Locating the Sharīʿa

Studies in Islamic Law and Society

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Locating the Sharīʿa

Legal Fluidity in Theory, History and Practice

Edited by

Sohaira Z.M. Siddiqui

BRILL

LEIDEN | BOSTON

Library of Congress Cataloging-in-Publication Data

Names: Locating the Sharīʿa (Conference) (2014 : University of California,
Santa Barbara). | Siddiqui, Sohaira Zahid, editor.
Title: Locating the sharīʿa : legal fluidity in theory, history and practice
/ edited by Sohaira Z.M. Siddiqui.
Description: Leiden ; Boston : Brill Nijhoff, 2019. | "The genealogy of this
volume begins, as many volumes do, at a conference at the University of
California Santa Barbara in February 2014 titled "Locating the Sharīʿa :
Creating New Sources for Knowledge and Inquiry"—ECIP introduction. |
Includes bibliographical references and index.
Identifiers: LCCN 2019000988 (print) | LCCN 2019001419 (ebook) |
ISBN 9789004391710 (ebook) | ISBN 9789004377103 (hardback : alk. paper)
Subjects: LCSH: Islamic law—Congresses.
Classification: LCC KBP15 (ebook) | LCC KBP15 .L63 2019 (print) |
DDC 340.5/9—dc23
LC record available at https://lccn.loc.gov/2019000988

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: brill.com/brill-typeface.

ISSN 1384-1130
ISBN 978-90-04-37710-3 (hardback)
ISBN 978-90-04-39171-0 (e-book)

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This book is printed on acid-free paper and produced in a sustainable manner.

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Notes on Contributors

Khaled Abou El Fadl
is the Omar and Azmeralda Alfi Distinguished Professor of Law at the University of California at Los Angeles (UCLA) School of Law. He is the author of *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (Rowman and Littlefield, 2014); *Speaking in God's Name: Islamic Law, Authority and Women* (Oneworld Press, 2001); *Rebellion and Violence in Islamic Law* (Cambridge University Press, 2001); *The Search for Beauty in Islam: A Conference of the Books* (Rowman and Littlefield, 2006); *The Great Theft: Wrestling Islam from the Extremists* (HarperSanFrancisco, 2005), among others.

Asma Afsaruddin
is Professor of Near Eastern Languages and Cultures in the Hamilton Lugar School of Global and International Studies at Indiana University, Bloomington, USA. She is the author and editor of seven books, including *Contemporary Issues in Islam* (Edinburgh University Press, 2015); and *Striving in the Path of God: Jihad and Martyrdom in Islamic Thought* (Oxford University Press, 2013) which won the World Book Award in Islamic Studies from the Iranian government (2015) and is being translated into Bahasa Indonesian. Among others, her research has been funded by the Harry Frank Guggenheim Foundation and the Carnegie Corporation of New York.

Ahmad Atif Ahmad
is a Professor of Religious Studies at the University of California in Santa Barbara (UCSB). He also serves on UCSB's 'Council on Faculty Issues and Awards' and the UC-System wide Academic Advisory Committee. He previously served as associate director of the University of California Center in Washington, and Sultan Qaboos Chair of Mideast Studies at the College of William and Mary. The author of five books including, *Islamic Law: Cases, Authorities, and Worldview* (London: Bloomsbury, 2017), *The Fatigue of the Sharīʿa* (NYC: Palgrave, 2012), and *Structural Interrelations of Theory and Practice in Islamic Law* (Leiden: Brill, 2006), Ahmad teaches courses on Islamic legal reasoning in medieval Islam and early modern Egypt.

Sarah Albrecht
PhD, is a lecturer and research associate at Freie Universität Berlin. She is the author of *Dār al-Islām Revisited. Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West* (Brill 2018) and *Islamisches Minderheitenrecht:*

Yūsuf al-Qaraḍāwīs Konzept des fiqh al-aqallīyāt (Ergon 2010) and the co-editor of *Conceptualising Muslim Diaspora* (Special Issue of the *Journal of Muslims in Europe* 2016).

Ovamir Anjum
is the Imam Khattab Endowed Chair of Islamic Studies at The University of Toledo in Philosophy & Religious Studies Department, and affiliated faculty in History. His work focuses on the nexus of theology, ethics, politics, and law in classical and medieval Islam, with comparative interest in Western thought. Besides his monograph, "*Politics, Law and Community in Islamic Thought: The Taymiyyan Moment*" (Cambridge University Press, 2012), he has authored numerous articles and speaks internationally, and is the editor of the American Journal of Islamic Social Sciences. His forthcoming works include a monograph on violence and rebellion in Islamic political thought, a general survey of Islamic history, and a translation of Ibn al-Qayyim's *Madārij al-Sālikīn* (Ranks of Divine Seekers).

Dale J. Correa
PhD, is Middle Eastern Studies Librarian and History Coordinator at the University of Texas at Austin. Dr. Correa specializes in Islamic legal theory, theology, and philosophy, with a particular interest in the intellectual tradition of the eastern regions of the Islamicate empire (namely, Transoxania, which is today in Uzbekistan/Tajikistan). Her current project examines the development and flourishing of the Transoxanian approach to testimony, or communication—that is, the transmission of knowledge of a past event by agents over time and space. Dr. Correa currently serves as Vice President/President-Elect of the Middle East Librarians Association.

Robert Gleave
is Professor Arabic Studies at the University of Exeter, UK. He is principal investigator of the European Research Council advanced award "Law, Learning and Authority in Imami Shi'ite Islam" in which Shīʾī legal thought it set within the wider context Islamic legal development. He is author of *Inevitable Doubt: Two Shīʿī Theories of Jurisprudence* (Brill, 2001), *Scripturalist Islam: The Thought and Doctrines of the Akhbari School of Imāmī Shiʿism* (Brill, 2007) and *Islam and Literalism: Literal Meaning and Interpretation in Islamic Legal Theory* (Edinburgh University Press, 2012).

Sohail Hanif
is a Lecturer in Islamic Studies at the Cambridge Muslim College where he also manages the BA program in Islamic Studies. He works on Islamic legal theory with a focus on the Ḥanafī school of law. He received an MA and DPhil from the University of Oxford with a doctoral thesis entitled "*A Theory of Early Classical Ḥanafism: Authority, Rationality and Tradition in the Hidāyah of Burhān al-Dīn 'Alī ibn Abī Bakr al-Marghīnānī* (*d. 593/1197*)." His publications include "A Tale of Two Kufans: Abū Yūsuf's *Ikhtilāf Abī Ḥanīfa wa-Ibn Abī Laylā* and Schacht's Ancient Schools," *Islamic Law & Society*, 25 (2018): 173–211.

Marion Katz
is a Professor of Middle Eastern and Islamic Studies at NYU. She received a BA from Yale and a PhD from the University of Chicago. She has taught at Franklin and Marshall and Mount Holyoke College. Her research revolves around issues of Islamic law, gender, and ritual. Her publications include *Body of Text: The Emergence of the Sunni Law of Ritual Purity* (SUNY Press, 2002), *The Birth of the Prophet Muhammad* (Routledge, 2007), *Prayer in Islamic Thought and Practice* (Cambridge, 2013) and *Women in the Mosque* (Columbia University Press, 2014).

Rami Koujah
is a PhD candidate at Princeton University's Near Eastern Studies department. He earned his JD from Stanford Law School, MSt in Oriental Studies from the University of Oxford, and graduated as a Departmental Scholar in Islamic Studies from the University of California, Los Angeles.

Asifa Quraishi-Landes
is a Professor of Law at the University of Wisconsin Law School, specializing in comparative Islamic and U.S. Constitutional law. She is a 2009 Carnegie Scholar and a 2012 Guggenheim Fellow. She is currently working on a book project, presenting a non-theocratic and non-secular model of Islamic constitutionalism for today's Muslim-majority countries.

Salman Younas
is a PhD candidate at Oxford University. He graduated from Stony Brook University with a degree in Political Science and Religious Studies. After completing his undergraduate degree, he moved to Amman, Jordan, where he studied spent an extensive period studying Arabic and the traditional Islamic sciences. In 2013, completed his MA in Oriental Studies at Oxford University

with honors. Currently, he is a final-year doctoral student at the University of Oxford investigating the evolution of Islamic law in the late formative period with a specific focus on the Hanafi school.

David H. Warren
is a Postdoctoral Research Fellow at the University of Edinburgh, focusing on the role of the ʿ*ulamāʾ* as actors and theorists during the Arab Spring and its aftermath. His current book project is titled, *For the Good of the Nation: The Contest Over the Egyptian Revolution Among the Sunni ʿUlamāʾ* and his recent publications include "Cleansing the Nation of the 'Dogs of Hell': ʿAli Jumʿa's Nationalist Legal Reasoning in Support of the 2013 Egyptian Coup and its Bloody Aftermath," *International Journal of Middle East Studies* 49:3 (2017): 457–77.

Introduction

The genealogy of this volume begins, as many volumes do, at a conference at the University of California Santa Barbara in February 2014 titled "Locating the Sharīʿa: Creating New Sources for Knowledge and Inquiry." Its aim was to honor the scholarly contributions of Dr. Khaled Abou El Fadl and Dr. Sherman Jackson in the field of Islamic Studies and, more specifically, Islamic law. In addition to exploring the indelible impact of these two scholars on the field of Islamic law, the conference provided a periscope into the drastic evolution the field has undergone in the past few decades. With this insight in mind, instead of producing a conference volume of the proceedings, or a *festschrift* in honor of Dr. Abou Fadl and Dr. Jackson, which is rightfully due, the decision was made to produce a volume on the field of Islamic law itself—its methodologies, its contradictions, its possibilities and its future.

It is not an exaggeration to say that the field of Islamic law has been burgeoning over the past century in Western Academia,[1] producing an increasingly dynamic and polyvalent intellectual scene that has evolved through, and at times away from, the early methodologies and inquiries characterizing the field. The preeminent early scholars of Islamic Law, Ignaz Goldziher (1850–1921) and Joseph Schacht[2] (1902–1969) introduced two central inquiries to the field that would continue to engage scholars for generations. The first examined origins—questioning the development of Islamic law, its sources, and the eventual institutional form it took within the *madhhabs*. The second inquiry explored the divergence, or the gulf, that was noted to exist between the theory of Islamic law (*uṣūl al-fiqh*) and positive Islamic law (*fiqh*).[3]

1 The broader systematic study of Islam began at the end of the 18th century and predates the more focused study on Islamic law. The first academic centers devoted to the study of the Orient were founded in the early 19th century in France (Société Asiatique, 1821), the United Kingdom (Royal Asiatic Society of Great Britain and Ireland, 1823) and America (American Oriental Society, 1842).

2 Ayman Shabana notes that there are two dominant paradigms for the study of Islamic legal history: ethnographic and textual. Goldziher and Schacht are representative of the latter trend, while Christiaan Snouck Hurgronje (1857–1936) and Robert Smith (1846–1894) are representative of the former. The volume will focus will be on the development of the textual trend of studying Islamic law. For the other see Ayman Shabana, *Custom in Islamic Law and Legal Theory* (New York: Palgrave MacMillan, 2010), 19–23.

3 The question of divergence was tackled differently depending on whether scholars adopted an anthropological or textual approach. Taking the anthropological approach, scholars were concerned with understanding how ritual and customary practice was considered legitimate

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Goldziher tackled this first issue in 1890 in his seminal work *Muhammedanische Studien.*[4] In it he argues that Islamic law developed after the death of the Prophet and was an amalgamation formulated from Judeo-Christian and Roman legal practices.[5] Most illustrative of this Judeo-Christian appropriation present in Islam were *ḥadīth*, which he argues gained prominence in the second century post-Hijri and can be directly traced to pre-Islamic or Judeo-Christian practices.[6] As for the Roman influence within Islam, it can be identified in the development of the School of Opinion (*ahl al-raʾy*) which stood in contradistinction to the School of Tradition (*ahl al-ḥadīth*). Turning to the sources of the law, the most spurious for Goldziher were *ḥadīth* which conspicuously arose in the first two centuries after the death of the Prophet and were freely invoked by the jurists. Though Goldziher does not cast aspersions on *ḥadīth* altogether, and notes that early jurists did attempt to weed out fabrications, the rate at which *ḥadīth* literature grew quickly outstripped the critical capacities of *ḥadīth* scholars, allowing for the existence of in increasingly dubious corpus of *ḥadīth*.[7]

Building on Goldziher's answer to the origins of Islamic law, Schacht in his *Introduction to Islamic Law* asserts that in the first century after the death of the Prophet, 'Islamic law' as it is known today did not exist; rather, rudimentary forms of customary law existed by adopting pre-existing legal, administrative and political practices of newly conquered Muslim lands.[8] It was not until the

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even if it seemed to contradict scriptural sources or the law as interpreted by jurists. The locus of their inquiry was the role of custom in law making, and the extent to which it was accommodated as a legitimate source of norm generation. As for the textual scholars, they were concerned with how legal theory related to legal practice, or in other words, how *uṣūl al-fiqh* related to *fiqh.* As the practice of law preceded its theorization by the schools, scholars were concerned with whether *uṣūl al-fiqh* actually produced *fiqh* or was simply a post-facto justification of what was already in practice.

4 Goldziher's work was translated into English and published under the title *Muslim Studies*. Ignaz Goldziher, *Muslim Studies* (London: Allen and Unwin, 1967); Ignaz Goldziher, *Introduction to Islamic Theology and Law* (Princeton: Princeton University Press, 1980).

5 Goldziher, *Muslim Studies*, 1:2, 75–87.

6 Ibid., 25, 42.

7 Ibid., 80–90.

8 Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 21. Also see Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (London: P.R. Macmillan, 1961). For an overview of some of Schacht's arguments see Wael Hallaq, "The Quest for Origins or Doctrine," *UCLA Journal of Islamic and Near Eastern Law* 2, 1 (2002–2003): 1–32; Jeanette Wakin, *Remembering Joseph Schacht (1902–1969)* (Cambridge: Islamic Legal Studies Program, Harvard Law School, 2003).

second century in Iraq that an identifiable Islamic legal architecture emerged. To reclaim authority and displace the centrality of customary practice, prominent jurists of these legal schools projected *ḥadīth* onto early figures of Islam, endowing *ḥadīth* with a sense of normative authority they otherwise lacked. The notion that the *ḥadīth* were *en masse* fabricated, retroactively projected, and then accepted and promulgated as authentic was the most controversial element of Schacht's thesis, matched only by his second controversial assertion regarding the closing of the doors of *ijtihād* in the 4th/10th century.[9] His two claims, taken together, both cast doubt on the authenticity of the Islamic legal paradigm, and negated the importance of scholarly contributions after the 4th/10th century.

Schacht, and Goldziher before him, threw down the proverbial gauntlet, and scholars of Islamic law after them, in one way or another, were unable to shirk their shadow. There were some that supported the case of Schacht and Goldziher and developed it further to elaborate on the 'foreign' elements that seeped into Islam,[10] but preponderantly, scholars challenged the assertions of Schacht and Goldziher, leading to new inquiries and methodologies within the field of Islamic law. Scholars in this second wave were concerned with four issues: (1) the origins of Islamic law and the *madhhabs*, (2) the historicity of Islamic scriptural sources, (3) the continuity of *ijtihād*, and (4) the relationship between theory, as expounded in treatises on *uṣūl al-fiqh*, and practice, as promulgated in treatises of *fiqh*. These four inquiries in some sense have become universal focal points within the field of Islamic law, with scholars continuously adding nuance. Though it is not possible to detail the developments in each of these sub-inquiries, a few remarks are fitting. On *madhhabs*, they have

9 Schacht, *An Introduction*, 71.

10 For texts supporting the early assertions of Schacht and Goldziher see Patricia Crone, *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate* (Cambridge: Cambridge University Press, 1987); Patricia Crone and Michael Cook, *Hagarism: The Making of the Islamic World* (Cambridge: Cambridge University Press, 1890). For an overview of Orientalism within the academic study of Islam see Richard Bulliet, "Orientalism and Medieval Islamic Studies," in *The Past and Future of Medieval Studies*, ed. John Van Engen (Notre Dame: University of Notre Dame Press, 1994), 94–104; Malcom Kerr (ed.), *Islamic Studies: A Tradition and Its Problems*, (Malibu: Undena, 1980); Azim Nanji (ed.), *Mapping Islamic Studies: Genealogy, Continuity and Change* (New York: Mouton de Greyter, 1997).

been described as regional schools,[11] guilds,[12] constitutional units,[13] and most recently interpretative communities[14]—with each of these characterizations unveiling something of their development, social status, and even political function. On the debate on the historicity of the sources of law, and more specifically *ḥadīth*, scholars have not only shed light on the process of early *ḥadīth* transmission,[15] but also demonstrated the existence of early *ḥadīth* works that were in fact a source of legal guidance,[16] and traced the process whereby *ḥadīth* were canonized alongside the Qurʾān as constituting part of divine guidance.[17] As for the question of *ijtihād*, and the much maligned doctrine of *taqlīd*, beyond dispelling the misconception that the doors of *ijtihād* were permanently sealed in the 4th/10th century,[18] scholars have demonstrated that *taqlīd* played an important role in the development of the *madhhabs* and the adjudication of legal issues.[19] Even more drastically, some scholars have argued that *taqlīd*

11 Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2001); Wael Hallaq, "From Regional to Personal Schools of Law? A Reevaluation," *Islamic Law and Society* 8:1 (2001): 1–26; Nimrod Hurvitz, "Schools of Law and Historical Context: Re-Examining the Formation of the Ḥanbalī Madhhab," *Islamic Law and Society*, 7:1 (2000): 37–64; Christopher Melchert, *The Formation of the Sunni Schools of Law: 9th–10th Centuries* (Leiden: Brill, 1997); Norman Calder, *Studies in Early Islamic Jurisprudence* (Oxford: Clarendon Press, 1993); Bernard Weiss, "The Maddhab in Islamic Legal Theory," P.J Bearman, Rudolph Peters and Frank Vogel (eds.), *The Islamic School of Law: Evolution, Devolution and Progress* (Cambridge: Islamic Legal Studies Program, Harvard Law School, 2005), 1–9; Yasin Dutton, *The Origins of Islamic Law: The Quran, the Muwaṭṭaʾ and Medinan ʿAmal*, (Richmond Surrey, 1999).

12 George Makdisi, "The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court," *Cleveland State Law Review* 34:3 (1986): 3–18.

13 Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996).

14 Ahmed El Shamsy, *The Canonization of Islamic Law: A Social and Intellectual History* (Cambridge: Cambridge University Press, 2015).

15 Nadia Abbott, *Studies in Arabic Literary Papyri* (Chicago: University of Chicago Press, 1976); Muhammad Mustafa Azami, *The History of the Quranic Text: From Revelation to Compilation* (Leicester: UK Islamic Academy, 2003); Muhammad Mustafa Azami, *On Schacht's Origins of Muhammadan Jurisprudence* (New York: Wiley, 1985); Fuat Sezgin, *Geschichte des Arabischen Schrifttums* (Leiden: 1967–present).

16 Scott Lucas, *Constructive Critics: Ḥadīth Literature and the Articulation of Sunni Islam: The Legacy of the Generation of Ibn Saʿd, Ibn Maʿin, and Ibn Ḥanbal* (Leiden: Brill, 2004); Eerick Dickinson, *The Development of Early Sunnite Ḥadīth Criticism: The Tadqima of Ibn Abi Ḥātim* (Leiden: Brill, 2001).

17 Jonathan Brown, *The Canonization of al-Bukhari and Muslim* (Leiden: Brill, 2007).

18 Wael Hallaq, "Was the Gate of Ijtihād Closed?," *International Journal of Middle East Studies* 16 (1984): 3–41.

19 Mohammad Fadel, "The Social Logic of Taqlīd and the Rise of the Mukhtaṣar," *Islamic Law and Society* 3:2 (1996): 193–233.

actually marks the apex in legal thinking as it allows for scholars to build their argument from pre-existing recognized methodologies.[20] In this sense, intra-*madhhab taqlīd* allows for later *mujtahids* within a school to actually change the doctrine of the school. Finally, on the debate regarding theory and practice, scholars have more accurately noted how and why divergences between theory and practice occur,[21] shed light on genres of legal literature linking theoretical discussions with practical ones,[22] and further investigated the ways in which jurists were influence by practice and custom.

By moving beyond the foundational concerns raised by Schacht and Goldziher regarding the authenticity of the sources of Islamic law, the juristic works produced reliant upon them have in turn become reliable repositories of information, and can be used to investigate issues far beyond the questions on origins and theory versus practice. In recent decades fruitful avenues of inquiry into Islamic law have included studies focusing on other genres of legal writing,[23] the relationship between law and other intellectual

20 Jackson, *Islamic Law and the State*, 73–102; Sherman Jackson, "Kramer versus Kramer in a Tenth/Sixteenth Century Egyptian Court: Post-Formative Jurisprudence between Exigency and Law," *Islamic Law and Society* 8:1 (2001): 27–51.

21 Sherman Jackson, "Fiction and Formalism: Toward a Functional Analysis of *Uṣūl ul-Fiqh*," in *Studies in Islamic Legal Theory*, Bernard Weiss (ed.) (Leiden: Brill, 2002).

22 Wael Hallaq, "From *Fatwas to Furūʿ*: Growth and Change in Islamic Substantive Law," *Islamic Law and Society* 1 (1994): 29–65; Wolfhart Heinrichs, "Qawāʾid as a Genre of Legal Literature," in *Studies in Islamic Legal Theory*, Bernard Weiss (ed.) (Leiden: Brill, 2002); Ahmad Ahmad, *Structural Interrelations of Theory and Practice in Islamic Law* (Leiden: Brill, 2006), and most recently Talal al-Azem, *Rule Formation and Binding Precedent in the Madhhab-Law Tradition* (Leiden: Brill, 2017).

23 Most important has been an increased focused on *fatwas* and court opinions. Muhammad Khalil Masud, Brinkley Messick and David Powers (eds.), *Islamic Legal Interpretation: Muftis and Their Fatwas* (Cambridge: Harvard University Press, 1996); Muhammad Khalil Masud, Rudolph Peters and David Powers (eds.), *Dispensing Justice in Islam: Qadis and their Judgements* (Leiden: Brill, 2006); Galal El-Nahal, *The Judicial Administration of Ottoman Egypt in the Seventeenth Century* (Minneapolis: Bibliotheca Islamica, 1979), Guy Bechor, *God in the Courtroom: The Transformation of Courtroom Oath and Perjury between Islamic and Franco-Egyptian Law* (Leiden: Brill, 2011); Judith Tucker, *In the House of the law: Gender and Islamic Law in Ottoman Syria and Palestine* (Los Angeles: University of California Press, 2000); Maya Shatzmiller, *Her Day in Court: Women's Property Rights in Fifteenth Century Granada* (Cambridge: Islamic Legal Studies Program, Harvard Law School, 2007); Ron Shaham, *Family and the Courts in Modern Egypt* (Leiden: Brill, 1997); Metin Cosgel and Bogac Ergene, *The Economics of Ottoman Justice: Settlement and Trial in the Sharīʿa Courts* (Cambridge: Cambridge University Press, 2016).

disciplines,[24] in-depth analysis of specific legal issues,[25] a recognition of systems within Islamic intellectual thought beyond simply Sunni legal theory,[26] and the development of Islamic law into the late-classical, modern and contemporary periods, to list a few. It is no longer possible to characterize the study of Islamic law as merely an inquiry into the origins, or the divergence between theory and practice. Nor is it possible to identify a period of time, or a genre of literature, that is overwhelmingly the focus of scholarly analysis to the neglect of others. But perhaps most remarkably, it is not possible to identify a singular method which characterizes the study of Islamic law. While the textual-philological method as pioneered by Goldziher and Schacht still remains the gold-standard for many scholars of Islamic law, and is championed in graduate programs, studies of Islamic law utilizing sociological, anthropological and ethnographic methods are becoming increasingly relevant, and are contributing to discussions on Islamic law.[27]

The expansion of the discipline of Islamic law has made embarking on a project of this magnitude far from simple. The tributaries in the field of Islamic law, as much as they cohere around central texts, figures and spaces, also undertake distinct inquiries. This volume does not purport to encapsulate the full methodological and scholastic diversity within the field of Islamic law; rather,

24 Of the various disciplines in Islamic intellectual thought, the relationship between law and theology has received the most attention. See Aron Zysow, *The Economy of Certainty* (Lockwood Press, 2013); Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1998); Bernard Weiss, *The Spirit of Islamic Law* (Georgia: University of Georgia Press, 1998).

25 Marion Katz, *Prayer in Islamic Thought and Practice* (Cambridge: Cambridge University Press, 2013); Marion Katz, *Body of Text* (New York: SUNY Press, 2002); Behnam Sadeghi, *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition* (Cambridge: Cambridge University Press, 2015).

26 Robert Gleave, *Inevitable Doubt: Two Theories of Shīʿī Jurisprudence* (Leiden: Brill, 2000); Robert Gleave, *Scripturalist Islam: The History and Doctrines of the Akhbarī Shīʿī School* (Leiden: Brill, 2007); Muhammad Baqir al-Sadr, *Principles of Islamic Jurisprudence According to Shīʿī Law* (Saqi Books, 2004); Devin Stewart, *Islamic Legal Orthodoxy: Twelver Shi'ite Responses to the Sunni Legal System* (Utah: University of Utah Press, 2007); Sayyid Amjad Hussain Naqvi (ed.), *Foundations of Jurisprudence: An Introduction to Imamī Shīʿī Legal Theory* (Leiden: Brill, 2016); Amirhassan Boozari, *Shīʿī Jurisprudence and Constitution* (New York: Palgrave Macmillan, 2011).

27 John Bowen, *Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge: Cambridge University Press, 2003); John Bowen, *On British Islam: Religion, Law and Everyday Practice in Sharīʿa Councils* (Princeton: Princeton University Press, 2016); Brinkley Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society* (Berkeley: University of California Press, 2013); Susanne Dahlgren, *Contesting Realities: The Public Sphere and Morality in Southern Yemen* (Syracuse: Syracuse University press, 2010); Lawrence Rosen, *The Justice of Islam* (Oxford: Oxford University Press, 2000).

it is an attempt to showcase *some* of the diversity by bringing together in scholarly conversation pieces that are testament to shifts within the academic study of Islamic law with prescient pieces signaling future avenues of inquiry. To anchor the reader as they navigate through seemingly distinct inquiries, the volume has been divided into three main parts. The first is devoted to reflections on the state of the field of Islamic law; the second focuses on novel research attempting to excavate more fully Islamic law in the classical and post-classical periods (3rd/9th–7th/13th centuries); and the third focuses on contemporary developments in Islamic law. Though at first glance it may seem as if these three sections are disjointed, they are in fact deeply interconnected.

In the first part, senior scholars integral to the development of the field of Islamic law have written reflective pieces on the state of the current field, the challenges it faces, and potential avenues for future research. Though this section provides unparalleled insight by preeminent scholars in the field, the absence of certain voices will undoubtedly be noticed. This was not an intentional decision, but merely the result of the practical constraints and considerations an edited volume produces. There was a concerted effort, however, to ensure that dominant methodological and scholarly trends were adequately captured, and that is reflected in the pieces. Part one opens with Khaled Abou El Fadl who reflects on how Islamic law as a discipline can be taken more seriously in Western Academia, and how scholars of Islamic law have an obligation to both apprehend and convey the micro and macro elements of the law. Robert Gleave examines the slow incorporation of Shīʿī jurisprudence to the study of Islamic law, and adduces how the scholarly understanding of Sunni law in the classical period may be augmented and enhanced by taking seriously Shīʿī juridical contributions. Marion Katz focuses more specifically on gender in Islamic law to note that the legal indeterminancy present within Islamic law allows for both interpretative freedom, and legal manipulation. She traces how legal fluidity facilitates the construction of rigid gendering and debates the manner in which legal scholars of gender can better address legal indeterminancy. Ahmad Ahmad completes part one with an introspective on the way the conversation on Islamic law is formed within Western Academia. Offering reflections through the recent translation of his monograph, Ahmad posits that the modern debate on the crisis of Islamic law is formed both by modernity and the Euro-American Academy. Taken together, section one highlights the evolution of the field, emergent trends, and important shortcomings that have led to scholarly oversights.

Part two moves away from a disciplinary analysis of the field to showcasing specific scholarly findings in the classical period. Sohail Hanif investigates how the early Ḥanafī school incorporated Kufan precedent into the law

through their doctrine of *ḥadīth al-mashhūr* (well-known Prophetic report). Building on the characterization of the *madhhabs* as local traditions, Hanif argues that the Ḥanafī doctrine of *ḥadīth al-mashhūr* demonstrates the localized nature of the early legal schools, and its importance in forging law. Next, Asma Afsaruddin analyzes the way in which exegetical commentary on the word *jihad* eventually had an impact on the way that jurists created the principle of immunity for non-combatants, demonstrating the interconnectivity between exegetes and jurists. Continuing in the vein of the connection between law and other disciplines, Dale Correa, analyzes the 'theological turn' in the oft-overlooked Ḥanafī scholars in Transoxania. Often simply characterized as Māturīdī, she argues that the Ḥanafī scholars in Transoxania had their own intellectual authority, legal theory and theology and should be more accurately denoted as a Samarqandi Ḥanafī school. Then, Rami Koujah, also noting the connection between theology and legal theory, argues that at stake in the much discussed doctrine of *maṣlaḥa* are theological questions regarding God's nature and the realm of rational evaluation. He traces the development of Ashʿarī ethics and Shafiʿī legal theory to demonstrate that reason and revelation were dually treated in theological and legal treatises. The four articles in this part shed further light on the localized nature of the *madhhabs*, point to connections between law and other disciplines, and challenge assertions regarding the characterization of the four legal schools. Though their inquiries are distinct, they each move beyond the early questions of the discipline to point to texts, intellectual connections, and bodies of writing in the classical period that merit further scholarly inquiry.

The final part commences with Salman Younas' article evaluating Ashraf Alī al-Thānawī's position on political rule by women. Lauded as one of the leading modern conservative Deobandi scholars, Younas demonstrates how al-Thānawī engages with classical legal rulings and his context in order to advance a novel legal interpretation on the women's right to rule. Next, Asifa Quraishi-Landes questions the relationship between law and morality in classical Islamic legal thought, and juxtaposes them to an attempt to 'legislate morality' in modern day Islamic nation states. She contends that modern interpretations of Islamic law often overlook nuances present in classical conceptions, leading to fundamental contradictions in any project that attempts to legislate *fiqh.* Continuing in the vein of Islamic law and the state, Sarah Albrecht evaluates how modern jurists adopt traditional classifications of *dār al-islām, dār al-ḥarb*, and *dār al-ṣulḥ* to a modern territorial world defined by nation states and international law. Utilizing some of the same scholars as Albrecht, David Warren's piece looks at how modern scholars utilize *maṣlaḥa* based reasoning

during the Egyptian revolution to reformulate the concept along state lines as opposed to communal religious ones. He also traces the development of *fiqh al-thawra* (the jurisprudence of revolution), that was increasingly utilized by legal scholars during the Egyptian revolution. The volume finally concludes, with Ovamir Anjum's analysis of the growing presence of normative arguments on Islamic law from within Academic institutions. While he notes that these new 'discursive trends' benefit from the opportunities afforded by the resources of the academy, he cautions that they must be cognizant of the post-enlightenment paradigm of academic institutions.

The objective of the volume is to leave its readers better exposed to the breath of the current study of Islamic law and with more insight into where future inquiries of Islamic law may lead. On the note of the future of Islamic law, the first part is of particular importance: Khaled Abou Fadl encourages scholars to think of Islamic law beyond the parameters of the discipline; Marion Katz and Robert Gleave shed light on disciplinary oversights in the fields of *uṣūl al-fiqh* and *fiqh*; and Ahmad Ahmad call scholars to be more aware of how the framing of their scholarship and questions is informed by modernity and the post-Enlightenment intellectual workspace they inhabit. If the reflections, and indeed advice, of these scholars is heeded, the future study of Islamic law will undoubtedly be as dynamic as its study in the past.

PART 1

Reflections on the Study of the Sharīʿa

CHAPTER 1

The Roots of Persuasion and the Future of Sharīʿa

Khaled Abou El Fadl

My scholarly work often draws upon my own life experiences, interests, and sense of commitments.* Within these experiences, I debate whether the life of an academic ought to contribute to resolving perceived problems, confronting experienced challenges, or engaging in selfless objective analysis. After a lifetime of pedagogical reflections and disputations, I have come to the belief that there can be no real scholarship without empathy with your subject. Not just sympathy, but empathy. It is a complete contradiction in terms to write about something that you truly hate because if you hate it, you do not understand it. Or to put it more precisely, one cannot approach the study of a subject unless one understands the passions, causes, influences, and aspirations that might have driven people to make the choices that they once did. You cannot give it the measure of care to which it is entitled by virtue of its becoming the topic of your scholarship. Empathy does not mean uncritical acceptance or necessarily sharing the epistemological convictions of one's subject of study. It does mean expending a concerted effort to understand the constructs of meaning and the epistemological universe of the people being studied as things made sense to them in their own time and space. The best approach to scholarship is not one that assumes the false pretense of objectivity, but one that genuinely understands or at least makes every effort to understand the object of its study on its own terms.

When I was a graduate student, many of my colleagues shared that, in many departments across the country, it was as if there was a sign that stated plainly to all job applicants: "Muslims need not apply." It was, at that time, quite acceptable to say that Muslims could not become scholars of Islam, by definition. There was, it was claimed, an impossibility of academic objectivity. Now, however, with a growing number of Muslim students trained by western academics and entering into the western academy, there are sufficient numbers in the field—not a critical mass that would make a major difference in the way that Islam is thought about or approached—but enough to reconsider

* I am very grateful to my student, Dana Lee, and my wife, Grace Song, for their invaluable feedback and assistance.

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the methodological and philosophical issues confronting a scholar who studies a field in which he or she has established commitments and beliefs.

The emergence of this debate in my field, for instance, is paired with the ongoing conversations regarding the Sharīʿa and its relationship to the academy and society. Most of you reading this will be aware of those states passing anti-Sharīʿa legislation.[1] I'm sure you are also aware of the numerous public figures who have issued condemnations of Sharīʿa. This, coupled with the significant unfolding of the Arab revolutions, demands us to ask the question: "What role, if any, does the Sharīʿa play?" The answer, I think, is still evolving and will continue to do so in perpetuity. I was involved in the first Azhar Declaration by Shaykh Aḥmad al-Ṭayyib in 2011.[2] The declaration itself states that wherever the will of the people is found, there the will of the Sharīʿa is located. Of course, this politically propitiating position poses tough questions about the sources of authority and definition of the Sharīʿa. For better or for worse, I strongly suspect that since the 2013 military coup in Egypt, Aḥmad al-Ṭayyib has retreated from this understanding of Sharīʿa as he has allowed the Azhar Declaration to retreat into oblivion. Nevertheless, this does not vitiate the fact that recurrent events inside and outside of the Muslim world continue to raise very significant questions about the nature of the Sharīʿa within a modern, nation-state framework. We see these questions raised repeatedly all over the Muslim and non-Muslim worlds including in countries such as Tunisia, Nigeria, and Malaysia.

As this debate unfolds, those of us who are advanced as Sharīʿa experts are sought for answers. What, however, does that mean? What is an expert in Sharīʿa? Many among my family members and friends—being proper Egyptians in Egypt—all think of themselves as 'experts' in Sharīʿa. They will issue *fatāwā* (non-binding legal opinions) left and right about any and all matters of life. Such a service is considered a matter of proper Egyptian culture. Journalists in the region will often speak of what Sharīʿa is and will philosophize at length about what constitutes authentic and inauthentic Sharīʿa. The Egyptian Muslim Brothers (*al-Ikhwān al-Muslimīn*) claim to understand the Sharīʿa—as do the Salafīs. In my recent visits to Egypt, I have had many meetings with

1 Legislation forbidding or curtailing the usage of the Sharīʿa has been introduced in Arizona, Florida, Louisiana, Oklahoma, South Carolina, Tennessee, and Utah. The Tenth Circuit Court of Appeals in the United States upheld an injunction against the Oklahoma law in 2012. See *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012). For further on the issue of anti-Sharīʿa legislation, see Jeremy Grunert, "How Do You Solve A Problem Like Sharia? Awad v. Ziriax and the Question of Sharia Law in America," *Pepperdine Law Review* 3 (2013): 695–734.

2 For further on the Azhar Declaration, see "Commentary on the Al-Azhar Declaration in Support of the Arab Revolutions" by Judge Adel Maged, *Amsterdam Law Forum*, Vol. 4, No. 3 (2012). http://amsterdamlawforum.org/article/view/282/463.

Coptic activists and politicians who were also telling me what the Sharīʿa is—sometimes even quoting from passages of the Qurʾān.

We must pause, therefore, and consider whether we are discussing the diverse manifestations of a singular idea—the Sharīʿa—or whether we are discussing multiple entities, multiple "Sharīʿas." We must also, however, remain aware of the finitude of the original language of the Sharīʿa, Arabic, and the various languages into which the term has entered or has been translated. Sometimes, when we use the original word, we obfuscate the fact that we lack complete intellectual clarity on the matter of its usage or meaning. At times, it seems we use Sharīʿa as one might use the word "*kosher.*" Kosher might mean the various dietary regulations observed by members of the Jewish community or, depending on its usage, it might indicate an affirmation: "All is well. Everything is kosher." It becomes a symbolic term for things not related to its history, its dynamics, or its historical legacy. We use phrases like "Islamic law," "Muslim law," "law of Islam," and "Sharīʿa," interchangeably and quite often. Yet, at times, we find that these words are either part of, or separate from, that to which we refer.

A few years ago, there was a rather hostile article that was published as a dedicated critique of Sherman Jackson's work and mine.[3] The article argued that scholars studying the Sharīʿa in the western academy are participating in an invented and imagined academic subfield—the specialty of Sharīʿa. Others have added to the discussion and their positions may be summarized as follows: "What these people are doing is not really law. It is more like Islamic studies." This is quite fascinating because when you say, "Islamic law," "Muslim law," and "law of Islam," most of these terms have the word 'law' present. But in using the term 'law,' we intimate a certain familiarity and knowledge of what the term means. Making use of the term is tempting because speaking of the law is authoritative, empowering, and worthy of deference. When scholars and academics in particular utilize the word, I think there is a fair assumption that we are at least comfortable with the complex epistemologies of law and the virtual universe of meanings in which this term is employed to refer to numerous social, cultural, and institutional norms. We ought to be always mindful of the fact that there is not just a considerable amount of literature, but there is a considerable amount of human lived experience with what constitutes law, the pathology of law, and the patterns and behaviors of law. On the one hand, then, I can see the point that Sharīʿa may be an Islamic studies concept in the sense that it is a concept provoking elements of Islamic theology

3 See Lama Abu-Odeh, "The Politics of (Mis)Recognition: Islamic Law Pedagogy in American Academia," *The American Journal of Comparative Law* 52, no. 4 (Autumn 2004): 789–824.

and philosophy. Yet, to what extent does it talk about law and legal systems more generally and, perhaps, comparatively? Does this word, "Sharīʿa," and do the sources that we use to define it, necessitate further interrogation on our part? If so, we must be sensitive that we do not read the sources in order to merely confirm our distinctions and differences of opinion on the concepts of "Islamic law," "Muslim law," or the "law of Islam." Instead, we must pause and allow the tradition to speak for itself.

I have read enough legal theories to know that legal systems possess their own internal logic. One of the realizations that a lot of anthropological and sociological studies have reached is that there are patterns to living legal systems and to legal systems expressed on the ground. To establish the relationship of these legal systems to their internal logics, allow me to use the example of 'Islamic law.' Like other legal systems, even nascent legal systems, the concept of Islamic law was born within specific practices, adjudications, and rules. Historically, there are two main patterns for the birth and development of legal systems. The first of these is the common legal system. By common, I do not want to say common law or civil law, because that is not going to be helpful, but by common I mean the sense that there is a great deal of the provincial and the local informing the practice of law.

If we imagine that we are judges asked to adjudicate a case within a specific locality, then it will matter a great deal if we are able to speak the language of the litigants and whether we are able to refer to categories that are meaningful to the litigants or to which the litigants are willing to defer, such that they accept these as authoritative or deserving of deference. *The common legal system* is one model that has developed in multiple places in the world—it was the genesis of Roman law itself—and it was extremely widespread in the Anglo-Saxon world, in pre-Islamic India, and in other places.

The differentiation within these provincial practices necessitates a measure of centralized adjudication. A centralized authority becomes supportive of the law on the basis of its benefits, and becomes interested in law to the extent that the law assists with the collection of tariffs and taxes, and clarifies specific issues related to the government's own privileges and the maintenance of certain social or political institutions. Overall, the law is left to provincial and mobile institutions that apply customary or culturally-based norms of law. These institutions resolve conflicts relative to the belief systems or the individual differences of societies within which they exist, but not relative to coercive government hegemony.

The second model is what I identify as *the corporate legal model*. Legal systems are born historically through a directed, cohesive and holistic effort that need not be systematic or analytically coherent, but are backed by a

centralized authority that takes ownership of the law and that takes pride in that sense of ownership. This centralized authority is willing to use coercion or the threat of coercion to enforce the law. In that model, in contrast to the common model, judges are often dispatched from urban centers to serve in provincial areas and are not indigenous to the areas in which they adjudicate. The laws created are therefore the product of imperial will rather than cultural deference. Usually, the birth of these legal systems—at least in the pre-modern world—was accompanied by a considerable amount of violence before acceptance of the legal system by the provincial territories. Here we cite the famous Justinian codification of the law and the little-known story of the considerable amount of violence that occurred in the eradication of the existing provincial laws that were before Justinian.[4] There are a number of other codes to which one can refer, such as Hammurabi's code,[5] the Burgundian Code, the *Pactis Legae Salicae* of Frankish law, the *Lex Salica Karolina* reportedly issued by Charlemagne, the Chinese Tang Code, and arguably the Hindu Law Code of Manu.[6] In all of these examples, there was a ruling central authority that either promulgated or laid claim to a definable set of commandments or rules that occupied a determinable space in the public or private life of a society. In all of these cases, a ruling authority took possession of or became vested in a specific set of rules, and these rules or codes, in turn, became symbols of authority and even legitimacy.

Both the common and corporate legal models appeal to a higher authority as an ultimate justification for the existence of the system or institution of law. This ultimate authority could be God or gods, custom, the wisdom of elders, or the intent of the forefathers, and it could be the state of nature, the logic and mandates of justice, or the will and demands of the people or populace. In all cases, this ultimate authority is intangible, esoteric, and absolute. Claims to an ultimate authority are necessary for the construction of legitimacy, but common and corporate legal systems negotiate access to this purported authority in very different ways. Corporate legal systems are far more effective in monopolizing access to purported ultimate authorities so that challenging or diverging from the demands of law can at once become a defiance of the

4 Alan Watson, *Law Out of Context* (Atlanta: Georgia University Press, 2000), 41–42; ibid., *Evolution of Law* (Baltimore, MD: John Hopkins University, 1985), 66–114; David Ibbetson and Andrew Lewis, "The Roman Law Tradition," in *The Roman Law Tradition*, ed. A.D.E. Lewis and D.J.E. Ibbetson (Cambridge: Cambridge University Press, 1994), 1–14.

5 M.E.J. Richardson, *Hamurabi's Law: Text, Translation, and Glossary* (New York: T&T Clark/Continuum, 2004), 28–134.

6 For a general introduction, see, Paul F. Kisak, *Ancient Legal Codes: The Historicity of Morals and Values* (Virginia: Create Space Independent Publishing Platform, 2015).

legitimacy of the legal order. Similarly, corporate legal systems enjoy a definable ruling center that becomes vested in a determinable set of rules, the defiance of which becomes a challenge to the very authority of the legal order. Common legal systems have a number of overlapping centers or institutions of law, but the ruler or ruling class does not vest itself into a unified and cohesive institution of law and does not take ownership over a set of determinate rules. The spaces occupied by the adjudications and rulings of a common legal system are far more negotiable because such a system is far more indeterminate and discursive in nature than its corporate counterpart. Finally, while corporate legal systems rely on the coercive powers of the state so that every commandment is backed up with the threat of punitive measures, common legal systems negotiate the consequences of legal violations in a far more indeterminate and complex fashion. This does not mean that common legal systems do not make use of the state's powers of enforcement. Common legal systems will often enter into partnerships with the ruling class precisely so that jurists could get their determinations enforced or, in other words, supported by the threat of force and punishment. But the space between legal determinations and enforcement is far more ambiguous and negotiable in common legal systems as opposed to their corporate counterparts.

Taking these two models, I want to return to the Islamic law that we know, and figure out how these models will influence our understanding of the Sharīʿa and our experience of it. If we examine Islamic law in its first manifestations, although there are divine commands, there is no systematic theory of law. The *Muṣannaf* texts of ʿAbd al-Razzāq (d. 211/826) and Ibn Abī Shaybah (d. 235/849), or even the *Maghāzī* of al-Wāqidīʿ (d. 207/822) attest to this.[7] Equally, there is no systematic conception of a holistic legal system. This earliest Islamic law is closer to the common legal system, which allows for a great deal of diversity from one locality to another, a diversity of differences of practice and opinion, and a rather strong correlation between the cultural practices of the region and adjudications offered by judges. We therefore know, based on the legal discussions dating from the first four centuries after the *hijrah*, there was a migration away from judgments that allowed a great amount of deference to the provincial laws that existed in the various conquered areas toward a more systematic and centralized application of law.

7 See ʿAbd al-Razzāq, *al-Muṣannaf*, ed. Ḥabīb al-Raḥmān al-Aʿẓmī (al-Majlis al-ʿIlmī, 1390/1970); Ibn Abī Shaybah, *al-Muṣannaf*, ed. Ḥamad b. ʿAbd Allāh al-Jumʿa (Riyāḍ: Maktabat al-Rushd, 2004); Muḥammad b. ʿUmar al-Wāqidī, *Kitāb al-maghāzī*, ed. Marsden Jones (Beirut: ʿĀlam al-Kutub, 2006).

The central authority in the earliest Arabian Islamic societies, for reasons that we do not need to outline here, was—if you believe Patricia Crone—prevented from centralizing or creating a corporate legal system.[8] Even if you disagree with Crone's findings, you would still say that the central authority was not interested in developing a corporate legal system. This had both advantages and disadvantages. One advantage was that the central authority did not have to implement the law with a considerable amount of violence and coercion, as happens in all corporate historical models. The law is so diverse and so localized that it begets the next historical sociological step: the attempt by theorists and jurists, who are always looking for the source of legitimacy and authority, to shape the discourse on law apart from any executive power. This attempt instantiates the systematization of legal manuals, analogous to the hornbooks issued to contemporary legal students, and the formation of legal guilds, which became very widespread through the Islamic world and later developed in Europe. Legal guilds, like the professional guilds that united craftsmen in very specific rules of conduct, acceptance, and rejection, became the primary method for enforcing the rule of law separate from enforcement by armies, police forces, and other instruments of the state. The state was not the primary enforcer of the law, though it would, when enough jurists were agitated and complained, open either a legitimate inquiry or a sham trial, such as that used against the Ḥanbalī jurist Ibn ʿAqīl (d. 513/1119), in order to restore equilibrium.[9] The locus for the actual enforcement of the rules of the practice of law was within and between the individual guilds themselves. This is very different than the way that Roman law—or the progeny of Roman law, as embodied by all corporate models—unfolded. There, the state became heavily invested in an inquisitorial process of enforcing legal orthodoxy and preventing deviations from authorized norms.

A duality begins to emerge. If you read books on *fatāwā* and *nawāzil* (legal cases), you are able to form a very distinct image of what the world of Islamic

8 Patricia Crone, *Roman, Provincial and Islamic law: The Origins of the Islamic Patronate* (Cambridge: Cambridge University Press, 1987), esp. 89–99; On Ibn al-Muqaffaʿ's (d. *ca.* 140/757) recommendation to the ʿAbbāsid Caliph al-Manṣūr (d. 158/775) to codify the law of the land, which was ultimately unsuccessful, see Muhammad Qasim Zaman, *Religion and Politics Under the Early ʿAbbāsids: The Emergence of the Proto-Sunnī Elite* (Leiden: E.J. Brill, 1997), 81–85.

9 Abū al-Wafāʾ ʿAlī b. ʿAqīl b. Muḥammad b. Aḥmad al-Baghdādī al-Ẓafarī was a Ḥanbalī jurist and theologian who studied under Abū Yaʿlā b. al-Farrāʾ. Later in his life, after the death of his teacher, he became interested in the works of Muʿtazilī scholars and mystical authors such as al-Hallāj. Upon his appointment to the chair of the Cathedral Mosque at al-Manṣūr, a group of Ḥanbalī students led by al-Sharaf Abū Jaʿfar (d. 470/1077) began to harass Ibn ʿAqīl for his Muʿtazilī and mystical tendencies forcing him to eventually issue a public retraction.

law was like. If you read the *mukhtaṣar* literature (hornbooks) or restatements of the law, you receive a very different picture of what Islamic law was like. By theorizing or observing the utilization and application of hornbooks, and comparing the voluminous productions of *fatwā* literature, we are able to begin to trace the organic development of the law outside of the power of centralized administration. Hornbooks were written in an attempt to create predictability within the legal system, but other than in urban centers, where hornbooks would be liberally applied by various judges, hornbooks became the primary method for, not applying, but studying the law. They were, in essence, grammars of law. Numerous hornbooks, such as the Mālikī *Mukhtaṣar* of Khalīl b. Isḥāq al-Jundī (d. 767/1325), the Ḥanafī *Hidāyah* by Burhān al-Dīn al-Marghinānī (d. 593/1197), and the Shāfiʿī *Minhāj* by Yaḥyā b. Sharaf al-Nawawī (d. 676/1277), were produced for the benefit of jurists but were produced largely by students who, in the process of studying the law, would write, produce, memorize, and reproduce the text for their teachers and colleagues.[10]

Taken as a complete body of literature, the hornbook genre makes it tempting to assume that Islamic law possessed a far more centralized and united corporate model than was the case. Yet, if we spend enough time studying the law and reading legal literature—a task, I admit, often reserved for rather boring individuals—we will begin to gain a feel for aspects of the *mukhtaṣar* literature beyond their legal content. These hornbooks, for example, always have flashy and ambitious titles—undoubtedly an attempt to fight for notice and acceptance in an absolutely overwhelmed market of texts. Tracing the history of the reception and dissemination of particular hornbooks such the *Minhāj* by al-Nawawī and the numerous commentaries, glossaries, marginalia, and epilogues written on this hornbook reveals a discursive process in which various legal doctrinal positions and orientations vie for acceptance and dominance within a single legal guild. There is no evidence that there was anything inevitable about the prominence that a hornbook such as *al-Minhāj* achieved within the Shāfiʿī legal guild. The state represented by a caliph or a ruler did not intervene to mandate or determine the revered or deferential status that such a text was able to command within the Shāfiʿī legal guild. The *Minhāj* rose to ascendancy within the Shāfiʿī legal guild through a competitive

10 Khalīl b. Isḥāq al-Jundī, *Mukhtaṣar Khalīl*, ed. Aḥmad Naṣr (Beirut: Dār al-Fikr, 1981); Burhān al-Dīn al-Marghinānī, *al-Hidāyah fī sharḥ bidāyat al-Mubtadī*, ed. Ṭalāl Yūsuf (Beirut: Dār Iḥyāʾ al-turāth al-ʿArabī, 2010); Yaḥyā b. Sharaf al-Nawawī, *Minhāj al-ṭālibīn wa ʿumdat al-muftīn* (Beirut: Dār al-Fikr, 2005). For the best study to date on the rise of the scholastic method in Islamic legal schools and the role of texts, see George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1982).

and highly negotiative process where it competed against alternative hornbooks within the legal guild.[11] Other than the example of this one hornbook, we have evidence from *fatāwā* literature that endowed chairs such as that of the Ṣāliḥiyyah School in al-Quds were not just in competition but also the subject of litigation. The endowment of the chair could determine not just the *madhhab* and rank of a professor, but would have profound implications as to which law textbooks would be adopted and taught in the school.[12] The challenge is that the historical record is widely dispersed, and to this point, has gone largely unexamined. In my many sojourns browsing in the manuscript collection at Azhar, I remember running into a *makhṭūṭah* (manuscript) of a *risālah* (epistle) written by an author, whose name I can no longer recall, protesting what he considers to be the inappropriate and offensive teaching materials being used in the law school of Baybars II by what he says is a prominent but unworthy professor. From his intimations and insinuations, I think that he was launching an attack against the larger than life and controversial figure of the jurist Jalāl al-Dīn al-Suyūṭī (d. 911/1505).[13] There is considerable evidence that law schools, endowed chairs, and necessary treatises used in legal instruction were the loci of numerous disputations seeking to establish the frame of reference and social language of law.[14] Far from a corporate model of law, what we consistently encounter in the Islamic legal framework is a negotiated and socially dependent system in which the authority of law is part and parcel of its authoritativeness. There is persistent competition between the law guilds, and even within the guilds of law to affirm their authoritativeness, or in other words their persuasiveness. In doing so, the legal guilds are competing and negotiating the amount of social deference and political privilege that they will be able to enjoy.

11 See Fachrizal A. Halim, *Legal Authority in Premodern Islam: Yahya B. Sharaf al-Nawawi in the Shāfiʿī School of Law* (London: Routledge, 2014); Mohammad Fadel, "The Social Logic of Taqlīd and the Rise of the Mukhtaṣar," *Islamic Law and Society* 3, no. 2 (1996): 193–233; and Ahmed El Shamsy, "The Ḥāshiya in Islamic Law: A Sketch of the Shāfiʿī Literature" *Oriens* 41, no. 3–4 (2013): 289–315.

12 See Abū al-Ḥasan Taqī al-Dīn al-Subkī, *Fatāwā al-Subkī* (Cairo: Maktabat al-Quds, 1355), 2:126–33.

13 On Suyūṭī and his controversies and eventual dismissal from al-Khānqāh al-Baybarsiyyah, see Marlis J. Saleh, "Al-Suyuti and His Works: Their Place in Islamic History from Mamluk Times to the Present," *Mamlūk Studies Review* 5 (2001): 73–89. For the history, pedagogies, and mechanics of Islamic education, see Mahdi Nakosteen, *The Islamic Origins of Western Education* (Boulder: University of Colorado Press, 1984), 37–63.

14 For instance, see Richard Bulliet, *Patricians of Nishapur: A Study in Medieval Islamic Social History* (Cambridge, MA: Harvard University Press, 1972) and George Makdisi, *Ibn ʿAqil: Religion and Culture in Classical Islam* (Edinburgh: Edinburgh University Press, 1997).

In my previous scholarship, I called attention to what I described as the micro-linguistic practices of Muslim jurists as a critical way in gaining insight into the negotiative and discursive dynamics of Islamic law.[15] If we scrutinize the language used in so many hornbooks and compendiums of law, we do indeed observe a jurisprudence that evolves through the deployment of a lexicon of technical expressions. Expressions such as *ʿalā al-muʿtabar* (the most reliable or authoritative position), *ʿalā al-arjaḥ* or *al-aṣlaḥ* (the most correct), *al-azhar* or *al-ashhar* (most accepted), *al-muttabaʿa* (the accepted practice) among others are found throughout the hornbooks, the commentaries, marginalia, the *responsa* literature, and the literature documenting actual cases (*kutub al-munāzaʾāt wa al-mukhāṣamāt* or *kutub al-qaḍāʾ*) of each *madhhab*. When carefully studied, this linguistic practice acknowledges the established legal doctrine within the *madhhab*, but also acknowledges the minority or dissenting opinions, and very often the jurist will note his personal opinion even if he considers the majority view to be wrongful. Moreover, through the mechanics of a fairly complex matrix of linguistic practices, jurists negotiated the application of the law most often in response to regional variations, and so we often encounter expressions such as "*al-maʿmūl bihi fī qaḍāʾ Misr*" (what is followed and applied in the courts of Cairo) or "*al-maʿmūl bihi fī qaḍāʾ Dimashq*" (what is followed and applied in the courts of Damascus) noting variations in the judicial regional practices even within a single *madhhab*. Moreover, when we examine the judicial practices of areas outside urban centers, for instance the tribal laws of Bedouins in Sina, we find the clear imprint of the hornbooks of the tribe's formal juridical *madhhab* but with radical departures from classical doctrines implemented in urban centers.[16] In other words, while it is clear that even tribal and rural regions would be impacted by the orthodox and formal determinations of the *madhhab*, there were numerous contingencies and variations in the customary laws followed in these areas.

Some of the most fascinating evidence about the Islamic legal system has been that of jurisdictional disputes between courts, forum shopping by litigants, litigation about whether someone has proper legal standing to bring a lawsuit, or whether a court has properly taken jurisdiction of a case.[17] *Fatāwā*

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15 Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001), 1–7, 321–42.

16 See Frank H. Stewart, "The Contract with Surety in Bedouin Customary Law," *UCLA Journal of Islamic and Near Eastern Law* 2 (2003): 163–280.

17 See Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarafī* (Leiden: E.J. Brill, 1996), esp. 142–84; David S. Powers, "The Mālikī Family Endowment: Legal Norms and Social Practice," *International Journal of Middle East Studies* 25, no. 3 (1993): 379–406; ibid., "A Court Case from Fourteenth-Century North

collections and texts on *munāzaʾāt* and *mukhāṣamāt* are replete with situations where the office of *qāḍī al-quḍāh* (chief judge) is asked to determine whether, for instance, a Ḥanafī court took proper jurisdiction of a case where a prior judgment has been entered by a Mālikī court. We also have a considerable amount of cases where litigants are accused of changing their *madhhab* so that they can obtain jurisdiction before a court where they arguably would secure a more favorable decision. All of this is typical evidence of a common rather than a corporate legal system. However, what is often inaccessible are the specifics and details of the circumstances surrounding cases that are reported on in *fatāwā* collections, the texts on *munāzaʾāt* and *mukhāṣamāt*, and also the texts on *nawāzil*. This is a challenge to scholars attempting to write the micro-history of the Islamic legal system, and the existence of this challenge has led scholars in the past to assume that such a micro-history does not exist. The absence of a micro-history determinable in legal texts is an earmark of a corporate, rather than a common, legal system, and because of this, scholars in the past failed to understand and mischaracterized the nature of Islamic law. But the fact that a micro-history is not readily apparent on the face of Islamic legal texts does not mean that this micro-history does not exist. It exists and it is essential to an understanding of this legal system.

Of great significance to understanding the nature of the Islamic legal system is the existence of jurisprudential texts that theorize and systematize Islamic law. The development of legal institutions appears to inevitably give birth to legalists who work with all due diligence to theorize and systematize law so as to increase the predictability and also the legitimacy of the legal system. The move from legal customs to normative standards that explain, justify, and theorize the law is typical of the evolution of common legal systems. Unfortunately, legal theory and philosophical standards further obscure and conceal the micro-history of a legal system. This is certainly true of the fields of *uṣūl al-fiqh* (jurisprudential theory) and *al-qawāʿid al-fiqhiyyah* (maxims or principles of law). Works of *uṣūl* such as the *Mustaṣfā* of Abū Ḥāmid al-Ghazālī (d. 505/1111) or *Qawāʿid al-Aḥkam* of ʿIzz b. ʿAbd al-Salām (d. 660/1262) did not precede the birth of Islamic law but followed from it. By comparing an early work on *uṣūl* such al-Shāfiʿī's *Kitāb al-Umm* to the remarkable sophistication of later works such as *al-Mustaṣfā*, it is clear that the field of jurisprudential theory had undergone a great deal of development. Similarly, Shihāb al-Dīn al-Qarāfī's (d. 684/1285) monumental work on the maxims of law, *al-Furūq*, or

Africa," *Journal of the American Oriental Society* 110, no. 2 (1990): 229–54; ibid., "Fatwās as Sources for Legal and Social History: A Dispute over Endowment Revenues from Fourteenth-Century Fez," *al-Qanṭara* 11 (1990): 295–341.

al-Shāṭibī's (d. 790/1388) *al-Muwāfaqāt* were late developments, where these jurists built upon pre-existing legal traditions by articulating general principles of law. It is tempting to reduce the production of systematizing activity to a single jurist in a single moment in time. So, for instance, it is tempting to say that Qarāfī invented the field of *al-qawāʿid al-fiqhiyyah* (maxims of law) or that Najm al-Dīn al-Ṭūfī (d. 716/1316) was the first theorist of *maṣlaḥah* (public welfare) in Islamic jurisprudence, but I think statements to that effect are invariably at error. Our knowledge of the sociology of law, or the way legal systems develop, make clear that jurists do not construct doctrines from thin air. Jurists build upon each other's work and function within communities of interpretation where they maneuver within an established linguistic practice re-stating, elaborating, and modifying. Common systems develop slowly through a process of incremental and cumulative interpretive acts, and no one jurist invents an entire field or theory on his own. We do find some contemporary scholars who will make statements such as al-Ghazālī or al-Shāṭibī are the founders of the theory of *maqāṣid al-Sharīʿa* (objectives and purposes of law) but such claims, to say the least, are exaggerations. Most certainly, brilliant minds such as al-Ghazālī or al-Shāṭibī took pre-existing linguistic practices and interpretive traditions and re-stated and elaborated upon them in a way that earned them the respect and deference of their colleagues. Unfortunately, the texts that were available to them and the layers of interpretive activity that they built upon in order to construct their authoritative summations of the law is all a part of the micro-history of the legal system that is so difficult to reconstruct centuries after the fact.

The important questions to ask, however, are: once these systematic and meta-narratives of the law come to be established and begin to function normatively among jurists, what becomes of the legal system? Once the great legal technicians are able to properly digest the annals of adjudications and systematize them into theoretical frameworks that explain the underlying logic and reasons at work in the legal system, does this significantly alter the shape or nature of the law? Do they really, as some have argued—not just in the context of Islamic law, but in other cultures as well—act as gravitational centers for the conversion of common legal systems to corporate legal systems? Do they start out as common legal systems unencumbered, malleable, and flexible but when they are systematized, regularized, and standardized, do they lose more and more of their common-type systems and become more akin to corporate systems? Finally, as some very pessimistic theorists about the future of common law say, is it the case that the common law system will eventually become the civil law system because legal theories, statutes, and codes kill common laws?

I think that, to an extent, we may answer these questions in the affirmative. Works of theory become perpetual and, eventually, habitual. This introduces for us a very significant pedagogical and methodological problem. When we study Islamic law, we often do not study it as a legal system. We are often not interested in whether legal history, sociology, and anthropology are able to afford our analysis with problematic questions. Equally, once we understand the role of books of theory for the consolidation, systematization, and centralization of the law, we must be prepared to account for how they become what define the legal system rather than the particular positive rulings that existed and were issued before the works of theory.

This is a very philosophical question that is debated intensely outside of the Islamic context. Once books of theory are incorporated into legal pedagogies, does it matter that a century earlier (or two or three) there were adjudications and even raw texts that were born, which did not take these books of theory into consideration? Must we then consider Islamic law—to put it rather bluntly—a set of specific commandments and determinations? To what extent should we even talk about Islamic law if we are not treating it as a legal system? Do we lack the necessary understanding of the historical experience itself?

Increasingly, we hear the question, "What is the fate of Islamic law?" Personally, I don't know the answer to this question. But until we attempt to understand the legal system within the logic of historical contingencies and processes within which it developed, we will fail to understand the manners by which the law accounted for new and emerging novelties and became comfortable with their adaptation into society. We may reach the conclusion that *qawāʿid fiqhiyyah* or *kutub uṣūl al-fiqh* is far more important than *kutub al-aḥkām*. In other words, we might end up concluding that books of theory are more significant for the future trajectory of Islamic law than the collection of positive commandments. But if we do so, we will find that our research efforts are better placed in the development of books of theories that are relevant to the historical contingencies that we confront today, rather than those that were confronted by jurists and theorists a millennium ago. That will require, of course, a shift in our methodologies of thinking, researching, and talking about Islamic law. But whether we wrestle with the historical record upon which the Islamic legal system unfolded, or the theoretical and normative trajectory wherein the future of Islamic law is explored, it is imperative that we take the field of Islamic law as law seriously.

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CHAPTER 2

Sectarianism and Integration

Contemporary Categories and the Prospects for Islamic Legal Studies

Robert Gleave

1 Introduction*

In his influential *Origins of Muhammadan Jurisprudence*, Joseph Schacht devotes six (of 351) pages to the contribution of "Shīʿa law" to the early development of Muslim jurisprudence.[1] This is not a very significant proportion of the book, and it might be said, it *overestimates* the level of interest in Shiʿite law at the time of Schacht's writing. In some ways, Schacht was unusual for paying even this level of attention to Shiʿite legal thought of the early or any other period. For most writers until well into the 1970s, early Shiʿite legal scholars (be they the Imams of one or other Shīʿī branch, or *fuqahāʾ* of the time) were generally ignored;[2] this attitude reflects, perhaps, the attitude prevalent in Oriental Studies (as it was then termed) at the time. It was subsequent political events which provided the context for the growth in interest in Shiʿism, and more specifically Shiʿite law. The emergence of the *faqīh* (jurist) as a figure of debated political authority in Shiʿism was coupled with Shiʿite political movements in Lebanon and Iraq, and eventually with the 1979 Iranian Revolution. Inevitably, the focus was on the Twelver (Ithnā-ʿAsharī or Imāmī) tradition; not simply because of Iran, but also because of all the Shīʿī intellectual traditions (the main ones being Zaydī, Ismāʿīlī and Imāmiyya/Ithnā-ʿAshariyya/Twelvers), the Twelvers had the most elaborated tradition of legal theory, legal sources and jurisprudence—including quite extensive legal hadith reports from the Prophet and the Imams; they were also numerically the strongest of

* The research for this chapter was carried out under the auspices of the European Research Council advanced award, project number 695245, LAWALISI, "Law, Authority and Learning in Imami Shi'ite Islam."

1 J. Schacht, *Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 262–8.

2 An exception to this is Noel Coulson's *Succession in the Muslim Family* (Cambridge: CUP, 1971) where Shīʿī laws on succession are covered in some detail (108–35); in his *History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), Coulson has a whole section dedicated to "Sectarian Legal Systems in Islam" (108–119), in which he takes issue with Schacht's thesis that the "end product" schools of the Shiʿites and the Kharijites are not so distinctive. Coulson outlines the "jurisprudential theory" of the Shiʿite school to be distinctive, and part of the explanation for this is "politico-religious beliefs").

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the Shīʿī groups; finally, they had had a close relationship with a number of political structures (including but not restricted to the Safavids), and therefore their activities (legal and otherwise) were relatively well-documented in the historical sources. By the time I embarked on doctoral research in the early 1990s (focusing on the late classical/early pre-modern development of Imāmī jurisprudence), there was a limited, but not negligible, body of secondary literature on which to draw, and an emerging set of research questions which were to dominate the subsequent study of Imāmī legal thought. These can be summarized:

1. How best might we characterize the relationship between Imāmī legal requirements of a theoretical political structure led by the sinless (but hidden) Imam, and actual political structures led by fallible (and often oppressive) caliphs and sultans?
2. What permission, if any, was provided to the scholar jurists (*ʿulamāʾ, fuqahāʾ*) to adopt functions theoretically reserved for the sinless Imam during periods of his political weakness or absence?
3. To what extent could scholar jurists cooperate with structures which were theoretically illegitimate, and quite possibly oppressive to the "saved sect" (i.e. the Imāmiyya) during the absence of the Imam?

As one can see, the primary questions were related to political theory, an inevitable consequence, one might think, of how the events of 1979 in Iran and elsewhere had surprised the worlds of both policy analysis and Orientalist academia. Most publications, at least in Western scholarship on the development of Imāmī legal thinking, were geared towards these questions, with perhaps the implied rationale that such research might produce a more nuanced understanding of the ever changing Middle Eastern political landscape.[3]

In this chapter, I wish to push these questions to one side a little. Whilst as a researcher one might be grateful for political events bringing one's subject to public prominence, it is not useful to conceive of future scholarly possibilities entirely in relation to what might or might not be policy relevant in the years to come. Accordingly, I will focus here on the contours of possible research in the early development of Shīʿī law, and the opportunities for enriching the field of the loosely termed "classical period" by a greater recognition of the traditions

3 A surge in studies in Shiʿism appears in the 1980s following the Iranian revolution, a number of them with a clear legal emphasis. Some of these were completed before the revolution, but updated in its wake. See, S.A. Arjomand, *The Shadow of God and the Hidden Imam* (Chicago: University of Chicago Press, 1984); M.J. Fischer, *Iran: from Religious Dispute to Revolution* (Cambridge, Mass: Harvard University Press, 1980); H. Modarressi Tabātabāʾī, *An Introduction to Shīʿī Law: A Bibliographical Study* (London: Ithaca Press, 1984) and his *Kharāj in Islamic Law* (Tiptree, Essex: Anchor Press, 1983). There were also a flurry of articles attempting to understand the legal dimensions of the Revolution's success.

and practice of Shīʿī law. I reserve some comments on the contemporary scene to the conclusion. The field of Islamic legal studies is now so broad, and so well-staffed internationally, that we are moving towards the establishment of a series of semi-formal sub-fields of Islamic legal studies, and in each of these, there is the potential for a broadening of evidence base to include (amongst others) the tradition and practices of Shīʿī law. From that broadened evidence base, one can try and develop more comprehensive answers to the principal research questions: how, for example, theology impacts on legal theory; how the process of forming a *madhhab* might best be characterized; how legal doctrine influences legal practice; and what and how a *fatwa* functions as a piece of legal advice. My main contention is that answers to all these questions, and others, would be much enhanced by a greater level of attention paid to patterns of activity and thinking which run across all Muslim legal traditions. Some of this may appear like special pleading for the Shīʿī case (or a demand for my own specialism to be more broadly recognized as having a valid contribution to make). That may be so on one level; but more fundamentally, I have noticed that the field continues to be locked into the habit of treating some traditions as afterthoughts or marginal offshoots, rather than part of a wider, richer Muslim legal history. It is this approach which, I believe, has somewhat impoverished the ever-expanding field of Islamic legal studies.

2 Early Shīʿī Law: Paradigms and Prospects

In context, Schacht's paltry six page foray into Shiʿite law seems almost generous, and certainly more focused on exclusively legal (rather than obliquely political) issues than much subsequent comment. Schacht makes some characteristically bold and challenging claims, without any fully fleshed-out argumentation. The works of Islamic law ascribed to the sixth Shiite Imam (Jaʿfar al-Ṣādiq, d. 148/765) are "apocryphal", he asserts; other early works supposedly of the 2nd century AH are of "doubtful" authenticity or "certainly" spurious. We can, he claims, only think of the Imāmīs as having a legal literature towards the end of the third century AH (early tenth century CE). For Schacht, the Zaydī work attributed to Zayd b. ʿAlī, the failed leader of the revolt against the Umayyads in 122/740, is also a later invention. All in all, Shiʿite jurisprudence is a later development, postdating the emergence of the Sunni schools and often presuming intellectual structures developed therein. It claims to derive its content from the teachings of ʿAlī and the subsequent Imams, but ʿAlī's legal doctrine, as far as it was understood amongst the second and third century Iraqi scholars, shows little connection with Shiʿite law as it was

subsequently understood. In an approach typical of much later scholarship on Islamic law, Schacht examines a series of "Shiʿite" legal doctrines, supposedly unique to (and characteristic of) Shīʿī law. He then proceeds to argue that these were not originally Shiʿite but became "adventitiously distinctive for Shiite as against Sunni law".[4] The "Shiʿite" positions emerge out of early (Sunni) legal disputes; later Shiʿites often adopted and championed a less well-known or marginal Sunni position and claimed it as their own. In his analysis of these doctrines, Schacht makes only three references to Shiʿite works of law or hadith; the first is to Querry's French translation of the *Sharāʾiʿ al-Islām* of al-Muḥaqqiq al-Ḥillī (d. 676/1277) and the other citations are from *Majmūʿ* (attributed to Zayd).[5] The remainder of the references are to his standard list of sources for the early development of Islamic jurisprudence: (Mālik) *Muwaṭṭaʾ* (in the two main recensions), (Ibn al-Qāsim) *al-Mudawwana*, (Shāfiʿī) *al-Risāla, al-Umm* and *Ikhtilāf al-Ḥadīth*, (Shaybānī) *al-Āthār*, (Abū Yūsuf) *al-Āthār*. This would, of course, be entirely unacceptable in more recent scholarship. To write an account of Shīʿī law and refer, almost entirely, to Sunni sources, would be simply considered bad practice. To be generous to Schacht, it could reflect the sources available to him in 1950.

The general thrust of his argument is, then, that Shiʿite law consists of "borrowings" from Iraqi jurisprudence, dating from well after the basic structures of Islamic jurisprudence had been established. The distinctive Shiʿite doctrines examined are (1) wiping rather than washing one's feet in *wuḍūʾ* ablutions, (2) the freedom or otherwise of the children of a slave concubine (*umm al-walad*), (3) temporary marriage (*mutʿa*) and (4) the *qunūt* supplicatory prayer. The attribution of these doctrines to Shiʿite Imams, or the assertion that these were distinctively Shīʿī doctrines in the period immediately after the Prophet are both, Schacht asserts, later attempts to establish a pedigree for Shiʿite law. In essence, though Schacht does not express it in this way, there was no distinctive Shiʿite doctrine in the first and second centuries; there was no distinctive Shiʿite legal method; and there was no discernable body of scholars promoting a particular Shiʿite legal doctrine (a proto-*madhhab* or similar). The later Shiʿite legal tradition—dating from the third century AH at the earliest—attempted to construct "Shiʿite" law out of the plethora of doctrines which emerged amongst Sunni jurists of the early period.

The notion that Shīʿī law was somehow a secondary, later construction, which reacted to, or harvested its opinions from the legal doctrines pioneered by Sunni jurists, remains a hypothesis. Schacht's brief examination can hardly

4 Schacht, *Origins*, 262.
5 Schacht, *Origins*, 265 n.7; 267 n.7, 268 n.3.

be cited as comprehensive evidence for its validity. It has not yet been even partially tested by a rigorous examination of sources, which are becoming available in increasing quantity in published form. Following Schacht's hypothesis, Shiʿite legal doctrine (and Shiʿism more generally) was a "delayed reaction" to Sunni law; it took Shiʿites longer to engage fully with the questions of the Muslim intellectual tradition. These assumptions have come to underpin much of the scholarship and secondary literature on both Shiʿism and Islamic law. Seeing Shiʿite legal developments through the prism of prior "Sunni" experience is the usual mode of enquiry.[6] I too have used this approach in my study of some aspects of Shiite law.[7] It could be argued such an approach is methodologically presumptuous, and would fail to entertain the possibility of internal development, seeing Shiʿite law purely as reaction. The approach, as initially presented by Schacht, has yet to be critically examined. Furthermore his specific assertion that there was, in the early period, neither a distinctive Shiʿite approach to legal reasoning, nor a set of distinctive Shiʿite doctrines, remains unexplored.

Other areas of Imāmī Shīʿī juristic activity are often analysed using the same "reactionary" framework. For example, portraying Shīʿī legal theory as an antiphon to the chorus of Sunni *fuqahāʾ* is perhaps indicated by the time-lag between the first (fully fledged) works of Sunni and Shīʿī legal theory (*uṣūl al-fiqh*). One has, the Ḥanafi al-Jaṣṣāṣ's (d. 370/981) *al-Fuṣūl*; incomplete as it may be, it represents the earliest extant comprehensive book project in legal theory. But this is not to say that Islamic law before Jaṣṣāṣ was "theory free". The body of legal scholars in the 2nd and 3rd centuries AH was clearly deeply divided, and the divisions were not simply over which scholar had the greatest authority in order to demonstrate the supremacy of their doctrine. Deep theoretical differences around the justification of rules were emerging before al-Shāfiʿī (d. 204/820),[8] and were crystallized after the general thrust of his *Risāla*'s

6 Calder's influential PhD thesis "Structures of Authority in Imami Shi'i Jurisprudence" (Unpublished PhD thesis, University of London, 1980) sets Imāmī jurisprudence in a general development of scholarly authority in early Islamic legal thought, primarily through a comparative analysis with al-Shāfiʿī's *Risāla*; Ian Howard published important articles also setting Imāmī ritual law in the context of Sunni legal thinkers: "The development of the Adhan and Iqama of the Salat in early Islam," *Journal Semitic Studies* 26.2 (1981): 219–228. This builds on his earlier article using a similar methodology "Mut'a Marriage Reconsidered in the Context of the Formal Procedures for Islamic Marriage," *Journal of Semitic Studies* 20.2 (1975): 82–92.

7 R. Gleave, "Imāmī Shīʿī Refutations of *qiyās*," in Bernard Weiss (ed) *Studies in Islamic Legal Theory* (Leiden: Brill, 2002), 267–292.

8 On the pre-Shāfiʿī development of Mālikī legal reasoning, see J. Brockopp, *Early Mālikī Law: Ibn ʿAbd al-Ḥakam and His Major Compendium of Jurisprudence* (Leiden: Brill, 2000); also touching on similar analysis see P. Gledhill, "The Development of Systematic Thought in Early Mālikī Jurisprudence", (Unpublished PhD thesis, University of Oxford, 2014).

findings (if not the book itself) had had its effect.[9] Neither can we realistically claim that the *Fuṣūl* was the first work of legal theory (*uṣūl al-fiqh*). Stewart has done some detailed forensic work to establish the existence of *uṣūl* works in the century before Jaṣṣāṣ;[10] one can remain ambivalent over whether al-Shāfiʿī's *Risāla* is a work of *uṣūl al-fiqh*, without committing oneself to a two century hiatus in scholarly interest in legal theory. The customary "first" book of Shīʿī *uṣūl al-fiqh* (*al-Tadhkira fī uṣūl al-fiqh* of al-Shaykh al-Mufīd, d. 413/1022) is dated 40 years after al-Jaṣṣāṣ; though this work (which probably survives in an abbreviated form in the *Kanz al-Fawāʾid* of Muḥammad b. ʿAlī al-Karājikī, d. 449/1057)[11] is not the first Shīʿī engagement with theoretical matters.[12] Al-Qāḍī al-Nuʿmān's (d. 363/974) critique of the whole discipline of *uṣūl al-fiqh* indicates that Shiʿite thinking on theoretical matters was advanced. Agreeably he was working in an Ismāʿīlī Shīʿī context, but he clearly was operating with the same sources (and to an extent within the same intellectual tradition) as Imāmī Shiʿite scholars; some Imāmī scholars claim him as their own rather than being an Ismāʿīlī.[13] Stretching back before him, Shīʿī reports from the 2nd and 3rd centuries AH, preserved in Imāmī collections may not be attributable to the Imams themselves, but appear to indicate that specifically Shiʿite theoretical doctrines were emerging alongside rather than simply in reaction to, the Sunni developments.[14] These legal theoretical doctrines included the (famous) rejection of *qiyās/ijtihād*,[15] suspicions around *raʾy*, the restrictions

9 See W. Hallaq, "Was Shafi'i the Master Architect of Islamic Jurisprudence?," *IJMES*, 25 (1993), 587–605; N. Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon, 1993); for a critique see Joseph Lowry, "The Legal Hermeneutics of al-Shāfiʿī and Ibn Qutayba: A Reconsideration," *Islamic Law and Society*. 11(1), (2004) 1–41.

10 D. Stewart, "Muḥammad b. Jarīr al-Ṭabarī's *al-Bayān ʿan uṣūl al-aḥkām* and the Genre of *Uṣūl al-Fiqh* in Ninth-Century Baghdad" in James Montgomery (ed.) *Abbasid Studies: Occasional Papers of the School of Abbasid Studies, Cambridge 6–10 July 2002. Orientalia Lovaniensia Analecta* 135 (Leuven: Peeters, 2002), 321–49 and his "Muḥammad b. Da'ūd al-Ẓāhirī's Manual of Jurisprudence, *al-Wuṣūl ilā maʿrifat al-uṣūl*" in B. Weiss (ed.) *Studies in Islamic Legal Theory* (Leiden: Brill, 2004), 99–158.

11 D. Stewart, "An Eleventh-Century Justification of the Authority of Twelver Shiite Jurists," in Asad Q. Ahmad, Behnam Sadighi and Robert Hoyland (eds) *Islamic Cultures, Islamic Contexts. Essays in Honor of Professor Patricia Crone* (Leiden: Brill, 2015), 468–97.

12 See D. Stewart, *The Disagreements of the Jurists: A Manual of Islamic legal theory* (London: New York University Press, 2015).

13 These are discussed in I. Poonawala, "A Reconsideration of al-Qāḍī al-Nuʿmān's "Madhhab", *BSOAS*, 37 (1974), 572–579.

14 R. Gleave, "Early Shīʿī Hermeneutics. Some Exegetical Techniques Attributed to the Shi'i Imams," in Karen Bauer (ed.), *Aims, Methods and Contexts of Qur'anic Exegesis (2nd/8th–9th/15th c.)* (Oxford: OUP, 2013), 141–72.

15 N. Calder, "Doubt and Prerogative: The Emergence of an Imāmī Shīʿī Theory of Ijtihād," *Studia Islamica*, 70 (1989), 57–78.

on *ijmāʿ*,[16] the general/specific distinction in hermeneutics[17] and the critique of provenance in the probative force of reports. Even if not attributable directly to the Imams (primarily Imam Muḥammad al-Bāqir, d.c.114/733 and Imam Jaʿfar al-Ṣādiq[18]), these reports are nonetheless earlier than Schacht's (and others') starting point of the late 3rd century AH.

Perhaps the most exciting future challenges in the study of the formation of Shīʿī law is, in essence, methodological: must we see Shīʿī law as the poor cousin of Sunni legal developments, or can we conceive of a wider pool of schools and doctrines from which the *madhāhib* emerged in the late 2nd and 3rd centuries AH?[19] One question which could emerge as central to the future study of early Islamic legal history is whether the sectarian nature of the later sources mask the level of interaction and cross-fertilisation there was between *fuqahāʾ* with different theological affiliations. Since scholars are increasingly seeing the labels of Sunni and Shīʿī as more fluid than contemporary dynamics might suggest,[20] is it realistic (or indeed methodologically sound) to restrict the sources we use for the early development of Islamic law to those subsequently identified as "Sunni" (or indeed "Shīʿī")?

3 Classical Imami Legal Developments

Once established, the Shīʿī tradition of legal study and composition could be viewed as an intellectual silo, which had little contact with outside influences.[21] The Imāmī *fiqh* works of the classical period—from, say al-Shaykh al-Ṭusī (d. 420/1067) onward—are self-referential, in that they primarily build upon,

16 D. Stewart, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System* (Salt Lake City: University of Utah Press, 1998).

17 R. Gleave, "Early Shiite hermeneutics and the dating of *Kitāb Sulaym ibn Qays*", *Bulletin of the School of Oriental and African Studies*, 78.1 (2015), 83–103.

18 For an account of the sayings of Imam Muḥammad al-Bāqir see A. Lalani, *Early Shiite Thought: The Teachings of Imam Muḥammad al-Bāqir* (London: Tauris, 2004).

19 The most influential recent accounts of the emergence of the Sunni *madhāhib* are Christopher Melchert, *The Formation of the Sunni Schools of Law 9th–10th centuries* (Leiden: Brill, 1997) and W. Hallaq, *Authority, Continuity, and Change in Islamic law* (Cambridge: Cambridge University Press, 2001).

20 J. Pfeiffer, "Confessional Ambiguity vs. Confessional Polarization: Politics and the Negotiation of Religious Boundaries in the Ilkhanate," in J. Pfeiffer (*ed.*) *Politics, Patronage and the Transmission of Knowledge in 13th–15th Century Tabriz*, (Leiden: Brill, 2014), 129–168.

21 This is, of course, debated. Stewart (in his *Islamic Legal Orthodoxy*) describes the exchange between Imāmī and Sunni scholars; I make comment on this in my review: Robert Gleave, "Review of Stewart, *Islamic Legal Orthodoxy*," *Islamic Law and Society* 7 (2000), 102–4.

and modify the legacy of the previous generations of Shīʿī scholars. In this, they do not appear very different from the mature works of the other *madhāhib*. There may be reference to the Shāfiʿī or Ḥanafī position on an issue; or more broadly, the author may play off a generalised "Sunni" (*al-ʿāmma*) position. There is, though, no conspicuous evidence of extensive inter-*madhhab* interaction and influence. When employed, the positions ascribed to other *madhāhib* are often fossilized; taken not from contemporaries, but from previous Shīʿī characterizations of Sunni positions, or from abbreviated Sunni *fiqh* manuals of the early formative period. In this, though, the Imāmī works are not so different from the mature works of the classical period in the Sunni *madhāhib*.[22] There too, the commitment to a particular tradition of scholarship roots a work, and provides an immediate context for the author to express themselves;[23] references to another school's position rarely reflects the latest developments within that school, but ossified, early doctrine of that school, formed many centuries previous when the school was carving out a distinctive position within the range of views. The cycles of scholarship are also similar: breviary *mukhtaṣar* works, followed by a snowball of commentaries and marginalia observations as each generation elaborates on the last, and when the commentarial volumes become unwieldy, there is a return to a new *mukhtaṣar* as the cycle is restarted. The content is, of course, distinctive (the Imāmīs, like the other *madhāhib* have many individual opinions, and not simply in the four areas identified by Schacht), and the textual sources are specific—but the legal enterprise is remarkably similar. Despite this, the tendency has been, from much influential scholarship in the field of Islamic law, to bracket the Sunni *madhāhib* together as somehow exhibiting sufficiently similar characteristics to justify their own typological category; and to ignore Islamic legal traditions outside of these (be they Ibāḍī, Shīʿī or other "minor" schools) as working according to entirely different dynamics. Now, labeling a time period as "classical" may be methodologically problematic, and this perhaps needs to be opened up to discrete investigation. Perhaps it is not sectarian affiliation which should dictate the boundaries of future research, but an awareness of how periodization can drive an argument. If "classical" Islamic law can survive as a meaningful category of analysis, there is a need to establish the lines around which we delimit this category. That said, the field has not yet

22 For a literary-based description of the "mature" tradition see N. Calder (C. Imber (eds)) *Islamic Jurisprudence in the Classical Era* (Cambridge: CUP, 2010).

23 The homage to the earlier tradition found in later works of jurisprudence is analyzed by Brannon Wheeler in his *Applying the Canon in Islam: The Authorization and Maintenance of Interpretive Reasoning in Hanafi Scholarship* (Albany: State University of New York Press, 1996).

managed to construct paradigms in the study of legal texts and doctrine of this period which are inclusive rather than divided on sectarian lines. Too often, books purport to provide a description of "Islamic law" when in fact they only provide a snap shot of one or more of the Sunni *madhhabs*.[24] These analyses, which have made some thoughtful observations and set up interesting theories in the field, could be enriched by seeing the intellectual processes at work as echoed across sectarian divides.

The possibilities opened up by a more inclusive approach to the subject material are intimated by studies which look specifically at patterns and interactions across the various Muslim legal traditions. A few such studies have emerged,[25] but they have been rather outnumbered by more exclusive studies.[26] There is even occasional explicit reference to the fact that studying Shīʿī jurisprudence is excluded from study because it requires a separate skills set;[27] this reinforces the notion that Shīʿī law is exotic and strange, and requires some form of intellectual initiation before embarking upon its study. My experience of research is that this attitude is rather exaggerated; perhaps it justifies the delimitation of a particular study (one always needs to determine what one is, and what one is not going to study, and the evidence upon which one is basing one's conclusions). It has, though, no serious methodological justification. There appears to be an acceptance in the field that a study using entirely Sunni sources can claim to characterize Islamic law generally; a study using entirely Shīʿī sources could never justify making the same entitlement. As is the case with the study of Islamic law in the early Muslim period, the classical

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24 Examples of this are many, but as a sample see H. Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 2003) and M. Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice* (Edinburgh: EUP, 2005). Even a thoughtful piece of work such as Ahmed Fekry Ibrahim's *Pragmatism in Islamic Law: A Social and Intellectual History* (Syracuse: SUP, 2015) has no room for a Shīʿī contribution to the book's themes.

25 Most notable here are M. Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (Cambridge: Cambridge University Press, 2000); K. Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001); more recently I. Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (Cambridge: Cambridge University Press, 2015).

26 See above, n.25, and also Ahmad Atif Ahmed, *The Fatigue of the Sharia* (London: Palgrave, 2012) and his earlier *Structural Interrelations of Theory and Practice in Islamic Law* (Leiden: Brill, 2006).

27 Hallaq in his *A History of Islamic Legal Theories* (Cambridge: CUP, 1997) recognizes his lacuna, but I cannot agree with him that "The Shi'ite and other legal theories are appreciably different both in their historical development and, consequently, structure. No doubt they stand on their own, and, like their Sunni counterpart, they demand an independent treatment. Thus no apology is in order for excluding non-Sunni legal theories." (p. viii).

period is also beset with methodological issues and questionable assumptions. A sectarian-based methodology (as that is how it would appear to an observer) may be the product of a peculiarly modern form of categorization; and the solution may be to try and explore how Islamic legal intellectual development can be more richly explained by using a broader range of sources.

This is not to say that there are not distinctive features of the classical Shīʿī legal doctrine. As with all the legal traditions, there are dynamics and modes of thought which characterize the tradition and make it internally coherent. Two things standout from the studies in the field to date: the first on the jurisprudence-legal practice debate, and the second in the interface between theology and legal theory. I take these in turn.

First, the relationship between legal doctrine as expounded by academic lawyers, and the practice of judges (and to a lesser extent muftis) has moved on considerably from Hallaq's interventions in the early 1990s.[28] The revolution brought about by the use of legal documents to track social history, and how these do (or do not) relate to jurisprudence has opened up new areas of investigation, particularly in the classical period.[29] There is no need here to rehearse the critique in the field of the ("Orientalist") notion of an ossified, atrophied legal doctrine and the closing of the gate of *ijtihād* (and with it innovation, originality and flexibility).[30] The use of archival materials, *sijillāt* and other records, fatwas, court judgments and other sources has enabled scholars to embark on a series of detailed and technical studies of how Islamic law was practiced in particular locations, and how this may have drawn on (or differed from) their school doctrine. Most productive here has probably been the use of the Ottoman archival collections;[31] how Sunni legal traditions related to judicial practice is inevitably better evidenced through these collections. This has left the study of the practice of Shīʿī legal institutions in a relatively primitive state.

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28 Particularly influential here was Hallaq's "From *Fatwās* to Furūʿ Growth and Change in Islamic Substantive Law," *Islamic Law and Society*, 1 (1994), 17–35.

29 The pioneer in this field was David Powers whose studies were collected in *Law, Society and Culture in the Maghrib, 1300–1500* (Cambridge: Cambridge University Press, 2002), but see also J. Tucker, *In the House of the Law: Gender and Islamic law in Ottoman Syria and Palestine* (Berkeley, Calif.; London: University of California Press, 1998).

30 Hallaq's influential contributions on *ijtihād* and his kick against these "Orientalist" notions can be found collected in his *Law and Legal Theory in Classical and Medieval Islam* (Brookfield, VT: Variorum, 1995).

31 An early example of this is U. Heyd, *Ottoman Documents on Palestine, 1552–1615: A Study of the Firman According to the Mühimme Defteri* (Oxford: Clarendon Press, 1960) and his *Studies in Old Ottoman Criminal Law* (Oxford: Clarendon Press, 1973).

The reasons for this relative underdevelopment are not simply that the study of Shiʿite law generally was under-represented in scholarship. On the one hand, the sources for the operation of Shīʿī law in practice are more difficult to access (if indeed they exist at all). The area where the evidence base is strongest is, for obvious reasons, in endowments linked to shrines and land. Here the operations of Shīʿī law in Iran and Iraq are the principal examples, and there are emerging a series of studies which link in Shīʿī endowment regulations with Shīʿī legal practice.[32] In the main, though, these studies are locked into the Iranian, Iraqi or more broadly Shīʿī context. The need to integrate the study of endowments in Shīʿī areas, or more precisely administrated under Shīʿī regulations, into the study of endowments more generally is critical for a full picture of how legal theory and practice operated in this area across the Muslim world during this middle period.[33] Picking out and delineating trends in the theory-practice relationship is more problematic in other areas of law (marriage, divorce, inheritance, financial transactions and trade, criminal law) given the resources available. The issue of source availability, either through accessibility, or simply that Shīʿī courts do not appear to have kept as thorough records as the Ottoman *sijillāt* and Sunni courts, means studies which focus on the latter are establishing the field, and therefore controlling the paradigms under which future research might be carried out.[34]

Second, the Shīʿī legal problem that any court system in the absence of the Imam is doctrinally illegitimate has inhibited the development of the study of Shīʿī legal practice during this period.[35] If, as one might sensibly hold as an

32 M. Sefatgol, "Safavid Administration of *Avqāf*: Structure, Changes and Functions, 1077–1135/1666–1722," in A. Newman (ed.) *Society and Culture in the Early Modern Middle East*, 397–408; N. Kondo, "The Waqf of Ustad ʿAbbas: Rewrites of the deeds in Qajar Iran" in Kondo Nobuaki (ed.) *Persian Documents: Social History of Iran and Turan in the 15th–19th Centuries* (London: Routledge, 2003), 106–127.

33 The broader study of *waqf* is the subject of an extended project by Randi Deguilhem (*Fondations pieuses waqf-habous des régions musulmanes et leurs communautés confessionnelles:* un programme GDRI du CNRS (Groupement de Recherche Internationale), 2012–2016); the field's possibilities first gained widespread recognition through R. McChesney's *Waqf in Central Asia: Four Hundred Years in the History of a Muslim Shrine, 1480–1889* (Princeton: Princeton University Press, 1991); Y. Lev, *Charity, Endowments and Charitable Institutions in Medieval Islam* (Florida: University Press of Florida, 2006).

34 The possibilities in this area are exemplified by some extremely promising studies by Zahir Bhalloo, "Judging the Judge: Judicial Competence in 19th Century Iran", *Bulletin d'études orientales* 58 (2013), 275–293, and his unpublished DPhil thesis (Zahir Bhalloo, *The Qajar Jurist and His Ruling: A Study of Judicial Practice in Nineteenth Century Iran*. DPhil. University of Oxford, 2013).

35 See my "Two Classical Shīʿī Theories of *qaḍāʾ*", in J. Mojaddedi, A. Samely and G. Hawting (eds) *Studies in Islamic and Middle Eastern Texts and Traditions in Memory of Norman Calder* (Oxford: Oxford University Press, 2001), 105–121.

Imāmī, working as a *qāḍī* for the illegitimate sultan is suboptimal (religiously speaking), then the operations of the religious courts, to the extent that they are recoverable, might be viewed as of limited relevance for an understanding of the theory-practice relationship in Shīʿī law. This, however, really only brings an interesting and different dynamic to the practical implementation of Shīʿī law, with challenging questions to be asked: How might it be done within an illegitimate system? Are the mechanisms of compromise and doctrinal flexibility found in some instances of Sunni judges more, or less, evident in a Shīʿī context? There is beginning to emerge from within the secondary literature (primarily focused on Iran) a body of scholarship which might record and determine the operations of Shīʿī courts in the classical period; integrating this into the wider field of medieval and early pre-modern Islamic legal practice is a much longer term (and, one suspects, collaborative) project.[36]

Another distinctive feature of classical Imāmī legal studies which would benefit from greater interaction with Sunni-dominant scholarship can be identified here: that is, the link between theological commitment and legal theory. The way in which certain theological premises were worked out in *uṣūl al-fiqh* has received some attention in the academic scholarship, and it is clearly emerging as a major area of research.[37] The reasons for this are not entirely down to arcane interest in medieval debate between Muslim theologians and jurists; or more abstractly between the disciplines of theology and law in medieval Islam. There is a clear contemporary relevance to the focus on this relationship; modernity (a term which could be the subject of a discrete study) has led to an investigation of whether the structures of classical *fiqh* can modernize.[38] The concern is that if modernization is pushed too fast, the Sharia will contravene certain theological principles (particularly concerning

36 The field was formerly limited to the studies of W. Floor including his "Changes and Developments in the Judicial System of Qajar Iran (1800–1925)," in Clifford E. Bosworth and Carole Hillenbrand (eds.) *Qajar Iran: Political, Social and Cultural Change* (Edinburgh: EUP, 1983), 113–47; since then we have a series of interesting studies (including that those of Bhaloo mentioned above): I Schneider, *The Petitioning System in Iran State, Society and Power Relations in the Late 19th Century* (Wiesbaden: Harrassowitz Verlag, 2007); M. Mohammedi, *Judicial Reform and Reorganization In 20th Century Iran* (New York: Routledge, 2008).

37 The ground-breaking studies in this area were those of A. Zysow (whose PhD thesis is now published as *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Atlanta: Lockwood Press, 2013) and K. Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought* (Albany: SUNY, 1995).

38 For the general framework see M. Qasim Zaman, *Modern Islamic Thought in a Radical Age* (Cambridge: Cambridge University Press, 2012); for a specifically Shīʿī application see A-R. Bhojani, *Moral Rationalism and Shariʿa: Independent Rationality in Modern Shīʿī Uṣūl al-fiqh* (New York: Routledge, 2015).

the unchanging nature of God's commands and the acceptability of departing from the explicit designation of revelatory texts). This creates a research imperative to understand the theological basis of Islamic legal theory, and predictably this relationship has attracted increased importance.

The dominant Imāmī Shīʿī theological school contains numerous elements with implications for a coherent legal theory, but two features are perhaps worthy of particular note: first, the commitment to the legal opinion of the Imam, absent but nonetheless authoritative, and second, the full-blown and unabashed commitment to the objectivity of moral values (elaborating on fundamental Muʿtazilī theological principles).[39] In late classical Shīʿī legal theory, these two elements came to the fore in the form of an intra-Imāmī conflict between Akhbārīs and Uṣūlīs (or *mujtahids*), a subject which has been a particular research focus of mine.[40] On the first, the two schools clashed over when and how the Imam's opinion might be known; and here the debate involved discussions over the probative value of the reports (*khabar al-wāḥid* and *al-khabar al-mutawātir*) and their ability to produce certain knowledge (*qaṭʿ, ʿilm*). There was also debate around whether the absence of the Imam's opinion entitled the scholar to explore how the sources might be made to be relevant to a case at hand and form the basis of the scholar's opinion (*ẓann*). Does this *ẓann* have the right to be considered a "possible" opinion of the Imam? The differences between the school were, then, over the legitimacy of the process known as *ijtihād*, and any full account of classical *ijtihād* theory in Islamic law cannot omit a reference to what is probably the most elaborate account of its workings as found in late classical Imāmī *uṣūl al-fiqh*.[41] The other foundational theological principle in Imāmī jurisprudence is the commitment to an objective ontology of moral values. For Imāmīs, the rightness of just actions and the wrongness of oppression being rationally discoverable and

39 The field was first explored by Wilferd Madelung, "Imamism and Mu'tazilite Theology" in T. Fahd (ed.), *Le Shîʿisme imâmite: colloque de Strasbourg* (*6–9 mai, 1968*) (Paris: Presses Universitaires de France, 1970), 13–30, and then later by A. Newman, "The Development and Political Significance of the Rationalist (Uṣūlī) and Traditionalist (Akhbārī) Schools in Imāmī Shīʿism History from the third/Ninth to the Tenth/Sixteenth Century" (Unpublished Ph.D. thesis, University of California Los Angeles, 1986).

40 R. Gleave, *Scripturalist Islam: The History and Doctrines of the Akhbari School of Shii Thought* (Leiden: Brill, 2007).

41 The accounts which could be enriched by incorporating such a perspective are based on the scholarship of Hallaq (Wael B. Hallaq, "On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad", *Studia* Islamica 63 (1986), 129–141, and his "Was the Gate of *Ijtihad* Closed?", *International Journal of Middle East Studies* 16 (1984), 3–41) and Ruud Peters (Peters, Rudolph, "*Ijtihād* and *Taqlīd* in 18th and 19th Century Islam," *Die Welt des Islams*, 20 (1980), 131–45).

are not dependent on the opinion of the Lawgiver. The Akhbārī-Uṣūlī dispute was not so concerned with the appropriateness of this doctrine, but on its legal implications (must the Sharīʿa conform to the externally extant moral code at all times? Can items be morally neutral but legally forbidden—such as eating pork?). The view that items are assumed to be legally uncategorized when not explicitly categorized by the Lawgiver (known as *barāʾat al-aṣl*) impinged not only on the inherent goodness and badness of items in the world, but more significantly about what function, precisely, is the Sharīʿa designed to perform in the plan of the Divine Lawgiver.[42] Once again, any contemporary postulation around the intellectual foundations for an "updating" of legal rules requires a solid historical grounding in the potentialities of different theological approaches, and for this the Akhbārī-Uṣūlī debates which emerged from the conflict are essential. The temptation to view the Akhbārī-Uṣūlī dispute as a sort of re-run of the Ashʿarī-Muʿtazilī differences, or a reflex of the Ẓāhirī-Sunni discussions, has proved irresistible for some commentators.[43] And in this, the paradigms set by the domination of studies in the Sunni intellectual tradition has played its part. My own work has attempted to show that whilst there may be some structural similarities with these other disputes, the particular features of Imāmī theological and legal history created both the Akhbārī and Uṣūlī legal schools, neither of which was simply a copy (or a less sophisticated version) of their Sunni counterparts. There is a possibility that some might see Ayatallah Khomeini's influential (and political successful) concept of the "guardianship of the jurist" (*wilāyat al-faqīh*) as the most important contribution of Shīʿī law to Islamic legal studies.[44] I would argue differently: the most important contribution is a realization that there has to be a clear methodological difference between what appears to be the requirements of the divine law, and what might be the law in reality. This is a direct outcome of the Uṣūlī elaboration of their theory of *ijtihād* after the end of the Akhbārī-Uṣūlī conflict. Imāmī Shīʿī scholars have worked through, with perhaps the greatest level of precision in the contemporary period, the ontological and epistemological implications of the limitations of human understanding when confronted with a defined corpus of revelation.[45] The future directions of the Islamic legal studies, indeed the possibilities for the development of Islamic law more broadly, will

42 See the study of Bhojani above, and that of Ashk Dahlen *Islamic Law, Epistemology and Modernity: Legal Philosophy in Contemporary Iran* (New York: Routledge, 2003).

43 See, for example, the above cited study of Madelung.

44 I have addressed this in my "Political Aspects of Modern Shi'i legal Discussions: Khumayni and Khu'i on *ijtihad* and *qada*'", *Mediterranean Politics*, 7.2 (2002), 96–116.

45 See the studies of Dahlan and Bhojani cited above.

be poorer if the debates in contemporary Shīʿī legal thought, outside of the much covered *wilāyat al-faqīh*, are not included in the discussion.

4 Conclusions

External to the academic field of Islamic legal studies, there is, of course, a world of passionate legal debate within the global Muslim community. This debate does not always rise to the highest levels, but it is the context in which academics do their scholarship. My argument here is, then, that the study of Islamic law has been impoverished by a rather narrow set of presumptions which have underpinned contemporary scholarship. Amongst these are the notion that the Shīʿī legal traditions generally, and Imāmī law in particular, is on the one hand derivative (consisting of borrowings from the wider Sunni milieu), and on the other exotic (being quite foreign in its dynamics). The result is a majority of studies in the field which present themselves as creating a general account of the functions of Islamic law, but without even a recognition of the greater diversity of the possible resources on which one might draw. There are exceptions of course, but there is little methodological coherence; and there is a danger the field might lapse, or at least allow to thrive, easy stereotypes about what is, and what is not, legitimate study under a certain category. In the current climate, I would argue, we have a responsibility as scholars to guard against adopting intellectual structures (including schemes of categorization) which fail to recognize the breadth of Muslim legal scholarship in history. The history of the last two decades in Islamic legal studies has, indeed, been an enlargement of the sources and resources of the field.[46] This work of integration, in which the field is viewed as having a broader base (rather than a "main" tradition, and subsidiary or marginal interests) remains to be fully worked through, and the external environment for such a project is not encouraging.

46 For example, in the main journal in the field, *Islamic Law and Society*, the coverage of Shīʿī law—both in dedicated articles and in comparative studies—has gradually increased since its foundation in the early 1990s. A search for Shīʿī and Shīʿite in the journal's content reveals a gradual increase from a low base of merely 2 mentions in the articles in the 1995 issues, to the first article entirely dedicated to Shīʿī law in 1997; studies in Shīʿī law now regularly feature in the journal's content. Though still a minority pursuit, scholars (almost as a matter of course) use Shīʿī positions as part of the variety of Islamic legal views on particular legal issues.

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CHAPTER 3

Gender and Legal Fluidity

Marion Katz

Over the last thirty years, stereotypes of the rigidity of classical Islamic law have been displaced by a growing body of scholarship demonstrating the diversity and dynamism of the premodern *fiqh* tradition. This trend, now long established, has evoked some nuances and correctives. Mohammad Fadel has cogently questioned the reflexive valorization of legal pluralism and fluidity, pointing out that consistency and predictability are central and legitimate goals of legal systems everywhere.[1] Hussein Agrama has suggested that widespread emphasis on the "creativity" of premodern legal scholars (and on the function of fatwas as vehicles of legal change) reflects distinctively western preoccupations that may distort our understanding of the dynamics actually at work.[2] The scholarship of Wael Hallaq (and, more recently, of scholars such as Kevin Jacques and Fakhrizal Halim) has allowed us to understand how legal schools both transmitted a plurality of competing opinions that served as an important resource for the madhhab and controlled that plurality through the designation of authoritative school doctrines.[3]

One question that has not been widely posed in Islamic legal studies, although it has been much more extensively pursued in debates over American law, is the degree to which legal fluidity (which I am here understanding as the co-existence of multiple valid legal interpretations on any given issue, which may be available at any given time and/or successively prevail at different times) should be understood categorically as a positive phenomenon by those interested in a gender-sensitive approach to the history of Islamic legal thought and practice. To a large extent, the politics and social dynamics of legal fluidity have remained implicit. Invocations of the "pluralism,"

1 See Mohammad Fadel, "The Social Logic of *Taqlīd* and the Rise of the *Mukhtaṣar*," *Islamic Law and Society* 3:2 (1996): 193–233.

2 See Hussein Ali Agrama, "Ethics, Tradition, Authority: Towards an Anthropology of the Fatwa," *American Anthropologist* 37.1 (2010), 7–10.

3 See Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001); Kevin Jaques, *Authority, Conflict and the Transmission of Diversity in Medieval Islamic Law* (Leiden: Brill, 2006); Fakhrizal A. Halim, *Legal Authority in Premodern Islam: Yaḥyā ibn Sharaf al-Nawawī and the Shafiʿī School of Law* (Abindgon, Oxon: Routledge, 2014).

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"diversity," or "multivocality" of the classical legal tradition obliquely evoke values such as toleration and inclusivity. However, scholars who use such terms rarely explicitly ask whether the literary perpetuation of multiple opinions within a given school, or a minority opinion's potential availability as an interpretive resource to a scholar qualified to perform *ijtihād*, is really analogous to the practices we might perceive as "pluralistic" or "inclusive" in the context of contemporary politics or society (which usually involve the representation of minority or subordinated social groups, not simply of minority or subordinated interpretive stances).

Over the course of the twentieth century, there has been serious debate among American legal theorists over the significance and political valence of legal indeterminacy (a phrase that, it will be noted, carries far less inherent evaluative charge than many of the words commonly used to address the same issues in Islamic studies). Some of this discussion reflects issues analogous to those debated within the Islamic legal tradition over the centuries; despite important differences in the historical context and theoretical framing of the law, Muslim jurists and practitioners of American law have confronted some of the same concrete obstacles to the generation of a uniform and consistent law. Thus, for instance, Karl Llewellyn's famous paired list of contrary canons of construction (which suggests that a jurist has almost unlimited scope to claim legitimacy for mutually contradictory interpretations of the law) includes items—such as no. 20, "Expression of one thing excludes another," sometimes known in Islamic legal terminology as *mafhūm al-mukhālafa* or "counterimplication"—that would have been quite familiar to Muslim legal theorists.[4] Similarly, the question of whether analogical reasoning was a rigorous means to approximate legal truth (however construed in each tradition) or an undisciplined source of proliferating opinions concealing unstated assumptions or motivations has preoccupied legal thinkers in both traditions. Cass Sunstein's spirited defense of analogical reasoning as a legal method (and thus of a common-law approach that stands in contrast to the trend of codification) certainly reflects the fact that the broader philosophic framing of American law has been very different from that of classical *fiqh*; it is doubtful that Muslim scholars, who usually had far less tolerance for epistemic uncertainty

4 Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons by Which Statutes Are to be Constructed," *Vanderbilt Law Review* 3 (1949–1950), 405. For a paraphrase of an extensive discussion of the debate over this principle in the work of the 13th-century CE Shāfiʿī legal theorist Sayf al-Dīn al-Āmidī, see Bernard Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah Press, 1992), 490–501 (summarizing a discussion that, according to Weiss, fills 47 pages of the 1914 Arabic edition of Āmidī's work).

and the resulting pluralism in the fields of theology and ethics than in that of law, would have agreed that debate employing analogical reasoning was useful precisely to accommodate the lack of agreement over higher-level principles and values in the society governed by the law. However, it does recognize and grapple with the legal indeterminacy inevitably associated with the exercise of analogical reasoning in some ways that are very familiar to anyone conversant with the history of Islamic legal thought.[5]

All this is not, of course, to deny the vast differences between the *fiqh* tradition and that of US law; the point is that each system involved at least some similar sources of legal indeterminacy, but the issue of indeterminacy has been treated very differently in the two cases. American legal theorists (as opposed to Americans who write about pre-modern Islamic law) have not conflated the multiplicity of valid legal interpretations with pluralism or inclusivity in the social or political sense, but actively raised the issue of the relationship between the two. Whereas Llewellyn in 1950 could argue that the indeterminacy of potential legal interpretations could and should be guided by a benign "Sense-for-All-of-Us,"[6] by the 1990's Sunstein must respond to the objection that analogical reasoning is "unduly tied to current intuitions" and thus "static or celebratory of current social practice."[7] It was no longer possible to ignore the possibility that the jurist's sense of rightness might actually reflect the status quo rather than an abstract common good, and that the inherent flexibility of the law might thus perpetuate the interests of those in power. Indeed, the Critical Legal Studies movement argued precisely that the indeterminacy of legal reasoning—the fact that it could not effectively constrain a specific outcome in any given case—rendered it a pliant instrument of existing vested interests that simultaneously mystified them in the name of objective legal logic.

In light of this background, it is unsurprising that the pioneering article applying the insights of Critical Legal Studies to Islamic legal history focuses on the argumentation supporting a new stricture against a minority group (denial of the eligibility of Christians and Jews to act as viziers, which had previously been admitted by an authoritative legal text of the relevant school). Sherman Jackson shows how this decision, which (like other legal rules) is made to appear as the inevitable result of the mechanical application of established hermeneutical rules, in fact exploits textual ambiguity in ways that reflect clear prior assumptions (including the jurist's beliefs about religious

5 Cass R. Sunstein, "On Analogical Reasoning," *Harvard Law Review* 106.3 (1993), 741–791.
6 Llewellyn, "Remarks on the Theory of Appellate Decision," 399.
7 Sunstein, "On Analogical Reasoning," 768.

minorities).[8] Baber Johansen's classic study of Islamic legal change revolves around the generation of a new legal model supporting the interests of private landholders.[9] Even among pre-modern Muslims, interpretive freedom could be seen in terms of the manipulability rather than simply the flexibility of the law; Leonor Fernandes notes that prominent Mamluk-era muftis such as al-Bulqīnī and al-Subkī were perceived as exercising a striking degree of interpretive freedom precisely because "their legal opinions were supported by the ruler and the military elite."[10] All this is not to say that historically the hermeneutic flexibility of Islamic law was used only in service of the powerful; as will be discussed in more detail below, jurists could—and demonstrably sometimes did—exercise their interpretive skills in the service of the vulnerable or the dispossessed. Neither the interpretive fluidity and judicial discretion highlighted by the indeterminacy critique nor the legal determinacy, stability and predictability celebrated under the rubric of "the rule of law" has any inevitable or invariable pro-hegemonic or counter-hegemonic content.[11] However, we should be alert to the fact that legal fluidity is at best a two-edged phenomenon.

In the US context, the issue of indeterminacy has not been equally central to specifically gendered critiques of law. Gerald Postema notes that "feminist legal theorists rarely found the indeterminacy critique compelling or theoretically useful," referencing Catharine MacKinnon's sardonic observation that it appeared "less useful for those for whom law is all too determinate."[12] Both critical race theorists and feminist legal theorists have sometimes argued that the rights claims dismissed by the indeterminacy critique as mystifications of the true workings of power were both experiential realities and

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8 Sherman A. Jackson, "Fiction and Formalism: Toward a Functional Analysis of *Uṣūl al-Fiqh*," in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: Brill, 2002), 196–200. The assumption that this particular rule may reflect the interests of the ruling majority is my own; Jackson emphasizes simply that the jurist in fact has a degree of discretion that is masked by the rhetorical force of his argumentation.

9 Baber Johansen, *The Islamic Law of Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Legal Literature of the Mamluk and Ottoman Periods* (London: Croom Helm, 1988), esp. 82.

10 Leonor Fernandes, "Between Qadis and Muftis: To Whom Does the Mamluk Sultan Listen?" *Mamlūk Studies Review* 6 (2002), 101.

11 The moral neutrality of "the rule of law" (and in particular, its lack of inherent connection to equality) is eloquently argued by Joseph Raz in "The Rule of Law and Its Virtue," in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1979, Published to Oxford Scholarship Online: March 2012), 211–229. I thank Anver Emon for this reference.

12 Gerald Postema, *A Treatise of Legal Philosophy and General Jurisprudence, Volume 11: Legal Philosophy in the twentieth century: the common law world* (Dordrecht, The Netherlands, 2011), 240.

indispensable tools for disempowered groups; in the words of Robert Williams, “One cannot experience the pervasive, devastating reality of a “right,” … except in its absence.”[13]

Scholars in the field of Islamic studies have taken various views of the relationship between legal fluidity and gendered concerns. In her classic study *The Veil and the Male Elite*, Fatima Mernissi argues passionately that it is the very multivocality of the Islamic hermeneutic tradition that impedes classical scholars’ recognition and defense of systemic principles such as gender equity (which she argues to be manifest in the text of the Qur’an).[14] Behnam Sadeghi’s work on the history of Hanafi argumentation about women’s congregational prayer reinforces, in a somewhat different form, the concern that the interpretive freedom enjoyed by legal authorities may historically have contributed to the construction and perpetuation of prejudicial gender ideologies. He argues that the evolving Ḥanafī legal argumentation reflects “maximal hermeneutic flexibility”—that is, the indeterminacy of their interpretive method allows these jurists to retro-fit valid legal rationales for a “desired law” dictated in part by their socially-conditioned vision of proper gender roles.[15] Ironically, it is the very flexibility of legal interpretation that is here shown to be instrumental in the construction of a rigid gendering of roles within public prayer.

Modern Muslim feminists have expressed a range of attitudes towards the fluidity of classical Islamic law. On the one hand, the profuse variety of legal opinions available in classical texts offers a rich reservoir of interpretive resources authentically rooted in the hermeneutic techniques and authority structures of the pre-colonial period. Scholar-advocates such as Aziza al-Hibri have pointed to the many recuperable elements within the tradition.[16] On the other hand, as suggested by Mernissi, the lush profusion of opinions—and the technical nature of the means traditionally used to authenticate and prioritize them—can stand in tension with the desire to identify and assert broad overriding principles. Thus, some scholars (for example, Amina Wadud) have

13 Cited in Phyllis Goldfarb, “From the Worlds of “Others”: Minority and Feminist Responses to Critical Legal Studies,” *New England Law Review* 26 (1991–1992), 696.

14 Fatima Mernissi, *The Veil and the Male Elite* (Reading, MA: Addison-Wesley Publishing Company, Inc., 1991), 127, 128. Mernissi’s argument here contrasts interestingly with the thesis of Muhammad Fadel’s “Two Women, One Man: Knowledge, Power and Gender in Medieval Sunni Legal Thought,” *International Journal of Middle East Studies* 29 (1997), 185–204.

15 Behnam Sadeghi, *The Logic of Law-Making in Islam* (Cambridge: Cambridge University Press, 2013).

16 See, for instance, Azizah al Hibri, “An Introduction to Muslim Women’s Rights,” in G. Webb, ed., *Windows of Faith: Muslim Women Scholar-Activists in North America* (Syracuse: Syracuse University Press, 2000), 51–71.

eschewed the precedents and techniques of the *fiqh* tradition in favor of a direct and holistic reading of the Qur'an. While Wadud explicitly acknowledges hermeneutical fluidity and positionality, she also emphasizes the internal coherence of the Qur'an and makes explicit a preference for interpretations favoring the disempowered; she does not celebrate interpretive pluralism for its own sake.[17] Kecia Ali, while certainly acknowledging the interpretive plurality of early *fiqh*, emphasizes underlying regularities that systemically subordinate women in the law of marriage and divorce.[18] More pointedly, Ayesha Chaudhry recounts that she embarked on her research on the interpretive history of the issue of domestic violence in the confidence that "Everyone said that the 'Islamic tradition' was complex, multivalent, and pluralistic" but eventually concluded that "despite the variance on technical points, pre-colonial exegetes offered consistently and monolithically patriarchal interpretations" of the relevant Qur'anic language.[19] To borrow MacKinnon's phrase, on a deeper structural level these gender-sensitive scholars have found law as historically expressed to be "all too determinate."

The value and function of the fluidity of classical Islamic law is also at stake in debates over the impact of legal codification, both historically and (in some locations such as Bahrain and Iraq) in the contemporary period. In her study of Islamic law in Ottoman Syria and Palestine, Judith Tucker concludes that uncodified *fiqh* allowed muftis and qadis "to respond with flexibility, creativity, and even compassion" to the predicaments of women and other subordinated groups. In contrast to this "fluidity," she argues that "as soon as the law is codified, gendered right and gendered duty become incontrovertible points of law, brooking no adjustments or modifications except from on high."[20] Wael Hallaq similarly argues that prior to nineteenth-century reforms in Ottoman family law "ijtihadic plurality" provided "flexibility in the application of the law"; for instance, "Women … could resort to any school, and the *qāḍī* in actual practice could apply any opinion from within that school to accommodate a particular

17 See Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (New York and Oxford: Oxford University Press, 1999). In critiquing this trend in feminist exegesis, Aysha Hidayatullah argues that its "prescriptiveness" (that is, the claim that it recovers the true egalitarian meaning of the Qur'anic text) leads to "an implicit intolerance for disagreement." Aysha A. Hidayatullah, *Feminist Edges of the Qur'an* (Oxford: Oxford University Press, 2014), 147–148.

18 See Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge: Harvard University Press, 2010).

19 Ayesha S. Chaudhry, *Domestic Violence and the Islamic Tradition* (Oxford: Oxford University Press, 2013), 7, 40.

20 Judith Tucker, *In the House of the Law* (Berkeley: University of California Press, 1998), 184, 185.

situation".[21] In contrast, codification "subjected [the provisions of the shari'a] to the rigidity of a single linear language devoid of the plurality and multiple juristic nuances and variations that the *fiqh* had afforded" leading, among other things, to the legal entrenchment of more rigid and hierarchical gender roles within the family.[22]

More recently, the anthropologist Nahda Shehada has argued (based on fieldwork data from the Sharīʿa courts of Gaza City) that in fact codification does not eliminate significant elements of interpretive freedom and personal discretion from the judicial process; it is these elements of "flexibility," she argues, that mitigate the injustices that might otherwise result from the mechanical application of codified Sharīʿa family law.[23] On the opposite end of the spectrum, some parties to contemporary codification debates have contended that (in the words of the Bahraini activist Ghada Jamshir) in the absence of codified law "You find each *sharʿi qadi* ruling according to his whim; you even find a number of [different] rulings on the same question, which has brought things to a very bad state of affairs in the *shariʿa* court." Thus, only codification could "guarantee women their rights."[24]

It is unlikely that, with respect to gender or any other specific dimension of the law, the fluidity of *fiqh* in its many historical forms can be shown to have any single function or valence. It is probably safe to assume that, in Islamic as in other contexts, the indeterminacy of legal rules can *both* render the law subservient to the interests of those in power *and* serve as a resource for the mitigation of injustices affecting the vulnerable. Rather than reaching some global evaluation of this phenomenon, we can hope to add more depth and specificity to our understanding of how legal fluidity has impacted the articulation and adjudication of gendered rights and roles within specific contexts. In pursuit of that goal, I will devote the remainder of this chapter to a brief case study.

21 Wael Hallaq, *Sharīʿa: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 449.

22 Ibid., 454.

23 Nahda Shehada, "Flexibility versus Rigidity in the Practice of Islamic Family Law," *PoLAR: Political and Legal Anthropology Review*, 32.1 (2009), 28–46.

24 Quoted in Lynn Welchmann, *Women and Muslim Family Laws in Arab States* (Amsterdam: ISIM / Amsterdam University Press, 2007), 23.

1 Case Study—An Unhappy Young Woman in Late-Medieval Morocco

Many of the issues raised by the phenomenon of legal fluidity are illustrated by one of the longer (and more notorious) cases covered by Aḥmad al-Wansharīsī (d. 914/1509) in his fatwa collection *al-Miʿyār al-muʿrib*.[25] The dossier presented by al-Wansharīsī on this particular case commences not with the legal problem originally presented to a mufti or *qadi*, but in the disputed aftermath of a case that is already long decided.[26] It opens with a letter from the judge of the northern Moroccan town of Taza, who is facing the attempted appeal of his former verdict, to a mufti who he hopes will vindicate his action in the case. While no date is given for the original dispute, one of the documents from its final stages is dated in May of 1339 (Dhū'l-Qaʿda of 739).[27] The judge, ʿĪsā ibn Muḥammad al-Tirjālī,[28] writes to the mufti, Abū l-Ḍiyāʾ al-Yāliṣūṭī (d. 750/1349),[29] that three years ago he married off a young woman in the place of her father. In the context of classical Mālikī law, this is a bold usurpation of the authority of the father, ordinarily the marriage guardian (*walī*) who (when present) alone is empowered to contract his daughter's first marriage and can do so even against her will. In support of this daring intervention in the authority structure of the family, al-Tirjālī presents a heart-rending account of the circumstances of the case. He writes that the young woman, who was previously unmarried (*bikr*, technically "a virgin," although we shall see that all parties agreed that this was

25 On al-Wansharīsī and his fatwa collection see David S. Powers, *Law, Society, and Culture in the Maghrib, 1300–1500* (Cambridge: Cambridge University Press, 2002), 4–9; idem., "Aḥmad al-Wansharīsī (D. 914/1508)," in Oussama Arabi, David S. Powers, and Susan Spectorsky, *Islamic Legal Thought* (Leiden: Brill, 2013), 375–399. It is notable that the sequence of events in this case very closely parallels that in another case analyzed by Powers; this may reflect either the consistency of procedures followed in the pursuit of highly contested legal cases or perhaps (at least to some extent) the specific inter-personal and political relationships existing among al-Tirjālī, al-Yaznāsinī, and al-Yāliṣūṭī. See Powers, *Law, Society, and Culture*, 23–52. The modern appeal of this case is suggested, for instance, by the fact that it is featured in a modern blog on the history of Morocco—where it is framed by a scholar at the University of Taza (interestingly from the point of view of this chapter) as a case of judicial oppression of a poor man. See Ḥamīd Tītū, "The Qāḍī's Tyranny and the Young Woman of Tāza," post of 11/11/2014 on http://zamane.ma/ar/ (last accessed 8/18/2015).

26 Aḥmad ibn Yaḥyā al-Wansharīsī, *al-Miʿyār al-muʿrib* (Rabat: Wizārat al-Awqāf wa'l-Shu'ūn al-Islāmīya li'l-Mamlaka al-Maghribīya, 1981), 3:59–82.

27 Ibid., 3:80.

28 David Powers notes that "My inability to identify this *qāḍī* in the biographical dictionaries suggests that he was an undistinguished jurist." *Law, Society, and Culture*, 26, n. 13.

29 On this jurist see references in Powers, *Law, Society and Culture*, 49, n. 92.

not the case), presented him with a complaint that her father was beating her because he accused her of illicit sexual activity (*zinā*). To prove her fornication, she reported, the father summoned midwives to examine her private parts and viewed them himself; he also shaved her hair, deprived her of proper food, spat in her face, and threatened to kill her,[30] until finally she managed to escape. She not only sought refuge from her father's abuse, however, but complained that had refused to marry her off (a legal violation known as *ʿaḍl*) despite offers from more than four suitors. More specifically, she attested that a certain Ibn al-Tarjumān had sought her hand, was socially her peer (*kufʾ*), and had been accepted by her, but that her father had refused to allow the marriage; she sought the *qadi*'s support in pursuing this match.

At al-Tirjālī's behest she produced witnesses, some of whom testified to the harm (*ḍarar*) inflicted on her by her father on the basis of direct experience, and others on the basis of the common knowledge circulating in town. The judge notes that the witnesses also attested to the father's constant proclamation of his daughter's fornication, which they believed would deter any other prospective suitors for her hand. They also bore witness that marriage would be salutary and appropriate for her, that she desired to be married, and that it was otherwise to be feared that she would engage in further impropriety. Finally, they attested to the social parity (*kafāʾa*) of her desired spouse. The judge presented the father with this signed testimony and gave him a brief grace period (described in other documents as only a day or two) to disprove the charges, during which time he was imprisoned. Brought into the presence of a group of religious scholars (*ṭalaba*), he told the judge to "do what you see best," but swore that he would not contract the marriage himself. After successfully seeking a supporting fatwa from a local scholar, the judge contracted the marriage.

Al-Tirjālī supported his decision with three considerations: the harm (*ḍarar*) inflicted by the father on his daughter, his wrongful refusal to marry her off (*ʿaḍl*), and one far more controversial principle: the minority view, attributed to Ibn al-Jallāb (d. 378/988) and the Mālikīs of Baghdad, that a woman who became a non-virgin (*thayyib*) through fornication was thus emancipated from her father's authority to marry her off (or, here, to refuse to marry her off) against her will (*ijbār al-ab*).[31] (This status change ordinarily occurred only

30 The complaint also recounts that he made her wear a *tillīs* (apparently some kind of basket or garment woven of palm leaves) and put a "*qarma*" on her—possibly a kind of scar or brand used to mark the noses of camels. While these words remain unclear to me, they contribute to the overall representation of the father as resorting extreme means to stigmatize and humiliate his daughter.

31 For this doctrine see ʿUbayd Allāh ibn al-Ḥasan Ibn al-Jallāb, *al-Tafrīʿ*, ed. Ḥusayn ibn Sālim al-Dahmān (Beirut: Dār al-Gharb al-Islāmī, 1408/1987), 2:29.

through a legitimate first marriage.) The judge recorded this transaction in a large record (*sijill kabīr*) with the signatures of all of the witnesses, suggesting that he felt the need to thoroughly document a potentially controversial case. Al-Tirjālī recounts that in the event, the father appealed directly to the sultan—who in his turn forwarded the document to the *faqīh* al-Yaznāsinī.[32] The latter, he claimed, endorsed the overall verdict while rejecting its invocation of the minority opinion of the Baghdadis. Al-Tirjālī writes that the entire document was then reviewed by jurists both in Taza and in the presence of the sultan; no one had found grounds to annul (*faskh*) his decision. Even the father, faced with the word of al-Yaznāsinī, explicitly conceded that he had forfeited his authority over his daughter's marriage. Now, however, the judge reported that the father had submitted a legal inquiry to al-Yāliṣūtī that distorted the course of events and omitted any mention of his own wrongdoing—clearly the occasion for the composition of the judge's letter. The judge closes by citing the doctrine of Ibn Rushd the Elder holding that if a judge reaches a verdict on the basis of a given opinion (i.e., one transmitted within the *madhhab*), his verdict could not be reversed in order to follow (*taqlīd*) another opinion. He makes it clear that what is at stake is the separation of the woman from a husband with whom she has now been living in wedlock for several years.

Al-Yāliṣūṭī, however, proves unreceptive to every aspect of al-Tirjālī's argument. First of all, a father is guilty of *ʿaḍl* only if he refuses to marry his daughter off repeatedly and in the face of a court order to do so. Furthermore, there is a valid justification for refusing the specific suitor requested by his daughter—who, it now emerges, is none other than the man with whom she has admitted to having illicit sex. Harm is similarly not grounds for removing the father's authority over his daughter unless and until he has been warned by the court. Even based on the opinion of Ibn al-Jallāb, the daughter's status as a non-virgin has not been legally proven—and in any case, she should have undergone a waiting period to establish the absence of pregnancy (*istibrāʾ*) after her confessed fornication before she could be married. He also argues that the father's explicit relinquishment of authority over his daughter's marriage is without legal effect, because a father's authority to contract his daughter's marriage is a right of God (*ḥaqq Allāh*) that can be relinquished by no human being. Al-Yāliṣūṭī's stinging opinion ends with the observation that al-Tirjālī has manifested obvious hostility to the father and thus should recuse himself from the case.

Al-Yāliṣūṭī's fatwa is followed by a series of other opinions endorsing his logic. One of the jurists observes, cogently if uncharitably, that if a woman's

32 On this jurist see Powers, *Law, Society, and Culture*, 26, n. 15.

own admission of pre-marital sexual activity sufficed to emancipate her from her father's authority, any woman who made this admission might plausibly be suspected of doing so simply so she could marry whomever she pleased. The same jurist notes that the woman had subsequently retracted her confession of *zinā*—presumably in order to avoid the legal penalty for that offense.[33] (The husband apparently also testified that she was a virgin on their wedding night, presumably for the same purpose.[34])

Al-Wansharīsī's dossier on this case also includes the text of the petition the father presented to the Sultan, which challenges al-Tirjālī's account of the course of events in several ways. Unsurprisingly, the father offers a very different view of the power relationships and interpersonal dynamics of the sexual affair that gave rise to the dispute. He emphasizes his own vulnerability as a widowed single father who was compelled to leave his minor children alone at home while he worked for a living, and describes his neighbor (Ibn al-Tarjumān) as having seduced his young daughter through intimidation and guile. He emphasizes that he has found no recourse against his daughter's seducer from the local authorities, and thus has been compelled to appeal directly to the sultan.[35] A complaint submitted on the father's behalf to the Shura council at Fez tells an even more lurid and detailed story, with his neighbor daringly sneaking into the father's house at night to consort with his daughter; the father quick-wittedly seizes the man's clothes and rouses a group of witnesses to confront him. The errant daughter is eventually found at the *qadi*'s house; she is returned to her father's home, to remain there for two more years (apparently, until the escape described in al-Tirjālī's letter). In that time, the complaint recounts that her father arranged her marriage to a religious student (*ṭālib*), who abandoned the match after reporting intimidation by the daughter's former lover. The father then goes to Fez and arranges a marriage for his daughter with another man in absentia; he returns home to be presented with the testimony against him compiled by al-Tirjālī.

The aspect of this version of the story that most fundamentally undermines al-Tirjālī's position is, of course, that the father does not appear to be guilty of denying his daughter the opportunity of marriage to an appropriate spouse. On the contrary, he attempts to marry her off to at least two acceptable candidates and openly proclaims that he will marry her to anyone but the specific man who has seduced her. This is a point forcefully made by the jurists arguing (in the later part of the dossier) in favor of the annulment of the marriage.

33 Wansharīsī, *Miʿyār*, 3:64.
34 Ibid., 3:68.
35 Ibid., 3:75.

They also argue that Ibn Tarjumān is not, in fact, an eligible peer (*kufʾ*) precisely because his sexual misbehavior demonstrates his bad character (*fisq*).[36]

It would seem that despite the father's direct appeal to the sultan and the strong support he received from al-Yāliṣūṭī, he did not succeed in separating his daughter from her husband as long as al-Tirjālī remained alive. However, yet another round of controversy erupted after the judge's death. It seems likely that at this point the dispute ended with the dissolution of the marriage after an examination by the *shūrā* council in the Marinid capital of Fez (although there is no direct record, at least in this source, of the real-world denouement of the story).

Much could be said about this colorful and intriguing case. For our present purposes, what is of interest is how it manifests the phenomenon of legal fluidity. On the one hand, this sequence of events offers a classic example of the way in which (as observed by Hallaq) the "multiple juristic nuances and variations" afforded by the classical legal model could enable a resourceful and compassionate jurist to fashion a solution that would not have been available in a more rigid and monolithic legal system. Al-Tirjālī's underlying problem is that a father's abusive behavior does not automatically forfeit his authority as his virgin daughter's marriage guardian, nor is there a clear evidentiary procedure to prove such abuse.[37] By admitting evidence based largely on reports of harmful behavior circulating in the community, he is adapting a procedure that would have been uncontroversial had the young woman been beaten by a husband rather than a father.[38] One suspects that for the judge, the two cases were morally equivalent; he is repulsed by the abuse of the daughter has endured and is willing to exercise considerable juristic ingenuity to end it. It is notable that while he is clearly solicitous of the young woman, he is by no means uncritical of her; he carefully documents not only her grievances, but the view that she is likely to re-offend if denied a legitimate sexual life with the

36 Ibid., 3:78, 80. "Religion" (i.e., an acceptable standard of piety, including refraining from major sins) is a central component of *kafāʾa* in Mālikī law. See Amalia Zomeno, "*Kafāʾa* in the Mālikī School: A *fatwā* from Fifteenth-Century Fez," in Robert Gleave and Eugenia Kermeli, eds., *Islamic Law: Theory and Practice* (London: I.B. Tauris, 1997), 87–106.

37 Al-Yāliṣūṭī declares forthrightly that "harm" such as "shaving her braids, threatening her with a knife, and beating her—none of that has any legal effect in removing her father's authority over her [as a marriage guardian], since he is obligated to guard her and protect her if he fears for her [i.e., presumably, for her chastity]." He goes on to observe that the use of hearsay testimony (*shahādat al-samāʿ*) would have been valid to prove abuse by a husband but has no basis as a form of evidence against a father (69–70).

38 See Chaudhry, *Domestic Violence*, 109–116.

man of her choice. Much in the spirit suggested by Lawrence Rosen,[39] he appears to strive for the restoration of social harmony rather than the imposition of some abstract standard of legal correctness. His resuscitation of the rather shocking minority opinion that a woman can emancipate herself through premarital sexual activity reflects this pragmatic approach. It also exploits another kind of gender fluidity in the law, the fact that not all women have similar legal rights and capacities; by transferring the woman from the category of "virgin" to that of "non-virgin," he radically redefines the conditions under which she can pursue the marriage she apparently desires.

Al-Tirjāli's opponents argue that the law is not, after all, as fluid as he claims; his verdict is simply wrong, and thus can and must be annulled. Although the jurists advocating the annulment of the marriage contracted by al-Tirjālī make a number of cogent points, however, we need not conclude that this is simply a case of legal error that is corrected by reference to a clear doctrine. Because the father is agreed by all parties to have publicly relinquished his authority over his daughter's marriage, arguments for the annulment of al-Tirjālī's action depend heavily on the argument that the father's marriage guardianship is a right of God and cannot be ceded. However, that this was far from universally accepted;[40] it would have been just as possible to argue the opposite. While the sinfulness (*fisq*) of a bridegroom was accepted in this period to be grounds for the invalidation of a marriage on grounds of lack of *kafāʾa*,[41] it is less clear that it applies when the bride herself is "sinful" by the same criterion. Both sides of this dispute thus exploit the fluidity of the law.

Overall, this case seems to be one in which a jurist avails himself of the options provided by legal fluidity in order to protect an abused woman, and prevails for a number of years; ultimately, however, stronger forces assert themselves. The outcome's dependence on the balance of personal and political power between the parties is suggested by the fact that al-Tirjālī's decision appears to have been reversed only in the aftermath of his death—at which point the inherent cogency of his arguments presumably did not change, but the social power behind them certainly did.[42] At each stage, legal fluidity is a

39 See Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989), 58–79.

40 See Wansharīsī, *Miʿyār*, 3:32.

41 See Zomeno, "*Kafāʾa* in the Mālikī School," esp. 96, 100, 106.

42 On one level, this seems to be an example of the system of "successor review" discussed by David Powers in his article "On Judicial Review in Islamic Law," *Law and Society Review* 26 (1992), 315–342, esp. 324. However, since vigorous efforts to overturn al-Tirjālī's verdict were clearly made during his lifetime, regardless of whether he left office before or after the father's first appeal to the sultan, his verdict was either challenged during his tenure

resource utilized by those with most ability to mobilize political support for their interpretive speech—although, significantly, at the outset it is mobilized *on behalf of* someone with very little power, an abused young woman with her reputation in tatters. It is conceivable that her lover was a powerful man or an associate of the judge; her father's status appears to have been humble, and gender does not define the only relations of power in this story. Overall, however, this unusually vivid example suggests both the rich potential of legal fluidity as a resource for the protection of those least well served by received interpretations of the law, and its ultimate adaptability to the interests of those at the top of the social and political hierarchy. As David Powers has observed of a procedurally very similar case involving al-Tirjālī, one's evaluation of the *qadi*'s resort to creative legal solutions depends strongly on whether one assumes him to be "a benevolent and fair-minded man" intent on preventing "injustice," or simply a biased actor who concealed his own agenda "behind a façade of legal reasoning."[43]

2 Conclusion

In her study of legal flexibility in the Islamic courts of Gaza, Nahda Shehada covers a case in which a *qadi* intervened to help a virgin daughter contract a marriage over the protests of her father, who was a drug addict dependent on her salary. In addition to exhorting the father to act in his daughter's best interest, the judge "warned the father that unless he proved the suitor was not eligible, he himself would act as the daughter's *wali* and allow the marriage." Much like al-Tirjālī, this modern-day *qadi* appears to have stretched the rules on *ʿaḍl* to prevent an abusive father from blocking a first marriage desired by his daughter. While little else may connect the circumstances of fourteenth-century Taza and twenty-first century Gaza, both cases reflect the potential for strategic use of legal fluidity in "protecting the rights of the weak, while maintaining social harmony."[44] In both cases the moral authority of the Islamic legal discourse wielded by a judge, most clearly manifested as a commitment to the protection of the weak, seems to be the most salient factor underlying the unpredictable details of the legal argumentation. Indeed, in the fourteenth-century example the claim of defending the vulnerable seems to be

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as judge or survived after it; the decisive factor was evidently his presence as a living actor on the scene.

43 Powers, *Law, Society, and Culture*, 51.

44 Shehada, "Flexibility Versus Rigidity," 36.

a rhetorical stance indispensable for both sides to the conflict, with al-Tirjālī's opponents re-framing the abusive father as a powerless victim of judicial oppression. Even beyond the malleability of the rhetoric of victimhood, in both cases (as observed by Shehada) jurists' "adherence to the notion of 'protecting the weak' is not informed by a desire to compensate for gender asymmetry" but reflects "the dominant gender discourse."[45]

All this is to suggest that we be more attentive to the diverse (and sometimes contradictory) roles played by legal fluidity in the negotiation of gendered rights and roles. Elsewhere I have discussed another instance in which the indeterminacy of the law became a factor (and an overt subject of contention) in a sixteenth-century controversy over women's legal prerogatives, in this case women's access to the Sacred Mosque of Mecca during the nighttime hours.[46] In this sequence of events, hermeneutic flexibility (including claims about the law's responsiveness to new social needs—in this case, specifically the alleged need to control misbehavior by Meccan women) was exploited to provide legal rationales for limiting the free access to the mosque that women had enjoyed throughout Islamic history. It was through steadfast invocation of the limits of legal fluidity (in the form of *taqlīd*, adherence to established school doctrines) that the primary scholarly opponent of this initiative sought to defend women's privileges. Nevertheless, his ostensible exercise of *taqlīd* involved a significant exercise of legal ingenuity in support of women's mosque access and might itself be considered an example of legal fluidity. Although in this case the assertion of legal continuity seems to have been successful on the ground, it is the fresh legal argumentation in favor of the limitation of women's access that ultimately left a greater trace in the mainstream legal tradition.[47] Thus, this story as well teaches complex lessons about the political valence of legal fluidity in the ongoing Islamic legal construction of gendered rights and roles. At the very least, it suggests that the law's "flexibility" to address "social needs" reflects, in part, the views and agendas with those with most ability to assert their view of what society needs. Only further attention to historical cases of legal flexibility—and to these cases' incremental contribution, if any,

45 Ibid., 39.

46 See Marion Katz, *Women in the Mosque: A History of Legal Thought and Social Practice* (New York: Columbia University Press, 2014), 199–257.

47 Prof. David Powers has brought to my attention to another case (Wansharīsī, *Miʿyār*, 3:327–331) where a judge applies flexible legal reasoning to address the needs of a distressed woman (in this case, an abandoned wife who desires a judicial divorce to end her undesired celibacy), only to have his reasoning briskly rejected by a mufti; it is, of course, the rejection that leaves a permanent normative trace as the final word in this exchange in Wansharīsī's collection.

to the sedimentation of emergent school doctrine—can help us to understand the political and moral valence of legal fluidity as applied to issues of gender.

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CHAPTER 4

Translating *The Fatigue of the Sharīʿa*

Ahmad Atif Ahmad

The way the (modern, Euro-American) academy exercises influence over its members may be as strong as the way the stars influence the human population. But the stars can only incline; they do not compel. In each episode of the modern academy's evolution, some academic voices have expressed dissent against its common trends. When the academy seemed satisfied to speak to its own, limited audiences and ignore wider implications in its broader surrounds, some academics insisted on identifying a link between theoretical or historical research, on the one hand, and the way things are in the world of the day, on the other. In the late 20th and early 21st century world of academic study of Islam, scholars with intensive, early exposure to life in the Muslim world and studies with its scholars could only be voices of resistance in post-Orientalist Euro-American environments. The academic newcomers, it seems, have finally exercised some influence over their adopted environments. Today's Islamic Studies themes and concerns do differ from those of half a century or even quarter a century ago.

In this short essay, I speak to three interrelated themes. First, I describe an occasion that led me to reflect anew on the worth and tasks of Islamic Studies scholarship for Anglophone audiences. The purported occasion is the production (at the end of 2016) of an Arabic translation for a book I wrote a few years prior. Second, I sketch the context of Islamic studies in the Euro-American academy and its changing and persisting elements and characteristics. Third comes a final reflection on how scholars of Islam look at modernity, the Sharīʿa, and legal reasoning.

Attending the long developments of the schools of law and their heritage over a millennium and a half were debates about the Sharīʿa—what it is and how it relates to God's revelation. There are also other, more intricate debates on whether traditions wear out well or badly, how much residing and irreversible 'change' takes place when 'change' seems to happen—and with these debates one finds much room for technical terminology to confuse the fast shopper and those who made up their mind about what is in these old sources. In *The Fatigue of the Sharīʿa* (NYC: Palgrave, 2012), I tried to merge some of the essential debates on the future, present status, and past meaning and relevance of the Sharīʿa in one volume. Observing a translation of this work,

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over a period just short of two years, led me to further reflections on one of the not-so-invisible hands that impact the study of Islamic law in the modern academy—that is, 1) *young* (undergraduate and graduate) *students* of Islamic history, politics, and law & 2) *the public at large* in the Euro-American world. The result of these reflections is a sensation akin to 'regret' of concessions I made over the years, by engaging in reductive debates of Islamic law and government, and a renewed resolution to make my academic work what it used to be in the past: a source of rejuvenation and excitement, rather than a burden to bear despite its pains.

When my publisher informed me in spring 2014 that the *Arab Network for Translation and Publication* in Beirut, Lebanon, purchased the rights to publishing an Arabic translation of *The Fatigue of the Sharīʿa*, I started to draft an Arabic introduction to the new translation. The draft of this introduction set me on a path of questioning of what the translation would mean and to whom, as compared to what the original text meant to its target audience. The subsequent contacts and discussions with the work's team of translators opened a window for me to ask my translators, further and more succinctly, what the new Arabic book will do and whom it addresses. *The Fatigue of the Sharīʿa* is a text in English derived mainly from Arabic sources. It places on a continuum three debates: a medieval debate on the *future* of the *Sharīʿa*, an early modern debate on the *present* and meaning of the Islamic *Sharīʿa*, and a recent debate on whether the *Sharīʿa* has become something of a historical artifact—something belonging to our *past*. The translation process confirmed the view that the audience of Islamic studies, Anglophone and Arabophone, was much more of an active partner in shaping its debates than is ordinarily assumed. In other words, the work needed much adjustment in its 'language register' to become meaningful to its Arabic audience; and given that the work's foundation was Arabic sources, the work needed a journey back to its true origins.

This, however, didn't mean that 'high middle Arabic' or 'classical Arabic' registers would need to be used to cover the book's medieval content. The author of the English text, both the translators and I knew, is a modern writer with modern concerns and perspective. The language of the Arabic translation would be more authentic and faithful to its author when it reflects this quality as well. The beauty of the Arabic translation, which I came to appreciate the longer I worked with the translators, consisted in its ability to keep intact the ideas of the English original text, engage the modern Arab reader in her or his world that is removed from the narrow curbs and turns of the academic American environment, and create a new bridge for future translations of similar works to assist their translators in their task.

When *The Fatigue of the Sharīʿa* appeared in Arabic at the end of 2016, the English text was four years old. Those who were interested in my clarifying some of the book's points were Arabic and Islamic studies scholars, religious studies scholars, and legal scholars who were interested in Islam in Euro-American academies. The readership of the Arabic translation is wider. It includes run-of-the-mill (educated) Muslims, who, telling from the few samples I have encountered, might first simply be disturbed by the presence of the Arabic term فتور الشريعة, which is the foundation of my title: *The Fatigue of the Sharīʿa*. This new readership relates to the matter on a personal level; they were both more invested in it and, again judging from indicators I have today, are and will be less tolerant of the surprises the book includes.

A three-episode television interview about the book and its author (in 2018) added further insights. When the interview was conducted, the Arabic translation had been out for about 15 months, and the impact of the average Muslim (and Arab, non-Muslim) reader on the work's meaning in its Arabic context became more apparent. The Theseus Paradox as to whether a ship changed/reformed one wooden log at a time until none of its original pieces were part of it *is or is not the same ship* became the center of the discussion. The Sharīʿa of old times continues to offer the name and structure for very new and modern ways of reasoning, and when one looks closely, the old lent the new more and less than mere name and general structure. Is it the same ship? Is it the same Sharīʿa?

The question of whether the essence of the Islamic Sharīʿa is the human reason, reports of the Prophet's life, or the schools of law, or some combination of these, veers into other questions. The profile of the medieval jurist is paramount among these (questions). Was the jurist a specialist of a narrow span of interests, perhaps especially in the later centuries of decline? One of the decline centuries' figures, the Ḥanafī jurist Ibn al-Turkumānī (*c.* 681/1282–744/1343), was interested, we are told, in astronomy and prosody, just as he was interested in law and philosophy.[1] Was the jurist detached from the government or in conflict with it? Aḥmad Ibn ʿUmar al-Hamāwī, a student of Tāj al-Dīn al Subkī (d. 771/1370), was part of the military justice system, where he was given appointments on three occasions.[2] Then, there is the nature of legal reasoning, which does not cease to surprise both the uninitiated and the seasoned among its students. In old Ḥanafī law, an incestuous marriage between

1 Ibn Hajar al- ʿAsqalanī (d. 852/1448), *al-Durar al-Kāmina fī ʾAʿyān al-Miʾah al-Thamīnā* (Cairo: Matbaʿa al-Madani, 1966), 1: 211.

2 Ibid., 1: 241.

a man and his sister cannot be a used as a defense by someone who slanders the couple after they embrace Islam and renounce their union.[3] A non-Muslim living among Muslims follows what he or she believes to be acceptable, and a Muslim is held to other standards. Time also divides one's experience of the law into periods, with different expectations and duties.

The Arab Spring, with its high hopes and continued ambiguity, provided a background that triggered other reflections. For many, there is nothing ambiguous there; civil war destroyed many Arab societies, and the hope for new ideas and possibilities from this region is an irrational hope. Political hopes aside, I find today's specific experience with its considerable variety a major influence in the atmosphere. For the purpose of answering the translators' inquiries, I focused on questions that related to the readers' comprehension. I learned a few valuable lessons from my translators. I was persuaded, for example, that an argument that scholars have themselves contemplated the end of the *madhhab*-Sharīʿa a thousand years ago might fuel an argument against the many constitutional schemes in Muslim countries that acknowledge the role of medieval Islamic reasoning in the formation of modern national laws and the need to continue this influence.

A sliver of the Arabophone readership will go and check to see whether I was reading my primary sources reasonably, charitably, or simply ideologically. Just as it invites the thoughtful, the chosen register of the Arabic translation also invites careless and half-interested audiences ready with opinions. Other readers have their own conversations on history and philosophy, and unless my work is fitted into them, it is, for them, useless. Some Arab readers think of the books' questions in far-away historical and philosophical terms. They could not care less about legal borrowing, let alone tradition. Some readers seem to think about the popular impact of a discussion on the fatigue of the Shari'a, the title here operating without the content, more than the book's intricate side. The publisher's hopes of a popular controversy coming out of this, hence pushing up sales, has already materialized.

There is pleasure in another, simple hope that a process is under way at the end of which one more curtain between the Islamic studies of the Euro-American academies and the rest of the world will be fully removed. I understand, and there is much evidence, that many individuals studied or ventured on personal impulses into 'the other side' of scholarship to see what is out there. The cross-border discussions, however, still fall into confusion and mistrust in a hurry. Should the remaining curtains all fall, the conditions promise a much more productive engagement within Islamic legal studies in the future.

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3 Muḥammad ibn al-Ḥasan al-Shaybānī, *al-Aṣl* (Beirut: Dar Ibn Hazm, 2013), 7: 220.

I don't see this as ending barriers among intellectual communities or creating further overlaps that do not already exist. Most importantly, I keep thinking that any fusion of historically non-conversant scholarships will not likely end the strange quality in human beings of overestimating themselves and underestimating others.

It is certainly hard to approach Islamic law comprehensively and find much in the way of concise assessments to offer. Islamic law has been part of the lives of Muslims for a millennium and a half and seems to continue to be part of it. It changed a lot over time, and across geographic areas. It ought to be hard, of that one must be sure, to make an argument with a straight face that the borders of modernity (just because we inhabit it) must be more important than any other borders this tradition crossed. This insistence that modernity changed everything comes more or less from lack of interest or lack of ability to study or take seriously Islamic law's paradigm shifts (to use Kuhn's much abused term) that occurred at the time of the Crusades, the Mongol Invasions, or the rise of military Turkish (non-Arab) leadership in the Muslim world in the 13th and again the 16th century, with their deep cultural, political and legal consequences.

However, when you study Islamic law as history, a false image of pan-Islamism, no matter how hard you try to deny it, arises, opposite to the extraordinary diversity that plague and ornament the body of law in Islam. Any approach to the subject of Islamic law that limits it to historical institutions and insist on separating these from the present is also more or less a rhetorical evasion (or denial) of the modern presence of the language of the Islamic legal tradition and its institutions in many parts of the world today. It does little to help someone who holds the historicist's view to understand why one may encounter a ruling in an Indonesian, Iranian, or Egyptian court of law, where the judge is just as interested in an old line of reasoning from medieval law as he or she is interested in modern legal and political institutions.

We know the historians are fleeing a worse fate, the study of Islamic law from a *positivist* and a *scientific* stance that eliminates legal rhetoric and takes for granted that when medieval ideas are translated into a modern context, they can only be treated in their modern form and discussed accordingly. The past lacks any true relevance today, on this view, except perhaps as an object of amusement and condemnation. The positivist approach's yardstick of studying the subject is modern court decisions and institutions; it should not care about any pre-modern standard of legal reasoning. In most cases, both approaches, which are *modernist* in their outlook, have their conclusions in their premises and unwittingly accept the superiority of modern legal reasoning, whatever the device they use.

It is, for these and other reasons, not easy to know how the Anglophone environment wants to move forward with *Islamic legal studies*. What is this *beast* for? Pedagogy plays a large, and largely unacknowledged, role in shaping the subject and creating its constraints. This, I believe, is true, despite appearances to the contrary, including how graduate style courses tend to be designed to make it clear that even the advanced undergraduate student could not meaningfully participate, and the idea that research leads to conclusions the (standard, undergraduate) students are neither equipped to handle nor interested in. The reality is that we teach in English and must speak about Islamic law in fairly twisted ways that change the subject multiple times before it finds a comprehensible expression.

The suggested alternative to these views is the most obvious and least pretentious of all. It is one that recognizes the diversity inherent in the subject that never left and could never leave it. If one must speak of a modern crisis of the Islamic Sharīʿa, one may understand it as consisting in the absence of a professional class of legal scholars with whose authority in the religious law the buck stopped. This crisis was hiding an opportunity, however, and the tasks of *ijtihād* of old times have now become distributed among '*commissions des savants*,' groups of different specialists, as well as laypeople. We now have a new version of Islam's Sharīʿa. But the traditions of *reports* and *madhhab*-Sharīʿa remained a foundation for all these modern activities. In fact, references to the old traditions and these traditions' details seemed to have expanded by the 15th/21st century than they have been throughout the 14th/20th. This view of things, one must anticipate, will not be satisfactory to many people. The crisis must be more exciting than this, and perhaps out of deference for another product of modern life, must possess some of the qualities of a thriller.

In academic circles, two views of the crisis of the Sharīʿa see it as consisting in the Sharīʿa's moral and organizational failure or the moral failure of modernity itself. Inured to the concerns of the primary sources of the tradition, there are those who think the Islamic Sharīʿa does not work in modern times, because modernity has (morally and organizationally) exceeded this Sharīʿa's capacity to regulate human behavior (even among the believers) convincingly. In the past century and a half, on one reading of the matter, the Muslim world produced new elites who, out of sympathy with their religious and less educated populations, introduced religious elements from their countries' traditions into their national laws. In some cases, the elites were religious and did what they did because they believed it was one of their religious duties to do that. And there are those who say that the Sharīʿa is too good for the modern world, with its manufactured communities and brutality against

the individual, because this Sharīʿa comes out of and serves a 'genuine community' that is based on participation by all in communal affairs. Keeping the conclusion and leaving the explanation aside, the Sharīʿa does not work, because it does not work, without any judgment on who has the higher moral ground. These approaches leave us without a plan on how to understand the presence of medieval legal reasoning and doctrines in modern national laws, the currency of *fatwa*-case laws, which have gone global and hence assumed a stronger presence.

Watching the Sharīʿa-modernity boxing-match, one is tempted to pick a winner. But one also must run into problems. The Sharīʿa could have never stood on a moral argument for the great bulk of those who followed its norms in medieval society. Sharīʿa arguments within a given professional class of jurists are either successful or unsuccessful based on legal and logical standards that are closed off by the *madhhab*. An argument for the whole legal system would more likely come from political and military backing. All these considerations weaken our confidence in the moral Sharīʿa of the good old days. If we take the blame-the-Sharīʿa stance, we go nowhere faster. If traditionally trained jurists are the cause of their problems, which consist in their failure to understand the times, why are not things getting better under secular regimes? In any case, with modernity being the *judge* of Sharīʿa *muftis* and *judges*, we are sneaking in a non-falsifiable and weird metaphysical argument against communities that don't want to live according to the recommendations of their critics; this exercise can only drag on and remain both self-referential and open-ended.

In the Euro-American academy, Islamic studies remained a Western academic field and the inevitable result was that theoretical ideologies that dominated the academy continued to dominate all its component fields. The theory you shopped for, whether from the humanities, the sciences soft and hard, or the brutal experience of working for the government or the market, would tell me more about what kind of Islamic studies scholar you are, than about the subject of Islamic law itself. These ideas don't lack influence in the Muslim world, although this influence has been much less than what scholars of the academy in economics or similar areas exercise influence over policies in third world countries. In any case, the influence of students on scholars can be seen in the scholarship. In a circuitous and strange manner, the student audience of Euro-American academy has played a role in shaping the way western-educated Muslims now think about their tradition. But the voices in the Muslim world are multiple, and any one of them may be presented as possessing a degree of validity equal to any other. This brings us a full circle to where we started, where the Muslim populations, specialists and non-specialists, have all

weighed in and contributed to both a new legal and moral order and the way to see and interpret this order.

In 2018, as the 21st century reached an age of maturity on some legal conventions, critiques of modernity (understood to be the age of the enlightenment, colonialism, and postcolonial states) continue to come from standpoints totally immersed in modernity's presumptuous sense that the advent of the modern changed human beings once and for all. This is not the same thing as acknowledging that some modern societies of strangers are different from premodern predecessors, or that the state's relationship with society may have changed within even less than a century (between the middle to end of the 19th century to the first half of the 20th), as Carl Schmitt argued in relation to constitutional legitimacy.[4] What I am after are positions that take the modern as both 'arbiter' and 'adversary' and think there is something to be achieved at the end.

To give my object of criticism the strongest alibi I can give, I must swiftly acknowledge that we are all modern. Who among us thinks that one could escape the deep modern prejudices with which we grew up, being evolutionist, materialist, and perhaps, despite ourselves, scientific in our approach to things? Yet, this acknowledgement does not help as much as it might seem to. One obvious problem with this vague acknowledgement is that it blends multiple layers of consideration—throwing together technical and popular notions, assuming a universal consensus on what it means to be one of these several labels. In any case, conceding that we are all modern does not change the fact of the un-tenability of attempting to come back with a criticism of the worldview that one took to dominate his or her outlook on the world.

Specifying the modern that is the target of criticism will turn out, the longer you think about it, to be futile. It must begin with distinguishing the premodern from the modern, which is easier said than done. To get into my subject, all generalizations aiming at an assessment of the Muslim world's relationship to its Islamic legal and moral tradition fail. There is no single story, for example, to tell about how Islamic law finds room within modern national laws. Between 1876 and 1949, Egypt had 'mixed courts,' which adjudicated cases that involved foreign citizens and foreign interests. Foreigners enjoyed an undue influence in 19th century Egypt. The mixed courts influenced Egyptian lawyers and judges in their view of Egypt's modern law. After the Montreux Conventions of 1937, Egyptian authorities started to roll back certain

4 Carl Schmitt, *Der Hueter der Verfassung*, translated into English in *The Guardian of the Constitution: Hand Kelsen and Carl Schmitt on the Limits of Constitutional Law*, by Lars Vinx (Cambridge: Cambridge University Press, 2016), 125.

foreign influences and embarked on a search for a modern, hybrid Egyptian law that combines medieval Islamic reasoning with modern French and other European and non-European systems. Pakistan was formed as a Muslim state, with a long and strong English legal tradition in the Subcontinent, and it continued to shop around for ideas from Islamic and non-Islamic laws, standing now with what Tahir Wasti[5] considers a unique form of 'privatized' criminal law that allows the family (the tribe) to forgive the killers of their members, as if a nation state is not in charge. Saudi Arabia applies corporeal punishment, not because prisons are inefficient or cruel, which may have been a medieval argument against them, but because tradition recommends these practical and uncostly punishments. An introduction by the Saudi Chief of the Supreme Judicial Council to a recent (2013) publication of Saudi court decisions can be said to flirt with and show a half-hearted commitment to the Anglo-American *stare decisis*, the doctrine that old court decisions should be binding in similar future cases, but reaffirms that the (Saudi) judge is an independent *mujtahid* and must follow his own reasoning—just the way the venerable Islamic tradition had it.

No one is denying that Islamic finance and cyber (Islamic) jurisprudence are activities that display the presence of the Islamic Sharīʿa in modern times. Islamic finance has been regularly criticized as a sham practice, governed in its objectives and operation by modern western finance. The new cyber Islamic law is a strange kind of law, because it presumes the presence of a global community and lacks disciplined reference to social standards or custom (*ʿurf*). Both are evolving and promise to go in unpredictable directions. When national laws are silent or accommodative of religious practices, the personal Sharīʿa kicks in. People decide matters of life and death, from abortion and to what extent to use reproductive technology to suicide, and they continue to reconcile their religious rituals with work schedules based on fatwa-case laws.

But one can dismiss all these as 21st version of Islamic law and hence not the real thing. Modern Muslim readings of institutions of the past are inauthentic, but the academics' readings of the past are. There is no reason to make an argument, if the argument is tailored to a conclusion. If you plan to argue backward from a conclusion, why bother argue? It is clearly inefficient.

It may well be that we are solving a false problem, because we are butting heads about personal inclinations and preferences of subject. When I read Egyptian legal literature in the 20th century, I realized that Sanhuri (d. 1971) knew he was doing something new, working on new theories and practices

5 Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan* (Leiden: Brill, 2009), 76–81.

for legal borrowing, and imagining concepts of the past traveling a journey into the present. He speculated from his contact with the details of legal reasoning in multiple traditions in the 1940s that ancient Roman law could not have influenced medieval Islamic law because the Roman distinction between personal and property rights is nowhere to be found in Islamic jurisprudence. Patricia Crone was still trying to establish the purported influence from some rudimentary knowledge of Arabic texts and Islamic law and some ideas about Greek and Roman sources in the late 1970s. I am assuming this is resolved now and the Crone thesis (God bless her soul) is something of an embarrassing episode in the history of scholarship. It would not have made a difference to me who is right or wrong here. I am still much more interested in legal reasoning than any speculation about legal history. It is perhaps my stars that incline me to have that interest and lack the other one, and that is something I may never be able to change.

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PART 2

Study of the Sharīʿa in the Classical Period

CHAPTER 5

Qurʾānic *Jihād* Refracted through a Juridical Lens

An Exercise in Realpolitik

Asma Afsaruddin

In popular discourse, *jihād* is assumed to be a monovalent concept referring exclusively to "military/armed combat." Even in academic literature, *jihād* is often explained as a term with a fixed, universal meaning divorced from the surrounding socio-political circumstances in which it has been deployed through time and has been assumed by a number of Western scholars to be the equivalent of the Christian/Western concept of "holy war." The military *jihād*, after all, is commonly deemed to be both defensive and offensive in nature and it is further assumed that the offensive *jihād* is to be waged until the whole world comes under the sway of Muslim rule. If we however go back to some of our earliest sources, particularly early Qurʾān commentaries and *ḥadīth* literature, it is possible to recover multiple meanings of the term *jihād*, in addition to its military significations, as I have more fulsomely discussed in a recent publication.[1] On the basis of these sources, it is also possible to excavate an earlier emphasis on *jihād* as defensive warfare only, based on a principled adherence to the Qurʾānic injunction of unqualified non-aggression, as expressed in Qurʾān 2:190 in particular. A diachronic comparison of early and later sources that deal with *jihād* further allows us to trace the progressive transformation of the principle of non-aggression into primarily the legal principle of non-combatant immunity during the conduct of war, as will be shortly discussed.

The monovalence of the term *jihād* emerges primarily from consulting the classical legal texts. After all jurists, usually in contradistinction to exegetes of the Qurʾān, *ḥadīth* scholars, and ethicists, primarily dealt with *jihād* as one of the obligations of the Muslim ruler and of his Muslim subjects in the context of external relations with non-Muslim polities. The law of nations or international law[2] (*siyar*) as an integral part of Islamic law developed early due to this pragmatic juridical concern for the intricacies of political relations

1 Asma Afsaruddin, *Striving in the Path of God: Jihād and Martyrdom in Islamic Thought* (Oxford: Oxford University Press, 2013).

2 A general definition of "law of nations" is offered by Lassa Oppenheim as follows: "Law of nations or international law is the name for the body of customary or treaty rules which are considered legally binding by States in their intercourse with each other," see Hersch Lauterpacht, ed., *International Law: A Treatise*, (London: Longmans, 1955), 1:4–5.

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with the broader non-Muslim world, as well as with religious minorities within Islamic realms. Allowing for a degree of over-simplification, we can basically agree with Majid Khadduri's statement that the Islamic law of nations "was essentially a law governing the conduct of war and the division of booty."[3] Within legal-administrative contexts, *jihād* is primarily military in nature. The rise of the imperial Umayyad and ʿAbbasid dynasties and their frequent military engagements with the Byzantines created the imperative for legal justification of *jihād* as offensive military activity. Realpolitik therefore understandably colored legal treatments of *jihād* and allowed for distinctive—and contested—juridical perspectives to emerge on this topic, shaped by the historical and political contingencies in which they were progressively formulated.

This process of transformation will be illustrated in my discussion of Qurʾān 2:190 which unambiguously and categorically affirms the principle of non-aggression in military matters. Drawing upon an array of Qurʾān commentary works, this chapter will discuss first how early and late Qurʾān commentators interpreted this verse. It will then proceed to discuss how certain prominent jurists in their articulation of the *siyar* laws pertaining to the military *jihād* both engaged and progressively undermined this Qurʾānic principle of non-aggression and essentially reinterpreted it as granting immunity to non-combatants, that is to say, to forbid targeting women, children and other groups of people who do not fight. Such a reinterpretation allowed these jurists to discuss Qurʾān 2:190 in the context of *jus in bello* rather than *jus ad bellum* considerations in deference to Realpolitik, which had important legal implications, as will be further stressed in the conclusion.

1 Exegeses of Qurʾān 2:190–91

These verses state: "Fight in the way of God those who fight you and do not commit aggression, for God does not love aggressors. Slay them where you find them and expel them from where they expelled you, for persecution is worse than killing".

Our earliest scholars understand the interdiction in Qurʾān 2:190, "Do not commit aggression for God does not love aggressors" as a clear and general prohibition against initiating hostilities under any circumstance. Thus the

3 Majid Khadduri, *The Islamic Law of Nations: Shaybānī's* Siyar (Baltimore: John Hopkins Press, 1966), 5. For further discussion of *siyar* as "law of nations" see Anke Iman Bouzentia, "The *Siyar*—an Islamic Law of Nations?," *Asian Journal of Social Sciences* 35 (2007): 19–46.

well-known early Qur'ān exegete Mujāhid b. Jabr (d. ca. 722)[4] comments that according to this verse, one should not fight until the other side commences fighting.[5] According to another early scholar Muqātil b. Sulayman (d. 767), this verse is specifically a denunciation of the Meccans who had commenced hostilities at al-Ḥudaybiyya (in 628), leading to a repeal of the prohibition imposed upon Muslims against fighting near the Kaʿba.

Al-Ḥudaybiyya was the name of a place near Mecca where the Prophet Muḥammad concluded a treaty with the pagan Meccans that called for a truce between the two sides for a period of ten years.[6] "Do not commit aggression" and "God does not love aggressors" constitute a categorical indictment of the Meccans who began to fight during the sacred month in the sacred sanctuary, which was a clear act of aggression (*fa-innahu ʿudwān*), continues Muqātil. The following verse (Qur'ān 2:191) subsequently gives permission to believers to slay the polytheists wherever one may find them and expel them from Mecca from where the Muslims were expelled. Permission to engage the pagan Meccans in fighting in seventh century Arabia was clearly contingent, according to Muqātil b. Sulayman, upon their having initiated hostilities, which abrogates the earlier complete prohibition against fighting, especially in the Sanctuary.[7]

The celebrated commentator on the Qur'ān al-Ṭabarī (d. 923) notes that verse 2:190 was understood by some unnamed exegetes as commanding the believers to fight the pagan Meccans only after the latter had initiated hostilities and to refrain from combat when they (sc. the pagan Meccans) refrained from fighting. But, he comments, that the well-known Successors (second-generation Muslims) al-Rabīʿ b. Anas (d. 756) and Ibn Zayd (d. 798) had been of the opinion that the ninth chapter (al-Tawba or al-Barāʾa) of the Qur'ān had abrogated this verse. Other exegetes (whom he does not name) had maintained that no part of this verse was abrogated and that the aggression forbidden in it, which was a categorical prohibition, applied specifically to women and children.[8] A new construal of the non-aggression clause therefore now emerges in al-Ṭabarī's exegesis—that of the immunity of non-combatants. The famed companion Ibn ʿAbbās is quoted by al-Ṭabarī as having said, "You should not kill women, children, the elderly, and the one who offers peaceful greetings

4 Only Common Era dates are being indicated in this chapter.

5 Mujāhid b. Jabr, *Tafsīr Mujāhid*, ed. ʿAbd al-Raḥmān al-Ṭāhir b. Muḥammad al-Suratī (Islamabad: Majma' al-buḥūh al-islāmiyya, n.d.), 23.

6 For a quick overview of this event, see the art. "Al-Ḥudaybiyya," *Encyclopaedia of Islam*, new ed., ed. C. E. Bosworth et al. (Leiden: Brill, 1980–1997; henceforth referred to as *EI*²), 3:539.

7 Muqatil b. Sulayman, *Tafsīr*, ed. ʿAbd Allāh Maḥmūd Shiḥāta (Beirut: Mu'assasat al-Tārīkh al-ʿArabī 2002), 1:167–68.

8 Al-Ṭabarī, *Jāmiʿ al-bayān fi tafsīr al-Qur'ān* (Beirut: Dār al-kutub al-ʿIlmiyya, 1997), 2:196.

and restrains his hand. If you do so, you have resorted to aggression" (*fa-qad iʿtadaytum*).[9] Furthermore, the pious Umayyad caliph ʿUmar b. ʿAbd al-ʿAzīz (d. 720) is said to have written to ʿAdiy b. Artaḥ, one of his military commanders, and interpreted this verse as "Do not fight those who do not fight you; that is, women, children, and monks". Al-Ṭabarī asserts that this statement of ʿUmar is the most fitting interpretation because there is no incontrovertible evidence that the meaning of this verse was abrogated, as some have maintained.[10]

Al-Ṭabarī then proceeds to offer his own exegesis of Qurʾān 2:190 as follows. The verse commands the believers, he says, to fight in the way of God in obedience to the laws of God. God urges the faithful to invite "with [their] hands and tongues" those who turn away from His religion in arrogance until they come to obey Him or pay the *jizya* (a kind of poll-tax) willingly if they are one of the scriptuaries (primarily Jews and Christians). The meaning of "Do not commit aggression" means that one should not kill children or women or those who pay the *jizya* from among the People of the Book[11] and the Zoroastrians. Those who transgress these limits and hold licit what God has clearly forbidden regarding these groups of people are those who are indicated in "Indeed God does not love those who transgress".[12] Exceeding these limits constitutes aggression.

It should be noted that al-Ṭabarī's reconstrual of the aggression clause in particular became quite influential and pervasive after him. This interpretation became reflected in the classical laws of war and peace formulated by jurists, who also came to understand the non-aggression clause in this verse as primarily setting up a prohibition against fighting non-combatants, and not a categorical prohibition against initiating fighting under any circumstance, as was clearly the view of several early exegetes.[13]

The influential Muʾtazilī exegete al-Zamakhsharī (d. 1144) in the twelfth century outlines three competing ways of understanding Qurʾān 2:190 as follows: a) that it refers to the Prophet's abstention from fighting against all those who did not fight and fighting only those who did; b) that they referred to his fighting those who resorted to combat and desisting from traditional non-combatants, such as women, children, the elderly, and monks; and c) that they referred to his fighting all the unbelievers whose resistance to Islam constituted an act of aggression in itself, whether they actually physically fought

9 Ibid.

10 Ibid.

11 The People of the Book (*ahl al-kitāb*) is the Qurʾānic term for Jews and Christians who are monotheists and follow divinely-revealed scriptures.

12 Al-Ṭabarī, *Jāmiʿ*, 2:196–97.

13 See further Afsaruddin, *Striving in the Path of God*, 43–58.

or not. Al-Zamakhsharī essentially endorses the third interpretation when he states that Qur'ān 2:190 was abrogated by Qur'ān 9:36 (which states, "Fight against all the polytheists" [*kāffatan*]).[14] His preference for the third option signals a widespread acceptance of this position by the scholars of his day, in contrast to earlier scholars, by invoking the exegetical tool of abrogation (*naskh*), according to which certain early verses may be considered to have been superseded by later verses.

But not all later scholars subscribed to this position. One noteworthy exception was the well-known exegete of the late twelfth century Fakhr al-Dīn al-Rāzī (d. 1210), who notably commented that the divine imperative in Qur'ān 2:190 is directed at actual, not potential, combatants.[15] What he clearly means by this is that the verse allows fighting only against those who have actually commenced fighting, and not against those who are able and prepared to fight but have not yet resorted to violence. One may detect here a rather trenchant critique of the prevailing juridical position in al-Rāzī's time, which had all but abandoned the Qur'ānic principle of non-aggression through legal and hermeneutical legerdemain.

The slightly later Andalusian exegete al-Qurṭubī continues to relate that early authorities like Ibn ʿAbbās, ʿUmar b. ʿAbd al-ʿAzīz, and Mujāhid, considered Qur'ān 2:190 with its proscription against initiating hostilities against polytheists to be universally binding and unabrogated (*muḥkama*) by any other verse in the Qur'ān. Abū Jaʿfar al-Naḥḥās (d. 950), the author of *Iʿrāb al-qur'ān*, is also said to have agreed with this position and said that this was the more correct (*aṣaḥḥ*) interpretation, for it was in accordance with the *sunna* and reason. Al-Qurṭubī himself endorses the view that the principle of non-aggression in Qur'ān 2:190 is unabrogated.[16]

1.1 *Survey of Juridical Works*

The Qur'ānic principle of non-aggression in verse 2:190 underwent considerable modification and transformation in juridical works which dealt with *siyar* law. A scrutiny of two key juridical treatises from the Mālikī and Shāfiʿī schools of law (*madhāhib*) confirms certain trends towards the attenuation of this key Qur'ānic injunction, as will now be discussed.[17]

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14 Al-Zamakhsharī, *Al-Kashshāf ʿan ḥaqā'iq ghawāmiḍ al-tanzīl wa-ʿuyūn al-aqāwīl fī wujūh al-ta'wīl*, ed. ʿĀdil Aḥmad ʿAbd al-Mawjūd and ʿAlī Muḥammad Muʿawwaḍ (Riyadh: Maktabat al-ʿubaykān, 1998), 1:395–96.

15 Al-Rāzī, *Al-Tafsīr al-kabīr* (Beirut: Dār iḥyā' al-turāth al-ʿarabī, 1999), 2:288.

16 Al-Qurṭubī, *al-Jāmiʿ li-aḥkām al-qur'ān* (Beirut: Dār al-kitāb al-ʿarabī, 2001) 2:347–48.

17 Due to length constraints, I am restricting myself to these two schools whose positions on this matter are not markedly different from those of the other two Sunni schools,

2 A Mālikī Text: *Al-Mudawwana al-kubrā* Attributed to Mālik b. Anas (d. 796)

The formidable legal compendium of the Mālikī school *al-Mudawwana al-kubrā* contains the juridical teachings of the famous early Medinan jurist Mālik b. Anas as transmitted by the Qayrawānī jurist ʿAbd al-Salām b. Saʾīd b. Ḥabīb al-Tanūkhī (d. 855), nicknamed "Saḥnūn". Saḥnūn was in turn transmitting from the Egyptian *faqīh* ʿAbd al-Raḥmān b. al-Qāsim al-ʿAtakī (d. 806), who was a prominent disciple of Mālik.[18]

The *Kitab al-jihād* section of this treatise begins with an emphasis on the importance of issuing a summons to Islam before commencing fighting. According to ʿAbd al-Raḥman b. al-Qāsim, Mālik was of the opinion that polytheists (*al-mushrikūn*) could not be fought until they had been summoned, regardless of which side initiated hostilities. Although Mālik himself had not specified how this summons should be formulated, Ibn al-Qāsim said customarily "we would invite them to God and His Messenger, so that they may either accept Islam or offer *jizya*."[19] This, he affirmed, was based on prophetic precedent and on the established practice of early Muslims like ʿUmar b. ʿAbd al-ʿAzīz.[20]

With regard to non-combatants, Mālik, according to Ibn al-Qāsim, prohibited the killing of women, children, elderly men, and monks and hermits in their cells. Mālik further counseled that the property of monks and hermits be left intact since that was their sole means of livelihood. Here the *ḥadīth* in which the Prophet forbids his troops to commit *ghilla* (illicit appropriation of war spoils), treachery, and mutilation is cited. Other reports similarly proscribing the killing of non-combatants, particularly women and children, are recorded.[21] The first caliph Abū Bakr's detailed report in which he forbids the killing of various non-combatants and of animals, the cutting down of trees

Ḥanafi and Ḥanbalī. See my longer study "The Siyar Laws of Aggression: Juridical Re-Interpretations of Qurʾānic Jihad and Their Contemporary Implications for International Law," in *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives*, ed. Marie-Luisa Frick and Andreas Th. Müller (Leiden: Brill/Martinus Nijhoff, 2013), 45–63, which discusses Ḥanafi and Ḥanbalī works as well.

18 For more details, see the art. "Saḥnūn," *EI*², 8:843.

19 Saḥnūn, *al-Mudawwana al-kubrā*, ed. Ḥamdī al-Damardāsh Muḥammad (Beirut: al-Maktaba al-ʿasriyya, 1999), 2:581–82.

20 Ibid.

21 Ibid., 2:585–87. See also al-Ṭabarī, *Ikhtilāf al-fuqahāʾ* (Leiden: Brill, 1933), 6–12.

and destruction of property is cited, as is the report from ʿUmar b. al-Khaṭṭāb in which he forbids the killing of the weak and elderly (*harīm*), women, and children.[22]

Compared with the earlier legal manual of Mālik b. Anas, titled *al-Muwaṭṭa'*, the *Mudawwana* does not offer as many details on the topic of non-combatant immunity. In *al-Muwaṭṭa'*, however, we encounter a number of well-known reports concerning ethical and humane conduct during warfare. Thus Mālik reported that he had heard that ʿUmar b. ʿAbd al-ʿAziz wrote to one of his governors and cited the example of the Prophet, who before dispatching one of his military contingents is reported to have counseled them, "Fight in the name of God in the path of God, fight those who disbelieve in God, do not commit deception in the division of spoils, do not commit treachery, do not mutilate, and do not kill children." ʿUmar urged his governor to convey this command to his troops.[23]

The immunity of non-combatants to attack is stressed in three additional reports recorded in *al-Muwaṭṭa'*: the first attributed to Abū Bakr, in which he famously proscribes attacking different groups of civilians, forbids the burning of fruit-bearing trees, and the unnecessary killing of animals.[24] The second is a *ḥadīth* in which the Prophet explicitly forbids the killing of women and children.[25] The third is the much-quoted *ḥadīth* in which Muhammad expresses remorse and displeasure on seeing a slain woman during one of his campaigns and prohibits the killing of women and children.[26]

With the marshalling of these additional reports, the Qur'ānic prohibition against initiating fighting in 2:190 is now firmly reinterpreted in the *Mudawwana* as referring exclusively to non-combatant immunity, with no specific discussion of the principle of non-aggression. Instead, a specific military protocol of summoning to Islam before initiating armed combat has been articulated in the *Mudawwana*, which represents at least a symbolic juridical nod, according to the Māliki school, in the direction of the original Qur'ānic principle of absolute non-aggression.

22 Saḥnūn, *Mudawwana*, 2:587.

23 Mālik b. Anas, *Al-Muwaṭṭa'*, ed. Bashshār ʿAwād Maʿrūf and Maḥmūd Muḥammad Khalīl (Beirut: Muʿassasat al-risāla, 1993), 1:356.

24 Ibid., 1:306–307.

25 Ibid., 1:357–58.

26 Ibid., 1:358, 920.

3 A Shāfiʿī Text: *Al-Ḥāwī al-Kabīr* by al-Māwardī (d. 1058)

Abū al-Ḥasan ʿAlī b. Muḥammad al-Māwardī was a prominent Shāfiʿī jurist from Basra who settled in Baghdad. His renown as a legal scholar led to his being appointed as *qāḍī* there and he eventually earned the honorific title of "supreme judge" (*aqḍā al-quḍāt*). He was close to the ʿAbbasid caliphs al-Qādir (d. 1031) and al-Qāʾim (d. 1074) and carried out a number of diplomatic missions for them. He wrote several religious, literary, political and legal works, one of the best-known of which is his *al-Aḥkām al-ṣulṭāniyya*.[27] In his *al-Ḥāwī al-Kabīr*, al-Māwardī devotes considerable attention to the theories of military *jihād* and the necessity of undertaking it in specific circumstances. In this eleventh century work, we see a more detailed articulation of the classical theories of *jihād*, in comparison with the *Mudawwana*, making it one of the most important legal treatises on this topic at our disposal from this period.

Beginning with the chapter titled "The Basis of the Obligatory Duty of *Jihād*,"[28] al-Māwardī outlines the evolving Qurʾānic articulation of the duty to fight, from its initial command to "turn away from the polytheists" (Qurʾān 15:94), to summoning to God with wise counsel and exhortation and arguing [with the People of the Book] with what is better (Qurʾān 16:125), to fighting only those who initiate fighting with Muslims, in recognition of the fact that Muslims have been persecuted and who are thereby assured of God's help when they fight under such circumstances (Qurʾān 22:39–40), and desisting from fighting those who do not resort to combat (Qurʾān 2:190). Up to this point in time (until the battle of Badr in 624), *jihād* was not yet a mandatory obligation, says al-Māwardī. But subsequent revelations establish its mandatory nature: Qurʾān 9:73 ("O Prophet, struggle against the unbelievers and the Hypocrites and be stern with them);[29] Qurʾān 22:78 ("Strive for the sake of God a true striving");[30] Qurʾān 2:216 ("Fighting has been prescribed for you even though you find it displeasing; perhaps you dislike something while it is

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27 See the art. "al-Māwardī," *EI*², 6:869.

28 Al-Māwardī, *al-Ḥāwī al-kabīr fī fiqh madhhab al-imām al-shāfiʿī raḍī allāhu ʿanhu wa-huwa sharḥ mukhtaṣar al-muzanī*, ed. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd (Beirut: Dār al-kutub al-ʾarabiyya, 1994), 14:102 ff.

29 Al-Māwardī interprets this verse to mean that *jihād* should be waged against the unbelievers with the sword, and against the hypocrites with good counsel (*al-waʿẓ*) if they conceal their ill intentions, and with the sword if they should publicly reveal them (ibid., 14:108).

30 Al-Māwardī allows for both non-combative and combative interpretations of this verse, so that it could mean: a) to display patience while bearing witness [to Islam] and b) to seek to inflict injury upon the enemy without expecting booty (ibid., 14:108). For a detailed treatment of the various interpretations of this verse, see Afsaruddin, *Striving in the Path of God*, 21–25.

better for you and perhaps you love something while it is inimical to you"). Qur'ān 9:36 and 9:5 uphold the sanctity of the traditional four sacred months (Dhū 'l-Qa'da, Dhū 'l-Ḥijja, al-Muḥarram, and Rajab) during which fighting was forbidden; this prohibition however was rescinded in Qur'ān 2:194, according to al-Māwardī.[31] Qur'ān 2:194 states: "The sacred month is for the sacred month and violations are subject to retaliation [in equal measure]. Whoever attacks you attack him to the extent of his attack."

A very important question now comes to the fore for al-Māwardī: Was the prohibition against initiating fighting in Qur'ān 2:190 rescinded in Qur'ān 2:193 so as to allow all-out fighting: that is, equally against those who initiate fighting and those who do not? Al-Māwardī documents the view of the early Meccan exegete and *faqīh* (jurist) 'Aṭā' b. Abī Rabāḥ (d. 733) who asserted that it was *never* permissible to fight those who do not fight. Al-Māwardī, however takes exception to this view, and states that the verse forbids the initiation of fighting specifically near the Sacred Precinct and allows armed combat there only in response to a prior act of aggression, lifting the previous absolute proscription against fighting in the Sanctuary (*ḥarām*), and, therefore does not have a broader applicability. The Qur'ānic articulation of the doctrine of military *jihād* reaches its final form in Qur'ān 2:193, 9:5, and 2:191, which, in al-Māwardī's understanding, encode divine permission *to fight equally those who fight and those who desist from fighting*.[32]

With regard to the status of non-combatants, al-Māwardī identifies two broad schools of thought on this topic. Genuine non-combatants are described in *al-Ḥāwī al-kabīr* as those who neither physically fight nor take part in war deliberations, such as the chronically ill, the incapacitated elderly, pious monks and hermits who dwell in monasteries and cells, whether young or old. The first school of thought held, as exemplified by Abū Ḥanīfa (d. 767), that such non-combatants may never be killed. This is in accordance with the *ḥadīth* in which the Prophet states, "Go forth in the name of God and upon the religion of the Messenger of God. And do not kill the incapacitated elderly, nor a child

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31 Al-Māwardī, *al-Ḥāwī al-kabīr*, 14:102–109.

32 Qur'ān 2:193 states, "And fight them until there is no more persecution and religion is for God. But if they desist, then let there be no hostility except against wrong-doers;" Qur'ān 9:5 states, "When the sacred months have passed, slay the idolaters wherever you find them and take them captive and besiege them and prepare for them each ambush. But if they repent and establish worship and pay the poor-due, then allow them to go their way. Indeed, God is forgiving, merciful;" and Qur'ān 2:191 states, "And slay them wherever you find them, and drive them out of the places where they drove you out from, for persecution is worse than killing. And fight not with them at the Sanctuary until they first attack you there, but if they attack you there, then slay them. Such is the recompense of unbelievers."

or the young, or a woman."[33] Another proof-text for this position is provided by the well-known report from Abū Bakr who counseled his commanders ʿAmr b. al-ʿĀṣ and Shuraḥbīl b. Ḥasana before departing for Syria not to harm these categories of non-combatants.[34]

The second school of thought maintained that anyone among the enemy may be slain; the proof-text they adduced for this position is Qurʾān 9:5 ("Kill the polytheists wherever you may find them"). This position is said to have been preferred by the early Shāfiʿī jurist al-Muzanī (d. 877).[35] This school furthermore offered the explanation that these restrictions had been imposed on attacking non-combatants so that Muslim soldiers would not be distracted from their primary objective—fighting enemy combatants who were capable of inflicting greater harm. Al-Māwardī notes that the proponents of this school of thought offered a similar explanation to get around Abū Bakr's interdiction against harming hermit-dwellers.[36] As a jurist, al-Māwardī subscribes to his school's position on the total immunity of non-combatants but then qualifies this position by saying that if these non-combatants put up resistance and fight, they are to be fought against and killed. If women and children resort to fighting, they may be fought against in self-defense but may not be put to death, he states.[37]

With regard to initiation of hostilities, al-Shāfiʿī himself had maintained that polytheists (*al-mushrikūn*) who have not previously heard of Islam (whose numbers had considerably dwindled by his time; mainly the Turks and Khazars are included by him in this group) cannot be fought "until they have been summoned to faith" (*yudʿaw ilā ʾl-imān*). If anyone among them is killed before such a summons, then the blood-geld (*al-diya*) must be paid, a position that is upheld by al-Māwardī.[38]

This protocol outlined by al-Māwardī for initiating armed combat more or less became the prevalent position among later jurists from other schools of law as well, as may be seen in the works of the Ḥanafī scholar Abū Bakr al-Sarakhsī from the eleventh century and the Ḥanbalī jurist Ibn Qudāma from the thirteenth.[39] As in Saḥnūn's legal treatise, Qurʾān 2:190 is invoked by most of the later jurists primarily in the context of non-combatant immunity and

33 Al-Māwardī, *al-Ḥāwī al-kabīr*, 14:193.
34 Ibid.
35 Ibid.
36 Ibid., 14:194.
37 Ibid., 14:192–94.
38 Ibid., 14:212 ff.
39 See futher Afsaruddin, *Siyar Law*, 55–59.

the principle of non-aggression becomes buried in the recounting of all those who qualify for such a status.

4 Conclusion: Modern Critiques of Classical Juridical Views

Our survey reveals that early scholars from the first two centuries of Islam like Ibn ʿAbbās, ʿAtāʾ b. Abī Rabāḥ, Mujāhid b. Jabr, and Muqātil b. Sulayman firmly maintained that Qurʾān 2:190 unambiguously forbade the initiation of military hostilities. Exegetes and jurists from the ninth century onwards like al-Tabarī, al-Shafīʿī, al-Māwardī and others nevertheless went on to endorse the principle of offensive *jihād*, either by applying the hermeneutic tool of abrogation to Qurʾān 2:190 which forbade such a concept, and/or by transferring the application of Qurʾān 2:190 from the realm of *jus ad bellum* to that of *jus in bello*, that is, from the realm of just cause for initiating war to just conduct during warfare, thereby making irrelevant adherence to a strict principle of non-aggression. The latter reinterpretation in particular became reflected in the classical laws of war and peace formulated by influential jurists, who typically came to understand the non-aggression clause in this verse as primarily setting up a prohibition against fighting non-combatants, and not as a categorical prohibition against initiating fighting under any circumstance, as was clearly the view of several early exegetes. Such a hermeneutic maneuver effectively allowed for a theory of offensive *jihād* to emerge among jurists which allowed Muslim rulers to launch pre-emptive wars against non-Muslim polities.

The gradual attenuation in later exegetical and legal literature of the categorical Qurʾānic prohibition against initiating aggression by Muslims is revealing of the triumph of political realism over scriptural fidelity. This proclivity is quite prominent in the late ninth century during the ʿAbbasid period with its imperial ambitions, as we noted in the exegesis of al-Ṭabarī and in the legal work of al-Māwardī. Both authors, not surprisingly, had close connections with the ruling ʿAbbasid elite. Such views would become fairly de rigeur in later exegetical and juridical works, as we observed. There were however those who represented notable exceptions to this general trend, such as the exegete al-Rāzī, who was suspicious of extracting politically expedient interpretations that were contrary to the exact semantic significations of words, and therefore trenchantly maintained that military activity could be launched only against actual, not potential, combatants.

Several modern Muslim scholars have undertaken a sustained critique of a number of positions adopted by the classical jurists, particularly on the issue of whether it is ever permissible to initiate an attack on an adversary, by resorting

to a close reading of the Qurʾān and other very early sources. Their main area of contention is with the later exegetical and juridical position which viewed lack of adherence to Islam, rather than aggression, as the *casus belli* for launching the military *jihād*. This perspective—which relies on the invocation of the principle of *naskh* (abrogation) for its validity—has been severely criticized by a variety of modern and contemporary Muslim scholars, including Muhammad ʿAbduh, Subḥī Maḥmaṣānī,[40] ʿAlī Jumʿa,[41] Abū Zahra,[42] and others. These scholars have emphasized instead that the Qurʾān should be read holistically and that the critical verses which forbid the initiation of war by Muslims and which uphold the principle of non-coercion in religion categorically militate against the conception of an offensive *jihād* to be waged against non-Muslims *qua* non-Muslims.

For example, in his interpretation of the cluster of verses Qurʾān 2:190–93, the modernist Egyptian reformer Muḥammad ʿAbduh (d. 1905) emphasizes that Qurʾān 2:190 allowed fighting as "defense in the path of God so as to allow unimpeded worship of Him in His house" and as a warning against those who break their oaths and seek to entice Muslims away from their faith. *Wa-lā taʿtadū* is interpreted by him to contain both a proscription against initiation of hostilities by Muslims and attacking traditional non-combatants such as women, children, the elderly, the infirm, and "those who offer you peace;" additionally, it prohibits causing destruction to crops and property.[43]

ʿAbduh rejects the interpretation advanced by some pre-modern jurists that the so-called sword verse (Qurʾān 9:5) had abrogated the more numerous verses in the Qurʾān which call for forgiveness and peaceful relations with non-Muslims. The injunction contained in Qurʾān 9:5 contains a clear reference to Arab polytheists, he notes, and is therefore not applicable in any way to non-Arab polytheists or to the People of the Book. He says that the "the security to be obtained through fighting the Arab polytheists according to these verses is contingent upon their initiating attacks against Muslims and violating their treaties …"[44] ʿAbduh goes on to point out that the very next verse Qurʾān 9:6 offers protection and safe conduct to those among the polytheists who wish to listen to the Qurʾān.[45] The implication is clear—polytheists and non-Muslims

40 See his "The Principles of International Law in the Light of Islamic Doctrine," *Receuil des cours* 117 (1966): 249–79.

41 See his *al-Jihād fī al-islām* (Cairo: Nahḍat Miṣr lil-Ṭibāʾa wa-al-Nashr wa-al-Tawzīʿ, 2005).

42 See his *al-Alaqāt al-dawliyya fī al-islām*, (Cairo: al-Qawmiyya, 1964).

43 Muḥammad Rashīd Riḍā, *Tafsīr al-Qurʾān al-karīm al-mashhūr bi-tafsīr al-manār* (Beirut: Dār al-kutub al-ʾilmiyya, 1999), 2:169–70. This work is referred to in brief as *Tafsīr al-manār*.

44 Riḍā, *Tafsīr al-manār*, 10:162–63.

45 Ibid., 10:171–75.

in general who do not wish Muslims harm and display no aggression towards them are to be left alone and allowed to continue in their ways of life.

Similar views are offered by by the former mufti of Egypt ʿAlī Jumʿa in his 2005 book *al-Jihād fī ʻl-islām*. In this book, Jumʿa emphasizes that the combative *jihād* was necessary for self-defense in a pre-modern, war-ridden world. Against such a historical backdrop, the Qur'ān (and the *sunna*) permitted fighting out of necessity while imposing humane and ethical restrictions on waging war. He asserts that in the modern world governed (at least theoretically) by international treaties and contracts, Qur'ān 8:61, which urges Muslims to incline to peace when the other side inclines to peace, is the more appropriate proof-text to be invoked in mandating peaceful relationships among nations.[46]

The Syrian legal scholar Wahba al-Zuhaylī in his well-known work *Athār al-ḥarb fī al-fiqh al-islāmī* has, like other modernist jurists, criticized in particular the position of certain medieval jurists that the so-called sword verse (Qur'ān 9:5) may be deemed to have abrogated about 124 other Qur'ānic verses which preach peaceful solutions to conflicts. All the verses on fighting, he says, were revealed only to allow Muslims to defend themselves against persecution and attack by their enemies.[47]

As a consequence of such hermeneutical endeavors, a revised military jurisprudence that emphasizes ethical principles drawn primarily from the Qur'ān and early strands of exegesis and juridical thought has clearly emerged. Such an emphasis brings into stark relief the concessions to Realpolitik made by the classical jurists and lays bare their historically contingent nature—further underscoring the need in our contemporary circumstances to revisit the classical juridical regulations concerning war and peacemaking in a more comprehensive manner.

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46 Jumʿa, *Jihād*, 22–24.

47 Wahba al-Zuhaylī, *Athār al-ḥarb fī al-fiqh al-islamī: dirāsa muqārana* (Beirut: Dār al-fikr, 1981), 106–20.

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CHAPTER 6

Al-Ḥadīth al-Mashhūr
A Ḥanafī Reference to Kufan Practice?

Sohail Hanif

1 Introduction

The legal school of Abū Ḥanīfa (d. 150/767), like that of Mālik b. Anas (d. 179/795), grew out of a regional teaching tradition. Joseph Schacht called these regional teaching traditions the ancient schools of law, and stated that Mecca, Medina, Kufa, Basra and Syria were each centres for their respective ancient schools.[1] While some later writers challenged the use of the word 'school' to describe these teaching traditions,[2] scholars generally agree that jurists such as Abū Ḥanīfa and Mālik were influenced by the precedent set by previous jurists in Kufa and Medina respectively.[3] The connection to this regional past was expressly theorized by Mālik, who upheld Medinan praxis as a primary source for Islamic law. The term *ʿamal ahl al-Madīna* (the practice of the people of Medina) is widely used in Islamic legal writings to explain the relationship of Mālikī legal doctrine to the regional tradition on which Mālik based much of his legal thought.[4] But what of Abū Ḥanīfa?

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1 Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 6–10.

2 Two leading detractors are Wael Hallaq and Nimrod Hurvitz: Wael Hallaq, "From Regional to Personal Schools of Law? A Reevaluation," *Islamic Law and Society*, 8.1 (2001): 1–26, and Nimvrod Hurvitz, "Schools of Law and Historical Context: Re-examining the Formation of the Ḥanbalī Madhhab," *Islamic Law and Society*, 7.1 (2000): 37–64, esp. 39–46.

3 This is clearly inferred from the presentations of both Hallaq and Hurvitz. Hallaq describes Mālik's method, for example, by saying [emphasis is Hallaq's], "It is obvious that Mālik's juristic repertoire derives from the legal doctrines of individual jurists.… They are again the individual scholars operating in his region or town. And … if no opinion existed on a certain matter, Mālik would exercise his *ijtihād according to* the 'doctrine of someone' he had known and studied with": Hallaq, "From Regional," 12–13. The influence of local precedent is also understood from Hurvitz's description of the early scholarly circles in which jurists trained, as these represented a localized social phenomenon: Hurvitz, "Schools of law."

4 For a detailed overview of the classical theory of Medinan praxis, as presented by its advocates, see Umar F. Abd-Allah Wymann-Landgraf, *Mālik and Medina: Islamic Legal Reasoning in the Formative Period* (Leiden: Brill, 2013), 219–69.

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References to *ʿamal ahl al-Kūfa*, and the like, are hard to find in the legal discourse of Abū Ḥanīfa and his school.[5] Is this because Abū Ḥanīfa's legal thought was independent of the teaching tradition of his town, or because the Ḥanafī school, as it developed its legal theory, found other ways to justify opinions that Abū Ḥanīfa based on Kufan precedent without having to coin such a term? The former possibility is unlikely. Studies that compare Abū Ḥanīfa's opinions with those of his Kufan predecessors display a large degree of correspondence, enough to show that he was deeply influenced by the precedent of leading teachers in his town.[6] Thus, the answer must be the latter, that the school was able to provide theoretical scaffolding to uphold his legal rulings without having to create such a parochial construct. The current essay argues that one construct the school used, into which Kufan precedent could be incorporated and presented as authoritative, is the concept of *al-ḥadīth al-mashhūr*, or the 'well-known' Prophetic report.

Although the term *al-ḥadīth al-mashhūr* is widely employed by *ḥadīth* scholars, Ḥanafī legal theorists employed the term distinctively to describe reports that occupy a status between the *mutawātir*—mass-transmitted reports—and the *āḥād*—reports transmitted with limited chains of transmission. For

5 An exception is the *uṣūl* work of Abū ʿAbd Allāh al-Jurjānī (d. 387/988), who is said to have used the phrase *ʿamal ahl al-Kūfa* to present a Ḥanafī legal principle whereby Kufan practice up to the time of Abū Ḥanīfa is presented as a normative source of authentic *sunna*. Interestingly, I have only found reference to the words of al-Jurjānī in Ḥanbalī *uṣūl* works, starting with the *ʿUdda* of Abū Yaʿlā b. al-Farrāʾ (d. 458/1065): Abū Yaʿlā b. al-Farrāʾ, *al-ʿUdda fī uṣūl al-fiqh*, ed. Aḥmad al-Mubārakī (Riyadh, 1993), 1053. This is repeated after him in several Ḥanbalī works: Ibn ʿAqīl, *al-Wāḍiḥ fī uṣūl al-fiqh*, ed. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī, 5 vols. (Beirut: Muʾassasat al-Risāla, 1999), 5:101; Āl Taymiyya, *al-Musawwada fī uṣūl al-fiqh*, ed. Muḥammad Muḥyī al-Dīn ʿAbd al-Ḥamīd (Beirut: Dār al-Kitāb al-ʿArabī, n.d.), 313; Ibn al-Laḥḥām, *al-Mukhtaṣar fī uṣūl al-fiqh ʿalā madhhab al-Imām Aḥmad b. Ḥanbal*, ed. Muḥammad Maẓhar Baqā (Mecca: Jāmiʿat al-Malik ʿAbd al-ʿAzīz, n.d.), 171; Ibn al-Najjār al-Ḥanbalī, *Mukhtaṣar al-Taḥrīr sharḥ al-Kawkab al-munīr*, ed. Muḥammad al-Zuḥaylī and Nazīh Ḥammād, 4 vols. (Riyadh: Maktabat al-ʿAbīkān, 1997), 4:700; ʿAlāʾ al-Dīn al-Mardāwī, *al-Taḥbīr sharḥ al-Taḥrīr*, ed. ʿAbd al-Raḥmān al-Jibrīn, ʿAwaḍ al-Qarnī and Aḥmad al-Sarrāḥ, 8 vols. (Riyadh: Maktabat al-Rushd, 2000), 8:4209; ʿAlāʾ al-Dīn al-Mardāwī, *Taḥrīr al-manqūl wa-tahdhīb ʿilm al-uṣūl*, ed. ʿAbd Allāh Hāshim and Hishām al-ʿArabī (Doha: Wizārat al-Awqāf wa-al-Shuʾūn al-Islāmiyya, 2013), 353. This principle is not stated as clearly in the *uṣūl* works of any other legal school including the Ḥanafīs. And as for the *Uṣūl* of al-Jurjanī on which it is based, I have not found its mention in bibliographical works or biographical dictionaries. It appears that one of our only sources for this work is Abū Yaʿlā, who quotes the work extensively in his *ʿUdda*.

6 See Shāh Walī Allāh al-Dihlawī, *al-Inṣāf fī bayān asbāb al-ikhtilāf*, ed. ʿAbd al-Fattāḥ Abū Ghudda (Beirut: Dār al-Nafāʾis, 1404/1983–4), 39. See also Sohail Hanif, "A Tale of Two Kufans: Abū Yūsuf's *Ikhtilāf Abī Ḥanīfa wa-Ibn Abī Laylā* and Schacht's Ancient Schools," *Islamic Law and Society*, 25 (2018): 173–211.

all practical purposes, they held the *mashhūr* report to be similar in epistemic strength to the *mutawātir*, allowing it to restrict the meaning of the Qurʾānic text, something Ḥanafīs do not allow for *āḥād* reports. However, when explaining what constitutes a *mashhūr* report, Ḥanafī theorists present varying definitions, with some seeming to suggest that it is identified by numbers of narrators, while others suggest it is identified by its acceptance among the early juristic community. The first part of this essay presents the theorization of *al-ḥadīth al-mashhūr* by leading early classical legal theorists, and the second part analyzes a selection of reports identified as *mashhūr* in Ḥanafī commentary works to support idiosyncratic Ḥanafī opinions. The essay concludes that the category of *al-ḥadīth al-mashhūr* was often employed to justify positions that were only prominent in Kufa specifically, or in Iraq in general (Kufa and Basra). In effect, granting the *mashhūr* report the high epistemic stature awarded to *mutawātir* reports was akin, in many cases, to granting Iraqi precedent this high epistemic stature.

2 The *Mashhūr* Report in Legal Theory

Aron Zysow presents a helpful introduction to the *mashhūr* report in Ḥanafī legal theory, particularly its early theorization. He shows that the earliest debates concerned its epistemic stature, with Abū Bakr al-Jaṣṣāṣ (d. 370/981), holding that one who rejects such a report is an unbeliever, and ʿĪsā b. Abān (d. 221/835–6) holding that such a person is deemed astray, but not an unbeliever. Zysow points out that al-Jaṣṣāṣ's position came to be identified with Abū Yūsuf, and Ibn Abān's with Abū Ḥanīfa.[7] Ṣalāḥ Abū al-Ḥājj presents a pertinent study of the *mashhūr* report, arguing that the *mashhūr* report should be seen as a reference to the actual practice of Companions or Successors, and thus is a way that Ḥanafī jurists referred to the precedent of the early community, just as *ʿamal ahl al-Madīna* refers to authoritative, early precedent.[8] However, Abū al-Ḥājj does not develop the idea further to state if a particular parochial influence can be found in *al-ḥadīth al-mashhūr* whereby it can really be seen as an Iraqi parallel to *ʿamal ahl al-Madīna*.

7 Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Atlanta, Georgia: Lockwood Press, 2013), 17–22.

8 Ṣalāḥ Muḥammad Sālim Abū al-Ḥājj, "*al-Sunna al-mashhūra ʿinda al-ḥanafiyya wa-taṭbīquhā fī kutubihim*," *Uṣūl*, 19 (2013): 33–58.

The current essay complements these studies by offering a stronger focus on the theorization and application of this topic in early classical Ḥanafī works. By early classical, I refer approximately to the works of the fifth/eleventh and sixth/twelfth centuries. These centuries offered the earliest fully mature expressions of school doctrine after the maturation of the schools of law, both socially and doctrinally, in the fourth/tenth century.[9] Thus, we find that the legal commentaries of these two centuries were considered most authoritative in stating school doctrine in the later memory of the Ḥanafī school.[10] The unique authority awarded to works of substantive law from this period also carried over to its works of legal theory (*uṣūl al-fiqh*).

The early classical period of the Ḥanafī school produced the most influential teaching text in Ḥanafī legal theory, the work of Fakhr al-Islām ʿAlī b. Muḥammad al-Bazdawī (d. 482/1089), whose *Kanz al-wuṣūl*, known popularly as *Uṣūl al-Bazdawī*, remained a standard teaching text for centuries, generating a large number of commentaries.[11] It also formed the basis of several influential *uṣūl* works that themselves generated numerous commentaries.[12] Accordingly, most later works in Ḥanafī legal theory framed their discussions of the *mashhūr* report to mirror the summary of al-Bazdawī. We will focus on al-Bazdawī's work to understand the theorization of this topic in the early classical period. However, al-Bazdawī's work is itself an attempt to categorize and repackage the discussions of Ḥanafī theory into a concise form, and in this the commentary tradition after him was sometimes at odds with his

9 On the social maturation of legal schools, see Christopher Melchert, *The Formation of the Sunni Schools of Law 9th–10th Centuries CE* (Brill: Leiden, 1997); on their doctrinal maturation, see Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001).

10 See Talal al-Azem, *Rule Formulation and Binding Precedent in the Madhhab-Law Tradition: Ibn Quṭlūbughā's Commentary on* The Compendium *of Qudūrī* (Leiden: Brill, 2017), 50–84. On unique features of the commentary works of this period, see also Ya'akov Meron, "The Development of Legal Thought in Hanafi Texts," *Studia Islamica*, 30 (1969): 73–118.

11 Kātib Çelebī, *Kashf al-ẓunūn ʿan asāmī al-kutub wa-al-funūn*, 6 vols. (Baghdad: Maktabat al-Muthannā, 1941), 1:81; al-Baghdādī, *Hadiyyat al-ʿārifīn*, 2 vols. (Istanbul: Wakālat al-Maʿārif al-Jalīla, 1951), 1:108, 314, 711, 735, 794, 831, 2:171, 188, 197, 112.

12 These include the *Badīʿ al-niẓām* of Ibn al-Sāʿātī (d. 694/1294–5) (Kātib Çelebī, *Kashf al-ẓunūn*, 1:235), the *Tanqīḥ* of Ṣadr al-Sharīʿa (d. 747/1346–7) (ibid., 1:498), the *Fuṣūl al-badāʾiʿ* of Shams al-Dīn al-Fanārī (d. 833/1430 or 843/1431) (ibid., 2:1268), and the *Manār al-uṣūl* of al-Nasafī (d. 710/1310) (al-Nasafī, *Kashf al-asrār sharḥ al-muṣannif ʿalā al-Manār*, 2 vols. [Beirut: Dār al-Kutub al-ʿIlmiyya, n.d.], 4), arguably the second most commented-upon work of Islamic legal theory, as observed in Aron Zysow, "Muʿtazilism and Māturīdism in Ḥanafī Legal Theory," in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (Leiden: Brill, 2002), 235–65, at 238.

proposed categorizations.[13] Therefore, to help us better understand the wider discussions pertaining to the topic in this early classical period, we will also consult the works of two of al-Bazdawī's contemporaries: his brother, Abū al-Yusr Muḥammad b. Muḥammad al-Bazdawī's (d. 493/1100) *Maʿrifat al-ḥujaj al-sharʿiyya* and Shams al-A'imma Muḥammad b. Aḥmad al-Sarakhsī's (d. *c.* 483/1090–1) *al-Uṣūl*. All three authors trained in the same milieu and shared the same teacher in Shams al-A'imma ʿAbd al-ʿAzīz b. Aḥmad al-Ḥalwānī[14] (d. 456/1064).[15] Despite sharing the same milieu, their presentations of the *mashhūr* report differ in important ways. As this generation represents the formulation of standard Ḥanafī *uṣūl* texts, and as the differences between them are representative of the various debates on the topic, both in earlier and later works, these three works are taken together in this paper as a window onto the Ḥanafī attempts to theorize this topic.[16] In what follows, the two brothers will be distinguished as they often are in Ḥanafī literature, with the former being referred to as Fakhr al-Islām and the latter as Abū al-Yusr.

All three texts agree on the exact place of the *mashhūr* report in the larger grading of legal indicants when discussing whether Prophetic reports may modify Qur'ānic injunctions. Ḥanafīs insist that Prophetic reports may not in any way replace, qualify or restrict what may be understood by a Qur'ānic verse as they hold this to be a form of abrogation (*naskh*). This is with the exception of reports concerning which a high degree of confidence may be attained regarding their having issued from the Prophet. There are two categories of such reports: the *mutawātir* and the *mashhūr*. All remaining reports, those that do not offer this high degree of confidence, are termed *āḥād*. *Mutawātir* reports

13 For example, his incorporating all linguistic investigations under the exploration of Qur'ānic composition and meaning was criticised by ʿAlā' al-Dīn al-Bukhārī (d. 730/1329–30) in his commentary on al-Bazdawī's work for being too narrow a framework to incorporate a disparate selection of linguistic topics: see Zysow, *The Economy*, 53.

14 Some later scholars (*muta'akhkhirūn*) called him al-Ḥalwā'ī: see Ibn al-Ḥinnā'ī, *Ṭabaqāt al-ḥanafiyya*, ed. Muḥī Hilāl al-Sarḥān, 3 vols. (Baghdād: Maṭbaʿat Dīwān al-Waqf al-Sunnī, 2005), 2:61.

15 Al-Dhahabī, *Siyar aʿlām al-nubalā'*, ed. Shuʿayb al-Arna'ūṭ *et al.*, 25 vols. (Beirut: Mu'assasat al-Risāla, 1985), 18:177.

16 The relevant sections are al-Sarakhsī, *Uṣūl al-Sarakhsī*, ed. Abū al-Wafā' al-Afghānī (Hyderabad: Iḥyā' al-Maʿārif al-Nuʿmāniyya, 1372/1952–3; reprint, Beirut: Dār al-Kutub al-ʿIlmiyya, 1993), 1:291–4; Abū al-Yusr al-Bazdawī, *Maʿrifat al-ḥujaj al-sharʿiyya*, ed. ʿAbd al-Qādir al-Khaṭīb (Beirut: Mu'assasat al-Risāla, 2000), 119–22; Fakhr al-Islām al-Bazdawī, *Uṣūl al-Bazdawī: Kanz al-wuṣūl ilā maʿrifat al-uṣūl* (Karachi: Mīr Muḥammad Kutub Khāna, n.d.), 152–8. A brief engagement with the same section of these three works, with a focus on epistemology, can also be found in Dale Correa, "Testifying Beyond Experience: Theories of *Akhbār* and the Boundaries of Community in Transoxianan Islamic Thought, 10th–11th Centuries CE," (PhD diss., New York University, 2014), 125–8.

are defined as reports transmitted by a sufficiently large number, in each generation, such that collusion and false attribution of these reports to the Prophet is deemed impossible. *Āḥād* reports do not reach such numbers of narrators, and thus may contain misattributions. The *mashhūr* lies between the two: it does not reach the number of narrators of a *mutawātir* report; yet Ḥanafī theorists express sufficient confidence in *mashhūr* reports to permit abrogation of the Qurʾān, making these reports, practically speaking, on the same footing as *mutawātir* reports. Let us look at the different ways our three works explain what makes a report *mashhūr*.

The main difference between these three works is in the definition of the *mashhūr* report. Both Fakhr al-Islām and al-Sarakhsī describe it as a report that is *āḥād* at its origin, meaning the generation of the Companions. In other words, the *mashhūr* report is initially narrated by only a few narrators such that it is conceivable for there to be an error in the report. But then, in the following generation, the situation changes. Fakhr al-Islām tells us,

> [T]hen it becomes widespread (*thumma intashara*), and it is then transmitted by a people of whom it cannot be conceived that they could agree to a falsehood (*lā yutawahhamu tawāṭuʾuhum ʿalā al-kadhib*), and they are the second generation after the Companions and those after them. They are a trustworthy people, imams who are not to be accused, so by virtue of their testimony and their verifying its truth, it becomes tantamount to the *mutawātir*, a proof of the proofs of God.[17]

He subsequently states that it is extremely difficult to distinguish such reports from those that are *mutawātir*. This description appears to focus on numbers of narrators: there are few narrators in the first generation of the report and a large number in the following generations. This is certainly how the later *uṣūl* tradition presents this concept, simply as a report that is *āḥād* in the first generation and then becomes *mutawātir*.[18] However, a careful reading of Fakhr al-Islām's passage shows that he avoids the term *mutawātir* and upholds the report's veracity by the uprightness of the second and third generations. His words are thus best read in the light of the explanation offered by his two peers.

Al-Sarakhsī tells us that the mark of the *mashhūr* report is that, after its *āḥād* origin, it is "received by scholars with acceptance and practice" (*talaqat-hu*

17 Fakhr al-Islām al-Bazdawī, *Uṣūl*, 152.

18 See for example Ṣadr al-Sharīʿa's (d. 747/1346–7) *al-Tawḍīḥ* in Saʿd al-Dīn al-Taftāzānī, *al-Talwīḥ sharḥ al-Tawḍīḥ*, 2 vols. (Cairo: Maktabat Ṣabīḥ, n.d.), 2:5, and Ibn al-Humām's (d. 861/1457) *al-Taḥrīr* in Ibn Amīr Ḥājj, *al-Taqrīr wa-al-taḥbīr*, 3 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1983), 2:235.

al-ʿulamāʾ bi-al-qabūl wa-al-ʿamal bih), giving the impression that it is a matter identified by its reception amongst the juristic community, not by numbers of narrators. This impression is further strengthened by Abū al-Yusr's presentation. Unlike his colleagues, Abū al-Yusr does not differentiate between the first and subsequent generations. He simply states that there is a doubt (*shubha*) regarding the transmission, as it was transmitted by numbers that could conceivably agree to a misattribution, but that its being true is likely as the narrators are upright (*ʿudūl*). He then tells us that the quality that makes the report *mashhūr* is that it is well-known amongst the jurists (*fuqahāʾ*) in all periods (*fī al-azmina ajmaʿ*) and that they accepted it and practiced it.

All three descriptions appear to differ slightly. Fakhr al-Islām appears to regard numbers of narrators and differentiates between the first and subsequent generations. Al-Sarakhsī regards scholarly acceptance in generations after the first. And Abū al-Yusr regards scholarly acceptance in all generations. Can these be interpreted in a single light?

Such an interpretation is possible, with al-Sarakhsī serving as a bridge between the two brothers. Later in his presentation, al-Sarakhsī states that the *mashhūr* report is *mutawātir* in the second and third generations. Assuming that he is not contradicting himself and that he is not simultaneously stipulating two independent conditions, which from his presentation is unlikely, we are led to assume that the acceptance of scholars and their practice *is* what is meant by *tawātur* in this context. One way to understand this is that a *mutawātir* report is said to be one whose chains of transmission need not be investigated; rather, by virtue of its mention on so many different tongues, it is known to be true regardless of the identities and uprightness of individual narrators. If it is widely practiced by jurists, then it can be assumed that multiple tongues transmitted the report, a number large enough to elevate the transmission above the possibility of being fabricated. Another point that helps explain Fakhr al-Islām's description in the light of his peers is that he rules out the possibility of the narrators' agreeing upon a false attribution by virtue of the second and third generations representing generations of upright 'imams'; this should be seen as a reference to the learned in these generations, to whom al-Sarakhsī and Abū al-Yusr refer respectively as *ʿulamāʾ* and *fuqahāʾ*. Thus, we can suggest that all three hold that what makes a report *mashhūr* is its acceptance amongst those learned in law from the earliest generations of Muslims.[19]

19 This understanding corresponds to other discussions from the Ḥanafī theory of reports, a theory constructed to reflect this high consideration given to those learned in law from the first two to three generations of Muslims: see Sohail Hanif, "A Theory of Early Classical

There remains the disagreement between Abū al-Yusr, who gives this report a singular description for all generations, and his peers who distinguish between the first and subsequent generations. However, this is a minor point, as it would still need to be related by this small number to the scholars for them to subsequently accept it, so it must start *āḥād* before its acceptance can spread, whether Abū Yusr states this explicitly or not.

When referring to this widespread acceptance amongst scholars, both Abū al-Yusr and al-Sarakhsī use the word *ijmāʿ* (consensus). Thus, in their descriptions, the epistemic strength of the *mashhūr* report draws from the epistemic strength of consensus. This leads to Abū al-Yusr's declaring this report to resemble the *mutawātir* (*mithl al-mutawātir*), and he quotes his mentor al-Ḥalwānī saying the same ("*al-mutawātir wa-al-mashhūr sawāʾ*"). Al-Sarakhsī, however, draws a clear distinction between the two. This leads directly to the debate on its epistemic status.

Al-Sarakhsī gives the most detail to this debate. He tells us, as mentioned above, that it originates in the opposing positions of Abū Bakr al-Rāzī al-Jaṣṣāṣ and ʿĪsā b. Abān. Al-Jaṣṣāṣ calls this report "that which is in the realm of the *mutawātir*" (*mā fī ḥayyiz al-tawātur*) and states that the report awards its recipient absolute certitude (*ʿilm al-yaqīn*) in its veracity, but that this certitude is not arrived at immediately (*bi-al-ḍarūra*)—as with the *mutawātir*—but by inference (*istidlāl*) and conscious acquisition (*iktisāb*). This is by inferring that it was mass-transmitted (*tawātara naqluhu*) to us, so this leaves no more doubt about the possibility of collusion (*ittifāq*) in the first generation,

> because those who received it with acceptance and practice could not have conceivably agreed to accept it except … by the preponderance of truthfulness (*ṣidq*) in its narrators …, but we only know this by inference; this is why we call the knowledge established by it to be 'acquired' (*muktasab*), even though we are absolutely certain of it.[20]

Al-Jaṣṣāṣ further argues that this report is able to modify the Qurʾānic text, which constitutes abrogation, necessitating that they be of the same epistemic strength.

The argument presented by al-Sarakhsī to support the opposing position of Ibn Abān is that the one who denies certain knowledge is an unbeliever, but the one who denies the *mashhūr* report is not an unbeliever; therefore, we know that the knowledge this report gives is a 'tranquil knowledge' (*ʿilm ṭumaʾnīna*)—as it takes one out of the intranquil state of doubt—but not

Ḥanafism: Authority, Rationality and Tradition in the *Hidāyah* of Burhān al-Dīn ʿAlī ibn Abī Bakr al-Marghīnānī (d. 593/1197), (PhD diss., University of Oxford, 2017), 49–59.

20 Al-Sarakhsī, *al-Uṣūl*, 1:292. This description supports the notion that *tawātur*, when used in this topic, is best seen as a reference to scholarly acceptance and practice.

certain knowledge, as the possibility of error still remains in the first generation. Al-Sarakhsī holds Ibn Abān's position to be correct (*huwa al-ṣaḥīḥ ʿindanā*), as does Fakhr al-Islām. Abū al-Yusr is more ambivalent on this question, and does not give a clear conclusion of his own. He states that most scholars held that rejecting a *mashhūr* report is as rejecting a *mutawātir* report, implying that such a person is an unbeliever, but then proceeds to give arguments for both positions, ending with the importance of not charging a believer with unbelief.

Al-Sarakhsī ventures beyond his peers by offering ʿĪsā b. Abān's three-level breakdown of *mashhūr* reports based on their level of acceptance.[21] The highest level are reports which were subject to widespread agreement, such as the reports of stoning the adulterer. He tells us that there was no disagreement regarding these reports in the first and second generations, with the insignificant exception of the Khawārij. The one who denies such reports is declared astray, but not an unbeliever (*yuḍallalu jāḥiduhu wa-lā yukaffar*). The second level are reports which were subject to temporary disagreement, but the disagreement was settled by the second generation. The example he gives of this are the reports of wiping over footgear (*khuff*s). The one who denies such reports is declared erroneous and possibly sinful, but not astray. The lowest level are reports which were subject to disagreement in every generation. Whoever upholds truth to be preponderant in these reports may practice them and declare opponents erroneous, but not sinful. This breakdown is insightful as it helps qualify al-Sarakhsī's previous explanation. Although he used the term 'consensus' when explaining why the *mashhūr* report enjoys a special epistemic status, his discussion here shows that only the first two levels of *mashhūr* report can be subject to consensus, while reports from the third level can be subject to much disagreement, at times in every generation, and still be considered *mashhūr*. The distinguishing trait is thus the presence of scholarly acceptance, not scholarly agreement.

The only other indicator of further nuance to the topic is in the examples of *mashhūr* reports that these books provide. Fakhr al-Islām gives three examples; Abū al-Yusr and al-Sarakhsī both give five. Most of these reports can easily be identified as being well-known amongst jurists, and were followed by all of the classical schools of law (*madhhab*s), such as the reports of stoning the

21 This is also presented in al-Jaṣṣāṣ, *al-Fuṣūl fi-al-uṣūl*, ed. ʿAjīl Jāsim al-Nashmī, 4 vols. (Kuwait: Wizārat al-Awqāf wa-al-Shuʾūn al-Islāmiyya, 1985–1994), 3:48–9, where Ibn Abān is quoted for giving three levels to '*ḥadīth*s' without any explicit reference to the '*mashhūr*'. However, al-Jaṣṣāṣ mentions this within his discussion of *al-qism al-thānī min qismay al-tawātur*, his term for the *mashhūr* report.

adulterer, wiping over footgear, the claiment's bearing the burden of proof, and identifying the six items[22] whose unequal exchange is considered usury (*ribā*). One of Fakhr al-Islām's three examples, however, stands out. It is the case of having to fast consecutively for three days upon violating an oath. He does not quote the report in question or indicate where it can be found. This particular case is not one agreed upon by the schools of law, and Ḥanafī commentators agree that this ruling is based on the Qurʾānic variant attributed to ʿAbd Allāh b. Masʿūd (d. 32/652–3), as mentioned explicitly by Fakhr al-Islām elsewhere in his work, where he describes this Qurʾānic variant as an example of a *mashhūr* report—as it was not conveyed by *tawātur*.[23] This provides our first indication of the label *mashhūr* being given to a primarily Kufan phenomenon.

The Qurʾānic variant of Ibn Masʿūd was said to be recited widely in Kufa, even after the establishment of ʿUthmān's (d. 35/656) *muṣḥaf* and the burning of opposing codices. The Kufan jurist Ibrāhīm al-Nakhaʿī (d. 96/714) reportedly said, "They would teach us—when we were in the *kuttāb*[24]—the *ḥarf* of ʿAbd Allāh just as they would teach the *ḥarf* of Zayd (d. 45/665–6),"[25] where the *ḥarf* of Zayd is a reference to the ʿUthmānic *muṣḥaf* that was presided over by Zayd b. Thābit. Irrespective of whether al-Nakhaʿī really uttered these words, the codex of Ibn Masʿūd was clearly a Kufan phenomenon and is treated by Ḥanafī jurists as a *mashhūr* report.[26] This is a significant, although solitary, indication that reports well-known only in Kufa could be considered *mashhūr*.[27]

This is the most we can extract from the treatment of the topic in our three texts. We have seen them agree that *mashhūr* reports may modify Qurʾānic verses, like *mutāwatir* reports, and agree, in some cases explicitly and in others implicitly, that what makes a report *mashhūr* is the acceptance and practice of the learned from the earliest generations of Muslims. Although they variably attempt to ground the topic in notions of *tawātur* and *ijmāʿ*, these are not presented as essential traits. We will now broaden our investigation of the topic by studying reports identified as being *mashhūr* in works of legal commentary.

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22 Gold, silver, dates, wheat, salt and barley.

23 Fakhr al-Islām, *Uṣūl*, 133.

24 The *kuttāb* was a primary school where children learnt the Qurʾān and writing. See *Encyclopaedia of Islam*, 2nd ed., s.v. "Kuttāb" by J.M. Landau.

25 Al-Jaṣṣāṣ, *al-Fuṣūl*, 1:198–9.

26 Ibid. See also al-Sarakhsī, *al-Mabsūṭ*, 30 vols. (Cairo: Maṭbaʿat al-Saʿāda, 1324/1906–7; reprint, Beirut: Dār al-Maʿrifa, 1993), 3:75.

27 For a study of arguments Ḥanafī jurists developed to uphold their reliance on this variant, see Ramon Harvey, "The Legal Epistemology of Qur'anic Variants: The Readings of Ibn Masʿūd in Kufan *fiqh* and in the Ḥanafī *madhhab*," *Journal of Qur'anic Studies*, 19.1 (2017): 72–101.

3 Searching for Kufa: Examples of *Mashhūr* Reports in Legal Commentaries

This section presents an initial exploration of the hypothesis that the *mashhūr* report sometimes simply refers to Kufan precedent. For this purpose, reports described as *mashhūr* were gathered from three leading early classical works of legal commentary by Ḥanafīs who belonged to the milieu of our three *uṣūl* authors: al-Marghīnānī's (d. 593/1196–7) *al-Hidāya*,[28] al-Kāsānī's (d. 587/1191) *Badāʾiʿ al-ṣanāʾiʿ*,[29] and al-Sarakhsī's *al-Mabsūṭ*. I present here a study of some reports identified as *mashhūr* in these works that were used to uphold Ḥanafī opinions not typically held by other schools of law, or were identifiably Kufan by being based on the codex of Ibn Masʿūd, a Kufan phenomenon considered a *mashhūr* report, as mentioned above. These reports were then traced in early works documenting juristic precedent—primarily the two *Muṣannaf*s of ʿAbd al-Razzāq (d. 211/827) and Ibn Abī Shayba (d. 235/845), *Ikhtilāf al-fuqahāʾ* of Muḥammad b. Naṣr al-Marwazī (d. 294/907?) and *Ikhtilāf al-ʿulamāʾ* of al-Ṭaḥāwī (d. 321/933) (preserved in an abridgement by al-Jaṣṣāṣ)—to investigate which regions were associated with practicing these reports. This is an initial exploration with only eight reports presented. The results show merit in the hypothesis and encourage a more expansive exploration.

1. The case of laughter in prayer. We are told that this nullifies ritual ablutions in accordance with the *mashhūr* report, "Whoever laughed among you, let him repeat his ablutions and prayer."[30] However, this report appears far from being a point of consensus or vast transmission. The chains of transmission show that it was a *ḥadīth* narrated by Basrans—primarily

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28 He studied under Najm al-Dīn ʿUmar al-Nasafī (d. 537/1142), the student of Abū al-Yusr (Ibn Abī al-Wafāʾ, *al-Jawāhir al-muḍiyya*, 2 vols. [Hyderabad: Majlis Dāʾirat al-Maʿārif al-Niẓāmiyya, 2331/1913–14], 1:394–5), and under Abū al-Maʿālī Ziyād b. Ilyās, the student of Fakhr al-Islām (Ibid., 1:245), and under al-Ṣadr al-Shahīd ʿUmar b. Māza (d. 536/1141), who studied under his father ʿAbd al-ʿAzīz b. Māza (d. *c.* 495/1101), the student of al-Sarakhsī (Ibid., 1:391, 560).

29 Al-Kāsānī's teachers were peers of our *uṣūl* authors, although I could not find a direct chain to them. His teacher ʿAlāʾ al-Dīn al-Samarqandī (d. 450/1058–9) was the student of Abū al-Muʿīn al-Nasafī (d. 508/1115), who was, along with Abū al-Yusr al-Bazdawī, a teacher of Najm al-Dīn ʿUmar al-Nasafī (al-Dhahabī, *Tārīkh al-Islām*, ed. ʿUmar ʿAbd al-Salām al-Tadmurī, 52 vols. [Beirut: Dār al-Kitāb al-ʿArabī, 1993], 35:213–4). ʿAlāʾ al-Dīn al-Samarqandī was also the teacher of Ḍiyāʾ al-Dīn Muḥammad b. al-Ḥusayn, a teacher of al-Marghīnānī, who, we have seen, was directly connected to each of our *uṣūl* authors (Ibn Abī al-Wafāʾ, *al-Jawāhir*, 2:243).

30 Al-Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-sharāʾiʿ*, ed. ʿAbd al-Jawwād Khalaf, 7 vols. (Beirut: al-Maṭbaʿa al-Jamāliyya, 1986), 1:32.

Abū al-ʿĀliya (d. 90/709 or 93/711–2), and also al-Ḥasan al-Baṣrī (d. 110/728) and Maʿbad al-Juhanī (d. 80/699)[31]—which then became popular among Kufan jurists. Al-Marwazī ascribes this opinion uniquely to the Kufans,[32] and only Kufan and Basran authorities are named for holding this position, with the one exception of the Syrian ʿAbd al-Raḥmān al-Awzāʿī (d. 157/774). In Kufa, we are told it was the position of Ibrāhīm al-Nakhaʿī, Sufyān al-Thawrī (d. 161/777?), Abū Ḥanīfa, and ʿĀmir al-Shaʿbī (d. 104/722–3), according to a report in Ibn Abī Shayba with a conflicting report of al-Shaʿbī's position in ʿAbd al-Razzāq. In Basra, it was upheld by ʿUbayd Allāh b. al-Ḥasan (d. 168/784–5), al-Ḥasan al-Baṣrī and Muḥammad b. Sīrīn (d. 110/729). Of the four Sunni legal schools, only the Ḥanafī school upholds this ruling.[33]

2. The permissibility of performing ritual ablutions with *nabīdh*, a fermented date-beverage. This is said to be established by a *mashhūr* report[34] which tells of the Prophet's performing ablutions from *nabīdh* on the *laylat al-jinn*, when the Prophet went, in the company of ʿAbd Allāh b. Masʿūd, to converse with the jinn. We are told that the permissibility of performing ablutions with *nabīdh* was upheld by ʿAlī b. Abī Ṭālib (d. 40/661),[35] Ḥumayd al-Ruwāsī (d. 192/807–8) and Abū Ḥanīfa of the Kufans, Abū al-ʿĀliya of the Basrans and ʿIkrima (d. 105/723–4) of the Meccans. Of the legal schools, only the Ḥanafī school upholds this ruling.[36]

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31 Al-Dāraquṭnī, *Sunan al-Dāraquṭnī*, ed. Shuʿayb al-Arnaʾūṭ *et al.*, 5 vols. (Beirut: Muʾassasat al-Risāla, 2004), 1:301–14.

32 Al-Marwazī, *Ikhtilāf al-fuqahāʾ*, ed. Muḥammad Ṭāhir Ḥakīm (Riyadh: Aḍwāʾ al-Salaf, 2000), 1:114.

33 Ibn Abī Shayba, *al-Muṣannaf*, ed. Muḥammad ʿAwwāma, 26 vols. (Jeddah: Dār al-Qibla and Damascus: Muʾassasat ʿUlūm al-Qurʾān, 2006), 3:311–12; ʿAbd al-Razzāq, *al-Muṣannaf*, ed. Ḥabīb al-Raḥmān al-Aʿẓamī, 11 vols. (Beirut: al-Maktab al-Islāmī, 1982), 2:376–78; al-Jaṣṣāṣ, *Mukhtaṣar Ikhtilāf al-ʿulamāʾ*, ed. ʿAbd Allāh Nadhīr Aḥmad, 5 vols. (Beirut: Dār al-Bashāʾir al-Islāmiyya, 2007), 1:161–2; Ibn Qudāma, *al-Mughnī*, ed. Ṭāhā Muḥammad al-Zaynī, 10 vols. (Cairo: Maktabat al-Qāhira, 1389/1968), 1:131. I refer to Ibn Qudāma's (d. 620/1223) *al-Mughnī* for Aḥmad b. Ḥanbal's opinions, which are often omitted from the consulted works.

34 Al-Marghīnānī, *al-Hidāya*, ed. Ṭalāl b. Yūsuf, 4 vols. (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 2000), 1:27.

35 I include ʿAlī as a Kufan authority, as he settled in Kufa and was a leading authority upheld by Kufan jurists in justifying their practice. Schacht presents ʿAlī as the authority usually upheld to support opinions within Kufa that diverged from popular Kufan doctrine: Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1982), 33–4.

36 Ibn Abī Shayba, *al-Muṣannaf*, 1:324–5; ʿAbd al-Razzāq, *al-Muṣannaf*, 1:179; al-Jaṣṣāṣ, *Mukhtaṣar*, 1:129; Ibn Rushd, *Bidāyat al-mujtahid wa-nihāyat al-muqtaṣid*, 4 vols. (Cairo: Dār al-Ḥadīth, 2004), 1:39.

Al-Kāsānī (d. 587/1191) presents an alternative *mashhūr* report to justify this practice. He quotes the Basran Abū al-ʿĀliya, who relates that he was once on a ship with a group of Companions, and that, when their water was consumed, some of them performed ablutions with *nabīdh* out of dislike for using sea water,[37] while others performed ablutions with sea water out of dislike for using *nabīdh*. Interestingly, al-Kāsānī presents this as a case of consensus (*ijmāʿ*), as all saw the permissibility of *nabīdh* and differed only on whether it should be used in the presence of sea water. Furthermore, he states, "With this, it is clear that this report has come in a manner that is well-known (*shuhra*) and widespread (*istifāḍa*), since the Companions practiced it and received it with acceptance, so it leads to inferential knowledge (*ʿilm istidlālī*)."[38] We can note in this passage a very loose application of the term *ijmāʿ* to facilitate the identification of this report as being *mashhūr* simply from its mentioning the practice of some Companions.

3. The case of raising hands only at the beginning of the prayer, and not when moving into the bowing position or when rising from it. This is said to be based on a *mashhūr* report: "Hands are not raised except in seven places: when opening the prayer," and then six places all connected to the Hajj pilgrimage.[39] Interestingly, this 'well-known' report is used to justify a practice almost uniquely associated with the Kufans. Al-Marwazī quotes al-Awzāʿī as saying, "I found the people of Hijaz, Sham, and Iraq—except the Kufans—raising their hands when starting the prayer, when bowing, and when raising heads from bowing."[40] To indicate how widespread it was in Kufa, al-Ṭaḥāwī quotes the Kufan Qurʾān reciter Abū Bakr b. ʿAyyāsh (d. 193/809) as saying, "I have never seen a *faqīh* raise his hands except at the beginning of the prayer."[41] The Kufan Abū Isḥāq al-Sabīʿī (d. 139/756–7) ascribed this practice to the companions of ʿAlī and Ibn Masʿūd.[42] The individual scholars named in the consulted sources for only raising their hands at the beginning of the prayer are the Kufans ʿAlī b. Abī Ṭālib, ʿAbd Allāh b. Masʿūd, ʿAlqama b. Qays (d. 62/681–2), al-Aswad b. Yazīd (d. 75/694–5), Abū Isḥāq al-Sabīʿī, Ibrāhīm al-Nakhaʿī, Khaythama b. ʿAbd al-Raḥmān al-Madhḥijī (d. *c.* 90/708–9), ʿĀmir al-Shaʿbī

37 The permissibility of performing ritual ablutions with sea water was debated in the formative period: see, for example, ʿAbd al-Razzāq, *al-Muṣannaf*, 1:93–6.

38 Al-Kāsānī, *Badāʾiʿ*, 1:16.

39 Al-Sarakhsī, *al-Mabsūṭ*, 1:14.

40 Al-Marwazī, *Ikhtilāf*, 129.

41 Al-Jaṣṣāṣ, *Mukhtaṣar*, 1:199.

42 Ibn Abī Shayba, *al-Muṣannaf*, 2:416.

(d. 104/722–3), Sufyān al-Thawrī, Ibn Abī Laylā (d. 148/765), al-Ḥasan b. Ṣāliḥ b. Ḥayy (d. 169/785–6) and Abū Ḥanīfa. Ibn Abī Shayba also reports this practice from ʿUmar b. al-Khaṭṭāb (d. 23/644) and his son ʿAbd Allāh b. ʿUmar (d. 73/692–3). However, the ascription of this practice to these two Medinan authorities requires further investigation as only Kufans narrate this practice from ʿUmar,[43] and as the one narration to this effect from ʿAbd Allāh b. ʿUmar contradicts the several narrations from him to the opposite effect.[44] Of the other *madhhab* imams, both al-Shāfiʿī (d. 204/820) and Aḥmad b. Ḥanbal (d. 241/855) held that hands are raised before and after bowing in the prayer, while al-Ṭaḥāwī and al-Marwazī present conflicting narrations of the position of Mālik b. Anas from his students.[45]

4. The case of a woman praying next to a man in a group prayer. There is a statement of ʿAbd Allāh b. Masʿūd, presented as a *mashhūr* report, where he said of women in the prayer, "Send them back from whence God has sent them back."[46] This report is used to show that a woman praying next to a man will invalidate his prayer unless he indicates to her to step back. The chains of narrators from Ibn Masʿūd are Kufan,[47] and only the Ḥanafī school has affirmed this ruling. The only other jurist associated with this position in the consulted sources is the Kufan al-Ḥasan b. Ḥayy.[48]
5. The case of pre-emption (*shufʿa*) of a sale of property awarded to the neighbor living adjacent to it. This right is awarded to the neighbor only by the Ḥanafī school. In this regard, al-Sarakhsī tells us that the Ḥanafīs followed the *mashhūr* reports that attest to this.[49] The consulted sources name only Kufans, some Basrans and one Meccan for holding this position. The Kufans are ʿAlī, Ibn Masʿūd, ʿAmr b. Ḥurayth (d. 85/704–5),

43 Ibid., 2:417.

44 Ibid., 2:417; ʿAbd al-Razzāq, *al-Muṣannaf*, 2:67.

45 Ibn Abī Shayba, *al-Muṣannaf*, 2:414–7; ʿAbd al-Razzāq, *al-Muṣannaf*, 2:67–71; al-Jaṣṣāṣ, *Mukhtaṣar*, 1:199; al-Marwazī, *Ikhtilāf*, 128–31; Ibn Qudāma, *al-Mughnī*, 1:358. On the internal Mālikī debate regarding raising hands in prayer, see M.I. Fierro, "La polémique à propos de *rafʿ al-yadayn fī l-ṣalāt* dans al-Andalus," *Studia Islamica*, 65 (1987): 69–90.

46 Al-Marghīnānī, *al-Hidāya*, 1:57–8.

47 Ibn Khuzayma, *Ṣaḥīḥ Ibn Khuzayma*, ed. Muḥammad Muṣṭafā al-Aʿẓamī, 4 vols. (Beirūt: al-Maktab al-Islāmī, 2003), 3:99; al-Ṭabarānī, *al-Muʿjam al-kabīr*, ed. Ḥamdī b. ʿAbd al-Majīd al-Salafī, 25 vols. (Cairo: Maktabat Ibn Taymiyya, 1983), 9:296.

48 Al-Jaṣṣāṣ, *Mukhtaṣar*, 1:266. Behnam Sadeghi suggests that this topic, which he refers to as the 'adjacency rule', was based originally on Basran doctrine pertaining to women's purity: Behnam Sadeghi, *The Logic of Lawmaking in Islam: Women and Prayer in the Legal Tradition* (Cambridge: Cambridge University Press, 2013), 50–6. However, none of the sources consulted in this study name a Basran authority for upholding this particular rule.

49 Al-Sarakhsī, *al-Mabsūṭ*, 14:94.

Shurayḥ (d. 87/705–6?),[50] Ibrāhīm al-Nakhaʿī, al-Shaʿbī, Ibn Shubruma (d. 144/761–2), Sufyān al-Thawrī, al-Ḥasan b. Ḥayy and Abū Ḥanifa; the Basrans are Qatāda (d. 117/735–6?) and al-Ḥasan, and the Meccan is Ṭāwūs b. Kaysān[51] (d. 105/724 or 106/725).[52] The imams of the other *madhhab*s all denied the right of *shufʿa* for the neighbor.[53]

A sub-set of the *mashhūr* report, as mentioned above, is the Qurʾānic variant attributed to ʿAbd Allāh b. Masʿūd. The following are some of the legal cases said to be based on his codex. Some of these positions were widely upheld, others were upheld only in Iraq.

6. The case of awarding maintenance to a wife given a final divorce (*mabtūta/muṭallaqa thalāthan*). The ʿUthmānic *muṣḥaf* reads on the topic of maintenance, "Lodge them where you lodge according to your means." (Qurʾān, 65:6) Ibn Masʿūd's codex reads, "Lodge them where you lodge *and spend on them* according to your means."[54] Accordingly, many Kufan jurists awarded a woman maintenance payments after a final divorce, including ʿAbd Allāh b Masʿūd, Shurayḥ, Ibrāhīm al-Nakhaʿī, Sufyān al-Thawrī, al-Ḥasan b. Ḥayy, and Abū Ḥanīfa.[55] Abū ʿĪsā al-Tirmidhī (d. 279/892) ascribes this position to "Sufyān and the people of Kufa".[56] The only non-Kufan mentioned in the consulted sources to uphold this opinion is ʿUmar b. al-Khaṭṭāb (interestingly, this position of his is

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50 The wording of Shurayḥ's statement is unclear. He says, "The partner [in the property] has a greater right than the *shafīʿ*, and the *shafīʿ* has a greater right than other than him": ʿAbd al-Razzāq, *al-Muṣannaf*, 8:78. It is unclear because the word *shafīʿ* includes everyone who has the right to pre-emption, not just the neighbor. However, as he contrasts it with the partner and as ʿAbd al-Razzāq adds this report to a section entitled *bāb al-shufʿa bi-al-jiwār wa-al-khalīṭ aḥaqq* ("Chapter regarding pre-emption being awarded to the neighbor, although the partner is more deserving"), it can confidently be assumed that by *shafīʿ* he means neighbor.

51 Ṭāwūs was a Yemeni scholar whom I count as Meccan because the main teaching circle to which he was attached was the Meccan circle of the Companion ʿAbd Allāh b. ʿAbbās: al-Dhahabī, *Siyar aʿlām al-nubalāʾ*, 5:38–9.

52 Ibn Abī Shayba, *al-Muṣannaf*, 11:485–6, 534–9; ʿAbd al-Razzāq, *al-Muṣannaf*, 8:77–9, 81; al-Jaṣṣāṣ, *Mukhtaṣar*, 4:239–40. I have ignored reports where Companions and Successors are quoted as narrating the Prophetic *ḥadīth* awarding *shufʿa* to the neighbor, as these are not explicit in stating the opinions of these Companions and Successors, themselves. I have, however, included ʿAlī and Ibn Masʿūd, as their statement, "The Prophet judged that the neighbor has the right to *shufʿa*," is more of a statement to uphold a legal position than a *ḥadīth* transmission.

53 Ibid.; Ibn Qudāma, *al-Mughnī*, 5:229.

54 Al-Kāsānī, *Badāʾiʿ*, 3:210.

55 Ibn Abī Shayba, *al-Muṣannaf*, 10:79–81 (containing conflicting narrations from the Kufan al-Shaʿbī); ʿAbd al-Razzāq, *al-Muṣannaf*, 7:18–27; al-Jaṣṣāṣ, *Mukhtaṣar*, 2:399–400.

56 Al-Tirmidhī, *Sunan, abwāb al-ṭalāq wa-al-liʿān* 11, *bāb mā jāʾa fī al-muṭallaqa thalāthan lā suknā lahā wa-lā nafaqa*, no. 1180.

conveyed only by Kufan narrators).[57] Of legal schools, only the Ḥanafīs awarded maintenance to a woman after a final divorce; al-Shāfiʿī and Mālik awarded her residence without maintenance, and Aḥmad denied her both maintenance and residence.[58]

7. The case of a man who has sworn not to approach his wife for four or more months, an oath known as *īlāʾ*. The ʿUthmānic *muṣḥaf* relates on this topic, "For those who take an oath for abstention from their wives, a waiting for four months is ordained; if then they return, God is Oft-forgiving, Most Merciful." (Qurʾān, 2:226) Ibn Masʿūd's codex adds to this latter clause, "If then they return *in that* [*period*] (*fī-hinna*),"[59] implying that the one swearing this oath (the *mūlī*) may only return to his wife within this four-month period, and not after. The former wording, without this extra condition, supports the opinion of many of the Companions, who said that the one swearing this oath, the *mūlī*, is stopped (*yūqafu*) *after* this period and asked of his intention; if he wishes to return to his wife, he may, and if he does not, then he is told to divorce her. Al-Bayhaqī (d. 458/1066) states, "Most of the Companions have said that the *mūlī* is to be stopped [and asked, after the period], so their opinion is more fitting than the opinion of one or two."[60] Who are the one or two to whom al-Bayhaqī refers? These are the Companions ʿAbd Allāh b. Masʿūd, teacher of the Kufans, and ʿAbd Allāh b. ʿAbbās (d. 68/687–8), teacher of the Meccans, in some narrations from him. According to this latter opinion, attested to by Ibn Masʿūd's codex, the *mūlī* must return to his wife within the four-month period; if he does not do so until the four-month period elapses, his wife is automatically divorced from him. Identifying which of these two opinions was followed by prominent Companions and Successors is not easy as many are claimed by both camps in what seems a contentious issue in the formative period.[61] Al-Bayhaqī tells us it is the Iraqis who followed the latter position. Those named for holding this position in the consulted sources are the Kufans Ḥammād b. Abī Sulaymān (d. 120/737–8), al-Ḥakam b. ʿUtayba (d. 115/733–4), Ibn Shubruma,[62] Ibn Abī Laylā, Sufyān al-Thawrī, and Abū Ḥanīfa; and the Basrans al-Ḥasan,

57 Ibn Abi Shayba, *al-Muṣannaf*, 10:79–80; ʿAbd al-Razzāq, *al-Muṣannaf*, 7:24.

58 Al-Jaṣṣāṣ, *Mukhtaṣar*, 2:399; Ibn Rushd, *Bidāya*, 3:113.

59 Al-Sarakhsī, *al-Mabsūṭ*, 7:20.

60 Aḥmad b. Farḥ al-Lakhmī, *Mukhtaṣar Khilāfiyyāt al-Bayhaqī*, ed. Dhiyāb ʿAbd al-Karīm, 5 vols (Riyadh: Maktabat al-Rushd, 1997), 4:248.

61 See, for example, the debate over the positions of prominent Companions in ibid., 4:244–8, and al-Jaṣṣāṣ, *Mukhtaṣar*, 2:474–5.

62 Ibn Shubruma held that the automatic divorce after the passage of four months is revocable (*rajʿī*): al-Marwazī, *Ikhtilāf*, 352.

Muḥammad b. Sīrīn and Abū al-Shaʿthāʾ Jābir b. Zayd (d. 93/711–2). The opinion was upheld by scattered supporters in other lands where it did not seem the dominant opinion. These are the Syrians ʿAbd al-Raḥmān al-Awzāʿī[63] and Makḥūl (d. 112/730–1?), the Meccans ʿAṭāʾ (d. 114/732 or 115/733) and ʿIkrima, and the Medinans Muḥammad b. al-Ḥanafiyya (d. 80/699–700 or 81/700–701), Abū Bakr b. ʿAbd al-Raḥmān (d. 49/712–13) and al-Zuhrī (d. 124/742). The imams of the other *madhhab*s all held that the *mūlī* is stopped after four months and asked.[64]

8. The case of fasting three days in expiation for a broken oath. The ʿUthmānic *muṣḥaf* reads,

> God will not take you to task for that which is unintentional in your oaths, but He will take you to task for the oaths which you swear in earnest. The expiation for this is the feeding of ten of the needy with the average of that which you feed your own folk, or the clothing of them, or the liberation of a slave, and for him who finds not (the means to do so) then three days of fasting. (Qurʾān, 5:89)

Ibn Masʿūd's codex adds to the end of this verse, "then three *consecutive* (*mutatābiʿāt*) days of fasting."[65] We are told that this addition is also found in the codex of Ubayy b. Kaʿb (d. 30/650–1).[66] It is thus not a purely Kufan codex, and the opinion finds acceptance across Muslim lands. In Kufa, those who stipulated that such fasts must be consecutive include ʿAlī, Ibrāhīm al-Nakhaʿī, al-Ḥasan b. Ṣāliḥ b. Ḥayy, and Abū Ḥanīfa. In Basra, it was followed by al-Ḥasan. In Mecca it was followed by Mujāhid (d. *c.* 104/722–3), Ṭāwūs, and ʿAṭāʾ, the latter being quoted as saying, "It has reached us from Ibn Masʿūd's codex, 'Whoever does not find (the means), then three consecutive days of fasting,' and thus do we recite it," conceivably a reference to Ubayy's codex. In Egypt, it was followed by al-Layth b. Saʿd (d. 175/791). Of the other *madhhab* imams, Mālik and al-Shāfiʿī permitted these fasts to not be consecutive; the stronger transmission from Aḥmad b. Ḥanbal is that they must be consecutive.[67]

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63 Al-Awzāʿī, like Ibn Shubruma, held that the automatic divorce after the passage of four months is revocable (*rajʿī*): al-Jaṣṣāṣ, *Mukhtaṣar*, 2:474.

64 Ibn Abī Shayba, *al-Muṣannaf*, 10:66–7; ʿAbd al-Razzāq, *al-Muṣannaf*, 6:453; al-Jaṣṣāṣ, *Mukhtaṣar*, 2:474, al-Marwazī, *Ikhtilāf*, 350–2; Ibn Qudāma, *al-Mughnī*, 7:553.

65 Al-Marghīnānī, *al-Hidāya*, 2:320.

66 Ibn Abī Shayba, *al-Muṣannaf*, 7:566.

67 Ibn Abī Shayba, *al-Muṣannaf*, 7:566–7; ʿAbd al-Razzāq, *al-Muṣannaf*, 8:513–14; al-Jaṣṣāṣ, *Mukhtaṣar*, 2:221–2; Ibn Qudāma, *al-Mughnī*, 8:554.

The preceding examples represent a small set of the many reports declared *mashhūr* in Ḥanafī commentaries. What these examples have shown is that, often, reports are termed *mashhūr*—and therefore given authority to qualify and add to established Qurʾānic injunctions—but were really only accepted and practiced among a group of Kufan jurists. At times, our examples have shown that these reports were only well-known amongst the Iraqis, and were championed by a number of jurists in both Kufa and Basra. As such, the category of the *mashhūr* report was often used for reports that had only a parochial acceptance, or, in other words, were cases of clear precedent only in the region of Kufa, or the region of Iraq in general. This is, of course, not always the case, as many reports termed *mashhūr* were subject to widespread juristic practice across Muslim lands. As this investigation has drawn directly from both works of *uṣūl al-fiqh* (legal theory) and *furūʿ al-fiqh* (substantive law), we will reflect briefly on the relationship between these two fields.

4 *Uṣūl* and *Furūʿ*

When the two disciplines of *uṣūl* and *furūʿ* are investigated together, it is usually in the context of assessing the core claim of *uṣūl al-fiqh* literature, namely, that it presents the very set of principles applied by jurists in formulating the rules found in Islamic substantive law. Some scholars have argued that *uṣūl* principles really did formulate these rules, although an increasing number of voices argue that they did not, but rather offered a means for justifying the rules after their formulation.[68] The current investigation underscores the im-

68 A prominent proponent of *uṣūl al-fiqh*'s ability to generate law, in recent decades, is Wael Hallaq, in several of his publications, including, "Considerations on the Function and Character of Sunnī Legal Theory," *Journal of the American Oriental Society*, 104.4 (1984): 679–89, where he presents "discovering the law of God" as one of *uṣūl al-fiqh*'s primary functions. Studies suggesting that the principles of *uṣūl al-fiqh* served not to produce law, but to justify already existent statements of law include Sherman Jackson, "Fiction and Formalism: Toward a Functional Analysis of *Uṣūl al-Fiqh*," in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (Leiden: Brill, 2002), 177–201; Mohammed Fadel, "'*Istiḥsān* is Nine-Tenths of the Law': The Puzzling Relationship of *Uṣūl* to *Furūʿ*," in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (Leiden: Brill, 2002), 161–76; Behnam Sadeghi, *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition* (Cambridge: Cambridge University Press, 2013), esp. 34–39. See also Robert Gleave's introduction to Aron Zysow, *The Economy of Certainty*, xii–xiii, for a brief survey of this debate.

portance of stepping beyond that debate to ask how *uṣūl al-fiqh* can offer a deeper understanding of the epistemological underpinnings of Islamic law.

I have argued elsewhere that the myriad discussions of *uṣūl al-fiqh* often reflect a set of epistemological premises that informed how jurists conceived the larger legal project.[69] These premises, once identified from a careful reading of *uṣūl al-fiqh* literature, can facilitate a deeper analysis of the layers of argument found in legal commentaries, giving greater insight into how jurists understood their own legal tradition and applied the legal epistemology of their schools. And this is independent of whether the founding imams applied the principles of *uṣūl al-fiqh* or not. However, as these epistemological premises were formulated to make sense of a set of legal cases believed to be transmitted from these imams, they often seem to reflect the insights of these imams. This is certainly what appears to be the case in the current investigation.

The topic of the *mashhūr* report reflects the understanding that the founding legal cases of this school, those that were believed to issue from Abū Ḥanīfa and his students, were produced by a precedent-based approach to the legal project. Where Prophetic reports were supported by early juristic precedent, they were awarded highest epistemic stature, in comparison to reports not buttressed by precedent. The category of the *mashhūr* report was created to reflect this understanding.

Were the jurists of the early classical Ḥanafī school conscious of this category being used to sometimes reflect specifically Kufan or Iraqi precedent? The answer to this is unclear. Their theorizing of this category does not suggest a Kufan interest. This appears to reflect Abū Ḥanīfa's own lack of theorizing the importance of Kufa, unlike Mālik's theorizing the normativity of Medinan precedent. Joseph Schacht has observed that Abū Ḥanīfa stood out from his Medinan contemporaries by his theorizing the law on more universal considerations than local consensus.[70] The category of the *mashhūr* report, whether this term itself was known or not in Abū Ḥanīfa's circle, appears to reflect an actual concern in Abū Ḥanīfa's circle for grounding the law in a theory that was universal in form, yet upheld the weight of local precedent.

If we can suggest that the *mashhūr* report seems to reflect a category as old as Abū Ḥanīfa's legal cases, then why the differences in the precise theorization of the topic? The differences we came across in the three *uṣūl* texts, specifically the varied attempts to employ the concepts of *ijmāʿ* and *tawātur*, should be

69 Sohail Hanif, "A Theory of Early Classical Ḥanafism."

70 Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 84–7.

seen as attempts to ground this category of legal theory in the strongest possible set of arguments to uphold it as a valid means to discern the law of God. Yet, these very *uṣūl* authors indicated that these qualities of *ijmāʿ* and *tawātur* do not always apply. We may suggest that the differences we encountered in these works of legal theory were a result of *uṣūl* authors trying to present the *ideal* form of the *mashhūr* report, the epistemically strongest member of the *mashhūr* category, while recognising that there also existed weaker, non-ideal forms of *mashhūr* report.

This apparent interest of *uṣūl al-fiqh* authors—that is, presenting the categories of legal theory in their strongest possible forms to strengthen the foundations of legal theory—is attested to by other examples. One such example is Fakhr al-Islām's definition of the *mutawātir* report, elsewhere in his work, where he makes it appear a condition of such reports that they be narrated by morally upright narrators found in different lands. This, ʿAlāʾ al-Dīn al-Bukhārī tells us in his commentary on *Uṣūl al-Bazdawī*, is not essential to the *mutawātir* report, as the large number of narrators relieves us of having to investigate each narrator's uprightness and because sufficiently large numbers might be reached in a single land. He then notes,

> Perhaps the *shaykh* [Fakhr al-Islām] only pointed to these meanings because they are more effective in cutting off the possibility [of error], and more decisive in forcing the opponent [to acknowledge this position] (*aẓhar fī al-ilzām ʿalā al-khuṣūm*), not that they are, in reality, conditions, such that acquiring knowledge from the *mutawātir* report would rest on these.[71]

This interest in upholding the *ideal* case of these legal-theoretical categories appears the best explanation for the differences in attempts to ground the topic of the *mashhūr* report, despite agreement on the practical purpose this category served—abrogating Qurʾānic verses—and its main underlying meaning—to give greatest weight to reports that correspond to the practice of early jurists.

A major question that remains pertains to the identification of particular reports as being *mashhūr*. The current essay followed the identification found in prominent legal commentaries from the early classical period. Further investigation is required to discover the sources for this identification. Is there a tradition going back to Abū Ḥanīfa's circle concerning which reports were to be deemed *mashhūr*? If not, then how were reports identified as being from

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71 Al-Bukhārī, *Kashf al-asrār*, 2:361.

this category? Regarding this latter question, two possibilities arise. The first is that *madhhab* jurists investigated precedent, perhaps in a manner similar to the investigation above, and identified as *mashhūr* those reports that reflect early juristic precedent. The second possibility is that jurists had no actual need to identify which reports support early precedent. Instead, they needed only to observe which reports were given great weight in Abū Ḥanīfa's legal cases, and then to conclude that their being given such weight means that they must belong to the *mashhūr* category. This latter possibility would imply that, for classical-era jurists, the *mashhūr* report served primarily as a rational category independent of historical considerations; thus any report given great weight in this legal system was *de facto mashhūr*. (If this latter possibility is found to be accurate, then the frequent correspondence of its conclusions to actual Iraqi precedent would prove that there is indeed a direct relation between the classical theory of the *mashhūr* report and the importance of juristic precedent to Abū Ḥanīfa's circle.) This puzzle regarding the actual identification of specific *ḥadīth*s as being *mashhūr* is the most important area for further investigation.

5 Conclusion

This essay has studied a particular category from *uṣūl al-fiqh*, namely, *al-ḥadīth al-mashhūr*, and has shown how it reflects an interest, on the part of Ḥanafī authors, in awarding highest consideration to the precedent of early jurists. Leading works of Ḥanafī legal theory from the fifth/eleventh century were studied to show that each of these agreed on the basic function of the *mashhūr* report—to modify Qurʾānic injunctions—and its underlying meaning—to give greatest weight to reports that were practiced by those learned in law from the earliest generations of Muslims. Eight examples of peculiar Ḥanafī positions said to be based on *mashhūr* reports were studied, showing that this category was at times employed to support reports only practiced widely in Kufa, specifically, or in Iraq, in general. This legal-theoretical category awarded highest authority to the early masters of jurisprudence on whose teachings Abū Ḥanīfa based much of his thought, allowing this category to serve as a parallel to the Mālikī notion of *ʿamal ahl al-Madīna* while being framed in more universal terms, reflecting the more universal outlook of Abū Ḥanīfa, himself. This essay has shown that the categories of legal theory can offer valuable insights into larger questions pertaining to the epistemological underpinnings of Islamic legal thought. However, careful analysis is required to identify the wider implications of these categories, as they can be presented only in their

epistemologically strongest forms in *uṣūl* works. For this, a study of how they are employed in works of legal commentary can be insightful.

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CHAPTER 7

Taking a Theological Turn in Legal Theory

Regional Priority and Theology in Transoxanian Ḥanafī Thought

Dale J. Correa

Abū ʿl-Ḥasan ʿAlī b. Saʿīd al-Rustughfanī, a student of the theologian Abū Manṣūr al-Māturīdī (d. 333/944) related that a pious man had a dream in which "he saw Abū Naṣr al-ʿIyāḍī (the teacher of al-Māturīdī), as if [he were holding] in his hands a plate of roses and another of sweetmeats. He [Abū Naṣr] presented the plate of roses to Abū ʿl-Qāsim al-Ḥakīm [al-Samarqandī], and the plate of sweetmeats to Abū Manṣūr al-Māturīdī …[through this act,] Abū Manṣur was blessed by God with knowledge of the truth, and Abū ʿl-Qāsim al-Ḥakīm was blessed by God with wisdom."[1] The anecdote is an example of the conceptualization of authority specific to the Ḥanafīs of Transoxania, located in present-day Uzbekistan. By establishing local, Transoxanian scholars as authorities in theology (*kalām*, "the truth") and the statements of the Prophet Muḥammad (*ḥadīth*, "wisdom"), the anecdote demonstrates the importance of regional, local identity to the authority structure of the Ḥanafī school in Transoxania. More widely-known Ḥanafī scholars from Iraq or Egypt could have been chosen for the anecdote, and so it is significant that Transoxanians choose to locate authority among themselves.

In this article, I focus on two characteristics of the mature, post-formative Transoxanian Ḥanafī school. The first is the centrality of Transoxanian scholarly identity in the post-formative period of the Ḥanafī school in the region, which I address by treating Transoxania as an intellectual center at a geographic periphery. I seek to turn our attention to a factor that tends not to appear in the secondary literature: the priority of the Transoxanians' regional identity (as Ḥanafīs) with Samarqand and *mā warāʾ al-nahr*, the area "beyond the Oxus river," otherwise known as Transoxania. I argue that the Ḥanafīs of Transoxania defined themselves among—not separate from—the larger Ḥanafī school through reference to Samarqand and to Abū Manṣūr al-Māturīdī in a constellation of issues in legal theory (*uṣūl al-fiqh*) with particular theological associations. I contend that in this time period, these scholars should not be considered "Māturīdī," but rather "Ḥanafī-Samarqandī," as the geographic

1 ʿAbd al-Karīm b. Muḥammad al-Samʿānī, *Kitāb al-Ansāb*, edited by ʿAbdallāh ʿUmar al-Bārūdī (Beirut: Dār al-Jinān, 1988): 3:62.

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association is a greater defining factor of their theological—and thus, legal theoretical—commitments than is the figure of al-Māturīdī himself.

The second characteristic is the theological turn. The post-formative scholars place more emphasis than their predecessors have done on the theological principles underlying legal theory. They demonstrate this in their introduction of theological debates and associations into the genre of legal theory writing. This is not to say that earlier periods did not also recognize a connection between the two disciplines; however, the relationship between the two is made explicit by these authors in almost a reactionary manner. I find that the independent institutionalization of legal theory and theology in the early post-formative period that changed the historically fluid relationship between the disciplines became so pronounced that the later post-formative scholars believe it necessary to draw explicit connections in order to relate the disciplines to one another.

1 Background

The nature of Transoxanian intellectual networks beyond the region, and the question of how Transoxanian scholars viewed their participation in an Islamicate intellectual tradition, present unique challenges in that historiographic and prosopographic materials from before the Mongol invasion are few and far between. A preliminary attempt to describe the intellectual networks of Transoxanian scholars of this period by Shahab Ahmed has indicated that they benefited from the work of scholars in other regions, at the very least through their texts if not through personal study.[2] However, this process of influence, as shown by Ahmed, seems to dwindle by the 5th/11th century. This sheds light on why the theological treatise of Abū ʾl-Muʿīn al-Nasafī (d. 508 AH/1114 CE)—the predecessor and teacher of the scholars I will focus on in this article—would have appeared at a low point of outside influence and the rise of a Transoxanian regional tradition.[3]

2 Shahab Ahmed, "Mapping the World of a Scholar in Sixth/Twelfth Century Bukhārā: Regional Tradition in Medieval Islamic Scholarship as Reflected in a Bibliography," *Journal of the American Oriental Society* 120:1 (2000): 41.

3 Wilferd Madelung and Muhammad Tanci have shown how Abū ʾl-Muʿīn al-Nasafī's work professes a thoroughly-articulated Transoxanian theology vigorously distinguishing itself from that of other regions and schools of thought. Wilferd Madelung, "The Spread of Māturīdism and the Turks," in *Actas do IV Congresso de Estudos Árabes e Islâmicos, Coimbra-Lisboa 1968* (Leiden: E.J. Brill, 1971); Muhammed b. Tavît at-Tancî, "Abû Mansûr al-Mâturîdî," *Ankara Üniversitesi İlâhiyât Fakultesi Dergisi* I–II (1955): 3–12.

Furthermore, as theology generally underpins legal theory in the Ḥanafī case,[4] we can locate points of association between the two disciplines. Aron Zysow has explained that there are "two levels of analysis here: the associations that modern scholars may detect and those associations perceived by the theologians and legal theorists,"[5] and it is the latter level of analysis which I undertake in this article. My argument is that the conscious distinction of Ḥanafī-Samarqandī theology from other schools of thought carries over into legal theory through regional priority and the theological turn.

I have chosen to focus on the legal theory of Najm al-Dīn ʿUmar al-Nasafī, Abū ʾl-Thanāʾ Maḥmūd b. Zayd al-Lāmishī, and ʿAlāʾ al-Dīn al-Samarqandī. Najm al-Dīn al-Nasafī, who died in 537 AH/1142 CE, is probably best-known as a theologian and the author of *al-ʿAqāʾid al-Nasafiyya*, a basic creed of the Ḥanafī-Samarqandī theological school that is still popular and taught today. He is not so well-known, however, for his multilingual work in *tafsīr*, legal terminology, *ḥadīth*, astronomy, or for his translation of the Qurʾān into Persian.[6] Most importantly, he is not well-known for his work in legal theory. However, it is now possible with the availability of a relatively unstudied—and in the North American and European case, unknown—manuscript that includes al-Nasafī's work on *uṣūl al-fiqh* to understand his approach to the discipline.[7]

Abū ʾl-Thanāʾ al-Lāmishī, whose *nisba* refers to a village outside of Farghana in what is now Uzbekistan, similarly died toward the end of the first half of the 6th/ 12th century. ʿAbd al-Majīd Turkī, the editor of both al-Lāmishī's *al-Tamhīd li-Qawāʿid al-Tawḥīd* and *Kitāb fī Uṣūl al-Fiqh*, believes al-Lāmishī was still alive when the London manuscript copy of the *Kitāb fī Uṣūl al-Fiqh* was finished in 539/1144.[8] He also suggests that al-Lāmishī studied with Abū ʾl-Muʿīn

4 Dale J. Correa, "Testifying Beyond Experience: Theories of *Akhbār* and the Boundaries of Community in Transoxanian Islamic Thought, 10th–12th Centuries CE" (PhD diss., New York University, 2014), 194–195.

5 Aron Zysow, "Muʿtazilism and Māturīdism in Ḥanafī Legal Theory," in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (Leiden: Brill, 2002), 235.

6 ʿUmar b. Muḥammad Nasafī, *Taysīr al-Tafsīr*, Princeton University Rare Books: Manuscripts Collection; Islamic Manuscripts, Garrett no. 3675Y (among other copies); for legal terminology, *ḥadīth*, astronomy, and other topics, see al-Nasafī's encyclopedia *Maṭlaʿ al-Nujūm wa Majmaʿ al-ʿUlūm* (Tashkent: Biruni Institute, MS 1462 [290 fols., copied 764/1363]); Abū Ḥafṣ Najm al-Dīn ʿUmar Nasafī, *Tafsīr-i Nasafī*, ed. ʿAzīz Allāḥ Juvaynī (Tihrān: Intishārāt-i Bunyād-i Farhang-i Irān, 1353–1354).

7 Najm al-Dīn ʿUmar b. Muḥammad Abū Ḥafṣ al-Nasafī, "Kitāb Taḥṣīl Uṣūl al-Fiqh wa-Tafṣīl al-Maqālāt fīhā ʿalā ʾl-Wajh" in *Maṭlaʿ al-Nujūm wa Majmaʿ al-ʿUlūm* (Tashkent: Biruni Institute, MS 1462 [290 fols., copied 764/1363]).

8 Maḥmūd b. Zayd al-Lāmishī, *Kitāb fī Uṣūl al-Fiqh*, ed. ʿAbd al-Majīd Turkī (Beirut: Dār al-Gharb al-Islāmī, 1995), 16.

al-Nasafī,[9] which would make him a colleague of both Najm al-Dīn al-Nasafī and ʿAlāʾ al-Dīn al-Samarqandī. The structure and content of al-Lāmishī's *Uṣūl al-Fiqh* confirms this suggestion.[10]

ʿAlāʾ al-Dīn al-Samarqandī (d. c. 539 AH/1144 CE) was a jurist, *mufassir*, and theologian who studied with Abū ʾl-Muʿīn al-Nasafī, Abū ʾl-Yusr al-Pazdawī, and Fakhr al-Islām al-Pazdawī.[11] He is best known for his works in *fiqh*, especially the *Tuḥfat al-Fuqahāʾ*; however, his *uṣūl al-fiqh* (*Mīzān al-Uṣūl fī Natāʾij al-ʿUqūl*) was quite influential as well, especially in his time period. The latter is available in manuscript and two editions.[12] It is likely that ʿAlāʾ al-Dīn spent some time in Anatolia accompanying his daughter, Fāṭima, and son-in-law, Abū Bakr al-Kasānī (d. 587/1191), a well-known jurist, before returning to Transoxania.

2 Taking a Theological Turn

The theological turn is marked by al-Nasafī, al-Lāmishī, and al-Samarqandī's acknowledgment that they are integrating theological principles into their works of *uṣūl al-fiqh*. This appears most notably in the introductions to their *uṣūl al-fiqh* works where they lay out their goals and expectations for the study of legal theory. These scholars also label certain *uṣūl al-fiqh* issues "theological matters," which points to their awareness of the distinction and overlap between the disciplines. Lastly, these scholars incorporate theological[13] discussions into their *uṣūl al-fiqh*. Altogether, their approach to integrating theological principles into *uṣūl al-fiqh* challenges the mutual exclusion in what Ibn Khaldūn and many in Islamic Studies consider to be the accepted categorization of Sunnī *uṣūl al-fiqh* into that of the *mutakallimūn* (theologians) and that of the Ḥanafīs. Their approach also shows us, in the words of Zysow, "how *uṣūl*

9 Al-Lāmishī, *Uṣūl al-Fiqh*, 11.

10 Correa, "Testifying Beyond Experience," 189–191.

11 *TDV İslâm Ansiklopedisi*, s.v. "Semerkandî, Alâeddin."

12 Unfortunately, Angelika Brodersen was unaware of these editions for *Encyclopaedia of Islam*, 3rd ed., s.v. "ʿAlāʾ al-Dīn al-Samarqandī." Editions: *Mīzān al-Uṣūl fī Natāʾij al-ʿUqūl*. Edited by Muḥammad Zakī ʿAbd al-Barr. Doha: Wizārat al-Awqāf wa'l-Shu'ūn al-Islāmiyya, Idārat al-Shu'ūn al-Islāmiyya, 1997; *Mizān al-Usūl fī Natāʾij al-ʾUqūl*. Edited by ʿAbd al-Malik ʿAbd al-Raḥmān Asʿad al-Saʿdī. Makka: Jāmiʿat Umm al-Qurā, 1984.

13 "*Wa hiya min masāʾil al-kalām*." Maḥmūd b. Zayd al-Lāmishī, *Kitāb fī Uṣūl al-Fiqh*, ed. ʿAbd al-Majīd Turkī (Beirut: Dār al-Gharb al-Islāmī, 1995), §191.

al-fiqh can contribute in the most direct fashion to our knowledge of Islamic theology" and vice versa.[14]

Al-Samarqandī and al-Nasafī make a point of defining *uṣūl al-fiqh* as "a branch of the science of *kalām*" (*uṣūl al-fiqh wa'l-aḥkām farʿ li-ʿilm uṣūl al-kalām*).[15] *Kalām* here is a double-entendre: based on the references to the Muʿtazila and *ḥadīth* scholars (*ahl al-ḥadīth*) that follow in both works, al-Samarqandī and al-Nasafī mean *kalām* as speculative theology. However, the study of language, and in particular how human beings understand God's message as translated into human language, is also a prominent aspect of their legal theory. Speculative theology came to be known as *kalām* in part because of early theological debates over the nature of God's speech. Thus, within the theological understanding of *kalām*, as well as the manner in which al-Samarqandī and al-Nasafī use it here, the term indicates that legal theory is a branch of speculative theology and the study of language.

It is worth taking a closer look at how al-Samarqandī imagines his legal theory project in order to understand the extent of his conscious integration of theology:

> It was necessary for this area of study that the composition [of this work] be in harmony with the beliefs of the author of the book. Most legal theory works are authored by Muʿtazilī authors who disagree with us [that is, the Transoxanian Ḥanafīs who identify as *ahl al-sunna wa'l-jamāʿa*] in our *uṣūl*, or by the *ahl al-ḥadīth* who disagree with us in the positive law (*furūʿ*). Thus, to depend upon these works will result in errors in the *aṣl* [principle] or in the *farʿ* [legal opinion]. It is evident through reason and revelation (*fī 'l-ʿaql wa'l-sharʿ*) that avoiding both of these situations is necessary.[16]

For al-Samarqandī, the personal theological commitments of the author of a legal theory work affect the way s/he approaches the subject. It is imperative

14 Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Atlanta: Lockwood Press, 2013), 2.

15 Both make extensive use of rhymed prose (*sajʿ*) in their writing styles. Najm al-Dīn ʿUmar b. Muḥammad Abū Ḥafṣ al-Nasafī, "Kitāb Taḥṣīl Uṣūl al-Fiqh wa-Tafṣīl al-Maqālāt fīhā ʿalā 'l-Wajh" in *Maṭlaʿ al-Nujūm wa Majmaʿ al-ʿUlūm* (Tashkent: Biruni Institute, MS 1462 [290 fols., copied 764/1363]), fol. 36a; ʿAlā al-Dīn al-Samarqandī, *Mīzān al-Uṣūl fī Natāʾif al-ʿUqūl*, ed. Muḥammad Zakī ʿAbd al-Barr (Doha: Wizārat al-Awqāf wa'l-Shu'ūn al-Islāmiyya, Idārat al-Shu'ūn al-Islāmiyya, 1997), 2. Future references to al-Samarqandī's *Mīzān al-Uṣūl* will be to this edition.

16 Al-Samarqandī, *Mizān al-Uṣūl*, 2.

for him, then, that his legal theory reflect his theological commitments as a Transoxanian Ḥanafī of the Samarqandī (later, Māturīdī) school of theology. He highlights the direct relationship between law/legal theory and theology: an error in one's principles (*uṣūl*)—which he uses ambiguously to imply that the error can occur in theological or legal principles—causes errors in one's legal reasoning and opinions. Common sense and scripture advise against getting into a situation in which one's principles would negatively affect one's legal reasoning. Therefore, it is necessary for al-Samarqandī to be consistent in applying his principles (especially the theological) for the production of correct legal reasoning in his legal theory.

Such a concern with maintaining consistency between belief and legal reasoning does not come out of a vacuum. Al-Samarqandī explains that it is the successes and failures of his predecessors that inspire him to attempt this novel approach:

> The works of our colleagues on this subject are divided into two categories. The first category satisfies the standards of perfection and accuracy because it was authored by those who gathered together the *furūʿ* and *uṣūl*, and they have immense knowledge in the science of *sharīʿa* and rational proofs. For example, the books titled *Maʾākhidh al-Sharāʾi* and *Kitāb al-Jadal* by the learned, ascetic leader, the head of the *ahl al-sunna*, Abū Manṣūr al-Māturīdī al-Samarqandī,[17] may God have mercy on him; and similar books authored by his teachers and his colleagues, may God have mercy on them. The second category is those works which satisfied a great degree of accuracy, explanation, good order, and structure. These works were authored by those who extracted *furūʿ* from the apparent meaning of revelation. Yet, they lack skill in the intricacies of *uṣūl* in rational proofs. Their approach resulted in the adoption of our opponents' opinions on some issues. The first category was abandoned either due to the difficulty of the expressions and their meanings,[18] or

17 Such references tell us something about these texts by al-Māturīdī, the content of which is unclear from the titles. Najm al-Dīn also refers to the *Maʾākhidh al-Sharāʾi* in his *Taḥṣīl*, and based on the general inclination in the 10th century CE to use the *jadal* method in legal theory, it is likely both texts addressed legal theoretical concerns. On *jadal* as a method, see Ahmed El Shamsy, "The Wisdom of God's Law: Two Theories," in *Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss*, eds. A. Kevin Reinhart, et al. (Leiden: Brill, 2014), 19–37. My thanks go to Ahmed El Shamsy for providing me an early draft of the final article.

18 Even al-Samarqandī has to admit that al-Māturīdī was not the most eloquent writer. His "difficult expressions" plague those who would read his *Kitāb al-Tawḥīd* to this day, and may be the reason why the *Maʾākhidh al-Sharāʾi* and the *Kitāb al-Jadal* have not survived.

> due to a lack of enthusiasm or laziness. The second category has become popular due to the inclination of the jurists to pure jurisprudence, even though some of them suffer some contradiction … However, they tried to perform legal reasoning without complete knowledge of the principles … The late Hanafīs (*muta'akhkhirīn*)[19] who were known for their intelligence, understanding, and knowledge of the two categories, did not author anything on this subject in order to remove this error and inaccuracy. This might be due to valid excuses and plenty of obstacles. Success is a dear thing, and God Almighty gives His power to whom He wills. It is not proper, nor [good] advice, to neglect this matter. There is no excuse for those who are able to address it. So, I took the initiative to complete this matter as a duty and an obligation for myself, to the best of my capacity, despite the humility of my knowledge.[20]

Of the two approaches that al-Samarqandī identifies among his predecessors, the first would have been quite successful were it not for the inadequacy of the language used in those works. He is very aware that students and specialists alike need access to clear and direct expositions of such complex issues. He notes later in the introduction that he designed the *Mīzān* as a summary of a longer and more specialized book on *uṣūl*—what he calls the *mabsūṭ* version of the *Mīzān*[21]—so that beginning and advanced students could benefit from his expertise until they feel inclined to explore the more complex work.[22] It is clear that al-Samarqandī prefers to approach legal theory with a solid foundation in theological principles, and that an entirely jurisprudential method, in his opinion, inevitably leads to error.

Al-Samarqandī's introduction also demonstrates his anxiety over the state of affairs for Transoxanian Ḥanafīs studying *uṣūl al-fiqh* or trying to undertake legal reasoning. He sees the mistakes of the jurisprudential purists as so egregious that his fellows (including the post-formative scholars, some of whom were guilty of the same jurisprudential purism) should have corrected them by his time. He is sincere in his desire to resurrect the first approach with improved language and insights, particularly bolstered by his concern for establishing the rational foundations for legal reasoning. Al-Samarqandī lays

19 For definitions of the "late Ḥanafīs," see Samy Ayoub, "The Sulṭān Says: State Authority in The Late Ḥanafī Tradition," *Islamic Law and Society* 23 (2016): 239–278.

20 Al-Samarqandī, *Mizān al-Uṣūl*, 3–4.

21 To my knowledge, there is no indication that a *mabsūṭ* version attributed to al-Samarqandī, or a work known as the *Mabsūṭ* of al-Samarqandī, exists today. Perhaps it was too long for posterity.

22 Al-Samarqandī, *Mizān al-Uṣūl*, 6–7.

the blame for adopting the opinions of the Transoxanian Ḥanafīs' opponents at the feet of the jurists. It is likely that he is referring to the Ḥanafī tendency by this time period to adopt Ashʿarī and/or Shāfiʿī positions, justified with Ḥanafī legal maneuvers.[23]

Two more aspects of the theological turn in *uṣūl al-fiqh* is the scholars' inclination to label certain *uṣūl al-fiqh* issues as "theological matters" and to incorporate theological discussions into *uṣūl al-fiqh*. These aspects arise particularly in the area of *amr* and *nahy* (command and prohibition). The issues of command and prohibition in the context of whether to hold non-believers accountable for God's Message without any proper instruction is considered a "theological matter" by al-Lāmishī, although the discussion appears in his work of *uṣūl al-fiqh*.[24] I examine in the following section how al-Lāmishī and al-Nasafī rely on theological arguments to resolve this legal theoretical issue.

3 Transoxanian Authorities on God's Command

Al-Nasafī's relatively short treatise on *uṣūl al-fiqh*, titled *Kitāb Taḥṣīl Uṣūl al-Fiqh wa Tafṣīl al-Maqālāt fīhā ʿalā ʾl-Wajh*, located in an 8th century AH/14th century CE unicum manuscript copy of his encyclopedic *Maṭlaʿ al-Nujūm wa Majmaʿ al-ʿUlūm*, is an unconventionally-arranged work that covers the usual subjects of *uṣūl al-fiqh* and highlights the views of al-Nasafī's colleagues from among the Ḥanafīs of Transoxania, and their similarities and differences with Ḥanafī colleagues and different schools of thought dominant in other regions. Al-Lāmishī's *Kitāb fī Uṣūl al-Fiqh* is similar in its rather uncommon arrangement, but has been available to the field for some time thanks to the efforts of ʿAbd al-Majīd Turkī. I have chosen to focus in these works on the treatment of command and prohibition, in which non-believers are held accountable for belief in God without having received any instruction. This is an issue of knowing good and evil through the rational faculties of the human mind, and a matter of God's eternal command. It is a quite basic issue, as well: how do human beings know what a requirement is, what form it takes, and what they are required to do, for each other and for God? Al-Lāmishī tells us quite clearly in his legal theory that "this is a theological matter" (*min masāʾil al-kalām*).[25] As discussed above, the way in which the Transoxanian Ḥanafīs

23 See Wilferd Madelung, "Abu 'l-Mu'in al-Nasafi and Ash'ari Theology," in *Studies in Honour of Clifford Edmund Bosworth*, eds. Ian Richard Netton et al. (Leiden: Brill, 2000).

24 Al-Lāmishī, *Uṣūl al-Fiqh*, §191.

25 Al-Lāmishī, *Uṣūl al-Fiqh*, §191.

define *uṣūl al-fiqh* as a branch of theology situates law as a distributary of theology and establishes theology as the background of their legal theory discussions.

On the question of the eternity of God's command, al-Lāmishī explains that the general opinion of *ahl al-sunna* (that is, those who align with the Transoxanian Ḥanafī school of thought in a broad sense) is that the command and address of God Almighty are eternal. Some of the *ahl al-sunna* hold the opinion that this is eternal speech, but that it becomes a command or an address upon reaching the commanded person. As the transition from eternal speech to command or address might suggest that God's speech somehow changes, al-Lāmishī adds that speech is an essential attribute of God, so it is not possible for it to change in any way.[26] Al-Nasafī reports essentially the same opinion, but elides the opinion of "some" of the *ahl al-sunna* that al-Lāmishī cites with the broader opinion on the eternity of God's command. He adds that "the commander whom it is necessary to obey is God."[27]

The eternity of God's speech to humans in the form of commands, prohibitions, and reports (*khabar*, pl. *akhbār*) raises the moral-legal question of what to do with those people who have not received any report of revelation. This issue is also cause for al-Nasafī and al-Lāmishī to delineate Ḥanafī and broader Islamic legal-theological fault lines, which allow us to see how the Transoxanian Ḥanafīs imagine themselves in the larger scheme of the Ḥanafī school. Al-Nasafī's treatment of the issue in his legal theory is quite thorough, and so I include it in full:

> "Are the unbelievers held accountable by the commands and prohibitions of God Almighty?"
>
> There are three issues here: the first—which is uncontested—is that the unbelievers are accountable for faith (*imān*), prohibited from unbelief, after the Message [of God] has reached them and his moral order has been revealed. As for before the Message [of God] has reached people living on mountaintops, or living in the time before revelation: our scholars in Iraq and Transoxania—the head of whom is Abū Manṣūr al-Māturīdī, may God have mercy on them all—hold the opinion that these people are accountable, and are punishable for abandoning faith. It is [also] the opinion of some of the Companions of Ḥadīth, like al-Qaffāl al-Shāshī and al-Ḥalīmī. [This opinion] is related from Abū Ḥanīfa, may God have mercy on him, and it is the opinion of the Muʿtazila of Baṣra.

26 Al-Lāmishī, *Uṣūl al-Fiqh*, §189.
27 Al-Nasafī, "Kitāb Taḥṣīl Uṣūl al- Fiqh," f. 36a.

> The Companions of Ḥadīth [otherwise], and the Ashʿarīs, say that these people are not accountable for faith. This is the opinion of some of the Muʿtazila of Baghdad, and it is the chosen opinion of some of the scholars of Bukhara. It is an issue of knowing good and evil through reason.
>
> The second issue is, "are they accountable for the laws?" As for before the Message [of God] has reached them: in our opinion, no. This is contrary to the Muʿtazilī opinion. As for after the revelation of [God's] moral order: in the opinion of the Companions of Ḥadīth and the Muʿtazila, they are accountable for the obligations and prohibitions [in the law]. This is the opinion of our scholars in Iraq. Some of the scholars of our region [Samarqand] hold the opinion that they are not accountable at all for anything of that, except for those things that have a legal indicator from a revealed text of the covenants of the *dhimma*, [such as] the prohibition of usury and the necessity of certain punishments. Some of the most discerning of our scholars hold the opinion that they are accountable for the prohibitions and the transaction-related prescriptions, but not for the ritual prescriptions.
>
> The third issue is that—before the revelation of [God's] moral order—the innate state of [objects and materials] that human beings use everyday is [either] permissibility, prohibition, or suspension of judgment (*waqf*). Our colleagues and the Companions of Ḥadīth from among the jurists and theologians hold the opinion that there is no judgment (*ḥukm*) on this, and they suspend judgment on it. This is the opinion of some of the Muʿtazila. However, the meaning of the suspension of judgment in our opinion is that the issue has a judgment, but we do not know it ourselves. In the others' opinion, there is no judgment for the issue at all because no command or prohibition has been revealed for it. Some of the Companions of Ḥadīth hold the opinion that the innate state of this issue is prohibition. The Muʿtazila hold the opinion that the innate state is permissibility.[28]

One of the most notable characteristics of al-Nasafī's treatment of this issue is how the Muʿtazila are considered to be entirely separate from his kind of Ḥanafīs, even in Iraq. Although secondary scholarship can point to figures such as Abū ʿl-Ḥusayn al-Baṣrī (d. 369/980) or Abū ʾl-Qāsīm al-Kaʿbī (d. 319/931) as major Ḥanafī-Muʿtazilīs, the Ḥanafīs of Transoxania did not recognize them as authorities for their own school. Throughout al-Nasafī and al-Lāmishī's texts, Abū Bakr al-Rāzī al-Jaṣṣāṣ (d. 370/981), Abū ʾl-Ḥasan al-Karkhī (d. 340/951),

28 Al-Nasafī, "Kitāb Taḥṣīl Uṣūl al- Fiqh," f. 36b.

and ʿĪsā b. Abān (d. 221/836) are the Iraqi Ḥanafīs pulled into the orbit of the Transoxanians. Furthermore, within Transoxania there are differences of opinion on these issues: some of the scholars of Bukhara hold the opposite opinion to the school of Samarqand on the first question, believing that people who have not been exposed to God's Message would not be held accountable for faith in God.

Using similar language to place this issue in a theologized context for legal theory, al-Lāmishī professes a more vivid approach to the accountability of unbelievers for faith before the arrival of God's message. He also specifies that those held accountable would only be those who had attained the age of majority (puberty). Like al-Nasafī, al-Lāmishī cites his colleagues, most especially al-Māturīdī, as well as some of the Companions of Ḥadīth, as holding the opinion that an adult living without exposure to God's message would be accountable for faith, "such that, were he to refuse [faith], and die, then he would enter the Hellfire". He relates from Abū Ḥanīfa's *Muntaqā* that he said, "There is no excuse for anyone to be ignorant of God Almighty for what s/he sees of the creation of the skies and earth." Al-Lāmishī tells us that, on the other hand, the Companions of Ḥadīth, such as al-Ashʿarī and others, hold the opinion that there is no obligation for this person before the message of God reaches them. "Even if such a person were to die in unbelief, he would be subject to the will of God Almighty. If He likes He will punish [this person], and if He likes He will enter [this person] into Paradise. This is based on [the Companions' of Ḥadīth] principle that the good and evil of things cannot be known by reason alone without the accompaniment of revelation. [According to them,] the necessity of thanking [the Benefactor], faith, and the prohibition of unbelief cannot be known through reason [alone, according to them]."[29]

The reader who peruses these sections of al-Nasafī's *Taḥṣīl Uṣūl al-Fiqh* and al-Lāmishī's *Kitāb Uṣūl al-Fiqh* may not be conscious of the inter- and intra-school divisions that al-Nasafī and al-Lāmishī highlight. The divisions are not as simple as "us" and "them;" for example, the differences that al-Nasafī and al-Lāmishī point to cannot be reduced to Ḥanafīs versus Shāfiʿīs, or Ḥanafīs versus Companions of Ḥadīth. In fact, neither scholar mentions the Shāfiʿī school of thought in these discussions. The names of the schools that they mention are exclusively theological, which may seem curious in a legal theory context. Theological associations of groups with different opinions would be important only if it is their theology that is the defining factor of the difference. In other words, it is the Ashʿarīs' theological commitments, and not their likely Shāfiʿī legal opinions, that are making the difference on these issues of being

29 Al-Lāmishī, *Uṣūl al-Fiqh*, §190.

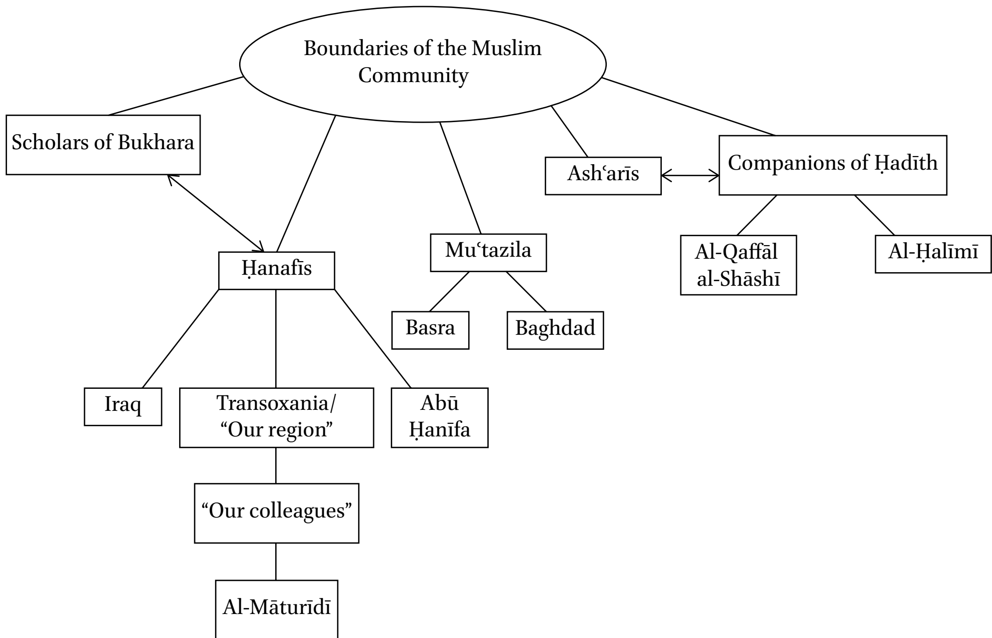

FIGURE 7.1 A visualization of Muslim intellectual/theological networks as delineated by al-Nasafī and al-Lāmishī.

held responsible for knowing God before or after revelation. Likewise, it is the Muʿtazilīs' theological opinions, and not the Ḥanafī legal opinions that they may share with the Transoxanian Ḥanafīs, that make the crucial difference. Theology is deeply integral to the foundational concepts of legal theory in the Ḥanafī school.

In addition, the reader is alerted to the geographic specification of the Transoxanian Ḥanafī school through al-Nasafī and al-Lāmishī's references to *mashāyikh Samarqand* (the scholars of Samarqand) and “their head” al-Māturīdī. Al-Nasafī and al-Lāmishī refer to Samarqand in order to emphasize the regional identity of their Ḥanafī school—best defined through theology—and not necessarily to identify themselves with the figure of al-Māturīdī as an eponym. These scholars are “Samarqandī,” not “Māturīdī,” because they understand it is Samarqandī Ḥanafī theology that informs their legal theory, not a “Māturīdī” theology. Al-Māturīdī is, however, the master articulator of that theology.

4 Conclusion

The theological turn pursued by al-Samarqandī, al-Nasafī, and al-Lāmishī, and these scholars' regional specification of their own group of Ḥanafīs, are not only integral to revisiting the characterization of Transoxanian Ḥanafīs as "Māturīdīs," but also to understanding the theological associations of legal concerns. This is also part of a larger discussion about the structure of intellectual authority for the Samarqandī Ḥanafī school. I have noted that the Transoxanians were well aware of other theological schools, especially the Muʿtazila, Ashʿarīs, and Companions of Ḥadīth. This calls into question secondary scholarship that has labeled some of the Ḥanafī scholars—such as al-Jaṣṣāṣ or al-Karkhī—Muʿtazili. Furthermore, the excerpts examined indicate that al-Māturīdī is one of several key authorities among Transoxanian "colleagues" whose opinions are not necessarily binding. This collegiality stretches beyond Transoxania to Iraq, where a handful of Ḥanafīs join the Transoxanian intellectual lineage. Although al-Nasafī and al-Lāmishī have mentioned potential eponyms, they do not do so while assigning them the final word of authority.

It is also in these examples that more can be understood not only about legal theory, but also about theology. In this treatment of command and prohibition in the legal theory, non-believers are held accountable for belief in God without having received any instruction, and—as al-Nasafī explains—this is both an issue of knowing good and evil through the rational faculties of the human mind, and a matter of God's eternal command. Al-Lāmishī states clearly on this issue that "this is a theological matter" which has been discussed and underlies other concerns in the treatment of command and prohibition in legal theory. That al-Nasafī and al-Lāmishī characterize the different opinions on the treatment of command and prohibition on the basis of theological commitments points to the fundamentally theological underpinnings of legal theory. In such instances of association, I argue, we can understand how theology has a role in the construction of a moral-legal order through legal theory.

It is significant to note that—with the theological turn—the opinions and approaches from the post-formative period are consolidated in a standardization of the composition of legal theory. Although it seems al-Nasafī and al-Lāmishī rely upon al-Samarqandī's *Mīzān* as a model for the principle issues of legal theory and for some aspects of organization, these scholars have not written the same text. The same can be said of Transoxanian theology in this period, wherein al-Nasafī and al-Lāmishī take Abū ʾl-Muʿīn al-Nasafī's *Tamhīd* as their model.

Among the three authors and their works, al-Nasafī and al-Samarqandī's texts stand out as particularly similar. It is likely that they are based on the same original text, which may be al-Samarqandī's *Mīzān*, or a combination of al-Māturīdī's work on legal theory in *Kitāb al-Jadal* and *Maʾākhidh al-Sharāʾiʿ* (both lost). In his introduction, al-Samarqandī combined the methods of al-Māturīdī and other theologians with that of the jurists, to perfect composition in a genre that he viewed as sorely lacking in useful contributions.[30] He tells us that the jurisprudence-focused works of the most recent scholars have deviated so far from demonstrating their argumentation and proofs that they have come to accept opinions from other schools of thought that are inadmissible in the Transoxanian Ḥanafī school.[31] As al-Samarqandī has proclaimed himself to be accomplishing what he believes to be a new, or at the very least reinvigorated, approach to legal theory, it is likely that al-Nasafī and al-Lāmishī took cues from his *Mīzān*.

Regardless of this chicken-and-egg problem, what we find with the theological turn is a standardization of the way to speak about the principal concerns of *uṣūl al-fiqh*. Al-Lāmishī, al-Nasafī, and al-Samarqandī are not the end of the legal theory story for the Transoxanians; however, their work represents an important moment of consolidation for the school of thought. Unfortunately, the contributions of the Transoxanian Ḥanafīs generally, and more specifically that of al-Lāmishī, al-Nasafī, and al-Samarqandī, have been overlooked and misunderstood. Aron Zysow, in particular, has shown the utility of al-Samarqandī's text for understanding the Ḥanafī school opinions of this period.[32] Yet, others have argued that al-Samarqandī has not significantly contributed to the development of the Ḥanafī school's legal thought.[33] By combining the approaches of the theologians and the jurists, bringing to light the minority opinions of the school while making the preferred opinion clear, beginning his work with a methodological and epistemological introduction, and extrapolating from the main concerns a way to approach legal theory that appealed to his time period and context, al-Samarqandī contributed greatly to the development of Ḥanafī legal thought. Additionally, he was one of the first Transoxanians to make the migration westward, where he worked in Anatolia for some time.[34] His contributions thus stretched not only throughout his school of thought, but over a vast geographical expanse.

30 Al-Samarqandī, *Mizān al-Uṣūl*, 3–4.

31 Al-Samarqandī, *Mizān al-Uṣūl*, 3.

32 See Zysow, *The Economy of Certainty*.

33 *Encyclopaedia of Islam*, 3rd ed., s.v. "al-Samarqandī, ʿAlāʾ al-Dīn."

34 For the tale of the Ḥanafī westward migration, see Wilferd Madelung, "The Spread of Māturīdism and the Turks," in *Actos do IV Congresso de Estudos Arabes e Islamicos, Coimbra-Lisboa 1968* (Leiden: E.J. Brill, 1971).

Lastly, these scholars' approach to legal theory problematizes Ibn Khaldūn's classification of *uṣūl al-fiqh* into that of the *mutakallimūn* (theologians; those who engage in *kalām*, theology) and that of the jurists (*fuqahāʾ*; the Ḥanafīs).[35] It is apparent that the Ḥanafīs of Transoxania did not conceive of their legal theory as a discipline entirely divorced from *kalām*. Moreover, they underwent shifts in their approach to legal theory over several generations. Although it is true that Ḥanafī legal theory works are organized in a manner strikingly different from those of other Sunnī theological schools, it is not justified to claim that the Ḥanafīs do not make use of *kalām* in their approach to legal theory. Ibn Khaldūn's labels construct an inaccurate relationship among the various approaches to legal theory that—because his analysis has been taken as gospel in the field—has misled our understanding of the nature of the Ḥanafī approach, and the relationship between Ḥanafī *uṣūl al-fiqh* and that of other schools. It is perhaps ironic—in light of Ibn Khaldūn's insistence that the Ḥanafīs are diametrically opposed to the *mutakallimūn* in their legal theory approach—that the Ḥanafīs examined here are so concerned with theological commitments.

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35 ʿAbd al-Raḥmān b. Muḥammad b. Khaldūn, *Muqaddimat Ibn Khaldūn*, ed. Aḥmad al-Zuʿbī (Beirut: Dār al-Arqam, 2001), 492–493.

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CHAPTER 8

Maṣlaḥa as a Normative Claim of Islamic Jurisprudence

The Legal Philosophy of al-ʿIzz b. ʿAbd al-Salām

Rami Koujah

Introduction

Understanding the relationship between ethical evaluations and legal rulings is not an inquiry unique to legal theorists. The issue is also interesting to thinkers from other backgrounds, like the litterateur Abū Ḥayyān al-Tawḥīdī (d. 414/1023), who asked whether it was possible for God to command what "the intellect rejects, disputes, dislikes, and does not deem permissible?"[1] Al-Tawḥīdī's question is a loaded one in that it folds together issues regarding the nature of value, how value is known, and how it ought to guide our behavior. Muslim jurists untangled these issues and thoroughly treated each topic in their works of theology (*kalām*) and legal theory (*uṣūl al-fiqh*). The two primary matters at stake in debating ethical theories became the understanding of God's nature and His actions, as well as demarcating the normative capacity of rational evaluations. Focusing on the latter, this essay traces developments in Ashʿarī ethics and Shāfiʿī legal theory to explain how the concept of *maṣlaḥa* (benefit) came to represent the principal normative drive upon which Islamic law was expounded.

1 Theological Context

Muslim jurists and theologians debating theories of ethical value are divided into two primary camps: Those who ascribe to a theory of "objectivism" and those who ascribe to a theory of "theistic subjectivism," also known as "ethical voluntarism."[2] The opposing camps hold contrasting views on metaethics,

1 Abū Ḥayyān al-Tawḥīdī and Miskawayh, *al-Hawāmil wa'l-shawāmil*, ed. Aḥmad Amīn and al-Sayyid Aḥmad Saqr (Cairo: al-Hayʾa al-ʿĀmma li-Quṣūr al-Thaqāfa, n.d.), 315.

2 George Hourani, "Two Theories Of Value in Medieval Islam," *The Muslim World* 50.4 (1960): 270.

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normative ethics, and applied theological ethics.[3] Generally, the Muʿtazilīs have been described as objectivists and the Ashʿarīs as theistic subjectivists.[4]

At the metaethical level, jurists discussed the ontology and epistemology of ethical value: Are goodness (*ḥusn*) and badness (*qubḥ*) real? Could knowledge of ethical value yield itself to the human intellect independent of revelation? Hence, this issue is often referred to as "the question of the intellect's capacity to predicate the good and the bad" (*masʾalat al-taḥsīn wa-l'taqbīḥ al-ʿaqliyyān*). With regards to normative ethics, the issue at stake was the normative capacity of ethical determinations, or the movement from the *is* (a descriptive claim) to the *ought* (a prescriptive claim). For instance, can a good action be rendered obligatory?

According to a famous anecdote, the debate between the two schools over this issue finds its origins in the very birth of Ashʿarism, when Abū al-Ḥasan al-Ashʿarī (d. 324/935–6) challenged his mentor, Abū ʿAlī al-Jubbāʾī (d. 303/915–6), to produce a rational justification of God's will and justice.[5] In one sense, therefore, the original schism between these two schools owes itself

3 See Ayman Shihadeh, "Theories of Ethical Value in *Kalām*: A New Interpretation," *The Oxford Handbook of Islamic Theology*, ed. Sabine Schmidtke (Oxford: Oxford University Press, 2016).

4 The Muʿtazilīs have been described as ethical *realists* because they affirm the ontological existence of ethical values intelligible to the naked intellect and possessed of intrinsic normative capacity. The Ashʿarīs—whose ethical theory is primarily built in reaction to Muʿtazilī's—have been described as *anti*-realists for denying the existence of ethical values and claiming that only God's commands are normative. Ibid. I will utilize the terms "objectivist" and "subjectivist" to avoid confusing the concept of realism with the way in which it is used by modern analytic philosophers. Broadly speaking, moral realism refers to the belief that there are moral facts based on which moral judgments can be said to be true or false, though realists may disagree about what a moral fact is. Geoffrey Sayre-McCord, "Moral Realism," *The Oxford Handbook of Ethical Theory*, ed. David Copp (Oxford: Oxford University Press, 2007), 40–1. Thus, moral realists can also be moral relativists if they take the position that moral facts are dictated by social practice. Ibid. Whereas Ayman Shihadeh uses realism to refer to ontological facts—that realists believe moral values have a *real*, ontological existence—most contemporary analytic philosophers understand realism as referring to ethical statements as "forms of reflection that are as fully governed by norms of truth and validity as any other form of cognitive activity." Hilary Putnam, *Ethics Without* Ontology (Cambridge: Harvard University Press, 2004), 72. For Putnam, ethical realism is consistent with an understanding of objectivity without objects, or an ethics without ontology. Ibid, 55–60. Hence, both Ashʿarīs and Muʿtazilīs are moral realists. The former hold that moral facts correspond to God's commands whereas the latter hold that moral facts correspond to ontological features. Moreover, Ashʿarīs, by contrast to the Muʿtazilīs, are voluntarists because their metaethics—with respect to evaluations that count as normative—depends on God's will. Philip L. Quinn, "Theological Voluntarism," *The Oxford Handbook of Ethical Theory*, ed. David Copp (Oxford: Oxford University Press, 2007), 63. For this clarification, I thank Joshua Kleinfeld.

5 Najm al-Dīn al-Ṭūfī, *Darʾ al-qawl al-qabīḥ bi-l-taḥsīn wa'l-taqbīḥ*, ed. Ayman Shihadeh, (Riyadh: King Faisal Centre for Research, 2005), 94.

to a dispute over ethical value.[6] So central was ethical theory to theology that the Muʿtazilī Rukn al-Dīn b. al-Malāḥimī (536/1141) stated that the basis upon which humans are made responsible by God is their capacity to know what is good and bad.[7] It should be noted, moreover, that even though ethical theories are expounded in abstract works of theology and legal theory, that should not detract from the fact that their authors viewed the outcomes of this debate as having real practical consequences.[8]

The Muʿtazilīs had a single definition by which good and bad were defined, differing between themselves only over the finer details.[9] A singular understanding of good and bad supported the ontological and epistemological aspects of their theory. The Baṣrans and the majority of the Muʿtazilīs assessed the value of an act according to its configuration (*wajh*), a calculus that required taking several variables into consideration in order to render a moral evaluation, including, but not limited to, the circumstance, context, and the intention of the agent. Prostrating, for example, can be good when it is directed towards God but bad when directed to the devil.

Ultimately, the Muʿtazilīs stressed that human beings are moral creatures by nature. If given a choice between lying or telling the truth, where either would yield the same outcome, one would choose to tell the truth because

6 Ethical theories were central to each school's theological system. While the Muʿtazilīs affirmed five principles that undergirded their theological beliefs, Abū al-Qāsim al-Balkhī (d. 319/931) stated that the "title 'Muʿtazilī' is not given to someone who contravenes the doctrine of [Divine] Oneness and Justice, even if they affirm the intermediary station." This was al-Balkhī's explanation for why Ḍirār b. ʿAmr (d. 200/815) could not rightfully be regarded as a Muʿtazilī. Ḍirār b. ʿAmr al-Ghaṭafānī, *Kitāb al-taḥrīsh*, ed. Ḥusayn Khānṣū and Muḥammad Kaskīn, (Beirut: Dār Ibn Ḥazm, 2014), 7. Mankdīm also echoes al-Balkhī's view that Divine Oneness and Justice are the only two irreducible principles of Muʿtazilism. Michael Cook, *Commanding the Right and Forbidding the Wrong* (Cambridge: Cambridge University Press, 2004), 205 note 58.

7 Rukn al-Dīn b. al-Malāḥimī al-Khwārazmī, *Tuḥfat al-mutakallimīn fī l-radd ʿalā l-falāsifa*, ed. Hasan Ansari and Wilfred Madelung (Tehran: Iranian Institute of Philosophy and Institute of Islamic Studies Free University of Berlin, 2008), 135.

8 For examples, see Tāj al-Dīn al-Subkī, *al-Ashbāh wa'l-naẓā'ir*, ed. ʿĀdil Aḥmad ʿAbd al-Mawjūd and ʿAlī Muḥammad ʿIwaḍ (Beirut: Dār al-Kutub al-ʿIlmiyya, 1991), 2:20f.

9 For instance, al-Qāḍī ʿAbd al-Jabbār (d. 415/1025) defined bad (*qabīḥ*) as a blameworthy act done by someone who knows, or is capable of knowing its blameworthiness, under certain circumstances (*ʿalā baʿḍ al-wujūh*) (Shāshdīw Mānkdīm, *Sharḥ al-uṣūl al-khamsa*, ed. ʿAbd al-Karīm ʿUthmān [Cairo: Maktabat Wahba, 1996]) 41). Good (*ḥasan*), in turn, is that which does not merit blame (Ṭūfī, *Dar'*, 79). Abū al-Ḥusayn al-Baṣrī (d. 436/1044) offered a similar definition but added that *ḥasan* can be that which an agent (*qādir*) should do (*ʿalayhi an yafʿalahu*) (Abū al-Ḥusayn al-Baṣrī, *Kitāb al-muʿtamad fī uṣūl al-fiqh*, ed. Muḥammad Ḥamīd-Allah [Damascus: al-Maʿhad al-ʿIlmī al-Faransī, 1964], 1:365–6).

he knows that lying is bad.[10] Further, an act does not merit praise (*madḥ*) when it is performed out of self-interest or coercion, but only if it is performed out of a sense of moral consciousness.[11] For the Muʿtazilīs, the objective nature of ethical value, and the universal definition by which it is understood, makes it such that an act of oppression (*ẓulm*) is bad whether it is produced by God or a human agent.[12] While this is not to say that God actually ever commits bad acts, it nevertheless was a major point of contention for the Ashʿarīs in the abstract.

Although the Muʿtazilīs held that ethical value can be discovered through reason, only a small pool of actions were open to the normative implications of ethical evaluations. In other words, in only a few instances can the intellect derive norms independent of revelation. Rukn al-Dīn b. al-Malāḥimī (d. 536/1141) distinguishes between rational and revelatory norms. Rational norms, such as the obligation to repay debts and avert harm from oneself are established independent of revelation. Other norms, like the obligation to pray and the prohibition against consuming wine, are known only through revelation.[13] The two are interconnected, as revelatory norms are meant to facilitate the fulfillment of rational norms (*al-sharʿiyyāt alṭāf fī al-taklīf al-ʿaqlī*).[14] As an example, revelation tells us that fornication is bad by prohibiting it, and the prohibition signifies that fornication is harmful (*mufsida*). Importantly, moreover, the grounds upon which fornication is deemed bad (*al-muʾaththir fī qubḥihā*) is its harmfulness.

The Muʿtazilī shift from *is* to *ought* was problematic for the early Ashʿarīs, although, as Badr al-Dīn al-Zarkashī (d.794/1392) points out, many of them misunderstood the Muʿtazilī position.[15] For instance, the Ashʿarīs, in what they thought to be an opinion diametric to that of the Muʿtazilīs, made a point to emphasize that the intellect does not legislate—God is the sole legislator (*shāriʿ*). But to be exact, the Muʿtazilīs never claimed that the intellect legislates; it is not reason that produces norms, instead, reason discovers certain pre-existent norms independent of revelation.[16]

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10 Mānkdīm, *Sharḥ*, 303, 306.

11 Al-Qāḍī ʿAbd al-Jabbār b. Aḥmad al-Hamadhānī, *Nukat al-kitāb al-mughnī*, ed. Omar Hamdan and Sabine Schmidtke (Beirut: Deutsches Orient Institut [in Kommission bei "Klaus Schwarz Verlag", Berlin], 2012), 158, 166–7.

12 Mānkdīm, *Sharḥ*, 310.

13 Ibn al-Malāḥimī, *Tuḥfa*, 135.

14 Ibid., 137.

15 Badr al-Dīn al-Zarkashi, *al-Baḥr al-muḥīṭ fī uṣūl al-fiqh*, ed. ʿAbd al-Qādir ʿAbd Allāh al-ʿĀnī, 6 vols. (Hurghada: Dār al-Ṣafwa li'l-Ṭibāʿa wa'l-Nashr wa'l-Tawzīʿ, 1992), 1:145.

16 Ibid., 1:134–5, 1:144–5; Idem, *Tashnīf al-masāmiʿ*, ed. ʿAbd Allāh Rabīʿ and Sayyid ʿAbd al-ʿAzīz, 4 vols. (Maktab Qurṭuba li'l-Baḥth al-ʿIlmī wa Iḥyāʾ al-Turāth al-Islāmī, 2006), 1:104, 110.

On the epistemological front, the Muʿtazilīs presented a typology for how knowledge of ethical value is acquired. Some ethical value is rationally known as a matter of necessity (*ḍarūra*), some is known through deeper reflection (*naẓar*), and some is known through revelation (*tawqīf*). For example, justice is necessarily known to be good, a beneficial lie is known to be bad upon reflection, and knowledge of the goodness of ritual worship (*ʿibādāt*) is acquired only through revelation.[17] Ashʿarīs viewed this framework as imposing strictures on God's omnipotence because, according to them, it required God's commandments to correspond to rational, human evaluations.

One tactic of the Ashʿarīs was to redirect the claims of the Muʿtazilīs from the realm of ontology to psychology.[18] In response to Muʿtazilī assertions that ethical value was apparent to the intellect (*ʿaql*), Abū Ḥāmid al-Ghazālī (d. 505/1111) argues that the locus of the type of ethical knowledge claimed by the Muʿtazilīs was actually in the appetitive self, or human desire (*ṭabʿ*). Al-Ghazālī famously presents a tripartite definition of ethical value, which would be reproduced by later generations of Ashʿarīs with various alterations: Good and bad can refer to (i) that which serves or hinders the objective (*gharaḍ*) of an agent, respectively; (ii) actions for which revelation bestows praise or blame upon the agent, respectively; or (iii) good may refer to anything which the agent has a legal right to do.[19] All of these definitions reflect the conviction that ethical values are non-ontological (*awṣāf iḍāfiyya lā yakūn ṣifa li'l-dhāt*).[20] Moreover, al-Ghazālī maintains that no definition should be privileged above any other, and that people should not quibble over semantics (*lā mashāḥa fī al-alfāẓ*),[21] presumably as long as they recognize that norms are established solely by revelation. Al-Ghazālī's most novel contribution was not in advancing a tripartite definition, but in classifying ethical evaluations as normative or non-normative depending on the source from which they derive. According to the Ashʿarīs, it is only the normative register of ethical value—i.e., ethical value defined by what merits reward/praise or punishment/blame—that is contested.[22]

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17 al-Ṭūfī, *Darʾ*, 83–4.

18 Sherman Jackson, "The Alchemy of Domination? Some Ashʿarite Responses to Muʿtazilite Ethics," *International Journal of Middle East Studies* 31.2 (1999): 190–1.

19 Ibid., 188.

20 Abū Ḥāmid al-Ghazali, *al-Mustaṣfā min ʿilm al-uṣūl*, ed. Ḥamza B. Zuhayr Ḥāfiẓ, 4 vols. (Medina: n.p., n.d.), 1:182.

21 Ibid.

22 Ṭūfī, *Darʾ*, 81–2; Zarkashī, *Baḥr*, 1:143.

While the Muʿtazilīs asserted the normative authority of reason on the basis that the intellect necessarily knows the ethical value of certain things, the Ashʿarī response was to question the scope of the intellect's capabilities. Knowledge of ethical value, they argued, is not *a priori*, and that is why humans need to be told what to do (through revelation).[23] For most Ashʿarīs, normative ethical value was not simply known through God's command, it was *defined* by it. Imām al-Ḥaramayn al-Juwaynī (d. 478/1085) writes: "The definition of good (*ḥusn*) is what revelation informs its doer is praised for, and what is intended by bad (*qabīḥ*) is what revelation informs its doer is blamed for."[24] This ontology supported Ashʿarī epistemology. While the Muʿtazilīs claimed that revelation confirmed (*muʾakkid*) certain rational evaluations—those known by necessity—but did not establish (*muʾassis*) them, the Ashʿarīs responded that the intellect was prone to error and was therefore unreliable for this task.

The Ashʿarī school, like the Muʿtazilīs, was not monolithic. Amongst the later Ashʿarīs, Fakhr al-Dīn al-Rāzī (d. 606/1210) forgoes the Ghazālian tripartite division of ethical value in his later works and instead grounds his theory in a rational consequentialism, though "'rational' only in the sense of being based on internal perceptions, grasped and reckoned by the mind, not in the sense of being rationally intuited, as the Muʿtazila maintain."[25] Al-Rāzī argues that moral judgements are the subjective determinations of the agent and are fundamentally based on perceptions of pleasure and pain. Hence, one obeys God's commands out of self-interest and in that way revelation remains the source of norms. Under al-Rāzī's definition, accordingly, rational evaluations are still not normative.

Ashʿarīs postdating al-Rāzī also affirmed a rational understanding of ethical evaluations. Al-Zarkashī offers a definition he claims to have been held by some of the early Shāfiʿīs, some Ḥanbalīs, the Ḥanafīs, and the later legal theorists and theologians who systematized the doctrines and arguments of their forebears. According to this definition, the intellect determines the goodness and badness of things, but revelation informs us of the reward or punishment that attaches:[26]

23 Zarkashi, *Baḥr*, 1:136.

24 Abū al-Maʿālī al-Juwaynī, *Kitāb al-irshād ilā qawāṭiʿ al-adilla fī uṣūl al-iʿtiqād*, ed. Muḥammad Yūsuf Mūsá and ʿAlī ʿAbd Al-Munʿim ʿAbd Al-Ḥamīd (Cairo: Maktabat al-Khānijī, 1950), 258.

25 Ayman Shihadeh, *The Teleological Ethics of Fakhr al-Dīn al-Rāzī* (Leiden: Brill, 2006), 67–8.

26 Zarkashī, *Baḥr*, 1:145–7; idem, *Tashnīf*, 104–5.

> The Muʿtazilīs and the Sunnīs concurred that the intellect [is able to] perceive the goodness and badness of things prior to the advent of revelation. They differed in that the Muʿtazilī views [these judgments] as entailing reward and punishment, so he determines that reward and punishment are established prior to [the advent of] revelation because goodness and badness are established before revelation … The Sunnī, however, knows that reward and punishment can only be known through revelation, so he denied goodness and badness prior to [the advent of] revelation.[27]

As discussed, these metaethical assumptions informed opinions on normative ethics. If ethical value has an ontological, objective, and rationally determinable existence, then, according to the Muʿtazilīs, one could ascertain certain norms based on rational ethical deliberation.[28] Although the quantity of actions that the Muʿtazilīs would claim rational normative knowledge of was minimal, their view remained theologically problematic for the Ashʿarīs for the fact that the latter saw it as infringing upon God's omnipotence. For this reason, the Muʿtazilīs and Ashʿarīs debated the normativity of actions "prior to the advent of revelation" (*qabla wurūd/majīʾ al-sharʿ*). The Muʿtazilīs held that thanking the Benefactor (i.e. God) (*shukr al-munʿim*) is obligatory, even in the absence of a divine directive (*qabla majīʾ al-sharʿ*), since reason can determine that it is good and doing good and avoiding the bad is obligatory.[29] This is not merely an ethical claim; it has direct legal implications because it is prescriptive. By contrast, al-Juwaynī maintained that "the intellect does not indicate the goodness of a thing nor its badness [when it comes to] normative judgements (*ḥukm al-taklīf*). In fact, goodness and badness[—in their normative sense—]are known by the sources of the religious law (*mawārid al-sharʿ*) and the requirements of revelation (*mūjib al-samʿ*)."[30]

The Nature of the Law

We can gather from the above that early Ashʿarīs, in effect, did not neatly distinguish ethical value from normative ethics. In their view, the norm *defines* the value. In terms of analytical jurisprudence, the Ashʿarī view amounts to a crude form of legal positivism. Legal positivism, as understood by the Western

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27 Zarkashī, *Baḥr*, 1:145.

28 Sophia Vasalou, *Moral Agents and Their Deserts: The Character of Muʿtazilī Ethics* (Princeton: Princeton University Press, 2008), 48–9.

29 Majid Fakhry, *Ethical Theories in Islam* (Leiden: Brill, 1994), 31; Kevin A. Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought* (Albany: State U of New York, 1995), 153.

30 Juwaynī, *Kitāb al-irshād*, 258.

legal philosophers of the nineteenth and twentieth centuries, maintains that there is no necessary connection between law and morality.[31] This is termed "the separability thesis" and is famously stated by John Austin as follows: "the existence of law is one thing; its merit or demerit another."[32] Although Ashʿarīs are unlike modern legal positivists because they consider legality as tantamount to morality, they are positivist to the extent that they reject the belief that legal validity is contingent upon extrinsic, or non-legal, rational evaluations. The Ashʿarīs affirm the separability thesis because, by equating normative ethics with law, they reject the use of non-legal ethical reasoning and evaluations for the purpose of deriving legal rules. There is no external standard to evaluate the validity and morality of legal rules. In effect, Ashʿarīs espouse an *amoral* conception of the law.

Although Ashʿarī legal positivists objected to a *necessary* relationship between law and non-legal ethical evaluations, they viewed the law as serving human interests. For instance, in al-Qaffāl al-Shāshī al-Kabīr's (d. 365/976) *The Virtues of the Sharīʿa in Shāfiʿī Positive Law*, the author elaborates on the rationales underlying different legal rulings. He states that while *maṣlaḥa* can be rationally ascertained as an abstract, general feature underlying various legal issues, *maṣlaḥa*, when considered in the context of particular rules, is unknowable.[33] As for the Ashʿarīs, though they emphasized God's omnipotence by claiming that he was not obligated to act according to human standards of good and bad, they nevertheless held that God always *chose* to legislate for the benefit (*maṣlaḥa*) of humanity.[34]

2 *Maṣlaḥa* in Pre-ʿIzzian Legal Thought

Taking the positivism of the Ashʿarīs to its logical conclusion, any concept of benefit (*maṣlaḥa*) is stripped of normative content. Yet, Muslim jurists viewed *maṣlaḥa* as the purpose, or telos, of the law, at least by the time of al-Rāzī. For Ashʿarīs prior to al-Rāzī, stripping *maṣlaḥa* of its normative content was

31 Jules L. Coleman and Brian Leiter, "Legal Positivism," in *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis Patterson (Singapore: Wiley-Blackwell, 2010), 228.

32 H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012), 207, quoting John Austin, *The Province of Jurisprudence Defined*.

33 Shāshī, *Maḥāsin*, 27.

34 Anver M. Emon, *Islamic Natural Law Theories* (New York: Oxford University Press, 2010), 91. George F. Hourani, *Reason and Tradition in Islamic Ethics* (Cambridge: Cambridge University Press, 1985), 145–146; Ihsan Abdul-Wajid Bagby, *Utility in Classical Islamic Law: The Concept of Maṣlaḥah in Uṣūl Al-Fiqh* (Diss. U of Michigan, 1986), 40.

necessary in order to be consistent with their positivism. Only then could *maṣlaḥa* be accounted for in legal reasoning. Put differently, a jurist could not assume that *maṣlaḥa* is pursued by the law since that would place *maṣlaḥa* prior to God's volition. Instead, the jurists inductively abstracted the concept of *maṣlaḥa* from the existent *corpus juris*. In this way, ethical deliberation—in the context of legal reasoning—became moot. The incorporation of *maṣlaḥa* into legal reasoning owed itself to the development of two legal concepts: *qiyās* (legal analogy) and *maqāṣid al-sharīʿa* (the objectives of the law). For pre-Rāzīan jurists, the problem persisted in qualifying, defining, and limiting *maṣlaḥa*.

The concept of *maṣlaḥa* underwent dramatic changes as it is developed over generations of Ashʿarī-Shāfiʿī jurists. In preserving the non-normative character of *maṣlaḥa*, jurists initially defined *maṣlaḥa* vis-à-vis the revealed law. Much like ethical value, *maṣlaḥa* could only be known through God's command. As Abū Iṣḥāq al-Shīrāzī (d. 476/1083) writes, "*maṣlaḥa* in the law is not contingent upon the dispositions of human nature such that [God's] command would be based on what human nature inclines to. Rather, *maṣlaḥa* is contingent upon the decree of God, praised be He."[35] Later jurists, by contrast, affirmed a normative concept of *maṣlaḥa*. For instance, Sayf al-Dīn al-Āmidī (d. 630/1233) held that the purpose of the law is to promote *maṣlaḥa*, and he defined *maṣlaḥa* vis-à-vis human interests: "legal rulings are not intended for their own sake, but for the sake of fulfilling human objectives."[36] By equating the aim of the law to human aims, *maṣlaḥa* was rendered normative.

Al-Imām al-Ḥaramayn al-Juwaynī

Al-Juwaynī defines *maṣlaḥa* vis-à-vis the law, arguing that if political authorities based *maṣlaḥa* according to their understanding then God's law would be subject to human discretion.[37] Further, the thought that the law pursues rationally determined *maṣlaḥa*s would amount to a rejection of the revealed law (*radd al-sharīʿa*).[38] In short, al-Juwaynī limits the scope of *maṣlaḥa* to textual interpretations carried out by the jurists. *Maṣlaḥa* is curtailed by the sources of the law, and while the law considers *maṣlaḥa*, not every *maṣlaḥa* will have legal bearing.[39] Elsewhere, al-Juwaynī admits a more liberal use of

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35 Ibid., 509. See also Reinhart, *Before Revelation*, 168.

36 Āmidī, *Iḥkām*, 3:312.

37 Al-Imām al-Ḥaramayn al-Juwaynī, *Ghiyāth al-umam fī iltiyāh al-ẓulam*, ed. ʿAbd al-ʿAẓīm al-Dīb (Doha: Maktabat Imām al-Ḥaramayn, 1981), 224.

38 Ibid., 220; Felicitas Opwis, *Maṣlaḥa and the Purpose of the Law: Islamic Discourse on Legal Change From the 4th/10th to 8th/14th Century* (Leiden: Brill, 2010), 44–5.

39 Al-Imām al-Ḥaramayn al-Juwaynī, *al-Burhān fī uṣūl al-fiqh*, ed. Salāḥ b. Muḥammad b. ʿUwayḍa, 2 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 2:41.

maṣlaḥa found in the precedent of the Companions of the Prophet Muḥammad. While the Companions did not take every *maṣlaḥa* into account when deriving law, where the source texts were silent they used their reasoned deliberation (*raʾy*) to arrive at what they thought to be consistent with the Prophet's method of legislation (*minhāj sharʿihi*), as long as they did not contradict the legal sources.[40] Although he nowhere offers a concrete definition of *maṣlaḥa*, it seems al-Juwaynī uses it in the sense of a human worldly well-being,[41] though this well-being is to be discerned through revelation.

Abū Ḥāmid al-Ghazālī

In his final work on *uṣūl al-fiqh, al-Mustaṣfā min ʿilm al-uṣūl,* Abū Ḥāmid al-Ghazālī identifies three types of *maṣlaḥa* in relation to the law. The law either affirms a *maṣlaḥa*, rejects it, or neither. The affirmed *maṣlaḥa*, al-Ghazālī writes, is used in *qiyās*. A rejected *maṣlaḥa* is one that is expressly or impliedly discounted by the law. Finally, there is the *maṣlaḥa* on which the law is silent, which is termed the "unattested *maṣlaḥa*" (*maṣlaḥa mursala*). Al-Ghazālī then devises a hierarchy for the first category of *maṣlaḥa*s based on their intrinsic merit (*quwwatihā fī dhātihā*): The law may consider certain *maṣlaḥa*s as necessary (*ḍarūrāt*), needed (*ḥājāt*), or as improving (*taḥsīnāt*) or embellishing (*tazyīnāt*) the law's efficacy.[42]

Properly grasping al-Ghazālī's definition of *maṣlaḥa* is critical to understanding his theory of it. Al-Ghazālī states that the basic definition of *maṣlaḥa* is procuring benefit or averting harm (*jalb manfaʿa aw dafʿ maḍarra*). This type of *maṣlaḥa* serves the objectives and interests (*ṣalāḥ*) of people. However, al-Ghazālī explicitly states that this is not the type of *maṣlaḥa* he is concerned with. Rather, *maṣlaḥa*, as a legal term of art, is "the preservation of the objectives of the law" (*al-muḥāfaẓa ʿalā maqṣūd al-sharʿ*). The objectives of law are five: The preservation of religion, life, intellect, lineage, and wealth. Further, these objectives are the necessary *maṣlaḥa*s the law upholds.[43] Based on this, I find myself in disagreement with Felicitas Opwis' claim that al-Ghazālī views mankind's *maṣlaḥa* as the "purpose" of the law[44] because al-Ghazālī adopts a deontic conception of *maṣlaḥa* which serves to safeguard the law's objectives and is not a telos in its own right. According to al-Ghazālī, any instance where the fulfillment of these objectives is ensured is considered *maṣlaḥa*.[45] Thus,

40 Juwaynī, *Burhān*, 2:30, 45.
41 Opwis, *Maṣlaḥa*, 45, 55.
42 Ghazālī, *Mustaṣfā*, 2:478–81.
43 Ibid., 2:481–2.
44 Opwis, *Maṣlaḥa*, 67.
45 Ghazālī, *Mustaṣfā*, 2:482.

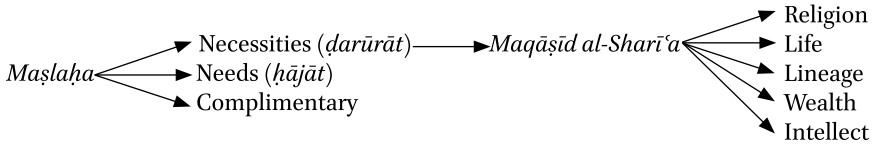

FIGURE 8.1 al-Ghazālī's theory of *maṣlaḥa*

to understand the objective of the law as *maṣlaḥa* and then define *maṣlaḥa* as preserving the objective of the law would be circular. Al-Ghazālī's definition considerably constrains the scope and consideration of *maṣlaḥa* in legal reasoning. Like al-Juwaynī, al-Ghazālī defines *maṣlaḥa* vis-à-vis the law, but he adds that preserving the five objectives is necessary for any legal system that aims to promote the wellbeing of its subjects (*iṣlāh al-khalq*).[46]

The abstract notion of *maṣlaḥa* as the purpose of the law, I believe, was problematic for al-Ghazālī. Much of his career was spent engaging with and refuting doctrines of the *falāsifa* (philosophers), Ismāʿīlīs, and antinomian Sufis. Al-Ghazālī declared certain doctrines held by the *falāsifa* and Ismāʿīlīs to be heretical (*kufr, zandaqa*). One of these doctrines was their view that the teachings of the prophets in revelation are not actually true. According to them, revelation conceals the true meaning of things (*talbīs*) and serves to promote worldly *maṣlaḥa*s.[47] Some of the *falāsifa*, Ismāʿīlīs, and the antinomian Sufis refused to follow religious prescriptions, claiming that they had attained a higher level of insight that relieved them of these duties which are intended to benefit the laity in order to keep them from fighting each other and following their base desires. By declaring their awareness of the law's purpose, they did not feel bound by it;[48] they considered themselves bound by the law's ends, not its means. Al-Ghazālī fought fiercely against adherents of this doctrine, whom he dubbed the "*ibāḥiyya*," or those who make the impermissible permissible.

Al-Ghazālī's most significant innovation is the doctrine of *maqāṣid al-sharīʿa*. It is utilized as a saving maneuver by which al-Ghazālī is able to integrate the concept of *maṣlaḥa* in his legal theory. Developing the doctrine of the *maqāṣid*—which is extracted by inductively assessing the contents of the positive law—is a move by which al-Ghazālī is able to reintegrate

46 Ibid., 2:482.

47 Abū Ḥāmid al-Ghazālī, *Fayṣal al-tafriqa bayn al-islām wa'l-zandaqa*, ed. Sulaymān Dunyā (Cairo: ʿĪsā al-Bābī al-Ḥalabī, 1961), 184; Griffel, *Al-Ghazālī's Philosophical Theology* (Oxford: Oxford University Press, 2009), 102.

48 Abū Ḥāmid al-Ghazālī, *al-Munqidh min al-ḍalāl wa'l-mūṣil ilā dhī al-ʿizza wa'l-jalāl*, ed. Jamīl Ṣalība and Kāmil ʿIyād (Beirut: Dār al-Andalus, 1967), 119.

rational normative ethical reasoning into legal reasoning:[49] The five objectives are universal and are sought out by all legal systems; hence, they are human ends as well. Al-Ghazālī also considers them to be known by necessity as objectives pursued by the law. In his earlier work on legal theory, *Shifāʾ al-ghalīl fī bayān al-shabah waʾl-mukhīl wa masālik al-taʿlīl*, al-Ghazālī writes that the *maqāṣid* are rationally known and reason judges by them, even in the absence of revelation (*al-ʿuqūl mushīra ilayhi wa qāḍiya bihi law lā wurūd al-sharʿ*).[50] This ethical deliberation, however, is circumscribed by the five *maqāṣid*. In certain situations, where revelation is silent, human beings are able to reason within these limitations and establish normative content. Notably, the doctrine of the *maqāṣid* fuses the first two of al-Ghazālī's definitions for ethical value, thereby combining rational/human and revelatory elements.

Fakhr al-Dīn al-Rāzī

While al-Ghazālī assumes a conservative posture when discussing the law's consideration of *maṣlaḥa*, al-Rāzī takes a more liberal stance. In contrast to al-Juwaynī, al-Rāzī accepts what he understands as the Mālikī position on *maṣlaḥa*. That is to say, a ruling that purely offers a *maṣlaḥa*, or in which *maṣlaḥa* is preponderant, is necessarily prescribed since the purpose (*al-maqṣūd*) of the law is to uphold the *maṣlaḥa* of people.[51] Further, al-Rāzī sees precedent for this in the practice of the Companions. The Companions, he writes, did not follow the strict formalism of *qiyās* that later jurists established. Rather, they upheld *maṣlaḥa*s based on their knowledge that it was the purpose of the law (*al-maqṣūd min al-sharāʾiʿ*).[52] Significantly, al-Rāzī's concept of *maqāṣid al-sharīʿa* is far broader than al-Ghazālī's; it contemplates all levels of *maṣlaḥa*, not simply those that are considered necessary.

Al-Rāzī is careful to note that God does not legislate with the purpose of benefitting humankind; instead, since rulings in the revealed law are always concomitant with *maṣlaḥa*, one may assume the presence of *maṣlaḥa* when

49 Aaron Zysow identifies this reconciliation between law and Ashʿari ethics. *The Economy of Certainty* (Atlanta: Lockwood Press, 2013), 199.

50 Abū Ḥāmid al-Ghazālī, *Shifāʾ al-ghalīl fī bayān al-shabah waʾl-mukhīl wa masālik al-taʿlīl*, ed. Muḥammad al-Kubaysī (Baghdad: Raʿāsat Diwān al-Awqāf, 1971), 162.

51 Fakhr al-Dīn al-Rāzī, a*l-Maḥṣūl fī ʿilm uṣūl al-fiqh*, ed. Jābir Fayyāḍ al-ʿAlwānī, 6 vols. (Beirut: Muʾassasat al-Risāla, 1997), 6:165; See also Ibid., 2:77–80; Opwis, *Maṣlaḥa*, 124–5. Mālik's view of *maṣlaḥa* was rejected by most Shāfiʿī jurists because it was viewed as being too lax and rational. According to al-Juwaynī, every jurist agrees, even Mālik b. Anas, that not every *maṣlaḥa* is legally relevant. Mālik's mistake, he continues, was not in his laxity, but in his misunderstanding and misapplication of the law by relying on the precedent of the Companions with no consideration paid as to its context. Juwaynī, *Burhān*, 2:161, 206.

52 Rāzī, *Maḥṣūl*, 6:167.

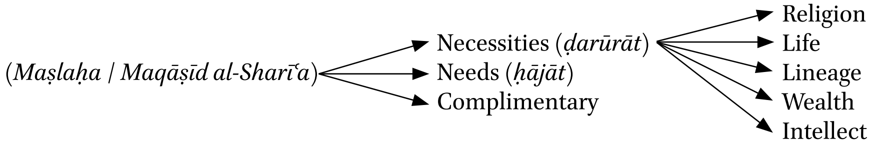

FIGURE 8.2 al-Rāzī's theory of *maṣlaḥa*

deriving law.[53] By virtue of his Mālikī view of *maṣlaḥa*, al-Rāzī advances a "thoroughly consequentialist" legal theory.[54] Ayman Shihadeh succinctly states it as follows: "… al-Rāzī implements consequentialism not only as the background on which the revealed law is superimposed, but also as the chief rational normative principle in jurisprudence through which the law is refined and extended."[55] With al-Rāzī, therefore, *maṣlaḥa* becomes the bona fide purpose of the law.

Sayf al-Dīn al-Āmidī

For al-Āmidī, every ruling entails a rationale (*ḥikma*), and the rationale is the purpose of the ruling.[56] He asserts that the purpose of legislation (*al-maqṣūd min al-sharʿ*) is to either procure *maṣlaḥa*, avert *maḍarra*, or both, as they relate (*bi'l-nisba*) to human beings. The purpose of the law is likely to coincide with human ends since that is suitable for humankind (*mulāʾim lah wa muwāfiq li-nafsihi*).[57] Instead of laying out a typology of *maṣlaḥa* like al-Ghazālī and al-Rāzī, al-Āmidī does this for the purpose of the law: A purpose can be necessary, needed, or complimentary. Again, the necessary purposes are the preservation of the five universals.[58] Whereas al-Rāzī states that *maṣlaḥa* is the purpose of the law and expanded the law's purpose to all the levels of *maṣlaḥa*, al-Āmidī similarly does so by elaborating this typology in terms of the law's *maqāṣid* and affirming a purpose for the law at every level. Further, al-Āmidī uses the term *maqṣūd* instead of *maṣlaḥa*, but states that the rationale of the law is the *maqṣūd*, which is to procure benefit and deter harm. In effect, he equates the law's purpose with *maṣlaḥa*.

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53 Shihadeh, *Teleological*, 97–101. See also Rami Koujah, "Divine Purposiveness and its Implications in Legal Theory: The Interplay of *Kalām* and *Uṣūl al-Fiqh*," *Islamic Law and Society* 23:4 (2017).

54 Ibid., 73.

55 Idem., "Theories of Ethical Value in Kalām," 404.

56 Sayf al-Dīn al-Āmidī, *al-Iḥkām fī uṣūl al-aḥkām*, 4 vols. (Cairo: Maṭbaʿat al-Maʿārif, 1914), 3:289.

57 Āmidī, *Iḥkām*, 3:389; Weiss, *The Search for God's Law*, 601–2.

58 Āmidī, *Iḥkām*, 393–6.

Al-Āmidī argues that legal rulings are prescribed for human purposes (*maqāṣid al-ʿibād*) according to rationally established arguments and by consensus. Since it is established that God legislates for the *maṣlaḥa* of mankind, we can conclude that the *maṣlaḥa* identified in a ruling is the intended purpose behind it.[59] Al-Āmidī contends that *maṣlaḥa* is rationally known. The Companions, he writes, relied on probable knowledge (*ẓann*) and considered opinion (*raʾy*) for certain rulings. Thus, ʿUmar b. al-Khaṭṭāb (d. 23/644) decreed the punishment of eighty lashes for drinking wine based on a saying of ʿAlī b. Abī Ṭālib (d. 40/661): "In my opinion (*arā*) if one drinks he becomes intoxicated; if he becomes intoxicated he maunders; if he maunders he slanders. Therefore, in my opinion he should receive the punishment of the slanderers." Al-Āmidī, however, disagrees with al-Rāzī on the latter's view that all *maṣlaḥa*s (pure or preponderant) are considered by God's law. Every legally relevant *maṣlaḥa*, instead, must be grounded in revelation.[60]

3 The Legal Philosophy of al-ʿIzz b. ʿAbd al-Salām (d. 660/1261)

Shāfiʿī jurists developed and adapted their understanding of *maṣlaḥa* over time, gradually allowing it to take on greater normative significance. While earlier jurists regarded *maṣlaḥa* as unknowable, later ones used *maṣlaḥa* as the principal normative claim, defined by human standards, upon which the law is established. As a result, human interests became a standard by which to assess the validity of legal determinations. In *al-Qawāʿid al-kubrā*, al-ʿIzz b. ʿAbd al-Salām, an Ashʿarī-Shafiʿī jurist, elaborates on *maṣlaḥa*[61] in far greater depth than the aforementioned authors. While the earlier jurists discussed *maṣlaḥa* in the highly technical context of *qiyās*, al-ʿIzz discusses *maṣlaḥa* more broadly and presents a sophisticated theorization of it that betrays both Ashʿarī and Muʿtazilī influences. Though clearly indebted to prior thinkers, al-ʿIzz's ideas are also remarkably original and often times radical. He manages

59 Ibid., 3:411–2.

60 Koujah, "Divine Purposiveness," 208; Weiss, *The Search for God's Law*, 670.

61 Almost every mention of *maṣlaḥa* in *al-Qawāʿid al-kubrā* is contrasted by the author with *mafsada*, the former's antithesis. *Maṣlaḥa* is often linked to God's command and *mafsada* to His prohibition. Thus, an obligatory (*wājib*) *maṣlaḥ* is contrasted by a forbidden (*maḥẓūr, ḥarām*) *mafsada*; recommended (*mandūb*) acts, likewise, are contrasted to reprehensible (*makrūh*) acts. To eliminate redundancy, only aspects of *maṣlaḥa* will be discussed and *mafsada* will be discussed where it is felt to be important. The reader can assume, though, that every reference to *maṣlaḥa* is contrasted by the author with a reference to *mafsada*.

to successfully integrate several Muʿtazilī ideas while firmly upholding the axiomatic tenets of Ashʿarism.

Ethical Value and the Nature of Legal Rulings

Al-ʿIzz does not subscribe to the early Ashʿarī position on ethical value. Where al-ʿIzz departs is in defining good (*ḥusn*) and bad (*qubḥ*) vis-à-vis worldly *maṣlaḥa*s. Worldly *maṣalaḥa*s and their causes (*asbāb*) are known as a matter of necessity (*ḍarūrīyāt*) and through experiences (*tajārib*), customs (*ʿādāt*), and probabilistic considerations (*al-ẓunūn al-muʿtabarāt*).[62] He writes:

> Whoever wants to know … the *maṣlaḥa*s and *mafsada*s, which of them preponderates and which is preponderated over, then he should assess it by his intellect (*ʿaqlihi*) on account of the fact that revelation (*al-sharʿ*) has not addressed this. Upon this, then, one bases (*yabnī*) legal rulings. There will be no ruling from them that [does not have an intelligible *maṣlaḥa* or *mafsada*] except that God has commanded His servants with it as an act of ritual obedience without informing them of its *maṣlaḥa* or *mafsada*. By this the goodness and badness of actions (*ḥusn al-afʿāl wa qubḥuhā*) is known.[63]

The *maṣlaḥa* of legal rulings, in most cases, is assessed according to a rational standard. Reversing the classical Ashʿarī formula, al-ʿIzz writes that most worldly *maṣlaḥa*s are known by reason, and it is known to every intelligent being, prior to the advent of revelation (*qabla wurūd al-sharʿ*), that procuring *maṣlaḥa* is praiseworthy and good (*maḥmūd*^{un} *ḥasan*).[64] Thus, according to al-ʿIzz, good and bad are known by a combination of both reason and revelation. While it is known that everything commanded obtains a *maṣlaḥa*,[65] the content of the *maṣlaḥa* is known by reason. Al-ʿIzz's commitment to Ashʿarism is demonstrated in that he does not allow for the derivation of legal rulings based on the rational calculations of *maṣlaḥa* alone.

Elsewhere, al-ʿIzz discusses the nature of ethical value as it relates to *maṣlaḥa, mafsada*, and legal rules. Human actions in their outward form can be good, bad, or contingent on a resulting *maṣlaḥa*. An action that is good in form (*ḥasan fī ṣūratihi*)—because it normally produces a *maṣlaḥa*—would be

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62 ʿIzz al-Dīn ʿAbd al-ʿAzīz b. ʿAbd Al-Salām, *al-Qawāʿid al-kubrā* (or *Qawāʿid al-aḥkām fī iṣlāḥ al-anām*), ed. Nazīh Kamāl Ḥammād and ʿUthmān Jumuʿa Ḍamīriyyah, 2 vols. (Damascus: Dār al-Qalam, 2000) 1:13.

63 Ibid., 1:13–4.

64 Ibid., 1:7–8.

65 Ibid., 1:11.

made permissible or obligatory by virtue of itself (*li-dhātihi*). For instance, an action that produces a *maṣlaḥa* would be good as long as it is not outweighed by a concomitant *mafsada*. An action can also be bad in form (*qabīḥ li-ṣūratihi*) and would be intrinsically (*li-ʿaynihi*) prohibited or disliked. Such an action would be bad as long it is not outweighed by a concomitant *maṣlaḥa*. An example of the latter would include the act of killing. Al-ʿIzz would consider killing bad by virtue of its form and thus prohibited, but killing may be permissible if it is outweighed by a concomitant *maṣlaḥa*, such as killing that results from self-defense. However, that which is totally bad (*afraṭa qubḥuhu*), such as fornication, could never be permissible, seemingly because it could never result in any type of *maṣlaḥa*.

The third category of actions are those that are not described as good or bad according to an intrinsic quality, but their rulings differ according to a consequent *maṣlaḥa* or *mafsada*. If a *maṣlaḥa* merits the qualification of being recommended, permissible, or obligatory, a ruling that produces such a *maṣlaḥa* assumes that qualification. Examples of such actions include eating, drinking, and sexual intercourse. The act of eating assumes the same form in every circumstance, but it may be recommended, obligatory, prohibited, or disliked depending on a resultant *maṣlaḥa* or *mafsada* that the law deems worthy of such a norm.[66] In other words, a legal qualification of recommendation, obligation, or permissibility attaches based on the value of the consequent *maṣlaḥa*. If an action produces a *maṣlaḥa* that the law considers as meriting the status of being obligatory, that action becomes obligatory. The upshot is that al-ʿIzz defers the authority to grade and evaluate *maṣlaḥa*s, and hence the normative basis of legal rulings, to revelation.

Al-ʿIzz expands on the difference between actions to which legal rulings directly apply and actions to which legal rulings attach by virtue of their consequences. The former category is divided by al-ʿIzz into two types. The first type includes actions that are intrinsically good and have good consequences (*ḥasan fī dhātihi wa thamarātihi*), e.g., knowledge of God and His attributes. The second type includes actions that are intrinsically bad and have bad consequences (*qabīḥ fī dhātihi wa-thamarātihi*), e.g., ignorance of God.[67] The author affirms for certain actions an intrinsic ethical value, a position firmly rejected by early Ashʿarīs, though he adheres to the Ashʿarī position on the ontology of ethical value. For Al-ʿIzz, ontological commitments are confirmed by a different class of actions, that is, those to which legal rulings attach by virtue of the action's consequences. Like the third category of actions mentioned in

66 Ibid., 2:199.
67 Ibid., 2:188.

the previous paragraph, these actions always maintain the same form (e.g., the act of eating). Such an action can be prohibited due to its bad consequences (*li-qubḥ thamarātihi*, e.g., eating carrion), commanded due to its good consequences (*li-ḥusn thamarātihi*), or made permissible (*mubāḥ*) due to a potential *maṣlaḥa* that may result from the performance or nonperformance of that action.[68] Accordingly, it can be inferred that the majority of actions receive their legal qualification on the basis of their consequences.

We are now in a position to examine the definitions al-ʿIzz provides for his terminology in order to understand what kinds of *maṣlaḥa*s are of normative significance. The author writes that *maṣlaḥa* and *mafsada* are conventionally expressed by such words as good (*khayr*) and evil (*sharr*), benefit (*nafʿ*) and harm (*ḍarr*), and virtues (*ḥasanāt*) and vices (*sayyiʾāt*) because "all *maṣlaḥa*s are beneficial, virtuous goods and *mafsada*s, as a class, are harmful, wicked evils."[69] The author then explains the true meaning of *maṣlaḥa* and *mafsada* (*ḥaqīqat al-maṣlaḥa wa-l-mafsada*). *Maṣlaḥa* is of four types: pleasure (*al-ladhdhāt*) and its causes and happiness (*al-afrāḥ*) and its causes (*asbāb*). *Mafsada*, likewise, is of four types: pain (*al-ālām*) and its causes and distress (*al-ghumūm*) and its causes. Further, each of these relates to either the worldly life or the Hereafter. Pleasure, happiness, pain, distress, and their causes, that relate to the worldly life, are known as a matter of lived experience (*ʿādāt*). Their counterparts in the Hereafter, on the other hand, are known through revelation.[70]

To safeguard against a hedonistic theory of value, al-ʿIzz writes that *maṣlaḥa* and *mafsada* are expressed either veridically (*ḥaqīqī*) or tropically (*majāzī*). Veridically, *maṣlaḥa* is pleasure and happiness, and *mafsada* is pain and distress. Tropically, *maṣlaḥa* refers to the causes of pleasure and happiness, and *mafsada* refers to the causes of pain and distress. This holds true since it is possible that the causes of pleasure and happiness are *mafasada*s, or vice versa. Thus, a cause of *maṣlaḥa*, which itself could be a *mafsada*, could be commanded or made permissible not for its being a *mafsada*, but because it causes a *maṣlaḥa*. To explain this concept, al-ʿIzz writes that punishments are not legislated because they pose a *mafsada*, but because they result in a *maṣlaḥa* which is their underlying purpose (*al-maqṣūda min sharʿiyyatihā*).[71] All punishments are "*mafsada*s that the law has required in order to attain the veridical *maṣlaḥa*s (*al-maṣāliḥ al-ḥaqīqiyya*) that result from them."[72] By this

68 Ibid., 2:188.
69 Ibid., 1:7.
70 Ibid., 1:15–6.
71 Ibid., 1:18–9.
72 Ibid., 1:19.

understanding, fornication would not be considered a *maṣlaḥa* because, even though it produces pleasure and happiness, it is in truth a cause for pain and distress. The normative grounding of the law, then, is based on the action's consequence, and, contra al-Rāzī, al-ʿIzz's taxonomy privileges an objective notion of ethical value.

The Epistemology of Maṣlaḥa

As noted above, according to al-ʿIzz, the *maṣlaḥa*s of the Hereafter are known by revelation and those of this world are known by necessity, experiences, norms, and considered opinions. Al-ʿIzz also affirms an innate disposition (*ṭabʿ*) by which *maṣlaḥa* is known: Humans instinctively prefer things that offer a greater *maṣlaḥa*.[73] Their constitution (*jibilla*) inclines towards pleasure and happiness and is repulsed by pain and distress.[74] In a tone reminiscent of the Muʿtazilīs, al-ʿIzz writes that God has created in most people characteristics (*akhlāq*) that draw them towards every good (*ḥasan*) and deter them from every bad (*qabīḥ*) so that they may benefit from this disposition in the absence of a revealed law (*al-fatarāt bayn al-rusul*), be aware of the rationale (*ḥikma*) in the law when it is revealed by the prophets, and be grateful for it. Noble people seek the same things that the divine laws seek. Some people, however, are tested with having ignoble characteristics, which they must strive to oppose in order to attain happiness. People also have desires for things that are beneficial (*yanfaʿ*)—coinciding with things that are obligatory, recommended, or permissible in the law—and aversions against things that are harmful (*yaḍurr*)—coinciding with things that are prohibited or with the neglection of things that are obligatory.[75] This innate disposition that God instilled (*faṭara*) in people provides knowledge for most worldly *maṣlaḥa*s so they may be pursued.[76] Al-ʿIzz writes that "most of what [human] dispositions strive for is also what the revealed laws strive for."[77] There is a natural affinity, therefore, between human nature and the revealed law. Most *maṣlaḥa*s considered by the law are evident for most people: "Justice, good conduct, and giving to relatives[78] are known to be good (*maʿlūm^{un} ḥusnuhu*) by every person; likewise, immorality, ill conduct, and oppression are known to be bad (*maʿlūm^{un} qubḥuhu*) by every person."[79]

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73 Ibid., 1:9.
74 Ibid., 1:22.
75 Ibid., 1:164–5.
76 Ibid., 2:110.
77 Ibid., 2:110.
78 This is a reference to Qurʾān 16:90.
79 Ibid., 2:194.

Regarding this natural human disposition, there are two things al-ʿIzz discusses that are worth noting. First, the rationale (*ḥikma*) of revealed rulings may or may not be intelligible (*maʿqūl al-maʿnā*). A rationale is intelligible when the *maṣlaḥa* that is produced or *mafsada* that is averted by a legal ruling is rationally known. When it is unknown, the ruling is considered to be legislated as a matter of ritual (*taʿabbud*).[80] Al-ʿIzz provides the following maxim (*ḍābiṭ*): Once a pure *maṣlaḥa* is apparent then the action is pursued; if a pure *mafsada* is apparent then the action is avoided; if the situation is unclear then one must exercise caution.[81] Secondly, al-ʿIzz writes that pursuing *maṣlaḥa* is based on probabilistic knowledge (*ẓann*); that is, the results sought are not certain.[82] These two considerations qualify al-ʿIzz's views on the congruency between human disposition and the divine law, and the rational capacity to evaluate good and bad actions.

Since a legal ruling is not guaranteed to produce the consequence that is the purpose underlying it, individuals are not held accountable for procuring the actual *maṣlaḥa*. Rather, one is only charged with the causes (*asbāb*), i.e. the actions that are a means to occasioning the ends.[83] Accordingly, the means assume the rulings merited by their ends (*li-l-wasāʾil aḥkām al-maqāṣid*).[84] Significantly, this conceptualization safeguards against consequentialist legal reasoning that justifies the means by the ends. According to al-ʿIzz, individuals must act in accordance with the law's prescriptions—the means—and not in pursuit of the law's purpose—the ends.

In short, legal rulings apply to actions that are the means to the ends. *Maṣlaḥa* is procured when the means cause the ends. Importantly, evaluative judgements relate to the ends since the ends signify the real, or veridical, *maṣlaḥa* or *mafsada*. But since legal rulings attach only to the means, reason cannot produce legal rulings. For al-ʿIzz, revelation is the sole source of legislation; it accords with human nature and both are motivated towards the same ends. Thus, at minimum, human nature provides reasons for complying with the revealed law.

80 Ibid., 1:28, 165.
81 Ibid., 83–4.
82 Ibid., 1:6; 2:35, 109.
83 Ibid., 1:23. See also Ibid., 2:126, 260.
84 Ibid., 1:177.

The Relationship between Law and Maṣlaḥa

Al-ʿIzz affirms a congruency between human nature and the revealed law, but to what extent does the law pursue *maṣlaḥa*? For al-ʿIzz, *maṣlaḥa* pervades every aspect of the law. He writes that "the Sharīʿa [consists of] exhortations (*naṣāʾiḥ*) either to avert *mafsada*s or to procure *maṣlaḥa*s."[85] This telos exists in the Sharīʿa irrespective of how minuscule or considerable the *maṣlaḥa* may be.[86] Al-ʿIzz upholds what was previously characterized as a Mālikī typology of *maṣlaḥa*: Actions that serve a pure *maṣlaḥa* will be obligatory, recommended, or permissible, and so on and so forth.[87]

The law's purpose of procuring *maṣlaḥa* and averting *mafsada* reigns so paramount in al-ʿIzz's legal philosophy to the extent that he allows for limited circumstances in which people may pursue impermissible means for good ends. Al-ʿIzz, as a general rule, holds that "if the unlawful (*ḥarām*) is widespread such that permissible [means] are unavailable, then it is not required of the people to be patient until [a situation of] necessity (*ḍarūra*) arises. This is because patience would lead to widespread harm (*al-ḍarar al-ʿāmm*)."[88] Moreover, in such circumstances it is permissible to partake in the unlawful according to one's needs (*al-ḥājāt*).[89]

Interestingly, al-ʿIzz contends that whoever considers the purpose of the law (*maqāṣid al-sharʿ*) in procuring *maṣlaḥa*s will come to the conviction (*iʿtiqād*) or deep knowledge (*ʿirfān*) of the impermissibility of neglecting such *maṣlaḥa*s even in the absence of a specific directive based on scripture (*naṣṣ*), consensus (*ijmāʿ*), or *qiyās*. According to al-ʿIzz, "understanding the spirit of the law requires this (*fa-inna fahm nafs al-sharʿ yūjib dhālik*)."[90] As an analogy, the author writes that one may have an intimate knowledge of God's law similar to a nobleman's associate who, by virtue of his familiarity with the nobleman's likes and dislikes, would be able to issue a judgement in accord with the nobleman's taste even in his absence.[91]

85 Ibid., 1:14.
86 Ibid., 1:39.
87 Ibid., 1:40–41.
88 Ibid., 2:79–80.
89 Ibid., 2:313–4.
90 Ibid., 2:314.
91 Ibid., 2: 314–5.

4 Conclusion

I interpret al-ʿIzz's ethics as follows. He is an Ashʿarī by ontology: Moral facts do not correspond to metaphysical features, but instead turn on the consequences of actions.[92] His epistemology is Muʿtazilī: Reason can judge what is good and bad by evaluating consequences and, moreover, the content of *maṣlaḥa* is objective. This is established by al-ʿIzz's division between veridical and tropical *maṣlaḥa* and thus differentiates his theory from al-Rāzī's.

We are left with three types of actions: (1) Actions that are intrinsically good (*ḥasan fī dhātiha*) because they *always* produce good consequences, such as the belief in God. (2) Actions that are good in form (*ḥasan fī ṣūratihi*) because they normally produce good consequences but may be bad when they fail to do so, such as speaking the truth. (3) Finally, the value of some actions, such as eating fruit, will always depend on their consequences since such actions do not have a natural tendency towards good or bad consequences.

So, is al-ʿIzz an objectivist or theistic subjectivist? The question is misleading if by it we mean to squarely place al-ʿIzz within the camp of the Muʿtazilis or Ashʿaris with respect to the question of ethical value. Although, for al-ʿIzz, *maṣlaḥa* is defined by human perceptions of pleasure and pain, these perceptions can misfire when the *maṣlaḥa* in question is actually tropical. Such is the case of fornication, which produces an immediate perception of pleasure but actually results in harm. Because of this human capacity to err, the law is a more reliable *index* of the good, though it does not *define* the good. While al-ʿIzz affirms the Muʿtazilī notion of a natural consonance between reason and law and commits to a rationalist definition of ethical value, he also takes the Ashʿarīs view that revelation is the sole source of *legal* norms (though reason may be delegated independent authority in exceptional circumstances). In summary, in the absence of revelation (*qabla wurūd al-sharʿ*) the good may be intelligible and normative, but no legal responsibility follows.[93]

92 In this way, al-ʿIzz would be considered a realist by contemporary philosophers since the factuality of moral propositions turns on actual consequences.

93 Al-ʿIzz's theory seems to share many similarities to Ibn Taymiyya's, which receives a thorough treatment by Sophia Vasalou in a monograph the insights of which I was unable to incorporate at the time of authoring this essay. See Sophia Vasalou, *Ibn Taymiyya's Theological Ethics* (New York: Oxford University Press, 2015).

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PART 3

Study of the Sharīʿa in the Modern and Contemporary Periods

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CHAPTER 9

A Conservative Jurist's Approach to Legal Change

Ashraf ʿAlī al-Thānawī on Women's Political Rule

Salman Younas

1 Legal Theory and Language

The position that a woman cannot be political ruler was a point of general consensus amongst scholars of the four Sunnī schools who identified being male as a condition for an individual to assume such a role.[1] The primary textual evidence cited for this position was the prophetic tradition narrated by Abū Bakra, "No nation shall prosper who assign their affair to a woman."[2] Scholars identified a number of reasons underlying the prohibition deduced from this tradition: women were deficient in their intellect and, therefore, could not soundly exert authority over others; women were not permitted to mingle with members of the opposite gender and appear in the public eye; men possessed a degree of social superiority over women on account of being their caretakers; and women were unable to effectively carry out certain state actions, such as warfare. Despite each of these points being forwarded to justify the prohibition in question, the legal reasoning used to derive it from the prophet tradition narrated by Abū Bakra returned to a theory of language espoused by legal scholars. It is this theory that is essential to understanding scholarly conclusions that generalized the prohibitive scope of Abū Bakra's narration.

Discussions concerning linguistic signification and interpretation are prominent in works of legal theory (*uṣūl al-fiqh*) and aim to establish and detail a purportedly essential relationship between words, the structures of language, whether morphological or syntactical, and meaning. Language, according

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1 Muḥammad Amīn ibn ʿĀbidīn, *Radd al-Muḥtār ʿalā Durr al-Mukhtār*, 5 vols. (Beirut: Dār Iḥyāʾ al-Turāth, 1987), 1:368; Muḥammad ibn Aḥmad ʿIlīsh, *Minḥ al-Jalīl Sharḥ Mukhtaṣar Khalīl*, 9 vols. (Beirut: Dār al-Fikr, 1984), 8:259; al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj ilā Maʿrifat Maʿānī Alfāẓ al-Minhāj*, ed. Muḥammad Khalīl ʿAytānī, 4 vols. (Beirut: Dār al-Maʿrifa, 1997), 4:168; Muwaffaq al-Dīn ibn Qudāma, *al-Mughnī*, ed. ʿAbd al-Fattāḥ Muḥammad Ḥulw & ʿAbd Allāh ibn ʿAbd al-Muḥsin Turkī, 15 vols. (Riyadh: Dār ʿAlam al-Kutub, 1997), 14:12–13.

2 Muḥammad ibn Ismāʿīl al-Bukhārī, *al-Jāmiʿ al-Ṣaḥīḥ*, ed. Muḥammad Zuhayr Nāṣir, 9 vols. (Beirut: Dār Tawq al-Najā, 2002), 6:8, 9:55; Muḥammad ibn ʿĪsā al-Tirmidhī, *al-Jāmiʿ al-Kabīr*, ed. Bashshār ʿAwwād Maʿrūf, 6 vols. (Beirut: Dār al-Gharb al-Islāmī, 1996), 4:111; Aḥmad ibn Shuʿayb al-Nasāʾī, *Sunan al-Nasāʾī*, ed. Mashhūr Ḥasan (Riyadh: Maktabat al-Maʿārif li-l-Nashr wa-l-Tawzīʿ, 1996), 809.

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to legal scholars, was created at some primordial moment when utterances (*alfāẓ*) were assigned (*waḍʿ*) particular meanings. Since this initial assignment was the original meaning intended for a word, it also constituted the literal (*ḥaqīqa*), plain, and veridical usage of that word.[3] For example, morphological imperatives signify obligation or prohibition because the original assignment of the imperative, or its literal meaning, was deemed to be such by the assigner.[4] Since expressions possessed a literal and original usage, the general presumption was that the intended meaning being conveyed by a speaker was the literal or plain sense of an expression, a point expressed by the legal maxim "the base presumption in speech is the literal sense."[5] The literal sense could be left for a metaphorical (*majāzī*) interpretation only when there was evidence to support such a departure, such as context. Thus, a morphological imperative uttered by an individual to someone in a position of authority is plausibly interpreted as a request as opposed to a demand given the status of the addressee.[6]

The literal sense could also be applied to all instances of a particular class. This general (*ʿāmm*) application of the literal sense was achieved through the usage of expressions that inherently conveyed generality, such as "all" (*kul*) or "whatsoever" (*mā*), or through linguistic structures, such as the negation of an indefinite noun.[7] When a general linguistic form was used, the majority of scholars stated that it was evidence that the lawgiver intended to apply a ruling to all the members of a class, while a minority stated that general linguistic forms only allow for a ruling to be applied to some in the class or that no presumption could be made without additional evidence.[8] Despite this disagreement, even the majority position conceded that the general form almost always came specified. This was known to jurists as *takhṣīṣ al-ʿāmm*, or the

3 ʿAbd al-ʿAzīz ibn Aḥmad al-Bukhārī, *Kashf al-Asrār ʿan Uṣūl Fakhr al-Islām al-Bazdawī*, 4 vols. (Beirut: Dār al-Kitāb al-ʿArabī, 1974), 2:39–40; Badr al-Dīn al-Zarkashī, *al-Baḥr al-Muḥīṭ*, ed. ʿAbd al-Qādir al-ʿĀnī, 6 vols. (Kuwait: Wizārat al-Awqāf wa-l-Shuʾūn al-Islāmiyya, 1992), 2:152–53.

4 ʿAlī ibn Muḥammad al-Bazdawī, *Uṣūl al-Bazdawī*, ed. Sāʾid Bakdāsh (Beirut: Dār al-Bashāʾir, 2016), 122–23; al-Zarkashī, *al-Baḥr*, 2:348.

5 Al-Bukhārī, *Kashf al-Asrār*, 1:70, 300, 3:126; al-Zarkashī, *al-Baḥr al-Muḥīṭ*, 2:191; Zayn al-Dīn ibn Nujaym, *Ashbāh wa-l-Naẓāʾir*, ed. Muḥammad Mutīʿ al-Ḥāfiẓ (Beirut: Dār al-Fikr, 1999), 77.

6 Al-Zarkashī, *al-Baḥr*, 2:346–48.

7 Al-Bazdawī, *al-Uṣūl*, 202–15; al-Zarkashī, *al-Baḥr*, 3:62–63.

8 Al-Bazdawī, *al-Uṣūl*, 190–95; al-Zarkashī, *al-Baḥr*, 3:17–21. For the theological background of these debates see Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Atlanta, Georgia: Lockwood Press, 2013), 80–86.

specification of the general, and indicated that the lawgiver did not intend the literal meaning outwardly entailed by an expression.[9]

The literal or metaphorical interpretation of an expression depended on the availability of contextual indicants (*qarāʾin*). Many scholars of legal theory identified three broad categories of indicants: (a) textual (*lafẓī*), (b) rational (*ʿaqlī*), and (c) extra-textual (*ḥālī*), all potentially serving as evidence assisting in clarifying the intent of a speaker through specification, abrogation, addition, definition, or explanation.[10] For example, the Qurʾān states that God sent a wind to the people of Hūd "destroying everything by the commandment of its Lord." (46:25) Here, the word "everything" (*kul*) was not understood literally as the verse continues by stating, "in the morning there was nothing to be seen but their dwelling places," a textual indicant affirming that not everything was destroyed. Another example is the prophetic tradition, "Do not sell that which is not in your possession (*lā tabiʿ mā laysa ʿindaka*)." Despite the fact that this prophetic tradition uses a particle of generality (*ḥarf al-ʿumūm*), many scholars permitted 'forward sales' (*salam*) involving payment up front for the production and future delivery of a good not yet in existence. Among the arguments forwarded for this exception was the prohibition being conveyed in a context where forward sales were customarily transacted without prophetic censure.

The importance that scholars of legal theory assigned to linguistic signification and interpretation stemmed in large part from a doctrinal perspective that viewed the Arabic language as possessing a unique status reflected both in the inimitability of the Qurʾān and the eloquence of the Arabs, the foremost of whom was the figure of the Prophet. Following from the notion that the speaker of language knew the original meanings that constituted the literal usage of words, their potential metaphorical usages, and the various linguistic conventions present in that language, it was natural to assume that words and linguistic structures were chosen carefully by the lawgiver, whether God or the Prophet, to convey a particular meaning. As such, the meanings conveyed by the primary texts could be understood from the rules and structures of language in predictable ways, and the results arising from the exercise of legal theory were predictable as well. Consequently, classical legal theory took on a highly formalistic appearance by attempting to restrict meaning to the

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9 For a detailed discussion on *takhṣīṣ* see Zysow, *The Economy of Certainty*, 76–93; Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), 45–47.

10 Al-Zarkashī, *al-Baḥr*, 2:191–93. For more on contextual indicants see Wael Hallaq, "Notes on the Term Qarīna in Islamic Legal Discourse" in *Journal of American Oriental Society* 8, no. 3 (July–September 1988), 475–80.

observable features of language with the hopes of constraining the presuppositions of an interpreter and confining legal rule deduction to a more systematic interpretive method.[11]

However, as Sherman Jackson argues, classical legal theory is only putatively formalistic and could neither exclude nor take account of the presuppositions that inform legal interpretation.[12] Thus, for example, while the search for indicants was required before making a presumption in favor of the literality of a text or evidencing a metaphorical intent, the actual decision by a jurist to search for indicants and the assiduousness by which he did so would return to a number of factors, such as his own set of concerns, presuppositions, and the relative importance he assigns to the interpretation of a particular text. As Jackson rhetorically asks:

> Is there really anything in the morphological composition of a word or the syntactical structure of a sentence that would tell us the precise level of assiduousness to exert in locating or eliminating the existence of relevant *qarāʾin*?[13]

Additionally, when a jurist was sufficiently motivated to inquire into the existence of potential indicants, the works of legal theory provided only broad guidelines. Works of legal theory do discuss the extent to which a scholar must search for indicants before making a presumption of generality: some said one must be certain no indicants exist; others stated one must be reasonably sure (*ghalabat al-ẓann*); another group said that minimal research was sufficient.[14] However, understandings of "certainty", "reasonable surety", and what constitutes "minimal research", are themselves subjective. In other words, rules systematizing in any substantial manner an actual process through which the existence of contextual indicants could be determined or the actual intent behind a word or statement discovered were absent. These determinations were largely contingent upon the subjective motivations and considerations of individual jurists. As such, a jurist was afforded significant liberty in modifying his or her application of legal theory to fashion and justify a legal interpretation.

11 Sherman Jackson, "Fiction and Formalism: Towards a Functional Analysis of *Uṣūl al-Fiqh*," in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (Leiden: Brill, 2002), 191.

12 Ibid., 192.

13 Ibid., 193.

14 Al-Zarkashī, *al-Baḥr*, 3:49.

2 The Classical Position on the Political Rule of Women

The formalism of classical legal theory and the rules governing the general form, specification, and contextual indicants provide the framework within which the classical position on women's political rule can be understood, as well as the legal verdict of al-Thānawī. As mentioned previously, the primary textual justification that scholars settled upon for this legal ruling was the narration of Abū Bakra, which was transmitted in a number of variant wordings all of which preserve an important linguistic structure, namely the negation of an indefinite noun, which was considered a general form.[15] This was the literal sense imparted by the prophetic tradition and specifying it would require additional evidence. The impermissibility of a woman being political ruler was deduced from the fact that such rule was identified as a cause for misfortune, which was clearly to be avoided. This was extended to the entire class of women since the literal sense of the prophetic tradition did not single out a specific group of people but *any* people (*qawmun*) who appoint *any* woman (*imra'atan*) as political ruler as signified by the indefinite forms of both words.

The utterance of this prophetic tradition being occasioned by a particular circumstance (*sabab*), namely the appointment of a woman as ruler of Persia, is affirmed in its major variants.[16] However, the circumstance was itself insufficient in specifying the prophetic tradition as being in reference to Persia or the person of Burān, the leader of Persia. Here, scholars returned to the primacy accorded to language within legal theory in order to reject the claim for specification based on circumstance. Classical legal theory did recognize the importance of non-linguistic context to interpretation but the majority of scholars held that the circumstance provoking a revelatory utterance was insufficient in itself to evidence a more specific intent on the part of the lawgiver, a point affirmed in the legal maxim, "consideration is given to the generality of the wording, not the specificity of circumstance."[17] The majority of scholars argued that it was the wording of the lawgiver that revealed his intent, and the usage of the general form indicated that the lawgiver intended a general legal ruling even if it was in response to a specific inquiry or event.

15 For example, the wording related by al-Bukhārī is *lan yufliḥ qawmun wallū amrahum imra'atan* where the word "nation" (*qawm*) is indefinite and preceded by a negation (*lan*). See al-Bukhārī, *al-Ṣaḥīḥ*, 6:8, 9:55.

16 Ibid. Here, Abū Bakra identifies the Prophet making this statement when he "heard the news that the Persians had appointed Chosroe's daughter as their queen."

17 Al-Zarkashī, *al-Baḥr*, 3:198. As with the general term and specification, the author points out that this principle has several details and exceptions. However, since these are not directly relevant to the current discussion, I have chosen not to discuss them in this article.

Though the circumstance occasioning this prophetic tradition was deemed insufficient as evidence of specification, the more interesting question is whether other indicants existed that could lend support to a narrower interpretation of this tradition. Some scholars in the modern period have referenced the Qurʾānic narrative of Bilqīs, the Queen of Sheba, as one such indicant. According to Yūsuf al-Qaraḍāwī, the figure of Bilqīs presented in the Qurʾān is one of a model political ruler who relies upon deliberation when formulating decisions, a narrative that serves as evidence for the permissibility of women being appointed as heads in modern day nation-states.[18] Similarly, progressive Muslims cite the narrative of Bilqīs to show that the Qurʾān does not restrict women from positions of political authority. Amina Wadud, for example, states that the Qurʾān depicts Bilqīs "extremely well" and "celebrates both her political and religious practices."[19]

Despite the fact that the Qurʾānic nature of Bilqīs' narrative provides it a degree of strength classically deemed higher than the narration of Abū Bakra in certain regards, such as being decisive in establishment (*qaṭʿī al-thubūt*),[20] its mention is virtually non-existent in legal works, while exegetes generally treat her as a minor part of a larger historical narrative focusing on the Prophet Sulaymān. Any discussion regarding the legal implications of her narrative on normative understandings of female political rule were brief and dismissed by referring to the narration of Abū Bakra. Mohammad Fadel mentions the following exegetes who introduce the narration of Abū Bakra in connection with the narrative of Bilqīs: Abū Bakr ibn al-ʿArabī (d. 543/1148), Abū Ḥayyān (d. 745/1344), al-Baghawī (d. 516/1122), al-Qurṭubī (d. 671/1273), al-Māwardī (d. 450/1058), and al-Shirbīnī (d. 994/1586).[21] In all of these works, the tradition of Abū Bakra is the primary, if not the only, textual evidence cited to prohibit the political rule of women.

Alongside the citation of this prophetic tradition, some of the aforementioned exegetes justified the prohibition in view to the nature of women, their inability to execute certain state actions, and the prohibition on opposite

18 Yūsuf al-Qaraḍāwī, *Min Fiqh al-Dawla fī al-Islām* (Cairo: Dār al-Shurūq, 2001), 174–76.

19 Amina Wadud, *Quran and Woman: Rereading the Sacred Text from a Woman's Perspective* (Oxford: Oxford University Press, 1999), 40, 89.

20 This was on account of its Qurʾānic nature as the entirety of the Qurʾān was viewed as decisively transmitted.

21 Mohammad Fadel, "Is Historicism a Viable Strategy for Islamic Law Reform? The Case of 'Never Shall a Folk Prosper Who Have Appointed a Woman to Rule Them,'" in *Islamic Law and Society* 18 (2011), 169 f.n. 129.

genders intermingling. Ibn al-ʿArabī, for example, quotes Abū Bakr al-Bāqillānī (d. 403/1012–13) as stating that political leadership requires "protecting borders, administrating affairs, receiving and distributing taxes to those entitled to it, which cannot be carried out in the same manner by a woman as it can be by a man."[22] Abū Ḥayyān, on the other, downplays the normative significance of Bilqīs' narrative by stating that her appointment as leader was "from the actions of her people, and they are disbelievers so it cannot serve as evidence."[23]

Using the primacy accorded to language by legal theory, scholars dismissed any potential indicants, whether textual or extra-textual, that could evidence a narrower reading of the prophetic tradition narrated by Abū Bakra. The wording of this tradition was viewed as evidence for the general prohibition of women being appointed political rulers and was extended by a majority of scholars to other positions of authority, such as judgeships.[24]

3 The Legal Verdict of al-Thānawī

There have been few Muslim scholars in the modern period as influential as Ashraf ʿAlī al-Thānawī (d. 1362/1943). Living in British India during a period of momentous political, social, and religious change, al-Thānawī belonged to a group of traditionally educated religious scholars who sought to defend the Islamic tradition and reaffirm the authoritative voice of the *ʿulamāʾ* when such traditions and authorities were eroded by European colonial projects. In this context, al-Thānawī emerged as a leading scholar and spiritual master commanding a following that constituted some of the most influential scholars of the 20th century. His prolific authorship, estimated at over a thousand works, continues to shape Islamic discourse in India, Pakistan, and in places as far as America, England, and South Africa where the Deobandī movement to which al-Thānawī belonged is well entrenched within segments of the South Asian diaspora.

22 Muḥammad ibn al-ʿArabī, *Aḥkām al-Qurʾān*, ed. ʿAli Muḥammad al-Bajawī, 4 vols. (Cairo: Dār Iḥyāʾ al-Kutub al-ʿArabiyya, 1957), 1:1457–58.

23 Abū Ḥayyān Muḥammad ibn Yūsuf, *Tafsīr al-Baḥr al-Muḥīṭ*, ed. ʿĀdil Aḥmad ʿAbd al-Mawjūd & ʿAlī Muḥammad Muʿawwaḍ, 8 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya), 7:64.

24 On women as judges see Karen Bauer, "Debates on Women's Status as Judges and Witnesses in Post-Formative Islamic Law," in *Journal of the American Oriental Society* 30, no. 1 (January–March 2010), 1–21.

As one of the key figures of the Deobandī movement, al-Thānawī closely followed the broader vision of the founders of Dār al-ʿUlūm Deoband.[25] Describing the scholarly vocation of early Deobandī scholars, Qasim Zaman states that it was:

> Reforming the beliefs and practices of ordinary believers … to the early Deobandīs, a self-conscious adherence to the teachings of the Qurʾān and the *ḥadīth* and a sense of individual moral responsibility were among the best means not only of salvation but also of preserving an Islamic identity in the adverse political conditions of British colonial rule.[26]

While scholars from the Deobandī movement sought to anchor their teachings in the primary texts, they continued to retain an all-embracing commitment to the Ḥanafī school and vociferously argued for adherence to one of the four legal schools (*taqlīd shakhṣī*).[27] This requirement to adhere exclusively to one of the four legal schools applied not only to the laity but also to scholars in their capacity as *muftī*s, since these scholars no longer viewed themselves as capable of engaging in independent legal reasoning (*ijtihād*). Although Deobandī attitudes towards *taqlīd* were not monolithic, the approach of many Deobandī scholars, including al-Thānawī, was to confine their legal activity to the Ḥanafī school. Indeed, al-Thānawī unequivocally argued against both the practice of picking and choosing between different legal schools and calls for *ijtihād* that sought to bypass these legal schools and engage directly with the primary texts.[28]

Despite being a proponent of *taqlīd*, al-Thānawī did engage in limited forms of *ijtihād*, such as internal-school *ijtihād* that involved determining the stronger of two or more transmitted positions within the school.[29] Al-Thānawī also

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25 Dār al-ʿUlūm Deoband was a religious seminary founded in 1866 by prominent Sunnī scholars in reaction to British colonialism in India. Currently, there are thousands of Deobandī seminaries around the world sharing the doctrinal orientation of Dār al-ʿUlūm Deoband. For more see Barbara Metcalf, *Islamic Revival in British India: Deoband, 1860–1900* (Princeton, New Jersey: Princeton University Press, 2014).

26 Muhammad Qasim Zaman, *Ashraf ʿAli Thanawi* (Oxford: Oneworld, 2007), 3.

27 For more on the obligation of *taqlīd shakhṣī* and its justification see Ashraf ʿAlī al-Thānawī, *al-Iqtiṣād fī al-Taqlīd wa-l-Ijtihād* (Karachi: Qadīmī Kutub Khāna, n.d.), 30–55; Muḥammad Taqī ʿUthmānī, *Uṣūl al-Iftāʾ wa-Adābuhu* (Karachi: Maktabat Maʿārif al-Qurʾān, 2011), 61–88.

28 For more on Deobandī attitudes towards *taqlīd* and *ijtihād* see Muhammad Qasim Zaman, *Modern Islamic Thought in a Radical Age: Religious Authority and Internal Criticism* (Cambridge: Cambridge University Press, 2012), 103–109.

29 Al-Thānawī, *al-Iqtiṣād*, 82.

stated that it was necessary for scholars in every period to employ the principles of their school to determine legal rulings for unprecedented cases.[30] In cases of necessity (*ḍarūra*) and need (*ḥāja*), he also deemed it permissible for scholars to go outside of their legal schools altogether.[31] Each of these forms of *ijtihād* was viewed as part of the broader framework of *taqlīd*, a framework that "encompassed the power to set in motion the inherent processes of continuity and change."[32] Indeed, one of al-Thānawī's most enduring attempts at reanalyzing a legal ruling to make it adaptable to the circumstances of his time was his response to the female apostasy crisis in India where Muslim women were renouncing Islam as a way of annulling their marriages. It was in response to this crisis that al-Thānawī authored a treatise entitled *al-Ḥīla al-Nājiza li-l-Ḥalīla al-ʿĀjiza*. In this work, he not only chose a weaker opinion in the Ḥanafī school concerning the effect of apostasy on marriage but also adopted the opinion of the Mālikī school as it related to both the duration a woman had to wait following the disappearance of her husband before seeking a marriage annulment and the manner in which such an annulment was granted in the absence of an Islamic court.[33]

The legal verdict of al-Thānawī on women being political rulers is another example of his undertaking *ijtihād*. In many ways, this legal verdict is more radical and sophisticated than the one he issued when attempting to resolve the problem of female apostasy. While the latter was largely characterized by the search for solutions *within* the existing rules of the legal schools, the former is a novel reinterpretation of the primary texts through the application of legal theory and legal principles. This is not to say that the conservatism of al-Thānawī is absent in this legal verdict; rather, it is precisely his ability to remain within the parameters of classical legal thought that makes the legal verdict particularly interesting.

The legal verdict on female political rulers is found in al-Thānawī's *Imdād al-Fatāwā*, a work that gathered the legal verdicts he issued between the years 1887 and 1943. It begins with the following question:

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30 Ibid.

31 Ibid., 81.

32 Wael, Hallaq, *Authority, Continuity, & Change in Islamic Law* (Cambridge: Cambridge University Press, 2004), 65.

33 For a detailed analysis of this treatise see Fareeha Khan, "Traditionalist Approaches to Sharīʿah Reform: Mawlana Ashraf ʿAli al-Thānawī's Fatwa on Women's Right to Divorce" (PhD Diss., University of Chicago, 2008).

> There is a prophetic tradition in al-Bukhārī, "No nation shall prosper who assign their affairs to a woman," which shows that a woman being a guardian or ruler is cause for lack of prosperity. Does this include modern-day nations that have women as rulers?[34]

In answering this question, al-Thānawī begins by forwarding a typology of leadership: first, one that is complete (*tāmm*) and generally encompassing (*ʿāmm*); second, one that is complete but not generally encompassing; and third, one that is generally encompassing but not complete.[35] He explains what he intends by the terms 'complete' and 'generally encompassing' immediately after mentioning the first type stating:

> By 'complete' what is meant is that the ruler is alone and independent in making decisions, namely his or her rule is personal (*shakhṣī*) and does not require the consent of a higher authority upon which such rule is contingent (*mawqūf*). By 'generally encompassing' what is meant is that those being governed are not a small, limited group (*jamāʿa qalīl wa-maḥdūd*).[36]

Giving examples of each of these, al-Thānawī states that the first type is a woman who exercises autocratic political rule over a nation, the second type is a woman who independently administers a small group of people, and the third type is a woman whose political rule is democratic (*jumhūrī*) such that she is not the ruler in actuality but one of many individuals (*rukn*) who form a consultative legislative body. In this type of government, authority resides with the entire legislative branch even if the woman who is formally designated as political ruler is given a degree of preference in her opinions during the consultative process.[37] According to al-Thānawī, the term 'ruler' can only be applied to the first of the aforementioned types since it is only such an individual who exercises authority independently without constraint over a significant population. The other two types of rule are only so in *form* (*ṣūrī*), not in *reality*, because the decisions of the ruler are either subject to legal restraints and mechanisms of checks and balances, or because it is exercised over an

34 Ashraf ʿAlī al-Thānawī, *Imdād al-Fatāwā* (Karachi: Maktabat Dār al-ʿUlūm Karāchī, 1999), 5:91.

35 Ibid.

36 Ibid. In other words, what al-Thānawī means by 'complete' is best understood as an 'autocratic' form of rule. Therefore, I will be using the latter term throughout this paper.

37 Ibid.

insubstantial population. In both cases, the ruler is actually not a ruler in the fullest sense of the term.[38]

After introducing this typology, al-Thānawī proceeds to analyze the prophetic tradition narrated by Abū Bakra to determine the type of political rule being prohibited for women. Does it include all the aforementioned types or is it specific to one or another? It is here that al-Thānawī introduces two broad types of indicants to evidence the specific intent behind the prophetic tradition: firstly, those relating directly to the prophetic tradition itself, such as its wording and the circumstance immediately surrounding it; and secondly, those that relate to the broader subject-matter of the tradition and assist (*taʾyyīd*) in clarifying its meaning.

3.1 *Direct Indicants*

The 'direct indicants' that al-Thānawī introduces are, firstly, the semantic significations of certain words found in the prophetic tradition and, secondly, its context, which was the appointment of Burān over Persia. Unlike pre-modern jurists who in their conclusions sufficed with the general linguistic form of this prophetic tradition, al-Thānawī attempts to scrutinize its wording in greater detail. Two words in particular are indicative of the specific intent of the lawgiver according to al-Thānawī: 'assign' (*wallū*) and 'people' (*qawm*). The first on account of being used unconditionally (*muṭlaq*) is to be understood according to the fullest sense of its meaning (*kamāl al-mafhūm*), which is an accepted principle in the Ḥanafī school.[39] Therefore, the word 'assign' in this prophetic tradition signifies a complete relegation of authority to a woman.[40]

Additionally, the ascription of the act of assigning such authority is made to a *qawm*, or a significant population of people properly constituting a nation. Thus, the prophetic tradition is speaking of complete political authority entrusted by a nation of people to an individual and exercised by said individual over such a people.[41] Consequently, the prohibition established by this prophetic tradition is applicable only to the first type of political rule, namely one that is truly autocratic (*tawliya kāmila*) and exercised over a large population of people constituting a nation who entrust their ruler with such authority.[42]

38 Ibid.

39 Al-Bukharī, *Kashf al-Asrār*, 1:260, 2:131, 395; Kamāl ibn al-Humām, *Fatḥ al-Qadīr*, 9 vols. (Beirut: Dār Iḥyā' al-Turāth, n.d.), 7:249.

40 Al-Thānawī, *al-Imdād*, 5:91.

41 Ibid.

42 Ibid.

According to al-Thānawī, this interpretation is further supported by the circumstance surrounding the prophetic tradition. Al-Thānawī is well aware of the majority position that the circumstance occasioning a revelatory utterance is insufficient on its own to evidence specification. Nonetheless, it may still be utilized to lend support to a narrower reading of the texts when other available evidence suggests such an interpretation, a point acknowledged even by pre-modern scholars.[43] In light of the wording of Abū Bakra's narration, the circumstance reveals that the prohibition in question is in reference to women ruling in a fashion akin in type and scope to that of Burān. As al-Thānawī states:

> Carefully scrutinizing the wording of this prophetic tradition reveals that it applies to the first type and this is why the circumstance under which it was uttered was the Persian appointment of the daughter of Chosroe as ruler.[44]

In this manner, al-Thānawī advances his interpretation along the same line of reasoning employed by pre-modern jurists: if it is true that the lawgiver chooses his words and linguistic structures carefully and intentionally to convey a particular meaning, then the choice of the lawgiver to use the words 'assign' and 'people' suggests his intent at a narrower meaning, a point further indicated by the particular circumstance surrounding the prophetic tradition.

3.2 *Indirect Indicants*

Following this initial line of justification, al-Thānawī proceeds to mention additional textual and legal evidences to demonstrate that women may assume leadership roles that correspond to the second and third types in his typology. The first piece of textual evidence he introduces is the narrative of Bilqīs. He states:

> The narrative of Bilqīs is mentioned in the Qur'ān wherein it quotes her stating, 'I am not accustomed to deciding an affair until you bear me witness.' Upon careful analysis, this verse demonstrates that Bilqīs' practice as a ruler was a democratic one (*jumhūrī*) whether this was due to prior legislative stipulations imposed upon her by her people or due to her

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43 Thus, al-Ghazālī stated that a text that was revealed in response to a specific event was more likely intended to have a specific meaning and could be specified by relatively weak indicants. See Muḥammad ibn Muḥammad al-Ghazālī, *al-Musṭaṣfā*, ed. Muḥammad ʿAbd al-Salām ʿAbd al-Shāfiʿī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1993), 236.

44 Al-Thānawī, *al-Imdād*, 5:91.

> own habitual practice (ʿ*āda mustamirra*). There is also no evidence that she was removed as ruler after having brought faith. Therefore, the explicit mention of her being ruler and the lack of evidence regarding her removal establishes that her rule continued, which history attests to, and so the legal principle, 'If God and His Prophet narrate something to us without censure, it is proof for us,' establishes that the Qurʾān permits the democratic rule of a woman.[45]

As an exegete himself, al-Thānawī was aware of what pre-modern scholars had stated about the implications of Bilqīs' narrative on normative understandings of women's political rule. Nonetheless, al-Thānawī reinterprets the narrative in question by employing classical principles in a manner that dictates a different conclusion to that reached by pre-modern scholars. While pre-modern scholars, such as Abū Ḥayyān, cited the principle that the actions of disbelievers do not constitute evidence for the permissibility of an action, al-Thānawī uses a different principle to affirm the evidentiary nature of the narrative of Bilqīs, namely the tacit approval of God and His Prophet, which was a well-established principle in the Sunnī schools.[46]

As such, the political rule of Bilqīs was permitted because it was not considered autocratic in nature corresponding thereby to the third type in al-Thānawī's typology. Her decision-making was based on consultation (*shūrā*) with the nobility and viziers of her kingdom, which made her a member of a larger consultative body. This was a role that women could undertake according to the primary texts. As al-Thānawī states:

> A woman is fit to be consulted. During the incident of Ḥudaybiya, the Prophet himself acted on the consultation of Umm Salama and the result was favorable (*maḥmūd*).[47]

Further, the fact that Bilqīs was viewed as an independent ruler was insufficient to include her type of leadership in the prohibition deduced from the narration of Abū Bakra as long as she willingly consigned her decision making to a consultative process:

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45 Ibid., 5:92.

46 Al-Zarkashī, *al-Baḥr*, 4:201–10.

47 Al-Thānawī, *al-Imdād*, 5:92.

> Even if the leadership of a woman is independent (*shakhṣī*) but she willingly persists in not following through on her exclusive opinion, this will not enter into the prophetic tradition.[48]

These words of al-Thānawī demonstrate that his key consideration is the act of consultation. As long as a female political ruler consults other people to formulate decisions, the prophetic tradition would not apply to her rule. According to al-Thānawī, this would be the case regardless of whether she was in actuality occupying the position of an independent ruler and regardless of whether her voice was deemed stronger in the consultative process than others. In other words, a female ruler could technically be an autocrat but still be considered from the third category of leadership if she willingly consigned decision-making to a consultative process.

The reason why the consultative process occupies such an integral place with al-Thānawī is because the legal cause (*ʿilla*) underlying the correlation between misfortune and women being political rulers is the assumed deficient intellect of the latter, a point also mentioned by pre-modern scholars. In al-Thānawī's view, the negative consequences arising from such a deficiency are mitigated by the presence of other opinions and viewpoints. This reasoning is analogous to the issue of female testimony (*shahāda*); just as a woman's testimony is inadmissible in court without supporting male witnesses, so too is her political rule impermissible and a cause for failure without other consultative voices.[49]

Following this, al-Thānawī discusses the validity of the second type in his typology, namely autocratic female rule exercised over a small population of people. Here, al-Thānawī cites the prophetic tradition, "The Imām is a caretaker (*rāʿin*) over the people … and a woman is a caretaker over the home of her husband and his children."[50] The word caretaker in this prophetic tradition refers to authority and leadership as understood from its usage for the Imām, which is a word synonymous to the caliph. This prophetic tradition, therefore, affirms the leadership of a woman over a small group of people.[51]

In further support of this interpretation, al-Thānawī cites the issue of women being appointed as judges. Whereas scholars of the Ḥanafī school deemed maleness a condition of validity (*sharṭ ṣiḥḥa*) for anyone assuming supreme leadership of the community (*imāmat al-kubrā*), this was not so

48 Ibid.
49 Ibid.
50 Al-Bukharī, *al-Ṣaḥīḥ*, 2:5.
51 Al-Thānawī, *al-Imdād*, 5:92.

for the role of a judge. Rather, a woman could validly assume such a role although the one appointing her would incur a degree of sin. The differing ways in which maleness was understood as a condition for the supreme leader and the judge mirror the first and second types of leadership in al-Thānawī's typology: the judge exercises authority over a limited population and, therefore, scholars did not deem maleness a condition for one to validly assume such a role. Similarly, maleness would not be a condition for one to validly assume the role of political ruler when the authority of the ruler is limited to a small group of people.[52]

In concluding, al-Thānawī states that the evidence specifies the prophetic tradition as applicable only to the first type of political leadership in his typology. Since modern day nations ruled by women are generally democratic in nature, they are not from this category of leadership and the prophetic tradition would therefore not apply to them.[53]

4 Reception of al-Thānawī's Legal Verdict

In the manner above, al-Thānawī was able to specify the narration of Abū Bakra as referring to a particular form of political rule: one that is *truly* and *completely* autocratic in practice and exercised over a nation. This position is nearly identical to the conclusions reached by later scholars who are generally viewed as being less conservative than al-Thānawī in their legal approach. Yūsuf al-Qaraḍāwī, for example, states that the prohibition on women being political rulers applies only to the office of the caliph as supreme leader of the Muslim community. He justifies this conclusion by resorting to arguments similar to those forwarded by al-Thānawī, such as the narrative of Bilqīs, the nature of modern democracies, and the linguistic signification of particular words.

Nonetheless, the language and structure of al-Qaraḍāwī's answer reveals an approach that is distinct to al-Thānawī's in both its method of argumentation and commitment to the dominant views of classical scholars. The first argument al-Qaraḍāwī introduces is the circumstance surrounding Abū Bakra's narration. Although al-Qaraḍāwī acknowledges that specification of a text through the circumstance surrounding it is contrary to the majority view of scholars, he dismisses such criticism on grounds that it not a consensus position. The second argument forwarded by al-Qaraḍāwī is the Qurʾānic depiction

52 Ibid., 5:92–93.
53 Ibid., 5:93.

of Bilqīs as a model ruler. Understanding Abū Bakra's narration as general to all types of political rule would contradict this narrative, and, therefore, it cannot be viewed as establishing a general prohibition. In a third argument, al-Qaraḍāwī argues that there have been many instances where women were more effective political rulers and administrators than men. It is after forwarding these arguments that al-Qaraḍāwī briefly mentions the linguistic signification of the word 'appoint' in the prophetic tradition as further evidence of specification.[54]

The manner in which al-Thānawī and al-Qaraḍāwī present their evidence reveals the importance both scholars assign to situating their arguments within the broader framework of the classical legal tradition. The legal verdict of al-Thānawī, however, demonstrates a more conscious attempt on the part of its author to conform to majoritarian interpretive principles. This is most apparent in the manner each scholar utilizes the circumstance surrounding the prophetic tradition: for al-Thānawī, it merely acts as a contextual indicant affirming what is already signified by the wording of the tradition; for al-Qaraḍāwī, the circumstance itself specifies the meaning of the tradition.

In the context of modern reform, the legal verdict of al-Thānawī is important to take note of. As noted by Jackson, progressive reformers have had virtually no impact on the actual shape of Islamic law because their reform efforts tend to resort to arguments viewed as foreign to the classical tradition.[55] These arguments tend to raise controversial theological questions, a point that Andrew March draws attention to when discussing what he refers to as the 'Reformers Dilemma',[56] which Mohammad Fadel succinctly describes:

> Because it is discursively less 'costly' in terms of moral capital to make revisions to applied doctrine than to methodological or foundational doctrines, an effective reformer is likely to exhaust the former before repairing to the ground of the latter.[57]

Fadel elaborates on this when discussing different historicist approaches towards the primary texts. The first is progressive historicism, which uses history to relativize the moral significance of legal rulings derived from the primary texts on the assumption that "history moves progressively towards a specific

54 Al-Qaraḍāwī, *Min Fiqh al-Dawla*, 174–75.

55 Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996), xxxii, 80.

56 Andrew March, "Law as a Vanishing Mediator in the Theological Ethics of Tariq Ramadan," in *European Journal of Political Theory* 10, no. 2 (April 2011), 196.

57 Fadel, "Is Historicism a Viable Strategy for Islamic Law Reform?" 134.

telos."[58] Progressive historicists may argue that rules promoting a system of gender hierarchy are unique to pre-modern contexts that lacked the means to support a system of gender egalitarianism. They may also assert that the universal ideals affirmed by the primary texts transcend specific legal rulings that were aimed at addressing issues effecting 7th century Arabia. Consequently, such legal rulings must be discarded and new interpretations forwarded in line with these universal ideals.[59]

The other type of historicism is hermeneutical historicism, which Fadel identifies as simply an additional interpretive tool that utilizes history to reveal the intent of the lawgiver by investigating the circumstances surrounding a text. According to Fadel, this form of historicism has legitimacy among some classical scholars. Hermeneutical historicism, therefore, has the potential to generate new readings of the primary texts without raising theological controversy. In light of 'Reformers Dilemma', Fadel suggests that the politically prudent approach for those committed to progressive reform would be to utilize conventional interpretive methods, such as hermeneutical historicism, before resorting to more controversial ones, such as progressive historicism.[60]

Directly relevant to Reformers Dilemma is the critique of classical Islamic legal theory offered by Jackson, namely that of 'New Legal Formalism' (NLF). The underlying premise of NLF is that all interpretive activity begins with a set of presuppositions that are the true determiners of legal doctrine. Legal theory merely provides a framework within which these conclusions can be validated and constrained. In other words, legal theory is not a value-neutral, mechanical means of deducing legal rulings but serves to validate the conclusions of a scholar by providing it with the rhetorical force needed to garner assent. Postulates derived from the primary texts are in essence subjective, making it possible to derive alternative legal rulings from the same texts and their language.[61]

The legal verdict of al-Thānawī confirms the assertion of Jackson that the same legal theory can yield different conclusions depending on how it is applied. This understanding that legal theory provides the general parameters for the validation of legal doctrine that is dictated primarily by practical, ideological, or religious presuppositions allows for the introduction of new interpretations that may be as equally valid as others according to the authoritative sources. Indeed, a number of sources identify the impetus behind the legal

58 Ibid., 135.

59 Ibid.

60 Ibid., 136–37.

61 Jackson, "Fiction and Formalism," 183–85.

verdict of al-Thānawī as a desire to preserve the political rule of certain women in the context of British colonialism.[62] Al-Thānawī not only utilizes a hermeneutical historicist approach to justify the validity of such political rule but an array of other tools that are widely accepted in the classical Sunnī tradition, such as particular principles relating to language, legal theory, and positive law. The question then is whether his legal verdict impacted normative understandings of Islamic law on the issue of women's political rule.

The answer to this question is not easy to determine but the evidence seems to suggest that religious scholars generally rejected the conclusion of al-Thānawī. The political history of Pakistan provided a number of opportunities where such a legal verdict could be cited to justify the political rule of a woman, such as when Fatima Jinnah contested the presidency in 1965 and when Benazir Bhutto was elected prime minister in 1988. Though there was considerable debate over the issue when Jinnah ran for president, it was particularly pronounced after Bhutto became prime minister. At the United Scholars Convention of 1989, hundreds of scholars from different schools passed a resolution seeking the removal of Bhutto on the grounds that her political rule was not religiously sanctioned.[63] A number of articles, newspaper editorials, and books were also penned in refutation of those who asserted that Islam permitted a woman to become head of state. These included works authored by two prominent Deobandī authorities, Yūsuf Ludhiyānvī and Rafīʿ ʿUthmānī, as well as scholars from other schools, such as Ṣalāḥ al-Dīn Yūsuf of the Ahl al-Ḥadīth and ʿAṭāʾ al-Bandyālvī of the Barelwī school.

Some of the aforementioned sources reveal that there was some disagreement amongst scholars on the issue. As al-Bandyālvī observed at the time, "there has been much debate and back and forth on the issue of women's political rule amongst scholars today."[64] However, these disagreements seem to have revolved more around the strategy religious parties had adopted following Bhutto's election and less so on the core question of whether a woman could be head of state. A majority of scholars seem to have agreed on the impermissibility of the latter, and many of the works authored in defense of

62 Muḥammad Isḥāq Mulṭānī, *Islām aur Siyāsat* (Multan: Idārat al-Ashrafiyya, 2006), 245–46.

63 Ṣalāḥ al-Dīn Yūsuf, *ʿAurat kī Sarbarāhī kā Masʾala aur Shubuhāt wa-Mughālaṭāt kā aik Jāʾiza* (Lahore: Dār al-Daʿwat al-Salafiyya, 1990), 91. Similarly during the candidacy of Jinnah, hundreds of religious leaders from Jamʿiat ʿUlamāʾ Pakistan (JUP) endorsed a legal verdict issued by Sayyid Aḥmad Shāh that the leadership of a woman was "un-Islamic", "impermissible", and "destructive". See "Fifty Years Ago: 'Woman Rulers Un-Islamic'," last modified April 21st, 2018, http://www.dawn.com/news/1149026.

64 ʿAṭāʾ Muḥammad al-Bandyālvī, *ʿAurat kī Ḥukmarānī* (n.p., 1990), 1.

this position were directed towards a non-scholarly class of academics and politicians. Interestingly, while al-Bandyālvī constantly reiterates scholarly agreement on the issue and directs most of his criticism towards the political disunity of the scholarly class, he himself concludes that it was the office of the presidency that was impermissible for a woman to assume in the context of Pakistan and not the office of prime minister.[65]

Al-Bandyālvī shows no awareness of al-Thānawī's legal verdict but the works of Ludhiyānvī, ʿUthmānī, and Yūsuf directly address it although some of them fail to specifically identify who exactly was citing it in support of female political rule. Yūsuf, for example, simply states, "the opinion of al-Thānawī is also being used as evidence when it comes to the issue of female political rule."[66] Ludhiyānvī, on the other hand, discusses the legal verdict while responding to Mawlānā Kawthar Niāzī, a religious scholar associated with Bhutto's political party.[67] One scholar to cite the legal verdict approvingly was Mawlānā ʿUmar Aḥmad ʿUthmānī who reproduced it in full during a lengthy exposition on the permissibility of a woman being appointed head of state.[68] This is a particularly interesting reference since ʿUmar was the son of al-Thānawī's nephew and prominent student, Zafar Aḥmad ʿUthmānī, though he was progressive in his legal approach unlike his father.[69] Besides the aforementioned, a number of those who cited the legal verdict were not from the religious scholarly class, such as Dr. Kaukab Siddique, an academic professor, and Muhammad Sharif Chaudhry, a prominent activist and lawyer.[70]

The above reveals that there were some religious scholars, academics, and public officials who cited the legal verdict of al-Thānawī to argue that Islam permitted the political rule of a woman. However, many of the arguments forwarded by these individuals demonstrate that it was not the legal reasoning of al-Thānawī that was of particular importance to them but the legitimacy that a figure of his repute lent to a position. All of the aforementioned individuals continued to justify their conclusions by resorting to controversial

65 Ibid., 10–18.

66 Ṣalāḥ al-Dīn Yūsuf, *ʿAurat kī Sarbarāhī*, 43.

67 Mulṭāni, *Islām aur Siyāsat*, 245–46.

68 ʿUmar Aḥmad ʿUthmānī, *Fiqh al-Qurʾān*, 6 vols., 2nd ed. (Karachi: Idārat Fikr al-Islāmī, 1988), 2:264, 268–73.

69 In his *Fiqh al-Qurʾān*, Uthmānī dedicates his work to both his father and al-Thānawī stating that his perspicacious insights into the Qurʾān were a result of their prayers for him. Meanwhile, Ludhiyānvī refutes a number of his opinions in a work entitled *Dawre Ḥāḍir Kay Tajaddud Pasand Kay Afkār* (Karachi: Maktabat Ludhiyānvī, 2000), 209–84.

70 Kaukab Siddique, *The Struggle of Muslim Women* (Springfield, Virginia: American Society for Education & Religion, 1986), 55; Muhammad Sharif Chaudhry, *Women's Rights in Islam* (Lahore: Muḥammad Ashraf Publishers, 1991), 173.

arguments, such as questioning the authenticity of the tradition transmitted by Abū Bakra. Further, they all argued for the unconditional permissibility of women political rulers contrary to al-Thānawī. Citing al-Thānawī was, therefore, more an appeal to authority that lent some degree of validity to their opinions in the face of intense scholarly opposition.

Progressive scholars and academics were not the only ones to pay scant attention to the legal reasoning of al-Thānawī. Deobandī scholars who considered him one of their foremost authorities largely rejected or reinterpreted his conclusions while avoiding any express critique of his legal reasoning. Ludhiyānvī's response became the standard Deobandī argument against those who would cite the legal verdict in support of female political rule. His response focused on the following points: firstly, al-Thānawī affirms the opposite in other works he authored and states that the narrative of Bilqīs does not alter this legal rule; secondly, the legal verdict was in response to conditions in British India during a time where the choice was between affirming the leadership of certain women who possessed a hereditary right to rule by stating that they were in reality part of a consultative ruling body or to nullify their rule completely and have the British take over active administration of that area, which was an unacceptable alternative; and finally, al-Thānawī was simply permitting women being members of a consultative legislative body, not actual rulers who had the power to enact legislation as the prime minister or president in modern-day democracies do.[71]

ʿUthmānī essentially forwards the same arguments that Ludhiyānvī does. He asserts that al-Thānawī was not discussing the question of permissibility but only whether the lack of prosperity mentioned in Abū Bakra's narration applied to modern democratic nations led by women. The answer to this was in the negative since al-Thānawī conceptualized the head of state in these democracies as merely a single member of a broader legislative body operating on the basis of consultation and not a political ruler in reality. As such, ʿUthmānī states that al-Thānawī's opinion revolves around the "reality of democratic governments," and that the issue of whether women are in reality rulers in such governments "is not through the verification of religious law but through ascertaining the current day reality of democracies." He then goes on to state that al-Thānawī's specialization was in the former, not the latter, and that the head of state in modern-day democracies was in fact an actual political ruler.[72]

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71 Mulṭānī, *Islām aur Siyāsat*, 274–76.

72 Muḥammad Rafīʿ ʿUthmānī, "ʿAurat kī Sarbarāhī kā Mas'ala," in *Nawādir al-Fiqh* (Karachi: Maktabat Dār al-ʿUlūm Karāchī, 1999), 190–93. Important to note here is that the primary consideration for al-Thānawī was not what a female ruler was able to do but the manner

Like Ludhiyānvī, ʿUthmānī does not address the classical hermeneutical principles that al-Thānawī applies to the primary texts to derive his conclusion. Rather, the main aim of both Ludhiyānvī and ʿUthmānī is to demonstrate that al-Thānawī did not depart from the classical view on the issue by interpreting his words in a very restrictive manner.

Despite rejecting the view of permissibility, scholars were not averse to compromise when required. The Jamāʿat al-Islāmī (JI) of Abū al-Aʿlā Mawdūdī, for example, was part of the Combined Opposition Parties (COP) that nominated and supported the candidacy of Fatima Jinnah in 1965 despite Mawdūdī's own view that Islam prohibited appointing women as head of state.[73] Though this decision was based on pragmatic political considerations and not changes in religious attitudes, the opinion of al-Thānawī proved to be a useful political tool. The COP obtained a legal verdict from Muftī Muḥammad Shafīʿ, a leading student of al-Thānawī, who cited his teacher in permitting the candidacy of Jinnah, a move that was undertaken in response to Ayub Khan obtaining legal verdicts denouncing her candidacy.[74]

5 Conclusion

This paper has analyzed a legal verdict on women's political rule in an attempt to illustrate the manner in which a conservative jurist dedicated to the classical tradition approached legal change. The conclusion reached by al-Thānawī and the manner he argues for it shed important light on the nature of classical legal theory and its utilization in the modern period to reform legal doctrine. Contrary to the perception that legal theory is formalistic and overly restrictive, the legal verdict of al-Thānawī lends support to the thesis of Sherman Jackson that legal theory may function to validate the conclusions of a decision maker that are determined primarily by a scholar's presuppositions. Though

in which she actually governed. He explicitly states that so long as there is a consultative process, the political rule of a woman would be valid even if she were an independent ruler whose viewpoints were given preference over others.

73 Seyyed Vali Reza Nasr, *Mawdudi and the Making of Islamic Revivalism* (New York: Oxford University Press, 1996), 44, 133.

74 Ian Talbot, *Pakistan A Modern History* (London: Hurst & Company, 1998), 160; Shehzadi Zamurrad Awani, "Political Discourse and Socio-Cultural Placement of Pakistani Women 1947–1976: A Historical Perspective" in *Journal of the Research Society of Pakistan* 53, no. 1 (January-June 2016), 215. Awani quotes the following from Muftī Muḥammad Shafīʿ: "In special circumstances, to support a woman candidate for the office of president is of no harm and this *fatwā* has been given by Ḥakīm al-Umma Mawlānā Ashraf ʿAlī al-Thānawī some fifty-three years back."

legal theory constrained the interpretive process by requiring a scholar to couch his conclusions in certain rhetorical tools, the absence of any objective and systematic procedure for rule derivation allowed a scholar to modify his application of this theory to investigate lines of reasoning that may have previously been given little consideration thereby allowing for novel legal interpretations to be forwarded.

On the level of actual impact, the legal verdict of al-Thānawī was cited by a number of individuals to justify the political rule of a woman during the history of Pakistan. However, a majority of religious scholars seem to have ignored or refuted al-Thānawī's opinion, which included those belonging to the Deobandī movement who considered al-Thānawī as one of their leading authorities. Indeed, if it is true that legal doctrine is primarily determined by one's presuppositions, an argument justifying a particular position that challenges these presuppositions or previously held beliefs may well be rejected regardless of the strength of its reasoning. This explains why the legal verdict of al-Thānawī seems to have largely been accepted by those who already held the opinion that women could be political rulers.

Of course, the proponents of reform from within recognize the myriad factors that go into an opinion being accepted and the extended period often required before the normative status of a position is settled upon. The rhetorical argument underlying it is only one factor among many others, one which relates to a broader notion of couching legal conclusions in authority. While the actual arguments that al-Thānawī forwarded were important, the real value of his legal verdict lay in its having been issued by an authoritative jurist. This rendered the legal verdict itself a tool for the validation of a legal opinion on the basis that it was a point of legitimate scholarly difference amongst recognized authorities. Despite a majority of scholars not being swayed by al-Thānawī's arguments, the fact that a jurist of his stature concluded that a woman could validly become a political ruler forced discussion on the issue within scholarly circles otherwise immediately dismissive of such positions. Indeed, it was the authority that al-Thānawī lent such a position that led Deobandī scholars to focus primarily on reinterpreting his conclusion and framing the issue in terms of political conceptions of leadership and not religious legal interpretation. This was an attempt to deprive the more progressive camp of a leading and scholarly conservative voice that partially lent support to their views. The validity of this difference has only continued to be strengthened due to the emergence of similar conclusions from subsequent generations of traditional scholarly authorities, such as Yūsuf al-Qaraḍāwī.

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CHAPTER 10

Legislating Morality and Other Illusions about Islamic Government

Asifa Quraishi-Landes

Introduction

It has been called "the central question in the jurisprudential reflection of our time."[1] The relationship between law and morality is a continuing challenge for secular legal systems, as illustrated in many public debates. Should the state prohibit abortion? Recognize same-sex marriages? Allow physician-assisted suicide? If you listen long enough to these debates, you will likely hear someone say "you can't legislate morality." This argument is powerful because western secularism subscribes to a "vague legal positivism holding that the nature, the origin, the role and the legitimacy of law have nothing to do with morality."[2] Indeed, the separation of law and morality is connected to secularism itself, which is viewed as creating a neutral space between competing religious views of the good. Under this view, in order to keep the law objective, good citizens of a secular state should keep their religious views and moral judgments out of the legislature.[3]

1 George P. Fletcher, "Law and Morality: A Kantian Perspective," *Columbia Law Review* 87 (1987): 533–558.

2 Seamus Murphy, "The Rule of Law: What Law? Whose Rule?," *Studies: An Irish Quarterly Review* 95, no. 380 (2006): 397.

3 Of course things are not always that simple. There is morality in secular laws on everything from the criminalization of murder to the prohibition of sex discrimination. It is only in areas of contested moral judgment where secular citizens consciously debate the separation of law and morality. I will not address this huge field here, for it begins as early as Aristotle and ends with the latest editorial opinion. For a very tiny sampling of some American legal theorists engaged in this topic, see Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994); Kent Greenawalt, *Religious Convictions and Political Choice* (Oxford: Oxford University Press, 1991); Ronald Dworkin, "The Model of Rules," *University of Chicago Law Review* 35 (1967): 14; Martin Luther King, Jr., "Letter from a Birmingham Jail," *The Journal of Negro History* 71, no. 1 (1986): 38–44; H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593; Lon Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," *Harvard Law Review* 71 (1958): 630.

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Sharīʿa is often seen as the antithesis of this principle. Because Sharīʿa includes ethical rules about personal behavior as well as rules regulating interpersonal conduct, it seems to reject "the distinction between public and private morality underlying the liberal democratic project."[4] Apparently uninterested in "a privatized faith as it is experienced by most Western Europeans,"[5] Muslims are often seen as a particularly dangerous threat to secular order.

More broadly, the idea of Islamic government is viewed with suspicion by secularists. Because Sharīʿa is understood as divine law, it is presumed that the lawmaking powers of an Islamic government would be devoted to enforcing that law, probably via religious experts interpreting divine scripture. In short, Islamic government is understood as theocracy. Thus, for a secularist, "the very idea of Sharīʿa law, and not just particular elements of it, seems an abomination."[6] This explains why, to take just one example, the European Court of Human Rights upheld the Turkish ban on Islamist political parties—not for any specific attempts to legislate particular religious laws but for what they *might* do sometime in the future.[7] Mere association with Sharīʿa was viewed as inconsistent with their declared support for democracy because Sharīʿa "intervenes in all spheres of private and public life in accordance with religious precepts."[8] This case is one of many illustrations of the widespread belief that support for Sharīʿa leads to the dangerous quagmire of legislating morality that the west escaped with the separation of church and state.

But what if the "legislating morality" quagmire exists only when Sharīʿa is observed through western lenses? True, Sharīʿa includes a lot of what we call morality, but does it necessarily follow that these rules must be legislated and enforced on everyone by an Islamic state? In this chapter, I will show that,

4 Ronan McCrea, *Limitations on Religion in a Liberal Democratic Polity: Christianity and Islam in the Public Order of the European Union, London School of Economics and Politics, LSE Law, Society and Economy Working Papers* (*18*), 2007: 13 (commenting on the position of G. Joffe).

5 Joel S. Fetzer and J. Christopher Soper, *Muslims and the State in Britain, France, and Germany* (Cambridge: Cambridge University Press, 2005), 150 (summarising the arguments made by Lewis in Bernard Lewis, *Islam and the West* (Oxford: Oxford University Press, 1993) and Roy in Olivier Roy, *Vers Un Islam Europeen* (Paris: Editions Esprit, 1999)).

6 Murphy, "The Rule of Law," p. 397.

7 McCrea, *Limitations on Religion*, p. 15–19.

8 EHRR, Refah Partisi and Others v. Turkey, 37 1, at par. 123 (2003). ("It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.").

contrary to popular belief (by Muslims as well as non-Muslims), the answer is "No." In the pages that follow, I will explain how this presumption about Sharīʿa is an illusion created by European nation-state definitions of what law is. In the nation-state model, legal authority is directly connected to political authority: law emanates from and is enforced by the state. (This is why church and state had to be separated in order for Europeans to escape theocracy.) But for Muslims—at least until the colonial era—the state has never been the exclusive location for the rules of Sharīʿa. In my work on Islamic constitutionalism,[9] I have explained how Muslim systems throughout history featured a structure of law and government quite different from the legal centralism of the nation-state.[10] Specifically, pre-colonial Muslim systems operated with two types of law: rules created by the state (*siyāsa*), as well as non-state law (*fiqh*) created by religious legal scholars. Moreover, the interdependency of these different legal realms enabled Muslim systems to avoid many of the theocratic pitfalls that befell Europe.

The categories of *fiqh* and *siyāsa* do not map easily onto western categories of "law," "religion," and "morality," nor do they reflect a separation of "church" and "state." Thus, any discussion of Sharīʿa using these terms risks merging categories that were kept separate in Sharīʿa literature. This is why western observers often distort, or do not even see, the categories of rules and rule-making by which Muslims have navigated their worlds. Worse, globalizing western categories like "law," "religion," and "morality" is not just inaccurate. It is dangerous. These categories may have been important in freeing western societies from theocracy, but they have unfortunately contributed to the creation of theocratic Muslim governments today. Because many contemporary Muslims think about law and legal authority in nation-state terms (inherited from colonialism and now dominant around the world), they tend to believe that the only way for Sharīʿa to exist in their countries is for it to be legislated by the government. This has translated into widespread support for political

9 By "Islamic constitutionalism," I mean a sharia-mindful way of thinking about the nature and allocation of power—political, religious, legislative, judicial, and so on. As I have explained elsewhere, I do not subscribe to the "Islamic state" political theory, popularized in the twentieth century, that follows European nation-state presumptions. Instead, I believe that there is a more appropriately Islamic way of thinking about government that is different from nation-state constitutionalism. This 'Islamic constitutionalism," I believe, can be found by studying Muslim history and principles found in *fiqh* literature. See Asifa Quraishi-Landes, "Islamic Constitutionalism: Not Secular. Not Theocratic. Not Impossible.," *Rutgers Journal of Law & Religion* 16 (2015): 553–579.

10 Asifa Quraishi, "The Separation of Powers in the Tradition of Muslim Governments," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Tilmann Roder, Rainer Grote, and Katrin Geenen (New York: Oxford University Press, 2011), 63–76.

Islamic movements and Sharīʿa legislation in many Muslim-majority countries. As I have described elsewhere, these movements are misguided attempts by Muslims to Islamize their governments, ironically adopting the European nation-state paradigm rather than using pre-colonial Muslim concepts of law and government.[11]

In this chapter, I examine the role that language has played in this state of affairs. I will show that western categories like "law" and "morality" inappropriately essentialize the European Christian experience with law and religion and that discussing Sharīʿa with these limited terms has contributed to unnecessary conflicts between Islamism and secularism in the world today. Once it is understood why describing Sharīʿa as "law" is both over and under-inclusive, it will become clear how a Muslim-majority country can have Sharīʿa as the law of the land—but not by legislating it.

1 Is Sharīʿa Law or Morality? Something In-between?

Sharīʿa is a big word, used to refer to many things. In a discussion about law and government, it is important to distinguish Sharīʿa from *fiqh*. Well-known by specialists, but worth repeating for clarity, Sharīʿa (literally, "way" or "street") denotes the divine way of life, the way God has directed people to live—in other words, "God's Law." *Fiqh* (literally, "understanding") is the humanly-created body of rules seeking to articulate God's Law by extrapolating from scriptural sources (the Qurʾān and the sunnah of Prophet Muhammad). Because Sharīʿa is "God's Law," it is often said that Sharīʿa is a legal system in which God is the "legislator" or "lawmaker." This description, of course, brings it into direct conflict with democracy, where law is made by the people. But the conflict is a distorted one. It ignores the human element in the legal doctrine attributed to Sharīʿa: it misses the reality of *fiqh* as a human creation, self-conscious of its own fallibillity. The *fuqaha* (scholars of *fiqh*) took their own fallibility very seriously, building it into the epistemological foundations of Islamic jurisprudence: all *fiqh* conclusions carry the risk of human error, and thus cannot be claimed to be God's Law with absolute certainty. Thus, the *fuqaha* do not speak for God. As Norman Calder put it, "This is not God's law made articulate, but man's effort at defining God's law, inevitably imperfect."[12]

11 Asifa Quraishi-Landes, "The Sharia Problem with Sharia Legislation," *Ohio Northern University Law Review* 41 (2015): 545–566.

12 Norman Calder, *Islamic Jurisprudence in the Classical Era* (Cambridge: Cambridge University Press, 2010), 95.

Fiqh doctrine—the rules people think of when they think of Sharīʿa as law—is man-made, suppositional, probable, and never certain.[13] Moreover, it comes in several different versions. As the *fuqaha* disagreed with each other, their mutual recognition of human fallibility led to the creation of multiple schools ("*maddhahib*") of *fiqh*. This respect for *fiqh* diversity created the complex situation in Muslim legal systems that multiple, even contradictory rules simultaneously exist as valid articulations of God's Law. So, to say that God is the legislator in this system is to look at only a very small part of the picture. *Fiqh* starts with, but certainly does not end with, God.

2 More about *Fiqh*

The doctrinal rules of *fiqh* are wide-ranging, covering not only topics that are typically described in English as "legal," but also those that are considered moral, in addition to rules on religious rituals. A typical *fiqh* book has chapters on "ritual purity, prayers, almsgiving, fasting, pilgrimage, sale, usury, pawn, delegation in transactions, confession, usurpation, rent, preemption of real estate sales, slave-delegate in contracts, vows and agency, marriage, dowries, jurisdiction of Islamic law outside of Islamic lands, divorce, re-enactment of marriage, spousal maintenance and support, crimes against bodily integrity, capital crimes, robbery, war, oaths, adjudication, testimony, and freeing of slaves."[14] It is thus no wonder that many have commented that *fiqh* is more than law. Noel Coulson describes *fiqh* as a "composite science of law and morality,"[15] and

13 For a descrition of the *fuqaha's* attitude about this, see A. Kevin Reinhart, "Islamic Law as Islamic Ethics," *Journal of Religious Ethics* 11, no. 2 (1983): 182–200, 192.

14 Ahmad Atif Ahmad, "Structural Interrelations of Theory and Practice in Islamic Law: A Study of *Takhrīj Al-Furūʿ ʿAla Al-Uṣūl Literature*" (PhD diss., Harvard, 2005), 111 (describing chapter organization of al-Zanjānī's *Takhrīj al-furūʿ ʿala al-Uṣūl*, noting it as typical of "law manuals"). It is useful to note here the different categories found in *fiqh* literature, as compared to legal works in the modern west. As Bernard Weiss explains, "Islamic jurisprudence … does not deal in a systematic way with general legal concepts such as the legal person, legal capacity, rights, obligations, property, contract, agency, and so on. Although these concepts certainly exist in Muslim legal thinking and are in fact highly developed, they are not discussed as topics in their own right but emerge only in connection with the discussion of actual rules." Bernard G. Weiss, *The Search for God's Law: Islamic Jurisprudence in Writings of Sayf Al-Din Al-Amidi* (Salt Lake City: University of Utah Press, 2010), 15.

15 N.J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 83.

Kevin Reinhart writes that "Islamic law is not merely law, but also an ethical and epistemological system of great subtlety and sophistication."[16] Bernard Weiss notes a "duality in *Sharīʿa* itself—its (positive) law side and its morality side," and asserts that "the human articulations of divine rules that make up *fiqh* are at once articulations of law and articulations of morality: the rules are at once legal rules and moral rules."[17]

Fiqh doctrine covers both law and morality because its subject is "all human action" and its "objective is identifying good practice."[18] Another way of thinking of *fiqh* is the rules of "right action" for living a Muslim life; it is a collection of guidelines and directives for good human action in this life, as indicated by God in the Qurʾān and the last Prophet.[19] Accordingly, Sharīʿa has been described as, "the totality of divine 'categorizations of human acts.'"[20] To create this, the *fuqaha*[21] painstakingly worked to extrapolate from divine scripture the normative value of all possible actions. They took as their job to determine "whether God is indifferent to this act, finds it blameworthy, or praises it."[22] As Kevin Reinhart summarizes,

16 Reinhart, "Islamic Law as Islamic Ethics," 187.

17 Weiss, *The Search for God's Law*, 14.

18 Ahmad, "Structural Interrelations," 260 ("Religious belief deals with questions of fact, whereas the objective of religious law is identifying good practice.").

19 See, for example, Frank Vogel and Samuel L. Hayes, III, *Islamic Law and Finance: Religion, Risk, and Return* (The Hague: Kluwer Law International, 1998), 20 ("Islamic law remains—in faith if not in legal reality—the criterion for right action in Muslim life."); Marshall G.S. Hodgson, *The Venture of Islam: Conscience and History in a World Civilization, Volume 1: The Classical Age of Islam* (Chicago: University of Chicago Press, 1977), 320 (describing the duty to "command the right and forbid the wrong" as, among other things "mutual exhortation to right action among the faithful"); A. Kevin Reinhart, "Transcendence and Social Practice: Muftis and Qadis as Religious Interpreters," *Annales Islamologiques* 27 (1993): 5, 24 ("Islamic morality is a morality of action, and right action is what muftis and qadis believed themselves to be conveying."); Reinhart, "Islamic Law as Islamic Ethics," 186 ("if most Muslims were asked which science is decisive for the determination of right action, they would nominate the Islamic legal sciences, namely, the *fiqh* sciences").

20 Weiss, *The Search for God's Law*, 1.

21 This work was done primarily by scholars of *uṣūl-ul-fiqh*, an enterprise that Mohammad Fadel and others have described as "moral theology." See, e.g., Mohammad Fadel, "The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law," *Canadian Journal of Law and Jurisprudence* 21, no. 08 (2008)., 23.

22 Ibid., 27.

> Islamic law stands as a significant example of a moral and legal theory of human behaviour in which initial moral insights are systematically and self-consciously transformed into enforceable guidelines and attractive ideals for all of human life."[23]

The result is a complex taxonomy of the moral valence of all human action—documenting not only what will generate reward and punishment, but also the normative value of all actions in between.

Famously, there are five categories in this taxonomy: (1) obligatory (*wājib* or *farḍ*), (2) recommended (*mandūb*), (3) permissible or neutral (*mubāḥ*), (4) discouraged or reprehensible (*makrūh*), and (5) prohibited (*ḥarām*).[24] In the first category—obligatory—are things that earn God's reward if performed and God's punishment if omitted, like the five daily prayers and fulfilling promises. At the other end of the spectrum—prohibited—are things like theft and wine-drinking, actions prohibited by God that will earn God's punishment if committed, and from which abstention will be rewarded. Between these are three additional categories to help guide Muslim lives. Some actions are designated "recommended," which means they earn divine reward if performed but not punishment if they are omitted—such as giving extra charity or performing extra prayers. Other actions are listed as "discouraged": God rewards those who avoid these things, but does not punish indulgence in them—such as wasting time or living an unhealthy lifestyle. Finally, the category of permissible or neutral includes all those many actions for which there is no specific divine reward or punishment at all—such as wearing the color blue, or preferring mangos over bananas.

These five classifications of human action, called the "*aḥkām taklīfiyya*" (rules of obligation or normativity), provide Muslims with a world of behavioral choices much more nuanced than just right and wrong. As Reinhart puts it, "[t]hese five categories represent not only the Islamic understanding of how the upright life is to be lived in the world, but an explicit rejection of the bi-polar view of moral categorization as simply good and bad."[25] They inform

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23 Reinhart, "Islamic Law as Islamic Ethics," 199.

24 Some slightly different Arabic terms used by different schools in varying contexts, but the fivefold classification is constant to all. For more detail, see ibid., 195. Interestingly, talmudic law also includes a similar five-fold classification for human conduct. See Judith Romney Wegner, "Halakhah and Shari'a: Roots of Law and Norms of Conduct in Theocratic Systems," *CCAR Journal: A Reform Jewish Quarterly* (2000), 85–89.

25 Reinhart, "Islamic Law as Islamic Ethics," 195; see also ibid., 196 ("The historical significance of the five-fold system is that it represents the compromise which was made in the first two centuries between the moral perfectionists, represented at the extreme by

believers of what is laudable behavior even if not mandatory, and what would be unkind or unwise to do even if not outright prohibited. By designating a layer between required and permissible, for example, the *fuqaha* embrace the reality that not every good action is attainable, and yet there is still value in documenting and recommending behaviors that may nevertheless remain aspirational.

This is a very different spectrum of human action than is usually addressed by modern law. Only three of the *taklīfiyya* categories fit the laws typically found in a modern state: obligatory (such as taxes), forbidden (such as murder) and permissible (everything not addressed by the other two). But even then, the match is not exact. Within the *taklīfiyya* category of "obligatory," for example, are rules that have parallels in the laws of a modern state (such as prohibiting theft and breach of contract), but also rules that would not be considered the proper subject of modern law (such as the details of ritual prayer). This makes sense if we remember that the goal of Sharīʿa is to provide Muslims with guidance on all human action, and that will naturally include personal spiritual development as well as treatment of others. But it is more than that. In a Sharīʿa worldview, the two are connected: there are spiritual consequences to many temporal (some would call "secular") actions. For example, a valid contract of marriage creates a husband's obligation to provide support, but this obligation is not just owed to his wife and children, it is also a divine obligation. Here there is "legal" and "moral" at the same time. As Bernard Weiss explains,

> God imposes upon us an obligation to fulfill the obligations we take upon ourselves in entering into transactions. It is thus the divine imposition that undergirds the obligatoriness of commitments that we freely assume.[26]

That same divine imposition is present with every human action that carries a *taklīfiyya* obligation, including those to other people, such as damages to compensate an injury. In this way, temporal and moral obligation are often intertwined in a Sharīʿa mindest: for a Muslim, actions that others might consider merely subject to wordly rules of law, also carry a moral valence designated

a group called the Kharijites, and the practical requirements of a world-wide polity that was inclusive and expansionist.… There is therefore a two-tiered membership in the community: those who are nominally obedient and those who are faithful, those who live between the boundaries of "must and must-not" and those who strive to do the recommended and avoid the discouraged. The five-fold system allows for this inclusive and hierarchical moral system while a bi-polar system does not.").

26 Weiss, *The Search for God's Law*, 12.

by God. To use a familiar western reference, there is not a clean line between what a Muslim renders to God and what she renders to Caesar, because some aspects of Caesar's law have an impact on her afterlife.

2.1 *Aḥkām Taklīfiyya and Aḥkām Waḍʿiyya*

It now might seem quite reasonable to describe Sharīʿa as a system that "legislates morality." After all, if everything has moral value, then what else could law be in such a system except the legislation of morality? Obvious as this conclusion may seem, it is too simplistic. This is because *fiqh* scholars distinguish the spiritual value of an action (how God sees it) from the worldly value of that action (how it impacts others). They do this by separating two types of *fiqh* rules: the *aḥkām taklīfiyya* (the fivefold normative categories listed above) and the *ahkam waḍʿiyya*, non-normative or consequential rules.[27] The *aḥkām waḍʿiyya* focus not on the spiritual value of human action, but rather the objective, tangible consquences of actions as they impact other human beings.[28] For example, *waḍʿiyya* doctrine details whether a given contract is valid according to the requirements laid down in the Qurʾān and Sunnah, and what consequences follow from this validity. (*Taklīfiyya* doctrine tells us whether or not entering such a contract will earn divine reward or punishment, or neither.) Thus, it is in the *aḥkām waḍʿiyya* that we find that "a valid marriage contract is one that produces such effects as the right to a dower or to a share in the inheritance, an invalid marriage (for example, a marriage of siblings) is one that does not."[29] The *aḥkām waḍʿiyya* also delinate whether an obligation (such as prayer or fasting) should be adjusted for extenuating circumstances, such as traveling or being ill.

Understanding the difference between *aḥkām taklīfiyya* and *aḥkām waḍʿiyya* goes a long way towards answering the question of whether Sharīʿa legislates morality. All human actions have a moral value on the fivefold scale of the *aḥkām taklīfiyya*, but only some actions generate tangible consequences under the *aḥkām waḍʿiyya*. For example, the *aḥkām taklīfiyya* say that it is highly

27 *Fiqh* also distinguishes the "rights of God" from the "rights of man," illustrating further how this system differs from "a liberal philosophy of law that restricts harm to 'harm to others.'" Ahmad, "Structural Interrelations," 143. In most cases, elements of both rights exist. Thus, to use an example from Mustafa Akyol, "As a Muslim, if I do not fast during Ramadan, for example, then I am disobeying God and violating His 'rights' over me. If I refuse to repay a debt to my neighbor, though, it not only is a sin but also is a violation of his property rights." Mustafa Akyol, *Islam without Extremes* (New York: W.W. Norton & Company, 2011), 278.

28 For more detail, see Weiss, *The Search for God's Law*, 1–15; Ahmad, *Structural Interrelations*, 141–143.

29 Weiss, *The Search for God's Law*, 2.

recommended (*mandūb*) to fulfill one's unilateral promises, but these promises are not enforceable as a matter of *aḥkām waḍʿiyya*.[30] Even more striking, an action deemed *prohibited* in the *aḥkām taklīfiyya*, might even be valid under the *aḥkām waḍʿiyya*. A well-known example is the "triple divorce" (irrevocable divorce created by declaration uttered thrice in one sitting): the *fuqaha* have designated such divorces as prohibited (*ḥarām*) as a matter of *taklīf*, but nevertheless will still consider such a divorce valid, effective, and binding, as a *waḍʿiy* matter.[31]

What this means is that the *fuqaha* did not imagine *fiqh* as a system of moral policing. Even though *fiqh* assigns to every action a moral value before God, the *fuqaha* nevertheless recognized a difference between God's evaluation of those actions and what impact they should have in this world. Seen in this light, the *ahkam taklifyya* have an almost personal character. They serve as guidance for right action, applied by individual Muslim consciences, but a lot of it is not enforceable by third parties.[32]

This leads us to a new question: should we even be calling the *aḥkām taklīfiyya* "law"? After all, as Colin Imber points out, "[i]n the sense that it regulates both worldly and religious matters, the [s]harīʿa is an all-embracing law but, in the sense that many of its provisions have no application in practice, much of it is not, in the modern sense, law at all."[33] If we take this seriously, then maybe the idea that Sharīʿa "legislates morality" comes not from the fact that the *fuqaha* include moral rules in the *fiqh*, but rather from a mistaken label: perhaps the *aḥkām taklīfiyya* should be considered something other than "law" in the first place? Consistent with this way of thinking, the *waḍʿiyya* rules are sometimes described as "positive" or even "secular," contrasted with the "moral" and "ethical" norms of *taklīfiyya*.[34] This approach has some appeal,

30 See Mohammad Fadel, "A Tragedy of Politics or an Apolitical Tragedy? Book Review of Sharīʿa: Theory, Practice, Tranformations by Wael Hallaq," *Journal of the American Oriental Society* 131 (2011): 109, 120 (citing Ibn Rushd (the grandfather)).

31 Ibid., 119 (citing al-Sawi, al-Dardir). An example of a discouraged (*makrūh*) action still having *waḍʿiyya* validity is the sale conducted during the time of Friday prayer. Despite the Quranic command to leave all negotiations when the Friday call to prayer is called (making all such sales *makrūh*), jurists nevertheless held sales conducted at that time to be valid.

32 Ahmad, *Structural Interrelations*, 45 ("Some of what is seen as part of the law in Islam cannot really be imposed by anybody other than those who apply it to themselves (e.g., the duty of fasting in the month of Ramadan)").

33 Colin Imber, *Ebu's-Su'ud: The Islamic Legal Tradition* (Stanford: Stanford University Press, 1997), 30.

34 See, e.g., Fadel, "A Tragedy of Politics?," 119 ("Muslim jurists, through the distinction between rules of obligation and rules that determine the consequences of that conduct,

since the *aḥkām waḍʿiyya* do tend to feel more "legal" to our modern senses: they establish the practical, tangible consequences to human action, separate from the moral goodness of that action in the eyes of God. Nevertheless, we must be careful with this language, lest it impose inaccurate categories upon our subject. For, despite their "legal" nature, the *aḥkām waḍʿiyya* still cover non-"secular" topics, such as what makes a prayer valid or invalid. A similar overlap exists with the *taklīfiyya*: while it is true that *some* norms of the *aḥkām taklīfiyya* are not enforceable here on earth and thus feel more like abstract moral guidance, this is not true of *all* of them. Some *taklīfiyya* rules have a great deal of real life impact—such as the prohibition of theft. In other words, there is not a clear "moral-vs-legal" line between the *taklīfiyya* and *waḍʿiyya* categories of *fiqh*.[35] That is just not how the *fuqaha* divided their world.

In fact, classical Arabic "does not possess the true equivalents of the words 'law' and 'morality.'"[36] As Bernard Weiss insightfully comments,

> [o]nly as speakers of English may Muslims make statements on the order of "X is both law and morality." … To speak of the Shari'a as both law and morality is thus to speak a language foreign to traditional Islam.… [i]t is we in the West who must always think in terms of the two concepts of law and morality and either separate them or fuse them together. When we attempt to think the thoughts of traditional Islam through the medium of English or some other Western language, we are compelled to deal with this law-versus-morality issue. We are compelled, that is, to ask whether the Shari'a is law or morality or both—and even if we agree that it is both we shall necessarily have given consideration to the other alternatives.[37]

Thus, it is only because we approach the subject and the literature of Sharīʿa from a modern western perspective that we consistently look to categorize

recognized a distinction between rules that address individuals' morality and rules that regulate their secular life"); Weiss, *The Search for God's Law*, 4 ("The method I have just proposed for distinguishing the law aspect of the divine categorizations of acts as obligatory or forbidden from the morality aspect presupposes a particular understanding of 'law' and 'morality.' 'Law' in this book will mean positive law.… I shall avoid the use of 'law' as a reference to a moral code or body of moral norms.…").

35 Of course, a more nuanced analysis would investigate what we mean by the terms "law" and "legal." For example, is law only that which is enforced upon people (either by the state or some other external force)? Or is it something that regulates behavior, even if not enforced? This is a complex question, one that has been debated in the literature of legal pluralism for decades. I will address it in a bit more detail later in this chapter.

36 Weiss, *The Search for God's Law*, 6.

37 Ibid.

aspects of *fiqh* as "law" or "morality" or some combination of both. To untangle the confusion that results, it is useful to step back and look at the historical operation of *fiqh* before this grafting of modern western categories began.

2.2 *Fiqh Institutions*

What institutions existed in Muslim history to mediate *fiqh* rules for believers, and how did they operate? First, remember that the creation of *fiqh* is a fully private, non-state enterprise. Often described as a "jurist's law," it is generated by individual legal scholars independent of the ruling power. As a body of literature illuminating the details of God's Law, it exists to a large extent disconnected from actual Muslim lives. To borrow Calder's imagery, *fiqh* would exist "even if there were no camels, and no tax-collectors, and no individual ownership."[38]

This is quite a different way of thinking of law than we moderns are used to. In contrast to the "political nature of the phenomenon of law in the modem era," *fiqh* is the result of scriptural legal hermeneutics, which means, in Ahmad Ahmad's words, that "a competent, trustworthy jurist could 'enact law' which it becomes the duty of pious people to follow regardless of governmental enforcement or lack thereof."[39] What is further remarkable is that—even though it exists as a scholarly enterprise independent of actual human action—the duty to follow *fiqh* is actually felt by everyday Muslims: they regularly implement these rules in their lives even if a state isn't making them do so. As countless scholars have documented, Muslims apply *fiqh* on their own initiative, and have done so for centuries.

To those of a positivist mindset, who rely on the state to define and enforce the law, this will seem odd. But scholars of legal pluralism and non-state law customary and indigenous law will recognize the powerful nature of this sort of "rule of law."[40] When people self-regulate out of personal obligation to non-state rules, not much executive force is needed for maintaining social order (as long as the non-state rules are consistent with the general desires of the state). This often occurs in highly religious societies where a great deal of personal behavior is addressed by religious norms. In other words, when "there is less

38 Calder, *Islamic Jurisprudence in the Classical Era*, 95.

39 Ahmad, "Structural Interrelations," 45. Notice Ahmad's qualified use of the term "enact" in this exerpt. He uses it to mean "lawmaking," but he is also aware that the term might imply state power, which would contradict the point being made.

40 In the famous words of Marc Galanter, "[j]ust as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions." Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law," *Journal of Legal Pluralism* 19 (1981): 1, 17.

occasion to enforce laws that reflect beliefs deeply ingrained in virtually the entire population," those laws are "at once less visible and more powerful."[41] The rules of *fiqh*—both the *taklīfiyya* and the *waḍʿiyya*—operate against this backdrop. They provide rules of right action implemented by believers, with very little necessary state enforcement of those rules.

How, then, did Muslims find out about these rules if not from the state (nor, by the way, from any "church")? The answer is a nuanced system involving three primary characters: the *faqīh* (*fiqh* scholar), *mufti* (*fiqh responsa* author), and the *qadi* (*fiqh* judge).[42] We have already met the *fiqh* scholars. They are the sophisticated jurists of Sharīʿa, masters of legal theory and analysis, and authors of the *fiqh* literature.[43] The job of the *faqīh* is to "characterise the law as a matter of universals derived from revelation, and explored through tradition."[44] The rules they produce are "multiplied through argument and uncertainty, and resolved into a decisive singularity through the authority of the *madhhab*."[45]

The *mufti* is also a *fiqh* expert, but her job is different than that of the academic *faqīh*. A *mufti* translates and applies the universal rules of *fiqh* to particular real life situations. *Muftis* are in direct and regular communication with average Muslims seeking *fatwas* (legal responsa).[46] *Muftis* thus not only know the *fiqh* as transcendent universal law, but also apply it to real life questions. In Reinhart's words, *muftis* illustrate the "transformative power of Muslim learning … assembling the transcendent data and the mundane, transmuting it into transcendent assessment of daily matters."[47]

Muftis are "essential to a life lived Islamically,"[48] because they answer *fiqh* questions relevant to everyday Muslim lives. They are the primary conduits

41 Alexander Morgan Capron, "Morality and the State, Law and Legalism," *Hastings Center Report* 26, no. 6 (1996): 35.

42 Norman Calder's description of this three-character institutional system is especially helpful. See Calder, *Islamic Jurisprudence in the Classical Era*.

43 This literature comes in many types, ranging from high level works of legal theory (*uṣūl ul-fiqh*) to summaries of *furūʿ al-fiqh* ("branches" or doctrinal results of *fiqh*) providing specific rules of right action, sometimes with elaborate supporting analyses, sometimes in commentary and critique of other schools, and sometimes as collections of many schools. See Ibid. for more details.

44 Ibid., 92 (describing Subkī's characterization).

45 Ibid.

46 See Calder, *Islamic Jurisprudence in the Classical Era*, 79 ("This process of discovering the generalities of the law, the law as a science, at least conceptually, was quite distinct from the process of applying the law. The latter task, the *mufti's* task, involved consideration of particulars (this governor, these goods).").

47 Reinhart, "Transcendence and Social Practice," 13.

48 Ibid., 12.

by which *fiqh* rules of right action can be known by Muslims. Without them, Sharīʿa would be inaccessible to the layperson. To use Reinhart's words again,

> right action depends on transcendent knowledge (*ʿilm*) something that the average Muslim lacks, in the view of the scholar. Consequently, the unqualified (*ʿamma*) are dependent on the knowledge and interpretations of knowledge conveyed by scholars. If the Christian religious economy was based on transactions in grace, the Sunni Muslim economy was based on transactions in knowledge.[49]

Unsurprisingly, then, *fatwas* are sought by all members of society, from the uneducated to the elite, from farmers and tradespeople to governors, and even judges and fellow jurists. As a result, *muftis* stand at the center of a complex interaction of the educational, spiritual, and socializing role of *fiqh* in Muslim lives.[50]

And yet the practical impact of *fatwas*—whether they are actually implemented in real lives—depends completely on the will of the *mustafti* (*fatwa*-seeker). This is because *fatwas* are, in themselves, not binding. As products of *ijtihād*, they are inherently fallible, and it is therefore left to the individual *mustafti* to decide whether or not to follow a given *fatwa*, and even to choose between different *fatwas*. This is another manifestation of the essentially non-state character of *fiqh: fatwas* are purely self-regulating; they do not come with a police power. If one chooses not to apply a *fatwa* in her life, there is no external force to make her do so. Whatever impact *fatwas* have in regulating Muslim lives, it is self-initiated and self-implemented by individual Muslims, not the state.

But what if enforcement is needed? What if, for example, you're in a *fiqh-based* property dispute involving another party, and you obtain a *fatwa* documenting your right, but the other party ignores it? Now you need the power of the state to enforce your *fiqh* right. This is where the third of our institutional actors, the *qadi*, comes in. A *qadi* is a *fiqh*-trained judge appointed by the ruler. Both *qadis* and *muftis* apply *fiqh* rules to specific real life cases, but *qadis* also have the police power of the state behind them. Unlike *muftis' fatwas, qadi* rulings are binding because, with ruler-appointment, their decisions are enforced by executive power.[51]

49 Ibid., 24.

50 See Calder, *Islamic Jurisprudence in the Classical Era*, 167–175.

51 It is important to emphasize that the binding nature of *qadi* rulings is not because their *ijtihād* is any less fallible than that of *muftis* (or themselves in their *mufti* capacities).

The *qadi's* primary role is to provide *fiqh*-based resolution of real life disputes. *Qadis* make findings of fact and decide the merits of the cases brought before them. Like *muftis*, they also translate *fiqh* universals to particular situations, but their rulings have more tangible impact than *mufti fatwas*. *Muftis* are not finders of fact; they answer essentially hypothetical questions, taking the facts as presented to them by the questioner. For example, a *mufti's fatwa* typically takes the following form: "if the evidence is as presented, then X would be entitled to compensation from Y for this injury." A *qadi's ḥukm* (ruling), on the other hand, would affirmatively declare that "Y owes to X $__ in compensation for this injury," and this ruling would then be enforced by the government.

Because *qadi* decisions are enforced, they do not cover the full range of *taklīfiyya* categories. Actions that rank as "recommended" (such as paying alimony to an ex-wife after the three month waiting period) or "discouraged" (such as selling grapes to a wine-maker), are generally not appropriate subjects for a *qadi* ruling because they typically are not enforceable against others, as detailed in the *aḥkām waḍʿiyya*.[52] And for even those actions deemed mandatory or prohibited in the *taklīfiyya*, a *qadi* will issue a judgement only on those for which the *aḥkām waḍʿiyya* provide enforceable consequences.[53] For example, ritual worship is generally not enforced by *qadis*. As Mohammad Fadel explains, "[j]urists distinguished between rules that apply as between an individual and God and rules that are judicially enforceable, even though both types of rules were equally obligatory from the perspective of the rules of obligation."[54]

A *qadi* court is where *fiqh* directly intrudes into people's lives. Based on the details of *aḥkām waḍʿiyya*, a *qadi* adjudicates a *fiqh*-based dispute between litigants and the power of the state will actually enforce that ruling. This is not

Rather, their bindingness comes from the *maṣlaḥa* role served by the *qadi*, as a delegate of the ruler's responsibility to serve the public good. That is, resolution of disputes with finality is itself service of the public good. That is why *qadi* decisions are binding. For more, see Asifa Quraishi, "On Fallibility and Finality: Why Thinking like a Qadi Helps Me Understand American Constitutional Law," *Michigan State Law Review* 2009, no. 2 (2009): 339–360.

52 Weiss, *The Search for God's Law*, 4 (describing the *qadi's* task as "to apply to cases brought before him nothing more and nothing less than the divine categorizations of … acts (including contractually stipulated acts) as obligatory or forbidden").

53 As Mohammad Fadel puts it, "That a relationship existed between the moral rules derived from the principles of *uṣūl al-fiqh* and the rules of law applied by a court cannot be denied, but what that relationship was is a very complex question, and cannot simply be explained as a matter of courts giving effect to only those ethical judgments that are obligatory in character." Fadel, "The True, the Good and the Reasonable," 26.

54 Fadel, "A Tragedy of Politics," 119.

self-regulated *fiqh*; this is *fiqh* enforced by the state. Moreover, the difference between these realms of *mufti* and the *qadi* is acknowledged in the *fiqh* literature itself. Hanafi jurists, for example, "make regular distinction in their *furūʿ* works between a rule that applies as a matter of religious conscience, known as the rule given by *fatwa* (also referred to as *diyanatan* in Ḥanafī works), and the rule that applies in litigation, *qaḍā*."[55] This means that, although all the rules of *fiqh* are important, only some of them are meant to be enforced by a force external to the individual Muslim conscience. This runs quite contrary to the stereotype of Sharīʿa as theocracy. Where *fiqh* is thus understood, Muslim societies display this curious feature: "one may violate the religious rules of seriat [Sharīʿa] without exposing oneself to the sanction of the *kadi* [*qadi*]."[56]

This brings us back to a familiar question: is this a separation of law and morality? In other words, are *qadi* rulings "legal" whereas *fatwas* are "moral"? After all, enforced judicial decisions are a quintessential example of "law" in modern society, and unenforceable advisory opinions from religious scholars seem much more like "moral" advice than "law." So, when writing to secular western audiences accustomed to thinking in these terms, this characterization seems like a helpful translation tool, and indeed many scholars have used it.[57] But it must be noted that this approach can obscure as much as it clarifies. To characterize the rules applied by the *qadi* as "legal," and the rules applied by the *mufti* as "moral" can create confusion because it is the same body of rules. Both *muftis* and *qadis* look to the same books of *fiqh* for the rules they apply; they just apply them to different tangible effect. Does the difference in effect mean that one is more "legal" than the other? Perhaps. If you are of the mind that only state-enforced rules qualify as "law," then *qadi* decisions are more legal than the *mufti's fatwas*. But not everyone takes that view. Legal pluralists, for example, hold that it is unreasonable to disqualify all non-state law as law.

Rather than typing the *qadi* realm "legal" and the *mufti* realm "moral," then, it seems more useful to think of a *fiqh* rule of law system as made up of three equally important institutions: the academic *faqih*, the *mufti*, and the *qadi*.

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55 Ibid. In this way, the *fuqaha* distinguished between norms which bind the "forum internum" of the individual believer and those of the forum externum" which the *qadis* apply in legal conflicts brought before them." Baber Johansen, "Truth and Validity of the Qadi's Judgment: A Legal Debate Among Muslim Sunnite Jurists from the 9th to the 13th Centuries," *Recht van de Islam* 14 (1997): 1–26.

56 Murteza Bedir, "Fikih to Law: Secularization through Curriculum," *Islamic L. & Society* 11 (2004): 378, 380 (also noting the *fuqaha's* distinction between judicial ("*kazai*") and religious "*diyan*") acts).

57 See, e.g., Fadel, "The True, the Good and the Reasonable," 23 (distinguishing the "moral rules derived from the principles of *usul al-fiqh*" and the rules of law applied by a court").

As described above, all three are essential to the effective operation of *fiqh* in Muslim lives, and all of them have aspects of what we would today deem "law" as well as "morality." In this tripartite system, the *faqih* provides details of right action by articulating the universal rules of *fiqh*, the *mufti* provides clarification and guidance by applying these universal rules to particular situations in nonbinding *fatwas*, and finally the *qadi* resolves conflicts arising out of these *fiqh* rules that are unresolvable through self-regulation. Some of this is state-controlled, but significant parts are not, and yet all three are interdependent—they all contemplate and expect the existence of the other.

There is one final important point to recognize as we look at state enforcement of *qadi* judgments, at least before the modern era: it wasn't uniform. Recognizing the multiplicity of *fiqh* schools (*madhhabs*), Muslim rulers appointed *qadis* belonging to different *fiqh* schools, often reflecting the *fiqh* affiliations within each population. This means that, even when *fiqh was* enforced by the state (i.e. via a *qadi* judgment), it was done in a way that honored *fiqh* diversity. In other words, until the modern period, state-enforcement of *fiqh* was not in the form of singular, codified state law. Thus, contrary to theocratic systems, Muslim rulers did not (though some tried and failed) enact a *fiqh* code and enforce it on all their subjects. Indeed, this was the hard-fought lesson of the *mihna*: it is not the role of the state to articulate, or even approve or disapprove of, a particular interpretation of scripture. Instead, the meaning of scripture must be left to the *fuqaha*, and to their diverse interpretive schools.[58]

To appreciate this better, it helps to address the role of the state as part of a holistic rule of law system contemplated by the scholars of Sharīʿa. That is, it is important to understand, from a Sharīʿa perspective, the appropriate scope of a ruler's power. What could a Muslim ruler do besides enforce *qadi* judgments, for example? Could she make any laws of her own? This is the subject of *siyāsa sharʿīyya* ("governance/policy" with Sharīʿa legitimacy).

3 The Realm of *Siyāsa*

Muslim legal systems before the colonial era possessed one important structural feature that distinguishes them from modern systems: they had two types of law. Whereas most modern legal systems follow the nation-state model in which law emanates from the state and is generally uniform, precolonial Muslim legal systems were essentially binary, made up of: (1) *fiqh*, created by

58 For more on this history, see Hodgson, *The Venture of Islam, Volume 1*, 285–319, 479–89; Quraishi, "The Separation of Powers."

scholars, and (2) *siyāsa*,[59] created by rulers and their delegates. *Siyāsa* laws typically addressed pragmatic, governance-related issues, covering topics like taxes, security, marketplace regulation, and public safety—i.e., things necessary for public order, but about which the scripture says little. In contrast to *fiqh* rules articulating right action for believers, *siyāsa* rules were pragmatic orders purportedly serving the public good (*maṣlaḥa ʿāmma*).

Service of *maṣlaḥa* is what makes *siyāsa* valid as a matter of *Sharīʿa* legitimacy. This is strikingly different from the source of legitimacy for *fiqh*, which is simply *ijtihād* (rigorous legal reasoning). The difference flows from the core epistemological foundations of Islamic jurisprudence. *Fiqh* rules are legitimate as long as they result from *ijtihād*, but because they are fallible human depictions of God's Law, that legitimacy does not come with any right to force them on others. (Hence, the mutual respect between practitioners of different *fiqh* schools.) Muslim rulers, on the other hand, may use force to apply their *siyāsa* rules. On what basis is this force justified? *Maṣlaḥa*—service of the public good. As articulated in the *siyāsa sharʿīyya* literature, rulers may create and enforce any rules that serve the public good, as long as they didn't violate uncontested Sharīʿa rules, or as sometimes rendered, "the public policy power could not be used to oblige conduct that was sinful, nor could it prohibit conduct that was morally obligatory."[60] This results in a curious combination of both *fiqh* and *siyāsa* rules for Muslim societies, with no direct connection between them. That is, it would be perfectly legitimate for Muslim rulers to create and enforce *siyāsa* rules that contradict *fiqh* rules—as long as they can justify this as serving the public good. For example, *fiqh* doctrine says that gratuitous promises are recommended (*mandūb*) but not enforceable as a matter of *waḍʿiyya*. But, imagine there's rampant societal unrest caused by too many broken promises. A ruler could, for reasons of the public good, punish people who don't keep their gratuitous promises.[61] In this way, state-created laws in Muslim lands could be inconsistent with *fiqh* doctrine, but nevertheless legitimate as a matter of *siyāsa sharīʿyya*.

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59 The term "*siyāsa*" is not the only term used to refer to a Muslim ruler's power, but it is one of the most common and broad-reaching, and so is used here. As a reference to statecraft and governance according to Sharīʿa, the word "*siyāsa*" has a long and established presence in Muslim history and literature, from Caliph ʿUmar to the Abbassids, and from Ibn Muqaffa to Ibn Taymiyya. It has continued to be used in modern times, although with slightly altered meanings. See Frank E Vogel, "Siyāsa," *Encyclopedia of Islam, 2d Edition*, 2012.

60 Fadel, "The True, the Good and the Reasonable," 58 (and citing al-Qarafi and al-Tahawi).

61 Ibid., 58 (citing Mawardī and others).

3.1 *The Interdependent Relationship of Fiqh and Siyāsa*

Understanding the interdependent roles of *fiqh* and *siyāsa* and their importance to a Sharīʿa rule of law means that you will not make the mistake of thinking that Muslims "are incapable of making a distinction between their moral commitments and what can legitimately be enforced as a matter of politics"[62] Muslim history shows, over and over again, that the powers of the Muslim ruler were not co-extensive with the *fiqh* rules of right action. Or, in the words of Khaled Abou El Fadl, "just because there exists an objective righteous path, it does not logically follow that a government, which identifies itself as Islamic, has the legal power or jurisdiction to compel adherence to such a path."[63] This is because, while it is the purpose of *fiqh* to define moral action, that is *not* the purpose of *siyāsa*. The police power of *siyāsa* is not a moral police. *Siyāsa* exists to serve the collective needs of the general public, not to make sure individuals in that public follow the rules of *fiqh*.

A good illustration of this phenomenon is the allowance of non-Muslims living under Muslim rule to continue their own practices, even those that fell quite definitely outside of Islamic norms of behavior. Non-Muslims are not required, for example, to perform Muslim ritual obligations such as prayer and fasting, or follow other scripturally-derived obligations, such as avoiding wine and usury. There are no grounds (other than the public good[64]) for a Muslim ruler to enforce these duties on non-Muslims. But the tolerance goes even further than that—to the validity of non-Muslim law over non-Muslim lives, even when it contradicts Muslim values. A vivid example of this was the idea that incestuous marriages (of mother and son, or brother and sister) should be recognized by Muslim rulers as long as they were valid under the religious law of the couple, even though such marriages are sinful in Islam.[65] This and other examples run counter to the widespread contemporary idea that any practice prohibited in the Quran must be actively punished by a Muslim government.

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62 Fadel, "A Tragedy of Politics or an Apolitical Tragedy?," 120.

63 Khaled Abou El Fadl, "The Place of Ethical Obligations in Islamic Law," *UCLA Journal of Islamic and Near Eastern Law* 4 (2005): 11, 8.

64 Service of the public good could sometimes justify imposition of *fiqh* rules on non-Muslims, but it is important to see that this was done with "religiously neutral reasons"—the public good—not because a Muslim government is entitled to impose Muslim religious rules on all its subjects. Thus, "[w]hile some Muslim jurists held the opinion that at least some non- Muslim residents of an Islamic state were subject to even the *hudud* penalties, their justification for applying these penalties to non-Muslims was either because the relevant *actus reus* was also prohibited to the defendant by his own religion or because of the defendant's undertaking to abide by the laws of Muslims, or because the public interest required imposition of that penalty." Fadel, "The True, the Good and the Reasonable," 62.

65 See Ibid., 62–63 (citing al-Zarkashi and Ibn Qayyim).

(It also provides a stark contrast to the historical practice of Christian governments enacting and enforcing only Christian definitions of marriage.)

Finally, service of *maṣlaḥa* provides an effective but non-theocratic justification for the use of police power, one that is especially appropriate for Muslim governments. This follows from the core Islamic epistemological principle that human beings cannot know God's Law with absolute certainty. With this starting point, a Muslim ruler's use of force has to be based on something other than "this is God's Law"; that basis turns out to be the public good. This is not to say that historical Muslim rulers did not favor one *fiqh* school over another (most did). But it is crucial to realize that (unlike so many European theocracies) they did *not* do so by collapsing *fiqh* and *siyāsa* lawmaking and putting both under their control. Indeed, the separation of these two types of law—*fiqh* rules of individual action and *siyāsa* rules for the public good—served as a powerful check against theocratic rule throughout most of Muslim history.

3.2 *The Mistaken Premise of Political Islam*

Sadly, the importance of separating *fiqh* and *siyāsa* is missed by political Islamist movements today. Most Islamist political advocacy focuses on legislating selected *fiqh* rules (often calling them "*Sharīʿa*"), usually with special attention to criminal, family, and sometimes economic rules. "Sharīʿa legislation" is what "Islamization" and the creation of an "Islamic state" has come to mean. But the idea of "Sharīʿa legislation"—the state enacting selected *fiqh* rules and imposing them on the entire population—flies in the face of the historical *fiqh-siyāsa* separation of law. Instead, it adopts the centralized political-legal structure of European nation-states, imported to Muslim lands with colonialism. In the nation-state model, law is defined by state power—it is centralized and enforced by the government. In virtually every Muslim-majority country today (whether it was actually colonized by a European power or not), "law" now means "state law."[66] Monolithic legal positivism has narrowed Muslim legal vision to just the realm of government-endorsed law.[67]

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66 See Mohammad Hashim Kamali, "Methodological Issues in Islamic Jurisprudence," *Arab Law Quarterly* 11 (1996): 3, 9 ("The government and its legislative branch tend to act as the sole repository of legislative power.... The advent of constitutionalism and government under the rule of law brought the hegemony of statutory legislation that has largely dominated legal and judicial practice in Muslim societies.); Sherman A. Jackson, "Shari'ah, Democracy, and the Modern Nation-State: Some Reflections on Islam, Popular Rule, and Pluralism," *Fordham Int'l L.J.* 27 (2003): 88.

67 For a commentary on this phenomenon in a discussion of legal pluralism, see Sherman A. Jackson, "Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?," *Fordham Int'l L.J.* 30 (2006): 158.

This is a dangerous turn of events. The more it is believed that all law comes from the state, the more everyone is forced into the state legislative arena to fight for laws that are important to them—religious laws included. These fights have polarized politics in Muslim-majority countries between aggressive secularism and equally aggressive Islamism, sometimes with violence. And it is unnecessary. The Islamist focus on the state to establish and enforce the substantive content of Sharīʿa is not an authentically Islamic approach to government. Quite the opposite, in fact. In seeking to "legislate Sharīʿa," they ignore the separation of *fiqh* and *siyāsa* that existed before the nation-state takeover. In Sherman Jackson's words, "the Islamic state is a nation-state ruled by Islamic law."[68] Far from restoring Sharīʿa, this has fundamentally transformed the role of Sharīʿa in these societies; Sharīʿa is now mistakenly believed to be a code of Muslim laws that must be enacted in order to make a government Islamic. And by using state power to enforce a single state-endorsed religious doctrine upon the public, they have effectively created—for the first time in Muslim history—Muslim theocracies.

4 Conclusion

Perhaps it all starts with the word "law." As international law scholars have pointed out, the word "law" usually presumes "national law" as its benchmark.[69] Thus, it is possible that the word "law" is so tied to the idea of "state law" that it will distort any English-language depiction of Sharīʿa even before we get started. Take even the quite common term "Islamic law." As Ahmad Ahmad

68 Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb Al-Dīn Al-Qarāfī* (Brill, 1996), xiv; see also Sherman A. Jackson, "Islamic Reform Between Islamic Law and the Nation-State," in *Oxford Handbook of Islam and Politics*, ed. John L. Esposito and Emad El-Din Shahin (Oxford: Oxford University Press, 2013), 42 ("liberal or illiberal, pro- or anti-democratic, the basic structure of the nation-state has emerged as a veritable grundnorm of modern Muslim politics. The basic question now exercising Muslim political thinkers and activists is not the propriety of the nation-state as an institution but more simply whether and how the nation-state can or should be made Islamic."). Frank Vogel similarly comments that this is apparent "when Islamic thinkers assume that to return to Sharīʿa one should just amend here and there the existing positive-law constitutions and statutes; or assert that a modern state is Islamic if its legislature pays respect to general Islamic legal precepts, such as bans on prostitution or gambling." Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia*, vol. 8 (Brill, 2000), 219.

69 Jose E. Alvarez, "But Is It Law?," *ASIL Proceedings* (*Proceedings of the Annual Meeting, American Society of International Law*) 103 (2009): 163.

points out, "[t]he concept of law in the term 'Islamic law' has no equivalent in the concept of law as applied to any modern Western legal system."[70] Similarly, Bernard Weiss says that it is "an oversimplification to equate the Sharīʿa with law."[71]

How could the term "law" be accurately used when discussing Sharīʿa? If "law" means "state law," then *siyāsa* seems to correspond most closely to this English word. But *siyāsa* is usually not what is meant when the term "Islamic law" is invoked. More likely, all or some aspect of *fiqh* is what is meant. But because *fiqh* is essentially non-state law, this can cause confusion. Is it not law if the state is not behind it? Maybe we should be more nuanced about *fiqh*, and distinguish *taklīfiyya* obligations from *waḍʿiyya* consequences, and categorize only the *aḥkām waḍʿiyya* as "law" because that is where enforceable rights are created. But even those rules are not always enforced by the state—sometimes they are self-enforced by individual Muslims. Take, for example, the *waḍʿiyya* rules that establish the duties and rights of a marriage contract: should these be called "law" only when they are enforced in a *qadi* ruling and thus have the backing of state enforcement? What about when these rules come in the form of a *fatwa* rather than a *qadi* judgement? Are *fatwas* not "legal" because they are not enforced by the state? Legal pluralists might say yes, *fiqh* (and a *fatwa* application of *fiqh*) is "law" as long as it regulates people's lives—i.e., it impacts individual behavior regardless of state enforcement.

But not everyone is a legal pluralist. More often than not, images of state involvement are (sometimes subconsciously) embedded in our understanding of the term "law." So, for example, when Anver Emon, in his investigation of the *fuqaha's* development of *taklīf*, speaks of "legal obligations that pose the threat of divine sanctions,"[72] the word "legal" may evoke images of state involvement in the minds of his readers. And when religious law and state are mentioned together, fears of theocracy are usually not far behind. To avoid this confusion, scholars writing about Sharīʿa in English often add adjectives to help clarify their meaning, such as referring to *fiqh* as "positive law."[73] This term is still confusing, however, because the established meaning of the term "positive law"

70 Ahmad, "Structural Interrelations of Theory and Practice in Islamic Law," 44.

71 Weiss, *The Search for God's Law*, 1.

72 Anver M. Emon, *Human Legislative Authority in Islamic Law*, 2004, Yale Critical Islamic Reflections conference, http://www.yale.edu/cir/2004/papers.html., 1.

73 See, e.g, Weiss, *The Search for God's Law*," 1 ("'Law' in this book will mean "positive law," nothing more and nothing less."); Fadel, "The True, the Good and the Reasonable," 27 ("The domain of positive law, known in Arabic as *fiqh*, was the preserve of legal specialists known as *fuqaha'*.").

includes the idea of the state as the source and location of such law.[74] Nevertheless, scholars writing about *fiqh* in English must look for English legal terms to translate *fiqh* concepts. Thus, we see the term "statute" describing the doctrinal rules in *fiqh* literature,[75] "legislator" and "lawmaker" to describe God and sometimes the *fuqaha*,[76] and the word "code" to refer to *mukhtaṣar* collections of *fiqh* rules. All of these terms are problematic because they all imply some action by a state. Indeed, just to speak of Sharīʿa as "law" (or "Islamic law") inevitably creates the false presumption that an Islamic government would legislate some or all of these rules.

Even when effort is made to distinguish between state-enforced *fiqh* and *fiqh* that is independent of the state, western presumptions embedded in the word "law" tend to intrude upon our discussions. Thus, the terms "judge" and "judicial" often show up to describe situations in which *fiqh* rules are enforced,[77] in contrast with the words "moral" and "ethical" to indicate non-state manifestations of *fiqh*. But this misses those aspects of *fiqh* that have tangible effect but not in the form of a judicial ruling, such as *mufti fatwas*. In short, the term "law"—if understood as state law—is both under and overinclusive in the Muslim context. The term straddles both *fiqh* and *siyāsa*. Adding the word "morality" does not help much because *fiqh* includes aspects of both "law" and "ethics/morals." As we have seen above, *fiqh* is "law," but it is not created by the state and it is not (always) enforced by the state. *Fiqh* is also "morality" but it is organized in what look like legal categories and analyses. Like yelling "Gooooaaaal!" at an American football game, using western legal categories for Sharīʿa concepts are close, but they are different enough that they just don't work as direct translations. Or, as Bernard Weiss eloquently puts it, "[l]aw and morality mean different things to different people, and those who separate them will understand them differently from those who fuse them together."[78]

74 English-language dictionaries typically define "positive law" as "law established or recognized by governmental authority," usually through statutory or other official means, often contrasting it to natural law. See, e.g., Merriam-Webster (2015).

75 See, e.g., Reinhart, "Islamic Law as Islamic Ethics," 188 (translating the hudud as "statutes").

76 See, e.g., Tariq Ramadan, "Ijtihad and Maslaha; The Foundations of Governance," in *Islamic Democratic Discourse: Theory, Debates, and Philosophical Perspectives*, ed. M.A. Muqtedar Khan (Oxford: Lexington Books, 2006), 3–20.15 (describing the *mujtahid* as in the position of legislator, seeking guidance from God, the "supreme Legislator").

77 See, e.g., Weiss, *The Search for God's Law*," 5 (clarifying "positive law" as that which is "in force" in a society, and defining "in force as "whatever is deemed by those charged with the task of making and enforcing judicial decisions to be relevant to, or determinative of, their deliberations").

78 Ibid., 6.

I do not mean to re-start the question "what is law?" I am much too late to the game, and it is an endless one anyway. What I want to highlight here is the problem of answering it for Islam from the perspective of a western (Euro-American, and Christian-influenced) mindset. Because "law," "religion" and especially "religious law" take on such powerful and specific meanings in the west (largely because of Europe's experience with Christian theocracies), applying these terms to Sharīʿa is inevitably problematic. Without careful attention to nuance and a large dose of self-awareness, using these terms in western discourse about Sharīʿa is likely to result in incomplete understandings, impossible-to-settle debates, and mistaken judgments of "Islamic law" then and now.

To take a classic example, is Sharīʿa "law in books" or "law in action?" A well-known orientalist trope about "Islamic law" is that it was aspirational, largely impractical and idealistic, "devoid of any significant human agency in the interpretation or construction of the law."[79] In opposition to this depiction are anthropological studies describing "Islamic law" almost completely in terms of human agency and *qadi* discretion, "to the detriment of any notion of legal authority, objectivity and legitimacy in the adjudicatory process."[80] Both and neither of these descriptions are accurate. They stand as opposites only if we are constrained by a binary worldview that separates "law" from "morality." What's missing from this view is an understanding of law that is inclusive of morality, but distinguished from the sort of law that is enforced by the state. This is very difficult to do if we insist on thinking in western categories. Without a nuanced understanding of Sharīʿa as a complex interconnection of *fiqh* and *siyāsa*—of academic (*faqīh*), self-applied (*mufti*) and enforced (*qadi*) rules of right action as well as *siyāsa* social ordering—it is difficult to make sense of Sharīʿa's varying manifestations as both "law in books" and "law in action."[81]

Norman Calder insightfully observes that "western scholarship (even when written by Muslims) has rarely presented Islamic law in such a way as to

79 Emon, *Human Legislative Authority in Islamic Law*, 3; see also Calder, *Islamic Jurisprudence in the Classical Era*, 72 ("That Islamic law-books had an impractical or idealistic bias was noticed, usually with distaste, by Western scholars up to and including Joseph Schacht.").

80 Emon, *Human Legislative Authority in Islamic Law*, 3.

81 In my opinion, this is the missing piece in Wael Hallaq's now famous argument about the "impossible" Islamic State. See Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (Columbia University Press, 2013). In his insistence, for example, that Islamic law doesn't distinguish between morality and law, and that it preferred informal dispute resolution to formal litigation, he dismisses the entire realm of *siyāsa* working in tandem with *fiqh*.

demonstrate its values rather than the values of the observer."[82] Nowhere is this phenomenon more obvious than in commentary on *fiqh* and *siyāsa*. Indeed, western observers usually miss the nuances of the relationship between them because they tend to think of *siyāsa* as standing outside of Sharīʿa, as if it were a Muslim separation of "church" and state. Thus, we see terminology referring to these two types of law not as "*fiqh*" and "*siyāsa*," but as "*Sharīʿa*" and "*siyāsa*"—thus, positioning *siyāsa* lawmaking outside of *Sharīʿa* altogether. Having designated "*Sharīʿa*" and "religious law" as corresponding only to the *fiqh* realm, *siyāsa* is then often described as "secular."[83] Once that move is made, it is very difficult to understand how the various institutions could work together as a holistic system all under Sharīʿa, so these observers instead use western church-state patterns to explain what they see in Muslim history.

Is there an alternative to thinking outside of this Eurocentric box? Writers in English will always use English terms, after all. We can be careful to clarify our terms, and even try to bring in terms from classical Sharīʿa literature, but at the end of the day, English words always carry western baggage. Shmuel Eisenstadt suggests:

> We cannot avoid Western concepts, but we can make them more flexible, so to speak, through differentiation and contextualization. The use of such concepts as public sphere, civil society, and collective identity is helpful as long as we do not assume that the way in which these components were put together in Europe constitutes an evaluative yardstick for other modernizing societies.[84]

82 Norman Calder, "Law," in *History of Islamic Philosophy*, ed. S.H. Nasr and O. Lehman (London: Routledge, 1996), 2, 479.

83 See, e.g., Ira M Lapidus, "The Separation of State and Religion in the Development of Early Islamic Society," *Int'l J. Mid E. Stud.* 6, no. 4 (1974): 364 ("[R]eligious and political life developed distinct spheres of experience, with independent values, leaders and organizations…. [From the middle of the tenth century] [g]overnments in Islamic lands were henceforth secular regimes—Sultanates—in theory authorized by the Caliphs, but actually legitimized by the need for public order. Henceforth Muslim states were fully differentiated political bodies without any intrinsic religious character, though they were officially loyal to Islam and committed to its defense."); see also Kristen Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (Oxford University Press, 2011), 25–27 (explaining the inadequacy of academic descriptions of Muslim ruler activity as non-religious, political and secular).

84 Shmuel N. Eisenstadt, "Concluding Remarks: Public Sphere, Civil Society, and Political Dynamics in Islamic Societies," in *The Public Sphere in Muslim Societies* (Albany: State University of New York Press, 2002), 159.

I want to make a similar point about the concepts of "law" and "morality." With this study I hope to have clarified where and why we need to be careful when using these terms, and how a more nuanced usage can help expand western appreciation both of itself as well as of the "east."

So let us return, finally, to the question of "legislating morality." Rather than getting stuck on language, let us look at the goal: what is the underlying motivation for secular warnings against the legislation of morality? We know that the idea is connected to the importance of separating church and state, and by extension, to protecting against religious oppression by governments. By moving religion (and thus all religious law) outside state power, European states protected themselves from such oppression. The warning "you can't legislate morality" echoes this history. Thus, the underlying principle of separating law from morality seems to be to protect freedom of belief, of religion, and to keep the government from becoming a moral police.

If *Sharīʿa* is the Muslim equivalent of "religious law," then polls showing vast public support for Sharīʿa in Muslim-majority countries today indicate a dangerous backward step—to state churches, imposed religious doctrine, and sectarian-fueled religious wars. This explains the increase in calls for a Muslim reformation—to bring Islam into the modern era by teaching Muslims how to separate "mosque" from state as Christians did centuries ago.[85] Besides being more than a bit paternalistic, these calls also reveal a myopic Eurocentrism that fails to see that Muslim experiences with religious law and government have not been the same as western experiences. A separation of church and state, for example, makes no sense for a religion that has never had a "church" in the first place. Moreover, unlike the uniformity of canon law and the legal centralism of the European nation-state, pre-modern Muslim governments did not operate on the assumption that all law emerges from the state. On the contrary, the *fiqh-siyāsa* division of lawmaking authority, along with the inherent and unavoidable diversity of *fiqh*, protected Muslim societies from the imposition of uniform religious law by Muslim rulers.

Thus, it is ironic (and more than a little painful) to find Europeans casting judgment on Sharīʿa as something in which "principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place."[86] The irony, of course, is that Muslims *were* doing pluralism—even legal pluralism—in the public sphere centuries before Europe was. Muslims

85 See, e.g., Ayaan Hirsi Ali, *Heretic: Why Islam Needs a Reformation Now* (New York: HarperCollins, 2015); Floyd, "An Islamic Reformation Is the World's Best Chance for Peace"; Rumi, "Islam Needs Reformation from Within."

86 EHRR, Refah Partisi and Others v. Turkey, 37 1 (2003), 123.

accomplished this by separating *fiqh* and *siyāsa* and protecting diverse *fiqh* schools (and non-Muslim religious diversity) in the non-state *fiqh* realm. Thus, unlike Christian kings sitting atop European theocracies, *siyāsa* power was not used to codify a Muslim ruler's preferred religious beliefs. Instead, Muslim history is a powerful demonstration of legal pluralism—where everyone knew that in order to follow a law, you do not have to make everyone else follow that same law too.

This is a very different way of thinking about law and of allocating legal and political power than occurred in the Christian west. But it is very hard to see if we are limited by western understandings of "law." Western terminology ends up merging categories that were kept separate in pre-modern Muslim systems. And they were kept separate for a reason—precisely to keep Muslim rulers from forcing theological beliefs upon their populations—the very same motivation, in fact, behind the secular warning against legislating morality.

So, ultimately the question is not whether or not "Sharīʿa legislates morality," but what is the concern behind that warning and whether Sharīʿa answers it. If the worry is that the state will use its police power to stifle religious freedom and impose its morality on its citizens, then the *fiqh-siyāsa* separation stands as a powerful Muslim answer to this problem. Thus, looking at law without European lenses, it is not necessarily true that "lawmaking influenced by religion will result in the unjustified coercion of religious minorities."[87] That result only follows if you define law in a monistic, state-centric way. But if we start with the idea that not all law has to be the same, and not all law has to come from the state, then a state influenced by religion does not automatically mean theocratic oppression. For Muslims at least, the existence of "religious law" articulating rules of right action does not mean the enactment of those rules for an entire population. To put it simply, whether or not something is "required" in the *fiqh* (even as religious normativity) is not the same question as whether or not a Muslim ruler should enforce it. It now becomes clear how a system that doesn't "legislate morality" can still have a lot of law about morals. Not everything is *fiqh*, in other words, and not everything is *siyāsa* either.

Moreover, *fiqh* itself is much more nuanced and complex than is generally believed. Unlike law in a purely "secular" system, there is an Islamic interest in filling in the gaps between the "required" and the "prohibited." That is, there are actions that the *fiqh-siyāsa* system does not want policed by the state, but are still worth providing rule-like guidelines about. That is the role of the

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87 Lucinda J. Peach, *Legislating Morality: Pluralism and Religious Identity in Lawmaking* (Oxford University Press, 2002), 15.

fivefold categories of *taklīfiyya* (mandatory, recommended, neutral, discouraged, and prohibited). The in-between "legal" realm of "recommended" and "discouraged" in the *fiqh* literature simply does not exist in the western concept of "law," thus creating very limited options for western actors. Citizens in western secular societies often feel something is morally wrong, and feel the compunction to try to stop it through legislation. "There ought to be a law …" is the motivation behind many political movements. But ought there be a "law" about abortion? Marijuana? Gambling? Pornography? Maybe, maybe not. In a secular state, these questions challenge the line between law and morality, because in a legally monistic state, there is nowhere else to go with this feeling *but* to legislate it. In a system that separates *fiqh* and *siyāsa*, however, you can still have law-as-morality without having the state legislate it. This allows moral behavioral controls (in the form of *fiqh*) without state imposition of those controls. In this way, precolonial Islamic legal systems embraced the spirit of the idea that "you can't legislate morality," but with much more complex application. Or, to put it in Sharīʿa terminology, you can't "*siyāsa*" morality, but you can "*fiqh*" it!

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CHAPTER 11

Relocating *Dār al-Islām*

Contemporary Islamic Perspectives on Territoriality

Sarah Albrecht

It is not only since a self-declared "Islamic State" has claimed to redraw the geopolitical boundaries in Iraq and Syria and to control a "territory […] ruled by Allah's pure Sharīʾah"[1] that Muslim scholars have engaged in heated debates about what actually makes a territory "Islamic." In fact, the questions of how to define "Islamic territory" and whether, and to what extent, the 'implementation' of the Sharīʿa is a key condition for a territory to be classified as "Islamic," have sparked controversies since the early days of Islamic legal history. When outlining his territorial world view, Abū Bakr al-Baghdādī, the self-proclaimed Caliph of the so-called "Islamic State" and "commander of the faithful" (*amīr al-muʾminīn*), thus builds on a centuries-long discussion about the Islamic legal classification of territories:

> O Umma of Islam, indeed the world today has been divided into two camps (*fusṭāṭayn*) and two trenches (*khandaqayn*), with no third camp present: The camp of Islam and faith, and the camp of unbelief (*kufr*) and hypocrisy […]. O Muslims everywhere, whoever is capable of performing *hijra* [i.e., emigration] to the Islamic State, then let him do so, because *hijra* to *dār al-islām* is obligatory.[2]

By dividing the world into two opposed camps, the "camp of Islam" and the "camp of *kufr*," al-Baghdādī invokes the Islamic legal tradition of distinguishing between *dār al-islām*, the "territory of Islam," and *dār al-kufr*, the "territory of unbelief" (often used synonymously with *dār al-ḥarb*, the "territory of war"), that was introduced by Muslim legal scholars in the 2nd/8th century AH/CE. While these concepts have been revised continually and complemented by further categories, such as the "territory of treaty" or "truce" (*dār al-ʿahd,*

1 This wording is taken from *Dabiq*, the English language online-magazine the so-called "Islamic State" has published regularly since July 2014. For this quote, see n.a., *Dabiq*, no. 10, Ramadan 1436/2015: 4. The magazine is widely available online; see, e.g., http://jihadology.net/category/dabiq-magazine.

2 Abū Bakr al-Baghdādī, quoted in n.a., *Dabiq* no. 1, Ramadan 1435/2014: 10.

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dār al-ṣulḥ), they have always been intrinsically linked with debates about where Muslims are supposed to reside so as to live fully in accordance with the Sharīʿa.[3] By alleging that *hijra* (emigration) to the "territory of Islam"—by which he clearly means the self-proclaimed "Islamic State" that he presides over—is "obligatory" for everyone capable of it, al-Baghdādī alludes to historical debates about whether it is legitimate at all for Muslims to live under non-Muslim rule, without, however, mentioning the plurality of views Muslim scholars have expressed over this matter in the course of Islamic history.[4] As Khaled Abou El Fadl has shown, scholars have always differed on how to define the concepts of *dār al-islām, dār al-kufr*, and related notions, and they have reconsidered and rephrased them in response to and in interaction with the respective political contexts. Accordingly, there has always been disagreement about the obligation to perform *hijra* to the "territory of Islam," that is, about the conditions under which Muslims were supposed to emigrate from "non-Muslim territory." At the same time, debates over territorial concepts have, throughout Islamic history, been closely linked with the question of whether the interpretation and application of the Sharīʿa change according to whether a Muslim resides inside *dār al-islām* or outside of it.[5]

Since the pre-modern period, discussions about the Islamic legal status of territories and the obligation to emigrate to "Islamic territory" have erupted particularly in times when large Muslim populations came under non-Muslim rule, as, for instance, in the course of the Mongol conquests, the Reconquista, and during the colonial era.[6] In the second half of the 20th century, these

3 For the concepts of *dār al-islām, dār al-kufr, dār al-ḥarb, dār al-ʿahd,* and *dār al-ṣulḥ*, their origins and definitions by the various schools of law in both the pre-modern and modern periods, see Sarah Albrecht, "Dār al-Islām, dār al-ḥarb," Encyclopaedia of Islam, Three. Ed. by Kate Fleet, Gudrun Krämer, Denis Matringe, John Nawas and Everett Rowson (Brill Online, 2016); and Sarah Albrecht, *Dār al-Islām Revisited. Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West* (Leiden: Brill, 2018), 39–119.

4 See also n.a., "The Danger of Abandoning darul Islam," *Dabiq* no. 11, Dhul-Qa'dah 1436/2015: 22–3.

5 See Khaled Abou El Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries," *Journal of Islamic Law and Society* 22, no. 1 (1994): 161; and Khaled Abou El Fadl, "Striking a Balance: Islamic Legal Discourse on Muslim Minorities," in *Muslims on the Americanization Path*, ed. Yvonne Y. Haddad and John L. Esposito, 2nd ed., 47–63 (Oxford: Oxford University Press, 2000), 49–50. For a brief historical overview, see Albrecht, "Dār al-Islām, dār al-ḥarb." See also Yāsir Luṭfī al-ʿAlī, "Al-Jughrāfiyā al-fiqhiyya li-l-ʿālam min ṣūrat al-tārīkh ilā ṣūrat al-wāqiʿ al-muʿāṣir," *Islāmiyyat al-Maʿrifa* 12, no. 45 (2006): 95–124; and Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1998), 219–34.

6 See Abou El Fadl, "Islamic Law and Muslim Minorities"; Alan Verskin, *Oppressed in the Land? Fatwās on Muslims Living under non-Muslim Rule from the Middle Ages to the Present* (Princeton: Markus Wiener, 2013); Alan Verskin, *Islamic law and the crisis of the Reconquista* (Leiden:

questions gained new momentum as scholars reconsidered the traditional classification of territories in the light of the newly established nation states and the unprecedented system of international relations. Initially, it was the late Syrian scholar Wahba al-Zuḥaylī (1932–2015) and the Egyptian Muḥammad Abū Zahra (1898–1974) who redefined traditional territorial concepts and adjusted them to the new world order.[7] Since the 1980s, renewed debates about the traditional territorial paradigm and its implications for Islamic legal interpretation and the legitimacy of residence under non-Muslim rule were fuelled when millions of Muslims, who had left their home countries mainly as migrant workers, students, and refugees, settled permanently in Western European and other predominantly non-Muslim countries. Faced with this unprecedented demographic situation, Muslim scholars and intellectuals responded in very different ways to the challenges of how to accommodate the classical notion of dividing the world into *dār al-islām, dār al-kufr*, and further territorial categories to the new political reality and how to reconcile a life in line with Islamic norms and values, as prescribed by the Sharīʿa, with the social and political conditions in secular, non-Muslim majority societies.

Based on selected case studies representing prominent voices in the Islamic legal discourse on Muslims in the West—Yūsuf al-Qaraḍāwī, Ṭāhā Jābir al-ʿAlwānī, Tariq Ramadan, and Saʿīd Ramaḍān al-Būṭī—this paper provides insight into the variety of territorial concepts underlying contemporary Islamic legal thought. Shedding light on how Muslim jurists and intellectuals reinterpret and adjust—or reject—the traditional paradigm of dividing the world into *dār al-islām* and other geo-religious categories, I explore the diversity of ways in which they relocate these concepts today and point to the implications the various conceptions of territoriality have for the interpretation of the Sharīʿa and the legitimacy of residence in predominantly non-Muslim countries. Notwithstanding the manifold views scholars have expressed on this matter, I offer that one can distinguish four ways by which scholars reconsider traditional territorial concepts in the light of the current geopolitical order and locate *dār al-islām* in today's world.

Brill, 2015); Kathryn A. Miller, Muslim Minorities and the Obligation to Emigrate to Islamic Territory: Two *fatwās* from Fifteenth-Century Granada, *Islamic Law and Society* 7/2 (2000): 256–88; and Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (The Hague et al.: Mouton, 1979).

7 See Wahba al-Zuḥaylī, *Āthār al-ḥarb fī al-fiqh al-islāmī: Dirāsa muqārana* (Damascus: Dār al-Fikr, 2009); and Muḥammad Abū Zahra, *Al-ʿAlāqāt al-duwaliyya fī al-islām* (Cairo: Dār al-Fikr al-ʿArabī, 1995).

1 *Dār al-Islām* and the West—A Contractual Relationship

"Our scholars, may God have mercy on them, have decreed that the *fatwā* changes according to time and place, with the greatest difference regarding the place being that between *dār al-islām* and what lies outside of it."[8] With these lines, the prominent Egyptian scholar Yūsuf ʿAbdallāh al-Qaraḍāwī (b. 1926), who has been based in Qatar since the 1960s, justifies his approach to interpreting the Sharīʿa for Muslims in the West, known as minority *fiqh* (*fiqh al-aqalliyyāt*).[9] Stressing that the interpretation of Islamic norms is essentially contingent upon time and place, the Azhar-trained scholar grounds his notion of place in the traditional concept of dividing the world into a "territory of Islam" and other territorial categories. By implying that Western countries lie beyond the boundaries of what he considers to be *dār al-islām*, al-Qaraḍāwī seeks to legitimize that the Sharīʿa is to be understood and applied differently in "non-Islamic territory." In view of the great importance he ascribes to the classification of territories in the context of his interpretation of Islamic norms, and given that his conception of territoriality is shared by many contemporary scholars, it seems indispensable to take a closer look at how he actually defines *dār al-islām*, specifically, upon which criteria he draws the boundaries of "Islamic territory," and how he classifies Western countries within this territorial paradigm.[10]

Throughout his writings on minority *fiqh*, al-Qaraḍāwī dichotomizes between *dār al-islām* and *ghayr dār al-islām*, i.e., between "Islamic" and "non-Islamic territory." This bifurcation is also reflected in the subtitle of his monograph on *fiqh al-aqalliyyāt* which reads *The Life of Muslims in* Other *Societies* (*Ḥayāt al-muslimīn fī l-mujtamaʿāt al-ukhrā*, emphasis added).[11] While al-Qaraḍāwī hardly defines, in this context, what exactly he means by these territorial categories, he elaborates on their definitions elsewhere. Just as the classification of territories has always played a crucial role in Islamic legal debates about *jihād* (in the sense of armed struggle) and *siyar*, i.e., the rules pertaining to the relations of lands under Muslim sovereignty with

8 Yūsuf al-Qaraḍāwī in al-Majlis al-Ūrūbī li-l-Iftāʾ wa-l-Buḥūth, "Fatāwā wa-qarārāt al-majlis: al-majmūʿatān al-ūlā wa-l-thāniyya," http://www.e-cfr.org/ar/index.php?cat_id=337 (accessed January 29, 2012), 2.

9 See Sarah Albrecht, *Islamisches Minderheitenrecht: Yūsuf al-Qaraḍāwīs Konzept des fiqh al-aqallīyāt* (Würzburg: Ergon, 2010); and Said Fares Hassan, *Fiqh al-Aqalliyyāt: History, Development, and Progress* (Basingstoke, Hampshire et al.: Palgrave Macmillan, 2013).

10 See also Albrecht, *Dār al-Islām Revisited*, 165–217.

11 Yūsuf ʿAbdallāh al-Qaraḍāwī, *Fī Fiqh al-aqalliyyāt al-muslima: Ḥayāt al-muslimīn wasaṭ al-mujtamaʿāt al-ukhrā*, 2nd ed. (Cairo: Dār al-Shurūq, 2005).

non-Muslims, it is particularly al-Qaraḍāwī's work on *fiqh al-jihād* that yields deeper insight into his conception of territories.[12]

Resorting to modern political jargon, he recurrently equates *dār al-islām* with the so-called "Muslim world" (*al-ʿālam al-islāmī*), "Islamic countries" (*bilād islāmiyya*), and "Muslim" or "Islamic societies" (*mujtamaʿāt muslima, mujtamaʿāt islāmiyya*). At the same time, he refers to it as the "Islamic homeland" (*al-waṭan al-islāmī*) and thus identifies *dār al-islām* with an imaginary place of origin, a space of belonging for every Muslim, irrespective of their actual place of residence.[13] In his monograph on *Fiqh al-jihād*, he offers a more jurisprudential definition, characterizing *dār al-islām* as "the land in which Islamic rites (*shaʿāʾir al-islām*) are manifested, that is guided by Islamic doctrine (*ʿaqīdat al-islām*), and whose people are ruled according to the Sharīʿa."[14] When translating these—by no means unambiguous—ideal-typical characteristics into *realpolitik*, al-Qaraḍāwī follows a far more pragmatic definition, according to which any modern state that has a Muslim majority population and is ruled by a Muslim qualifies as part of *dār al-islām*.[15] Although he generally advocates a political system that declares Islam the state religion and refers to the Sharīʿa as the, or as one of the sources of its constitution, those are, ultimately, *not* the prerequisites for him to count a land as part of *dār al-islām*. This may be interpreted as resulting from his understanding that the legal systems in Muslim majority countries are not, in fact, mainly based on Islamic law, nor are the political systems in line with what he regards as "Islamic" policies. Taking Turkey as an example, he points out that even secular states can be considered "Islamic territory," as long as they have historically been under Muslim rule and are, until today, inhabited by a predominantly Muslim population. Thus, it is not the de facto political system or the 'application' of the Sharīʿa—which he refers to, more precisely, as the "implementation of Islamic [legal] rules" (*ẓuhūr aḥkām al-islām*)—but demographic majorities that provide the bedrock for al-Qaraḍāwī's definition of *dār al-islām*.[16]

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12 See Yūsuf al-Qaraḍāwī, *Fiqh al-jihād: Dirāsa muqārana li-aḥkāmihi wa-falsafatihi fī ḍauʾ al-qurʾān wa-l-sunna*, 2 vols. (Cairo: Maktabat Wahba, 2009).

13 See, e.g., al-Qaraḍāwī, *Fī Fiqh al-aqalliyyāt al-muslima* 5, 13, 16, 17, 28, 30, 161; and al-Qaraḍāwī, *Fiqh al-jihād*, vol. 2, 909.

14 Ibid., 909.

15 See, e.g., ibid., 900; and al-Qaraḍāwī, *Fī Fiqh al-aqalliyyāt al-muslima*, 16, 167.

16 See al-Qaraḍāwī, *Fiqh al-jihād*, vol. 2, 900–1. Although al-Qaraḍāwī does not, in this context, define what exactly he understands by the 'implementation' of the *sharīʿa* or, more specifically, of "Islamic rules" (*aḥkām al-islām*), he appears to equate these "rules" primarily with legal aspects, as he distinguishes them from "Islamic rites" (*shaʿāʾir al-islām*) and "Islamic doctrine" (*ʿaqīdat al-islām*), see ibid. 888–9 and 909.

Notably, while al-Qaraḍāwī suggests that his understanding of what makes a territory "Islamic" is derived from the Islamic legal tradition, the demographic argument did *not* play a crucial role in pre-modern definitions of "Islamic territory," which is certainly not surprising considering that the lands Muslims brought under their control were initially not inhabited by Muslim majority populations. In fact, ever since the territorial division of the world has become a matter of debate, Muslim scholars have based their definitions of *dār al-islām* on different sets of criteria. While some opined that "the rules of Islam" (*aḥkām al-islām*) must be implemented and, like al-Qaraḍāwī, stressed the importance of Muslim rule and the manifestation of Islamic rites (*shaʿāʾir al-islām*), others grounded their definitions primarily on the provision of security and the freedom for Muslims to practice their religion—criteria that are today of great importance to other contemporary scholars (see below).[17]

When classifying Western countries, al-Qaraḍāwī also resorts to classical Islamic legal terminology. While locating them "outside of *dār al-islām*" and labelling them as "non-Islamic territory" (*ghayr dār al-islām*), he also refers to them as *dār al-ʿahd*, the "territory of treaty," a concept that has its origins in the thought of Muḥammad ibn Idrīs al-Shāfiʿī (d. 204/820) and was consequently adopted by scholars of the various schools of law. Historically, the notion signified territory that was recognized *temporarily* by Muslim authorities as a non-Muslim political entity after an armistice was entered into, without however entailing any *permanent* guarantees of a state of peace. Pre-modern jurists across the legal schools disagreed as to whether this territory was an independent third category or rather a subcategory of either *dār al-islām* or *dār al-ḥarb*. Consequently, the introduction of the concept of *dār al-ʿahd* did not replace the *dār al-islām/dār al-ḥarb* binary with a tripartite model (as is often assumed), but rather differentiated the existing territorial paradigm.[18] Without elaborating on the historical controversies over this notion, and building on al-Zuḥaylī and Abū Zahra, who were the first to adjust traditional territorial concepts to modern nation states, al-Qaraḍāwī—like many other contemporary scholars—reinterprets the concept of *dār al-ʿahd* today as an additional third category distinct from *dār al-islām* and *dār al-ḥarb* that represents a *permanent* contractual relationship between modern nation states. Accordingly, he applies it to all predominantly non-Muslim countries that are member states of the United Nations and, thereby, to be understood as contractual partners

17 For a brief overview of historical definitions of *dār al-islām*, see Albrecht, "Dār al-Islām, dār al-ḥarb."

18 See ibid. See also Abou El Fadl, "Islamic Law and Muslim Minorities"; and Albrecht *Dār al-Islām Revisited*, 55–9.

of Muslim countries. Against this backdrop, he regards any country that forms part of this "territory of treaty" as a legitimate place of residence for Muslims. The only non-Muslim state that does not, in al-Qaraḍāwī's view, fall into this category is Israel which he classifies as "territory of war" (*dār al-ḥarb*) due to its occupation of "Muslim land."[19] While this categorization serves him to justify armed *jihād* against Israel, al-Qaraḍāwī has, in the context of Muslims in the West, largely banned the notion of *dār al-ḥarb* from his linguistic repertoire and focuses, instead, primarily on the supposed difference between *dār al-islām*, i.e., Muslim majority countries and "what lies outside of it." Although he acknowledges that Muslim majority countries do *not* in fact base their legal and political systems mainly on Islamic law, this notion of *territorial othering*—that is, the juxtaposition of *dār al-islām* and *ghayr dār al-islām*—serves him to create the impression of an inherent otherness of predominantly non-Muslim societies vis-à-vis Muslim majority societies and, thereby, to legitimize his concept of minority *fiqh*.[20]

Starting from the premise that Muslims residing in the West are especially in need of facilitation (*taysīr*), not only because they live in a culturally and religiously diverse environment and in a state of "alienation from their Islamic homeland" (*ightirāb ʿan waṭanihim al-islāmī*), but also because he associates life in a minority context per se with a state of weakness, al-Qaraḍāwī argues that they require a *fiqh khāṣṣ*, that is, a "specific *fiqh*" fitted to the necessities (*ḍarūrāt*) that are, supposedly, arising particularly from life in those societies. He construes this *fiqh khāṣṣ* as part and parcel of the general *fiqh* (*al-fiqh al-ʿāmm*) and thereby assigns it a place within the jurisprudential tradition similar to other "branches" (*furūʿ*) of *fiqh* (such as the "*fiqh* of medicine" or the "*fiqh* of economy").[21] In consequence, he conceptualizes *fiqh al-aqalliyyāt* as one such "branch" (*farʿ*) that is specifically tailored to the needs of Muslims in the West and is, therefore, supposed to remain limited to minority contexts, i.e., to what al-Qaraḍāwī regards as "outside of *dār al-islām*."[22]

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19 See al-Qaraḍāwī, *Fiqh al-jihād*, vol. 2, 901–8.

20 For more details on the functions of what I call *territorial othering*, particularly on the legitimization of minority *fiqh*, see Albrecht, *Dār al-Islām Revisited*, 357–65.

21 See al-Qaraḍāwī, *Fī Fiqh al-Aqalliyyāt al-Muslima*, 15, 28, 32, 51. For more details on Qaraḍāwī's concept of *fiqh al-*aqalliyyāt, see Albrecht, *Islamisches Minderheitenrecht*, 53–100.

22 As I analyzed elsewhere, these theoretically construed boundaries between *dār al-islām* and "non-Islamic territory" are not always maintained, but often become blurred when applied in practice, i.e., in *iftāʾ*. See Albrecht, *Dār al-Islām Revisited*, 365–78.

2 Locating *Dār al-Islām* in the West

Though likewise a trailblazer of the concept of *fiqh al-aqalliyyāt*, the Iraqi-born, Azhar-trained jurist Ṭāhā Jābir al-ʿAlwānī (1935–2016), who spent about two decades of his life in the United States, vehemently rejects both al-Qaraḍāwī's definition of *dār al-islām* and his categorization of Western countries. Arguing that the division of the world into a "territory of Islam" and a "territory of war" is "among the most consistently misunderstood and misinterpreted rulings" and often understood in a "plainly anachronistic" way,[23] al-ʿAlwānī regards the revision of the traditional territorial paradigm as a central plank of his concept of minority *fiqh* as well as his broader work on *ijtihād* and *maqāṣid al-sharīʿa*, i.e., the intentions or objectives of the *sharīʿa*.[24] Emphasizing that the notions of *dār al-islām, dār al-ḥarb*, and *dār al-ʿahd* lack any normative basis in the Qurʾān and the Sunna, but were introduced by early Muslim scholars, al-ʿAlwānī advocates understanding them, first and foremost, as products of a particular moment in history.[25]

While justifying his critique of the classical concept of territoriality with the changed political realities Muslims are confronted with today, al-ʿAlwānī does not discount the legal history of these concepts as such. On the contrary, he seeks to substantiate and thereby legitimize his territorial world view by asserting that there has always been considerable ambiguity with regard to the definition of territorial concepts, and by making selective use of approaches developed by earlier *fuqahāʾ* whom he deems more in tune with Islamic teachings and sources than many contemporary Muslim thinkers.[26] In particular, he cites the 5th/11th-century Shāfiʿī scholar Abū al-Ḥasan al-Māwardī (d. 450/1058) who was quoted by Ibn Ḥajar al-ʿAsqalānī (d. 852/1449) as saying:

23 Taha J. al-Alwani, *Issues in Contemporary Islamic Thought* (Herndon: IIIT, 2005), 190; Taha Jabir al-Alwani, *Ijtihad* (Herndon: IIIT, 1993), 28.

24 See e.g. Ṭāhā J. al-ʿAlwānī, *Fī Fiqh al-Aqalliyyāt al-Muslima* (Cairo: Nahḍat Miṣr, 2000); al-Alwani, *Ijtihad*, Ṭāhā J. al-Alwānī, *Maqāṣid al-sharīʿa*, 2nd ed. (Beirut: Dār al-Hādī, 2005); Taha J. al-Alwani, *Missing Dimensions in Contemporary Islamic Movements* (Herndon: IIIT, 1996); and Ṭāhā J. al-ʿAlwānī, "Al-ʿAql al-Muslim wa-l-Ijtihād," (Muscat, December 13, 1998), 62 (I am grateful to Ṭāhā J. al-ʿAlwānī for providing me with a copy of this unpublished paper).

25 Ṭāhā J. al-ʿAlwānī, interview with the author, Cairo, April 28, 2011.

26 See al-Alwani, *Ijtihad*, 28; al-ʿAlwānī, *Fī Fiqh al-Aqalliyyāt al-Muslima*, 43; and Alwani, *Issues in Contemporary Islamic Thought*, 274.

> If a Muslim is able to practice his religion openly in a land of unbelief, that land becomes *dār al-islām* [by virtue of his settling there]. Settling in such a country is preferable to moving away from it as other people would be likely to convert to Islam.[27]

While endorsing al-Māwardī's argument that it is not—as is often argued—primarily Muslim rule and an Islamic legal system that make a territory "Islamic," al-ʿAlwānī seems to invoke this quote also so as to remove any doubt about the legitimacy for Muslims to reside in a predominantly non-Muslim country. In order to substantiate his conviction that the classical antagonism of *dār al-islām* vs. *dār al-ḥarb* is not only inapplicable to today's world, but was already revised by pre-modern scholars, he refers to the 7th/12th-century scholar Fakhr al-Dīn al-Rāzī (d. 606/1209), also belonging to the Shāfiʿī school of law, to whom he ascribes an alternative classification of territories. According to al-ʿAlwānī, al-Rāzī, building on Abū Bakr al-Qaffāl al-Shāshī (d. 365/976), replaced the classical antagonistic terminology by omitting the term *dār al-ḥarb* and distinguishing instead between *dār al-islām* or *dār al-ijāba* ("the territory of compliance [to Islam]") on the one hand and *dār al-daʿwa* ("the territory for the propagation of Islam")—meaning non-Islamic lands—on the other.[28] By drawing on these pre-modern definitions, al-ʿAlwānī seeks to underpin his argument that the boundaries between *dār al-islām* and "non-Islamic territory" have always been drawn (at least by some prominent pre-modern scholars) on the basis of where Muslims are actually able to practice their faith and manifest their norms and values. Hence, he concludes:

> *Dār al-islām* is anywhere a Muslim can practice his religion in safety, even if he lives among a non-Muslim majority. *Dār al-kufr* is wherever a believer is not assured this right, even if the majority of the population adheres to the Islamic faith and civilization.[29]

Contrary to al-Qaraḍāwī, al-ʿAlwānī thus underscores that *dār al-islām* is, ultimately, neither defined by demographic majorities nor by the religious affiliation of the ruler or an Islamic legal system, but primarily by the freedom to religious practice. That means, he neither identifies *dār al-islām* with the so-called Muslim world, nor does he rule out Muslim majority countries falling

27 Ibn Ḥajar al-ʿAsqalānī, cited in al-ʿAlwānī, *Fī Fiqh al-Aqalliyyāt al-Muslima*, 43.
28 See ibid., 43–4.
29 Ibid., 43.

out of that category if they fail to guarantee to all Muslims the right to practice their faith.

Against this background, al-ʿAlwānī sharply criticizes other contemporary *ʿulamāʾ* for "erroneously" equating *dār al-islām* with predominantly Muslim countries while labelling Western countries as *dār al-ḥarb*.[30] Accusing them of disregarding the current social and political realities, he asks rhetorically:

> [W]ith what weapons are Muslims going to fight the so-called *dār al ḥarb* countries when the shoes and the clothes they wear—let alone arms—come from them? [...] [I]s it appropriate, in the Ummah's present situation of almost total dependency on others, to talk of *dār al Islam* and *dār al ḥarb*? In fact, are Muslim countries today lands of peace? Most of the Muslims who settled in the West did so because, in their own countries, they were deprived of their civil liberties and freedoms, security and human rights. People could not—and cannot—, in certain cases, even organize congregational *ṣalāh*.[31]

Irritated by the supposedly simplistic answers other scholars have offered to these questions, he wonders:

> How can a sane person justify going today into details of such non-issues as *zakāh* distribution in the form of barley [...] or *dār al Islam/dār al ḥarb*, when fundamental ethical, political and economic issues in the Ummah have not been dealt with?[32]

Considering that al-ʿAlwānī himself did, nonetheless, engage in redefining this traditional territorial binary, his criticism is certainly not to be understood as an attempt to suppress any discussion of these concepts, but rather as an urgent appeal to contextualize them within the broader discourse on the political, economic, and ethical ills in many Muslim majority countries today. While he appears generally hesitant to apply his definition of *dār al-islām* to modern nation states, he once confirmed in an interview that Western secular democracies, such as the US, are to be regarded as a "homeland" for Muslims, "tantamount to 'Islamic territory'" (*bi-mithābat ʿdār al-islāmʾ*), for as long as they are allowed to practice their religious rituals.[33] Accordingly, al-ʿAlwānī does not,

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30 See al-Alwani, *Ijtihad*, 28.

31 Ibid. 28–9.

32 Ibid., 29.

33 N.a., "Ṭāhā al-ʿAlwānī raʾīs al-majlis al-fiqhī li-amrīkā al-shamāliyya: Nadʿū al-muslimīn li-akhdh afḍal mā fī al-mujtamaʿ al-amrīkī," in *al-Sharq al-awsaṭ*, July 21, 2002. http://www.aawsat.com/print.asp?did=114299&issueno=8636 (accessed September 5, 2017).

unlike al-Qaraḍāwī, conceive of Muslims in the West as being separated from any distant "Islamic homeland" but rather infers that whenever a Muslim

> lives according to his religion and through his Islamic identity, but in a Western society [...] his identity certainly differs from that of Muslims who live in Muslim majority societies. So I tell him: live there, and the homeland of Islam shall be with you (*waṭan al-islām maʿaka*).[34]

By invoking this deterritorialized notion of an "Islamic homeland," al-ʿAlwānī illustrates his conviction that Islam is "at home" wherever Muslims have the ability and are committed to practicing their religion—irrespective of whether they live in a Muslim majority country or in a minority context. In fact, he even suggests that secular Western countries may provide a more fertile ground for practicing Muslim rituals and implementing Islamic ethical principles than many Muslim majority countries.[35]

Nonetheless, al-ʿAlwānī is not only a strong advocate of a particular interpretation of the Sharīʿa for Muslims in the West, but he is known to be the one who introduced the term *fiqh al-aqalliyyāt* in this discourse.[36] However, unlike al-Qaraḍāwī, al-ʿAlwānī does not conceptualize *fiqh al-aqalliyyāt* as a *fiqh khāṣṣ*, meaning a specific *fiqh* that is meant to answer particular questions arising from minority contexts and is thus geographically confined to so-called Western countries. Rather, he subsumes it under *al-fiqh al-akbar*, the "greater fiqh." Borrowing this notion from the title of the work on Islamic doctrine attributed to Abū Ḥanīfa (d. 150/767), al-ʿAlwānī argues that it is not simply one of many subordinate branches of *fiqh*, but ascribes it a more general meaning, covering not only practical but also theological and methodological aspects of Islamic law and normativity.[37] His concept of *fiqh al-aqalliyyāt* is, hence, to be understood as a methodological approach that does not only cater to the needs of Muslims living in a minority context, but one that can potentially be transferred to Muslim majority societies and thus constitutes part and parcel of his overall *maqāṣid*-inspired approach to the reform of Islamic thought.[38]

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34 Al-ʿAlwānī, quoted in Dina M. Taha, "Muslim Minorities in the West: Between Fiqh of Minorities and Integration," https://dar.aucegypt.edu/handle/10526/3100 (accessed January 10, 2014), VIII.

35 See al-Alwani, *Ijtihad*, 28–9; and Ṭāhā J. al-ʿAlwānī, interview with the author, Cairo, April 28, 2011.

36 See Albrecht, *Dār al-Islām Revisited*, 220–1.

37 See al-ʿAlwānī, *Fī Fiqh al-Aqalliyyāt al-Muslima*, 5.

38 See the chapter on *fiqh al-aqalliyyāt* in al-ʿAlwānī, *Maqāṣid al-sharīʿa*, 93–120. See also Albrecht, *Dār al-Islām Revisited*, 378–81. For al-ʿAlwānī's approach to Islamic reform, see also Ibrāhīm S. Abū Ḥulaywa, *Ṭāhā Jābir al-ʿAlwānī: Tajalliyyāt al-tajdīd fī mashrūʿih al-fikrī* (Beirut: Markaz al-Ḥaḍāra li-Tanmiyat al-Fikr al-Islāmī, 2011).

3 *Dār al-Islām* vs. *Dār al-Kufr*—Maintaining Traditional Binaries

In contrast to these diverse attempts by prominent proponents of *fiqh al-aqalliyyāt* to reinterpret and adjust traditional territorial concepts to today's world, some scholars—all of whom reject the notion of a specific *fiqh* for Muslims residing in the West—repudiate those revisions and propagate a more traditionalist, dichotomous notion of territoriality. Although this view occupies a marginal position in the discourse on Muslims in Europe, particularly as compared to al-Qaraḍāwī's position, it carries a certain weight due to the renown of the scholars promoting it. Besides various well-known Saudi *ʿulamāʾ*, among them ʿAbd al-ʿAzīz ʿAbdallāh ibn Bāz (1910–1999) and Muḥammad ibn Ṣāliḥ al-ʿUthaymīn (1925–2001),[39] the late Muḥammad Saʿīd Ramaḍān al-Būṭī (1929–2013), who was known as probably Syria's most prominent Sunni scholar, was a prime representative of this position.[40] An outspoken critic of *fiqh al-aqalliyyāt*, al-Būṭī promoted a binary notion of territoriality, drawing a sharp line between *dār al-islām* and *dār al-kufr.* A vocal supporter of the Assad regime, al-Būṭī did certainly not mean to espouse the ideology of jihadist organizations such as the so-called "Islamic State" in this regard. However, his division of the world into "Islamic territory" and the "territory of unbelief" shows, at first sight, certain parallels to the territorial worldview promoted by its self-proclaimed Caliph. Just like Abū Bakr al-Baghdādī, al-Būṭī considers this division to be intrinsically linked to questions of *jihād* and *hijra*:

> The reason for this [territorial division] is that Muslims need a yardstick that serves them to determine the difference between countries whose people must be combatted and in which residence is generally not permitted, and those countries that must be defended and in which those who seek to invade it must be combatted.[41]

Although both justify their adherence to this traditional dichotomy by its function as a guideline for the duty to perform armed *jihād*, and for the legitimacy

39 For ibn Bāz, al-ʿUthaymīn, and others sharing their position regarding the territorial division of the world, see Albrecht, *Dār al-Islām Revisited*, 125–64.

40 For al-Būṭī, see, e.g., Andreas Christmann, "Islamic Scholar and Religious Leader: A Portrait of Muhammad Sa'id Ramadan al-Buti," in *Islam and Modernity: Muslim Intellectuals Respond*, ed. J. Cooper, R. Nettler and M. Mahmoud, 57–81 (London: I.B. Tauris, 1998); and Thomas Pierret, *Religion and State in Syria: The Sunni Ulama from Coup to Revolution* (Cambridge et al.: Cambridge University Press, 2013), 76–82.

41 Muḥammad Saʿīd Ramaḍān al-Būṭī, "Hakadhā fa-la-nadʿu ilā al-islām," http://www.almeshkat.net/vb/ showthread.php.?t=73258 (accessed February 26, 2012).

of residence in particular territories, al-Būṭī's approach ultimately differs significantly from al-Baghdādī's. Whereas the latter appears to identify *dār al-islām* exclusively with the territory he has brought under his control, that is, the self-proclaimed "Islamic State," al-Būṭī regarded the Syrian state under the rule of the Assad regime as "Islamic territory." This is because he defines *dār al-islām* as any territory that is under Muslim rule and where Muslims are, thereby, able to practice their religion in safety.[42] Unlike al-Baghdādī, however, he argues that religious practice only includes fundamental Islamic rituals, such as Friday prayer, the celebration of Islamic holidays, fasting in Ramadan, and pilgrimage (*ḥajj*), but *not* that "the law in force is entirely Islamic" (*an takūna al-qawānīn al-marʿiyya kulluhā islāmiyya*).[43] Rather, he argues the implementation of Islamic law is something Muslims must strive for, not, however, a condition for a land to be classified as *dār al-islām*, which may be understood as a justification of al-Būṭī's own position as a scholar and staunch defender of the nation state who collaborated with the Syrian regime, i.e., with a state that has a dual system of both civil and Sharīʿa courts and whose constitution declares the Sharīʿa to be the main—though not the only—source of legislation.[44] While his attempt to qualify the importance of the legal system as a characteristic of the "territory of Islam" thus served his overall effort to represent the Syrian state as the custodian of a truly Islamic life, it also underpinned his criticism of militant Islamists who, like al-Baghdādī, claim that *dār al-islām* is conditioned upon the comprehensive 'application' of the Sharīʿa, including *ḥudūd* punishments. In al-Būṭī's words: "If these rules are not applied, as is the case in most if not all Islamic countries (*bilād islāmiyya*), then this country [i.e., Syria] becomes a *dār ḥarb* [in the eyes of militant Islamists]! And you know that if a country becomes a *dār ḥarb*, Muslims are obliged to emigrate from it!"[45] Polemicizing against those who hold such views, al-Būṭī added that "many Muslim youth left their countries which they had declared territories of unbelief or war, but where to? Astonishingly, many of them migrated to Europe or America!"[46] While disdainfully expressing his bewilderment that a Muslim could ever think that a Western country may be regarded as a more legitimate and desirable place to live than a predominantly Muslim country

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42 Saʿīd Ramaḍān al-Būṭī, *Al-Jihād fī al-islām: Kayfa nafhamuhu? Wa-kayfa numārisuhu?* (Damascus: Dār al-Fikr, 1992), 80.

43 Al-Būṭī, quoted in Muḥammad al-Kadī al-ʿUmrānī, *Fiqh al-usra al-muslima fī al-muhājar: Hūlandā namūdhajan* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2001), 110.

44 See Al-Būṭī, *Al-Jihād fī al-islām*, 81. See also Christmann, "Islamic Scholar and Religious Leader: A Portrait of Muhammad Sa'id Ramadan al-Buti," 76.

45 Al-Būṭī, *Al-Jihād fī al-islām*, 81–2.

46 Ibid., 82.

that, so to speak, merely shows deficiencies in its implementation of Islamic law, this criticism points to al-Būṭī's classification of the West: while he generally regarded any land that is under non-Muslim rule as part *of dār al-kufr*, he subdivided this "territory of unbelief," unlike other scholars, into a "territory of war" (*dār al-ḥarb*), "if there is reason for combat between Muslims and non-Muslims," and a "territory of safety" (*dār al-amān*), that is, lands where Muslims are granted safety.[47] When applying this distinction to the contemporary geo-political landscape, al-Būṭī argued that China, for instance, represents a "territory of safety" (without elaborating at all on the state's repressive policies vis-à-vis its Muslim minority population),[48] whereas he vaguely suggested that the US may be regarded as part of the "territory of war," due to its "unjust attacks against innocent Muslims in Afghanistan."[49]

Against this backdrop, al-Būṭī considered life in secular societies in principle incompatible with full observance of Islamic obligations and hence a threat to Muslim religious practice and identity. Even though he thus generally disapproved of Muslims residing permanently in Western countries, he appeared to accept it as a matter of fact. Consequently, he took up a rather pragmatic position, declaring that for residence outside of what he regarded as *dār al-islām* to be permissible, Muslims must not neglect any of the Islamic rituals, such as fasting and the ritual and communal prayers.[50] At the same time, however, he did not only deny the *need* for any context-specific interpretation of the Sharīʿa for Muslims in the West, but entirely disputed the *legitimacy* of minority *fiqh*. Arguing that *fiqh* "does not have a homeland" (*lā waṭan lahu*),[51] al-Būṭī asserted that Islamic legal interpretation must not be limited to any specific territory. Hence, he accused the proponents of *fiqh al-aqalliyyāt* of attempting to split Islam and the *umma* along geographical lines and to create a schism (*fitna*) among Muslims that would ultimately serve Western interests.[52]

47 See al-Būṭī, "Hakadhā fa-la-nadʿu ilā al-islām."

48 See Muḥammad Saʿīd Ramaḍān al-Būṭī, "Hal tuʿtabar buqʿat al-Ṣīn min dār al-ḥarb am min dār al-islām?" http://bouti.alafdal.net/t489-topic (accessed November 15, 2013).

49 Muḥammad Saʿīd Ramaḍān al-Būṭī, "Hal aṣbaḥat Amrīkā al'ān dār al-ḥarb? Wa-matā yusammā al-insān ḥarbiyyan?" http://bouti.alafdal.net/t138-topic (accessed February 26, 2012).

50 See, e.g., Muḥammad Saʿīd Ramaḍān al-Būṭī, *Fiqh al-sīra*, 7th ed. (Damascus, 1977), 7, 55, 112; and Muḥammad Saʿīd Ramaḍān al-Būṭī, *Al-Islām wa-l-gharb* (Damascus: Dār al-Fikr, 2007), 152.

51 Muḥammad Saʿīd Ramaḍān al-Būṭī, "Laysa ṣudfa tulāqī al-daʿwa ilā fiqh al-aqalliyyāt maʿa al-khuṭṭa al-rāmiya ilā tajzi'at al-islām," http://www.bouti.com/ar/month_word.php?id=16&PHPSESSID=e80efdb085f56e1ff7b8b0cf79e411b (accessed May 1, 2007).

52 See al-Būṭī, *Al-Islām wa-l-gharb*, 145–53.

4 *Dār al-Islām*—An Outdated Concept?

While the majority of scholars engaged in the Islamic legal discourse on Muslims in the West have endeavoured to redefine—in various ways—the traditional territorial paradigm so as to bring it in line with the current world order, some Muslim intellectuals fundamentally challenge the very idea of applying geo-religious notions such as *dār al-islām* to today's world. Probably the most prominent among them, the Swiss-Egyptian intellectual and professor for Islamic studies Tariq Ramadan (b. 1962), calls for abolishing traditional territorial boundaries altogether.[53] Emphasizing, similar to al-ʿAlwānī, that *dār al-islām* and related notions are not rooted in the normative sources of Islam but were introduced by Muslim scholars in response to particular historical realities, Ramadan deems them outdated and inapplicable to today's geopolitical order. Arguing that the distinction between "Islamic" and "non-Islamic territory" misrepresents the universal nature of Islam, Ramadan suggests conceiving of the world instead as one geographically unified space, which he labels *dār al-shahāda* or "espace du témoignage," that is, the "space of testimony."[54] For him, this neologism represents a global space that is no longer subdivided into juxtaposed territories, but is instead a space in which Muslims in both Muslim majority and non-Muslim majority countries must "bear *witness*, must be *witnesses*, to what they are and to the values they hold."[55] As giving testimony to one's faith is, in Ramadan's view, possible not only in situations where security and religious freedom are guaranteed, but also in situations of oppression (for instance in the form of resisting injustice), he does not see any restrictions as to where Muslims are allowed to reside.

Just as Ramadan is concerned, first and foremost, with Muslims in the West, where he enjoys great popularity, particularly among Muslim youth, he

53 Besides Tariq Ramadan, the Libyan intellectual Aref Ali Nayed (b. 1962), who is trained in Islamic and Christian theology, is an outspoken critic of this-worldly interpretations of *dār al-islām* and related concepts. For Nayed, who is not only a prominent figure in various interfaith initiatives, but currently also serves as the Libyan ambassador to the United Arab Emirates, *dār al-islām* is to be understood as a theological concept that can refer to both, an "interior abode," i.e., a spiritual state that is completely detached from physical space, and to the Hereafter, i.e., paradise. Yet another critic is Tareq Oubrou, a prominent French-Moroccan imam and self-trained theologian. For an analysis of their alternative conceptions of *dār al-islām*, see Albrecht, *Dār al-Islām Revisited*, 282–310.

54 See Tariq Ramadan, *Dār ash-shahāda: L'Occident, espace du témoignage* (Lyon: Tawhid, 2004); and Tariq Ramadan, *Western Muslims and the Future of Islam* (Oxford et al: Oxford University Press, 2004).

55 Ramadan, *Western Muslims and the Future of Islam*, 76 (italics original).

considers this geographically unbounded notion of space to be of particular importance for these Muslims as it

> breaks the binary relation and, in a global world, it achieved reconciliation with Islam's universal dimension: the whole world has become a space, an abode, of testimony. The witness is no longer a stranger in the other's world, neither is he linked to the other by a contract: he is at home, among his own kind, and he simply tries to be consistent with his beliefs and in harmony with the people with whom he lives and builds his future.[56]

While Ramadan thus criticizes the idea of a contractual relationship between Muslims and Western countries, as proposed by al-Qaraḍāwī and others who conceive of the West as a "territory of contract" (*dār al-ʿahd*), he likewise rejects these scholars' concepts of minority *fiqh*. This is not, however, because he denies the need for contextual interpretation of the Sharīʿa, but primarily because he considers labelling Muslims in the West as "minorities" counterproductive, as it perpetuates the impression of Muslims remaining permanent strangers within those societies: "Muslims should […] never talk about themselves as minorities. As citizens, they are not a minority. As a people bearing values, they are not a minority. They share the majority values in the West, in the US as well as in Europe."[57] Accordingly, he accuses others, especially al-Qaraḍāwī, of reinforcing the image of Muslims in the West as living in a state of exception, separated from an imaginative "Islamic homeland." Referring to the subtitle of al-Qaraḍāwī's monograph on minority *fiqh, The Life of Muslims in Other Societies*, Ramadan criticizes:

> In his [i.e., al-Qaraḍāwī's] mind, Western societies are "other societies" because the societies normal for Muslims are Muslim-majority societies. But this is no longer the case, and what were once thought of as some kind of "diasporas" are so no longer. There is no longer a place of origin from which Muslims are "exiled" or "distanced"; and "naturalised," "converted" Muslims—"Western Muslims"—are at home, and should not only say but feel so.[58]

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56 Tariq Ramadan, *What I Believe* (Oxford: Oxford University Press, 2010), 52.

57 Ramadan, quoted in Leen Jaber, "Shedding the Minority Mentality: Tariq Ramadan: Muslims must think beyond integration and focus on contributions to society," *Islamic Horizons*, November/December 2011, 42.

58 Ramadan, *Western Muslims and the Future of Islam*, 53.

Despite his overall rejection of al-Qaraḍāwī's and others' attempts to reinterpret traditional territorial concepts, Ramadan does not break with this tradition altogether. When asked why he does not simply eliminate the notion of *dār* from his writings, and instead introduces a new but related term, *dār al-shahāda*, he explained that for him, "*dār* has to do with dignity, presence and belonging, not with geography." Thus, the term remains important to him "because the *dār* is where one finds peace, [...] because it defines identity, and because it defines where we are."[59] In other words, though criticizing other scholars for their perpetuation of traditional, yet reinterpreted, *dār* notions, Ramadan continues to use similar terminology as he eventually shares their belief that such concepts contribute to defining Muslims' sense of belonging and thus play a crucial role in identity construction.[60]

5 Conclusion

As this overview of the four major ways in which prominent Muslim scholars and intellectuals reinterpret and locate *dār al-islām* in today's world illustrates, the Islamic legal tradition of dividing the world into a "territory of Islam" and other geo-religious categories has remained a matter of great concern. Drawing on Khaled Abou El Fadl's argument that the diverse views Muslim scholars, throughout history, held regarding the definition of territories and their implications for the obligation to emigrate and the interpretation of the Sharīʿa have always reflected particular historical realities, this insight into selected case studies shows that contemporary Muslim scholars and intellectuals continue to redraw the boundaries of *dār al-islām* and related territorial concepts in response to and in interaction with the specific political and demographic circumstances they are faced with. In their attempts to render this Islamic legal tradition relevant in a world of nation states, they reinterpret the criteria that make a territory "Islamic" in multiple ways—ranging from those that can be traced back to the pre-modern era, such as Muslim rule, the application of Islamic legal rules, and the freedom for Muslims to practice their religion in safety to the notion of demography that has only played a crucial role in modern definitions of territorial concepts. Just as the geo-religious classification of the world has always been crucial for debates about the interpretation and applicability of the Sharīʿa under non-Muslim rule, today's discussions about

59 Tariq Ramadan, Interview with the author, Doha, December 14, 2011.

60 For a detailed discussion of the meaning of territorial notions for identity construction, see Albrecht, *Dār al-Islām Revisited*, 398–420.

how and where to locate *dār al-islām* are intrinsically linked with the ongoing discourse about *fiqh al-aqalliyyāt*, that is, about how to interpret Islamic norms for Muslims living in Western societies. While some Muslim intellectuals, most prominently Tariq Ramadan, reject the very idea of distinguishing between "Islamic" and "non-Islamic" territories, even well-known critics of current attempts to reconcile traditional *dār* notions with today's geo-political system, such as Ramadan, do not discard this tradition altogether, but regard it as a major factor in shaping Muslims' sense of belonging and, thereby, in constructing Muslim identity.

Though prompted by the unprecedented presence of large numbers of Muslims in the West since the second half of the 20th century, this paper has demonstrated that the large variety of ways in which contemporary scholars reinterpret traditional concepts of territoriality is certainly not a (post-)modern phenomenon, but rather builds upon a rich history of debate about how to interpret traditional concepts of territoriality in particular historical moments. Against this backdrop, al-Baghdādī's claim that the self-proclaimed "Islamic State" is nowadays the only "territory of Islam" on earth, as it is, in his view, under truly Islamic rule and governed according to the Sharīʿa, may be understood as one among many attempts to adjust the traditional *dār al-islām/dār al-kufr* binary to today's world—and, besides, as a crude effort to legitimize his authority. Concealing that none of these concepts go back to the Qurʾān or the Sunna and that even in the first centuries of Islam, scholars differed on what qualifies a territory as "Islamic," al-Baghdādī's ostensibly authentic revival of an early Islamic conception of territories appears to be but one example of the historical amnesia that underlies the ideology of the so-called "Islamic State," showing complete disregard for the multifaceted discussions about how to define the boundaries of *dār al-islām* that have been part and parcel of Islamic legal discourse from the 2nd/8th century until today.

Acknowledgments

This article is based on a paper presented at the UCSB conference "Locating the Sharīʿa. Creating New Sources for Knowledge and Inquiry" in Santa Barbara on February 17–19, 2012. I am grateful to Sohaira Siddiqui, the editor of this volume, the anonymous reviewers, and the participants of the conference for their insightful comments. The findings presented here are part of my monograph *Dār al-Islām Revisited. Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West* (Leiden: Brill, 2018).

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CHAPTER 12

Religion, Politics, and the Anxiety of Contemporary *Maṣlaḥa* Reasoning

The Production of a Fiqh al-Thawra *after the 2011 Egyptian Revolution*

David H. Warren

1 Introduction

The contemporary *ʿulamāʾ* legitimate their interventions in the public sphere by appealing to the concept of *maṣlaḥa*, or the common good. Muḥammad ʿAbduh (d. 1905) and Rashīd Riḍā (d. 1935) initiated this trend by dramatically expanding the conceptual remit of *maṣlaḥa* with a view to reinvigorating the *ʿulamāʾ*'s voice in Muslim societies.[1] They held this view because, on the one hand *maṣlaḥa*, as a legal principle, promotes interventions that use a form of utilitarian reasoning that would grant the *ʿulamāʾ* greater flexibility to respond to the pressing issues of the day. On the other hand, at the same time wider Muslim society also came to acknowledge that debates over the *maṣlaḥa*, as a more general concept of the common good, fell within the expertise of the *ʿulamāʾ qua ʿulamāʾ*. This more general understanding of *maṣlaḥa* then served to legitimate the *ʿulamāʾ*'s interventions in the public sphere more broadly.

However, because *maṣlaḥa* based interventions utilize a form of utilitarian reasoning, rather than being explicitly rooted in the source texts, the *ʿulamāʾ* who intervene in the public sphere in the name of *maṣlaḥa* are vulnerable to the argument that they are twisting the texts in favor of their whims. In this chapter I am interested in how the *ʿulamāʾ* respond to the concern that they might be accused of inconsistency, and I use the work of Yūsuf al-Qaraḍāwī (b.1926) and his *ʿulamāʾ* allies during the 2011 Egyptian Revolution and its aftermath as an example. Qaraḍāwī is the most well-known of the *ʿulamāʾ* who supported the Revolution, and he often couched his reasoning in terms of *maṣlaḥa*. However, over the course of the eighteen days of the Revolution, Qaraḍāwī's positions changed in response to both unfolding events and the counter arguments of his *ʿulamāʾ* interlocutors who supported the regime of Ḥusnī Mubārak (b.1928).

1 Samira Haj, *Reconfiguring Islamic Tradition: Reform, Rationality, and Modernity* (Stanford: Stanford University Press, 2009), 77–83.

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Here I will make three points about the contemporary *ʿulamāʾ* and their concern that their reasoning appears consistent. First, I argue that the *ʿulamāʾ*'s concern with appearing consistent is a result of their internalization of the modern distinction between religion and politics. This internalization manifests itself in the *ʿulamāʾ*'s assumption, which their critics share, that religious interventions in the realm of politics must be consistent if they are to be considered sincere and not manipulative. Second, I will show that the *ʿulamāʾ*'s understanding of the substance of *maṣlaḥa*, what the common good actually is in a given situation, forms interdependently through mutual contestation. In other words, the *ʿulamāʾ* do not meditate in private upon the common good, and then intervene in the public sphere consistently on behalf of that position. Rather, their arguments change, both in the short term and the long term. However, the reality that arguments change over time does not mean that the *ʿulamāʾ* are not concerned about being accused of inconsistency, the opposite in fact. Consequently, my third point is to show how the *ʿulamāʾ* make use of networks of supporters, Qaraḍāwī and his allies in this instance, to produce Islamic legal knowledge *ex post facto* in order to produce the effect that their *maṣlaḥa* reasoning was consistent with both a theory and the source texts. The production of Islamic knowledge under the rubric of a *fiqh al-thawra* (the jurisprudence of revolution) after the Egyptian Revolution is evidence of this phenomenon.

In order to make these arguments, and after a brief discussion of *maṣlaḥa* in contemporary *fiqh*, I will use Qaraḍāwī's media interventions during the eighteen days of the Egyptian Revolution to demonstrate how his arguments changed in response to the counter arguments of his interlocutors, particular the former Egyptian Grand Mufti ʿAlī Jumʿa (b.1952) and the Shaykh al-Azhar Aḥmad al-Ṭayyib (b.1946). I then draw upon a selection of four books and articles that were produced by Qaraḍāwī's allies from the International Union of Muslim Scholars (*al-Ittiḥād al-ʿĀlamī li-ʿUlamāʾ al-Muslimīn*, IUMS) and the Association of Qaraḍāwī's Students (*Rābiṭat Talāmīdh al-Qaraḍāwī*, RTQ). After the Revolution these allies produced Islamic legal knowledge to provide an *ex post facto* theory that would create the effect that Qaraḍāwī's arguments had been consistent, while also providing a model for future interventions. This theory was called *fiqh al-thawra*.

2 *Maṣlaḥa* in Modern *Fiqh*

In premodern *fiqh, maṣlaḥa* was a minor and somewhat controversial concept. Jurists were hesitant to utilize *maṣlaḥa* reasoning given that this reasoning was

not explicitly rooted in the source texts. Though a number of jurists did utilize *maṣlaḥa* reasoning, the concept's place in the premodern Islamic legal schema was always a tenuous one.[2] This situation changed when ʿAbduh and Riḍā argued for the transformation of the status of *maṣlaḥa*. Their vision for the renewal of the *fiqh* tradition depended upon bringing *maṣlaḥa* from the margins of *fiqh* theory to its center. Riḍā elaborated upon the pre-existing distinction between ritual acts of worship (*ʿibādāt*), which were immutable and grounded in an explicit text, and legal rulings that concerned human interactions (*muʿāmalāt*), which were subject to change. In his effort to render *maṣlaḥa* an autonomous source of law in its own right, Riḍā argued that all *muʿāmalāt* rulings were revisable according to changing social conditions. Significantly, these revisions could be made on the basis of *maṣlaḥa* alone.[3] However, Riḍā seemed uncomfortable at the extent to which his emphasis on *maṣlaḥa* appeared to prioritize human will at the expense of the divine will evidenced in the text.[4] Moreover, Riḍā never articulated a definitive model for how the *ʿulamāʾ* should balance the perceived needs of the day with their reading of the texts as they sought to find and articulate the *maṣlaḥa* in the public sphere.[5]

3 The Fragmentation of Knowledge and the Mixing of Religion and Politics

The period in which Riḍā was advancing his new ideas was characterized by the fragmentation of the *ʿulamāʾ*'s scholarly authority. New voices entered the public sphere in competition with the *ʿulamāʾ* as intellectuals, some trained at new educational institutions like the Dār al-ʿUlūm,[6] began to articulate their own visions of the common good.[7] Moreover, the shift from the

2 Muhammad Qasim Zaman, *Modern Islamic Thought in a Radical Age: Religious Authority and Internal Criticism* (Cambridge: Cambridge University Press, 2012), 109–10.

3 Felicitas Opwis, "Maṣlaḥa in Contemporary Islamic Legal Theory," *Islamic Law and Society* 12, no. 2 (2005): 182–223 (18–20).

4 Malcolm H. Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad ʿAbduh and Rashīd Riḍā* (Berkeley: University of California Press, 1966), 203–8.

5 Aria Nakissa, "The Fiqh of Revolution and the Arab Spring: Secondary Segmentation as a Trend in Islamic Legal Doctrine," *The Muslim World* 105, no. 3 (2015): 298–321 (5–6).

6 Cairo's Dār al-ʿUlūm was founded in 1872 as a state-run, higher-education institution. For more on the Dār al-ʿUlūm see Hilary Kalmbach, "Dār al-ʿUlūm," ed. Kate Fleet et al., *Encyclopaedia of Islam* (Leiden: Brill).

7 Dale Eickelman and James Piscatori, *Muslim Politics* (Princeton: Princeton University Press, 1996), 131.

pre-modern to modern periods was characterized not only by a fragmentation of authority, but a fragmentation of knowledge. Modernity fragmented knowledge and social life into different spheres: culture, economics, politics etc. As part of this fragmentary process the knowledge that the *ʿulamāʾ* possessed was re-defined as a specialized form of knowledge called religious knowledge, because it was understood as arising from the study of texts similarly re-defined as religious texts.[8]

The assumption that religion and politics are two distinct forms of knowledge conforming to two distinct realms that should not, above all, mix originates in a process that began in sixteenth century Europe before spreading unevenly throughout the colonized world.[9] I argue that it is a result of this fragmentary process that the attempt to contribute religious knowledge to a different realm, particularly politics, came to be understood by both the *ʿulamāʾ* and their competitors as requiring additional justification. This is because these contributions were perceived by all involved as mixing religion and politics. An intervention that is understood as mixing religion and politics is met with suspicion regarding its legitimacy and sincerity, evidenced by the well-known Arab slogan "no religion in politics, no politics in religion." While the *ʿulamāʾ* reject the argument that religion and politics should not mix, I contend that their rejections nevertheless demonstrate that they have internalized the religious-political distinction to such an extent that is self-evident to them as well. Qaraḍāwī, for example, in arguing against the separation of religion and politics says, "It is not possible to improve human life if Islam is responsible for only part of it [...] it is not possible that Islam be [solely] for the mosque, while the school, university, law court, television, journalism, theatre, cinema, souq and street are [left] to secularism."[10] His argument for the relevance of religion to socio-political life is clearly rooted in the supposition that these terms relate to distinct realms.

8 Abdulkader Tayob, "Religion in Modern Islamic Thought and Practice," in *Religion and the Secular: Historical and Colonial Formations*, ed. Timothy Fitzgerald (London: Acumen, 2007), 177–92 (12–3).

9 Timothy Fitzgerald, "Encompassing Religion, Privatized Religions and the Invention of Modern Politics," in *Religion and the Secular: Historical and Colonial Formations*, ed. Timothy Fitzgerald (London: Acumen, 2007), 211–40.

10 Yūsuf al-Qaraḍāwī, *al-Dīn wa-l-Siyāsa: Ta'sīl wa-Radd Shubuhāt*, 2nd ed. (Cairo: Dār al-Shurūq, 2013), 70.

4 The Interdependency of *Maṣlaḥa* Reasoning during the 2011 Egyptian Revolution

The contemporary *ʿulamāʾ* do not intervene in the public sphere with fully-formed notions of what the *maṣlaḥa* in a given situation actually is. Rather, they elaborate further upon their understanding of the *maṣlaḥa* in response to the counter arguments of their interlocutors, who raise particular issues and contest certain parts of an *ʿālim*'s argument while overlooking others. As such, over the course of the Egyptian Revolution, Qaraḍāwī elaborated upon his *maṣlaḥa* arguments in response to counter arguments, but also changed his arguments in response to unfolding events.

The demonstrations that would cause Mubārak's departure began on January 25, 2011. However, Qaraḍāwī waited until January 27, the third day of protests, before making his first intervention. In an interview with the Cairene newspaper *al-Shurūq*, Qaraḍāwī's initial message was one of general support,

> There is no doubt that what happened in Tunisia is a powerful lesson, and should be repeated. The Arab nations are changing for the better, and should be granted their rights and their freedom [...] the people who have gone out to give voice to their desire [for freedom], no one is defending them, and no party or political force is representing them, but they represent Egypt.[11]

Four protesters had been killed by the police that day, and Qaraḍāwī attempted to dissuade the police from further violence saying, "I want Egypt to become like other countries, that treat protesters with respect, rather than violence. The expression of an opinion is a human right." Referring to the police, Qaraḍāwī added, "Whoever says he is a servant of the ruler, I say to him, you are servant of God, and the killing [of protesters] is forbidden."[12]

The following day, January 28, 2011, Qaraḍāwī's language shifted to a different register and incorporated more explicit references to Qurʾān and Ḥadīth. In an interview with al-Jazeera, Qaraḍāwī commented upon the concept of obedience to the ruler. Qaraḍāwī spoke about this concept because other *ʿulamāʾ* in Egypt had begun to promote it as part of their rationale for continuing to support Mubārak.[13] As such, obedience to the ruler had become part of

11 Yūsuf al-Qaraḍāwī, *25 Yunāyir Thawrat Shaʿb: al-Shaykh al-Qaraḍāwī wa-l-Thawra al-Miṣriyya* (Cairo: Maktabat Wahba, 2011), 36–7.

12 Ibid.

13 Nakissa, "Fiqh," 10–4.

the conceptual terrain over which the *maṣlaḥa* was being contested. Though Islam maintains a general principle of obedience, Qaraḍāwī said, the ruler's right to obedience was not absolute. By way of justification, Qaraḍāwī quoted the Qur'ān's rebuke of those who obeyed Pharaoh (Q43:54), and argued that the right to obedience was enjoyed only by the ruler who was obedient to God, and implemented His Law in the spirit of justice, dignity, and freedom.[14] It is noteworthy that Qaraḍāwī referred to the abstract category "Islam" rather than a particular text or authority. Referring to Islam in this manner, I suggest, is evidence that Qaraḍāwī considers himself to be contributing a distinct brand of knowledge, religious knowledge, to the public sphere.

That day was the fourth day of demonstrations, and the regime's attempts to suppress the protesters had intensified. Communication networks had been disrupted, and eleven protesters had been killed by the police in Suez as the Interior Ministry warned darkly of taking "decisive measures" to end the protests.[15] In response to these new developments Qaraḍāwī began to argue that Mubārak was not a ruler entitled to obedience,

> As for [the ruler] who rebels against the religion (*al-dīn*), and oppresses the people, steals and plunders their wealth, how can he be obeyed? There is no obedience to anyone who is disobedient (*maʿṣiyya*) to God, Muslims are all in agreement about that […] as it says in the ḥadīth "there is to be no obedience to that which is disobedient to God, but rather obedience is to that which is good."[16]

That same day, Mubārak dismissed the Egyptian Cabinet, and appointed for the first time a Vice-President to implement "constitutional and legislative reforms." Nevertheless, riots continued throughout the night across the country.[17]

The following day, Ṭayyib gave a statement to the media. Ṭayyib argued that while the initial protests were legitimate in calling for reform, the appointment of a Vice-President and Mubārak's subsequent promises of change represented the fulfilment of this demand. As such, Ṭayyib argued that the protests "no longer have any meaning" and had achieved their goals. While Ṭayyib described those who have been killed during the protests up to that point as martyrs, given the increasing violence across the country, he argued

14 Qaraḍāwī, *25 Yunāyir*, 38–40.

15 "Timeline: Egypt's Revolution A Chronicle of the Revolution That Ended the Three-Decade-Long Presidency of Hosni Mubārak," *al-Jazeera*, February 14, 2011, http://www.aljazeera.com/news/middleeast/2011/01/201112515334871490.html.

16 Qaraḍāwī, *25 Yunāyir*, 39.

17 "Timeline."

that further protests represented a "call to chaos," and a rebellion (*khurūj*). He also described the *ʿulamāʾ* (i.e. Qaraḍāwī) who had called for further protests as "beckoning toward the gates of Hell."[18] That same day, January 29, 2011 was the first time Qaraḍāwī echoed the demonstrators' calls for Mubārak to leave office. Responding to Ṭayyib's argument that the sacking of the government and promises of reform were sufficient, Qaraḍāwī replied that Mubārak, "Lives in a different world, and has no feeling for what is happening in the Egyptian street."[19]

Jumʿa waited until February 2 to make his first major statement to the media. That day had been the most violent of the Revolution so far. Approximately 1500 people had been injured in Cairo as pro-Mubārak supporters attacked the protesters in Taḥrīr Square with sticks and knives.[20] Speaking to the media that day, Jumʿa called on the protesters to return to their homes, and justified his argument by appealing to the "common ground of the country" (*maṣlaḥat al-balad*), which Jumʿa understood as the need to preserve life and property. What was needed was "change, not destruction" (*taghyyīr laysa tadmīr*),[21] Jumʿa said. In another statement Jumʿa blamed the protesters for causing the turmoil.[22] As Jumʿa placed the blame for the current turmoil upon the protesters, he cited a well-known ḥadīth that reads "*fitna* is sleeping, may God curse whoever wakes it."[23] Though non-violent protests were not illegitimate in themselves, Jumʿa reasoned, what made them illegitimate was if they led to violence and chaos, which to him was clearly occurring in this instance. Jumʿa's reasoning was based upon the principle that an otherwise lawful action was rendered unlawful on the basis of its consequences (*sadd al-dharāʾiʿ*).[24]

Qaraḍāwī's own statement on February 2 was intended as a response to Jumʿa's argument, and it took up the new themes he raised. Qaraḍāwī contested Ṭayyib and Jumʿa's argument that the protests represented a rebellion, and instead expanded upon the pre-existing principle that there is an obligation upon individuals to advise a ruler who has strayed, which Qaraḍāwī said was part of the obligation to command the right and forbid the wrong. Qaraḍāwī

18 Aḥmad al-Ṭayyib, "Aḥmad al-Ṭayyib Yuftī bi-an Muẓāhirāt Mīdān al-Taḥrīr Ḥarām Sharʿan," n.d., https://www.youtube.com/watch?v=-bFg3MfyPuI.

19 Qaraḍāwī, *25 Yunāyir*, 42–43.

20 "Timeline."

21 ʿAlī Jumʿa, "Muftī Miṣr," February 2, 2011, https://www.youtube.com/watch?v=7leQws-tEB0&list=FLHfyNVWjX2twX7IcYPOURZA&index=32.

22 ʿAlī Jumʿa, "Maqṭaʿ Ṣawtī li-l-Muftī ʿAlī Jumʿa Athnāʾ al-Thawra," October 25, 2011, http://www.youtube.com/watch?v=hzf_79q9fKo. Nakissa, "Fiqh," 14.

23 Jumʿa, "Muftī Miṣr."

24 Nakissa, "Fiqh," 14.

argued that the obligation to advise a ruler fell upon Muslims as a collective and the protesters were performing this obligation by their actions. Addressing the increasing violence, and Jumʿa's argument that further protests should be forbidden, Qaraḍāwī argued that Islam prescribed strict rules that regulated rebellion so that it did not lead to civil war. At the same time, Qaraḍāwī argued that peaceful resistance had become "a means to bring about positive change worldwide, and often leads to the fall of dictatorships" and Islam welcomed such new practices.[25]

During the Revolution it was on Fridays after the congregational prayer that the largest demonstrations occurred. As such, both Jumʿa and Qaraḍāwī made their statements on February 2 with the coming Friday in mind. Qaraḍāwī urged all Egyptians who were able to take to the streets after the prayer, referring to the coming February 4 as "The Friday of Resolution" (*jumʿat al-ḥasm*).[26] Jumʿa made his counter argument in an interview the following day, Thursday February 3. While he expressed sympathy with those protesting against the government, "the issue is that people cannot even find a mouthful of bread" he acknowledged, Jumʿa painted a picture of increasing chaos throughout the country. He viewed the protests as even clashes between supporters and opponents of the government, rather than simply a one-sided government repression of dissent. With that in mind, Jumʿa then issued a fatwa that allowed people to set aside the obligation to perform the congregational prayer saying, "Is it permissible for people to go to the Friday prayer tomorrow? Yes. But, if people are fearful for their person or property (*khawf al-fitna ʿalā l-nafs wa-l-māl*), it is possible they can set aside the prayer. I am not saying do not go to prayer tomorrow, but it is permitted [to not go]."[27] In that fatwa Jumʿa was referencing a pre-existing legal position that the obligation to perform the congregational Friday prayer could be set aside during times of strife. Jumʿa added that he had received hundreds of calls from Egyptians who were fearful of the chaos in the streets.[28]

That Friday, hundreds of thousands of protesters gathered in Taḥrīr Square after the prayer, though it was not until a week later that Mubārak finally resigned. As Qaraḍāwī praised the Revolution's success in Doha that day, he described it as the end result of decades of perseverance (*ṣabr*) under unjust rule. As he did so, Qaraḍāwī divided up the time that Egyptians had lived under

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25 Qaraḍāwī, *25 Yunāyir*, 58.

26 Ibid., 60.

27 ʿAlī Jumʿa, "Fatwā D. ʿAlī Jumʿa bi-Khuṣūṣ Taẓāhirāt Yawm al-Jumʿa," n.d., https://www.youtube.com/watch?v=98tPO8eC310&list=FLHfyNVWjX2twX7IcYPOURZA&index=30.

28 Ibid.

dictatorship into three stages: perseverance under unjust rule, a popular uprising, followed by the overthrow of the government. Qaraḍāwī arranged these three stages according to the well-known *ḥadīth*, "He who among you sees something abominable should change it by his hand; and if he has not strength to do that, he should do it by his tongue; and if he has not strength to do even that, then he should [abhor it] in his heart; that is the least of faith." For Qaraḍāwī, the final stage of overthrowing the government could only come after passing through earlier demonstrations, and after a long period of perseverance under unjust rule when people were silent and only abhorred their oppressors in their hearts. Qaraḍāwī describes this period of perseverance as a "Jihād of the Heart" saying, "what does it mean to make Jihād through your heart? It means that you boil inside, waiting for the hour that [the heart] explodes into a sudden outburst of emotion and positive action."[29] It is my view that a key reason Qaraḍāwī presented this chronology is because he had not consistently called for the overthrow of Egypt's dictators since his exile to Qatar in 1961, and at times had even lent support toward the Mubārak regime.[30] As such, Qaraḍāwī's purpose in positioning the Egyptian Revolution as an outcome of decades of perseverance under dictatorship was to provide a model that explained why his own reasoning in previous years had been not consistent with his support for the 2011 Revolution.

As Qaraḍāwī advanced his understanding of the *maṣlaḥa* over the course of the eighteen days of the Revolution, the substance of his arguments changed. Qaraḍāwī shifted from a statement of general support for the demonstrations, to calling for Mubārak to leave office, to then describing the success of the Revolution as the culmination of progressive stages of activism: Jihād by the heart (quiet perseverance), then the tongue (protest), then the hand (revolution). By contrast, Ṭayyib appeared satisfied with the regime's promises of reform and Mubārak's sacking of the government on January 29. Jumʿa argued that the protests had initially been legitimate, but then became illegitimate as chaos increased. Laying the blame for this disruption upon the anti-government protesters, Jumʿa's arguments made repeated reference to the harm the protests

29 Qaraḍāwī, *25 Yunāyir*, 108.

30 An example of this qualified support came during an uprising in Cairo's ʿAyn Shams district in 1988. While the *ʿulamāʾ* of al-Azhar quickly legitimized the government's violent crackdown, Qaraḍāwī emphasized the need for the taking of peaceful measures to re-exert control of the district. However, Qaraḍāwī also said, "we believe in the faith of the regime and we trust the regime's faith in Egypt." He also said that the Qurʾān and Sunna "stipulate clear ways for thwarting deviations from the correct path, which do not include [...] undue haste in stipulating reforms." Raymond W. Baker, *Islam Without Fear: Egypt and the New Islamists* (Cambridge, MA: Harvard University Press, 2003), 83–9.

appeared to be causing. What is noteworthy here is that the *ʿulamāʾ* debated their positions on the same terms, forming their arguments interdependently as they contested concepts like obedience to the ruler.

Currently, in the study of the contemporary *ʿulamāʾ*, how best to make sense of the inconsistencies between their abstract theories and their statements in response to immediate events remains something of an enigma. Zaman argues that the *ʿulamāʾ* should be viewed as activists just as much as they are studied as articulators of consistent theories, and that there is little to be gained from highlighting the instances when an *ʿālim*'s theory and practice appear inconsistent.[31] While this argument has merit, I argue here that the *ʿulamāʾ* have nevertheless clearly internalized the hegemonic assumption that a changing argument inconsistent with a previous position requires a particular justification. Moreover, I would add that the *ʿulamāʾ* view their interventions in the public sphere as the interventions of religious leaders in politics. As such, even though they think their interventions are legitimate, they nevertheless also think they are doing something that requires an additional justification. I suggest that the *ʿulamāʾ* seek to provide such a justification by producing *ex post facto* theories in an attempt to demonstrate that their changing *maṣlaḥa* reasoning did indeed conform to an overarching model, and was consistent with the source texts. The production of *fiqh al-thawra* in the aftermath of the Revolution is one such example of this trend.

5 Producing *Fiqh al-Thawra* after the Egyptian Revolution

Knowledge is produced socially, by which I mean that knowledge is the product of a particular social context. Islamic legal knowledge, *fiqh*, is no exception. I have argued that Qaraḍāwī and his allies assumed that their interventions in the public sphere required additional justification because they have internalized the categorization that they are religious leaders intervening in the realm of politics. Consequently, Qaraḍāwī and his colleagues begin to produce knowledge in the form of models to show that their reasoning had an overarching and consistent structure and was not simply the creation of their whims. Qaraḍāwī and his colleagues called this knowledge *fiqh al-thawra*.

Qaraḍāwī began producing this *fiqh al-thawra* two days after Mubārak's departure on February 13, 2011 during an episode of *Sharīʿa and Life*, the popular al-Jazeera program he had hosted since 1996. His first goal was to establish

31 Zaman, *Modern*, 310.

the legitimacy of non-violent protests as a means to reform a government or overthrow a regime. The need to legitimize protests in Islamic legal terms had become necessary because it had been contested by Qaraḍāwī's interlocutors.[32] Qaraḍāwī argued that a rebellion (*khurūj*) as discussed in Islamic legal sources explicitly referred to armed rebellion (*al-khurūj al-muṣallaḥ*) against a government. Since the Egyptian Revolution was unarmed, it therefore should not be classified as *khurūj*.[33] The second part of Qaraḍāwī's argument referred in more detail to the concept of obedience to the ruler. Qaraḍāwī roots his negotiation of this concept in Q4:59, "O you who believe! Obey God and obey the Messenger and those charged with authority from among you (*minkum*). If you differ in anything among yourselves, refer it to God and His Messenger."[34] In the interview, Qaraḍāwī said that the *ʿulamāʾ* who have argued that the ruler is entitled to unqualified obedience have made the mistake of reading this particular verse in isolation, neglecting the verse that precedes it. The preceding verse (Q4:58) reads, "God commands you to render back your trusts (*amānāt*) to those to whom they are due; and when you judge between people that you judge with justice: truly how excellent is the teaching which He has given you! For God is He who hears and sees all things."[35] If we turn our attention to this preceding verse, Qaraḍāwī told his audience, then it becomes clear that "God has charged [rulers] with ruling according to two foundational principles. First, rendering security to the people, to the full extent of the term trusts (*amānāt*). Second, ruling the people with justice." Qaraḍāwī's argument focused on a reinterpretation of *amānāt*. This term is interpreted by the exegete Ibn Kathīr (d. 1373), for example, as referring to something that someone is expected to take care of, be it on behalf of someone else, or the obligations a believer is

32 Nakissa, "Fiqh," 10–4.

33 Qaraḍāwī argues that there are three ways to change a government: through democratic elections, a peaceful revolution, or *taghallub*. Qaraḍāwī describes *taghallub* as the swift overthrow of one government and its replacement with another by force. In Qaraḍāwī's description, overthrowing a government by force can be legitimate if it is carried out with such immediate and overwhelming force that a civil war is avoided. Qaraḍāwī, *25 Yunāyir*, 126. Ironically, ʿAlī Jumʿa later also referred to *taghallub* in a similar manner to justify the July 2013 Coup. David H. Warren, "Cleansing the Nation of the 'Dogs of Hell': ʿAli Jumʿa's Nationalist Legal Reasoning in Support of the 2013 Egyptian Coup and its Bloody Aftermath," *International Journal of Middle East Studies* 49, no. 3 (2017): 457–77.

34 Abdullah Yusuf Ali, *The Meaning of the Holy Qur'an* (Brentwood, MN: Amana, 1991), 203. I have preferred to use Yusuf Ali's translation for this chapter, but have preferred the word God in place of Allah.

35 Yusuf Ali, *Meaning*.

entrusted with by God (i.e. prayer).[36] By contrast, in this interview Qaraḍāwī interpreted the term *amānāt* in the light of the remainder of the verse, which referred to ruling with justice. As such, Qaraḍāwī argued that *amānāt* referred to the security and protection a ruler is expected to provide to the people.

Qaraḍāwī then argued that those who have focused solely on the second of these two verses, Q4:59, and interpreted the clause "Obey God and obey the Messenger and those charged with authority from among you" had not taken into account the specificity of "from among you" (*minkum*). Qaraḍāwī argued that "from among you" meant that the ruler is an agent of the people, rather than in a position of dominion.[37] With this point in mind, Qaraḍāwī argued that that there was a need to change the prevailing culture among the security forces, who viewed themselves as the servants of the ruler. Instead, Qaraḍāwī said the security forces must understand they are servants of the citizenry.[38]

To justify his own interventions in support of the Revolution, Qaraḍāwī then highlighted historical moments when the *ʿulamāʾ* had sided with the people against oppressive rulers. Qaraḍāwī cited the examples of Saʿīd b. Jubayr (d. 714), who famously participated in the rebellion against the Umayyads, and ʿAbd al-Qādir's (d. 1883) resistance against the French in Algeria. Rather than appealing to a specific text as he made this argument, Qaraḍāwī appealed to "the spirit (*rūḥ*) of the Qurʾān, and the spirit of the Sunna, and the spirit of those who strive for the sake of God." Then, in response to Jumʿa's argument that the common good was best served by people remaining in their homes, Qaraḍāwī asked "how can a Muslim *ʿālim* forbid an individual Muslim from speaking the truth, and commanding the good and forbidding the wrong?"[39]

For Qaraḍāwī, the non-violence of the protesters during the Revolution represented a model to be replicated. With that in mind the RTQ and the Doha-based Qaraḍāwī Center for Islamic Centrism and Renewal (*Markaz al-Qaraḍāwī li-l-Wasaṭiyya wa-l-Tajdīd*) produced a book titled *25 January: A People's Revolution*. In the introduction, Qaraḍāwī wrote that his purpose was to "take the opportunity to present a jurisprudence of revolution (*fiqh al-thawra*)

36 Ibn Kathīr wrote that *amānāt* "refers to all things that one is expected to look after, such as God's rights on His servants: praying, *zakāt*, fasting, penalties for sins, vows and so forth. The [term] also includes the rights of [believers] on each other, such as what they entrust each other with." Saifur Rahman al-Mubarakpuri, trans., *Tafsir Ibn Kathir*, 6 vols. (New York: Darussalam, 2000), 2:493.

37 Qaraḍāwī, *25 Yunāyir*, 152–3.

38 Ibid., 143.

39 Ibid., 159.

to the umma."[40] As such, Qaraḍāwī's first point was to assert the legitimacy of *maṣlaḥa* reasoning saying, "whoever reads the books of *fiqh* will find hundreds of examples of rulings that base their analogical reasoning on the logic of *maṣlaḥa*."[41] Notably, Qaraḍāwī also wrote that a purpose of the book was to respond to criticisms of his role during the Revolution, particularly his return to Cairo for the Taḥrīr Square Sermon on February 18, 2011, which had an estimated attendance of over a million people.[42] That sermon had been praised in the Egyptian daily *al-Miṣrī al-Yawm* as "one of the greatest sermons of the modern era,"[43] while in the Western media the image of a prominent *ʿālim* returning from exile after a revolution had seen him dubbed the "Egyptian Khumaynī." At the same time, other portions of the Egyptian media were highly critical of his return, and the television channel *Miṣr al-Nahār Dah* even banned Qaraḍāwī from appearing on air for fear of where further boosts to his stature might lead at that tumultuous time.[44] The prominent journalist Muḥammad Ḥassanayn Haykal (d. 2016) also drew comparisons between Qaraḍāwī and Khumaynī, and argued that Qaraḍāwī's return represented an effort by the Muslim Brotherhood to co-opt the Revolution. Qaraḍāwī took this criticism seriously, and attempted to respond to Haykal's concerns directly in *25 January*. Qaraḍāwī defended his role during the Revolution by arguing that there was a need to contribute legitimate *fiqh* opinions in the face of obfuscation by the Shaykh al-Azhar and the Grand Mufti. Qaraḍāwī argued that Egypt's youth were able to determine who was legitimately on the side of the Revolution and who was not.[45] My point is that Qaraḍāwī recognized Haykal's criticism that his support for the Revolution represented the intervention of a religious leader into politics and, as such, required additional justification.

While Aria Nakissa has examined how Qaraḍāwī legitimated his *fiqh* arguments in support of the Revolution in relation to pre-existing *fiqh* rulings,[46] in this chapter I am concerned with how these arguments were arranged in

40 Ibid., 7.

41 Ibid., 32.

42 "Milūnā Mutaẓāhir bi-Mīdān Taḥrīr," *al-Jazeera.net*, n.d., http://www.aljazeera.net/news/pages/c3b14752–8169–466e–86f0–529d87fca4e2.

43 Samīr Farīd, "al-Qaraḍāwī fī Iḥdā Aʿẓam Khuṭab al-ʿAṣr al-Ḥadīth Yu'akkid Istimrār al-Thawra," *al-Miṣrī al-Yawm*, February 19, 2011, http://today.almasryalyoum.com/article2.aspx?ArticleID=288341.

44 Bettina Gräf, "Media Fatwas and Fatwa Editors: Challenging and Preserving Yusuf al-Qaradawi's Religious Authority," in *Media Evolution on the Eve of the Arab Spring*, ed. Leila Hudson, Adel Iskandar, and Mimi Kirk (New York: Palgrave MacMillan, 2014), 139–57 (2).

45 Qutb al-ʿArabī, "Haykal wa-l-Qaraḍāwī wa-l-Khumaynī," *al-Yawm al-Sābiʿ*, February 20, 2011, http://www.youm7.com/News.asp?NewsID=355329; Qaraḍāwī, *25 Yunāyir*, 8–9.

46 Nakissa, "Fiqh," 8–18.

texts as Islamic knowledge to produce certain effects. Aside from Qaraḍāwī's introduction, the book *25 January* did not contain any original material, but instead began with two fatwas he had published in 2009 and 2010. In the book, these two fatwas were then followed by a verbatim reproduction of all Qaraḍāwī's media interventions during the Revolution. This arrangement was intended to produce the effect that Qaraḍāwī's *maṣlaḥa* interventions during the Revolution was consistent with his earlier positions, as represented by these two fatwas.

The first fatwa was titled "Who pronounces the corruption of the ruler?" and Qaraḍāwī argued that such a pronouncement rested with "the *ʿulamāʾ* who are free" that is, those who do not serve in state institutions. Moreover, Qaraḍāwī emphasized that being "free" *ʿulamāʾ* did not mean they were at liberty to intervene in the public sphere however they saw fit. Instead, they must follow "public opinion (*al-raʾī al-ʿāmm*) and the public's Islamic conscience (*al-ḍamīr al-islāmī*), which binds (*yaqayyid*) those among the *ʿulamāʾ* who are free."[47] The second fatwa referred to the legitimacy of peaceful protests, and Qaraḍāwī referred specifically to the concern that they were an imported political practice from the West and, as such, were illegitimate.[48] Qaraḍāwī's argued, "The important thing is we take [from the West] that which is in accordance with our doctrines, values, and laws (*sharāʾiʿnā*)."[49] In the fatwa, Qaraḍāwī elaborated in greater detail what he meant,

> If they [protests] serve legitimate ends, like calling for the implementation of Sharīʿa, or freeing those imprisoned without legitimate grounds, or halting military trials of civilians, or cancelling a state of emergency that gives the ruler absolute powers, or achieving people's general aims like making available bread, oil, sugar, gas, or other aims whose legitimacy admits of no doubt in things like these, legal scholars do not doubt the permissibility [of demonstrations].[50]

47 Qaraḍāwī, *25 Yunāyir*, 21–3; idem, *Fiqh al-Jihād: Dirāsa Muqārana li-Iḥkāmihi wa-Falsafatihi fī Ḍawʾ al-Qurʾān wa-l-Sunna*, 2nd ed.. 2 vols. (Cairo: Maktabat Wahba, 2010) 1:204–9. Specifically, Qaraḍāwī grounds his legitimacy in his view that he is giving voice to the will of the Egyptian nation. Though further discussion of this point is beyond the remit of this chapter, this line of reasoning originates with Rifāʿa al-Ṭahṭāwī (d. 1873). For more on this point see David H. Warren, "For the Good of the Nation: The New Horizon of Expectations in Rifaʿa al-Tahtawi's Reading of the Islamic Political Tradition," *The American Journal of Islamic Social Sciences* 34, no. 4 (2017): 30–55.

48 Nakissa, "Fiqh," 14–5.

49 Qaraḍāwī, *25 Yunāyir*, 31.

50 Ibid., 33. Quoted in Nakissa, "Fiqh," 17.

Placing these two fatwas prior to the reproduction of Qaraḍāwī's interventions during the Revolution was intended to produce the effect that his practice during the Revolution followed, not just a consistent position, but also the will of the public. *25 January* was intended to lay the foundations for *fiqh al-thawra*.

6 Producing *Fiqh al-Thawra* through Commentary

In the attempt to establish *fiqh al-thawra* as a new model of *maṣlaḥa* reasoning, Qaraḍāwī was assisted by his colleagues from IUMS. In this section I examine the *fiqh al-thawra* literature as commentaries. Commentaries provide a new discourse with an "identity and sameness" whereby "new verbal acts are reiterated, transformed, or discussed" and, I would add, further established.[51] Here I examine three works by ʿAlī Muḥyī al-Dīn al-Qaradāghī (b.1949), Waṣfī Abū Zayd (b.1975), and Aḥmad al-Raysūnī (b.1953).

The establishment of *fiqh al-thawra* through commentary comes first in the form of articles, and then in books. Qaradāghī published an article in July 2011, and his aim was to respond to the assertion that non-violent protests inevitably led to violence and civil strife. To do so, Qaradāghī produced a model listing the criteria that protests must conform to if they were to be considered legitimate. He argued that a non-violent protest could only retain its legitimacy if it remained peaceful, "Even if they face armed repression from the government, they must not deviate from non-violence." Moreover, protests were only to occur "as a response to government injustices, or due the passing of legislation that contravenes the rulings of the Sharīʿa (*aḥkām al-sharīʿa*) such as the permitting of usury, alcohol, alcoholism, or moral depravity."[52] As an elaboration on Qaraḍāwī's argument that protests could only serve "a legitimate end, such as calling for the implementation of the Sharīʿa, or freeing those imprisoned without legitimate grounds,"[53] Qaradāghī said protests were legitimate if they had "legitimate intentions (*maqāṣid mashrūʿa*), such as casting off oppression" but "may not have personal, or party political interests." If protests observed this model, Qaradāghī argued, then they were legitimate and could not be considered *khurūj*. Qaradāghī said that, rather than being *khurūj*, non-violent protest was a contemporary means of commanding the right and forbidding the

51 Michel Foucault, *The Archaeology of Knowledge & The Discourse on Language* (New York: Pantheon, 1972), 220.

52 ʿAlī al-Qaradāghī, "al-Taʾsīl al-Sharʿī li-l-Muẓāhirāt al-Silmiyya," July 8, 2011, http://www.Qaradāghī.com/portal/index.php?option=com_content&view=article&id=1978:2011-07-08-06-57-23&catid-14:2009-04-11-15-11-36&Itemid=8.

53 Qaraḍāwī, *25 Yunāyir*, 33.

wrong. Moreover, while Jumʿa used the concept of *sadd al-dharāʾiʿ* to argue that otherwise legitimate protests became illegitimate if they caused violence and civil strife, Qaradāghī's based his reasoning on intentions. Qaradāghī implied that if non-violent protests unintentionally led to a violent uprising they would still have been legitimate.[54]

Abū Zayd's commentary was far more detailed than Qaradāghī's article, and appeared as a book titled, *Qaraḍāwī, The Revolutionary Imam.* Like the members of the RTQ who produced *25 January*, Abū Zayd aimed to show that Qaraḍāwī's reasoning during the Revolution was consistent with both the source texts and Qaraḍāwī's earlier writings. To produce this effect, Abū Zayd structured his book in the same way as *25 January* inasmuch as Abū Zayd placed his own commentary prior to the verbatim reproduction of Qaraḍāwī's interventions over the course of the Revolution's eighteen days. Abū Zayd structured his commentary to present the reader with each set of legal sources, including the Qurʾān, the Sunna, the *maqāṣid al-sharīʿa* and legal maxims that, as he put it, "nourished" (*ghadhā*) Qaraḍāwī's reasoning during the Egyptian Revolution.[55] As with *25 January*, Abū Zayd intended for this arrangement to produce the effect that Qaraḍāwī's practice followed a model, rather than vice versa.

In Abū Zayd's first chapter, "Qaraḍāwī's Sharīʿa-based points of departure during the Revolution," he established a connection between the textual source material and Qaraḍāwī's *maṣlaḥa* reasoning in a novel way. Abū Zayd first presented a list of thirty short Qurʾānic verses that related thematically to resisting oppressive rule, such as Q71:4 "For when the Term given by God is accomplished, it cannot be put forward, if ye only knew."[56] It is striking that these verses, followed by a selection of *ḥadīth* such as, "the best Jihād is to speak a word of truth to an unjust ruler" were presented as a simple list and surrounded on the page by empty space. As such, they were disconnected from a discussion of the circumstances of their revelation (*asbāb al-nuzūl*), or any exegetical or other legal commentary.[57] This arrangement facilitated Abū Zayd's argument that these Qurʾānic verses and ḥadīth, as a whole, "place a special emphasis on one meaning and one concept [alone], the resistance of oppression."[58] Abū Zayd argued that these sources acted as a whole, rather than individually, to channel Qaraḍāwī's reasoning during the Revolution.

54 Qaradāghī, "Taʾsīl."

55 Waṣfī Abū Zayd, *al-Qaraḍāwī al-Imām al-Thāʾir: Dirāsa Taḥlīliyya Uṣūliyya fī Maʿālim Ijtihādihi li-l-Thawra al-Miṣriyya* (Britton Farms, OH: Sulṭān li-l-Nashr, 2011), 44.

56 Yusuf Ali, *Meaning*, 1533.

57 Nakissa, "Fiqh," 19.

58 Abū Zayd, *Imām*, 49.

In the next stage of his commentary, Abū Zayd drew connections between Qaraḍāwī's reasoning and legal motifs derived from premodern authorities, such as the concept of *fiqh al-wāqiʿ* (a deep and true understanding of the social reality) that he attributed to Ibn al-Qayyim. In Abū Zayd's commentary, the relationship between Qaraḍāwī's reasoning and the social reality is a reciprocal one, which works by "understanding the necessities of the reality, and understanding the law of God that is relevant to it either in the Qurʾān or the Sunna, then applying one to the other."[59] At the same time, Qaraḍāwī and Abū Zayd's referral to *fiqh al-wāqiʿ* was slightly different. In Qaraḍāwī's own writings, the social reality is presented as a justification to relax a specific ruling by demonstrating a legal necessity (*ḍarūra*). By contrast, here Abū Zayd appears to posit an attentiveness to the social reality as an explanation for why Qaraḍāwī's positions changed over the course of the eighteen days of the Revolution. Rather than portraying Qaraḍāwī's waiting for five days before explicitly calling for Mubārak's departure as an inconsistency in need of justification, Abū Zayd appears to attribute this shift as a feature of Qaraḍāwī's "attentiveness" (*waʿī*) to the changing social reality.[60] Abū Zayd then cited statistics to produce a knowledge of social reality that appeared objective. For example, Abū Zayd cited a statistic that forty percent of Egyptians lived in poverty in order to produce seemingly objective evidence for the necessity of Mubārak's departure. Then, Abū Zayd attributed the shift in Qaraḍāwī's argument to calling for Mubārak's departure to Qaraḍāwī's awareness that this departure was the will of the people, and again Abū Zayd attempted to establish this necessity numerically. Abū Zayd reported that when Qaraḍāwī understood that eight million young Egyptians had taken to the streets across the country, he realized that revolution was a true representation of the people's will. This was because those eight million protesters represented the will of their extended families as well, who "supported [the revolutionaries] in their hearts, but were not themselves able [to go out and protest]."[61]

The second chapter of the book is titled a presentation of the "the legal maxims regulating Qaraḍāwī's discourse during the Revolution." The chapter is divided into ten sections, each beginning with a legal maxim.[62] Legal maxims are short epithetical statements that are occasionally taken from the Qurʾān or Ḥadīth but are more commonly found in the work of premodern

59 Ibid., 56–8.
60 Ibid.
61 Ibid., 59.
62 Nakissa, "Fiqh," 18–9.

authorities, who considered them to be expressive of the goals of the Sharīʿa. As is clear from the title, Abū Zayd's goal in this chapter was to emphasize that Qaraḍāwī's reasoning was "regulated" by the Sharīʿa, as evidenced by the maxims, and was not simply the product of his whims. Abū Zayd predicated his argument upon making connections between a general maxim and a specific example taken from Qaraḍāwī's reasoning during the Revolution. For example, one maxim read, "an action that is necessary to fulfil an obligation is itself an obligation" (*mā lā yatimm al-wājib ilā bihi fa-huwa wājib*). In Abū Zayd's commentary he proceeded by first citing the maxim in the work of a premodern authority, in this case, al-Ghazālī's (d. 1111) *al-Mustaṣfā*. Abū Zayd then provided a premodern instance showing how this maxim had been utilized in the past and in this example Abū Zayd cited a statement from al-Zarkashī (d. 1373) who argued a portion of water containing a ritually unclean substance, such as blood or urine, became unlawful in its entirety. Abū Zayd then drew an analogy between al-Zarkashī's example and Qaraḍāwī's discourse saying, "and among the applications of this [maxim] in Qaraḍāwī's discourse is that the corruption that had come to pass [in Egypt], the repression, the poverty, the authoritarianism had reached such an extent that it had to be changed and stood up against, and would not end except by going out in mass demonstrations."[63] In Abū Zayd's presentation, this maxim regulated Qaraḍāwī's reasoning as he produced his fatwa that attending demonstrations, especially on Fridays, was obligatory for all who were able. As Abū Zayd put it, Qaraḍāwī's knowledge of the goals of the Sharīʿa, evidenced by this maxim, played a role in structuring Qaraḍāwī's legal reasoning, so he realized that reforming the regime piecemeal was not possible, and it had to be swept away in its entirety by revolution.

Another of Abū Zayd's maxims stated, "All that contravenes a fixed principle is invalid" (*kull mā khālif aṣlan qaṭaʿiyyan mardūd*), which Abū Zayd drew from al-Shāṭibī's *al-Muwāfaqāt*. In Abū Zayd's commentary, this maxim regulated Qaraḍāwī's rebuttal of the arguments made by Jumʿa and Ṭayyib when they cited specific verses or ḥadīth, such as "*fitna* is sleeping, may God curse whoever wakes it," in order to argue for obedience to a ruler (i.e. Mubārak) no matter the circumstances. After presenting the maxim Abū Zayd then quoted from an interview by Qaraḍāwī on *Sharīʿa and Life* during the Revolution in which he said,

63 Abū Zayd, *Imām*, 114–5.

> I am truly sorry that the great *ʿulamāʾ* accuse these youth of going astray, rebelling against Islam, and causing *fitna* […] I do not know how they [the *ʿulamāʾ*] could have forgotten the verses and ḥadīth that reject oppression! Hundreds of verses in the Holy Qurʾān reject oppression, and curse the oppressors.[64]

Abū Zayd then provides his commentary on Qaraḍāwī's words,

> So, the Shaykh here is explaining that it is not correct jurisprudence and not rational that we abandon clear texts and explicit rulings, and become preoccupied with speculative interpretations and unclear texts […] how can [anyone] oppose the hundreds of verses and sound ḥadīth that make explicit the matter [of opposing injustice] without any doubt or hesitation?[65]

In Abū Zayd's commentary the number of Qurʾānic verses and ḥadīth that condemn oppressive rule serve to establish, in their entirety, resistance to oppression as a "fixed principle," as per the aforementioned maxim. As such, this fixed principle of resisting oppression outweighed any individual verses or ḥadīth that others may have cited in order to argue for obedience to an unjust ruler.[66] It was only after Abū Zayd has established this model in this manner over three chapters and one hundred and seventy pages that he then presented to the reader the texts of each of Qaraḍāwī's fatwas and interviews with the media over the eighteen days of the Revolution. The effect that this arrangement produced for the reader was that Qaraḍāwī's changing reasoning was channeled by the texts of the Qurʾān, the Sunna, legal maxims, and were also consistent with Qaraḍāwī's own oeuvre on the basis of motifs such as *fiqh al-wāqiʿ*.

The final commentary to be discussed here takes a very different form to the others. Rather than focusing on Qaraḍāwī in particular, or attempting to produce a model that might channel *maṣlaḥa* reasoning in future revolutions and produce the effect of consistency, al-Raysūnī took a different approach. Completed in January 2012, Raysūnī's book *Fiqh al-Thawra* argued instead that the *maṣlaḥa* was not to be found through particular models, but was instead the result of contestation. At first, Raysūnī's argument proceeded along lines familiar to readers of Qaraḍāwī: the achievement of the *maṣlaḥa* in public life represented the achievement of the purposes of the Sharīʿa (*maqāṣid*

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64 Ibid., 133.
65 Ibid.
66 Nakissa, "Fiqh," 19.

al-sharīʿa). However, while Qaraḍāwī argued for the need to allow for *maṣlaḥa* reasoning that was not grounded in the texts and can revise pre-existing rulings, Qaraḍāwī also imagined the substance of the *maṣlaḥa* to be something that can be agreed upon definitively in a particular context. It was in this regard that Raysūnī, in my reading, departed from Qaraḍāwī. Qaraḍāwī argued for the maintenance of what he called the constants of the community (*thawābit al-umma*), and expressed a certain frustration that issues long thought to have been closed to consensus were re-debated.[67] Raysūnī, by contrast, appeared to envisage the finding of the *maṣlaḥa* to be the result of active contestation and bargaining between people, rather than coming as the result of interpreting the text in the light of new social conditions or following prevailing social customs (as Qaraḍāwī would say). Raysūnī described the relationship between the source texts and politics or systems of government as vague. For Raysūnī, what was required then was, not only engaging in the discursive practices that one might expect: independent reasoning (*ijtihād*), consultation (*shūra*) etc., but also another practice that Raysūnī called *al-taʿāruf*.[68] Contrasting *taʿāruf* with social custom (*al-ʿurf al-ijtimāʿī*), which societies have agreed upon passively over time, Raysūnī elaborated upon what he intended by this practice,

> I mean by *taʿāruf* that which the people consciously decide upon as result of intentional choice. So the meaning of *taʿāruf* is more specific than social custom. Though social custom is established and accepted by the people, it is concluded passively over time. As for *taʿāruf*, it carries the meaning of mutual understanding, mutual agreement, and active bargaining [...] As such, while social custom (*al-ʿurf al-ijtimāʿī*) is a suitable point of reference for the public in terms of their mutual interactions and ways of thinking, it is neither suitable nor sufficient for politics or governance.[69]

What Raysūnī intends by *taʿāruf* becomes clearer when he elaborated upon his understanding of the application of the Sharīʿa. He quoted a passage from Ghazālī's *Mustaṣfā* to the effect that whatever achieves the purposes of the Sharīʿa represents the *maṣlaḥa*. "All that guarantees the preservation of these five foundational purposes [faith, life, rationality, progeny, property], that is

67 Zaman, *Modern*, 134.

68 Aḥmad al-Raysūnī, *Fiqh al-Thawra: Murājiʿat fī l-Fiqh al-Siyāsī al-Islāmī* (Beirut: Namaa for Research and Studies Center, 2012), 13.

69 Ibid., 13, n. 1.

the *maṣlaḥa*."[70] To Raysūnī, this passage meant, "All that is good and brings benefit on the face of the earth, and consequently avoids corruption or harm on the face of the earth, that is the Sharīʿa."[71] As such, achieving the *maṣlaḥa* is a true representation of the Sharīʿa. In contrast to a figure like Qaraḍāwī, whose theoretical writings on the *maṣlaḥa* focus primarily on the realm of statecraft (*siyāsa sharʿiyya*),[72] Raysūnī considered the application of the Sharīʿa to extend beyond the realm of the government, and be a responsibility of civil society at large.[73]

7 Conclusion

This chapter has investigated the interventions of prominent *ʿulamāʾ* during the Egyptian Revolution and its aftermath, focusing in particular on Qaraḍāwī and his IUMS colleagues. During the Egyptian Revolution, I have argued that the *ʿulamāʾ*'s understanding of the *maṣlaḥa* took shape interdependently, rather than in isolation. I also argued that as a result of colonial processes the *ʿulamāʾ* have internalized the hegemonic distinction between religion and politics. Resulting from this internalization is the assumption that political activism should be consistent in order to be considered sincere, and religious reasoning must be grounded in religious texts. As such, while Zaman argued that the *ʿulamāʾ* should not be approached solely as "systematic thinkers articulating an internally consistent philosophy, but rather as activist intellectuals responding over the course of long careers to new and old controversies,"[74] with any deviation from their theories being criticised as inconsistency, the *ʿulamāʾ* nevertheless do attempt to produce the effect that their *maṣlaḥa* reasoning is consistent with their earlier arguments. The *ʿulamāʾ* take great pains to emphasize that their *maṣlaḥa* reasoning is not only regulated by the texts and the tradition of their scholarly forebears, but also bound by the will of the public, in whose name they claim the right to speak. The *ʿulamāʾ* who are the most successful in this regard work within mutually supportive networks, and members the IUMS network surrounding Qaraḍāwī produced models through commentary to create a *fiqh al-thawra* after the 2011 Revolution. Abū Zayd's model aimed to show that Qaraḍāwī's changing reasoning

70 Ibid., 74.
71 Ibid., 75.
72 Zaman, *Modern*, 114.
73 Raysūnī, *Fiqh*, 77.
74 Zaman, *Modern*, 310.

was consistent with the source texts, legal maxims, and Qaraḍāwī's oeuvre at large, while Qaradāghī produced a model attempting to overturn the connection between non-violent protests and civil strife. A notable exception to this trend was the work of Raysūnī, who pointed toward an argument that finding the *maṣlaḥa* was the result of mutual contestation by multiple voices, rather than an individual's reading of the text in the light of changing social conditions. The aftermath of the Egyptian Coup in 2013 may have rendered IUMS's effort to produce a *fiqh al-thawra* redundant for now, and Qaraḍāwī's support for the Sunni regime's repression in Bahrain in February 2011 also weakened his own authority among significant segments of the Arab public.[75] At the same time, Raysūnī's concept of mutual contestation and deliberation, or *taʿāruf*, as a means of finding the *maṣlaḥa* may offer an important new vista for politics in the Arab World.

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75 David H. Warren, "The ʿUlamāʾ and the Arab Uprisings 2011–13: Considering Yusuf al-Qaraḍāwī, the 'Global Mufti,' between the Muslim Brotherhood, the Islamic Legal Tradition, and Qatari Foreign Policy," *New Middle Eastern Studies* 4 (2014): 17, 31.

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CHAPTER 13

Whither Islam?

Western Islamic Reform and Discursive Density

Ovamir Anjum

The tremendous existential challenges of the modern world—in particular, the facts of modern science, economy, politics, and the worsening crises of global inequality and environmental depredation—urgently require Muslims to develop a healthy intellectual tradition through which to understand and respond to them. Since the modern world is seen as having emerged largely out of a triumphant struggle against religion, in particular Christianity, Islam is seen by most outsiders and many insiders as an obstacle to be overcome in the path of progress and modernity. Yet, what the moderns call "religion" has obdurately maintained its presence in the contemporary world. Most notable in this respect is the resilience and rise of Islam and the reemergence even of Christianity.[1]

The majority of Muslims in the world, while enthralled by the achievements of modernity, are less and less willing to relinquish Islam. Attempts at reconciling Islam with aspects of modernity such as democracy, the nation-state, capitalism, science, and the general ascendancy of materialism have been ubiquitous among Muslim intellectuals. The failure of these efforts to create a sustainable intellectual tradition that enjoys wide legitimacy among Muslims is seen as the greatest crisis of Islam and often characterized as the "crisis of authority."[2] A formidable Western historian of Islam, Richard Bulliet, optimistically sees the current "crisis of authority" as one of the latest "big bangs" of Islamic history—one likely to be followed by a "big crunch."[3] Both the challenges as well as the opportunities of our era, on this view, are likely to settle

1 I am referring here to the fact that secular modernity has had to create the category of "religion" in order to define and confine the multiplicity of the preceding or rival traditions of being, believing, and reasoning. See Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: Johns Hopkins University Press, 1993), in particular ch. 1, and *idem.*, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003), in particular ch. 6.

2 See, for instance, Richard W. Bulliet, "The Crisis Within Islam," *The Wilson Quarterly*, vol. 26 (Winter 2002).

3 Richard Bulliet, "Islamic Reformation or 'Big Crunch'?: A Review Essay," *Harvard Middle Eastern and Islamic Review* 8 (2009), 7–18.

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through some combination of deconstruction and synthesis, as has happened repeatedly in the past.

The shape and nature of the next "big crunch," however, are far from discernible. What follows are some reflections on the conditions of establishing and reinvigorating the Islamic discursive tradition that could attain such an objective. Bulliet's earlier work, incidentally, has also emphasized the role of the new frontiers of Islam—as opposed to its old civilizational centers—in bringing about innovative yet seminal changes in Islamic civilization. The foremost such frontier today is arguably the West. With these premises, and as an American Muslim historian of and contributor to Islamic thought, I identify some of the discursive challenges and opportunities that attend the work of Muslim academic scholars of Islam in the West. What sets scholars like these apart is their concern with reforming the way Islam is understood and practiced by Muslims and doing so with a critical reverence for Islamic tradition. This applies to both their academic works, which are executed more or less within the boundaries of some academic discipline, and their public writings, where moral and reformist concerns are more prominent.

I propose that the crucial condition for reconstructing a legitimate, vibrant, intellectually rigorous, and visionary (that is, forward-looking, inspiring, and pro-active) Islamic discursive tradition is to attain sufficient "discursive density." Before I explain this neologism, I should state my key premises. The intellectual dimension of Islam is best conceptualized as a discursive tradition. The main occupations of any discursive tradition are to seek the normative response or range of responses to questions of theory or practice faced by its adherents, and to seek coherence within the tradition. Conversely, a discursive tradition is but a cumulative record of such answers. Finally, in Sunni Islam (and to a large extent Shiʿi Islam as well), the mechanism of seeking such answers is primarily discursive (rather than institutional, social, or political) and usually multi-generational.[4]

By "discursive density," I wish to capture the proposition that the discursive process succeeds in consolidating and developing its authority and legitimacy only by an accumulative convergence of a sufficient number of "insider" voices that share a common language and some overlapping sets of fundamental

4 Ovamir Anjum, "Islam as a Discursive Tradition: Talal Asad and His Interlocutors," *Comparative Studies of South Asia, Africa and the Middle East* 27, no. 3 (2007), 656–72. I concern myself here only with the discursive aspect of Islamic tradition, rather than its embodied or experienced aspect, because it is with reforming the discursive tradition that all intellectual efforts under consideration here are concerned. Of course, at stake in such projects of reform is often precisely the relationship between discursive and embodied aspects of Islamic tradition.

traditional commitments in the absence of which no convergence would be possible.[5] I draw here on Alasdair MacIntyre's argument that "[t]here is no standing ground, no place for enquiry, no way to engage in the practice of advancing, evaluating, accepting, and rejecting reasoned argument apart from which is provided by some particular tradition or other."[6] Furthermore, to put it in terms of a scientific metaphor, the logic of free discursive authority requires that the greater the number of independent data points, the more a pattern is likely to emerge so long as the instruments and methodological assumptions attending the quest to discover the answer are compatible.

Lest my understanding of Islamic tradition be deemed entirely cerebral, I should point out that the most crucial instrument of thinking, by the Qur'ānic logic, is the heart, the center that knows, loves, surrenders to, and seeks light from God, or fails to do so. Differences in this regard affect much in the arguments one finds persuasive and in the way one formulates and approaches questions, but this concern in itself plays no direct role in the discursive process.

Discursive density can be said to obtain in the quest for solutions to problems of a discursive tradition when two conditions are fulfilled: there is a sufficient number of independent and critical adherents participating in the quest of discovering coherent answers to the problems that face them, and there exists a sufficient common ground (that is, a minimal measure of shared vocabulary, foundational premises, and objectives) for their research, mutual criticism, and disagreement to be mutually comprehensible and lead to a constructive resolution. Part of what discursive density accomplishes is the clarification of verbal (or semantic) disagreements and conceptual ambiguities, and, more importantly, exposition and examination of the premises and silent presuppositions of the various participants, so that both agreements and abiding disagreements become clearer.

A tradition, thus understood, is a particular relationship to an irreplaceable past; it proceeds by "inhaling and exhaling the past," in contrast with modernity, which supposes that the past can and ought to be surpassed in every respect.[7] The crucial concern for Islam, as for other Abrahamic traditions, is the preservation of the unsurpassable moment of divine encounter with humanity, encapsulated in the case of Islam in the divine word and the

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5 For an insightful collection of perspectives on the insider vs. outsider debate, see Russell McCutcheon (ed.), *The Insider/Outsider Problem in the Study of Religion* (London: Cassell, 1999).

6 Alasdair MacIntyre, *Whose Justice? Which Rationality?* (London: Duckworth, 1988), 350.

7 See Anjum, "Islam as a Discursive Tradition" for a review of literature on the tradition-modernity controversy.

teachings of the messenger who embodied that moment. Notwithstanding the Enlightenment prejudice that sees tradition as opposed to both reason and reasoned change, the debate about what is essential (unchangeable, constant) versus what is merely accidental (and hence variable) is the characteristic activity of discursive traditions. The related questions of what is essential to a tradition, what situates one inside a tradition, and how one determines right doctrine (orthodoxy) or practice in a given matter are the very core of a discursive tradition, and determinative of the distribution of authority and legitimacy within the community of its adherents.

It must be noted that Islam is more than a discursive tradition; it is an embodied tradition that is received and lived by the adherents of Islam who may be unable or unwilling to recognize, articulate, or analyze their beliefs and practices. The two dimensions, as Talal Asad has noted, may be in harmony or contradiction with or even oblivious of each other.[8] The lived dimension of Islam may even play a decisive role in the resolution of discursive disputes. For instance, popular support for one scholarly opinion or another may be decisive in settling its fate, at least for a time. The acceptance or admiration by large numbers of believing Muslims is routinely seen in biographical dictionaries as a sign of divine sanction—a sensibility nicely summed up in a statement attributed to Aḥmad b. Ḥanbal, who reportedly said to his stately detractors: "Between you and us are the funerals"—i.e., the number of people attending our funeral prayers will be a testimony to the believing masses' acceptance of our positions.[9]

In Sunni Islam, as noted earlier, orthodoxy is maintained not by individual or institutional infallibility (as, for instance, in historical Catholicism) but by means of relatively dynamic discursive processes. The subtlety of these mechanisms has eluded many observers: and as Sherman Jackson has observed, Western scholars have taken differences from Christianity in the mechanisms by which Islam regulates theological discourse to conclude that the latter simply has no such mechanisms.[10]

A discursive tradition not only moves in time but expands in space. In Islam, the two types of growth have functioned in analogous ways in some respects, such that a doctrine or practice may accrue authority if it has been vindicated over several generations or is widely upheld in various independent scholarly centers. Neither time nor space, however, is homogeneous; the doctrine of the

8 Personal communication, June 21–28, 2012.

9 Ibn Kathīr, *al-Bidāya wa ʾl-nihāya* (Iḥyāʾ al-turāth al-ʿArabī, 1988), 10:376.

10 Sherman Jackson, *On the Boundaries of Theological Tolerance in Islam* (Oxford: Oxford University Press, 2002), 30.

supremacy of first few generations of Muslims (*salaf*) is upheld by all Sunni sects in various ways.[11] Modern scholars have expressed the spatial expanse of Islam through history by characterizing it as a "networked civilization." John Voll has suggested that rather than the unwieldy notion of "civilization," it can be more fruitfully understood as "a Special World-System," a metaphor inspired by Immanuel Wallerstein's influential political-economic theory.[12] Elsewhere, I have expatiated on how Voll's proposal can be enriched by Asad's interpretation of Islam as a discursive tradition, concluding that key aspects of Islam in history come to light when it is seen as a globally networked discursive tradition.[13] With the recent wave of globalization, Islamic tradition has become ever more globally networked. Furthermore, numerically small as Western Muslims may be, the West's hegemony ensures that the trends and problems of Western Islam (or the problems of the West with Islam) draw a disproportionate measure of attention worldwide and that traditional authorities of the Muslim mainlands are not unconcerned about their reception among Western Muslims.[14]

Each geographical location where Islamic discursive tradition takes root can be conceptualized as a node in a complex, global, and historically extended network. This is not to deny that each node is shaped to a large degree by its particular geographic context, but merely that the influences from other nodes cannot be ignored. If a node comes to possess a measure of independence, this independence is more or less transient, for the networked nature of Islamic tradition is a constant source of challenge and change. It's a network whose nodes are stable only so long as they can hold their own in the process of a discursive activity that, though not always fair, is ultimately sorted out in the field of the opinion of the community at large.

Let us turn now to taking stock of the emergent Western node of this networked discursive tradition. In Western Muslim communities today, the main

11 The role of center and periphery (the "edges") has been fruitfully broached in Richard Bulliet's *Islam: The View from the Edge* (New York: Columbia University Press, 1994).

12 John Voll, "Islam as a World-System," *Journal of World History*, 5:2 (1994), 222. For more recent contributions on the subject, see *Muslim Networks from Hajj to Hip Hop*, ed. Miriam Cooke and Bruce B. Lawrence (Chapel Hill: University of North Carolina Press, 2005); particularly interesting is the contribution by David Gilmartin.

13 Ovamir Anjum, "Putting Islam Back into the Equation: Islam as a Discursive World-System," in Khaldoun Samman and Mazhar Al-Zo'by (eds.), *Islam and the Orientalist World-system* (Boulder: Paradigm Publishers, 2008).

14 See, for instance, Bettina Gräf and Jakob Skovgaard-Petersen (eds.), *The Global Mufti: The Phenomenon of Yusuf Al-Qaradawi* (London: Hurst & Co., 2008); Zareena A. Grewal, "Imagined Cartographies: Crisis, Displacement, and Islam in America" (PhD Diss., University of Michigan, 2006).

discursive paradigms can be classified into the following ideal types: traditionalism; progressivism (and modernism);[15] and the academic Muslim discourse on Islam and Muslims. These categories also more or less reflect those in the Muslim mainlands at large, with the exception perhaps of the last, an emergent type whose location within Western academia gives it an unprecedented place in Islamic discourse. Its potential for long-term impact is yet unclear, but its increasing influence in Western Muslim communities and well beyond is discernible. Since they can be classed into the former categories of traditionalists and progressives, whether academics should be deemed a class on their own can be debated. However, their placement in Western academia does compel them into a certain discipline, certain expectations of broad engagement, as well as certain limitations that are shared regardless of their ideological or hermeneutic camp.

In the Muslim world, graduates of secular humanities departments have tended to be modernists and secularists, of either liberal or Marxist tenor and of limited influence, and are seen as intellectual extensions of Westerns ideologies. In North America, however, while the predominant mode of Muslim academic scholarship follows the same pattern as the secular academics in the Muslim world, there may yet emerge unique creative potentials and new forms of relationship with Islamic intellectual tradition. Given the unprecedented reach of the now globalizing Western intellectual influence (with all its diversity and contradictions) into the Muslim world, the stakes and consequences of the direction of American Muslim scholarship can be significant. Its traditional worth, however, will depend on whether it can muster sufficient discursive density and hold its own in the face of challenges from other nodes.

I proceed now to contextualize and justify my propositions vis-à-vis the current modes of approaching Islam in Western universities and in critical conversation with the nascent Western Muslim discourse.

1 The Crisis of Western Academia

The (Western, liberal) university setting affords the study of Islam a tremendous, indeed historic, openness in terms of the potential for critical rigor and

15 'Modernism' can be identified as the remnants of the now-obsolete rationalist or scientistic European ideals and is common among older Muslims, while 'progressivism' is embraced by younger Muslims and influenced by the more current Western progressive ideas such as pluralism, multiculturalism, environmentalism, new-age spirituality, etc. Gender equality remains important to both but in different ways, depending on the wave of feminism one takes as the norm.

creativity in thinking about, through, and against the Islamic tradition. The sheer mass of accumulated factual knowledge in the modern university, in disciplines ranging from history, anthropology, and philosophy to the various natural and social sciences, that now crowns the shared human intellectual heritage—despite the raging and irresolvable debates on its nature and moral consequences and the hegemonies and inequities its possession and control has made possible—is an indispensable point of departure for any serious and rigorous contemporary intellectual tradition.

There is much to be said about the woefully phlegmatic response of the conventional modes of Islamic learning in sifting through, critically evaluating, and embracing these new bodies of knowledge. I will limit my focus, however, to the challenges that face the study of Islam in the West, more precisely, in Euro-American secular universities. The enormous material disparity between the West and the Muslim world has forced itself upon virtually all Muslim reformists as their point of departure and the most important fact to be reconciled in thinking about reform and critique. This realization structures the discourse in such a way that Islam is inevitably the object of reform and critique whereas the West the source of history and the paradigm to be (however "cautiously") emulated. Yet, the Western thought-world today is afflicted by an all-encompassing epistemic crisis and moral nihilism. While this condition of agnosticism and *agnosia* about ultimate truths and ends, called by some "post-modernity," has allowed a multiplicity of voices to be tolerated within academia (including Islamic ones), it has also frustrated any aspiration to a moral or rational vision against the "will to power" of the capitalist and military forces that modernity has also spawned. It not only cannot mitigate the power differentials between various incommensurable visions, it also has no collective rational commitments to imagine any mechanism that could—thus leaving the academic sphere in a dark, chaotic fog and the public square forced into a capitalist straitjacket.[16] The threat of this epistemological chaos, in which no rational, let alone religious, certainties can hold sway, is extended to the rest of the world through the forces of globalization and imperialism beyond anyone's control. This explosive rise of the economy over all other

16 Although written in 2012, these observations I think remain valid today, it being added that we have since seen the emergence of a strong xenophobic nationalist reaction against the left-liberal ideology that prevails on college campuses across Euro-America. The conflict has become increasingly militant precisely because no shared beliefs and fundamental beliefs can be called on as shared ground. For a trenchant critique of this liberal intolerance by an British atheist philosopher, see John Gray, "The Problem of Hyper-liberlism," *Times Literary Supplement*, 27 March 2018, https://www.the-tls.co.uk/articles/public/john-gray-hyper-liberalism-liberty/ (Accessed 5 June 2018).

domains, including the political, threatens to "flatten" our world, as one prophet of neo-liberalism has recently phrased it. A flat world governed by the principles of neo-liberalism is destructive of all its "others."

The intellectual model of the secular university, while uniquely resourceful for examining Islamic history and society as well as the workings of the modern world, is potentially destructive to the Islamic tradition.[17] Before further characterizing the challenge the liberal university poses, it may be useful to attend to a similar criticism with respect to Jewish scholarship by the prolific Jewish historian and theologian Jacob Neusner. Arguing that Jews should support Jewish seminaries rather than endow chairs in liberal universities, he writes: "When believing and practicing Jews decide who will teach what to whom, they take for granted that some things are more important than others. (…) The Jewish sponsors of Jewish learning derive the scale of values from the received canon and tradition. Universities, by contrast, have no stake in according to Scripture or Midrash and Talmud a superior position in the curriculum. (…) So the curriculum is a mishmash of this and that—discrete details of a main point that does not register." He admits that "[f]resh perspectives and a broad range of interests have endowed Jewish learning with vitality. A whole new set of topics claimed standing and warranted specialization. (…) Yet overall, the change in venue marks the decline in classical learning." He concludes, therefore, that "even as they struggle, [the] classical centers of learning are necessary to guaranteeing the future of Judaism. That is a goal to which Yale and Stanford, Princeton and Brown, Purdue and the University of Michigan simply do not aspire." Besides, "[a]cademic professors do not—and cannot be expected to—embody a personal model of piety for their students." Ultimately, he concludes, "[t]he positive result for vital scholarship is outweighed by the charge against the future of Judaism as a tradition of religious learning and religious action."[18]

The concerns in this lucid but brief statement have been investigated and substantiated by a growing body of research in philosophy, anthropology,

17 For a philosophical critique of the modern secular university, see Alasdair MacIntyre, *God, Philosophy, Universities: A Selective History of the Catholic Philosophical Tradition* (Rowman and Littlefield Publishers, Inc., 2009); for a Christian critique, Stanley Hauerwas, *The State of the University: Academic Knowledges and the Knowledge of God* (Oxford: Blackwell Publishing, 2007); for the destructive and fateful link between the American university and the corporation, see the work of former Harvard President Derek Bok, *Universities in the Marketplace: The Commercialization of Higher Education* (Princeton University Press, 2004).

18 Jacob Neusner, "The Costs of Jewish Studies Endowments," *Huffington Post*, October 13, 2010, http://www.huffingtonpost.com/jacob-neusner/the-costs-of-jewish-studi_b_754489.html?view=print; accessed April 4, 2012.

and other fields over the last half century. Alasdair MacIntyre in his works like *After Virtue* gives an account of post-Enlightenment Western thought that is more persuasive than the Enlightenment's own triumphant narrative for explaining the current crisis. We routinely observe, thus MacIntyre begins, that no debate on any ethical issue is rationally resolvable—a condition that is both the cause and effect of a pervasive relativism or perspectivism. (In his *The Closing of the American Mind*, Allan Bloom notes that such relativism is the default religion of the American undergraduate.[19]) Yet, MacIntyre says, Westerners are constantly engaged in debate on these issues, as if there existed agreed upon rational foundations on which resolutions could be based. From academia to media and television, everyone works under the pretense that agreement through rational debate is possible, while acknowledging fully well that there are no agreed upon foundations by which agreement on any serious issue could be attained. Our daily language is rife with words such as good, truth, beauty, and their equivalents, while our sober philosophical reflection can yield no collective rational basis to ground these concepts. This schizophrenia is the result not of lower standards of education or inept thinking (as Allan Bloom thought) but an inescapable outcome of the Enlightenment project of the eighteenth and the nineteenth centuries. Enlightenment thinkers disagreed on all matters except one, and that was their rejection of tradition in favor of reason. It was believed that any rational person, regardless of his or her prior beliefs, sensibilities, and interests, could be convinced of one truth arrived at by reason. This belief of the early Enlightenment soon gave way to cynicism toward and an indictment of reason. Why do moderns then continue to pretend otherwise? Because, MacIntyre suggests, Westerners have inherited much of their language, culture, and thought, and hence memories and desires, from the pre-Enlightenment world—a world in which rational ethical verities were possible and desirable. Then, rational debate took place *within* a tradition and had the possibility of resolution and thus guiding a life of virtue. Such possibility no longer exists in the post-Enlightenment world, leading to the liberal political order and its ultimate model and governing logic in economy, free-market capitalism. Liberalism, deprived of moral certitudes, seeks to construct foundations of law and politics without recourse to any transcendent truths or any certainties based either on reason or tradition. In such a world, and this is MacIntyre's main point, "virtue" vanishes, because the development of virtue is an enterprise that takes place within a community of shared beliefs and norms. The cultivation of virtue is no small matter; it is the foundational

19 Allan Bloom, *The Closing of the American Mind* (New York: Simon and Schuster, 1987), 25.

concern for all pre-modern traditions, including, of course, Islam.[20] The key insight of premodern traditions since at least the Greeks, including Christianity and Islam, was that human beings must grow into virtue; they are not born what they are, but become what they are raised to be.

In the Islamic tradition, virtues like *taqwā* (loving fear of God), courage, patience, gratitude, humility, chivalry, etc., are to be cultivated through practice, training, mutual advice, and correction, encapsulated in that most important obligation of 'commanding right and forbidding wrong.' Therefore, for the proper development of virtue, the Islamic tradition requires the need for external discipline—be it by the community, in particular its elders and scholars, or government, where the virtue of the ruler and his officials is a necessary part of a good political system. The Islamic tradition is varied within itself and differs from other Near Eastern ethical traditions on other points of virtuous development, such as the distribution of potentials among humans and proper means to attain virtue, as well as the list of specific virtues themselves. But these two points are shared: the cultivability of virtue through discipline, role models, and training, rather than a view of virtue as inner adherence to a fixed principle or categorical imperative; and the need for guidance within a community for this purpose. These conditions of moral or spiritual growth have been made unavailable today, not just by some particular kind of liberal ethical philosophy, but, MacIntyre insists, by the moral and rational chaos that is a necessary result of an intellectual world based on the Enlightenment project, which began by rejecting tradition in favor of universal reason and ended by rejecting both.

The main challenge, therefore, that liberal Western academia presents to the Islamic tradition is not one attributable to long-standing but perhaps transient problems like colonialism, Islamophobia, or Orientalism, but by virtue of its very constitutive history, structure, and premises. Any tradition that comes to be studied on the terms of the Enlightenment is likely to suffer the same fate as the Enlightenment project itself: death by nihilism. Islam, therefore, can be taken apart, analyzed, and deconstructed by the myriad of critical

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20 MacIntyre claims that within Abrahamic, faith-based traditions the Aristotelian ethics "is complicated and added to, but not essentially altered" (*After Virtue: A Study in Moral Theory* [Notre Dame, IN: University of Notre Dame Press], 53). I cannot judge the extent to which this holds true, but it appears that all schools within Islam, from philosophers and grammarians to theologians, embraced certain notions that had become the shared heritage of the Near East in both Peripatetic and biblical traditions and were gestured at in the Qur'ān itself, such as the ethic of moderation, the golden mean, some version of the four cardinal virtues, and the inculcation of virtues through discipline and training in a community of shared beliefs and practices.

historians, anthropologists, and philologists who consider it their virtue to have no allegiances or moral commitments in their study. But if such are the grounds of the new knowledge, any hope for a coherent growth or development, or resolution of crucial problems or of the much talked-about crisis of authority, must be abandoned.[21]

In *Whose Justice?* MacIntyre contends that a situated intellectual tradition is a necessary condition for any moral enquiry. Sharing some common ground is necessary for different positions to meaningfully disagree (351). Furthermore, as Islamicists hardly need to be reminded, a tradition is

> more than a coherent movement of thought. It is such a movement in the course of which those engaging in that movement become aware of it and of its direction and in self-aware fashion attempt to engage in its debates and to carry its inquiries forward. The relationships which can hold between individuals and a tradition are very various, ranging from unproblematic allegiance through attempts to amend or redirect the tradition to large opposition to what have hitherto been its central contentions. But this last may indeed be as formative and important a relation to a tradition as any other. (326)

In fact, it is precisely by successfully addressing internal disagreements and external challenges that traditions mature (327). However, whereas discursive traditions may to an extent transform in response to external challenges, if they fail to address new challenges, ruptures, and transformations in terms of their own conceptual toolset, they lose their identity and force (356).

Talal Asad's seminal work has made crucial contributions to our understanding of tradition by taking the scholarship on tradition from philosophy to the disciplines of anthropology and the study of Islam generally. He famously proposed that Islam be studied as a discursive tradition, rather than an artifact in the museum of ideas accessible in the great classical books, as Orientalists have done, or an epiphenomenon of socio-political forces, as social scientists have tended to do. But even more important is Asad's concern with power, as he took the concept of discursive tradition out of the conditions of the "seminar room" assumed by many philosophers and theorists, such as MacIntyre and Habermas, into the real world, where discourse informs and is informed by practice and is articulated inevitably in the context of power relations that

21 The classical role of the scholars of religion in liberal academia, although increasingly challenged, has been brought out in the aptly-titled monograph by Russell McCutcheon, *Critics Not Caretakers: Redescribing the Public Study of Religion* (Albany: SUNY, 2001).

are crucial to understanding traditions.[22] For instance, the American Muslim discourse on terrorism, violence, *jihād*, war, and reform in Islam in the years immediately after 11 September 2001 obviously cannot be understood purely on the basis of the intellectual resources of Islam, rational critique, or contributions to this discourse by academic scholarship. More often, however, the ways in which power relationships inform and are informed by discourses are not so blatant and require closer investigation.

In the context of the aforementioned epistemological crisis of the modern world and its fundamental moral uncertainties, power relations, sustained as they are today by incredible military and economic might, have become evermore pervasive and normalized, rendering normative ideals ever-less relevant. Any project of Islamic reform, therefore, must respond to and be ever-vigilant of the dual challenge of the modern epistemological crisis and the power inequalities that characterize the modern world. Given the odds, of course, it might be no more than foolhardy optimism to suggest that a reconstituted Islamic tradition just might provide Muslims a way to face these multifarious challenges. The present essay, nevertheless, is an invitation to a sustained inquiry into the conditions in which the Islamic discursive tradition may survive or, more precisely, resuscitate itself, rather than being merely an epiphenomenon reflecting the workings of this dual peril.

Islamic seminaries in the West, if and as they are established, will certainly have their place in establishing the Islamic tradition in the West, but they will have to fight an uphill battle. Even if Western Muslim communities were as resourceful and established as their Jewish and Christian counterparts, their support of seminaries would ultimately face the same challenges that Jacob Neusner complains afflict the already established Jewish seminaries. An increasingly secularizing community distinguished only by its loose and melting identity is unlikely to appreciate and invest heavily in traditional learning, except for the immediate and limited goal of the production of imams and chaplains, whose training requires more attention to counseling and social services than discursive traditional depth. Therefore, while an important need, seminaries are unlikely to address the great deficit of critical knowledge or meet the standards of research that departments of Islamic studies or related disciplines housed in resourceful, mainstream American universities take for granted. Furthermore, without an accessible discursive tradition that is critical yet committed to Islam, such seminaries, even when they develop, are likely to become a source of traditional reactivism of one brand or another and of

22 Armando Salvatore, *The Public Sphere: Liberal Modernity, Catholicism, Islam* (New York: Palgrave Macmillan, 2007), 83–4.

popular American spirituality peppered with uncooked academic theories—as indeed one can already observe in the brew. If the Islamic discursive tradition in the West is to hold its own in a competitive academic scene and in critical conversation with the larger (that is, Western and now global) humanities and social sciences, its best chance may be Western Muslim academics who would commit to working within it as a discursive community while holding themselves and their colleagues to the highest critical standards, emulating and excelling their Western contemporaries as well as classical antecedents.

2 Islamic Tradition: *Sharīʿa* and Its Scope

Now I turn to my interlocutors within the Islamic tradition and justify my choice of terminology and the attendant conceptual toolset, addressing why I speak of "discursive tradition" rather than terms more indigenous to Islamic tradition such as Sharīʿa, *fiqh*, and the like. I opt for the term "discursive tradition" with the generic qualifier "Islamic" in part because it is analytically useful in conversation with Western scholarship, as I have shown in the foregoing, and in part because it can help avoid the internal polemics and complex history that inevitably surround any terms indigenous to Islamic discourse.

The key question of who is an insider versus outsider, or the etic/emic debate, is at the heart of any tradition, for it is a matter not only of defining a tradition but also authority, its distribution and limits, and requires us to examine the discursive mechanisms of control, persuasion, and continuity through time. Any community identified by a religious tradition must distinguish its members from non-members; some, like Christianity, emphasize faith or creed, whose uniformity may be enforced or upheld through an institution; others, like Judaism, may emphasize lineage and ritual law, thus relaxing to a degree the priority of dogma; yet others, like historical Hinduism, might relax it all and rely on attachment to a relatively isolated territory as its guarantee of survival through time. In Islam, the attachment has been to a set of scriptural texts which give creedal as well as practical dimensions to membership in Islam. Due precisely to this multidimensionality, relaxation in any one dimension can be accommodated so long as a discursively justified relationship to the foundational scriptural texts is maintained.[23]

One crucial issue pertaining to Islamic authority is whether Islam is to be understood primarily as a legal system—and whether, therefore, its ultimate

23 An important American Muslim contribution in this respect is Jackson, *Boundaries*, which is an annotated translation of al-Ghazali's *Fayṣal al-tafriqa*.

arbiters must be jurists. The implications of this difference can be evidenced by the recent debates on the viability of the Sharīʿa, understood as Islamic law, in the modern world. When Wael Hallaq declares that the Sharīʿa is effectively dead and all modern attempts to resuscitate it are futile, he assumes a certain notion of the Sharīʿa.[24] To him, the Sharīʿa is a legal tradition, a complex and marvelous one, historically generated by Muslim jurists over many centuries. This accretist and legalistic notion of the Sharīʿa is taken for granted by many contemporary legal scholars, from Hallaq to his traditional counterparts at al-Azhar and elsewhere. Only if the Sharīʿa is thus understood does the debate about its extinction or fatigue become meaningful—for in this view any degree of faithful commitment to the scriptural texts by contemporary Muslims is not sufficient to resuscitate the Sharīʿa.

In a recent monograph, *The Fatigue of the Shari`a*, Ahmad A. Ahmad places Hallaq's erudite challenge in the context of a similar debate in classical Islam (ca. 4th/10th–7th/13th centuries) and thus manages to bring out the profound multidimensionality of the issue. Ahmad argues that the Sharīʿa has become ingrained in the institutions and culture of Muslim societies more deeply than Hallaq grants, and that the nation-state may not be as total in its reach as Hallaq assumes.[25] As Ahmad shows, the theological possibility of the fatigue of the Sharīʿa, which was a distinctly Ashʿarī position, was rejected by the Ḥanbalis and Muʿtazilīs alike, because they rejected the Ashʿarī notion that ethical verities (the knowledge of the good and evil nature of acts) are inaccessible to human reason and limited to the explicit word of revelation.[26] The difference between the Ashʿarīs and the Ḥanbalīs should not be overstated, of course, because they agreed in denying rational ethical verities any eschatological efficacy (meaning, reward and punishment in afterlife accrue only based on revelation, not on norms known only by reason). Ibn Taymiyya (d. 728/1328), a

24 Note that this was Wael Hallaq's position in his 2003 article (cited below), a position he considerably revised in his seminal monograph *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2012), and which he may have further revised since.

25 Ahmad A. Ahmad, *The Fatigue of the Shari'a* (New York: Palgrave Macmillan, 2012), 22; 104 (where Ahmad argues that the legal elites of the Sharīʿa have suffered but nonetheless survived and influenced modern Muslim societies); 147 ("The Shari'a as a legal science, as a language and a profession serving multiple professions, and as culture and sensibilities, as a political and social and organizational legacy, is too complex to be given a death certificate or authoritatively claimed to have reached a degree of unprecedented fragmentation"); 157 (both the intellectual and social infrastructures of the Sharīʿa appear to be alive); 171 (it is found away from the state's reach, "unsupervised" and "underground").

26 Ibid., 181.

magisterial critic of classical Islamic heritage, generally endorsed this Ḥanbalī position, but his systematic emphasis on justice, politics, and the agency of the Muslim community in commanding good and forbidding wrong, unusual even in the Ḥanbalī tradition,[27] led him to a notion of Islamic normativity (Sharīʿa) in which reason played a greater role in areas where the explicit texts were silent. But how does this contextualization mitigate Hallaq's challenge?

Elsewhere, I have challenged the legalistic view of Islamic tradition by focusing on Ibn Taymiyya's intervention, and suggest that Hallaq's challenge loses some of its force because Islamic politics has always been essential in creating the conditions for Islamic law to operate, and the modern world should be no exception.[28] On Ibn Taymiyya's view, justice being the arch-imperative and ultimate good of the Sharīʿa, if "right reason" has access to the knowledge of good (justice) and evil (injustice), then any pursuit of justice becomes a revelational imperative with eschatological efficacy—thus rational and just politics may be deemed fully a part of the Sharīʿa.[29] One way to state this is that for Ibn Taymiyya the Sharīʿa, limited by the classical formalist juristic method to the specific (*khāṣṣ*) commandments, becomes extended under the guidance of the general (*ʿāmm*) texts.

Hallaq's challenge, despite the aforementioned studies that considerably challenge its terms, still stands: one that can be met, as Hallaq himself suggests, only if the political will of a legitimate Muslim state along with its Muslim citizens embraces the project of resurrecting the Sharīʿa, holding the modern nation-state under scrutiny as they negotiate reform within the Sharīʿa—rather than the one-way reform of the Sharīʿa to meet modern imperatives hitherto imposed.[30]

A revitalized Islamic discursive tradition is the ground on which the conditions for the Sharīʿa to be rethought and provide a persuasive, reasoned, and viable alternative to the modern trinity of the nation-state-capitalism-secularism may be cultivated. And alternative visions of life will be needed direly if this trinity—after consuming away the very planet and the people that

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27 Ovamir Anjum, *Politics, Law and Community in Islamic Thought: The Taymiyyan Moment* (Cambridge: Cambridge University Press, 2012), in particular, ch. 5–6.

28 Ibid.

29 One should note the absolutely central caveats for Ibn Taymiyya that justice is defined first and foremost by the known revelational texts and cannot contradict them, and that the *salaf* remain the best judge of the primary meanings of these texts.

30 Wael Hallaq, "Can the Shari`a be Restored?" in *Islamic Law and the Challenge of Modernity*, eds. Y. Haddad and B. Stowasser (Lanham: Altamira Press, 2004), 22. In the same year as I wrote this essay, Hallaq's *Impossible State*, mentioned earlier, was published.

have fed it and that it has for the most part refashioned—ever leaves us an earth that is still inhabitable. Realistically, it might already be too late.[31]

3 Conclusion

It is obvious to the point of banality that contemporary attempts at Islamic reform, including that in the Muslim world, are westernizing, or at least in response to the West. These reform projects have, as such, yet to take any serious notice of (let alone rethink their objectives and values in view of) the Western internal rethinking as well as the colossal disasters—including climate change, squashing of indigenous cultures, and increasing economic disparity—that modernity has wrought globally.[32]

When thinking of reform, Muslim reformers would do well to note that the historical, networked, discursive nature of Islamic tradition is particularly suited in a world of colossal contradictions, inequalities, and uncertainties. Any rethinking in such a tradition is necessarily a combination of acculturation and self-reform (through the tradition), deconstruction (of claims for and against the traditional norms), synthesis, and accommodation. This rethinking then is submitted to the never-ending collective review. We may therefore wonder if the "reform" of Islam, so wide a desideratum among Westerners and Western Muslims, is a useful way to describe this task; as Talal Asad has recently noted, one *lives* rather than *reforms* a tradition, and while living, one engages in any number of conversations, self-criticism, and rethinking.[33] A Martin Luther of Islam, in any case, is neither imminent nor necessary. Often taken as a tragedy,

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31 Sir Martin Reese, President of the Royal Society of the United Kingdom, declares that "the odds are no better than fifty-fifty that our present civilization on earth will survive to the end of the present century." James G. Speth, who has served as Yale's Dean of Forestry and Environmental Studies and official of or advisor to the US government under Carter and Clinton administrations—one does not get more mainstream than this—is a bit more optimistic. He declares solemnly that not only modern capitalism but the very mode of being that is defined by modernity must be abandoned and alternatives found in which happiness is sought in community and spirituality rather than in material progress, growth, conquest (of nature and peoples) and consumption. James G. Speth, *The Bridge at the End of the World: Capitalism, the Environment, and Crossing from Crisis to Sustainability* (New Haven: Yale University Press, 2009), 6, 233ff.

32 Ovamir Anjum, "Do Islamists Have an Intellectual Deficit?" in Shadi Hameed and Willian McCants (eds.), *Rethinking Political Islam* (New York: Oxford University Press, 2017).

33 Personal communication, June 21–28, 2012; also, see my "Interview with Talal Asad," *American Journal of Islamic Social Sciences* 35, no. 1 (2018): 55–90.

that modernity encountered the Islamic tradition a century or two after the Christian tradition may after all be a blessing in disguise. Living and thinking critically through Islamic tradition is an ongoing, collective, and long-term endeavor. Therefore, critical humility and patience (rather than the bold arrogance and rash heroism that too often afflict reformers) are the appropriate attitudes when engaging in this endeavor.

Furthermore, given the networked nature of Islamic discursive tradition, there is unlikely to ever be an "American Islam," just as there has never been a stable "Egyptian Islam," "Chinese Islam," or "Saudi Islam"—for the simple reason that no Muslim authority can for long ward off reasoned challenge from outside on the basis of local, ethnic, or nation-state boundaries. The Western node of this immense network, with the opportunity to face modernity in a more intimate and candid way than any else, might be in a crucially important position at this historical moment. The half-life of the solutions it provides will depend on the density of its discourse, which, all else being equal, will depend on both the quality of Western Muslim scholarship and the ability of the scholars to engage with their critics and opponents within the tradition, rather than seeking unfair advantage in a necessarily unequal playing field.

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