Fiqh and Canons: Reflections on Islamic and Christian Jurisprudence

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As this very fine conference demonstrates, American law-and-religion scholarship has begun to expand its focus beyond the traditional study of church-state relations to an examination of religious law itself. Much of the new scholarship is comparative, addressing law's place in different religious traditions.[1] Yet scholars have neglected one important topic. Although American scholarship has begun to address both Christian and Islamic jurisprudence in a serious way,[2] virtually none of the literature attempts to compare the place of law in these two world religions.

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[1] *See, e.g.*, RELIGION, LAW AND TRADITION: COMPARATIVE STUDIES IN RELIGIOUS LAW (Andrew Huxley ed., 2002); Harold J. Berman, *Comparative Law and Religion*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 739 (Mathias Reimann & Reinhard Zimmermann eds., 2006); Chaim Saiman, *Jesus' Legal Theory—A Rabbinic Reading*, 23 J.L. & RELIGION 97 (2007); Symposium, *Text, Tradition, and Reason in Comparative Perspective*, 28 CARDOZO L. REV. 1 (2006).

[2] On Christian jurisprudence, see, for example, CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell et al. eds., 2001); CHRISTIANITY AND LAW: AN INTRODUCTION (John Witte, Jr. & Frank S. Alexander eds., 2008); THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE (John Witte Jr. & Frank S. Alexander eds., 2006). On Islamic jurisprudence, see, for example, ABDULLAHI AHMED AN-NA'IM, ISLAM AND THE SECULAR STATE (2008); Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789 (2004); Khaled Abou El Fadl, *Muslim Minorities and Self-Restraint in Liberal Democracies*, 29 LOY. L.A. L. REV. 1525 (1996); Haider Ala Hamoudi, *Baghdad Booksellers, Basra Carpet Merchants, and the Law of God and Man: Legal Pluralism and the Contemporary Muslim Experience*, 1 BERKELEY J. MIDDLE E. & ISLAMIC L. 83 (2008); Ali Khan, *The Reopening of the Islamic Code: The Second Era of Ijtihad*, 1 U. ST. THOMAS L.J. 341 (2003); Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67 (2006); Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695 (2004).

This Essay begins to compare Islamic and Christian conceptions of law and suggests some implications for contemporary debates about religious dispute settlement. One must approach this project with humility, especially in a short piece. Islam and Christianity are subtle and complex religions. Each has competing strands; each has evolved over millennia and expressed itself differently over time. Moreover, although systematic treatments of Islamic law are beginning to appear in English,[3] much remains available only in languages, like Arabic, that are unfortunately inaccessible to most American scholars.

Notwithstanding these complexities, some generalizations are possible. Both Islam and Christianity spring from faith, but the two religions express faith differently—and the difference relates to law. In Islam, a comprehensive body of law sacralizes daily life and connects believers to God.[4] Islam's primary discourse, *fiqh*, or "jurisprudence," attempts to derive that law from scriptural sources.[5] Islam's clergy, the *ulama*, or "learned"—often translated as "jurists"—are experts in that law.[6] In fact, many scholars maintain that nothing exceeds law's importance in the life of Islam. A generation ago, the Orientalist Joseph Schacht famously asserted that law constitutes Islam's "core and kernel";[7] more recently, Wael Hallaq has written that "law has been so successfully developed in Islam that it would not be an exaggeration to characterize Islamic culture as a legal culture."[8] One should not "overlegalize" Islam,[9] which values commitment to God rather than routine rule following.[10] Nonetheless, a comprehensive religious law system, one that guides believers in their daily activities, has been a crucial part of the Muslim experience.

By contrast, Christianity does not express its faith through a body of law. Christianity's traditional discourse is theology, a reflec-

[3] *See, e.g.*, MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE (3d ed. 2003).

[4] *See* MALISE RUTHVEN, ISLAM IN THE WORLD 181 (3d ed. 2006) (discussing Sunni Islam).

[5] *See* F.E. PETERS, ISLAM: A GUIDE FOR JEWS AND CHRISTIANS 174 (2003) (defining *fiqh*).

[6] *Id.*; *see also* RUTHVEN, *supra* note 4, at 129 ("scholar-jurists").

[7] JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 1 (1964).

[8] WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES 209 (1997).

[9] MOHAMMAD HASHIM KAMALI, SHARI'AH LAW 1 (2008).

[10] *See* DANIEL BROWN, A NEW INTRODUCTION TO ISLAM 127 (2004); JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH 68 (3d ed. 1998).

tion on God's nature, not His will.[11] Its clergy are sacramental ministers, not legal scholars.[12] This is not to say that Christianity embraces antinomianism or lacks interest in ethical behavior. On the contrary, most contemporary churches have some form of canon law,[13] and Christian jurisprudence exists.[14] But law lacks the significance in Christianity that it has in Islam. Unlike *fiqh*, canon law serves an auxiliary function in the life of Christianity; it is facilitative, not constitutive, of the believer's relationship with God.[15] Unlike *fiqh*, it has a fairly limited scope. And, unlike *fiqh*, Christian jurisprudence is not exegetical. Compared with Islam, as many scholars note, Christianity focuses more on orthodoxy than orthopraxy, on correct doctrine rather than correct practice.[16]

The different emphasis that Islam and Christianity place on religious law is reflected in contemporary attitudes toward religious tribunals. In some Western societies, Muslim organizations have called for Islamic tribunals to resolve family and commercial disputes among consenting Muslims. According to proponents, such tribunals are necessary for Muslims in Western societies—so-called "minority" Muslims[17]—to "'live our faith to the best of our ability.'"[18] Not all "minority" Muslims agree; the proposals have created tensions within Muslim communities as well as with non-Muslims.[19] The fact that many Muslims believe that their faith requires them to resolve family

[11] *See* ESPOSITO, *supra* note 10, at 68.

[12] *See* PETERS, *supra* note 5, at 176.

[13] For an introduction to contemporary canon law, see Norman Doe, *Modern Church Law*, *in* CHRISTIANITY AND LAW: AN INTRODUCTION, *supra* note 2, at 271.

[14] For a sourcebook on Christian jurisprudence, see FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT (Oliver O'Donovan & Joan Lockwood O'Donovan eds., 1999).

[15] *See infra* text accompanying notes 145-51.

[16] ESPOSITO, *supra* note 10, at 68; RUTHVEN, *supra* note 4, at 354.

[17] *Cf.* TARIQ RAMADAN, RADICAL REFORM 31 (2009) (discussing the "'minority *fiqh*'" that some scholars have formulated for "Muslims living in a 'minority situation,' particularly in the West").

[18] Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573, 585 (2008) (quoting Interview by Rabia Mills with Syed Mumtaz Ali, President, Can. Soc'y of Muslims (Aug. 1995), *available at* http://muslim-canada.org/pfl.htm).

[19] *See, e.g.*, Abdullahi Ahmed An-Na'im, *The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law*, 73 MOD. L. REV. 1, 27–28 (2010) (arguing against Islamic arbitration). For more on some Muslims' objections to Islamic arbitration, *see infra* note 186 and accompanying text.

and commercial disputes in Islamic tribunals, however, demonstrates the importance that religious law has in contemporary Muslim life.

By contrast, a desire for religious tribunals does not loom large for contemporary Christians. True, some Christian organizations offer "Christian arbitration" services, and church tribunals resolve disputes about church structure and discipline.[20] But these phenomena differ from their Islamic counterparts. Although hard statistics are unavailable, it does not appear that many Christians wish to resolve legal questions in religious tribunals; most see civil litigation as an acceptable dispute settlement mechanism.[21] Moreover, even if Christians wished to settle their disputes under religious law, contemporary Christianity does not provide one for them to use. For example, the current Code of Canon Law of the Catholic Church belies any notion of a general Christian substantive law. "In respect to most legal matters regulated by civil law," the Code "says nothing."[22] Similarly, "Christian arbitration" tends to involve general ethical principles rather than legal doctrine.[23]

To be sure, factors beyond internal religious dynamics also help explain why contemporary Muslims and Christians value religious law differently. The Enlightenment has had a secularizing effect on Western society and made Christianity a more private phenomenon than it once was.[24] Islam may similarly evolve; indeed, some argue that the transformation already has begun. And the desire of some Western Muslims for Islamic tribunals may reflect an assertion of community identity more than religious commitment. I discuss these factors below. One should not dismiss internal religious dynamics, however. Comparatively speaking, law figures more prominently in the life of Islam than Christianity, and this difference surely influences how Muslims and Christians view religious tribunals today.

Before going further, I should clarify the way I use three important terms. By "Islam," I mean the classical Sunni tradition. Some

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[20] On Christian arbitration, see Michael C. Grossman, Note, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 177–78 (2007). For a recent case enforcing a Christian arbitration agreement, see Easterly v. Heritage Christian Sch., No. 1:08-CV-1714-WTL-TAB, 2009 WL 2750099 (S.D. Ind. Aug. 26, 2009).

[21] *See* Thomas J. Paprocki, *Methods of Avoiding Trials*, *in* NEW COMMENTARY ON THE CODE OF CANON LAW 1803, 1803–04 (John P. Beal et al. eds., 2000).

[22] John M. Huels, *Introduction*, *in* NEW COMMENTARY ON THE CODE OF CANON LAW, *supra* note 21, at 47, 85.

[23] *See infra* text accompanying notes 189-94.

[24] *See* MARK LILLA, THE STILLBORN GOD 57–58 (2007).

may quarrel with this decision. To focus on classical Sunni Islam is to exclude other important currents like Shia Islam and Sufi mysticism. Moreover, some commentators maintain that the classical model is "too theoretical" to justify scholarly emphasis.[25] For example, Haider Hamoudi cautions that, by focusing on classical Islam, one risks becoming an expert in an abstraction that has little to do with how law actually operates in Muslim countries.[26] And some contemporary Muslims are rethinking the classical model and developing new ways of following Islam in the Western world.[27]

Notwithstanding these criticisms, a focus on classical Sunni Islam seems justified. Roughly ninety percent of contemporary Muslims are Sunni,[28] and classical Sunni Islam remains the overwhelming focus of mainstream Islamic law scholarship.[29] Scholars like Hamoudi may be correct when they advocate change in Islamic legal scholarship, but, for an outsider seeking to engage the material, the mainstream position seems a safe place to begin. Moreover, "a substantial number of Muslims derive, and for the foreseeable future will continue to derive, their normative understandings of Islam from historical conceptions of Islamic orthodoxy."[30] Classical Islam thus represents an important empirical phenomenon that scholars must engage if they wish to understand the background for contemporary Muslim thought.

Like Islam, "Christianity" encompasses different traditions. The Catholic view of law differs from the Protestant and the Orthodox. Moreover, Christian traditions have adopted different positions at different times; one cannot reduce millennia of reflection to a single formula. One must start somewhere, though. When I discuss Christianity, I mean what some scholars call the "great tradition," defined by the Bible, the apostolic tradition, and the first ecumenical councils.[31] Most mainstream Christians accept the legitimacy of these

[25] Mohammad Fadel, *Islamic Politics and Secular Politics: Can They Co-Exist?*, 25 J.L. & RELIGION 187, 190 (2009) (discussing this criticism).

[26] *See* Hamoudi, supra note 2, at 83–84.

[27] *See infra* text accompanying notes 198–212.

[28] *See* PEW FORUM ON RELIGION & PUBLIC LIFE, MAPPING THE GLOBAL MUSLIM POPULATION: A REPORT ON THE SIZE AND DISTRIBUTION OF THE WORLD'S MUSLIM POPULATION 1 (2009), *available at* http://www.pewforum.org/uploadedfiles/Orphan_Migrated_Content/Muslimpopulation.pdf.

[29] *See* Hamoudi, *supra* note 2, at 83–84.

[30] Fadel, *supra* note 25, at 190 (stating author's assumption).

[31] *See* James S. Cutsinger, *Introduction: Finding the Center*, *in* RECLAIMING THE GREAT TRADITION: EVANGELICALS, CATHOLICS & ORTHODOX IN DIALOGUE 7, 7–10 (James S. Cutsinger ed., 1997); *see also* J.I. Packer, *On from Orr: Cultural Crisis, Rational Realism*

sources, even if they disagree about particulars. As Witte and Alexander observe, "there is more confluence than conflict in Catholic, Protestant, and Orthodox understandings of law," particularly if one takes the "long and responsible historical perspective."[32]

"Law," too, is a vague term that covers many discrete concepts relevant here, including canon, divine, Islamic, Jewish, and natural law. I cannot treat these categories in detail, nor, I think, is it necessary to do so. I will distinguish among them where important to avoid confusion. The key point is this: When I say that Islam values law in a way Christianity does not, I mean that Islam has thought it vital to develop a comprehensive legal system to guide believers' daily lives. Classical *fiqh* covers topics most readers would think of as spiritual, like prayer and fasting, as well as those most readers would think of as temporal, like commerce and inheritance.[33] Apart from medieval Catholicism, perhaps, Christianity has never had such a system, and no Christian tradition has one today.

One sort of law that I will not discuss much here is state law. Islam and Christianity both have reflected on state law and the stance that believers should take toward it. I leave that important and complicated subject for another occasion. My interest here is law in religion, not religion in law. I address how law figures in the relationship between believers and God, not between believers and the political authorities.

Finally, I should note that my interest relates to Islam and Christianity as empirical phenomena. They also represent much more than that. I do not, however, address the religions' truth claims here, nor do I attempt to evaluate their respective approaches to law. I attempt instead to offer tentative views on a difference that lurks in the background of Muslim-Christian interactions, one that already has contributed to controversy in two Western democracies. Before Muslims and Christians can negotiate this difference, they must understand it. I hope this Essay contributes to that important endeavor and to the growing body of work in comparative religious law.

& Incarnational Ontology, *in* RECLAIMING THE GREAT TRADITION: EVANGELICALS, CATHOLICS & ORTHODOX IN DIALOGUE, *supra*, at 154, 156–57 (describing content of "the great tradition of Christian faith and life").

[32] John Witte Jr. & Frank S. Alexander, *Introduction* to 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, *supra* note 2, at xxi, xxxv.

[33] *See* KAMALI, *supra* note 9, at 42.

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As Tariq Ramadan observes, "[t]he first and most important element of Muslim identity is faith."[34] The Muslim is one who believes and puts his trust in God, who submits to God's will, as God has revealed that will in the witness of the Prophet Muhammad.[35] Unlike Christianity, however, Islam has not attempted to express its faith by reflecting systematically on God's nature.[36] Islam has focused most of its intellectual energy on jurisprudence, an attempt to understand God's will, not His nature, and to actualize that will in a system of law.[37]

Islam teaches that God revealed His final law for humanity—the Sharia, a word which in Arabic means "way to the watering-place"[38]—in two sources. The Quran, or "Recitation," is a collection of roughly 6200 verses (*ayat*) that Muslims believe God communicated to Muhammad, through the intercession of the angel Gabriel, over a span of roughly two decades beginning in the year 610.[39] The revelations came during two discrete periods in Muhammad's life, the first in Mecca, where he struggled against a largely hostile political and religious establishment, and then in Medina, where he emigrated to form the new Muslim community, or *umma*.[40] The verses appear in more than 100 chapters (*sura*s), arranged in terms of length, from longest to shortest.[41] In contrast to Christians, who see the Bible as divinely inspired, Muslims believe that the Quran is literally the word of God, an inimitable miracle, "perfect, eternal, and unchangeable."[42]

Less than ten percent of the Quran concerns law.[43] Yet, as Hallaq observes, the legal *ayat* "represent a larger weight than [their]

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[34] TARIQ RAMADAN, WESTERN MUSLIMS AND THE FUTURE OF ISLAM 79 (2004) (emphasis omitted); *see also* KAMALI, *supra* note 9, at 5 ("Islam is a faith and a moral code first and foremost; it stands on its own five pillars, and following a legal code is relative and subsidiary to the original call and message of Islam.").

[35] *See* RUTHVEN, *supra* note 4, at 108.

[36] *See* RAMADAN, *supra* note 34, at 11–12 (arguing that Islam does not have a "'theology,'" in Christian terms).

[37] *See* ESPOSITO, *supra* note 10, at 68–69.

[38] KAMALI, *supra* note 9, at 2.

[39] *See* KAMALI, *supra* note 3, at 16–17; PETERS, *supra* note 5, at 99, 101.

[40] On Meccan and Medinan *sura*s, see PETERS, *supra* note 5, at 99. On the founding of the *umma* in Medina, see *id.* at 128.

[41] KAMALI, *supra* note 3, at 17.

[42] ESPOSITO, *supra* note 10, at 19.

[43] KAMALI, *supra* note 3, at 25.

number may indicate."[44] Unlike the nonlegal verses, the legal verses tend not to repeat, and their average length is two or three times that of the nonlegal verses.[45] Thus, while one should not perceive the Quran as a code, its legal elements are quite important. The Quran prescribes rules regarding both worship (*ibadat*) and "civil transactions" (*mu'amalat*).[46] The latter category covers many subjects that contemporary Western readers would think of as secular, like family law, including "marriage, divorce, paternity, custody of children, maintenance, inheritance and bequests"; "commercial transactions, such as sale, lease, loan, and mortgage"; and "crimes . . . such as murder, highway robbery, theft, adultery, and slanderous accusation."[47]

The Sharia's second source is the Sunna, or practices of the Prophet—his words and deeds, the judgments he rendered, the conduct he allowed and the conduct he forbade.[48] The Sunna appears in "tradition reports," or *hadith*s, that recount episodes in the Prophet's life.[49] Many such reports circulated after Muhammad's death in 632; in the ninth and tenth centuries, Muslim scholars sifted and compiled them into authoritative versions.[50] Unlike in the Quran, legal materials predominate.[51] Although it binds believers, the Sunna must be read consistently with the Quran, and, in case of clear conflict, the latter controls.[52]

Because it often speaks in general terms, especially with respect to *mu'amalat*, the Sharia does not always provide believers clear guidance.[53] *Fiqh* evolved as a way to make the Sharia operational. The systematization "took place in the second and third centuries of Islam," starting around 750.[54] The *ulama* derived *fiqh* through an exegetical

[44] WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 21 (2005).

[45] *Id.*

[46] *See* KAMALI, *supra* note 3, at 26 (discussing Quranic rules); KAMALI, *supra* note 9, at 17 (defining these terms).

[47] KAMALI, *supra* note 9, at 19.

[48] *See* ESPOSITO, *supra* note 10, at 80.

[49] *See id.* Scholars often use the terms Sunna and *hadith* interchangeably. *See* KAMALI, *supra* note 3, at 61–62.

[50] ESPOSITO, *supra* note 10, at 80–81.

[51] *See* KNUT VIKØR, BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW 45 (2005).

[52] KAMALI, *supra* note 3, at 79.

[53] *See* KAMALI, *supra* note 9, at 50.

[54] AN-NA'IM, *supra* note 2, at 14.

process called *ijtihad*, a word that means "striving or exertion."[55] Faced with a situation the Sharia did not expressly cover, the jurists would search for a similar case and determine its "cause," or *'illa*.[56] Having done so, they would see whether the *'illa* could extend by analogy—*qiyas*—to the new case.[57] For someone trained in common law reasoning, this process is very familiar: one discovers the *ratio decendi* of a case and determines whether it applies in new circumstances.[58]

Ijtihad is quintessentially a religious exercise, a way of relating to the divine.[59] The Legislator, in Islamic legal theory, is God; the jurist simply seeks, as best he can, to infer God's will from revelation.[60] Islam does not admit the concept of natural law in the Christian sense.[61] Early on, the *ulama* rejected the idea that human beings could discern good and evil, and thus the requirements of God's law, through speculative reason.[62] That view, associated with a ninth-century school known as the Mutazalites, seemed to impinge on God's sovereignty.[63] Mainstream *fiqh* adopted the position of the Mutazalites' opponents, the Asharites, who argued that God's will, not human reason, determines what is good or bad, lawful or unlawful.[64] Thus, while reason plays an important role in Islamic law, its purpose remains circumscribed. The jurist who engages in *ijtihad* does not seek principally the rule that seems to him most beneficial or just.[65] He does not even attempt to understand the ultimate intent of God,

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[55] KAMALI, *supra* note 9, at 162; *see also* PETERS, *supra* note 5, at 180–81 ("'personal initiative'").

[56] BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW 67 (1998).

[57] For an excellent discussion of this process, see KAMALI, *supra* note 3, at 264–305.

[58] *See* Wael B. Hallaq, *Legal Reasoning in Islamic Law and the Common Law: Logic and Method*, 34 CLEV. ST. L. REV. 79, 86 (1985–86).

[59] *Cf.* AN-NA'IM, *supra* note 2, at 15 ("The essentially religious nature of Shari'a and its focus on regulating the relationship between God and human believers mean that believers can neither abdicate nor delegate their responsibility [for *ijtihad*].").

[60] *See* KAMALI, *supra* note 3, at 440–41.

[61] *See* RÉMI BRAGUE, THE LAW OF GOD 160 (Lydia G. Cochrane trans., 2007); RUTHVEN, *supra* note 4, at 149–51.

[62] This is not to say that Islam rejects speculative reason entirely. *See infra* text accompanying note158.

[63] *See* RUTHVEN, *supra* note 4, at 149.

[64] *See id.*; BRAGUE, *supra* note 61, at 165–67. *See generally* KAMALI, *supra* note 3, at 441–45 (discussing three different views that *ulama* have held regarding reason and revelation).

[65] *See* WEISS, *supra* note 56, at 37.

which remains unknowable.[66] Rather, he seeks to discover, through reason, the rule that the Lawgiver has commanded.[67]

The *ulama* recognized that jurists conducting *ijtihad* could reach different conclusions. Over time, though, jurists might be able to reach consensus, or *ijma*, on a point of *fiqh*.[68] Once formed, consensus precluded further *ijtihad*.[69] Indeed, "[b]y the beginning of the tenth century," the *ulama* had concluded that *ijma* had been reached on all the essential points of *fiqh*.[70] The "door of *ijtihad*" had closed; from then on, jurists were not to derive new rules, but simply "study the established legal manuals and write their commentaries."[71] To do otherwise would be to engage in unjustified innovation (*bida*), an accusation "equivalent to the charge of heresy in Christianity."[72] Not all *ulama* have agreed, then or now, but "the closing of the door" remains a powerful concept in mainstream Islam.[73]

One should not see *fiqh* as "monolithic," however.[74] Islam has had various schools of jurisprudence (*madhab*s) over the course of its history, four of which remain today in Sunni Islam: the Hanafi, Shafi'i, Maliki, and Hanbali *madhab*s, all named for the jurists who founded them.[75] Traditionally, they have dominated in different geographical regions.[76] The *madhab*s disagree on some substantive and methodological questions, including the correct interpretation of parts of the Sharia and the proper role of reason, judicial preference (*istihsan*), and public interest (*istislah*) in legal analysis.[77] In

[66] *See* BRAGUE, *supra* note 61, at 183-84 (discussing work of Ghazali).

[67] *See* KAMALI, *supra* note 3, at 440–41.

[68] *See* ESPOSITO, *supra* note 10, at 82–83.

[69] *See* DAVID WAINES, AN INTRODUCTION TO ISLAM 83 (2d ed. 2003).

[70] KAMALI, supra note 9, at 94.

[71] ESPOSITO, *supra* note 10, at 84; *see also* RUTHVEN, *supra* note 4, at 142–44.

[72] ESPOSITO, *supra* note 10, at 84; *see also* JONATHAN P. BERKEY, THE FORMATION OF ISLAM: RELIGION AND SOCIETY IN THE NEAR EAST, 600–1800, at 147 (2003) ("To go against the consensus was, in a very real sense, to step outside the tradition, to become in fact a heretic.").

[73] *See* ESPOSITO, *supra* note 10, at 226–29 (discussing Muslim traditionalism); KAMALI, *supra* note 3, at 490 ("With the exception of the Hanbalis, who maintain that *ijtihad* in all of its forms remains open, the *ulama* of the other three schools have on the whole acceded to the view that independent *ijtihad* has discontinued."). For a recent call for "a second era of *ijtihad*," see Khan, *supra* note 2.

[74] KAMALI, *supra* note 9, at 92.

[75] *See* WAINES, *supra* note 69, at 65–71; Stilt, *supra* note 2, at 721.

[76] KAMALI, *supra* note 9, at 73 (contrasting regional distribution of Hanafi and Maliki *madhab*s).

[77] *Id.* at 93–94.

principle, though, each Sunni school accepts the others as legitimate, and Muslims need not adhere exclusively to any *madhab*. Nowadays, "[a] Muslim may join any orthodox school he or she wishes, or change from one school to another, without formalities."[78]

Law has had a more ambivalent place in Christianity. Christianity started as a movement within Judaism; the Gospels record that Jesus was a rabbi, a teacher of Jewish law, or Torah.[79] Very early, though, in apostolic times, Christianity rejected what it saw as Judaism's legalism, especially the style of close legal reasoning that characterized the Pharisaic tradition that was becoming Judaism's dominant expression.[80] The Gospels portray Jesus as denouncing religious lawyers for focusing on technicalities and neglecting "the weightier matters of the law: justice and mercy and faith."[81] In particular, Christians rejected what they characterized as ceremonial practices, such as dietary rules and circumcision.[82] The Pauline epistles portray such rules as distracting from the more spiritual worship God desires.[83]

Christianity did not reject law entirely, though. The early Christians drew a distinction between the ceremonial aspects of Torah and what they perceived as its moral content—the Ten Commandments, for example.[84] The moral law survived; in fact, Paul argued, it was accessible to human reason as a kind of natural law.[85] Christians taught that the moral law had achieved perfection in Christ's example of piety and sacrifice, in the values He had proclaimed in the Sermon on the Mount, particularly the Beatitudes ("Blessed are those who hunger and thirst for righteousness, for they will be filled. Blessed are the merciful, for they will receive mercy.").[86] This is what the ear-

[78] *Id.* at 94; Stilt, *supra* note 2, at 721 ("Historically, school affiliation among Sunnis was more important than it tends to be today.").

[79] *See, e.g.*, *John* 1:38; *see also* Luke Timothy Johnson, *Law in Early Christianity*, *in* CHRISTIANITY AND LAW: AN INTRODUCTION, *supra* note 2, at 53, 57.

[80] *See* Johnson, *supra* note 79, at 56 (discussing ascendance of Pharisaic Judaism after 70 A.D.).

[81] *Matthew* 23:23.

[82] *See* Johnson, *supra* note 79, at 63.

[83] *See, e.g.*, *Galatians* 5:6; *Romans* 14:1–6.

[84] *See* Johnson, *supra* note 79, at 63.

[85] *See* Brian Tierney, *Natural Law and Natural Rights*, *in* CHRISTIANITY AND LAW: AN INTRODUCTION, *supra* note 2, at 89, 91 (discussing *Romans* 2).

[86] *Matthew* 5:6–7; *see also* CATECHISM OF THE CATHOLIC CHURCH § 1965, at 477 (1994) ("The New Law or the Law of the Gospel is the perfection here on earth of the divine law, natural and revealed. It is the work of Christ and is expressed particularly in the Sermon on the Mount.").

ly Christians meant when they said that Christ had come to fulfill the law,[87] that Christ constituted the law's end, or *telos*.[88] Christ had revealed Torah's inner dimension; if they believed in Him, Christ would give his followers grace to follow His "new commandment" to "love one another."[89] "[T]he one who loves another," Paul wrote, "has fulfilled the law."[90]

Now, "love one another" does not provide much practical legal guidance.[91] The early Christians recognized this fact but apparently did not think such guidance important. They believed that the temporal world was quickly passing away; the point was not to achieve justice on earth but to prepare for eternity, which would arrive very soon.[92] Thus, where the Quran announces detailed rules about inheritance,[93] the Gospels recount that Jesus declined to resolve an inheritance dispute for one of his followers.[94] Dividing an estate correctly was not important, but the condition of one's soul, which God would soon judge. Paul reprimanded early Christians for bringing lawsuits against one another, particularly in Roman courts where pagan judges presided. Christians should resolve disputes among themselves. Indeed, why were Christians demanding their legal rights at all? "Why not rather be wronged?" Paul asked.[95] "Why not rather be defrauded?"[96]

As the apostolic age ended, and Christians realized that they were not living in the last generation but would need some sort of temporal arrangements, they started to engage law in a more serious way.[97] Practically, they began to formulate canons—the word comes

[87] *See Matthew* 5:17.

[88] *Romans* 10:4; *see also* Johnson, *supra* note 79, at 63.

[89] *John* 13:34.

[90] *Romans* 13:8.

[91] *See* Johnson, *supra* note 79, at 63–64.

[92] *Cf.* HANS KÜNG, ISLAM: PAST, PRESENT & FUTURE 581–83 (John Bowden trans., 2007) ("The original Christian community . . . lived in expectation of the imminent return of the Lord . . . and consequently were uninterested in establishing structures of worldly power.").

[93] THE MEANING OF THE HOLY QUR'AN 4:11-14, at 186-88 ('Abdullah Yusuf 'Ali trans., 11th ed. 2004).

[94] *Luke* 12:13–15.

[95] 1 *Corinthians* 6:7.

[96] *Id.*

[97] *See* Ladislas M. Örsy, *Theology and Canon Law*, *in* NEW COMMENTARY ON THE CODE OF CANON LAW, *supra* note 21, at 1, 7 (noting that early Christian assemblies realized that "they had to create ordered structures and converging operations if they wanted to exist at all").

from the Greek for "straight rod'" or "measuring stick"—regarding church structure and discipline.[98] The canons developed episodically; they tended to be brief and ad hoc.[99] Christians collected them in informal handbooks like the first century *Didache*, "which established rules governing the liturgy, the sacraments and lay practices such as fasting."[100] For centuries, various unofficial collections circulated throughout the Christian world.[101] Christians did not regard any of these collections as complete or universally applicable; Christians evidently did not think they required such a collection.[102] Indeed, the first serious attempt to systematize the canons occurred relatively late, during the so-called Papal Revolution (1050–1200), roughly one thousand years after Christianity's founding.[103]

Virtually all Christian traditions have some form of canon law, but they value it differently.[104] Catholicism has been most enthusiastic. Medieval Catholicism, in particular, developed a reticulated canon law system that extended beyond worship and church discipline to cover social relations. So, for example, there was a medieval canon law of crimes, contracts, inheritance, property, and torts, all of which derived, in theory, from the church's authority over the sacraments.[105] Medieval Catholicism also professionalized the ecclesiastical courts. These courts had existed since late antiquity; in the fifth century, Augustine had bemoaned the time his judicial tasks took away from his other episcopal responsibilities.[106] But ecclesiastical courts always had been somewhat informal.[107] The medieval Papacy regularized their

[98] HAROLD J. BERMAN, LAW AND REVOLUTION 199 (1983) ("measuring stick"); Kenneth Pennington, *The Growth of Church Law*, *in* 2 THE CAMBRIDGE HISTORY OF CHRISTIANITY 386, 390 (Augustine Casiday & Frederick W. Norris eds., 2007) ("straight rod").

[99] *See* R.H. Helmholz, *Western Canon Law*, *in* CHRISTIANITY AND LAW: AN INTRODUCTION, *supra* note 2, at 71, 72–73; Johnson, *supra* note 79, at 64.

[100] Pennington, *supra* note 98, at 387.

[101] *See* R.C. MORTIMER, WESTERN CANON LAW 12–15 (1953).

[102] *See* BERMAN, *supra* note 98, at 199–200; Helmholz, *supra* note 99, at 73–74.

[103] *See* BERMAN, *supra* note 98, at 115–19, 202.

[104] *See* Helmholz, *supra* note 99, at 72.

[105] BERMAN, *supra* note 98, at 225; John Witte, Jr., *Introduction* to CHRISTIANITY AND LAW: AN INTRODUCTION, *supra* note 2, at 1, 10–11.

[106] *See* John C. Lamoreaux, *Episcopal Courts in Late Antiquity*, 3 J. EARLY CHRISTIAN STUD. 143, 144–46 (1995); Noel E. Lenski, *Evidence for the* Audientia episcopalis *in the New Letters of Augustine*, *in* LAW, SOCIETY, AND AUTHORITY IN LATE ANTIQUITY 83, 93 (Ralph W. Mathisen ed., 2001).

[107] *See* Helmholz, *supra* note 99, at 74.

operation and theorized their jurisdiction as part of a new "constitutional" order of the church.[108]

Other Christian traditions have been less positive about canon law. Protestants have been the most suspicious. As Witte explains, the Reformers believed that "medieval Catholic canon law obstructed the individual's relationship with God and obscured simple biblical norms for right living."[109] Luther burned canon law books,[110] and Protestant countries gradually transferred the jurisdiction of ecclesiastical authorities to state officials.[111] Protestants did not abolish canon law entirely, however, and most denominations continue to employ some form today.[112] Orthodoxy has canons, but it views them more as "pastoral texts" than "juridical norms," guides to handling specific spiritual problems, not prescriptions for conduct.[113] It allows "ample scope" for "economy," the relaxing of canons in particular cases in order to further a person's spiritual development.[114] Orthodoxy has never produced a universal code of canons.[115] While some contemporary Orthodox writers favor codification, others argue that it would contradict Orthodoxy's mystical essence.[116]

Christianity also has engaged law philosophically, as a matter of jurisprudence. Over centuries, it has developed subtle and varied typologies of law. The Church Fathers taught that there were three kinds of law: natural law, accessible to human reason; Mosaic Law, contained in the Old Testament; and the law of Christ, revealed in the Gospels.[117] In the ninth century, Nestorian Christians came up with a slightly different taxonomy: the divine law of Christ, "beyond reason and nature"; the "law of nature, based on reason, innate in man's mind"; and the satanic "law of violence," which opposed both

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[108] *See* BERMAN, *supra* note 98, at 221–24, 530.

[109] Witte, *supra* note 105, at 16.

[110] *Id.*; *see* Helmholz, *supra* note 99, at 83.

[111] *See* HAROLD J. BERMAN, LAW AND REVOLUTION, II, at 6 (2003); Witte, *supra* note 105, at 16.

[112] *Cf.* Doe, *supra* note 13, at 271 (mentioning Protestant churches that have canon law).

[113] LEWIS J. PATSAVOS, SPIRITUAL DIMENSIONS OF THE HOLY CANONS 21–22 (2003).

[114] Doe, *supra* note 13, at 285; *see* PATSAVOS, *supra* note 113, at 12–13.

[115] *See* Paul Valliere, *Introduction to the Modern Orthodox Tradition*, *in* 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, *supra* note 2, at 503, 518.

[116] *See* PATSAVOS, *supra* note 113, at 8–9.

[117] *See* BRAGUE, *supra* note 61, at 212.

God and nature.[118] Christian legal theorists have argued for centuries about the overlap among the different categories as well as the respective roles of reason and revelation in discovering them.[119]

As with canon law, Christian traditions have valued jurisprudence differently. Western Christianity has been more enthusiastic, with Catholicism showing the most interest in systematic legal philosophy.[120] Aquinas provides the best example; with the rise of neo-Thomism since the nineteenth century, systematic legal thought has experienced a renaissance in Catholic circles.[121] Protestantism has viewed jurisprudence somewhat more skeptically, but it has made important contributions too.[122] For example, Melanchthon developed an influential theory of law's "three uses"—promoting "external . . . morality," revealing God's wrath against sin and sinner, and educating the faithful[123]—which his contemporary, Calvin, adopted in his own *Institutes*.[124] More recent Protestant jurisprudential thinkers include Barth, Kuyper, and Niebuhr.[125] Of the three main traditions, Orthodoxy has had the least interest in systematic jurisprudence, reflecting, perhaps, its suspicion of scholasticism and greater stress on mystical apprehension of divine reality.[126]

Fiqh and canon law are subtle and complex subjects, and space has allowed only a brief discussion here. This overview, however, allows one to make some observations about the place law has in Islam

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[118] *See* Anton Tien, *The Apology of Al-Kindi*, *in* THE EARLY CHRISTIAN-MUSLIM DIALOGUE 381, 449 (N.A. Newman ed., 1993). For more on Nestorian jurisprudence, see BRAGUE, *supra* note 61, at 214.

[119] *See, e.g.*, Angela C. Carmella, *A Catholic View of Law and Justice*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 2, at 255, 261–62 (contrasting Catholic and Protestant thought); Tierney, *supra* note 85, at 91 (noting tensions in Christian conceptions of natural law).

[120] *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH, *supra* note 86, §§ 1949–1986, at 473–81.

[121] For a good introduction to Aquinas, see ST. THOMAS AQUINAS: THE TREATISE ON LAW (R.J. Henle ed. & trans., 1993). For a good introduction to neo-Thomism, see Russell Hittinger, *Introduction to Modern Catholicism*, *in* 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, *supra* note 2, at 3.

[122] *See, e.g.*, BERMAN, *supra* note 111, at 6–10 (discussing Lutheran and Calvinist jurisprudence).

[123] FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT, *supra* note 14, at 651.

[124] *See id.* at 664.

[125] *See* Mark A. Noll, *Introduction to Modern Protestantism*, *in* 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, *supra* note 2, at 261, 282.

[126] *See* Valliere, *supra* note 115, at 506 (discussing but qualifying this observation).

and Christianity. First, the historical development of Islamic law differs greatly from the analogous process in Christianity. Recall that the *ulama* began to systematize *fiqh* quite early; the process was basically complete within two or three centuries of the Prophet, when the *ulama* decided that the "door of *ijtihad*" had closed.[127] By contrast, Christianity existed for one thousand years before any Christians—and only Christians in the West—thought to assemble the canons into a comprehensive and universally applicable collection.[128] This difference alone suggests how much more important legal system building has been to the Muslim, as opposed to the Christian, religious experience.

Second, *fiqh* and canon law have dramatically different scopes. Classical *fiqh* covers "almost every conceivable arena of social life,"[129] including how to comport and groom oneself, how to pray, what to eat, how to conduct business and make contracts, how to buy and sell real property, whom to marry, how to divorce, and how to divide one's estate.[130] Indeed, because *fiqh*'s scope is so extensive, in the classical conception, "all" practicing "Muslims need[] . . . at least some rudimentary understanding of it."[131] Muslims can gain this understanding on their own, but the more typical method is to consult a member of the *ulama* for a legal opinion, or *fatwa*. A *fatwa* does not bind (or excuse) a believer,[132] but it can be influential, particularly if the issuing jurist has a reputation for insight and integrity. The *ulama* thus function as Islam's clergy; as in Judaism, religious lawyers are the authorities to whom the community turns for guidance in daily life.[133]

Canon law, by contrast, has a much more limited compass.[134] It deals overwhelmingly with matters of church administration rather than personal behavior and moral judgment.[135] As a result, most Christians have comparatively little contact with it in their daily lives.

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[127] *See supra* text accompanying notes 70–73.

[128] *See supra* text accompanying note 103.

[129] BERKEY, *supra* note 72, at 143.

[130] *See, e.g.*, *id.* (discussing topics covered by classical *fiqh*); KAMALI, *supra* note 9 (same).

[131] BERKEY, *supra* note 72, at 143. Some contemporary Muslim scholars argue that much of classical *fiqh* should be rethought. *See infra* text accompanying notes 198–212.

[132] *See* AN-NA'IM, *supra* note 2, at 16.

[133] *See* PETERS, *supra* note 5, at 176–77.

[134] *See* BRAGUE, *supra* note 61, at 145.

[135] *See* JAMES A. CORIDEN, AN INTRODUCTION TO CANON LAW 4 (rev. ed. 2004).

As I have explained, medieval Catholicism apparently *did* have a comprehensive body of canon law.[136] One should not exaggerate, however, the degree to which medieval system building represents something central in Christian thought.[137] Even at the time, important voices protested. Around 1150, for example, Bernard of Clairvaux warned Pope Eugenius not to pay attention to the lawsuits clogging the papal courts.[138] "[I]t is unworthy for you to be involved in such affairs," he wrote, "since you are occupied by more important"—that is, spiritual—"matters."[139] And, as I have explained, Protestant and Orthodox Christians never shared medieval Catholicism's enthusiasm for canon law.

Moreover, notwithstanding the medieval situation, contemporary Catholicism shows little interest in legal system building. The current Code of Canon Law, adopted in 1983, eschews any notion of a general Christian substantive law. The largest sections deal with questions of worship and discipline, such as the ordination and rank of clergy and the reception of sacraments.[140] "In respect to most legal matters regulated by civil law," the current Code "says nothing."[141] Indeed, the Code frequently adopts civil law by reference in a process called canonization.[142] As long as civil law doctrines do not violate principles of "divine law"—the law drawn directly from revelation or natural law—the Code typically defers to them in areas like contracts, employment, inheritance, and torts.[143] Augustine would be pleased: Church trials nowadays are reserved "almost exclusively for marriage annulment cases," Christians having decided that Paul's admonition against secular litigation no longer applies.[144]

Third, the functions of classical *fiqh* and canon law differ greatly. *Fiqh* operates as a crucial link between Muslims and God. Recall that

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[136] *See supra* text accompanying notes 105–108.

[137] *Cf.* Helmholz, *supra* note 99, at 71–72 (discussing continuing controversy over canon law in Christian history).

[138] FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT, *supra* note 14, at 269.

[139] *Id.* at 270–71; *see also* BERMAN, *supra* note 98, at 196 (discussing Bernard's views regarding the papal courts).

[140] CORIDEN, *supra* note 135, at 42.

[141] Huels, *supra* note 22, at 85.

[142] *See* 1983 CODE c.22 (Canon Law) ("Civil laws to which the law of the Church defers should be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless it is provided otherwise in canon law.").

[143] On the definition of "divine law," see CORIDEN, *supra* note 135, at 36.

[144] Paprocki, *supra* note 21, at 1803; *see* CORIDEN, *supra* note 135, at 194.

the goal of classical *ijtihad* is to ascertain the will of the Legislator, that is, God.[145] The *ulama* reason out what God has ordained; in the final analysis, believers comply because God commands it.[146] Canon law, by contrast, has an auxiliary function. In John Coughlin's phrase, canon law "point[s] beyond itself";[147] it works indirectly, by supporting other aspects of Christian life.[148] For example, by creating an orderly internal structure, canon law allows the church to administer the sacraments and accomplish its evangelical mission.[149] Similarly, canon law educates believers and aids their spiritual growth.[150] In short, canon law is facilitative, not constitutive, of the believer's relationship with God. Canon law honors God,[151] but it does not respond, the way *fiqh* does, to a divine command.

Fourth, canon law has a contingent quality that classical *fiqh* lacks. Because canon law exists to help the church on earth to achieve its mission, and because the church on earth remains subject to time and circumstance, canon law must have the capacity to adapt.[152] This does not mean that canon law is entirely malleable; the belief that divine law does not change places a limit on canon law's elasticity.[153] "The vast majority of canons" do not embody divine law, however, and can evolve.[154] For example, rules on clerical celibacy in the Catholic Church have varied from time to time and place to place. Before the medieval Papal Revolution, parish priests in the Latin rite could marry; afterwards, they could not.[155] In Eastern rites, parish priests may still marry.[156] This capacity for change distinguish-

[145] *See supra* text accompanying notes 59–60.

[146] *See supra* text accompanying notes 59–67.

[147] John J. Coughlin, *Canon Law and the Human Person*, 19 J.L. & RELIGION 1, 47 (2003).

[148] *See* CORIDEN, *supra* note 135, at 5–6 (describing functions of canon law).

[149] *See* Örsy, *supra* note 97, at 2–3.

[150] *See* PATSAVOS, *supra* note 113, at 4–5, 21; Doe, *supra* note 13, at 281.

[151] See Örsy, *supra* note 97, at 3 ("When the people intelligently and freely give themselves to [Christ's] Church and observe its laws, they honor him.").

[152] *See id.* at 2; *cf.* BERMAN, *supra* note 98, at 202–03 (discussing Western canon law's understanding of law as evolving).

[153] *See* Huels, supra note 22, at 56 ("Divine laws, given by God, are unchangeable by human beings."). Canons that seek to embody divine law may be somewhat contingent, however. Örsy, *supra* note 97, at 2.

[154] CORIDEN, *supra* note 135, at 36.

[155] *See* BERMAN, *supra* note 98, at 95. For the current rule on clerical celibacy, see 1983 CODE c.277 § 1 (Canon Law).

[156] *See* John E. Lynch, *The Obligations and Rights of Clerics*, *in* NEW COMMENTARY ON THE CODE OF CANON LAW, *supra* note 21, at 343, 356 n.68.

es canon law from *fiqh*, which—in the classical conception, at least—achieved perfection many centuries ago and cannot develop further.

Finally, Islamic and Christian jurisprudence differ in basic orientation. *Fiqh* is an exegetical exercise, an attempt to deduce concrete rules from scriptural sources.[157] It generally does not concern itself with defining the nature of justice or the human responsibility for moral reasoning. Islam does not lack interest in such questions, but it has tended to channel them to a different discipline called *kalam*, or "discourse," a fascinating subject I lack space to address.[158] Christian jurisprudence, by contrast, is not exegetical. It is a kind of speculative legal philosophy, addressing the interplay between reason and faith and the capacity to apprehend the moral law without special revelation.[159] Christianity's interest in speculative legal reasoning dates from the religion's formative period.[160] The Pauline epistles, the earliest Christian scriptures, themselves speak of natural law, a set of moral principles "written on [the] hearts" of all people, even "Gentiles."[161] Historian Patricia Crone nicely captures the distinction between the Islamic and Christian approaches in discussing how the two religions would address the use of religious images, or icons. "[I]n the legal culture of Islam," she writes, the question would be, "'when precisely are images permitted?'"[162] In the more "philosophical culture of Christianity," by contrast, the question would be, "'what precisely is the nature of an image?'"[163]

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The different emphasis on religious law is reflected in contemporary Muslim and Christian attitudes toward religious tribunals. In countries where they constitute minority communities, some influential Muslim organizations have sought to establish Islamic law tribunals to resolve family and commercial disputes among consenting Mus-

[157] *Cf.* BRAGUE, *supra* note 61, at 145 (noting that canon law "does not put into operation an exegetical method comparable to" Islamic law).

[158] *See* ESPOSITO, *supra* note 10, at 69; WEISS, *supra* note 56, at 25–30. For an argument that *kalam* represents the most important discipline in Islam, see Mohammad Fadel, *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 CAN. J.L. & JURISPRUDENCE 5, 31 (2008).

[159] *See, e.g.*, Carmella, *supra* note 119, at 261–62.

[160] *See* Tierney, *supra* note 85, at 89–91.

[161] *Romans* 2:14–15.

[162] Patricia Crone, *Islam, Judeo-Christianity and Byzantine Iconoclasm*, 2 JERUSALEM STUDIES IN ARABIC AND ISLAM 59, 83 (1980).

[163] *Id.*

lims. These organizations contend that Muslims require such tribunals, whose rulings would bind parties in civil courts, in order to practice their faith. Two recent controversies, one in Canada and the other in Great Britain, illustrate the phenomenon.

In 2003, the Canadian Society of Muslims announced its intention to establish a Muslim Court of Arbitration in Ontario to resolve family disputes.[164] The Society planned to operate the tribunal under Ontario's Arbitration Act, which allows binding family-law arbitration.[165] The tribunal was to resolve only those disputes that Muslims voluntarily referred to it and decide cases according to "Muslim Personal/Family Law."[166] Such a tribunal was necessary, the Society explained, because Canadian Muslims "live in a non-Muslim country which subjects us to laws which, for the most part, do not allow us to live our faith to the best of our ability."[167]

News of the tribunal sparked immediate resistance, with most opponents expressing concern about the potential oppression of women.[168] The outcry did not diminish when a government report recommended allowing Islamic family law arbitration, with some safeguards.[169] The report explained that religious organizations, including at least one Muslim group, had been conducting dispute settlement in Canada for years,[170] thereby helping "people of faith . . . to live . . . according to their beliefs."[171] In response to the outcry, Ontario's Premier announced a ban on all religious arbitration,[172] but the province eventually took a more nuanced position. As of 2007,

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[164] *See* Caryn Litt Wolfe, Note, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 448 (2006). For the Institute's Web site, see The Islamic Institute of Civil Justice—the Muslim Court of Arbitration, http://muslim-canada.org/DARLQADAMSHAH1.html (last visited May 19, 2010).

[165] *See* Shachar, *supra* note 18, at 577.

[166] *See* Interview by Rabia Mills with Syed Mumtaz Ali, President, Can. Soc'y of Muslims (Aug. 1995), *available at* http://muslim-canada.org/pfl.htm.

[167] *Id.*

[168] *See* MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION 48, 52 (2004), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf; *see also* Wolfe, *supra* note 164, at 448–49 (discussing this concern).

[169] BOYD, *supra* note 168, at 133. For example, the report recommended numerous steps to ensure that people's consent to religious arbitration was informed and voluntary. *Id.* at 133–42.

[170] *Id.* at 55–60.

[171] *Id.* at 63 (discussing submissions from advocates of religious arbitration).

[172] Wolfe, *supra* note 164, at 449.

Ontario had decided to allow religious organizations to arbitrate family disputes, but only under secular law.[173]

The British controversy began in 2008, when the Archbishop of Canterbury, Rowan Williams, gave an address in which he advocated a formal role for Islamic tribunals.[174] In a pluralistic society, Williams argued, a supplementary role for voluntary Islamic arbitration, particularly in family and commercial disputes, seemed unavoidable.[175] Otherwise, a "secular legal monopoly" would overwhelm citizens' religious commitments.[176] Williams emphasized that Islamic tribunals could not be allowed to deny Muslim citizens their civil rights and pointed out that Christian and Jewish tribunals traditionally had shared jurisdiction with civil courts in Britain without creating dire consequences.[177] Critics excoriated Williams,[178] but the Lord Chief Justice endorsed his position.[179] By autumn 2008, reports surfaced that the government was advising Muslim groups that civil courts could enforce Islamic arbitration awards under the English Arbitration Act.[180]

One such organization, the Muslim Arbitration Tribunal (MAT), would like to test the government's theory. MAT runs Islamic tribun-

[173] Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449, 469 & n.91 (2009).

[174] Rowan Williams, Archbishop of Canterbury, Foundation Lecture at the Royal Courts of Justice: Civil and Religious Law in England: A Religious Perspective (Feb. 7, 2008) (transcript available at http://www.archbishopofcanterbury.org/1575).

[175] *Id.*

[176] *Id.*

[177] See *id.*; *see also* Interview by Christopher Landau, BBC World at One, with Rowan Williams, Archbishop of Canterbury (Feb. 7, 2008), *available at* http://www.archbishopofcanterbury.org/1573 (discussing Orthodox Jewish tribunals).

[178] One newspaper characterized the reaction to Williams's speech as "the most serious threat to the authority of his office since he became Archbishop." Ruth Gledhill & Joanna Sugden, *Archbishop of Canterbury 'Should Resign' over Sharia Row*, TIMES ONLINE (London), Feb. 8, 2008, http://www.timesonline.co.uk/tol/news/uk/article3335026.ece.

[179] Lord Phillips, Lord Chief Justice of Eng. & Wales, Equality Before the Law 8–9 (July 3, 2008) (transcript available at http://www.matribunal.com/downloads/LCJ_speech.pdf).

[180] *See* Abul Taher, *Revealed: UK's First Official Sharia Courts*, SUNDAY TIMES (London), Sept. 14, 2008, at 2, *available at* http://www.timesonline.co.uk/tol/news/uk/crime/article4749183.ece; *cf.* David G. Green, *Introduction* to DENIS MACEOIN, SHARIA LAW OR 'ONE LAW FOR ALL?' 1, 3-4 (2009) (discussing assertion by British Government minister that "sharia rulings on family matters . . . could be given the authority of a British court").

als in London, Birmingham, and Manchester.[181] Although informal Islamic arbitration has existed in Britain for decades, the organization's Web site proclaims that it "will . . . for the first time, offer the Muslim community a real and true opportunity to settle disputes in accordance with Islamic Sacred Law with the knowledge that the outcome as determined by MAT will be binding and enforceable."[182] MAT advertises its services primarily in family disputes, but it also handles commercial, debt, inheritance, and mosque disputes.[183] MAT acknowledges that civil law binds citizens but states that Islamic law also "[has] its place in this society" as "our personal and religious law."[184] "What a great achievement it will be," its Web site proclaims, "if we can produce a result to the satisfaction of both English and Islamic law!"[185]

Some Canadian and British Muslims have vociferously opposed the creation of these Islamic arbitration regimes.[186] And it is true that the tribunals would cover only certain aspects of *fiqh*—primarily family and commercial law—not its entirety. Still, the apparent level of support for Islamic arbitration contrasts dramatically with the lack of interest contemporary Christianity shows in religious law and tribunals. Recall that ecclesiastical courts tend to be reserved nowadays for internal church matters and, in some cases, marriage annulments.[187] The vast majority of Christians would never think to use them for lay legal disputes.[188] Moreover, although some Christian organizations

[181] *See* Green, *supra* note 180, at 2–3. For the organization's Web site, see Muslim Arbitration Tribunal, http://www.matribunal.com/ (last visited May 19, 2010).

[182] Muslim Arbitration Tribunal, *supra* note 181.

[183] Muslim Arbitration Tribunal, Our Cases, http://www.matribunal.com/cases.html.

[184] Muslim Arbitration Tribunal, Values and Equalities of MAT, http://www.matribunal.com/values.html.

[185] *Id.*

[186] On Canadian Muslim opposition, see Jehan Aslam, Note, *Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship*, 38 N.Y.U. J. INT'L L. & POL. 841, 842 (2006); Wolfe, *supra* note 164, at 449. On British Muslim opposition, see Sameer Ahmed, *Recent Developments: Pluralism in British Islamic Reasoning: The Problem with Recognizing Islamic Law in the United Kingdom*, 33 YALE J. INT'L L. 491, 491, 495–96 (2008). For a recent critique of Islamic arbitration from a Muslim perspective, see An-Na'im, *supra* note 19, at 27–28.

[187] *See supra* text accompanying note 144.

[188] *Cf.* Paprocki, *supra* note 21, at 1804 (explaining that "most Christians today are more likely to sue a fellow Christian in civil court . . . than to bring an action . . . in a [church] tribunal").

do offer arbitration services, "Christian arbitration" entails a search for ethical resolutions to legal disputes, not an application of Christian law.

Peacemaker Ministries, a prominent Christian dispute-settlement organization, offers a good illustration.[189] The group was established "in 1982 by a group of pastors, lawyers, and business people who wanted to encourage and assist Christians to respond to conflict biblically."[190] In addition to informal dispute-settlement mechanisms like mediation, the group offers arbitration through its "Institute for Christian Conciliation."[191] The Institute's rules make clear that arbitrators do not resolve disputes according to some sort of Christian law. Rather, arbitrators apply secular law, subject to broad biblical principles like keeping one's word and acting justly and mercifully.[192] The rules also state that "arbitrators may grant any remedy or relief that they deem scriptural, just and equitable, and within the scope of the agreement of the parties."[193] In essence, the service that Peacemaker Ministries provides resembles what commercial arbitrators know as "ex aequo et bono" decision making—the resolution of legal disputes according to the broad equitable discretion of the arbitrator rather than formal legal analysis.[194]

I recognize that factors beyond internal religious dynamics may help explain why contemporary Muslims and Christians place a different value on religious tribunals. For decades, sociologists have discussed the "secularization theory," which holds that modernity leads inexorably to a decrease in religious commitment.[195] Perhaps this theory explains the contemporary lack of interest in Christian law.

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[189] *See* Grossman, *supra* note 20, at 177–78 (describing Peacemaker Ministries).

[190] Peacemaker Ministries, First Visit? Please Read This, http://www.peacemaker.net/site/c.aqKFLTOBIpH/b.937085/k.A1EB/First_Visit_Please_Read_This.htm (last visited May 19, 2010).

[191] Grossman, *supra* note 20, at 178.

[192] *See* Peacemaker Ministries, FAQ's Regarding Christian Conciliation: An Introduction to Christian Conciliation, http://www.peacemaker.net/site/c.aqKFLTOBIpH/b.3910013/k.93FC/FAQs_Regarding_Christian_Conciliation.htm (last visited May 19, 2010).

[193] *See* The Inst. for Christian Conciliation, Rules of Procedure, http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5378801/k.D71A/Rules_of_Procedure.htm (Rule 40(B)) (last visited June 21, 2010).

[194] *See* ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 43, 127–28 (3d ed. 1999) (discussing equitable arbitration).

[195] *See* Mark C. Modak-Truran, *Secularization, Legal Indeterminacy, and Habermas's Discourse Theory of Law*, 35 FLA. ST. U. L. REV. 73, 79–80 (2007).

That Christians today do not wish to settle disputes according to religious law may reflect more a decline in religious intensity than law's place in Christianity.[196] Islam today is approximately the same age Christianity was at the time of the Renaissance. Perhaps Muslims' religious intensity will also decrease over time, and Muslims come to see *fiqh* as less important to their daily lives. Indeed, advances in scientific knowledge and technology since the Western Enlightenment might accelerate the secularization process.[197] Voltaire had to rely on the printing press; his successors can use the Internet.

Secularization may already have begun. The fact that proposals for religious tribunals relate only to some areas, not the whole of *fiqh*, suggests that even those Muslims who desire Islamic law do not desire it in its entirety. Moreover, some contemporary Muslim thinkers question the relevance of the classical, law-based model for Western Muslims. Many of these thinkers reject the "closing of the door" and seek to open a new era of *ijtihad*.[198] For example, Tariq Ramadan argues that Islam represents a faith, not a culture or civilization.[199] He maintains that Islam requires Western Muslims to participate wholeheartedly in the social and political life of their countries, to be good citizens who "submit to the body of positive law,"[200] as long as that law does not violate Islamic conscience.[201] Ramadan thinks that conflicts will be "limited."[202] On a true interpretation of Islam, he argues, one that avoids the "distorting prism" of the conventional model, Western laws should not pose major barriers to Muslim life.[203] In most situations, jurists should be able to find solutions to allow Muslims to practice their faith and abide by secular law.[204]

Khaled Abou El Fadl likewise rejects as "Orientalist" and "essentialist" the notion that Islam and Islamic law are "one and the

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[196] *Cf.* Witte & Alexander, *supra* note 32, at xxxiv (observing that "the legal structure and sophistication of the modern Christian church as a whole is a pale shadow of what went on before").

[197] *See* John O. McGinnis, *The Symbiosis of Constitutionalism and Technology*, 25 HARV. J.L. & PUB. POL'Y 3, 12 (2001) (observing that "[s]cientific discovery and technological progress seem to have been generally correlated with a decline in religious faith").

[198] *See, e.g.*, AN-NA'IM, *supra* note 2, at 15; Khan, *supra* note 2, at 343.

[199] *See* RAMADAN, *supra* note 34, at 79, 214.

[200] *Id.* at 95.

[201] *Id.*

[202] *Id.* at 100; *see also id.* at 95 ("very rare").

[203] *Id.* at 100.

[204] *See id.* at 100–01.

same."[205] Although many observers believe that Muslims must comply with the totality of Islamic law wherever they are—a belief that would make life in a non-Muslim country practically impossible—not all Muslim jurists agree.[206] Muslims must have the ability to practice Islam, but that does not necessarily mean following classical *fiqh* in every context. For example, Abou El Fadl points out, the twentieth-century Egyptian jurist Rashid Rida maintained that Muslims in a non-Muslim country need follow "only . . . the laws pertaining to acts of worship (*'ibadat*) such as fasting, almsgiving, and praying."[207] In other areas, like commercial and criminal law, Muslims could follow the secular laws of the host country.[208]

Finally, Abdullahi An-Na'im argues that Islamic law should never be enforced by the state, either in those countries where Muslims make up a majority of the population or in those countries where Muslims form minority communities.[209] For him, Islamic law must be a matter of voluntary compliance on the part of the believer. "Islamic law is always relevant and binding on Muslims," he writes, "but only as each Muslim believes it to be and not as declared and coercively enforced by the state."[210] In the minority-Muslim context, this means that Muslims must avoid involving the state in Islamic arbitration.[211] If the state enforces Islamic arbitral awards, he believes, that will inevitably corrupt *fiqh*; "the outcome will always be state law on its own terms."[212] State enforcement creates the risk that Muslims will comply with rulings, not out of honest religious conviction, but because civil courts have ordered them to do so.

It is hard for an outsider to evaluate this debate within Islam. Notwithstanding some signs of an "Islamic Reformation,"[213] though,

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[205] Khaled Abou El Fadl, *Striking a Balance: Islamic Legal Discourse on Muslim Minorities*, *in* MUSLIMS ON THE AMERICANIZATION PATH? 47, 60–61 (Yvonne Yazbeck Haddad & John L. Esposito eds., 2000).

[206] *See id.* at 57; Khaled Abou El Fadl, *Legal Debates on Muslim Minorities: Between Rejection and Accommodation*, 22 J. RELIGIOUS ETHICS 127, 151–53 (1994) (discussing diversity of opinion among pre-modern and contemporary jurists).

[207] Abou El Fadl, *supra* note 205, at 54.

[208] *Id.*

[209] An-Na'im, *supra* note 19, at 2. For An-Na'im's more extensive development of his position, see AN-NA'IM, *supra* note 2.

[210] An-Na'im, *supra* note 19, at 3.

[211] *See id.* at 26–28.

[212] *Id.* at 27.

[213] The phrase is An-Na'im's. ABDULLAHI AHMED AN- NA'IM, TOWARD AN ISLAMIC REFORMATION (1990).

one should resist assuming that modernity will inevitably change Islam. Observers have begun to question the power of the secularization theory generally; despite the confident forecasts of a generation or two ago, religion does not seem to be in terminal, global decline.[214] With respect to minority-Muslim communities, specifically, traditional expressions disproportionately attract younger, Western-born Muslims with university degrees and a familiarity with contemporary culture—the very people to whom, presumably, secularism would appeal most.[215] Although progressive Islamic scholarship is important, it often encounters resistance in Muslim communities. Ramadan, for example, concedes that his ideas "are frightening and . . . appear new and 'offensive'" to many Muslims;[216] the title of his most recent work, *Radical Reform*, suggests the degree of change he believes necessary.[217] An-Na'im writes that his views "are not only controversial, but also psychologically and intellectually difficult for the vast majority of Muslims to accept today."[218]

Another factor that may explain Western Muslims' interest in religious tribunals is Muslims' status as a minority community. Muslims have only recently begun to arrive in significant numbers;[219] like most immigrants, many of them find comfort in traditional ways.[220] Moreover, Muslims may find aspects of Western law and courts to be alien and unfamiliar, the reflections of a different religious history and sensibility.[221] As the dominant religious group in Western society, Christians fail to perceive the ways in which their worldview pervades the judicial system; values that appear neutral and unremarkable to Christians may not seem so to Muslims.[222] Finally, Western Muslims

[214] *See, e.g.*, Thomas F. Farr & William L. Saunders, Jr., *The Bush Administration and America's International Religious Freedom Policy*, 32 HARV. J.L. & PUB. POL'Y 949, 967–68 (2009).

[215] *See* CHRISTOPHER CALDWELL, REFLECTIONS ON THE REVOLUTION IN EUROPE: IMMIGRATION, ISLAM, AND THE WEST 156–58, 234 (2009).

[216] RAMADAN, *supra* note 34, at 5.

[217] RAMADAN, *supra* note 17.

[218] Abdullahi Ahmed An-Na'im, *Religion, the State, and Constitutionalism in Islamic and Comparative Perspectives*, 57 DRAKE L. REV. 829, 843 (2009).

[219] *See* RUTHVEN, *supra* note 4, at 353 (discussing Muslim migration to the West in recent decades).

[220] *See* BOYD, *supra* note 168, at 46.

[221] *Cf.* RAMADAN, *supra* note 34, at 99 (noting that "[t]he laws of Western countries have been thought out and elaborated for a society from which Muslims were absent").

[222] *See* BOYD, *supra* note 168, at 46.

who experience social prejudice may seek solidarity in an expression of group difference.[223] In short, the fact that many Western Muslims propose Islamic tribunals may reflect an assertion of communal identity more than the centrality of law in the Islamic tradition.

Christians often do fail to perceive the ways in which their values continue to influence Western law, even considering the major secularizing impact of the Enlightenment.[224] Even so, the argument that one should see proposals for Islamic tribunals as reflecting communal identity rather than religious conviction misses the point. Of course Muslims who advocate Islamic tribunals are asserting their identity. Religious conviction and communal identity often intertwine; identity is how religious conviction expresses itself in human communities. The key point is that many Muslims express their identity through a demand for law. Other similarly situated groups do not. Increasing numbers of Buddhists, Hindus, and Sikhs also have immigrated to Western countries in recent decades, yet no comparable movement for Buddhist, Hindu, or Sikh tribunals has emerged.[225] So far, these communities have been content to rely on Western legal institutions even though those institutions have Christian antecedents, and presumably express some Christian values, that the communities do not share.

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This Essay represents a beginning. Much comparative work on Islamic and Christian jurisprudence remains to be done. For example, what impact, if any, has each religion had on the other's understanding of law? How have Islamic and Christian jurisprudence influenced the ways that Muslims and Christians conceive the state and its proper relationship to believers? What implications do Muslim and Christian theories have for contemporary concepts of religious freedom and other human rights? These questions will have to await another day. For now, I hope that I have shed some light on the complex and different ways that Muslims and Christians understand

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[223] *Cf.* RAMADAN, *supra* note 34, at 6–7 (alleging that Western Muslims live with social "Islamophobia" on a daily basis).

[224] *See* Witte, *supra* note 105, at 28–30 (discussing Christianity's impact on current law).

[225] *But cf.* John Witte, Jr., *Exploring the Frontiers of Law, Religion, and Family Life*, 58 EMORY L.J. 87, 93 (2008) (observing that "Muslims, Hindus, and other religious minorities are now pressing for equal treatment for their systems of religious arbitration of marriage and family disputes").

law, and how these complexities and differences inform an important contemporary debate.