Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law

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I. INTRODUCTION

If the salient question of the twentieth century was race, first as manifested in European imperialism and then in international decolonization and domestic civil rights movements, the corresponding question of the twenty-first century may very well be religion, particularly Islam. Even in the absence of September 11th, several long-term global trends would have made it almost inevitable that previously specialized debates on the compatibility of Islam and human rights law would become an important concern to policymakers throughout the world. Among these are (i) the revival in religious expression and assertions of religious identity among all major religions, including Islam; (ii) the presence of large numbers of Muslims in established democracies and major developing countries aspiring to enter the club of advanced democracies (for example China, India, and Russia); and (iii) the success of religiously-based political movements in Muslim-majority states demanding greater Islamization of the state and society and the corresponding retreat of secular politics.

Many, if not all, Islamic political movements have an ambiguous position toward human rights law; they tend to endorse the concept as an abstract principle while objecting to certain substantive provisions of human rights law. This ambivalence is reflected in the policies of Muslim-majority states. Many of these states ratify international human rights conventions but do so subject to a reservation that, in the event of a conflict between provisions of the treaty and Islamic law, the provisions of Islamic law control.[1] Indeed, relevant international

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1 This policy of ratifying an international convention, such as the Convention for the Elimination of Discrimination Against Women ("CEDAW"), subject to an Islamic law reservation, has drawn

instruments themselves have created a tension between human rights law—which is focused primarily on the individual—and cultural rights law which recognizes the right of a state to act to protect its culture or way of life. Moreover, the reluctance of many Muslim-majority jurisdictions to accede without qualification to human rights instruments because of Islamic law creates concern as to the willingness and ability of Muslim minorities to conform to the domestic human rights standards of established democracies. This in turn contributes to fostering domestic political movements in various democracies that promote fear of Muslim immigrants as a subversive cultural and political force.

Given these political realities, human rights advocates have to tread a careful line in their approach to issues that potentially conflict with Islamic law. On one hand, too categorical of an approach risks violating legitimate rights of religious expression and contributes to an overall political climate in which the political rights of Muslim individuals may be infringed upon equally by hostile non-Muslim majorities or authoritarian regimes in the Muslim world resisting calls for increased democratization on the argument that to do so would only empower illiberal elements of their societies. Yet on the other hand, too deferential an approach risks tolerating systematic violations of human rights norms in Muslim majority jurisdictions or in multicultural societies with Muslim minorities.[2]

II. A RAWLSIAN APPROACH TO INTERNATIONAL HUMAN RIGHTS LAW AND ISLAMIC LAW

This Article seeks to build on overlapping concerns of human rights law and Islamic law in the hope of mapping out a principled approach to resolving conflicts between contemporary human rights standards and accepted doctrines

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the ire of human rights lawyers. See, for example, Ann Elizabeth Mayer, *Internationalizing the Conversation on Women's Rights*, in Yvonne Yazbeck Haddad and Barbara Freyer Stowasser, eds, *Islamic Law and the Challenges of Modernity* 133, 136 (AltaMira 2004) (stating that Arab countries which adopt the CEDAW subject to an Islamic law reservation thereby "indicat[e] their determination to adhere to nonconforming domestic standards"). See also Michael Schoiswohl, *The New Afghan Constitution and International Law: A Love-Hate Affair*, 4 Intl J Const L 664, 672 n 39 (2006) (mentioning various Muslim countries that have entered Islamic law-based reservations to CEDAW).

2 For an excellent discussion of the problematic relationship that international human rights organizations have developed with Islamic law, see Naz Modirzadeh, *Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds*, 19 Harv Hum Rts J 191, 193 (2006). For an example of the impact the issue of Islamic law can have on Muslim minorities in jurisdictions committed to multiculturalism, see Natasha Bakht, *Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy—Another Perspective*, 40 Ottawa L Rev 67 (2006).

of Islamic law.[3] This strategy is based on concepts developed by John Rawls in his seminal work *Political Liberalism*,[4] and argues that much of the current conflict between the substantive norms of human rights law and Islamic law could be resolved if human rights justifications were grounded in an overlapping political consensus rather than in foundational metaphysical doctrines that are necessarily controversial. In other words, I argue that it would be possible to resolve conflicts between substantive human rights provisions and Islamic law if human rights advocates and Islamic law advocates both agreed to observe the limitations of "public reason." Public reason for Rawls is a term of art that refers to a particular mode of reasoning that citizens use in their public deliberations on constitutional essentials and matters of basic justice. Public reason limits citizens to advance only such positions as they may justify on grounds that they reasonably believe others as free and equal could reasonably accept.[5]

For purposes of developing this argument, I assume that for most liberals (individuals with commitments derived from the philosophy of Kant or Mill, for example), deviations from an equality norm—so long as the deviation is voluntary and rational from the perspective of the concerned individual—do not raise a *political* concern, even if liberals might question the wisdom of such a choice. Accordingly, a Muslim woman who would only consider marriage to a Muslim male—based on her free religious conviction that marrying a non-Muslim spouse would be sinful, even if a Muslim male is permitted to marry certain non-Muslim women—does not raise a concern for human rights law. It is only when a state would prohibit her from marrying a non-Muslim on the grounds that such a marriage is invalid under Islamic law that a human rights violation occurs. An individual's voluntary and subjectively rational deviation from an equality norm, moreover, may not be consistent with liberal notions of personal autonomy. But, to the extent that such a deviation is driven by properly motivated religious observance, the human right to free exercise of religion also supports—and perhaps even requires—permitting such conduct, even if it results in inequality that would violate human rights norms were such conduct to be mandated by the state. Whatever the proper standard for restricting free exercise of religion may be, it cannot be the case that the exercise of religion that results in deviation from a secular norm of equality results in a per se violation

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3 Obviously, the substantive content of both human rights law and Islamic law is dynamic, and although one cannot preclude radical doctrinal change in either body of law, for purposes of this Article I will assume that the current rules in each system are stable or are only amenable to long-term change.

4 John Rawls, *Political Liberalism* (Columbia 1993).

5 Id at xliv, l.

of human rights norms.[6] Accordingly, liberals should be indifferent to the existence of non-egalitarian outcomes—from the perspective of liberalism—in civil society resulting from individual choice, so long as those choices are not the result of state-backed coercion.

Similarly, I also assume that most Muslims are indifferent to any specific legal regime so long as that legal regime does not compel them to undertake acts that they subjectively deem sinful or prevent them from fulfilling the devotional elements of Islam. Accordingly, Muslims should be indifferent to whether a state enacts positive legislation mandating an Islamic vision of the good, so long as the state gives Muslims the freedom to live in accordance with that vision.

While liberalism and Islam are philosophically incompatible as comprehensive theories of the good, Rawls suggests that they nevertheless may agree on enough basic political propositions such that their relationship is characterized by an "overlapping consensus." An overlapping consensus exists when individual citizens—despite their profound moral, philosophical and religious divisions—are nevertheless able to endorse the basic political structure of society for reasons that each finds morally persuasive within her own system of moral, philosophical or religious commitments.[7] It is worth exploring this possibility since the payoff would be quite significant—the emergence of a truly universal human rights regime, and the reduction in the scope and scale of tensions between individual Muslims and the world order.

Elsewhere, I have argued that public reason is legitimate from the perspective of Islamic theology, ethics, and law.[8] Given that Islamic law in its current form reflects the norms of a pre-modern legal culture, it must be subjected to review for compatibility with the norms of public reason. But this process should be no different from that which occurred in other jurisdictions that transitioned from legal systems that recognized gender and legal hierarchies to legal systems in which norms of non-discrimination largely prevail.

From the perspective of public reason, pre-modern Islamic law is problematic because it permits (indeed, in many cases, mandates) discrimination on the basis of religion[9] and gender.[10] Moreover, in the case of the *hudud*

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6 Likewise, I assume that liberals would not object to a newspaper publishing an advertisement by a Muslim woman who seeks a spouse where the express terms of the advertisement are limited to Muslim males.

7 See, for example, Rawls, *Political Liberalism* at Lecture IV – *The Idea of an Overlapping Consensus* (cited in note 4).

8 Mohammad H. Fadel, *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law* (forthcoming 2008, *Canadian Journal of Law and Jurisprudence*) (manuscript on file with author).

9 Non-Muslims under traditional Islamic law were tolerated, but were not given the same civic rights as Muslims. In addition to being subject to a special tax, they also suffered some legal

offenses,[11] the substantive penalties that Shari`ah requires to be imposed, such as amputation for theft and stoning for adultery, cannot be justified on the grounds of public reason.[12] The *hudud* raise particularly thorny problems since, according to orthodox theological opinion, the state is obligated to apply these punishments once the substantive elements of the crime have been proven.[13]

Therefore, from a Rawlsian perspective, at least some rules of Islamic law will have to be revised to meet the requirements of public reason. This obligation to revise doctrine in order to make it compatible with public reason also applies to international human rights law. In the case of the latter, though, what needs to be revised is not so much substantive doctrine, but the justification for the doctrines. To the extent that international human rights norms are derived from metaphysical conceptions of personhood—especially liberal conceptions of personhood—they will necessarily conflict with the theological premises of not only Muslims, but also traditionalist adherents of other theistic faiths, and therefore are impermissible justifications for the norms. Instead, international human rights norms should limit themselves to *political* conceptions of the person in order to increase the likelihood that Islamic countries will endorse international human rights norms freely and without reservation.

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disabilities, including the inadmissibility of their testimony in courts of law. Although some public offices were open to non-Muslims, they could not, for example, serve as judges in Islamic courts.

10 Islamic law facially violates contemporary notions of gender equality, in family law principally. It should be noted, however, that there are other discriminatory norms in areas unrelated to gender. For example, descendants of the Prophet Muhammad are forbidden under Islamic law from receiving alms.

11 The *hudud* offenses consist of seven crimes—adultery/fornication, slander, theft, brigandage, wine-drinking, apostasy, and rebellion—whose penalties are legally fixed and for which the state lacks any enforcement discretion once the elements of the crime have been proven. See Robert Postawko, Comment, *Towards an Islamic Critique of Capital Punishment*, 1 UCLA J Islamic & Near E L 269, 286–87 (2002).

12 Numerous modern Muslims have proposed theories that would justify departing from classical doctrine regarding the necessity of the application of the *hudud* penalties. See, for example, Khaled Abou El Fadl, *The Place of Ethical Obligations in Islamic Law*, 4 UCLA J Islamic & Near E L 1, 11–12 (2005) (describing the decision of medieval jurists to treat the specified punishments associated with the *hudud* as being immutable as "erroneous" and "unfortunate"). For purposes of this Article, I assume that substantial numbers of Muslims—for the foreseeable future—will continue to adhere to orthodox doctrine on this question, and, accordingly, the problem of *hudud* and international law will remain salient.

13 As a practical matter, the issue of legal discrimination justified by appeals to Islamic law is a much greater practical problem than that posed by the *hudud*, since only a handful of Muslim jurisdictions continue to apply these penalties. Because of the categorical nature of the penalties, and probably because they have come to symbolize Islam, however, many Islamic political movements have made vocal demands for the application of these penalties as proof that the legal system is Islamic. Accordingly, the problem posed by the *hudud* is already politically salient and could become legally salient in an increasing number of Muslim jurisdictions in the future.

In setting forth my arguments for how public reason would approach the problem of reconciling Islamic law[14] and international human rights law, I begin with a brief discussion of rules of Islamic law that are already consistent with public reason, and then proceed to those rules that may be in conflict with it. The set of rules that may be in conflict with public reason are divided into three categories: (i) permissive rules (for example, the right to own slaves or the right of a man to marry more than one wife); (ii) mandatory rules with which voluntary compliance could be consistent with the requirements of public reason (for example, Islamic inheritance law); and (iii) mandatory rules that are categorically repugnant to public reason (for example, the criminalization of apostasy).

I will consider the extent to which international human rights norms or justifications need revision in light of the limitations of public reason simultaneously with my discussion of the Islamic rules of law. One category of such Islamic rules represents rights that are either categorically repugnant to norms of public reason or could be legitimately regulated or even proscribed under the norms of public reason (for example, the right of males to have multiple wives). Next, I will consider another category of rules that are inconsistent with public reason, but could be reconciled without any revision of Muslim theological or ethical commitments. If the Islamic rule is mandatory and cannot be reconciled with the requirements of public reason without a revision to Islam's theological commitments, it imposes on the believer an obligation to act and thus does raise a question of conscience. Where this stands in contrast to the merely permissive category of rules described above, I ask whether the voluntary adherence by a Muslim to the Islamic norm—in contrast to state application of that norm—would be consistent with public reason. This inquiry inevitably entails a discussion of the extent to which public reason would permit granting religious believers exemptions from otherwise valid laws. Finally, I will explore whether there are any mandatory rules of Islamic law that are categorically repugnant to public reason, and therefore require theological revision.

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[14] Islamic law, for purposes of this Article, includes the rules of all historically recognized schools of Islamic law, and assumes the legitimacy of *talfiq*—the right of the legislator to pick and choose rules from more than one school of substantive law. Accordingly, I assume that Islamic states that include Islamic law as a source (or *the* source) of its positive legislation will usually begin with the rule, regardless of the school in which it originates, that is closest to the norms of international human rights law.

III. Reconciling Islamic Law and International Human Rights Law with Public Reason

A. Rules of Islamic Law That are Consistent with Public Reason

An exercise in reconciling Islamic law to public reason would be futile but for the fact that the bulk of substantive Islamic law is generally consistent with notions of public reason. For example, the legal doctrines set forth in the numerous treatises that pre-modern Muslim jurists wrote describing the rules governing the conduct of the state and the judiciary generally are consistent with notions such as: (i) the government is the agent of the governed and therefore exists to further the welfare of the ruled; (ii) individuals are rights-bearers whose rights cannot be infringed without due process of law; (iii) mature individuals have the legal capacity to direct their affairs autonomously without the interference of the state or others; (iv) parties to a judicial proceedings must be given notice and an opportunity to be heard, a right that includes the right to present evidence and impeach the other party's evidence; (v) judges must be neutral and disinterested and are to rule based on evidence admitted pursuant to general rules of evidence rather than their personal knowledge of the case; (vi) government agents are subject to the law; and (vii) the government may not take private property except for a permitted purpose and with compensation to the owner.[15] Similarly, Islamic private law, while perhaps obsolete, is generally non-discriminatory and therefore already consistent with public reason.[16] This much is, or ought to be, non-controversial.

Less well-known, perhaps, are rules of Islamic law that robustly protect sexual privacy,[17] most notably the evidentiary hurdles related to the prosecution

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15 For a general discussion of the structural features of Islamic law that make it conducive to such a conception of government, see John A. Makdisi, *The Islamic Origins of the Common Law* 77 NC L Rev 1635, 1703–12 (1999).

16 A good example of the obsolescence of some rules of Islamic law is its proscription of many contracts involving contingent payoffs, and for that reason does not recognize the validity of commercial insurance. See Mahmoud A. El-Gamal, *Islamic Finance: Law, Economics and Practice* 61 (Cambridge 2006). For the non-discriminatory nature of Islamic private law, see Fadel, *The True, the Good and the Reasonable* at *88 (cited in note 8). This does not mean that historical or contemporary Muslim societies were or are always successful in adhering to the models of legality they set out for themselves; that is a different question from whether the rules themselves and the commitments implicit in those rules are consistent with public reason.

17 See Muhammad b. Yusuf al-Mawwaq, 4 *al-Taj wa al-iklil li-mukhtasar khalil* 104 (Dar al-fikr 1992) (prohibiting the government from interrogating a woman found in the company of dissolute men to determine whether she had engaged in sexual misconduct, although she could be punished for a lesser crime on the grounds that the purpose of the law is to protect privacy). See also al-Mawwaq, 4 *al-Taj* at 497 (cited in note 17); Ahmad b. Muhammad b. Ahmad al-Dardir, 2 *al-Sharh*

of adultery.[18] This principle also manifests itself in other areas of the law and generally has the effect of enhancing the autonomy of women, particularly with respect to their procreative lives. For example, the legal principle that "women are the trustees of their wombs" operates to preclude judicial inquiry into matters such as whether a pregnancy terminated as the result of an abortion or a miscarriage, or whether a divorcee has completed her "waiting period," meaning that (i) her first husband loses the right to remarry her without her consent (including a new contract and new dowry) and (ii) she becomes free to marry again. This same principle also barred expert evidence as proof of penetration in the case of a rape claim.[20] This same principle has been invoked to deny a husband's claim that his ex-wife aborted his child after their divorce, even in circumstances where immediately after the divorce the wife had claimed pregnancy.[21] Likewise, medical evidence to determine whether a bride was a virgin at the time of marriage has been held not admissible in a suit brought by a husband alleging that his bride was not a virgin. Furthermore, in the case where a husband claimed that his bride had engaged in intercourse prior to the

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al-saghir 483 (Dar al-ma'arif 1972–1974) (Mustafa Kamal Wasfi, ed) (a female's guardian, in connection with contracting her marriage, was obliged to conceal any sexual misconduct of the bride).

18 See generally Seema Saifee, Note, *Penumbras, Privacy, and the Death of Morals-Based Legislation: Comparing U.S. Constitutional Law with the Inherent Right of Privacy in Islamic Jurisprudence*, 27 Fordham Intl L J 370 (2003) (describing Islamic law's protections of privacy, particularly as relating to private sexual conduct). See also Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective*, 18 Mich J Intl L 287, 295–297 (1997) (describing Islamic law's according priority to privacy in prosecution of consensual adulterers).

19 See al-Mawwaq, 4 *al-Taj* at 104 (cited in note 17) (woman's statement regarding the termination of her waiting period—whether by conclusion of three menstrual periods or by conclusion of pregnancy, whether by miscarriage or delivery—is to be accepted by a court without the woman's oath); Muhammad 'Illaysh, 4 *Sharh minah al-jalil 'ala mukhtasar al-'allama khalil* 190 (Dar al-fikr undated) (accepting a divorced woman's statement that her waiting period has concluded without requiring her to swear an oath, after which her divorce is final and may remarry); 4 Ahmad b. Ahmad al-Qalyubi, *Hashiyat al-Qalyubi wa 'Umayra* 4 (Molvi Mohammed Bin Gulamrasul Surtis Sons undated) (a woman's sworn statement regarding the termination of her waiting period following divorce is to be accepted without additional proof); Muhammad al-Khatib al-Sharbini, 3 *Mughni al-muhtaj ila ma'rifat alfaz al-muhtaj* 339 (Dar al-fikr undated.) (same); Abu Yahya Zakariyya al-Ansari, 2 *Fath al-wahhab bi-sharh manhaj al-tullab* 88 (Dar al-fakr undated) (same); 4 Hashiyat al-Jamal 'ala sharh al-manhaj (Chapter on Revocable Divorce) (included in the *Encyclopedia of Islamic Jurisprudence* (Harf v 3.01 2002), available online at <http://feqh.al-islam.com> (visited Apr 21, 2007)) (same).

20 Abu al-Walid Sulayman b. Khalaf al-Baji, 5 *al-Muntaqa sharh al-muwatta* 269 (Misr: Matba'at al-sa'ada, 1914) (the statement of a free woman claiming to have been raped is to be accepted by the court even if she is examined by females who, after examining her, claim she is a virgin).

21 See Muhammad al-'Illaysh, 2 *Fath al-'ali al-malik fi al-fatwa 'ala madhhab al-imam malik* (Chapter on Torts and Misappropriation) (included in the *Encyclopedia of Islamic Jurisprudence* (cited in note 19)).

marriage, he was subject to punishment as a slanderer, even if the marriage contract represented that she had never been married.[22]

Finally, upon attaining the status of a legal adult, a woman's right to marry a husband of her choosing is not contingent upon the approval of her male kin.[23] The right of women to control their bodies is even implicitly recognized in the refusal of Islamic law to recognize any legal obligation for a mother to nurse her child, except in circumstances where the life of the child is at risk.[24] A woman's right to bodily integrity is also reinforced by a rule allowing a wife to sue her husband for compensation from injuries suffered at his hand, despite the husband's nominal legal right to discipline his wife.[25] Moreover, where a husband and wife disagree as to the whether the husband beat the wife or lawfully disciplined her, the law of evidence presumes the truth of the wife's claim.[26]

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22 Al-Dardir, 2 *al-Sharh al-saghir* at 476 (cited in note 17); al-Mawwaq, 3 *al-Taj* at 490–91 (cited in note 17). Al-Hattab points out in his commentary, *Mawahib al-jalil*, that the evidentiary rule governing this dispute—that the bride wins the case by swearing an oath—applies only on the assumption that breach of a contractual representation of virginity results in an annulment of the marriage, a rule that is itself controversial within the Maliki school. See Muhammad b. Muhammad b. 'Abd al-Rahman al-Hattab, 3 *Mawahib al-jalil li-sharh mukhtasar Khalil* 490–91 (Dar al-fikr 1992).

23 Indeed, it may be that it was the recognition of the contradiction between the robust protection of the rights of adult women to choose their mate and the rule permitting fathers to marry off their minor daughters that led 'Izz al-din b. 'Abd al-Salam, a prominent thirteenth century Egyptian/Syrian jurist to justify—even though such a rule diminishes the child's autonomy interests—the latter rule on the basis of necessity. 'Iz al-din b. 'Abd al-Salam, 1 *Qawa'id al-ahkam fi masalih al-anam* 89 (Dar al-ma'rifa undated). Accordingly, the right of the power to contract binding marriages for his children is recognized as an exception to the general rule of autonomy in personal affairs.

24 Women may be contractually bound, however, in certain cases to nurse their children. Such an obligation to nurse is an incident of the marital contract. In the absence of an express agreement, the Malikis looked to custom, concluding that for most women, the implied term of their contract required them to nurse. The contracts of wealthy women, however, were understood to lack such a condition. In theory, at least, even poor women could contract out of the requirement to nurse their children. Only in circumstances where the child refused the breast of available wet nurses and would nurse only from his birth mother, was the birth mother legally obligated to nurse. This obligation arises out of the duty to save the child's life, however, not out of the duties of motherhood. In such a case, the mother was entitled to compensation for her labor, either from the child or the father.

25 Al-Dardir, 2 *al-Sharh al-saghir* at 512 (cited in note 17) (stating that wife-beating is an assault and entitles her to compensation and judicial divorce); al-Hattab, 4 *Mawahib al-jalil* at 15 (cited in note 22) (stating that a wife whose husband has beaten her is entitled to compensation) and al-Hattab, 6 *Mawahib al-jalil* at 266 (cited in note 22) (noting that the wife was entitled to special damages (*diya mughallaza*)); 'Illaysh, 9 *Fath al-'ali al-malik* at 138 (cited in note 21) (same).

26 Ahmad b. Muhammad al-Sawi, 2 *Bulghat al-salik ila aqrab al-masalik* on the margin of al-Dardir, 2 *al-Sharh al-Saghir* at 511 (cited in note 17) (where the spouses disagree whether the husband exercised lawful discipline or committed abuse, the wife is presumed to be truthful unless the

B. Permissive Rules of Islamic Law and Public Reason

Islamic law includes permissive rules, such as the right to own a slave, the right of a man to marry more than one woman, and the qualified right of a husband to discipline his wife, which contradict both the requirements of international human rights law and public reason. Because such permissive rules do not raise a question of conscience for a committed Muslim—as by definition he is not obliged to invoke these permissive rights—elimination of these rights would not appear to be problematic.[27] These three issues should be particularly easy, since Islamic law has traditionally viewed both slavery and polygamy unfavorably, even if legally permissible, and has viewed a husband's right of marital discipline with discomfort.

Thus, Islamic law restricted the supply of slaves by first prohibiting the enslavement of Muslims or non-Muslims who were permanent residents of an Islamic state, even if such enslavement was pursuant to a contract and, second, by presuming that individuals in the territory of an Islamic state were free. Islamic law also encouraged manumission by imposing a duty to manumit slaves as a means for expiation of various sins. Islamic law further instituted a reduced evidentiary burden to prove acts of manumission, so that even ambiguous language—regardless of subjective intent—could be sufficient to result in the manumission of a slave. Finally, Islamic law has often manumitted slaves as a remedy for abuse of a slave by a master. The pro-liberation policy of Islamic law toward slavery was expressed in the legal principle that "the Lawgiver looks forward to freedom."[28] Accordingly, an absolute prohibition of slavery does *not* raise a question of conscience for Muslims and would arguably further the Islamic view of the good, even if traditional Islamic law did not consider slavery to be a categorical evil.

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husband is well-known for piety); al-Hattab, 4 *Mawahib al-jalil* at 15 (cited in note 22) (wife is presumed to be truthful in a dispute with husband regarding the proper characterization of the husband's action).

27 In this case, the justifications of the prohibition or the regulation would be important from the perspective of a traditionalist Muslim. Even if he could comply in good faith with the prohibition, he may not be able to accept a particular justification of that prohibition on controversial metaphysical grounds, in which case he would be forced to express opposition to the rule in question, at least to the extent that the legislation was deemed to be the manifestation of a moral doctrine that the traditionalist Muslim believes to be false.

28 For example, in a case where a plaintiff alleges that another person is her slave, but lacks direct evidence for that claim, the defendant is exempted from the otherwise applicable evidentiary obligation to swear an oath denying the plaintiff's claim on the grounds that "the law presumes the freedom of people, so the plaintiff's claim that the defendant is a slave is contrary to the law's presumption of freedom and the lawgiver's desire for freedom, thus rendering the claim very weak indeed, with the result that the defendant need not swear an oath denying it." Al-Sawi, 4 *Bulghat al-salik* at 219 (cited in note 26).

Similar arguments can be made with respect to a prohibition of polygamy. While legally permissible, it was nevertheless disfavored, and Islamic law enforced contractual protections against polygamy. A very common example of such a term was a provision called *tamlik*. *Tamlik* was a general contractual device of delegation, pursuant to which a husband could delegate to his wife the power to divorce in the event a certain contractually specified condition occurred. For example, a wife could bargain for the right to a divorce in the event that the husband was absent from the marital home for a specific period of time.[29] This same strategy could be used to provide a wife the right to a divorce in the event that her husband took another wife,[30] the right to force the divorce of the second wife,[31] or to force the manumission or sale of a concubine acquired by the husband.[32] Another rule prohibiting and criminalizing secret marriages also operated to protect the interests of a first wife.[33] Accordingly, a prohibition of polygamy—so long as based on political conceptions and not comprehensive moral doctrines—would be consistent with a traditional Muslim's normative commitments.[34]

With respect to marital discipline, while Islamic law recognizes a husband's conditional and qualified right to discipline his wife, it also subjects him to liability for injuries he inflicts on her. The law of evidence, moreover, generally requires a husband to prove, as an affirmative defense to a wife's charge of

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29 David S. Powers, *Women and Divorce in the Islamic West*, 1 Hawwa 29, 39 (2003). Indeed, in the case cited by Powers, the contract even specified the evidentiary burden the wife would need to meet in order to exercise this right, which in this case was simply her willingness to swear an oath as to his absence for the specified length of time.

30 Amira El-Azhary Sonbol, *History of Marriage Contracts in Egypt*, 3 Hawwa 159, 167 (2005).

31 Id at 168.

32 Id. See also Mohammad H. Fadel, *Reinterpreting the Guardian's Role in the Islamic Contract of Marriage: the Case of the Maliki School*, 3 J Islamic L 1, 24–25 (1998) (providing a translation of a model Islamic marriage contract from eleventh century Muslim Spain illustrating *tamlik* provisions). See also al-Dardir, 2 *al-Sharh al-saghir* at 595 (cited in note 17) (explaining that, because *tamlik* conditioned on the husband marrying another woman is intended to protect the first wife from the harm of polygamy, the husband cannot retract that delegation, in contrast to other cases in which the husband has appointed an agent to effect a divorce solely on his behalf).

33 Al-Dardir, 2 *al-Sharh al-saghir* at 382–83 (cited in note 17) (declaring secret marriages to be legally void and subject to criminal punishment). A marriage was considered "secret" if the husband asked the witnesses to conceal news of the marriage from others, even if that other is only one person and even if only for a few days.

34 I am not the first to make this argument. Fazlur Rahman as well as a senior Ottoman-era jurist made a similar argument; for the latter, see Charles Kurzman, ed, *Modernist Islam, 1840–1940: A Sourcebook* 188–191 (Oxford 2002). Tunisian legislation prohibiting polygamy, however, is an example of Islamic modernist legislation that violates public reason because the justification given is theological, namely, that the Qur'an, properly read, prohibits polygamy, rather than being rooted in public reason, for example, that it is harmful to women or children. Fazlur Rahman, *A Survey of Modernization of Muslim Family Law*, 11 Intl J Middle E Studies 451, 457 (1980).

abuse, that his use of force satisfied the requirements of legitimate discipline. In the absence of such evidence, he is presumed to have used unlawful violence against his wife, thus necessitating both monetary compensation for the wife and her right to divorce. Islamic law also reduced the evidentiary burden of a wife claiming spousal abuse by admitting hearsay evidence in such cases[35] and by permitting witnesses to testify based on circumstantial evidence of abuse.[36] Finally, moral teachings stating that only the worst of men beat their wives confirm the ethically tenuous status of the husband's right to discipline his wife within the Islamic tradition. For these reasons, a legal prohibition of such a right does not raise any ethical problems for a traditional Muslim.[37]

C. Islamic Law, Public Reason, and Questions of Fact

The second category of rules of Islamic substantive law that do not conform to the requirements of public reason involves rules that could nevertheless be made consistent with public reason simply by revising an obsolete factual assumption.[38] In other words, some rules of Islamic law are based on factual assumptions that are no longer true, even if they might have been true in the past. For instance, one such rule relates to the discriminatory norms applied to the legal emancipation of male and female children.[39]

According to pre-modern Islamic law, a male attains full legal capacity (*rushd*) simultaneously with physical puberty. A female, however, remains a minor (and therefore under the control of a guardian) until she can prove that she has attained the skills necessary for independence. Ordinarily, females

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35 Al-Dardir, 4 *al-Sharh al-saghir* at 283 (cited in note 17) (permitting witnesses to testify to abuse based on widespread second-hand reports of the spouse's abuse) and 1 Burhan al-din Ibrahim b. Muhammad b.Farhun (known as Ibn Farhun) at 281 (Dar al-kutub al-'ilmiyya undated) (same).

36 2 Ibn Farhun at 12 (cited in note 35) (circumstantial evidence permitted in cases of claims of abuse because that is all that is generally possible to obtain).

37 As Fazlur Rahman has noted, such an approach does not solve the theological problems inherent in the belief in a divine text whose teachings are taken to contemplate norms that go beyond its provisions. Fazlur Rahman, *Islamic Modernism: Its Scope, Method and Alternatives*, 1 Intl J Middle E Studies 317, 330–31 (1970).

38 Islamic law does not require deference be given to factual findings of previous generations of jurists.

39 For a more detailed discussion on the rules of capacity and the interaction of these rules with the autonomy of females in contracting their marriage, see Fadel, 3 J Islamic L at 8–11 (cited in note 32). See also Muhammad b. Idris al-Shafi'i, 3 *al-Umm* (Chapter on the Legal Incapacity of Those Who Have Attained the Age of Majority) (included in the *Encyclopedia of Islamic Jurisprudence* (cited in note 19)) (explaining that religiosity and care in the management of property apply to both males and females with respect to obtaining full legal capacity and that females generally require more time than males to obtain the experience necessary to manage their affairs since they customarily do not attend to the market from an early age as do boys).

tended not to attain full legal capacity until after the consummation of their first marriage. A woman could, however, obtain a judicial declaration of capacity (*tarshid*), in which case she would enjoy full contractual capacity, including full capacity with respect to marriage contracts. The legal justification for this discriminatory rule, however, is non-theological and is based instead on a stereotype of women being prone to waste their property.

The fact that women are given an opportunity to present evidence demonstrating their competence in managing property—in which case they are recognized as individuals with full legal capacity over their affairs including marriage and divorce—confirms the non-theological origin of this rule. Accordingly, this rule can be made to conform to public reason simply be revising the obsolete stereotype. Moreover, because such a revision would not implicate any theological presumptions, there is no reason to think that Islamic law would have a principled objection to overturning this empirical presumption. The fact that many Muslim-majority states offer equal access to education to both boys and girls suggests that the empirical basis for this stereotype should no longer apply. This would be an especially easy change to make given the spread of compulsory public education on a gender neutral basis throughout the Islamic world. Whatever empirical basis might have once existed in the past to justify treating males and females differently with respect to the capacity to manage their property, the presumption should no longer apply.

The same strategy could be used to justify the revision of other rules that are in conflict with international human rights norms and public reason, such as rules permitting the marriage of minors. Interference with minors' autonomy interests in these cases was justified on empirical grounds. Whereas pre-modern jurists believed that marriage was necessary to secure a child's well-being, especially for a female child, radically changed social circumstances now allow children, including girls, the opportunity for material security outside of marriage, at least for all but the poorest and least-developed Muslim-majority jurisdictions. Accordingly, the grounds on which the interference in children's autonomy interests had been justified as a general matter no longer exist.

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[40] Indeed, there is evidence that pre-modern Moroccan jurists had already dispensed with this discriminatory presumption and recognized the full contractual capacity of females as arising simultaneously with puberty, just as they did with males. 3,5 Muhammad al-Banani, *Hashiyat al-banani* on the margin of *Sharh al-zarqawi 'ala mukhtasar sidi Khalil* 297 (Dar al-fikr undated). It is not clear, however, whether they then applied the presumption of full legal capacity of females to issues of marriage.

D. Mandatory Rules of Islamic Law, the Right to Free Exercise of Religion, and Public Reason

The third category of problematic rules consists of discriminatory rules that are grounded in theological justifications, and therefore cannot be revised by simply correcting an erroneous factual assumption. In these circumstances, a change in theological doctrine would be required in order for the rule of Islamic law to be brought into line with public reason. Failing that, the question becomes whether public reason would permit Muslims to adhere voluntarily to that discriminatory rule as a legitimate expression of religious freedom. This section will use the example of the inheritance law to address the problems related to this category of legal rules.

Relying on express provisions of the Qur'an, Muslim jurists developed elaborate rules of intestate succession. A fundamental rule was that a male heir receives twice the share of a similarly situated female heir.[41] The fact that the Qur'an made any provision at all for women to inherit was a radical departure from pre-Islamic practice in Arabia, where women did not inherit property[42] and where widows themselves could be inherited.[43] Muslim modernists such as Fazlur Rahman have argued that the rule of the Qur'an should not be interpreted as an eternally binding rule of law, but instead should be viewed in the context of numerous reforms that the Qur'an made improving the overall social status of women. On this reading of Qur'anic legislation, the aim of the Qur'an with respect to social relations was one of equality, but its specific rules represented the practical limit of how far such reforms could be taken in light of the circumstances of seventh-century Arabia.[44]

The notion that gender equality is a Qur'anic teaching is supported by numerous verses of the Qur'an stressing the spiritual equality of men and women. This assumption of equality has also made its way into legal discourse insofar as jurists have assumed that in the absence of evidence to the contrary, legal texts—whether granting rights or imposing obligations—apply equally to both men and women.[45] Even in the context of intergenerational transfer of

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41 Qur'an 4:11, 4:176. Accordingly, a son receives twice the share of the daughter, and the father receives twice the share of the mother.

42 C.E. Bosworth, et al, eds, VII *The Encyclopaedia of Islam* 106 (Brill 1993)

43 Qur'an 4:19.

44 Consider Rahman, 11 Intl J Middle E Stud 451 (cited in note 34) (describing Qur'anic reforms regarding women's rights as being limited by "realistic" conditions while also laying out "moral guidelines" that could lead to further reform subsequent to when more modest legal reforms are accepted).

45 See Shihab al-Din al-Qarafi, 5 *Nafa'is al-usul fi sharh al-mahsul* 2386 (Makkah: Maktabat Nizar Mustafa al-Baz 1997) ('Adil Ahmad 'Abd al-Mawjud and 'Ali Muhammad Mu'awwad, eds)

wealth, inheritance laws were not the only relevant body of law. Though the laws of intestate succession mandated a discriminatory rule regarding distribution of the estate's property, a norm of equality governed lifetime dispositions; that is, inter vivos gifts. Finally, Islamic law also permitted the use of trusts as a vehicle to transfer wealth from one generation to another, and the settlor of a trust was given almost complete freedom in determining who would and would not benefit from the trust's assets.[46] Interestingly, Malik B. Anas, the eponym of the Maliki school, prohibited the formation of trusts for the exclusive benefit of sons, but had no objection to trusts formed for the exclusive benefit of daughters. Accordingly, a Muslim modernist may cite rules such as these in support of a reading of the Qur'anic verses on inheritance as establishing a floor rather than a ceiling on a woman's inheritance rights.

Nevertheless, such a reading—even if theologically permissible—is not textually compelled, and, accordingly, the traditional reading remains defensible as a matter of Islamic religious doctrine. To pass a law mandating equality in the distribution of assets, therefore, would not satisfy the justifications required by public reason insofar as either justification would suggest that the views of traditionalist Muslims are simply *wrong*. If, however, the relevant law of descent permitted traditionalist Muslims to opt out of a mandatory rule of equality in favor of traditional Islamic law of inheritance, the implication that traditionalist Muslim doctrine is morally wrong or repugnant to public reason would be dispelled. Accordingly, the resolution of the question turns on whether accommodating a traditionalist Muslim's desire to follow the discriminatory prescriptions of the traditional Islamic law of inheritance would be a permissible departure from public reason's equality norm.

There are two reasons to believe that public reason would permit such an accommodation. First, granting the accommodation in this circumstance would further the rational self-interest of the testator. As a traditionalist Muslim, she

("women are like men for all [rules of] the Divine Law except where there is [textual] evidence [to the contrary]"). Al-Qarafi, an Egyptian theologian who died in the latter half of the thirteenth century, criticizes Fakhr al-Din al-Razi, a Central Asian theologian who died in the first decade of the thirteenth century and who authored the text on which al-Qarafi is commenting, for holding the view that God did not intend for women to understand revelation directly, but that they should instead be taught religion at the hands of religious scholars. Instead, al-Qarafi argued that the same rule applies to both men and women, namely, whoever has the intellectual ability to understand revelation is obliged to understand it, while those lacking that capacity, whether men or women, are excused from this obligation.

46 The basic doctrine of trust law was that "the words of the settlor [set forth in the trust deed] are like the words of the Lawgiver." Al-Dardir, 4 *al-Sharh al-saghir* at 120 (cited in note 17). See also Aharon Layish, *The Family Waqf and the Shar'i Law of Succession in Modern Times*, 4 Islamic L & Soc 352, 356 (1997) (noting the flexibility of Islamic trust law and its usefulness as a device to circumvent mandatory rules of inheritance law).

could be concerned that by failing to ensure that her estate is distributed to her heirs according to Islamic law, she will be committing a sin for which she will be held accountable to God. Second, it appears that such an accommodation would be "reasonable" from a Rawlsian perspective—that is to say, it does not involve using the coercive power of the state to impose one's own view of the good upon others who do not share that view.

There may be circumstances, however, where application of a discriminatory norm by a private person for religious reasons—such as enforcing the discriminatory provisions in the will of a traditionalist Muslim—could violate concerns of public reason. These considerations may provide independent grounds, other than a commitment to gender equality, on which the state could legitimately reject a request for a religious accommodation in the form of an exemption from a gender-neutral inheritance law. One such possible circumstance would be if a legal heir would be left destitute if the decedent's request for a traditionalist accommodation was given, but would not if the jurisdiction's rules of inheritance were applied.[47] Another reason to believe that granting such an accommodation in the case of a traditionalist Muslim is otherwise consistent with the norms of public reason is that a traditionalist Muslim can point to numerous Islamic theological doctrines that affirm the moral equality of men and women, as well as other legal doctrines that treat males and females equally, such that there is little risk that granting such an accommodation could reasonably be viewed as furthering a view of the good that is fundamentally "unreasonable" in a Rawlsian sense.

The accommodation argument could also potentially resolve the problem of the *hudud*. As previously noted, the justification for the *hudud* penalties is religious, insofar as they function as a means for a sinner to expiate his sin.[48] For this reason, non-Muslims were not subject to the *hudud* unless the penalties used in connection with the *hudud* were also deemed to further a secular interest, for example, protecting property or security in the case of crimes such as theft or highway robbery. This suggests that Islamic jurisprudence recognizes—at least for non-Muslims—an exemption from the *hudud* penalties on the theory that non-Muslims obtain no spiritual benefit from having such penalties applied to them. To the extent that Islamic law also applied these penalties to non-Muslims then, it did so for prudential reasons, not theologically motivated ones.

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47 Indeed, there is an analogous rule in the Maliki law of inheritance. In circumstances where the decedent dies leaving only daughters but the daughters have a paternal uncle, the ordinary rule provides that the daughters share two thirds of the estate equally, and the paternal uncle takes the remaining third. In circumstances where the public treasury is in disarray, however, the rule changes to provide that the daughters share in the entire estate and the paternal uncle gets nothing.

48 See Fadel, *The True, the Good and the Reasonable* at *89 n.239 (cited in note 8).

Accordingly, recognition of the applicability of international human rights law to preclude the use of the *hudud* against non-Muslims should not raise any theological difficulties for traditionalist Muslims.

The same argument should apply to dissident Muslims who do not voluntarily submit to the *hudud* penalties. In the case of a recalcitrant Muslim, application of the religiously motivated penalty does not further *any* interest of the individual defendant, since with respect to that defendant, the salvific benefits of the penalty are not achieved. In this circumstance, application of the *hudud* penalty can only be justified on prudential grounds as a means to further a secular interest (for example, the protection of property in the case of the punishment of a thief). If the punishment is being applied for prudential reasons, however, it should not be problematic to treat a dissenting Muslim in the same manner as Islamic law would treat a non-Muslim. Accordingly, Islamic law should be able to countenance revising the scope of the *hudud* penalties so that they are applicable only to persons who specifically consent to the application of the *hudud* punishment.[49]

If the *hudud* were to be applied only to those individuals who specifically consented to those penalties, they would arguably be consistent with the requirements of public reason, assuming that the state can ascertain that the person in fact specifically consented to the punishment in question.[50] As a

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[49] The detailed arguments from Islamic law as to why limiting the applicability of the *hudud* penalties to those who specifically consent to the punishment would be a reasonable internal doctrinal development are beyond the scope of this Article. Such a rule would be consistent, however, with the high evidentiary standards usually required before the *hudud* penalties could be applied and with the fact that confessions could be retracted at any time, including at the time the penalty is imposed. Finally, prominent Muslim legal authorities refused to apply the mandatory penalty for drinking alcohol to those Muslims who believed that this penalty was limited to those who drank grape wine, although they did leave open the possibility of punishing them for prudential reasons. In short, it is not an unreasonable interpretation of Islamic law to conclude that the *hudud* penalties should apply only to those who subjectively consent to them.

[50] Were a state to offer this option, it would obviously have to impose substantial procedural protections to ensure that the person is acting freely and is not under undue pressure from other third parties. Assuming these procedural requirements are satisfied, the *hudud* penalties that are limited to lashes should not raise any difficulties. Stoning presents a unique problem because the person subject to stoning, by virtue of the finality of the penalty, is essentially foreclosing her future self from questioning her present self's commitments. Amputation of the hand also results in a permanent disability, but does not foreclose the person from rationally revising her conception of the good in the future, and, accordingly, is less problematic than stoning but more problematic than lashes. In this case, the social costs of the amputee, however, would have to be borne by the Muslim community and not the state. The timing of the consent would also be a question, but from the perspective of Islamic law, it would not be problematic were public reason to conclude that such consent must be revocable. Islamic evidentiary law permitted defendants who were convicted of *hudud* crimes based on confession to retract their confessions without penalty prior to the execution of the punishment, and thus the revocability of consent would not seem to raise a problem from the perspective of Islamic law. As a practical matter, however, I do

general matter, it is rational for a devout Muslim to submit to a mandatory penalty because expiation of sin implicates her salvation interest. By submitting to the mandated penalty for drinking wine, for example, the believer is rationally furthering her goal of obtaining salvation. It is also reasonable to permit the application of the *hudud* to this class of persons, since in this case state power is not being used to coerce their compliance with rules that are inconsistent with their conception of the good.

This suggests that the most powerful argument against the application of the *hudud* is not that they are cruel and unusual punishments because such an argument would have no purchase among believing Muslims. The more persuasive argument against the application of the *hudud*, from a Muslim perspective, would be based on religious freedom, focusing on the absence of a religious benefit to the defendant in cases where she is a dissenter. Whether that dissenter is a Muslim or non-Muslim should be irrelevant in light of the fact that by rejecting the normative status of the *hudud* penalty, the penalty loses its religious function and, thus, achieves only secular purposes. Accordingly, it should be subject to all applicable limitations on lawful secular punishments, including those of international human rights laws.

E. Mandatory Rules of Islamic Law That Are Repugnant to Public Reason

This last category includes rules that traditional Islamic law deemed mandatory, but could not be permitted under any notion of accommodating the free exercise of religion because the substance of the rule mandates violation of the freedom of the rights of others. Such rules include those requiring discriminatory treatment of non-Muslims and those punishing Muslims who renounce Islam. Most Muslim-majority states have abolished *de jure* discrimination against non-Muslim citizens in connection with establishing modern legal systems, and only the most extreme Islamist groups call for reintroducing pre-modern discriminatory legal norms into the legal systems of modern Muslim states. Apostasy, however, remains politically and legally salient, as evidenced by recent high profile cases involving issues of apostasy even in non-Islamist regimes such as Egypt and Malaysia. Moreover, to the extent that Muslims discard the criminalization of apostasy, the rights of non-Muslims within Muslim-majority jurisdictions would be made more secure. It is also not unreasonable to believe that a principled resolution of the issue of apostasy under Islamic law would also lead to the resolution of a host of other rules

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not believe that a large number of Muslims, if any, would volunteer to have the *hudud* penalties applied to them. Nevertheless, it is important to consider the hypothetical of the Muslim who wishes to undergo such a penalty on free exercise of religion grounds.

within pre-modern Islamic law that restrict freedom of thought, and thereby also reduce the conflict between Islamic law and human rights norms protecting the freedom of thought.

While Muslim theologians and jurists have not been able to overturn orthodox doctrine on the treatment of apostates, many leading twentieth-century Islamic modernist scholars—including prominent figures such as Selim el-Awa—have rejected the traditional criminalization of apostasy, arguing that it is fundamentally inconsistent with Islam's commitment to free acceptance of religious truth based on rational conviction.[51] Instead, they read the normative texts that appear to contemplate execution of apostates as referring to acts of treason rather than a change in a person's conviction. While one may question whether the modernist reading of the apostasy rules is a plausible reading of the Islamic legal tradition, human rights advocates should not shy away from using the opening provided by Muslim modernist scholars to criticize the governments of Muslim-majority regimes that continue to make concepts such as apostasy relevant to their legal systems, even if that relevance is limited solely to civil matters.[52]

IV. CONCLUSION

It appears likely that for the foreseeable future, both the norms of international human rights law as well as of Islamic law will gain importance. It is accordingly imperative that legal scholars develop a framework that would permit a principled reconciliation between the commitments of each tradition. Under a Rawlsian theory of public reason, robust guarantees of freedom of religion should reasonably protect the interests of Muslims who are concerned with preserving the integrity of their way of life, while at the same time, respecting the rights of non-Muslims as well as dissenting Muslims. This synthesis would require Islamist political movements to abandon the goal of establishing "perfectionist" Islamic states which seek to enforce the Islamic

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51 Consider Mohammad Hashim Kamali, *Freedom of Expression in Islam* 93–96 (Cambridge 1997) (discussing ancient and modern dissenters to the rule criminalizing apostasy from Islam and attributing to el-Awa the view that revising this doctrine is "urgent").

52 See, for example, the notorious Nasr Hamid Abu Zayd divorce case in Egypt, where the defendant was judicially divorced from his wife on the grounds that his writings were tantamount to apostasy in an action brought by third-party plaintiffs. Court of First Instance, Giza, 27.1.1994, case no. 591 / 1993 (dismissing the action for lack of standing); Court of Appeals Cairo, 14.6.1995, appeal no. 287 / judicial year 111 (reversing the lower court and concluding that the defendant was an apostate and on that basis divorcing the defendant from his wife); Egyptian Court of Cassation, 5.8.1996, appeals no. 475, 478, 481 / judicial year 65 (upholding decision of Cairo Court of Appeals). See also Killian Bälz, *Submitting Faith to Judicial Scrutiny through the Family Trial: "The Abu Zayd Case,"* 37 Die Welt des Islams 135 (1997) (discussing the context of this case in the Egyptian legal system).

conception of the good—in whole or in part—on individuals through the use of state power. The limitations of public reason, however, would also require a revision of the rhetoric of human rights. It is not clear that either human rights advocates or Islamist movements or Muslim-majority governments would be willing to accept this synthesis. Theoretically, however, the method I have outlined in this Article is responsive to the major concerns of each group without requiring either side to abandon its fundamental moral commitments. Therefore, it is reasonable to believe that a Rawlsian approach could be a useful means of resolving the growing conflict between international human rights law and Islamic law.