CLE MATERIALS RE:

ISLAMIC CONSTITUTIONAL AND "INTERACTION" THEORY

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

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I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

5 Id at xliv, l.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. RECONCILING ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW WITH PUBLIC REASON

A. RULES OF ISLAMIC LAW THAT ARE CONSISTENT WITH PUBLIC REASON

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. PERMISSIVE RULES OF ISLAMIC LAW AND PUBLIC REASON

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

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

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

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

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

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

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

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

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

31 Id at 168.

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

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

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

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

C. ISLAMIC LAW, PUBLIC REASON, AND QUESTIONS OF FACT

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

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

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

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

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

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

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

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

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

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

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

D. MANDATORY RULES OF ISLAMIC LAW, THE RIGHT TO FREE EXERCISE OF RELIGION, AND PUBLIC REASON

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

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

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

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

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

43 Qur'an 4:19.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. MANDATORY RULES OF ISLAMIC LAW THAT ARE REPUGNANT TO PUBLIC REASON

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

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

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

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

IV. CONCLUSION

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

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

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

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

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Review Essay

*187 ISLAMIC POLITICS AND SECULAR POLITICS: CAN THEY CO-EXIST?

Mohammad **Fadel** [FNa1]

Islam and the Secular State: Negotiating the Future of Shari'a. By ‘Abdullahi Ahmed An-Na'im. Harvard University Press 2008. Pp. 324. $35.00. ISBN: 0-674-02776-0. [FN1]

Professor Na'im, over a period of more than twenty years, has been thinking, writing and lecturing on the relationship of international human rights law and the Shari'a--Islamic law. [FN2] Throughout this period he has expressed allegiance to two moral and intellectual traditions that are typically viewed as in competition if not outright conflict: [FN3] an international legal system based on a liberal conception of universal human rights and Islam as a religious system that also makes universal claims. One can sense a palpable feeling of relief in the book's first sentence when the author declares that “This book is the culmination of my life's work, the final statement I wish to make on issues I have been struggling with since I was a student at the University *188 of Khartoum, Sudan, in the late 1960s.” (vii)

Na'im could not have persisted in this task for so long, however, without genuine dedication to the advancement of both a universal system of human rights, and the promotion of a religious conception of Islam that would enable Muslims to endorse the emerging international human rights regime on terms that would not compromise their moral integrity. Because of his leadership, dedication, and courage in working toward the realization of both of these ends, I would genuinely be disappointed if this work is, in fact, his last word on this subject. It is unlikely that the problems that have preoccupied him over the last twenty years are going to disappear any time soon. And I am extremely doubtful that, as long as these problems persist, he would have nothing significant to add to their conceptualization and, one hopes, their resolution.

It is a testament to Na'im's importance in this field that the publication of Islam and the Secular State prompted almost immediately a vibrant series of thoughtful academic exchanges on his arguments among various scholars of religion, historians, political theorists and social scientists. [FN4] And as evidence that Na'im remains vitally engaged in the project of reconciling human rights law and Islam, Na'im himself has published a reply to the many academics who have written about his book. [FN5] In the hope, therefore, that Na'im will continue to be an active participant in the ongoing conversation regarding Islamic commitments and human rights law, my review joins the already vibrant discussion of the book's themes.

My review takes up the author's express normative invitation to Muslims to take seriously the Islamic desirability of a secular state (vii)--defined for purposes of his argument as a state which is neutral with respect to both religion and non-religion, and adheres to a constitution that protects human rights--by considering whether Na'im's arguments enjoy sufficient Islamic plausibility to win the support of substantial numbers of believing Muslims.

This review, therefore, will proceed in two parts. The first will set out an overview of Na'im's arguments and the second will set out some possible Islamic objections to those arguments. The conclusion will ***189*** consider the extent to which Na'im could respond to those arguments using the resources of the Islamic tradition itself. The second part of the review will show that at many critical junctures in his Islamic argument for a secular state, Na'im makes claims about Islam that, from the perspective of traditional Islamic theology, are extremely controversial and as a result, threaten to undermine the likelihood that his principal argument--that a religiously neutral state is Islamically desirable--will persuade large numbers of Muslims. The conclusion will argue that Na'im, if he were to reformulate some of these controversial arguments about the nature of Islamic commitments so that they are in greater conformity with historically orthodox Islamic commitments, or if his argument were to recognize explicitly orthodox objections to his arguments, he would have a much greater chance of winning support for his project from within the orthodox Muslim community. [FN6] I believe he can show greater appreciation for these orthodox arguments without threatening either the goal of a religiously-neutral state or his commitments to a universal system of human rights.

One group of critics has already expressed their skepticism of Na'im's Islamic arguments, suggesting they are insufficiently grounded in Islamic revelation to be taken seriously by Muslims. [FN7] I too have my own doubts regarding the Islamic plausibility of Na'im's arguments, but not because they are insufficiently grounded in Islamic revelation. Indeed, in some ways Na'im is also a scripturalist: he argues against the normativity of the Islamic tradition in favor of continuous individual interpretations of revelation. (15-16)

In my opinion, however, revelation is ambiguous (but not silent) with respect to questions of governance. Accordingly, it is not plausible to believe that revelation, on its own, can provide a solid foundation for an Islamic theory of the secular state because it could also provide a plausible basis for a religious state. Muslims, moreover, do not read revelation in a vacuum: a learned Islamic theological, ethical and legal tradition that has existed for well-over a millennium is already in place ***190*** that provides Islamic reasons to object to at least some features of a secular state. In order to be plausible, an Islamic argument for a secular state must be able to overcome objections to this project that could arise out of that tradition by demonstrating, presumably, that those elements within the Islamic tradition that are consistent with the ideal of the secular state are more faithful representations of Islamic ideals than those that do not.

In order to resolve contradictions between the Islamic tradition and the requirements of a secular state, I believe it is necessary to explain to Muslims why the views of their ancestors may have been the product of mistaken readings of revelation, or why those views may be qualified in a manner that makes them irrelevant to assessing whether a secular state is Islamically desirable. Na'im, however, expressly eschews any attempt to engage in any exegetical or hermeneutical analysis of Islamic sources. (viii)

It might be thought that an emphasis on the learned traditions of Islam is too theoretical and therefore not necessarily representative of how actual Muslims conceive of the relationship of religion to the state. In this case, some might think it would be preferable to use the empirical methods of the social sciences, including statistically-significant polling data, [FN8] to

demarcate the median Muslim's reaction to the prospect of a secular state. I believe, however, that an explicitly doctrinal approach that uses historical orthodoxy as a proxy for baseline Islamic commitments (and hence can serve as a proxy for Muslim objections to Na'im's project) rather than alternative methods such as polling data or the arguments of contemporary Muslim reformers is superior because it requires the argument to answer plausible Islamic objections to the project of a secular state. [FN9] Because I assume a substantial number of Muslims derive, and for the foreseeable future will continue to derive, their normative understandings of Islam from historical conceptions of Islamic orthodoxy, it is important to take into account orthodox objections to any theory of Islamic reform before assessing its plausibility. Conversely, to the extent that a reform theory could be viewed as satisfying historical standards of orthodoxy, then one can, to that extent, be justified in expecting that such a theory would be persuasive to Muslims. In other words, an Islamic theory of the secular ***191*** state should aim for convincing Muslim skeptics, not those who already accept the desirability of a secular state. [FN10]

There is, however another advantage to be gained from taking the doctrinal approach that I advocate: to the extent that Na'im wishes to include non-Muslims in the process of negotiating the future of the Shari'a (viii), it is much easier for them to do so in the capacity of historians of ideas or political philosophers. The critical study of historical doctrines encourages a critical distance and objectivity that debate over current political controversies necessarily lacks. Accordingly, if the goal is to provide a principled reconciliation of human rights law to Islam, then we need a framework that is sufficiently abstract to allow for critical discussion without implicating any particular interests. Careful analysis of historical doctrines, I argue, provides a relatively neutral domain compared to the realities of the post-World War II international order where power disparities between non-Muslim and Muslim polities have led to the over-politicization of any discussion involving issues such as Islam and liberalism and Islam and international law. [FN11] Applying an explicit methodology for the determination of the content of Islamic doctrinal commitments, moreover, has the added benefit of reducing the ethical and political dangers that can result from overly results-oriented readings of the Islamic tradition. [FN12]

An Overview of Islam and the Secular State

The structure of Islam and the Secular State discloses as much about Na'im's theoretical approach to the problem of the relationship between Islam and modern human rights law as does his explicit ***192*** discussion of his approach: one that is highly pragmatic, but that is working consistently toward a clear moral end. Na'im constructs an argument based on an eclectic set of sources: sociology of religion, Islamic history, his own conception of Islamic theology, liberal political philosophy, political science and the lived experience of Muslims and non-Muslims sharing the same political space over the last few hundred years. This eclecticism is reflected in the contents of the book's six substantive chapters: the first three of which form the “theoretical” structure of Na'im's argument while the last three consist of various instantiations of how, in his view, his eclectic approach to conceptualizing the relationship of Islam to the values of “constitutionalism, human rights and citizenship” (40) provides a useful normative framework for criticizing the experiences of three different states' attempts at regulating the role of Shari'a in their states.

The best way to read the book, however, may not be in the order of the chapters presented by the author. Instead of beginning with Chapter One --Why Muslims Need a Secular State--it may

make more sense for the reader to begin with Chapter Three --Constitutionalism, Human Rights and Citizenship--which lays out Na'im's theory of the state. From a normative perspective, Na'im espouses a liberal theory of the state as legal entity that comes into existence by virtue of a constitution that both empowers the state to govern and limits the kinds of actions it can take. While there can be pluralism in constitutions, this pluralism is not infinite. Instead, all constitutions are bounded by human rights norms because, in his words, “failure to comply with these principles is simply ultra vires, beyond the capacity of state institutions.” (40) These liberal underpinnings to the state, therefore, are categorical and not amenable to “negotiation,” unlike the values of the Shari'a whose place in society can be legitimately negotiated through the institutions of the liberal state. Accordingly, a state is not free to have a constitution that establishes discriminatory classes of citizenship, or that, for example, empowers one religion over others. An Islamic state, therefore, at least to the extent it is defined as a state whose purpose is the application of the historical Shari'a, could never be a legitimate state.

This seems to create a moral paradox: the normative values of the liberal state are non-negotiable, yet so are the values of the Shari'a. As Na'im puts it, Muslims are always under a moral obligation “to observe Shari'a as a matter of religious obligation,” whether they are “minorities or majorities.” (3) These two sets of normative duties cannot be reconciled in the present, however, because as a historical matter, the Shari'a espoused values such as male guardianship of women (qiwama), ***193*** sovereignty over non-Muslims (dhimma) and wars of expansion (jihad) which are irreconcilable with the requirements of constitutionalism, human rights and citizenship. (39) Accordingly, Muslims must

reinterpret Islamic sources [doctrines] in order to affirm and protect the freedom of religion and belief [these norms]. This is my position as a Muslim, speaking from an Islamic perspective, and not simply because the freedom of religion and belief is a universal human rights norm that is binding upon Muslims from the point of view of international law. (117)

Why the Shari'a is amenable to reinterpretation in a manner to make its doctrines consistent with the non-negotiable norms of the liberal state is essentially the subject of Chapter One --Why Muslims Need a Secular State.

Na'im's normative conception of the state, therefore, requires it to be neutral with respect to religion, and that political discourse be motivated by “civic reason.” While it is not quite clear what Na'im means by the term “civic reason,” it appears intentionally designed to evoke the general values of public reason as espoused by John Rawls and Jürgen Habermas but without necessarily adopting all the philosophical baggage associated with the term. (97) Na'im's use of his own term, civic reason, is indicative of his eclecticism: he is prepared to appropriate various normative strategies to build his argument without necessarily concerning himself with reconciling all the pieces of his argument from a more rigorous philosophical perspective. Nevertheless, it is clear enough what Na'im means by “civic reason”: legitimate political discourse must strive to limit itself to arguments that are consistent with the non-negotiable values of constitutionalism, citizenship and human rights, because such limitations are necessary to ensure that politics remains accessible to all citizens. (7)

As a practical matter, Na'im would permit Muslim citizens (or other religious citizens, for that matter) to advance policies that are part of their religious world view, provided that such policies are not grounded exclusively in Islamic religious norms. (7-8) This stance places him squarely outside the consensus of contemporary Islamic political movements who seek to make the state a tool for the promotion of substantive Islamic values, and even many nationalist movements in the Islamic world which supported the adoption of Islam as the state religion even

though they reject the notion of an Islamic state or do not apply Shari'a as part of their domestic law. It also means, however, that ***194** Na'im rejects laïcité, [FN13] in both its Turkish and French versions, as violations of the principles of the requirement of the state to be neutral toward religion. (41, 203-14)

Na'im's argument is not limited, however, to a normative conception of the state. He also has a positive conception of the state, for which he uses the term “politics.” In language that is evocative of James Madison in Federalist no. 10, [FN14] Na'im conceives of the body politic as being made up of numerous interest groups which, at different times and circumstances, may make alliances with or against one another in order to advance their preferred policies. Politics, being the realm of interest, is subject to the threat that one or two groups could capture the state, thus converting the state into a tool for the advancement of that group's interests, rather than the advancement of the public good. One strategy to prevent this from occurring would be to exclude groups with illegitimate policy goals, e.g., Islamist political parties that lack a sufficiently reformed doctrine of the Shari'a, from the political process. Na'im's analysis of the histories of India, Turkey and Indonesia, however, suggests that this is impossible, or even if possible, comes at too high of a price to the non-negotiable values of constitutionalism, citizenship, and human rights. Accordingly, he affirms that religion in general, and Islam in particular, has a legitimate political role to play, even though it--at least to the extent the politically problematic aspects of Islam continue to be affirmed--could threaten the neutrality of the state. Nevertheless, like any other faction, precautions must be taken to prevent it from taking over the state.

To protect the state's neutrality against the threat of capture by religion, Na'im appears to adopt two strategies. The first appears to be the optimistic assumption that Islamic political parties, operating in the context of a regime that respects the values of constitutionalism, citizenship and human rights will themselves only make political demands that are consistent with the legitimate political values of the state for pragmatic reasons, or that they will undertake reforms of Islamic doctrines to make them more compatible with these values. While this optimism may be dismissed by some observers as unduly optimistic, Na'im cites the historical examples of Islamic movements in both republican Turkey and Indonesia for the proposition that the proper ***195** set of political institutions can “mediate” the inherent tension that exists between the liberal norms of constitutionalism, citizenship and human rights, and the historical norms of the Shari'a, both of which--to their respective adherents--are equally non-negotiable. In any case, what practical alternative do we have? The only other choice would be self-defeating, perhaps even bloody confrontation, because as Na'im puts it, “I know that if I, as a Muslim, am faced with a stark choice between Islam and human rights, I will certainly opt for Islam.” (111)

Although Na'im does not say so explicitly, his account of the Shari'a's normative relationship to the state (none) and its role to politics (significant) seems to assume the existence of an intermediate set of state institutions that do not reflect perfectly normative liberal doctrines regarding constitutionalism, citizenship and human rights, but nevertheless create enough space for genuinely competitive and pluralistic politics. His positive account of the state, therefore, is consistent with Madison's argument in Federalist No. 10: ideally, perhaps, it would be desirable to eliminate the existence of self-interested factions (read: religiously-inspired political movements) from the body-politic, but one can only eliminate such movements by extinguishing liberty, with the result that political life itself would be destroyed, not just factional religious politics. This is what he means, I believe, with his persistent call throughout the book for the state to “mediate” or “negotiate” the role of the Shari'a in politics: by reducing it to one of many interest groups in civil society, the state can manage the contradictions between a normative

politics that is not in need of religion, and a citizenry for whom religion is one of the most important sources of political inspiration.

Within an actual Madisonian state (in contrast to an ideal liberal state), Na'im must believe that it will be possible for the relatively small but significant set of Islamic doctrines that are in conflict with constitutionalism, citizenship and human rights to be reformed and internalized by religiously observant Muslims. It would seem, therefore, that the legitimate domain of religious politics would necessarily decrease with the passage of time as Muslims, in active interaction with constitutional orders that mediate the relationship of religion to the state, reform traditional Islamic doctrines that are politically problematic to make them more substantively consistent with the moral underpinnings of the liberal state and a liberal international order built on universal human rights. I believe this reading of Na'im's argument is the only way to reconcile his argument that Muslims must revise their non-conforming historical doctrines of the Shari'a with his argument that ***196** they must do so for what are genuinely Islamic reasons that are unrelated to power disparities between Muslim states and the west.

Islamic Objections to Na'im's Argument

Na'im's argument for the adoption of a policy of mediation by the liberal state with respect to Islam rather than one of confrontation is premised on the assumption that Muslims will reform non-conforming Islamic doctrines sufficiently so that for their own Islamic reasons they would respect the state's religious neutrality. Muslims, of course, must subjectively believe that these doctrinal revisions are genuinely part of (or consistent with) their commitments as Muslims who adhere in good faith to the Shari'a.

This is a normative task of Islamic justification, and Na'im sets out to provide that Islamic justification in Chapter One --Why Muslims Need a Secular State--and Chapter Two --Islam, the State and Politics in Historical Perspective. He appears to provide at least three Islamic arguments for the proposition that Muslims should support a religiously neutral state rather than a state that takes as its purpose the application of the Shari'a. One of the arguments is normative (and explicitly theological). The second argument, although epistemological, “sounds” in Islamic theology, and thus raises profound theological implications. The third argument is historical. I will describe each argument below, followed by an “orthodox” response to his argument.

Religious Freedom

Na'im begins his argument with a very strong statement emphasizing that adherence to Islam must be voluntary in order for it to be Islamically normative, and that only a state that is neutral with respect to religion can guarantee the background conditions of a free and voluntary acceptance of Islam. An Islamic state, however, would provide political and material inducements to adhere to Islam, corrupting the voluntary nature of the choice to be Muslim. (1) Traditional notions of Islamic law and theology would agree with Na'im that only a free and voluntary decision to follow Islam is morally relevant, and accordingly, individuals generally cannot be coerced into becoming Muslims. [FN15] Na'im, however, goes beyond traditional Islamic teachings regarding the pre-condition of voluntariness for conversion to Islam to argue that voluntariness is a morally required element in all religious acts. (8) Accordingly, a state that applied the *Shari'a* would necessarily be ***197** coercing individuals into acting in accordance with religious dictates, something that destroys the religious significance of the act.

While orthodox theologians and jurists would no doubt agree with Na'im that the entry into Islam must be free and voluntary, they would disagree that the rule recognizing the validity of only free conversions to Islam necessarily requires that compliance with its detailed rules must be similarly voluntary. In fact, they could very well argue that coercive application of Islamic law is rightful because the act of accepting the truth of Islam, by necessary implication, also entails acceptance of the rightness of its rules. [FN16] Punishing a failure to obey those rules in this case would be consistent with the Muslim's moral integrity because coercion is being applied in a manner consistent with his own moral convictions. His failure to comply does not represent a genuine conviction, but only a present desire that is inconsistent with those convictions. Accordingly, coercion of Muslims into following Islamic law is conceptually no different from Odysseus' decision to lash himself to his ship's mast to prevent him from heeding the Sirens' call, an act that saved himself, his ship and his crew, despite his fervent desire to go to them once he actually had heard their voices. This is not the case with a non-Muslim of course because the non-Muslim does not accept the truth of Islam. For the non-Muslim then, coercion with respect to following the rules of Islam--all things being equal--would violate the non-Muslim's moral integrity, and therefore is not generally allowed by Islamic law. [FN17]

An Islamic State is Rationally Incoherent

Na'im also argues that the idea of an Islamic state--to the extent it is understood to be a state that applies the Shari'a on the theory that it is God's law--is rationally incoherent. The incoherence of the project of an Islamic state is a result of the fact that human beings do not have direct access to the Shari'a's rules. Rather, all rules that human beings ***198*** attribute to the Shari'a are in reality the product of human interpretive effort that inevitably leads to numerous disagreements and controversies over the precise contents of the Shari'a. In addition, any attempt by a state to apply the Shari'a necessarily requires it to select some subset of the rules falling under the category of the Shari'a. The result is that what is enforced in all cases is not the Shari'a, but rather the political will of the regime that chose to apply one interpretation of the Shari'a rather than another. Na'im thus takes the relative indeterminacy of the Shari'a's rules as categorical evidence that is impossible to have a state based on religious law because at the critical point of enforcement politics does the work, not religious truth.

Na'im's radical skepticism as to the possibility of attaining knowledge (in contrast to mere opinions) regarding the content of the Shari'a represents a self-conscious rejection of traditional Islamic distinctions between aspects of the Shari'a that are known without the need for the skills of legal interpretation, e.g., the sinfulness of drinking grape wine or engaging in fornication (known as the “necessary elements of religion” or rules based on “unequivocal texts”), and those rules that do, e.g., whether drinking intoxicating beverages other than grape wine is also sinful (known as “the speculative elements of religion” or rules based on “equivocal texts”). (13-14) Rejection of this distinction, however, does more than make the idea of an Islamic state incoherent: it makes the very idea of Islam as a communal religion incoherent, since there would be no objective basis on which Muslims could even decide whether someone was a Muslim. It is unlikely that Na'im would really go so far in his skepticism as to deny the existence of any genuine (meaning, pre-interpretive) Islamic doctrines. Otherwise, his argument for Islamic recognition of human rights law, which he states is grounded in the Islamic principle of reciprocity (mu'awada), would be trivial because any Muslim would be justified in arguing that no such doctrine exists. (127)

A more defensible position to attribute to Na'im might be that no aspect of the Shari'a that is legal in the modern sense of the term could be deemed to form part of the necessary elements of religion. Accordingly, any attempt to apply Islamic law will always involve a choice by a political actor; whether that actor is an agent of the executive or the judicial branch. As a result, it is not the Shari'a that is being enforced but rather the political judgment of the relevant decision maker.

This argument, to be correct, however, assumes that the only coherent sense in which the Shari'a could be applied is in situations ***199** where its application does not require any human judgment. It is clear that Sunni Muslims, however, reject this proposition as a matter of their theology. For them, religious obligation can arise simply by virtue of reason, interpreting revelatory sources, coming to the conclusion on the preponderance of the evidence that to act (to refrain from acting) is morally obligatory (morally prohibited). From the perspective of practical ethics, the obligation to act (refrain from acting) is the same whether the evidence for the obligation is based on unequivocal or only probable evidence. The epistemology of the moral obligation is relevant only to the question of whether dissent may be tolerated with respect to that particular issue: if the evidence is unequivocal, then dissent is not tolerated, but where it is merely probable, then dissent is legitimate. [FN18]

But even in cases where dissent is Islamically legitimate, it would be overly hasty to conclude that a judge called upon to adjudicate a dispute between two Muslim litigants who each holds a legitimate but contrary view of what the Shari'a requires in their case cannot resolve that case in accordance with the Shari'a. If all the Shari'a requires is that the dispute be resolved using revelatory sources rather than a particular or substantively “correct” interpretation of those sources then the judge can be fairly said to have applied the Shari'a to resolve the dispute to the extent she applies those sources to the facts at hand in good faith and with integrity. For example, one can reconcile the legitimate role judgment plays in the interpretation of the Shari'a with the obligation to rule by the Shari'a and not by human laws, by taking a proceduralist rather than substantive view of the Shari'a: a position which is in fact the one that prevailed among Sunni Muslims in the pre-modern era. [FN19]

A similar analysis applies to prospective law-making: the existence of legitimate disagreement as to the content of what the Shari'a requires with respect to the adoption of general policies does not necessarily mean that to speak of adopting policies pursuant to the Shari'a is incoherent. It would be perfectly coherent to recognize any prospective state policy as being in accord with the Shari'a if it is in conformity with a legitimate interpretation of the Shari'a. Na'im's concern that such an approach would violate the individual religious freedom of dissenting Muslims could be addressed by allowing dissenting Muslims a certain ***200** right to opt out of such rules. In fact, pre-modern Islamic law did recognize such an opt-out right but only where conformity with government policies would require an individual to commit a sin. Otherwise mere moral disagreement with the government's policy did not excuse an individual from his duty to comply with lawful government policies. [FN20] In this case, obedience is not due because the government's interpretation of the Shari'a is deemed correct: if it were the individual would not have a right to opt out; rather, the duty to comply arises out of another legal principle of the Shari'a--the duty to obey lawful commands of the government so long as obedience does not entail sin. Accordingly, prospective orders of the government were not called judgments (ahkam) in contrast to the decisions of judges. Rather, they were called acts of state (tasarruf bi-l-imama), a classification that emphasized the discretionary nature of the acts in

question and one that recognized the right of subsequent governments to revise or repeal such acts of state within the limits of Islamic legality. [FN21]

Accordingly, allegations that the idea of an Islamic state is conceptually incoherent are dependent on very specific idiosyncratic conceptions of what Islamic commitments require: both with respect to the epistemology of the Shari'a, i.e., that it is unknowable, and substantive, i.e., only when one is following what one subjectively believes the Shari'a requires is one acting in an Islamically ethical fashion.

The Idea of an Islamic State Lacks Historical Islamic Legitimacy

Na'im devotes Chapter Two to the proposition that even before the colonial interregnum in the Islamic world Muslims did not establish governments in which religion and state were fused. Instead, Muslim governments were headed up by politicians who, even though they were Muslims, used their power to further the ends of the state. For the most part they did not claim religious legitimacy except in the sense that they protected and promoted Islam. In this capacity, they negotiated with the religious scholars regarding the role of the *Shari'a* in the state's ***201** governance. The religious scholars maintained their independence from the state thus giving them the distance from power necessary to allow them to act as an effective check against the tendency of rulers to abuse their powers, whether in the name of religion or for other reasons.

While seductive, this objection would be unpersuasive to orthodox Sunni Muslims and categorically rejected by orthodox Shi'i Muslims. The reason this is so is that raw experience is not normative absent some normative theory that makes history morally significant. This is often described as the familiar “is/ought” fallacy. In this case the fact that Muslims historically have separated religion from the state but permitted religion to play a role in politics is not logically sufficient to ground a normative argument that they should continue to do so. One can imagine, for example, a Sunni Islamist follower of Sayyid Qutb or Abu al-A'la al-Mawdudi who rejects the separation of religion and state advocated by Na'im as dismissing the historical practice of pre-modern Muslim polities as mere evidence of a failure resulting from insufficient commitment to Islamic teachings rather than as evidence of an Islamic normative ideal.

On the other hand, it is hard to imagine an orthodox Shi'i Muslim's reaction to Na'im's historical evidence other than “What further proof is needed for a divinely-inspired Imam?” According to orthodox Shi'a theology, the need for an infallible imam is not something derived in the first instance from experience. Rather, the infallible Imamate is a part of their doctrine of theodicy, i.e., that God's justice and goodness makes it inconceivable that He would not provide human beings an infallible source of religious guidance and justice. Accordingly, even a relatively positive history of the institutional separation of religion and the state might not be relevant to an orthodox Shi'i Muslim. [FN22]

Similarly, it is also incorrect to assert that responsibility for the ideal of an Islamic state can be laid exclusively at the feet of post-colonial conceptions of the territorial state as applied to Muslim communities. (10) Islamic law, as Na'im frequently points out when discussing the contradictions between historical Shari'a and contemporary norms of international human rights law, creates a hierarchical system of rights with Muslims enjoying the highest degree of legal protection, followed by non-Muslims living permanently under ***202** Islamic rule (dhimmis), followed by non-Muslims living temporarily under Islamic rule (musta'mins), and finally, non-Muslims living under the rule of hostile regimes (harbis) who had no rights under Islamic law. This was not a simple matter of discrimination; rather, it was a manifestation of the fact that only

Muslims were full citizens of the state. Even a cursory reading of one of the several works attributed to the early Hanafi jurist Muhammad b. al-Hasan al-Shaybani on international relations would confirm that he conceived the polity as being the polity of the Muslims, not the polity of all individuals living in the state's territory. [FN23]

Conclusion

In critiquing Na'im's Islamic argument for the desirability of a secular state, I do not intend either to belittle the importance of such a project or to give the impression that such a project is impossible. Instead, I only wish to make the following point: Muslims have a long tradition of theological, ethical and legal reasoning. It is implausible to believe that they will forget the teachings of this tradition as they struggle to reconcile their religious convictions with a system of governance rooted in a liberal system of human rights. Instead of viewing this tradition as a burden, I believe it is important for Muslim reformers such as Na'im to tap into the resources of this tradition to make the case for a secular state based on liberal norms.

I will briefly give two examples illustrating how greater attention to these historical doctrines could be useful to Na'im. One of Na'im's arguments against an Islamic state is based on a hermeneutic theory: human understandings of the Shari'a are always contextual, suggesting an almost infinite plasticity to how revelation can be read. But, as discussed above, this argument would not only make the project of an Islamic state unintelligible, it would also make any communal experience of Islam impossible. What Na'im's theory instead requires is an account of revelation's language that grants the existence of a body of stable meanings in the normative sources of Islam that are ascertainable through close reading, but at the same time takes into account human experience in the interpretation of revelation. Such a theory, in fact, is ***203*** not so different from the one already developed by pre-modern Muslim scholars of usul al-fiqh who took the view that the plain meaning of revelatory texts is to be given effect, but only presumptively, i.e., until a sufficiently strong countervailing factor is identified. These countervailing considerations could be rational in the case of theological questions, e.g., God's attributes, [FN24] but they can also be experiential as demonstrated by arguments of twentieth-century Muslim jurists' interpretations of jihad, [FN25] and more generally by the juristic principle that changed social circumstances often justify revising legal doctrine, [FN26] even in circumstances where the rule is based on an explicit text of revelation. [FN27]

With respect to the precise normative position Na'im advocates--the separation of religion from the state or the rejection of the religious character of government generally--this is an essential feature of Sunni doctrine as evidenced by their inclusion of the imamate in books of theology. [FN28] That does not constitute the commitment to religious neutrality that is Na'im's desideratum, but it does emphasize the point he is trying to make: that the state should not be thought of as a divine instrumentality. In some respects, pre-modern Islamic jurists were willing to go even further than Na'im in denying the religious basis of political decision-making. For example, Na'im is willing to grant that during the Prophet Muhammad's lifetime, but especially in Madina, religious and political leadership were fused. (53) For many Muslim jurists, however, the Prophet Muhammad was understood to have acted ***204*** in different capacities, sometimes as a secular law-giver, and other times as prophet acting on behalf of God. When acting in a political capacity, his decisions were binding only by virtue of his political position, not his prophetic one.

Despite my dissatisfaction with the Islamic justification Na'im provides for his version of secularism, I believe the book overall provides a very practical way to move forward. Of course, in real life, it is not always the case that theoretical coherence is a prerequisite for political progress. I believe Na'im makes very persuasive practical arguments in favor of a secular state that will appeal to many religious Muslims who are simply seeking a way to live their lives as more or less traditional Muslims within the framework of a modern nation state. Na'im makes it clear that this is institutionally possible without violating the fundamental rights of either Muslims or non-Muslims, even if his theoretical arguments do not make clear why this is the case. Once the practical institutions are in place, however, there will be plenty of time for theoretical reflection and justification.

[FN1]. The reviewer participated in a pre-publication workshop with the author in January 2007.

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[FN2]. ‘Abdullahi Ahmed An-Na'im has written numerous books dealing with Islam and human rights, or Islam and constitutionalism, see, e.g., ‘Abdullahi Ahmed An-Na'im, Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law (Syracuse Univ. Press 1990); ‘Abdullahi Ahmed An-Na'im, Human Rights in Cross-Cultural Perspectives: A Quest for Consensus (Univ. Penn. Press 1992); ‘Abdullahi Ahmed An-Na'im, et al., Human Rights and Religious Values: An Uneasy Relationship? (Eerdman's Publ'g Co. 1995); ‘Abdullahi Ahmed An-Na'im, Islamic Family Law in a Changing World: A Global Resource Book (Zed Books 2002); ‘Abdullahi Ahmed An-Na'im, African Constitutionalism and the Role of Islam (Univ. Pa. Press 2006). He also has numerous articles to his credit, including, for example, ‘Abdullahi Ahmed An-Na'im, The Rights of Women and International Law in the Muslim Context, 9 Whittier L. Rev. 491 (1987); ‘Abdullahi Ahmed An-Na'im, Islam and International Law: Toward a Positive Mutual Engagement to Realize Shared Ideals, 98 Am. Soc'y Int'l L. Proc. 159 (2004); ‘Abdullahi Ahmed An-Na'im, Globalization and Jurisprudence: An Islamic Law Perspective, 54 Emory L.J. 25 (2005); ‘Abdullahi Ahmed An-Na'im, Shari‘a and Positive Legislation: Is an Islamic State Possible or Viable?, in 5 Yearbook of Islamic and Middle Eastern Law 29-42 (Eugene Contran & Chibli Mallat eds., 1998-99).

[FN3]. See, e.g., David A. Westbrook, Islamic International Law and Public International Law: Separate Expressions of World Order, 33 Va. J. Int'l L. 819 (1993).

[FN4]. More than ten reviews of Islam and the Secular State have already been published on the blog The Immanent Frame. See The Immanent Frame: Islam and the Secular State, http://www.ssrc.org/blogs/immanent_frame/category/islam-and-the-secular-state/ (last visited Dec. 13, 2008).

[FN5]. Posting of ‘Abdllahi Ahmed An-Na'im to The Immanent Frame, http://www.ssrc.org/blogs/immanent_frame/2008/07/24/call-it-x/ (July 24, 2008, 07:49 EST) (entitled Islam and the Secular State: “Call it X”).

[FN6]. On the importance of distinguishing theological from legal arguments in the Islamic context, see generally Mohammad Fadel, The True, the Good and the Reasonable: The

Theological and Ethical Roots of Public Reason in Islamic Law, 21 Can. J.L. & Jurisprudence 5 (2008), and Mohammad Fadel, Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law, 8 Chi. J. Int'l L. 1 (2007).

[FN7]. See, e.g., posting of John Esposito to The Immanent Frame, http://www.ssrc.org/blogs/immanent_frame/2008/08/25/the-challenge-of-creating-change/ (Aug. 25, 2008, 15:30 EST) (entitled Islam and the Secular State: The Challenge of Creating Change); posting of Daniel Philpott to The Immanent Frame, http://www.ssrc.org/blogs/immanent_frame/2008/07/14/arguing-with-an-naim/ (Jul. 13, 2008, 07:37 EST) (entitled Islam and the Secular State: Arguing with An-Na'im).

[FN8]. See, e.g., posting of John Esposito to The Immanent Frame, http://www.ssrc.org/blogs/immanent_frame/2008/03/02/who-speaks-for-islam/ (Mar. 2, 2008, 13:04 EST) (entitled Rethinking Secularism: Who Speaks for Islam).

[FN9]. See Fadel, The True, the Good and the Reasonable, supra note 6, at 11-14 (giving a defense for using historical doctrines in this fashion).

[FN10]. Posting of Säid Amir Arjomand to The Immanent Frame, http:www.ssrc.org/blogs/immanent_frame/2008/08/19/preaching-to-the-converted/ (Aug. 19, 2008, 09:28 EST) (entitled Islam and the Secular State: Preaching to the Converted).

[FN11]. Some commentators have pointed out that Muslim liberals occupy a politically precarious position, a fact that undermines their claims to Islamic authenticity. Lama Abu-Odeh, The Politics of (Mis)Recognition: Islamic Law Pedagogy in American Academia, 52 Am. J. Comp. L. 789, 808 (2004). An-Na'im has himself made the point that inability of the international system to bind the United States to the norms of international law or to solve the Palestinian problem undermines the very idea of international law, including international human rights law. An-Na'im, Islam and International Law, supra note 2, at 8.

[FN12]. Khaled Abou El Fadl, The Unique and International and the Imperative of Discourse, 8 Chi. J. Int'l L. 43, 43 (2007) (“Coherent theoretical stands are often the only safeguard against result-oriented activism. When human rights activists and religious activists act without the restraint of reflective and self-critical pauses, they often end up violating the moral space in which human beings function.”). To this risk should be added the presence of anti-Muslim groups who, in support of their conviction that Islam and Muslims constitute an ever-present danger, mine the Islamic tradition seeking only those elements most incompatible with modern sensibilities.

[FN13]. Laïcité is often translated as “secularism,” but is a complex doctrine relating to the relationship between the state, the citizen, religion and equality in connection with maintaining a democratic public space. John Richard Bowen, Why the French Don't Like Headscarves: Islam, the State, and Public Space 2-3 (Princeton Univ. Press 2007).

[FN14]. The Federalist No. 10, at 40 (James Madison) (Terence Ball ed., 2003).

[FN15]. Fadel, The True, the Good and the Reasonable, supra note 6, at 31-35.

[FN16]. An eleventh-century Muslim jurist made precisely this point in a treatise on public law. Abu al-Hasan Ali b. Habib al-Mawardi, Al-Ahkam al-Sultaniyya 69 (Dar al-kutub al-‘ilmiyya 2000).

[FN17]. Fadel, The True, the Good and the Reasonable, supra note 6, at 61-65 (discussing medieval debates regarding when it is permissible to coerce non-Muslims to comply with Islamic law). Note, however, that while it is possible to show why enforcement of religious rules coercively with respect to believers does not necessarily violate their religious freedom, it requires one to assume, counter to all evidence, that believers are all well-trained theologians who have thoroughly assimilated the doctrines of Islamic theology and ethics. To the extent that such an assumption is unjustifiable, one could construct an argument on Islamic theological grounds that in such circumstances, there is no religious basis to enforce religious law as religious law. Space constraints, however, do not permit me to develop the details of such an argument here.

[FN18]. For a general account of the role of probability in Sunni moral and legal thought, see Aron Zysow, The Economy of Certainty (1984) (unpublished Ph.D. dissertation, Harvard University).

[FN19]. Baber Johansen, Truth and Validity of the Qadi's Judgment. A Legal Debate Among Muslim Sunnite Jurists from the 9th to the 13th Centuries, 14 Recht van de Islam 1 (1997).

[FN20]. Fadel, The True, the Good and the Reasonable, supra note 6, at 58 n. 234.

[FN21]. The medieval jurist and theologian, Abu Hamid al-Ghazali, in fact uses a policy dispute between the first two Sunni caliphs regarding whether public resources should be distributed equally or on the basis of individual merit as evidence that in those areas of life not regulated by a definitive rule of revelation, the views of all qualified interpreters of the law are equally valid. Abu Hamid Muhammad b. Muhammad b. Muhammad al-Ghazali, al-Mustasfa fi ‘ilm al-Usul 353-54 (Muhammad ‘Abd al-salam ‘Abd al-Shafi ed., 1992). He did not conclude, however, that neither caliph was therefore precluded from resolving the policy dispute; rather, each caliph was free to follow the policy that he thought was best.

[FN22]. Al-Hasan b. Yusuf b. Alî (known as Ibn ul-Mutahhar al-Hillî), ‘Al-Bãbu 'l-hâdî ‘Ashar: A Treatise on the Principles of Shi'ite Theology 62-68 (William McElwee Miller trans., Royal Asiatic Soc'y Gr. Brit. & Ir. 1958) (explaining that the obligation to have an imam who combines religious and political knowledge and who is immune from sin is rationally necessary by virtue of God's inherent goodness).

[FN23]. For example, the early Hanafi jurist Muhammad b. Hasan al-Shaybani's regular use of terms like “obligation of the Muslims (dhimmat al-muslimin),” “the Muslims' ruler (imam al-muslimin),” and “the Muslims' power (mana‘at al-muslimin)” in the course of his explanation of the rules governing treaties and international relations suggests a normative conception of the state as being an instrumentality that belongs exclusively to the Muslims. Muhammad ibn

Ahmad Sarakhsi, Sharh Kitab al-Siyar al-Kabir lil-Imam Muhammad Ibn al-Hasan al-Shaybani (1st ed., Dar al-Kutub al-‘Ilmiyya 1997).

[FN24]. Nicholas Heer, The Priority of Reason in the Interpretation of Scripture: Ibn Taymiyyah and The Mutakallimun, in Literary Heritage of Classical Islam 181-95 (Mustansir Mir ed., Darwin Press Inc. 1993).

[FN25]. Many twentieth-century Muslim jurists engaged in “jihad-revisionism,” arguing that earlier scholars based their doctrines of aggressive jihad on the assumption that the default relationship between states was war. Because of the introduction of international organizations and the spread of international law, that factual presumption is no longer warranted, thereby requiring a revision of the legal rules governing international conflict so that only defensive war is permissible. In this connection, see Muhammad Abu Zahra, al-‘Alaqat al-Dawliyah fi al-Islam (al-Dar al-Qawmiyya li-l-Tiba‘ah wa-l-Nashr 1964); Wahba al-Zuhayli, al-‘Alaqat al-Duwaliyya fi al-Islam: Muqaranah bi-l-Qanun al-Dawli al-Hadith (Mu‘assasat al-Risala 1981); Mahmud Shaltut, A Modernist Interpretation of Jihad: Mahmud Shaltut Treatise Koran and Fighting, in Jihad in Classical and Modern Islam: A Reader 59-102 (Rudolph Peters ed., Markus Wiener Pub. 1996).

[FN26]. Mohammad Hashim Kamali, Principles of Islamic Jurisprudence 285 (Islamic Texts Soc'y 1991) (noting that legal reasoning often incorporate conditions that prevailed at the time of their formulation, and accordingly, if those circumstances change, legal reasoning must be updated in light of those changed circumstances).

[FN27]. Id. at 288 (stating that the general terms of a revelatory text can be qualified by custom in certain circumstances).

[FN28]. Mohammad Fadel, Adjudication in the Maliki Madhhab: A Study of Legal Process in Medieval Islamic Law 39, n. 8 (1995) (unpublished Ph.D. dissertation, University of Chicago).

[FN29]. Sherman A. Jackson, From Prophetic Actions to Constitutional Theory, 25 Int'l J. Middle E. Stud. 71, 74 (1993).

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BACK TO THE FUTURE: THE PARADOXICAL REVIVAL OF ASPIRATIONS FOR AN ISLAMIC STATE

REVIEW OF *THE FALL AND RISE OF THE ISLAMIC STATE* BY NOAH FELDMAN

Mohammad Fadel*

The Fall and Rise of the Islamic State by Noah Feldman (Princeton and Oxford: Princeton University Press, 2008), 189 pp.

> *When empires fall, they tend to stay dead. The same is true of government systems. . . . There are, however, two prominent examples of governing systems reemerging after they had apparently ceased to exist. One is democracy . . . . The other is the Islamic state.*[1]

Noah Feldman's most recent publication seeks to explain the apparently paradoxical rise of grassroots political movements in the Islamic world (and especially the Arab Middle East) demanding the resurrection of an Islamic state, movements often broadly referred to as "Islamist." In a field that is dominated by specialists who usually write for specialists, his book is a welcome addition to the literature on the modern idea of an Islamic state. It gives a highly readable and accessible account of the history of Islamic law, its relationship to Islamic ideals of governance, and why that history and those ideals remain relevant to large numbers of politically active Muslims in the modern world. Its policy recommendations, specifically the need for the United States (U.S.) to engage positively with Islamic movements committed to the democratized version of Islamic law he describes may be controversial, but he

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1 Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton: Princeton University Press, 2008) at 1.

argues for them with some force. Feldman argues that a democratized version of Islamic law is being developed by indigenous Muslim elites that, on its own terms, can reasonably be viewed as a progressive development in the governance of those societies, and that to the extent such movements enjoy democratic legitimacy, U.S. opposition to their political success represents a betrayal of U.S. values and, potentially, U.S. interests as well. While features of his account of the classical Islamic state and the history of governance in the Arab/Islamic world in last 150 years are highly problematic (as discussed below), it nevertheless fills an important gap in the nonspecialist literature on the history of the idea of an Islamic state.

Part I of his book — *What Went Right?* — provides a thumbnail sketch of the historical Islamic state's constitution as a state committed to a version of the rule of law that both justified state action and limited it. Key to the success of that constitutional system, according to Feldman, was the role of a class of religious scholars who served as legal specialists (referred to alternatively as "jurists" or "scholars") who acted as a relatively effective check on the arbitrary power of the ruler.

Part II of the book — *Decline and Fall* — analyzes the nineteenth century Ottoman-era legal and constitutional reforms known as the Tanzimat. Feldman argues that these reforms, due to their incomplete nature, succeeded in dislodging the jurists from their privileged constitutional position but as a consequence produced a greatly strengthened executive whose power was left unchecked by either a powerful legislature or an independent judiciary. This led to a thoroughgoing legal positivism becoming the official legal ideology of the successor states to the Ottoman Empire. This transformation, moreover, was largely the endogenous product of the Ottoman Empire's Tanzimat reforms.[2]

Part III of the book — *The Rise of the New Islamic State* — accounts for the rise of Islamist politics as a consequence of the disastrous effects of the Tanzimat. Feldman makes clear, however, that contemporary Islamists have no intention of restoring the constitutional status quo ante in which the jurists enjoyed a privileged constitutional position; instead, they desire a democratically accountable state that is subject, one way or another, to the rules of Islamic law. Feldman argues that this *democratized* version of Islamic law presents its own set of thorny doctrinal problems from the perspective of Islamic jurisprudence that Islamists have not adequately addressed. Failure

2 *Ibid.* at 60-61.

to resolve these doctrinal problems, Feldman believes, will lessen the chance that Islamists will succeed in their goal of restoring the rule of law to modern Arab states.

By identifying the classical Islamic constitution with a conception of the rule of law, Feldman can argue that the contemporary demand for an Islamic state represents a legitimate demand for constitutional reform in the Muslim world whose goal is support for the rule of law. This forms the basis for his policy argument: that the United States should cease and desist from policies that prop up Arab authoritarian regimes in the face of democratically elected Islamist movements.[3] Feldman is not clear, however, in explaining why citizens of the Arab world would believe that an Islamic state — even a reformed Islamic state — should be the preferred route of constitutional reform.[4] This leaves the impression that some vague combination of nostalgia and the continued salience of religion as a force in Arab societies explains the preference for a religious conception of the state over a liberal one.

Regardless of the wisdom of Feldman's policy recommendations (which I largely agree with), specialists in Islamic legal history, Ottomanists, and modern historians of the Middle East could all legitimately criticize his historical analysis.[5] The historical accuracy of his claims deserves careful consideration, even if the primary audience for the work is policy makers. Because the idea of an Islamic state continues to enjoy political salience, our theoretical understanding of its constitution may help shape political practice. A more accurate understanding of the normative justification of the Islamic constitution may solve some unresolved tensions inherent in what Feldman calls the "new Islamic state";[6] however, it may also point out other, perhaps more intractable difficulties in the concept.

This review will proceed in three parts. First, I will provide a normative account of the classical Islamic constitution[7] that supplements Feldman's

3 *Ibid.* at 150-51.

4 A constitutional democracy that respects human rights, for example, would also seem to be an equally plausible alternative to the constitutional status quo or a reformed Islamic state. See *e.g.*, 'Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge, MA: Harvard University Press, 2008).

5 See e.g., Saïd Amir Arjomand, "Why Shariah?" The Immanent Frame (28 March 2008), online: SSRC Blogs <http://www.ssrc.org/blogs/immanent_frame/2008/03/28/why-shariah/>; Haider Ala Hamoudi, "Orientalism and The Fall and Rise of the Islamic State" (2009) 2 Middle East Law and Governance (forthcoming) (pointing out the inapplicability of Feldman's analysis to Shi'i Muslims).

6 *Supra* note 1 at 118-22.

7 In referring to the "classical Islamic constitution," I am referring exclusively to Sunni doctrines.

largely positive account in order to determine the legitimacy of the Tanzimat-era codifications. Second, I will challenge Feldman's assertion that the legal positivism of contemporary Arab states is primarily an endogenous development whose roots lie in the Tanzimat. Finally, I will argue that the classical Islamic constitution is doctrinally rich enough to solve the theoretical difficulties Feldman identifies. Islamic coherence, however, comes at the cost of the assumption that the "people" are all Muslims. If it is assumed that non-Muslims are equal citizens, however, a new constitutional theory that goes beyond both the classical and modern Islamic constitution is needed.

I. THE NORMATIVE ISLAMIC CONSTITUTION

Despite Feldman's recognition of the centrality of the rule of law as an ideal in the classical Islamic constitution, his description of how it operated, and in particular how it empowered a class of religious-legal specialists to act as a substantial restraint on the arbitrary power of the ruler, is surprisingly thin. The primary rule he cites in his argument relates to the rules of succession in the Islamic contract of governance (*'aqd al-imama*). Because Islamic law rejected a hereditary principle of succession, jurists were given a practical opportunity to make themselves politically important players in succession battles. The competitive nature of Islamic politics in the premodern age therefore permitted jurists to function as a kind of reputational intermediary, a role that they could leverage to insure that rulers, even if only out of self-interest, substantially complied with the law that the jurists had formulated.[8]

That Muslim jurists functioned to some extent in the manner Feldman describes must certainly be true. On its own this is not sufficient to explain how Islamic law helped further the ideals of the rule of law.[9] Once the concept of rule of law is tied to a particular balance of power within society, moreover, it surely becomes the case that many complex social and legal factors need to be accounted for, in addition to the rules governing succession.[10] Positive anal-

8 *Supra* note 1 at 29-32 and 34-35. To be fair to Feldman, he also discusses the role of the protection of private property and that the government in the Islamic constitution was required to obtain revenues only through lawful taxation (40-41), but space limitations preclude a discussion of this line of argumentation.

9 *Supra* note 1 at 6.

10 For a general argument that many rules of Islamic law can be understood as attempts to limit the power of government, see Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (New York: E.J. Brill, 1996). One extra-constitutional feature that must have been critical in enabling jurists to maintain their power, for example, was direct access to public funds independently of the government through a system of endowments that was itself justified on questionable legal grounds. Kenneth M. Cuno, "Ideology and Juridical

ysis of the effects of legal rules, while helpful in some respects, can never answer questions of legitimacy. Feldman's argument, however, does not provide us an explanation for what constitutes Islamic legitimacy other than a vague reference to upholding the law by "commanding the good and forbidding the evil."[11] Yet, his analysis of the Tanzimat depends on his conclusion that they were illegitimate from the *internal* perspective of Islamic jurisprudence. The only way to determine whether the Tanzimat reforms were legitimate from an Islamic jurisprudential perspective, however, is to engage in a detailed analysis of the relevant normative doctrines of Islamic constitutional law.[12] Detailed normative analysis of legal doctrine, on its own, cannot tell us if those rules were respected (and that is why positive analysis is always necessary); however, without such a normative analysis it is impossible to determine whether the Tanzimat-era reforms were legitimate from the perspective of the Islamic legal system.

For Feldman, the Islamic constitution was essentially a quid pro quo: the jurists agreed to confer legitimacy upon the ruler, and in exchange the ruler agreed to uphold the law by "commanding the good and forbidding the evil."[13] Such a conception of the contract of governance fails to account for the discretionary powers the ruler and other public officials exercise pursuant to the contract of governance, and so, to that extent, is a substantially incomplete description of the classical Islamic constitution. The ruler's discretionary powers, in fact, are probably more important for understanding the jurists' conception of the rule of law than is the model of the "ruler as enforcer." Alongside the obligation to enforce mandatory rules[14] implicit in the concept of commanding the good and forbidding the evil, a task that al-Mawardi mentioned as falling under the responsibility to protect Islamic orthodoxy and

Discourse in Ottoman Egypt: the Uses of the Concept of Irsād" (1999) 6 Islamic Law & Society 136.

11 *Supra* note 1 at 35.

12 The most well-known source of Islamic constitutional law is *The Ordinances of Government*, which is available in a recent English translation. Ali b. Muhammad al-Mawardi, *The Ordinances of Government: A Translation of* Al-Ahkām al-sulÔāniyya wa-l-wilāyāt al-dīniyya, trans. by Wafaa Wahbah (Reading, UK: Center for Muslim Contribution to Civilization; London: Garnet Publishing Ltd., 1996). This translation, however, should be used cautiously. All cites to Mawardi in this essay will be to the Arabic version of the text. 'Ali b. Muhammad b. Habib al-Mawardi, *al-Ahkam al-sultaniyya* (Beirut: Dar al-kutub al-'ilmiyya, n.d). Translations from Mawardi's Arabic text are my own.

13 *Supra* note 1 at 35.

14 The number of such rules is quite limited and would leave very little for the state to do since Islamic law does not oblige any punishment, much less a specific punishment, for the violation of the vast majority of its rules.

enforce the *hudud*[15] of God, the ruler is also granted discretionary power to pursue various kinds of public goods on behalf of the Muslim community.[16]

The contract of governance and the institutions of governance that are included within its terms establish a legal means to resolve collective action problems inherent in the pursuit of public aims that Islamic law specifies only in general terms. For that reason, the contract of governance gives the ruler and other public officials a legal monopoly over these functions.[17] The contract of governance is therefore the paradigmatic exemplar of what Muslim jurists term a collective obligation (*fard kifaya*).[18] The Islamic state, through its exercise of discretion (*tasarruf bi-l-imama*) in the pursuit of the public good pursuant to the contract of governance, could make positive law that, subject to some minimal substantive restrictions, became morally and politically binding upon the Muslim community. The Muslim jurists of the middle ages referred to this kind of law making generally under the rubric of *siyasa shar'iyya*.[19]

The Islamic contract of governance legitimates the state's power to compel individuals' adherence to the law, a power that even the most learned jurists constitutionally lack.[20] The state can exercise coercive power because it is the *representative* of the Muslims considered as a collectivity, and to that extent, its lawful decisions are binding upon them as individuals simply because they are the decisions of the Muslims themselves.[21] The power of the Islamic state

15 *Hudud* (sing. *hadd*) refer to a narrow class of crimes the punishments for which are mandatory and enforcement of which is not subject to the state's discretion, unlike ordinary criminal law which is.

16 These include, *inter alia*, the establishment of a system of courts to resolve disputes and a system to enforce those rulings; provision of physical security to persons within the territory of the Islamic state; defence of the state's frontiers; prosecution of the *jihad* against non-Muslim states not at peace with the Islamic state; appointment and supervision of a competent and honest bureaucracy to administer the affairs of the state; and the organization of the public finances. Al-Mawardi, *supra* note 12 at 18.

17 *Ibid.* at 15.

18 *Ibid.* at 6.

19 Even jurists, however, claimed the power to generate rules based on considerations of siyasa. 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 79-91 (discussing the systematic role siyasa-based rules played in Islamic law in the Mamluk period).

20 The principle difference between a judge, for example, and a mufti, is that the judgments of the former are binding whereas the judgments of the latter are only enforceable to the extent that an individual or individuals voluntarily comply with it.

21 The representative nature of Islamic government is assumed by numerous rules included in the *al-ahkam al-sultaniyya*. See *e.g.*, al-Mawardi, *supra* note 12 at 11 (explaining that just as the sitting ruler cannot dismiss his designated successor without legal cause, so too the electors cannot dismiss the incumbent ruler from office without legal cause, because in both cases, they are acting

to bind individual Muslims through the decisions of its officials is simply the practical manifestation of the collective power of the Muslim community (*wilayat al-muslimin* or *'ammat al-muslimin*).[22] Moreover, because the ruler under Islamic law is a representative, his powers are limited by the terms of his appointment.[23] The ruler's actions are therefore generally subject to the rules governing the relationship between an agent and a principal, including the rule that the ruler act for the benefit of the governed.[24]

Accordingly, the legal conception of the state as the exclusive public representative of the Muslim community permeates the rules regulating the validity of public acts, simultaneously justifying the power public officials exercise, limiting the use of that power to ends that are beneficial to the public, imposing upon public officials an ideal of impartial decision making, and requiring individuals to accept the decisions of those officials that fall under the scope of the contract of governance.

While Feldman correctly points out that, well before the nineteenth century, Muslim jurists had already recognized that the state had the right to promulgate its own rules and regulations within limits prescribed by the *shari'a*,[25] his account of the classical Islamic constitution is silent as to the source of the state's power to do so. The failure to account for the state's authority to promulgate law under Islamic law is not unique to Feldman. Scholars of Islamic

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on behalf of the Muslim community, not themselves); and at 15 (explaining that because the ruler has been entrusted with fulfilling the ends of the contract of governance, the ruler has the exclusive right to pursue the ends set out in the contract of governance).

22 See Abu Bakr b. Mas'ud al-Kasani, Bada'i' al-sana'i' fi tartib al-shara'i' (Cairo: Zakariyya Ali Yusuf, n.d.) at 4110 (referring to the caliph as the agent of the Muslims whose actions represent the actions of the general Muslim community).

23 Abu Bakr Muhammad b. Abdullah b.al-'Arabi, *Ahkam al-Qur'an* (Cairo: Dar al-Manar, 2002) vol. 2 at 91(explaining that the ruler lacks authority to waive the property claims of individual victims of a brigand because "the ruler is not an agent [*wakil*] of specific persons among the people with respect to their specific claims. He is only their representative [*na'ib*] with respect to their general, unspecified claims [*huququhum al-mujmala al-mubhama*] which are not specific [with respect to any one person].").

24 Shihab al-Din Ahmad b. Idris al-Qarafi, *al-Dhakhira*, ed. by Sa'id A'rab (Beirut: Dar al-Gharb al-Islami, 1994) vol. 6 at 223-24 and vol. 10 at 43. Qarafi quotes the Prophet Muhammad as saying "Whoever is given authority over any of the affairs of the people, but does not exercise his best efforts on their behalf, nor does he act out of sincere desire for their [benefit], Paradise is prohibited to him." A substantially similar version of this hadith is included in the well-regarded hadith (sayings attributed to the Prophet Muhammad) collection of Muslim, where the Prophet Muhammad is quoted as having said "No ruler who has authority over the affairs of the Muslims and fails to exercise his best efforts for them nor does he act out of sincere desire for their [benefit], except that he shall not enter Paradise with them." Abu al-Husayn Muslim b. al-Hajjaj al-Qushayri al-Nisaburi, *Sahih Muslim* (Beirut: Dar Ibn Hazm, 1995) vol. 3 at 1161.

25 *Supra* note 1 at 49-51.

law have long treated the existence of positive legislation in Islamic legal history as something of an afterthought if not an outright embarrassment.[26] Classical orientalist scholars, for example, have long accepted the notion that in Islamic law God is the only legislator, and accordingly the state is simply the means by which God's laws are carried out.[27]

Closely related to this conception of Islamic legality is the position that only those rules that are developed by the jurists through their exegetical techniques are genuinely "Islamic."[28] This conception of Islamic legality, however, is only partially true, and is limited to those rules of Islamic law that are derived from revelation, either expressly or via juristic interpretation.[29] There are other categories of rules that are also Islamically legitimate, specifically those that arise by virtue of ordinary human beings exercising a power, such as a vow, that is granted to them by God.[30] Another example is a judge's decision (*hukm*) which, in the absence of fraud or bad faith, has the effect of creating an unassailable legal and moral obligation (on the part of the losing party) and an inviolable legal and moral right (on the part of the prevailing party), neither of which had existed simply by virtue of revelation.[31] Only in a relatively narrow class of cases — when the rule of law is the object of a universal scholarly consensus — is the role of the judge limited to enforcing (*tanfidh*) the law after finding the legally relevant facts.[32]

Discretionary acts of state are another example of legitimate rules of Islamic law that owe their existence to the exercise of a power granted pursuant to law, but not by the law itself. The legal and moral consequences of a

26 See *e.g.*, Amr Shalakany, "Islamic Legal Histories" (2008) 1 Berkeley Journal of Middle Eastern & Islamic Law 2 at 5 (noting that prevailing historiography excludes the study of *siyasa*-based rules from the study of Islamic law proper).

27 Fadel, *supra* note 19 at 79.

28 See, e.g., Wael B. Hallaq, "Can the Shari'a Be Restored?" in Yvonne Yazbeck Haddad & Barbara Freyer Stowasser, eds., *Islamic Law and the Challenges of Modernity* (Walnut Creek, CA: AltaMira Press, 2004) and Wael B. Hallaq, "'Muslim Rage' and Islamic Law" (2002-2003) 54 Hastings Law J. 1705 (casting doubt on the Islamic legitimacy of state-made law).

29 Al-Qarafi refers to these as "rules that God has set forth in His revelation [*ma qarrarahu fi asl shar'ihi*]." Shihab al-Din Abu al-Abbas Ahmad b. Idris al-Qarafi, *al-Ihkam fi tamyiz al-fatawa 'an al-ahkam wa tasarrufat al-qadi wa-l-imam*, ed. by Mahmud 'Arnus (Cairo: Maktab Nashr al-Thaqafa al-Islamiyya, 1938) at 4. I will refer to such rules in this essay as "prepolitical."

30 *Ibid.* at 4.

31 Prior to the judge's ruling, both parties could have been acting in good faith pursuant to a legitimate interpretation of God's will. *Ibid*. at 5, 15-16. For a discussion of the public officials who enjoyed the legal power to resolve disputes, see *ibid*. at 44-48. I refer to legitimate rules of Islamic law that are the product of human agency reflecting deliberation and choice — as opposed to simply the product of interpretation of revelation — as "political rules."

32 *Ibid*. at 38.

discretionary act of state, however, are substantially different than those of a legal judgment. A valid discretionary act of state, though legally binding, is not legally or morally unassailable: subsequent decision makers are free to revise, repeal, or affirm the rule.[33] A discretionary act, however, applies generally rather than only to the litigants appearing before the judge. Like the ruling of a judge, a discretionary act of state must find some basis in law (*fatwa*), but unlike a judge's ruling, the public official's promulgation of a rule, even if based on a good-faith interpretation of law, is not *morally* dispositive. Discretionary acts do not, therefore, change the objective moral rule governing the conduct at issue. As a result, individuals — to the extent that the positive law purports to compel certain conduct (or to refrain therefrom) — have to continue to rely on their own moral judgment in determining whether to comply with the positive law.[34]

We now have a more complete picture of how classical Islamic constitutional law established a state through law and how it then regulated the conduct of that government by law by creating a domain for the political, i.e., human rule making, based on political deliberation, that was bounded by the normative limits implicit in the acceptance of Islam as a *true* religion. As a matter of normative constitutional doctrine, then, neither public officials nor even the scholars themselves have any inherent power. The ruler and other public officials only possessed such powers as could be delegated to them by the Muslim community acting as a collective. Because no individual Muslim — in the absence of exigent circumstances (*darura*) — has the authority to violate the law (since that would contradict his acknowledgment of Islam's truth), so too the state and its agents, who are only representatives of the collectivity of Muslims, lack the power to act in contravention of Islamic law.[35]

33 *Ibid*. at 48-55 (giving examples of legal decisions that are acts of state and hence subject to revision prospectively).

34 Mohammad Fadel, "The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law" (2008) 21 Canadian J. of Law & Jurisprudence 5 at 58 (individuals obliged to comply with commands of the state unless doing so would entail disobedience to God).

35 See *e.g.*, Muhammad b. Yusuf al-Mawwaq, *al-Taj wa al-Iklil li-Mukhtasar Khalil* (Beirut: Dar al-Fikr, 1992) vol. 3 at 354 (a Muslim prisoner of war held by non-Muslims who is released on condition that he not fight must comply with that condition in contrast to a condition that he not return to the Islamic state because compliance with such a stipulation would cause him to commit a sin).

II. ASSESSING THE ISLAMIC LEGITIMACY OF NINETEENTH-CENTURY OTTOMAN REFORMS

The primary villain for Feldman in the rise of authoritarianism in the Arab world is codification. Elite Muslim jurists who in previous centuries had served as an important check on the arbitrary power of executive authority were now obsolete as a result of codification. They were no longer necessary for law finding or law making, nor were they necessary for the administration of the law. The very act of codification meant that one did not need to undergo the kind of specialized and rigorous learning that had been offered in Muslim seminaries and that had produced in previous centuries elite legal jurists in order to be able to administer competently the modern code. Shockingly, elite Muslim jurists failed to raise any meaningful opposition to codification despite its jurisprudentially suspect nature, and despite the threat it posed to their corporate interests. Finally, while attempts were made to restrain the executive as part of the overall program of legal reforms, e.g., the promulgation of the Basic Law of the Ottoman Empire in 1876, such attempts failed because, having been freely granted by the executive, they could also be, and subsequently were, withdrawn.[36] Law in the Ottoman Empire had now come full circle: having originated in a system that rejected the Roman dictum that "[t]he prince is not bound by law,"[37] it now seemed to embrace that proposition without debate.

I will address three points raised by this argument, the first addressing the jurisprudential legitimacy of codification, and the remaining two addressing the historical question of whether the acquiescence of the Muslim scholarly class to the Tanzimat's legal reforms really is a puzzle, and whether responsibility for the authoritarianism of the successor states to the Ottoman Empire can be fairly attributed to endogenous developments in Islamic constitutional doctrine in the nineteenth century rather than exogenous factors, most critically, colonialism and great power interventions.

The Islamic Legitimacy of Codification

Although the notion that codification of Islamic law is inherently repugnant to the ideal of Islamic law, or is at a minimum deeply in tension

36 *Supra* note 1 at 77.
37 *Ibid*. at 54.

with it[38] is not unique to Feldman,[39] twentieth-century Muslim jurists did not seem to have expressed a *principled* opposition to codification as such.[40] Feldman himself points out that contemporary advocates of a renewed Islamic state have no use for an uncodified law administered by a group of elite religious scholars.[41] While this may be a consequence of Islamist commitments to egalitarianism,[42] Feldman fails to consider whether persons committed to Islamic law could also be attracted to codification for reasons that are themselves related to the rule of law. I suggest that a strong commitment to the rule of law could have led Muslim reformers of the nineteenth century, including elite members of the Ottoman judiciary, to support codification of Islamic law, and for several reasons.

First, uncodified Islamic law suffered from a unique source of indeterminacy, namely, the provenance of its rules. Because of the historical uncertainty of legal sources in Islamic law, the risk of even good-faith legal error was significant. The age of Islamic legal sources (Islamic law had by the nineteenth century compiled almost a millennium's worth of jurists' opinions) introduced another source of legal error: many legal opinions were fact-dependent, and although legal theory required that such rules be revised in light of changed factual circumstances,[43] many jurists often continued to apply rules without regard to changes in circumstances, rendering those rules obsolete.[44] Jurists offered no solution to such problems other than to demand that judges do a better job of paying attention to changed circumstances. Codification, however, offered a universal solution by binding judges to the application of only those rules that the state had determined were in conformity with the conditions prevailing in contemporary society.

Second, because of the particular theological commitments that undergirded the normative pluralism of Sunni Islam,[45] there was no theoretical justification for granting precedential value to a court's decision applying a controversial rule of Islamic law. This meant that the jurists were incapable

38 *Ibid.* at 118.

39 See *e.g.*, Hallaq, *supra* note 28.

40 See *e.g.*, Oussama Arabi, *Studies in Modern Islamic Law and Jurisprudence* (The Hague; London: Kluwer Law International, 2001).

41 *Supra* note 1 at 106.

42 *Supra* note 40.

43 Both of these weaknesses in the traditional Ottoman legal system were discussed in the introductory section of the Majallah called the *Madbata* (*Mazbata* in Turkish). *The Civil Law of Palestine and Jordan*, trans. by C.A. Hooper (Jerusalem: Azriel Printing Works, 1933) vol. 1 at 3-4.

44 Jackson, *supra* note 10 at 126-27, 130 (giving examples of how jurists, by failing to recognize the distinction between law and fact, subverted the rule of law).

45 Fadel, *supra* note 34 at 43-50 (giving overview of Sunni doctrine of ethical pluralism).

of promulgating generally applicable law, even though it had become clear to most nineteenth century Muslim officials that the reform and modernization of Muslim societies required the development of a comprehensive legal system that applied in principle to all persons within the jurisdiction. Promulgation of a code by a state, precisely because it is a human rather than divine artifact, resolves this theological obstacle to the establishment of general law because the restraint required in the interpretation of revelatory texts is not present in the interpretation of human ones.

Third, even pre-nineteenth century Muslim jurists were acutely aware that, because of the indeterminacy of their system of jurists' law, the bad faith of individual legal officials could easily subvert the impartial administration of the law.[46] The recognition that juristic prerogatives of interpretation could subvert the rule of law led Muslim jurists, in the premodern era, to attempt to limit judges, in the vast majority of cases, to rendering decisions exclusively according to the well-established rule of the judge's particular legal school.[47] Ottoman-era jurists recognized the legitimacy of jurisdictional provisions which required judges to rule based only the authoritative opinion of the appointee's legal school. In this case, if the judge ruled using another rule, it could be overturned on jurisdictional grounds.[48] Accordingly, pre-nineteenth century Muslim jurists had already taken steps to organize their law into a more objective system that would further the rule of law by making it more transparent and thus accountable.

Fourth, traditional Islamic law rejected neither the legitimacy of an instrumentalist analysis of legal rules, nor the choice of a particular legal rule based on instrumentalist considerations. The jurisprudential doctrine known as *takhuyyur* (the right of an individual, when faced with contradictory views of what the law required, to choose the rule most suitable to his own ends[49])

46 Abu Ishaq Ibrahim b. Musa al-Shatibi, *al-Muwafaqat fi usul al-shari'a* (Beirut: Dar al-Kutub al-Ilmiyya, n.d.) vol. 4 at 97-101 (citing examples of jurists who exploited indeterminacy of law to benefit prominent persons, family members and their friends).

47 Mohammad H. Fadel, "The Social Logic of Taqlīd and the Rise of the Mukhtasar" 3 Islamic Law & Society 193 (discussing how the Maliki school of law attempted to restrict interpretation of legal sources in order to further the ideal of the rule of law). See also Rudolph Peters, "What Does it Mean to be an Official Madhhab? Hanafism and the Ottoman Empire" in Peri Bearman, Rudolph Peters & Frank E. Vogel, eds., *The Islamic School of Law: Evolution, Devolution and Progress* (Cambridge, MA: Harvard University Press, 2005) (stating the Hanafism between the twelfth and sixteenth centuries had evolved into a body of relatively unequivocal legal rules that left little room for judicial discretion and was well-suited for the bureaucratized system of law that applied in the Ottoman Empire).

48 Fadel, *ibid*. at 229-30.

49 This doctrine did not lack its detractors, *e.g.*, al-Ghazali and al-Shatibi. Abu Hamid Muhammad

was recognized as permissible so long as a definitive rule of law was not thereby violated.[50] To be sure, the Islamic state, which is the agent of the collective body of Muslims, would have this right.

The Ottomans, as Feldman notes, had used their power to issue positive laws extensively, regularly issuing legal decrees known as *qanun*s. What was unique about the nineteenth-century Ottoman legal reforms, then, may not have been the executive's claim of a right to make law, but the sheer scale on which the executive asserted that the public good required it to create uniform public law in areas that had historically been the domain of the jurists. Given that jurists had already granted the state the right to promulgate rules on instrumentalist grounds, at least in circumstances where there is no unequivocal rule, it is easy to see why codified law could be attractive to thoroughly orthodox Sunni Muslims. A code would at least require the state to make a public statement regarding its conception of where the public good lies, in the form of generally applicable rules. A code could therefore serve as a relatively effective means of restricting the state's ability to use its power of takhayyur arbitrarily, relative to the default rule of the classical Islamic constitution which theoretically allowed the state and its officials to make case by case decisions on grounds of the public interest.[51]

Finally, because the state exercises its discretion only as the agent of the Muslim community pursuant to the contract of governance, its power to exercise discretion is limited by the terms of that agreement. The provisions of a code or of a written constitution, from a jurisprudential perspective, could reasonably be understood as representing contractual limitations on the discretionary power of the state to pursue the public good that go beyond the prepolitical restraint of not using delegated power to violate the mandatory rules of Islamic law. Codification, then, from the perspective of the classical Islamic constitutional model, could be understood as simply an attempt to limit the power of the public's agents to engage in discretionary acts of state. From this perspective, the prepolitical rules of Islamic substantive law set the boundaries of permissible political rules, but do not define their substantive content.

b. Muhammad al-Ghazali, *al-Mustasfa fi 'ilm al-usul* (Beirut: Dar al-Kutub al-'Ilimiyya, 1993) 378-82 and al-Shatibi, *supra* note 46 at 95-97.

50 Ahmad b. Idris al-Qarafi, *Nafa'is al-usul fi sharh al-mahsul*, ed. by 'Adil Ahmad 'Abd al-Mawjud and 'Ali Muhammad Mu'awwad (Riyadh: Maktabat Nizar Mustafa al-Baz, 1997) vol. 9 at 4134-4139.

51 See *e.g.*, *supra* note 46.

The Perhaps Not-So-Puzzling Acquiescence of the Muslim Scholarly Class to Codification

Feldman claims that the Majallah, a comprehensive code of Islamic civil law issued by the Ottomans as part of the Tanzimat, represented the coup de grace for the legal class.[52] Yet he cites to none of its provisions in support for his claim that the Majallah effected a jurisprudential revolution, nor does he cite the views of any leading Ottoman jurists from that era to that effect. This silence, instead of causing Feldman to reconsider his interpretation of the reforms' Islamic legitimacy, leads him to describe the silence of late-nineteenth century Ottoman jurists in the face of the Majallah as a "puzzle."[53] Jurists' acquiescence is only puzzling, however, if one accepts Feldman's view that the classical Islamic constitution did not provide jurisprudential resources sufficient to accommodate the Majallah. The text of the Majallah itself provides empirical evidence that its jurisprudence was consistent with that of traditional Islamic law.

The drafters of the Majallah, it appears, went to some length to ensure that its text did not support "sultanic absolutism." The primary evidence for this proposition is the *Madbata* (Turkish: mazbata), which served as a kind of jurisprudential introduction to the Majallah.[54] The Mazbata justified the state's authority to promulgate the Majallah on what appears to have been an uncontroversial doctrine of Islamic substantive law (or at least uncontro-

52 *Supra* note 1 at 62.

53 *Ibid*. at 105. Feldman suggested that the Shi'i jurists of Iran were more prescient in opposing codification than their Sunni counterparts. I am more inclined to interpret the different reactions to codification to differences in Sunni and Shi'i constitutional theory: whereas Sunni constitutional theory envisaged a legitimate role for the state in rule-making, the Shi'a at least prior to the Iranian revolution continued to deny any legitimacy to any state in the period of the occultation of the last Imam. Abbas Amanat, "From ijtihād to wilāyat-i faqīh: The Evolution of the Shiite Legal Authority to Political Power" in Abbas Amanat and Frank Griffel, eds., *Shari'a: Islamic Law in the Contemporary Context* (Stanford, CA: Stanford University Press, 2007) 120 at 123 (Shiite theory of occultation of the 12th imam rendered all government inherently oppressive, and as a result, they never articulated a theory of a "legal public space").

54 M. Munes Tomeh, *The* Mazbata: *The Protocols of the* Mecelle *Committee and Continuity and Change in Islamic Law in the 19th Century Ottoman Empire* (2008) at 8-9 [unpublished, manuscript on file with author] at ("The *Mazbata* does the work of jurisprudence; it does the rhetorical work of explaining, rationalizing, and ultimately, persuading, or attempting to persuade, its audience about the correctness of the Committee's approach to Islamic law in the process of promulgating the *Mecelle*. It is jurisprudence is *Islamic*, even if not entirely Islamic in a classical sense, in that it broadly outlines the protocol or method the Committee followed in selecting from among the ocean of vastly diverse opinions in Islamic law, and particularly in selecting opinions from within the Hanafi school."). For an English translation of the Mazbata, see Hooper, *supra* note 43 at 1-15.

versial among Hanafi jurists): that the ruler has the power "to bind judges in accepting one interpretation of Islamic law over numerous others."[55] The Mazbata also affirmed the *shari'a*'s status as the general background law of the Ottoman Empire "against which the entirety of the Tanzimat's codes are mere exceptions,"[56] referring to the *shari'a* alternatively as the Ottoman Empire's "original law"[57] or as its "fundamental laws."[58] Tomeh describes the jurisprudential rhetoric of the Mazbata as the "'constitutionalization' of the *sharî'ah*."[59] The Mazbata also limited the right of the state to promulgate specific rules to the so-called "rules of Islamic law derived through interpretation (*al-masa'il al-mujtahad fiha*)" in contrast to the unequivocal rules of Islamic law (*al-ahkam al-qat'iyya*), and limited the sultan's choice of solutions to opinions that had already been expressed by Muslim jurists of the Hanafi school.[60]

Nothing in the express language of the Majallah, therefore, seems to support Feldman's contention that the Majallah's jurisprudential authority derived from the state, rather than from the *shari'a* itself.[61] Accordingly, Feldman produces very little evidence that the Majallah was the turning point in the move toward legal positivism and away from Islamic law in the Arab world that he claims it to be.

The Failure to Develop Effective Checks Against the Executive

Feldman is correct, however, to point out the dramatic institution-

55 Tomeh, *supra* note 54 at 11. Tomeh points out that this principle is in the background of much of the jurisprudential discussion in the Mazbata, even if it is only explicitly referenced at the conclusion of the Mazbata. It also appears in the substantive provisions of the Majallah itself, in Book XVI on Judgments. Article 1801 provides that, as an example of the kinds of permissible exceptions to the judge's jurisdiction over cases involving Islamic law, where the sultan gives an order "that in a certain matter the opinion of a certain jurist . . . is most in the interest of the people, and most suited to the needs of the moment . . . , and that action should be taken in accordance therewith[, t]he judge . . . may not act in such matter in accordance with the opinion of a jurist which is in conflict with that of the jurist in question. If he does so, the judgment will not be executory." Hooper, *supra* note 43 at 496. See also, Salim Rustum Baz al-Lubnani, *Sharh al-majalla* (Beirut: Dar ihya' al-turath al-'arabi, 3d ed., 1986) at 1169 (explaining this rule by stating that "when the order of the sultan implicates an issue of *ijtihad*, his command is enforced").

56 Tomeh, *supra* note 54 at 11.

57 *Ibid*.

58 *Ibid*. at 12.

59 *Ibid*.

60 *Ibid*. at 28. See also Peters, *supra* note 47 at 152-53 (noting existence of at least 32 sultanic orders by the sixteenth century directing judges to give judgment based on non-authoritative opinions within the Hanafi madhhab).

61 *Supra* note 1 at 64. See also Tomeh, *supra* note 54 at 28.

al changes that were taking place in the administration of the law in the Ottoman Empire in the nineteenth century, particularly the creation of a new system of courts that included judges who were not always the products of the traditional Ottoman system of legal education.[62] Could it be that the creation of these institutions, which included nonjurists, inevitably (though unintentionally) led to the rise of a positivist state in the manner suggested by Feldman?[63]

Even from a positive perspective, it seems implausible to believe that Ottoman legal reforms, particularly its codification of Islamic civil law, were the proximate cause for the rise of the late-Ottoman/post-Ottoman legal positivism that came to prevail in the Arab world.[64] More plausible is the possibility that Ottoman political elites were badly divided on the questions of how to reform the Empire's institutions, and whether restraints on the executive were necessary or desirable to further the Empire's survival in the midst of a seemingly never ending chain of crises that buffeted it during the last fifty years of its existence.[65] Throughout this period the Ottoman Empire continued to lose territories to hostile European powers; it also effectively lost sovereignty over much of its internal affairs as a result of the devastating combination of the capitulations and debt obligations to European creditors. By the latter half of the nineteenth century, it could no longer regulate its own domestic economy, tax foreigners, or even prosecute them in its own criminal courts.[66] Given the practical limitations on Ottoman rule in this period, a healthy dose of skepticism regarding the effectiveness of these reforms is probably warranted.[67]

62 Feldman appears to have exaggerated the exclusion of traditionally-trained jurists from the new court system. Ruth A. Miller, "Apostates and Bandits: Religious and Secular Interaction in the Administration of Late Ottoman Criminal Law" (2003) 97 Studia Islamica 155 (emphasizing that traditionally-trained jurists often staffed both trial courts and courts of appeal in the new courts created by the Tanzimat and that the shari'a and Ottoman secular legislation were perceived as working together rather than existing in two separate spheres).

63 *Supra* note 1 at 77-79.

64 Indeed, the Ottoman constitution was restored in 1908. Nathan J. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (Albany, NY: SUNY Press, 2002) at 26.

65 *Ibid*. at 25-26 (describing how the process of creating a constitution for the Ottoman Empire sharpened divisions among the Ottoman political elites rather than helping to consolidate the regime and that even after the restoration of the constitution in 1908 with provisions that strengthened the hand of the parliament relative to the executive, the crises facing the Ottoman Empire continued unabated).

66 "Imtiyazat" in 3 *Encyclopaedia of Islam*, 2d ed. 1178b at 1188a-88b. Indeed, by the latter half of the nineteenth century, some non-Muslim Ottoman citizens had been able to obtain privileges that were in theory reserved to citizens of European powers.

67 It would be interesting, for example, to contrast the Ottoman experience following the introduction of the new court system with that of Egypt which adopted the Mixed Court system and the French civil code in substantial part as strategies to preserve independence from outside powers,

The political elites of the Ottoman Empire, moreover, were not the only actors involved or interested in legal reform in the late-nineteenth century and the first half of the twentieth century: so too were European powers, first as creditors, and then often as colonial or quasicolonial administrators of Arab successor states to the Ottoman Empire. In order to protect creditors, the British intervened militarily in Egypt, ostensibly to protect its legitimate ruler, the Khedive Tawfiq, and in the process quashed the Egyptian Constitution of 1882.[68] And while it is true that Arab states at the conclusion of the First World War often used the Ottoman Constitution of 1908 as a model for drafting their own constitutions,[69] it is also true that the British, for example, repeatedly frustrated attempts to strengthen constitutional provisions that could have provided for meaningful parliamentary oversight of Arab rulers, preferring to deal with an internally strong but externally weak monarch to one subject to parliamentary oversight, in which nationalist forces would likely dominate.[70]

None of this is to suggest that British or French, or more generally western intervention in the internal politics of the Arab world following the collapse of the Ottoman Empire in 1919 is the sole or even most important cause for the authoritarian regimes prevalent in the Arab world. It does, however, weaken Feldman's claim that jurisprudential developments of the nineteenth century were the primary cause for the rise of authoritarianism in the Arab states.[71]

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particularly Great Britain. Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge; New York: Cambridge University Press, 1997) at 28-30 (stating that Egypt accepted the Mixed Court system as an improvement over the capitulations, despite its limitations on Egyptian independence and that the Egyptian government, in adopting the French civil code, did so more to preserve Egyptian independence in the face of an imminent British invasion rather than out of a desire to break with Islamic law).

68 Brown notes that the domestic process that resulted in the Constitution of 1882, as was the case in the Ottoman Empire, divided local political elites, but that it was the presence of "foreign threats" that led to a decisive break in the two camps. Brown, *Constitutions*, *supra* note 64 at 28. Similarly, the Tunisian constitutional experiment in collapsed in part because of British-French rivalry. *Ibid*. at 18.

69 *Ibid*. at 26.

70 See *e.g.*, *ibid*. at 39 (Britain repeatedly intervened in domestic Egyptian politics in an extraconstitutional manner); *ibid*. at 43-44 (British drafted 'Iraqi constitution ensured that relationship of Britain to 'Iraq would be outside of the constitution and thus beyond Parliamentary control); and *ibid*. at 47 (Jordanian constitution allowed British to determine Jordanian policy and legislation at will).

71 *Supra* note 1 at 150. Feldman's analysis of the rise of Arab authoritarianism following the First World War is also odd in that it seems to contradict the basic policy recommendation he offers at the book's conclusion: that intervention to pre-empt Islamist political parties from assuming power pursuant to electoral victories "is likely to backfire, since the public will see it for what it is, and it will reconfirm the view that the Islamist aspiration to justice is opposed by the West and the local autocrats."

III. THE NORMATIVE COHERENCE OF THE NEW ISLAMIC STATE

Feldman, I believe, is largely correct in pointing out that the "new" Islamic state envisioned by Islamist parties suffers from important doctrinal problems. I disagree, however, to the extent he suggests that these problems relate to the question of how the state can be at once democratic and derive its authority from the *shari'a*.[72] As I suggested in Part I of this review, legislation can be deemed to be a process of regulating the discretionary power of the state, which is merely an agent of the Muslim community, rather than a process of Islamic law interpretation.[73]

Instead, the constitutional dilemma of the modern Islamic state is unearthed in asking how to square the normative assumptions implicit in the Islamic constitution, whether modern or classical, with the explicit constitutional assumptions of the modern state, in which the state is not the representative of only Muslims but of the "people," at least some of whom will be non-Muslims.[74] While it is theoretically coherent for the *shari'a* to serve as a substantive limit on the kinds of actions the state, as an agent of a collective Muslim principal, can take in its name, it is hard to understand why a people — the Egyptian people, for example, an entity that is not defined by religion — would be so bound.

To the extent that the coherence of the democratic Islamic constitution Feldman describes requires a sectarian definition of the body politic, it would appear to represent a dead end in the long run, even if it could very well promote substantial improvements in day-to-day governance in the short- and medium-term. That does not mean, however, that Feldman's policy recommendations are wrong. It does suggest, however, that if Islamist parties were allowed to govern, the democratized *shari'a* could only be an intermediate step in the long-term constitutional reform of the states comprising the Arab world.

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72 *Supra* note 1 at 119-23.

73 This "negative" role for the *shari'a* approaches the method used by the Egyptian Supreme Constitutional Court in interpreting Article 2 of the Egyptian Constitution which makes the *shari'a* the principal source of Egyptian legislation.

74 See for example, the Proclamation to the Egyptian Constitution which speaks in the name of "We, the people of Egypt." See *Constitution of the Arab Republic of Egypt* online: Egypt State Information Service <http://constitution.sis.gov.eg/en/2.htm>. To be fair to Feldman, he raises the problem of equality in another work. See Noah Feldman, *After Jihad: America and the Struggle for Islamic Democracy* (New York: Farrar, Straus and Giroux, 2003) at 62-69 (discussing the problem of equal citizenship within Islamic political thought).

Ultimately, the challenge facing Islamist political movements will be to set out the terms under which Muslims, subject to their ethical commitments to observe the *shari'a*, can agree to be bound by a constitution that also represents non-Muslims on the basis of equality. More theoretically inclined Islamist thinkers, such as the Egyptian historian and retired judge Tariq al-Bishri, for example, already have pointed out that political equality of Muslims and non-Muslims is the *sine qua non* of the long-term success of any Islamist political project.[75] While the democratized Islamic constitution described by Feldman does not seem to address this concern, it nevertheless represents an important step toward that goal by transforming the *shari'a* from an affirmative source of political obligation to a set of restraints on political outcomes. This conception of the *shari'a* points the way to the kind of a non-Islamic constitution that religiously committed orthodox Muslims could endorse in good faith: if a non-Islamic constitution does not permit political outcomes that violate the moral integrity of Muslims, then it would appear that Muslims could endorse such a constitution, even if it is non-Islamic. Theorizing the outlines of a non-Islamic constitution that would satisfy this requirement is well beyond the scope of this review, but it is a task that urgently deserves the attention of political philosophers and Islamist thinkers committed to the project of a democratized *shari'a*.

75 Leonard Binder, *Islamic Liberalism: A Critique of Development Ideologies* (Chicago: University of Chicago Press, 1988) at 248.