from classical discourses, and more deeply rooted in personal experience and opinion. While this development is a reversal or rebuttal of the classical, medieval discourses that emphasized textual evidence over personal moral judgment, it also suggests a return to the extremely decentralized *fiqh* practiced in the earliest decades of Islam, when customary considerations and personal discretion formed the backbone of the law. The earliest Muslim legal system was the product of a community on the move, with uncertain knowledge of religious texts and a central government that had little if any direct interaction with the judicial apparatus. This historical situation, which produced a diverse and flexible legal system based on jurists’ individual moral reasoning, bears a striking resemblance to the one in

which diasporic Muslims find themselves now – and they have reacted by creating a legal-moral discourse that bears a strong resemblance to that of their earliest co-religionists.

The Internet abounds with Muslim-oriented websites, blogs, and messageboards offering *fatāwā* and straightforward personalized advice on issues of religious law. These sites, many of which are written and maintained by web-savvy laymen rather than traditionally educated *fuqahā*, focus strongly on issues of marriage and divorce. In particular, many of them offer advice to Muslim women who are considering the implications of pursuing a *khul*' divorce. Evolving approaches to the issue of wife-initiated *khul*' divorce are an especially pertinent lens through which we might examine the development of digital discourses on *fiqh*. The authors of these websites use innovative methodologies to make arguments for and against the availability of *khul*', with fascinating results. Their conclusions diverge at times from those found in classical Islamic jurisprudence and historic court records, but also sometimes parallel classical discourse and practice. Each Internet "mufti" is developing new approaches to understanding and interacting with shari'ah by subordinating textual authority to modernist moral discourses, while disregarding or minimizing traditional scholarly qualifications. Digital *fiqh* is distinguished from that produced via other media by two characteristics: First, the Internet itself serves as a vast repository of information, allowing for a greater aggregation of Islamic religious knowledge than was possible at any other point in history. Second, digital *fiqh* is characterized by the potential for exchange of information and ideas – *fiqh* in every other medium is shared through a one-way transmission, but in the digital realm it can be directly debated and mutually determined. It is crowdsourced in every sense of the term.

It should be noted that my argument does not suggest that the ongoing, digitally aided pluralization of religious knowledge is indicative of a new trend within Islamic legal and moral discourses. Rather, I concur with Peter Mandaville's suggestion that the methodologies and practices of *fiqh* have always grown from a tradition of decentralized nodes of authority interacting with a tradition of personal ethical responsibility. The historically novel factor, then, is the introduction of digital *fiqh*, which allows individuals to not only derive their own, personalized moral conclusions from the familiar textual and legal authorities, but to share those conclusions with a global audience and to create a new kind of imagined community: the online diasporic *umma*, composed of like-minded individuals interpreting Islamic law and ethics through perspectives unlike those of any historical *umma*, except perhaps the earliest one.

Nor do I argue that the methodologies of writing *fatāwā* have been vastly changed by the Internet; there is no doubt that, over the centuries, muftis have often used secondary textual evidence to support their personally reasoned conclusions. Even in digital *fiqh*, the practice of fatwa production resembles that of early and classical-era muftis. Rather, I argue that the normative, discursive relationship of textual authority to individual moral reasoning has been reversed from its classical, medieval form and has cycled back to resemble the earliest Islamic legal discourses, which were highly customary and often made little if any reference to textual evidence. The vestigial use of textual evidence is retained in digital *fatāwā*, but muftis rarely if ever show signs of believing that textual evidence genuinely ought to outweigh individually reasoned opinions. For the past century or more, Muslim reformers have been claiming to reject traditional authority as part of their project to "purify Islam and restore it to its original strength

by returning to the scriptural sources of Qur'an and sunna,"¹ a project that took as its foundational assumption that idea that *ijtihad* had died out and must be revived. However, even these radicals retained the medieval prescriptive discourse that mandated the supremacy of textual authority over personal reasoning. It is only with the birth of digital *fiqh* that this discourse has been turned on its head.

The past two centuries' demolition of historical Muslim systems of governance and law has led to a series of attempts to reshape those systems into contemporary validity – indeed, many of the Muslim political movements of recent history have taken this search as a core *raison d'être*. Practitioners and consumers of digital *fiqh* likewise seek to reconcile the historical forms of legal practice with modern social and political realities. For them, the absence of traditionally structured shari'a courts and practices is mitigated by digital forums that reproduce the forms of the classical shari'a system while adapting its markers of authority and its approach to individual conscience. Interestingly, the assumptions and markers of textually-based authority have not changed significantly, even in the past two centuries, while understandings of the jurist's individual moral responsibility have shifted considerably since the earliest era of shari'a.

In the twentieth century, political developments in Muslim countries eroded the authority of local muftis and *fuqahā'* at the same time that many Muslims became citizens of Muslim-minority countries that lacked any shari'a tradition.² Many of these Muslims, especially members of the diaspora, "encounter Islamic law only to the extent that we choose to apply it in

¹ Felicitas Opwis, "An Islamic Reformation?," in *Shari'a: Islamic Law in the Contemporary Context*, edited by Abbas Amanat and Frank Griffel, 40.

² Abdullahi Ahmed An-Na'im, *Islam and the Secular State*, 18-19.

our personal dealings.”³ Non-Arabic-speaking Muslims were even more alienated from traditional *fiqh* by virtue of the language barrier, and so were doubly unable to observe the practice of traditional shari‘a. These factors appear to have caused a body of law and jurisprudence built over centuries to shift in the popular imagination of many Muslims, perhaps especially non-Arabs and members of the diaspora, from a system of serious scholarship to a set of text-based moral precepts.⁴ Muslims of the so-called diaspora may be perceived as being particularly estranged from the classical shari‘a system, but in reality, there is no nation-state on the planet that practices shari‘a in a traditional sense – notwithstanding the possible exceptions of northern Nigeria, where local courts still observe “Maliki substantive law and procedure,”⁵ and Saudi Arabia, where uncodified shari‘a law is applied.⁶

Most of these “shari‘a-based” legal systems, which are found in many Muslim-majority countries, bear little resemblance to the decentralized, pluralistic shari‘a of the classical era. Codification not only alienates law from its roots in the shari‘a by privileging a single interpretation of the law over all others, but also provides opportunities for the state to manipulate the law for its own purposes. When governments are “allowed to usurp the process by which shari‘a is determined,” it becomes possible for the state to grant itself “unrestrained

³ Kecia Ali, *Progressive Muslims*, 163.

⁴ Yvonne Y. Haddad and Barbara Stowasser, *Islamic Law*, 7-10.

⁵ Muhammad Khalid Masud, David S. Powers, and Rudolph Peters, “Qadis and Their Courts: An Historical Survey,” in *Dispensing Justice in Islam: Qadis and Their Judgements*, 41.

⁶ The Saudi Arabian situation is unlikely to continue much longer, according to a recent report in the Jerusalem Post. The article reports that Saudi Arabia is nearing completion of a \$2 billion effort to codify its laws and standardize its legal system, and suggests that the effort is part of a political campaign to prove the viability of shari‘a as a source of law. See Rob L. Wagner, “Saudi Arabia gets ready to put order in its courts,” The Jerusalem Post, February 24, 2011, <http://www.jpost.com/MiddleEast/Article.aspx?ID=209745&R=R1>

legislative and executive powers,”⁷ a situation that lends itself to the politically driven legislation of divine law. One might even argue that all Muslims are in some way members of a sort of juridical diaspora, one in which the historic relationships of law, state, and self have been recently replaced by modern, codified models that incorporate classical *fiqh* norms only partially, if at all. The gradual disappearance of the institutions and educational system associated with classical shari‘a have fundamentally changed its meaning – away from a scholarly process and toward a content based on moral values.⁸

Immediately on the heels of this process of alienation came the advent of the Internet, where individual Muslims share home-brewed *fatāwā* and exchange theories of shari‘a. In this arena, lay opinions and interpretation can appear to carry as much weight as those of any trained jurist. “The backgrounds of a cyber ‘alim may be rooted in skills other than recognized training in the principles of Islamic jurisprudence[, but] this may not delegitimize that individual in the eyes of the person accessing the ‘alim’s site,” Gary R. Bunt reports, going on to note that, “[c]onventions of religious authority have been challenged by those networks, organizations, and individuals intent on redefining Islam for a digital age.”⁹ The capability to rapidly publish cut-and-pasted text on the Internet has accelerated the laicization of jurisprudence. In traditional jurisprudence, the oral preservation of texts naturally limited popular access to legal theory, whereas on the Internet, individuals can find textual backing for virtually any argument they

⁷ Khaled Abou El Fadl, “Constitutionalism and the Islamic Sunni Legacy,” *UCLA Journal of Islamic and Near Eastern Law* 1 (2001): 74-75.

⁸ Brown, Nathan. “Shari‘a and State in the Modern Muslim Middle East.” *International Journal of Middle East Studies* 29 (1997): 359.

⁹ Gary Bunt, *IMuslims*, 32.

wish to make. Especially for non-Arabic speakers, *fiqh* may be more accessible now than it has been at any point in the past.

These two factors – the idea of shari‘a as a set of mere moral precepts, combined with the Internet’s gradual destruction of the role of the expert – created a situation in which it was remarkably easy for many Muslims to reevaluate, consciously or not, the classical, normative relationship of textual authority and personal moral reasoning. The process of negotiating this abruptly restructured landscape gained new urgency and new potential with the advent of the Internet, where hundreds, if not thousands, of websites offering shari‘a-based advice have appeared in recent years. Each interaction on these sites appears to implicitly recognize the tension between their self-assigned mandate and the realities of digital communications. Digital “muftis” appropriate the classical markers of authority while often lacking any training in the sources of that authority; each individual posts an *istifta’*, a request for a fatwa, in a search for authoritative information that is often difficult to find. The result is a hybridized creation in which shari‘a is understood and experienced from an entirely new vantage.

This widening of access to religious texts and authority allows individual Muslim, both law-writers and -readers, to interpret and even create legalistic texts and opinions. As Bunt argues, the “decentralization” of religious scholarship means that “the opportunities to present and disseminate decisions based on *ijtihad*, for example, are far greater than they were in the 1990s. Any person who deems themselves (or is proclaimed) an authority can make a pronouncement and upload it on a website.”¹⁰ To borrow a buzzword beloved by the change

¹⁰ Ibid., 278.

agents of Western digital media, one might say that shari‘a has been crowdsourced,¹¹ which is to say that it has been appropriated and re-defined by the truly public sphere of the Internet.

Classical Sunni *fiqh* and its less-scholarly online cousin bear certain superficial resemblances to one another, but differ on so many key points of prescriptive discourse as to be almost entirely separate entities. At the same time, digital muftis’ discourses of authority and reason are quite similar to those of the earliest *umma*, when jurists’ decisions were based on *ra’y* “as derived from local customs and laws, administrative regulations, the Koran, and Islamic norms ... there was no attempt to develop a consistent methodology or to adhere to precedent.”¹² In practice, online muftis select *ahādīth* and Qur’anic verses to support the conclusions they wish to reach – much like the practice of their classical and early predecessors. Unlike the medieval scholar’s approach of extrapolating legal arguments from atomistic textual interpretation,¹³ Internet jurists use textual evidences as secondary sources to bolster arguments founded in modern moral and social beliefs. In a very real sense, although with little fanfare, these self-appointed Internet muftis have incorporated modernist moral frameworks of gender, power, and family into the sources of this online quasi-jurisprudence, alongside the Qur’an, Sunna, *ahādīth*, and *ijmā’*. It is worth noting that the vast majority of digital muftis present themselves as men or give no indication of their gender. The relative scarcity of women writing digital *fatāwā* suggests that there are still in existence some of the old social barriers to the

¹¹ See <http://en.wikipedia.org/wiki/Crowdsourcing> for an extended definition of the term “crowdsourcing.” Appropriately enough, Wikipedia itself is, of course, a crowdsourced encyclopedia.

¹² Matthew Lippman, “Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law,” *Boston College International and Comparative Law Review* 12 (1989): 31.

¹³ Wael Hallaq, *Shari‘a: Theory, Practice, Transformations*, 45-51.

democratization of *fiqh*. These sites represent a democratization of normative religious discourse that is an inevitable product of the Internet, but even digital media's power to level social barriers is not absolute.

A NOTE ON PRIMARY SOURCES AND TERMINOLOGY

All of the *fatāwā* that I examine here are profoundly modern in their outlooks. Aside from a handful of important exceptions, all identified in the text, their authors are probably not qualified as muftis; they tend to adopt aspects of the roles of qadi, mufti, and *faqih* in non-traditional ways, so that none of these terms is a precise match for their activities. However, they most closely hew to the role of the mufti, which is the term I will apply here. Their websites appear, for the most part, to be the work of enthusiastic amateurs; their opinions are presented as *fatāwā*, but lack the intellectual rigor of the traditional practice. For these reasons, I have restricted my analysis to online *fatāwā* that make hadith-based arguments, in the hope of discerning with the greatest possible clarity their distinctions from traditional practice and the underlying logic of their claims. Due to the wide-ranging and ill-defined boundaries of digital *fiqh*, I apply a rather loose definition of the term “digital mufti,” including any person who publishes advice on issues of shari’a, regardless of qualification, ranging from the well-known and classically trained Shaykh Ibn Baaz to anonymous individuals who lack any authority beyond a strong opinion.

Where websites include documentation of their preferred *ahādīth*, it has been preserved in this paper. Several of these sites have published nearly identical *fatāwā* with slight variations;

in these cases it is almost impossible to know which opinion is the original and which is plagiarized. Where a fatwa posted on one site is signed and a nearly identical one from another site is not, I attribute the fatwa to the named author in text or in footnotes. It should be noted here that many of these *fatāwā* appear to be written by non-native speakers of English and contain grammatical and spelling errors, which I have preserved to avoid accidentally altering their meanings.

These websites express a wide variety of intended purposes and moral/religious views; some are obviously designed expressly to advance political agendas (at several points along the spectrum) and others act as resources of practical shari‘a knowledge related to marriage and divorce, publishing advice columns and offering access to counselors or personal legal advice, and even supporting messageboards for individuals to exchange ideas and arguments. Several sites include official-looking *khul’* or *talaq* applications which can be submitted to, for example, “a panel of scholars, representing many established institutions in the UK.”¹⁴ A small fraction of these sites self-identify with particular *madhahib*, but most use a modernist “patchwork” approach to *fiqh*, borrowing from variant traditions to suit their goals. All of them exclusively select *ahādīth* that support their predetermined arguments and disregard others, often without regard to the relative authenticity of any given tradition.

Finally, both primary and secondary sources differed in describing the overlapping relationship of the *khul’* divorce to *faskh*, the annulment of a marriage by a qadi. The variables involved – return of the *mahr*, the “legitimacy” of the reason for the *khul’* request, and the

¹⁴ Islamic Shari‘a Council, “Who we represent,” <http://www.islamic-sharia.org/about-us/about-us-3.html>.

husband's consent or non-consent – are grouped in the *khul'* category by some online authors and in the *faskh* category by others, while a few authors seemed to use the terms almost interchangeably. For instance, some digital muftis say that *khul'* (and the return of the *mahr*) occurs in cases with a non-compelling reason for divorce, and *faskh* (which does not require the return of the *mahr*) occurs in cases where a qadi forces divorce on an abusive husband. Others write that all legal dissolutions of marriage in which the wife initiates the request are *khul'*, regardless of the circumstances or the husband's consent. I encountered several variations on this theme, often presented with little explanation. For the purposes of this paper, I will refer to all wife-initiated dissolutions of marriage as *khul'*, except in the few cases where an explicit differentiation is made possible by the source text.

TEXTUAL AUTHORITY, INDIVIDUAL MORAL REASONING, AND *KHUL'* IN CLASSICAL *FIQH*

The discourses and practices surrounding the issue of *khul'* combine to form a useful example of jurists' balancing act between textual authority and individual moral reasoning. Classical Muslim jurisprudence categorized *khul'* as a wife's conditionally available right to exit the marriage contract, usually in exchange for the return of her *mahr*; a pair of *ahādīth* and Qur'anic verses (which will be discussed in detail below) were used to detail the exact situations in which *khul'* could be requested. *Talaq*, of course, has been understood in nearly all times and places to be an undeniable and exclusive male privilege. Prescriptive claims found in normative

works of *tafsir* and *fiqh*, which were based in turn on the textual evidence of Qur'an and sunna, were usually more restrictive of the right to *khul'* than were working qadis and muftis, who were often quite permissive. In classical *fiqh*, a wife's *khul'* request could technically be granted even if she presented "no compelling reason" for her request, but "the jurists are unanimous in their view that it is morally reprehensible" to obtain this type of divorce. This type of *khul'* required the return of the *mahr*.¹⁵ It was more commonly accepted, legally and morally, that *khul'* or *faskh* could be granted in response to situations in which the husband failed to fulfill some basic aspect of the marriage contract. Speaking very generally, in cases of this type, "the great majority of jurists and schools require the husband to grant his wife *khul'* without remuneration. It is reasoned that the failure to deny the husband this remuneration would result in a double injury to the wife."¹⁶ These situations included, according to the different *madhahib*, one or some combination of the following: physical abuse, infertility, contagious illness, the withholding of sexual contact, and failure to provide maintenance and appropriate housing, among others.¹⁷

Jurists required the husband's consent in some situations and were empowered to enforce *faskh* and dissolve a marriage against the husband's wishes in others.¹⁸ As with many issues, legal practice was more flexible and less restrictive than normative texts would suggest. For instance, Amira El-Azhary Sonbol even notes that, "I have not seen a single case in shari'a courts dating from the Ottoman period in which a woman sued for divorce and did not receive

¹⁵ Wael Hallaq, *Sharia: Theory, Practice, Transformations*, 284.

¹⁶ *Ibid.*, 284-285.

¹⁷ *Ibid.*, 192; see also Susan A. Spector, *Women in Classical Islamic Law*, 127-129; and Amira El-Azhary Sonbol, "Ta'a and Modern Legal Reform," *Islam and Christian-Muslim Relations* 9 (1998): 92.

¹⁸ Susan A. Spector, *Women in Classical Islamic Law*, 127-128.

it.”¹⁹ Sonbol, Judith Tucker, Wael Hallaq, and a handful of lesser-known scholars have shown that, at least in certain times and places, *khul'* was easily available to almost any woman with the temerity to request one before a judge.

For instance, in the premodern period, women enduring abuse could and did exercise the right to legally dissolve their marriages. *Faskh* was the tool preferred by jurists in these cases. Hallaq notes that, “[h]aving fairly easy access to the courts, ... abused women had the option of addressing themselves to the qadi, who would assign officials of the court to investigate the abuse. If abuse was proven, the court had the power to dissolve the marriage, as it often did.”²⁰ Additionally, contractual stipulations routinely expanded the basic list of divorce-legitimizing conditions. “In their marriage and remarriage contracts ... women inserted conditions to varying effects, including a woman’s right to dissolve the marriage contract if her husband took another wife; ... if he were to force her to move to a residence not of her choice; ... if he were to take a concubine” and so on; such stipulations were fairly routine.²¹ Classical legal practice made *khul'* so easily available that, “in the historical record, *talaq* appears to be less common than *khul'*.”²²

¹⁹ Amira El-Azhary Sonbol, “Ta’a and Modern Legal Reform,” *Islam and Christian-Muslim Relations* 9 (1998): 293.

²⁰ Wael Hallaq, *Shari’a: Theory, Practice, Transformations*, 192. The statement that follows, “The law also allowed the woman the right to self-defense, including, under certain circumstances, the killing of her abusive husband,” is a ruling one would be unlikely to find in most Internet *fatāwā*.

²¹ *Ibid.*, 188.

²² *Ibid.*, 191.

TEXTUAL AUTHORITY, INDIVIDUAL MORAL REASONING, AND *KHUL'* IN DIGITAL *FIQH*

More recently, *khul'* and *faskh*, along with many other concepts of traditional *fiqh*, have been approached somewhat differently. By borrowing heavily from the sources, but inverting the techniques, of classical *fiqh* and interpreting them through a lens of twentieth and twenty-first century moralities, Internet jurists forge entirely modern interpretations of *khul'* and its related problems of gender and power. All of the sites I will explore employ traditional textual markers of authority, advancing their claims by employing and interpreting *ahādīth* and/or Qur'anic verses dealing with women and divorce.²³ Only a few of the authors claim any traditional training in *fiqh* or *tafsir*, with a slightly higher number claiming to have studied *fiqh* at secular universities, and many authors apparently lacking any credentials other than enthusiasm, which gives their *fatāwā* a fascinating foundation in an array of unfiltered, semi-informed laymen's views. Heeding reformers' calls to re-examine the original textual sources of Islam – the Qur'an, sunna, and hadith – young diasporic Muslims have made the logical next step from re-reading from a personal moral perspective to offering advice to other young Muslims based on their readings. In contrast to the changing discourses surrounding the use of individual reasoning, the practices of *fiqh* have remained relatively stable over time, as have the mufti's markers of authority. When they share their ideas in the form of advice to their peers, they take on the historic markers of authority: basing their arguments on hadith, couching them in quasi-legalistic language, and co-opting the methodologies of the classical mufti.

²³ A small number of the websites examined here do not explicitly quote the two *ahādīth* dealt with in this paper, but do paraphrase them or make clear reference to their contents.

Within the past two hundred years, rapidly shifting social structures and the growth of diasporic Muslim communities have not only driven the development of new kinds of Muslim identities, but also new understandings of the nature and role of individual moral reasoning in shari‘a. These shifts have become even more rapid and visible with the spread of Internet access and its continuing transformation of young Muslims’ ideas about the nature of their ethical and moral responsibilities to understand and apply religious knowledge. While Internet muftis often borrow the forms and trappings of classical *fatāwā*, the advice they give is typically reasoned from a much more modern starting point; essentially, they often seem to operate from the assumption that individual moral reasoning is more important than textual evidence. This aspect of their practice is ultimately not very different from that of the classical jurists, who were also inclined, in practice, to subordinate textual evidence to individual reason. Where these digital muftis depart from their historical forbears is in their understanding of the *normative* relationship of textual authority to personal intellectual and moral judgment.²⁴ They typically produce an opinion based on modern, personal moral discourses and only then, in some cases, offer textual evidence to uphold their claims.

²⁴ Unfortunately, there are so few extant *fatāwā* and court records dating from the period of the Islamic expansion that it is impossible to directly compare the practices of that era with those of the classical and digital periods.

***FATĀWĀ* BASED PRIMARILY ON INDIVIDUAL MORAL REASONING**

The muftis whose opinions are based primarily on personal moral reasoning rather than textual evidence are also most likely to be making an obvious political argument. These are the muftis who are most clearly influenced by modernist political ideologies and can even be said to fall into “conservative” and “liberal” camps, in the twentieth-century senses of those terms. I impose these categories of political labels here for convenience; for the most part, digital muftis do not overtly categorize themselves in this way. In general, the few digital *fatāwā* that privilege textual evidence over individual reasoning lack an obvious foundation in modern social norms and elude easy political categorization, and so I refer to them here as “apolitical.” On the other hand, digital *fatāwā* that privilege individual reasoning over textual evidence are clearly based on modern moral norms; these *fatāwā* also clearly align with the twentieth-century political ideologies commonly termed “liberal” and conservative.” To clarify, the conservative sites all use arguments similar to those of the so-called social conservatives found across the world in the past century, while liberal sites have adopted the modernist, progressive rhetoric of individual freedom and human rights.

To offer a visual metaphor, one might say that their arguments fall along two axes. The first axis categorizes *fatāwā* according to the degree of importance they assign to textual evidence, so that those *fatāwā* with a tendency to accord greater importance to textual evidence are placed at one end and those with a tendency to accord greater importance to individual moral reasoning at the other. The second axis measures political orientation, ranging from apolitical to

liberal to conservative. Unfortunately, the impossibility of quantifying each *fatāwā*'s political and discursive tendencies precludes the creation of a chart that might illustrate these axes.

Individual Internet muftis also differ in the degree of lip service they pay to normative discourses of textual authority, although this factor appears unrelated to each author's place along the text-reasoning spectrum. Similarly, the relationship of textual evidence to individual reasoning does not typically correlate with each mufti's apparent degree of classical training. I will examine here a number of Internet *fatāwā* that fall at several points along these axes.

The following exchange from a messageboard illustrates the importance of exchange in the process of crowdsourcing shari'a, as well as several other important issues such as individual opinions on the rights of laymen to write *fatāwā*. First, a user named Faaris posts an *istifta'*; note his repeated request for references to authoritative jurists:

“Bismillah. I had a few questions in regards to Khul'. Are there any circumstances which would make khul' obligatory on the husband according to the 4 schools of law? Also, could anyone give me the insights of the Salafi jurists on this topic? It would be much more preferable if I could get references to their works if that is ok.”²⁵

A user named Umm Abdullah responds with a laundry list of the typical justifiable causes for khul' recognized by moderate digital muftis. Faaris responds with another attempt at finding authoritative information: “Jazzaki Allah Khair for the reply, however this answer seems only to

²⁵ “Khul', various opinions,” <http://www.ahlalhdeth.com/vbe/showthread.php?t=8543>

discuss its permissibility and not whether or not the husband can be obligated to accept the khul' offer. Would you happen to know the opinions of the classical ulema on this subject?"²⁶

As several days pass without a response, Faaris posts again with a request for further responses, writing "Anyone?????" A week later, he writes, "Heh, so much for "students of knowledge" ☺."²⁷ Umm Abdullah tries to apply individual reason a second time, writing, "i dont think it works like that, its like the wife not agreeing to the divorce! i think once the shariah court decides she has a right to khula then thats it, otherwise whats the point of women being allowed to give khula if a man can object? ps thats just my personal opinion...."²⁸ She continues several days later with,

"Do you have to have ijaza from a certain university to have knowledge and answer a question? because ive heard of a few mashaikh who give some fatwas that even laymen have a better opinion!. Are there any incidents in history where little boys or children had more knowledge than elders/ the learned? what constitutes knowledge? some of it is common sence. ... Ofcourse we cant give fatwas but this is a forum where you can discuss things but if you want a proper fatwa then you need to ask a scholar - also you have to give more personal details like what the khula is for and why you object etc..."²⁹

Umm Abdullah's comments spark a debate on the permissibility of laymen offering *fatāwā*; some users reject the practice and others accept it.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

The sites I have termed “conservative” are those that offer the most restrictive arguments against *khul’* – arguments that are clearly influenced by modern political arguments based on regression to an imagined prior era of social stability and clear gender roles. Both the categories of arguments they make and the methodologies they use to make them are innovative. Their arguments against the availability of *khul’* are three-fold, although not all of the muftis mentioned here apply each of these arguments. First, many warn of the social problems that will arise from women who will demand divorces on the flimsiest of pretexts, tearing apart families and rending the fabric of society; the word “*fitna*” itself is rarely used, but the concept seems to inform this argument on a basic level. Second, some conservative muftis acknowledge that wives may request divorce, but they severely restrict the conditions under which *khul’* may be granted and give husbands absolute power to accept or reject a *khul’* request. Finally, they all ground their restrictions in a weak hadith that I will explore below – although there are a significant number of websites and messageboard posts advocating against *khul’*, there are relatively few that even attempt to offer hadith-based arguments to that purpose. After citing one or all of these cultural, customary, and moralistic arguments, the conservative muftis then and only then may also provide some form of textual evidence to support their claims.

The commonly applied order of argument – in which social consequences are discussed before the relevant hadith – is significant, I believe, because it clearly indicates the relative importance assigned by the mufti to each factor. The tendency to weigh social problems over the traditional textual sources of *fiqh*, and the urge to preserve the Victorian-style patriarchal, nuclear family at all costs, are twentieth-century developments, rather than traditional

considerations in *fiqh*.³⁰ Conservative muftis generally agree that *khul'* is theoretically possible, but that it can only be granted when it has been written into the marriage contract as a special clause granted by the husband rather than as an intrinsic right of all wives. This ahistorical claim contrasts starkly with the flexibility of classical law in practice, where conditionally available *khul'* was a basic right that, with the use of contractual stipulations, could be expanded to encompass virtually any imaginable situation. These authors make no mention of the possibility that a judge may grant a wife's *khul'* or *faskh* request against her husband's wishes. In other words, *khul'* is understood as a concession made solely at the husband's discretion; the right to divorce lies entirely in the husband's hands so that both *khul'* and *faskh* are essentially meaningless. There is a faintly tautological character to the logic of all of these arguments – they rely implicitly on a sort of political *ijmā'* in which they ground in their use of *maslaha* to champion the political arguments on which they have already reached consensus.

This normative shift can also be seen in other twentieth-century developments in *fiqh* such as the denial of women's traditional legal rights³¹ and the creation of entirely new wifely responsibilities, such as housework³² and gratitude to one's husband³³ (these latter two arguments based on Victorian beliefs about biological determinism). Requirements such as these are clearly modern innovations; as Kecia Ali writes, in the classical period, “Maliki, Hanafi, and

³⁰ Barbara Stowasser, “Gender Issues and Contemporary Qur'an Interpretation,” in *Islam, Gender, & Social Change*, edited by Y. Y. Haddad and J. L. Esposito, 33. See also Stowasser, “Religious Ideology, Women, and the Family: The Islamic Paradigm” in *The Islamic Impulse*, 284-285, for a discussion of the modern paradigms influencing “real-world” conservative muftis.

³¹ Wael Hallaq, *Shari'a*, 456.

³² Kecia Ali, *Progressive Muslims*, 173-175.

³³ Barbara Stowasser, “Gender Issues and Contemporary Qur'an Interpretation,” in *Islam, Gender, & Social Change*, edited by Y. Y. Haddad and J. L. Esposito, 35.

Shafi'i jurists emphatically denied any wifely duty to perform housework."³⁴ Wael Hallaq links this shift to the economic and political processes of the nineteenth and twentieth centuries, which tended to limit female economic independence and to favor the rise of patriarchal-nuclear families, in which wives' rights were generally circumscribed.³⁵ Another indication of this shift can be seen in the conservative-leaning digital muftis' decision to abandon the traditional legal paradigm based on the extended family in favor of one based on individuals bound in a nuclear family structure – for instance, not one of the conservative *fatāwā* examined for this paper acknowledges the concept of the *wali*, or guardian. Instead, each mufti assumes that the *mustafti* before him is a full legal person, capable of representing his or her own interests, rather than a member of an extended family.

Conservative muftis appear divided on the historically accepted option of *faskh*, in which a judge can grant a wife's divorce request against her husband's wishes.³⁶ For instance, one site offers two responses to a questioner, who asks, "I have read somewhere that according to a certain Islamic school of Fiqh, if wife wants divorce (khul') it cannot be granted, as long as husband does not agree, if this is true, what then is the point of giving women the right of khul'?" One mufti, Sheikh Hamed al-'Ali, identified as the "instructor of Islamic Heritage at the Faculty of Education, Kuwait and Imam of Dahiat As-Sabahiyya Mosque," responds with a standard classical opinion, writing, "Yes, Khul' has to be resorted to at the consent and agreement of both spouses However, the wife has another option should the husband does not agree to go for Khul', that is to file a case in the court and resort to the Muslim Qadi (judge).

³⁴ Kecia Ali, *Progressive Muslims*, 170.

³⁵ Wael Hallaq, *Shari'a*, 457.

³⁶ Anne Sofie Roald, *Women in Islam*, 221.

If she has an excuse then she releases herself by paying back the dowry to her husband and the Qadi compels him to let her go.” Al-‘Ali’s position is not particularly revolutionary, although it does conflate the role of the *mahr* in *faskh* and *khul’* in a slightly confusing manner. It is his fellow mufti who makes a less supportable claim. The second authority quoted here, Dr. Muhammad Ahmad Siraj, a “professor of Shari‘ah at the American University, Cairo, Egypt” counters al-‘Ali’s claim with an argument that “the majority of scholars object to the view that the Qadi has the right to force the husband to accept *Khul’* and divorce the wife if she gives him what he paid her.”³⁷ Both opinions are presented without evidence or comment by the website’s authors on their relative textual authority. Note also that both of these authors present themselves as qualified to offer authoritative *fatāwā*, yet both are associated with secular educational institutions. Interestingly, although this fatwa was written in response to an *istifta’* posted in 2002, Dr. Siraj’s position contradicts not only classical *fiqh*, but also the Egyptian Law No. 1 of 2000, which legalized *khul’* and rendered the husband’s consent unnecessary.

Conservative Internet *fatāwā* describe the problems arising from a female right to divorce in both social and spiritual terms. They write that women who request divorce from their husbands are engaged in “an affair which is loathsome to Allah ... due to the problems and possible evils” inherent in such an action.³⁸ *Khul’* is to be avoided because it is inimical to Islam, which “cares about family stability, which is the cornerstone of the Muslim society. Therefore, it lays down rules and arrangements that guarantee that love and harmony prevail in the

³⁷ Group of Muftis, “Separation through *khul’*: Is agreement of both couple necessary?” http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/FatwaE/FatwaE&cid=1119503545568.

³⁸ The Fatwa Center at Islamweb, “Wife divorcing her husband,” <http://www.islamweb.net/ver2/Fatwa/ShowFatwa.php?lang=E&Id=81487&Option=FatwaId>.

society.”³⁹ Another site also frames its argument in positive terms, saying that, “for the sake of creating stability in the family and providing a secure and peaceful life for children, you should try to maintain matrimonial life This would be far more better than putting an end to this solemn contract Islam is keen to maintain.”⁴⁰ While there is some circumstantial evidence to suggest that classical discourses sought in a limited way to discourage divorce and encourage marital stability – for instance, the commonly cited hadith stating that “Of all lawful actions, Allah most hates divorce” – the above fatwa implies that Islam treats marriage as a unique social institution, distinct from all other legal contracts. In each of these opinions, the author privileges these social imperatives over textual evidence.

The conditions under which *khul'* may be granted are narrowly defined on conservative websites. Wives are sternly warned by a Hanafi imam that, “[i]t must be noted that Khul’a must only be asked in extreme circumstances. It must not be resorted to on flimsy grounds.”⁴¹ Conservative sites variously define the circumstances required to make a legitimate *khul'* request as entailing physical abuse, abandonment of religious duties, “immoral behaviour, cruelty, oppression and transgression.”⁴² One site, Islamweb.net, offers this response to a questioner: “The thing, which is prohibited, is a wife seeking a divorce from her husband for no reason of

³⁹ “Can a woman divorce herself?”

http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/FatwaE/FatwaE&cid=1119503545612.

⁴⁰ “Is hatred a sufficient ground for divorce?”

http://www.islamonline.net/servlet/Satellite?pagename=Islamonline-English-Ask_Scholar/FatwaE/FatwaE&cid=1119503544166.

⁴¹ “Women and divorce,”

<http://ashraf786.proboards.com/index.cgi?board=divorce&action=display&thread=14131>

⁴² Ibid.

the shariah. There is a serious threat made for seeking a divorce without a valid reason.⁴³ ... If the inquirer's purpose is to know whether a woman can divorce her husband or not, we inform her that divorce is one of the husband's rights only. But, when a man authorizes his wife to divorce herself whenever she wishes, then she has the right to do so at anytime. Allah knows best.”⁴⁴ Other websites⁴⁵ concur with this second claim, one declaring, “The first thing that must be clarified is that a woman may not declare divorce (talaq or khula), unless she has had this right stipulated in her marriage contract, or if she was granted this right by her husband at some other point in time (before or after the marriage).”⁴⁶ Conservative sites, then, imitate the restrictions applied to *khul'* in some normative classical discourse, but expand those restrictions and create entirely new ones through a combination of careless *tafsir* and the imposition of a twentieth- and twenty-first-century moral framework.

“Liberal” websites host the second category of muftis that have embraced the normative reversal of the relationship of text to individual moral reasoning. Several of the sites I describe here as liberal make their arguments in order to advance specific, openly stated political projects, either liberal-feminist or Islamist-feminist. To that end, like their counterparts at other points on the spectrum of restrictiveness, they marshal a set of hadith and Qur’anic verses only in order to prove their political points. Their common arguments are based on an assumption that fault must

⁴³ The “threat” referred to here is found in a hadith declaring the denial of paradise as punishment for frivolous divorce requests. See page 29 for more information on this hadith.

⁴⁴ The Fatwa Center at Islamweb, “Wife divorcing her husband,” <http://www.islamweb.net/ver2/Fatwa/ShowFatwa.php?lang=E&Id=81487&Option=FatwaId>.

⁴⁵ “Can a woman divorce herself?” http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/FatwaE/FatwaE&cid=1119503545612.

⁴⁶ Niyaz Abdul Majeed, “Khul or khula,” <http://en.allexperts.com/q/Islam-947/Khul-Khula-1.htm>.

be determined in order to grant an equitable *khul'*; in their framework, both spouses are full legal persons and partners with the power to enter or leave a marriage at will, so both have the power to cause a marriage to end. They are least likely of all the sites surveyed here to refer to the arguments of classical jurisprudence, but they do concur with the Maliki *madhab* on some important points, including the notions that in cases of abuse the wife is not required to “ransom” herself, and moreover, that if the husband is at fault, arbitrators can force him to accept a *khul'* without the return of the *mahr*, as in this classical example: “Ibn Abi Zayd says that a wife can free herself from her husband for more or less than her marriage portion However, if it turns out that he has injured her or forced her to buy her freedom, then whatever she gave him is returned to her.”⁴⁷ Arbitrators, in classical Maliki *fiqh*, determine which party is at fault and “[i]f the husband is at fault, they separate the couple without compensating him for divorcing her; if the wife is at fault, they take whatever they think best from her to compensate the husband.”⁴⁸ In the modernist liberal discourse, this borrowed classical claim is the natural result of viewing both spouses as full legal persons with equal power to enter or break the marriage contract.

Liberal digital muftis have an uneasy relationship with the classical jurists. Like scholars from every era, they borrow freely from jurisprudence that suits their purposes, such as Malik’s embryonic formulation of at-fault divorce, but they also are quick to reject more restrictive classical *fiqh*. Where conservative digital muftis tend to make use of *maslaha* and political *ijmā'*, liberal digital muftis more commonly use *istihsan* to mediate between what they perceive to be the universal moral principles of shari‘a and the failures of classical *fiqh* to address modern

⁴⁷ Susan A. Spector, *Women in Classical Islamic Law*, 173.

⁴⁸ *Ibid.*, 173.

realities. Here, a liberal site explicitly positions itself as a corrective to the errors of classical jurisprudence:

“The traditional *fuqahā*’ agreed that women have the right to seek divorce, but disagreed as to the extent to which it may be exercised. They placed different restrictions upon the types of divorce that may be obtained by a wife. The Hanafis and the Shafi’is give a narrow interpretation on the court’s power to order dissolution of marriage, while the Malikis and the Hanbalis give a more liberal interpretation. Unfortunately, the lack of restriction on a husband’s right to divorce and the numerous restrictions placed on a wife’s right has led to various forms of injustice”⁴⁹

Liberal muftis thus identify themselves as agents of a political project as much as a religious one. This reformist tone means that liberal sites’ politics are more obvious than those of conservative or apolitical sites, but this point should not be taken to imply that conservative and apolitical sites are free of political intentions. Digital muftis of all political persuasions clearly privilege political arguments and individual moral reasoning over textual evidence.

Liberal sites’ legal claims about divorce do share a significant characteristic with those of some less obviously politicized sites – the party determined to be “at fault” is responsible for paying off his or her wronged spouse, either through the return of the *mahr* if the wife is at fault, or through *talaq*-style continued maintenance if the husband is at fault. Consider, for instance, this lengthy explanation of post-divorce financial arrangements:

⁴⁹ “Equal rights to dissolve marriage and upon its dissolution,” http://www.musawah.org/rk_divorce.asp.

“If there is no good reason for a wife wishing to divorce her husband, but it is a case in which she simply wishes to finish the marriage with no particular legal grounds against the husband, the husband may agree to grant her the divorce if she returns all or part of the mahr. ... If the wife does have genuine grounds for divorce - such as cruelty, mental cruelty, breaking of the marriage contract, adultery, desertion, incurable insanity, long-term imprisonment, abandonment of Islam - then the divorce is not khul but a normal talaq⁵⁰, in which the wife has as much right to instigate proceedings as the husband. In these cases, she most certainly does not have to hand over any of the mahr. ... If the wife has genuine grounds for divorce but the husband refuses the divorce, she may then approach lawyers for khul, and appoint an Imam to act for her. It is sensible to do this as well as having a UK lawyer. She is not required to pay back any of her mahr. Indeed, the lawyers may demand some further compensation for her if the husband is guilty. (She may have to prove his guilt, and should gather as much evidence beforehand as she can - such as signed and witnessed statements of witnesses, photographs of injuries sustained, etc).”⁵¹

However, liberal muftis also consider situations in which neither party is at fault to be legitimate *khul*’ cases. One site, Islamfortoday.com, describes khul’ as a transaction “in which a wife sues

⁵⁰ This statement is a remarkable innovation in itself, since no classical faqih would grant women the right to talaq, which is unrestricted, at-will, and an exclusively male privilege.

⁵¹ Ruqaiyyah Waris Maqsood, “Payments to and from the bride in Islamic law and tradition,” <http://www.islamfortoday.com/ruqaiyyah07.htm>.

for divorce even though the husband has not driven her to it by his unreasonable behavior.”⁵²

Although the terminology differs, liberal sites seem to have borrowed some concepts from secular Western divorce law, treating *khul'* as similar to either a no-fault divorce or an at-fault divorce.

Another point of similarity between liberal and apolitical sites is their shared declaration that *khul'* can be granted against the husband's will. One moderate mufti, representing an “Islamic Shari‘a Council,” matter-of-factly writes, in a statement similar to those on some liberal sites, that “[i]t is also noticed that some husbands do not accept the Council's verdict on the divorce. In such cases the woman should not worry as long as she is divorced, she is no more bound to him.”⁵³ In this and other apolitical sites, statements like this seem intended to prove the qadi's or shari‘a council's authority, rather than to achieve an ideological goal, while liberal sites may also be influenced by feminist claims about the equal legal rights of husband and wife.

Like conservative sites, liberal muftis use twentieth-century conceptions of family life to establish their claims that *khul'* can be granted for any reason. Where conservative muftis employ a discourse of social cohesion, preservation of the father-headed nuclear family, separate spheres, and motherly/wifely sacrifice, liberal sites embrace a related but politically opposed image of marriage. In this case, the discourse is one of romantic companionate marriage that requires compatibility and mutual goodwill. As one site notes, “divorce may be sometimes unavoidable if a couple proves to be incompatible, and thus the essence of family life is missing,

⁵² Ibid.

⁵³ Islamic Shari‘a Council, “Divorce: General observations,” <http://www.islamic-sharia.org/divorce-talaq/divorce-general-observations-2.html>.

even though each one of the couple individually may be a good person.”⁵⁴ The only requirement for divorce is that “in the case of *khul'*, the wife must have an aversion to her husband; in [*faskh*], there should be mutual aversion.”⁵⁵ The liberal muftis’ insistence on romantic love and personal compatibility between spouses appears to be derived from twentieth-century liberalism.

***FATĀWĀ* BASED PRIMARILY ON TEXTUAL EVIDENCE**

There is a broad category of digital muftis who adhere, at least nominally, to the classical discursive relationship of textual authority and individual reasoning. However, even these muftis disregard the classical relationship in important ways. Most of the muftis whose opinions are based primarily on textual evidence are not easily identified with a contemporary political ideology, and, perhaps as a result, their judgments are somewhat more closely related to those of the classical jurists. However, some identifiably liberal and conservative muftis also prefer textual evidence to overt political arguments; in these cases, the political overtones are clear, but remain subordinated to the use of textual evidence.

In fact, many liberal sites use rhetoric and arguments very similar to those of feminist neo-“*mufassirat*” such as Amina Wadud and Asma Barlas. Just as Wadud and Barlas advocate a return to a pure shari‘a based on authenticated sources rather than medieval *tafsir*, liberal websites argue that unbiased modern *tafsir* will prove the legitimacy of unrestricted access to

⁵⁴ “Equal rights to dissolve marriage and upon its dissolution,”

http://www.musawah.org/rk_divorce.asp.

⁵⁵ “Permanent marriage,” <http://www.al-islam.org/al-serat/muta/2.htm>.

khul'. These muftis use textual evidence, but do so in unorthodox ways, arguing for a new *ijtihad* that is implicitly based on political goals. As one site puts it, "A look at the injunctions in the Qur'an and Sunnah shows that the spirit of the *Shari'a* tends towards egalitarian rights, for it allows divorce rights to both husbands and wives, subject to the payment of compensation to innocent divorced spouses. The proceedings for arbitration and mediation in Surah an-Nisa' 4:35 places both spouses on an equal footing" ⁵⁶ By claiming that the authentic texts of Islam support their political project while overtly denying the legitimacy of medieval *fiqh*, liberal muftis put into practice Barlas' academic arguments.

They use a hadith also commonly included in many apolitical sites, but they make slightly different emphases:

"Narrated Ibn 'Abbas (raa): The wife of Thaabit bin Qais came to the Prophet and said, "O Allaah's Apostle! I do not blame Thaabit for defects in his character or his religion, but I, being a Muslim, dislike to behave in un-Islamic manner (if I remain with him)." On that Allaah's Apostle said (to her): "Will you give back the garden which your husband has given you (as Mahr)?" She said, "Yes." Then the Prophet said to Thaabit, "O Thaabit! Accept your garden, and divorce her once."
[Al-Bukharee] ⁵⁷

⁵⁶ "Equal rights to dissolve marriage and upon its dissolution," http://www.musawah.org/rk_divorce.asp. This passage immediately follows the better-known verse 4:34, which mandates wifely obedience and describes the correct process for a husband's correction of disobedience.

⁵⁷ Shaykh Saalih bin Fawzan bin 'Abdullah Al-Fawzan, "The regulations of *khul'*: Dissolution of marriage," <http://abdurrahman.org/women/theregulationsofkhul.html>.

Both liberal and apolitical digital muftis assign greater importance to the implication that the Prophet simply dissolves Thabit's marriage at the wife's request, without requiring any sort of justification, and that Thabit has no say in the matter. Liberal muftis thus deprive the husband of the ability to force his wife to stay in an unwanted marriage. The moderates, conversely, most often concentrated on the wife's desire to avoid irreligious conduct.

Some conservative muftis also employ textual sources as evidence, albeit in unorthodox ways. Even in this category of *fatāwā*, however, the use of textual evidence is generally weak and rather spotty at best. The hadith used as secondary evidence in many conservative *fatāwā* reads, "Allah's Apostle said, "Any woman who asks divorce from her husband without a reason, the smell of Paradise is prohibited for her." Its *isnad* is considered *hasan* (good) rather than *sahih* (authentic), and in historical jurisprudence it has "been actively used in order to weaken women's claims for divorce."⁵⁸ A hint of this hadith's less-than-impeccable authenticity, and of the carelessness with which it is interpreted, can be seen in the fact that few of the sites I examined differentiated between the hadith's original source, its *isnad*, and its medieval compiler. Conservative muftis do concur with the normative claims drawn from this hadith in some classical *fiqh*: "Those belonging to the three first generations of Muslims and later scholars have judged that *khul'* is not allowed except when a woman suffers hardship in the marriage."⁵⁹ Internet muftis, however, take this legal opinion a step further with the addition of a moral imperative to support the nuclear family.

⁵⁸ Anne Sofie Roald, *Women in Islam*, 219.

⁵⁹ *Ibid.*, 219.

Of all the websites surveyed here, it is the sites that make the most plainly traditionalist, text-based arguments, using both Qur'anic verses and hadith to support their claims, that lack a clear political motive. It may be that a relatively strong awareness of and adherence to classical prescriptive discourses on authority is the source of these sites' "apolitical" character. In the absence of assertively obvious political agendas (tempered with the occasional appearance of some subtle bias), an apolitical mufti can build a fairly flexible argument with textual support. However, while they do use texts more often and show greater concern for textual authenticity than conservative muftis, some do still emphasize social arguments to a greater degree than a typical classical jurist would. They primarily ground their opinions in a single hadith, which is usually carefully documented, and a single Qur'anic verse. The hadith the websites prefer to use is this or some variant of it:

“Hadith - Sahih Al-Bukhari, Vol. 7, Hadith No. 197 Narrated Ibn 'Abbas: The wife of Thabit bin Qais came to the Prophet and said, ‘O Allah's Messenger! I do not blame Thabit for defects in his character or his religion, but I, being a Muslim, dislike to behave in an un-Islamic manner (if I remain with him).’ On that Allah's Messenger said (to her), ‘Will you give back the garden which your husband has given you (as Mahr)?’ She said, ‘Yes.’ Then the Prophet said to Thabit, ‘O Thabit! Accept your garden, and divorce her once.’”⁶⁰

⁶⁰ “Khul' (the parting of a wife, i.e. divorce, from her husband by giving him a certain compensation. initiated by the wife),” <http://muttaqun.com/khul.html>.

The websites emphasize that the dissolution of Thabit’s marriage was a necessary evil to avoid sin. Classical jurists relied on variants of that hadith and on a significantly expanded version of it:

“Dawud b. Abi Asim [said] that Sa’id b. Al-Musayyab informed him that a [particular] woman was married to Thabit b. Qays b. Shamas, who had given her a garden as a marriage portion. He was extremely jealous, and he beat her and broke her hand. So she went to the Prophet and complained and said: ‘I will return his garden to him.’ The Prophet said ‘You will?’ She said ‘Yes.’ So the Prophet called her husband and said ‘She will return your garden to you.’ He [i.e. Thabit] said: ‘Is that lawful for me?’ The Prophet said: ‘Yes.’ He said ‘Then I accept, O Messenger of God.’ Then the Prophet said [to the two of them]: ‘Go, and that counts as a single divorce.’”⁶¹

This added plot twist – the presence of violence in the marriage of Thabit and his wife, and its role as a catalyst in the wife’s divorce request – is perhaps a source of some of the conditions traditionally required for *khul’* in classical discourses. It is interesting to note that although none of the apolitical websites surveyed here refer to this elaborated version of the hadith, many nonetheless continue to require that a wife suffer some violence or insult before a *khul’* request can be considered.⁶²

Other apolitical jurists rely heavily on textual evidence and specifically reject the use of

⁶¹ Susan A. Spector, *Women in Classical Islamic Law*, 125; other variants include the wife’s name, Habiba bint Sahl, mention two gardens rather than one, and reassign her injury from a broken hand to a broken shoulder (Ibid., 171).

⁶² See Appendix A for a further-embroidered version of this hadith.

social norms to override classical constructions of authority. Dr. Tariq Abdelhaleem, a Canadian engineer and imam, displays no obvious political affiliations and quotes extensively from textual sources, including the Qur'an and hadith, as well as classically reasoned *fatāwā*, in his opinion authorizing *khul'*. For this reason, his fatwa must be categorized as apolitical. He writes that,

“because there are exceptional cases when a woman comes to hate the companionship of her husband after she initially accepted it, and since divorce [presumably meaning *talaq*] is in the hand of the husband only, Allah SWT, being All Just, decreed that a woman who's afflicted in such a case that can seek a legal divorce through a judge. By giving the woman this option, a bigger harm is averted if the marriage between a man and a woman who hates him continues, because the snare of women is mighty when they are helpless. Thus, the Prophet PBUH decreed legal divorce for a woman (*Khul'*), which is the right of woman to request separation (divorce) from her husband if she hates his companionship in return for giving back whatever he gave her in dowry and gifts which is also the ultimate justice.”⁶³

He specifically attacks those who might deny the legality of *khul'* based on social concerns, using first textual evidence and then *maslaha* to support his argument:

“Now someone will say: you are opening the door of tribulation (*Fitna*) and helping women destroy their homes! We say: *Subhana Allah*, who says this *Kufr!*

⁶³ Tariq Abdelhaleem, “Fatwa on a woman’s Legal Divorce (*Khul'*),” <http://www.learndeen.com/jm/articles-a-views/29/45-fatwa-on-a-womans-legal-divorce-khul.html?5e79d1c535618125fe5727bbc91646f1=47a0be8ad974a410f7a7f31003746da7>

Can we describe the command of the Prophet PBUH, his decree and guidance, which is valid to the utmost degree, as opening the door of tribulation?! Hasn't this person through his claim already fallen into *Fitna*? Furthermore, the true tribulation is forcing a woman into a companionship that she hates and its the subsequent problems that no one knows except Allah. A person who makes such a claim is like the husband who accepts to be under one roof with a woman who clearly hates him. Obviously, the husband is more deserving of the reprimand and reproach due to his lack of honour and manhood. However, we seek refuge in Allah from promoting destruction of homes and families. But we know that whatever Allah and His messenger decreed is the ultimate goodness. Women's Legal Divorce (*Khul'*) has been documented in the books of *Fiqh* since the time of the four Imams. However, it was rare that a woman resorted to it, because Allah SWT knows that it is for exceptional cases; "Should He not know, He that created? And He is the One that understands the finest mysteries (and) is well-acquainted (with them)?" Moreover, since it is not for us to make what Allah made unlawful as lawful, it is also not for anyone to outlaw what Allah made lawful. Legal Divorce (*Khul'*) is permissible from the time that the Prophet PBUH decreed it for the wife of *Thabit bin Qays*.⁶⁴

⁶⁴ Ibid.

Perhaps significantly, Dr. Abdelhaleem writes in Arabic⁶⁵ – this may be the reason he is able to rely so heavily on textual evidences. His grasp of classical fiqh discourses is strong enough that he carefully differentiates between the different isnads of the relevant fatwa:

“Woman’s Legal Divorce (*Khul’*) is lawful in Islam by the consensus of the scholars. The only known scholar to deviate from the scholarly consensus is *Bakr bin Abdullah Al-Mazni*. *Ibn Qudamah* wrote in *Al-Mughni* (the largest collection of comparative *Fiqh*): “The woman, who detest her husband and she hates to deny him, is not disobedient in denying him; thus there’s no harm in redeeming herself by compensation.” The scholars of Islam based their consensus on the Hadith of *Bukhari*, *Nisaei*, and *Ibn Majah* as narrated by *Ibn Abbas* that: “the wife of *Thabit ibn Qays* came to the Prophet peace be upon him and said: ‘O’Prophet of Allah, I do not reprimand *Thabit ibn Qays* for his mannerism or devoutness. However, I hate *Kufr* in Islam.’ The Messenger of Allah peace be upon him said: ‘Will you return his garden back to him?’ She said: ‘Yes’. The Messenger of Allah peace be upon him said [to *Thabit*]: ‘Accept the garden and divorce her once’. In another narration by *Bukhari*: “but I cannot stand him” and in the narration by *Ibn Majah*: “but I cannot stand him because I detest him” and in another narration by *Ibn Majah*: “I would spit in his face”.”⁶⁶

⁶⁵ The text quoted here is drawn from Hani Abid’s post of an English translation.

⁶⁶ Tariq Abdelhaleem, “Fatwa on a woman’s Legal Divorce (Khul’),” <http://www.learndeen.com/jm/articles-a-views/29/45-fatwa-on-a-womans-legal-divorce-khul.html?5e79d1c535618125fe5727bbc91646f1=47a0be8ad974a410f7a7f31003746da7>

Dr. Abdelhaleem continues, eventually culminating in a resounding rejection of the logic that leads to politically motivated delegitimations of *khul'*. He even goes so far as to engage in a bit of atomistic textual interpretation:

“The scholars said that it is not required to ask the man about his dissension because the Messenger of Allah peace be upon him did not ask *Thabit* about his opinion of his wife; as mentioned by *Ibn Hajar* in *Fath al-Bari* vol.9 p.445.

The consensus is that the reason for *Khul'* is simply the woman's hatred for her husband – no more - and that there's no other condition for it as *Ibn Hajar* said. Some, who claim to have knowledge of *Shari'ah* and *Ijtihad*, claim that *Khul'* requires another reason other than the wife's hatred for her husband. This opinion is rejected as follows:

The narration in *Tabari*, *Nisaei*, and *Abi Dawood* that “*Thabit bin Qays bin Shammas* harmed his wife and broke her hand”, we say:

1. The woman in this narration is *Jameela bint Abdullah* and not the same woman in the Hadith of *Bukhari* and *Nisaei*, who is *Habeeba bint Sahl* who came in the early morning. That is why *Ibn Hajar* favoured in *Fath Al-Bari* that these are two separate stories. *Ibn Hajar* said: “I say that it is apparent that they are two separate occurrences with two separate women”.
2. The woman did not come to the Prophet to complain of her beating as it is clear from the narration in *Nisaei* and *Abi Dawood* because it was her brother who came to ask for her legal divorce.

3. The correct narration in *Bukhari* and others made it clear that the woman said “I do not reprimand him” and “I cannot stand him because I detest him”. Thus, the reason for her request was her dislike for him, not because of his devoutness or mannerism.

The principle used by *Ahlul Sunnah* is to look at all the evidences together, as was mentioned by al-*Shatibi* in *al-Muwafaqat*, and ‘Exercising the evidence is better than ignoring it’ as established in the *Fiqhi* principles. So we do not ignore one proof in favour of another as people of *Bida’a* do. Therefore in order to exercise all the proofs, we say that even if *Thabit* had hit his wife, she did not wish to divorce him because of that. Rather, she hated him not for his devoutness or mannerism, but because of his hideousness as in the other narration. This is exactly what *Ibn Hajar* concluded: “it apparent that he did not do anything to her that required her to complain about. But from the narration of *Nisaie*, it seems that he broke her hand so it can be said that she felt that he is ill-mannered, but she did not reprimand him for that but rather for another reason [his hideousness]. Similarly, in the story of *Habeeba bint Sahl* as narrated by *Abu Dawood* that he hit her and broke her hand. However, neither woman complained about that. It is clear that the complain was about something else, which is his hideous appearance as reported by *Ibn Majah*”. If we accept that she asked for divorce because he hit her, then we must ignore the other narrations which say that she

doesn't hate him for his devoutness or mannerism and that she hates him for his hideousness and because of this reason she wanted to spit in his hideous face.”⁶⁷

The carefully reasoned fatwa goes on in this manner for several paragraphs, carefully applying textual evidence to the detriment of politicized individual reasoning.

Classical jurists and modern websites alike rely heavily on Qur'anic verse 2:229, cited here on an apolitical site:

“Then if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she gives back (the Mahr or a part of it) for her Al-Khul' (divorce).”⁶⁸

The sinless nature of a properly justified *khul'* is a recurring theme in apolitical sites, perhaps in reaction to conservative attempts to delegitimize its use. These apolitical websites describe *khul'* somewhat grudgingly as an action without the potential for harm, and conceive of it as an Islamic right granted to women as a means of escape from truly intolerable marriages. The apolitical Internet muftis agree with some classical jurists on several relevant points: that *khul'* is initiated by a wife who has suffered some injury to her person or rights, that it can only be granted in situations where the husband has failed in some major religious or marital duty, that it is subject to arbitration and ultimately to approval by a qadi, and that a qadi can force divorce on an uncooperative husband. Finally, the websites' encouragement of *khul'* as a tool of last resort, available on a conditional basis, bears a close resemblance to the recommendations of classical

⁶⁷ Ibid.

⁶⁸ “Khul' (the parting of a wife, i.e. divorce, from her husband by giving him a certain compensation. initiated by the wife,” <http://muttaqun.com/khul.html>.

fiqh, but their methodology and attitudes differ on some minor points.⁶⁹ The muftis differ from their classical forebears in the relative lack of importance assigned to textual evidence in their arguments – they rely on textual authority more heavily than many other digital muftis, but markedly less so than classical jurists. They also differ in the importance they place on certain types of insult and injury to the wife, and in the degree of “official” verification that apolitical muftis require for a *khul'* to be deemed legitimate.

Insofar as these websites differentiate between arbitration and judgment by a qadi, they tend to place all decision-making power in the hands of the qadi. Contemporary apolitical muftis differ with Malik’s judgment that “whatever the two arbitrators decide regarding a husband and wife, separation or joining, is valid,” and that “the arbitrators are sent by the qadi, but that they exercise their judgment independently and have the authority to separate the couple without further reference to him.”⁷⁰ The couple cannot divorce without a qadi’s approval. This tendency may be a function of the greater importance assigned by these muftis to authority in general as well as in the classical context.

Modern discourses on gender, power, and family structure inform apolitical websites’ arguments, especially in their delineations of the conditions that make *khul'* permissible, but several of these conditions are virtually unchanged from their medieval counterparts. For instance, Shaykh Ibn 'Uthaymeen says that a “woman has a right to ask for divorce from her husband if it is shown that the infertility problem is from him alone. If he divorces her, that is

⁶⁹ Some moderate websites also share the classical jurists’ concerns over whether *khul'* is a divorce or an annulment, how many divorces a *khul'* “counts” as, and the amount of “ransom” the husband can demand.

⁷⁰ Susan A. Sectorsky, *Women in Classical Islamic Law*, 127-128.

final. If he does not divorce her, a judge may dissolve her marriage. ... This is the stronger opinion among the scholars.”⁷¹ Infertility, violence, and moral/religious failings are all classically acceptable reasons to grant *faskh*. Apolitical muftis continue to preserve these legitimating conditions on the Internet.

Similarly, “harm” is still grounds for divorce but the category has been expanded to include drug use and verbal abuse as well as the more traditional physical violence. A mufti advises, “If a woman is harmed by staying with her husband because of his dissoluteness – as is the case of an intoxicant addict – or by harming her physically by beating her, or harming her psychologically by insulting her, and so forth, then it becomes lawful for her to ask him for *Khul’* or divorce.”⁷² Modern attitudes toward issues such as verbal abuse seem to be the cause for their inclusion among the legitimizing criteria for *khul’*. A woman reports to one site that her husband “curses me and my father and calls us Jews, Christians and Shee’ah. ... I began to hate him a great deal, to the point that I cannot stand even talking to him. I asked him for a divorce but he refused.” Shaykh Ibn Baaz responds, “If the situation is as you have just described, there is nothing wrong in seeking divorce. ... This is due to his improper behaviour and wronging you by evil speech.”⁷³ Here, speech becomes a form of injury rather than mere insult. Finally, some websites list emotional requirements such as one that “[t]he hatred [of the wife for the husband]

⁷¹ Shaykh Ibn 'Uthaymeen, and Shaykh Ibn Baaz, “World of Islam: *Khul’* (female divorce),” <http://www.angelfire.com/mo2/scarves/khul.html>.

⁷² The Fatwa Center at Islamweb, “Took *khul’* without having the intention to remarry,” <http://www.islamweb.net/ver2/Fatwa/ShowFatwa.php?lang=E&Id=129011&Option=Fatwald>.

⁷³ Shaykh Ibn 'Uthaymeen, and Shaykh Ibn Baaz, “World of Islam: *Khul’* (female divorce),” <http://www.angelfire.com/mo2/scarves/khul.html>.

must have reached a proportion where she would not allow him conjugal rights.”⁷⁴ The idea that a wife has the right to deny her husband sexual contact is, of course, a direct contradiction of classical *fiqh*. Clearly, apolitical websites preserve many characteristics of traditional *fatāwā*, but have added a number of modern innovations.

⁷⁴ “Khul’ (the parting of a wife, i.e. divorce, from her husband by giving him a certain compensation. initiated by the wife,” <http://muttaqun.com/khul.html>.

**THE JURIST’S CONFLICTING RESPONSIBILITIES:
DEVELOPING DISCOURSES OF INDIVIDUAL REASONING, TEXTUAL AUTHORITY, AND STATE
POWER**

At first glance, digital muftis’ use of modernist cultural norms and political ideologies would seem to be both innovative and unprecedented. In fact, though, digital muftis have re-invented the same normative discourses employed by the very earliest Muslim jurists. Here I will discuss the development of Muslim legal discourses of authority and reason, from the ad hoc norms employed by the earliest qadis, to the rigid, hierarchical arrangement of legal sources of the medieval *fuqahā*’, up to the personalized moral underpinnings of the contemporary digital mufti. These differing approaches to the conflict of text-based authority and jurists’ use of individual moral reasoning, along with the often-unacknowledged presence of the state and community’s coercive power as a source of authority, have developed in a cyclical pattern driven by unknown factors. I hypothesize that these changes were shaped by historical sociopolitical and technological shifts over time. While the early period of legal development lasted for a century at most, the medieval iterations of this discourse continued in a delicate balance that remained relatively stable for roughly one thousand years, from its inception in the eighth century to its final demise in the nineteenth.

These are also the forces that determine the nature of digital *fiqh* as an ongoing, crowdsourced re-imagining of the classical shari‘a system. Changes over time in the discursive relationship of textual authority and individual moral reasoning lie at the heart of my argument; in prescriptive

discussions of classical *fiqh*, personal moral reasoning, judgment, and legislation were subordinated to textual authority, while this relationship is reversed in the first century of Islamic legal development and in the emerging discourses of digital *fiqh*. I will discuss theoretical issues of online community formation, the Internet's democratization of knowledge, the absence of state power and the development of concepts of digital citizenship, and the nature of online constructions of authority, in order to show how each of these factors is central to the normative discourses of digital Muslim jurists. Understanding each of these theoretical issues is critical to mapping the history and future of digital *fiqh* and its real-world social and political consequences.

In all historical periods, legal authority and the principles of shari'ah have been constructed from several categories of sources. Obviously, the mufti's several sources of authoritative knowledge occasionally come into conflict, and classical jurists solved this problem by arranging the sources of *fiqh* in a discursive hierarchy of knowledge and evidence. The earliest jurists developed a wildly diverse legal system in which textual evidence was just one source of authority among many, including *ra'y*, customary law, and the demands of the government; *ra'y* and local custom in particular typically took precedence over textual sources of authority. It was not until 715-720 C.E. that religious scholars began to create a consistent set of laws that conformed to Qur'anic principles and existed independent of the state.⁷⁵ In direct contrast to the early period, in normative discussions of classical jurisprudence, revealed textual knowledge such as that found in the Qur'an always outweighs other types of evidence. The

⁷⁵ Matthew Lippman, "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law," *Boston College International and Comparative Law Review* 12 (1989): 32.

sunna and hadith, as authenticated accounts of the Prophet's and early Companions' sayings and deeds, are ranked only slightly below revealed knowledge. After these come human procedural and intellectual tools: First is *ijmā'*, community consensus, followed by *qiyas*, a broad term for all types of analogous reasoning. Finally, early and classical jurists practiced under the aegis of the state's coercive power, which, while often unacknowledged, served as a very real source of juridical authority.

Over time, and particularly in normative discourses, the shari'a system trended toward privileging textual authority over the judgment of the individual jurist. In digital *fiqh*, as I will show, this relationship is reversed. The Internet's tendency to democratize knowledge and encourage the formation of "echo chamber" communities of like-minded individuals, combined with the lack of functional systems of shari'a in almost all modern nation-states, is creating a new normative discourse of *fiqh* in which each mufti's personal knowledge and moral responsibility outweigh classical constructions of text-based authority. Digital muftis have returned to a discursive hierarchy quite similar to that of the earliest jurists, in which modern moral, political, and customary concerns are the most important sources of authority.

JUDICIAL PRACTICE OVER TIME

Despite the apparent precision of this system, even classical jurists could and in practice did disregard this normative ordering in order to reach judgments they felt were appropriate to the cases before them – in that sense, digital muftis are preserving an important aspect of early and classical praxis. Even classical juristic practice shows strong evidence of the importance of personal moral judgment, suggesting that the jurist’s individual moral imperative can equal or even occasionally override the textual authority of the Qur’an and sunna.

Law is conceived in Muslim societies as a means of ordering conduct and stabilizing social systems; these goals are achieved by setting expectations for acceptable behavior and means of dealing with deviant behavior. As a legal framework, shari‘a carries the weight of moral and religious values. The mufti, then, as the primary contributor to the ongoing process of creating substantive law,⁷⁶ holds a position of great responsibility in the shari‘a system. At the same time, the authority of an individual legal ruling or opinion is proportionate to the degree to which its author’s rulings are perceived to hew to the sources of law. Historically, the mufti’s primary jurisprudential function is providing advice in the form of *fatāwā* at the request of a qadi or an interested private citizen. The qadi courts appear to have based many of their rulings on *fatāwā*⁷⁷; in effect, the mufti indirectly received the backing of the state, which lent the legal system both its coercive power (in certain limited means) and its moral authority as the self-styled successor to the Prophet Muhammad’s ideal social order.

⁷⁶ Wael Hallaq, “From *Fatwas* to *Furu‘*: Growth and Change in Islamic Substantive Law.” *Islamic Law and Society* 1 (1994): 39-41.

⁷⁷ Muhammad Khalid Masud, David S. Powers, and Rudolph Peters, “Qadis and Their Courts: An Historical Survey,” in *Dispensing Justice in Islam: Qadis and their Judgements*, 1-4.

A fatwa may be requested by a layman, called a *mustafti*, or a qadi. The qadi's *istifta'* contains all the relevant facts of the case. The mufti's response to the *istifta'* is the *jawab*, and both are recorded together, making a fatwa. Thus we can see both the work of the qadi and that of the mufti, preserved together.⁷⁸ Wael Hallaq has shown that new *fatāwā* continued to be incorporated into the *furu'* (substantive law) even after the supposed rigidification of the post-formative period. In other words, new *fatāwā* were not purely theoretical legal discourses, but were functional, dynamic aspects of the law as a living institution. A fatwa, at its most basic, is the answer provided by a jurisconsult (mufti) in response to a question posed to him. It is therefore addressed to specific questions regarding “highly particular circumstances” with real-world implications. Muftis were, in fact, discouraged from writing *fatāwā* without roots in real-world problems. The mufti was responsible for writing *fatāwā* that were consistent with their school's doctrine, and therefore played an important role in the development of the *furu'* of each *madhhab*.⁷⁹

At the same time, Islam's rationalization as divine law means that jurists do not understand themselves to be legislating but only interpreting already-existing divine law. The religious nature of the law has certain practical implications: Because the ultimate legal authority is divine, legislation is not vested in the people. Issues of authority and sacred history influence laws and their interpretations, and the law's divine origin means that the law is not challengeable; there can be no individual human arbiter or infallible Pope figure. However, the lack of an earthly final arbiter means that constraint is necessarily exercised on the shari'a by a

⁷⁸ Ibid., 1-4.

⁷⁹ Wael Hallaq, “From *Fatwas* to *Furu'*: Growth and Change in Islamic Substantive Law.” *Islamic Law and Society* 1 (1994): 57-58.

plurality of opinions and the fact of individual choice; law is unenforceable except by individual choice moderated by consensus, social pressure, and state power. Historically, law was homogenized by the narrowing of consensus on acceptable sources of law and acceptable methods of reasoning.

Individual moral reasoning plays a crucial role in the functionality of the shari‘a system. Historically, the diffuse and polyvalent nature of authority in Islamic legal systems has formed a sort of discursive and practical lacuna that could only be filled by the personal ethical choices of the individual jurist. These personal choices serve a fundamental purpose in *fiqh*: Although the textual sources of authority do provide guidance on many potential subjects of legislation, they are by no means a complete legal system. The jurist’s moral judgment, exercised through any of several legal techniques and principles, was necessary to build a practicable legal system out of those sources. The individual Muslim jurist retained the decisive power to accept or reject established legal doctrine and even the textual sources of the law themselves.

CHANGING DISCOURSES OF AUTHORITY

In normative discourses of authority in classical shari‘a, the certain knowledge found in textual evidence typically outweighs the jurist’s use of the uncertain knowledge gained by the use of individual reasoning. The preeminent textual source of legal authority, the Qur’an, is regarded as a textual revelation of God's moral order for the universe. Human nature, in Islamic moral epistemology, is divided between a tendency to *islam* (submission to the divine) and a tendency to temptation; in legal terms, the Qur’an exists to provide humanity with an avenue for pursuing *islam*. It is not a legal document in any practical sense, but it does contain some legal pronouncements that are, in normative terms, incontrovertible. However, those legal pronouncements cover a range of human behavior that is limited at best. Muslim scholars of the classical era therefore created a massive corpus of commentaries on the Qur’an in order to interpret its moral and legal imperatives.⁸⁰

The secondary source of textual authority is the vast treasury of legal pronouncements and social commentary found in the sunna and hadith traditions. The epistemic value of a sunna as a foundation of law is “measured according to the conditions under which it was transmitted.”⁸¹ Those conditions indicate the authenticity of a sunna when a) there are multiple sources of transmission, b) the original transmitters must be eyewitnesses to the incidents they transmit, and c) these two conditions apply to each link in the isnad.⁸² Together, these conditions

⁸⁰ Fazlur Rahman, *Islam*, 30-42

⁸¹ Wael Hallaq, *A History of Islamic Legal Theories*, 58-68.

⁸² *Ibid.*, 58-68.

allowed classical jurists to draw on the practices of the Prophet and his Companions as a source of law.

By contrast, both early and digital jurists take a somewhat different discursive approach to the origin, nature, and purpose of authority. These two groups of jurists share a common approach to this discourse, shaped under similar social conditions. First, each group was born out of a highly mobile society in which new communities rapidly developed localized customs that often conflicted with the textual sources of law. For the first Muslim jurists, working in the era of the Islamic expansion, knowledge of and adherence to local custom would have been necessary to achieve a legal system that held any meaning for the people it judged. For digital muftis, membership in the Muslim diaspora means that they are linguistically and culturally distinct from the originators of the authoritative texts. Second, each group is or was composed of individuals who lack any formal or institutionalized training in legal methodology, but are guided only by their piety, ethical principles, and personal knowledge of religious texts. Many first/seventh century jurists possessed no more than passing familiarity with the textual sources of law; they were “recruited from the ranks of pre-Islamic arbitrators, lacked formal training and were illiterate.”⁸³ Similarly, many (though not all) online muftis feel the need to cite textual support for their arguments, but they do not rely on texts as the source of their rulings. In this section, I will explore the construction of online authority in the absence of both traditional *fiqh* hermeneutics and state enforcement of legal rulings.

⁸³ Muhammad Khalid Masud, David S. Powers, and Rudolph Peters, “Qadis and Their Courts: An Historical Survey,” in *Dispensing Justice in Islam: Qadis and their Judgements*, 8.

Early jurists worked in the absence of a formalized system of legal sources, yet they had to establish their authority in a military-dominated society.⁸⁴ They lacked access to the as-yet undeveloped body of *tafsir* that their descendants would rely on, meaning that a collection of uninterpreted, fragmented religious texts would have been less than helpful in executing law over a garrison full of soldiers. Likewise, in the absence of “the epistemological and hermeneutical framework within which their *faqih* predecessor operated,”⁸⁵ as well as that of any functional coercive state power on the Internet, digital muftis must work creatively to establish their right to offer authoritative legal opinions. Individual Internet users, including digital muftis, use several strategies to mark themselves as authoritative speakers on their chosen subject.

The authors of online *fatāwā* use several broad categories of “codes” to establish authority, such as using official-sounding titles, requiring paperwork to process *khul’* and *talaq* applications, citing textual evidence, and appealing to higher authorities. Several of these codes bear a superficial resemblance to the conventions of classical *fiqh*, although they have been repurposed to fit contemporary realities. In some senses, “[t]he Internet has also served to reinforce and reify ... traditional structures and forms of authority,”⁸⁶ by forcing digital muftis to prove their authority using familiar markers. While the immediate form of information exchange has been altered, the very newness of Internet *fiqh* requires its practitioners to prove their authority according to traditional measures.

⁸⁴ Ibid., 8-9.

⁸⁵ Wael Hallaq, “Can the Shari ‘a be Restored?” In *Islamic Law and the Challenges of Modernity*, edited by Y.Y. Haddad and B.F. Stowasser, 26.

⁸⁶ Peter Mandaville, “Reimagining Islam in Diaspora : The Politics of Mediated Community.” *International Communication Gazette* 63 no. 2-3 (2001): 183.

However, there are important differences between classical and digital markers of authority. All such markers used by classical jurists are ultimately rooted in the supremacy of the certain knowledge found in divine or authenticated texts. The use of titles, for instance, stems from an educational system founded on the study of texts; the citation of textual evidence is the source of, rather than support for, their conclusions; and their appeals to higher authority are based on isnads and the sound authentication of their sources. In other words, classical jurists use these markers of authority to prove the authenticity of their claims; digital jurists use markers of authority to prove their right to speak on their chosen subject. El-Nawawy and Khamis identify this transaction as the establishment of trust between author and reader,⁸⁷ a transaction rendered unnecessary in classical *fiqh* by the strict protocols regarding jurists' moral character. The reliance of digital Islam on markers of authority has its drawbacks, most notably the incompatibility of digital anonymity with classical *fiqh*'s dependence on the publicly attested upright moral character of any given *faqih* or mufti. For instance, "the enterprising young 'alim who sets himself up with a colorful website in Alabama suddenly becomes a high-profile representative of Islam for a particular, disseminated and distantiated constituency. ... [O]ne can also never be sure whether the 'authoritative' advice received via these services is coming from a classically trained religious scholar or a hydraulic engineer moonlighting as an amateur religious scholar."⁸⁸ However problematic this discrepancy may be, however, Muslim Internet users have not yet arrived at a universally satisfactory means of establishing authority.

⁸⁷ Mohammed El-Nawawy and Sahar Khamis, *Islam Dot Com*, 73-75.

⁸⁸ Peter Mandaville, "Globalization and the Politics of Religious Knowledge: Pluralizing Authority in the Muslim World." *Theory, Culture & Society* 24, no. 2 (2007): 183.

Digital muftis often establish their knowledge by citing hadith or Qur'anic verses, thus visibly establishing fluency with the foundational texts of *fiqh*. Their use of these texts is nonetheless often quite shallow – one gets the sense that some authors include them as a sort of pro forma defense against accusations of judicial legislation. Alternatively, it is possible that digital muftis instead borrow the forms of these classical authority markers as a way to “offer a reassuring set of symbols and terminology which attempt to reproduce familiar settings and terms of discourse in locations far remote from those in which they were originally embedded.”⁸⁹ Regardless, it seems obvious that authoritative texts are usually, if not always, included in digital *fatāwā* as symbols of the author's authority rather than as evidence to be interpreted. Certainly, these haphazardly applied texts can only succeed as symbols of authority if their audience, like their authors, is also ignorant of the content of classical-era *fatāwā*.

There are also some other ways in which these muftis attempt to establish their own “official” legitimacy and authority. They do this first by using titles such as shaykh, imam, or mufti. They also require documentation in order to approve a *khul'* case, which is decided based on a written application.⁹⁰ Establishing authority through paperwork is hardly a new practice, but details such as these, required by the U.K. Islamic Shari'ah Council, are fairly recent developments:

“The woman who applies for a divorce is required to fill an application form, which cover most of the details about the marriage itself. She has to provide a Marriage Certificate and other relevant documents. ... If the husband agrees to

⁸⁹ Ibid., 183-184.

⁹⁰ See Appendix B for an example of one such application form.

divorce in exchange of dowry, the Khul'a divorce is deemed to be completed. If he does not agree the Council may issue divorce as an authoritative body work in the capacity of an Islamic Court.”⁹¹

Despite these innovations, apolitical websites are clearly attempting to base their methods and results on those of the classical Sunni jurists.

Digital muftis often offer blanket rationalizations for their authority – many *fatāwā* begin with the phrase, “Islam says ...” or similar formulations, followed by an opinion that may or may not bear any relation to those found in classical jurisprudence. Even the very slightly less sweeping phrase of justification used by some other sites, “Islamic law says ...,” condenses centuries of diverse discourse into a monolithic tradition without room for debate or interpretation. These appeals to the ultimate authority of Islam serve a dual purpose. The first is simple: to situate the author as a delegate of divine law. The underlying aim is to protect the author from accusations of legislating shari‘a, a practice forbidden for obvious reasons. The second purpose of these appeals is similar to the purpose of digital muftis’ shallow use of textual evidence; it offers a certain comfort to people seeking definitive religious knowledge. It should be noted that conservative muftis seem somewhat more likely than liberal ones to borrow the markers of the classical jurist, such as legalistic language and appeals to authority; the liberal sites use more blatantly political language and argue for the legitimacy of individual interpretation of Muslim morality. Liberal sites are least likely to lay claim to traditional titles of

⁹¹ Islamic Shari‘a Council, “Khul'a case - what are the factors taken into consideration to decide a case?” <http://www.islamic-sharia.org/divorce-khula/khula-case-what-are-the-factors-taken-into-consideration-to-decide-a-2.html>

authority, probably because they are part of a movement that, to some degree, rejects the traditions of medieval *tafsir* and mediated access to shari‘a. They also make unabashed reference to secular sources, such as the Universal Declaration of Human Rights, interweaving these evidences with *ahādīth* and Qur’anic verses.⁹²

⁹² “Equal rights to dissolve marriage and upon its dissolution,”
http://www.musawah.org/rk_divorce.asp.

CHANGING DISCOURSES OF INDIVIDUAL MORAL REASONING

As a system of divine law, normative discourse obviously forbids humans to legislate changes to shari 'a. Despite this basic restriction on classical jurists' activities, they developed a wide range of techniques that allowed them to render judgments that were more appropriate to individual situations than textual sources might strictly allow. The formal transmission of prophetic hadith had created an authoritative basis for traditionalist legal rulings; rationalist jurists could not provide an equally authoritative basis for their personally reasoned rulings, and so several procedural tools were formalized as part of their attempt to do so. However, even in historical periods when these intellectual methodologies were most accepted, normative discourses still subordinated their use to that of the certain knowledge found in the Qur'an and sunna.

In classical epistemology, human intellectual tools are the basic means by which personal moral judgment is rendered. Fazlur Rahman suggests that *'ilm* and *aql* (knowledge and intellect) combine in human beings to produce moral responsibility, the human obligation to perceive and act within God's commands for the world.⁹³ These characteristics, although by no means universal, must be possessed by the competent jurist, who may apply them in several ways. *Ijmā'* is the first major means by which jurists may indirectly legislate. In classical shari 'a, the functioning of the legal system and the prevention of juridical chaos are both protected by *ijmā'*. Classical definitions of *ijmā'* included either the unanimous agreement (tacit or expressed) of *mujtahidin* on a particular issue or rule of law, or, as in Shafi'i's definition, the consensus of the

⁹³ Fazlur Rahman, *Islam*, 33-35.

umma and not only the *mujtahidin* – meaning that *ijmā'* can only be achieved on very broad issues related to general religious duties.⁹⁴ Ghazali's rather broader definition describes *ijmā'* as the consensus of the Prophet's community on any matter, whether juridical, customary, or linguistic.⁹⁵ Practically speaking, then, *ijmā'* is a means of sanctioning the less authoritative interpretations of jurists – i.e., those that are unsupported or uncertainly supported by textual evidence. In other words, *ijmā'* has the tendency to homogenize legal interpretations while undermining the absolute authority of textual evidence.⁹⁶

Ijtihad is, of course, the most obvious means by which a jurist may exert an individual influence on legislation. *Ijtihad* is the “exertion of mental energy in the search for a legal opinion to the extent that the faculties of the jurist become incapable of further effort”⁹⁷ – the *sina qua non* of personal judgment. Orientalists argue, of course, that the so-called “gate of *ijtihad*” closed by the third/ninth century, but Hallaq has famously and convincingly shown that the gate was not closed in either theory or practice and that *ijtihad* was in fact indispensable to workaday classical Sunni jurisprudence. The objective of *usul al-fiqh* was to establish principles that could be extrapolated to novel cases (presumably to avoid the exertion of unnecessary *ra'y*); because *ijtihad* was necessary to accomplish that goal, classical jurists found a place for it even in their normative hierarchy of legal sources.

Orientalists based their claim on the theory that *ijtihad* fell into disuse because the standards for accomplishing it became impossibly high; Hallaq disagrees, saying that *ijtihad* was

⁹⁴ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 238-239.

⁹⁵ *Ibid.*, 238-239.

⁹⁶ *Ibid.*, 231.

⁹⁷ Wael Hallaq, “Was the Gate of *Ijtihad* Closed?” *International Journal of Middle East Studies* 16, (1984): 3.

taken for granted in law and government in the fifth/eleventh century and beyond, when it continued to play a role in developing positive law. He acknowledges that there was a narrowing of the potential for *ijtihad* after the tenth/sixteenth centuries due to the “completion” of legal theories and schools and the simultaneous trend against the creation of new doctrines and schools. However, it was still possible to be a *mujtahid* within one's *madhhab* or within a particular area of law, i.e., inheritance law. Types of *mujtahids* had to be reclassified, i.e., the founder of a school must be re-termed an independent *mujtahid*, but there could no longer be a place for other such independent *mujtahidin*.⁹⁸ *Maslaha*, a type of *ijtihad*, literally means “a cause or source of something good or beneficial” – it is the jurist’s obligation to consider the social good or public weal (although it also can be applied to private or individual situations). *Maslaha* embodies the spirit of Islamic law while simultaneously sometimes conflicting with its letter. It addresses one of the central problems of Islamic law by acting as a vehicle for legal change, which is necessary to maintain the legal system’s relevance in the face of social change. However, this principle can conflict with the need to preserve the law's origins in divine revelation.⁹⁹

The principle of *istihsan* serves a slightly different function. In practice, it is the legal principle of fairness and equity; it relies on the philosophical first principles of shari‘a, which assume externally valid, static values of right and wrong. Because the creation of *furu’* in new cases is based on limited and rigid sources, a jurist may be forced to issue a ruling that, while

⁹⁸ Ibid., 8-16.

⁹⁹ Felicitas Opwis, “Islamic Law and Legal Change: The Concept of *Maslaha* in Classical and Contemporary Islamic Legal Theory.” In *Shari‘a: Islamic Law in the Contemporary Context*, edited by Abbas Amanat and Frank Griffel, 62-63.

based firmly on casuist reasoning and existing positive law, is inappropriate to the particulars of the case before him. *Istihsan* is used to mediate the discrepancies between the rigidities of existing positive law and shari‘a’s foundational first principles, so that a jurist may rule without being handcuffed to existing positive law. Controversies thus surround both *istihsan*’s relation to the similar tools of *qiyas* and *ra’y*, and its basic validity as a tool of law. Because of this basic controversy, classical jurists assumed that *istihsan* must be regulated to avoid total judicial subjectivity and legal chaos. The various *madhahib* approached these regulations differently: The Shafi‘is rejected *istihsan* completely; the Hanbalis accepted it but subjugated it to the sunna; the Hanafis and Malikis accepted it much like they accepted *ra’y* (although it still had to be justified or legitimated by some form of textual evidence).¹⁰⁰

Evidence suggests that in the early period of legal development (in the third/ninth century and earlier), textual evidence did not necessarily outweigh all other considerations, such as customary law, local practice, and individual moral and ethical preferences.¹⁰¹ Jurists of the early era and the digital period share a similar dependence on the use of individual moral reasoning in determining their verdicts. It has even been argued that scholars of the classical era developed a formalized set of intellectual methodologies and procedures as a means of rationalizing the *ra’y*- and custom-based rulings of earlier generations.¹⁰² As with the development of discourses on

¹⁰⁰ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 323-350.

¹⁰¹ *Ibid.*, 323-350.

¹⁰² Felicitas Opwis. “Islamic Law and Legal Change: The Concept of *Maṣlaḥa* in Classical and Contemporary Islamic Legal Theory.” In: *Shari‘a: Islamic Law in the Contemporary Context*, ed. Abbas Amanat and Frank Griffel. Stanford: Stanford University Press, 2007, 65.

textual authority, similar social conditions in both situations encouraged a heavy reliance on independent legal reasoning.

Both early and digital muftis discovered themselves to be leading a legal vanguard, cut off from the support of previous generations' legal system, and each group is or was participating in the ad hoc creation of a legal system with roots in non-Islamic moral and legal discourses. The early jurists faced unprecedented social, political, and legal problems resulting from the Islamic expansion, including the cultural melting pot of garrison towns, the pressures of state administration, and the near-total lack of functional textual guidance. In the early period, the lack of legal precedent, jurists' limited knowledge of religious texts, and the presence of still-extant pre-Islamic moral and legal practices all combined to promote independent reasoning and discourage reliance on authoritative texts.¹⁰³ Their use of independent reasoning was predicated on a legal and religious epistemology that depended on an incomplete democratization of knowledge – while they lacked access to an institutionalized body of texts, the very absence of such a body meant that all early jurists possessed the same rights to legislate based on personal discretion. Moreover, the early jurists may have been aware of “the tradition attributed to the Prophet stating: ‘Every mujtahid [jurist who strives to find the correct answer] is correct,’ or ‘Every mujtahid will be [justly] rewarded.’ This implied that there could exist more than a single correct answer to the same exact question,”¹⁰⁴ an implication that early jurists would have happily used to justify their pluralism.

¹⁰³ Muhammad Khalid Masud, David S. Powers, and Rudolph Peters, “Qadis and Their Courts: An Historical Survey,” in *Dispensing Justice in Islam: Qadis and their Judgements*, 8.

¹⁰⁴ Khaled Abou El Fadl, “Constitutionalism and the Islamic Sunni Legacy,” *UCLA Journal of Islamic and Near Eastern Law* 1 (2001): 96-97.

Digital muftis have similar and equally compelling reasons to privilege individual reason over textual authority. Like the early jurists, they are starting from scratch in a real sense – few if any digital jurists can draw on the hermeneutics of a familiar legal heritage – and lack deep awareness of legal or religious texts. They live in sociopolitical situations that are indifferent at best, and openly hostile at worst, to the structures and traditions of shari‘a. For digital muftis, the Internet democratizes knowledge in several ways, some more obvious than others – and the democratization of knowledge is, of course, the source of all digital *fiqh*. At its most basic, the Internet is a vast and universally accessible repository of information. At the same time, it engenders dialogue and information exchange. Newly opened spheres of debate lead to the pluralization of formerly monolithic discourses.

How, then, is knowledge democratized in digital Muslim communities? Online muftis use versions of the procedural tools discussed above – *maslaha*, *istihsan*, etc. – to inject moral and social concerns into their *fatāwā*. The “absence of sanctioned information from recognized institutions”¹⁰⁵ drives young Muslims to search for religious knowledge online. Although many, perhaps most, sources of digital *fiqh* claim to represent authentic Islam, seekers are immediately confronted with a wild variety of conflicting statements. With access to virtually every possible interpretation of Islam, “Muslims are increasingly taking religion into their own hands,” allowing them to “solicit information about what ‘Islam’ says about any particular problem.”¹⁰⁶

¹⁰⁵ Peter Mandaville, “Reimagining Islam in Diaspora : The Politics of Mediated Community.” *International Communication Gazette* 63 no. 2-3 (2001): 182.

¹⁰⁶ *Ibid.*, 182.

Knowledge that was once effectively confined to the ‘ulama’ is now the subject of intense debates among laypeople.

Knowledge democratization has several important effects on digital Muslim communities. First, as consumers of religious knowledge accelerate the pluralization of religious knowledge, most segments of the digital *umma* will arrive at a gradual loss of support for normative claims made by any given branch of Islamic thought. The digital landscape will provide homes for innumerable communities of Islamic thought, each acknowledging, however reluctantly, the others’ right to exist. The same effect will be felt, to varying degrees, in real-world political and social spheres. Second, the ability to freely produce and propagate knowledge will have both obvious tangible effects, such as the immediate diversification of legal and moral opinions, but also intangible ones, such as the growth of a sense of individual ownership over religious (and perhaps political) choices.

To some extent, one must rely on the assumption that the democratization of knowledge naturally leads to its pluralization. Mandaville argues that for Muslims, the Internet has allowed “knowledges (and contestations of knowledge) to mingle with a historically unprecedented intensity,”¹⁰⁷ a phenomenon that, he suggests, will lead not only to a pluralization of Islamic thought but also to a sense of universal pluralism and tolerance, even to the point of undermining Muslim acceptance of Islam’s ontological assumption of universality. The democratization of knowledge, then, “allows Islamic knowledge to be understood as one particular form of authoritative discourse among many. Rather than serving as a ‘trump card’ that supersedes all

¹⁰⁷ Peter Mandaville, “Globalization and the Politics of Religious Knowledge: Pluralizing Authority in the Muslim World.” *Theory, Culture & Society* 24, no. 2 (2007): 108.

other forms of authoritative discourse (e.g. appeal to universal human rights), Islamic knowledge becomes resettled as one component of a pluralistic system of heterogeneous authorities which coexist comfortably and often quite profitably.”¹⁰⁸ In my estimation, Mandaville takes this argument a step too far – while it seems obvious that for young Muslims, roughly simultaneous democratization of Islamic knowledge and widespread exposure to multiple, competing discourses will lead to adoption of this type of universal pluralism, his suggestion that Islam will lose its position as an ultimate discourse or paradigm seems to be an extraordinary claim without extraordinary evidence backing it up.

¹⁰⁸ Ibid., 104-105.

CHANGING DISCOURSES OF STATE POWER, COMMUNITY PRESSURE, AND COERCION

Normative discourses of authority in every era rarely acknowledged the importance of state power or social pressure in *fiqh* – either moral and coercive – as implicit justifications of legal rulings. It is difficult to say with certainty how the classical jurists’ decisions were affected by their access to the state’s powers of coercion. The legal status of the qadi is based on a system of delegation from central authority; he operated according to highly regimented systems, had coercive power, large areas of jurisdiction, taught law and issued *fatāwā*, legitimized the investiture of a new caliph or the deposition of an old one, oversaw the market and other municipal functions, and settled litigations including wills.¹⁰⁹ In many times and places, then, the shari‘a jurist has functioned as a direct representative of the state, whose power he upheld and whose authority he relied upon.

The Qur’an uses two verbs to describe different aspects of the process of judgment: *hakkama* for arbitration and *qada* for authoritative judgment. Muhammad has always been Muslim society’s model of an ideal combination judge and arbitrator, and this dual role strongly influenced the classical conceptions of the jurists’ role.¹¹⁰ Other influences include the historical development of the relationship between the state and the divine law it sometimes enforced. The rashidun caliphs inherited Muhammad's role as ultimate arbiter and the Umayyads acted as a sort of ultimate qadi. The earliest qadis worked in garrison towns and were subject to the caliph; they

¹⁰⁹ E. Tyon, “Judicial Organization.” In *Law in the Middle East*, edited by Majid Khadduri and H. J. Liebesny, 236-241.

¹¹⁰ Muhammad Khalid Masud, David S. Powers, and Rudolph Peters, “Qadis and Their Courts: An Historical Survey,” in *Dispensing Justice in Islam: Qadis and their Judgements*, 7.

functioned as arbiters of disputes based on their (possibly limited) understanding of the Qur'an and on personal discretion. In the earliest decades their jurisdiction was limited to the garrison towns, where Mu'awiya and the early Umayyads formally appointed qadis as their delegates. In that sense, the jurist acted as an inheritor of the delegated authority of the caliph and the Prophet himself.

Under the Umayyads, the process of consolidating state control over the legal system began in earnest. In this period, the office of qadi was a judicial-administrative one under the patronage and authority of the state. The qadi's legal sources were Qur'an, sunna, local custom, and *ra'y*, with a heavy reliance on the latter two.¹¹¹ The Umayyads also gave the qadis access to wealth and strengthened the qadis' social and political positions by giving them the right to administer *awqaf*. Harun ar-Rashid appointed the first chief qadi, who was his direct representative – an early attempt to consolidate state control over the legal system.¹¹² Abbasid-era qadis also had increasing legal influence, culminating in the ninth/second century in the political disaster of the *mihna*. This episode, in which an unpopular state appropriated the 'ulama' as propagandists, led to a popular backlash against the qadis' role as state propagandists, causing many if not all of the 'ulama' to categorically reject state attempts to unduly influence their doctrines. While later classical-era caliphs were less insistent on directing the course of legal doctrine, they did continue to subtly extend their power over the 'ulama' by requiring proof of loyalty from anyone appointed as a qadi.¹¹³ By the mid-ninth century, qadis were political

¹¹¹ Muhammad Khalid Masud, David S. Powers, and Rudolph Peters, "Qadis and Their Courts: An Historical Survey," in *Dispensing Justice in Islam: Qadis and their Judgements*, 11.

¹¹² *Ibid.*, 12.

¹¹³ *Ibid.*, 12-13.

insiders appointed from outside the towns they judged for. They became state functionaries and based their decisions on the formal doctrine of an institutionalized *madhab*.

At the same time, the qadi's reliance on state authority was not complete and in some ways actually paradoxically increased his ability to exert his own judgment. Because non-democratic states typically derive legal authority by bolstering their credibility with the claim that their law is divine and morally righteous, they make themselves dependent on the goodwill of the legal class. Both historic and contemporary "Islamic" states perform various bureaucratic and linguistic acrobatics to avoid the appearance of legislating divine law. As Hallaq argues, "[i]ncreasing Islamicization among the masses, and the legitimacy with which the religious scholars were invested, left the caliphs no option but to endorse a religious law whose authority depended on the human ability to exercise hermeneutic. Those who had mastered this science were the jurists,"¹¹⁴ whose mastery of hermeneutics allowed them to mediate between state power, textual authority, and the reality of practicing law. Jurists of the post-mihna period exercised an increasing degree of political power over the ruling class, allowing qadis to produce judgments with a certain freedom from state control.

The last point of similarity between early and digital discourses of authority lies in their different degrees of contact with a coercive state or state-like institution. Expansion-era jurists worked within small, contained, relatively homogenous young communities, although they of course also acted as delegates of a state apparatus. Early qadis were direct delegates of the state, appointed from within the ranks of the communities they judged. Although their legislation was almost certainly affected by their superiors' needs, the relationship of jurists to state was not one

¹¹⁴ Wael Hallaq, *Shari'a: Theory, Practice, Transformations*, 131.

of official subjugation, but rather was built on by the subtler pressures of political patronage and community norms.¹¹⁵ Digital communities perform an indirect controlling and coercive role somewhat similar to that of the state or even the unofficial proto-*madhahib* of the expansion era; they are the wellsprings of the *ijmā'* that informs digital muftis' political and discursive judgments. Digital communities are best analyzed here as Habermasian public spheres in which social pressure determines the direction of mutually agreed-upon discourses, so that "homogeneity within the public sphere would help reach a consensus on the issues being discussed."¹¹⁶ The *fatāwā* authored by digital muftis are usually identifiable with a particular community's presence on the Internet, and these opinions show the traces of the community's political presence.

Muslim digital community formation is also affected by concrete, real-world political factors. The realities of postcolonial social fragmentation in rapidly developing societies, a fragmentation that is deepened by the diaspora, form a uniquely high-pressure search for identification with a community. Searchers turn naturally to the Internet, with its social chaos punctuated by nodes of commonality. These nodes of commonality can seem especially enticing to a member of the diaspora, for whom the "processes of community and identity articulation become even more pronounced. The estrangement of a community in diaspora – its separation from the 'natural' setting of the homeland – often leads to a particularly intense search for and negotiation of identity: gone are many traditional anchor points of culture; conventional hierarchies of authority can fragment. In short, the condition of diaspora is one in which the

¹¹⁵ Muhammad Khalid Masud, David S. Powers, and Rudolph Peters, "Qadis and Their Courts: An Historical Survey," in *Dispensing Justice in Islam: Qadis and their Judgements*, 9-11.

¹¹⁶ Mohammed El-Nawawy and Sahar Khamis, *Islam Dot Com*, 25.

multiplicity of identity and community is a key dynamic.”¹¹⁷ However, the diasporic plurality of identity is quickly limited within digital communities.

While one might automatically assume that online communities, as products of the (semi-)universally accessible Internet, are inherently open to ideological pluralism, the opposite is true. Digital communities are as prone to insularity and suspicion of outsiders as any isolated village. Internet users often naturally sort themselves into homogenous communities and then self-segregate from other groups.¹¹⁸ Muslim digital communities are, of course, subject to the same universal social pressures, leading each community to self-police the online behavior and the normative discursive tendencies of its members with common tactics such as a trolling, flaming, and shunning.¹¹⁹ These digital tactics of social control perform a function similar to that of the state or the community in earlier periods, enforcing a narrowing *ijmā'* that creates ever more homogenous rulings within each community. It may be possible, due to diasporic peoples' especially strong drive to construct coherent identities,¹²⁰ that diasporic digital communities may exert an even stronger homogenizing influence on their members than others would. If this is the case, then digital communities may possess discursive authority at least as strong as that of the state or the old *umma*.

¹¹⁷ Peter Mandaville. “Reimagining Islam in Diaspora : The Politics of Mediated Community.” *International Communication Gazette* 63 no. 2-3 (2001): 172.

¹¹⁸ Mohammed El-Nawawy and Sahar Khamis, *Islam Dot Com*, 16.

¹¹⁹ See [http://en.wikipedia.org/wiki/Flaming_\(Internet\)](http://en.wikipedia.org/wiki/Flaming_(Internet)) and [http://en.wikipedia.org/wiki/Troll_\(Internet\)](http://en.wikipedia.org/wiki/Troll_(Internet)) for thorough explorations of these terms.

¹²⁰ Mohammed El-Nawawy and Sahar Khamis, *Islam Dot Com*, 117.

**CONCLUSION:
THEORETICAL AND PRACTICAL CONSEQUENCES OF CHANGING DISCOURSES OF AUTHORITY,
INDIVIDUAL REASON, AND SOCIAL COERCION**

The era of digital *fiqh* has ushered in a new course of development for normative discourses on textual authority, individual moral reasoning, and state power; a chronological arc that previously appeared to lead in one direction from an old discourse to a new one has in reality turned back on itself. Attempts to explain the cause of this cyclical effect are, of necessity, purely speculative, but the available evidence suggests that it appears to be rooted in changing social circumstances. The classical adherence to textual evidence as the ultimate authority is undeniably dead; the institutions, logic, and societies that created classical shari‘a have vanished from the earth and are unlikely to return, barring almost unimaginable political upheavals. However, it is presently unclear if individual moral reasoning will come to be understood as superior to textual authority or if the two will be seen as equally necessary aspects of a fluid system.

At the same time, it also appears that the juristic practices based on those changing discourses have remained relatively static – as discussed above, available evidence from every era suggests a fairly universal tendency to privilege the jurist’s individual reason over divinely revealed, authoritative texts. The variations in practice that do exist appear to be the product of changing degrees of state power; it is intuitively obvious that the jurist whose opinion is backed by all the coercive authority of the state will rule differently than one who is dependent on his social status and powers of persuasion. Today, the crowdsourcing of shari‘a means that no digital mufti can call on a controlling state apparatus to enforce his or her arguments, but many other

aspects of their methodologies are similar to those of their predecessors. However unconventional the digital muftis' conclusions or training may be, they almost universally base their opinions on individual reasoning, familiar customary practice, and moral norms, using textual evidence only as secondary proof, if at all.

If, as I have shown, the normative relationship of textual authority and individual moral reasoning has been repeatedly reversed, while their practical relationship has remained roughly stable, what are the likely consequences for Muslim communities, religious and political movements, and thinking on pluralism and human rights? How will individuals and communities re-evaluate their relationships with shari‘a? Considered skeptically, a purely normative shift in discourse over a de facto defunct legal system would seem unlikely to have any discernible impact; however, this shift is undeniably making its mark, especially on diasporic communities. The reversal of the discursively normative relationship of authority and individual in *fiqh* will have both theoretical and practical consequences. Both of these factors, along with the community that encapsulates and relates them to each other, will be understood in new ways.

The Internet's social landscape, based as it is on a combination of tight-knit "echo chamber" communities and vast, anonymous spaces, will shape new understandings of the function of community, social pressure, and consensus as sources of moral and religious authority. The distinguishing characteristic of digital groups is that they are, of course, communities of choice rather than necessity. Perhaps paradoxically, the individual's ability to choose his or her preferred community means that each group will increase in uniformity over time. This increasing uniformity will probably increase the social cohesion of each group and thus the strength of the group's influence over its members. While digital communities obviously

do not wield the coercive power of the state, the social pressure produced by group membership can function in a similar way, ensuring that digital *fatāwā* are quite likely to impact the lives of the people who request them. It seems unlikely that this increase in the cohesion and influence of communities, based as it is on the distinct structures of digital life, will translate to the functioning of real-world Muslim communities, but if it does, it is possible that the present sorting of diasporic Muslims into groups based on political and ethnic affiliation may intensify. Other aspects of community structure, such as the relationships and status hierarchies that pervade them, will likely remain stable. The social position of the Muslim scholar of positive law, while robbed of its “official” authority, is much the same in the era of digital *fiqh* as it was in the time of the earliest Muslim expansion.

New discourses of authority and individualism may already be shaping Muslim religious and political movements. Is it possible that these changing discourses made the leap from digital *fiqh* to non-religious political action? Certainly the broad human activities included in these discourses, and the social and technological skills needed to participate in them, can be transposed to the political situation in many Muslim-majority countries. The newfound ability to produce and share knowledge has already had at least one profound impact in the real world – while it may take some years for its role to be fully understood, it seems obvious that digital debates, organization, and information-sharing were integral to the widespread Arab political revolts against authoritarian governments in the winter and spring of 2011. The same process may also be occurring in diasporic Muslim communities – the jihadi movement, with its strong contingent of young Muslim immigrants throughout the world, draws much of its doctrine (and many of its recruits) from online discussions featuring the same principles of debate based on

democratized religious knowledge. At the other end of the political spectrum, proponents of “progressive Islam” are also subjecting religious ideas to the new discourses of authority and individual reason.

It is possible that the ongoing democratization of knowledge in the digital sphere has also had another immediate impact in real-world Muslim thought. The ever-increasing access to information may, for instance, lessen the importance of national distinctions by creating a broad class of people who share in the same pool of knowledge regardless of national borders. For instance, “[b]eyond the emergence of ‘new Islamist intellectuals’ (Roy, 1994) and ‘lay’ Muslims without formal religious education as authorized articulators of Islam, we also see a concomitant widening in the spatial dimensions of the public sphere. Religious leaders, imams and muftis in local contexts and their constituencies all have increased awareness of, and, indeed, actively engage with discourses and personalities in other countries – often today via satellite broadcasts and Internet discussion forums.”¹²¹ It is tempting to compare this partial and extremely confined virtual dissolution of national borders to the twentieth-century activist pan-Arab or pan-Islamic ideologies. However, it seems rather likelier that there may be a revival or a widening of one or many apolitical pan-Islamic identities, which would be added to other forms of overtly political identification without replacing them.

It would be irresponsible to suggest that the rise of digital *fiqh* will revolutionize contemporary Muslim understandings of plurality, religious freedom, and human rights. Such an argument is flawed, not only by its clumsy assumption of a monolithically repressive and

¹²¹ Peter Mandaville, “Globalization and the Politics of Religious Knowledge: Pluralizing Authority in the Muslim World.” *Theory, Culture & Society* 24, no. 2 (2007): 108.

intolerant Islam, but also because of its clear relation to typical twentieth century modernization discourses. While the specific forms of this discourse have shifted over the decades, its essentialist and civilizational basis remains unchanged. If only Muslims had access to [education, democracy, consumer capitalism, the Bible, the Internet], that argument goes, they would finally be westernized and reject their hidebound, oppressive ways. Western policy-makers and politicians have reframed the same argument again and again and been disappointed at every turn. As digital Islam blooms into a vibrant culture, its members will not automatically adopt Western political and social ideals; instead, they will debate and decide on issues in ways that suit their own concerns as Muslims, citizens of modern nation-states, and individuals. While it seems obvious that ideological pluralism will be strengthened by this process, it would be morally and intellectually wrong to suppose that the Internet will usher in a new age of freedom, tolerance, and democracy.

It seems clear that “shari‘a as a legal system [is] now defunct, as Wael Hallaq asserts”¹²² – traditional shari‘a court systems have ceased to exist¹²³; for many exegetes, *tafsir* has become a political project rather than a religious exercise; and *fiqh* has been appropriated by anyone with an Internet connection and a basic mastery of the English language. It is impossible to predict the exact path to be taken by this layman’s’ *fiqh*, or the effects it will have on lay Muslim understandings of shari‘a. However, the factors that influenced the evolution of digital *fiqh* thus far will continue to exert an influence that seems likely to increase with time. Bunt argues that while traditionally accredited religious-legal scholars may continue to exist, “the potential

¹²² Yvonne Y. Haddad and Barbara Stowasser, *Islamic law*, 10.

¹²³ Or are ceasing to exist, in the rare places where they can still be found.

opportunities for accessing alternative routes and information nodes has expanded exponentially on the Internet.”¹²⁴ Both the intellectually democratizing effect of the Internet and the intrusion of modern discourses of morality will almost certainly continue to bear on historical understandings of *fiqh*’s nature and role.

As Internet access becomes more widespread, Muslims are increasingly likely to engage critically with traditional shari‘a and to view it through the lens of modernist moral frameworks. If this is the case, one can quite possibly expect *fiqh* to become the base of a personal and individualistic value system rather than a scholarly practice with real-world legal implications. A development of this nature would fit neatly with the theories and arguments of those scholars, such as Abdullahi An-Na’im,¹²⁵ who propose making a re-evaluated *fiqh* the foundation of a personal moral discourse rather than a public legal one. Legions of digital muftis will continue to attempt a reconciliation of modernity and divine authority – most notable among them, Shaykh Qaradawi, whose work “is devoted to the construction of a progressive Islamic state, by way of reconciling the Holy Qur’an with democracy, human rights, and modernity”¹²⁶ – but at the moment, it appears that modernity may completely overtake the traditional authority of the sacred texts.

My research leaves several important questions unanswered. For instance, why is it that while the development of normative discourses is driven by ongoing social and political changes, the practices ostensibly based on those discourses have remained static? What is the relationship

¹²⁴ Bunt, *IMuslims*, 279.

¹²⁵ Abdullahi Ahmed An-Na’im, *Toward an Islamic Reformation*, Introduction.

¹²⁶ Barbara Stowasser, “Old Shaykhs, Young Women, and the Internet: The Rewriting of Women’s Political Rights in Islam.” *Muslim World* 91, no. 1/2 (Spring 2001): 99

of diasporic digital *fiqh* to the digital *fiqh* produced by residents of Muslim-majority countries? How are the characteristics of diasporic digital *fiqh* different from those of Muslim-majority *fiqh*? How will each variant of digital *fiqh* develop, and how will they influence one another?

The newly apparent cyclical development of normative Muslim legal discourses, especially when contrasted with the relatively static relationship of the same variables in practice, is consistent with the supposition that there can be no externally authenticatable object called “shari ‘a.” Instead, even the prescriptive discourses surrounding a divine system of law are subject to social change and human mutability. While many of the reformers of the past two centuries would almost certainly be appalled at the elusive, personal, and decentralized character of crowdsourced shari ‘a, it seems likely that digital *fiqh* is the only rational response available to Muslims who want to keep shari ‘a alive in the era of the nation-state. While digital *fiqh* has been much altered from its classical counterpart, it also shows the flexibility of an ancient system, and its relevance for the future.

APPENDIX A: DIGITAL ELABORATION OF HADITH

One apolitical website used this entertaining narrative of the hadith of Thabit's wife. Unfortunately I was unable to include this in the main text, but its rather unique text is worth reading nonetheless:

“In the "Exegetical Collection" it is related in Volume I on page 167 that Ibn Abbas reported that Jameel , wife of Thabit bin Qais, sought audience of the Prophet and complained to him: "O Apostle of God! I cannot stand one moment more of life with Thabit bin Qais, nor shall my head ever rest again on the same pillow as his." After a pause she added: "I am not accusing him of a lack of faith or of moral and marital virtues: but I am afraid that I myself will fall into infidelity and blasphemy if I have to spend another minute with him. I turned up the tent-skirting and my eye fell on my husband in the middle of a crowd of other men. He looked so ugly, a black-avised, dwarfish runt, and I hated him, and I can't go on. ...!" She ran on thus, and the Prophet, after absorbing her outpouring, tried to advise and admonish her, but she paid him no heed. So he sent for Thabit bin Qais and laid the situation before him. Thabit was deeply attached to Jameel , but self-sacrificingly and for her sake agreed to take back the marriage portion he had settled upon her - a beautiful garden - and give her a *khul'* divorce.”¹²⁷

¹²⁷ Source: Sayyid Mujtaba Musavi Lari. "Divorce in Islam,"

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APPENDIX B: SAMPLE ONLINE KHUL' APPLICATION FORM

See following page.

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