Nature, Revelation and the State in Pre-Modern Sunni Theological, Legal and Political Thought

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Introduction

The pre-modern Islamic theological, legal and political tradition—understood for purposes of this paper as the period between the 9th and 18th centuries—represents a complex synthesis of pre-Islamic Arabian, Near Eastern, Central Asian and Hellenistic traditions with the revelation given to Muḥammad ibn ʿAbd Allāh (d. 632) in seventh century Western Arabia. The Islamic tradition, therefore, is multifaceted, incorporating ancient Greek and Hellenistic philosophy, pre-Islamic Near Eastern wisdom traditions, the heroic values of Arabian paganism, and notions of divine kingship found in Turko-Iranian Central Asian traditions. This synthesis manifested itself in numerous literary genres, including, speculative philosophy (*falsafa*) in the ancient Greek and Hellenistic traditions, rationalist theology (*kalām*), traditionalist theology (*ʿaqīda*) and law (*fiqh*), and belle-lettres (*adab*), each of which offered a distinctive point of view on questions of nature, revelation, law and the state. It would be an error, moreover, to assume that impermeable barriers separated these various disciplines and approaches to understanding the world. Not only were many Muslim authors polymaths, and therefore composed works in several of these traditions, but there can be little doubt that the views expressed, and the tastes developed, in these various domains regularly crossed the self-defined boundaries of their respective genres and intruded into the domains of others, if only because pre-modern Muslim intellectuals would have had at least some exposure to these various different traditions, all of which, one way or another, contributed, even if in varying degrees, to the formation of an 'Islamic' *weltanschauung*.[1]

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[1] The great Shāfiʿī authors, al-Māwardī (d. 1058) and al-Ghazālī (d. 1111), as well as the Mālikī jurist and philosopher, Ibn Rushd (d. 1198; Lat. Averroes), are exemplars of the broad range of interests that preoccupied medieval Muslim intellectuals. Al-Māwardī, for example, although known primarily as a Shāfiʿī jurist, also wrote an important work on ethics from a secular perspective, *Adab al-dunyā wa-l-dīn*

It goes without saying, therefore, that it would be impossible to provide an exhaustive survey of the Islamic tradition with respect to perspectives regarding nature, revelation and the state; moreover, it would be absurd to attempt to reduce the pluralism of the Islamic tradition on these questions to one *Islamic* position on nature, revelation and the state. Accordingly, this paper will limit itself to the Sunni theological and legal traditions on these matters, with the caveat that even with this qualification there is the real risk of obscuring the richness and diversity of thought on these questions within the Sunni theological and legal traditions. Nevertheless, I will focus on the idea of divine law and its relationship to nature as articulated by the majority of Sunni Muslim theologians in the discipline of theological ethics (*uṣūl al-fiqh*) and Sunni positive law (*fiqh*), and the Sunni conception of the state, the outlines of which, I argue, can be discovered through a careful reading of various doctrines of Sunni positive law. This paper's relatively narrow focus on law stands in sharp contrast to the papers of my interlocutors and fellow contributors, Joan Lockwood O'Donovan and Russell Hittinger, whose papers,[2] despite their differences, both seem to share a certain regret at the increasing turn toward legalism in Christian theology as a result of the transition to modernity. The prominence of a legal approach to ethics in the Islamic tradition from its earliest days, as well as the post-Enlightenment Christian tradition, may perhaps offer an interesting window into considering the long-term developments of Abrahamic traditions as they evolved out of late Antiquity, through the Middle Ages and into modernity, but weaving together such a narrative is too ambitious for this paper.[3] At the same time, the kind of integration between law, theology and philosophy suggested by the papers of Joan Lockwood O'Donovan and Hittinger as being the natural desideratum of Christianity is not something completely unfamiliar to the Islamic tradition, take, for example works such as *al-Dharīʿa ilā makārim al-sharīʿa* [The Means to Understanding the Virtues of the Revealed Law] of al-Rāghib al-Isfahānī (d. 1108 or 1109) or the *Iḥyāʾ ʿulūm al-dīn* [Reviving the Religious Sciences] of al-Ghazālī (d. 1111), both of which give an account of Islamic ethics from a broader philosophical, indeed, Aristotelian, perspective. Incorporating the ethical, theological and political theories of the Muslim philosophers such as al-Fārābī (d. *ca.* 950), Ibn Sīnā (d. 1037; Lat. Avicenna) and Ibn Rushd (d. 1198; Lat. Averroes), among others, is also, unfortunately, beyond the scope of this article and must be left for another day. But since

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[Ethics of Secular and Religious Life], as well as works on political ethics from the Iranian mirror of princes tradition. Ghazālī, too, wrote numerous philosophical, theological and mystic works as well as works of law. Averroes, although known primarily in the Latin West in his role as a commentator on Aristotle, was also a prominent Mālikī jurist in his own right, authoring an important treatise of comparative law, *Bidāyat al-mujtahid wa-nihāyat al-muqtaṣid*, and in legal theory and theology, *al-Kashf ʿan manāhij al-adilla*.

[2] Joan Lockwood O'Donovan, 'Law and Moral Community in Pre-Modern Christian Thought: Continuity and Discontinuity in the Western Tradition', *The Muslim World*, 106:2 (2016): 291–305; F. Russell Hittinger, 'Natural Law and Wisdom Traditions', *The Muslim World*, 106:2 (2016): 313–336.

[3] On this possibility, see Armando Salvatore, *The Public Sphere: Liberal Modernity, Catholicism, Islam* (New York: Palgrave, 2007), esp. chaps. 3 and 4, where the author argues that medieval Catholicism and Sunni Islam played crucial roles in creating a lay system of public reasoning that paved the way for the formation of the liberal public sphere.

this article grows out of the desire to initiate 'new conversations' in Islamic and Christian political thought, it is encouraging to know that there remains much ground on which those new conversations can be pursued fruitfully. For now, however, the conversation will be limited to Sunni Muslim conceptions of revealed law, its relationship to nature, and the relationship of revealed law to the state.

Sunni Theological Debates on the Nature of Divine Law between Reason and Revelation

While scholars continue to contest many of the details of early Islamic legal history, there is little dispute that Islamic substantive law, *fiqh*, preceded a theoretical account of the origins of the law. The discipline that attempts to account for the law's origins is known as *uṣūl al-fiqh*, literally, the 'foundations of understanding'. It is useful to dwell, if only for a moment, on the literal meaning of this term, itself a compound noun. The second noun, *fiqh*, although it came to designate 'law', literally means 'understanding', and it is in that sense which the Qur'an uses when it rhetorically asks, 'What ails those people? They scarcely comprehend (*yafqahūna*) even a single statement!',[4] and when it says 'We have certainly prepared Hell for many of the jinn and human-kind; they have hearts but do not use them to understand (*yafqahūn*)'.[5] The word *uṣūl*, on the other hand, is a plural of the noun *aṣl*, which means 'origin', or 'root', or in the case of a tree, its 'trunk', as compared to its branches, which in Arabic is *furūʿ* (sing. *farʿ*). The compound noun *uṣūl al-fiqh*, therefore, refers to how we come to understand divine law, it being understood that our 'understanding', our *fiqh* of divine law, is a product of a certain approach to understanding. The method which we use to understand divine law constitutes our *uṣūl*, the roots of the law, while the conclusions reached by the good faith application of our method of inquiry are merely the 'branches' that grow out of these methodological principles. Although the branches are derivative in this metaphor, it is the branches which represent the actual rules regulating the behavior of Muslims, individually, and collectively.

The other crucial point is that 'understanding' from the Qur'anic perspective is subjective: it takes place at the level of each individual, and the goal of revelation is to produce individuals whose hearts 'understand' revelation. This subjective perspective on law in turn manifests itself in the Muslim jurists' definition of *fiqh* as knowledge of how the divine lawgiver judges the actions of those subject to the law (*mukallafūn*).[6] It is therefore a theological conception of the law insofar as its primary concern is understanding how God judges human action; it is only secondarily concerned with law in the

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[4] *Qur'an* 4:78 (*al-Nisāʾ*): *fa-mā li-hāʾulāʾi al-qawmi lā yakādūna yafqahūna ḥadītha.*
[5] *Qur'an* 7:179 (*al-Aʿrāf*): *wa la-qad dharaʾnā li-jahannama kathīran min al-jinni wa-l-insi la-hum qulūbun lā yafqahūna bi-hā.*
[6] Accordingly, al-Ghazālī defines *fiqh* as 'an expression for the knowledge of the established revelatory rules governing actions of persons with moral capacity (*ʿibāra ʿan al-ʿilm bi-l-aḥkām al-sharʿiyya al-thābita li-afʿāl al-mukallafīn*); al-Ghazālī, *al-Muṣṭasfā* (Beirut: *Dār al-Kutub al-ʿIlmiyya*, 1993), 5.

273

sense of regulating human conduct from the perspective of what is good for humans from a human perspective, although as we shall see, Muslim jurisprudence developed theories whereby there was a presumed identity between what God demanded of humans and what the actual good of humans as humans is. But, the main point is that the 'understanding' which is the desideratum of Muslim legal inquiry is not, in the first instance, an 'understanding' of what humans should want considered solely as humans, but rather what humans should want from the perspective of humans as servants of God. It is therefore a theocentric conception of law and ethics. *Uṣūl al-fiqh*, meanwhile, is primarily the meta-theory that governs our inquiry into our understanding of divine law, from whence it can be discovered, the tools of reasoning that can be used in interpreting its material sources, to the extent reasoning on such matters is permitted, and determining who is qualified to engage in such reasoning.[7]

In this context, we are interested in the extent to which Sunni theologians understood nature to be an independent source of knowledge of divine law. Muslim jurists took up this issue largely in connection with their answers to two highly-contested questions. The first question was the status of human actions before the advent of revelation (*ḥukm al-ashyāʾ qabla wurūd al-sharʿ*), and the second was whether pure reason could determine the essential goodness or evilness of actions (*al-taḥsīn wa-l-taqbīḥ al-ʿaqliyyayni*).[8] Oversimplifying, Sunni Muslim jurists and theologians divided into two camps on these questions, largely as a result of the extent to which they believed that moral knowledge was generated exclusively through divine revelation or whether reason was also a source of moral knowledge. The Ashʿarīs generally affirmed that revelation was the exclusive source of moral knowledge, while the Muʿtazilīs took the view that pure reason was a source of at least *some* moral knowledge. If a jurist or theologian was a Muʿtazilī, or sympathetic to some Muʿtazilī ethical doctrines, he would be likely to affirm the proposition that even prior to the advent of revelation, human beings could adopt a presumption that their actions were morally permissible (*ibāḥa*), at least where no apparent harm would ensue as a result of the conduct, and that human beings were subject to at least *some* moral obligations for which they could be fairly accountable before God, such as the obligation to thank a benefactor, to save a drowning person from death, and the sinfulness of oppression.[9] Ashʿarīs, on the other hand, or those sympathetic to them, took the position that before the advent of revelation, human action was not governed

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[7] Al-Ghazālī defines *uṣūl al-fiqh* as 'an expression of the proofs of these rules [of *fiqh*] and knowledge of how they indicate the particular rules [as a matter of inference] as a general matter, not in their particulars (*ʿibāra ʿan adillat hādhihī al-aḥkām wa ʿan maʿrifat wujūh dalālatihā ʿalā l-aḥkām*); al-Ghazālī, *Muṣṭasfā*, 5.

[8] For a good overview of the main features of this debate, along with translations of important texts in the debate, see Kevin Reinhart, *Before Revelation* (Albany, NY: State Univ. of New York Press, 1995).

[9] Abū l-Ḥusayn al-Baṣrī (d. 1085) may be taken as a representative figure of the Muʿtazilī position on these matters. See Abū l-Ḥusayn al-Baṣrī, *al-Muʿtamad fī uṣūl al-fiqh*, ed. Khalīl al-Mays (Beirut: *Dār al-Kutub al-ʿIlmiyya*, 1983), 315–22.

by any norm of divine law (*lā ḥukm*), and moreover, that pure reason is incapable of making true judgments regarding good and evil, and therefore, no obligation under divine law exists prior to revelation's communication of such obligations.[10]

We should not, however, exaggerate the differences in these ethical theories, nor misunderstand what was at stake. Both sets of theologians were concerned primarily with knowledge of the content of divine law. Accordingly, when the Ashʿarīs denied that pure reason could generate knowledge of an obligation, what they had in mind was an obligation toward God. This is clear from Ghazālī's discussion of whether pure reason is sufficient to generate an obligation of gratitude to a benefactor, e.g., God, before revelation, and concludes that it cannot because it is impossible for reason to know whether God desires humans to show gratitude to Him through worship at all.[11]

The general Ashʿarī skepticism of the utility of reason in discovering the content of *divine* law, however, is irrelevant to whether or not they believed reason was also an unreliable guide for *human* law-making. Indeed, there is plenty of evidence that numerous Ashʿarī theologians affirmed the reliability of human reason as a guide to discerning good and evil from a humanistic perspective. For example, the twelfth century Syrian Ashʿarī theologian and Shāfiʿī jurist, ʿIzz al-Dīn ibn ʿAbd al-Salām (d. 1262) expressly stated that human reason is generally sufficient to allow humans to discover their own, secular goods, unaided by revelation, and in most cases—at least outside of devotional matters—there will be a happy congruence between what revelation commands and what human reason discovers.[12] The great Central Asian Shāfiʿī jurist and theologian, Fakhr al-Dīn al-Rāzī (d. 1209), affirmed reason as grounds for interpersonal obligation, while denying that what reason recognizes as obligatory for human beings necessarily binds God insofar as human beings, *qua* human beings, have objective needs that can't be ignored, while God, because of his omnipotence, has no needs and therefore cannot be limited by rational judgments.[13]

Rāzī's explanation of the relationship of reason to divine law suggests that the medieval debates between Muʿtazilīs and Ashʿarīs were more about divine freedom rather than the reliability or competence of human reason as such in knowing good and evil. The important point is that even from the perspective of Ashʿarīs, human reason was in principle a reliable guide to what constituted good behavior, but one could not trust one's reasoned conclusions in the absence of revelation from God confirming those judgments.

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[10] Ghazālī may be taken as a representative figure of the Ashʿarī position granting revelation a monopoly of moral knowledge. See, al-Ghazālī, *Muṣṭaṣfā*, 45.

[11] Al-Ghazālī, *Muṣṭaṣfā*, 49–50 (pure reason is unable to discern whether God would punish us or reward us for showing gratitude to Him in the form of worship prior to revelation commanding us to do one or the other).

[12] ʿIzz al-Dīn ibn ʿAbd al-Salām, *Qawāʿid al-aḥkām fī maṣāliḥ al-anām*, 2 vols. (Beirut: *Dār al-Maʿrifa*, 1968), 1:4.

[13] Fakhr al-Dīn al-Rāzī, *Mafātiḥ al-ghayb*, 32 vols. (Cairo: al-Maṭbaʿā al-Bahiyya al-Miṣriyya, 1934–62) 20:174.

The Ashʿarī critique of Muʿtazilī 'rationalist' ethics is not so much a rejection of rationalism in ethics as it is a criticism of the Muʿtazilīs for making assumptions about the nature of good that themselves could not be justified on the basis of pure reason. Revelation, according to the Ashʿarīs, itself provides the basis for believing that our rational understanding of good and evil—when confirmed by revelation—provides a reliable basis for human understanding of divine law. The perceived congruence between reason and revelation, however, is not a matter of rational necessity, but by virtue of divine grace (*faḍl*).

Having come to the conclusion that reason was potentially a reliable tool in discovering divine law, and with revelation's actual negation of the doubts that pure reason would have regarding its ability to know divine law, Ashʿarī theologians, beginning as early as Ghazālī, if not earlier, set about understanding divine law as *though* it were consistent with the conclusions of natural reason, and so articulated a theory of revelation that argued that divine law, as an empirical matter, confirmed by a thorough induction of revelation, furthered five universal ends (*al-maqāṣid al-kulliyya*): the protection of religion (*dīn*), life (*ḥayāt*), property (*māl*), progeny (*nasl*) and mind (*ʿaql*). They also argued that these five universal ends of revealed law were not particular to Islamic law, but were characteristic of all the pre-Islamic revealed laws and represented values that were also held in common with Greek philosophy (*falsafa*). Differences found among various cases of revealed law as well as differences between revealed law generally and philosophy was primarily the result of different weightings of the same goods rather than representing categorical incommensurability.[14] The most systematic articulation of the *maqāṣid* understanding of revealed law and how we humans are to understand it rationally comes in the work of the eminent Spanish Muslim jurist, al-Shāṭibī (d. 1388) as articulated in his work of theoretical jurisprudence, *al-Muwāfaqāt*.[15] The theory of revealed law's universal ends in turn has been taken up eagerly in the modern era by Muslim reformers who seek to use the meta-theory of *maqāṣid* to justify various reforms of Islamic substantive law that goes beyond the historical doctrines of Islamic law.[16]

Theoretical Jurisprudence and the Problem of Legal Indeterminacy

Muslim theology, over its long history, sought a synthesis between a conception of law that was revealed in a more or less determinate body of texts, on the one hand, and a conception of law that was consistent with the conclusions of natural reason, on the

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[14] Mohammad Fadel, 'The True, the Good and the Reasonable', *Canadian Journal of Law and Jurisprudence* 5 (2008): 55–6. For a detailed treatment of the various theories articulated by medieval Muslim jurists that sought to reconcile revelation with reason, see Anver Emon, *Islamic Natural Law Theories* (New York: Oxford Univ. Press, 2010).

[15] Al-Shāṭibī, *al-Muwāfaqāt fī uṣūl al-sharīʿa*, ed. ʿAbdallāh Dirāz, 4 vols. (Beirut: *Dār al-Maʿrifa*, 1975).

[16] For an overview of the place of the *maqāṣid* in the reasoning of modern Muslim reformers, see Andrew March, 'Theocrats Living Under Secular Law: An External Engagement with Islamic Legal Theory', *Journal of Political Philosophy* 19:1 (2011): 34–8.

other. This did not mean, however, that all important issues were resolved. Indeed, their shared conception of divine law—whether it was contained exclusively in revealed texts, as in the Ashʿarī conception, or whether reason's conclusions operated in an independent and complementary fashion to revealed texts, as in the Muʿtazilī conception—required careful attention to the words of revelation. I am aware of no Muslim theologian, for example, that claimed that the results of natural reasoning could abrogate an express command of revelation. Accordingly, whether a jurist was sympathetic to the Ashʿarī or Muʿtazilī understanding of the relationship of nature to divine law, all Muslim jurists agreed that texts were an indispensable source for understanding the content of divine law. From this perspective, therefore, it is unsurprising that much of *uṣūl al-fiqh* is concerned with questions of epistemology, both as a general matter, and with the specific problem of how to obtain knowledge of divine law. Another shared assumption which was crucial to the subsequent development of *uṣūl al-fiqh* was that the texts of revelation were not themselves divine law, but rather served as *evidence* (*adilla*; sing. *dalīl*) of the content of divine law, and accordingly, the detailed content of divine law inevitably required the use of human inference and reasoning (*istidlāl*).

Generic accounts of *uṣūl al-fiqh* often present it as little more than the so-called four source theory, namely, that Muslim jurists recognized four material sources from which divine law might be discovered: the Qur'an; the normative practice of the Prophet Muḥammad, known as the *sunna*; consensus, known as *ijmāʾ*; and finally, analogy, known as *qiyās*. But reducing *uṣūl al-fiqh* to the 'four source' theory not only reduces this discipline to a question of what are the material sources of divine law, it also is misleading insofar as it fails to identify the more controversial and substantive debates found in *uṣūl al-fiqh* related to questions such as the nature of language, hermeneutics, how the material sources themselves are defined, how they are to be weighed in the event of conflict, who is authorized to derive judgments regarding the content of divine law, and what is the epistemological/theological/ontological status of such judgments, on the assumption that human judgment is an admissible procedure for understanding and deriving divine law from revelation in the first place. Behind the superficial agreement among Sunnis to consider these four material sources as containing indicants of divine law, lay substantial disagreement on nearly all these other questions.

As a practical matter, while Sunni jurists were in broad agreement as to the admissibility of the so-called 'four sources' in legal reasoning, what constituted normative Prophetic practice, how consensus ought to be defined, and what kinds of analogy, to say nothing of when analogy was admissible, were matters of deep and abiding controversy. The only material source that was non-controversial was the first source, the Qur'an, but although there was no controversy as to the contents of the Qur'an, nor any doubts that it had been reliably transmitted over time from the Prophet Muḥammad to the present day, there were substantial disagreements as to how its legal provisions (which themselves constituted only a small part of its text) should be understood. These deep methodological disagreements no doubt were significant in producing the epistemological bent of *uṣūl al-fiqh*. The epistemological focus of *uṣūl al-fiqh* is reflected in the juristic

taxonomy of indicants of divine law in relation to two variables: historical certainty with respect to its attribution to the Lawgiver (*thubūt*), and interpretive certainty with respect to the Lawgiver's intended meaning (*dalāla*).

Accordingly, any jurist who attempts to use a text as evidence for a particular rule of divine law had first to establish, as a historical matter, that the text in question could be appropriately attributed to the Lawgiver. This was not problematic with respect to the Qur'an according to Muslim jurists because of the fact that its text reached us through such a large and widely-dispersed number of individuals that it was inconceivable that the unity of the text they transmitted could be explained either as a coincidence or a conspiracy. The only explanation for the observed unity of the Qur'anic text was that it had a single source, specifically, the Prophet Muḥammad. Muslim jurists referred to any historical report that met the prerequisites of widespread and concurrent historical transmission as *mutawātir* and believed that it produced certain knowledge of past events (with *tawātur* referring to the concept of widespread and concurrent transmission).

Aside from the Qur'an, however, no other texts containing indicants of the divine law could satisfy this requirement. Historical reports about the Prophet's teachings and practices could only be known by the transmissions of particular individuals. For that reason, Muslim jurists referred to these reports as 'reports of individuals' (*āḥād*; sing. *aḥad*). These individual reports could not be guaranteed either to be free from error or even not to be products of outright fabrication. Accordingly, a recipient of a report was under an obligation to investigate the likelihood that its claimed attribution to the Prophet Muḥammad was reasonable before it would be admissible as an indicant of divine law. While Muslim scholars by the third Islamic century (ninth century CE) developed critical techniques intended to sort reliable reports from those that were not, jurists insisted that because of the mode of the transmission of these reports, individual reports could never claim more than a *probable* attribution to the Lawgiver, even in the best of circumstances. Accordingly, the particular texts documenting the historical teachings of the Prophet Muḥammad could only produce a probable opinion (*ẓann*) regarding the content of divine law, even in cases where the purported teachings found in the report are themselves textually clear. Consensus, although in theory an infallible source of knowledge regarding the content of divine law, suffered from conceptual ambiguities, and because it was essentially a claim about the past, claims of consensus were always subject to doubt regarding the veracity of the claim.[17]

Disputes regarding the veracity of the attribution of various reports to the Prophet Muḥammad or the occurrence of consensus played an important role in generating controversy among Muslim jurists about the content of divine law. Just as important, however, were disputes as to the meaning of various revealed texts. In other words, jurists might agree that a particular text was validly attributed to the Prophet Muḥammad, but

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[17] For an overview of the doctrine of consensus, see Wael Hallaq, 'On the Authoritativeness of Sunni Consensus', *International Journal of Middle East Studies* 18:4 (1986): 427–54.

they might nevertheless derive different legal inferences from the reported statement or practice.[18] Interpretive disputes among the jurists could be a product of numerous factors, such as differing hermeneutical understandings of the text, or the extent to which extra-textual circumstances should be taken into account in understanding the text. Out of a recognition that jurists in good faith could come to different legal conclusions about the meanings of texts held in common, or about which sources of divine law should be considered dispositive on particular issues, Sunni jurists distinguished between rules based on the considered opinion (*ẓann*) of a qualified jurist (*mujtahid*), and those rules that were known of necessity to be constitutive of divine law and therefore were not dependent on the reasoning of specialized interpreters. Jurists referred to such rules using various names, such as 'that which is known to be part of the law by necessity (*al-maʿlūm min al-dīn bi-l-ḍarūra*)', or 'conclusive rules (*aḥkām qaṭʿiyya*)', to contrast them from the speculative rules developed by the jurists through legal reasoning.

Accordingly, the epistemological strength of a particular rule was a function of two different variables, one historical and the other interpretive. A text could be definitive in terms of its attribution to the Lawgiver, in which case it would be referred to as having certainty with respect to attribution (*qaṭʿī al-thubūt*), or its attribution to the Lawgiver could be probable (*ẓannī*). Otherwise, its attribution to the Lawgiver might be considered improbable (*ḍaʿīf*), or without basis, i.e., forged (*mawḍūʿ*). As a general rule, the contents of divine law could only be derived from texts whose historical attribution to the Lawgiver were either certain or probable. Texts were also divided semantically in accordance with the clarity or ambiguity of their meaning. Accordingly, a text that bore no semantic ambiguity was referred to as certain with respect to its meaning (*qaṭʿī al-dalāla*), while texts which communicated a likely meaning, but also conveyed a secondary possible intent were referred to as probable with respect to its meaning (*ẓannī al-dalāla*). Only if a text were certain with respect to both variables could one conclude that the rule produced was itself certain. Otherwise, the rule only represented a *probable* determination of the content of divine law.

Most rules of Islamic law, as a result, could only claim to be probable rulings, at least according to the Sunnis. Equally important in this context, however, was that because these derivative rules were merely probable, they were also non-uniform, insofar as different jurists arrived at different conclusions regarding the content of divine law as applied to specific cases. The willingness of Sunnis to countenance probable conclusions as valid expressions of the content of divine law, combined with a plurality of qualified legal interpreters (*mujtahid*), eventually produced a system of normative pluralism, whereby these different conceptions of divine law—which could often substantially conflict on derivative matters (derivative at least from the perspective of theology)—existed side by side in a system of mutual recognition that can be accurately characterized as normative pluralism. It was a pluralistic conception of divine law simply by virtue of the

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[18] See, for example, Fadel, '*The True, the Good and the Reasonable*', 59–60.

fact that numerous competing opinions existed at any time; this system of pluralism was normative because it was inherent to the entire project of Islamic law conceived of as a project of human interpretation of divine revelation that did not allow for any living human being, after the death of the Prophet Muḥammad, to claim direct access to divine law. While Sunni jurists were divided as to whether a single correct rule corresponding to the actual content of divine law existed for all cases, such that only one of the expressed opinions of the jurists was correct and the others wrong, they agreed that even on the assumption that only one of the different opinions of the jurists could be the correct opinion, it was impossible to know which of the various opinions was the correct one. They also agreed that those jurists who were mistaken were not only *not* morally culpable for their good faith error, but that they would also be positively rewarded on the basis of their good-faith, but mistaken, effort to discover God's rule for the case.[19]

While Sunnis believed that acting in conformity with a probable conception of divine law, at least from the perspective of a morally-competent individual, was sufficient to live a morally acceptable life before God, it meant that, from a political perspective, divine law, on its own, could not serve as a basis for adjudicating most quotidian disputes, at least in circumstances where disputants had a good faith basis for believing that they were each acting in conformity with divine law. This pluralistic conception of divine law as it applied to practical matters of secular life no doubt gave great impetus for Muslim jurists to theorize the role of a state as prerequisite for rendering divine law an effective tool of social governance. I now turn to this topic.

The Place of the State in Sunni Conceptions of Divine Law

From a theological perspective, the diverse answers that Muslim jurists gave to quotidian legal questions, such as the formula that were used to initiate various civil transactions, or to contract or dissolve marriages, were all equally plausible conceptions of divine law, and accordingly, individuals were morally entitled to act on the basis of such opinions from a religious perspective. But what would happen if there were an interaction between two individuals with contrasting, and in that particular case, incompatible conceptions of divine law? Ghazālī, for example, gives the hypothetical of a husband

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[19] Muslim jurists are divided on this question into two camps. Those who held that there was a single correct legal rule for each case and that all other opinions were erroneous conceptions of divine law were known as *al-mukhaṭṭi'a*. The second group of jurists, known as *al-muṣawwiba*, opined that in the absence of an express rule found in revelation, Muslims were subject to a meta-ethical norm to exercise judgment in good faith (*ijtihād*) to determine the status of the indeterminate act in light of what was expressly contained in revelation. In all cases determined by good faith judgment, the ethical obligation is to follow the results of one's good faith interpretation, if one was a qualified interpreter of revelation (*mujtahid*), or to follow the reasoning of a qualified interpreter of revelation, if one was not qualified to interpret revelation independently (*muqallid*); Fadel, 'The True, the Good and the Reasonable', 44–7.

and wife, each of whom is a qualified independent interpreter of the law, who disagree as to whether a certain utterance made by the husband constitutes a binding expression of divorce. Because both the husband and wife are each qualified interpreters of revelation, they are morally obliged to follow the results of their own reasoning, but in following the meta-ethical principle that applies in areas where revelation fails to provide an express rule, the two are at loggerheads: the husband insists she is his wife, while the wife insists she is now divorced. It is impossible to reconcile these two views because, unlike a contract dispute, for example, the wife cannot simply compromise her claim, for to do so would cause her, from her perspective, to be engaged in illicit cohabitation.

The solution, Ghazālī tells us, is that they must submit their dispute to a judge (*qāḍī*), and the judge's interpretation of the law becomes binding on them both.[20] Ghazālī's solution—adopt the reasoning of the judge—raises its own problems, among them, how is it possible that a ruling of the judge can effect a *pro tanto* repeal of the otherwise applicable meta-ethical norm that individuals—in cases where no express rule of revelation controls—are under an obligation to follow their own good faith moral reasoning based on a comparison of the case at hand with cases which revelation had conclusively resolved? While this is an essentially theological problem, Ghazālī's solution also raises an institutional problem: who is this figure, the *qāḍī*, and by virtue of what authority is his judgment given authority to pre-empt the good faith moral judgments of other individuals who, by hypothesis, are also acting in good-faith, and have a *prima facie* claim to be acting in a lawful manner?

Muslim jurists had long disputed whether a judge's verdict could alter the underlying moral rule that governed the disputed case, but over time, and certainly by the fourteenth century, they had generally come to the view that the judge's ruling conclusively resolved the dispute between the parties, not only in terms of the parties' rights and obligations in this world, but also as a moral matter between the parties and God.[21] As explained by al-Qarāfī (d. 1285), the moral effect of a judge's decision not only bound the disputants, it also bound the rest of the world, meaning that jurists who, prior to the judge's resolution of the dispute, would have been entitled to opine that a certain transaction or marriage was invalid, for example, were obligated to adopt the judge's reasoning *for that case*, and recognize the validity of that transaction or marriage, despite the fact that they had previously believed it to be invalid. For example, suppose an adult, but never-previously married, woman freely enters into a marriage with an eligible suitor, but without the prior consent of her father, who is present in the town. According to a majority of Muslim jurists, such a marriage would be invalid, because a condition of validity of such a marriage is the consent of the woman's father. Suppose, however, the father brings a suit to invalidate the marriage, and the case is heard by a judge who

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[20] Al-Ghazālī, *Muṣṭaṣfā*, 356–57.
[21] For an overview of the various debates on the moral effects of judge's ruling, see Mohammad Fadel, 'Forum, Exterior (*Ẓāhir*), and Interior Forum (*Bāṭin*)', in Stanley N. Katz (ed.), *Oxford International Encyclopedia of Legal History*, 6 vols. (New York: Oxford Univ. Press, 2009), 3:97–8.

believes that an adult woman, whether or not previously married, is free to enter into a marriage contract without her father's consent, and upholds the marriage. In this case, his ruling not only conclusively establishes the moral validity of this marriage as between the couple and the bride's father, but it also stops jurists who believe that marriages concluded by a never-previously married woman require the father's consent from opining that their marriage is invalid. Rather, if they are asked about the validity of that woman's marriage, they must say, 'It is a valid marriage, because a judge has ruled that it is valid'.[22]

But the conclusion to clothe judicial decisions with moral authority that superseded the pre-political interpretive authority of divine law was itself a product of several centuries of theological, moral and legal debate, and was in no way a doctrinally inevitable outcome, at least as viewed from the perspective of the earliest Muslim community. Judges, then, had the paradoxical authority to resolve conclusively quotidian disputes in accordance with divine law despite the fact that divine law, on its face, did not provide conclusive answers to those quotidian disputes. The authority to do so, however, was not by virtue of some inherent quality in the judges, or something about their function that was oracular, but rather by virtue of the combination of having been validly appointed to the office of judge *and* their adherence to the rule of law by ruling in accordance only with established rules of evidence and valid rules of substantive law. It was only as a result of the maturation of Sunni thinking about the nature of public order, as evidenced in works such as *al-Aḥkām al-sulṭāniyya* [The Ordinances of Government] of the aforementioned al-Māwardī, and its relationship to the public order, that the morally constitutive role of the state could be explicitly theorized.

But, how could a stable rule of law have arisen if, according to the epistemological assumptions of *uṣūl al-fiqh*, legal disputes were generally resolved only by a probable conception of divine law which admitted the plausibility of numerous solutions to the same issue? Indeed, many jurists argued that a qualified interpreter of the law, a *mujtahid*, was obliged to review his own reasoning each time a case was presented to him to insure that he or she had not changed his or her mind as a result of new information.[23] Under such a norm, it would be hard to see how a stable body of rules could emerge that would support the rule of law. The solution, again, was political: because theological doctrines did not permit recognition of a human authority that could determine which conflicting view was the 'correct' conception of divine law, Sunni jurists in the Middle Ages applied the doctrine of 'deference', *taqlīd*, to place a limit on the spectre of legal indeterminacy and put a limit on legal pluralism. By the thirteenth century, if not earlier, judges had ceased being *mujtahid*s, and instead were *muqallid*s, jurists who

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[22] Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (New York: Brill, 1996), 171–74.
[23] Mohammad Fadel, '*Istafti qalbaka wa in aftāka al-nāsu wa aftūka*': The Ethical Obligations of the *Muqallid* between Autonomy and Trust', in A. Kevin Reinhart and Robert Gleave (eds.), *Islamic Law in Theory: Studies in Jurisprudence in Honor of Bernard Weiss* (Boston: Brill, 2014), 109–10.

practiced deference to previous authorities, and were bound to uphold the rules of prior masters.[24] Judges who applied rules that were not approved by established authorities were likely to have their rulings overturned, while judges who respected established legal doctrines could be certain that their rulings would be respected under the Islamic legal principle which is similar to *res judicata*: that a prior judicial ruling based on a reasonable interpretation of the law (*ijtihād*) is not to be overturned by a subsequent court based on a different interpretation of the law (*ijtihād*).

In addition to the effective reduction of legal pluralism by reducing the scope for novel interpretations of revelation, Muslim jurists in the Late Middle Ages also articulated a doctrine that enabled a reviewing court to overturn a prior decision in situations where the prior court issued a ruling based on a rule that could not be justified within the constraints of the shared interpretive assumptions of the Sunni jurists themselves. Accordingly, if a judge's decision contradicted consensus, an *a fortiori* analogy, a clear scriptural text (*naṣṣ*) or general legal principles, it was to be overturned.[25] This principle no doubt had the effect of reducing differences among the different Sunni authorities, or at a minimum, helped reduce the scope of legal differences to those that had been previously recognized as legitimate by the jurists themselves. While the rise of *taqlīd*, and the various doctrines designed to reduce the scope for different interpretations of divine law could be described as non-political doctrines, their effectiveness was dependent upon the fact that judicial rulings were enforceable only to the extent that they adhered to these doctrines. It is unlikely that such doctrines could have gained any long-term traction if, in fact, they were not supported by the state that appointed judges and enforced their decisions against recalcitrant parties.

The quotidian application of divine law, and its ability to act as an effective moral regulator of the social world, therefore, could not proceed without a state which appointed judges, without whom it would have been impossible to provide conclusive rules in circumstances where mere interpreters could only provide guesses, reasonable guesses to be sure, but guesses nonetheless, regarding the specific content of divine law. At the same time, the existence of the state was necessary to insure that the interpretive project of the discovery of divine law by human interpretation did not degenerate into an irresponsible cacophony of arbitrary opinion by allowing for the best-reasoned and best-attested opinions to crystallize into law that was publicly recognized and enforced. The state, in an important sense, was a prerequisite to the effective functioning of divine law in the Sunni conception as a system for the resolution of quotidian disputes. But did the Sunnis have a conception of the state that went beyond merely a neutral arbiter of divine law among its citizens? As I will argue below, the answer is yes: Sunni jurists, certainly by the fourteenth century, had developed a theory of the state that allowed it to

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[24] For an account of how the Islamic judicial system evolved from one based on independent legal reasoning to one rooted in deference to prior doctrine, see Mohammad Fadel, 'The Social Logic of *Taqlīd* and the Rise of the *Mukhtaṣar*', *Islamic Law and Society* 3:2 (1996): 193.
[25] Jackson, *Islamic Law and the State*, 107.

play a positive role in improving (*iṣlāḥ*) the community under the doctrine of *siyāsa shar'iyya*, statecraft in accordance with divine law.[26] The next section takes up this topic in greater detail.

Siyāsa Shar'iyya, *Positive Law and Self-Government in Sunni Law*

Thus far, we have seen how the ideal of divine law, because it is not specified in a fashion that operationalizes it at a quotidian level, requires the establishment of a state that at a minimum could provide a legitimate forum for the resolution of the disputes that inevitably break out, even among properly motivated moral subjects. Significantly, later Sunni jurists did not merely recognize the authority of courts as a *de facto* necessity born out of the pragmatic need to bring an end to secular strife and conflict, but also that the decisions of judges, if they were the result of a valid procedure that applied reasonable conceptions of divine law, were also morally significant, even in the absence of the possibility of coercive enforcement. The question we wish to address in this section is how such a state to which is entrusted the administration of divine law can come into existence.

Sunni Muslims rejected two perfectionist models of a state under divine law, instead adopting a conception of a state built upon the idea of a community made up of the adequately virtuous. The two models that I contrast to the Sunni model of the state belong to the Khawārij and the Shi'a, respectively. Despite the radical differences between the Khawārij's conception of the state and that of the Shi'a, they both shared a commitment to the rule of the most virtuous. The Khawārij, so-called because 'they departed' (*kharajū*) from the camp of 'Alī b. Abī Ṭālib (d. 661), the fourth rightly-guided caliph in Sunni doctrine, and the first Imam of the Shi'a, when 'Alī agreed to submit his dispute over the caliphate with Mu'āwiya b. Abī Sufyān (d. 680), the then governor of Syria and the would-be avenger of his cousin, 'Uthmān b. 'Affān (d. 656), the third Sunni caliph who was murdered at the hands of rebels, to an arbitrator for resolution. For the Khawārij, 'Alī, by agreeing to submit this political dispute to human resolution, substituted human law for divine law, and thereby forfeited his right to claim authority over the Muslim community.[27] For the Shi'a, by contrast, only a divinely-designated descendant of the Prophet Muḥammad was a legitimate ruler of the Muslim community, and any ruler who rejected the authority of the Imam was, by definition, a usurper.

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[26] As a historical matter, it was not until the modern era when Muslim states began using the power of *siyāsa shar'iyya* expansively in an effort to transform Muslim societies. Prior generations of rulers had used this power sparingly, and largely to regulate state interests, such as taxation and land use, and in the field of criminal law. Until the nineteenth century, therefore, Muslim law could be fairly described as having been developed and applied largely by judges and jurists, not rulers.

[27] Indeed, the slogan by which the Khawārij became famous was 'Judgement belongs only to God' (*lā ḥukma illā li-Llāh*).

The Khawārij conception of authority was highly egalitarian insofar as any Muslim was eligible to rule the community, provided he was the most virtuous member of the community. The puritanical Khawārij commitment to political perfection was manifest not only at the time the community's leader was selected; indeed, if the ruler subsequently committed a violation of divine law, for example, by substituting human law for divine law as had occurred in their interpretation of ʿAlī's willingness to arbitrate the conflict with Muʿāwiya, it became an obligation of the Muslim community to topple the faithless leader.[28] The Shiʿa in contrast to the Khawārij believed that only a divinely-inspired figure who, by virtue of divine grace, was capable of perfectly interpreting and applying the law was entitled to govern and that anyone lacking this feature would, by definition, by a usurper. An infallible Imam was needed from the Shiʿi perspective because, in their opinion, it was the only solution to the problem of crafting authority against the background of human equality. While the Khawārij reconciled the problem of justifying political authority among a community of equals by demanding that the ruler be the most virtuous in terms of knowledge of and adherence to the law, the Shiʿa solved the same political problem by positing an infallible figure, the Imam, who attained his position through his status as a descendant of the Prophet Muḥammad and who was deemed to have perfect knowledge of the law.[29] For the Sunnis, by contrast, every human being of sound intellect (ʿaql) and moral integrity (ʿadl), was capable of having a *reasonable* understanding of divine law by virtue of the universal accessibility of revelation and of reasonably conforming with the law's demands without the mediation of extraordinary humans.

As Ibn ʿAbd al-Salām, the thirteenth-century Shāfiʿī jurist put it, no human being by nature possessed a superior claim to obedience than any other human being. The Sunnis, unlike both the Khawārij and the Shiʿa, turned away from the rule of the most virtuous, and solved the political problem of authority among equals by positing a self-governing community that could appoint an agent—the *caliph*—who would be entrusted to administer the law and the community's affairs, and insofar as he was an agent of the community, he could be held accountable to the community through the law for his conduct. The basic outlines of this solution are found in the law of the caliphate. The Sunni doctrine of the caliph as agent of the Muslim community first developed in the context of the various theological debates that swirled around the institution among various Muslim theologians long after the historical events that created the historical institution of the caliphate had already taken place and after sectarian differences had become established. Although Muslim jurists, in the course of developing substantive

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[28] For an overview of the development of Khārijī political and theological doctrines, see Adam Geiser, *Muslims, Scholars, Soldiers: The Origin and Elaboration of the Ibāḍī Imamate Traditions* (New York: Oxford Univ. Press, 2011).

[29] For a classical elaboration of the Shiʿi defense of their position on the Imāmate, see al-Ḥillī, *al-Bāb al-Ḥādī ʿAshar: A Treatise on the Principles of Shiʿite Theology*, trans. William McElwee Miller (London: Royal Asiatic Society, 1958), 62–8.

Islamic law, articulated rules governing the constitution and exercise of power by public officials, it was not until the eleventh century that Muslim jurists wrote systematic treatises on the law of the caliphate when the Shāfiʿī jurist Māwardī and his Ḥanbalī contemporary, Abū Yaʿlā al-Farrāʾ (d. 1066); both authored treatises with the same title, *al-Aḥkām al-sulṭāniyya* [The Ordinances of Government].

While there is substantial overlap in both works—indeed some passages are reproduced in both works verbatim—there are, nevertheless, important differences in the two works that perhaps led to Māwardī's work eclipsing that of Abū Yaʿlā's. Perhaps the most important reason behind the greater fame of Māwardī's work is that as a Shāfiʿī jurist, Māwardī's work was able to take advantage of the geographically broader dispersal of Shāfiʿī jurists relative to the comparatively limited presence of Ḥanbalī jurists in the medieval Islamic world. The celebrated Ḥanafī jurist, Abū Bakr al-Kāsānī (d. 1191), although he did not author an independent treatise on the caliphate, nevertheless also confirmed the idea of the principal-agent relationship as the defining feature of the Sunni conception of political authority. In his discussion of the appointment and dismissal of judges and governors, there is a passage which deserves to be quoted at length:

> The difference between an agent who serves a natural principal [and a judge] is that the agent [of a natural principal] acts solely under the authority of the natural principal and solely for his interests and so [upon the death of the natural principal], the principal's legal capacity terminates and the agent is dismissed by operation of law. The judge, however, does not act under the authority of the caliph and for his interests; rather, he acts under the authority of the Muslims for their interests. The caliph is nothing more than their messenger [with] respect [to appointing and dismissing judges] and for that reason is not personally liable, just like agents in all other contracts...And since the caliph is an agent, his acts are effectively the acts of the Muslim public, and their authority persists after the death of the caliph and so the judge continues in his office...When the caliph dismisses a judge or a governor, however, the dismissal is effective, even though they are not dismissed by operation of law upon the caliph's death, because he is not, in reality, dismissed by the caliph, but rather by virtue of the authority of the Muslim community, on account of what we already mentioned: the caliph obtained his office by virtue of the Muslim community's appointment of him, and it is the Muslim community, conceptually, that authorized him to replace one public official with another because their well-being depends on that. Accordingly, his authority to dismiss officials, conceptually, is derived from them as well.[30]

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[30] *Wa-wajh al-farq anna al-wakīl yaʿmalu bi-wilāyat al-muwakkil wa-fī khāliṣ ḥaqqihi ayḍan wa-qad baṭalat ahliyyatu l-wilāya fa-yanʿazil al-wakīl wa-l-qāḍī lā yaʿmal bi-wilāyat al-khalīfa wa-fī ḥaqqihi bal bi-wilāyat al-muslimīn wa-fī ḥuqūqihim wa-innamā l-khalīfa bi-manzilat al-rasūl ʿanhum li-hādhā lam talḥaqhu al-ʿuhda ka-l-rasūl fī sāʾir al-ʿuqūd...wa idhā kāna rasūlan kāna fī luhu bi-manzilat fīʾl ʿāmmat al-muslimīn wa-wilāyatuhum baʿda mawt al-khalīfa bāqiya fa-yabqā al-qāḍī ʿalā wilāyatihi...inna al-khalīfa idhā ʿazala al-qāḍī aw al-wālī yanʿazil bi-ʿazlihi wa lā yanʿazil bi-mawtihi li-annahu lā yanʿazil bi-ʿazl al-khalīfa ayḍan ḥaqīqatan bal bi-ʿazl al-ʿāmma li-mā*

In any case, Sunni jurists adopted the language of agency to describe the nature of the political relationship between the caliph and the community, and it is through the lens of the agency relationship that the mutual rights and obligations of public officials and individuals in the Muslim community are structured. The relationship of agency does this in two ways: first, it limits the power of the ruler by making a distinction between authorized conduct and unauthorized conduct. Just as a natural principal is only bound by the authorized actions of his agent, so too the Muslim community is bound only by the caliph's *authorized* actions. Because public officials are not authorized to commit illegal acts, any action or command of a public official that is contrary to law loses its status as a public act and becomes, as a result, a legal nullity. From a moral perspective, this principle was articulated in the juristic principle, 'No obedience in sin'.[31] This moral principle was also reinforced by the formal doctrine of agency law, which rendered void any agency agreement whose object was an unlawful act. Applying this principle to the agency agreement between the Muslim community and the caliph, it follows that the Muslim community lacks the power to appoint a caliph to pursue illegal ends, and so it is inconceivable that a caliph, or any other public official who acts unlawfully could claim to be acting pursuant to delegated power in such a circumstance; instead, a public official acting unlawfully, from a formal jurisprudential perspective, is relying on the brute force of personal power rather than the delegated authority of the community.

The refusal of Muslim jurists to recognize the legality of illegal actions was operationalized in various ordinary rules of law, such as the rules governing the transfer of public property to private individuals,[32] and the rules of liability for tort.[33] The principle that stepping outside of the scope of his delegated authority renders a public official the legal equivalent of a private person is explicitly affirmed by the renowned thirteenth century Ḥanbalī jurist, Ibn Qudāma, who, in his analysis of unlawful killing, expressly compares the liability of an individual who kills another in compliance with what he knows to be the illegal command of someone acting under color of law to someone who complies, even as a result of coercion, with the command of someone *not* acting under color of law, saying that the illegal command of the public official renders him the legal

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dhakarnā anna tawliyatahu bi-tawliyat al-ʿāmma wa-l-ʿāmma wallawhu al-istibdāl maʿnan li-taʿalluq maṣlaḥatihim bi-dhālika fa-kānat wilāyatuhu minhum maʿnan fī l-ʿazl ayḍan; al-Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-sharāʾiʿ*, 7 vols. (Cairo: Maṭbaʿat al-Jamāliyya, 1910), 7:16.

[31] The Arabic expression is *lā ṭāʿata li-makhlūq fī maʿṣiyyat al-khāliq*.

[32] Al-Sarakhsī (d. 1096), for example, gives the case of a ruler who attempts to transfer public property to a private person in a fashion that would be harmful to the public good. In this case, any member of the public is given the right to challenge the transfer before a court on the grounds that the ruler lacks authority to harm the public good; al-Sarakhsī, *Kitāb al-Mabsūṭ*, 30 vols. (Beirut: Dār al-Maʿrifa, 1913), 23:183.

[33] For this reason, a subordinate public official who knowingly orders the death of someone he knows to be innocent, or knowingly executes an innocent person, is liable to the victim's next of kin, even if he is following the order of a superior public official. Ibn Qudāma, *al-Mughnī*, 10 vols. (Cairo: Maktabat al-Jumhūriyya al-ʿArabiyya, 1964), 8:366.

equivalent of a private person who never has the authority to kill another, even if that other person is legally deserving of capital punishment.

But, the principles of agency law which prevented public officials from acting legitimately outside the scope of the law also functioned to bind the community affirmatively in cases where the public official *did* act within the scope of his authority. In other words, when a public official exercised discretion in a manner that was consistent with the terms of the agency relationship, individual Muslims became duty bound to obey such discretionary commands, even though they were not, in the first instance, obligatory from the perspective of divine law as set out in revelation. Accordingly, and as made clear in Māwardī's and Abū Yaʿlā's discussion of the contract of the caliphate, participation in this contract was obligatory (*wājib*), and the ruler was entitled to fight those who refused obedience as rebels (*bughāt*). The contract of the caliphate, therefore, created a notion of *rightful* coercion that public officials could wield against those individuals who refused to obey the law, such as a defendant in a lawsuit who refused to appear voluntarily before a judge when summoned.[34]

Public officials also had the power to make general law and thereby resolve certain disputes among the jurists that were not amenable to resolution as a matter of juristic interpretation. One particularly important example of this from the post-thirteenth century era was the decision by rulers, when appointing judges, to limit their jurisdiction to specific doctrines of law, such that, if they ruled on the basis of rules outside of those designated in their appointment, their judgments would be overturned, even if the substantive rule which the judge relied on was a legitimate interpretation of divine law from the perspective of interpretation.[35] In the Ottoman era, it was not uncommon for rulers to designate specifically which rule of law—among a variety of interpretively legitimate solutions—would be recognized in courts, not on the grounds that the ruler knew the divine will better than the jurists, but rather in the name of the public good.[36] Like Hobbes' sovereign, the Sunni ruler had the authority to undo the knots of interpretation that had accumulated in the law by virtue of 'making what ends he will'. The Sunni ruler, however, unlike Hobbes' sovereign, was always restricted in choosing ends that the divine law had authorized; moreover, he could not contravene the ends of divine law, nor could he claim to determine conclusively which particular interpretation of divine law was, in fact, correct; instead, his jurisdiction was limited to determining which rule was most appropriate for the public good (*al-maṣlaḥa al-ʿāmma*).

The authority to cut the Gordian knot could be exercised even outside the context of judicial appointments, such as in the imposition of price-control regulations. The

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[34] Farhat Ziadeh, 'Compelling a Defendant's Appearance at Court in Islamic Law', *Islamic Law and Society* 3:3 (1996): 305.

[35] Fadel, '*The Social Logic of Taqlīd*', 229–30.

[36] Rudolph Peters, 'What Does it Mean to be an Official *Madhhab*? Ḥanafism and the Ottoman Empire', in Peri Bearman et al. (eds.), *The Islamic School of Law: Evolution, Devolution, and Progress* (Cambridge, Mass.: Harvard Law School, 2005), 152–53.

legitimacy of price-controls was deeply contested among pre-modern Sunni jurists, with many jurists holding the opinion that they were an unlawful interference in a merchant's property rights. Some jurists, however, upheld price-controls in certain circumstances if they were viewed as reasonable and necessary to secure the public good. Where the ruler decided to issue price controls in accordance with the criteria established by those jurists who authorized them, however, it became a moral *and* prudential obligation to obey the command, even on the part of those individuals who, in good faith, believed that the revealed law did not permit price controls. Although individuals have the right, indeed, the duty, to disobey the ruler to the extent his command results in sin, mere disagreement with the content of a public official's command is not grounds for disobedience if the individual can comply with the command without committing a sin. In the case of price controls, a merchant commits no sin by selling to the public at a price designated by the ruler, even if that price is less than the price he would have charged in the absence of that restraint.[37]

In all cases where a public official is exercising coercive power, he is not doing so in the name of a *true* conception of divine law that is uniquely accessible to him; rather, the right to coerce stems from this status as a lawful representative of the community who has been entrusted to use political judgment (*al-siyāsa*) to further the public good within the constraints of divine law, hence giving rise to the appellation, *siyāsa sharʿiyya*, sometimes translated as "religious politics," but more aptly understood as politics within the bounds of divine law. Under that power, the public official is not limited to merely upholding the pre-political order of rights, perhaps in the fashion suggested by Joan Lockwood O'Donovan's Christian monarch, but could also encompass any 'action through which the people are [brought] closer to prosperity'.[38] The discretion given to public officials to pursue the public good, and the moral obligation on the part of individual Muslims to obey lawful exercises of discretion, can only be understood as resulting from the relationship of agency that Sunnis posited existed between the Muslim community and their rulers.

Conclusion

Sunni Islam offers a complex tradition of theological, legal and political thought that attempts to synthesize commitments to following divine law as manifested in a particular revelation with naturalistic assumptions that revelation, as an empirical matter, furthers ends that are reasonably intelligible to human beings' nature as rational beings. The idea of a kind of deep harmony between divine law as indicated in revealed texts with human beings' natural ends supported egalitarian assumptions regarding the accessibility of divine law to ordinary human beings. Because we are all equally situated, or

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[37] Ibn Ḥajar al-Haytamī, *al-Fatāwā al-Kubrā*, 4 vols. in 2 (Beirut: Dār Ṣādir, 2000), 1:235–36.
[38] Mohammad Fadel, 'Adjudication in the Mālikī Madhhab: A Study of Legal Process in Medieval Islamic Law' (PhD diss., Univ. of Chicago, 1995), 83.

substantially so, with respect to knowledge of divine law, we are, as a theological matter, entitled to our own reasonable interpretations of the content of divine law, at least with respect to its secondary and tertiary rules. The pluralism inherent in the Sunni conception of divine law, however, also generated a contrary impulse, namely, the desire to create a state that could make divine law effective as a tool for the resolution of the quotidian disputes that arose within the Muslim community. Unlike other Muslim conceptions of the state, Sunni theologians and jurists conceived of the state as an institution made up of individuals of ordinary integrity who, because of their knowledge of divine law and their status as lawful representatives of the Muslim community, could resolve particular disputes that broke out among members of the community in a morally conclusive fashion and could also pursue the public good of the community, coercing the recalcitrant in appropriate circumstances. It must be emphasized that the Sunni theological and juristic tradition emphasized in this essay is not the only tradition of theological, juristic and political thought within historical Islam, nor even is it the exclusive tradition within Sunnism. I do suggest, however, that it is the dominant Sunni interpretation of law, nature and the state, and provides an appropriate basis for productive conversation with our Christian interlocutors.