The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law

Mohammad Fadel
University of Toronto

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*As I drew near the age of adolescence the bonds of mere authority ceased to hold
me and inherited beliefs lost their grip upon me, for I saw that Christian youths
always grew up to be Christians, Jewish youths to be Jews, and Muslim youths to
be Muslims.*

Abu Hamid al-Ghazali, d. 1058 *

*I love the righteous, but am not one of them,
Hoping thereby to obtain their intercession;
I despise those whose commerce is sin,
Although our merchandise is the same.*

Muhammad b. Idris al-Shafi'i, d. 820 **

Part 1: Introduction: Islam, Liberalism and Rawls

Even before the events of September 11, 2001 and the subsequent declaration of
a "war on terrorism," articles on the relationship of "Islam" to notions such as lib-
eralism, democracy and pluralism were ubiquitous in the scholarly academy, to say
nothing of the popular press.[1] Much of this work, however, is either apologetic or

* Abu Hamid Muhammad b. Muhammad b. Muhammad al-Ghazali, *The Faith and Practice of
al-Ghazali*, trans. by W. Montgomery Watt (Chicago, IL: Kazi Publications, 1982) at 21. For
more information on al-Ghazali, see, "al-Ghazali, Abu Hamid Muhammad b. Muhammad al-
Tusi" in 2 Encyclopaedia of Islam 1038b; see also Ebrahim Moosa, *Ghazâlî & the Poetics of
Imagination* (Chapel Hill, NC: University of North Carolina Press, 2005).

** Muhammad b. Idris al-Shafi'i, *Diwan al-Shafi'i* (Beirut: Dar al-thaqafa, 1962) at 119. Al-Shafi'i
is arguably the most famous Muslim legal jurist and is generally believed to be the founder of
theoretical Islamic jurisprudence. For more information on al-Shafi'i, see "al-Shafi'i, Muhammad
b. Idris" in 9 Encyclopaedia of Islam 181a.

1. The number of works written on the relationship of "Islam" to democracy, human rights, moder-
nity, pluralism, etc., is, simply put, staggering. See Ruud Peters, "Islamic Law and Human Rights:
A Contribution to an Ongoing Debate" (1999) 10 Islam and Christian-Muslim Relations 5 (noting
that "[d]uring recent decades a host of publications have seen the light with titles like: 'Islam
and X' or 'X in Islam,' where X is typically a concept with positive connotations, such as democ-
racy, peace, social justice, or women's rights" at 5). I refer to the themes evoked by this body
of scholarship as the "Islam/liberalism dichotomy."

polemical.[2] On the other hand, given the real[3] and perceived[4] tension that characterizes the relationship of the United States and Western Europe with much of the Islamic world, the highly-charged nature of this subject is unsurprising.[5]

This Article argues that to transcend the limitations of the Islam/liberalism dichotomy, participants should explore compatible elements within the moral language of each. More specifically, this Article argues that the framework developed by John Rawls in his seminal work *Political Liberalism*[6] provides a framework that will allow Muslims and liberals to explore in a systematic fashion the possibility of such a compatibility. Viewed from a Rawlsian perspective, this Article argues that the Sunni Islamic[7] tradition provides rich resources out of which committed Muslims could construct theological commitments that contribute to a Rawlsian overlapping consensus. This Article is an attempt to provide a doctrinal roadmap of those resources and how they could be used to articulate a set of theological and moral commitments that would plausibly allow committed Muslims to endorse Rawlsian constitutional essentials for the right reasons.[8]

As an initial matter, this Article argues that commentators who have asserted an irreconcilable conflict between orthodox Islamic commitments and liberal constitutional democracy have erroneously assumed that the historical doctrines of substantive Islamic law represent the highest order commitments of Islamic orthodoxy. In fact, this Article demonstrates the opposite: the predominant Islamic theological, ethical and legal traditions are consistent with the conclusion that the political commitments enshrined in the historical formulations of Islamic law are subordinate to, and carry relatively less moral weight within the normative Islamic tradition viewed as a whole, than do the commitments set forth in theology and ethics. The

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2. *Ibid.* (characterizing most writing on the Islam/liberalism dichotomy as "partisan" and either "incriminat[ing]" or "apologetic" at 5-6).

3. The last 100 years have witnessed chronic warfare between many Arab-Islamic countries and the leading Western democracies. For an excellent discussion of the longer-term historical background to these tensions, see Maxime Rodinson, *Europe and the Mystique of Islam*, trans. by Roger Veinus (Seattle: University of Washington Press, 1987), especially ch. 1.

4. According to a survey conducted by the Pew Global Attitudes Project dated June 22, 2006 "[m]any in the West see Muslims as fanatical, violent and as lacking tolerance. Meanwhile, Muslims in the Middle East and Asia generally see Westerners as selfish, immoral and greedy —as well as violent and fanatical." See *The Great Divide: How Westerners and Muslims View Each Other,* online: Pew Global Attitudes Project http://pewglobal.org/reports/display.php?ReportID=253.

5. See, e.g., Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics*, 3rd ed. (Boulder, CO: Westview Press, 1999) (researchers working on the relationship of Islam to international human rights law "step[] into an ideological minefield" at 3).

6. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996).

7. Throughout this Article, unless otherwise stated, any reference to Islam is limited to Sunni Islam. The omission of material from other Islamic sects such as the Shi'a is solely a reflection of the author's inadequate knowledge of and familiarity with the Shi'ite theological and ethical tradition and should not be taken as an implicit argument that Shi'ism or other Islamic sects are necessarily unreasonable in a Rawlsian sense.

8. The recent work of Andrew March confirms the utility of a Rawlsian approach to the Islam/liberalism dichotomy. See Andrew F. March, "Liberal Citizenship and the Search for an Overlapping Consensus: the Case of Muslim Minorities" (2006) 34 Phil. & Pub. Affairs 373 [March, "Liberal Citizenship and Muslim Minorities"]; and Andrew F. March, "Islamic Foundations for a Social Contract in non-Muslim Liberal Democracies" (2007) 101 Am. Pol. Science Rev. 235 [March, "Social Contract"].

commitments adumbrated in theological and ethical discourses lead to a more opti-
mistic view regarding the likelihood of discovering overlapping commitments
between Islamic orthodoxy and liberalism.

Specifically, this Article argues that (1) fundamental theological and ethical doc-
trines in the Islamic tradition privileged rational inquiry and deliberation as the
preconditions to establishing political life, living a moral existence, and obtaining
religious salvation, commitments which are either consistent with or require a polit-
ical commitment to freedom of thought; (2) as a result of the centrality of rational
inquiry in the quest for salvation and conceiving the basics of the ethical good life,
Islamic theology and ethics placed relatively greater emphasis on the procedural
integrity of inquiry rather than its substantive conclusions, and as a result Muslim
ethical theory produced a system of normative pluralism that expressly recognized
the burdens of judgment;[9] and (3) as a result of this normative pluralism, Islamic
jurisprudence grew to recognize the legitimacy of rule-making based on arguments
whose premises—while consistent with revelation—were non-revelatory and there-
fore that Islamic law, as a historical matter, recognized the legitimacy of public rea-
son arguments, or at the very least, recognized the legitimacy of arguments that
are consistent with the requirements of public reason. Behind this historical devel-
opment was epistemological skepticism regarding the possibility of definitive moral
knowledge,[10] something that resulted in the acceptance of probable opinion as the
basis for the moral and political life of the community. As a result, pluralism—at
least intra-Muslim pluralism—became an indelible feature of Muslim moral and
political life.[11]

There are several reasons to think a Rawlsian approach to the Islam/liberalism
dichotomy may be helpful. First, Rawls has offered a model of liberalism that
expressly contemplates the continued vitality of non-liberal moral theories, includ-
ing religious theories, of the good within a liberal state. Accordingly, Rawls' inter-
pretation of political liberalism suggests that the philosophical incompatibility of
Islam with liberalism is insufficient to conclude that it is impossible to engage in
reasonable social cooperation with individuals who are committed Muslims. Given
Rawls' status among liberals, his analysis represents a plausible starting point for
a systematic analysis of the relationship of fundamental Islamic theological, ethical
and legal concepts to those of modern liberalism.

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9. See Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh*
(Leiden: Brill, 1999) (providing examples of significant doctrinal differences separating the var-
ious schools of Islamic law at 65-71).

10. See *ibid.* (giving an overview of the historical development of Sunni Islamic law, how and why
it came to evolve separately from theology and Sunni Islamic law's commitment to a sort of "nor-
mative pluralism" at 1-76). A similar process appears to have occurred in early modern England,
where appeal to the Bible to justify public positions fell out of favor, not because the English
had lost faith in the Bible or Christianity, but because they came to the recognition that the Bible
could not resolve their differences. See Jeffrey Stout, *Democracy and Tradition* (Princeton, NJ:
Princeton University Press, 2004) at 94-97.

11. Cf. Johansen, *supra* note 9 (criticizing Joseph Schacht, a well-known western scholar of Islamic
law, for failing to recognize the importance of dissent and pluralism in substantive Islamic law
due to Schacht's being "too much part of an occidental tradition which understands the legitimacy
of the dissent on principles as a specific western form of modern political and religious culture
so that he cannot envisage its existence in a non-occidental sacred law or deontology" at 65).

Second, a central problem in *Political Liberalism* was the general problem of reconciling non-liberal "comprehensive theories of the good"[12] to the requirements of a liberal polity, while allowing citizens who adhere to such theories to endorse freely the constitutional essentials of the state.[13] Religion in Rawls' framework is simply one of many non-liberal comprehensive doctrines that must be reconciled to the basic structure of society. Thus the moral obligation of a Muslim citizen under Rawls' scheme is generically no different than that of orthodox adherents of other revealed religions, such as Catholics or Jews.[14]

Rawls' account of political stability under conditions of profound moral disagreement is premised on the distinction between comprehensive moral and philosophical doctrines, on the one hand, and "conceptions limited to the political," on the other.[15] Rawls acknowledges that comprehensive theories of the good—such as Islam, liberalism and socialism—are necessarily incompatible as a matter of philosophical truth. Nevertheless, adherents of otherwise conflicting comprehensive doctrines may yet agree on certain fundamental points related to political organization such that a stable "overlapping consensus" regarding constitutional essentials could arise among them. Equally important from the perspective of a committed Muslim, Rawls expressly disclaims that political liberalism has any ambition to displace other comprehensive theories of the good with liberal philosophy.[16] Because the scope of political liberalism in Rawls' view is limited to the basic political institutions of society, citizens of a politically liberal state are not required to affirm controversial metaphysical doctrines in order to participate as citizens in good faith. For these reasons, the *philosophical* incompatibility of Islam and liberalism should not on its face be problematic from the perspective either of a committed Muslim or a committed Rawlsian liberal.

For an overlapping consensus to arise, however, the adherents of conflicting comprehensive doctrines must be "reasonable," meaning that, the justifications they proffer for the exercise of political power can be justified by the criterion of reciprocity.[17] As a result, under Rawls' account of political liberalism, a committed

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12. Rawls describes moral/philosophical conceptions as comprehensive when they include conceptions of what is valuable in human life, ideals of personal character, etc., with the limit being the entire range of values in human life. Rawls, *supra* note 6 at 13. As noted by Andrew March, Islam might be considered, in Rawlsian terms, a "'comprehensive ethical doctrine' *par excellence.*" March, "Social Contract," *supra* note 8 at 236.

13. Rawls described the central problem of political liberalism as finding the answer to the following questions:

> How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines? Put another way: How is it possible that deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime? What is the structure and content of a political conception that can gain the support of such an overlapping consensus?

> Rawls, *supra* note 6 at xx.

14. March has noted that "what we might call 'normative Islam' prescribes just the form of reflection Rawls imagines that each citizen will perform, consisting of the self-conscious interrogation of the norms of one's social and political system in light of formal religious doctrine." March, "Social Contract," *supra* note 8 at 236.

15. Rawls, *supra* note 6 at xvii.

16. *Ibid.* at xl.

17. *Ibid.* (exercise of political power is proper only when it is sincerely believed that the reasons

Muslim can be assured that her theological and moral premises need not be revised so long as she is otherwise a "reasonable" citizen. Rawls' concern, then, is whether there is sufficient flexibility in both Islam and liberalism—viewed from within the internal perspective of Islam as a comprehensive doctrine and liberalism as a free-standing public conception of justice—to permit them to co-exist as constituent elements of a reasonable pluralism rather than as part of a modus vivendi. Rawls would ask then whether Muslim citizens could freely endorse the constitutional essentials of a politically liberal state for reasons within their own comprehensive doctrine, rather than for reasons having to do with a relatively weak position within a contingent domestic balance of power.[18]

This Article attempts to outline the fundamental theological doctrines out of which a "reasonable" Muslim might reconcile her normative commitments to Islam as a comprehensive theory of the good and her political commitments to a liberal constitutional order. To develop the outlines of this theology, I discuss various pre-19th century Islamic theological, ethical and legal doctrines from the perspective of gauging the extent to which the political commitments implicit in those doctrines are consistent (or subject to reasonable interpretation, can be made consistent) with the "constitutional essentials" of a politically liberal regime. This Article focuses on the principal theological and ethical doctrines which gave rise to, and ultimately provided legitimacy for, arguments in the Islamic legal tradition that are recognizable as exercises in public reason.

The need to replace the "conflict of civilizations"[19] paradigm with a more analytically neutral framework in discussions regarding Islam and liberalism is especially pressing in the wake of 9/11 and the subsequent terrorist attacks in Madrid and London. The growing presence of Muslims in Canada, the United States and Western Europe has continued to generate various policies that target, directly or indirectly, Muslim populations, in no small part because Muslim populations are viewed as "dangerous."[20] Indeed, alarmists might even argue that "special" rules are needed to deal with this civilizational "threat."[21] Exploring how Muslims can

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offered in justification of political action could reasonably be accepted by other citizens as a justification of those actions, taking other citizens to be free and equal at xlvi).

18. *Ibid.* at 139-42.

19. Ironically, Samuel Huntington, author of the widely cited "Conflict of Civilizations?," in which he suggested that the most important source of warfare in the post-Cold War era will be between "civilizations," particularly Islamic and western civilizations, has subsequently made clear that such a conflict would not be the result of any inherent attributes of Islam, but rather of specific political policies. Samuel P. Huntington, "The Age of Muslim Wars" *Newsweek* 138:25 (17 December 2001) at 14.

20. See Patrick Macklem,"Militant democracy, legal pluralism and the paradox of self-determination" (2006) 4 Int'l. J. Con. L. 488 (describing legal measures instituted in democratic jurisdictions following 9/11 as imposing a regime of "militant democracy" the cumulative effect of which "is a dramatic recalibration of the legal relationship between the individual and the state" at 488-89).

21. Lisa Anderson, "Shock and Awe: Interpretations of the Events of September 11" (2004) 56 World Politics 303 (quoting Daniel Pipes as referring to "Muslims as a whole as 'a basically hostile population,'" and as agreeing that although "'the distinction between terrorists operating in the name of Islam and ordinary Muslim 'moms and dads' . . . is a true and valid distinction, but . . . if adhered to as a guideline for policy, it will cripple the effort that must be undertaken to preserve our institutions'" at 306) [Anderson, "Shock and Awe"]. One columnist argues that the United

participate in an overlapping consensus may help dissipate the suspicion that is currently focused on Muslim minorities living in constitutional democracies.[22] At the same time, to the extent that liberalism can be viewed as sharing many fundamental values with Islam—despite their ultimate philosophical incompatibility—many stereotypes Muslims have about liberalism would also dissipate.

The fate of Islam in Western democracies, however, has not been the only casualty of the "war on terrorism": liberalism has found itself under increasing attack as irrelevant to a world in which, we are told, terrorists can threaten death and destruction on the scale of Hiroshima or Nagasaki.[23] Ironically, political realities created by the "war on terrorism" have created conditions—perhaps for the first time in the last two hundred years—in which both liberals and Muslims have a mutual interest in effecting a meaningful rapprochement.

This Article proceeds in four parts, not including Part 1, the Introduction and Part 6, the Conclusion. Part 2 is methodological and summarizes the theoretical issues involved in providing an account of the relationship of Islam as a comprehensive theory of the good to liberal constitutional essentials. It explains why such an account, although conjectural, may nevertheless be relevant in understanding how the beliefs of Muslims citizens could reinforce constitutional essentials. It also gives an overview of the interpretive challenges in determining, as a historical matter, what "counts" as an Islamic comprehensive doctrine. Finally, a brief justification for limiting the applicability of this theory to Muslim citizens of liberal democracies is given. Part 3 provides a brief introduction to Islam and those aspects of its intellectual history—scholastic theology (Part 3.b), moral theology (Part 3.c) and positive law (Part 3.d)—that this Article argues are most relevant to a meaningful discussion of Islam and liberalism. Part 4 sets forth the substantive arguments regarding the political implications of Islamic theological and ethical doctrines. Part 4.b discusses the political implications that Muslim citizens could reasonably draw from two important theological doctrines: the obligation of intellectual inquiry

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States and Europe should adopt policies that would prevent Muslims from coming to the United States or Europe, shut down existing Muslim institutions in the west, subject Muslims to enhanced surveillance in order to "isolate and contain Islam," and more generally, "[l]et [Muslim] blood flow in the streets like great rivers as penance for their evils." Warner Todd Houston, "Terrorism —we won't win unless we get serious" (31 August 2006), online: Renew America http:// www.renewamerica.us/columns/huston/060831.

22. See Evelyn Azeeza Alsultany, *The Changing Profile of Race in the United States: Media Representations and Racialization of Arab- and Muslim-Americans Post-9/11* (Ph.D. dissertation, Stanford University, 2005) [unpublished] (arguing that post-9/11 media representations of Muslims construct Islam "as the compulsive, the dangerous, and incomprehensible Other" at iv); and Anderson, "Shock and Awe", *supra* note 21 (quoting one author as expressing the view that the "'growth of . . . Muslim communities in the United States'" aids the growth of terrorism at 309). In addition, a USA Today/Gallup Poll, taken over July 28-30, 2006, reported that 34% of Americans believed that American Muslims back al-Qaida and that nearly 40% of the respondents in the same poll supported requiring Muslims, even those who have U.S. citizenship, to carry special identification. Lydia Saad, "Anti-Muslim Sentiments Fairly Commonplace: four in ten Americans admit feeling prejudice against Muslims" *Gallup Poll News Service* (10 August 2006), online: The Gallup Organization http://media.gallup.com/ WorldPoll/PDF/AntiMuslimSentiment81006.pdf.

23. Anderson, "Shock and Awe", *supra* note 21 (noting that in the wake of 9/11 many questioned the continued relevance of liberalism at 323-25).

and the human origins of the state. Part 4.c discusses Islamic ethical theory, the role of human judgment in establishing ethical norms, and the normative ethical pluralism that resulted from Islamic theories of moral judgment and moral obligation, and the political implications of those doctrines. Part 5 argues that Islamic law, through doctrines grounded in (or at least consistent with) public reason, solved the political problems arising out of the system of normative pluralism described in part 4.c.

Part 2: Defining the Scope of Islam as a Comprehensive Doctrine of the Good

a. Why Speak of "Islam as a Comprehensive Doctrine of the Good"?

Akeel Bilgrami raised the question of the extent to which "absolutist" political commitments are an integral part of Muslim identity.[24] This Article argues that one way to answer his question is to describe Islam as a comprehensive doctrine, and then determine the extent to which it satisfies Rawlsian reasonableness criteria. This Article, therefore, can be seen as providing a theological and ethical answer to Bilgrami's question using Rawlsian criteria. The Article then extrapolates from these theological and ethical doctrines a set of fundamental political commitments in order first to establish a set of "baseline" political commitments that one could reasonably attribute to Islam as a comprehensive doctrine. This will lay the normative foundation for exploring the extent to which a doctrinal "commitment to Islam . . . [is] itself differentiated internally into a number of, in principle, negotiable detailed commitments."[25]

There are procedural and substantive limitations to this approach. I try to answer them here and suggest why this Article presents a plausible means of thinking about the Islam/liberalism dichotomy. A significant objection to this Article's method is that it requires one to reduce the historical messiness of Islam into a tidy set of doctrines, a procedure that inevitably privileges some Muslim traditions (specifically, the written tradition of orthodoxy) and marginalizes non-conforming Muslim views. Moreover, such an approach may result in reinforcing the Orientalist (in the bad sense) tendency to assume that it is possible (and perhaps even preferable) to understand the lives and aspirations of Muslims from the detached study of a series of texts instead of engaging in a more rigorously empirical investigation of the lives and commitments of actual Muslims.[26] In short, it might be said that this Article's methodology does not assist Muslim citizens in liberal democracies in their goal to be defined as individual citizens rather than as believers in Islam, but instead suggests that it is possible to discern a Muslim's political commitments simply by knowing that she is a Muslim.

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24. Akeel Bilgrami, "What is a Muslim? Fundamental Commitment and Cultural Identity" (1992) 18 Critical Inquiry 821 at 823.

25. *Ibid.* at 824.

26. The fundamental critique of orientalism remains the work of the late Edward Said, especially his book with that name, *Orientalism*, 2nd ed. (New York: Vintage Books, 1994).

Nothing in this Article, however, should be taken to imply that the implicit political commitments of the Islamic tradition identified in this Article can be attributed to any particular historical individual,[27] much less a contemporary individual. Aside from the obvious fact that many Muslims have only nominal commitments to Islam, it is doubtful that even observant Muslims living in contemporary liberal societies have anything more than superficial familiarity with the doctrines discussed in this Article. Accordingly, this Article does not argue that the political commitments described below are held by any particular persons. Instead, its argument is simply that it would be reasonable to attribute this set of political commitments to persons holding the set of beliefs described in this Article.

On the other hand, we know with certainty that a subset of nominal Muslim residents and citizens of liberal democracies profess to be normatively committed to Islam. It is not unreasonable to attempt to describe what might be a plausible set of political commitments shared by this group on the reasonable assumption that historical articulations of Islamic orthodoxy continue to have some influence, and may, with increased education, especially among committed Muslims who are citizens of liberal states, have increased resonance with this group.[28] For that unknown subset of nominal Muslim citizens, this Article provides a roadmap to those Islamic doctrines which they may find relevant (and perhaps even persuasive) in constructing a theology and ethical theory that could potentially assimilate their experience as citizens of liberal states to the larger sweep of Islamic religious history.

Reform-minded Muslims, on the other hand, might argue that this Article's approach ignores the work of contemporary liberal or liberal-minded Muslim theologians,[29] and therefore erroneously assumes or suggests that Islamic doctrine is

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27. Indeed, insofar as this Article represents a synthesis of several doctrines, it is unlikely that any historical pre-modern Muslim religious intellectual understood the political implications of the doctrines discussed in this Article in the manner described here.

28. See, e.g., the web site of Zaytuna Institute at www.zaytuna.org, which describes its mission as providing "the highest quality educational programs, materials, and training in the traditional sciences of Islam."

29. Many contemporary Muslim scholars remain committed Muslims while viewing some or many aspects of the "tradition" as having been profoundly wrong and thus are engaged in more or less radical theological reconstructions of Islam. For a general introduction to the work of some of these scholars, see Charles Kurzman, *Liberal Islam* (New York: Oxford University Press, 1998). Among the more prominent of these scholars who write (or have written) in English are Fazlur Rahman, Khaled Abou el Fadl, Abdallah an-Na'im, Abdalaziz Sachedina, Farid Esack, Asma Barlas, Aziza al-Hibri, Fatima Mernissi and Amina Wadud-Muhsin.

I do not include among Muslim reformers those who espouse theories that sound in necessity or duress or even need. While such arguments are no doubt legitimate from the internal perspective of Islamic comprehensive doctrines, from a Rawlsian perspective they only represent evidence of a *modus vivendi*, not of an overlapping consensus. Accordingly, concepts such as the "jurisprudence of minorities," which have been advocated by some Muslim scholars living in the west such as Shaykh Taha Jabir al-Alwani, would not be sufficiently principled from the perspective of political liberalism and accordingly do not seem to be a promising method for Muslim citizens to understand their experience as citizens of liberal polities. For an extensive treatment of the concept of the "jurisprudence of minorities," see Yusuf al-Qaradawi, *Fi fiqh al-aqalliyat al-muslima* (Cairo: Dar al-Shuruq, 2001). See also Taha Jabir al-Alwani, *Towards a Fiqh for Minorities: Some Basic Reflections*, trans. by Ashur A. Shamis (London: International Institute of Islamic Thought, 2003). Note, however, that the existence of both liberal religious reformers and theories such as the "jurisprudence of minorities" are consistent with Rawls' insight that citizens living under the experience of a constitutional democracy are likely to revise their comprehensive doctrines in a way that tends to support, rather than undermine, constitutional essentials. See *infra* note 31.

frozen. This Article, while cognizant of these efforts, does not make its argument contingent on the success of these projects. Accordingly, this Article assumes that within the context of a politically liberal polity, many committed Muslims will remain faithful to some or all historically "orthodox" doctrines, such as those described in this Article. It is thus implausible that these efforts would ever completely replace historical notions of orthodoxy, even among Muslim citizens in liberal polities. Accordingly, in developing a Rawlsian account of Islam's relationship to constitutional essentials, it makes sense to begin with doctrines that have been historically recognized as constituting Islamic orthodoxy,[30] on the assumption that if there is a basic compatibility with those doctrines—reasonably interpreted—and constitutional essentials, then Muslim citizens of a contemporary liberal state *a fortiori* would understand Islam in a manner consistent with constitutional essentials.[31] Accordingly, this Article's decision to limit itself to pre-19th century doctrine is not intended to foreclose what orthodox Islam may become, but only to provide a relatively uncontroversial doctrinal baseline from which principled consideration of the relationship of liberal constitutional essentials to Islam can meaningfully proceed.[32] Modern citizens of liberal states with commitments to Islam, then, may find the approach outlined in this Article useful in formulating their own subjective understanding of Islam as a comprehensive doctrine and in understanding how such commitments relate (and may subtly differ from), simultaneously, to their commitments to liberal constitutional essentials and historical Islamic doctrines.

An objection might also be raised that in raising the issue of Islam's relationship to liberal constitutional essentials, this Article simply reinforces casual stereotypes that Muslims lack a principled commitment to liberal democracy. Because this Article takes a Rawlsian tack, however, it does not single out Islam for special treatment. Rawls presumes all reasonable citizens undertake the task of reconciling their comprehensive views with those of public reason.[33] While one must be aware of this risk, it can be reduced if the author takes the task of describing Islamic comprehensive doctrines seriously, and interprets them in a reasonable and intellectually honest fashion. Accordingly, the possibility of advancing understanding rather then reinforcing stereotypes cannot be foreclosed *a priori.*

Finally, to the extent that there are committed Muslim citizens of liberal states, it is not unreasonable for both Muslim and non-Muslim citizens to wish to understand the relationship of Islamic comprehensive doctrines to constitutional essentials. Viewed from this perspective, knowledge of relevant theological and ethical

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30. See March, "Liberal Citizenship and Muslim Minorities," *supra* note 8 (discussing the need to develop an account of citizenship that would be plausible to Muslims who would reject the principles of liberal citizenship for principled reasons at 374, 375, n. 2).

31. This assumption, moreover, is consistent with Rawls' notion that experience of life as a citizen in a politically liberal state has a dynamic impact upon citizens' understandings of their comprehensive doctrines. As a result of this experience, they tend to revise their own comprehensive doctrines in such a manner so as to make them more compatible with constitutional essentials over time. Rawls, *supra* note 6 at 158-60.

32. See Bilgrami, *supra* note 24 (arguing that a certain amount of abstraction "in order to identify core doctrine" is necessary to make reform possible at 838).

33. Indeed, Rawls goes so far as to suggest, perhaps implausibly, that such self-reflection is "already part of the background culture." Rawls, *supra* note 6 at 249.

doctrines may be helpful to contemporary Muslim and non-Muslim citizens in creating or sustaining an overlapping consensus and building the mutual trust Rawls identifies as a characteristic feature of politically liberal societies.[34]

b. Islam as a Comprehensive/Reasonable Comprehensive Doctrine of the Good

Before one can speak of Islam as a comprehensive doctrine of the good, one must first identify those doctrines that should "count" as Islamic comprehensive doctrines. That task itself presents difficult problem of historical interpretation. Once this task is completed, another interpretive problem must be faced: can Islam as a comprehensive doctrine reasonably be interpreted so that it qualifies, on Rawlsian terms, as a *reasonable* comprehensive doctrine? Accordingly, I start from some of the limitations Rawls places on reasonable comprehensive doctrines of the good in general before describing one manner in which Islamic comprehensive doctrines could be reasonably interpreted so that they are reasonable in Rawlsian terms.

One important limitation of reasonable theories of the good according to Rawls is that they have a limited capacity to generate *radical* doctrinal change.[35] Accordingly, from the perspective of Rawls, a reasonable Islamic comprehensive doctrine would have to satisfy two requirements: first, it must be reasonable from the perspective of its compatibility with constitutional essentials, and second, it must also be *plausible* from the internal perspective of Islamic comprehensive doctrine. This second requirement is necessary in order to demonstrate that respect for constitutional essentials is plausibly derived from Islamic comprehensive doctrines so as to avoid the risk that one's declared commitments either to political liberalism or to Islam are viewed skeptically.[36] This Article attempts to solve the question of sincerity by limiting its analysis to those theological, ethical and legal doctrines that were hegemonic in the Islamic world prior to colonialism and eschewing reliance on novel interpretations of revelation.

This Article does not claim to present simply pre-19th century Islamic doctrine. Instead, it tries to put forth a plausible description of the normative commitments of a hypothetical reasonable Muslim who accepts the truth of the theological and ethical doctrines described in this Article and endorses liberal constitutional essentials for the right reasons. It then attempts to draw out the reasonable political impli-

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34. Rawls, *supra* note 6 (recognizing that in connection with particularly contentious matters, especially where it involves matters of religion, it may be permissible to present one's comprehensive views in connection with public matters in order to confirm the existence of an overlapping consensus, something which "strengthens mutual trust and public confidence" at 248-49).

35. Rawls, *supra* note 6 (stating that one of the distinguishing characteristics of a reasonable comprehensive doctrine is that it is not subject to sudden and unexplained changes in its doctrine at 59).

36. Liberal Muslim intellectuals are sometimes accused, on the one hand, of concealing a sinister agenda behind claims of adopting a "liberal" form of Islamic law, e.g., characterizations of Khaled Abou el Fadl as a "stealth Islamist," Daniel Pipes, "Stealth Islamist: Khaled Abou El Fadl" *Campus Watch Research*, online: Campus Watch http://www.campus-watch.org/article/id/1178; or on the other hand, of being disingenuous in their claims to be Muslims rather than "run-of-the-mill" liberals, Lama Abu-Odeh, "The Politics of (Mis)Recognition: Islamic Law Pedagogy in American Academia" (2004) 52 Am. J. Comp. L. 789 at 808.

cations that could be drawn by such a Muslim citizen from those doctrines, even if those implications are only conjectural. The plausibility of this conjectural exercise should be judged on whether (1) it is sufficiently faithful to the historical doctrines of Islamic theology, ethics and law, even if the account provided is only panoramic, and (2) the proposed interpretation of the political commitments implicit in those doctrines is plausible.

Another important goal of this Article is to equip a liberal non-specialist in Islamic intellectual history (whether or not Muslim) with sufficient knowledge of central Islamic theological and ethical doctrines to permit meaningful dialogue regarding the political implications of Islam as a comprehensive theory of the good within a liberal constitutional order,[37] while understanding the theological limits of what constitutes reasonable doctrinal change within Islamic comprehensive doctrines. This can be done most effectively by focusing on pre-19th century doctrines, even if such doctrines are no longer hegemonic. This is so because of the impact of colonialism: many Muslims presume that pre-19th century Muslim authorities were objective interpreters of the Islamic tradition, while the views of 19th and 20th century Muslims represent a "politicized" interpretation of Islam given in response to the pressures of colonialism, and are therefore less authentic.[38]

Accordingly, despite the contestability of what should "count" as an Islamic comprehensive doctrine, the identification of majoritarian trends, influential scholars and authoritative texts ought not be controversial. An opinion can be identified as representative, for example, if one can corroborate that several authorities expressed the same or similar views. Similarly, a scholar may be fairly identified as influential or representative of Islam as a comprehensive theory of the good to the extent that a particular author is quoted by subsequent authors in the tradition. Similarly, a text can be deemed to be authoritative to the extent that it has been the subject of systematic study or commentary or is regularly quoted by subsequent authorities.[39]

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37. See Macklem, *supra* note 20 (arguing for the need to initiate a "jurisprudential dialogue between European and Islamic legal orders, where the individual tenets of one system are tested against those of the other" rather than dismissing a commitment to the values of Islamic law as indicative of the wholesale rejection of democratic values at 512-13).

38. It is not a relevant objection to point out that all interpretation is political: the point is whether it is true that Muslims attribute a greater authenticity to pre-colonialist interpretations of Islam than they do to interpretations of Islam that arose in response to colonialism. The truth of this proposition can be demonstrated circumstantially by the sources that even a prominent Muslim liberal such as Khaled Abou El Fadl uses to establish the Islamic credentials of his arguments. See, e.g., Khaled Abou el Fadl, "Islam and the Challenge of Democracy" in Joshua Cohen & Deborah Chasman, eds., *Islam and the Challenge of Democracy* (Princeton, NJ: Princeton University Press, 2004) 3 (citing overwhelmingly pre-19th century authorities as evidence for an Islamic theory of democratic commitment at 36-46). See also Abu-Odeh, *supra* note 36 (criticizing Abou el Fadl for not citing an authority earlier than the fourteenth century in his attempt to articulate a theory of Islamic constitutionalism at 810).

39. Given the decentralized nature of religious authority in Islam, some contemporary Muslims suggest that there is precious little Islamic doctrine that is authoritative, see Khaled Abou el Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: One World, 2001) (noting the attempt by Muslim theologians to distinguish fundamental points of dogma from derivative points, but suggesting this effort was largely a failure at 65-66), or conclusive, see Khaled Abou el Fadl, "Islam and the Challenge of Democratic Commitment" (2003) 27 Fordham Int'l L. J. 4 (suggesting that no revelatory text—no matter how clear—can establish divine intent

To the extent that a doctrine can be documented as either being majoritarian, as having been adopted by an influential scholar or by an authoritative text or commentary on such a text, I accept such a doctrine as being objectively part of Islam as a comprehensive theory of the good, at least as a historical matter. In the case of a view advanced by an influential scholar or adopted by an authoritative text, the fact that the view in question was not a majoritarian position does not exclude it from being part of Islam as a comprehensive theory of the good: to the contrary, unless there is explicit evidence of that view being denounced as heretical (and not simply mistaken), it is legitimate to consider that opinion or view as constituting a legitimate dissenting view within Islam as a comprehensive theory of the good. Adopting a legitimate dissenting view is precisely the type of doctrinal revision that can be accomplished within a comprehensive theory of the good without raising concerns that such a revision has not been undertaken in good faith.[40]

Finally, although this Article uses pre-19th century Islamic comprehensive doctrines to argue, among other things, that pre-19th century Islamic law included elements consistent with Rawls' conception of public reason, it does not make the claim that pre-19th century Islamic legal doctrine had become unqualifiedly non-perfectionist. Instead, it makes the more limited claims that (1) fundamental Islamic theological and ethical doctrines are compatible with, and to some extent, may require, political commitments such as freedom of conscience, and to that extent, this Article answers the question "Why would a committed Muslim endorse constitutional essentials for principled reasons rather than compulsion?" and (2) because Islamic law historically recognized the legitimacy of public reason-style arguments, largely as a result of certain theological and ethical commitments, there is no reason to foreclose the possibility that Muslim citizens of liberal democracies could revise, in good faith, the politically perfectionist commitments of in pre-19th century Islamic law, including the criminalization of apostasy, in order to participate in an overlapping consensus regarding constitutional essentials which protects their most important values—the potential to know God and live an ethical life in accordance with revelation.

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with certainty at 69-70). This view confuses the logical possibility that certain doctrines—whether historical or contemporary—may prospectively be revised or even abandoned wholesale with the historical fact that certain doctrines are or were deemed to be authoritative or conclusive. At the other extreme are those who assume that because Islam is a revealed religion, Islamic law must be immutable, and accordingly, what Islamic law stood for in one period must also be the same as what it stands for in subsequent periods. See, e.g., Patricia Crone, *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate* (Cambridge: Cambridge University Press, 1987) (noting that, "In practical terms . . . any legal work composed between 800 and 1800 [of the common era] may be cited as evidence of classical doctrine" at 18), quoted in Wael Hallaq, "*Usûl al-Fiqh:* Beyond Tradition" (1992) 3 J. Islamic Studies 172 at 176.

40. For an example of such an approach to the question of women as political actors in Islamic law, see Mohammad Fadel, "Knowledge, Gender and Power in Medieval Sunni Legal Thought" (1997) 29 International J. Middle East Studies 185 (giving an overview of the legal controversies regarding the admissibility of evidence reported by females, the participation of females in the production of knowledge generally and whether women could serve as judges, and the relationship of these issues to women as independent political actors).

c. Why Only Muslim Citizens in Liberal Polities?

Because this Article focuses on Muslim citizens of liberal regimes, it does not address issues arising out of international law,[41] nor does it attempt to address how Muslim citizens in Muslim majority jurisdictions would or should understand the political commitments implicit in a normative commitment to Islam. There are both principled and pragmatic reasons for limiting the scope of this Article to Muslims living in liberal regimes and their relationship to domestic law. First, the pragmatic reasons: there are currently 57 member states and five observer states in the Organization of the Islamic Conference, located in Africa, Europe and Asia. The economic, historical, political and sociological circumstances are so varied among these jurisdictions that conjecture as to how Muslims in those countries would understand the relationship of Islamic comprehensive doctrine to political liberalism within the space constraints of a single article would be meaningless. In addition, large numbers of Muslim minorities live under authoritarian regimes, e.g., the People's Republic of China, or "new" or "emerging" democracies, e.g., The Russian Federation and India, under equally varied conditions with the result that conjecture regarding their views of Islam and political liberalism would be equally or even more implausible.

The principled reason has to do with contentions Rawls himself makes regarding the conditions in which it is plausible to imagine that politically liberal institutions supported by an overlapping consensus might arise. As Rawls notes, centuries of human history had suggested "that social unity and concord requires agreement on general and comprehensive religious, philosophical or moral doctrine. Intolerance was accepted as a condition of social order and stability."[42] Thus, according to the Rawlsian account of the rise of political liberalism, the religious wars and the ensuing debates in Europe regarding religious liberty were a critical catalyst (and perhaps even a "but-for" condition) in paving the way for the rise of liberal institutions.[43]

The historical role of Sunnism within Islamdom[44] in this respect differed markedly from that of the Catholicism within Christendom: while Sunni Islam

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41. For this reason I am neither concerned with the views Rawls expresses in his *Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), nor do I discuss the laws governing *jihad*—which include both the rules of law governing warfare between Muslim and non-Muslim powers and international relations in general. For an analysis of the law of jihad in the modern context, see Sherman Jackson, "Jihad and the Modern World" (2002) 7:1 J. Islamic Law and Culture 1.

42. Rawls, *supra* note 6 at xxvii.

43. *Ibid.* at xxvi-viii. This is not the only plausible reading of the origins of political liberalism as an idea, however. See, e.g., Christine M. Korsgaard, "Rawls and Kant: On the Primacy of the Practical" in Hoke Robinson, ed., *Proceedings of the Eighth International Kant Congress*, vol. 1(Milwaukee, WI: Marquette University Press, 1995) 1165 (arguing that, for Rawls, political liberalism is the solution to the paradox that a commitment to liberalism precludes imposition of its ideals on others at 1169-72).

44. The great scholar of Islamic history, Marshall Hodgson, introduced the term "Islamdom" to signify those areas of the world in which Islamic civilization, along with its patterns of thought and social and political organization, came to dominate historically, thus serving as an analogue to Christendom. Marshall Hodgson, *The Venture of Islam* (Chicago, IL: University of Chicago Press, 1977) vol. 1 at 58.

became a politically hegemonic comprehensive doctrine, Sunni Muslims were gen-
erally content with ensuring their superiority within a multi-confessional state.[45]
With the passage of time, therefore, especially after the failure of the *mihna* in the
9th century,[46] Sunni Islam gradually became ascendant in Islamdom and dissenting
Muslims as well as followers of other non-Islamic religions gradually became polit-
ically marginalized. As a result, religious dissidents—whether Muslim or non-
Muslim—could not threaten intracommunal violence on the scale Europe
experienced during the Reformation and thus Islamdom never experienced religious
civil wars on the scale that, according to Rawls, made possible the rise of liberal
politics in Europe.

The hegemony of Sunni Islam within Islamdom—after having been firmly estab-
lished around the 12th century of the Common Era—subsequently broke down, in
the 19th and 20th centuries, but largely as a result of pressure from colonial powers
and not because of internal dissent, religious or otherwise. Accordingly, the kinds
of debates Muslims had in the 19th and 20th centuries tended to be instrumental inso-
far as they were focused on what steps Muslim states needed to take in order to
fend off aggressive European powers.[47] Those debates did not lead to the kind of
political and social conflict involving conflicting transcendental claims that could
not be resolved through ordinary political compromise, since as a general matter,
Muslim populations were by and large in general agreement that more or less radical
political and social reforms were needed, but that abandonment of Islam was not
an option.[48] As a result, most states with Muslim majority populations obtained
independence with a homogeneous religious culture intact, lessening the practical
pressures to fashion a political discourse that mooted appeals to religious language.[49]

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45. See, e.g., "Dhimma" in 2 Encyclopaedia of Islam 227a.
46. The *mihna* refers to an episode early in the 'Abbâsid dynasty in which the 'Abbasid caliphs
   attempted to compel the religious elite to accept the caliph's power to determine orthodox religious
   doctrine. Resistance by religious scholars forced the government to abandon these efforts and
   helped crystallize the formation of Sunni Islam. See " *Mihna*" in 7 Encyclopaedia of Islam 2b.
47. Charles Kurzman, in his reader *Modernist Islam, 1840-1940: A Sourcebook* (Oxford: Oxford
   University Press, 2002), provides a good collection of 19th and 20th century reflections of Muslim
   intellectuals throughout Islamdom on the impact of modernity on their societies. Another reader
   by the same author, *Liberal Islam*, *supra* note 29, provides an anthology of Muslim writings over
   the last one hundred years that engage liberal themes.
48. Cf. Rawls, *supra* note 6 (noting that the conflict that resulted from the Reformation involved
   "a transcendent element not admitting of compromise," something which "forces either mortal
   conflict moderated only by circumstance and exhaustion, or equal liberty of conscience and free-
   dom of thought" at xxviii).
49. This is not to deny that radical change occurred in the nature of religious discourse and religious
   authority in the Muslim world over the course of the last 200 years. The point is simply that,
   because the vast majority of the population remained Muslim throughout this period, overtly
   Islamic arguments—whether traditionalist, radical or modernist (despite the theological incom-
   patibility of these three modes of Islam)—retain a certain saliency in a way that would be implau-
   sible in a society lacking a hegemonic religious majority. For example, even the staunchly
   "secularist" Republic of Turkey maintains supervision of Islamic affairs, going so far as to prepare
   sermons for state-appointed clerics. T. Jeremy Gunn, "Fearful Symbols: The Islamic Headscarf
   and the European Court of Human Rights" (4 July 2005), online: Strasbourg Conference
   http://www.strasbourgconference.org/papers/Sahin%20by%20Gunn%2021%20by%20T.%20Jere
   my%20Gunn.pdf (describing the substantial involvement of the Turkish state in the formulation
   and dissemination of a state-approved form of Islam within the Republic of Turkey at 17-19).
     Ironically, given the reflexive Western fears of pan-Islamism, see Rudolph Peters, *Jihad in*

The absence of actual pluralism in most Muslim majority societies, especially Middle Eastern countries, combined with the profound challenges facing post-colonial societies, makes it unlikely, at least under current circumstances, that providing a theological account of pluralism (other than intra-Muslim pluralism) would be high on the list of the political priorities of these polities or their citizenry.

Muslim citizens of liberal jurisdictions (especially in North America), however, do live in societies whose citizens adhere to numerous religious and non-religious theories of the good under a constitutional regime of equal liberty. Moreover, they are also exposed to intra-Muslim pluralism on a scale that is unimaginable for a Muslim living in a country that has historically had a Muslim majority, such as Turkey, Morocco or Pakistan. From a Rawlsian perspective, therefore, it is more plausible to believe that, under such conditions, those Muslim citizens of liberal polities with commitments to Islam will attempt to formulate an account of pluralism from their internal Islamic perspective, if only to make sense of their own experience as equal citizens of a liberal constitutional regime.[50]

Muslim citizens of liberal polities are also better positioned, relative to their co-religionists, to tap the intellectual resources of the Islamic tradition with respect to its potentiality for sustaining a stable pluralism. The greater affluence of liberal polities, along with already-won guarantees of freedom of conscience, combine to provide Muslim citizens of liberal polities with the material and political resources necessary to engage in the kind of intellectual reflection assumed by Rawls to an extent not as readily available in most Muslim majority jurisdictions. Finally, because of the rich collection of Islamic literature (secular and religious) available in the research libraries of universities in North America and Western Europe, Muslim citizens in liberal democracies simply have easier access in many cases to the Islamic tradition than most Muslim citizens of Muslim-majority jurisdictions. In short, it may be the case that only Muslims living in already established liberal democracies—for the reasons mentioned above (as well as perhaps for other

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Classical and Modern Islam (Princeton, NJ: Markus Wiener, 1996) at 55-56, it may be the case—following James Madison's reasoning in Federalist no. 10—that the best circumstances for formulating comprehensive doctrinal reform in Muslim majority states would be the existence of a pan-Islamic federation, in which case a *modus vivendi* among the adherents of the various contemporary Islamic comprehensive doctrines, e.g., traditionalist, modernist and radical, as well as of non-Sunni sects, could arise. This could then evolve into a more robust pluralism characterized by an overlapping consensus, which would eventually include non-Muslim citizens as well.

50. Rawls, *supra* note 6 ("the success of liberal constitutionalism came as a discovery of a new social possibility: the possibility of a reasonably harmonious and stable pluralist society. Before the successful and peaceful practice of toleration in societies with liberal institutions there was no way of knowing of that possibility," at xxvii). This is not to say that Muslim scholars working on issues of Islam and democracy in the context of Muslim-majority jurisdictions are indifferent to the concept of public reason. In a recent work, Abdullahi An-Naʻim stresses the importance of notions derived from "public reason" in strengthening commitments to democratic rule and human rights in Muslim majority jurisdictions. Abdullahi An-Naʻim, *The Future of Shari'a* [forthcoming in 2008] (see especially ch. 3 and 4). Raja Bahlul has also published an article in which he questions the applicability of Rawls' notion of public reason to Muslim majority jurisdictions, but suggests that an "Islamic public reason," assuming certain substantive reforms to traditional Islamic law are effected, could function in a similar fashion. See Raja Bahlul, "Toward an Islamic Conception of Democracy: Islam and the Notion of Public Reason" (2003) 12 Critique: Critical Middle Eastern Studies 43.

reasons)—are in a position to make proper use of the resources afforded by the Islamic tradition to formulate a theology and ethics appropriate for participation as citizens of a liberal polity.[51]

Part 3: The Islamic Background

a. Political History of the Early Islamic State[52]

Islam began in Makka, a trading and pilgrimage center in western Arabia. Muhammad, a native of Makka and a member of a respected clan of Quraysh, the tribe then in control of the town, was born approximately in 570. He began to receive revelations from God, starting approximately in the year 610, and ending with his death in the year 632. These revelations were subsequently gathered into one book, called the Quran. During the course of Muhammad's twenty three year prophetic mission, Islam expanded from his immediate family to become the religion of the peninsular Arabs. His success in creating a unified Arab state paved the way for the dramatic expansion of the Islamic state under his successors—the caliphs—within the first one hundred and fifty years of his death.

Upon the death of the Prophet, the state he had founded experienced its first crisis: would there be a religious or political successor to the Prophet? If there were a political successor, who would that person be? The most fundamental dispute revolved around the nature of the successor himself, viz., did he succeed only to the Prophet's secular office, or did he also share, if only to a limited extent, the Prophet's charismatic authority deriving from his status as prophet? The view that prevailed was the former, and the supporters of this position eventually became known as Sunnîs. The supporters of the latter view become known as the Shî'ites.[53]

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51. This is not to deny the possibility that the experience of Muslim citizens in liberal societies—to the extent that it is recognized by the larger Muslim world as a successful articulation of an Islamic way of life—could influence the interpretation of Islamic comprehensive doctrines in Muslim majority jurisdictions. Given the impact of globalization, it is almost inconceivable to imagine that such an articulation would *not* have a profound impact on the larger Muslim world.

52. Much of early Islamic history is contentious, with several leading western historians of Islam advancing various revisionist theories on the origins of Islam over the course of the last fifty years. This Article provides a very brief overview of those elements from early Islamic history that are relevant to understanding later Muslim theological doctrines pertaining to the state. This summary account hews closely to traditional Muslim historical accounts because it is the account that is accepted by most Sunni Muslims and therefore is a necessary part of understanding Islam as a comprehensive theory of the good. For an introduction to the controversy surrounding the historiography of early Islamic history, see Fred Donner, *Narratives of Islamic Origins: The Beginnings of Islamic Historical Writing* (Princeton, NJ: Darwin Press, 1998). For examples of the work of a revisionist historian, see the work of Patricia Crone, including Michael Cooke & Patricia Crone, *Hagarism* (Cambridge: Cambridge University Press, 1977); and Patricia Crone, *God's Caliph* (Cambridge: Cambridge University Press, 1986). For examples of historians who more or less accept Muslim accounts regarding the origins of Islam, see Marshall Hodgson, *supra* note 44; Hugh Kennedy, *The Prophet and the Age of the Caliphates,* 2nd ed. (Harlow, UK: Longman, 2004); and William Montgomery Watt, *Muhammad at Mecca* (Albany: State University of New York Press, 1988) & *Muhammad at Madina* (New York: Oxford University Press, 1981).

53. The Shi'ites believe that political leadership of the community is inseparable from religious leadership, and for that reason, the community's legitimate ruler, whom they term "*imâm,*" is divinely

At the end of the initial one hundred and fifty year of expansion of the Islamic state, the Muslims, who were still largely ethnic Arabs, ruled an empire with immense religious and ethnic diversity. While the Muslim elite, whether Arab or non-Arab, were unified vis-à-vis their non-Muslim subjects, the disputes that emerged at the time of the Prophet's death continued and became further crystallized within the Muslim community, even as the political boundaries of their empire continued to expand. It was within this crucible of cultural, religious, and intellectual diversity that the Islamic intellectual tradition—including scholastic theology, moral theology and law—was born.[54] While many of the doctrinal disputes in these subjects trace their origin to the community's earliest disputes, e.g., the relationship of religious authority to political authority, the continued development of these three subjects can only be understood as responses to the diversity Muslims found in their contemporary social milieu. Thus, scholastic theology arose as a discipline to investigate truth claims regarding God made by the various Muslim and non-Muslim communities that lived in the Islamic state. Moral theology arose, at least in part, as a result of the perceived need to explain the basis upon which human conduct is morally evaluated. Finally, law existed to serve the instrumental function of maintaining social order in a manner consistent with Islam's worldview. In the following three sections, I will briefly discuss the most important features of each discipline.

b. Scholastic Theology

Scholastic theology is an imprecise translation for the Arabic term *'ilm al-kalâm*, which literally means the science of speech, or disputation.[55] Hence, kalam is sometimes translated as dialectical theology. Even with this qualification, however, theology is an incomplete translation as it implies to the English reader that its primary concern is the study of God whereas kalam's scope is much broader. Under the rubric of kalam, Muslim theologians developed their metaphysical, ontological, and epistemological doctrines, as well as their religious dogmas.[56] The study of God was simply one subject within the general study of being.[57] A Muslim theologian

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selected, and like the Prophet, is believed to be infallible, at least in matters dealing with religion. The Shi'ites believe that the Imam must come from a specific line of the Prophet's descendants. For more information on the Shi'ites, see "Shi'a" in 9 Encyclopaedia of Islam 420a.

54. See, e.g., Joel Kraemer, *Humanism in the Renaissance of Islam* (Leiden: Brill, 1986) (describing theological disputations of 11th century Baghdad as involving not only orthodox and heterodox Muslims, but also "infidels, Mazdeans, materialists, atheists, Jews, and Christians—in short, infidels of every sort," that the ground rules of such interdenominational disputation "proscribed appeal to the authority of revelation," and that the only admissible arguments were those "derived from reason" at 59).

55. For more information on scholastic theology among Muslims, see "Kalam" in 4 Encyclopaedia of Islam 468b.

56. Bernard G. Weiss, *The Search for God's Law* (Salt Lake City: University of Utah Press, 1992) at 34, 51.

57. *Ibid.* (describing "theology proper" in the Muslim conception as limited to the study of the "existent whose existence is necessary," and accordingly, that "the study of God [is rooted] in the study of being" at 51). See also Johansen, *supra* note 9 (describing Muslim scholastic theology as "a theocentric system of rational speculation on God and the universe" at 6).

defined kalam's scope as including all questions that admit, logically, of only one correct answer.[58] Given the highly abstract nature of kalam, at first glance it is surprising that it also includes discussions regarding the nature of political authority.[59] One Sunni theologian explains this apparent anomaly by placing the blame on sectarian elements within the Muslim community who *falsely* believed that the question of political authority was a matter of religious dogma, and for that reason Sunni theologians were obliged to include this topic within their doctrinal works, if only to refute those false doctrines.[60]

This Article focuses on the two principal schools of scholastic theology that existed within the Sunni Muslim tradition, the Mu'tazilites[61] and the Ash'arites,[62] with an emphasis on the theological and moral doctrines of the Ash'arites.[63] Although the Ash'arites are viewed as representing Sunni "orthodoxy," the Mu'tazilites were not heretics, and even if they eventually lost adherents among Sunni Muslims, their influence on the development of Islamic theology was immense. Both the Ash'arites and the Mu'tazilites, for example, were committed to the proposition that God could not be known without the mediation of deliberative reflection, and therefore, that both pure and practical reason were necessary tools in the quest for religious salvation.[64] Some Muslims, however, viewed both schools' use of speculative reason with suspicion.[65]

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58. Muhammad b. 'Abd al-karim al-Shahrastani, *al-Milal wa-1-nihal* (Cairo: Maktabat al-husayn al-tijariyya, 1948-1949), vol. 1 at 54-55, quoted in Abu al-Husayn Muhammad b. Yusuf al-'Amiri, *al-I'lam bi-manaqib al-islam*, ed. by Ahmad 'Abd al-hamid Ghurab (Cairo: Dar al-Katib al-'Arabi 1967) at 115, n. 2. For more information on al-Shahrastani, see "al-Shahrastani" in 9 Encyclopaedia of Islam 214b. For more information on al-'Amiri, see "Aflatun" in 1 Encyclopaedia of Islam 235b.

59. Abu Hamid Muhammad b. Muhammad b. Muhammad al-Ghazali, *al-Iqtisad fi al-i'tiqad,* ed. by Muhammad Mustafa Abu'l-'Ila (Cairo: Maktabat al-jundi, n.d.) [al-Ghazali, *Iqtisad*] (noting that the Caliphate does not fit comfortably within kalam because it is more properly a matter of legal inquiry and not rational inquiry at 197).

60. See Mohammad Fadel, *Adjudication in the Maliki Madhhab: A Study of Legal Process in Medieval Islamic Law* (Ph.D. dissertation, University of Chicago, 1995) [unpublished] at 39, n. 8.

61. For more information on the Mu'tazilites, see "Mu'tazila" in 7 Encyclopaedia of Islam 783a.

62. For more information on the Ash'aris, see "al-Ash'ari, Abu 1-Hasan Ali b. Isma'il" in 1 Encyclopaedia of Islam 694a and "Ash'ariyya" in 1 Encyclopaedia of Islam 696a.

63. A third school of theology, the Mâtûrîdîs, often took middle positions between the Mu'tazilites and the Ash'arites. For more information on this theological school, see "al-Maturidi, Abu Mansur Muhammad b. Muhammad" in 6 Encyclopaedia of Islam, 846a and "Maturidiyya" in 6 Encyclopaedia of Islam 847a.

64. 'Ali b. Muhammad al-Jurjani, *Sharh al-mawaqif* ed. 'Abd al-rahman 'Umayra (Beirut: Dar al-jil, 1997), vol. 1 (while knowledge of God is a duty unanimously affirmed by all Muslims, the Ash'aris and the Mu'tazilites agree that deliberative reflection is the only way to attain that knowledge and for that reason is also obligatory at 152-53). See also Johansen, *supra* note 9 ("the obligation to rationally recognize God has remained part of the *Sunnî* definition of belief" at 5-6).

65. See, e.g., George Makdisi, "Ash'ari and the Ash'arites in Islamic Religious History" (1962) 17 Studia Islamica 37 and "Ash'ari and the Ash'arites in Islamic Religious History (Conclusion)" (1963) 18 Studia Islamica 19 (discussing the battle in Islamic theological history between those scholars who advocated the use of speculative reason and those who shunned it); Nicholas Heer, "The Priority of Reason in the Interpretation of Scripture: Ibn Taymiyyah and The Mutakallimun" in Mustansir Mir, ed., *Literary Heritage of Classical Islam* (Princeton, NJ: Darwin Press, 1993) (describing the conflict in the approaches of traditionalist theologians and Ash'ari theologians at 181); see also Ibn Hajar al-'Asqalani, *Fath al-Bari bi-sharh sahih bukhari*, ed. by Muhammad Fu'ad 'Abd al-Baqi and 'Abd al-'Aziz b. Baz (Beirut: Dar al-ma'rifa, n.d.), vol. 13 (summarizing the controversy regarding the obligation to use reason to know God, and ascribing to

To conclude, the science of kalam, to its adherents, provided the metaphysical foundation upon which all other fields of religious and empirical studies of the world could proceed.[66] The object of kalam was to discover truth, truth about being, truth about how humans obtain knowledge, including knowledge from revelation, and truth regarding religious dogma through the use of reason.[67] Because of the general nature of its inquiries, and its reliance in the first instance on rational propositions rather than revelation, kalam was also a universal science, something that was not true for the other two subjects—moral theology and law—that will be discussed in this Article.[68]

c. Moral Theology

Moral theology, or *usûl al-fiqh* in Arabic, takes as its subject how God judges human acts. Consequently, it is a theological discipline.[69] This science does not so much discuss the substantive conclusions reached by moral inquiry, but rather concerns itself with general questions regarding the nature of moral inquiry, such as the sources of moral obligation,[70] the process by which moral judgments may be made, the various categories of moral judgment,[71] and the epistemological limitations of those judgments.[72] Because the language of revelation is Arabic, usul

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some theologians the view that faith not preceded by rational inquiry was valid while ascribing to other theologians the view that although rational faith was necessary, it need not be the product of theological proofs and to others the position that faith was instinctual and that therefore rational inquiry was unnecessary and possibly sinful at 432-39). For more information on Ibn Taymiyya, see "Ibn Taymiyya, Taki al-Din Ahmad" in 3 Encyclopaedia of Islam 951a. For more information on Ibn Hajar, see "Ibn Hadjar al-'Askalani, Shihab al-Din Abu '1-Fadl Ahmad b. Nur al-Din" in 3 Encyclopaedia of Islam 776a.

66. Weiss, *supra* note 56 (theology is the first proper concern of the human intellect, and in one's encounter with it, one develops an understanding of epistemology and the prerequisites of rational inquiry at 35).

67. See Johansen, *supra* note 9 (saying that "[t]heology is a rational vindication of religious truths" at 26).

68. Indeed, al-'Amiri cites kalam's universality as one of its chief virtues. Al-'Amiri, *supra* note 58 at 115. See also Abu Hamid Muhammad b. Muhammad al-Ghazali, *al-Mustasfa fi 'ilm al-usul*, ed. by Muhammad 'Abd al-salam 'Abd al-shafi (Beirut: Dar al-kutub al-'ilmiyya, 1993) [al-Ghazali, *Mustasfa*] ("The one religious science that is universal is theology" at 6).

69. A. Kevin Reinhart, "Islamic Law as Islamic Ethics" (1983) 11 J. Religious Ethics 186 (the object of inquiry in this discipline is "the search for the . . . [moral] judgment . . . that is appropriate to a given . . . act" at 188). Al-Ghazali defines it as "an expression for the bases of [moral] judgments and knowledge of the various ways by which they signify [moral] judgments in general." Al-Ghazali, *Mustasfa*, *supra* note 68 at 5. Ethical judgments are known as *ahkâm taklîfiyya*—the rules of obligation, because they command, permit or prohibit specific actions for specific persons.

70. Richard Frank, "Moral Obligation in Classical Muslim Theology" (1983) 11 J. Religious Ethics 204 (discussing various theories of moral obligation propounded by Muslim theologians).

71. In addition to the rules of obligation, moral theology also recognizes another category of judgments, known as *ahkâm wad'iyya*—positive rules—which neither command nor prohibit action, but instead set forth the positive consequences of certain actions. Accordingly, while all human actions are judged by reference to the ethical rules of obligation, only some actions generate legal consequences under the positive rules. For example, while a contract of sale is generally permissible, once executed, certain legal consequences arise, including the duty of the seller to deliver the good and of the purchaser to pay the purchase price, among other legal consequences that are a function of the positive rules.

72. See generally Aron Zysow, *The Economy of Certainty* (Ph.D. dissertation, Harvard University, 1984) [unpublished] (describing the importance of probability to understanding *usûl al-fiqh*);

al-fiqh also deals with hermeneutical questions relating to the various modes of Arabic expression.[73]

Usul al-fiqh, however, is not only concerned with how we make moral judgments; it seeks to provide an account for how *true* moral judgments or, if true judgments are not possible, *probable* moral judgments, are reached. In this respect, it is similar to theology insofar as both sciences strive to reach the truth regarding certain propositions, the difference being that theology deals with metaphysical truths while usul al-fiqh deals with moral truths. To illustrate the difference between the two, kalam is concerned with questions such as determining whether the world is eternal (*qadîm*) or contingent (*hâdith*), and whether God has essential attributes such as sight, hearing, speech, power, life, will and knowledge, whereas usul al-fiqh is concerned with determining the proper ethical judgment attaching to human conduct (as viewed from the perspective of God) in specified circumstances, such as drinking wine, thanking a benefactor or eating pork. Usul al-fiqh, therefore, is the science in the Islamic tradition that attempts to account for the good, explain how humans can know what is good (and the limitations thereon), and how to judge specific actions from the perspective of the good.

According to Muslim moral theologians, ethical judgments are discovered either through the application of pure reason, from the command of God, or by a combination thereof. In any case, however, human beings *discover* the ethical norm governing the conduct at issue; they do not create it and the ethical norm is utterly categorical.[74]

For this reason, usul al-fiqh is, in the first instance, a dogmatic enterprise: the determination of the content of God's rule concerning a particular human action. It follows that, even prior to the ethical obligation to act in accordance with God's rules, one is obliged—at least to the extent such rules can be established with any certainty—to believe in their attribution to God. Rejecting the truth of rules that are known to be set forth in revelation with certainty, therefore, is tantamount to the rejection of Islam and thus constitutes apostasy. In the more typical case, however, the conscientious application of the rules of ethical inquiry does not yield a certain result. Instead, the use of moral judgment necessarily results in different (and even contradictory) moral judgments, and for that reason, usul al-fiqh also deals with the question of ethical disagreement and its theological consequences. Indeed, one of its primary functions is to distinguish between legitimate and illegitimate moral disagreement.[75]

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see also al-Ghazali, *Mustasfa*, *supra* note 68 (linking the possibility of sin to epistemology at 347-48). I am indebted to Professor Baber Johansen for this reference.

73. To get a sense of the extent to which hermeneutical issues occupied the attention of Muslim moral theologians, approximately 230 out of 745 pages of Weiss' book, *The Search for God's Law*, which is itself a rendering of Sayf al-din al-Amidi's *al-Ihkam fi usul al-ahkam*, is devoted to issues pertaining to language and its interpretation. See Weiss, *supra* note 56.

74. This does not mean that Muslim theologians believed that moral inquiry was an entirely objective process. See *infra* notes 171-176, and the accompanying text.

75. Illegitimate disagreement constitutes rejecting that which is known by necessity to be part of Islam due to the fact that these matters are so clearly established by revelation that that only those who reject the truth of revelation could deny these obligations. See al-Ghazali, *Mustasfa*, *supra* note 68 (rejection of the obligation to pray and fast, and the prohibition against drinking wine

Another fundamental function of usul al-fiqh is to identify the "data" that is relevant to ethical inquiry. The most important source of data for ethical knowledge is revelation, which according to Sunni Muslims, is of three types, in descending order of epistemological weight. The first is the Quran.[76] The second is the "traditions" of the Prophet, known in Arabic as *hadîth.* These are narrative accounts of anecdotes from the Prophet's life which include his statements, his actions, and his silence when confronted with the act of another, thereby implying, at least, moral indifference to the act in question.[77] The third is consensus, known in Arabic as *ijmâ'.*[78] Once data is identified as relevant to moral inquiry—whether that data comes from the Quran, the hadith or consensus—it had to be interpreted according to applicable hermeneutic principles.

This data may be applied to novel cases using a variety of techniques, the most important of which is analogical reasoning, known in Arabic as *qiyâs.* Analogical reasoning proceeds on lines familiar to lawyers: look to the principal case, called in Arabic the *asl,* identify the legal cause (*'illa*) that accounts for the ruling, and apply that rule as the rule of the unknown case (*al-far'*) if the legal cause is present in the unknown case. A typical example is whether drinking beer is prohibited. Revelation expressly forbade drinking grape-wine, but was silent as to other intoxicating beverages. Analogically, however, the prohibition of wine can be extended to prohibit the consumption of all intoxicating beverages, including beer, because the legal cause of prohibition in the known case is believed to be wine's capacity to intoxicate rather than some other characteristic of wine, for example, its color. Because the capacity to intoxicate is present in beverages other than wine, the rule of prohibition should apply to all other intoxicating beverages.[79] The strength of this conclusion, however, is subject to one's confidence that intoxication is the legal cause for the prohibition of wine. Because it is impossible to know with certainty that intoxication is in fact the legal cause for its prohibition, the conclusion that drinking other intoxicating beverages, e.g., beer, is also prohibited, is only a probable, not a certain, judgment.[80] In addition to analogical reasoning, other modes

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and theft are tantamount to the rejection of Islam at 347). Those areas of revelation that require some interpretive effort on the part of the listener comprise the domain of legitimate ethical disagreement as well as those areas of human life as to which revelation appears to be silent.

76. Reinhart, *supra* note 69 (describing the Qur'an, in the Muslim perspective, as "an unparalleled window into the moral universe," functioning "as a quarry in which the astute inquirer can hope to find the building blocks for a morally valid, and therefore true, system of ethics" at 189).

77. *Ibid.* (noting that because the Prophet's life, on the Muslim understanding, was "[a] life lived totally in accord with the Moral," his life "becomes a window into moral knowledge" at 190).

78. While the "data" provided by the Qur'an was of indubitable historical accuracy in the opinion of Muslims, the hadith and consensus posed unique problems. See Zysow, *supra* note 72 (noting that unlike the Qur'an, which Muslims deemed to be "of absolutely certain authenticity," the authenticity of reports attributed to the Prophet Muhammad was a matter of "serious concern" at 11). Consensus of the Muslims, although universally recognized as data relevant to ethical inquiry, was fraught with difficulties as well. See *ibid.* at 198-261; and Wael Hallaq, "On the Authoritativeness of Sunni Consensus" (1986) 18 Int'l J. Middle East Studies 427 (explaining the problematic nature of defining consensus within Islamic jurisprudence).

79. Reinhart, *supra* note 69 at 191-92.

80. Zysow, *supra* note 72 at 283. Some Muslim theologians rejected analogy for this very reason, and instead claimed to derive all their moral judgments from the plain meaning of revelatory texts. *Ibid.* (describing the views of those Muslim theologians who rejected analogy at 294-323).

of reasoning that relied on more inductive techniques such as considerations of welfare[81] were also recognized, although these arguments were more controversial.

Many contemporary scholars translate usul al-fiqh as the "sources of law," or "jurisprudence," or perhaps even "philosophy of law."[82] The multiple translations are not indicative of confusion or controversy, but rather arise out of the eclectic range of topics discussed within this genre. Thus, insofar as usul al-fiqh discusses the process by which ethical judgments are made, and because inevitably some of these ethical judgments will also be rules of law enforced by state actors, in some sense usul al-fiqh can certainly be described as jurisprudence, i.e., a theoretical account of the origin and operation of legal rules. Insofar as usul al-fiqh treats the sources of ethical judgment, which in turn lead to the production of legal rules, it is also a science that explains the sources of the law. I prefer the non-literal translation of "religious ethics" or "moral theology" because it better captures what I believe is the primary object of usul al-fiqh: knowledge of the moral consequences of human conduct in the next life when human beings, according to Islamic dogma, will be judged by God.[83] That a relationship existed between the moral rules derived from the principles of usul 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.[84] Thus, in the context of

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81. The Arabic term is "*maslaha mursala*," which is often translated inaccurately as "public interest," or "social welfare." In addition to maslaha mursala, *istihsân*, translated as "juristic preference," was another inductive technique used in ethical reasoning. See John Makdisi, "Legal Logic and Equity in Islamic Law" (1985) 33 Am. J. Comparative L. 63.

82. Weiss, *supra* note 56 (translating "*usûl al-fiqh*" as "the principles of jurisprudence" at 14-16); Sherman A. Jackson, "Fiction and Formalism: Toward a Functional Analysis of *Usûl al-fiqh*" in Bernard Weiss, ed., *Studies in Islamic Legal Theory* (Leiden; Boston; Koln: Brill, 2002) [Weiss, *Studies*] at 177 [Jackson, "Fiction and Formalism"] at 179.

83. The dual concern of moral theology, with its emphasis on the consequences in the afterlife of one's conduct in the profane world, is especially clear in the controversy regarding whether non-Muslims are morally culpable for their failure to discharge the ritual obligations of the Islamic law. See Badr al-din Muhammad b. Bahadur b. 'Abdallah al-Zarkashi, *al-Bahr al-muhit*, ed. by Muhammad Muhammad Tamir (Beirut: Dar al-kutub al-'ilmiyya, 2000), vol. 1 at 320-28. Cf. Ibn Nujaym, *al-Ashbah wa-1-naza'ir* (Beirut: Dar al-kutub al-'ilmiyya, 1993) (stating that general rules of substantive law from which detailed particular rulings are derived are the actual sources of law at 15). For more information on al-Zarkashi, see "Badr al-Din Muhammad b. Bahadur b. 'Abdallah al-Zarkashi" in 2 Encyclopaedia of Islam, 142b and 3 Encyclopaedia of Islam 1091b. For more information on Ibn Nujaym, see "Ibn Nudjaym, Zayn al-Din" in 3 Encyclopaedia of Islam 901a.

84. Weiss, *supra* note 56 (discussing the complex relationship of law to morality in Islamic thought at 1-16). The most obvious example of a legal rule that cannot be explained simply as a reflection of Islamic ethics is the notorious triple, irrevocable *talâq* (divorce). Although in certain circumstance the Malikis considered a man who used this formula to divorce his wife a sinner, see Abu Barakat Ahmad b. Muhammad b. Ahmad al-Dardir, *al-Sharh al-saghir* (Cairo: Dar al-ma'arif, 1986), vol. 2 at 537-38, and even subject him to criminal punishment in such circumstances, see, e.g., *ibid.* at 567, 574, the divorce was nevertheless recognized as effective. Fadel, *supra* note 60 at 12. Another example is the law of conversion (*ghasb*): while conversion is unlawful, and may be punished criminally, the converter in certain circumstances acquires limited property rights with respect to the converted object. See Hiroyuki Yanagihashi, *A History of the Early Islamic Law of Property* (Leiden: Brill, 2004) at 98-121. Finally, not all acts that are legally prohibited are sinful. For example, the Shafi'is prohibited a foster parent living in a city, even if originally a bedouin, from removing the foster child from the city to the desert, or even a village. See Daniel Pollack et al., "Classical Religious Perspectives of Adoption Law" (2004) 79 Notre Dame L. Rev. 693 at 747-48.

usul al-fiqh, the primary purpose of asking whether an action is obligatory, permissible or forbidden, is to know (or if knowledge is not possible, reach a probably judgment) whether God is indifferent to this act, finds it blameworthy, or praises it.[85]

Accordingly, while usul al-fiqh certainly has a relationship with the production of legal rules, it is first and foremost concerned with identifying what is good conduct and what is evil conduct so that individuals could obtain salvation in the next life, first by knowing the good, and second by living in accordance with its requirements. Whether a particular moral rule should subsequently become a legal rule enforced by state actors is an entirely different question, one answered by substantive law.

d. Positive Law

The domain of positive law, known in Arabic as *fiqh*, was the preserve of legal specialists known as *fuqahâ'* (s. *faqîh*).[86] Islamic law, like Roman law, was a jurist's law—it developed largely as a result of scholarly efforts and not positive legislation of a government. In principle, legal rules were derived from revelation by application of the method of inquiry determined by usul al-fiqh.[87] In fact, however, it is questionable whether usul al-fiqh was actually responsible for the development of legal rules, for at least two reasons.[88] The first is historical. The foundational period of Islamic law, circa the eighth century of the common era, occurred prior to the formalization of the science of usul al-fiqh. The second is functional. Usul al-fiqh describes the process by which a person of suitable qualifications derives ethical judgments directly from revelation. Such a suitably qualified person is called a *mujtahid* in the Islamic tradition.[89] Certainly by the 13th century, if not earlier, legal specialists were no longer interpreters of revelation, but instead followed the legal doctrine established by previous well-known legists who were mujtahids.[90] A jurist

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85. Reinhart, *supra* note 69 (noting definition of obligatory and forbidden in relation to religious consequence of act at 99-100); cf. *ibid.* (discussing difficulty in determining whether judgments in usul al-fiqh are primarily moral judgments or legal judgments, but concluding that connotation is primarily legal at 103-05). See also al-Ghazali, *supra* note 68 (explaining the preference for the term "blame (*dhamm*)" rather than "punishment (*'uqûba*)" to describe the consequence of violating God's commands because, while religious blame occurs immediately, punishment may or may not occur due to the possibility of divine forgiveness at 57); Weiss, *supra* note 56 (quoting al-Amidi as using the term "blame" in connections with violations of the divine law at 99-100).

86. See Johansen, *supra* note 9 (describing how law came to be separated from theology in Islamic history at 1-7).

87. See, e.g., al-Ghazali's definition of fiqh as "an expression for the science [concerned with] ethical judgments that are established for the actions of morally-responsible persons (*'ibara 'an al-'ilm bi-1-ahkam al-shar'iyya al-thabita li-af'al al-mukallafin khassa*)." Al-Ghazali, *supra* note 68 at 5.

88. Mohammad Fadel, "*Istihsân* is Nine-Tenths of the Law: the Puzzling Relationship of *Usûl* to *Furû'* in the Mâlikî Madhhab" in Weiss, *Studies*, *supra* note 82 at 161.

89. The word mujtahid is the active participle of the verbal noun *ijtihad*, which means "to exert one's self to the utmost of her ability." In the context of ethical reasoning, it is to exert one's judgment to her utmost in discovering the correct ethical ruling regarding specific conduct.

90. See Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihâb al-Dîn al-Qarâfî* (Leiden: Brill, 1996) [Jackson, *Constitutional Jurisprudence*] at 77.

who followed the doctrine of a mujtahid was known as a *muqallid.* Eventually, the study of Islamic law in the Sunni tradition became organized around the study of the teachings of four mujtahids, Abu Hanifa, Malik b. Anas, Muhammad b. Idris al-Shafi'i and Ahmad b. Hanbal. Thus, four "schools" of Islamic law were established, each named for its eponym: the *Hanafî* school, the *Mâlikî* school, the *Shâfi'î* school, and the *Hanbalî* school.[91]

While inter-school debates were not infrequent regarding the different substantive doctrines adopted by each school,[92] and encyclopedic works were authored devoted to explaining the differences in the legal doctrines of the schools,[93] legal doctrine within each school largely developed linearly, each school taking as its departure point the corpus of legal teachings left behind by their various eponyms and their leading students. Legal doctrine developed largely as a result of the interaction between two forces. The first was social change, and the need to conform legal rules to changing circumstances. The second was the jurists' own desire to create a coherent set of legal rules, a complex task that required harmonization of a vast number of individual rules in an attempt to discern principles that could explain the existing corpus of legal doctrine.[94]

In discharging these tasks, the jurists were forced to confront practical issues, such as which party in a dispute bears the burden of proof and what remedies could be provided within the legal system, that scholars operating in the more abstract domain of usul al-fiqh did not need to consider. Because of the pressing need to develop a set of rules to be followed by judges, they also had to take into account political concerns that were not necessarily relevant to the purely ethical inquiry of usul al-fiqh, e.g., the need for predictability of legal decision-making.[95] Similarly, the existence of a plurality of legal doctrines required the jurists to develop a system

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91. For more information on the founders of the schools of Islamic law and the schools themselves, see "Abu Hanifa, al-Nu'man b. Thabit" in 3 Encyclopaedia of Islam 162b; "Hanafiyya" in 3 Encyclopaedia of Islam 162b; "Malik b. Anas" in 4 Encyclopaedia of Islam 262b; "Malikiyya" in 6 Encyclopaedia of Islam 278a; "Ahmad b. Hanbal" in 1 Encyclopaedia of Islam 272a; "Hanabila" in 3 Encyclopaedia of Islam 158a; "Shafi'iyya" in 9 Encyclopaedia of Islam 185a.

92. See, e.g., George Makdisi, *The Rise of Colleges* (Edinburgh: Edinburgh University Press, 1981) at 133-34.

93. See, e.g., Abu al-Walid Muhammad b. Ahmad Ibn Rushd, *Bidayat al-mujtahid wa nihayat al-muqtasid*, ed. by 'Ali Mahmud Mu'awwad & 'Adil Ahmad 'Abd al-Mawjud (Beirut: Dar al-kutub al-'ilmiyya, 1996); and Muwaffaq al-din 'Abdallah b. Ahmad b. Muhammad Ibn Qudama, *al-Mughni* (Jeddah: Maktabat al-Sawad, 2000). For more information on Ibn Rushd, known to the Europeans as Averroes, see "Ibn Rushd, Abu '1-Walid Muhammad b. Ahmad" in 3 Encyclopaedia of Islam 909b.

94. For example, in discussing whether a father's prospective waiver of his rights to the custody of his minor children in the event of the mother's remarriage is binding, Badr al-din al-Qarafi, a sixteenth-century Maliki judge from Egypt, analyzed the issue under the rubric of the enforceability of prospective waivers of contingent rights under Maliki doctrine generally rather than engage in scriptural interpretation. See Sherman Jackson, "Kraemer v. Kraemer in a Tenth/Sixteenth Century Egyptian Court: Post-Formative Jurisprudence between Exigency and Law" (2001) 8 Islamic Law & Soc. 27 (describing the jurisprudential approach prevailing in that period as one that attempted to harmonize various strands of legal doctrine rather than one fixed by revelatory texts). For more information on Badr al-din al-Qarafi, see "al-Karafi, Badr al-Din" in 4 Encyclopaedia of Islam 255b.

95. See Mohammad Fadel, "The Social Logic of Taqlid and the Rise of the Mukhtasar" (1996) 3 Islamic Law & Soc. 193 [Fadel, "Social Logic"].

of claim preclusion to prevent this legal pluralism from disintegrating into legal chaos.[96] Finally, because of the jurists' close connection with courts of law, they had to take into account the problem of state power, and how the rules they were articulating, when combined with the coercive power of the state, would impact other cherished values of the legal system.[97]

Thus, positive law took as its primary focus *not* how God would likely judge particular acts in the next life, e.g., whether commission (omission) of a particular act renders a person deserving of divine praise (blame), but rather, the secular consequences of those same acts upon other human beings or society at large, or both, e.g., whether destruction by A of property belonging to B creates an obligation on A to compensate B, regardless of whether A's act is considered praiseworthy or blameworthy by God. Accordingly, I argue that while one can read the substantive rules of Islamic law in order to extract the political commitments of pre-modern Islamic society,[98] one cannot assume that a political commitment (as expressed by a particular rule) expresses a non-negotiable moral or theological commitment.[99] Islamic positive law, therefore, is the realm in which Islamically *reasonable* rules, rather than the true, is the desired goal.[100] Therefore, unlike the conclusions of usul al-fiqh, the validity of the rules of substantive law are generally unrelated to individuals' subjective knowledge of those rules, and thus do not implicate the theological concerns of usul al-fiqh.[101]

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96. See Jackson, *supra* note 90 at 174; John A. Makdisi, "The Islamic Origins of the Common Law" (1999) 77 N.C. L. Rev. 1635 at 1708.

97. See Jackson, *Constitutional Jurisprudence*, *supra* note 90 at 185-224.

98. See Peters, *supra* note 1 (arguing that the soundest approach to studying classical Islamic law's relationship to modern international human rights law is "to examine and analyze classical *fiqh* texts in order to find out what are the elementary values and inalienable rights of individuals recognized and protected by Islamic law" at 8); see also Baber Johansen, "Sacred and Religious Elements in Hanafite Law—Function and Limits of the Absolute Character of Government Authority" in Ernest Gellner & Jean-Claude Vatin, eds., *Islam et Politique au Maghreb: Table Ronde du CRESM, Aix, Juin 1979* (Paris: Centre National De La Recherche Scientifique, 1981) 281.

99. Accordingly, the legal requirement to have a Caliph may not represent a theological commitment to perfectionist politics, but a political commitment based on a belief (which may or may not have been justified) that Islam as a religion could not survive in non-Islamic states which were also politically perfectionist in a manner hostile to Islam.

100. A rule is Islamically "reasonable" when it does not contradict an express text of revelation. Substantive law is therefore the Islamic domain in which it is most likely that one may find analogues to Rawlsian "reasonableness," for it represents the political terms on which individuals are to engage in cooperative activity, i.e., it defines the terms on which the coercive powers of the state can be invoked. Usul al-fiqh, by contrast, is more akin to the rational in Rawls' vocabulary, as its judgments do not describe public terms of cooperation but rather set forth the conduct required of an individual to earn merit with God. Rawls, *supra* note 6 (explaining how the "reasonable" is "public" in contrast to the "rational" at 53).

101. In the terms of Hodgson, *kalâm* and *usûl al-fiqh* are properly Islamic disciplines (since they are fundamentally related to Islam as a religion), while *fiqh*, with the exception of ritual law, is largely an Islamicate discipline. Hodgson, *supra* note 44 at 100.

Part 4: The Relationship of Islam as a Comprehensive Theory of the Good and Political Liberalism

a. Introduction

In exploring the relationship of Islam as a comprehensive theory of the good, the goal is not to set forth an Islamic theory of liberal democracy. Instead, this Article focuses on particular theological, ethical and legal doctrines and their relationship in the aggregate to the constitutional essentials of a politically liberal state for two reasons. The first is related to the decentralized nature of Islam as a comprehensive theory of the good. As a result any theory of democracy or the state would, at best, represent a doctrine or theory that *might*, with the passage of time, become part of Islamic comprehensive doctrine. At worst, it would simply represent my views and establish that those subjective views—regardless of their relationship to Islam as a comprehensive theory of the good—are in themselves compatible with a politically liberal order.[102] The second relates to Rawls' conception of the relationship of comprehensive doctrines to political essentials. According to Rawls, a comprehensive doctrine is "reasonable," and therefore compatible with a politically liberal state, if the adherents of that comprehensive doctrine can endorse constitutional essentials based on the their own theory of the good, thereby allowing them to participate in the "overlapping consensus" which sustains a politically liberal polity over time. From the perspective of a Rawlsian, therefore, whether Islam is a "reasonable comprehensive doctrine" does not turn on whether liberal democracy is a part of Islamic comprehensive doctrines so much as whether Islamic comprehensive doctrines permit Muslims to participate in a "reasonable pluralism." According to Rawls this condition is satisfied when "the reasons from which [Muslim] citizens act include those given by the account of justice which they [individually] affirm."[103] Accordingly, my goal is limited to exploring the relationship of fundamental Islamic comprehensive doctrines to the basic structure of a political liberal state to identify the extent to which such doctrines satisfy the aforementioned condition, and if not, what types of good faith arguments a Muslim could make to adjust those elements of Islamic comprehensive doctrines in order to make them compatible with the requirements of the basic structure of a politically liberal state.

As Rawls has noted, any reasonable comprehensive doctrine will have an internal hierarchy of value. And, Rawls further posits that within each such doctrine, the political values secured by a politically liberal state will correspond to values that rank sufficiently high enough within each comprehensive doctrine's own vision of the good that its adherents could not, consistent with their own view of the good, sacrifice their own higher-order values which are protected by a liberal political order for the sake of achieving lower-order values that would be unprotected by

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102. See Mohammad Fadel, "Too Far From Tradition" in Cohen & Chasman, *supra* note 38 at 81 (criticizing "top down" theories of Islamic democracy in favor of a "bottom-up" approach, that relies more on established historical doctrines and less on appeals to revelation at 84).

103. Rawls, *supra* note 6 at xx.

the coercive mechanisms of a politically liberal state. This insight suggests that any argument relating to the relationship of Islam as a comprehensive theory of the good to a politically liberal order must begin by identifying the normative hierarchy of values within Islam as a comprehensive doctrine.

This Article argues that kalam, scholastic theology, is the discipline that identifies the highest order goods within normative Islam, as it is within that discipline that the requirements for a soul's salvation—the ultimate good from the perspective of Islam—are determined.[104] Next in logical and ethical priority are the ethical doctrines developed in usul al-fiqh, moral theology, whereby human beings learn to evaluate the ethical value of their conduct. Last in moral significance are rules of substantive law, which, although they are, all things being equal, reasonable guides to living the Islamic "good life," are too contingent upon particular historical and social circumstances to represent categorical Islamic values, and accordingly, are routinely compromised when countervailing considerations are brought into consideration. Accordingly, analysis of the relationship of Islam to constitutional essentials (Part 4.b.i) begins with Islamic theology, its conception of salvation and the relationship of theology to pluralism. After describing Islamic salvation theory, I will then discuss briefly the implications of that theory for political organization (Part 4.b.ii). I will then discuss the relationship of moral theology to Rawls' concept of the burden of judgment (Part 4.c), arguing that the epistemological skepticism that characterized Muslim moral theology justified an ethical system that recognized the legitimacy of intra-Muslim normative pluralism, a development that led the use of public reason style arguments as an alternative to moral theology as a source of legal rule making.[105]

b. The Theology of Pluralism

i. The Epistemology of Salvation

Medieval Muslim theologians were in general agreement that rational inquiry (the technical term for which is *nazar*) regarding knowledge of God was a moral obligation either as part of Islamic dogma or Islamic practice, or at least morally commendable. For many theologians, moreover, it was also the first moral obligation.[106]

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104. Indeed, for Ash'ari theologians, true knowledge of God—even if unaccompanied by righteous conduct—guaranteed eventual salvation, even if it came after a period of punishment for failure to live in accordance with God's commands. See Ibrahim al-Bajuri, *Tuhfat al-murid 'ala jawharat al-tawhid* (Samarang, Indonesia: Maktabat Usaha Kaluwarka, n.d.) at 22; see also Abu Ja'far al-Tahawi, *Islamic Belief*, trans. by Iqbal Ahmad A'zami (Leicester: UK Islamic Academy, 1995) (stating that even unrepentant sinners who are Muslim will eventually be saved if they have true knowledge of God at 13). For more information on al-Bajuri see "Badjuri, Ibrahim b. Muhammad" in 1 Encyclopaedia of Islam 867b. For more information on al-Tahawi, see "al-Tahawi, Ahmad b. Muhammad" in 10 Encyclopaedia of Islam 101a.
105. This account of the rise of public reason arguments in Islamic legal history is consistent with Rawls' notion of tolerance arising out of the fact of social pluralism.
106. Al-Jurjani, *supra* note 64 (majority of Muslim theologians agree that to have knowledge of God is the first moral obligation of human beings at 165); Shihab al-din al-Qarafi, *al-Umniyya fi idrak al-niyya*, ed. by Musa'id b. Qasim al-Falih (Riyad: Maktabat al-haramayn, 1988) (stating

There was disagreement, however, as to the source of this moral obligation.[107] Predictably, the Ash'aris argued that revelation demanded rational knowledge of God, arguing at times that obedience to the plain meaning of several verses of the Qur'an and traditions of the Prophet requires reflection, while at other times arguing that the moral obligation to have knowledge of God, itself known by an infallible and universal consensus, could not be achieved except by rational inquiry. Accordingly, rational inquiry into the existence of God and His attributes must itself be obligatory because it is the only means by which humans could discharge this obligation.[108] Two principal objections to this doctrine are of relevance here. The first asserts that far from demanding a reasoned basis for knowledge of God, truthful conviction, even if rooted in deference to authority (*taqlîd*), is sufficient for salvation.[109] Although Ash'ari theologians did not unanimously teach that faith, unmoored in rational reflection, is insufficient for salvation, rational faith appears to have been considered superior to that rooted only in deference to authority, even by those theologians who accepted that faith unmediated by rational reflection was sufficient for salvation.[110] More importantly, for those theologians who denied the validity of faith in the absence of rational inquiry, they argued that even Bedouins—

that the first duty upon an adult who was capable of reflection and inquiry was to reflect upon the signs of God's existence at 112). A small minority of Muslim theologians expressed the view that rational inquiry into matters of faith was sinful. See 13 Ibn Hajar, *supra* note 65 at 433. Others argued that faith based on deference to an authority could nevertheless constitute religiously valid faith if it was an independent conviction that was true in itself and that was based on some type of evidence, such that if the authority were to change his view of God, the follower's conviction would be unchanged. See al-Bajuri, *supra* note 104 (attributing this view to Taj al-din al-Subki at 22). Others argued that belief in God as a result of rational proofs was only necessary to perfect faith, see *ibid.*, or obligatory only in circumstances where a believer is overcome by doubt. See al-Ghazali, *supra* note 59 at 8. Others argued that faith grounded in deference to authority was sufficient, but that such individuals with the ability to undertake rational inquiry who failed to do so were sinners, whereas those individuals lacking such capacity were not. See al-Bajuri at 22. Others argued that belief based on general evidence was obligatory in all cases, See, e.g., Muhammad al-Dassuqi, *Hashiyat al-dassuqi 'ala umm al-barahin* (Samarang, Indonesia: Maktabat Usaha Kaluwarka, n.d.) ("Those who hold this view believe that everyone has the capacity [for rational belief in God] because what is required is a general proof by which [psychological] certainty occurs, such that one having this knowledge does not say 'I heard the people saying something, so I said it.' General proof [of God] is available to all. This opinion is based on the notion that belief originates as internal speech deriving from firm conviction" at 55), but that detailed knowledge of the rational proofs for God is only an obligation of some members of the Muslim community. See Sa'd al-din Mas'ud b. 'Umar b. 'Abdallah al-Taftazani, *Sharh al-maqasid* (Beirut: 'Alam al-kutub, 1989), vol. 1 at 266. Other theologians argued that rational belief in God was required by all, and while failure to discharge this obligation resulted in sin, it did not invalidate one's belief in God. See al-Dassuqi at 55. See also Johansen, *supra* note 9 (explaining the rational basis of belief in the creedal system of Sunni Islam at 5-7). For a general overview of the precise contours of reason and authority in determining the validity and efficacy of faith in Islamic theology, see Joseph P. Kenny, O.P., *Muslim Theology as Presented by M. b. Yûsuf as-Sanûsî*, especially *in* his *al-'Aqîda al-Wustâ*, (Ph.D. dissertation, University of Edinburgh, 1970) [unpublished] at 89-99. For more information on these theologians, see "Shihab al-Din al-Karafi, Abu '1-Abbas Ahmad b. Idris" in 9 Encyclopaedia of Islam 435b; "al-Djurdjani, Ali b. Muhammad" in 2 Encyclopaedia of Islam 602b; "al-Subki, Tadj al-Din" in 1 Encyclopaedia of Islam 593a; "al-Taftazani, Mas'ud b. 'Umar b. 'Abdallah" in 10 Encyclopaedia of Islam 88b.

107. Al-Jurjani, *supra* note 64 at 147-48.

108. *Ibid.* at 148.

109. *Ibid.* at 151.

110. For Ash'ari theologians who did not consider rational reflection to be a prerequisite for valid faith, reflection was deemed to "perfect" faith. See al-Bajuri, *supra* note 104 at 22.

who stereotypically represent the most backwards of human societies in Islamicate literature—are capable of rational inquiry. Thus, one theologian states that "They [i.e., the early generations of Muslims] knew that they [i.e., the Bedouin] understood rational proofs in general, as one Bedouin stated 'The droppings [of a camel] are proof of the [existence of the] camel, and footprints are proof of travel, and stars in the heavens and valleys in the Earth are proof of the Subtle, Well-Informed [Creator].' All that can be said is that they did not go into detail . . ."[111]

Both Ash'ari and Mu'tazili theologians, moreover, rejected non-rational means, such as inspiration, authoritative instruction, or mysticism as a possible means whereby the obligation to know God could be discharged, either because they rejected them as false as a matter of course, or unreliable, not universally available, or ultimately requiring the corroboration of reason before giving rise to knowledge.[112] Thus, rational inquiry was the only universally accessible means by which knowledge of God could be obtained.

The Mu'tazilis, however, argued that the source of the obligation to use reason in establishing knowledge of God is itself reason. They argue that a rational person, when confronted with the variety of opinions held by human beings about God, and the severe consequences that could result to him if his own opinion about God turns out to be mistaken, will experience fear.[113] And, because the experience of fear is harmful, and because reason requires a person suffering harm, to the extent possible, to alleviate that suffering, a rational person will try to remove this fear by discovering the truth about God. But, because the only way to distinguish true opinions from false ones is through the use of rational inquiry, rational inquiry into God and His attributes is obligatory.[114]

Medieval Sunni theology's commitment to grounding religious faith in rational inquiry yields two important consequences. First, although knowledge of God's existence, along with knowledge of at least some of His attributes, is rationally accessible, it is neither innate nor is it necessary,[115] thus implying not only the necessity of a deliberate act on the part of human beings to acquire this knowledge, but also the need for time to conduct the inquiry, with the concomitant possibility

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111. Al-Jurjani, *supra* note 64 at 151.

112. See *Ibid.* at 152-54; al-Taftazani, *supra* note 106, vol. 1 at 266-67.

113. Al-Qadi 'Abd al-jabbar, *Sharh al-usul al-khamsa*, ed. by 'Abd al-Karim 'Uthman (Cairo: Maktabat wahba, 1965) at 68-69. There are other experiences, however, that also may trigger the obligation to inquire according to the Mu'tazalis. Among these are hearing preachers who make claims about God or being exposed to a book in which the author claims God exists and that individuals may be punished by God for failure to obey Him, or even a random thought in his mind. Contemplation of the natural world and the miraculous nature of one's own life can also cause a person to begin an inquiry about God. Al-Qadi 'Abd al-Jabbar, *al-Mughni fi abwab al-tawhid wa-1 -'adl* (Cairo: Wizarat al-thiqafa wa-1 -irshad al-qawmi, 1960-1965), vol. 12 at 396. For more information on al-Qadi 'Abd al-Jabbar, see "'Abd al-Djabbar b. Ahmad" in 1 Encyclopaedia of Islam 59b.

114. Al-Jurjani, *supra* note 64 at 153.

115. Muslim theologians divide knowledge into the "necessary" and the "acquired." The former is that category of human knowledge that impresses itself upon the human mind without the intermediation of rational deliberation. See Weiss, *supra* note 56 at 3700-41. See also al-Taftazani, *supra* note 106, vol. 1 at 266; al-Dassuqi, *supra* note 106 (quoting Ibn al-'Arabi as saying that knowledge of God is not necessary and can only be acquired through the use of reason at 58).

that human beings will commit errors in their search for this knowledge.[116] Accordingly, categorical condemnation is reserved only for the morally slothful, who, despite having the ability to conduct a serious inquiry into the existence of God, fail to do so.[117]

Knowledge of God and His attributes, of course, is only one half of the Islamic formula for salvation, the other half consisting of recognizing the truthfulness of Muhammad in his claim of prophethood. Unlike the proofs for the existence of God, the theological proofs for the truth of a messenger were inductive and historical. The most important proof of the truthfulness of a person's claim to prophethood, according to Muslim theologians, was the miraculous sign.[118] Recognition of a miracle, however, itself depends upon "an awareness of the regularities of the phenomenal world,"[119] an awareness which comes about only "as a result of prolonged experience."[120] This inductive process "gives rise first to opinion—an awareness not accompanied by full certainty—and then to knowledge."[121] But, because of the variety of human experiences, "the ability to grasp the presence of a miracle will vary from individual to individual."[122] In the case of the Prophet Muhammad, the primary miraculous sign is the literary text of revelation itself, the Qur'an. The miraculous nature of this revelation, being in the first instance literary, can only be directly grasped by one possessed of considerable experience in Arabic literature, particularly in the literature of the pre-Islamic Arabs.[123] Accordingly, receptivity to the miraculous signs of Muhammad seems to at least be partially a function of facility with the Arabic language and its literary history. Acquisition of the experience necessary to appreciate the Prophet's most miraculous sign, therefore, suggests that a lengthy time may be needed before one becomes morally culpable for rejecting the Prophet's message.[124]

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116. Al-Jurjani, *supra* note 64 at 168.
117. *Ibid.* ("As for those who were allotted sufficient time in which they could conduct a complete inquiry which would give them knowledge of God, but they failed to inquire during that period of time, and therefore failed to attain knowledge [of God] without an excuse, they are sinners."). Those who died prior to discovering the truth could be saved on the basis of their diligent search for truth. *Ibid.* ("Those who were not allotted any time, meaning, they died before becoming an adult, are like the child who dies in his youth. [As for] those who were allotted some time in which they could inquire, but not enough to complete their inquiry, if they did not put off their inquiry, and death overcame them prior to the completion of their inquiry and the attainment of knowledge [of God], they are certainly not sinners.") As for those who negligently put off delayed their search for truth, it is likely, but not definitive, that they are sinners. *Ibid.*
118. It should be noted that the rational proof of God and His attributes prepares a person for the possibility of prophetic revelation. Weiss, *supra* note 56 at 69.
119. *Ibid.* at 73.
120. *Ibid.*
121. *Ibid.*
122. *Ibid.* at 74.
123. *Ibid.* at 75.
124. Abu Hamid Muhammad b. Muhammad b. Muhammad al-Ghazali, *On the Boundaries of Theological Tolerance in Islam*, trans. by Sherman Jackson (Karachi: Oxford University Press, 2002) (noting that people who have not heard of the Prophet Muhammad are without doubt going to be saved and that people who have heard of him, but only in the context of distorting polemics, may nevertheless still be saved even if they nominally rejected his message at 126).

ii. Political Implications of the Epistemology of Salvation

We can identify two theories, then, regarding the relationship of knowledge of God to salvation. The first theory, which I call the "strong theory," stipulates knowledge of God as a condition of salvation. The second theory, which I call the "weak theory," accepts the possibility that truthful conviction based on deference to authority is sufficient for salvation. The weak theory has two variants. The first recognizes that rational belief in God is obligatory, but only in the sense that violation of this obligation results in sin, not disbelief. The second version of the weak theory holds that rational knowledge of God is only a condition for the perfection of faith. Under this variant, the failure of an individual to obtain knowledge of God results neither in disbelief nor sin. Both variants, however, recognize the religious superiority of independently derived knowledge over truthful conviction grounded in deference to authority.

Contemporary Muslims could draw some political implications from these doctrines. First, it appears that under the strong theory, a significant tension, if not outright contradiction, would exist between the requirements of spiritual salvation, and a state founded on a comprehensive theory which it aims to impose upon in its citizens, even if this state is nominally Islamic. This is so because no rational benefit accrues to the person upon whom true doctrine has been imposed. Nor would imposition of religious truth be in the state's rational interest (viewed solely from an ethical perspective) because it receives no moral rewards for imposing truth on those who reject it.[125] The only justification, then, for enforcing theological views would be to protect the religious community from the threat of persecution at the hands of non-believers. Because such a threat does not exist in the well-ordered society described by Rawls, a reasonable Muslim citizen of such a society would not have any rational interest in wanting or needing the state to compel religious belief or punish heresy. Second, because of the emphasis Muslim theologians placed upon rational assent as the basis of salvation, contemporary Muslim citizens could reasonably argue that the most important function of a political order is to provide space wherein persons can discharge this primary obligation and their secondary duties of living in accord with God's commands in order to obtain salvation. This would be consistent with traditional theological views which believed that the process that leads to salvation can generally occur only within an organized political society, and for that reason Islamic theology had to be concerned with issues of temporal order, and the ends to which temporal order is directed. Third, they could also reasonably argue that while Sunni Muslim theologians believed that rational demonstration proved the truth of Islam, the political order, to be just from the perspective of medieval Sunni theology, must also allow for a modicum of freedom of thought and pluralism. This is an implicit corollary to the proposition that salvation was individual, and that each individual had to reason his way to Islam's

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125. See al-Bajuri, *supra* note 104 (noting that dispute regarding the necessity of rational belief as opposed to truthful conviction is solely matter of next life and thus outside of legal inquiry at 22).

truth, a process that could be rather lengthy, and even take years, as each individual diligently investigated various conflicting claims about God, the nature of the good and claims of prophecy.[126] More fundamentally from the perspective of Rawls, Muslim citizens could reasonably point to the role of rational investigation and assent in assuring salvation to demonstrate that Muslim theology recognizes the ability of individuals to grasp and revise their conceptions of the good, one of the fundamental moral powers Rawls ascribes to citizens in a politically liberal state.[127]

1. The Rejection of Authoritative Instruction as a Guiding Principle of Political Life

Because of the connection between reason, knowledge and salvation, one might suppose that adherents of the strong theory would not generally find political projects that impose religious doctrine *qua* religious doctrine to be attractive. The reason for this appears to be epistemological. The salvific potential of religious dogma, according to these theologians, has two elements. The first is the objective truth of any dogmatic proposition, something that makes it amenable to rational investigation. The second, however, is that the truth of Islamic dogma must be subjectively grasped by an individual as true, rather than, for example, popular opinion.[128] Adherents of the weak theory of the first moral obligation, however, might be tempted to view the state as an appropriate vehicle by which truthful religious doctrine could be imposed on the public writ large, even if, as a result of the state's mediation, citizens' faith would be the product of deference to authority rather than reasoned assent. The fact that state imposition of religious truth is potentially consistent with some versions of the weak theory does not mean that adherents of the weak theory would conclude that such state indoctrination (or even coercion) in matters of religion to be obligatory or even desirable. Such a policy might be objectionable because it could preclude others who could confirm their religious convictions via rational proof from so doing. Adherents of the weak theory might find this objection persuasive insofar as they agree that faith based on rational assent is always superior to faith acquired as a result of deference to authority. Accordingly, both adherents of the strong theory and the weak theory would have positive reasons

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126. Note that even under the strong theory, it would be permissible for the state to teach Islam, whether directly or indirectly, but it could not prohibit individuals from reaching their own conclusions based upon the exercise of their reason.

127. Rawls, *supra* note 6 at 19.

128. The impermissibility of deferring to the authority of another with respect to religious dogma was contrasted with the permissibility, indeed the obligation for the untrained, to defer to the opinions of specialists with respect to moral reasoning. Because moral reasoning, as discussed in further detail below, does not result in certain knowledge of moral truth, in most cases opinion is all one may reasonably expect to attain. Accordingly, deference to the opinion of others in morally controversial matters is epistemologically defensible since one opinion is not inherently superior to another in those circumstances. See al-Dassuqi, *supra* note 106 (arguing that deference to authority in matters of religious dogma is insufficient because dogma corresponds to ontological reality in contrast to matters of moral reasoning whose conclusions do not necessarily have independent ontological existence at 55). Even in matters of moral reasoning, however, non-specialists were permitted to defer to the opinions of an authority only to the extent that they had independent grounds for trusting that authority. Al-Ghazali, *Mustasfa*, *supra* note 68 at 373.

to support political institutions that permit free inquiry into religious matters, even if they marginally might prefer political institutions that privilege Islamic teachings. More importantly, in the circumstances of a well-ordered society neither adherents of the strong theory or the weak theory would have a principled reason to object to a constitutional norm of free inquiry on matters pertaining to religion or *a fortiori*, any other topic.[129]

While Sunni theologians were largely indifferent to the political theories articulated by Muslim philosophers such as Avicenna and al-Farabi,[130] they took the movement known as the *Batiniyya* (the "esotericists") or the *Ta'lîmiyya* (the "followers of authoritative instruction") quite seriously. This movement, in contrast to that of the Muslim philosophers, did pose a significant political threat to the hegemony of Sunni Islam, and succeeded for a time in establishing a rival Caliphate, based in Cairo, under the leadership of the Fâtimid dynasty. The Fatimid dynasty, at the height of its power, included all of North Africa, Egypt, parts of the Fertile Crescent and Yemen. In contrast to Sunni theology, the Fatimids, who were a sect of Shi'ites,[131] espoused a doctrine of infallibility (*'isma*), attributing to their rulers, known as Imams, infallibility in matters of religious teaching. On this basis they demanded that all Muslims submit to the political and religious authority of their infallible Imam. Significant refutations of their political and religious teachings were penned by leading Sunni Muslim theologians, including al-Ghazâlî, who wrote a lengthy refutation of their doctrines in support of the legitimacy of the prevailing Sunni political order.[132]

In refuting the doctrine of infallibility that lay at the heart of the Fatimids' claim to political legitimacy, al-Ghazali reaffirmed the central role of rational judgment (*ijtihâd*) in determining the content of the good and questions of political organization. In so doing, he attacked the doctrine of infallibility as being either irrelevant, redundant or, even assuming the existence of an infallible teacher, the practical impossibility of identifying the infallible imam, given the numerous and conflicting claims to that office. Accordingly, al-Ghazali concludes, political matters cannot be resolved by any means other than human convention and choice (*ikhtiyâr*).[133] Al-Ghazali's refutation of the Batiniyya thus confirms, albeit indirectly, that Sunni theologians did not believe the state was critical for the promulgation of religious truth. As will be set forth in the next section, however, Sunni theologians nevertheless assigned a critical role to the state for the proper functioning of religion. This role, however, was more procedural rather than substantive.

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129. See, e.g., al-Ghazali, *Iqtisad*, *supra* note 59 (assigning to theology the responsibility to refute heresy at 8). If, however, the state had an affirmative moral obligation to suppress heretical doctrine, presumably there would be no need for theology.

130. The most famous medieval Muslim philosophers were generally Aristotelians, except in politics, where they found greater inspiration in Plato's writings. See *Medieval Political Philosophy: A Sourcebook*, Ralph Lerner & Muhsin Mahdi, eds., (Ithaca, NY: Cornell University Press, 1963).

131. The Fatimids should be distinguished from the Twelver Shia, who represent the majority of today's Shi'ite community. By the time the Fatimids began their propaganda, the last Imam of the Twelvers had gone into "hiding," and ever since, the Twelver Shia have been forced to manage their community's affairs without the benefit of an infallible imam.

132. Abu Hamid Muhammad b. Muhammad b. Muhammad al-Ghazali, *Fada'ih al-batiniyya*, ed. by 'Abd al-rahman Badawi (Cairo: al-Dar al-qawmiyya lil-taba'a wa-al-nashr, 1964).

133. See *ibid.* at 73-145.

2. Institutional Implications of the Sunni Muslim Theory of Salvation

Given the importance rational investigation plays in medieval Sunnism's account of salvation, and that this obligation to inquire is an individual one, one should not be surprised if theologians' expectations from government were rather minimal. This expectation is confirmed in the writings of Sunni Muslim theologians. Al-Ghazali's argument on the nature of government in his theological treatise *Al-Iqtisâd fî al-i'itqâd* is representative of the thin politics espoused by Sunni Muslim theologians. Al-Ghazali's argument for the state proceeds from a theological proposition, namely, that one of the aims of the Prophet, in his capacity as lawgiver to his community, was to insure that the affairs of religion were well-ordered.[134] According to al-Ghazali, this goal cannot be achieved in the absence of a state.[135]

In arguing for the truth of this premise, al-Ghazali makes the following observations. First, the good order of religion cannot occur in the absence of the good order of the profane world (*nizâm al-dunyâ*), and good order in the profane world cannot be achieved in the absence of government. According to al-Ghazali, the good order of the profane world consists of "the entirety of [a person's] needs prior to his death." Provision of these secular goods is the condition precedent to the good order of the religious realm.[136] Al-Ghazali argues that the good order of religion can occur only via knowledge (*ma'rifa*) and worship (*'ibâda*). These goals in turn cannot be obtained in the absence of physical health, personal security and adequate clothing, housing and food. Thus, "whosoever awakes each morning secure in his home, his body healthy, and in possession of his day's bread, it is as though the entire world is his."[137] Where these secular goods are not guaranteed, owing to political instability, for example, it is hard to understand how "someone who spends all his time protecting himself from the swords of oppressors and seeking his daily bread from usurpers . . . will have time to devote to learning or worship, even though these are the two means to salvation in the next world."[138] Accordingly, al-Ghazali concludes that the good order of the secular world, in the sense of providing the minimum needs of human life described above, is a condition precedent to the good order of religion. And, experience demonstrates conclusively that in the absence of a government, it is simply impossible for human beings to cooperate to achieve the good order of the secular world.[139]

Two significant points emerge from al-Ghazali's argument regarding the necessity of government. The first concerns his observations regarding the relationship of secular order and religious order. With respect to this question, al-Ghazali clearly subordinates the good order of religion to the good order of the secular world, not in a moral sense, but in a political one. That is the import of his claim that good order of the secular world—understood as providing the basic necessities of a decent

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134. See al-Ghazali, *Iqtisad*, *supra* note 59 at 197.
135. *Ibid.*
136. Al-Ghazali's expression is "provisions [adequate to satisfy needs] are a condition to the good order of religion." *Ibid.* at 198.
137. *Ibid.*
138. *Ibid.*
139. *Ibid.* at 198-99.

life to all persons—is a condition precedent to the good order of religion. In other words, religion has not only an important stake in social justice and stability, these questions are literally decisive, for in their absence it is impossible to imagine that religion could function properly. Thus, religion depends upon the existence of a society that meets certain minimum standards of organization, namely that human beings living therein have sufficient physical and economic security to allow them the reasonable opportunity to pursue learning and engage in religious devotions.

The second is that al-Ghazali's ostensibly theological argument for the necessity of government, despite its lip service to the theological doctrine of consensus, is based on experience, not revelation.[140] In addition, the fact that al-Ghazali's argument includes certain explicit distributive concerns—that each person should be guaranteed certain minimum social entitlements, including economic entitlements—suggests that al-Ghazali had a thicker conception of justice than that demanded by Islamic law.[141]

To conclude, it appears that for al-Ghazali an organized state which can guarantee a certain minimal level of physical security and economic prosperity to all its members is a necessary condition for religion to flourish and for persons to achieve salvation. Implicitly, al-Ghazali does not support any particular form of state or government, but only that government whose rules and structures can guarantee for its members that minimal level of physical security, economic prosperity and personal/associational freedom that would allow them to direct their lives according to the religious vision of Islam. How a government must be organized in order to satisfy these minimum needs is certainly not a substantive concern of theology (except to deny that it is a matter of religious dogma), but instead appears to be largely a question of practical reason, and therefore, while the positive rules of Islamic law would certainly have a role in contributing to the good order of secular society, they may not be sufficient to achieve that end, given Islamic law's relative indifference to distributive outcomes.[142]

iii. Pluralism and Salvation

A fundamental contention of Rawls is that, under conditions of freedom, citizens will adhere to several, incompatible, though reasonable, theories of the good. As the previous discussion makes clear, however, Muslim theologians argue that reason

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140. Al-Ghazali, *Iqtisad*, *supra* note 59 at 197-99.
141. Indeed, the only redistributive tax recognized by medieval Islamic positive law was the institution of *zakât*, a tax on private wealth whose central, though not exclusive, purpose was to provide for the impoverished. See al-Dardir, *supra* note 84, vol. 1 at 657-63. In addition to the zakat, however, Islamic law imposed maintenance obligations within the family, which created judicially enforceable obligations of support within a family. In Maliki law, for example, adult children—as long as they were solvent—were under a legal obligation to support their parents in the event that they became impoverished. See al-Dardir, *supra* note 84, vol. 2 at 657-63. For more information on al-Dardir, see "al-Dardir, Abu Barakat Ahmad b. Muhammad b. Ahmad" in 6 Encyclopaedia of Islam 278a.
142. But see, Hussein Hassan, "Contracts in Islamic Law: The Principles of Commutative Justice and Liberality" (2002) 13:3 J. of Islamic Studies 257 (arguing that Islamic law was profoundly concerned with questions of distributive justice and had numerous institutions designed to achieve an equitable distribution of wealth and resources at 266-68).

provides unequivocal evidence for the truth of Islam. Accordingly, they present a case of "rationalist" believers.[143] A Rawlsian, therefore, might question whether the notion of reasonable pluralism could be compatible with Islamic theology's commitment to the rational truth of Islamic dogma.

In one sense the answer is obviously no. Muslim theologians could never characterize a denial of Islam's truth as reasonable, at least in circumstances where the person denying Islam's truth is assumed to be fully informed of the rational proof regarding God's existence and attributes, and the historical evidence regarding the truth of Muhammad's claim to be a prophet. In another sense, however, the answer may very well be yes. Whether a rejection of Islam could be reasonably *excused* in the view of Muslim theologians depends on numerous contingencies, including whether such person was accurately informed about Islam. Accordingly, it is theoretically possible that Muslim theology could accept other theories of the good as at least *provisionally* reasonable in the absence of genuine knowledge of revelation.[144] The notion that incomplete information excuses a failure to accept Islam is enshrined in the medieval concept of the "communication of Islam's teachings (*bulûgh al-da'wa*)."[145]

But, is there a better defense of pluralism within the Islamic theological tradition than simply an empirical argument based upon incomplete or imperfect information? Here, medieval Sunni theology gives divergent answers. For the Mu'tazalites—the theological school followed by a minority of Sunni theologians—the social fact of pluralism that confronts a human being is the catalyst for religious inquiry, and in that sense is a positive good.[146] On this basis, a Muslim could plausibly argue that pluralism is a necessary prerequisite for initiating the process of rational inquiry that eventually concludes in genuine religious faith.

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143. Rawls, *supra* note 6 at 152-53 (raising the hypothetical case of "rationalist" believers in connection with discussion of the duty of restraint).

144. There may be alternative grounds on which Muslims could recognize other non-Islamic theories of the good to be *provisionally* reasonable, and therefore worthy of respect. These would include ways of life based on revelation pre-dating Islam, such as Judaism and Christianity and perhaps other pre-Islamic religions as well, given the Islamic belief in the universality of prophecy. Other provisionally reasonable ways of life would be those grounded in philosophy, given its commitment to life lived in accordance with reason. Such faith communities and philosophic communities might be worthy of respect because they share with Islam a fundamental commitment to truth following. More problematic from the point of view of Muslim theology would be ways of life based on paganism, which were deemed to be contrary to both reason and revelation, and therefore not worthy of respect, the paradigmatic case being that of the pre-Islamic Arabs, whose way of life was called *jâhiliyya* or barbarism. Perhaps for this reason some Muslim theologians sometimes went to extreme efforts to deny that the non-Abrahamic communities that they encountered were genuinely pagan. See, e.g., Sher Ali Tareen, *Reifying Religion While Lost in Translation: Mirza Mazhar Jan-i Janan on the Hindus* (2006) [unpublished, manuscript on file with the author] at 4-7.

145. For the continuing relevance of this doctrine, see Majd Ahmad Makki, ed., *Fatawa mustafa al-zarqa* (Damascus: Dar al-qalam, 2004) (concluding that substantial numbers of North Americans and Europeans cannot be morally culpable for failing to embrace Islam at 358-59). See also Yusuf al-Qaradawi, *Fatawa Mu'asira* (Beirut: al-Maktab al-islami, 2003), vol. 3 (concluding that while, for purposes of Islamic substantive law, any person who is a non-Muslim is deemed to be an infidel, such persons may nevertheless not be morally culpable before God in the next life to the extent that their failure to embrace Islam is a product of ignorance or imperfect information about Islamic teachings, rather than defiance of God at 154-56).

146. See al-Jurjani, *supra* note 64 at 162.

Ash'ari theology does not need pluralism to initiate the intellectual journey that leads to faith, because revelation, with its affirmative command to know God, fulfills that function.[147] Nevertheless, Ash'ari doctrine also supports the existence of pluralism on other grounds. The Ash'ari argument for pluralism would proceed from the premise that while human reason can affirm the logical possibility of revelation, it cannot, prior to the actual occurrence of revelation and its communication to human beings, discern its contents. Accordingly, when revelation arrives in human society, it will address human beings who already exist in communities, at least some of whom will already have conceptions of the good that are incompatible with the teachings of revelation. If revelation is introduced to a pluralistic society, then the adherents of revelation will be able to make rational arguments regarding revelation's truth. If instead revelation is introduced to a society that either lacks tolerance for different points of view, or is governed by a comprehensive doctrine that is incompatible with the teachings of revelation, adherents of revelation will face one of two undesirable choices: either abandon their view of the truth, or engage in some type of political struggle against entrenched forces supporting the status quo. Accordingly, it seems plausible that an Ash'ari would also support the existence of reasonable pluralism because a society that respects, and even expects, multiple viewpoints regarding the nature of the good is more likely to permit the dissemination of revelation and to tolerate individuals who live in accordance with its teachings.

While the concept of "the communication of Islam's teachings" sets out why traditional Islamic theology could endorse pluralism as a social good, a Muslim citizen could also argue that it provides a principled basis for affording all reasonable comprehensive doctrines equal respect, at least in a constitutional, if not theological sense, for at least two reasons. The first is that a reasonable Muslim could recognize in other reasonable non-Islamic comprehensive doctrines commitments to values such as rational inquiry and justice that are themselves considered virtuous from the Islamic perspective, even if they are not grounded in a belief in a transcendent God.[148] The second is because citizens of the well-ordered society are adherents of reasonable comprehensive doctrines, a Muslim could reasonably assume that, from an Islamic theological perspective, their commitments to rational inquiry[149] preclude a categorical judgment that such persons are morally depraved

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147. Not all Ash'aris accepted the argument that revelation was the source of the obligation to know God. Fakhr al-din al-Razi, for example, accepted the argument that this obligation arises simply by the operation of reason even prior to the advent of revelation. Fakhr al-din al-Razi, Mafatih al-ghayb (Cairo: al-Matba'a al-bahiyya al-misriyya, n.d.), vol. 20 (commenting on al-Isra', 17:15, which states, in part, "We punish no one until we send a messenger," at 172-73). For more information on Fakhr al-din al-Razi, see "al-Razi, Fakhr al-Din" in 2 Encyclopaedia of Islam 749b.

148. See, e.g., 'Abd al-rahman b. Ahmad b. Rajab, *Jami' al-'ulum wa-1-hikam* (Beirut: Dar al-jil, 1987) (noting that although an intention to serve God is necessary in order to receive a reward in the next life, acts such as charity and reconciliation of people—even without such an intent—are nevertheless described in the Quran as good because of "the general benefits that result from [such acts]" at 15).

149. On political liberalism's commitment to truth, Rawls notes that "it would be fatal to the idea of a political conception to see it as skeptical about, or indifferent to, truth, much less as in conflict with it," Rawls, *supra* note 6 at 150, and that just as political liberalism neither asserts nor denies "any particular comprehensive religious, philosophical, or moral view," it also "assume[s] each citizen . . . affirm[s] some such view." *Ibid.*

or theologically condemned, and as a result, such ways of life—even though they may be mistaken in one or more profound ways—would be worthy of respect from an Islamic perspective.[150]

iv. Conclusion

A fundamental doctrine of medieval Islamic scholastic theology was the notion that religious faith, before it could lead to salvation, needed to be grounded in a process of rational inquiry. Because salvation is the highest good to be obtained by a human being, Muslim citizens could argue that the substantive values of medieval Islamic theology provide a principled basis justifying political institutions that, at a minimum, restrict the power of the state to compel adherence to comprehensive doctrines. Such doctrines could also provide, more robustly, Islamic theological justifications for a politically liberal constitutional order that compels respect for the existence of a plurality of distinct viewpoints of the good, either in order to satisfy the conditions necessary for the initiation of religious inquiry under Muʻtazili doctrine, or in order to insure that individuals have sufficient political freedom to discharge the obligation to obtain rational knowledge of God under Ashʻari doctrine.[151] In addition, the theological concept of "the communication of Islam's teachings," combined with the fact that reasonable comprehensive doctrines necessarily include virtues that are also important Islamic virtues, could provide a reasonable basis on which Muslim citizens could conclude that reasonable

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150. This conclusion appears consistent with some of the writings of the contemporary theologian Yusuf al-Qaradawi on the problem of political cooperation between Muslims and non-Muslims, and the theological status of the latter. See, e.g., Zarqa, *supra* note 145 (summarizing the views of a group of noted Muslim theologians who debated the question of "the communication of Islam's teachings" in the 1950s as concluding that although there is certainty that some non-Muslims in all areas of the world have received accurate information regarding Islam such that they can be held morally culpable if they fail to embrace it, it is impossible to conclude that any particular individual non-Muslim can be found to be morally culpable for failing to embrace Islam at 359, n. 1) and al-Qaradawi, *supra* note 145, vol. 3 (stating that whether a non-Muslim will be culpable before God for his failure to embrace Islam is a matter left to God at 154). Al-Qaradawi also suggests that only subjectively unreasonable rejection of Islam results in culpability before God. See *ibid.* (arguing that only those who reject Islam despite their subjective recognition of its truth are culpable at 154-56). Finally, despite the incompatibility of Islam and other comprehensive doctrines *qua* comprehensive doctrines, *ibid.* at 188, he argues that it is nevertheless possible for Muslims to cooperate with non-Muslims for several reasons, including, a Muslim's belief in the dignity of each person regardless of her comprehensive doctrine, that diversity in comprehensive doctrines is something willed by God for a wise purpose, a Muslim is under no obligation to judge non-Muslims on account of their unbelief, or punish non-Muslims on account of their error, and a Muslim's love of justice and virtue and hatred of oppression, even if the unjust party is a Muslim and the aggrieved party a non-Muslim. *Ibid.* at 189-91.

151. Theological doctrines that support pluralism, either directly or indirectly, however, were not always enshrined into positive law by Muslim jurists in as robust a manner as would be required by political liberalism. For that reason, a significant contradiction exists between the values of scholastic theology which reinforce intellectual freedom, and legal rules which in certain instances burden, and in other cases, criminally punish, those who hold and espouse theories of the good which are deemed to be contradictory to orthodox Islam. The most prominent of these rules was the criminalization of overt apostasy. Accounting for the criminalization of apostasy remains an important challenge for Islamic orthodoxy and is a topic I will take up in some detail in a forthcoming article.

non-Islamic ways of life are nevertheless worthy of respect and constitutional protection, independent of the instrumental value of pluralism.

c. Islamic Moral Theology and the Burden of Judgment

Second only to the willingness to propose fair terms of cooperation in Rawls' conception of the reasonable is the recognition of the "burdens of judgment" and an acceptance of "their consequences for the use of public reason in directing the legitimate exercise of political power in a constitutional regime."[152] Rawls introduces the concept of the "burdens of judgment" to explain how it is possible that reasonable persons, engaging in good faith investigation and discussion, can nevertheless fail to agree.[153] In short, the "burdens of judgment" is Rawls' explanation for why reasonable pluralism is the inevitable result of the exercise by individuals of their "powers of reason and judgment in the ordinary course of political life."[154]

Islamic moral theology is also deeply concerned with explaining ethical disagreement. Medieval Islamic debates on the nature of good and evil and the nature of moral judgment, despite their theological context, are nevertheless relevant in determining the extent to which Islam as a comprehensive theory of the good recognized or could recognize the "burdens of judgment" or some concept or concepts analogous thereto. Three medieval debates are of particular relevance in this context. The first is whether pure reason can make true judgments regarding good and evil, and therefore imposes obligations on human beings in the absence of revelation. The second is the relationship of qualified moral judgment to moral obligation.[155] The third is the moral status of human acts prior to the advent of revelation.[156] As further described below, based on the answers given by Muslim theologians to these questions, it would be reasonable to conclude that they could in good faith Rawls' notion of the "burdens of judgment."

i. Reason, Revelation and Moral Obligation

Theological opinion among Sunnis breaks down broadly into two camps with respect to whether pure reason is capable of imposing moral obligation. Ash'aris such as al-Ghazali argued that, because only divine command or prohibition renders a particular act good or evil, pure reason cannot discern moral value, while the Mu'tazilis believed that good and evil are essential attributes of acts (or at least of some acts) and therefore, are amenable to discovery through rational investigation.[157] Historically, the Ash'ari position on this question became dominant in Muslim moral theology.

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152. See Rawls, *supra* note 6 at 54.
153. *Ibid.* at 55.
154. *Ibid.* (describing "the more obvious sources" of reasonable disagreement at 56).
155. This issue is discussed under the rubric "*taswîb al-mujtahidîn* (the infallibility of those who engage in qualified moral judgment)."
156. This issues is discussed under the rubric of "*hukm al-ashyâ' qabla wurûd al-shar'* (moral status of acts prior to the advent of revelation)."
157. Sherman Jackson, *The Alchemy of Domination* (1999) 31 Int'l J. Middle East Studies 185 at 186. Post-Ghazali Ash'aris, such as Fakhr al-din al-Razi and al-Taftazani, argued that the real issue

The Ash'ari theory of theological voluntarism has been subject to sustained crit-
icism in the modern period. Some human rights advocates have even laid partial
blame on the abysmal human rights condition in many Muslim countries on the
continued vitality of Ash'ari doctrines of good and evil.[158] Regardless of the philo-
sophical criticisms that may be directed to the Ash'ari theory of theological vol-
untarism, the political criticism is unwarranted, or at the very least, is premature
in the absence of taking into account the Ash'ari position on the relationship of
moral judgment to moral obligation. The critical question, at least from the per-
spective of political liberalism, is not the truth of a controversial ethical theory such
as theological voluntarism, but whether the Ash'ari theory of moral obligation—
whether rooted in revelation or in reason—recognizes the existence of reasonable
moral disagreement, or, to use Rawls' terms, the "burdens of judgment." As I
shall show below, the Ash'ari theory of moral judgment appears consistent with
Rawls' concept of the "burdens of judgment," despite its commitment to theological
voluntarism.

Both Ash'aris and Mu'tazilis, as well as the generality of medieval Muslim
jurists, were in broad agreement that moral judgment is at once equivocal, in that
it is impossible for human beings to know with certainty the moral status of many,
if not most of their acts, and that therefore reasonable differences in the outcome
of moral judgment are a natural consequence of moral judgment itself.[159] They also
agreed that human action in conformity with qualified moral judgment was nec-
essary to live a moral life—insofar as secular life would grind to a halt if the ethical
rule were that one could not act in the absence of moral certainty—and that action
in conformity with qualified moral judgment was also sufficient for the moral life.
A brief outline of the various positions on moral judgment is now in order.

*ii. The Relationship of Qualified Moral Judgment to Moral Obligation in
Muslim Moral Theology*

Before discussing the details of the medieval Muslim debate regarding the rela-
tionship of moral judgment to moral obligation, it makes sense to ask the extent
to which qualified moral judgment plays a role in Muslim moral theory, especially
in the Ash'ari view that moral obligation arises exclusively from revelation. For
the Ash'aris, it would seem that the answer to this question is directly related to

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separating the Ash'aris from the Mu'tazilis was not moral epistemology as such, but rather divine
freedom. Thus, al-Razi argued expressly for the proposition that reason can give rise to inter-
personal obligations independently of revelation, but that reason cannot claim to bind God. Fakhr
al-din al-Razi *Mafatih al-ghayb*, *supra* note 147, vol. 20 ("The position to which we incline and
which we adopt is that [the judgment] of pure reason is a means that creates an obligation upon
us to act in accordance with that which benefits us and to refrain from that which is harmful
to us. Pure reason, however, does not indicate that any thing is obligatory for God. This is because
our nature is such that we are compelled to seek benefits and ward off harm, so it is no wonder
that reason by itself is sufficient to oblige us, but God, may He be glorified, is beyond any need
to seek benefits or to ward off harm, thus making it impossible for reason to conclude that God
is obliged to do, or refrain from, anything" at 174).

158. See Mayer, *supra* note 5 at 44-45.
159. See Johansen, *supra* note 9 at 35-36.

their understanding of revelatory language. According to most Muslim moral theologians, including the Ash'aris, revelation did not conclusively resolve most moral issues because of the inherent limitations of human language: Most revelatory texts yielded only an apparent meaning (*zâhir*), and although one could reasonably posit that the apparent meaning is the intended one, one could not be certain that was the case.[160] Because the apparent sense of revelatory texts yields only a probable inference, an interpreter could depart from it if "sufficient" considerations existed to suggest that the apparent meaning was not the one intended.[161]

Accordingly, even an Ash'ari would recognize that qualified moral judgment plays an indispensable role in moral life, even after the advent of revelation. Even though the Ash'aris substituted revelation for reason as the principal ground of moral obligation, they could not avoid facing the question of the relationship of moral judgment to moral obligation: The conclusive texts of revelation were simply too few to provide more than a few rudimentary rules governing moral life.[162]

This fundamental fact regarding revelation was reflected by the Muslim classification of moral rules into two broad categories, those "known from revelation by necessity (*mâ 'ulima min al-dîn bi-al-darûra*)," and those derived by the diligent exercise of qualified moral judgment (*al-ahkâm al-ijtihâdiyya*).[163] Moral theology, because its concern is moral judgment, deals almost exclusively with the latter category of moral rules. Moreover, it was uncontroversial among medieval Sunni theologians and jurists that the vast bulk of moral and legal rules derived from revelation were the product of qualified moral judgment, and therefore could be taken to be no more than probable expressions of moral reality.

Muslim theologians, therefore, approached the relationship of moral judgment to moral obligation through the lens of epistemology, dividing broadly into two camps: the "fallibilists," i.e., those who argued that a right answer exists for all moral questions (*al-mukhatti'a*), and the "infallibilists," i.e., those who argued that all instances of qualified moral judgment, assuming they are undertaken with sincerity and sufficient diligence, were by definition correct (*al-musawwiba*).[164] Because qualified moral judgment is intended to illuminate the rules by which human beings can expect God to judge them in the next world, and because qualified moral judgment is used to fill in the lacunae of revelation, the relationship of these moral judgments to moral obligation is a pressing one in Islamic moral theology.

For the fallibilists, moral inquiry simply makes no sense unless inquiry had a goal, or a "target," i.e., the actual judgment of God pertaining to the question at

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160. Weiss, *supra* note 56 (stating that the revealed law is largely the product of revelation's apparent meanings, simply by virtue of the fact that reliance on apparent meaning is the primary method of linguistic expression at 474).

161. Jackson, "Fiction and Formalism," *supra* note 82 (explaining the indeterminacy of language as understood by Muslim moral theologians at 192-93); Weiss, *supra* note 56 (explaining that because the plain meaning of words according to Muslim moral theologians yields only a probable judgment as to the intent of the speaker, they may be legitimately interpreted contrary to plain meaning where there is evidence that the plain meaning is not intended at 471-73).

162. See, e.g., al-Ghazali, *Fada'ih al-batiniyya*, *supra* note 132 (noting logical impossibility that revelation could provide an answer for everything at 88).

163. Abou El Fadl, *Speaking in God's Name*, *supra* note 39 at 65-66; Zysow, *supra* note 72 at 11-68.

164. Al-Ghazali, *Mustasfa, supra* note 68 at 352; Zysow, *supra* note 72 at 459-83.

hand.[165] According to this group, if it turns out that one's moral judgment is substantively incorrect—meaning that one's good faith conclusion as to what God had decreed in respect of the question at hand was mistaken—one was nevertheless excused from moral blame, because there is no moral obligation to be substantively correct in the absence of conclusive evidence.[166] Indeed, despite the error in judgment, the interpreter who undertook the inquiry in good faith would nevertheless be rewarded for his efforts, although her reward would be less than that interpreter whose judgment accorded in fact with God's ruling for that case.[167]

For those theologians who denied that God has a rule for each discrete event, moral obligation in those areas of human life unregulated by express revelatory norms was subject to a meta-rule of moral obligation which required moral agents to exercise their moral judgment in novel situations based on their experience and knowledge of God's revealed will. In these cases, moral obligation is two-fold: (1) to discharge with sincerity and diligence the duty of moral inquiry and (2) to act in accordance with the result of that sincere and diligent moral inquiry.[168]

For al-Ghazali, the position of the infallibilists was implicit in the Ash'ari notion that moral obligation arises only upon the communication of the divine norm to the relevant actor. Al-Ghazali argues that it makes no sense to describe someone whose conduct is contrary to an undisclosed norm as being mistaken. Moreover, because Ash'ari moral theology rejects the notion that moral obligation can arise solely through the operation of pure reason, it follows that even in situations where an express revelatory norm has been revealed, such a norm governs the conduct only of those persons to whom the revelatory norm has been communicated.[169]

But, even assuming the perfect communication of revelation to all concerned persons, most revelatory texts are susceptible to more than one reading, and there is no one method of reading that could objectively guarantee which of these permissible readings is the correct one. And, al-Ghazali adds, it is impossible to rest moral obligation upon a question—the correct interpretation of equivocal language—which does not admit of objective proof.[170]

In al-Ghazali's moral epistemology, subjective factors such as experience and psychological disposition play a determinative role in the interpretation of equivocal evidence.[171] This is so because opinions, he argues, are "no more than a person's inclination toward something and his finding certain images to be pleasant, so whenever a person's nature is consistent with a particular image, he describes it as good."[172] Thus, it is not surprising if two people who consider the same equivocal evidence reach different, even contradictory, conclusions. Indeed, he compares the relationship of an interpreter to equivocal evidence in the context of moral argument

165. Al-Ghazali, *Mustasfa, supra* note 68 at 352.

166. *Ibid.*

167. Abou el Fadl*, Speaking in God's Name*, *supra* note 39 (discussing the relationship of interpretation to God's will, and the moral status of interpretation at 147-50).

168. Al-Ghazali, *Mustasfa*, *supra* note 68 at 352.

169. *Ibid.* at 353.

170. *Ibid.* at 352.

171. *Ibid.* at 353.

172. *Ibid.* at 362.

to the relationship of magnets to matter: whether an interpreter is "attracted" to certain evidence or is "repulsed" by it will depend solely upon the particular subjective components of the interpreter, just as a magnet's power to attract an object will depend solely on the constituent elements of the particular object.[173] Accordingly, al-Ghazali concludes that much of what passes as argument and proof in the books of theologians and jurists lacks any objective or compelling basis in and of itself, that ethical arguments in the absence of conclusive evidence from revelation are necessarily relative and that they acquire their persuasive force solely from the subjective characteristics of the particular interpreter.[174]

The infallibilist view that, in the absence of explicit revelation, moral theology permits multiple answers to the same question, responds directly to the "paradox" of Islamic liberalism identified by Binder.[175] It is also critical to any argument that seeks to explain why a Muslim can simultaneously affirm that good and bad are known exclusively from revelation while at the same time affirming that pluralism in matters of moral judgment is not an evil to be tolerated, but is itself consistent with revelation's vision of morality. On this view of the good, human beings are subject to a meta-ethical rule which commands them to seek the good by complying with God's command, but in those cases for which there is no command from God, they are to seek the good by judging the novel case in light of what they know of God's revelation. In this latter case, whatever conclusion they reach will be the moral rule that governs their individual conduct. Questions of political justice under this rule would fall under that category of cases for which there are no express rules from God.[176] Thus, questions such as distributive justice, as well as other questions that are implicated in discussions of constitutional essentials, are not governed by express revelatory norms, and therefore Islamic moral theology is consistent with a robust pluralism in such matters.

iii. Moral Judgment Prior to the Advent of Revelation and the Veil of Ignorance

Another issue that preoccupied Muslim moral theologians was the moral status of acts *prior* to the advent of revelation.[177] What most concerns us in this context is

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173. *Ibid.* at 353-54.
174. *Ibid.* at 354.
175. See Leonard Binder, *Islamic Liberalism: a Critique of Development Ideologies* (Chicago, IL: University of Chicago Press, 1988) (arguing that for Islamic liberalism to make sense, it must be assumed, paradoxically, that the Islamic community—despite its status as a divinely favored community—cannot know with certainty what God wants of it at 4).
176. Al-Ghazali argued that the policy dispute between the first two Muslim caliphs, Abu Bakr and 'Umar, regarding how funds from the public treasury should be distributed could be understood as an example of how subjective difference in character influenced the exercise of judgment. Abu Bakr was an ascetic, and accordingly favored a strictly egalitarian distributive policy, whereas 'Umar was deeply committed to improving the community's temporal welfare, and thus he believed that public resources should be allocated based on the recipient's relative contribution to the community's political success. Each adopted his policy as a result of his individual subjective characteristics, not because one policy was objectively superior to another. Al-Ghazali, *Mustasfa*, *supra* note 68 at 353-54.
177. This issue was discussed under the rubric of "What is the moral status of acts prior to the advent of revelation?" See generally A. Kevin Reinhart, *Before Revelation: the Boundaries of Muslim Moral Thought* (Albany: State University of New York Press, 1995).

the answer provided by the Ash'aris: Acts prior to the advent of revelation are not subject to a moral law (*lâ hukma lahu*).[178] This position is consistent with the Ash'ari view regarding the infallibility of qualified moral judgment. As a result of these two positions on moral epistemology, the Ash'ari moral universe is one thin in moral absolutes—prior to the advent of revelation, moral obligation, as such, does not exist, and even after its arrival, it only provides a limited set of express moral rules, very few of which, if any, provide absolute rules on matters relating to constitutional essentials.[179] Significantly, the fact that prior to the advent of revelation no moral obligation exists means that those persons who have no knowledge of the Islamic dispensation are not, properly speaking, subject to the moral law.

The direct link between moral obligation and the direct communication of revelation to moral subjects is reflected in the theological and legal concepts of "the communication of Islamic teachings." Accordingly, just as one could not be held morally accountable before God for failing to become a Muslim in circumstances where one was non-negligently ignorant of its truth, one was also excused from those obligations of the moral law about which one was non-negligently ignorant.[180]

Because the substantive norms of revelation do not apply to a person prior to that person's subjective encounter with revelation, a Muslim could reasonably argue that consideration of society's basic structure ought to be viewed as occurring—from the perspective of moral time—prior to the advent of revelation, despite the objective advent of revelation in historical time. Given this theory of moral obligation, it is hard to see a principled objection that Islamic theology could raise against the veil of ignorance as a heuristic device for mapping out constitutional essentials, at least on the assumption that agents acting behind the veil of ignorance would design constitutional essentials in such a way that revelation would have a fair opportunity to present its claims to citizens and that Muslim citizens would have the freedom to act in accordance with their reasonable understanding of revelation. Moreover, because a Muslim could reasonably argue that Islamic law's rules, insofar as they are grounded solely in the recognition of the truth of revelation but not some other principle cognizable in public reason did not apply to non-Muslims,[181] *a fortiori* those rules ought not be relevant in constructing the basic political structure of society.[182] At the same time, given the theory of moral obligation outlined above, Muslims would have no rational interest in imposing their

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178. *Ibid.* at 62. This was not the exclusive position expressed by Muslim theologians, however. See *ibid.* (describing various answers to this question at 10-28).

179. There are verses in the Qur'an that stress the importance of consultative decision making and the duty to show obedience to lawful authority. See, e.g., 42:38 (praising those who conduct their affairs in a consultative fashion) and 4:59 (commanding Muslims to obey, in addition to God and the Prophet, those with lawful authority).

180. See, e.g., al-Zarkashi, *supra* note 83, vol. 1 (non-Muslims can become morally culpable for their breaches of the moral law in the next life only if they negligently fail to learn of their obligations at 326).

181. See *infra* notes 249-268, and the accompanying text, discussing rules in Islamic law where non-Muslims were exempt for precisely this reason).

182. Islamic theology would, however, charge individuals acting behind the veil of ignorance with responsibility for acknowledging the possibility of revelation, and therefore the obligation to permit religious freedom.

substantive standards of the good on others to the extent such conceptions of the good could not be independently justified on the basis of public reason.

One might, however, take a more pessimistic view of this debate and conclude that because moral obligation does not exist prior to the advent of revelation (at least according to the Ash'aris), Islamic theology suggests that, but for revelation, it is impossible to identify norms which could organize the economic, political and social life of a community.[183] This would be to confuse the transcendental truths of theology with the immanent claims of secular reason, however. While human reason, because of God's absolute freedom from needs or ends, cannot know the content of God's command prior to encountering it, human reason is eminently capable of identifying interpersonal secular goods, a fact that provides a legitimate basis on which political life could be organized in the absence of revelation.[184]

This analysis leaves unanswered the situation of a person in the well-ordered society who adopts Islam, and whether she could maintain her good faith commitments to constitutional essentials after accepting the truth of Islam or whether the well-ordered society must accommodate her way of life. For now, I assume that a well-ordered society is capable of accommodating the way of life of a reasonable Muslim citizen. While there may be disputes regarding which elements of such a citizen's way of life ought to be accommodated by a well-ordered society, that problem is in principle no different or ought to be no different from the more general problem posed by how majorities are to accommodate the reasonable demands of minority citizens.[185]

iv. Conclusion

Muslim theologians, whether Ash'ari or Mu'tazili, recognized revelation to be a decisive source of moral knowledge. At the same time, they believed that revelation—because of the nature and limitations of human language—generally provides only presumptive answers to moral questions. In addition to the inherent ambiguity of language, the texts of revelation were also limited in number. Accordingly, moral judgment was indispensable to living an ethical life. The necessity to appeal to moral judgment, however, meant that Muslim theologians had to recognize the legitimacy of the numerous and often contradictory opinions that resulted from the exercise of moral judgment.

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183. This is precisely the conclusion Crone draws from the theological debate regarding moral judgment prior to revelation. See Patricia Crone, *God's Rule: Government and Islam* (New York: Columbia University Press, 2004) (arguing that Muslim political thought generally assumed that states could arise only through the intervention of God in the form of a prophet who acts as a lawgiver at 259, 263-68).

184. Al-Taftazani, *supra* note 106, vol. 4 (stating that dispute regarding the ability of reason to grasp good and evil simply a question of whether God's judgments for purposes of reward and punishment in the next life are necessarily the same as reason's judgments of good and evil at 282); al-Razi, *supra* note 157, vol. 20 at 174.

185. I have published a short essay outlining a possible approach to reconciling substantive commitments of Islamic law to commitments arising out of public reason. See Mohammad H. Fadel, "Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights" (2007) 8 Chicago J. Int'l L. 1.

Finally, the Ash'ari view that moral obligation cannot exist prior to revelation, combined with their view that reason can recognize interpersonal goods (at least in the utilitarian sense identified by Ash'ari theologians such as Fakhr al-din al-Razi and Sa'd al-din al-Taftazani) suggests an epistemological and ethical foundation for a Muslim interpretation of liberal constitutional essentials as being those political arrangements which reason would recognize as binding human beings prior to the advent of revelation. Rawls' heuristic of the veil of ignorance on this interpretation would be analogous, in terms of Muslim concepts of moral time,[186] to periods prior to the advent of revelation. In such circumstances, reason leads human beings to recognize only the *possibility* of revelation. Accordingly, prior to revelation (and thus acting under the conditions prevailing behind the veil of ignorance), humans are required to act according to what reason finds to be beneficial in connection with their temporal lives.[187] Liberal constitutional essentials would, therefore, be consistent with Islamic ethical theory from this perspective to the extent that they (1) conform to the rational welfare of human beings and (2) allow individuals to conform to the commands of revelation (subject to reasonableness limitations) if and when it arrives, and they accept its claims as true.

Part 5: Moral Indeterminacy, Islamic Law and Public Reason

a. The Distinction Between the Moral Order and the Legal Order and the Emergence of an "Islamic" Public Reason

Because of the indeterminacy prevailing in the moral order, Islamic law could have degenerated into an unstable and dysfunctional system grounded in solipsism if legal rules were (1) simply the result of qualified moral judgment and (2) judges were obliged to exercise independent moral judgment in resolving cases that were presented to them. Historically, however, Islamic law solved the problem of moral indeterminacy politically[188] through the convention of taqlid, a legal institution whereby legal decision-makers were obliged to follow the substantive doctrine of particular legal schools.[189] Significantly, what led Muslim jurists to adopt this position was the realization that a functioning legal system demanded both stability

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186. The question of the moral status of human acts prior to the advent of revelation does not refer to an actual historical period, but instead was purely a thought experiment. Crone, *supra* note 183 at 264.

187. Cf. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) (stating that persons behind the veil of ignorance are assumed to know general facts regarding political affairs, economic theory, psychology, and whether these general facts affect the choice of the principles of justice at 137). Nothing in Islamic moral epistemology appears to be incompatible with Rawls' assumptions regarding what knowledge may be attributed to persons in the original position. The possibility of revelation, and its impact on conceptions of the good, therefore, would appear simply to be one of the "circumstances of justice," *ibid.* at 126, the details of which persons are ignorant in the original position. *Ibid.* at 137 (parties know only that their societies are "subject to the circumstances of justice and whatever this implies").

188. Johansen, *supra* note 9 (saying that in the face of uncertainty, Muslim judges insisted on strict observance of procedural regularity to insure validity of rulings at 36).

189. See Fadel, "Social Logic," *supra* note 95 (arguing that the legal institution of taqlid was adopted to solve the problem of indeterminacy inherent in Islamic law's structure as a jurists' law).

and predictability in legal outcomes, goals that would have been impossible to achieve were the rules of decision applied by judges derived in accordance with the methods of usul al-fiqh.[190] Thus, in defense of taqlid later jurists appealed to political notions that are analogous to concepts such as equal protection, viz., that similarly situated litigants should have their disputes resolved under the same rule, and the public integrity of the legal system, viz., that judges would lose their standing as neutral arbiters if they ruled in one case pursuant to one rule, and then in a second case similar to the first pursuant to a second rule, simply because the judge's moral judgment was declared to have changed between the time of the first judgment and the second.[191] That political values explain the prominence of taqlid and not a change in the theory of moral judgment is confirmed by the fact that: (1) a muqallid-judge could rule in accordance with a rule of law despite his subjective disagreement with the correctness of that rule,[192] and (2) many authors insisted that while judges and other legal officials were bound by taqlid to apply existing legal doctrine, this obligation attached to them *only* in their official capacities. In their private lives, however, they could still conduct themselves in accordance with other interpretations of the moral law that had not been adopted by the courts.[193] This distinction between rules that one applies to disputes in a courtroom and those rules by which one conducts one's own life is further evidence that Islamic law distinguished between a legal order whose rules could be coercively enforced via state power, and a moral order whose norms could be enforced only via the power of private conscience. In fashioning a determinate legal system that recognized the autonomous existence of a highly indeterminate moral universe, Muslim jurists and theologians gave birth in the Islamic milieu to a qualified form of what Rawls calls "public reason."[194]

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190. *Contra* David A. Westbrook, "Islamic International Law and Public International Law: Separate Expressions of World Order" (1993) 33 Va. J. Int'l L. 819 (arguing that because Islamic law's concept of legality is correspondence to an objectively unknowable fact—God's judgment on the case—it could not conceive of law as a system of rules growing over time or even accept the authority of previous court decisions, thus ruling out the possibility that the legal system could learn from its own experience over time at 874-76). Westbrook's view, although not uncommon, is flatly contradicted by medieval legal authorities such as Ibn Rushd the Grandson (Averroes), al-Qarafi, al-Qadi 'Iyad and Ibn al-Salah, who argued that taqlid was superior to ijtihad for that very reason. See Fadel*, Adjudication*, *supra* note 60 at 213-14.

191. See Fadel, "Social Logic," *supra* note 95 at 213-15.

192. See Shihab al-din al-Qarafi, *al-Ihkam fi tamyiz al-fatawa 'an al-ahkam wa tasarrufat al-qadi wa-1-imam,* ed. by Muhammad 'Arnus (Cairo: Maktab nashr al-thaqafa al-islamiyya, 1938) [al-Qarafi, *Ihkam*] (noting that a *muqallid*-judge can rule based simply on the rule of his Imam, without necessarily accepting the validity of that rule at 30); Jackson, *Islamic Law and the State*, *supra* note 90, (stating that al-Qarafi equivocated between permitting the *muqallid*-judge to rule based either on the rule of his school even where he could not determine that it was substantively correct or allowing him to choose among the competing views within his school at 166).

193. Fadel, *Adjudication supra* note 60 at 276. See also Johansen, *supra* note 9 (observing that Islamic thought "makes a clear distinction between ethical norms which bind the *forum internum* of the individual believer and the legal norms which [judges] have to apply when legal conflicts are brought before them" at 35-36).

194. I describe the form that "public reason" took in Islamic history as "qualified" for primarily two reasons: (i) Islamic substantive law retained significant elements of political perfectionism, i.e., rules that were justified (or could be justified) only by appeal to the truth of Islam and (ii) the domain of the "public," by modern standards, was extremely limited, encompassing only matters such as war and peace, criminal law, and management of public property, e.g., natural resources, and public infrastructure, e.g., roads and marketplaces.

I will explore some features of this qualified form of "public reason" through an investigation of five topics. The first is whether Muslim theologians themselves understood Islamic substantive law to be a religious vocation or a secular one. The second is the theory of the universal ends of the moral law (*al-maqâsid al-kulliyya*). The third is the doctrine of public policy/police power (*siyâsa shar'iyya*). The fourth is the evolution of the "rules of recognition"[195] in Islamic jurisprudence from ones making explicit appeals to revelation to ones grounded solely in juristic doctrine. The fifth is the extent to which non-Muslims are substantively bound by the rules of Islamic law.

b. Islamic Law: Religious or Secular?

Western scholarship on Islamic law has popularized the notion that Islamic substantive law is a religious law, and as such, is generically different from a secular legal system.[196] While secular law is viewed primarily as the means by which the community's secular interests are organized to permit satisfaction of the legitimate needs and desires of individuals and society, Islamic law is assumed to reflect those rules of conduct that are concerned primarily with setting forth the standard of conduct required of human beings so that they may earn salvation. As a consequence, the ordering of secular affairs, according to these commentators, is at best a secondary concern of Islamic law.[197] I have instead argued that salvation, at least in the view of pre-modern Sunni orthodoxy, was primarily a function of theology (knowledge of certain truths about God) and only secondarily was a function of upholding certain standards of ethical conduct that are known directly from revelation or are discovered from the application of human reason to the commands of revelation.[198]

Islamic substantive law, however, is only partially concerned with these two issues. It overlaps with theology insofar as it, as a matter of substantive law, penalized apostasy and heresy. It also overlaps with Islamic ethics insofar as it criminalized certain conduct that Islam as a religion deems immoral or commanded acts that Islam as a religion deemed meritorious. What distinguishes Islamic substantive law from theology and ethics, however, is that Muslim jurists approached these questions as matters subject to some sort of legal process within a system of temporal justice rather than as a question pertaining to either theological or ethical truth.[199] As a result, Islamic law's view of human conduct was a decisively secular

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195. See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) (discussing the concept of a "rule of recognition" as the means by which a legal system identifies the rule that is applicable to a legal question at 92-93).

196. See Johansen, *supra* note 9 (summarizing and criticizing a hundred years of Western scholarship on Islamic law that, to varying degrees, has been unwilling to study Islamic law as a legal system rather than as a system of deontic ethics at 48-54).

197. See Fadel, *Adjudication*, *supra* note 60 (reviewing secondary literature on the alleged indifference of Islamic law to the practical regulation of society at 4, 10-11).

198. See Johansen, *supra* note 9 ("the definition of belief as knowledge and acknowledgment of God prevailed in the . . . theological systems of Sunnî Islam" and pursuant to these theological systems, "works are neither a condition of belief nor a constituent part of it," at 21-22).

199. See *ibid.* (describing the substantive rules of Islamic law "as a normative reference for a universally valid system of justice" at 26).

one, i.e., it was concerned primarily with the consequences of human conduct in the profane world.[200]

Al-Ghazali's taxonomy of the sciences corroborates the view that Islamic substantive law is primarily a secular discipline. As noted earlier, al-Ghazali had argued that the good order of the secular world is antecedent to the good order of religion and that the latter cannot flourish without the stability and prosperity of the former. Accordingly, politics, which al-Ghazali defined as that craft whose purpose is "to establish harmony, society and cooperation with the purpose of [securing] the means of life as well as their organization,"[201] is considered by him to be the highest profane craft.[202] Substantive law is the means by which these ends are achieved, and for that reason, al-Ghazali classifies Islamic substantive law (fiqh) as a secular science.[203] The function of the jurist, in the view of al-Ghazali, is limited to instructing the ruler regarding the rules of justice and the rules of social cooperation,[204] and thus, jurists' concerns never transcend the profane world.[205]

Nevertheless, substantive law is "entangled" in religion.[206] But, al-Ghazali argues, this entanglement should not mislead us into confusing what is a profane subject for religious learning, much less genuine religious devotion. The entanglement between religion and substantive law arises because religion is incomplete in the absence of substantive law, and for this reason, people have mistakenly believed that substantive law is a religious subject.[207] In fact, his argument suggests that substantive law is related to religion because it is one of the many exogenous circumstances that affect the ability of religion to flourish. While the nature of those circumstances is important, perhaps even decisive for religious observance, that

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200. Abu Hamid Muhammad b. Muhammad b. Muhammad al-Ghazali, *Ihya' 'ulum al-din* (Beirut: Dar al-kutub al-'ilmiyya, 1986), vol. 1 ("Thus, the entirety of the jurist's competence is tied to the profane world" at 30). The secular orientation of Islamic law is further confirmed by its rules of pleading which limits a judge's jurisdiction to claims which implicate the tangible interests of the parties. See al-Qarafi, *Ihkam*, *supra* note 192 at 3. Accordingly, Muslim jurists and theologians routinely distinguish between a rule that applies in the profane world from a rule that applies only for purposes of the next life. Examples of this include the obligation to know God: for adherents of the strong theory, this is an obligation that may only be enforced by God in the next life, whereas for purposes of the temporal legal system, any person who claimed to be a Muslim was taken at her word. See *supra* note 125. Another example is the culpability of non-Muslims for failing to discharge ritual obligations: although no liability attached to them under the temporal legal system, they could very well be accountable before God for such failure. See *infra* note 254 at 54.
201. Al-Ghazali, *Ihya' ulum al-din*, *supra* note 200 at 23.
202. *Ibid.* at 24. Al-Ghazali's obvious respect for politics should be contrasted with Westbrook's suggestion that politics occupied, in the judgment of Islamic law, the realm of "compromised aspiration." See Westbrook, *supra* note 190 at 882.
203. *Ibid.* at 28.
204. *Ibid.* ("Thus, the jurist is the teacher of the ruler and his guide to how humanity should be governed and organized so that, as a result of their adherence [to the law], their secular affairs are put in order.")
205. *Ibid.* (even when discussing questions of conversion to Islam or ritual observance, a jurist's competence is limited to worldly considerations at 29).
206. *Ibid.* ("By my life, [law] is also connected with religion, but not in and of itself, but through the mediation of the secular world" at 28.)
207. *Ibid.* (explaining that while religion provides the normative principles that make a polity possible, religion cannot survive without the existence of a state which in turn is dependent upon law to organize its affairs).

does not justify confusing one with the other, or believing that expertise regarding the circumstances that make possible the flourishing of religion is the same as religious knowledge or actual piety. Thus, expertise in substantive law for al-Ghazali is equivalent to the expertise of guards who, in pre-modern times, protected pilgrimage (*hajj*) caravans from the depredations of bandits. Competent guards were necessary for the successful completion of the Pilgrimage, but this craft was not studied for its own sake. Similarly, substantive law is one of those exogenous circumstances required for religion to flourish, but it is not in itself a religious matter or a type of religious knowledge.[208] Instead, for al-Ghazali, "the craft of law is nothing more than knowledge of the means by which people are governed and their well-being protected."[209]

c. The Universal Ends of Islamic Law

The case by case method of moral reasoning used by moral theologians to investigate moral questions—combined with the indeterminacy of the moral world—raises the question whether such a method of moral judgment could provide a coherent body of moral rules at all. The theory of the universal ends of the law, however, functioned to prevent moral reasoning from becoming so engrossed in particular questions that it lost sight of general principles. In contrast to the deductive method of moral theology which proceeded on a text-by-text basis, the theory of the universal ends of the law was derived inductively, by a study of revelation in its entirety. Thus, if one were to conduct an inductive study of the substantive rules of Islamic law, one would discover that it protects five universal categories of well-being (s. *maslaha*/pl. *masâlih*): (1) religion (*al-dîn*); (2) life (*al-nafs*); (3) capacity *(al-'aql)*;[210] (4) progeny (*al-nasl*); and (5) property (*al-mâl*).[211] Within each of these five universal categories, individual rules were further classified into primary (*darûrî*), secondary (*tahsînî*) and tertiary (*tazyînî*) rules based upon the

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208. See also Fadel, *Adjudication*, *supra* note 60 (citing Ibn Rajab, a prominent Hanbali jurist and theologian from the 14th century, for the proposition that jurisprudence is not the same as religious knowledge, and may even be destructive of religiosity at 13-14).

209. Al-Ghazali, *Ihya' ulum al-din*, *supra* note 200 at 29. My characterization of al-Ghazali's view of substantive law as a secular vocation is limited to its objective characteristics. Al-Ghazali also argues that a person who discharges a secular vocation, such as law or politics or medicine, with the subjective intent to serve God, sanctifies that activity and gains favor with God as a result of that devotional intention. Nevertheless, al-Ghazali explicitly denies that such an intention is required in order for a person to discharge competently the secular function of a vocation such as law, politics or medicine. *Ibid.* at 35.

210. A literal translation of the Arabic term "*'aql*" might be "reason," but "capacity" to discharge one's obligations appears to be the real concern of the jurists.

211. Al-Ghazali, *Mustasfa*, *supra* note 68 (stating that the meaning of the term *maslaha*, when used as a term of art in moral discourse, means that which preserves the goals of revelation, which are preserving religion, life, capacity, progeny and property at 174). Ibn Farhun, a fourteenth-century Mâlikî jurist and judge living in Madina, proposed an alternative five-fold classification of the rules of Islamic law into rules furthering (i) self-discipline; (ii) preserving the necessities of human existence; (iii) facilitating the satisfaction of human needs to increase their well-being; (iv) the pursuit of generosity; and (v) deterrence and social order. See Fadel, *Adjudication, supra* note 60 at 84, n. 37.

importance of a particular rule as a means to achieve one of the law's five universal ends.[212] Accordingly, Muslim moral theory established a calculus of moral value whereby conflicting revelatory and legal norms could be prioritized subject to the relative weight assigned to each interest by revelation.[213] For example, timely performance of certain ritually specified prayers, even if obligatory,[214] should be interrupted to save a human life, because saving life is a primary interest whereas discharging the obligation to pray at a specific time is only secondary interest, and thus must give way to the primary interest.[215]

Thus, even Ash'ari theologians agreed that human beings, by virtue of their rationality, seek to maximize their well-being, and that revelation had to be understood in light of the rational understanding of human beings. Accordingly, it is permissible to disturb a corpse that was buried without the benefit of a proper funeral bath, but not if the body was already in an advanced state of decomposition. The same theory was used to justify rules of public policy, e.g., a rule immunizing public officials against personal liability arising from errors in judgment with respect to lost property so long as they are acting within the scope of their legal authority, on the grounds that, given the frequency with which public officials would be exposed to personal liability were the rule to be otherwise, no one would be willing to serve as an agent of the public.[216]

While this method of moral and legal reasoning could not give a definitive answer in all cases, it established a method for reasoning about moral value and legal rules that went well beyond linguistic interpretation of revelation to consider the harms and benefits accruing to human beings as a result of certain rules and setting forth a principled method for weighing them when they conflicted. It is not surprising then that application of this style of moral reasoning relied heavily on empirical judgment regarding the state of the natural and social worlds inhabited by human beings rather than scriptural interpretation.[217] More importantly, the relative emphasis upon the empirical suggested the possibility that non-Muslims could also collaborate in this project, and indeed, Muslim theologians declared that all the revealed religious laws (*sharâ'i' samâwiyya*), specifically, the laws followed

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212. See *al-Ghazali,* Mustasfa, *supra* note 68 (explaining that benefits are divided into primary, secondary and tertiary and giving examples of each at 174-75).

213. 'Izz al-din 'Abd al-'Aziz b. 'Abd al-Salam, *Qawa'id al-ahkam fi masalih al-anam* (Beirut: Dar al-ma'rifa, n.d.) (vol. 1) ("When benefits and harms exist simultaneously, if it is possible to obtain the benefits without the harm, we do so . . . but if it is impossible to avoid the harms and obtain the benefits, then [either] the harms exceed the benefits, [in which case,] we avoid the harms and ignore the benefits . . . or the benefits exceed the harms, [in which case] we take the benefits and accept the harms. Where the harms and benefits are equal, either may be selected or no choice made at all." at 83-84). For more information on this author, see "'Izz al-Din 'Abd al-'Aziz b. 'Abd al-Salam" in 9 Encyclopaedia of Islam 812b.

214. Islamic ritual law obliges Muslims to pray five times a day: dawn, noon, afternoon, sunset and nightfall. Performance of prayers outside their prescribed times is ordinarily considered sinful. See al-Dardir, *supra* note 84, vol. 1 at 232.

215. See Ibn Abd al-Salam ("Priority is given to saving drowning persons over timely performance of prayers because saving the lives of drowning persons is deemed more virtuous by God than timely discharge of prayer, especially since it is possible to do both by first saving the drowning persons then performing the prayer later" at 57.)

216. *Ibid*. at 89-90.

217. See, e.g., *ibid*. at 91.

by Jews and Christians likewise protected these categories of well-being. Ibn 'Abd al-Salam also included the followers of Greek philosophy in this moral consensus. Thus, in an important sense, Muslim theologians recognized the existence of a potential common language among the adherents of these three monotheistic faiths as well as philosophers that would permit inter-communal communication without first requiring conversion.[218]

Accordingly, Ibn 'Abd al-Salam explained the differences in ethical judgments among Muslims, adherents of the other monotheistic faiths and followers of the Greek philosophical tradition as arising out of reasonable differences in the relative weighting of the same basket of goods, not incommensurable moral difference.[219] In Ibn 'Abd al-Salam's considered view, despite the fact that ultimate goods could only be discovered via revelation, human beings, by virtue of being rational, are capable of using reason to discover those rules of the profane world necessary for their secular well-being in the here-and-now.[220]

Ibn 'Abd al-Salam was not the only Muslim theologian and jurist to adopt this approach to understanding the moral and legal rules of Islam. Abu Ishaq al-Shatibi, a Spanish Maliki jurist, attempted to provide a systematic presentation of the theory of the universal ends of the Shari'a based on an inductive approach to revelation and Islamic law.[221] Rather than relying on discrete texts of revelation, al-Shatibi proposed an inductive method which would marshal various pieces of evidence and interpret them in light of the universal ends of the Shari'a.[222] In this manner, he hoped to provide positive law a more secure epistemological foundation in revelation than the conventional approach to moral theology which was grounded in a combination of linguistic and logical formalism.[223]

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218. *Ibid*. at 4. Indeed, Ibn 'Abd al-Salam also states that while revelation is indispensable for knowledge of the hereafter, and the means by which one attains eternal happiness, "the benefits and the harms of the profane world and the causes thereof are known via necessity, experience, custom and considered opinion, and if something is ambiguous, inquiry is made [using] its evidence [viz., necessity, experience, etc.]. And, whoever wishes to understand the substantive reasons [for revelatory rules regulating the profane world], the costs and benefits [of certain conduct], and the weightier of these considerations, he should present these [questions] to his mind, imagining that revelation was silent on these matters, and then he should derive rules. In this case, hardly will a rule [imposed by revelation] differ from the conclusions reached, save for such devotional rules as God has imposed upon His servants with respect to which He did not reveal to them either its benefit or its harm."

219. *Ibid*.

220. See also al-Taftazani, *supra* note 106 (making a similar argument at 282).

221. See Wael Hallaq, "On Inductive Corroboration, Probability and Certainty in Sunnî Legal Thought" in Nicholas Heer, ed., *Islamic Law and Jurisprudence, Studies in Honor of Farhat J. Ziadeh* (Seattle: University of Washington Press, 1990) 3 [Hallaq, "Inductive Corroboration"] at 24-31. For a general overview of Shatibi's work in the social and political context of Muslim Spain, see Muhammad Khalid Masud, *Islamic Legal Philosophy: a Study of Abu Ishaq al-Shatibi's Life and Thought* (Islamabad: Islamic Research Institute, 1977). For more information on al-Shatibi, see "al-Shatibi, Ibrahim b. Musa" in 9 Encyclopaedia of Islam 364a.

222. In this respect, al-Shatibi's approach to legal proofs resembles legal pragmatism. See Daniel A. Farber, William N. Eskridge, Jr. & Philip P. Frickey, *Constitutional Law: Themes for the Constitution's Third Century* (St. Paul, MN: West, 1993) at 126.

223. See Hallaq, "Inductive Corroboration," *supra* note 221 at 25; Jackson, "Fiction and Formalism," *supra* note 82 (criticizing the formalism of moral theology on the grounds that it "neither exclude[s] nor take[s] account of the presuppositions that inform legal interpretation" at 192).

As was the case with Ibn 'Abd al-Salam, al-Shatibi's insistence that revelatory texts could only be understood in relation to substantive values, e.g., the universal ends of the law, meant that the system of moral and legal reasoning he advocated required close attention to empirical realities.[224] Thus, al-Shatibi was not primarily concerned with identifying the linguistically most correct reading of a text of revelation. He was more concerned with interpreting the law—and any revelatory texts that were deemed to be the revelatory origins for that law—in the manner most consistent with the universal ends of revelation, even if that required introducing implicit glosses on the legal text in question. For example, when asked about a partnership for the production of cheese—an arrangement which facially violated the rules regulating the exchange of certain commodity foodstuffs—al-Shatibi looked to the wealth effects that would result from prohibiting the arrangement at issue. Upon doing so, he concluded that a prohibition of those partnerships would reduce wealth, and therefore he concluded that the partnerships should be permitted.[225]

Al-Shatibi's analysis demonstrates the practical implications of the rising concern of Muslim jurists with the substantive consequences of legal rules rather than the revelatory genealogy of the rule. Although al-Shatibi justifies his departure from the general rule based on the revelatory principle that God's commands do not result in unreasonable hardship, this principle can only be invoked by reference to factual circumstances. Moreover, al-Shatibi's approach to the concept of "hardship" is not the only plausible interpretation of the Quranic passage concerning hardship.[226] It would be plausible to read this concept as definitional, i.e., nothing that God has commanded constitutes a hardship, in which case the concept of "hardship" would not limit the plain sense of other texts. Accordingly, al-Shatibi's analysis turns not so much on subtle hermeneutic questions arising out of the interpretation of scripture, but rather on an economic analysis of the alternative rules that could potentially govern the case, finally settling on that interpretation of the law that was most consistent with the economic well-being of the individuals within his community.

d. Public Policy/Police Power (Siyâsa Shar'iyya)[227] and Islamic Moral Theology

Many western historians of Islamic law have disparaged the Islamic legal doctrine of public policy as an unprincipled—even if necessary—departure from "true"

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224. Significantly, al-Shatibi argued that the empirical investigation of the world is an activity that can never come to an end. See Abu Ishaq Ibrahim b. Musa al-Shatibi, *al-Muwafaqat fi usul al-shari'a* (Beirut: Dar al-ma'rifa, n.d.), vol. 4 at 89-90. See also Shihab al-din Ahmad b. Idris al-Qarafi, *al-Furuq* (Beirut: 'Alam al-kutub, n.d.), vol. 1 (noting that the investigation of the empirical world is open-ended, both in the sense that empirical knowledge is always subject to prospective revision, and that the means by which humans obtain empirical knowledge are also (potentially) unlimited, since they are not limited by revelation at 129).

225. Ahmad b. Yahya al-Wansharisi, *al-Mi'yar al-mu'rib*, ed. by Muhammad Hajji (Beirut: Dar al-gharb al-islami, 1990), vol. 5 at 215.

226. See, e.g., al-Baqara, 2:220 ("Had He wished, He could have burdened you") and al-Hajj, 22:78 ("He has made no hardship for you in religion").

227. Closely related to the concept of *siyâsa shar'iyya* were the concepts of *hisba*, the *mazâlim* jurisdiction and the power of *ta'zîr*. For a general overview of these various jurisdictions in medieval Islamic constitutional law, see Fadel, *Adjudication*, *supra* note 60 at 61-75.

Islamic principles of legality.[228] The rise of the doctrine of public policy in Islamic law, however, can reasonably be viewed as part and parcel of the evolution of the Islamic legal system from one derived wholesale from revelation into a system of rationally determined public values bounded, rather than determined, by a commitment to revelatory norms.

Pursuant to this doctrine, duly authorized agents of the state were authorized to promulgate rules which went beyond the requirements of both revelation and the rules of positive law as articulated by the jurists, so long as such rules did not contradict revelation and furthered a lawful purpose.[229] According to medieval treatises on public law, the chief distinction between public policy and the law of the jurists was that in the case of jurisdictions that were limited to applying the law of the jurists, e.g., ordinary courts, the decision-maker was bound to apply the applicable rule of law as set forth in the books of substantive law, whereas a decision-maker exercising public policy powers could create enforceable obligations in contexts where the law of the jurists would not recognize any obligation. For example, Islamic law does not enforce gratuitous promises, although it deems it morally commendable for the promisor to do so voluntarily (*mandûb*).[230] A decision-maker entrusted with the powers to determine public policy could, however, oblige a promisor to fulfill her gratuitous promise.[231] Thus, one medieval author described the doctrine of public policy as that power entrusted to the government to improve society.[232] Exercises of this power were valid insofar as they were undertaken with the purpose of enhancing the community's welfare, and did so improve it in fact.[233] The only limit upon this power was that the public policy power could not be used to oblige conduct that was sinful, nor could it prohibit conduct that was morally obligatory.[234]

A particularly important arena for public policy was criminal law.[235] While Islamic law provided for the mandatory punishment of a narrow set of crimes,[236]

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228. See, e.g., Fadel, *ibid.* at 79-81.
229. Al-Qarafi, *al-Furuq*, *supra* note 224, vol. 4 (stating that discretionary actions of public agents are enforceable only if they achieve either a pure or preponderant good, or prevent a pure or preponderant harm at 39).
230. See John A. Makdisi, *supra* note 96.
231. Abu al-Hasan Ali b. Habib al-Mawardi, *al-Ahkam al-sultaniyya* (Beirut: Dar al-kutub al-'ilmiyya, n.d.) (a decision maker exercising this authority in the context of a private lawsuit is not restricted to rules of obligation at 105). For more information on al-Mawardi, see "al-Mawardi, Abu '1-Hasan Ali b. Habib" in 6 Encyclopaedia of Islam 869a.
232. Fadel, *Adjudication*, *supra* note 60 at 82.
233. Al-Qarafi, *al-Furuq*, *supra* note 224, vol. 4 at 39.
234. See Ahmad b. Muhammad Ibn Hajar al-Haytami, *al-Fatawa al-fiqhiyya al-kubra*, CD-ROM: *Encyclopedia of Islamic Jurisprudence* (Kuwait: Kuwaiti Ministry of Endowments, the Islamic Development Bank & Harf Information Technology, 2004) (concluding that it was obligatory to comply with a price-setting regulation—even if its legality was controversial—because compliance with the regulation did not entail sinning); Fadel, *Adjudication*, *supra* note 60 at 83, 93; see also al-Tahawi, *supra* note 104 (obedience to government is obligatory so long as compliance with the command does not entail committing a sin at 13-14).
235. Regulation of the marketplace was another context in which this power was widely used. See Kristen Stilt, *The muhtasib, law, and society in early Mamluk Cairo and Fustat (648-802/1250-1400)* (Ph.D. dissertation, Harvard University, 2004) [unpublished].
236. These are the controversial "*hudûd*" crimes which, for example, call for the amputation of the hand of a thief, and the stoning of a married adulterer.

the vast majority of criminality was punished pursuant to the power of the government to formulate public policy. Such punishments were described as crimes subject to discretionary (*ta'zîr*) punishments. The goals of these punishments were protection of the public, general or specific deterrence and/or reformation of the defendant.[237] Accordingly, the legitimacy of such punishments was based not on fidelity to a revelatory norm, but rather upon the reasonable belief that punishment would improve the public welfare by achieving one of the aforementioned goals.[238] For the same reason, al-Qarafi argued that there were sins whose secular harms were so inconsequential that they could not legitimately result in criminal punishment because crafting a penalty severe enough to deter the crime would render the punishment disproportionate to the harm resulting from the sin. At the same time, a punishment satisfying the proportionality requirement would be insufficient to deter the defendant from continuing to sin.[239] Because the predicate for applying discretionary penalties was determined by an empirical assessment of harm, this area of the law was entirely independent of theological expertise, and accordingly, legitimized rule-making for the vindication of public interests rather than the vindication of express revelatory norms.[240]

At the same time that medieval authors were writing treatises in Islamic public law defending the doctrine of public policy, a revaluation of the Prophet's legal role was also taking place. Al-Qarafi, for example, argued that a proper understanding of the Prophet's role as lawgiver requires an appreciation of the distinction between those instances in which he acted in the capacity of a prophet (*nabî*), and those instances in which he acted as a head of state (*imâm*).[241] Al-Qarafi does not challenge the normative status of Prophetic actions and teachings as evidence of the moral law; rather, he argues that prior to concluding that a specific Prophetic report communicates a norm that binds prospectively all subsequent generations, the interpreter must conclude that the Prophet, at the time of the report in question, was acting in his capacity as a prophet, i.e., communicating a religious norm on the behalf of God, rather than in his capacity as the head of state or as a judge. Al-Qarafi illustrates his point using some well-accepted Prophetic reports whose legal consequences were the subject of well-known disagreements among various Muslim jurists in the middle ages. He explains these disagreements as resulting from disagreements regarding the capacity in which the Prophet was acting at the time of the report.

One example will help cast light on al-Qarafi's argument. Muslim jurists accepted as genuine the following statement of the Prophet: "Whosoever reclaims

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237. Fadel, *Adjudication*, *supra* note 60 at 91-92.

238. *Ibid*. at 92-93.

239. Al-Qarafi, *al-Furuq*, vol. 4 *supra* note 224 at 181.

240. A modern Egyptian authority, for example, notes that this classical function of Islamic law has been subsumed under the administrative apparatus of the modern state. See 'Ali al-Khafif, "al-Hisba fi al-islam" in *Usbu' al-fiqh al-islami: mihrajan al-imam ibn taymiyya* (Cairo: al-Majlis al-a'la li ri'ayat al-funun, wa al-adab wa al-'ulum al-ijtima'iyya, 1961) 559 at 594. See also Fadel, *Adjudication*, *supra* note 60 at 67, n. 81.

241. Sherman A. Jackson, "From Prophetic Actions to Constitutional Theory" (1993) 25 Int'l J. of Middle East Studies 71 [Jackson, "Prophetic Actions"] at 74.

abandoned land becomes its owner." While there was general agreement among jurists as to the authenticity of the report, the leading jurists nevertheless differed significantly in understanding its legal significance. The Hanafi school concluded that regardless of the report, ownership of abandoned real property via reclamation could only occur with the permission of the government. The Shafi'is, on the other hand, deduced from the report a rule to the effect that abandoned land could become private property simply by the act of reclamation, regardless of the government's knowledge or permission. The Malikis, however, argued that while ownership of abandoned land passed simply upon reclamation, it also concluded that one could not proceed to reclaim abandoned land without first seeking permission from the government to insure the absence of competing claims of ownership.

For al-Qarafi, these three positions are best understood as resulting from different assumptions regarding the capacity in which the Prophet acted at the time he made the relevant statement. The Hanafis, according to al-Qarafi, assumed the Prophet had been acting in his capacity as head of state at the relevant time, and thus, treated the precedent simply as a policy (*tasarruf*) that, while lawful, was not prospectively binding. The Shafi'is' analysis presumed the opposite; they concluded that the right to reclaim land was a religious norm which bound successive generations of Muslims. The Malikis accepted the Shafi'i argument, but they nevertheless imposed the requirement of seeking the government's permission prior to reclaiming any land to avoid unnecessary conflicts regarding land ownership.[242]

Jackson has noted the potential importance of al-Qarafi's mode of analysis for legal modernization in the Muslim world.[243] More important from our perspective, however, is that al-Qarafi's argument suggested that considerations of public policy were not a late-comer to the Islamic legal tradition or an otherwise unprincipled deviation from the norms of Islamic jurisprudence, but rather logically preceded, even if only implicitly, any attempt to understand the transmitted body of the Prophet's teachings. Similarly, by placing policy concerns at the center of the inter-pretive effort to glean meaning from the Prophet's legacy, the effect of al-Qarafi's theory is to diminish *theological* learning in favor of the empirical learning which would be useful to understanding the policy goals of the various precedents attributed to the Prophet.[244]

e. Rules of Recognition

The various schools of Muslim jurisprudence applied differing "rules of recog-nition" to determine which rule should govern a particular case. Given Islamic law's status as a "jurists' law," establishing a rule of recognition was simultaneously a

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242. *Ibid*. at 77-78.
243. *Ibid*. at 78-79.
244. See also Taj al-Din 'Abd al-Wahhab b. 'Ali al-Subki, *al-Ashbah wa-1-naza'ir*, ed. by 'Adil Ahmad 'Abd al-Mawjud & 'Ali Muhammad 'Iwad (Beirut: Dar al-kutub al-'ilmiyya, 1991), vol. 2 (explaining that the Prophet acted in both the capacity of a prophet and a head of state, and that his statements in the latter category are not prospectively binding, but instead are subject to con-siderations of the public good at 285-86).

considerable challenge and critical to the establishment of a functioning legal system. Indeed, because of the largely decentralized process of rule-making in medieval Islamic law, one must speak of two sets of rules of recognition. The first is a rule of recognition that operates within a particular legal school and serves to organize its legal doctrine.[245] The second is an inter-school rule of recognition that assures mutual-recognition of the legal decisions handed down by judges applying the divergent doctrines of the various legal schools. Space constraints permit discussion only of the former.

The intra-school rules of recognition evolved from rules of recognition which assumed that judges and other legal officials relied on the scriptural sources of the law to ones which assumed that the judge was a muqallid.[246] The rule of recognition that applied in this case required the judge to follow strictly pre-existing legal rules and subjected his decisions to review by more senior members of the legal hierarchy. Significantly, this rule of recognition expressly contemplated revision of applicable rules in light of changing circumstances and in response to perceptions of the public's welfare. The rules restricting the legal discretion of judges, moreover, were justified by express appeals to political values such as preserving the public's perception of the legal system's integrity—which would be at risk if different rules were applied to similarly situated litigants—and the desire to assure that courts treated litigants equally. Moreover, by the Ottoman era, jurists had made clear that this rule of recognition was not simply the result of the judge being a muqallid, but rather was jurisdictional insofar as the terms of his appointment required him to render judgment based on the established rules of his school.[247] Equally significant, a muqallid judge was permitted—indeed obliged—to rule according to the established rule of his school, even if the judge did not believe that rule to be, as a substantive matter, the strongest opinion on the matter.[248]

f. Are Non-Muslims Politically Bound by the Rules of Islamic Law?

One way of exploring the extent to which the political commitments of Islamic law are potentially consistent with public reason is to consider the extent to which non-Muslims were understood to be politically bound by Islamic law, if at all, on the theory that Islamic law's approach to this issue gives a reliable indication of the extent to which Islamic law is inherently perfectionist. Given the numerous non-Muslim religious communities that lived within the Islamic state, as well as its universal aspirations, it is not surprising that Muslim moral theologians and Muslim legists debated whether non-Muslims were politically bound by the same rules that applied to Muslims.

As a general matter, Muslim moral theologians and jurists were in agreement that non-Muslims living in an Islamic state, in addition to being under a general

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245. For a detailed account of the rise of intra-school rules of recognition, with a special emphasis on the Maliki school, see Fadel, "Social Logic," *supra* note 95.

246. *Ibid*.

247. Fadel, *Adjudication*, *supra* note at 269-70.

248. Jackson, *Islamic Law and the State*, *supra* note 90 at 160.

religious obligation to accept the truth of Islam, were subject to the criminal penal-
ties of Islamic law as well as its rules regarding commercial exchange, property
and tort.[249] While some Muslim jurists held the opinion that at least some non-
Muslim residents of an Islamic state were subject to even the *hudûd* 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,[250] or
because the public interest required imposition of that penalty.[251] Similarly, non-
Muslims were exempt in this world from the ritual obligations of Islamic law such
that if they became Muslim, they had no obligation to "make up" the ritual obli-
gations that they did not discharge prior to becoming Muslim.[252] On the other hand,
the majority of theologians, with the exception of the Mu'tazilites, as well as the
central Asian Hanafis,[253] argued that non-Muslims were potentially culpable in the
next world for a failure to discharge such obligations if their lives were sufficiently
long to allow them to become Muslim.[254] Non-Muslims were also granted exemp-
tions from other rules of Islamic law for reasons rooted in their religious autonomy.
Thus, they were exempt from the Islamic laws of marriage and divorce,[255] including

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249. Al-Zarkashi, *supra* note 83, vol. 1 (non-Muslims also subject to property law and tort law at 323,
331); see also 'Ala' al-din 'Abd al-'aziz b. Ahmad al-Bukhari, *Kashf al-asrar 'an usul fakhr al-
islam al-bazdawi* (Beirut: Dar al-kitab al-'arabi), vol. 3 (a non-Muslim is subject to all rules that
are not intended to serve God at 242-43).

250. See, e.g., Taj al-din Muhammad b. al-Husayn al-Armawi, *al-Hasil min al-mahsul*, ed. by 'Abd
al-Salam Mahmud Abu Naji (Benghazi: Jami'at Qar Yunus, 1994), vol. 1 at 475.

251. In this latter case, the non-Muslim is being subjected to a discretionary punishment whose sen-
tence, while substantively the same as that of the *hadd* penalty applied to Muslims, is nevertheless
viewed jurisprudentially as an action taken to protect the public's rights rather than out of an obli-
gation to fulfill a divine command. See al-Zarkashi, *supra* note 83, vol. 1 (quoting Ibn Khuwayz
Mindad as having concluded, based on various statements attributed to Malik b. Anas, that "[Non-
muslim residents of an Islamic state] are subject to amputation for theft and execution for highway
robbery for deterrence, so [the punishment] is discretionary, not mandated by God; the mandatory
punishments are acts of penance for those who commit them, and these [punishments when
applied to non-Muslims] are not acts of penance" at 322); and Muhammad b. 'Ali b. 'Umar al-
Mazari, *Idah al-mahsul min burhan al-usul*, ed. by 'Ammar al-Talibi (Beirut: Dar al-gharb al-
islami, 2001) (explaining that in Malik's view, non-Muslims are not subject to the *Îudûd* penalties
with the exception of the mandatory penalties for theft and highway robber "because of the neces-
sity to protect property, in contrast to the other *hudûd* the purpose of which is penance for those
[who have committed these acts], for [the non-Muslim], given his rejection [of Islam], is not
under an obligation to perform penance for these sins" at 77-78). For more information on al-
Mazari, see "al-Mazari, Muhammad b. 'Ali b. 'Umar" in 6 Encyclopaedia of Islam 942b.

252. If a Muslim fails to discharge this obligation in a timely fashion, he is required to "make up"
the missed prayer when he gets an opportunity. See al-Zarkashi, *supra* note 83, vol. 1 at 326;
and al-Bukhari, *supra* note 249 at 243.

253. See al-Bukhari, *supra* note 249 at 243-45.

254. Non-Muslims were exempt from the ritual obligations of Islamic law so long as they remained
non-Muslims on the theory that Islam was a condition precedent to the valid discharge of ritual
obligations. See al-Dardir, *supra* note 141, vol. 1 at 260-61. Accordingly, non-Muslims were
morally, but not politically, obliged to become Muslims so they could validly discharge their ritual
obligations. Thus, non-Muslims are "morally obliged to satisfy the condition [i.e., Islam] that
renders their devotions valid, and if enough time passes whereby they could obtain [knowledge
regarding] Islam and their obligations thereunder [but do not], they are deemed sinners on both
counts." Al-Zarkashi, *supra* note 83, vol. 1 at 326.

255. Al-Zarkashi, *supra* note 83, vol. 1 (no effect given to their use of Islamic pronouncements of
divorce at 322) and ibid. (their marriages are deemed valid because they believe them to be valid
under their religion at 328).

marriages that Islamic law deemed to be incestuous.[256] Similarly, they were not sub-ject to punishment for drinking wine and Muslim courts would order the return of wine taken from the possession of a non-Muslim.[257]

This pattern of enforcement and exemption suggests that Islamic law—within a system of a religiously hierarchical state—resolved to subject non-Muslims to its rules only to the extent enforcement could be justified on religiously neutral reasons.[258] That this limitation on the applicability of Islamic law was motivated by an ethos similar to that animating public reason is confirmed by the concept of *iltizâm al-ahkâm*, a concept which can be literally translated as "a [voluntary] undertaking to be bound by the law."[259] Functionally, it is a jurisdictional concept which serves to distinguish those who are politically subject to the rule of an Islamic state from those who are not. A non-Muslim could become subject to the juris-diction of an Islamic state by one of two means. First, he could take up permanent residence in an Islamic state, in which case he takes on the status of a *dhimmî*, i.e., a member of a protected non-Islamic religion, or he could enter an Islamic state for a limited purpose on the understanding that he would return to his home country when he completed his task, in which case he would be granted an *amân*, or guar-antee of safe passage.[260] An important consequence of falling within the jurisdiction of Islamic law was that religious conversion did not act as an impediment to the application of the law. This was despite the fact that the Prophet Muhammad was reported to have said that "Conversion to Islam cancels what preceded it (*al-islâm*

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256. Ibn Qayyim al-Jawziyya, *Ahkam ahl al-dhimma* ed. by Abu Bara' Yusuf b. Ahmad al-Bakri & Abu Ahmad Shakir b. Tawfiq al-'Aruri (al-Dammam: Ramadi, 1997), vol. 2 (applying principle that Islamic law recognizes the validity of non-Muslims marriages to the extent that applicable non-Muslim law would deem such marriage to be valid to Zoroastrian marriages of a mother to her son or a sister to her brother at 864-65). For more information on Ibn Qayyim al-Jawziyya, see "Ibn Kayyim al-Djawziyya, Shams al-Din Abu Bakr Muhammad b. Abi Bakr al-Zari" in 3 Encyclopaedia of Islam 821b.

257. Al-Zarkashi, *supra* note 83, vol. 1 at 329.

258. One could say as a general matter that non-Muslims were subject only to those rules of Islamic law that dealt with the "rights of man." See Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes* (2001-2002) 15 J. Law and Religion 185 (discussing the taxonomy of rights in Islamic law, including, the "rights of God" and the "rights of man" at 192).

259. Scepticism is warranted with respect to whether in fact such undertakings were "voluntary" in the sense used by Rawls. See John Rawls, "The Idea of Public Reason Revisited" (1997) 64 U. Chi. L. Rev. 765 (limiting "voluntary" to rational decisions made under fair circumstances at 792, n. 68). For example, Hanafis found that this requirement could be satisfied simply by the fact that a non-Muslim chose to remain permanently in the territory of the Islamic state. Akmal al-din Muhammad b. Mahmud al-Babarti, *Al-'Inaya sharh al-hidaya, kitab al-hudud, bab al-wat' alladhi yujib al-hadd*, vol. 5, CD-ROM: *Encyclopedia of Islamic Jurisprudence* (Kuwait: Kuwaiti Ministry of Endowments, the Islamic Development Bank & Harf Information Technology, 2004). On the other hand, the concept of *iltizâm al-ahkâm* at least establishes, even if only formally, that legitimate exercise of political power requires some sort of consent.

260. A person granted a guarantee of safe passage was known as a "*mu'amman*," or alternatively a "*mu'âhad*." The obligations of a non-Muslim only temporarily in the Islamic state were sub-stantively narrower than those of a non-Muslim who permanently resided in the Islamic state. See *al-'Inaya*, *supra* note 259, vol. 5 (since a *mu'amman* who enters the territory of the Islamic state does so only for a limited period of time, and for only a particular purpose, e.g., commerce, he is subject only to those obligations of Islamic law that deal with civil obligations (*huqûq al-'ibâd*)). See also Abu Yahya Zakariyya al-Ansari, *Asna al-matalib sharh rawd al-talib, kitab qati' al-tariq*, vol. 4 (explaining that a *mu'amman* is not criminally liable for the crime of highway robbery, but instead reverts to being a non-protected person by virtue of his breach of his under-taking to obey the law).

yajubbu mâ qablahu)."[261] The same concept of iltizam al-ahkam was also used to justify the death penalty for Muslim apostates.[262]

Thus, a non-Muslim permanently residing in an Islamic state is deemed to have given a general undertaking to obey the substantive rules of Islamic law, and for that reason, were he to kill another non-Muslim while subject to the jurisdiction of the Islamic state, he could not escape punishment by converting to Islam.[263] This is in contrast to a non-Muslim from a hostile power who never took up lawful residence in an Islamic state nor did he enter its territory pursuant to a grant of safe passage, and thus never became subject to its jurisdiction. Should he kill someone or destroy property in the course of a war (or his own private desire to plunder, for that matter) with the Islamic state, he would not be legally accountable before the courts of that Islamic state if he subsequently became a Muslim or a permanent non-Muslim resident of the Islamic state.[264] Similarly, if a non-Muslim from a hostile power entered the territory of an Islamic state pursuant to a grant of safe passage, and in his possession were items that he had plundered from Muslims or non-Muslim permanent residents of an Islamic state at a time of peace, then such property would be returned to its rightful owners. If, however, he obtained that property during a time of war, he would be allowed to retain it, with the exception of any Muslim captives in his possession. While he would be required to free those captives, he would also be entitled to receive their fair value (on the assumption that they had been enslaved). [265]

The contrasting legal treatment of a foreigner with one subject to the state's jurisdiction is entirely political. There is certainly no suggestion that the moral consequences are less for the foreigner. Rather, the refusal to extend the application of Islamic law to the foreigner seems to be rooted in notions of basic fairness—the foreigner, unlike the resident, has not submitted to the jurisdiction of the state, and accordingly, receives no benefits from its laws. After all, were he to have been killed in his foray, his heirs would have had no legal standing to pursue compensation

261. Al-Zarkashi, *supra* note 83, vol. 1 at 336.
262. Al-Mawardi, *supra* note 231 (arguing that upon becoming a Muslim, one agrees to be bound by all rules of Islamic law, including law of apostasy at 69).
263. Al-Zarkashi, *supra* note 83, vol. 1 at 330. But for the doctrine of *iltizâm al-ahkâm,* conversion to Islam could be legally beneficial to such a defendant given the fact that only the Hanafis allowed retaliation (*qisâs*) to occur in the event that a Muslim killed a non-Muslim. This rule applied only to cases of intentional murder in which there was no element of treachery or a desire to obtain property from the victim, however. Otherwise, the killer was deemed a threat to public security and the religious identity of the killer and his victim were immaterial. See al-Dardir, *supra* note 141, vol. 4 (a free Muslim is subject to capital punishment if he murders a non-Muslim permanent resident or a slave using stealth or out of a desire to take the victim's property at 333).
264. Al-Zarkashi, *supra* note 83, vol. 1 (if a non-Muslim permanent resident murders another non-Muslim or has destroyed property, his liability does not lapse upon his conversion to Islam in contrast to a citizen of a hostile power who has killed or destroyed property in Islamic territory and then becomes a Muslim at 330-31); al-Dardir, *supra* note 141, vol. 4 (excluding nationals of hostile powers from scope of tort laws at 331). If the national of a hostile power was captured in the territory of the Islamic state, he would be deemed a prisoner of war, and his treatment would be subject to the discretion of the ruler. Al-Dardir, *supra* note 141, vol. 2 (explaining that the ruler, subject to considerations of the community's welfare, was free to choose among the following options with respect to prisoners of war: unconditional release, holding them for ransom, exchange for Muslim prisoners of war, execution or enslavement at 296).
265. Al-Dardir, *supra* note 141, vol. 2 at 290-91.

for his death.[266] The non-Muslim resident of an Islamic state, however, enjoys the protections of the legal system and should therefore also be subject to its prohibitions. Religious conversion does nothing to change the fact that at the time of his crime, he was already subject, by virtue of his relationship with the Islamic state, to its laws, at least those that protect life and property.[267]

The concept of iltizam al-ahkam provided a basis other than religion upon which the exercise of jurisdiction could be justified. This concept can be understood as being rooted in a notion of citizenship, or a relationship approaching that of citizenship, whereby the state's right to exact punishment was conditioned upon the existence of a reciprocal relationship with the defendant whereby it could be plausibly assumed that the defendant, just as he was now subject to the coercive powers of the state, had previously benefited from the protections granted by the state. This notion of reciprocity also lay at the heart of Islamic law's exemption of non-Muslims from those rules of Islamic law, e.g., ritual observance and prohibitions of wine-drinking, which lacked a sufficient non-religious basis to justify their coercive application against non-believers. In formulating an approach to the relationship of non-Muslims to Islamic law, Muslim jurists went a long way in transforming Islamic law from simply a body of rules for believers, to a body of rules that could regulate all members of society, regardless of their religious status.[268]

g. Conclusion

Despite Muslims' adherence to a scriptural foundation for ethics, Muslim moral theology placed great reliance upon the diligent exercise of moral judgment in the formulation of what constitutes the Islamic "good life" in those areas of life in which revelation was either silent or ambiguous. Indeed, for the majority of Muslim theologians, the exercise of moral judgment was indispensable to discovering the "good," because (i) revelation did not (nor could it) provide conclusive answers to all ethical questions facing human beings, and (ii) the texts of revelation, even when relevant, were generally susceptible to more than one interpretation. Their

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266. As a foreigner from a hostile state, he would be deemed a *harbî*, and would lack any standing under Islamic law. See al-Dardîr, *supra* note 141, vol. 4 (noting that since a *harbî* lacks standing under the law, he does not enjoy the protections offered by tort law at 333). On the other hand, Islamic law made it very easy for a *harbî* to obtain a de facto grant of safe passage if he failed to obtain a valid safe passage before entering the territory of the Islamic state. Al-Dardir, *supra* note 141, vol. 2 (explaining that even a defective grant of safe passage—so long as the citizen of the hostile power believed it was valid—was effective to protect him from treatment as a hostile invader at 289).

267. The same principle applies to the rules of *hirâba* (highway robbery): a non-Muslim resident in an Islamic state could not avoid prosecution for this crime against the public order by converting to Islam whereas a non-Muslim living outside the territory of an Islamic state could not be convicted of committing this crime since he had not submitted to the Islamic state's jurisdiction. See al-Zarkashi, *supra* note 83, vol. 1 at 300-31.

268. See Johansen, *supra* note 9 (quoting Chafiq Chehata for the proposition that Islamic law is "'as much a positive law as Roman law'" and that, with the exception of laws on marriage, divorce and succession, "it owes 'nearly nothing to the scriptural sources'" and is Muslim "'only to the degree that it refers to some holy texts. For the rest it does not constitute a religious law at all,'" and as a result, the true "source" of Islamic law is not revelation, but the jurists themselves at 59-60).

relative confidence in moral judgment survived despite the fact that it led to numerous and conflicting views of the good. Nevertheless, rather than attempting to give "orthodox" status to some moral opinions and discarding the others, Muslim moral theology attempted to legitimate all moral opinions which were the result of the diligent exercise of moral judgment. Some clung to the notion that moral truth existed—even where revelation was either silent or ambiguous—and that therefore, only one opinion among many could be the correct answer, even if we could never know which of the various opinions was the "truth." For this group of moral theologians, however, no sin could attach as a result of mistaken judgment. Others argued that all opinions in matters of moral theology were correct, so long as they were the result of the diligent exercise of moral judgment. What cannot be doubted, however, was that moral theology conditioned Muslim intellectuals to accept the fact that moral judgment would lead to a plurality of reasonable, but incompatible conclusions, and therefore, some type of accommodation to the fact of reasonable moral disagreement had to be found.

This accommodation occurred across many fronts, and in so doing, arguments that could be characterized as being rooted in public reason began to circulate widely. This occurred both at the level of moral theology and in law. Thus, we find that despite the Ash'ari theory that the good (or at least the ultimate good) was unknowable in the absence of revelation, the theory of the five universals suggested that revelation's substantive commands and prohibitions were virtually identical with human perceptions of their own well-being. No doubt, this instrumental view of Islamic revelation helped prepare the ground for the right of the state to legislate for the public good pursuant to its powers of public policy and helps explain why that doctrine became widely-accepted, limited only by the duty of the state not to promulgate rules that were in themselves immoral. In addition, the substantive rules of Islamic law themselves came to be viewed as a secular instrumentality, no doubt critical to enabling believers to live an Islamically inspired good life, but not something commanded by God for its own sake. Judges became bound by an objective rule of recognition that allowed for the systematic review of rulings to insure consistency in the application of the law. Finally, the concept of iltizam al-ahkam, rather than religious identity *simpliciter*, provided a basis for the state's jurisdiction over individuals. These developments suggest that the medieval Islamic theological and ethical traditions recognized the "burdens of judgment" and the limitations those burdens placed on the power of government. As a result, many rules of Islamic law became justified on considerations other than the theological truth of the norm or rule being applied. Accordingly, a kind of "Islamic" public reason came to exist whose features are consistent in many respects with Rawls' understanding of public reason.

Part 6: Conclusion

This Article has argued that one reason for the polemical nature of the current debate on Islam and liberalism is the failure to distinguish philosophical conceptions from political ones. Accordingly, I have suggested adopting a Rawlsian framework

to assess the compatibility of Islam with constitutional essentials. In so doing, I have outlined a theory of Islam as a comprehensive theory of the good which relies on authorities central to the Sunni theological, ethical and legal traditions. To the extent I have synthesized various elements of historical doctrines in connection with theorizing about the political implications of these doctrines, my interpretation does not go beyond the kinds of plausible changes to comprehensive doctrines that Rawls asserts characterize the internal development of reasonable theories of the good. Such doctrinal changes ought to be especially plausible in light of Rawls' assertions regarding the tendency of adherents of conflicting comprehensive doctrines of the good under conditions of a constitutional democracy to revise their private conceptions of the good in a manner that makes them more favorably disposed to reasonable cooperation rather than the opposite.

In substance, I have made the following argument: Islam, as a theory of the good, is characterized by a hierarchical set of normative discourses that begin with scholastic theology, proceed to moral theology and conclude with substantive law. The normative conclusions set forth in scholastic theology and in moral theology bind primarily the individual conscience, in contrast to the rules of substantive law, which were politically relevant independent of any theological belief in their correspondence to the divine will. It is the essentially political function of Islamic substantive law, combined with the system of normative pluralism legitimated by the epistemology of moral theology, that allowed for the introduction and acceptance of arguments within Islamic law that mimic Rawls' notion of public reason as defining the limits of legitimate political discourse.

The normative discourses of scholastic theology and moral theology required the active participation of rational judgment in order to discharge fundamental moral obligations. In theology, salvation, according to a substantial number of theologians, was conditional upon an individual obtaining knowledge of God, an obligation that could be discharged only by means of rational inquiry. Even those theologians who believed that salvation could be attained through true conviction rooted in deference to authority agreed that rational knowledge of God was at a minimum religiously superior to true conviction based on deference. Similarly, one could not live an ethical life according to Muslim moral theologians without the mediation of reason in the form of qualified moral judgment, even after the advent of revelation. Because of the prominent role reason played in both theological and ethical discourses, this Article argued that a commitment to such discourses necessarily implies, as a political matter, a commitment to a society that provides space for free normative inquiry. Otherwise it would be impossible for individuals to discharge the norm of inquiry that is the basis for the greatest good, which is salvation.

Because moral theology recognized an obligation to exercise qualified moral judgment in situations where revelation did not provide an express rule, and that it was impossible for qualified moral judgment to achieve certainty in most cases, moral theology recognized a "normative pluralism" with respect to the contours of ethical conduct. The commitment to ethical judgment also reinforces the political necessity to respect free inquiry, since in its absence individuals cannot discharge this prerequisite to an ethical life.

Because moral reasoning could not provide definitive rules of law, Islamic law developed other techniques for rulemaking, namely, taqlid and siyasa shar'iyya. Unlike the conclusions of moral reasoning, a rule of law could legitimately be enforced without a theological belief that the rule in question was from God. Instead, any rule could potentially become an "Islamic" so long as it did not contradict express commands of revelation.

In fashioning a workable legal system, jurists were no doubt influenced by the conclusions of the moral theologians, but a clear distinction between ethical rules, known as rules of obligation, and rules of law in a strict sense (*ahkâm wad'iyya*), was maintained. It is particularly within this latter body of rules that one finds jurists making arguments that sound in what Rawls calls public reason rather than in theology. Significantly, developments in moral theology legitimated the existence of legal arguments grounded in this qualified form of public reason rather than revelation. Accordingly, al-Ghazali argued that substantive law was in itself entirely instrumental and concerned solely with the just organization of temporal life. Similarly, moral theologians argued that the rules communicated by revelation (at least those not dealing with ritual), were rationally connected to human notions of well-being, and accordingly, utility became a legitimate basis for explaining and deriving ethical and legal rules. Finally, the fact that moral theologians, in considering the scope of Islamic law, generally refrained from recognizing any political obligation on non-Muslims to obey its terms *except* with respect to those rules that could be justified to non-Muslims either on account of their own beliefs, or on a common secular basis, e.g., the need to protect property, strongly implies their recognition that political coercion could not depend only on the inherent truth of the political claim at issue.

For these reasons (and no doubt others), a committed Muslim has very powerful normative reasons within her own traditions for endorsing liberal constitutional essentials as they clearly provide sufficient political space for her to discover those truths necessary for her salvation. Moreover, as this Article has demonstrated, a committed Muslim educated in the Islamic traditions described in this Article will not find public reason arguments to be alien to her given the historical existence of arguments consistent with Rawlsian public reason within the Islamic tradition.

These arguments raise numerous questions for which I do not claim to have provided conclusive answers. For example, I have suggested that theological issues such as the obligation of inquiry into God and the moral status of human action prior to revelation are important in the formulation of an Islamic theology consistent with liberal constitutional essentials. Each of these issues, however, awaits greater treatment by scholars of Islamic intellectual history. In addition, I did not touch on the critical question of the relationship of the laity to specialists in Islamic ethical theory and whether the general moral obligation of non-specialists to defer to the moral reasoning of specialists could be made consistent with Rawls' conception of the moral powers of citizens. Despite these (and no doubt, other) limitations, I believe that the doctrinal roadmap described in this Article hints at a workable system for resolving, in a principled fashion, the legacy of political perfectionism in Islamic law, one which I freely admit exists and could pose a significant theoretical

obstacle to orthodox Muslims' principled endorsement of constitutional essentials in the manner envisaged by Rawls.

In brief, I believe that the distinction between non-negotiable theological commitments of individual Muslims, which can be quite broad and diverse, and their political commitments—as manifested in the substantive Islamic law—must be respected. Because theological commitments are non-negotiable, but political commitments as set forth in substantive law generally are,[269] it follows that departures from perfectionist commitments in Islamic law should always be justified on political grounds wherever possible, instead of controversial moral ones. It is precisely Rawls' recognition that individuals with incommensurate moral theories may nevertheless agree on fundamental political questions while each retains her moral conception of the good that should make political liberalism categorically more appealing to committed Muslims than thicker conceptions of liberalism which would require Muslims to revise their moral and theological commitments in so many cases that it would strain credulity to accept the sincerity either of those revisions or their continued adherence to Islam as a comprehensive doctrine of the good.

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269. In other words, it is conceivable that a person could believe as a matter of theology that an adulterer deserves in the judgment of God to be subject to capital punishment but nevertheless agree that such a punishment should not be applied by the state. Rawls' concern is that the political justification for not applying that rule be for principled reasons and not a result of a contingent balance of power that is presently unfavorable to applying that rule.