A TURN IN THE EPISTEMOLOGY AND HERMENEUTICS OF TWENTIETH CENTURY *UṢŪL AL-FIQH*

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Abstract

I argue here that an epistemological shift has taken place in twentieth century *uṣūl al-fiqh*: away from the classical/orthodox Ashʿarī position in which the human mind simply discovers the divine law and extends it to new cases on the basis of consensus (*ijmāʿ*) and analogical reasoning (*qiyās*); and toward a position in which reason is empowered to uncover the *ratio legis* behind the divine injunctions—a distinctly Muʿtazilī approach. This shift has been accompanied by a privileging of universal ethical principles (*kulliyyāt*), now identified as the aims of the Law (*maqāṣid al-sharīʿa*), over the specific injunctions of the texts (*juzʾiyyåt*)—a hermeneutic strategy that has often favored public interest (*maṣlaḥa*) as the chief criterion for developing fresh legal rulings in the light of new sociopolitical conditions. The main theoreticians discussed here are Muḥammad ʿAbduh, Muḥammad Rashīd Riḍā, ʿAbd al-Razzāq Sanḥūrī, ʿAbd al-Wahhāb Khallāf, Muḥammad Abū Zahra, and Muhammad Hashim Kamali.

LAW AND THEOLOGY IN ISLAM, as for Christians in medieval Europe, have always had a symbiotic relationship.[1] But whereas western Christians accorded a secondary holy status to the Emperor Justinian's *corpus juris civilis*, Muslims could not grant final authority in legal matters to any other text but the sacred texts of the Qurʾān and Sunna. And while both Christians and Muslims regarded their respective authoritative texts as emanating from God, directly or indirectly, and both communities considered the primary task of the jurist to be the

* I wish to express my gratitude for the judicious critique and encouragement of Frank Griffel, Bernard Haykel, Felizitas Opwis, and three anonymous reviewers.

[1] Bernard Weiss, "Law in Islam and in the West: Some Comparative Observations," in *Islamic Studies Presented to Charles J. Adams*, eds. Wael B. Hallaq and Donald P. Little (Leiden and New York: E. J. Brill, 1991), 239-53, at 245. See also George Makdisi, "The Juridical Theology of Shāfiʿī: Origins and Significance of *Uṣūl al-Fiqh*," *Studia Islamica* 59, 1984, 5-48, where he coins the phrase, "juridical theology."

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exegesis and commentary of these texts, only in Islam does the sacred text of the Qurʾān acquire prime theological and legal importance in its very wording.[2] In the classical discipline of *kalām*—the closest equivalent to "theology" in Islam, along with *uṣūl al-dīn* ("the roots," or "foundations of religion")—God's speech was regarded as one of his seven attributes which finds its perfect expression in the Qurʾān ("inlibration").[3]

Law for Muslims is part and parcel of theology, and, as the blueprint for the believer's obedience to the divine will, it takes precedence over the latter. Human reason is an instrument of choice in Islamic theology, starting with the proofs for the existence of God. In Islamic law, however, God's directives are already embedded in the texts, and while Muslim jurists were likely more forthcoming than their Christian counterparts about the ambiguity of language—and thereby displayed great tolerance for the variety of views represented by the various schools—they nonetheless held tenaciously to the Qurʾān and Sunna as sole primary sources of law.

This essay examines one aspect of Muslim legal theory, *uṣūl al-fiqh* ("the roots," or "foundations of jurisprudence") in the twentieth century: the interplay between reason and revelation in the process of discovering and applying God's law to the changing conditions of modern society. My thesis is that mainstream Muslim refomers have tentatively embraced a paradigm shift, from the classical orthodox position (Ashʿarī) in which the human mind simply discovers the rulings (*al-aḥkām*) of divine law and extends them to new cases on the basis of consensus (*ijmāʿ*) and analogical reasoning (*qiyās*), to a position in which reason, now empowered to discern right from wrong and to ferret out the *ratio legis* behind the divine injunctions—a distinctly Muʿtazilī predilection—is granted the privilege and responsibility to make legal rulings according to the spirit of *sharīʿa* (literally, its aims, or purposes, *maqāṣid al-sharīʿa*). This move has

[2] Khaled Abou El Fadl notes that the "technique of the jurist relies on language as its primary tool by which power is asserted, legitimated, or challenged. Language is the main tool by which a jurist attempts to negotiate reality, produce domains of truth, and frustrate domains of truth or reality" (*Rebellion and Violence in Islamic Law*, Cambridge University Press, 2001), 321.

[3] Harry A. Wolfson, *The Philosophy of the Kalam* (Cambridge, MA: Harvard University Press, 1976). The term "inlibration" expresses for him the striking parallel between the Muslim doctrine of the Qurʾān and the Christian doctrine of incarnation.

been accompanied by another (tentative) hermeneutical decision: the texts' legal jurisdiction is now restricted to ritual and theology (*al-ʿibādāt*), as opposed to the domain of civil transactions (*al-muʿāmalāt*)—including the political arena—where change, creativity, and cultural diversity occurs over time.[4] This theological turn involves ontology (the status of ethical values), epistemology (how much can the human mind know?) and hermeneutics (an interpretive strategy favoring the spirit over the letter of the text).[5] Further, it starts with a new theology of humanity and creation which posits the human person as God's trustee on earth, empowered by Him to manage the affairs of this world.[6] Finally, because, as in Christian circles, theology is always worked out in context,[7] this approach to *sharīʿa* is consciously linked to a form of constitutional "democracy" (loosely defined) in which laws are enacted in conformity with the demands of Islam by a kind of parliament (*ahl al-ḥall waʻl-ʿaqd*, "the people who bind and loose"), which includes among its members the contemporary equivalent to the classical scholar-jurist (*mujtahid*). This observation raises some critical questions about the current relationship between Islamic legal theory and the global context of our 21st century. But first, a word on the background of Islamic law.

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[4] I owe a debt of gratitude to Riḍwān al-Sayyid who first alerted me to this issue in his article, "Contemporary Muslim Thought and Human Rights," *Islamochristiana* 21 (1995), 27-41.

[5] The discipline of *uṣūl al-fiqh* articulates a properly Islamic philosophy of language, and thereby, a formulation of humanity's connection to its Creator as a creature endowed with a mind (*ʿaql*), and the resulting attributes of language and knowledge. As an epistemological statement, writes Aziz al-Azmeh, *uṣūl al-fiqh* casts the world "in a *sharʿī* mode [congruent with the divine *sharīʿa*] when judgments on particular things are enracinated in the *uṣūl*: the Koran, the Sunna, consensus (*ijmāʿ*), and analogical connection (*qiyās*)" ("Islamic Legal Theory and the Appropriation of Reality," in *Islamic Law: Social and Historical Contexts*, ed. Aziz al-Azmeh, 250-65, London & New York: Routledge, 1988), 251.

[6] On this, see my article, "The Human *Khilāfa*: A Growing Overlap of Reformism and Islamism on Human Rights Discourse?" *Islamochristiana* 28 (2002), 35-53.

[7] "Theology in context" has been the hallmark of "liberation theology" in the second half of last century. It is aptly echoed in the work of a South African Muslim, Farid Esack, *Qurʾan, Liberation and Pluralism: An Islamic Perspective of Interreligious Solidarity against Oppression* (Oxford: Oneworld, 1997).

The Backdrop of Classical Islamic Law

In order to appreciate the significance of the above-mentioned paradigm shift in modern times, one should first consider the interplay between theology and ethics evident in the heated discussions between the Ashʿarites and Muʿtazilites from the third to the fifth centuries A.H. This will enable us to reconsider the central legal matters of *qiyās* (analogy) and *ijmāʿ* (consensus of the legal experts, the *ʿulamāʾ*) in Ashʿarite theological cum legal theory. Abū Ḥamīd Muḥammad al-Ghazālī (d. 505/1111) was perhaps the first to breach this theory and modern jurists later turned this breach into a gateway.

Ethical Theory

Albert Hourani offers a useful sketch of the Muʿtazilī/Ashʿarī debate on ethics by distinguishing between the ontology of good and evil, and their epistemological dimension.[8] Whereas the Muʿtazilites claimed an objective existence to ethical values which God takes into account in his dealings with people and his created order (objectivism), the Ashʿarites taught that these values may be defined only in terms of what God decrees (theistic subjectivism, or ethical voluntarism).[9] As for whether or not these values can be known to people through the use of reason, the Muʿtazilites answered in the affirmative ("partial rationalism").[10] Majid Fakhry explains that for the Muʿtazilites ethical knowledge yields intuitive certainty, and in this sense it is "autonomous and self-validating."[11] This means that human reason does not need the assistance of revelation to determine the basic contours of righteous living. In fact, for the great eleventh century jurist, theologian and

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[8] See Hourani, *Reason and Tradition in Islamic Ethics* (Cambridge, UK: Cambridge University Press, 1985), Chapter three, "Ethical Presuppositions of the Qurʾan."

[9] This was the position of Plato and Aristotle who both posited the universal value of the good. Plato's dialogue between Socrates and Euthyphro clearly makes the point that the gods send down laws because they are holy, and rejects the thesis that they are holy because they were sent down by the gods.

[10] This rationalism is "partial" because in some areas what is right can only be known through revelation (e.g., religious rites), and in many others ethical knowledge is attained through reason and revelation in cooperation. For the same reason Majid Fakhry calls the Muʿtazilī position "a quasi-deontological theory of right and wrong" (*Ethical Theories in Islam*, Leiden: E. J. Brill, 1991, 41).

[11] Ibid., 33. The Muʿtazilites were commonly known as "the people of oneness [a strict monotheism which required a created Qurʾan] and justice" (*ahl al-tawḥīd wa'l-ʿadl*).

philosopher ʿAbd al-Jabbār (d. 415/1025), in addition to "specifying" the morally upright life, revelation "defines the kinds of sanctions attached to them in the life-to-come. In that respect, revelation (or scripture) does no more than restate the obligation in the general theological or eschatological context".[12] For the Ashʿarites, by contrast, right and wrong can be discovered only through revelation. Abū 'l-Ḥasan al-Ashʿarī (d. 324/935), an influential Muʿtazilī doctor, experienced a kind of spiritual and intellectual conversion at age forty, and subsequently wrote scores of books to refute his prior convictions, thus gaving his name to the movement that was to become the principal theological position of Sunnism. From the Ashʿarī perspective, reason is capable of ascertaining the existence of God, but it cannot stipulate any action as morally or religiously obligatory. Only the Qurʾān and the Prophet's tradition (Sunna) can yield ethical certainty in human actions, and the hope of spiritual merit in the life to come.

This ethical/theological discussion triggered two other related questions—questions that repeatedly crop up in modern Muslim debates. The first has to do with the connection between obligation, responsibility, and free will, and the second with the utilitarian nature of the good. On the first issue, Muʿtazilites and Ashʿarites were sharply divided, while on the second, the lines of demarcation were blurred.

Hourani notes that the Muʿtazilites were by and large the "missionaries on the frontiers of Islam, who felt the weight of the large populations and powerful intellectual traditions that they were called upon to combat."[13] Foremost among these traditions were Zoroastrianism and Christianity—both of which demanded from Muslim interlocutors an affirmation of theodicy, that is, that God is just and acts only in good and righteous ways.[14] On the other hand, cautions Hourani, these Muʿtazilī apologists were never overwhelmed by the sophisticated arguments of their opponents, and deliberately selected any doctrines within the Islamic framework that best suited their

[12] Ibid., 35.

[13] *Reason and Tradition,* 94.

[14] Hourani concludes that although there is no direct evidence of borrowing from these outside sources, the circumstantial evidence is too strong to deny the impact of these longstanding traditions on the early formulations of Islamic theology, both in content (theodicy and free will) and in method (rationalistic disputation). See also Wolfson's discussion of early Christian and Muslim debates on whether God is capable of doing all things (including evil), or is limited to doing only what is good and just (*The Philosophy of the Kalam,* 578-89).

position. In fact, they chose not to make direct use of Greek philosophy—their ethical theory diverged sharply from that of Aristotle, unlike the philosophical ethics in the classical period of Islam developed by thinkers such as Miskawayh (d. 421/1030). Yet they were clear on two points of convergence with these other systems: God is just and He justly rewards people according to their deeds in the afterlife. Thus, "a moral action is defined . . . in terms of its relation to an agent who is both conscious (*ʿālim*) and capable (*qādir*)."[15] Whether an action is seen from the rational or religious angle, it must have been produced through the agent's power (or capacity, *qudra*), either directly (*mubāsharatan*), or indirectly (*bi'l-tawallud*). Though individual Muʿtazilites differ on certain details, all agree in their affirmation that this power precedes the person's action—a forceful statement of humanity's free will. Furthermore, this in no way detracts from God's sovereignty, since He designed his creature to act freely and thereby merit the reward for his good deeds.

A necessary corollary (in the minds of the Muʿtazilites) of God's justice is the thesis that God always acts "in accordance with the universal precepts of wisdom."[16] The theologians used three principal test cases to debate this thesis. First, did God create humankind for a reason (*ʿilla*)? Second, could God command people to accomplish the impossible (*mā lā yuṭāq*)? Finally, would God deliberately cause pain to innocent people without rewarding them in the end? The answers are simple (even if the arguments are complex): "yes" to the first question, since God created humanity for its own benefit as a way of showing His gracious benevolence (*tafaḍḍul*); "no" to the last two questions: God is just and will not order people to carry impossible burdens, nor will he cause people to suffer in this life without compensating them in the life to come.[17] It follows—and here Hourani quotes ʿAbd al-Jabbār—that the moral obligations incumbent upon humanity fall into three classes. The first are those actions which are obligatory "by virtue of an intrinsic property"—e.g., being kind to our fellow human beings, or protecting ourselves from injury, or showing God gratitude for his great kindness.[18] The second class is composed of those actions the obligatory nature of which flows from

[15] Fakhry, *Ethical Theories,* 35.
[16] Ibid., 42.
[17] The Ashʿarites consistently answered these three questions in the opposite way.
[18] Ibid., 34-5.

God's grace (*lutf*), the only non-rational category, roughly parallel to what later jurists would call *ʿibādāt* (commands relating to worship). The largest class is the third: those actions "that are obligatory by virtue of the advantage accruing to the agent from performing them or avoiding their opposites." To this Hourani adds: "The 'utilitarian' maxim that man ought to ward off injury to himself and seek his own advantage in matters spiritual and temporal is regarded by this theologian as incontrovertible."[19] I will point out the importance of this thought in modern times below.

The Ashʿarī perspective is the opposite of all the above assertions. In fact, the Ashʿarites on the issue of human freedom are the direct descendents of the early Muslim determinists (the Mujbira). As al-Shahrastānī in his *al-Milal wa'l-niḥal*: "actions are imputed to him [viz., the human agent], just as they are imputed to inanimate objects, and just as we say (for instance) that the tree bore fruit, water flowed, the stone moved, the sun rose and set."[20] If one objects that the Qurʾān teaches that people do in fact choose to do evil or good, the Ashʿarites reply that only God is transcendent and all of His creation is contingent upon him—including people. Without God's continuous creative action the universe would simply collapse. Human acts themselves, therefore, are the products of God's creative power. In another sense, however, God does confer on humankind an "acquired" ability to act. The doctrine of the "acquisition" (*kasb*) of this power of initiative conveniently explains human responsibility, while at the same time preserving the ontological distinction between human and divine creativity. In this perspective, it is not necessary for a person to have the ability to act before the act—to perform a certain act or to refrain from performing it. Bernard Weiss offers an illustration of this perspective that focuses on the act of murder:

> If I murder someone, I may be held responsible for my act and justly punished for it without my having had the power to pursue another course. Because the act proceeded from an ability created in me, I am the murderer, the one to be indicted. Human abilityṢand with it human agencyṢstands on an altogether different plane from divine ability and agency. Both planes are involved in my act of murdering. God creates the act as an act performed by me by creating the act in me (as its substrate) along with the ability to perform the act. The proper object

[19] Ibid., 35. See also Wolfson's excellent discussion of the issue of free will among the *mutakallimūn* (*The Philosophy of the Kalam,* 601-719).

[20] This is Fakhry's translation, ibid., 46.

> of God's uncreated ability is the sheer existence of the act; the proper object of my created ability is the act considered as a given among the givens of the created order. God is agent qua Creator, **conferrer** of existence; I am agent qua murderer.[21]

As to the question of whether the consequences of an act—specifically the ensuing benefit or harm to the agent—contribute in any way to its ethical value, the answer is more complex. Certainly, all Ashʿarī theologians would deny that the goodness of an action resides in any factor inherent to it or even exterior to it, as the sacred texts are the sole criterion for determining good or evil. Fakhry enumerates some of the many arguments put forward by the likes of ʿAbd al-Qāhir al-Baghdādī (d. 429/1037), al-Juwaynī (d. 478/1085) and al-Shahrastānī (548/1153) to the effect that human notions of right and wrong are relative and often in conflict. Indeed, human reason is so limited that it must constantly refer to revelation in order to follow the "straight path" commanded by God. Having said that, the revealed law does not actually cover every possible aspect of human experience in this world. And this is why, in juristic reasoning, the utilitarian perspective still resonates to some extent, as the next section shows.[22]

Law and Theology

Islamic jurisprudence is the discipline that systematically categorizes human actions according to the textual indications (*adilla* or *dalālāt*) found in the Qurʾān and Sunna. However, as less than ten percent of the Qurʾān is in the form of "X is obligatory," it is up to human scholars to search through the less precise statements of the texts in order to explicate God's categorization of human acts, and turn them into a system amenable to every day legal concerns (*fiqh*). This pious

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[21] *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah Press, 1992), 63, emphasis in the original.

[22] Daniel Brown argues that "Islamic ethics tends toward extreme theological voluntarism," with two corollaries: (a) it is very pessimistic about the capacity of human reason to discern what is right and wrong; and (b) this perspective fosters "a particular form of scripturalism which prefers specific concrete cases over general rules" ("Islamic Ethics in Comparative Perspective," *Muslim World* 89, 2, 1999, 181-92, at 185). Yet this extreme voluntarism is mitigated by two factors: (a) God's commands are largely assumed to be purposeful; and (b) Islamic jurisprudence is often caught in the tension between God's specific commands and his general purposes. More on this in the next section.

enterprise has as its objective the true understanding (the root meaning of *fiqh*) of God's eternal *sharīʿa*.

Muslim jurists developed two separate disciplines in the legal field: a body of theoretical principles governing the hermeneutics of textual manipulation, including the rules for extending God's classification of actions to areas not directly covered by the texts (*uṣūl al-fiqh*), and the positive application of this theory to the kind of law required by human society (*fiqh*). In practice, Islamic jurisprudence always tended toward idealism, and often shied away from positive embodiment.[23]

This idealistic reflex of Islamic law also (and more importantly, I would argue) has its source in the Ashʿarī determination to eliminate any human judgment in the legal enterprise. Naturally this is impossible, and, for that reason, the tool of analogy was invented. Yet the resort to *qiyās* was carefully circumscribed, more so in some schools, and totally forbidden by the Ẓāhirī school. In order to explicate the theological ramifications of these legal controversies, I will use Weiss's work on *Sayf al-Dīn al-Āmidī*'s (d. 631/1233) *Kitāb al-iḥkām fī uṣūl al-aḥkām* (henceforth, the *Iḥkām*), the most comprehensive treatment of *uṣūl al-fiqh* from a strict Ashʿarī perspective.[24] Even the *Kitāb al-maḥṣūl* by his contemporary, Fakhr al-Dīn al-Rāzī (d. 606/1209), "does not quite match the vastness of the *Iḥkām*, although it ranks with the *Iḥkām* as one of the major works in Islamic jurisprudence."[25]

In the course of Āmidī's discussion of God's acts and their relation to human acts, he chooses to highlight the differences between Muʿta-

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[23] Malcolm H. Kerr, for instance, commented on the many gaps in the positive application of *sharīʿa* law, and in particular with regard to the institution of the caliphate. Whereas in theory questions in the sociopolitical domain (not specified in the texts) were to be regulated through the use of the two second-level sources (or "roots," *uṣūl*) of the *sharīʿa*—analogy (*qiyās*) and the consensus (*ijmāʿ*) of the legal experts, in reality this never materialized. On the micro level, this lack of consensus filtered down to the local *qāḍī* (judge) or *muftī* (legal consultant) who, still felt free to make ad hoc judgments as representating one of the four respected schools of law. Kerr saw this " noninstitutionalization of *ijmāʿ*" as one of the factors that pushed reformers in the modern context to rework the whole philosophy of Islamic law.

[24] 4 vols., Cairo: Dār al-Kutub al-Khidīwiyya, 1914.

[25] Weiss, *The Search for God's Law,* 22. He adds, "In fact, after them nothing of that stature is ever again produced. The great works of Bayḍāwī (d. 685/1286, *Minhāj al-wuṣūl*) and Ibn al-Ḥājib (d. 646/1248, *Mukhtaṣar al-muntahā al-uṣūlī*), and Ījī (d. 756/1355) are actually super-commentaries on these and previous works."

zilites and Ashʿarites. First, the orthodox Ashʿarī position: (a) creation is an exclusively divine action; and (b) God's acts are not dictated by any purpose or ends. For the Ashʿarites people cannot be said to "create" their own actions, for the possibility of human creative power threatens God's omnipotence—a thought abhorrent to the orthodox mind. At the same time, they could not bypass the numerous allusions in the Qurʾān to human responsibility—hence the resort to the theory of acquisition.

To the Ashʿarite point (a) the Muʿtazilī theologian responds: God's acts of creation do not account for the totality of all existence, since human acts are the sole result of human initiative. This is so, for otherwise, how could human beings be held responsible for actions they did not initiate? The Muʿtazilī answer to the orthodox statement (b), according to Āmidī, is in five points:

1. Ends imply some kind of benefit.[26]
2. God cannot possibly be in need of any benefit, and so no act of his could aim for this kind of benefit.
3. It is inconceivable that God should posit an act without an end in mind, for that act would be considered frivolous.[27]
4. There cannot be anything frivolous in God's acts.
5. Therefore the benefit intended by God's acts is that of his creatures.

Āmidī responds:

1. Acts not directed to ends are only frivolous within our human frame of reference.
2. God's acts are governed by criteria other than ends, though we as humans cannot say what those criteria might be.
3. Further, the assertion that acts without intended ends are frivolous assumes that the intellect can discern what is intrinsically good (*ḥasan*) or bad (*qabīḥ*). This assumption is untenable.

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[26] This discussion by Weiss (63-4) is based on Āmidī's treatment of these issues in his *Ghayāt al-marām fī ʿilm al-kalām* (Cairo: al-Majlis al-Aʿlā li'l-Shuʾūn al-Islāmiyya, 1971), 224-5.

[27] Weiss indicates that the word attributed by Āmidī to the Muʿtazilī argument is *wujūb*, which may be translated in two possible ways: (a) obligation; (b) rational necessity. Since the Muʿtazilīs do not concede that God is under any obligation to take ends into account in his actions, the idea here is that of rational necessity. Thus for God to act with no purpose in mind would violate the human intellect's sense of what is proper.

The last point underscores the difference between the assumptions of the two opposing groups: by way of reminder, from an ontological viewpoint, while both groups look to the Qur'ān for support, the Ashʿarites declare that the ethical qualities of good and evil are not inherent in particular actions (ethical voluntarism), while the Muʿtazilites argue that actions are indeed inherently good or evil because these categories exist in and of themselves (objectivism). On the epistemological plane, the Ashʿarites claim that ethical values can be discovered only through the revelation of God in the Qur'ān and Sunna (Hourani's "traditionalism"), while the Muʿtazilites state that revelation mostly confirms what the human intellect can perceive on its own (ethical objectivism, or Hourani's "partial rationalism"), including the five categories of actions revealed in the texts (forbidden, disapproved, neutral, recommended and obligatory) which can also be derived rationally.[28] This is precisely the position that Āmidī reproves: the assessment of acts as good or bad "by virtue of their essence" (*li-dhawātihā*). Surely, he argues, the goodness or badness of an act is determined by one or more factors outside of the act itself: the end toward which the act is directed, e.g., praise or blame on the part of a sovereign, or the state of the actors themselves, e.g., whether or not they have been coerced to act in this way.[29] In my view, however, this kind of ethical reasoning already presupposes some innate moral judgment on the part of its author. A strict Ashʿarī position may be untenable in the end, and that is why some degree of utilitarianism always crept in through the back door.

In any case, both positions tended to become more moderate as the discussion progressed. The orthodox stance opened some space for rational inquiry into the ends of certain actions (though not those pronounced obligatory or forbidden by the *sharīʿa*). This amounts to a relativistic view of good and evil as concepts susceptible to evaluation by the human mind. As Weiss puts it, "The pious would preoccupy themselves wholly with the divinely determined good and bad, while the rest of the world went about living in the light of the less momentous dictates of human reasoning."[30] The Muʿtazilī theo-

[28] See Weiss's Figure 1, page 86 for a Muʿtazilī categorization of human acts. A more recent discussion of these issues is found in *Islamic Political Ethics: Civil Society, Pluralism, and Conflict*, ed. Sohail H. Hashmi (Princeton University Press, 2002), chapter eight, "Islamic Ethics in International Society," 150-4.

[29] Weiss, *The Search for God's Law,* 87, quoting from the *Iḥkām*, 1:113-4.

[30] Ibid.

logians, on the other hand, concede that the goodness and badness of an obligatory act can also be seen in a factor outside of the act itself: the divine benefit (*fā'ida*) or wisdom (*ḥikma*) behind it.[31]

I open a parenthesis here as a necessary background to understanding the theological import of Āmidī's legal arguments relative to the use of analogy (*qiyās*). As mentioned above, the only unanimity among the *uṣūlī*s of the four main schools of Islamic law is on the use of the Qur'ān and Sunna for inferring laws in a *shar'ī* way, and that the two lesser methods which were generally recognized were *ijmā'* and *qiyās*. The two words for "source" or "root" (used interchangeably in the literature) are *aṣl* (pl. *uṣūl*) and *dalīl* (also "evidence" or "proof," pl. *adilla*). While the first term evokes an image of law as a tree that grows up from its roots,[32] the second emphasizes the quest for certainty in the discipline. In the end, however, certainty lies only in the direct commands of the Qur'ān and Sunna—thus their appellation *adilla naqliyya* (evidences transferred from the revealed texts).[33] Thus the rest of the *mujtahid*'s toolbox are labeled *adilla 'aqliyya* (rational sources or evidences).[34] Historically, *uṣūlī* writers (specialists in *uṣūl al-fiqh* or *uṣūliyyūn*), depending on the school, have accepted the validity of several of the following "evidences": *istiḥsān* ("legal equity" or "preferential choice"), *istiṣḥāb* (presumption of continuity), *maṣlaḥa mursala* (social welfare not mentioned in the texts, similar to the earlier method, *istiṣlāḥ*), or its counterpart, *sadd al-dharā'i'* ("closing the gate to evil"), *'urf* (custom), *shar' man qablanā* (revealed laws from those before us—People of the Book), *madhhab al-ṣaḥābī* (the school, or juridical method of the Companions).[35]

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[31] Ibid., 89.

[32] Applied jurisprudence is also called "the branches of jurisprudence" (*furū' al-fiqh*). **Mawil** Izzi Dien notes that many modern *uṣūlī* writers, trying to harmonize Islamic law with contemporary western law, use the more logical word *maṣdar* for "source" ("*Maṣlaḥa* in Islamic Law: A Source or a Concept? A Framework for Interpretation," in *Studies in Honor of Clifford Edmund Bosworth*, vol. I, ed. Ian Richard Netton, Leiden: Brill, 2000, 355). He cites two *uṣūlī*s in particular: the prominent Iraqi jurist 'Abd al-Karīm Zaydān, and the Egyptian Muḥammad Abū Zahra (see below).

[33] The consensus of the experts (*ijmā'*), sometimes extended to the community at large, is included in this category, but it occupies a slightly inferior position in terms of certainty.

[34] A *mujtahid* is a jurist who through the use of all the tools permitted by Islamic jurisprudence strives to infer rulings for situations not covered by the sacred texts (*ijtihād*).

[35] Typical of contemporary manuals is Muḥammad Muṣṭafā Shalabī's *Uṣūl al-*

The "rational source" of law which is of most concern in the modern period is *istiṣlāḥ* (search for public benefit), early a mark of the Mālikīs. What is at stake is the feasibility of using the notions of benefit, welfare or interest (*maṣlaḥa*) as a criterion for extending the *aḥkām* found in the texts to cover new situations. If one is able to ascertain the efficient cause (*ʿilla*) of a particular injunction, one may extrapolate by analogy from there.[36] Thus, if God forbids the selling or buying of merchandise during the Friday prayer service, one can surmise that His purpose is to keep people from being distracted from their duty to pray (Q. 62:9-10). It follows that all other kinds of transactions must be forbidden as well during the prayer service. Here one has discovered the Lawgiver's purpose in issuing His *ḥukm*. This is the "efficient cause," or the *ʿilla*, which, for the Ḥanafīs and Shāfiʿis, is as much as one can discern with human reason alone—but which stricter Ashʿarites like al-Āmidī said could be used for *qiyās* only if they were "taken into consideration by the texts." Others went further, looking for the *ḥikma* ("wisdom," here "objective") behind the injunction.[37]

By the first half of the 4th/11th century, the use of *maṣlaḥa* had become a hotly debated issue in *uṣūlī* circles. A first position was that of some Shāfiʿī and Ashʿarī theologians (e.g., al-Āmidī) who vouched for a *maṣlaḥa* only if it was based on a text (*naṣṣ*). If not, then it was a *maṣlaḥa mursala* ("unattached to a text") and had no justification. The second group (Shāfiʿis disciples and most Ḥanafis) validated a *maṣlaḥa* on the basis of an analogy in the text or which followed the consensus of other jurists. Finally, Mālik b. Anas (d. 179/795) is said

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fiqh al-islāmī (Cairo: Maktabat al-Naṣr, 1991, 5th printing). In his outline, he first presents the "four *adilla*" (Qurʾān, Sunna, *ijmāʿ* and *qiyās*), then adds "the *adilla* on which there is difference (of opinion)": all those mentioned above, but with *maṣlaḥa mursala* in second position. A few years earlier, ʿAbd al-Wahhāb Khallāf devoted the first part of his *ʿIlm uṣūl al-fiqh* (12th ed., Kuwait: Dār al-Qalam, 1978, 1st ed. 1942) to *al-adilla al-sharʿiyya* and listed ten—the same order as in Shalabī, but with the *sadd al-dharāʾiʿ* subsumed under *maṣlaḥa mursala*.

[36] Recall that this same word (*ʿilla*) was used by the Muʾtazilites to refer to the divine purpose(s) in creation.

[37] Kerr describes *ḥikma* as the "underlying reason" of a prohibition or a command, and thus involving a value judgment: "The *ḥikma* may in some cases be rationally comprehensible and identified explicitly or implicitly in the language of the Qurʾān or ḥadīth, or seem readily apparent to common sense; but this need not be so, and even where it is, it is traditionally controversial whether the jurist may or may not go beyond the *ʿilla* to base his analogy on the *ḥikma* itself" (*Islamic Reform,* 67).

(in retrospect) to have validated *maṣlaḥa* as an independent source of *fiqh* in and of itself.[38] The Muʿtazilī scholar Abūʾl Ḥusayn al-Baṣrī (d. 478/1085) taught that behind all the qurʾānic injunctions was the Legislator's pursuing of human well-being, or benefit (*maṣlaḥa*). But even the Ashʿarī Imām al-Ḥaramayn al-Juwaynī (d. 478/1085) shows that the issue had already become controversial. He too held that the *ʿilla* can be broken up into five levels, all relating in one way or another to *maṣlaḥa*. But his student, al-Ghazālī, took this idea several steps further in his *Muṣṭafā min ʿilm al-uṣūl*:

> In its essential meaning it [viz., *maṣlaḥa*] is an expression for seeking something useful (*manfaʿa*) or removing something harmful (*maḍarra*). But this is not what we mean, because seeking utility and removing harm are the purposes (*maqāṣid*) at which the creation (*khalq*) aims and the goodness (*salāḥ*) of creation consists in realizing their goals (*maqāṣid*). What we mean by *maṣlaḥa* is the preservation of the *maqṣūd* (objective) of the law (*Sharʿ*) which consists of five things: preservation of religion, of life, of reason, of descendents and of property. What assures the preservation of these five principles (*uṣūl*) is *maṣlaḥa* and whatever fails to preserve them is *mafsada* and its removal is *maṣlaḥa*.[39]

This is a landmark theological statement about creation and its connection to *sharīʿa*. Taken literally, it could lead to making *maṣlaḥa* an independent variable and pivotal juridical tool. Al-Ghazālī did not go that far. In his view, the above five "purposes" of *sharīʿa* can be taken into consideration only in cases of necessity (*ḍarūra*), i.e., in cases not covered by the texts. There are two lower levels of *maṣlaḥa* for al-Ghazālī: the *ḥājiyyāt* or the *maṣāliḥ* (sg. *maṣlaḥa*) which, although not essential are nevertheless necessary in order to achieve overall well-being in this life; and the *taḥsīnāt* or *tazyīnāt* ("embellishing benefits") which contribute to the refinement of human life. Additionally, in the rare case of a necessity that would lead us to contravene a clear *ḥukm* of the *sharīʿa*, the situation must present two other characteristics: it must exhibit crystal-clear certainty (*qaṭʿiyya*) and a quality of universality (*kulliyya*).[40] But for al-Ghazālī

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[38] Muhammad Khalid Masud, *Islamic Legal Philosophy: A Study of Abū Isḥāq al-Shātibī's Life and Thought* (New Delhi, India: International Islamic Publishers, 1989), 150-1.

[39] Al-Ghazālī, *Muṣṭaṣfā min ʿilm al-uṣūl,* **00 vols**. (Baghdad: Muthannā, 1970), vol. 1, 286-7; quoted and translated by Masud, *Islamic Legal Philosophy*, 152-3.

[40] Kerr, *Islamic Reform,* 95-6. In this context he translates the passage in the first volume of the *Muṣṭaṣfā* in which al-Ghazālī presents the only case he can think of which meets those criteria—the siege in which Muslim prisoners are used as shields by their enemies (see below).

maṣlaḥa remains subordinate to *qiyās*, which, he stipulates, must be attached to the sacred text, for otherwise it becomes *istiḥsān* or *maṣlaḥa mursala* (a benefit not mentioned in the text)—both which remind him of *tafsīr bi'l-ra'y* (qur'ānic interpretation based on human judgment), which he rejects outright.[41] Hence *istiṣlāḥ* remains an "imaginary" (*mawhūm*) source of law for al-Ghazālī. Theologically, he is not willing to concede that humans, by virtue of their intellectual endowment by the Creator, can discern what is good and bad, what benefits humanity (*maṣlaḥa*), or what detracts from that benefit (*mafsada*).[42]

Āmidī was familiar with the thinking of al-Ghazālī and that of the other great theorists before him. In his discussion of *munāsaba* and *mulā'ama* (suitability) Āmidī concedes that the objectives expressed in the five necessities are truly in God's mind—at least it is probable that they are. The *mujtahid* may use those objectives to ascertain a suitable analogy to a clear *ḥukm* in the text. This effort, however carefully it is carried out, can produce only a tenuous conclusion, with a "rather low level of probability as compared to more text-based approaches."[43] It is true, concedes Āmidī, that the notion of suitability includes the ideas of harm and benefit. But it is not enough to show that a feature in a particular case passes the suitability test. The *mujtahid* will also have to prove that this feature was actually taken into account (*u'tubira*) by the Legislator. If textual evidence to this effect can be adduced, then the feature should be categorized as *mu'tabar*, "taken into account."[44] But if a particular feature of a case was neither taken into account nor deliberately excluded from consideration (*mulghāh*), it should then be classified as *mursal* ("textually undefined").

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[41] Rudi Paret compares *istiḥsān* and *istiṣlāḥ* in the history of *'ilm uṣūl al-fiqh* ("*Istiḥsān* and *Istiṣlāḥ*," *EI*^{2}, vol. 4, 256-9). While the former is only formally recognized by most Ḥanafī scholars, it has been used by the other *madhhabs* as an exceptional arm of *qiyās*. As for *istiṣlāḥ*, Paret states that several authorities trace this method to Mālik himself, but that Mālik never actually uses the word in his writings.

[42] Masud, *Islamic Legal Philosophy*, 156; Kerr, *Islamic Reform*, 91-7. A more recent discussion of these issues is found in Ebrahim Moosa, "The Poetics and Politics of Law after Empire: Reading Women's Rights in the Contestation of Law," *UCLA Journal of Islamic and Near Eastern Law* 1, 1 (Fall/Winter 2001-02), 1-46, at 18-20.

[43] Weiss, *The Search for God's Law,* 618.

[44] Ibid., 676.

A feature of a case that qualifies as suitable but is at the same time *mursal*, cannot be used to establish a valid analogy. For Āmidī this is the case of the forbidding of *khamr* in the sacred text. Though many jurists claim that the Legislator's objective in this was the preservation of rationality, the texts nowhere substantiate this. Thus, one cannot conclude that He actually took this objective into consideration. Hence, the *mujtahid* "may not proceed to develop other rules on the basis of analogies that entail the factor of intoxication."[45]

In theological terms, this position is consistent with Ashʿarism. Āmidī continues his exposé, noting that this approach (*maṣlaḥa mursala*) was rejected by the Shāfiʿīs, Ḥanafīs and "others." He does not mention any proponents of this method, although he does concede that Mālik b. Anas is reported to have advocated it, but he only considered those benefits that are "necessary, universal, and certain to occur" (*al-maṣāliḥ al-ḍarūriyya al-kulliyya al-ḥāsila qaṭʿan*, taken straight from al-Ghazālī) as a valid basis for the formulation of law. He then gives an example of this reasoning drawn from the period of Islamic conquest. A hostile army in war seizes a number of Muslim captives and begins to use them as a defensive shield. If the Muslim army does not attack, the enemy will push through their defenses, destroy the Muslim army and conquer Muslim lands. But if the Muslim army does attack they will likely kill most, if not all, of the Muslim prisoners. The latter is the preferred solution, Mālik would claim, even though the Muslims killed are innocent of any crime, because of the greater benefit of this course of action—a benefit (*ḥifẓ al-dīn*, protection of religion) clearly "necessary, universal, and certain to occur."[46] It is, after all, the very survival of Islam that is at stake. Āmidī, however, along with many other jurists, would still disagree: this benefit is neither mentioned nor disavowed in the texts, and like all other cases of *maṣlaḥa mursala*, it should be systematically discarded as material for juridical reasoning.[47]

Few jurists beyond the sixth century A.H. were as consistent in their Ashʿarism as Āmidī.[48] With the benefit of hindsight, we can

[45] Ibid., 677.
[46] Ibid., 678.
[47] Al-Ghazālī had already discussed this human shield example, and the killing of Muslims in this case, as an example of *maṣlaḥa mursala* that is allowed on the basis of necessity. Kerr (*Islamic Reform,* 95-6) translates this example from the first volume of the *Muṣṭaṣfā* (139-40).
[48] Āmidī and the Mālikī, Ibn Ḥājib (d. 646/1249) are classified by Masud as

see that al-Ghazālī opened the door to a more moderate approach. Here I mention only a few of the authors from the late classical period who are cited in modern times. The first two are Ḥanbalī jurists, and, by definition, conservative. Ibn Taymiyya (d. 728/1328) and his disciple Ibn Qayyim al-Jawziyya (d. 751/1350). Ibn Taymiyya lived in the aftermath of the Mongol sack of Baghdad (1258), when Muslim political thought was undergoing a change. Part of this can be attributed to the gradual transfer of power from the caliphs to the Turkish sultans beginning in the Buyid period (932-1062), with the resulting enmity of the *'ulamā'* for the powerful Turkish or Caucasian military class, as well as the general Muslim consensus that any rule is better than chaos (*fitna*). It was in this context that al-Ghazālī wrote that a ruler could be delegated by the possessor of power (*tafwīḍ*). Even that condition can be waived, however: an imam can appoint himself. And even an unjust ruler should not be deposed if to do so would involve civil strife.[49] Yet another factor must be taken into account. Even before the fall of Baghdad, the Muslim elite was well educated in Greek philosophy, and the two greatest works influencing political thought were Plato's *Republic* and Aristotle's *Nicomachean Ethics*.[50] Hourani summarizes this view of the state as follows:

> [T]here is an inherent harmony between human nature and society, such that man can only attain his natural end in the community. The virtuous life is that of the individual performing his proper function in the virtuous State, and the State is therefore a necessity of human nature. The best State is that which is ruled by the best man, and the best man is he who possesses not only the moral virtues required to rule over others but the wisdom of knowing what goodness is. His aim as a ruler will be to establish justice, and justice consists in the right relationship of classes, each performing a necessary function according to its natural capacities.[51]

Attempts to islamize this vision of the state by thinkers such as al-Farābī (d. 339/950) and Ibn Sīnā (d. 428/1037) convinced few Muslims, yet the philosophical current continued to influence Sunni thought, albeit in a submerged form. This current maintained that rulers are

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two prominent examples of jurists "who reject *al-maṣlaḥa al-mursala* as a valid basis of reasoning" (*Islamic Legal Philosophy*, 161). In this they are exceptional.

[49] Hourani, *Arabic Thought in the Liberal Age 1798-1939* (Cambridge: Cambridge University Press, 1983 [1962]), 14.

[50] Hourani states that Aristotle's *Politics* may not have been translated into Arabic in the twelfth century CE.

[51] Ibid., 16.

to be judged according to their intentions, rather than their actual deeds, and that the *umma* may be united by respecting its common good. Ibn Taymiyya, for his part, had to deal with two realities: the ideal Islamic rule as established by the Prophet in Medina, and in theory at least during the early caliphate; and secondly, the power exercised by the Mamluk sultans. On the one hand, *ijtihād* seems to have come to a halt on the *sharīʿa* side, and, on the other, the laws laid down by the Mamluks were products of political and administrative expediency. Ibn Taymiyya posited that the essence of government is the power of coercion, the order imposed on a society that is otherwise threatened by natural human selfishness.[52] Although all authority, legitimate or illegitimate, just or unjust, must be obeyed, a just ruler is one who chooses to "impose on all a just law derived from God's commands and ensuring the spiritual and material welfare of the community."[53] This had been the case with Muḥammad's rule in Medina. Just as Islamic law had developed a body of public law (*siyāsa sharʿiyya*) from the eleventh century onwards,[54] Ibn Taymiyya recognized the role of human reason in this sphere (effectively under the control of the ruler and out of the reach of the *ʿulamāʾ*).[55] And he rejected the claim that *ijmāʿ* and *ijtihād* had become fossilized in his day, i.e., that there was no room left for *ijtihād*.[56]

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[52] Ibid., 19.

[53] Ibid.

[54] See Noel J. Coulson, *A History of Islamic Law* (Edinburgh, UK: Edinburgh University Press, 1994 [1964]), 120-34.

[55] See Michel Hoebink's important article on the roots of revivalism in Islamic theology and the continuity of themes between the classical and modern period. For him, the Ḥanbalī scholars are an essential link between the two periods: at the same time that they opposed the ossification of law in Islamic legal circles, they emphasized the need for fresh interpretation, with the expectation of a renewer (*mujaddid*) every century. Hence, by refusing any consensus except that of the Prophet's Companions, Ibn Taymiyya, to a greater degree than the traditionalists, "recognized the human mental faculties of reason and mystical intuition as sources of moral knowledge" ("Thinking about Renewal in Islam: Towards a History of Islamic Ideas on Modernization and Secularization," *Arabica* 46, 1998, 29-62, at 36-7).

[56] Coulson writes that Ibn Taymiyya "had himself claimed the theoretical right of *ijtihād* (*A History of Islamic Law*, 202). Certainly, this is how Ibn Taymiyya has been interpreted in the modern era. Joseph Schacht was more cautious: "Ibn Taymiyya did not explicitly advocate the reopening of the 'door of *ijtihād*, let alone claim *ijtihād* for himself; but as a consequence of his narrowly formulated idea of consensus [based on the Prophet's and his Companions' decisions] he was able to reject *taqlīd*, to interpret the Koran and the traditions from the Prophet

Between those who held on to a rigid interpretation of *sharīʿa* according to which no change can be made in face of changing circumstances, and the freedom of some rulers to enact any rules, regardless of their compatibility with Islam, Ibn Taymiyya believed there was a middle road: the concept of *sharīʿa* should be enlarged to encompass everything that a ruler needs to decide in order to administer the state. Thus a distinction must be made between matters of worship and dogma (*ʿibādāt*), which cannot be modified, and matters pertaining to sociopolitical life (*muʿāmalāt*), which should be administered in light of public utility (*maṣlaḥa*).[57]

Kerr quotes from Henri Laoust's assertion that for Ibn Taymiyya the use of the efficient cause (*ʿilla*) in *qiyās* amounts to a bridge ("a middle term") connecting reason and revelation:

> Ibn Taymiyya manages to identify the *qiyās* of jurists with the syllogism of the philosophers. The juridical syllogism founds knowledge on the natural order of causes; in striving to "reason as nature reasons," and penetrate the secret of things, he [the jurist] must essentially reproduce the causality which God willed and placed in the world.[58]

This seems to be a step away from the Ashʿarī perspective on juridical theory and its conception of the role of human reason in applying the law. In fact, it comes close to a theory of natural law, at least in the sociopolitical realm, except that for Ibn Taymiyya no ruling on the basis of *ijtihād* may contradict the letter of the sacred texts.[59] His disciple Ibn Qayyim al-Jawziyya also put forward a legal theory that blurs the traditional distinction between *qiyās* and *istiṣlāḥ*. Consider the following passage, often quoted in modern *uṣūl al-fiqh* manuals:

> The *sharīʿa* is built upon the foundation of wisdom [*ḥikam*] and people's welfare [*maṣāliḥ*] in this world and the next. It is entirely justice and mercy, entirely welfare [*maṣāliḥ*] and wisdom. Any ruling which moves from justice to tyranny, mercy to its opposite, benefit to harm, wisdom to futility did not issue from the *sharīʿa*, even by allegorical interpretation [*bi'l-taʾwīl*].[60]

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afresh, and to arrive at novel conclusions concerning many of the institutions of Islamic law" (*ibid*., 72).

[57] Hourani, *Arabic Thought,* 20.

[58] *Essai sur les doctrines sociales et politiques de Taqī-d-Dīn Aḥmad b. Taimiya* (Cairo: Institut Français d'Archéologie Orientale, 1939), 244.

[59] Kerr, *Islamic Reform,* 79.

[60] *Iʿlām al-muwaqqiʿīn ʿan rabbi'l-ʿālamīn*, ed. Muhammad Muḥyī al-Dīn ʿAbd al-Ḥamīd (Cairo: Maṭbaʿat al-Saʿāda, 1955), vol. 3, 14.

Ibn Qayyim is decidedly more confident about the capacity of the human mind to discern the *ʿilla* behind most of the rulings in the *sharīʿa*. Though he does not say so explicitly (the quarrels with the Muʿtazilites were still in the air), he assumes the attributes of justice, welfare, and their opposites, have an objective existence, which, for the most part, are apprehensible by human reason.[61] He also takes for granted that the overall purpose of God's law is to foster human benefit in this world and the next.

Lastly, I conclude this first section with two fourteenth-century jurists who have provided much inspiration to twentieth-century legal theory. The first is the Granadan jurist, Abū Isḥāq al-Shāṭibī (d. 790/1388), who is credited by several contemporary scholars with having negotiated the turn from traditional text-based literalism to a focus on the meta-legal notion of *sharīʿa*'s aims.[62] I will present only one aspect of his theory, as it bears on the epistemological questions at hand. Al-Shāṭibī fashioned the traditional, mostly Mālikī, legal tool of *maṣāliḥ mursala*, into a consistent, all-embracing, fundamental legal principle, and thus rejects al-Ghazālī's anti-rational instinct that had subsumed it under *qiyās*. According to al-Shāṭibī a new certainty emerges because *uṣūl al-fiqh* becomes a science based on *kulliyāt al-sharīʿa*, the universal values that can be derived rationally from the five "necessities" (*al-ḍarūriyyat*: the protection of life, religion, progeny, property, and a sane mind).[63] It is true, he concedes, that although the rationality of Islamic rituals cannot be demonstrated (even if certain patterns can be discerned in the *ʿibādāt*), the *sharīʿa* demonstrates ample room for rationality in injunctions concerning human transactions (*muʿāmalāt*). He now presents the two lower levels of legal purpose first mentioned by al-Ghazālī: the *ḥājiyyāt*, and the

[61] See Masud's discussion of Ibn Qayyim (*Islamic Legal Philosophy,* 163-4); and Kerr's (*Islamic Reform,* 77-8).

[62] I realize that the following views I present on al-Shāṭibī are controversial. Although I am unable to discuss them more critically here, this task is of great importance, as al-Shāṭibī is widely quoted (misquoted?) by contemporary scholars and jurists. What is said here reflects the consensus of the following scholars: Masud (*Islamic Legal Philosophy*); Aziz al-Azmeh, "Islamic Legal Theory"; Riḍwān al-Sayyid, "Contemporary Muslim Thought" (cf. note 4); Izzi Dien, "*Maṣlaḥa* in Islamic Law" (cf. note 32); and Wael B. Hallaq, most notably in "*Uṣūl al-Fiqh*: Beyond Tradition," *Journal of Islamic Studies* 3, 2, Oxford (1992), 172-96, and "The Primacy of the Qur'ān in Shāṭibī's Legal Theory," in *Islamic Studies Presented to Charles J. Adams*, eds. Wael B. Hallaq and Donald P. Little (Leiden: E. J. Brill, 1991), 69-90.

[63] Al-Azmeh, "Islamic Legal Theory," 260.

taḥsīnāt. These generalities, he argues, are certain, because the notion of *maṣlaḥa* unites the divine will exemplified in the *sharʿ* is with the human God-given ability to apprehend reality and give it meaning.

The ability of al-Shāṭibī to systematize leads him to radically rework the traditional textual hermeneutic. For him, everything that pertains to the intentions of the Divine Legislator is found in the Qurʾān (*kulliyyāt*).[64] The Sunna is useful only in so far as it provides illustrations of these foundational moral principles, and thus offers additional particular examples of legal applications (*juzʾiyyāt*). Moreover, the juridical principle of the public good can only be found in the Qurʿān by means of induction—linking enough specific rulings (*juzʾiyyāt*) so that they reach the level of irrevocability that characterizes the universals (*kulliyyāt*) found almost exclusively in the Meccan suras. It is not surprising that his views were either opposed or ignored for centuries. Yet it was his method of induction "which depended on scanning the intention and spirit of the law—without limiting itself to specific textual statements (the common characteristic of other theories)" which made his theory "attractive to a group of modern thinkers whose primary occupation is to free the Muslim mind from the fetters created by the immediate, and perhaps shackling, meanings of the revealed texts."[65]

The second *uṣūlī* called upon by modern reformers to blaze new trails in Islamic legal theory and practice is Najm al-Dīn al-Ṭūfī (d. 716/1316), the Ḥanbalī jurist who studied in Baghdad and Damascus (under Ibn Taymiyya, among others). The author of several volumes on *uṣūl al-fiqh* al-Ṭūfī is best known in the twentieth century for his *Kitāb al-taʿyīn fī sharḥ al-arbaʿīn*, a commentary on forty *aḥādīth*, the lion's share of which is an *uṣūlī* analysis of the thirty-second *ḥadīth*, "no injury or counter-injury" (*lā ḍarar wa-lā ḍirār*). For him *maṣlaḥa* consists in both "attracting utility" (*jadhb al-nafʿ*) and "repelling harm" (*rafʿ al- ḍarar*), and should be used as the major source of law after the Qurʾān and Sunna, while in some cases of *muʿāmalāt* even superseding them.[66] Whereas in the domain of spiritual duties owed to God ("God's rights," *ḥuqūq Allāh*), the human mind cannot

[64] This paragraph summarizes some of the main points of Hallaq's thesis in "The Primacy of the Qurʾān."

[65] Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Uṣūl al-Fiqh* (Cambridge, UK: Cambridge University Press, 1997), 206.

[66] Cf. W. P. Heinrichs, "Al-Ṭūfī," EI², vol. 10, 588-9.

and should not attempt to discern the reasons behind the textual injunctions, in the domain of human interactions God has delegated to humanity the right and duty to set up just rules and regulations in accordance with the public interest (*maṣlaḥa*). This second area is only a slight expansion of the classical *fiqh* category of "people's rights" (*ḥuqūq al-ʿibād*).

Hallaq argues that al-Ṭūfī's theory of the supremacy of *maṣlaḥa* over Qurʾān, Sunna and *ijmāʿ* as the primary source of the *sharīʿa* quickly fell into oblivion, partly because of the radical nature of his claims, and partly because of the inferior nature of his epistemological scheme. After all, he "nowhere defines in any detail his concept of *maṣlaḥa* and its scope." Yet, as the remainder of this essay shows, "[his 'novel theory'] was rejuvenated again [sic] in the twentieth century, when *maṣlaḥa* became the main axis around which legal reform revolves."[67]

Twentieth Century Uṣūlī Developments

I now begin an investigation of a group of mostly Egyptian legal theorists of the 20th century, seeking to uncover the theological implications of their choices in matters of reform. All of them believe that Islamic law must be made to accommodate the sweeping changes imposed on Muslim societies in the modern period. Although most of them are conservatives, the implications of the points of theory they choose to emphasize indicate a shift in theology, including epistemology and hermeneutics.

Here Hallaq offers a typology that deserves comment. After excluding from consideration the "secularists" (mostly among the Arab nationalists like the Syrian Ṣādiq Jalāl al-ʿAẓm) and traditionalists for whom the doctrine of *taqlīd* remains in full force (e.g., the rulers of Saudi Arabia), he singles out two main currents of legal reform within Islam starting in the nineteenth century: "utilitarianists" for whom the principle of public interest (*maṣlaḥa*) has become the commanding criterion for the development of legal theory and methodology; and "liberalists" like Muḥammad Saʿīd al-ʿAshmāwī, Fazlur Rahman, and the Syrian engineer-turned theologian, Muḥammad

[67] Hallaq, *A History*, 153. See also Kerr's discussion of al-Ṭūfī as "far from orthodox," yet at the same time presenting a typical view of *maṣlaḥa* (*Islamic Reform,* 81-3).

Shaḥrūr, whose respective approaches all consist in "understanding revelation as both text and context." This means that "[t]he connection between the revealed text and modern society does not turn upon a literalist hermeneutic, but rather upon an interpretation of the spirit and broad intention behind the specific language of the text."[68]

All the authors studied here fall under Hallaq's unnecessarily pejorative label, "utilitarianists." My argument is that the obvious hermeneutical (and even prior to that, epistemological) shift advocated by progressive writers such as Fazlur Rahman[69] had already been embarked upon by these so-called utilitarians, although they were wary of drawing out its full implications. Both utilitarian and progressive jurists display what I call here a "*maqāṣidī*" ("purposeful," or "purposive") approach" to Islamic legal theory.[70] They start with the purposes or aims of the divine law and move from the general to the specific, using not only public interest (benefit or welfare, *maṣlaḥa*) and necessity (*ḍarūra*) as guiding tools, but also ethical imperatives such as justice, and increasingly, peacebuilding and reconciliation.[71]

This approach, which favors the spirit of the texts over their literal reading has become a hermeneutic of choice practiced by a wide spectrum of Muslim thinkers. Thus Hallaq's division between "utilitarianists" and "liberalists" reflects more the willingness of particular authors to apply this *maqāṣidī* strategy consistently and courageously (for instance, with regard to human rights norms), rather than a distinction between those who cling to the traditional literalist hermeneutic and end up in subjectivism and relativism, and those who disavow that hermeneutic and build consistent, liberal legal methodologies.[72]

I seek to explore the legal strategies chosen by some influential *uṣūlī*s of the twentieth century, attempting to show how mainstream

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[68] Ibid., 231.

[69] Hallaq's term "liberalists" is an awkward neologism. It connotes a sociopolitical stance (e.g., "liberals" versus "conservatives" in current US politics), unless one follows Charles Kurzman's definition as set out in his edited anthology, *Liberal Islam: A Sourcebook* (New York: Oxford University Press, 1998).

[70] Moosa in his "Poetics and Politics" discusses this at length (see below) and calls it the "purposive interpretation."

[71] A good example of this approach is Abdulaziz Sachedina, *The Islamic Roots of Democratic Pluralism* (New York and Washington, DC: Oxford University Press and The Center for Strategic and International Studies, 2001).

[72] See for example, Hallaq, *A History*, 231.

(reformist) Islamic jurists seek to go beyond the specific injunctions of the texts to their underlying principles, and how they use these principles as grids for the dynamic construction of new legal rulings in response to the changing conditions of modern society.

ʿAbduh and Riḍā: A Turn Toward Maqāṣid al-Sharīʿa

In an early section of Al-Manār (1901), the journal he had started with Muḥammad Rashīd Riḍā, Muḥammad ʿAbduh is eager to explain his legal philosophy.[73] The articles on the topic of *sharīʿa* in the fourth volume of a recent Lebanese edition are in the form of a dialogue between a reformer (*muṣliḥ*) and a traditional jurist (*muqallid*).

In the first dialogue ʿAbduh sets forth the foundational perspective—God's laws are eminently practical and understandable: "The Legislator . . . made plain the legal rules by practical means (*bayyana al-aḥkām al-ʿamaliyya bi'l-ʿamal*). . . That which is needed practically for the task of *ijtihād* and *raʾy* he entrusted to their *ijtihād* and *raʾy*."[74] In the same passage he interprets the Medinan phrase, "Today I have completed your religion for you" (Q. 5:3), as applying only to the matters relating to theological statements and rituals (*ʿibādāt*). Only these are properly called the foundations of religion, *uṣūl al-dīn*. With regard to issues of human society (*muʿāmalāt*), ʿAbduh maintains, there is much latitude in *ijtihād*.[75] He then goes on to argue that general principles of *sharīʿa* can be summarized in the notion of justice and

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[73] Until his death in 1905, ʿAbduh wrote all such articles for al-Manār.

[74] *Tafsīr al-Qurʾān al-ḥakīm al-shahīr bi-tafsīr al-manār*, 33 vols. (Beirut: Dār al-Maʿrifa, 1990), vol. 4, 207. For a recent examination of the role of *ijtihād* in ʿAbduh and Riḍā, see Muneer Goolam Fareed, *Legal Reform in the Muslim World: The Anatomy of a Scholarly Dispute in the 19th and the Early 20th Centuries on the Usage of Ijtihād as a Legal Tool* (Bethesda, MD: Austin & Winfield, 1996). Though he offers helpful insights into the movements of reform, Salafiyya and islamism, Fareed nowhere mentions *maṣlaḥa* or *maqāṣid al-sharīʿa*.

[75] This separation between the religious and the profane in Islamic law is one of two main points made by Jacques Jomier in his chapter on Islamic law in al-Manār. The other is the refusal of both ʿAbduh and Riḍā to attach themselves to any particular school of law (*Le Commentaire Coranique du Manār: Tendances Modernes de l'Exegèse Coranique en Egypte*, Paris: Editions G.-P. Maisonneuve, 1954). Yet neither Jomier nor Charles C. Adams make any comment about ʿAbduh's and Riḍā's use of *maṣlaḥa* (*Islam and Modernism in Egypt: A Study of the Modern Reform Movement Inaugurated by Muḥammad ʿAbduh*, New York: Russell & Russell, 1968, 1st ed. 1933). Both Adams and Jomier mention *maṣlaḥa* in passing several times, but without explaining its significance. For Jomier *maṣlaḥa* is translated "public interest," and for Adams, "the commonweal."

equality of rights for all. Thus "after stipulating the rule of consultation (*shūrā*) the Legislator delegated the task of ordering the detailed rules (*al-juz'iyyāt*) to the leaders of the experts and rulers who, according to the *sharīʿa*, must be people of knowledge and justice who decide in a consultative manner on what is best for the Umma according to the times."[76]

The last sentence confirms the content of the preceding paragraph: ʿAbduh assumes the independent ontological status of good and evil—justice being subsumed under the former—and the human moral capacity to apply these values through the use of *ijtihād* and *raʾy* in harmony with the "clear" values illustrated by the *sharīʿa*. It would be difficult not to notice the distinct Muʿtazilī framework of ʿAbduh's theology, and many scholars have indeed pointed this out.[77] Malcolm Kerr devoted a chapter to "Muḥammad ʿAbduh and Natural Law," building on an earlier article by Robert Caspar, who exposed the Muʿtazilī aspects of ʿAbduh's doctrines—certainly in those areas in which one sees the greatest distance between his thinking and traditional Islamic views.[78] Kerr concludes that ʿAbduh's "theological departures [from tradition] amounted implicitly to a revival of Muʿta-

[76] *Tafsīr al-Manār*, 210.

[77] The epistemological turn toward Muʿtazilism in the modern period has been noticed by many. Richard C. Martin and Mark R. Woodward argue that "[m]odern Islamic thought, in the writings of theologians like Muhammad ʿAbduh, has incorporated elements of both rationalism and traditionalism" (*Defenders of Reason in Islam: Muʿtazilism from Medieval School to Modern Symbol*, Oxford: Oneworld, 1997). This is perhaps a more careful way of defining the two opposing poles today, rather than using the traditional terms, Ashʿarism and Muʿtazilism. However writers like Sohail H. Hashmi do not shy away from using these categories. Hashmi argues that Islamic theology (*kalām*) originated in the early legal arguments on the question of how human beings are able to discern God's laws. Fazlur Rahman, building on the work of Sayyid Ahmad Khan (d. 1898), Muhammad ʿAbduh (d. 1905), and Muhammad Iqbal (d. 1938), openly turned his back on Ashʿarism. This, contends Hashmi, is the watershed issue between today's modernists and fundamentalists ("Islamic Ethics in International Society," in *Islamic Political Ethics: Civil Society, Pluralism, and Conflict*, ed. Sohail H. Hashmi (Princeton University Press, 2002, 150-4).

[78] "Le Renouveau du moʿtazilisme," *Mélanges* IV, Institut Dominicain d'Études du Caire, 1957, 57-72. Hourani, also citing Caspar, comments, "[ʿAbduh's] thought always bore the mark of Ibn Sina in which al-Afghani had initiated him; and it is possible to see the influence of Muʿtazilism, that early Islamic rationalism which had been first sponsored the Abbassid caliphs, had then become a dormant element in Islam, but since [sic] ʿAbduh has been one of the elements of modern orthodoxy" (*Arabic Thought,* 142).

zilism."[79] At the same time he remained conservative and never openly adopted the Muʿtazilī label.[80] At other times he shows the influence of al-Māturīdī on his epistemology: reason can grasp good and evil because, by virtue of creation, those categories exist in and of themselves (Muʿtazilites) but only revelation can determine what acts constitute obedience or disobedience to God's law (Maturidites).[81] What is clear is that he has left Ashʿarite territory. For the latter, reason cannot determine what is good or evil without revelation. Yet, though reason can tell people *what* they should do or should not do, only revelation can show them *why* they must do so.

Kerr's analysis of ʿAbduh's thought, which draws upon the full spectrum of his writings, including his articles in the short-lived journal edited together with Jamāl al-Dīn al-Afghānī, *Al-ʿUrwa 'l-Wuthqā*, presents a wealth of material around the theme of his "naturalist" theology. For our purposes here, it will be sufficient to outline his dual level of natural law to illustrate the theological foundation he passed down to his followers.

Muslim reformers could choose between two models of natural law, each one characterized a different relation between reason and revelation:

1. Reason and revelation form "two separate spheres of competence," much like the traditional Roman Catholic doctrine pioneered by Thomas Aquinas. In short, "God's creation of the world of nature, including human nature, in keeping with an Eternal Law, provides human reason with the necessary basis for determining the principles of social morality, while revelation addresses itself to spiritual questions of personal devotion and redemption."[82] Muslim theologians found this line of reasoning distasteful in light of its view of God as not only "wholly other," but also fully involved with His creation, to the point of continually recreating everything that takes place. In this respect,

[79] *Islamic Reform,* 105. Another longer work he quotes from is Osman Amin (*Muḥammad ʿAbduh: Essai sur ses idées philosophiques et religieuses* (Cairo: Miṣr Press, 1944), which also focused on ʿAbduh's "Muʿtazilism."

[80] Hourani reveals that the first edition of ʿAbduh's *Risālat al-Tawḥīd* contained a sentence asserting the created nature of the Qurʾān, but he removed it from later editions without putting anything in its place (*Arabic Thought,* 142).

[81] Kerr, *Islamic Reform,* 127. Kerr describes the Māturīdī position in these terms: "the obligatory character of virtue could only be known from revelation."

[82] Ibid., 107.

Kerr observes, ʿAbduh was an Ashʿarī in certain areas, especially on the issue of free will.[83]

2. The second model was more congenial to the Muslim way of thinking: reason and revelation operate in the same sphere, with no separation or distinction between them. There may be gaps, as divine commands touch on human social realities, and human reason seeks to understand certain truths affirmed in the texts about God. But these gaps are "random," as Kerr puts it, because each sphere has its own subject matter: "Thus reason can discover the existence of God and identify His most important qualities, but can not determine the correct forms of worship; revelation prescribes all the details of the law of inheritance, but omits mention of the details of governmental organization."[84]

Following the second model, ʿAbduh further differentiated between two spheres in which the human moral capacity operates somewhat differently. In the first sphere, that of individual natural law, the individual obeys the commands of God knowing that they are good, yet without knowing whether this will benefit him in this world. His obedience is an act of faith—a process in which reason and revelation cooperate:

> For the individual the starting point of 'Abduh's thinking is man's ability to distinguish for himself between good and evil—to determine the norm of right behavior—through a combination of esthetic instinct and rational calculation of utility [*maṣlaḥa*]. The obligatory character of the norm is then supplied by religious consciousness, which informs him that it is God's will that the norm be adhered to on pain of punishment in the

[83] Ibid., 110-16. On the one hand, when it comes to strict theological arguments, he falls back on traditional Ashʿarite theology—though often with a twist. His explanation of *kasb*, ironically, turns out to be more Muʿtazilite than Ashʿarite. On the other hand, he is also a pragmatist, and he notices that predestination has "an undesirable social effect," and so it must be abandoned. Kerr concludes, "What appears to have led him to an espousal of free will was not simple utilitarianism but the consideration that religious belief was itself undermined by the idea of predestination" (ibid., 115). Kerr's analysis is penetrating here: because ʿAbduh's passion was first and foremost to bring about the worldly success of the Muslim community—his "faith in the destiny of the true Muslim Community" (ibid., 113)—he realized that a strong predestinarian belief had in fact paralyzed Muslim society, now in decline. In effect, his position was "a theological version of *istiḥsān*" (ibid., 117): Muslims must choose to improve their lot, even though that choice is theoretically imputed to them by an act of divine creation. One of his most often quoted verses is "God will not change the condition of a people until they change it themselves (Q. 13:11).

[84] Ibid.

> afterlife. The norm, in other words, is inherent in what man perceives in his environment and is determined by proper use of natural human faculties, while the sanction is beyond nature and rational perception.[85]

ʿAbduh's analysis of the group dimension of natural law is reminiscent of Ibn Taymiyya's *Siyāsa Sharʿiyya*[86] and Ibn Khaldun's sociological analysis, but he now consciously puts it to apologetic use, tirelessly demonstrating that Islam is in complete compatibility with the modern scientific method (unlike the teachings of Christianity which, he contends, rely on miracles). On the social level, God has delegated to humankind the task of navigating its challenges with the use of reason, without the direct help of revelation. Again, the key term is "sanction." Kerr writes,

> For the group, the starting point is perception not of the norm but of the sanction, from which the norm can be inferred. The sanction in the case of the group is material and worldly, and can therefore be rationally perceived, whereas for the individual this is not the case. Groups are rewarded and punished on earth for their deeds and misdeeds. By taking the fate of other groups—that is, by the study of history and sociology—they are led to seek the patterns of conduct that will bring them success. These they can discover through collective reason.[87]

ʿAbduh, however, never wrote a manual on *uṣūl al-fiqh*. Rashīd Riḍā came closer to accomplishing this task in his 1928 booklet, *Yusr al-Islām wa-uṣūl al-tashrīʿ al-ʿāmm* (*The Ease of Islam and the Foundations of General Legislation*).[88] As the title indicates, the author is concerned to emphasize the "ease" and "well-being" that stem from

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[85] Ibid., 121.

[86] This is one of the characteristics of the "modernist" attempt to renew Islamic law in the last century, according to Aharon Layish. Starting with ʿAbduh, the modernists widened the traditional doctrine of *siyāsa sharʿiyya* to include the ruler's authority to impose decisions of personal status and *waqf* (religious endowments) on the *sharīʿa* courts ("The Contribution of the Modernists to the Secularization of Islamic Law," *Middle Eastern Studies* 14, 3, 1978, 263-77, at 264).

[87] Ibid.

[88] I us a 1984 Cairo edition (Maktabat al-Salām). Hallaq works with the Cairo edition of 1956 (al-Nahḍa). Malcom Kerr used the original 1928 text (Cairo: **Maṭbaʿ** al-Manār). Shakīb Arslān in his book, *al-Sayyid Rashīd Riḍā: **ikhāʾ** arbaʿīn sana* (Damascus: Matbaʿat Ibn Zaydūn, 1937), names *Yusr al-Islām* as one of twenty books *Riḍā* wrote that were published (number 12, on p. 10). But they cannot be listed in chronological order since *al-Khilāfa aw al-imāma al-ʿuẓma* (1923) is mentioned by name in the *Yusr al-Islām,* which is in 13th position in Arslān's list. Nor is this book mentioned in Arslān's 811 page account of his relationship and letter exchanges with Riḍā, at least from what can be gathered from his detailed twenty-one page table of contents.

a proper understanding of the Qur'ān and Sunna, as compared to the complications and complexities introduced by the many schools of law in the course of time.[89] As Riḍā sees it, the jurists have not only made it impossible for young people to gain a firm grasp of what the *sharīʿa* is, but also, by multiplying legal injunctions, they place an unnecessarily heavy burden on their shoulders. Together with the growing appeal of the West and its decadent ways, this creates an even greater incentive for the younger generation to abandon Islam. Riḍā counts three main groups among the Muslims of his day: fierce advocates of *taqlīd*, who slavishly copy the past and enjoin the status quo in all matters; those who call for the secularization of Muslim society in conformity with the values of the age, mainly those of the West; and finally, "moderate reformers," of whom he is one, "who maintain that Islam can be revived and its true guidance renewed by following the Qur'ān, the authentic (*ṣaḥīḥa*) Sunna, and the inspiration of the righteous forbears (*hudā al-salaf al-ṣāliḥ*),[90] with the help of the imams of all the *madhāhib* ("schools of law"), but without being attached to any particular point in the books of jurisprudence and the theoretical peculiarities of each school, as is the case of the first group."[91]

What does this Salafiyya reform look like in practice? Interestingly, Riḍā's point of departure is a twenty-five page discussion of two qur'ānic verses (5:101-2):

> O ye who believe! ask not questions about things which, if made plain to you, may cause you trouble. But if ye ask about things when the Qur'ān is being revealed, they will be made plain to you: God will forgive those: for God is Oft-Forgiving, Most Forbearing. Some people before you did ask such questions, and on that account lost their faith" (Yusuf Ali).

In his comments on this passage, Riḍā marshals a host of commentators and collectors of *aḥadīth*, who in one way or another support his thesis: that which was revealed concerns mainly matters of ritual

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[89] E.g., 6-8, 44-6, 127-8.

[90] His favorite expression is "the Muslims of the first period" (*muslimū al-ṣadr al-awwal*), roughly, the first three generations of Muslims. Jomier notes that Riḍā's use of the term is narrower than ʿAbduh's, who uses this term in a more elastic sense as well—including some of the great Islamic writers of the third and fourth centuries A.H. (*Le Commentaire Coranique,* 194). See also Hallaq's discussion of *Yusr al-Islām* in *A History*, 214-20.

[91] *Yusr al-Islām*, 10.

and doctrine. If you ask questions about the rest, you might end up with legal rulings that would actually bring harm to you, not ease. In the areas which concern human interactions, God allows for much latitude—he is, after all, merciful and forgiving. And if He is silent about some matters, then it is an expression of His mercy. This opens the door for individual and collective legal effort (*ijtihād*) in order to discern a way that is in harmony with the general principles of Islam. As for His revealed text (*al-naṣṣ*), it always aims to benefit believers in this life and the next. He explains:

> Through the plain meaning of the Address (*al-khiṭāb*) or by allusion (*al-ishāra*) God opens for them the door of *ijtihād* in all those areas which concern their welfare (*maṣāliḥ*), so that every individual or wise group acts in accordance to what appears true and beneficial (*bi-mā ẓahara annahu al-ḥaqq wa'l-maṣlaḥa*), and forbids that which appears worthless and harmful. The individual will experience a kind of self-restraint in personal questions according to his level of knowledge and virtue, as will society as a whole with regard to civil laws, for these are decided by the mutual consultation of those in authority. In these matters there is great latitude and ease.[92]

Riḍā then proceeds to offer ten principles around which this movement finds cohesion, ten "purposes" (*maqāṣid*) rather than "means." The second, third and fifth relate most directly to the topic at hand. First, "This religion brings happiness (*yasurru*), and God has removed any difficulty (*ḥaraj*, lit. "tightness") from it," as the Qurʾān indicates, "And We will make it easy for thee (to follow) the simple (Path)" (87:8, Yusuf Ali).[93] Second, "the Wise Qurʾān is the source (*aṣl*) of religion." Sunnaic rules, if they are not directly related to religious matters (*al-aḥkām al-dīniyya*), are the fruit of Muḥammad's *ijtihād*, and we are not obligated to follow him in "civil, political, and military matters" (*al-maṣāliḥ al-madaniyya wa'l-siyāsiyya wa'l-ḥarbiyya*).[94] Third, "God has entrusted (*fawwaḍa*) to Muslims [the management of] their worldly affairs, both individual and collective, particular and general, on the condition that the worldly offend neither religion nor the guidance of the *sharīʿa*."[95]

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[92] Ibid., 35.

[93] This is why, he adds, the *sharīʿa* is greater than other legal systems, because of its ease. "The Prophet called her [the *sharīʿa*] *al-ḥanīfiyya al-samḥa* ("the True and Merciful Religion") and described her thus, 'her day and night are the same'" (ibid., 45).

[94] Ibid., 46.

[95] Ibid., 47. Notice the indirect allusion to the caliphate of humanity, here

After more *aḥādīth* and commentary on the issue of not asking questions, Riēā comes to the heart of his book—a rethinking of *uṣūl al-fiqh*. He begins with the staunchest opponent of *qiyās*, the Andalusian Ẓāhirī jurist Ibn Ḥazm (d. 456/1054), turns his skepticism to advantage (Ibn Ḥazm conveniently exposes the futility of the other schools' hair-splitting), and then calls upon the Ḥanbalī jurist Ibn Taymiyya and his disciple, Ibn Qayyim al-Jawziyya, to show that, in the end, it would be absurd to deny the important role of *raʾy* (opinion) in Islamic jurisprudence. There are, in fact, three kinds of *raʾy*: one futile, one proper, and one dubious. After identifying four categories of futile *raʾy*, he offers four categories of the "praised" kind, mainly emphasizing the way in which the Companions of the Prophet used opinion both in interpreting the sacred texts and in shaping new laws in areas in which the texts are silent in order to solve new problems as they arose. In this they necessarily resorted to analogy (*qiyās*).

Riḍā then shows that opponents of *qiyās* make four mistakes (pp. 96-104), which allows him to initiate a bold hermeneutical discussion. The central issue is the clarity of the texts (*dalāla*, or the certainty with which one can derive clear laws from them). This explicitness is of two kinds, the "true" *dalāla*, in which the purpose and intention of the author is discerned (and about which there is no disagreement), and the "additional" kind, in which the interpreter's comprehension is influenced by mental capacity, knowledge, personality, and so on. Here, as the frequent disagreements among the Companions show, a wide latitude of perspectives must be allowed. Depending on the jurist, one verse may yield one, two, ten injunctions (a*ḥkām*), or no injunction at all.[96] Then one must take into account the general texts (*al-nuṣūṣ al-kulliyya*), that is, those texts that allow an almost infinite number of analogies.[97] But what is an acceptable analogy? Here Riḍā

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restricted to the Muslim Umma, but which, in the context of the two verses he cites, refers to all humankind: (a) "it is He who created for you all that is in the earth" (2:29); (b) "And He has subjected to you , as from Him, all that is in the heavens and on the earth" (43:13).

[96] Ibid., 104-13.

[97] Leaning on Ibn Qayyim and going beyond, Riḍā discusses the issue of usury (120-8). He argues: (a) there are two kinds of usury, the obvious one being the grave exploitation of the poor in Arabian *jāhilī* society, and that is strictly forbidden; the "hidden" kind is forbidden only as a means to prevent people from moving toward the first kind; (b) in fact, there is a lot of discussion about *aḥādīth* that permit certain kinds of interest in sales; (c) there is no clear text on this, and

quotes Abū Isḥāq al-Shāṭibī (from his book, *al-Iʿtiṣām*) who introduced a distinction between *al-taʿabuddāt* (read *al-ʿibādāt*) and *al-ʿādāt* (i.e., *al-muʿāmalāt*, but including customs shaped by local culture). Whereas the laws in the former category are unambiguous and fixed for Mālik b. Anas, in the second category al-Shāṭibī spent a great deal of time and effort to understand the "welfare meanings" (*al-maʿānī al-maṣlaḥiyya*), and "with the observing of the Legislator's purpose" not to stray from any of its sources (*uṣūl*).[98]

Yusr al-Islām ends with Riḍā's most important considerations for the renewal of *uṣūl al-fiqh*. From Najm al-Dīn al-Ṭūfī, Riḍā takes the notion that "human welfare (*maṣlaḥa*) is one of the bases (*adilla*) of Islamic law, as well as its strongest and most precise basis."[99] Riḍā

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circumstances determine how need and welfare make the use of the second kind permissible (124). I disagree with Erwin I. J. Rosenthal, who states that Riḍā is unbending in this area (*Islam in the Modern National State,* Cambridge University Press, 1965, 68). Jomier, however, reproduces a very similar discussion from the third volume of the Manār (*Le Commentaire*, 222-30), so it may well be that Riḍā is simply reflecting his master's reasoning on this subject. Jomier also states that he was told that ʿAbduh issued a *fatwā* authorizing bank savings accounts. Chibli Mallat informs us that in response to questions about the recently established Egyptian postal administration's Savings Fund, both ʿAbduh and Riḍā issued short *fatwās* in 1904 affirming its validity ("Tantawi on Banking Operations in Egypt," in *Islamic Legal Interpretations: Muftis and their Fatwas,* eds. Muhammad Khalid Masud, Brinkley Messick, and David S. Powers, Harvard University Press, 1996). Finally, Fareed cites a discussion on *ribā* in Riḍā's *al-Khilāfa*, in which Riḍā favors interest-bearing transactions because "Muslims are now faced with great difficulties when trying to secure a loan." So he calls for "the relaxation of the *ribā* rules on the basis of *ḍarūra*, or necessity." Later, however, Fareed sides with Hourani, who believes that Riḍā, together with ʿAbduh, actually goes against the literal import of the text by his redefinition of the term *ribā* (*Legal Reform,* 73-4).

[98] *Yusr al-Islām,* 143. Riḍā asserts that al-Shāṭibī is without precedent in his ability to distinguish between *maṣlaḥa mursala* (the traditional category for a ruling based on human welfare on an issue not mentioned in the text) and *bidʿa* (an innovation, a category usually considered as forbidden). It is wrong to think—as many do—that only the Mālikīs devote attention to the *maṣlaḥa mursala*. The *uṣūlis* often included it in their discussions of analogy or called it *munāsaba*, or *al-maʿnā al-munāsab* (the appropriate meaning). This is the same thing, argues Riḍā, for both are extrapolated from "general intentions of the *sharʿ*" (144).

[99] Ibid., 147. Amazingly, Riḍā offers not one objection. Hallaq devotes some space to this as well (150-3). He shows that it is through the accepted theory of preponderance (*tarjīḥ*) that Ṭūfī builds his case for the abandonment of certain texts over others in the name of *maṣlaḥa*. The reason his theory was all but forgotten until recently, contends Hallaq, is because it was epistemologically inferior. This is the reason why Hallaq devotes an entire chapter to al-Shāṭibī, who represents the apex of the use of inductive reasoning in securing the legal interpretation of the sacred texts. On al-Shāṭibī's theory of epistemology, see also al-Azmeh ("Islamic Legal Theory," cf. note 5).

then devotes his last section to al-Shāṭibī's treatment of *maṣlaḥa*, a section which offers no theoretical improvement to his own thinking, but advances only ten examples of how the Companions made creative legal rulings based on this principle of human welfare.[100] True to his vision, as articulated in his earlier book, *al-Khilāfa aw al-imāma al-ʿuẓma*, Riḍā concludes with political considerations:

> The truth is, it is evident that the questions of civil transactions (*al-muʿāmalāt*) which come under the jurisdiction of the rulers (whether judicial matters, political or military) all go back to the principle (*aṣl*) made plain by the *ḥadīth*, "no injury and no counter-injury" (*lā ḍarār wa lā ḍirār*), which refers directly to the verses which remove the burdens from inheritance and marriage (that is, the avoidance of individual and collective harm). From this has been derived the rule of avoiding harm and protecting public interests (*al-maṣāliḥ*), thus giving due consideration to to the Legislator's texts and purposes.[101]

In the above we have seen Riḍā waver between calling *maṣlaḥa* the principal purpose behind the *sharīʿa,* or a *dalīl* or an *aṣl* of Islamic jurisprudence in the general category of *muʿāmalāt*. In my view, in the legal methodology of ʿAbduh and Riḍā, *maṣlaḥa* now surpasses *qiyās* and *ijmāʿ*. Yet, as Kerr puts it, neither of them is consistent. Riḍā is ambivalent in *Yusr al-Islām* as to whether *istiṣlāḥ* is simply an extension of *qiyās* (the classical position also held by Ibn Taymiyya), or whether it goes beyond.[102] He implies in the last section of the book that the very simple method of *istiṣlāḥ* is just as valid as the painstaking traditional method of *qiyās*. In the context of a book that explicitly argues for Islam's preference for ease, however, it is

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[100] I agree with Muhammad Khalid Masud, who characterizes Riḍā's use of al-Shāṭibī as shallow (*Islamic Legal Philosophy*, 194). By tying the notion of *maṣlaḥa* too closely to *maṣlaḥa mursala*, Riḍā overlooks the radical nature of al-Shāṭibī's use of *maṣlaḥa*. For one thing, Riḍā only quotes from *al-Iʿtiṣām*. He does not seem to have read al-Shāṭibī's *magnum opus*, *al-Muwāfaqāt*. Had he done so, he might have gone further in his theoretical understanding of *uṣūl al-fiqh*.

[101] Ibid., 152. For the use of the above *ḥadīth*, see also al-Manār, vol. 4, 861. For Riḍā, the rulers must listen to a legislative council (called by the traditional name of *ahl al-ḥall wa'l-ʿaqd*), the members of which, as Muslim jurists, will exercise the necessary *ijtihād* as they offer these leaders guidance. I concur with Fareed, who argues that Riḍā "was a modernist or neo-*salafi* in terms of his political philosophy but a *salafi* in terms of his religious outlook" (*Legal Reform.,* 67). Like Hourani, Fareed argues that "[Riḍā's] legal reform thus lacked the boldness that characterized the *ijtihād* of ʿAbdūh's other disciple ʿAlī ʿAbd al-Rāziq, whose controversial work*, Al-Islām wa uṣūl al-ḥukm*, was roundly condemned by Riḍā himself" (ibid., 70).

[102] Kerr, *Islamic Reform*, 194.

clear where Riḍā's preference lies. Further, had Riḍā been consistent in his use of al-Ṭūfī, he would have given *maṣlaḥa* preponderance—at least in the sociopolitical realm—over qurʾānic injunctions.[103] But as Kerr observes, Riḍā did not follow through on the implications of his legal theory:

> To an undefined extent, then, *maṣlaḥa* becomes a basic source of legal interpretation in its own right and is no longer dependent on the particular indications of textual sources. . . . And indeed, if *maṣlaḥa* is taken as a legal source in its own right, *qiyās* itself can often be dispensed with, and positive rules can be decided on utilitarian grounds without the use of analogy, for the "wisdom" (*ḥikma*) behind the revealed Law is no longer inscrutable. But these are only implications, and they are not spelled out by Riḍā.[104]

I may be safely said that Riḍā builds on ʿAbduh's eclectic theology in which the *sharīʿa* is equivalent to natural law (with the exception of religious rites). The resulting hermeneutic of legal rulings is based not so much on specific rules spelled out by the text, as it is on the ethical principles revealed as God's purposes behind the text. In practice, as Kerr has noted, Riḍā remains very conservative and never recommends contravening any explicit injunction spelled out by either Qurʾā or Sunna. I now turn to more recent *uṣūlī* writers who move toward this *maqāṣidī* perspective.

A Continuing Trend Toward Maqāṣid al-Sharīʿa

ʿAbd al-Razzāq Sanhūrī (d. 1971) and ʿAbd al-Wahhāb Khallāf (d. 1956) were younger contemporaries of Riḍā, and offered major contributions to Egyptian law, the first as the reformer of the Egyptian Civil Code,[105] and the second as an *uṣūlī*.

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[103] On Riḍā's sharp distinction between *ʿibādāt* and *muʿāmalāt* in law, see also Layish, "The Contribution of the Modernists," 264. This had unintended consequences, Layish asserts: by distinguishing between "spiritual law" and "earthly law", Riḍā "made an appreciable contribution to the formation of a secular concept of the legislative authority" (ibid., 268).

[104] Kerr, *Islamic Reform,* 196-7. Kerr characterizes the progressive nature of Ridā's legal theory as "ambiguous," making him more of an "ideologist" than a "practical reformer" (ibid., 187).

[105] His work went way beyond the scope of his native Egypt. Enid Hill calls him "the principal architect of the present civil codes of Egypt, Iraq, Syria, Libya, and the commercial code and other basic legislation of Kuwait. . . Sanhuri is unequivocally considered by the Arab world to be its most distinguished modern jurist" ("Islamic Law as a Source for the Development of a Comparative Jurisprudence, the 'Modern Science of Codification': Theory and Practice in the

Sanhūrī is no doubt difficult to categorize. On the one hand, he is a Muslim with a secular vision of society. On the other, he always maintained an admiration for Islamic law and eagerly longed to see it reformed. Already in his doctoral thesis, *Le Califat*, presented to the Faculté de Droit of the Université de Lyon (1926),[106] he advocated a reshaping of Islamic law in the light of comparative law—indeed, that was the purpose of the thesis. At the time he was hoping for the establishment of a spiritual caliphate that would provide guidance to a "League of Oriental Nations" on the model of the League of Nations, and one of the preliminary tasks would be to renew Islamic law from within. This could be done only under two conditions: (a) non-Muslims would have complete equality with Muslims before the law, and (b) Islamic jurisprudence must be adapted to "the requirements of modern civilization."[107] The latter task would be carried out in two phases, a scientific phase in which one would begin by separating the spiritual from the temporal dimensions, and a second, a legislative phase, in which Sanhūrī proposed using personal status law as a field of experimentation. And if the experience were successful, it would be extended to statutory law.[108]

Ten years later, in 1936, Sanhūrī published a more robust and detailed plan for the overhaul of the Egyptian Civil Code. In his view, the Code as it stood contained some important gaps. One of these was that its texts dealt only with matters of social relationships (*muʿāmalāt*) and not with those of personal status, which is governed almost entirely by Islamic law. He explains, "[a]nd if we touch upon personal status laws we will find that Islamic law (*al-sharīʿa al-islāmiyya*) puts forth principles which come into direct contradiction with the principles of French law."[109] Thus he calls for "a scientific

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Life and Work of ʿAbd Al-Razzāq Aḥmad al-Sanḥūrī (1895-1971)," in *Islamic Law: Social and Historical Contexts*, ed. Aziz Al-Azmeh, New York: Routledge, 1988, 146-7).

[106] Lyon by the Imprimerie Bosc Frères & Riou, 1926.

[107] *Le Califat*, 578,

[108] Ibid., 581-3.

[109] "Wujūb tanqīh al-qānūn al-madanī al-miṣrī wa-ʿalā ayy asās yakūnu hādhā al-tanqīh bi-munāsaba al-ʿīd al-khamsīnī li'l maḥākim al-ahliyya," *Majallat al-qānūn wa'l iqtiṣād* 6 (1936), 3-144, 23. It is clear that by this time that Sanḥūrī had abandoned any hope for a caliphate, even the very nominal one he had envisaged earlier. He states clearly that the work of renewing the civil code must be carried out on the basis of three sources: (a) Egyptian law as it has evolved over the last fifty years; (b) contemporary codifications of law in other lands (taking into account the latest developments in international law); and (c) Islamic law

movement of renewal" of Islamic law. As he had previously noted in his thesis, we must distinguish between the religious side of the *sharīʿa* which relates to the next world and its worldly side of social interaction. As for the religious dimension, its creeds and rites are honored as "belief (*al-ʿaqīda*)" located in the heart. So we differentiate between the spiritual side and "statutes based on a properly logical and legal foundation, and that is the sphere of our present scientific research."[110]

However short and poorly developed, Sanḥūrī does present one *uṣūlī* argument: "Let us not forget that one of the four sources (*maṣādir*) of Islamic law is consensus (*ijmāʿ*). We consider it the key for the development of this *sharīʿa*, for it is this consensus that confers on it its life-giving renewal and its ability to respond to the changing demands of sociopolitical realities."[111] He then shows that there were three stages in the development of consensus: (a) the customary laws of Medina which were given their official recognition by the Prophet and his Companions; (b) the laws agreed upon by the Companions in the expanded Muslim empire; (c) the laws recognized and codified by later generations of *mujtahidūn*. In light of this, I would argue that in the overall scheme of Sanhūrī's theological thinking, his argument about *ijmāʿ* stems from a *maqāṣidī* mindset, that is, he picks and chooses among the *sharīʿa*'s traditional *fiqh* what he thinks best exemplifies the spirit of "good law."[112] Yet, as Aharon Layish has argued, this new concept of *ijmāʿ* not only contradicts the traditional one, but also leaves unspecified practical issues such as "the identity of the *ʿulamāʾ* participating in the *ijmāʿ*, the manner of their election, the validity of their decisions and their relations with the secular parliaments."[113]

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(77). Note the order, and note the justification: because "it was the law of the land before the introduction of the present legislation, and is still law in different areas; the present Egyptian code has borrowed several of its statutes, and it still can borrow from it a good deal more" (ibid.). Nowhere in the document does he mention any religious or moral reasons for appealing to the *sharīʿa*—only "scientific" ones. Yet the *sharīʿa* remains, he contends, one of the most advanced codes in the world.

[110] Ibid., 115.

[111] Ibid.

[112] Enid Hill expresses his *maqāṣidī* perspective in these words: "He sought also to discover and apply the 'spirit' of the law—past and present—in a Montesquieuian sense, to be known from a particular country's historical development—socially, economically, *and legally*" ("Islamic Law," 147, her emphasis).

[113] "The Contribution of the Modernists," 266.

ʿAbd al-Wahhāb Khallāf tackles these questions directly as an *uṣūlī*. A law professor at the University of Cairo, he published his *ʿIlm Uṣūl al-Fiqh* in 1942. One of his students, an impressive *uṣūlī* in his own right, Muḥammad Abū Zahra,[114] writes in the preface to the recent French translation of this book that as he was starting to write his own "foundations of law" the idea came to him to abandon the project "in order to re-edit the work of our regretted Professor Khallāf."[115] In this work—which marked his students' generation—we read in the opening paragraph that Muḥammad was God's messenger in order "to bring a Law wise, pure and harmonious, the principle of which is to lighten the difficulties of men and spare them all harm, and the objective of which is to serve the interests of men and justice."[116] That is precisely the *maqāṣidī* perspective, begun and illustrated by ʿAbduh and Riḍā, but now more coherently developed.

The outline of Khallāf's book is telling. Out of the four parts of his book, the first three reflect the traditional *uṣūl al-fiqh* subject matter, but always with a twist. The first part seeks to delimit all the sources of *ijtihād*—but instead of using *uṣūl* or *maṣādir*, he uses *adilla* for all the categories.[117] Naturally Qurʾān and Sunna are at the top of the list, but the order of the next six "sources" indicates his perspective: *ijmāʿ, qiyās, istiḥsān* (preferential choice), *maṣlaḥa mursala, ʿurf* (custom), *istiṣḥāb* (presumption of continuity), *sharʿ man qablanā* ("revealed laws of those before us"), *madhhab al-ṣaḥābī* (the legal practice of the Companions). Notice the position of *maṣlaḥa*, and

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[114] See below on his book.

[115] *Les Fondements du Droit Musulman*, trans. Claude Dabbak, Asmaa Godin and Mehrezia Labidi Maiza (Paris: Edition Al Qalam, 1997). The editing was done by two of Abū Zahra's colleagues, ʿAbd al-Fattāḥ al-Qāḍī and ʿAlī al-Khafīf.

[116] *ʿIlm uṣūl al-fiqh* (Cairo: Dār al-Qalam, 1972, 10th print.), 8. This perspective continues in the next paragraph: "The great *mujtahidūn* among the Muslim imams have invested all their intellectual energy in order to derive the prescriptions of the Islamic Law from its sources, extracting from the Texts the spirit and the meaning of the *sharīʿa*'s inestimable legislative treasures."

[117] Here he is much clearer than Riḍā was. The first category, "the indispensable" (explicitly following al-Shāṭibī), includes the five areas that must be safeguarded at all costs (life, religion, progeny, mind, and possession). The second category, "the necessary," covers protection from harm in human relations, seeking "to meet people's needs without arousing quarrels or resentment" (ibid., 317). The last category is mainly that which enables people to better fulfill their obligations in the first two categories. For instance, covering one's intimate parts is accessory, because in the case of medical emergency, clothing must be removed in order for the person to be treated.

the inclusion of the last item, which would not have been included before the works of ʿAbduh and Riḍā. Furthermore, as Hallaq judiciously points out, Khallāf's treatment of the crucial *dalīl* of *qiyās* renders it virtually indistinguishable from *istiṣlāḥ*—again, *maṣlaḥa* takes over, and this time as the rationale (*ḥikma*) behind the divine prohibitions and permissions.[118]

The next two parts, although more traditional, are treated in a much more streamlined fashion than in the classical handbooks on *uṣūl*: the divine injunctions (*al-aḥkām al-sharʿiyya*), and the linguistic rules (levels of significance of a text, general terms versus specific ones, and so on). Then comes his last and most novel section: the juridical rules. He identifies five rules: (a) the general purpose (*maqṣad*) of Divine Legislation; (b) the rights of God and the rights of people; (c) when *ijtihād* is permitted; (d) the abrogation of injunctions; (e) the problem of contradiction, and levels of priority among conflicting injunctions. Items (b), (d) and (e) are certainly traditional *uṣūlī* material, but (a) and (c) are not, technically speaking. The section opens with this statement:

> The general purpose of the Legislator in the injunctions of the Law is to care for the interests (*maṣāliḥ*) of human beings by guaranteeing for them that which is indispensable (*ḍarūrī*), as well as the necessary (*ḥājī*) and accessory (*taḥsīnī*). Each divine prescription aims for one of these objectives, which together constitute human welfare (*maṣlaḥa*). The accessory cannot be taken into account if it jeopardizes the necessary, nor can the necessary or accessory be taken into account if they jeopardize the indispensable.[119]

Far from being a last recourse in a case in which one finds no text addressing a particular issue, Khallāf's attention to the objectives of the Legislator illustrates a more far-reaching principle: "The knowledge of the general objective of the Legislator in [formulating] the Law's injunctions contributes in a capital manner to the correct comprehension of the texts and their application to practical cases, as well as to the inferring of the rulings in the cases not mentioned by the texts."[120] In effect this Muʿtazilī-like criterion becomes an overarching criterion for sifting out contradictions and ambiguities from the texts, and for enacting new rulings in light of changing socioeconomic and political conditions.

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[118] Hallaq, *A History of Islamic Legal Theories*, 221.
[119] Khallāf, *ʿIlm uṣūl al-fiqh*, 197.
[120] Ibid.

Was Khallāf willing to go further than his contemporaries in his use of *maqāṣid al-sharīʿa*? This is likely, but he remains conservative overall. In the Preface of the published lectures he delivered at the Cairo Higher Institute of Arab Studies in 1953-1954 (*Maṣādir al-tashrīʿ al-Islāmī fī mā lā naṣṣa fīhi*, "Sources of Islamic Legislation Where There Is No [sacred] Text"),[121] he strikes an apologetic stance that aims to be progressive. He announces the three parts of the book: (a) an exploration of *al-ijtihād bi'l-ray'*, i.e., the contexts ("facts," *waqā'iʿ*) in which it legitimately may be used and those who made use of it; (b) after his section on *istiṣlāḥ* he included a new edited and annotated text of al-Ṭūfī's commentary on the *ḥadīth, lā ḍarar wa-lā ḍirār*;[122] (c) a refutation based on parts one and two of the orientalist claim that the *sharīʿa* is rigid and sterile.

Each of the paths (*ṭuruq*) that a *mujtahid* might choose, depending on the situation, is connected to the purposes spelled out by the Legislator in the texts—the promoting of the welfare of the *mukallafūn*, "those addressed by God's Law and held accountable for their response to it." Five paths are described in the book (in the following order): *al-qiyās, al-istiḥsān, al-istiṣlāḥ, al-ʿurf*, *al-istiṣḥāb*. Each path is intimately connected to the divine purpose of *maṣlaḥa* for those who come under its jurisdiction, and although *istiṣlāḥ* is in third place, the inclusion of al-Ṭūfī's commentary is itself an eloquent move in the "purposive" direction. In his introduction, Khallāf explains how al-Ṭūfī, upon reaching the thirty-second *ḥadīth*, "He elaborated his explanation and expanded with great detail his *uṣūlī* research on the evidences of the Divine Law (*fī adillati al-sharʿ*) for the rulings (*ʿalā al-aḥkām*) and the place of observing the public interest (*maṣlaḥa*) in these evidences; and he spoke on this issue, going further than anyone had gone before."[123] Khallāf then informs us that the Damascene Jamāl al-Dīn al-Qāsimī annotated this section and published it separately. It was also published in al-Manār (vol. 9, section 10, 1906), and then chosen as a dissertation topic by Muṣṭafā Zayd, who, using two hitherto unknown manuscripts, produced a revised edition with his own commentary. While praising this booklet, Khallāf only regrets that its general theories (*naẓariyyātuhā al-kulliyya*) were not translated into specific rulings (*juz'iyyāt ʿamaliyya*).

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[121] Kuwait: Dār al-Qalam, 1972, 3d printing.
[122] Al-Ṭūfī's text occupies 38 pages in Khallāf's book (106-44).
[123] *Maṣādir al-tashrīʿ*, 105.

Did Khallāf follow al-Ṭūfī's method? Only to a certain extent. In some cases, the imperatives of legal change override the revealed texts. In the chapter on customary practices, he argues that certain contracts which include an element of risk (insurance, for instance), though forbidden by the *sharīʿa*, should nonetheless be legalized today because our modern economy depends on them.[124] His conclusion to the discussion on *istiṣlāḥ* comes in three points. First, he says, all Mālikīs and Ḥanbalīs agree that all the rulings of the *naṣṣ* aim to fulfill people's well-being. Second, the *ḥadīth* "no injury or counter-injury" has the force of a specific (*khāṣṣ*), definitive, or categorical (*qāṭʿī*) text. As conditions of Muslim societies change over time, it is conceivable that the above *ḥadīth* could overrule a specific injunction of the sacred texts, though only in the sphere of the *muʿāmalāt*. Third (and this is perhaps the boldest and most succinct statement of the *maqāṣidī* hermeneutic):

> The texts, the consensus, and the evidences and signs of the *sharīʿa* are but means to achieve people's well-being (*maṣāliḥ*); and the attention to public interest (*riʿāya al-maṣlaḥa*) is one of the evidences (*adilla*) of the rulings and an indication pointing to them. Thus if we act on the basis of public interest instead of what one of these evidences [in a literal fashion], then we are acting on the basis of a preponderant evidence (*dalīl rājiḥ*, i.e., having weighed the alternatives) instead of a least suitable evidence (*dalīl marjūḥ*), because public interest is [the Law's] primary intention, and the intention has more weight than the means [to achieve it]. For this reason some of the *sharīʿa*'s injunctions have been abrogated, due to a necessary exchange of interests (*tabaddul al-maṣāliḥ*).[125]

Khallāf's assertion of the overriding nature of *maṣlaḥa* is seemingly contradicted in his summary of this chapter (and in other places of his book). Here he insists that *ijtihād* cannot be exercised with respect to injunctions based on explicit, categorical texts (*nuṣūṣ ṣarīḥa qaṭʿiyya*), either because they are in the sphere of *ʿibādāt* or family status, or because the Qurʾān or Sunna text clearly delineates a legal injunction (*qaṭʿiyya fī dalālatihā ʿalā aḥkāmihā*).[126] Furthermore, a judgment based on human welfare must meet three strict conditions: (a) it must concern the priority level of *maṣlaḥa*, that of necessity (*al-ḍarūriyyat*); (b) it must be definitive (possible injuries have been

[124] Ibid., 124-5. Also in Hallaq, *A History of Islamic Legal Theories*, 221.
[125] *Maṣādir al-tashrīʿ*, 99.
[126] E.g., ibid., 11.

carefully weighed against all perceived benefits); (c) it must not contradict any text or prior consensus. Thus even if, in the name of *maṣlaḥa,* one questions a husband's right to divorce his wife (though not vice versa), or a daughter's inheriting only half as much of her father's estate as her brother does, they would be wrong to do so. Since the texts are clear, this is only an imagined benefit (*maṣlaḥa wahmiyya*).

Conservative as he is in these areas, Khallāf nevertheless embraces the theological and hermeneutical turn advocated by al-Manār before him—as demonstrated by his inclusion of al-Ṭūfī's controversial treatise. *Uṣūl al-fiqh*, after all, is a well-established science with its own carefully defined parameters going back almost ten centuries. Change starts at the theoretical level and then slowly filters down to that of legal rulings in specific and changing situations.

As a student and colleague of Khallāf's, Muḥammad Abū Zahra adopted the *maqāṣidī* strategy, but in a more guarded way. His *Uṣūl al-Fiqh* begins with a definition of the discipline. Though much of his presentation is clearly conservative, this definition already sets him at odds with the likes of al-Shāfiʿī:

> *Uṣūl al-fiqh* is the science which identifies the methods devised by the imams who engaged in *ijtihād* (*al-aʾimma al-mujtahidūn*) in their deducing and exploration of the Islamic legal injunctions (*al-aḥkām al-sharʿīyya*) from the texts (*al-nuṣūṣ*), and the building upon them on the basis of the causes (*al-ʿillal*) upon which they are built. These injunctions, in turn, are related to the benefits (*al-maṣāliḥ*) which the Wise Law (*al-sharʿ al-ḥakīm*) aims to accomplish. These benefits [on behalf of human beings] are highlighted by the Noble Qurʾān, and are pointed to by the Prophetic Sunna and the Muḥammadan guidance (*al-hudā al-muḥammadī*).[127]

There seems to be a tension (if not a contradiction) between Abū Zahra's strong preference for the Ashʿarī position on the role of the human mind and his confidence in his assertion that the *aḥkām al-sharīʿa* are tied to human welfare.[128] Apparently, Abū Zahra was not

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[127] *Uṣūl al-Fiqh* (Dār al-Fikr al-ʿArabī, 1958), 3.

[128] The first section of his second part ("The Legislator") is entitled, "The mind's determining good and evil" (67-72). Here Abū Zahra devotes two pages to the Muʿtazilī position on ethical objectivism (good and evil exist in absolute terms and can be grasped by the mind), then three paragraphs to the Māturīdī/Ḥanafī position, then an even shorter comment on the Ashʿarī position. He concludes in agreement with the great majority of the legal experts (*al-fuqahāʾ*) that "the mind cannot establish obligation" (*al-ʿaql lā yukallif*) because only God is the

aware of the inconsistency. And though the outline to his *Uṣūl al-Fiqh* is somewhat more traditional than Khallāf's, he ends up in the same place: the actual functioning of *ijtihād* today, with *maqāṣid al-sharīʿa* in the forefront. In his section on *maṣlaḥa mursala*, for instance, he confidently declares that "it has been established through research and through the texts that the injunctions of the Islamic Law encompass the well-being of people (*maṣāliḥ al-nās*)."[129] He then explains that this being so, God's purpose in promoting human welfare is the general fabric behind all the specific commands, prohibitions and injunctions of the texts.

Abū Zahra then comes to the central epistemological question: the connection between *maṣlaḥa* and *naṣṣ* ("text"). There are three views, he says: (a) any *maṣlaḥa* you see is on the surface of the text and nothing can be said about the intent of the Lawgiver (the Ẓāhirī school); (b) the intent of *maṣlaḥa* is discernible in the text, but only in those cases in which the text clearly gives a rationale for a specific injunction (*maṣlaḥa* comes under the *ʿilla* of *qiyās*; (c) any *maṣlaḥa* that seeks to protect the five necessities of humanity (life, religion, mind, progeny and wealth) is a true one that promotes the purpose of God in the revelation of His *sharīʿa*, whether it is mentioned in a text or not. The last position is, of course, his own. But he also attributes to Mālik b. Anas, who stipulated three conditions for recourse to *maṣlaḥa mursala*. The first is "a concordance between the benefit (*maṣlaḥa*) which is considered a source (*aṣl*) standing on its own and the purposes of the Lawgiver, without this benefit negating any other source (*aṣl*)." Here are the next two:

> 2. That it be reasonable in itself, agreeing with the appropriate, reasonable descriptions, which, if explained to intelligent people (*ahl al-ʿuqūl*) would meet with acceptance.
> 3. That if it were acted on, it would remove a necessary hardship (*ḥaraj*), such that if the course of reasonable benefit were not decided, people would experience hardship, as God—may be He exalted—has said,

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Legislator—even if the Ḥanafīs say the intellect can discern good and evil as separate entities. Thus, he agrees with Khallāf, who straightforwardly says he follows the Māturīdī position on this (*Les Fondements*, 146-8). Further, he writes that because God has attached consequences (reward and punishment) to human actions, human reason can begin to sort out what is commanded and what is not. In the end, however, he is much more hesitant than Khallāf in this area, and he sounds like a strict Shāfiʿī at times (e.g., 72).

[129] Dār al-Fikr al-ʿArabī, 1957, 265.

> "[God] has not imposed on you any difficulties (*ḥaraj*) in religion" (Q. 22:78).[130]

This position allows a much greater role to human reason than al-Ashʿarī would have granted. Moreover, by saying that God intended to attach his commands to human benefit, thus laying bare certain general principles that can be extended into other areas not covered by the texts, Abū Zahra has crossed an epistemological threshold and, as a result, can avail himself of a useful interpretive tool: the discerning of God's purposes in the Law—*maqāṣid al-sharīʿa*. This is borne out in the last part of his *Uṣūl*. The last three headings are as follows: "The purposes of the Law's injunctions," "The conditions for *ijtihād*," and "The giving of legal opinions—or fatwas" (*al-iftāʾ*). Yet, as mentioned above, he remains cautious. When he considers the purposes of the Divine Law, he finds that they are three: (a) the individual's spiritual formation (*tahdhīb*) through the properly religious injunctions; (b) justice at all levels, and in particular, social justice; (c) human welfare (*maṣlaḥa*), which is inscribed in all of God's commands—"true welfare" and not the lower passions (*ahwāʾ)* toward which people may instinctively gravitate.[131] Whereas this third category might have appeared as the least important of the three, it monopolizes the rest of the section.

Under the rubric "*al-maṣlaḥa al-muʿtabara*" (" welfare accredited by the texts"—as opposed to the *mursala* kind), Abū Zahra launches into a theological discussion, covering the five areas of human experience that the Law seeks to protect (life, religion, progeny, possessions and mind), and then the three levels of human benefit (necessary, needful, leading to a better quality of life). Though all jurists agree that *maṣlaḥa* is attached to God's commands, he maintains, there is a disagreement about how this can be connected to God's will.

A first group (Ashʿarīs and Ẓāhirīs) denies that God is required to connect his statutes with human benefit. Any kind of *ʿilla* we attribute to God would give human reason an edge over revelation. The second group (some Shāfiʿīs and Ḥanafīs) consider that the welfare dimension may serve as an "efficient cause," but only as attached to the order itself, and without making a statement about God's will. Finally, there are those who maintain that God promised to bring mercy and guidance through His Law, and therefore, *maṣlaḥa* is tied to all of the *sharīʿa*'s

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[130] Ibid., 267.
[131] Ibid., 351-3.

injunctions. In the end, this is only a theoretical debate, declares Abū Zahra, which has no bearing on how the jurists go about their task, for all agree that "there is no command put forth by Islam except that it contains benefit for humankind."[132] But this is tantamount to saying that everybody agrees with the third group—a clearly Muʿtazilī position. Ironically, by proclaiming that theology is unimportant, he concedes his own unwillingness to get to the bottom of the relationship between reason and revelation; and significantly, in this whole discussion, he omits the adjective (or noun) Muʿtazilī. Apparently, in legal circles, this is the worst fault of which one could be accused.

Nor are contemporary *uṣūlī*s more forthcoming on this issue. But the *maqāṣidī* approach seems to be gaining ground. Muhammad Hashim Kamali, for instance, in a paper presented to the *Sharīʿa* Symposium in Malaysia in September 1989, lays down what he sees as the theoretical framework of Islamic *fiqh*. He writes, "With regards to matters on which there is no *naṣṣ* or *ijmāʿ, ijtihād* is to be guided by the general objectives of the *Sharīʿah* (*maqāṣid al-Sharīʿah*). This type of *ijtihād* is usually referred to as *ijtihād bi al-raʾy*, or *ijtihād* which is founded on opinion."[133] His next section is "Objectives of *Sharīʿah*" (*Maqāṣid al-Sharīʿah*)." Here he reproduces almost verbatim Abū Zahra's three objectives: spiritual formation, justice and human welfare.[134]

In Kamali's discussion of the third objective of *sharīʿa*, "Consideration of Public Interest (*Maṣlaḥa*)," al-Shāṭibī takes center stage:

> In his pioneering work, *al-Muwāfaqāt fī Uṣūl al-Sharīʿah*, al-Shāṭibī has in fact singled out *maṣlaḥa* as being the only overriding objective of *Sharīʿah* which is broad enough to comprise all measures that are beneficial to the people, including the administration of justice and *ʿibādāt*. He places fresh emphasis on *maqāṣid al-Sharīʿah*, so much so that his unique contribution to the understanding of the objectives and philosophy of the *Sharīʿa* is widely acknowledged.[135]

This means that there is no ruling (*ḥukm*) in the *sharīʿa* that does not aim at securing a *maṣlaḥa* for those who obey it. Conversely, its

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[132] Ibid., 356.

[133] "Sources, Nature and Objectives of Shariah," *The Islamic Quarterly* 33, 4 (1989): 215-35, at 224.

[134] Ibid., 226. Here Kamali references **ʿIzz al-Dīn ʿAbd** al-Salām (d. 660/1263), whose *Qawāʿid al-aḥkām fī maṣāliḥ al-anām* was published in 1968, whose theory of *maṣlaḥa* was marked by his Sufi orientation (cf. Masud, *Islamic Legal Philosophy,* 161-2).

[135] Ibid., 228.

prohibitions seek to prevent evil and corruption (*mafsada*). Kamali then details the three types of *maṣlaḥa* that al-Shāṭibī borrowed from al-Ghazālī (*ḍarūriyyāt, ḥājiyāt, taḥsīniyyāt*) and discusses the five categories of *ḍarūriyyāt*. But now he follows al-Shāṭibī, who moves beyond al-Ghazālī, arguing that consideration of public interest (not primarily of individual benefit) is a variable "whose validity is independent of relative convenience and utility to particular individuals." He writes:

> This is so, as al-Shāṭibī explains, because the *Sharīʿah* is eternal and timeless in its validity and application. Hence the interest which it seeks to uphold must also be objective and universal, not relative and subjective. . . . The objectivity of *maṣlaḥah* is measured by its relevance and service to the essential *maṣāliḥ*, which are clearly upheld by *Sharīʿah*. *Maṣlaḥah* is basically a rational concept and most of the *maṣāliḥ* of (*maṣāliḥ al-dunyā*) [sic] are identifiable by human intellect, experience and custom even without the guidance of *Sharīʿah*.[136]

Is this a bold step forward in relation to most classical jurists? Kamali is silent on this. However, in his conclusion, after surveying the extensive damage wrought by Western colonialism to the Muslim psyche, he makes an urgent call for an "imaginative reconstruction and *ijtihād* entailing revision and modification of the rules of *fiqh* so as to translate the broad objectives of the *Sharīʿah* into the laws and institutions of contemporary society."[137] Kamali outlines some concrete proposals on the juridical and political levels in his *Principles of Islamic Jurisprudence*.[138] He advocates, for example, that Muslim jurists be given a voice in the parliament of Muslim countries and that laws be enacted in the spirit of *sharīʿa*—a rather vague wish

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[136] Ibid., 230. Kamali has a footnote in this section referring to Masud's *Islamic Legal Philosophy*.

[137] Ibid., 232. This kind of thinking was the trademark of the late Ismaʿīl al-Farūqī. In an article entitled "Islam and Human Rights," Farūqī speaks of the "Islamic bill of human rights" enshrined in the *sharīʿa*, the spirit of which "was promulgated by God for all places and times" (*The Islamic Quarterly* 27, 1, 1983, 12-30, at 12). Aside from these "axiological postulates," the letter of the law, or the application of *sharīʿa* to specific times and contexts is "ever-open to reinterpretation by humans" (ibid.). "For the overwhelming majority of Muslims (the adherents of the Hanafi, Maliki, and Ja'fari schools or *madhāhib* of law) to establish critically—i.e., empirically—the requisites of public welfare and to subsume them, either through *istiḥsān* (juristic preference) or *maṣlaḥah* (juristic consideration of the commonweal), under the *Maqāsid al-Sharīʿah* (the general purpose of the law), is the pinnacle of juristic wisdom and Islamic piety" (ibid., 13).

[138] Cambridge, UK: Islamic Texts Society, 1991, Revised Ed.

that will offend neither the conservatives nor the progressives, since he offers no opinion on the status of the legal structures inherited from the West.

Evaluation

In this essay I have attempted to uncover some theological themes that lie beneath the twentieth-century Islamic reformist movement and its evolving legal theory, and the connection of these themes to the parallel (but distinct) debates in Islam before or after al-Ghazālī. The central issues revolve around the nature of ethical truth (ontology), the capacity of human beings to make moral judgments (epistemology), and the jurist's relative approach to the specific rulings of the texts and the more general ethical principles referred to therein (hermeneutics).

While consciously attempting to avoid a reductionist approach, I would still point out the impact of sociopolitical factors on the evolution of legal/theological positions. One takes a look at the moral victory of Ahmad b. Ḥanbal under the duress of the *miḥna* (soon followed by the political victory of orthodox Islamic theology), and one can agree with H. A. R. Gibb who called this turn away from a "created Qurʾān" the "decisive moment" in Islamic history—"the moment at which Islam rejected the conceptions [Greek speculative thought] which were, later on, to exercise a determining influence in Western civilization."[139] Then with the progressive erosion of central caliphal power, jurists began to separate the ideal *sharīʿa* injunctions in religious affairs (including family status law) from the necessary development of public law, already firmly in the executive and legislative hands of princes with little concern or knowledge of Islamic law. It is in this context that the discipline of *siyāsa sharʿiyya* developed, and that al-Ghazālī presented his innovative scheme to increase the role of public interest (*maṣlaḥa mursala*) among the sources of law—a tacit approval of Muʿtazilī objectivism, while still claiming to be faithful to Ashʿarī traditionalism. Finally, it is within the framework of post-Mongol Islamdom that Ibn Taymiyya called for the renewal of *ijtihād* and crafted a theology that pavied the way for natural law—at least in the political sphere. Henceforth, reason and revelation renew

[139] *Modern Trends in Islam* (Chicago: The University of Chicago Press, 1947), 19.

their mutual cooperation, and especially in eighteenth- and nineteenth-century India and Egypt, when Muslims called upon an Umma in decline to shake off the straightjacket of *taqlīd*, and exercise *ijtihād* in order to face the challenges of western modernity.

Other factors came into play besides political upheavals, to be sure. Yet theology is always shaped by its context, and, as the theology of the twentieth-century *uṣūlī*s sampled in this essay demonstrates, sociocultural pressures eventually affected even the production of legal theory—by nature staunchly conservative. Just the same, it may hardly be said that a progressive adoption of what I have been calling a *maqāṣidī* perspective represents a wholesale re-adoption of Muʿtazilism. If anything, this study reveals the inner tensions and continuing contradictions of legal theorists who, on the heels of Rashīd Riḍā, seem to embrace a Muʿtazilī-like ethical objectivism and partial rationalism and yet fail to draw out the consistent implications of making the purposes of the *sharīʿa* (with *maṣlaḥa* in the forefront) take precedence over the traditional *qiyās* and *ijmāʿ*. This is because of the textualist stance they inherited from the first *uṣūlī*s.[140] The early *uṣūlī* theories (attributed to al-Shāfiʿī), which required that every new ruling in areas not covered by the texts fall under *qiyās* and *ijmāʿ*, were largely developed in order minimize the scope of human judgment in legal reasoning. Naturally this position became untenable with the rapid social changes experienced by the Muslim world in the last century. The new purposive strategy did open some flexibility in the positive application of traditional *sharīʿa* in the sphere of *muʿāmalāt*, but the tension remained between a literal interpretation of the received corpus of *fiqh* (including a small body of qurʾānic legal rulings) and the new realities of modern society (including a massive injection of western secular statutory law).[141]

This unresolved tension will only grow more acute in the future, when the Muslim world faces at least three formidable challenges: the military and ideological pressures of a new world power (U.S.A.) that seemingly controls it on all sides; the confrontation between the Umma and the dynamics of international law and norms of human rights in a world of nation-states; and finally, the strident debates

[140] Moosa calls this "logocentrism" in his article "The Poetics and Politics" (see note 42).

[141] Again, see Layish for a detailed analysis of this phenomenon ("The Contribution of the Modernists").

between Muslim traditionalists, neo-revivalists and progressives. The crucial finding of this investigation, I would argue, is the tension created by hermeneutics. The *maqāṣidī* perspective points instinctively to a divine text contextualized by God for a seventh-century target audience. If the historicity of the Qur'an is acknowledged (by Fazlur Rahman and many since then), then Islamic legal theory, now irreversibly "purposive," may perhaps develop a new, consistent methodology that responds to the needs of Muslims in their present context.[142] Scholars such as Ebrahim Moosa,[143] Mohammad Hashim Kamali,[144] and Soualhi Younes[145] have recently published articles illustrating this strategy. Each one observes that the specific rulings of the text (which were context-specific) will have to be revised in certain instances.[146] Another scholar who illustrates a *maqāṣidī* strategy, amply quoting from traditional sources yet with a postmodern hermeneutical twist, is Khaled Abou El Fadl.[147]

Last Words

We began this essay by stating the obvious linkage between law and theology in Islam. Abū Zahra nicely typifies what Abdulaziz Sachedina has called the epistemological crisis in contemporary Islamic thought.[148] If this crisis is to be solved, somehow the connection between *kalām* and *uṣūl al-fiqh*, *sharīʿa* and *fiqh* must be made, and then its implications seriously articulated in the light of Enlightenment rationalism, and even more importantly, in light of postmodern epistemology.[149]

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[142] See Hoebink's excellent article on the spectrum of recent hermeneutical positions ("Thinking about Renewal in Islam," see note 56).

[143] "The Poetics and Politics," and "The Dilemma of Human Rights Schemes," *The Journal of Law and Religion* 15, 1&2 (2000-2001), 185-215.

[144] "Issues in the Understanding of *Jihād* and *Ijtihād*," *Islamic Studies* 41, 4 (2002), 617-34.

[145] "Islamic Legal Hermeneutics: The Context and Adequacy of Interpretation in Modern Islamic Discourse," *Islamic Studies* 41, 4 (2002), 585-615.

[146] E.g., Kamali writes, According to one of the maxims of *ijtihād* there should be no *ijtihād* in the presence of a clear text (*lā ijtihād maʿa l-naṣṣ*). This may now have to be revised" ("Issues," 631). Likewise the traditional definition of *ijmāʿ* has to change in this new context.

[147] See my analysis of his approach in "*Maqāṣid al-Sharīʿa*: A Promising Hermeneutic for Islamic Law and Human Rights?" (forthcoming)

[148] *The Islamic Roots of Democratic Pluralism*, 56.

[149] For an introduction to the growing Muslim discussion on this issue, see two books which originally were to be published as one: Ernest Gellner, *Postmodernism,*

Kemal A. Faruki would have agreed with his compatriot, Fazlur Rahman, who saw in a new awareness of hermeneutics the key to an Islamic reformation.[150] Here religious scholars or lay people are consciously engaged in a dynamic interaction, both with the text and with their world. Meaning comes from the interpreter's scrutiny of this double horizon of the text's historical setting and his or her own.[151] But Faruki took went one step further than Rahman, distinguishing "between the legal imperatives of Islam as they are (*sharīʿa*) and the legal imperatives of Islam as the human intellect understands them (*fiqh*); between reality as it is and reality as it is understood."[152] How far in that direction the *uṣūlī* focus on human benefit and necessity in the purposes of the Law will proceed—or whether this "purposive" strategy can be dubbed "utilitarian"—is a matter for debate.

What is certain is that the *maqāṣidī* strategy has been gaining momentum,[153] and spilling over into *fiqh* more generally. To be sure, further research is required if we are to understand more fully current developments in *uṣūl al-fiqh*. In particular, a closer look should be given to the seeming contradiction between the popularity of al-Ṭufī

Reason and Religion (London: Routledge, 1992), and Akbar S. Ahmed, *Postmodernism and Islam: Predicament and Promise* (London: Routledge, 1992). See also the present author's dissertation, "Toward Muslims and Christians as Joint Caretakers of Creation in a Postmodern World" (Pasadena, CA: Fuller Seminary Dissertation, 2001). Finally, S. Parvez Manzoor's review of Jürgen Habermas' *Between Facts and Norms: Contributions to a Discourse of Law and Democracy*, tr. William Rehg (Cambridge, MA: MIT Press, 1996), raises these issues from a Muslim perspective: "Faith and Law: At the Crossroads of Transcendence and Temporality," in *Muslim World Book Review*, 18, 3 (1998).

[150] *Islamic Jurisprudence* (Karachi: Pakistan Publishing House, 1962).

[151] *Islam and Modernity: Transformation of an Intellectual Tradition* (University of Chicago Press, 1982). See also Ebrahim Moosa's Introduction to the edited version of Rahman's *Revival and Reform in Islam: A Sudy in Islamic Fundamentalism* (Oxford: Oneworld, 2000).

[152] *Islamic Jurisprudence*, 252.

[153] I have found five other *Uṣūl* works published since 1995 with *maqāṣid al-sharīʿa* in their titles: (1) ʾAbdallāh Muḥammad al-Amīn al-Nuʿayyim, *Maqāṣid al-Sharīʿa al-Islāmiyya* (Khartūm: al-Ḥaraka al-Islāmiyya al-Ṭullābiyya, 1995; (2) Muḥammad Saʿad b. Aḥmad b. Maṣūd Yūbī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa-ʿalāqātuhā bi'l adilla al-sharʿiyya* (al-Riyaḍ: Dār al-Hijra li'l-Nashr wa'l-Tawzīʿ, 1998); (3) Nūr al-Dīn Būthawrī, *Maqāṣid al-Sharīʿa: tashrīʿ al-Islām al-muʿāṣir bayna ṭumūḥ al-mujtahid wa-quṣūr al-ijtihād: dirāsa muqārana naqdiyya* (Bayrūt: Dār al-Ṭalīʿa li'l-Ṭibāʿa wa'l-Nashr, 2000); (4) ʿAbd al-ʿAzīz ʿIzzat, *Maqāṣid al-Sharīʿa wa-uṣūl al-fiqh* (ʿAmmān: Maṭābiʿ al-Dustūr al-Tijāniyya, 2000); (5) Jābir al-ʿAlwānī Ṭāhā, *Maqāṣid al-Sharīʿa* (Bayrūt: Dār al-Hādī li'l-Ṭibāʿa wa'l-Nashr wa'l-Tawzīʿ, 2001.

among authors cited here and their ambiguity on the final status of clear texts which run counter, for instance, to certain norms of human rights enshrined in the UN's 1948 Universal Declaration of Human Rights. Equally, while it seems that contemporary *uṣūlī*s (conservative by definition) are slowly moving toward an epistemic distinction between *sharīʿa* and *fiqh* in a *maqāṣidī* way, at least in the sociopolitical sphere (*muʿāmalāt*),[154] it is less certain that the Muslim community is ready for an open debate on the historicity of the Qurʾān. Without a serious grappling with this issue, however, I seriously doubt that contemporary Islamic legal theory will be able to re-articulate a comprehensive, coherent, and context-specific system.

[154] I am not saying that all contemporary *Uṣūl* manuals display this thinking up front, but the same *maqāṣidī* spirit is discernable. A Shiʿite manual, for instance, claims to present the topic "in a new cloak" by giving greater than usual attention to the *dalīl* of *istiṣḥāb* and ignoring everything else that is not attached to *qiyās* (Muḥammad Jawwad Maghniyya, *ʿIlm uṣūl al-fiqh fī thawbihi al-jadīd*, Beirut: Dār al-ʿIlm li'l-Malāyīn, 1975). An often quoted manual by Muḥammad al-Khuḍarī declares in the first paragraph that the *sharīʿa*'s prescriptions are connected to human welfare (*muʿallila bi'l maṣāliḥ*), but subsumes *al-maṣlaḥa al-mursala* under *qiyās* (*Uṣūl al-fiqh*, Cairo: Maṭbaʿat al-Istiqāma, 1938, 3d print.). A more influential *uṣūlī*, Muḥammad Muṣṭafā Shalabī, lists *maṣlaḥa* as the second of seven *adilla* beyond *qiyās*, and, like Khalāf and Abū Zahra, devotes his next to last section to *maqāṣid al-sharīʿa* (*Uṣūl al-fiqh al-Islamī*, Cairo: Maktabat al-Nasr, 1991, 5th print.). Even more influential than Shalabī because he spent his last five years as Shaykh al-Azhar (1958-63), Mahmūd Shaltūt saw himself as a reformer in the line of Muḥammad ʿAbduh (cf. Kate Zibiri, *Mahmūd Shaltūt and Islamic Modernism*, Oxford: Clarendon Press, 1993). He devotes the last section of his popular *Al-Islām ʿaqīda wa-sharīʿa* (Cairo: Dār al-Qalam, 1966, 3d print.) to his views on legal theory. The *sharīʿa* has only three sources: Qurʾān, Sunna and *raʾy*. He advances three arguments for the use of *raʾy*: (1) the command to follow the *shūrā* method; (2) the command to submit difficult questions to the leader (*ūlū al-amr*); (3) Muḥammad's instructions to his Companions to use sound opinion while governing foreign lands (552). Under the heading of *raʾy, ijmāʿ* is defined as "the agreement of the people of reflection on public interest" (*ittifāq ahl al-naẓar fī'l maṣāliḥ*). And in fact, he often invokes *maṣlaḥa* in his fatwas.