2-5-2010

Is Modern Religious Liberty Sufficient for the Islamic Legal Maqsad (‘Ultimate Objective’) of Hifz al-din (‘Preserving Religion’)?

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Abstract: Perhaps the most popular trend in contemporary Islamic legal and political thought is to view sharī‘a as embodied not primarily in specific rules nor in terms of a painstaking, thorough extraction of those rules from the revelatory texts according to the methods of classical legal theory (uṣūl al-fiqh), but rather as defined in terms of the overall “purposes” (maqāṣid) for which God revealed the law. The theory of the “purposes of divine law” (maqāṣid al-sharī‘a), which I refer to as a form of “Complex Purposivism” in legal interpretation and argumentation, is often viewed as a panacea for modern reformers and pragmatists who want to establish Islamic legitimacy for new substantive moral, legal and political commitments in new socio-political conditions, because it allows Muslims to ask not whether a given norm has been expressly endorsed
within the texts, but whether it is compatible with the deeper goods and interests which God wants to protect through the law. All maqāsid theories posit that there are five universal necessary interests the protection of which the law prioritizes: life, religion, lineage, property and reason. For all of these interests, protection can involve both positive and negative liberties, as well as various forms of restrictions on other less fundamental acts. The purpose of this paper is to examine some treatments of the meaning and extension of the Islamic legal purpose (maqāsid) of protecting religion (ḥifẓ al-dīn), with an eye towards Islamic legal theorists’ explicit or implicit encounter with modern liberal and secularist understandings of what it means to “protect religion.”

I. Muslim Minorities and the Encounter between Islam and Secular Positive Law

With the growth of Muslim communities in the West over the past few decades, it is natural for Western intellectuals (particularly political and legal theorists) to take an interest in the way in which a comprehensive doctrine like Islam, with rich, long-standing and intellectually powerful traditions of law, theology and morality, interacts with existing and evolving Western conceptions of the relationships between religion, law and social solidarity. Issues pertaining to Muslim communities and Islamic religious practices are, of course, well-represented in the rich literatures on multiculturalism and legal accommodation. There is also a growing literature on more abstract Islamic thought on the minority condition and on the terms of citizenship offered by various religiously-diverse countries in which Muslims are a demographic minority.

At risk of simplification, scholars interested in Islamic religious thought on political morality within the (by and large) secular, (by and large) liberal countries of the West are likely to generate questions on two broad topics: (1) developments in substantive views on questions of applied political ethics, and (2) developments in form and method within Islamic religious discourses. The first broad topic is the question “What do Muslims believe?” The second is the question “How are internal Islamic ethical debates conducted – what are the standards of proof, argument and persuasion?” The two sets of questions are, of course, deeply intermingled.\(^1\) Indeed, it is the express purpose of this paper to explore the way in which non-Muslim political theorists potentially interested in (1) should also be interested in (2). Nonetheless, the relationship

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\(^1\) All substantive ethical views are arrived at through some method or another, whether that method is as simple (?) as interpolating one’s own intuition or as complex as formal, expert reasoning according to the rules of religious legal theories. Moral argumentation, again to simplify, is either a question of disputing another’s application of commonly agreed methods or of disputing which methods ought to be used. Yet, dispute over the methods of moral reasoning is liable to “always already” involve dispute over substantive ethical commitments – either directly and transparently or because at least one of the parties believes that out of two prima facie acceptable methods, one is more likely to lead to specific applied conclusions. Finally, methods of moral reasoning no less than specific moral commitments are liable to be treated as settled, off-limits and definitive of whether another human meets the lowest requirements of rationality and reasonability to warrant inclusion in a shared community. Indeed methods of moral reasoning are liable to be fetishized and totemized by moral communities – one questions them publicly at risk of abuse and exclusion.
between (1) and (2) is not easily predictable and I would maintain that it is often reasonably clear when we may make a distinction between views pertaining to one or the other and when the intermingling of the two itself becomes a crucial object of study.

For reasons of simplicity, let us begin with a mainstream liberal perspective on toleration, secularism and religious pluralism. Such a perspective will involve a commitment to quite substantial self-restraint on the part of the state and the majority culture. A liberal will assume that citizens have rights to cultural and religious freedom, that the state should not demand that citizens make public proclamations which might violate their conscience and that cultural assimilation should be limited in purpose and strictly non-coercive. Such a perspective will also, however, involve quite substantial limits to that self-restraint. A liberal will be skeptical of radical legal pluralism in a single society if that pluralism is likely to lead to concerns about the equal civil rights of some citizens. She will not assume that all non-coercive cultural and religious assimilation is prima facie an injustice or misfortune. And she will likely have a concern for the social and moral agreement which contributes to the long-term stability of a sufficiently just, sufficiently democratic political community. Many areas of detail in the legal and public policy application of these broad commitments will, of course, be the subject of disagreement even amongst individuals who share this broadly liberal perspective.

What interest does a person who shares this perspective have in the internal religious beliefs of her Muslim fellow citizens? Beginning with the idea that most liberals have a concern for the social and moral agreement which contributes to the long-term stability of a sufficiently just, sufficiently democratic political community, she will probably find it reasonable in principle to ask Muslim fellow citizens to affirm something like the following beliefs:

- that Islamic conceptions of morality may only be cultivated and encouraged within Muslim families and communities though non-coercive means;

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2 It is intuitive to assume that persons arguing within a certain community for innovative or unpopular applied ethical views will make risky and costly demands in the realm of method or foundations only when necessary to justify the applied, practical argument. Thus, it might be intuitive to assume that a believing Muslim public intellectual, for example, will open up deep questions of theology and legal method which are very “costly” within a wide Muslim community only when she has reached the limits of what can be attained by way of substantive moral reform from within mainstream theological or jurisprudential assumptions. This is certainly Rawls’s assumption behind the idea of a political liberalism: deep metaphysical arguments are “costly” and since deep metaphysical agreement is not always needed to arrive at practical agreement we should avoid them in public whenever possible. However, a view could be very undemanding on the conscience of a given moral community in terms of the behavior it advocates while very demanding in terms of its reasoning for that behavior. A good example of this is the recent book by Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (New York: Oxford University Press, 2009). In this book, Ramadan loudly proclaims the need for “radical reform” of Islamic law and ethics, as well as common Muslim attitudes. His willingness to call into question very basic principles of Islamic law and theology is potentially extremely alienating of a conservative Muslim audience. One would assume that he would only expend this kind of “methodological capital” in order to justify equally challenging and novel points of applied ethics. However, in my opinion, the specific practices and attitudes about behavior in the world which he then calls for (Section IV, “Case Studies”) are not particularly radical or challenging – either to a conservative Muslim or to a well-meaning non-Muslim, interestingly enough. His eagerness to tout “radical reform” on methodological issues and common attitudes without needing to make those risks in order to extract substantive reforms on the other, applied side is an interesting feature of Ramadan’s own aspirations and worthy of discussion in its own right.
that the public sphere in non-Muslim liberal democracies cannot be expected to accommodate all Islamic religious sensibilities by limiting freedom of expression;

that grievances with public authorities be redressed politically and with a long-term commitment to democratic political institutions (one which may be compatible with occasional acts of civil disobedience);

that non-Muslim fellow citizens are recognized as eligible for bonds of political and social solidarity and that relations with them are regarded as relationships of justice (rather than contingent accommodation);

that Muslims can recognize the diversity and ethical pluralism of liberal societies as a permanent and acceptable feature and not something to be ultimately overcome by a future Muslim majority;

that, whatever legitimate solidarity Muslims feel for the global community of Muslims, non-Muslim states of citizenship enjoy immunity from violence.

I would like to argue further, however, that these above beliefs are all political liberals are justified in demanding. Furthermore, while the liberal citizen may regard the above beliefs as fully justified, she may consistently with that be very concerned about the ethics of asking her Muslim fellow citizens to publicly endorse them. Finally, even if she is interested in whether her fellow citizens share an understanding of the terms of social cooperation, she might not be interested in, or feel justified in scrutinizing, the specific religious doctrinal argumentation which leads to an endorsement of the above beliefs.

But let’s say she is. She is interested in whether there exists an interpretation of Islamic political morality which could be part of an “overlapping consensus” and is perhaps interested in contributing to the understanding of whether one exists, what would be required for one to exist and how stable one would be vis-à-vis other interpretations of Islamic doctrine. If that is the case, then I submit that she will be interested in a further set of questions as well. Is she only interested in whether the demographic community of “cultural Muslims,” which includes persons of variable type and extent of commitment to Islam as a comprehensive doctrine (Rawls’s “pluralists”), statistically tends to share her beliefs about the terms of social cooperation? Is she, rather, interested in whether devout fellow citizens who self-consciously identify with Islam as an authoritative source of political morality regard the liberal terms of social cooperation as acceptable? If the latter, how conservative or traditionalist of a doctrine is she looking for? More intriguingly: what drives her answers to these questions – judgments about intellectual integrity and persuasiveness, or judgments about the contemporary popularity of beliefs?

I do not think that various answers to these questions are mutually exclusive. I believe that a person can be sociologically sophisticated and realistic, and thus hold that religious views are in a constant state of negotiation and that persons act out of many

3 For a further elaboration and defense of these views, see [Author, publications].
4 She may be more concerned about the moral costs and consequences of a public culture in which Muslims are frequently under suspicion for not endorsing the above beliefs and thus asked to do so in the wrong ways, by the wrong people, at the wrong times. She may judge that the non-Muslim majority is at this or that time much further afoul of their obligations to their Muslim fellow citizens than the reverse. She may recognize that moral debate and argumentation can take place in more or less fair and egalitarian circumstances and thus choose not to prioritize a politics of searching for common ground with Muslim fellow citizens if she thinks the power dynamics are pathological.
motivations besides what their self-reported ethical beliefs would require, while also believing that religious traditions are just that – traditions, with accumulated understandings of doctrine and great exemplars of rigor and sophistication.

So let us say that our liberal citizen believes something like the following: the existence of an elaborate and explicit endorsement of an “overlapping consensus” from within a religious doctrine is of unclear empirical-sociological importance. She reserves judgment about just how sociologically important it is that there be an explicit “Islamic [or any other] doctrine of liberal citizenship” out of fear of making foolish empirical claims. At the same time, she believes that if we are going to take an interest in each other’s deepest metaphysical and moral beliefs, especially when dealing with moral communities, that we should take great care to approach those traditions of belief with intellectual respect.5 We should appreciate that moral disagreement often flows from deep sources and that if the purpose of an overlapping consensus (or public philosophy in general) is to seek to attenuate moral disagreement, to narrow the distance a bit between citizens, then we should strive to be aware of what it takes for an argument to persuade within someone else’s tradition. I would go further and suggest that a person interested in an overlapping consensus is interested in arriving at a certain kind of equilibrium: she is interested in the internal (in this case, Islamic) justification of a common view which is as inclusive as possible of conservative, traditionalist Muslims, that is, a justification which avoids needless theological or linguistic demands on the other which might alienate them, whilst still being fully reasonable from a liberal perspective. What we are concerned to avoid here is taking undue satisfaction in the existence of views “compatible” with a liberal conception of justice without asking hard questions about their relationship to the tradition or mainstream of a religious community.

Here is where my above distinction between (1) substantive political moral beliefs and (2) the methods of moral argumentation re-enters and becomes important. What makes a given view more or less conservative and traditionalist? Of course, it is often reasonably clear what a religious or secular tradition has held to be the dominant interpretation of its position on a given applied ethical question: How should women dress? Is abortion permissible? When is it allowed to go to war? What kind of harm between persons justifies state intervention? However, I would like to suggest that we also pay close attention to the language and methods through which applied ethical positions are arrived at, or at least publicly justified. Most cases of public moral conflict involve disagreement over what kind of behavior should be allowed or required in society, and thus liberal multiculturalists are accustomed to being on guard against demands which go too far in this realm. However, for our longer-term, and less-public, inquiry into the thinking of religious communities such as Muslims on whether positive law and the liberal terms of citizenship are acceptable even in principle, we are required to also devote some thought to the kinds of demands in language, form and method which are explicitly or implicitly imposed through non-public moral inquiry between persons from distinct religious communities open to the possibility of grounding consensus.

5 Which is not necessarily the same as moral respect. Holding that one owes one’s fellow citizens respect (as humans, as fellow citizens, as meaning-creating beings) does not imply that one owes all of their beliefs moral respect, although the two are often confused. Many scholars have paid Carl Schmitt great intellectual respect without assuming that his thought is always worthy of moral respect.
How is it possible for outsiders to navigate the tension between political liberalism’s desire to avoid placing theological, linguistic and epistemic obstacles in the way of political consensus and its desire not to rest with a mere modus vivendi? I do not believe that there need be any single answer to this question independent of the specific concerns, anxieties and tendencies of particular comprehensive doctrines and moral communities. However, I believe that the principle of seeing the overlapping consensus as an equilibrium point which allows for the inclusion of the most conservative, most potentially illiberal members of a religious community suggests that one devote particular attention to the patterns of moral argumentation and doctrinal development in those traditionalist communities from which objections to the liberal terms of citizenship are most likely to emerge.

II. The Priority of Islamic Law

Islam is a religion of Law. All of the normal caveats apply to this statement, of course; however, it is beyond serious dispute that Law (shari‘a, fiqh) maintains the greatest claim to the expression of normativity for believing Muslims. The claims of Law may be taken more or less seriously and the Law’s rulings may be more or less practiced across various Muslim communities, especially with regards to specific areas of human activity. Nonetheless, the idea that Law remains central to Muslim self-understanding and self-identification, and that many if not all normative questions admit of legal answers, persists despite the assaults on this idea in the colonial and post-colonial eras.

The problem of Law for contemporary reformers, especially those living in Western secular societies where it is extremely difficult to imagine a fully autonomous space to apply Islamic law, presents two broad possibilities: either (1) to reject the constraints of Law in a “decisionist” way, by merely ignoring it, or by focusing on other values or aspects of Islam; or (2) to reform or redefine the Law and thus to redefine one’s own behavior or institutions as in conformity with the Law.

There are many Islamic thinkers who are pursuing (1) in one way or another. It is also undeniable that there are many pious Muslims who seek to follow Islamic law in areas of ritual, worship and personal morality who simply do not think about problems of political morality and political legitimacy in shari‘a-terms. It is natural to assume that the most likely source for a stable overlapping consensus would be an interpretation of Islamic political morality which is already to a large extent liberated from the obligation to justify departures from both the rulings of Islamic law and juridical methods of moral argumentation. Indeed, in his only comment on the matter, Rawls refers to a scholar, Abdullahi An-Na‘im, who is well known (although it is not clear whether known by

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6 In this essay, I will use “Law” as synonymous with the idea of shari‘a or an ontologically real morality created by God. It refers both to the idea of a Divine Law and also Islamic scholars’ conception of shari‘a as something perfect and integral despite human’s fallible and contingent understanding of it.

7 Islam is also a religion of mysticism (Sufism), dialectical theology, daily habits of the body, etc.

8 “Fiqh” is the term for Islamic jurisprudence, the practice of searching for the shari‘a and arguing for interpretations of it. The term fiqh is generally used to refer to human articulations of the shari‘a which are thus fallible and contestable.
Rawls) to represent a highly controversial, highly innovative approach to the place of Islamic law within Islamic theology and ethics.⁹

On its own there is no objection to this. However, I would like to reiterate that there are costs to an approach which assumes from the outset that the best representative of an “overlapping consensus” is one as reformist and revisionist as that of An-Na’im. Since it is the more conservative traditions and the believers who seek to follow them which are mostly likely to have principled objections to liberal citizenship, establishing consensus or congruence with them is a greater priority.¹⁰ If political liberalism aims at the widest possible support for a public conception of justice, then it makes sense that it would begin with the most enduring principled hindrances to that support. Furthermore, and perhaps most crucially, the belief that a genuine and reliable Islamic doctrine of support for political liberalism requires a radical reformist project in both substance and language runs the risk of creating the common impression that all other thinkers who do not assert a radical break with Islamic law are therefore incapable of engaging reasonably with non-Muslims.

Thus, I would like to suggest that non-Muslim political and legal theorists should take particular interest in Islamic thought on issues of common concern emanating, broadly speaking, from within the Islamic legal tradition. In other words, I think that non-Muslim political liberals should be particularly interested in the grounds for congruence or consensus along the lines of approach (2) to the Law. An overlapping consensus which could include shari’a-minded lay Muslim and scholars is, all things considered, more desirable than one which assumes as an entry cost the abandonment or neglect of legal doctrine and methods.

Are we justified, however, in assuming that endorsing something along the lines of the liberal terms of social cooperation, including the modern conception of religious liberty, in a diverse, non-Muslim society will require reform of Islamic law?

III. Does Islamic Law Object to Liberal Religious Freedom in the West?

I noted above that there could be numerous points of contact between any given comprehensive doctrine and political liberalism. For the purposes of this paper I am concerned with the core question of religious freedom and individual autonomy. What political liberalism requires is affirmation of something like the following two principles:

- that Islamic conceptions of morality can only be cultivated and encouraged within Muslim families and communities though non-coercive means;
- that the public sphere in non-Muslim liberal democracies cannot be expected to accommodate all Islamic religious sensibilities by limiting freedom of expression.

⁹ Rawls, “The Idea of Public Reason Revisited,” in The Law of Peoples, p. 151. As Rawls notes, An-Na’im’s views involved reversing the traditional understanding of the temporary and the eternal in the Qur’an and are regarded by many Sunni Muslims to be heretical (his mentor and originator of this approach, Mahmud Muhammad Taha was hanged for apostasy).

¹⁰ Such consensus might also be presumed to imply that liberal principles will be justified for persons with a less demanding or rigorous conception of religious obligation. In other words, evidence of congruence from within more conservative sources is very likely to suggest the fact of congruence from within less conservative ones (even if the “evidence,” i.e., the precise arguments which happen to convince the conservative believer, cannot be presumed to sway the less conservative one).
This is the most familiar liberal conception of religious freedom, which inclines towards a negative conception of liberty. For purposes of simplicity, I will refer to it throughout this paper (following Constant and Berlin) as “modern religious freedom.” I do not mean to suggest that all modern thinkers have endorsed this conception, that persons contesting or rejecting it are therefore “antimodern,” or that even if they were that the designation “antimodern” is a final and dismissive moral judgment. I also do not mean to suggest that the specific boundaries and distributions of religious liberties in a secular society is an easy matter, or a settled one, even for persons interested in defending a liberal, negative, “modern” conception of religious freedom. Nonetheless, I think the broad outlines are clear enough and, importantly, probably shared even by many persons presently interested in critiquing secularism and liberalism. By “modern religious freedom” I mean the general ideas that:

- Religious communities do not determine the civil rights of their members.
- Religious communities cannot be guaranteed protection from public criticism of their beliefs, from “moral injury” inflicted by the disapproved behavior of others (including blasphemy or mockery), or from the exit of individual members from the group.
- “Religious freedom” cannot be interpreted as the right of a religious community to fully and successfully realize its entire conception of the good without regard for the preferences of those who dissent from the interpretation of that conception.
- Religious freedom implies a right not only to reject one’s own religion in favor of another, but to reject religion altogether.

I believe that almost all of the disputed areas of the application of free religious practice – including the rights of religious groups to discriminate within their own institutions, the right to religious dress in schools, the right to parallel religious schooling, the right to religious arbitration of civil contracts and the issue of offensive speech – fall within this broad understanding of the “(religious) freedom of the moderns.”

We know that Islamic positive law as prescribed for Muslim majority societies is strictly at odds with this liberal conception of justice, rights and religious freedom. But, while one possible Muslim response to life as a minority is the demand that internal Muslim affairs be managed along šaīra lines, the assumption that Muslims are living in a society where Islamic law cannot be generally applied requires Muslim legal and political theorists to think about political life outside of the normal assumptions, categories and debates of Islamic political and legal discourses. What, then, is the question if we assume, by positing that we are dealing with a community that is in the minority, that using the state to impose a conception of the good is not generally part of the political imagination of the community in question?

To talk about a response to political liberalism emerging from within the tradition of Islamic law assumes that Islamic law has something to say about how non-Muslim polities should govern themselves. That assumption is more bizarre than it might appear.

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11 To give just the most blatant example, all conventional interpretations of Islamic positive law include such rulings as capital punishment for public apostasy from Islam. I will have occasion below to discuss more specific examples and also some treatments of Islam’s underlying logic of positive religious liberty.
Islamic law is nothing other than a discourse about political legitimacy and political obligation. Strictly speaking, classical interpretations of Islamic law regarded non-Muslim political space as lawless. But even without this interpretation, the question is either meaningless or tautological: either Islamic law is a positive law for Muslim societies, in which case it has no reason to discuss what laws other societies should apply to themselves, or it is a universal law coterminous with justice. Either way, it wouldn’t appear that Islamic law is a likely source for other ideas on how a religiously diverse society should distribute rights and responsibilities.

Alternatively, we might understand Islamic legal thought about the Muslim minority condition as the ethics of what Muslims ought to demand from non-Muslim polities and how they ought to behave there. In a sense, this likely implies the idea that I found bizarre above, for an ethics of what Muslims ought to demand suggests that what they ought to demand is what is morally owed to them by non-Muslims and is thus an ethics of how non-Muslim polities should govern themselves, at least as pertains to Muslims.

Thus, what we have in mind if we assume a conservative Islamic legal framework is something like a “jurisprudence of Muslim minorities.” There is not a long tradition of thinking about this (unlike (perhaps) Jewish law), but that is precisely what has been developing over the past few years under the banner of “fiqh aqalliyyat” (“jurisprudence of (Muslim) minorities”). Over the past decade or so an increasing number of Muslim scholars both in the West and in Muslim majority countries have attempted to interrogate the Islamic ethical-juridical tradition in light of the myriad novel challenges faced by Muslims living as minorities, with particular concern, I believe, for the challenges faced by Muslims living in Western liberal democracies.

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12 Non-Muslim societies and polities may have conventions, which are law-like, but because those conventions were man-made those societies were beyond the space of the organization of social life according to divinely originating, and thus objective and just, laws. An exception would apply to Jews and Christians who are often spoken of having “shar’i” (pl. of shar’a). A good example of this is the Islamic jurisprudence of warfare, which only discusses the obligations of Muslims in wartime. There was no conceptual framework for even thinking about the obligations of non-Muslims in wartime, only their legitimate responses to the Islamic invitation to join the Abode of Islam.

The idea of a *fiqh* (jurisprudence, or ethics) for the minority condition is premised, I believe, on a number of assumptions: that the minority status of Muslims in certain countries is an indefinite condition, that a large number of those Muslims have a religious consciousness which aims at explicitly *shari`a*-based answers to ethical dilemmas, and that the spaces in which many Muslims are living as minorities provide Muslims with a *particular* range of flexibility. The liberal political and constitutional order of the countries of Europe and its settler states of North America and Australasia presents Muslim minorities with a specific range of freedoms and unfreedoms. On the one hand, the religious freedom of liberal societies provides a context for the mutual contestation of the specific demands of public life: schooling, religious dress in school, mortgages, ritual obligations, and so on. On many non-constitutional matters there is a space in liberal societies for negotiating the precise terms of public and private life, a condition for which *fiqh* reasoning is ideally suited. On the other hand, liberal societies are more inflexible than non-liberal ones on the question of legal pluralism. It is much harder for liberal societies to grant Muslim communities parallel legal jurisdiction to apply the *shari`a* than it is for societies without universalizing commitments to equality of civil rights. Scholars know that the *fiqh* of minorities cannot begin and end with a demand for Muslim self-government, even to the extent granted in countries such as Israel and India, or for a form of corporatism with communities represented at the state level by their religious leaders such as may have been the European response to religious pluralism in years past.

Thus, for many of the questions non-Muslim liberal citizens of diverse societies might be interested in the Islamic answers to (i.e., the points I introduced earlier), this discourse – the jurisprudence of Muslim minorities – potentially provides a space for an encounter between Islam and liberalism that, for all of its ambiguities and disadvantages, has the benefit of conservative and traditional authority. Indeed, it is a rich source of creative-yet-cautious thought particularly on issues related to loyalty, membership and belonging in non-Muslim polities. However, to this point this literature tends to be silent on matters of comparative criminal law (where religious freedom issues would arise), or to provide practical answers without consideration of the deeper principled rationale for abiding by the terms of modern religious freedom.  

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14 For example, the specific applied topics addressed by Qaraḍāwī in his treatise on *fiqh al-aqalliyyāt* include the following: Friday prayer times; the building of Islamic centers and whether donations to those funds may be considered *zakat*; the burial of Muslims in Christian cemeteries; omitting to sacrifice a lamb at ‘Eid due to widespread livestock disease in host country; the nullity of marriage between a Muslim...
Here one might say that this implies the lack of a conflict between Islamic juridical approaches to the minority condition and the terms of modern religious freedom, perhaps following Rawls’s statement that “even if we do not, say, hold some form of the doctrine of free religious faith that supports equal liberty of conscience, our actions nevertheless imply that we believe the concern for salvation does not require anything incompatible with that liberty.” However, I do not believe that this conclusion is correct for at least three reasons. One, logically speaking, silence is not endorsement. The reasons of the religious scholars for choosing not to expend great effort responding to the liberal conception of justice as it relates to the philosophy of religious freedom could be numerous, for example, a cautious concern not to open knotty questions between scholars and lay believers which at the present admit of no good resolution. Two, as Rawls makes clear at numerous points, a community’s approach to liberal institutions may vary greatly with variations in its sociological and demographic strength. A community which knows it is a small minority knows that it does not have a great chance of imposing its comprehensive doctrine for now, but adopts this restraint and silence as a tactical attitude. Finally, it is far from clear that Islamic scholars and thinkers are satisfied with modern religious liberty as presently configured. Disputes over religious schooling, religious arbitration and offensive speech reveal a willingness to challenge this conception. Thus, I would maintain that political liberals ought to still be interested in the possibility of an Islamic “theology” or “jurisprudence” of modern religious liberty.

IV. The Promise of Purposivism: Maqāṣid al-sharīʿa in Reformist Writings

Enter the theory of the “objectives of the Law” (maqāṣid al-sharīʿa). Islamic law, like any legal system, distinguishes between positive (applied) law (fiqh) and legal theory or jurisprudence (uṣūl al-fiqh, the “sources of law”). The theory of the “objectives of the Law” is that all applied rulings (aḥkām) of the Law, originally extracted by the jurists through a painstaking hermeneutic study of the texts of revelation, can be shown to advance and protect a consistent set of human interests (maṣāliḥ, sing: maṣlaḥa). I will discuss below the origin and evolution of this theory; however, it suffices to note for now that this theory has traditionally been used by scholars to explicate the deeper wisdom (ḥikma) of the Law’s rulings, to help in extending the Law to new circumstances and to help in adjudicating cases of indeterminacy or apparent conflicts between rulings.

Today this theory is perhaps the most popular trend in Islamic legal and political thought with dozens of books and doctoral dissertations written on the theory of the maqāṣid and its application in every possible area from criminal law to the ethics of genetic engineering. It is a fully legitimate and popular discourse even amongst very

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woman and a communist man; the marriage of a Muslim man to a non-Muslim woman (polytheist, atheist, apostate, Baha’i, Jew or Christian); questions that arise if a married woman converts to Islam but her husband does not; a Muslim inheriting from a non-Muslim; vinegar made from wine; enzymes made from pig products; congratulating non-Muslims on their holidays; how to interact with a non-Muslim neighbor in a non-Islamic country; buying homes in the West through banks.  

conservative scholars, but the idea that shari‘a should not be understood solely as embodied in specific rules (e.g., the thief’s hand must be cut off) nor in terms of a painstaking, thorough extraction of those rules from the revelatory texts according to the methods of classical legal theory (usūl al-fiqh), but rather defined in terms of the overall “purposes” (maqāṣid) for which God revealed the Law is often viewed as a panacea for modern reformers and pragmatists. For those who want to establish Islamic legitimacy for new substantive moral, legal and political commitments in new socio-political conditions, this idea allows Muslims to ask not whether a given norm has been expressly endorsed as compatible with the texts, but whether it is compatible with the deeper goods and interests which God wants to protect through the Law. Consider a few statements to this effect:

Among the ways in which maqāṣid and maqāṣid-based thinking can serve the Islamic call and those engaged in it is by giving them greater flexibility and innovativeness in relation to the means and approaches which they employ. Things which can be classified purely as methods and means, including those which are mentioned explicitly in revelation, admit of change, modification and adjustment.

I understand Islamic law to be a drive for a just, productive, developed, humane, spiritual, clean, cohesive, friendly, and highly democratic society. … The validity of any method of ijtihād [juridico-ethical reasoning and argumentation] is determined based on its degree of realization of maqāṣid al-shari‘ah. The practical outcome is Islamic rulings which are conducive to the values of justice, moral behavior, magnanimity, co-existence, and human development, which are ‘maqāṣid’ in their own right.

Towards realizing the features of openness and self-renewal in the system of Islamic law, this book suggests the change of rulings with the change of the jurist’s worldview or cognitive culture.

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16 See David L. Johnston, “Maqāṣid Al-Shari‘a: Epistemology and Hermeneutics of Muslim Theologies of Human Rights,” Die Welt des Islams, 47, 2, pp. 149-187, for a typology of various trends in the treatment of human rights in Islamic legal thought which includes discussion of how “traditionalists” and “progressive conservatives” (two different groups for Johnston) use the maqāṣid.

17 “The approach to scriptural interpretation that proceeds from what classical jurists identified as the maqāṣid al-shari‘a has acquired almost panacean expectations among modern Muslims. This is based on the belief that interpretations that are violent, intolerant or misogynistic, or culturally, economically or politically stultifying or ineffective are almost invariably grounded in a literalism that cannot stand in the face of appeals to the broader aims and objectives of the law.” (Sherman A. Jackson, “Literalism, Empiricism, and Induction: Apprehending and Concretizing Islamic Law’s Maqāṣid Al-Shari‘ah in the Modern World,” Michigan State Law Review, Vol. 2006, pp. 1469-1486, at p. 1470.)


20 Ibid., p. 256. Emphasis added.
The attractiveness of the maqāsid approach to Islamic normativity is particularly stressed in the context of the Muslim minority condition. A prominent Islamic think-tank, based in London and the Washington, DC area, The International Institute of Islamic Thought (IIIT), has an on-going publication series in Arabic and English of prominent texts on the maqāsid and a translation series of maqāsid texts from Arabic to English (and other languages spoken by Muslim communities). The coordinator of this translation project declares that “knowledge of the maqāsid is a prerequisite for any attempt to address and resolve contemporary issues challenging Islamic thought. Indeed such knowledge can help in the process of developing a much needed objectives-based fiqh for minorities.”\(^{21}\)

In this vein, consider Tunisian Islamist activist Rashid al-Ghannūshi’s statements about political legitimacy and participating in non-Islamic governments:

An Islamic government is based on a number of values which if accomplished in their totality would result in a perfect or near-perfect system. But it may not be possible for all such values to be implemented, and therefore some must suffice in certain circumstances in order for a just government to exist. A just government, even if not Islamic, is considered very close to the Islamic one, because justice is the most important feature of an Islamic government, and it has been said that justice is the law of God.\(^{22}\)

Ghannūshi’s argument, based on his understanding of the theory of the maqāsid, holds that the Muslim’s duty is “to work towards preserving whatever can be preserved of the aims of sharī’a” understood broadly as the five basic human interests of life, religion, property, intellect and lineage. This emphasis on the ultimate purposes of divine Law serves to deflect attention from both particular, technical rulings of Islamic law and the un-Islamic forms of behavior permitted in non-Muslim states. Instead, non-Islamic governments can been seen as sufficiently just because of the general human interests which they protect (such interests include for Ghannūshi, both in Muslim majority and minority political contexts, “independence, development, social solidarity, civil liberties, human rights, political pluralism, independence of the judiciary, freedom of the press, or liberty for mosques and Islamic activities”), possibly resulting in a legitimate form of governance which he calls “the government of rationale” as opposed to “the government of sharī’a.” The crucial measure of Ghannūshi’s doctrine of how to share political space with non-Muslims is how he addresses the question of social coalitions with non-Muslims. Here, he sides firmly with liberal secular groups over other non-liberal religious ones: “Can any Muslim community afford to hesitate in participating in the establishment of a secular democratic system if it is unable to establish an Islamic democratic one? The answer is no. It is the religious duty of Muslims, as individuals and as communities, to contribute to the efforts to establish such a system.”\(^{23}\)

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option for such minorities is to enter into alliances with secular democratic groups. They can then work towards the establishment of a secular democratic government which will respect human rights, ensuring security and freedom of expression and belief – essential requirements of mankind that Islam has come to fulfill.”

The centrality of the *maqāṣid* for theorizing an Islamic approach to the minority condition which is itself not “political in the wrong way” from an Islamic juridical perspective is stressed by the most prominent scholars to have written on both Islamic legal theory and the jurisprudence of Muslim minorities, such as ‘Abd Allāh Ibn Bayya, Yūsuf al-Qaraḍāwī and .CONNECTOMAELI 27. The idea of the *maqāṣid* also figures prominently in thought of non-traditional scholars writing for a broader audience, such as Tariq Ramadan and the American convert Umar Faruq Abd-Allah.

In order to appreciate the significance of this theory, and also to distinguish between different applications of it, it is necessary to provide a brief background to traditional Sunni Islamic legal theory.

V. A Primer on Classical Legal Theory and the Place of Purposivism

Islamic law is based on two conjoined principles: divine sovereignty and divine omnipotence. The first principle is that God is the creator and master of all existence. He is free to command obedience and punish disobedience. The second important corollary of this principle is that God’s power is unlimited, which means that His power to command certain acts and beliefs cannot be constrained by a prior, ontologically independent moral order. God does not reveal morality to us; he creates morality – good

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24 Ibid., p. 94. Occasionally scholars will go so far as to say that because of the freedom Muslims enjoy in the West and the proliferation of Islamic societies and foundations available to them Western countries should be viewed as part of the “Abode of Islam” (*dār al-Islām*). (See ‘Abd al-Razzāq, *al-Aqalliyyāt al-muslima fi’l-gharb*, p. 45, quoting a Moroccan scholar ‘Abd al-'Azīz ibn Ṣaḍīq who based his position partially on Ghannūshī’s views.)


28 “The great responsibility of Muslims in the West is to give an adapted European shape to their identity…Keeping in mind … the three levels of *maṣlaḥa*, namely the [three levels of interests theorized to be the *maqāṣid* of Islamic law]…Muslims, whether scholars or organization leaders, must provide European Muslims with the appropriate teachings and rulings to enable to protect and fulfill their identity.” (Ramadan, *To Be a European Muslim* (Leicester, UK: The Islamic Foundation, 1999), p. 196.) See also Ramdan, *Western Muslims and the Future of Islam* (New York: Oxford University Press, 2004), pp. 161-3.

29 See Umar Faruq Abd-Allah, “Living Islam with Purpose.”

and bad, obligatory and forbidden – ex nihilo in a state of perfect freedom. God is under no moral or logical necessity to create a Law which is rationally beneficial to humans as they might perceive it. It is, thus, an important point of theological principle that God’s commands are not subject to human ratification, rejection or modification and need not be immediately coherent or intelligible to humans. To foreshadow, though: *as it happens*, God has made provisions for man’s wellbeing, including the Law itself, which exists to promote man’s welfare. Man is assured that the requirements of the Law will not be greater than what he can bear (although this is not by logical necessity, only by God’s good will and mercy and the assumption that a perfect being like God does not lie or act frivolously).

Thus, in classical, orthodox Islam, there is no conception of natural law in the sense of an objective morality which humans can (in principle, if imperfectly) discover through reason, intuition or the empirical investigation into human welfare. God is the only possessor of original rights; God’s slaves (mankind) have no original rights whatsoever, but only those rights granted by God. In turn, they have no original obligations either. Man exists in a natural state of freedom from moral obligation – *barâ‘a asliyya*. Because man is free and all humans are equally God’s slaves, absolute moral obligations cannot come from social custom or the arbitrary will of other humans, including political rulers.

This assumption of moral non-obligation (*barâ‘a*) is somewhat akin to the idea of the state of nature in the Western tradition. “Tyranny” in Islam is, in turn, defined not so much in terms of the amount of negative liberty an individual has, or even the procedure by which coercive laws are promulgated and the place of the citizen vis-à-vis that procedure, but rather in terms of whether humans find themselves subject to the authority of other mortal creatures or of God. The search for legitimate rule is thus fundamentally the search for something objective outside of the customs, prejudices, interests and whims of phenomenal beings. That something is, of course, God’s command, which in His mercy he has revealed to humans through *texts*. But early Muslims were aware that texts do not speak for themselves and they most certainly do not rule. Making the texts speak and using them to make God, and only God, the ruler over men is a process in which faithful servants of God must engage, but is fundamentally a fallible one. Bridging the space between God’s command – the *shari‘a* as it exists in God’s mind – and the fallible human understanding of it is the search for *certainty*. That search, in developed Sunnism, is not carried out by a single “deputy of God” in the form of a Caliph, Imam or Pope. But, significantly, nor is it carried out by a *select and insular* group of priests, philosophers or “sources of emulation.” Rather, it is carried out in public, through methods which are themselves the subject of debate. Claims to certainty, that is, claims to knowledge of God’s command, are thus claims to have applied well a method of

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31 It is thus common to speak of Islamic moral theology as “voluntarist” or “subjectivist” as opposed to “objectivist.” Morality is voluntarist or subjectivist in the sense of being *willed* by God *subjectively* as opposed to “objectivist” in the sense of existing apart from God’s freely willed choices. On a voluntarist account, we simply do not know whether lying, for example, is bad. On an objectivist account, we assume that there are some acts which have an intrinsic moral attribute which even God cannot violate. (See, for example, the essays in George F. Hourani, *Reason and Tradition in Islamic Ethics* (Cambridge, UK: Cambridge University Press, 1985).
interpretation to a text which all have in common, claims which are presented on the basis of evidence and argumentation for a community of equals to evaluate.

Thus, this theological foundation calls for a method of arriving at moral and legal rules which we might call textual-hermeneutic, or empiricist in the sense of “looking askance at all a priori claims to knowledge of the shari‘a that go beyond and cannot be explicitly documented in the [textual] sources.”

1. The “Empiricism” of Classical Legal Theory

If humans are God’s slaves, in a position of absolute moral obligation, and God enjoys absolute freedom to create moral values and moral obligations, how do humans know what morality requires? The only way in which we can know for sure the moral evaluation of an act is through communication with God, that is, by examining the texts of revelation.

The central conviction of the classical jurists is that the foundational texts of Islam represent God’s final revelation to humankind and that these texts have been preserved for us intact. This view is required by Islam’s “divine voluntarism” (the Law is what God has willed). It means that the search for Law is the search for those authoritative texts which have been faithfully transmitted. The Qur’an is, of course, beyond question and, while any individual hadith report is subject to doubts about its authenticity, authenticity can be affirmed with a high degree of probability through repetition of common themes throughout the sunna.

The jurists further assumed a principle of intentionalism: texts are carriers of meaning intended by their Author. Textualism and intentionalism were linked by a theory of language and hermeneutics: “The discoverability of original legislative intent behind these texts is assured by a view of language that makes it an entirely serviceable tool of communication through which a speaker/author is able to objectify what he has in mind, using a realm of public meaning to which all who are conversant with the language have access. The preservation of the language – the code – through time, making it possible for generations down to the day of Judgment to have access to the divine intent is assured by the principle of ‘tawātur’ [“recurrence”].” In other words: the relationship between a vocable sound (also known as a “word”) and its meaning is fixed at some point and thus becomes objective – it belongs to the public arena and is available to all speakers. Speakers appropriate these meanings by using them to express something which they intend. They do not create new meanings de novo. These meanings all constitute a code (also known as a “language”) and this code can be preserved and transmitted intact without corruption.

Law has not been sent down as a ready made code, however. Jurists have to search for it in the following sources (usūl): (1) the Qur‘ān, (2) the hadith and (3) the records of early juridical consensus (ijmā‘). This process of discovering the law and formulating an actual legal code based on these sources is referred to often as “harvesting” (istithmār) and the resulting “rules” or “judgments” (akhām) are referred to

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33 Weiss, The Spirit of Islamic Law, p. 65.
as the “branches” (furū’) or “fruits” (thamara) of law. Jurists may extend the rules discovered in these three sources through (4) carefully constrained use of analogical reasoning (qiyyās).

The aim of this careful process of searching for the Law’s rulings is to arrive at a ruling or judgment (hukm) on individual acts. Here we have a working definition of the idea of “sharī’a.” Etymologically sharī’a refers to a “path (especially to a watering hole),” but we might define it as the totality of divine categorizations of or judgments on (ahkām) human acts. There are five possible moral categorizations or judgments for acts:

1) Obligatory: wājib/faqird; 2) Recommended: mandāb/mustaḥabb; 3) Neutral, indifferent: mubāḥ; 4) Disapproved of/detested: mākrūḥ; 5) Forbidden: ḥarām/mahzūr. The first four may also be regarded as “ḥalāl,” or permitted. Thus, in addition to punishment, acts may engender reward, praise or blame, and while they may be regarded as liable for worldly punishment this is not a necessary condition for the treatment to be of a “legal” nature. Islamic jurisprudence (fiqh) is in turn the collective record of jurists’ fallible attempts to argue for those categorizations based on revelatory evidence.

Of course, the jurists created and debated complicated rules and methods for the use of the revelatory texts to arrive at moral judgments of specific acts. There is no need to go into these in detail here, beyond noting how rigorous, principled and demanding these rules could be. Classical legal theory insisted on two points regarding the use of texts to justify moral and legal rulings: (a) that a legal ruling derived from unambiguous texts is certain and subject to no legitimate disagreement, and (b) that any legal ruling derived from an ambiguous text is merely probable and subject to legitimate disagreement. The obstacles to certainty include: the ambiguity of language (many words have multiple meanings both figurative and literal) and disagreements on how to use specific Qur’ānic verses or ḥadīth reports (based on disagreement over the circumstances/contexts of revelation, the general vs. specific application of a text, and the way the texts impinge on one another including the possibility of abrogation).

To get a sense of the rigor insisted upon by the legal theorists: they arrived at eight distinct classifications of texts on a scale of linguistic clarity/definitiveness vs. ambiguity/probability; they distinguished between texts of general vs. specific legislative application, with four types of specification; specific commands were regarded as having greater certainty than general ones and thus trumped them in legal argumentation; and even in the case of linguistically clear expressions, jurists distinguished between four different types of “textual implications” with different levels of strength, certainty and preponderance for deriving rules. Similar rigor was applied, in principle, to the use of

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34 There are other ways of categorizing acts, as well. They may be “valid” (ṣaḥīḥ) or “invalid” (bāṭil) in their discharging of moral duties or social transactions (ex.: prayer must be performed in a certain way, contracts have certain conditions for validity, etc.).

35 As in liberal justification: the existence of a general right to something always implies the possibility of restrictions of the specific scope that right.
hadīth reports, along with considerations for additional problems raised by the use of fragmented oral reports. However, the authoritative, unambiguous texts on which Islamic law wishes to ground moral obligation are limited. How, then, to extend the law? (Should the law be extended?) In the first order this is done through carefully constrained analogical reasoning. The method of “analogy” (qiyās), the fourth official “source of the Law,” proceeds by seeking to identify the “legal cause” (ratio legis: ‘illa) of a clear textual ruling and then extending that ruling to other cases that share the features of the original case. The most cautious textualists understood the search for the ratio according to a “sign model”: identifying the ratio is a matter of identifying the sign which indicates the original ruling. For example, we know from the texts that wine is prohibited, but what property of wine causes the prohibition? Out of all of wine’s properties, only the fact that it intoxicates could make sense of the prohibition.

This sign model is designed to keep human reason and judgment at bay, and thus is cautious about speculating on the deeper underlying reason, motivation or wisdom behind God’s decision to make a certain property worthy of moral classification. However, already here we can see how difficult it is to sustain this caution. For what is it about intoxication that makes wine suitable for prohibition more than, say, color or smell? On a truly voluntarist conception of Law, it is would be entirely within God’s rights and capacity to forbid man from consuming all red beverages. Any jurist who is unwilling to make these assumptions about God, and stick to a truly textualist foundation for Law, is thus always already willing to make certain substantive moral assumptions about the kinds of features or properties of acts which make them suitable for God’s intervention.

Thus, even as basic a practice of Islamic jurisprudence as analogical reasoning points beyond a cumulative, empirical use of the texts to what we might call a “motive model” for understanding the ratio of specific divine judgments on acts. On this view, one simply cannot distinguish between, say, wine’s intoxicating quality and its color or smell as a suitable ratio for its prohibition without some assumptions about the higher purpose at which God was aiming.

However, making such assumptions and using them to ground knowledge of God’s rulings is deeply controversial in that it runs the risk of disrupting the proper balance between obeying God and obeying human reason. One way of taking this risk seriously is by limiting the search for motives and purposes to what was explicitly in the texts. Thus, if God there or elsewhere expressly explains that intoxication and its dangers are what He is trying to avoid by the prohibition, then one is justified in identifying this as the ratio and extending the prohibition to other similar substances. Still better if He explains which deeper or more general interest (maṣlaḥa) is being protected by prohibiting intoxication. However, here one is still limiting reference to the human

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36 For a detailed presentation of these issues, see Hallaq, *A History of Islamic Legal Theories*, and Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge, UK: Islamic Texts Society, 2005). The latter has detailed chapters on each source of law and other methods of legal reasoning.

37 Indeed, an early legal school known as the Zāhīrī (“Literalist”) school rejected use of qiyās on grounds that it relied too much on fallible human reason.
interests (maṣāliḥ) which are threatened by intoxication to those explicitly mentioned in the texts.

This question of whether the Law is clear and consistent in articulating a concise set of human interests which are protected and advanced by the specific rulings of the Law, and which could in principle be argued to ground legal rulings even in the absence of explicit textual authorization (maṣlaḥa mursala), is the hinge which opens onto the theory of the “objectives (maqāṣid) of the Law.”

2. The “Inductivism” of Purposive (Maqāṣidī) Theories

According to the “motive model” for understanding the ratio of specific divine judgments on acts, the search was thus not only for textual evidence for rulings but also for the ultimate human interests which Law in general sought to protect and advance. As noted above, this was controversial for theological reasons (for some textualists the search for legal causes within the texts in order to apply them to new cases was already too much). Scholars still committed to the principles of divine sovereignty and divine omnipotence resulting in the theological doctrine of divine voluntarism but who wanted a flexible and living Law had to show that God did in fact take human interests into account when ordaining the rules of the Law, and that the protection of those interests did in fact constitute the overall purpose of Law. Unless this could be shown, human interests could not contribute to the formation of Law.

The detailed, cumulative, “empirical” reading of the texts did not suffice to establish this. What many scholars came to defend was a method of “inductive corroboration” (istiqrā’ – which in Arabic might suggest something like “reading in to”). This involves reading multiple treatments of similar problems to see whether there is corroboration for the idea that certain common interests are at stake. These scholars used Scripture to justify this move: God is referred to in the Qur’ān as a “wise” or “rational” being (who thus acts only with a purpose) and who “does not intend hardship for you” (Q. 5:6). Thus, His rules must also be a mercy for us and intend us benefit rather than harm and, indeed, the entire Law itself came to be described as existing at large to bring welfare to humankind and dispel harm.

Importantly, this theory did not hold that God was bound to act this way, merely that we can surmise that he has chosen to do so. Indeed, the prime theorists of this move from strict empiricism to inductivism included the great Ash’arite theologians al-Juwaynī (d. 1085), al-Ghazālī (d. 1111) and al-Rāzī (d. 1209), all of whom contributed to the vanquishing of the rationalist and ethically objectivist Mu’tazilite school. Inductivism was, and remains, the bridge between the commitments to voluntarism and also to a coherent and flexible Law: we are permitted to refer to human interests as objectives of the Law (and thus as a tool for legal reasoning) because a comprehensive, inductive reading of revelation reveals God’s consistent concern with human welfare.

Jurists eventually came to speak of the “objectives of the Law” (maqāṣid al-sharīʿa) which were discovered through the inductive reading of the texts, and devised hierarchies and classifications of these purposes. All scholars, from al-Ghazālī to the
master theorist of the maqāṣid, the Andalusian jurist Abū ʿIṣḥāq al-Shāṭibī (d. 1388), agreed that at the top of the hierarchy are five universal basic human necessities (ḍarūrāt or ḍarūriyyāt): religion, life, lineage, property and rationality. (Some jurists have added “honor” [al-ʿird] as a sixth necessity.) All sharīʿa rules can in some way be shown to “protect” or “preserve” (ḥifz) these universal necessities. For all of five universal necessary interests, preservation can involve both positive and negative provisions, as well as various forms of restrictions on other less fundamental acts. Many specific rulings of the Law, however, only contribute to these interests by protecting or promoting lesser “needs” (ḥājiyyāt) or still lesser “improvements” (taḥṣīniyyāt) or “embellishment” (tazyīniyyāt), all of which have their place in the edifice of a just social and legal order but are not equally important or indispensible. Rulings shown to be advancing mere ḥājiyyāt or taḥṣīniyyāt could be theoretically replaced by other practices if the ultimate ḍarūriyyāt were not harmed and if other benefits could be established.

I would propose as a term for this form of Islamic legal reasoning something like “Complex Purposivism.” This is a method of legal interpretation and argumentation which makes central an appreciation of God’s purposes behind legislating in general, and the specific body of legislation He has revealed in particular. However, this Purposivism is complex because of the way in which it is constrained not only by the letter of revelatory texts, but also the accumulated tradition of positive legal rules, most of which crystallized before the advent of the theory of the maqāṣid (or, indeed, before “classical” legal theory at all) and thus acquired the status of authoritative and binding interpretations. As we will see below, even theorists who purport to use the maqāṣid in order to facilitate a pragmatic and flexible approach to law for modern societies display relatively little interest in radically revising long-standing rulings of Islamic criminal law related to apostasy, heresy and the freedom to pursue a non-Islamic conception of the good. Most often, the maqāṣid serve to elucidate and justify the underlying wisdom of the classical rules as traditionally understood.

This theoretical logic is the point at which this paper enters. Given that the Law exists to protect or preserve religion (ḥifz al-dīn) as the most central and basic of its five primary purposes, that Islamic scholars have often used the theory of the maqāṣid to justify a principled and purposive flexibility in legal reasoning, and that scholars concerned with the minority condition have declared an eagerness to turn to the theory of the maqāṣid to theorize a permanent Muslim presence in non-Muslim polities, it is natural to ask how this general purpose of the Law can be attained in a secular liberal state.

In other words, for the Muslim or non-Muslim scholar interested in the long-term encounter between Islamic law and liberal secularism, the question now becomes: Is modern religious freedom sufficient for the sharīʿa purpose (maqṣad) of “preserving
religion” (ḥifż al-dīn)? Could it not be argued that liberal societies with extensive religious liberties offer robust provisions for the preservation of religion? 

In the next section I will examine some treatments of the meaning and extension of the shari‘a objective (maqṣad) of protecting religion (ḥifż al-dīn) in general treatises on Islamic legal theory for Muslim majority societies. I will follow this with some tentative reflections on just what is involved in using the idea that Islamic law seeks primarily to advance certain goals and interests to justify satisfaction with the kinds of rights and protections consistent with “modern religious liberty.”

VII. Ḥifż al-dīn in Majoritarian Islamic Legal Theory: The Philosophical Logic of “Preserving Religion” as Positive Religious Liberty

To this point, I have referred to the maqāṣid as a framework which justifies legal change in “reformist” discourses. However, it should not be understood that the function of maqāṣid-reasoning is to liberalize the shari‘a by making it less restrictive in all cases. In fact, the opposite is more likely insofar as the mandate to “protect and preserve” various fundamental interests turns the jurist’s attention away from the justification of rulings through reference to specific texts and towards the policy of “blocking the means” (sadd al-dharā‘i) to the corruption of those interests. It is true that maqāṣid-reasoning opens the door to considering new means for advancing stable goals and interests, but it is also simply the case that the jurist now sees more things as harmful to reason, religion and the other “universal necessary interests.” If before the jurist clung to a narrow, formalist prohibition on alcohol based on the Qur’an, he now sees countless potential sources of harm to reason. In a sense, this does in fact make the Law less restrictive – less restrictive on those who seek to “command the right and forbid the wrong” rather than less restrictive on those who might seek to dip their toes in the waters of the wrong.

It is certainly the case that classical and modern-traditionalist legal theorists have generally used the idea of “preserving religion” as one of the five core objectives of the Law as a way of demonstrating the underlying logic and wisdom of the traditional rulings

38 Jackson’s article “Literalism, Empiricism, and Induction: Apprehending and Concretizing Islamic Law’s Maqāṣid Al-Sharī‘ah in the Modern World” is based on a similar investigation of the meanings and uses of one of the five darūriyyāt, in his case the maqṣad of preserving reason (ḥifż al-‘aql). However, his purposes differ somewhat in that he begins with a frustration with the lack of boldness and creativity on the part of Islamic scholars who tend to limit their concern with “preserving reason” to a constant repetition of the prohibition on intoxicants. For Jackson (a believing Muslim), the concept has rich possibilities for Islamic opposition to all forms of false consciousness and other hegemonic ideas which have served to corrupt the minds of African Americans and colonized Muslims.

39 Attia, for example, notes that “maqāṣid-based thinking contributes to the expansion of the process of assessment in qiyās.” Using the example of the prohibition on wine being linked to the maqṣad of preserving reason (ḥifż al-‘aql), Attia notes that one possibility emerging from this is a “process of broad qiyās [whereby] we apply the legal prohibition to everything which negatively influences one’s reasoning capacity even if it does not inebriate as drugs do. Indeed, we can expand it still further by applying the same prohibition to everything which harms the mind, including superstitions, magic arts, brainwashing operations, baseless imitation of one’s forebears, and the like.” (Attia, Towards Realization of the Higher Intents of Islamic Law, pp. 165-6.)
of criminal and public law. As such these discussions tend to be an invaluable source of the philosophy of religious freedom in orthodox Islamic thought. This is a philosophy of a deeply communitarian, “positive” conception of religious freedom where “preserving religion” refers to fully realizing all of its possible objectives and removing any and all potential sources of harm. Or, in the words of al-Shāṭibi, “preserving religion involves calling to it with promises and warnings, fighting those who resist it and those tumors who rot it from within, and repairing any accidental unforeseen defects.”

1. What is “religion”?

Islamic scholars tend to regard important concepts as having various definitions depending on their sphere of use, for example, “linguistic” meanings versus “legal” (sharʿī) meanings. What is relevant for our purposes is the meaning of “religion” as the scholars understand it for juridical and theological purposes. This sharʿī definition of religion is the most expansive possible: “Religion consists of divine rules which God has revealed through prophets to guide mankind to truth in matters of belief and to good in matters of behavior and social relations. Religion constrains mankind by these rules and brings them into submission to their commands and prohibitions so that they may attain the happiness of this world and the next.” Complete, perfect religion is composed of four elements: faith (īmān), external submission (islām), belief in right doctrines (iʿtiqād) and works (ʿamal).

The jurists clearly specify the necessary human personal and social goods which are advanced by the various elements of religion, beginning with the metaphysical, or perhaps theologico-anthropological claim that “since religiosity is part of innate human nature [fiṭra], all mankind must affiliate itself with some religion or another and opposing this innate nature is pure deviation.” The only question is whether it is the true one or one of the false ones. The only sense in which the jurists believe “preserving religion” to be one of the aims of the sharʿīa is insofar as it is understand that only Islam is recognized by God as the final religion valid for all time. Thus:

Religion in the sense of divine revelation sent down through prophets is necessary to guide human minds to truth. Religion in the sense of belief in God is necessary for individual human life in order for the soul to find security and tranquility from the kind of anxiety and stress which can lead to a nervous breakdown or even suicide. It is also necessary for social life because it guarantees the establishment of legislation which

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40 Al-targhīb waʾl-tarhib: this common phrase means to “incite desire and fear,” or to use the carrot and the stick. The idea here is that Muslim proselytizers should inspire desire for what God gives and promises and at the same time fear of His disapproval and punishment.


protects social relations from all ills which might corrupt them. Religion in the sense of
divinely legislated laws is necessary in order to provide rules of justice and equality
between persons and to protect them from the traps of human whims and passions.
Indeed, mundane interests alone suffice to prove the necessity of religion in the lives of
individuals and societies.\footnote{al-Na‘īm and Muḥammad, \textit{Maqāṣid al-sharī‘a}, pp. 27-8.}

Following al-Shāṭibī, the jurists then divide the modes through which the \textit{sharī‘a}
protects the interest humans have in the integrity and flourishing of religion into the
positive establishment of certain elements of religion (\textit{al-ḥifẓ min jānīb al-wujūd}) and the
removal of potential harms (\textit{al-ḥifẓ min jānīb al-‘ādam}). The former has a literal meaning
of providing for the “existence” and the latter has a literal meaning of providing for the
“absence.” I will call them “positive preservation” and “negative preservation”
respectively.

2. “Positive Preservation” (\textit{Ḥifẓ min jānīb al-wujūd}): Creation of Necessary
Elements

Consistent with the general structure of \textit{maqāṣid} thinking, jurists discuss three levels of
goods necessary for the preservation of religion – the necessities (\textit{dārūriyyāt}), the needs
(ḥājiyyāt) and the improvements (\textit{taḥṣīniyyāt}) or embellishments (\textit{tazyīniyyāt}).

Some accounts of the “positive preservation” of religion emphasize the individual
perfection of faith and works as a believer. On this account, the first level (\textit{dārūrī})
consists of faith in God which is necessary for any act to be valid, or to “count” with
God. God has provided for two primary paths for the attainment of this foundational good
– first, human reason itself which is capable of perceiving empirical, sensory truths, and,
second, revelation which is necessary for attaining knowledge of the unseen world. The
first, necessary level of protecting religion is thus the “establishment of faith in the
hearts” of human subjects and includes the “first pillar” of Islam, the declaration of God’s
unity and Muḥammad’s Prophethood. Building on this faith, the second level (ḥāji) consists of worship, that being “obedience with the goal of submission and self-
abasement (\textit{al-khudū‘ wa’l-tadhallul}), both considered a basic necessary part of the
establishment, perfection and preservation of religion because they include both the inner
and outer aspects of mankind’s behavior.”\footnote{al-Na‘īm and Muḥammad, \textit{Maqāṣid al-sharī‘a}, p. 29.}

This second level of worship includes the remaining basic pillars of Islam, prayer, \textit{zakāh}, fasting and the pilgrimage to Mecca. Finally, the third level (\textit{taḥṣīnī}) consists of supererogatory prayers, pilgrimages, good
works and acts of charity which might contribute to the perfection of religion when the
earlier stages of belief have been achieved.\footnote{For this account of the “positive preservation” of religion, see ibid., 28-31. According to a recent
reconstruction, the views of 13\textsuperscript{th} and 14\textsuperscript{th} century theologian Ibn Ṭaymiyya bear comparison. His
conception of the “positive preservation” of religion consists of two main pillars: “belief in God, love for
Him, exaltation of Him, and knowledge of His names and characteristics” and “seeking protection in

\footnote{44 al-Na‘īm and Muḥammad, \textit{Maqāṣid al-sharī‘a}, pp. 27-8.}
Other accounts of the “positive preservation” of religion are more expansive and collective, describing it as “upholding its pillars and establishing its rules.” A common approach is to view the “positive preservation” of religion as consisting of three broad fields of thought and action: 1) acting in accordance with it [al-‘amal bihi], 2) judging in accordance with it [al-ḥukm bihi], and 3) calling others to it [al-da‘wa ilayhi].

Contemporary Saudi-based scholar Muhammad al-Yūbī, author of a widely-read study of the maqāṣid, adds 4) jihād (fi sabīlihi), which more commonly appears in other accounts of the maqāṣid as belonging to “negative preservation.”

The first (al-‘amal bihi) simply refers to the performance of all individual and collective religious obligations at a minimum and the performance of all encouraged acts as an aspiration. The second (al-ḥukm bihi) is a statement of revelation’s absolute authority over all moral, legal and political values. “How can religion be preserved if it is not the judge over human acts?” al-Yūbī uses this obligation to register a strong rejection of any form of secularism: “Judging by other than that which God has revealed, removing religion from [any area of] life and substituting for it human whim and individual opinions – what possible greater loss for religion or crime against it could there be?”

Referring all moral questions to revelation preserves religion in three specific forms: it preserves the faith, and thus salvation, of the individual; it preserves religion in society by applying the entirety of Islamic laws and rituals and making them sovereign over all aspects of life; and it prevents all other ideas, religions and moralities from appearing and spreading in an Islamic society. Īlmaydān carefully catalogues the deleterious effects of abandoning the shari‘a in the areas of spirituality/religiosity, society, politics, economics and the afterlife.

49 Ibid., p. 198. Īlmaydān’s views bear comparison: “The shari‘a must be integral and not fragmented. No abrogation, replacement, distortion or equivalence [with other systems] will be accepted, for there is no law above the Law of God.” (Īlmaydān, Maqāṣid al-shar‘a al-Īslāmiyya, p. 95.)
50 “Judging according to religion and applying its rulings closes the door to the ‘people of arbitrary whim’ [ahl al-ahwā‘], destructive schools of thought and misguided ideas, and forbids them from spreading their beliefs and manifesting their edicts for when they know that they are in a state which upholds the laws of God and repels everything contrary to it, they will refrain from their erroneous writings out of fear of punishment. Whereas when religion is constrained and removed from judgment and replaced with positive law, then they can spread their poisonous ideas under the veil of academic research or intellectual freedom.” (al-Yūbī, Maqāṣid al-shar‘a al-Īslāmiyya wa ‘alāqatuha b‘il-adilla al-shar‘īyya, p. 199)
51 Including the hardening of hearts, the spreading of error and hypocrisy and loss of desire for repentance. (Īlmaydān, Maqāṣid al-shar‘a al-Īslāmiyya, p. 96.)
52 “The chaos and disruption of aggression against life, property and honor, the spreading of enmity and rancor, and the misery of fear and hunger. (Ibid., p. 97.) Here Īlmaydān invokes the common claim that the
Calling to Islam (al-da’wa ilayhi) is equally a prerequisite for upholding and spreading religion. This obligation is given a grounding in revelatory texts, but is also linked both to the obligation to spread an inherently universal religion and to the need to constantly confront and repel the tireless efforts of Islam’s enemies to “distort the truths of Islam.” *Da’wa* is given four specific tasks linked to the “positive preservation of religion”: educating the ignorant, uncovering and dispelling errors in circulation about Islam, disrupting the opportunity of the enemies of Islam to spread false and destructive ideas about Islam, and realizing Islam’s universality for all times and places.\(^{55}\) However, “calling to this religion will not always meet with acceptance but also with rejection. Indeed, some will impose stumbling blocks and powerful obstacles in its way, forbidding others to enter, blocking their access to its concepts, all insurmountable obstacles which those who wish to accept Islam cannot overcome. . . . In fact, things will always progress beyond this to the point of domination over Muslims and warfare against them [for their religion].”\(^{56}\) And thus jihād is necessary for the protection and preservation of religion.

Al-Yūbī’s discussion of jihād and its importance for the maqṣad of preserving religion includes some observations which are instructive for our consideration of the minority condition. As part of his explication of the necessity of jihād, al-Yūbī notes various evils associated with non-Muslims ruling over Muslims [*tasalluṭ al-kuffār ‘alā al-mu’minīn*]: a) Muslims are forbidden from upholding the rites of their religion [*qiyām bi-sha‘ā’ir dīnīhim*] and in general are restricted and oppressed [*taḍyīq ‘alayhum*]; b) laws and rulings contrary to and incompatible with Islam are implemented; c) religion is renounced and forsaken thus debasing and degrading the religious in the eyes of others; d) the face of religion is distorted and thus an aversion is created towards it on the part of others; and e) religion is encircled and restricted to a certain sphere. This condition and its dangers arising from the rulership of non-Muslims over Muslims is al-Yūbī’s primary argument for linking the communal obligation of jihād to the sharī‘a objective of preserving religion.

3. **“Negative Preservation” (Ḥifż min jānīb al-‘adam): Removal of Harms**
Generally, jurists speak of four forms of preserving religion via the removal of harms: 1) jihād⁵⁷ (although as we saw above some include jihād amongst the positive forms of preserving religion), 2) the killing of self-declared and self-obscuring apostates⁵⁸, 3) combating heresy [bid‘a] and punishing heretics [mubtadi‘ūn] and occultists, and 4) forbidding sinful behavior and punishing its perpetrators through both ḥudūd and ta‘zīr punishments.⁵⁹ A single principle of religious obligation underlies all of these modes of preserving religion: the idea of “commanding the right and forbidding the wrong” [al-amr bi‘l-ma‘rūf wa‘l-nahī ‘an al-munkar], the activist and interventionist conception of enforcing religious morality which might be said to be the single principle underpinning all Islamic political, ethical and legal thought, particularly when we consider the claim that the maqṣad of preserving religion “is the most important of the maqāsid, indeed the core, spirit, foundation and root of all the maqāsid.”⁶⁰ Indeed, “commanding the right and forbidding the wrong,” particularly through fighting, is often held to be the characteristic of the Muslim community which distinguishes it as superior to all prior religious communities.

An important point follows here. Strictly speaking, then, there is no separate, distinct branch of legal and ethical thought concerned with how Muslims are commanded to “preserve religion.” Rather, the entire edifice of Islamic public and criminal law is what is meant by the obligation to preserve religious through the removal of specific harms – “preserving religion by ‘providing for the absence’ [min jānib al-‘adam] is simply to repel everything which opposes religion in word and deed.”⁶¹ “Preserving religion means salvaging it … from anything that might undermine and confuse beliefs and distort behavior.”⁶²

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⁵⁷ The most constant definition of which is something like: “Fighting unbelievers for the glorification of the word of God.” (al-Nā‘īm and Muḥammad, Maqāsid al-sharī‘a., p. 33; Iḥmaydān, Maqāsid al-sharī‘a al-Islāmiyya, p. 106.)
⁵⁸ I am translating zandīq (pl.: zanādīqa) as “self-obscuring apostates” consistent with al-Na‘īm and Muḥammad’s explication as “manifesting Islam while hiding unbelief.” I understand this term to refer to theologians and philosophers who publicly proclaim their orthodoxy but convey heterodox beliefs through their writings esoterically. (For example, Ghazālī’s classical text Fāṣal al-tafriqa bayna al-Islām wāl-zandaqa treats the problem of Ḥisābis and philosophers who refer to themselves as Muslims but advance unacceptable doctrines esoterically.) I refrain from translating this term as “heretics” since I believe this to be expressed by the term “mubtadi‘ūn”: purveyors of bid‘a or ibtidā‘, literally “innovation.” I believe the idea of persons openly advancing new theological doctrines in defiance of existing orthodoxy to best reflect the concept of “heresy.”
⁵⁹ The ḥudūd are the mandatory punishments for certain crimes (adultery, theft, drinking wine, false accusation of adultery) stipulated in the revelatory texts. Ta‘zīr punishments are discretionary punishments which judges and rulers may impose on grounds of public policy.
⁶² Muḥammad al-Tahir Ibn ‘Ashur, Treatise on Maqāsid al-Sharī‘ah (London: International Institute of Islamic Thought, 2006; trans. Mohamed el-Tahir el-Mesawi), p. 120.
The function of *maqāṣid* reasoning is thus primarily to explicate the wisdom and rationale of the rules, “revealing the perfection of Islamic law.”\(^{63}\) For example, apostates are killed whereas the mere unbeliever by birth [*kāfir ašlī*] is allowed to live because Apostasy is a means by which cracks enter the ranks of the Muslims and their internal front is fractured. This is a great evil and corruption because the most dangerous thing for a community is chaos, disruption in its [common] beliefs, intellectual disarray and a lack of trust in what preserves its order. The apostasy of a Muslim is much more dangerous than mere unbelief because the apostate has had the full opportunity to be exposed to the proof and evidence which made him believe in Islam by free choice alone and thus there is no excuse for him as there is for the unbeliever by birth who has not had this opportunity. We thus view atheist ideas circulating in Muslim lands as much more dangerous than mere transparent unbelief in Islam [on the part of non-Muslims] because doubt in one’s system and the fragmentation of the internal ranks is one of the primary reasons for the victory of the enemy. It is for this reason that Islam does not leave the apostate freedom to apostatize in contrast to its firm respect for the freedom of conscience of the unbeliever by birth.\(^{64}\)

Blasphemy is punished and the honor of the Prophet Muḥammad is protected because When the honor of the Prophet is violated then respect for and aggrandizement of the Prophet’s mission collapses, and thus so collapses everything which he achieved. … The collapse of the honor and glorification of the Prophet is the collapse of religion itself. This demands vindication through the killing of the blasphemer. … He who blasphemes against the Prophet and attacks his honor [*yasubb al-rasūl wa yaqa’ fi ʿirdīhi*] is trying to corrupt people’s religion and by means of that to also corrupt their worldly existence. Whether or not they succeed, the person trying to corrupt another’s religion is therefore seeking to ‘sow corruption on Earth.’\(^{65}\) Defaming religion and casting ugly aspersions on the Prophet so that people will have an aversion towards him is amongst the greatest of corruptions. Furthermore, blasphemy is a form of sacrilege against the Prophet and a wrong\(^{66}\) against God, His Prophet and His believers. It is an attempt on the part of infidels to subvert the Islamic order, to humiliate believers, to remove the glory of religion and debase the word of God … all of which are amongst the most grievous forms of ‘corruption on Earth.’\(^{67}\)

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\(^{65}\) This phrase “*fasād fiʿl-ʿarḍ*” is taken from a verse in the Qur’an often used to establish capital punishment for those who rebel against the state or provoke such rebellion through propaganda or incitement. It has served as a very flexible and supple legal tool in the hands of Islamic governments, including most recently the Islamic Republic of Iran, to justify charges of treason against political and ideological dissenters.

\(^{66}\) Ādhā is more commonly used for “harm” or “injury” but out of concern for the theological complexities arising from the idea that God could be harmed or injured by human actions I will translate it as “a wrong against.” God can certainly be wronged by humans (Islamic law speaks of many public, communal or ritual obligations as “the rights of God”) even where He cannot be harmed by them.

Similar communitarian-consequentialist justifications for suppressing deviant behavior are commonly given for the cases of heretics, “hypocrites,” “shameless muftis” and all those who sin by violating the most important tenets of the Law.

VII. What is Involved in Arguing to Modern Religious Liberty from the Sharī‘a Purpose of “Preserving Religion”?

I introduced earlier the theory of Complex Purposivism as a potential device for creative, reformist Islamic thinking about norms and legitimacy in new conditions. The preceding section should convince us that, if what we mean by “reform” is something along the lines of modern human rights standards regarding freedom of religion and conscience, the move from the maqāṣid to “human rights” (in the modern liberal formulation) is hardly a slam dunk.

When discussing the relationship of the maqāṣid to “human rights,” conservative scholars usually invoke the maqāṣid theory in an apologetic vein. This can take a few forms, which I paraphrase here as: (1) “Islam invented human rights. We don’t need to answer to the UN.” And: (2) “The maqāṣid remind us of our God-given rights to criticize the government and have security of person and property which are presently being denied by autocratic secular regimes.” The human rights which are discussed are those convenient for a conservative Muslim conscience, but knotty issues such as apostasy, blasphemy, heresy and the general right of persons to reject Islamic morality or religion altogether are not brought into question.

However, still speaking of the human rights debate for Muslim majority societies, it is most certainly the case that when joined with other values and the motivation to move beyond strict adherence to the classical rulings and categories on issues of religious

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68 Ihmaydān includes as his fifth means for preserving religion the thwarting of “shameless muftis” (al-muftī al-mājin), those who “corrupt religion and exploit the ignorant” by devising juridical ruses (ḥiyal) to get around religious obligations. (Ihmaydān, Maqāṣid al-sharī‘a al-İslāmïyya, p. 128.) It is common for maqāṣid works to devote long sections or even chapters condemning the practice of devising such legal ruses (al-taḥayyul). (See for example, Ibn ‘Ashur, Treatise on Maqāṣid al-Sharī‘a, Ch. 22, especially pp. 180-183.)


70 Johnston describes the position of Egyptian writer Muḥammad ‘Amāra in this way (‘Amāra, al-İslâm wa huqūq al-insān: ḍarûrāt…lā huqūq [Islam and Human Rights: Needs ... Not Rights] (Cairo: Dâr al-Shurûq, 1989)).

71 See also Muḥammad al-Zuḥaylî, et. al., Ḥuqūq al-insān: miḥwar maqāṣid al-sharī‘a [Human Rights: The Axiality of the Objectives of Sharī‘a] (Qatar: Wizârat al-Aqwāf wa’l-Shū‘ūn al-İslâmîyya, 2002), where human rights are defined exclusively in terms of the interests God has chosen to protect through the Law.
freedom and equality, the maqāṣid are a helpful and valuable framework. Rāshid al-Ghannūshī, quoted earlier, states in a well-known work that “the Universal Declaration of Human Rights, in its broad outlines, meets with wide acceptance among Muslims, if their legal framework (fiqh) has been correctly interpreted.”

This correct modernizing interpretation of Islamic law in the conditions of modern international law is declared to rest largely on Shāṭibī’s conception of the maqāṣid: “And if we are to offer the best interpretations of shari‘a in order to set up a legal framework for the liberties and duties of humankind, we will find that the contemporary scholars of Islam almost all agree with the lucidity of the theoretical framework assembled by the venerable al-Shāṭibī in his Muwāfaqāt.”

Unlike more conservative scholars who formulaically assume that the classical legal rulings represent the shari‘a’s wisdom on matter of religious freedom, Ghannūshī is willing to reopen even core issues of apostasy and the right of non-Muslims to proselytize (da‘wa).

A much more explicit statement for the reform of Islamic criminal law in the direction of modern human rights standards based to a large extent on reference to the logic of the maqāṣid has come in the writings of prominent Islamic legal theorist Mohammad Hashim Kamali. In a forceful critique of the implementation of the traditional Islamic criminal code in the Malaysian state of Kelantan, Kamali writes:

At its present time in history and in the face of the crisis that has afflicted the liberality and caliber of Islamic thought, the ummah is faced with difficult choices. We either choose to retain the eternal message of Islam, to uphold its civilizational ideals, and invest our energy in the task of reconstructing a society in that image, or lower our sights to see only the concrete rules and specific details. This latter alternative is not only unwise but also methodologically unsound as it attaches higher priority to details and makes them the focus of attention at the expense of the broader and more important objectives of Islam. … To fall into the trap of literalism such that would blur our vision of the ideals and objectives of Shari‘a (maqāṣid al-shari‘a) in total dedication to specific details violates the wisdom (hikmah) of Islam which takes such a high profile in the Qur‘an and the exemplary Sunna of the Prophet. To devise effective deterrents against criminality and aggression must be the overriding objective of an Islamic penal policy, just as they are of the hudud penalties. The deterrent and punitive efforts need also to be moderated with considerations of care and compassion, such that would nurture the prospects of reformation and return, whenever possible, to normal life in society. If this is undertaken with diligence, then I believe that the Muslim community would have observed the basic purpose and meaning of hudud Allah. If the specific punishments [of classical criminal law] are temporarily suspended for fear of indulgence in uncertainty and doubt, while in the meantime efforts are made which would pave the way for a more

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74 Born in Afghanistan, Kamali was educated in the UK and now teaches Islamic law in Malaysia. He is the author of numerous books, including the above-cited Principles of Islamic Jurisprudence.
comprehensive understanding and implementation of Shari’a, this would be a worthwhile endeavor and, I believe, ultimately more meaningful.\textsuperscript{75}

Kamali has developed similar arguments about the capacity for \textit{maqāṣid} reasoning to move Islamic law, including criminal law on the most sensitive matters of religious transgression, in a liberalizing direction throughout his many writings.\textsuperscript{76} Whereas for more conservative traditionalists, the imperative of preserving religion allows them to use the \textit{maqāṣid} as warrant for restrictions on more and more behaviors which might at variable distances serve as the means to undermining religious morality, for Kamali the logic of the \textit{maqāṣid} provides Muslims with a firm intellectual framework for replacing traditional rules or practices with others less offensive to a modern conscience.

Evidence for the capacity of \textit{maqāṣid}-style reasoning to facilitate reforms of Islamic law which we might justly refer to as “liberalizing” can be found in two important areas: just war doctrine, and treatment of the punishment for apostasy. In both cases, many jurists in the modern period have argued that the underlying purposes behind the traditional doctrines demonstrate that if those purposes can be achieved through other means, it is permissible to replace even doctrines which have grounding in revelatory texts. Thus, for many legal “Modernists,” the underlying purpose behind the \textit{jihād} doctrine was not the eradication of disbelief or the universalization of Islamic legal order, but the preservation of Islam in a hostile world and the spreading of the Islamic mission (\textit{da’wa}) to new communities. Such Modernist jurists argue that in the contemporary period, Islam is no longer in danger or eradication and that where the right to proselytize is protected there is no need for aggressive warfare.\textsuperscript{77} Similarly, many scholars argue that the original purpose of the capital punishment for apostasy was solely to protect the community from outright armed rebellion (\textit{fitna}). Where apostasy is merely a matter of


private conscience and is not linked to a general rebellion against the state and the social order, there is no justification for executing the apostate.78

However, the primary concern of this paper is not with legal change in Muslim majority societies where the burden of proof to justify revisions of long-standing understandings of the Law sits so heavily on the side of reformers but rather in Muslim minority contexts where it is not quite so clear what the conservative status quo on issues of public and criminal law is. Here I believe that the least one can say is that the idea of seeing Islamic law as a set of rulings which advance certain purposes and objectives gives even very conservative Muslim thinkers (those who might be reluctant to argue for the revision of traditional rulings for the majority context) a framework for creative engagement with the non-Muslim political and legal contexts from an Islamic jurisprudential perspective, bearing in mind that concepts such as *maṣlaḥa* and the *maqāṣid* are most conventionally invoked by Islamic jurists as tools for extending the Law into new social contexts where the original texts of revelation are silent. The notion of *maqāṣid* reasoning as “Complex Purposivism” underscores this: the five most important necessary interests protected by the Law – religion, property, reason, progeny and life – all have their echoes in the legal and political systems of secular liberal democracies, but what their protection requires is bound to be informed even in the minority context by the long-standing jurisprudence developed in the majority context.

What I am proposing here is thus an understanding of *maqāṣid* reasoning as a framework of argumentation about the relative legitimacy of various legal and political institutions in non-Muslim liberal democracies given that even very conservative Islamic jurists (including those contributing to the *fiqh al-aqalliyyāt* discourse) regard the Muslim presence in Europe and North America as a social phenomenon requiring original jurisprudence.79 The plausibility of this is demonstrated also in the way that jurists speak of the jurisprudence of the minority condition as itself having certain *maqāṣid* which are served and advanced by certain conceptual tools from classical legal theory. For example, ‘Abd Allāh ibn Bayya, along with Qaraḍāwī the most prestigious senior scholar writing on *fiqh al-aqalliyyāt*, posits that the very idea of a minoritarian jurisprudence has the “*maqāṣid*” of 1) preserving religious life at the group and individual levels; 2) subtle and gradual *da‘wa*; 3) civil interaction with the Other; and 4) good relations between the individual and the group.80 Iraqi scholar (and politician) Şalāḥ ‘Abd al-Razzāq begins his study into the ethics of the minority condition by positing the following *maqāṣid* of *fiqh al-aqalliyyāt*: 1) treating problems such that the solutions are in perfect harmony with Western reality in terms of culture, law, politics, society, and economy; 2) the

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78 See, for example, S.A. Rahman, *Punishment of Apostasy in Islam* (New Delhi: Kitab Bhavan, 1973). However, a knotty issue for Islamic thinkers who argue against the punishment for apostasy in this way is identifying exactly when public proclamation of un-Islamic beliefs and doctrines becomes a form of harm to the integrity of the social order even short of armed rebellion.

79 Because these populations are largely the result of immigration over the past 50 years jurists do not tend to treat them the way they might treat “native” Muslim minorities in such countries as India, Israel or various Africa countries, where juridical reflection tends to focus on communal self-governance.

preservation of Islamic identity; 3) highlighting Islam’s flexibility and dynamism and its ability to co-exist with and acclimate to other cultures and civilizations; 4) making sure that Islam remains capable of great personal influence in people’s lives and that da’wa remains a powerful force; and 5) that Muslim minorities in the West should play an influential role in their societies and participate in public life, especially in politics, economics, and culture.\(^81\) Qaraḍāwī echoes these goals through vaguer statements about the insufficiency of majoritarian jurisprudence and the need for law to change with circumstance. For all of these writers, the tools provided by classical legal theory include the theory of the *maqāṣid* conjoined with other tools such as Islamic legal maxims which stress ease and facilitation (*taysīr*) in enforcing the Law. “This *fiqh* must balance between looking at individual texts on the one hand, but also at the spirit of Islam, the goals of *shari‘a*, the universal ends (*al-maqāṣid al-kulliyya*), and the general goals.”\(^82\)

However, as noted above, it appears that to this point such scholars have not mobilized these jurisprudential tools for a *general theoretical inquiry* into what kind of conception of religious freedom in the West could be regarded as sufficient (if not ideal) for the goal of preserving religion. What might be the components of such a framework of argumentation which is cautiously and critically open to Western legal frameworks while using the theory of the *maqāṣid* to structure Islamic moral inquiry and political action?

Most obviously, this would be a framework which would begin by taking seriously distinctions between different types of *goals*, *agents*, *means* and *obstructions* as part of a process of unpacking the cohesive and integral logic of “preserving religion”-as-positive-liberty elaborated earlier.

- **Clear goals** belonging to a moral obligation to “preserve religion” would include ensuring access to knowledge of Islam, perpetuating religiosity across generations, the construction of the religious institutions of a Muslim civil society (mosques, publishing houses, centers of research, seminaries, lobbying groups), minimizing social costs for living a Muslim life and for converting into Islam, and enlarging the ranks of Muslim communities.
- **Purposive (*maqāṣid*)** reasoning would have to identify when preserving religion is the obligation of various kinds of *agents*, including: individual Muslims, individual non-Muslims, Muslim communities and civil society institutions, non-Muslim communities and civil society institutions, and the non-Muslim state.
- **There would have to be serious consideration of appropriate means** for advancing which goals, including: coercive laws, persuasion, proselytism, Islamic religious schools, direct action, political participation, methods of social pressure, or violence.
- **Finally, a strong theory would have something to say about the different kinds of obstructions** to preserving religion which Muslim minority communities face: the mere impact of a dominant non-Muslim culture, the “moral injury” of others acting in alien and disapproved ways, the temptation of social and personal

\(^81\) `Abd al-Razzāq, *al-Aqalliyyāt al-muslima fi’l-gharb: qaḍāyā fiqhiyya wa humūm thaqāfīyya*.

\(^82\) Qaraḍāwī, *Fī fiqh al-aqalliyyāt al-muslima*, p. 36. See also Ibn Bayya, p. 169 and `Abd al-Razzāq, p. 15.
freedoms, the lack of communal control over the circulation of information and beliefs, direct efforts of other groups to “seduce” (*fitna*) Muslims away from Islam, laws which limit communal or family control over the education and rights of members, laws which limit the right to worship and behave Islamically in public, hostile representations or descriptions of Islam and Muslims in non-Muslim media, and coercive state laws which force Muslims to declare abandonment of Islam.

An intellectually serious account of whether the *sharīʿa* “purpose” of preserving religion can be attained within non-Muslim societies might proceed by imagining all of the possible ways in which religion might *not* be preserved in a non-Muslim society (from a society which merely protects Muslim apostates to one which actively persecutes Muslims merely for proclaiming belief in Islam), by positing a principled “minimum” which falls short of full self-governance on majoritarian *sharīʿa* lines but also represents a coherent account of fair religious liberty, by ranking and prioritizing various components of the communal “preservation of religion,” by interrogating existing legal and political arrangements according to those standards, and then by considering how different means of advancement and resistance are appropriate for different kinds of obstructions.

A framework of this kind might replicate the classical dichotomy between how a non-Muslim environment sets out to provide “positive” protections for religion and remove “negative” ones (*ḥifz* min jānīb al-*wujūd*; *ḥifz* min jānīb al-*‘adam*). By way of positive provision (*wujūd*), liberals and Muslims might agree that a religiously diverse society ought to provide equal access to the public sphere, representation in media outlets and access to the institutions of state. Areas where the state allows groups and communities to provide for their own institutions might also fall under the rubric of positive provision (*wujūd*), and thus liberals and Muslims might agree that Muslim communities ought to be allowed to: create religious schools, proselytize, enjoy full rights of speech and dissemination subject only to the same restrictions as other groups, and build mosques, seminaries and research centers. By way of restrictions or removal of harms (*‘adam*), liberals and Muslims might agree that in a religiously diverse society where Muslims are a minority there should be no coerced public declarations of controversial metaphysical views in shared institutions, no faith tests or requirements of religious homogeneity for public officials and no punishment for conversion out of the majority religion. Areas where the state allows groups and communities to respond to harms might also fall under the rubric of negative provision (*‘adam*), and thus liberals and Muslims might agree that Muslim communities ought to be allowed to: publicly dissuade individuals from leaving their religious community, impose non-violent deterrent punishments on apostates and sinners such as boycotts or exclusion from institutions, arrange internal institutions such as mosques and seminaries on hierarchical and authoritarian grounds, or publicly condemn dissenters, sinners and heretics even in theologically harsh terms.

However, here is exactly where such a framework will inevitably come into contact with any kind of liberal secular one. By way of positive provision (*wujūd*) Muslims might argue that in order for religion to be genuinely preserved the state must provide them with mandatory religiously homogenous schools to the exclusion of public
education, legal recognition for the right of Muslim communal and religious leaders to represent exclusively all Muslims in dealings with the state, and full legal and political autonomy to apply Islamic law within the Muslim community, including criminal law. By way of restrictions or removal of harms (‘adam), Muslims might argue that “preserving religion” requires that the non-Muslim state suppress all speech offensive to a Muslim sensibility, including novels, cartoons and source-critical historical scholarship, prevent non-Muslims from actively proselytizing amongst Muslims and create a common public space free of sexually immoral behavior. They might even argue that a commitment to “religious freedom” requires all of these things lest the “religious freedom” on offer be dismissed as an arbitrary, sectarian, liberal-secular conception of “freedom” no more intuitively justifiable than the one demanded by Islamic law.

Between these two extremes – perfect consensus and perfect antagonism – the kind of Complex Purposive framework I outlined is a likely candidate for structuring Islamic juridical thought on inevitable “hard cases” like schooling and offensive speech. Ideally, an Islamic juridical theory would be able to distinguish between blasphemous or offensive speech which the state inscribes as part of its public language of justification, from offensive speech which public officials routinely feel free to engage in, from offensive speech in civil society which the state merely refrains from suppressing and punishing. Moreover, a minoritarian Islamic juridical theory ought to be able to distinguish various forms of political action in response to such speech: from protest to positive public representations of religion to political bargaining to murder. Similarly, such a theory ought to be able to distinguish the right to religious schooling from the right to restrict all community members to this form of schooling, and state regulations of religious schooling based on certain civic public interests from state regulations based on purely theological objections to Islamic teachings.

Indeed, there is evidence of the use and attractiveness of this form of argumentation by Islamic intellectuals. In addition to the above-quoted remarks by Rāshid al-Ghannūshī on the potential legitimacy and justness of certain non-Muslim legal systems, Tariq Ramadan has argued for the justness of present European positive law treatments of religious freedom. Using the language of Islamic legal theory, in particular the notion of Purposivism, he writes that “the Islamic sciences were but a means for meeting Muslims’ needs to protect their Faith, lives and religious practice.”83 In this context, he argues that European positive law provides a framework both for protecting religion and for negotiating the boundaries of religious practice. He also advances a hierarchy inspired by the theory of Purposivism for evaluating the relative losses at stake in those shari‘a-derived practices which are not protected.

Thus, “it is possible to assert that five fundamental rights are secured: (1) the right to practice Islam; (2) the right to knowledge; (3) the right to found organizations; (4) the right to autonomous representation; (5) the right to appeal to the law.”84 And, although “Muslims obviously cannot apply all the global principles and rulings prescribed by the Qur’an and the Sunna in the field of social affairs … it should be noted that the majority of [religiously prohibited activities] are not imposed on Muslims but are rather legally

83 Tariq Ramadan, To Be a European Muslim: A Study of Islamic Sources in the European Context (Leicester, UK, 1999), p. 131.
84 Ibid., pp. 135-7.
allowed … [and thus] the abode of Europe appears as a space within which Muslims can live in security with some fundamental rights both acquired and protected. As a minority in a non-Muslim environment they are able to practice and to respect the more important rulings of the Islamic teaching.”

The purpose of my presentation here of a possible framework for Muslims to use Islamic legal theory to endorse secular positive law based on a liberal conception of religious freedom is not to suggest that the only intellectually serious use of the theory of the maqāṣid will exactly replicate the kinds of distinctions and evaluations which liberal theories of religious freedom make. Rather, what I would like to suggest is that if we are interested in the views of more conservative and traditionalist believers towards religious freedom and public space in a religious and morally diverse society, in addition to already semi-secularized “post-legal” Muslims, then we ought to look to the theory of the maqāṣid as a flexible, complex form of legal/moral argumentation which has the capacity to provide for an Islamic response to the modern liberal conception of religious freedom which is somewhere in between enthusiastic full endorsement and a mere agreement to obey the law out of unfortunate social and demographic necessity (ṣarūra).

VIII. Conclusion: The Promise, and Insufficiency, of Mainstream Islamic Legal Theory

In an important article on Rawls’s idea of the overlapping consensus, Kurt Baier argued that an overlapping consensus can occur to a varying extent on three dimensions: a) “level,” or degree of specificity, b) the “extent” of support among the population, and c) the “intensity” of agreement by those not opposing the regime. In this paper I have only focused on the issue of formal doctrinal grounds for affirming or rejecting an overlapping consensus and left the issue of popular opinion and feeling entirely to the side. However, even when studying formal doctrine, one can appreciate that agreement or disagreement can occur at various levels of specificity, breadth and depth. Some approaches to the minority condition prefer a piecemeal consideration of every possible aspect of social life in the West. Here there may be numerous specific points of convergence and divergence between political liberalism and Islamic ethics that occur against a backdrop of mutual unintelligibility. In contrast, some approaches prefer to begin with a broad statement of a post-legal humanist Islamic ethics which may have the breadth required by an overlapping consensus, but is not in a strong position to speak to specific questions emerging from the more mainstream Islamic legal tradition. My own interest in Islamic legal theory and particularly the doctrine of the maqāṣid al-shari‘a is motivated by my belief that it is the most likely source of an Islamic minoritarian political ethics which is specific in application and broad in its consideration of social conditions but also deep in the range of answers it can give in response to objections emerging out of orthodox Islamic legal and theological debates.

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85 Ibid., pp. 139-140. Emphasis in original.
87 For example, all but the most radical Islamic scholars hold that all Muslim residents of non-Muslim polities are under strict obligations of mutual security with those polities. This is an important ethical attitude, but does not suggest any affirmation of the principles by which that polity happens to govern itself.
The theory of the maqāṣid is attractive because it is a coherent and elaborate theory, a strong edifice with deep roots in classical Islamic law, as opposed to a tacit or “decisionist” shift in emphasis, or a mere citation of numerous Qur’ānic verses which seem conducive to legal change in a liberalizing direction. It is both intellectually respectable and morally appealing to a conservative Muslim conscience. However, as seen throughout this paper, for those who approach Islamic ethics with an interest in the possibilities of some kind of dialogue with political liberalism (or some other non-Islamic moral doctrine), much more is needed than the maqāṣid alone. The Islamic moral theorist needs some reason to balance the harm of allowing non-ideal behavior with other benefits. Many simply accept that living as a minority imposes this unfortunate fact on Muslim minorities, but this approach is clearly “political in the wrong way” as it refuses to normalize or normativize such realism. Thus, an important area for scholarly research, as well as civic dialogue, is to closely follow the internal arguments and sources of motivation for combining a recognition of reasonable moral pluralism in a diverse society with the jurisprudential logic of the theory of the maqāṣid al-sharī‘a.

However, an awareness of the tools, language and inherited doctrines of Islamic jurisprudence should at the very least impose on the non-Muslim interlocutor a measure of patience and flexibility in evaluating some of the outcomes of this encounter. Short of denouncing Qur’ānic punishments, there may be many ways for an Islamic thinker to balance membership in the epistemic community of Islamic jurists with an openness to the legal institutions of diverse, secular societies. Imagine, for example, a conservative jurist considering the problem of religious freedom in the West from the perspective of Islamic legal theory. Suppose he or she advances something like the following position:

Revelatory texts call for a set of punishments for moral crimes (ḥudūd) which from an early point in the history of Islam attained the status of near universal consensus. Later Islamic legal theorists masterfully showed how all of the many individual rulings of the Law can be shown to advance a consistent set of human interests, the most important ones being the preservation of religion, life, property, lineage and reason. Through this theory we gained a finer appreciation for which rulings of the Law are the most important or even indispensible in themselves, and which are merely the most ideal means for advancing them. Today in the West we are confronted with a social, political and legal situation unprecedented in the history of Islam. If Islamic law is going to remain relevant and vital we must be thoughtful in determining our priorities and goals. Without a doubt, the overall objective is to preserve the religion, life, property, lineage and reason of Western Muslims. As for religion, the necessary and indispensible rights (darāriyyāt) which we must secure are the rights to manifest our religion and educate our children into it in a condition of freedom and security from repression and intimidation. If these conditions are not available than Muslims must not live in such a land. Once these are secured, further important needs (ḥājiyyāt) for preserving religion include the rights to

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88 For example, American Muslim writer and activist Maher Hathout offers a fully liberal account of religious freedom inclusive of non-Muslims, but only mentions the five interests which form the maqāṣid as an afterthought once he has already proven his case via a long list of Qur’ānic verses. (Maher Hathout, In Pursuit of Justice: The Jurisprudence of Human Rights in Islam (Los Angeles: Muslim Public Affairs Council, 2006, p. 146.)
openly call others to Islam, spread accurate knowledge of Islam, build mosques and other sacred spaces, enable Muslims to interact in the public sphere without engaging in forbidden acts, and create institutions of Islamic learning at all levels. Should these most urgent two levels first be secured, further improvements (taḥṣīniyyāt) to the conditions of minority Muslims include the general protections of the honor of Islam and Muslims and rights to communal self-governance. As to the canonical criminal punishments (ḥudūd) we thus need not regard them as indispensible to living a good Islamic life and preserving our religion as the shari‘a intends. Certainly in the minority context they are at most taḥṣīniyyāt rather than ẓarūriyyāt or even ḥājiyyāt.

I believe there is space for a political liberal to appreciate the distinction between “we need not regard these punishments as indispensible to living a good Islamic life and preserving our religion as the shari‘a intends” and “given our unfortunate demographic position, we need not insist on implementing these punishments for the time being.” True, we prefer a less ambiguous shared condemnation of the very idea of punishing someone for revising their conception of the good. But that preference need not force us to adopt an antagonistic stance towards fellow citizens raised and living in a traditionalist religious community seeking to balance multiple commitments. The structure of the theory of the maqāṣid provides such fellow citizens with both substantive and also linguistic flexibility which we are well advised to recognize.