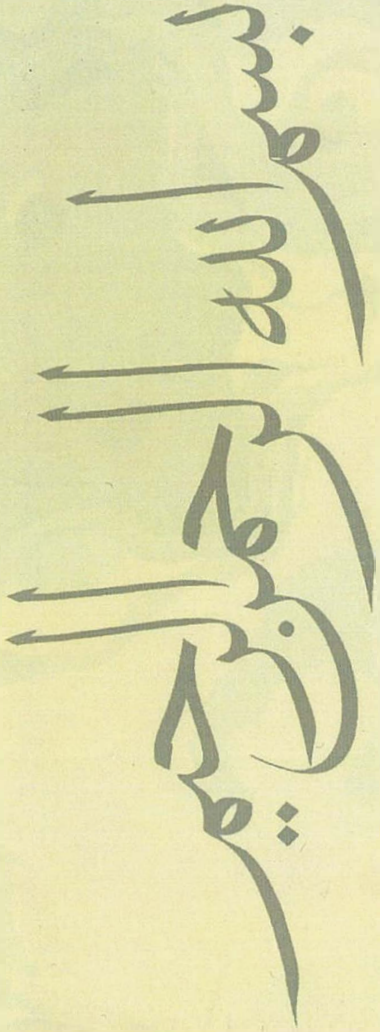
Islamic Natural Law Theories



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nature centrally important to our analysis. Having a Creator in the background required our jurists to reflect upon the theological implications of any natural law theory. For instance, a Creator can be principally viewed as a legislator whose legislative acts define the good and the bad: X is good *because* God does X. Or the Creator can be viewed as legislating only in pursuit of the good: God does X *because* X is good. These two views of God as legislator offer distinct approaches to understanding the good, and have competing implications for a philosophy of law and the role of human reason in it. If all good is a function of God's will, then a resulting legal philosophy may limit the scope to which human beings can know the good independent of indicators from God. But if God does X because X is good, that assumes the notion of 'good' is separate and distinct from God's will on the matter. It also suggests that human beings can know the good, even if God has not provided express guidance to us about what the good is. In this latter case, we can use our reason to investigate the world around us to form principles of normative ordering that reflect what God would want for us. Consequently, to frame this study using natural law is, for the purpose of this study, to consider:

- the competing theologies of God;
- how those competing theologies of God offer distinctive understandings of the objective and normative quality of nature;
- whether and how those competing theologies and understandings of nature affect the authority of reason; and
- how methods of practical reasoning are designed to recognize and limit the use of reason in the law.

What Does Islamic Natural Law Contribute to Our Understanding of Sharīʿa and Reason?

The relationship between Sharīʿā and reason is not a topic just of recent interest. Indeed, it has been an important issue in both the pre-modern period as well as the modern one. Muslims have, throughout history, contended with the role, scope, and authority of reason in a religious tradition that is fundamentally linked to a book (the Qurʾān) that is believed to be God's word, revealed to the Prophet Muḥammad, and meant to guide humanity to

salvation.[29] Adhering to and satisfying God's will is an important factor in attaining salvation. Consequently, the Qurʾān offers the most obvious source of God's will for Muslims to follow. But Muslim jurists knew that the world of lived experience cannot be and is not captured between the Qurʾān's two covers; thus they debated whether and to what extent they could build upon what they learned from the Qurʾān. The literature on legal theory (*uṣūl al-fiqh*) expounds on the ways in which Muslim jurists can extend and develop the law in light of changed circumstances, while remaining mindful of the source-texts that are deemed to represent God's will best (such as the Qurʾān and traditions of the Prophet).[30] In the modern period, much of the debate about reason has been about whether, how, and to what extent Muslims can perform *ijtihād*, or renewed interpretation, on matters already addressed by historical precedent. In both the scholarly and popular literature, the doctrine of *ijtihād* offers theorists and reformists alike an important opportunity to address the scope of moral agency, and the relationship between law, reform, and modernity.[31]

However, as noted above, a natural law inquiry frames the role of reason in a manner that is distinct from, though certainly not unrelated to, the question of *ijtihād*. Here we are interested in the ontological authority of reason in Sharīʿa or, in other words, whether and to what extent, in the absence of source-texts, reasoned deliberation about the good and the bad can assume sufficient normative authority to result in Sharīʿa norms that reflect what God desires or wills. The significance of framing this study using natural law is reflected both by contemporary Muslim and scholarly discourses on reason and Sharīʿa.

[29] eg, Q 2:1 states: 'This Book—there is no doubt it is guidance for all who are ever-mindful of God.'

[30] For scholarly treatments of Islamic legal theory, see Wael B Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1999); Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd edn, Cambridge: Islamic Texts Society, 2003); Ṣubḥī Maḥmaṣṣānī, *Falsafat al-Tashrīʿ fī al-Islām* (3rd edn, Beirut: Dār al-ʿIlm li'l-Malāyīn, 1961).

[31] For scholarly works on *ijtihād* and the debates about whether it was forestalled or not, see Ali-Karamali and Dunne, 'The Ijtihad Controversy'. The historical validity of this alleged closure has been substantially questioned and attacked in Hallaq, 'Was the Gate of Ijtihad Closed?'. However, modern self-proclaimed reformers nonetheless consider their calls for renewed *ijtihād* to be novel and perhaps even edgy. See eg Manji, *The Trouble With Islam Today*.

Muslim Debates on Sharīʿa and Reason

This study on Islamic natural law theories arises amidst, and offers a partial corrective to, popular perceptions of Sharīʿa as legislated by God, whom the devout are bound to obey.[32] On this view reason cannot be an authoritative source for divine injunctions; at most it can confirm or corroborate what is already established by authoritative source-texts. These perceptions are neither new nor sudden; rather they have a history, which is rooted in both early theological debates and the history of legal development over centuries. Those who oppose this view are deemed heterodox, and are often labeled as modern day Muʿtazilites.[33] The Muʿtazilites are considered the early rationalists in Islam.[34] They upheld the view that God only does the good and just and avoids the evil. In other words God does X *because* X is good. By holding such a position, though, they implicitly suggested that concepts like 'good' and 'just' are virtues that are separate and distinct from God's will on any given issue. As separate and distinct from God's will, they are virtues that can be reasoned about and rationally known. But if that is the case, then it also follows that anything that we decide is good or bad would

[32] For an overview of such views and how they operate in the public sphere today, see Anver M Emon, 'Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation' (2008) 87 *Canadian Bar Review* 391.

[33] Richard C Martin, Mark R Woodward, and Dwi S Atmaja, *Defenders of Reason in Islam: Muʿtazilism from Medieval School to Modern Symbol* (Oxford: Oneworld Publications, 1997) 166–7. The apostasy case of Nāṣr Ḥāmid Abū Zayd, an Egyptian intellectual deemed to have apostated from Islam through his writings on the Qurʾān, is a well known case of an intellectual whose ideas were viewed by some as Muʿtazilite or as heterodox, and thereby contrary to prevailing Islamic norms. For an overview of the relationship between intellectual freedom and apostasy cases, and the Abū Zayd case, see Baber Johansen, 'Apostasy as objective and depersonalized fact: two recent Egyptian court judgments' (2003) 70 *Social Research* 687; Susanne Olsson, 'Apostasy in Egypt: Contemporary Cases of *Ḥisbah*' (2008) 98 *The Muslim World* 95. For a comparative study of Muʿtazilite ideas and those of Abū Zayd, see Thomas Hildebrandt, 'Between Muʿtazilism and Mysticism: How much of a Muʿtazilite is Naṣr Ḥāmid Abū Zayd?' in Camilla Adang, Sabine Schmidtke, and David Sklare (eds), *A Common Rationality: Muʿtazilism in Islam and Judaism* (Würzburg: Ergon in Kommission, 2007) 495.

[34] For the history of Muʿtazilite theology, see Martin et al, *Defenders of Reason*, 25–45; W Montgomery Watt, *The Formative Period of Islamic Thought* (Oxford: Oneworld Publications, 1998) 209–52. For thematic analysis of Muʿtazilite and other theological doctrines, see Harry Austryn Wolfson, *The Philosophy of the Kalam* (Cambridge, Mass: Harvard University Press, 1976).

thereby imply that God would not act counter to that good, or in furtherance of that evil, since God only acts justly and in accordance with the good. Indeed, this suggests that we could, through our own reasoned deliberation, limit the scope of God's acts and will.[35]

Voluntarist theologians, on the other hand, were keen to uphold the omnipotence of God. They considered the Muʿtazilite position a threat to the theology of an all-powerful God. For various reasons Muʿtazilite theology lost favor in the course of Islamic intellectual history, and Voluntarist concepts have become significant theological frames for understanding God and His omnipotence.[36] Consequently, anyone who suggests today that reason has ontological authority as a source of Sharīʿa norms is deemed unpersuasive for orthodox Sunnī Muslims.[37] So, for instance, Khaled Abou El Fadl offers a philosophically oriented approach to Islam as a moral system rooted in justice.[38] But in doing so, he is immediately deemed not credible by those who consider his ideas tantamount to heterodox Muʿtazilite rationalism. As Mohammad Fadel writes in his response to Abou El Fadl:

> It is somewhat surprising, then, that Abou El Fadl would partly ground the basis for democratic life among Muslims on a heretofore discredited theological argument...His case would have been stronger if he had

[35] Qāḍī ʿAbd al-Jabbār, *Sharḥ al-Uṣūl al-Khamsa* (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī, 2001) 203–7. For the debate on authorship of this treatise, see the discussion on ʿAbd al-Jabbār in Chapter II. For further discussion on the relationship between God and justice, see Martin et al, *Defenders of Reason*, 71–81.

[36] For a history of Islamic theology and on the construction of orthodoxy, see Tilman Nagel, *The History of Islamic Theology: From Muhammad to the Present* (Princeton: Markus Wiener Publishers, 2000); Oliver Leaman and Sajjad Rizvi, 'The Developed *Kalām* Tradition' in Tim Winter (ed), *The Cambridge Companion to Classical Islamic Theology* (Cambridge: Cambridge University Press, 2008) 77; Ahmed El Shamsy, 'The Social Construction of Orthodoxy' in Winter, *The Cambridge Companion to Classical Islamic Theology*, 97.

[37] This book reviews the works of authors who are often considered part of the Sunnī tradition. To examine Shīʿa legal theory on natural law was beyond the scope of this project, especially as Shīʿa jurisprudence reserves an important place for reason in the law. The author hopes that this book will inspire further research in legal philosophy, natural law, and Sharīʿa.

[38] Khaled Abou El Fadl, *Islam and the Challenge of Democracy: A Boston Review Book*, Joshua Cohen and Deborah Chasman (eds) (Princeton: Princeton University Press, 2004) 3–48.

> demonstrated that democracy is consistent with either theory of the good traditionally espoused by Muslim theologians.[39]

Whether or not a scholar is explicit about his or her Muʿtazilite sensibilities, a suggestion that reason offers an important source of guidance for the modern Muslim raises suspicions of heterodoxy framed in pre-modern terms. To theorize about reason, therefore, is fraught with theological implications that demarcate not only the intellectual bounds of credible Sharīʿa-based argument, but also the political bounds of community and belonging. This is not to suggest that there is no other rationalist approach outside the Muʿtazilite model. Even Professor Fadel is keen to assert that reason has an authority that cannot be denied. For Fadel, Muslims who adhere to their religious convictions can participate in a Rawlsian overlapping consensus in a liberal public sphere.[40] His utilization of the notion of the 'reasonable' suggests that even those attempting to work within a more 'orthodox' or 'traditional' vision of Islam are nonetheless committed to finding space for reasoned deliberation.

In addition to arising amidst a popular image of Sharīʿa, this study is mindful of a tradition of Muslim reformist literature that has sought, since the late 19th century, to increase the scope of reasoned deliberation in the hope for change, development, and modernization in the Muslim world.[41] For instance, in the writings of Muḥammad ʿAbduh and Rashīd Riḍā, we find a reliance on reason and the idea of perceived goods (*maṣlaḥa*) in order to develop the Sharīʿa in light of changed historical realities. In doing so, they called for renewed interpretation and engagement with the historical legal tradition, or in other words *ijtihād*.[42] But in doing so, they could not focus on the epistemic question without acknowledging the ontological one.

[39] Mohammad H Fadel, 'Too Far From Tradition' in Abou El Fadl, *Islam and the Challenge of Democracy*, 81, 82.

[40] Mohammad Fadel, 'The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law' (2008) 21 *Canadian Journal of Law and Jurisprudence* 5.

[41] For a general overview of different modern Muslim reformists who contend with the nature and scope of reasoned deliberation, see Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (Herndon, Va: International Institute of Islamic Thought, 2008) 144–53.

[42] Hamid Enayat, *Modern Islamic Political Thought* (Austin, Tex: University of Texas Press, 1982) 46–8.

Muhammad 'Abduh (d. 1905) equated the *Shari'a* with natural law . . . and opened the door for modern jurists to use reason as a basis for legal interpretation. Pursuing this line of thought, Rashid Rida (d. 1935) might be regarded as the most effective protagonist of the use of *maslaha* as a source for legal and political reform. . . . Rida tried to re-interpret the *Shari'a* on the basis of *maslaha* . . . as the expression of public interest.[43]

These descriptive remarks are fascinating for our purpose as they raise questions about the philosophical bases by which reformists have justified the ontological authority of reason in Sharīʿa. Their questions (and especially the ambiguity of their answers) are, in part, an animating factor for this study.

The ambiguity in the response to the ontological question has continued throughout the 20th and 21st centuries. When contemporary clerics write in support of reason in Islam, they may root their conclusion in the Qurʾān itself, identifying various verses in which the Qurʾān asks the reader to think or reflect.[44] This approach to the authority of reason relies on the authority of the Qurʾān, which indeed clothes the use of reason with a type of divine authority. But the effect of this approach is to render the ontological authority of reason derivative at best. If the Qurʾānic references constitute the bases by which reason is an authoritative source of Sharīʿa, then reason does not stand as a separate and distinct source of Sharīʿa at all.

But if reason is a separate source, and the Qurʾānic references merely corroborate what we already know by reason, that begs the question: 'how do we know?' Tariq Ramadan, a European Muslim reformist, suggests that the natural world offers insights about the workings of God's will. He writes:

God always makes available to humankind tools and signs on the road that lead to recognizing Him. The first space that welcomes human beings in their quest is creation itself. It is a book . . . and all the elements that form part of it are signs that should remind the human consciousness that there exists that which is 'beyond' them. This Revelation in and through space is

[43] M Khadduri, 'Maslaha' in P Bearman, T Bianquis, CE Bosworth, E van Donzel and WP Heinrichs (eds), *Encyclopaedia of Islam, Second Edition* (Leiden: Brill, 2009) [Brill Online. University of Toronto. http://www.brillonline.nl].

[44] For an example of such a strategy, see Yusuf al-Qaradawi, *al-'Aql wa al-'Ilm fi al-Qur'ān al-Karīm* (Beirut: Mu'assasāt al-Risāla, 2001) 11–68.

wedded to Revelations in time, which, at irregular intervals, came as reminders of the origin and end of the universe and of humanity.[45]

Creation and source-texts offer two approaches to understanding the divine will. For Ramadan, both are 'texts' that must be read and reflected upon. The created world, fashioned by God, is a sign of God's will if only we would look closely. Ramadan effectively fuses fact and value in the created world, thereby rendering it a foundation for the ontological authority of reason. Ramadan offers an approach to reason's ontological authority that may be sympathetic with natural law. But depicting the natural world akin to a text raises important hermeneutic questions about the determinacy and objectivity of the law. Furthermore, the more Ramadan incorporates the human and natural sciences into legal analysis, the more he also challenges the view of law as a distinct discipline, whose efficacy in part depends upon a degree of determinacy and objectivity that may not be possible given his agenda for 'radical reform'.[46]

For the few reformist thinkers noted above, there is a clear reliance on reason as an authoritative source of Sharīʿa. They situate their arguments on a spectrum of possibilities, each of which has some basis in the vocabulary and doctrine of the Islamic legal tradition. Their positions are built upon a tradition of pre-modern legal debate about the authority of reason in Sharīʿa. Their approaches are also very much reflective of their historical moment, which some consider to be the crisis of modernity, which the Muslim world has faced with the rise of independent Muslim majority states, and the development of significant Muslim minority populations in liberal-democratic polities.[47] The reformists rely on the historical tradition to give

[45] Tariq Ramadan, *Western Muslims and the Future of Islam* (Oxford: Oxford University Press, 2004) 13.

[46] Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (Oxford: Oxford University Press, 2009).

[47] The 'crisis of modernity' has become a feature of much writing about the relationship between Muslims, their religious tradition, and the socio-political contexts in which they find themselves. Writing about Arab-Muslims, Haddad states that the 'impact of the power of the West has challenged to the core [their] concept of who [they] are and where [their] destiny lies.' Yvonne Yazbeck Haddad, *Contemporary Islam and the Challenge of History* (Albany: State University of New York Press, 1982) xi. For others similarly concerned with the 'crisis of modernity' for Muslims, see Bassam Tibi, *The Crisis of Modern Islam: A Preindustrial Culture in the Scientific-Technological Age*,

meaningful responses to their present context. Framing present debates with pre-modern categories situates any reformist theory within a tradition that is deemed to be a source of authority and identity. But to bring that past into the present raises concerns about how translatable the past is for those who wish to adopt it for present purposes. The past tradition was framed by jurists very much concerned with debates about theology and the implications of those debates for a theory of law. Modern reformists, though, have very different concerns. To rely on past traditions without duly attending to what they signified in the past ignores the historical significance of the internal debates, and how that historical significance may adversely affect the interests of contemporary reformists. This study focuses on the pre-modern debates to understand a world of law and philosophy different from our own. However, it remains ever mindful of how that past still animates the present.

Scholarly Debates on Sharīʿa and Reason

The scholarly literature on Islamic law reflects different approaches to the place of reason in the law. In the aggregate, it conveys an openness to the ontological question that underlies this study. Certainly Muslim jurists of the pre-modern world emphasized the role of foundational text and close adherence to its terms as a means for legitimating their juristic analyses.[48] But as recent scholarship

Judith von Sivers (trans) (Salt Lake City: University of Utah Press, 1988); Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (Chicago: University of Chicago Press, 1982); Mohammad Arkoun, *Rethinking Islam: Common Questions, Uncommon Answers*, Robert D Lee (trans) (Boulder, Colo: Westview Press, 1994); Abdelwahab el-Affendi (ed), *Rethinking Islam and Modernity* (London: The Islamic Foundation, 2001). In his recent book, Wael Hallaq addresses the crisis of modernity, and the impact of the modern state system on the nature and function of Islamic law. Hallaq, *Shari'a: Theory, Practice, Transformations*.

[48] Asaf AA Fyzee, *Outlines of Muhammadan Law* (3rd edn, Oxford: Oxford University Press, 1964) 78–9; Noel J Coulson, *A History of Islamic Law* (1964; reprint, Edinburgh: Edinburgh University Press, 1997) 76; Bernard G Weiss, *The Spirit of Islamic Law* (Athens, Ga: University of Georgia Press, 1998) 38–65. This emphasis on foundational text will be illustrated in Chapter III. Studies of Islamic legal theory illustrate the priority given to literalist readings by reference to the interpretive preference for the apparent meaning (*ẓāhir*) of words over the allegorical or metaphorical meaning (*majāz*). For a treatment on such rules of interpretation, see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd edn, Cambridge: Islamic Text Society, 2003) 117–66.

suggests, fidelity to the text does not preclude the interpretive license and agency that is generally a feature of mature legal systems, despite the rarefied image of Sharīʿa that often predominates in the popular imagination.[49] Contemporary analyses of Islamic law and legal theory emphasize that pre-modern Muslim jurists utilized discretion in adjudicating cases,[50] theorized about interpretative agency,[51] articulated theories of legal authority amidst difference and dispute,[52] and designed doctrines that reflect contextual factors of varying sorts.[53] Mohammad Hashim Kamali's survey of the principles of Islamic jurisprudence offers the closest thing in English to a textbook on the modes and types of legal reasoning in Islamic law.[54] Yasin Dutton s work on the early *Muwaṭṭā'* of Mālik b. Anas argues that the origins of Islamic law were not merely textual, and reflect an implicit non-textual discourse about the early practice of the Prophet, his companions and successors.[55] Studies on the *fatwā* and the resolution of cases offer a window into various historical moments, and show how the nature of legal decision must take into account the context and subjectivity of the adjudicator who makes decisions in light of both text and context.[56] This is not to suggest that all Sharīʿa reasoning is to be rendered a function of pure context, discretion or even expediency.[57] Those who have described

[49] For a discussion of this concept of Islamic law, see Anver M Emon, 'Conceiving Islamic Law in a Pluralist Society: History, Politics and Multicultural Jurisprudence' [2006] *Singapore Journal of Legal Studies* 331; Emon, 'Islamic Law and the Canadian Mosaic.'

[50] Leslie Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley: University of California Press, 2003); David S Powers, *Law, Society and Culture in the Maghrib, 1300–1500* (Cambridge: Cambridge University Press, 2002).

[51] Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld Publications, 2001); Muhammad Khalid Masud, *Shatibi's Philosophy of Islamic Law* (Islamabad: Islamic Research Institute, 1995); Hallaq, *A History of Islamic Legal Theories*; Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001).

[52] Abou El Fadl, *Rebellion and Violence*.

[53] Dutton, *The Origins of Islamic Law*.

[54] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd edn, Cambridge: Islamic Texts Society, 2005).

[55] Dutton, *The Origins of Islamic Law*.

[56] Muhammad Khalid Masud, Brinkley Messick, and David S Powers, *Islamic Legal Interpretation: Muftis and Their Fatwas* (Cambridge, Mass: Harvard University Press, 1996); Powers, *Law, Society and Culture in the Maghrib*; Peirce, *Morality Tales*.

[57] Such an unflattering view of Islamic law and legal reasoning was held by US Supreme Court Justice, Felix Frankfurter, in *Terminiello v Chicago*, 337 US 1, 11; 69 S Ct 894, 899 (1949).

Islamic legal adjudication in an anthropological key, for instance, have met criticism from those who see in Islamic legal reasoning a mode of justice that is disciplined by reason, and yet open to the complexity of lived experience upon which the law is often called to adjudicate.[58]

Notably, some in the field of Islamic law and history have remarked that there is no natural law tradition in Islam.[59] For instance, Patricia Crone writes that when pre-modern Sunnī Muslims debated the philosophical question concerning situations where there is no revelation on a matter (*qabla wurūd al-sharʿ*) they indulged in a thought experiment about human nature as if it were stripped of divine guidance. According to Crone, in Islamic law no one has the right to create obligations that invoke the divine. That is od's job alone, and humans cannot speak on behalf of Him. While humans can create their own laws, such laws have no bearing on other-worldly salvation.[60] In a sense, Crone and others are right. The prevailing Sunnī position, as expressed in pre-modern treatises on legal theory (*uṣūl al-fiqh*), holds that where there is no scripture on a matter, one is left in a state of suspended judgment (*tawaqquf*); there is no epistemically coherent way to determine the divine law on that matter, and consequently no one is in a sufficient epistemic position to attribute to God a ruling of any normative force.[61] Reason does not assume any ontological authority akin to that of

[58] Lawrence Rosen has written extensively in the field of Islamic law and anthropology. See *The anthropology of justice: Law as culture in Islamic society* (1989; reprint, Cambridge: Cambridge University Press, 1990); *The Justice of Islam: Comparative Perspectives on Islamic Law and Society* (Oxford: Oxford University Press, 2000). For those who have criticized Rosen for not sufficiently accounting for the disciplined nature of legal reasoning, see Powers, *Law, Society and Culture*, 23–52; Khaled Abou El Fadl, 'Islamic Law and Ambivalent Scholarship [A Review of Lawrence Rosen, *The Justice of Islam: Comparative Perspectives on Islamic Law and Society* (Oxford: Oxford University Press, 2000)]' (2002) 100 *Michigan Law Review* 1421.

[59] George Makdisi, *Ibn 'Aqil: Religion and Culture in Classical Islam* (Edinburgh: Edinburgh University Press, 1997) 130; Patricia Crone, *God's Rule: Government and Islam: Six Centuries of Medieval Islamic Political Thought* (New York: Columbia University Press, 2004) 263–4. Notably, the Shīʿite tradition considers reason to be a source of law. However, to investigate the full extent of the debate in the Shīʿite tradition is beyond the scope of this study. For discussions about the debates on the use of reason in Shīʿite jurisprudence, see Robert Gleave, *Inevitable Doubt: Two Theories of Shiʿi Jurisprudence* (Leiden: Brill, 2000).

[60] Crone, *God's Rule*, 263–4.

[61] For the discussion on this point, see Chapter III.

scripture to justify using it as a basis for determining and constructing obligations that emanate from the divine.

This study, however, shows that Muslim jurists recognized to a certain extent that reason must have ontological authority for Sharīʿa purposes. Pre-modern Sunnī Muslim jurists struggled to understand Sharīʿa conceptually in light of their debates on nature and reason. To narrow the scope of this study, it focuses on juristic debates about the ontological authority of reason in situations where there is no scriptural or revelatory text.[62] Jurists framed their debate on this question by reflecting upon whether their use of reason (*ʿaql*) alone could be the basis for knowing the good (*ḥusn*) and the bad (*qubḥ*), and thereby legitimately justify correlating obligations and prohibitions under Sharīʿa law, where there is no scriptural source-text. For the purpose of this study the use of 'scriptural' or 'revelatory' is meant to signify foundational 'source-texts' of religious belief and practice, such as the Qur'ān and oral traditions of the Prophet, which in the aggregate constitute a corpus of evidence that stands outside and separate from the individual.[63]

The debate on the ontological authority of reason required jurists to incorporate fundamental theological premises in their jurisprudence. They theorized about nature and reason amidst competing theological commitments about the authority and omnipotence of God. For them, nature is the link between the divine will and human reason. They viewed nature as the product of God's purposive creation for the benefit of humanity. As such, nature's goodness is tied to God's omnipotence, purposiveness, and either *justice* or *grace* upon humanity. As a divine good, nature constitutes a body of facts that we can investigate. Using our reason, we can make conclusions about both the good (*ḥusn*) and the bad (*qubḥ*) in empirical terms. But because the empirical world is infused with a divine, purposeful,

[62] An English source on Islamic natural law offers a broad-based approach to the role of nature in Islamic intellectual history: A Ezzati, *Islam and Natural Law* (London: ICAS Press, 2002). In doing so, though, the author does not offer an account of Islamic natural law that resonates with the debates that fall more generally within the field of legal philosophy.

[63] This definition of revelation and/or scripture is inspired by Robert M Adam, 'Introduction' to Immanuel Kant, *Religion within the Boundaries of Mere Reason and Other Writings*, Allen Wood and George di Giovanni (trans) (1998; reprint, Cambridge: Cambridge University Press, 2006) xxxi.

deliberate good, our reasoned conclusions about the empirical good are infused with normative content stemming from the divine creative will. In other words, the 'is' becomes the 'ought'. Pre-modern Muslim jurists argued that because nature is created by God and thereby reflects His goodness, nature is also good, and thereby is fused with both fact and value. This fusion opens the way for reasoned observations o nature to transform into norms governing our conduct.

At the heart of these pre-modern debates are the terms of art *ḥusn* and *qubḥ*, which mean good and bad, respectively.[64] To focus on the debates around these two terms will situate us within the particularity of the Islamic legal tradition, while maintaining our interest in natural law as a philosophical frame of inquiry. The two terms are antonyms of each other, as indicated by the pre-modern lexicographer Ibn Manẓūr (d. 711/1311).[65] According to Ibn Manẓūr, the term *qubḥ* can be defined as an absence or diminution of *ḥusn* (*naqd al-ḥusn*), while *ḥusn* is the opposite of *qubḥ*, as well as the diminution of *qubḥ* (*al-ḥusn ḍiddu al-qubḥ wa naqduhu*).[66] In Sunnī legal theory these terms of art capture a debate about whether conceptions of the good and the bad (and thereby obligation and prohibition) are rationally determinable, or whether everything that is good or bad in the world is the product of a divine legislative will.[67]

Kevin Reinhart has offered an important study of these terms, and their implication for the more general debate on *qabla wurūd al-shar'*, which he calls the 'before revelation complex'. For Reinhart, the debates on the 'before revelation complex' involve discussions about whether acts not addressed by scripture are presumptively

[64] EW Lane, *Arabic-English Lexicon* (Cambridge: Islamic Texts Society, 1984) 1:570, 2:2479.

[65] Throughout the work, the Islamic *hijra* date is provided alongside the common era date based on the Gregorian calendar.

[66] Abū al-Faḍl Jamāl al-Dīn Muḥammad b. Makram Ibn Manẓūr, *Lisān al-'Arab* (6th edn, Beirut: Dār al-Ṣadr, 1997) 2:552, 13:114.

[67] Fazlur Rahman, 'Law and Ethics in Islam' in Richard G Hovannisian (ed), *Ethics in Islam* (Malibu, Calif: Undena Publications, 1985) 3–15, is sensitive to the connection between this moral question and the law generally. On the connection between this debate and jurisprudence, see also George Makdisi, 'Ethics in Islamic Traditionalist Doctrine' in Hovannisian, *Ethics in Islam*, 47–63, 50. However, Makdisi argues that Islamic law is mainly characterized by voluntarism. Makdisi also treats this issue in his biography of the 6th/12th century jurist, Ibn 'Aqīl Makdisi *Ibn 'Aqil*, 97–130.

prohibited, permitted, or in a state of indecision. Reinhart writes that the specific questions Muslim jurists addressed in this debate were really indirect mechanisms by which they could ask epistemologically difficult questions about moral valuation that are otherwise too unnerving to deal with directly. He states:

> [W]hen someone first posed this problem in debate it was eagerly seized upon and elaborated, we suppose, because through it Muslim intellectuals could examine notions too amorphous and sometimes too disturbing or unnerving to state baldly. Perhaps, also, through these 'thought experiments' they could discuss issues too profound to think about directly.[68]

This is not to suggest that the pre-modern debate was a mere façade by which Muslim jurists asked difficult theoretical questions about rational moral evaluation without doing so directly. On the contrary, Reinhart suggests that the hypotheticals were meant to have some theoretical bite. He writes:

> When Muslim scholars in the foreground were asking about acts before Revelation, I believe they were also reflecting upon important epistemological questions in the background. They were asking about the importance of Revelational knowledge over against other sources of knowledge; they were asking, What constitutes religious knowledge?; they were also asking questions about moral categorization and its relation to being itself: Does the goodness of gratitude or the badness of a lie come from some characteristic innate to the nature of gratitude and prevarication? . . .They asked also, What is it that makes something good? Does its goodness reside in the structure of the created world or in the ungrounded determination of God?[69]

Ḥusn and *qubḥ*, as terms of art, offered jurists a vocabulary by which to address the nature of knowledge, and the relationship between knowledge, reason, and authority. As will be shown below, these terms and the 'complex' within which they fell are philosophically significant for understanding the ontological authority of reason in Sharī'a. Consequently they present the uniquely Islamic starting point for addressing the existence and contours of Islamic natural law theories.

[68] Kevin Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought* (Albany: SUNY Press, 1995) 4.

[69] Reinhart, *Before Revelation*, 5.

Islamic Natural Law Theories: An Overview

Not all who read this book may come to it as a specialist in pre-modern Islamic law or history, and so may benefit from this brief overview of the study. Likewise, students and specialists in the field may find a general outline of the argument useful as they work through the detailed debates of each jurist. This study focuses on debates that center around the Arabic words *ḥusn* and *qubḥ*. These two terms mean *good* and *bad*, respectively. They feature centrally in a pre-modern debate in Islamic legal philosophy about the authority of reason to make ethical decisions and transform them into Sharīʿa obligations. Muslim jurists questioned the authority of reason to constitute obligations in situations where no source-text exists to justify a particular legal conclusion, or as they would say: *min qabla wurūd al-sharʿ*.[70] When viewed from the lens of legal philosophy, and more specifically natural law jurisprudence, this phrase raises the question of whether human moral inquiry into the good (*ḥusn*) and the bad (*qubḥ*) can be an authoritative basis for asserting a rule of law consonant with the divine will when source-texts are silent. While one refrain in Muslim apologetic literature often holds that there is no issue unaddressed by a source-text in Islamic law, pre-modern Muslim jurists clearly disagreed. This is not to suggest that this debate ignores the existence of source-texts. Rather it arguably recognizes that source-texts are finite, and that sometimes we require an alternative authority for the law, such as reason.

Not surprisingly, jurists disagreed about the authority of reason on grounds spanning the fields of theology and legal theory. Competing theologies about the omnipotence of God affected how pre-modern jurists conceived of the authority of reason. Their different theological starting points contributed to two models of natural law theory, hereinafter called Hard Natural Law and Soft Natural Law. Hard Natural Law theorists relied on the theological presumption that God only does what is good: God wants X *because* X is good. From this starting theological presumption, they developed natural law theories by which they granted ontological authority to reason

[70] For further insight on this issue, see Reinhart, *Before Revelation*.

in Sharīʿa by linking the divine will and human reason through the medium of nature. Soft Natural Law theorists started from the contrary Voluntarist theological position: X is good *because* God wants X. They held that goodness and Sharīʿa norms were two different matters. Reason can certainly determine what is good or bad. But that rational conclusion cannot assume the authority of a Sharīʿa norm. Despite their Voluntarist critique of Hard Natural Law, Soft Natural Law theorists nonetheless recognized that in some cases there is no source-text to guide us in understanding the Sharīʿa. In some cases, we would need to rely on an alternative authority to generate norms to order our affairs.

The distinct theological starting points lead jurists of both camps to different theories about the authority of reason in the law. Despite their theological differences, though, this study will show that the different natural law theories that ultimately resulted actually share much in common. Jurists of different theological camps did not deny the fact that a philosophy of law must make room for reasoned deliberation. To do so, jurists of both camps ultimately relied on nature as a link between the authority of the divine will and the authority of reason, which allows us to frame their legal philosophies using natural law. The remainder of this chapter will summarize how they understood the link between God, nature, and reason, and developed competing theories to limit the potential for idiosyncrasy and abuse of discretion.

Theory I: Hard Natural Law

The first pre-modern theory of natural law, hereinafter called Hard Natural Law, is reflected in the works of al-Jaṣṣāṣ, and the Baṣran Muʿtazilites al-Qāḍī ʿAbd al-Jabbār and Abū al-Ḥusayn al-Baṣrī. It is built upon theological first principles about God and nature. Hard Natural Law jurists espoused as a theological first principle that God only does good and is incapable of doing any evil. Consequently, according to Hard Natural Law adherents, when God created the world, He intended to benefit humanity. God would not have created the world to benefit God's self since God requires no such benefit. Nor would God create it in order to cause pain and suffering for others regardless of their behavior, since that would be

unfair and unjust to those adversely affected. As God is only just, they held that creation must therefore pose a benefit to others. From this proposition, they thereby held that we can discern these benefits through the use of our reason and thereby develop norms of behavior whose normative authority is based on the divine creative will, which purposely created the benefits in the first place. Hard naturalists fused the value arising from God's justice and will with the facts of a natural order to invest nature with both objectivity and normative value.

A significant theological implication of Hard Natural Law theory is whether human beings can, through their rational analysis into the good and the bad, create norms of behavior that God not only would, but indeed must punish and reward. This proposition raised theological concerns because of the implication it had for the theology of God's omnipotence. If God is truly omnipotent, how could He essentially be bound by human reasoning to reward or punish certain conduct that people designate as obligatory and prohibited (*wājib* and *maḥẓūr*)? To make their argument, Hard Naturalists upheld the theology of a just God, and of a nature in which God's will and human reason can be linked. Nature is objectively good for humanity given the assumption of a just Creator that only does the good and needs nothing. Consequently, Hard Naturalists argued that one could rationally deduce the good from nature, and transform that finding into a normative Sharīʿa value since the empirical goodness of nature embodies the purposeful intent of God. For the Hard Naturalists al-Jaṣṣāṣ (d. 370/981), Qāḍī ʿAbd al-Jabbār (d. 415/1025) and Abū al-Ḥusayn al-Baṣrī (d. 436/1044) the fusion of fact and value is a central feature of their natural law theory, and is expressed as the presumption of permissibility (*ibāḥa*). In the absence of evidence to the contrary, all things are good and at a base level legally permissible, with no consequence one way or another.

Hard Natural Law theorists fused fact and value in nature. In doing so they held that human beings can reason about the good and the bad (*ḥusn, qubḥ*) by observing the natural world, and that their initial empirical assessments transform into normative ones. They argued that the normative content of empirical assessments is founded upon the fusion of fact and value, by which nature is

invested with a presumptive normativity that stems from God's purposeful creation of nature for human benefit. Rational determinations of the good and the bad natural observations, transform into divine obligation because of the fusion of fact and value. Once an act is deemed good on a rational basis, it can be obligatory to perform that act, with liability for punishment in the Hereafter in the event of omission. Unlike their Soft Natural Law opponents, the Hard Naturalists relied on a view of nature that is constant and determinate. This feature of constancy in their conception of nature is why this study calls their version of natural law 'hard'.

The Voluntarist Critique of Hard Natural Law

Voluntarist jurists were concerned about the theological implications of Hard Natural Law. They argued that the implication of Hard Naturalism is not only that God cannot do evil, but also that God would be obliged to reward or punish someone because of a reasoned determination we make. This implication challenged the assumption of God's omnipotence. Voluntarist jurists adopted the theology of an omnipotent God who is not subjected to reasoned determinations about the good and the bad. Indeed, these concepts have no meaning without God's deliberate decision: X is good *because* God wants X. Anything else would seem to constrain God's infinite power. Voluntarist jurists were concerned that if the Sharīʿa were susceptible to conclusions from reason alone, then effectively human beings could hold God obliged to enforce rules that arise purely out of human determinations wit outreference to God's will. God's judgment, therefore, would be contingent on the results of human rational inquiry.[71] This possibility challenges the theological premise of an all-powerful God subservient to no one.

Voluntarists argued that one must investigate and analyze source-texts with divine authority to determine obligations and prohibitions that reflect the divine will. Indeed for Voluntarist jurists,

[71] George F Hourani, 'Two Theories of Value in Medieval Islam' (1960) 50 *Muslim World* 269, 276–7.

'"good" and "right" and similar terms have no meaning other than "that which God wills": thus God makes things good or right for us by His decision that they should be so.'[72] Richard Frank remarks that for Voluntarists, 'the ontological reference of "bad" is God's prohibition. These valuations are true of actions only by the giving of the law (*bish-shar'*) and not by the mind's intuitive judgment... so that "he who does not validly know the law does not validly know that a bad action is bad."'[73] In other words, one must wait for divinely inspired source-texts (*shar'*) before making any Sharī'a determination. In the absence of *shar'*, Voluntarists generally held that there is no divine obligation on the matter, and that one is left in a state of suspended judgment (*tawaqquf*).

This is not to suggest that they avoided determining the value of acts on which scripture is silent. They admitted that humans can use their reason to understand creation and create a moral ordering of things. Human beings can assess the good and the bad as empirical matters, and can assert cultural or moral truths about the good and the bad. But those truths cannot be considered obligations emanating from the divine. For instance the Shafi'ite-Ash'arite jurist al-Juwaynī (d. 478/1085) recognized that people constantly make judgments about how best to avoid harm (*ijtināb al-mahālik*) and enjoy various benefits in nature (*ibtidār al-manāfi'*).[74] But making moral determinations of the good and the bad is entirely different from identifying a ruling of God (*ḥukm Allāh*). Whether something is obligatory or prohibited depends on whether God has provided a sanction for violating the given norm. Without a sanction, one cannot meaningfully speak of obligations and prohibitions.[75] *Ḥusn* and *qubḥ* are ethical terms of art, but these terms do not contribute content to the Sharī'a. While Hard Naturalists assured themselves that eternal happiness (*al-sa'ādat al-ukhrawiyya*) could be achieved

[72] Hourani, 'Two Theories of Value,' 270. See also Sherman A Jackson, 'The Alchemy of Domination? Some Ash'arite Responses to Mu'tazilite Ethics,' (1999) 31 *International Journal of Middle East Studies* 185.

[73] Richard M Frank, 'Moral Obligation in Classical Muslim Theology' (1983) 11 *Journal of Religious Ethics* 204 (citation omitted).

[74] Abū al-Ma'ālī al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, Ṣalāḥ b. Muḥammad b. 'Awīḍa (ed) (Beirut: Dār al-Kutub al-'Ilmiyya, 1997) 1:10.

[75] Al-Juwaynī, *al-Burhān*, 1:10.

through a rational engagement with reality in the pursuit of a good (*maṣlaḥa*), Voluntarists doubted whether that nexus offers any insight into the divine will. As Hourani writes: '[i]t is possible to some extent to discover by empirical reason what produces happiness in an earthly society, and to see the causal relation between the means and the end. But where the goal is happiness in an afterlife...there is no intelligible relation between the cause (certain kinds of action) and the effect (the reward of bliss in the next life),' since the implication of our acts in this world on our salvation in the Hereafter is something only God can know.[76] Reason has no authority to resolve or decide upon such matters.

The Voluntarists issued their critique of Hard Naturalism on two grounds. First, they argued that nature is not sufficiently determinative, objective, or foundational to ground the authority of reason: fact is not fused with value. Their opposition to any fusion of fact and value is based on Q. 17:15, which states: 'We do not punish until We send a messenger.' This verse enshrines the idea that divine sanction requires an ex ress statement of will not a reasoned inquiry into e good and the bad. To reason from nature, they argued, assumes too much of both God and the human capacity to know the divine will. For instance, the 11th century jurist Ibn Ḥazm, never one to mince words, argued that the Hard Naturalists' fusion of fact and value in nature was 'plain pomposity' (*makābirat al-iyān*).[77] By their very nature, human beings are prone to sexual licentiousness, drunken debauchery, and lapses in religious observance. These are all potentially natural dispositions, he noted, all of which God prohibits expressly. Consequently, one cannot argue from the facts of nature to moral norms and obligations with the imprint of the divine.

Secondly, while they accepted the fact that human beings make rational moral judgments all the time, those determinations cannot assume the normative authority of a divine rule whereby God is bound by human reason to reward or punish. For nature to be a bounty and source of goodness, one had to assume that God only

[76] Hourani, 'Two Theories of Value,' 273.

[77] Abū Muḥammad Ibn Ḥazm, *al-Iḥkām fī Uṣūl al-Aḥkām* (Cairo: Dār al-Ḥadīth, 1984) 1:54.

does the good, seeking to benefit humanity.[78] Voluntarist jurists rejected this theology of God, especially since it potentially undermines God's omnipotence. If God can only do the good for humanity's benefit, and human reason can decide what is good, then effectively humans can require God to reward and punish certain behavior. This possibility undermined, for the Voluntarists, the idea that God was beyond any limits. Jurists such as Abū Isḥāq al-Shīrāzī (d. 476/1083) argued vociferously that God is not limited in any way. Rather God does as He wishes and rules as He desires (*yafʿalu Allāh ma yashā' wa yaḥkumu ma yurīdu*).[79]

For Voluntarist jurists, where no source-text addresses an issue, no one can assert a divine rule of law. Voluntarist jurists did not deny that a rule of God exists; they argued instead that humans are not in an epistemic position to determine what the law is.[80] Consequently in situations where there is no source-text, Voluntarist jurists held that the divine law is in a state of deferred judgment (*tawaqquf*, *waqf*), such that one cannot authoritatively assert a rule of obligation or prohibition.[81]

Hard Naturalists countered, however, that the position of deferred judgment (*tawaqquf*) is substantively no different than their presumption of permissibility. Both positions imply that one suffers no consequence for acting.[82] But Voluntarists countered that Hard Natural Law depends on an affirmative rational assumption of

[78] For Hard Naturalist sources relying on this assumption, see Abū Bakr al-Jaṣṣāṣ, *Uṣūl al-Jaṣṣāṣ: al-Fuṣūl fī al-Uṣūl*, Muḥammad Muḥammad Tāmir (ed), 2 vols (Beirut: Dār al-Kutub al-ʿIlmiyya, 2000) 2:100; Abū al-Ḥusayn Muḥammad b. ʿAlī b. al-Ṭayyib al-Baṣrī, *al-Muʿtamad fī Uṣūl al-Fiqh* (Beirut: Dār al-Kutub al-ʿIlmiyya, n.d.) 2:320.

[79] Abū Isḥāq al-Shīrāzī, *Sharḥ al-Lumʿa*, ʿAbd al-Majīd Turkī (ed) (Beirut: Dār al-Gharb al-Islāmī, 1988) 2:983–4.

[80] On human epistemic weakness, see Abū ʿAbd Allāh Muḥammad b. Maḥmūd b. ʿAbbād al-Aṣfahānī, *al-Kāshif ʿan al-Maḥṣūl fī ʿIlm al-Uṣūl*, ʿĀdil Aḥmad ʿAbd al-Mawjūd and ʿAlī Muḥammad Muʿawwaḍ (eds) (Beirut: Dār al-Kutub al-ʿIlmiyya, 1998) 1:370-1.

[81] Al-Khaṭīb al-Baghdādi, *Kitāb al-Faqīh wa al-Mutafaqqih* (n.p.: Maṭbaʿat al-Imtiyāz, 1977) 192–4; Ibn Ḥazm, *Iḥkām*, 1:52; Abū al-Muẓaffar al-Samʿānī, *Qawāṭiʿ al-Adilla fī al-Uṣūl*, Muḥammad Ḥasan Muḥammad Ḥasan Ismāʿīl al-Shāfiʿī (ed) (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997) 2:46–7, 52; Abū Isḥāq al-Shīrāzī, *Sharḥ al-Lumʿa*, 2:977; Tāj al-Dīn ʿAbd al-Raḥmān b. Ibrāhīm Ibn al-Farikān, *Sharḥ al-Waraqāt*, Sārah Shāfi al-Hājirī (ed) (Beirut: Dār al-Bashā'ir al-Islāmiyya, 2001) 347–50, stated that this position was adopted by the majority of Ashʿarites.

[82] Abū Bakr al-Jaṣṣāṣ, *Uṣūl al-Jaṣṣāṣ*, 2:103.

the fusion of fact and value in nature, and thereby the goodness that underlies the legal category of the permissible (*ḥalāl*, *mubāḥ*). The Voluntarist position of *tawaqquf* or suspended judgment makes no such rationalist assumption. It only asserts the absence of an authoritative source-text that could justify finding an obligation.[83]

Voluntarists acknowledged that when source-texts are silent, some mode of analysis is required to ensure that we can still order our lives. It is one thing to suspend judgment, but another to suggest that no liability follows by acting one way or another. To respond to this second concern, Voluntarists relied on the rational presum tion of *istiṣḥāb al-ḥāl*, or the resum tion of continuity, whereby they argue at w ere no scripture governs a case, no liability is imposed for acting as one wishes. This is a rational presumption that does not amount to an affirmative rational assertion of legal value. For Voluntarists, the presumption of continuity involves the use of reason only to the extent that it is utilized epistemically to determine whether any scripture exists that governs the given situation. Reason has no ontological authority in Sharīʿa. A rational conclusion about the good and the bad is not infused with normative power. Where there is no authoritative source-text there is no law. Fundamentally the presumption of continuity does not violate the principle that obligation must come from an express legislative will.

Theory II: Soft Natural Law

As much as they rejected Hard Natural Law, Voluntarists were not so jurisprudentially naïve as to assume that sufficient source-texts exist to address every potential legal issue. Certainly issues would arise for which no source-text provides guidance. Simply to rely on the presumption of continuity or the suspension of judgment offers little comfort to those of us keen to order our affairs normatively. To suspend Sharīʿa judgment in these cases is tantamount to

[83] Abū al-Walīd al-Bājī, *Iḥkām al-Fuṣūl fī Aḥkām al-Uṣūl*, ʿAbd al-Majīd Turkī (ed) (2nd edn, Beirut: Dār al-Gharb al-Islāmī, 1995) 2:689; Ibn Ḥazm, *Iḥkām*, 1:56; Abū Hāmid Muḥmmad b. Muḥammad al-Ghazālī, *al-Mustaṣfā min ʿIlm al-Uṣūl*, Ibrāhīm Muḥammad Ramaḍān (ed) (Beirut: Dār al-Arqam, n.d.) 1:133; al-Samʿāni, *Qawāṭiʿ al-Adilla*, 2:52, al-Shīrāzī, *Sharḥ al-Lumʿa*, 2:979–80.

limiting the capacity of Sharīʿa to order normatively the complexity of lived experience. The Voluntarists' response to this situation illustrates how they balanced their theological commitment to God's omnipotence with the need to endow reason with sufficient authority to extend the Sharīʿa.

Voluntarists developed what is herein called Soft Natural Law. Soft Natural Law theories rely on a conception of nature that, just as for the Hard Naturalists, fuses fact and value: nature is deemed beneficial for human beings. But the benefit that nature provides is not a consequence of God's eternal goodness and His inability to do evil. Rather, nature is a contingent good only because of God's grace (*faḍl, tafaḍḍul*).[8] An empirical investigation into nature reveals that the created world poses various benefits to human existence. This evidence of goodness indicates, for Voluntarist Soft Naturalists, that God created the world for the purpose of supporting, maintaining, and preserving the interests of people. But God does so purely out of His grace, which is subject to change if God so desires. The argument of grace both allows for the fusion of fact and value in nature—thus rendering natural reason authoritative—and preserves a theological commitment to God's omnipotence, since God can alter His graceas He sees fit. For Soft Naturalist jurists, God need not have provided any guidance through His creation of nature. But since He did, out of His grace, humans can rely upon it. But they do so not because of some theological assumption about the limits of God's power. Instead, we can reason about the good and the bad as a basis for the law only because of God's purposive, merciful, and gracious creation of our ability to discern such things from His creation—which God can alter at any time. While both Hard and Soft Naturalists fused fact and value in nature, the Soft Naturalists

[84] The technical terms of *faḍl* and *tafaḍḍul* are the key term of art for the Voluntarist naturalist theory, which also distinguished it from Hard Naturalism. For other Voluntarist examples, see Fakhr al-Dīn al-Rāzī, *al-Maḥṣūl fī ʿIlm Uṣūl al-Fiqh*, Ṭāha Jābir Fayyāḍ al-ʿAlwāni (ed), (3rd edn, Beirut: Muʾassasat al-Risāla, 1997) 5:176; Shihāb al-Dīn al-Qarāfī, *Nafāʾis al-Uṣūl fī Sharḥ al-Maḥṣūl*, Muḥammad ʿAbd al-Qādir ʿAṭā (ed) (Beirut: Dār al-Kutub al-ʿIlmiyya, 2000) 4:642; Najm al-Dīn al-Ṭūfī, *'al-Ḥadīth al-Thānī wa'l-Thalāthūn,'* in Muṣṭafā Zayd, *al-Maṣlaḥa fī al-Tashrīʿ al-Islāmī wa Najm al-Dīn al-Ṭūfī* (2nd edn, n.p.: Dār al-Fikr al-ʿArabī," 1964), 213; Abū Isḥāq al-Shatibi, *al-Muwāfaqāt fī Uṣul al-Sharīʿa*, ʿAbd Allāh Darāz et al (eds), 2 vols (Beirut: Dār al-Kutub al-ʿIlmiyya, n.d.) 2:131.

argued that its constancy is subject to a divine purposiveness that can be changed at God's discretion. Nature, as it exists, is certainly a source of the good. But it is not an unchangeable, indubitable good. This theologically-based contingency of nature's constant goodness is the reason why this study considers this second natural law model to be soft. Despite the contingency in nature, the theory of God's grace suggests that Soft Naturalists fused fact and value in nature to render reason an ontologically authoritative source of Sharīʿa norms, where source-texts are otherwise silent.

Soft Natural Law and Practical Reasoning

Of crucial significance—not to mention some degree of irony—is the fact that both Hard and Soft Natural Law jurists fused fact and value in nature to render reason an authoritative source of Sharīʿa norms. In the end, both considered nature objective and distinct from the individual observing what it can and does 'say'. Despite their differing theologies of God, the two groups of natural law jurists have much in common, from the perspective of legal philosophy.

This irony though is not as poignant as it may first seem. Certainly the ontological authority of reason is a shared feature of both Hard and Soft Natural Law. But Soft Naturalist jurists did not discard their concerns about the implications of reason's authority in the law. Consequently, we see them limiting the scope of reasoned deliberation in the law by developing highly structured methodologies of legal analysis and inquiry. Soft Natural Law jurists designed various theories of practical reasoning, many of which revolve around the term *maṣlaḥa* or a perceived good, and frame practical reasoning as an enterprise that aspires to fulfill basic purposes of the law, or what are called *maqāsid al-sharīʿa*. As will be discussed below, Soft Naturalist jurists generally held that the purpose of the Sharīʿa is to preserve five fundamental values: life, lineage, property, mind, and religion. Any rule that is not fundamentally premised or justified by reference to an authoritative source, such as the Qurʾān or a *ḥadīth* of the Prophet, must satisfy one or more of these fundamental values.

As these values are highly abstract, jurists recognized the importance of arguing to a particular legal ruling via a legal principle of the good or *maṣlaḥa*, in light of these abstract, fundamental values. What is *maṣlaḥa*? In the context of Soft Naturalist practical reasoning, *maṣlaḥa* is a legal term of art that has to do with a perceived general good that speaks to the perfection of a polity, both at the individual and general levels.[85] For instance, an oft-cited early example of a rule pursuant to *maṣlaḥa* is provided by a story about the second caliph ʿUmar b. al-Khaṭṭāb (r. 634–644 CE), who suspended the corporal punishment for theft in a time of famine. The Qurʾān stipulates that the convicted thief must suffer the amputation of his hand.[86] Despite the source-text's prohibition against theft, famine presented a substantive public interest that affected how ʿUmar would apply and enforce the law.[87] Perhaps his ruling was exceptional. Or perhaps the conditions that render theft punishable are deemed not to exist in a case of famine. In either case, though, jurists contended with arguments based on both source-texts and reasoned deliberation about the wellbeing of the polity. In the pre-modern literature, Muslim jurists debated the relevance, authority, and significance of *maṣlaḥa* for legal reasoning.

Not all *maṣlaḥa*-based arguments are authoritative. Indeed, those that contravene an authoritative source-text must fail for a lack of authority. And yet, even this limiting factor does not always preclude a ruling on the basis of *maṣlaḥa*. In the absence of a source-text, a *maṣlaḥa*-based argument could justify a rule of law.[88]

[85] For general studies on *maṣlaḥa*, see Yūsuf Ḥāmid al-ʿĀlim, *al-Maqāṣid al-ʿĀmma li al-Sharīʿa al-Islāmiyya* (Herndon, Va: International Institute of Islamic Thought, 1991); Ḥusayn Ḥāmid Ḥassān, *Naẓariyyat al-Maṣlaḥa fī al-Fiqh al-Islāmī* (Cairo: Dār al-Nahḍa al-ʿArabiyya, 1971); Muṣṭafā Zayd, *al-Maṣlaḥa fī al-Tashrīʿ al-Islāmī wa Najm al-Dīn al-Ṭūfī* (2nd edn, Cairo: Dār al-Fikr al-ʿArabī, 1964); Muhammad Khaled Masud, *Islamic Legal Philosophy: A Study of Abū Isḥāq al-Shāṭibī's Life and Thought* (Delhi: International Islamic Publishers, 1989) 2, 150; for studies on the concept of *maṣlaḥa*, see Kamali, *Principles of Islamic Jurisprudence*, 351–68; Ihsan Bagby, 'Utility in Classical Islamic Law: The Concept of "Maslahah" in 'Usul al-Fiqh" (PhD dissertation, University of Michigan, 1986) 3; M Khadduri, 'Maṣlaḥa' in *Encyclopaedia of Islam, Second Edition*.

[86] Qurʾān 5:38.

[87] Ibn Qayyim al-Jawziyya, *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, ʿAbd al-Raḥmān al-Wakīl (ed) (Cairo: Maktabat Ibn Taymiyya, n.d.), 3:14–15.

[88] Muḥammad Abū Zahra, *Uṣūl al-Fiqh* (Cairo: Dār al-Fikr al-ʿArabī, 1957) 293; Zayd, *al-Maṣlaḥa fī al-Tashrīʿ al-Islāmī*, 33.

How jurists defined *maṣlaḥa* is not an easy issue to survey. Indeed, this study is not designed to offer an answer to that question. Rather, it illustrates how Soft Naturalists used concepts such as *maqāṣid al-sharīʿa* and *maṣlaḥa* to develop a theory of practical reasoning by which they could recognize *and* limit the authority of reason in the law.

This section began by noting the irony that despite their difference, the Hard and Soft Naturalists both fused fact and value in nature to provide a philosophical foundation for the ontological authority of reason in Sharīʿa. However, the Soft Naturalists' model of practical reasoning illustrates how they developed an epistemology of inquiry that is designed, in large part, to limit the scope of reasoned deliberation. This douses the poignancy of the irony. With one gesture, Soft Naturalists granted reason ontological authority, but with another they limited its scope of operation in the law.

The pre-modern move to limit the scope of reason raises the specter of a second irony that brings us to modern day reform movements in the Muslim world. For many 20th and 21st century Muslim reformers, the related concepts of *maqāṣid al-sharīʿa* and *maṣlaḥa* offer a mechanism of practical reasoning that is rooted in the pre-modern Islamic tradition *and* provides an interpretative model for responding to the challenges of modernity. For them, *maqāṣid* and *maṣlaḥa* are conceptual opportunities for enhancing the scope of reason amidst an inherited tradition of legal doctrine that is often considered an obstacle to ongoing development.[89] Spanning the globe from Indonesia to the Arab world, Muslim reformists have adopted these concepts to call for reform in the Sharīʿa tradition.[90] Indeed, even in the realm of Muslim civil

[89] Muṣṭafā Zayd argues that *maṣlaḥa*-based reasoning offers an important framework for practical reasoning that was used by pre-modern jurists and can continue to be used today, especially as many circumstances of the modern world have no prior precedent in authoritative source texts or otherwise. Zayd, *al-Maṣlaḥa fī al-Tashrīʿ al-Islāmī*, 28–32.

[90] Mujiburrahman, 'Islam and Politics in Indonesia: the political thought of Abdurrahman Wahid' (1999) 10 *Islam and Christian-Muslim Relations* 339, 348; Michael Mumīsa, *Islamic Law: Theory and Interpretation* (Beltsville, Md: Amana Publications, 2002) 163–4; Fathi Osman, 'Islam and Human Rights: The Challenge to Muslims and the World' in El-Affendi, *Rethinking Islam and Modernity*, 27, 38–42. Indeed Muslim institutes have commissioned translations of Arabic sources that address these concepts. The effort has resulted in an increase in English language sources, which

society, we find these concepts animating how Muslims organize and contribute to the world stage. For instance, the Cordoba Initiative, with offices in New York City and Kuala Lumpur, is spearheading the development of a 'Sharia Index Project'. The proposed Sharīʿa Index offers a standard for evaluating the Islamicity of a Muslim state. The values that animate the Index are drawn directly from the concept *maqāṣid al-Sharīʿa*.[91] Gender justice groups such as *Sisters in Islam* and *Women Living Under Muslim Laws* utilize the language of *maqāṣid* on their websites to legitimate their calls for legal reform to promote gender equality in Muslim lands.[92]

If we read the Soft Naturalists' model of practical reasoning as a response to Hard Naturalism, we cannot help but recognize their use of *maqāṣid al-sharīʿa* and *maṣlaḥa* as devices expressly designed to limit the operation of reason in the law. *Maqāṣid al-sharīʿa* and *maṣlaḥa* were developed by pre-modern Soft Naturalists as a check on the scope of reason, despite their naturalist theory that recognized its authority in the law in the first place. Modern reformists see these concepts as enhancing the authority of reasoned deliberation amidst an inherited tradition of *fiqh* that dominates the discourse on Islamic law. This second irony lies in the distance between the animating principles of the Soft Naturalists, and those of modern reformers. The Soft Naturalists were concerned with

are aimed to inspire innovative thinking about Islam and its legal history. See eg the two works published by the International Institute of Islamic Thought (IIIT): Muhammad al-Tahir Ibn Ashur, *Treatise on Maqāṣid al-Sharīʿa*, Mohamed el-Tahir el-Masawi (trans) (London: International Institute for Islamic Thought, 2006); Ahmad al-Raysuni, *Imam al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law*, Nancy Roberts (trans) (London: International Institute of Islamic Thought, 2005). More recently, IIIT published the following English monograph: Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law* (London: International Institute of Islamic Thought, 2008).

[91] For the website, visit <http://www.cordobainitiative.org/?q=content/shariah-index-project>.

[92] eg, Women Living Under Muslim Laws offers the following *maqāṣid*-based definition of Islamic feminism: 'Islamic feminism aims to recover and implement the fundamental objectives (maqasid) of Islam: social justice and the equality of all Muslims, including gender equality' <http://www.wluml.org/english/newsfulltxt.shtml?cmd[157]=x-157-547094>.

For the Sisters in Islam website and publications, visit <http://www.sistersinislam.org.my>.

theological first principles and the imperatives of jurisprudence. Soft Naturalists were wary of any jurisprudence that might impinge on God's omnipotence. And yet they could not ignore the jurisprudential imperative of having to adjudicate where source-texts are lacking. Their legal philosophy recognized the ontological authority of reason; but in doing so, Soft Naturalists limited the extent to which reason is an indubitable authority. God's grace is an important feature in both rendering reason authoritative, and ensuring its authority is contingent on the divine will. Likewise the model of practical reasoning ensures the primacy of God's express will, and so limits the scope over which reasoned deliberation can operate. For modern reformers, the concerns arising over reasoned deliberation have less to do with theological first principles. For them, the significance of debates about reason have to do with the challenge of modernity, the modern state system, and the image of Sharīʿa as a system of rules that many believe impede development at the individual, regional, national, and transnational levels.

After Islamic Natural Law

This study focuses on the pre-modern in order to situate the particular debates on natural law in the intellectual milieus in which they were developed. But, the two ironies of Islamic natural law take us from the pre-modern to the modern period. There is little doubt that Sharīʿa remains a vibrant discourse for Muslims the world over. Whether in popular discourses, political contests,[93] or scholarly debate, Sharīʿa invokes considerable response in the world today. However, what it may have meant centuries ago is one thing; what it means today is different. Thinking philosophically about Sharīʿa without recourse to history will more often than not gloss over the particularities that animated the pre-modern theoretical discourse to begin with.

By identifying the ironies, we are in a better position to understand the significance of the pre-modern debates, and the various

[93] The political significance of Sharīʿa is evident in the way it has become a point of multicultural debate in polities ranging from Canada to the Philippines. See Emon, 'Canadian Mosaic'; Emon, 'Techniques and Limits of Rights Reasoning'.

camps that were formed from and by the debates. Those camps, whether defined by theological school or legal guild, offer important indices of how a particular jurist might think about an issue. The ironies also alert us to the importance of metaphysics to pre-modern jurists, and the relationship of metaphysics to their respective theologies of God and their theories of natural law. While we can demarcate fields of thought along disciplinary lines, that does not mean such fields of thought cannot penetrate one another. Indeed, theology and Sharīʿa are brought together through the lens of natural law; they are in large part brought together because of the metaphysics that animat ir ʾuris rudence—a metaphysics that can be traced to how we understand God and nature.

The ironies, though, show that the fusion of fact and value can have the effect of preserving the status quo. If what exists is also what ought to be, then it is not clear how Islamic natural law provides a mechanism of fostering change. It can certainly aid in the development of new laws where source-texts are silent. But the more source-texts contribute to authoritative precedents, the less room for employing the *maqāṣid-maṣlaḥa* model of analysis. Indeed to use the *maqāsid-maslaha* model expansively in order to foster change may actually require a rejection of various parts of the inherited tradition of Sharīʿa. To seek change through *maqāṣid* in the modern day, it would seem, begs a prelimin uestion of what constitutes the relevant sources of Sharīʿa that control and limit the scope of reasoned deliberation in the law.

The ironies suggest that this study of Islamic natural law theories is simply a starting point for those keen to understand the dynamics of legal philosophy within a Sharīʿa framework. Certainly many might find the metaphysics of Islamic natural law unconvincing. They might find the fusion of fact and value far too stagnating. They may find the *maqāṣid-maṣlaḥa* model of practical reasoning far too formalistic to account for the complexity of modern life. Yet such critiques are not unique to Islamic law. Legal systems across the world suffer from similar limitations. Perhaps that simply suggests such limits are characteristic of legal systems generally. Aristotle, when writing about justice, was mindful of both the formality of the law, and the need to provide more case-specific analysis in situations where legal formality may cause substantive injustice.

Sometimes a judge must look to the equities of a case to render a justice that is not fully captured by the formal legal system. This is not to suggest that the resort to equity indicates a failure of the justice system. Both the formality of the law and the equitable inquiry contribute to the fulfillment of justice. The essential nature of the equitable is that 'it is a rectification of the law where the law is defective because of its generality.'[94] Likewise, Balakrishnan Rajagopal, writing about international law, remarks that law 'needs to establish its own field of autonomy only by simplifying and excluding much of actual reality... indeed, each time law comes into contact with "reality", it struggles to reflect it, even as it maintains its distance from it to show that as "law", it is different from the "reality" and can therefore constrain it.'[95] Islamic natural law and the *maqāṣid-maṣlaḥa* model of practical reasoning may be designed to respond to the natural world, the world of human experience. But their metaphysics and formality may have the effect of covering over more of the world than reflecting it.

[94] Aristotle, *Nichomachean Ethics*, Harris Rackham (trans) (Hertfordshire: Wordsworth, 1996) 134.

[95] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge: Cambridge University Press, 2003) 65.