Is There a Conception of the Political in Sunnī Fiqh?
A Bottom-Up Approach

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1. Introduction

This paper seeks to answer the question of whether Sunnī Islam, as represented largely in the writings of post-formative jurists, had a normative conception of political life. Asking this question might strike some as silly: it seems obvious that Sunnī Islam must have had a conception of politics. After all, we are repeatedly told that Islam is, in the first instance, a religion of law, and it is hard, if not impossible, to conceive of law outside the framework of a polity that applies that law. There is also no doubt that Muslims of all bents, Sunnīs as well as Shīʿa, orthodox as well as heterodox, wrote about subjects that seemed to touch on politics, and that they did so from a rationalist perspective, e.g., al-Fārabī, a religious, theological perspective, e.g., al-Bāqillānī, and a traditionalist perspective, e.g., Niẓām al-Mulk, with some authors writing in more than one of these genres, e.g., al-Ghazālī and al-Māwārdī, both of whom wrote about politics from theological, legal and traditionalist perspectives.

Yet, secondary scholarship generally remains unconvinced that there is much, if any, substance to Sunnī jurisprudence when it comes to formulating distinctly *political* ideals. One need only engage in a cursory survey into works on Islamic law and Islamic political thought over the last fifty years to reach the conclusion that there is a virtual consensus that Sunnī Islam failed to produce any conceptual of the political, with the universal explanation for this failure (or virtue, depending on your perspective) being that Islamic law essentially made politics, as an idea, redundant. For those who decried the failure of Sunnī Muslims to generate a normative theory of politics, Islamic law retarded the development of

political thinking insofar as it was a body of normative, even utopian doctrine that was independent of, and indifferent if not hostile to, the needs and interests of actual rulers. According to this point of view, which, it must be said, is virtually hegemonic among modern western authors, Muslim rulers could either abide by the law, or flaunt it, but in all cases, Islamic law and its ideals left no room for political judgment or rationality that was normatively distinct from theological or juristic rationality. One might argue that nothing makes clearer the fundamentally anti-political ideal of the Sunnīs than their stipulation that the caliph be a mujtahid. Were such a stipulation to be fulfilled, the triumph of the theo-juristic would be absolute. Conversely, the failure to achieve that stipulation implies a disturbing deficiency in public life, and that Muslims experience politics, at best, as a world of compromised aspiration rather than a domain of experience that is constituted by its own normative ideals that distinguish it from the ordinary theo-juridical reasoning of the juristic class as best exemplified in theoretical and practical jurisprudence. For other authors, such as Wael Hallaq, who revel in the absence of the political in Sunnī Islam, denying, for example, that Islamic law even constitutes law in the familiar sense or that Muslims actually had states prior to the encounter with colonialism, the absolutist commitment to the theo-juridical on the part of Sunnī jurists is taken as evidence of an alternative conception of ordering, one that does not depend on the coercive apparatus of a state, with a rationality and morality that is distinct from that which applies to the individual believer, whether viewed simply as an individual or in community with other believers.

Needless to say, both interpretations of politics and its relationship to Islamic law concur that in the notion that there is no normative conception of politics within Islamic law, differing only in whether this absence is viewed positively or negatively. I wish to challenge the notion that Islamic law, in its Sunnī variant, lacked a normative conception of the political. Using various examples drawn from substantive Islamic law (*furūʿ al-fiqh*), this paper will argue that Sunnī *fiqh* contained within it a normative conception of politics that was subject to its own distinct ethical regime. The ethical regime

that governed politics was of course derived from the more general ethical concerns of Muslim theologians and jurists, nevertheless, the normative standards that govern political reasoning are sufficiently different from that which govern ordinary ethical reasoning such that we are justified in claiming that Islamic substantive law produced a distinctive body of political ethics that applied to a distinct sphere of human activity that we call political.

The most fundamental ethical ideal that applied to the legal conception of politics is that of representation, which was manifested legally in the notion that public officials are, in all instances, agents of an idealized Muslim public. The ideal of agency, both as a positive ideal insofar as it authorizes conduct of the agent, and as a negative ideal insofar as it limits conduct of the same agent, underwrites the moral legitimacy of a distinctively Islamic public order, even as it puts forth standards to judge the legitimacy of the actions of public agents that are normatively distinct from the moral standards that govern the conduct of individuals.

2. Searching for a Political Conception in Islamic Law

If the argument presented here is correct, one must legitimately ask why has so much of the secondary scholarship been wrong? The answer, in my opinion, lies in certain methodological biases in the writings of major scholars in the field, such as Joseph Schacht and Noel Coulson, on the one hand, and an unduly naive understanding of the nature of law and its relationship to the state, on the other. Another reason why secondary scholarship has ignored the political dimension of Islamic law has been an inordinate focus on the contract of the caliphate, and whether it ever effectively regulated the historical practices used by Muslim societies in selecting rulers. Because the elective procedures assumed by Sunnī theologians and jurists were not followed, it has been generally assumed that the entire theory was a dead letter, or at best, exemplary evidence of the utopian idealism that characterized Sunnī law.

Both Schacht and Coulson brought to the study of Islamic law particular biases that were a result of their own legal training. Schacht, for example, was trained in the civil law tradition, for which the distinction between public law and private law is fundamental. The opening pages of the Justinian Digest quote the Roman jurist Ulpian as stating "Public law is that which regards the constitution of the Roman state," while "private law looks at the interest of individuals,"[1] thus justifying the fundamental distinction in Roman law between public law, the law that applies to the state, and private law, the law that applies to individuals. Schacht no doubt must have had the fundamental Roman division of public law and private law in mind when he suggested that there was an absence of public law in Islamic law; indeed, one would search Islamic law treatises in vain for a classification of Islamic law that reflects or could be construed as analogous to this Roman conception. Instead, Muslim jurists divided Islamic law into two broad categories: ritual law (*ʿibādāt*) and the law of pertaining to inter-personal interactions (*muʿāmalāt*). In both cases, the law seems relevant only to natural persons. Later jurists complicated the category of inter-personal interactions with the result that Islamic law came to be divided into four parts, "rituals, sales, marriage and injuries,"[2] but again, not in a fashion that makes the state an independent subject of the law, at least not in the Roman sense.

Coulson, on the other hand, was an English common law lawyer, which burdened him with different biases that also seem to have affected his understanding of Islamic law. The common law, like Islamic law, did not recognize the Roman distinction between public law and private law, and in fact, the recognition of the legitimacy of public law, particularly, administrative law, gave rise to a substantial controversy among English lawyers that lasted well into the 20th century. For the prominent English legal historian and constitutional commentator Albert Venn Dicey, for example, the Roman distinction

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1 *Justinian's Digest*, § 1.1.1.2.

2 Wael Hallaq, *Sharīʿa: Theory, Practice, Transformations* (New York: Cambridge University Press, 2009), p. 551.

between public and private law, particularly as manifested in French practice, was a pernicious pretense that undermined the rule of law, served as a mask for despotism, and threatened the integrity of English law.[3] Coulson's background as an English lawyer, given the pre-existing English bias against the civilian distinction between public and private law, and administrative law more generally, might very-well explain his blanket condemnation of Muslim tribunals such as the *maẓālim* that functioned as a kind of administrative courts and which dismissed as exercises in arbitrary secular despotism.[4] Even as English lawyers were praising themselves for resisting the despotic tendencies of Roman law, however, it was clear that the common law itself provided forms of action that were unique to actions involving the government, the so-called "prerogative remedies," such as certiorari, mandamus, and prohibition.[5] And of course, English law finally came around to a formal endorsement of the notion that a distinctive set of procedures applied to cases involving public authorities.[6]

All this is to say that in considering the question of whether pre-modern Islamic law produced public law, and therefore included within it a normative conception of a political domain, one must be careful not to introduce, by uncritically deploying certain controversial terms, polemics from one context into another. One can speculate as to the reasons why Muslim jurists did not divide their law along the lines envisioned by the Romans, but as is the case in the common law, it is simply impossible

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3 J.W.F. Allison, "Variation of View on English Legal Distinctions Between Public and Private Law," 66,3 *Cambridge Law Journal* 698, 704 (2007) (discussing polemical position that public law occupied in English legal thought).

4 Coulson, p. 131 (condemning the appearance of *maẓālim* courts in Islamic legal history as amounting to the "tolerat[ion] of secular absolutism"). Recent scholarship has discredited Coulson's view that *maẓālim* courts wielded unbridled and arbitrary discretion. See Yossef Rapoport, "Royal Justice and Religious Law: Siyāsah and Shariʿah Under the Mamluks," 16 *Mamluk Studies Review* 71-102 (2012), pp. 80-81 (historical evidence from Mamluk period contradicts notion that *maẓālim* courts were either arbitrary or indifferent to the legal norms of the Shariʿa).

5 Allison, p. 704.

6 Ibid, p. 706.

to deny, based on the empirical evidence of the rules of Islamic law itself, examples of which this paper will present below, that Muslim jurists developed a distinctive set of rules that applied to actions involving government officials.

In ascertaining the existence of an Islamic public law, it is proper to take a functionalist approach rather than a nominal one. In the words of Ulpanus, "as a matter of fact, some things are beneficial from the point of view of the state, and some with reference to private persons."[7] As this paper will show in greater detail below, some rules in Islamic law are formulated from a *public* perspective, that is, they are "beneficial from the point of view of the *public*," in contrast to the perspective of private persons. It is such rules, I argue, that constitute Islamic public law, and they are found scattered in various sections of Islamic substantive law that otherwise do not generally have a public character. That fact, however, should not mislead us into failing to recognize the essentially public perspective that justifies those rules.

Another important obstacle in understand pre-modern Islamic legal conceptions of the state has been confusion arising out of the relationship of the ideal of a revealed law -- which is said to have God as its nominal sovereign -- and the contingency of any set of material institutions that somehow is justified by giving effect to the rules of divine law. This puzzle has given rise to the often-asserted claim by Islamicists that Islamic law is somehow unique insofar as the law, *because* it is divine, precedes the state, and the state's role is merely to enforce the law, it being casually assumed that non-Islamic law, because it is non-religious, and thus is created by a human sovereign, operates in precisely the opposite direction: the state comes first and the law follows.[8]

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[7] *Justinian's Digest*, § 1.1.1.2.

[8] Bernard Lewis,

This conception of the relationship of the law to the state transforms the law into a purely intellectual object of inquiry that is divorced from any concrete political structure. From a practical perspective, this means, if the Islamicists' theory is correct, that competition, if not outright hostility was endemic to the relationship between the state and the jurists who produced the law. This rivalry in turn manifests itself in what is said to be a particularly pathological gap between ideal and reality in Islamic legal history. The jurists, we are told, developed a body of law through interpreting the words of a divine lawgiver which could never be, and were never even intended to be, serviceable from the perspective of earthly rulers, who, because they lacked sovereignty, might or might not be worthy to the degree to which they complied with divine law, but they could never have any role in its formulation.

The virtual unanimity with which renowned Islamicists make this point tells us less about the nature of Islamic law and its relationship to an institution we can call the state than it does about the casual legal positivism that dominates the conceptual thinking of Islamicists in which all law must be traced to an actual, unitary sovereign that can be identified either as God or particular human rulers. But if one steps outside the circle of the study of Islamic law, and into the broader world of legal philosophy, one discovers that the categories of sovereignty and the sovereign, and their relationship to law, including the fundamental law of a regime, are not so neat, and the answers not so clear.[9]

Having cleared the field from certain misconceptions that have clouded our ability to investigate the political in Islamic law, the question immediately arises regarding how we should investigate this topic and which sources are likely to yield positive results. The path of least resistance is to begin with a re-reading of the well-known treatises of Islamic law that seem to speak directly to public law, e.g., al-

[9] See, for example, Martin Laughlin, "The Concept of Constituent Power," paper presented at the University of Toronto Faculty of Law *Law and Theory Workshop*, Jan. 15, 2013; and, Pavlos Eleftheriadis, "The Rule of Law as a Constitutional Essential," paper presented at the University of Toronto Faculty of Law *Constitutional Roundtable*, September 19, 2012. Both papers make the point that the written texts of a legal system, even their constitutions, draw from a political/moral conception that can never be fully manifested in the material institutions, including the written laws of the polity.

Māwardī's *al-Aḥkām al-Sulṭāniyya* and al-Farrāʾ's book with the same title, in the hope that it can teach us something about the political ideals animating Islamic law. As Sherman Jackson argued in his work on al-Qarāfī, however, we should expand our inquiry beyond the rules surrounding the caliph into the relationship of Islamic law to the functioning of the Muslim community at the level of quotidian institutions and ideals such as the rule of law, and the jurisdictional limitations of the law.[10] From this perspective, specialized treatises on adjudication such as Ibn Farḥūn's *Tabṣirat al-Hukkām* and al-Ṭarābulusī's *Muʿīn al-Ḥukkām*, and al-Qarāfī's work *al-Iḥkām fī Tamyīz al-Fatāwā ʿan al-Aḥkām wa Taṣarrufāt al-Qāḍī wa al-Imām*, are important sources for exploring rules constituting Islamic public law. One hitherto unexplored resource that I have found to be surprisingly rich in rules of public law has been ordinary treatises of Islamic law. This last contention may be surprising in light of my previous observation that Muslim jurists did not formally divide the law between public law and private law but instead, spoke of rituals, sales, marriages, and injuries. Despite Muslim jurists' focus on the rights and obligations of individuals, however, numerous rules regulating the conduct of public officials arise interstitially in the course of presenting rules that in the ordinary course apply to natural persons. This of course creates some obstacles for researchers insofar as relevant rules are scattered throughout various sections of Islamic substantive law that otherwise do not generally have a public character. One particularly interesting example of this phenomenon is the chapter on the prayer for rain in Mamlūk- and Ottoman-era Mālikī and Shāfiʿī treatises, which provides the commentators the opportunity to discuss the political question of the limits of obedience to public authority in general and not just in connection with discharging a public ritual. In short, I argue for a "bottom-up approach" to the question of Islamic law and the political: by interrogating numerous rules of substantive law, I hope to show that a coherent political ideal distinct from the ordinary moral inquiry of jurists existed.

[10] Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (New York: Brill, 1996), p. xxi-xxii. (emphasizing the importance of looking at Islamic law's treatment of the state outside the narrow question of the procedures governing the selection of the caliph).

3. The Problem of Obedience (*Ṭaʿa*), the Idea of the Caliphate and Agency

The central political problem that Sunnī jurists tried to solve was that of legitimate obedience. To put it differently, the principal question that demands an answer is under what circumstances is one human being under a moral obligation to obey the commands of another? It may seem odd to identify the problem of obedience as central to the concern of Muslim jurists in light of the commonly-held view that for Sunnī jurists, there was a unanimous view that there was a virtually unqualified obligation to obey the ruler. Sunnī conceptions of obedience, however, are in fact much more complex than this caricature would suggest. Indeed, the central presumption that animates juristic thinking on the problem of obedience is precisely the opposite: that human beings are, presumptively, *not* under a moral obligation to obey the commands of another human being. Call this the human independence principle. Obligations of obedience are therefore, from a moral perspective, extraordinary, and call for an explanation.

The independence principle is ultimately grounded in theology, at least in the view of al-ʿIzz b. ʿAbd al-Salām, a prominent 13th century Mamlūk theologian: because God is the true benefactor, and the only remover of harm, no one is ever rationally justified in submitting to the will of another. Obedience, therefore, can only be justified in circumstances where God has permitted one human being to obey another. According to Ibn ʿAbd al-Salām, God has made exceptions to the independence rule with respect to some human beings, such as God's messengers, religious scholars, caliphs, judges, governors, fathers, mothers, masters, husbands, and employers over their employees within the scope of their work and crafts.

Because of the independence principle, any person claiming a right to obedience must establish some grounds for doing so. In the religious system of Islamic law, the initial answer is that God has authorized certain individuals to enjoy obedience, and indeed, Ibn 'Abd al-Salām mentions a disparate

group of such people: messengers (*rusul*) and scholars (*ʿulamāʾ*); parents, masters of slaves and employers; and finally, rulers (*al-aʾimma*) and governors (*al-wulāt*). Messengers convey to humanity God's commands to them through the mediation of revelation, but with the death of the Prophet Muḥammad, no other human beings can claim this role; scholars convey to humanity God's commands through the mediation of learning but cannot coerce compliance with those commands; parents, masters of slaves, husbands and employers are entitled to obedience as well, but unlike messengers and religious scholars, only from particular persons, in particular, their own children (but no one else's), their own slaves (but no one else's), their own wives (but no one else's), and their own employees (but no one else's), in each case, in accordance within the limits set forth in revelation.

Rulers and governors, it is true, are entitled to obedience in accordance with the rules of revelation, but unlike these other classes of individuals who are entitled to obedience, the relationship between the one commanded (*al-maʾmūr*) and the one commanding (*al-āmir*) is not bilateral. In this respect, they are similar to messengers and religious scholars whose authority is general (*ʿāmm*), but they are also like individuals whose entitlement to obedience is by virtue of a particular, legally recognized relationship, rather than by virtue of a special knowledge that they possess. In addition, the notion that rulers and governors are entitled to obedience itself entails a subject of obedience -- a public -- that is *sui generis*. Unlike slaves, wives, children and employees, the subject of obedience is not a natural person, but the public, which is itself an idea and not an empirical reality.

The obedience due to rulers, then, is on account of a political relationship, not one that is either natural -- as is the case of obligations in family law -- or contractual, as is the case in employment relationships. It immediately gives rise to a tension with the independence principle: if there is never an obligation to obey another human being, on what grounds does a person become an imam, governor, or other public official and thereby become entitled to obedience? It is this question that the idea of the

caliphate is intended to answer. The crucial idea in the Sunnī conception of the caliphate is that of representation. In other words, a person claiming a moral right to obedience by virtue of his office, whether imam, governor or judge, can do so only if he has received a valid delegation of power from the subject of obedience, the Muslim community. The centrality of the idea that public officials are representative of the Muslim community is explicit in al-Māwardī's discussion of the procedures governing the selection of the caliph. On the assumption that the electors, the so-called "the people of who loose and bind (*ahl al-ḥall wa al-ʿaqd*)," choose the caliph, they are not free to select whomever they wish willy-nilly; rather, they function effectively as trustees who are empowered to choose on behalf of the community the most-suitable candidate as viewed from the perspective of the Muslim community, and not their own, subjective preference. Accordingly, once they select a suitable candidate, and the candidate accepts the position, the electors lose the power to depose the caliph, *unless* the caliph becomes unfit for the office, whether by some act, omission or general incapacity. So too, if the incumbent caliph designates his successor, *walī al-ʿahd*, he is acting in a representative capacity, not a personal one, and therefore is under an obligation to select a suitable candidate viewed from the perspective of the Muslim community. After the incumbent caliph appoints a successor, he loses the power to dismiss the designated successor unless he becomes unfit for the office, whether by act, omission or general incapacity. The reason why the electors and the incumbent caliph lack the power to dismiss, even though they have the power to appoint, is that, in each case, they are acting in a representational capacity, not a personal one. Having discharged the obligation entrusted to them by their principal, they no longer have any power to exercise.

This distinction between the personal power of an official, and his representative power is crucial in other respects as well: lesser officials are either personal representatives of the appointing official, or are themselves representatives of the public who were appointed via the mediation of the appointing official. Accordingly, judges and provincial governors do not lose their authority when the

caliph (or other appointing official) dies or is dismissed because they are not personal representatives of the appointing official, but are representatives of the Muslim community itself. The persistence of the jurisdiction of these officials is in contrast to the personal delegates of an appointing official, e.g., executive ministers, whose authority terminates simultaneously with the death or dismissal of the appointing official.

The idea of representation and its centrality to Sunnī political thinking is stated in a surprisingly direct fashion by the sixth century Ḥanafī jurist al-Kāsānī. According to al-Kāsānī, an ordinary agent works exclusively for the interest of, and is subject to, the capacities of his principal, which are those of a natural person. Accordingly, when the principal dies, his agent is divested of power to act on his behalf because the principal himself no longer has legal capacity as a result of his death. But, according to al-Kāsānī, the judge does not serve the person of the caliph or his interests, but rather he serves pursuant to the power of the Muslim community (*wilāyat al-muslimīn*), and to protect their rights (*ḥuqūqihim*). Accordingly, the caliph is merely the agent of the community (*al-khalīfa bi-manzilat al-rasūl ʿanhum*). For that reason, the caliph's actions are, from a legal perspective, nothing other than the actions of the Muslim community itself (*fiʿluhu bi-manzilat fiʿl ʿāmmat al-muslimīn*), a fact that explains his personal immunity from liability (*lam talḥaqhu al-ʿuhda*). Because the authority of the Muslim community persists (*wilāyatuhum bāqiya*) after the caliph's death, the judge's jurisdiction continues to be valid. This is not inconsistent with the fact that the caliph has the power to dismiss judges, because in reality, just as the appointing power is the Muslim community itself (*al-ʿāmma*), so too the dismissing power is that of the Muslim community itself (*al-ʿāmma*) acting through the caliph, who, whether he appoints a judge or dismisses him, is acting only in the capacity as the agent of the Muslim community. Indeed, it is the case that the Muslim community granted the caliph the power to dismiss judges only in order to further their own collective good (*li-taʿalluq maṣlaḥatihim bi-dhālika*).

The idea of the caliphate then acts to create two kinds of representations: an idea of a public -- which is defined as the Muslim community -- and the notion that persons who are entitled to obedience are so entitled only because they are representatives of that principal. This double representation in turn helps to explain another important feature of the contract of the caliphate: it divests actual, individual persons with the right to enforce the law and vests it exclusively in the public agents who represent them as members of an ideal public principal. Thus, one essential incident to the caliphate in al-Māwardī's analysis is that the caliph (and his lawful appointees) have exclusive jurisdiction over public affairs: "It is obligatory for all individuals within the community to delegate public matters to him without any interference or opposition so that he [i.e., the caliph] may discharge those duties which have been entrusted to him with respect to the public good and administration."[11] Al-Māwardī's description of the consequences of the caliphate is thus similar to Hobbes' insistence that for a state (commonwealth) to exist, a categorical distinction must be made between the private powers of individuals, and that of the sovereign, who is the exclusive representative of the state.[12]

The conception of agency, then, while it provides a moral basis for authorizing public officials to undertake actions on behalf of their principal, it simultaneously limits the normative claims public officials have on individuals to actions that are consistent with the powers delegated to the public agent from the public itself. It also explains why individuals are morally obliged to comply with lawful actions of the public agent: in so obeying such commands, they are only obeying themselves. As al-Kāsānī explained, the lawful action of the public agent (caliph) is simply the action of the Muslim public (*ʿāmmat al-muslimīn*) and it is from their power (*wilāya*) that the binding quality of the act derives. It

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[11] *ʿalā kāffat al-umma tafwīḍ al-umūr al-ʿāmma ilayhi min ghayr iftiyāt ʿalayhi wa lā muʿāraḍa li-yaqūma bi-mā wukkila ilayhi min wujūh al-maṣāliḥ wa tadbīr al-aʿmāl*.

[12] "And the sovereign, in every Commonwealth, is the absolute representative of all the subjects; and therefore no other can be representative of any part of them, but so far forth as he shall give leave: and to give leave to a body politic of subjects to have an absolute representative, to all intents and purposes, were to abandon the government of so much of the Commonwealth, and to divide the dominion, contrary to their peace and defence, which the sovereign cannot be understood to do." Hobbes, *The Leviathan*, Book XXII.

also explains why an illegal act does not bind individuals, or create any moral obligation whatsoever: when a public official, whether a caliph or lesser office holder, issues a command or a prohibition which violates the terms of his appointment, he ceases to be a public official, is stripped of his representative capacity, and becomes, from a legal perspective, the equivalent of a private person. And because he is a private person in these circumstances, the independence principle applies which entails no duty to obey, and depending on the nature of the command, e.g., if it is immoral in itself, there may actually be a duty to disobey. Finally, because the contract is between an ideal body, namely the Muslim community, and its representatives, the fact that it is a moral obligation to partake in this contract means that the subjective assent of individual Muslims to its terms is irrelevant: they can effectively be forced into membership in the political community. This feature of the contract of the caliphate is most pronounced in al-Farrāʾ, but it is also present in the Ashʿarī-Shāfiʾī tradition from which al-Māwardī hails. For al-Farrāʾ, the caliphate can be established contractually, but only through the approval of *jumhūr ahl al-ḥall wa al-ʿaqd*. Otherwise, coercion (*qahr*) is a perfectly valid way to bring about the existence of a lawful public order in circumstances where the electors are unable to settle on a single candidate. While al-Farrāʾ is open in his legitimation of coercion, al-Māwardī and his Ashʿarī predecessors obfuscate the role of coercion through reducing the number of electors required to select a caliph; by recognizing the legitimacy of the decision of only a handful of electors, they are authorizing such a candidate to subdue the Muslim community in the name of establishing a Muslim community, for in such a circumstance, the public agent is supressing not the Muslim community, but rebellious individuals who are refusing to accept the authority of the Muslim community's duly appointed and exclusive agent. On either the Ashʿarī or th Ḥanbalī account, then, violence to establish the caliphate, the public order of the Muslim community, is justified.

To conclude, Sunnī jurists identified sovereignty with the idea of the Muslim community, an idea that is represented by the appointment of certain officials and designating them as the exclusive

representatives of that community. This idea then animates numerous rules of substantive law that regulate the conduct, both positively and negatively, of public representatives.

4. Substantive Rules of Public Law As an Expression of the Agency Relationship

While sovereignty in the view of the Sunnī jurists belongs to the Muslim community, the Muslim community itself is a rational idea whose content is defined by the joint and several commitment of idealized Muslims to uphold the normative prescriptions of Islamic law, not the empirical Muslim community which may be composed of heretics, criminals, libertines and even atheists. This rational idea of the Muslim community is further instantiated in the concept of "commanding the good and forbidding the evil," whether at a moral or political level. The fact that sovereignty lies with the idea of the Muslim community, and no its contingent material existence, therefore, presents one of the most important *substantive* limitations on the power of public officials in Islamic law: they may not exercise their power in a manner that violates the moral ideals of that community, whether by commanding an act that is immoral, or by refusing to apply a peremptory norm of Islamic law. This term was encapsulated in the juristic principle of "no obedience in sin" (*lā ṭāʿata li-makhlūq fī maʿṣiyat al-khāliq*).

This notion -- that all public officials were absolutely bound by the law -- sharply distinguished pre-modern Islamic law from the Roman conception of government power set out in Justinian's Digest which provided that the emperor was the source of all law (*Justinian's Digest*, § 1.4.1), and therefore not bound by them (*Justinian's Digest*, § 1.3.31), even if he abided by them voluntarily (*Institutes*, § 2.17.8).[13] The recognition that public officials were bound by the rules of Islamic law, however, has led to the unwarranted conclusion, that the *only* role for public officials in Islamic law was to *enforce* the pre-existing norms of Islamic law. Scholars of Islamic law routinely assert, for example, that the government in Islamic law lacks legislative powers, and that Muslim jurists recognized, at most, the right

[13] Bernard H. Stolte, "Public Law: Byzantium," *Oxford International Encyclopedia of Legal History*.

of the state to make rules under the guise of "administration," without explaining the difference between legitimate "administration" and illegitimate "legislation." Part of the problem stems from confusion between rules of Islamic law derived from revelation through the interpretive methods of the Muslim jurists and set out in the books of theoretical jurisprudence, and the deliberative rules made by public officials by virtue of the exercise of the powers vested in them *pursuant* to law. The jurists referred to the former as *fiqh*, while the latter category was referred to as *taṣarruf bi-l-imāma* (or *taṣarruf imāmī*),[14] a category of rulemaking which I translate as "public acts." While the rules of *fiqh* can be understood as general rules of law that are pre-political, at least in the sense that their substantive intelligibility does not depend on the existence of a public order, a public act derives its normativity not from its conformity with a particular interpretation of revealed law in the manner of a rule of *fiqh*, but rather from the extent to which it can be judged to be a lawful *action* of the sovereign who is simply a representative of the public. For this reason, we are justified in translating *taṣarruf bi-l-imāma* as a "public act" to contrast it with the conduct of a private person, sometimes called *taṣarruf khāṣṣ*. Just as a natural person endowed with legal capacity has the freedom to engage in certain kinds of conduct, e.g., enter into a contract of sale, subject to a legal determination of the validity of that conduct, so too, public officials could direct how the public should act, provided that such conduct was otherwise legally valid.

Because the public, however, is not a natural person, it can only act through the coordinated actions of the natural persons that fall within its jurisdiction; public acts commanding them or prohibiting them from certain actions, for example, become the means by which the public manifests its will. Whether public acts are effective depends on the extent to which individuals are bound to comply with particular public acts. Positive law, then, from the perspective of Islamic law, is nothing more than the manifestation of the public's will, as expressed by the decision of its authorized representative, to act or

[14] Sherman Jackson, "A Novel Theory . . ."

refrain from acting, in a certain fashion. It is not an expression of, or even an attempt to understand divine will. It is simply an expression of the public will, the will of the Muslim community. It is analogous to the manifestation of a natural person's private will insofar as the willed conduct can be valid, or invalid, moral or immoral. What needs to be considered then are the legal standards governing the conditions which render particular public acts valid, and therefore binding on individuals.

The first such requirement – which one might refer to as a negative check – is that the public act not violate substantive Islamic law. Instead of asking abstractly whether a public act violated Islamic law, however, Muslim jurists considered this question from the subjective perspective of the person receiving the command, asking whether it would be possible for the person commanded to comply with the rule without committing a sin. Provided the other legal requirements for a valid public act were met (to be discussed below), public acts could therefor oblige individuals in circumstances where the *fiqh* would not recognize an obligation. Thus, if a public official made a rule ordering the people to perform or abstain from an act that the *fiqh* did not classify as an obligation (whether affirmative or negative), the general rule was that individuals were obligated to comply with that rule so long as they could do so without committing a sin.

This did not mean that individual Muslims could evade compliance with a rule because they subjectively disagreed with its content. For example, although jurists disagreed as to whether public authorities could legitimately set prices for certain goods, when some merchants asked the famous Shāfiʿī Mamlūk-era muftī Ibn Ḥajar al-Haytamī whether they were under an obligation to comply with the ruler's command not to sell their goods except at a certain price, he replied that their subjective conception of the legitimacy of the rule was irrelevant to their duty to comply; rather, what was at issue was their ability to comply with the rule without committing a sin. Even though as a Shāfiʿī, al-Haytamī did not believe that such a rule was consistent with Islamic law, he pointed out that the questioners

could comply with the command, despite their substantive disagreement with its content, *without* committing a sin: no one commits a sin by selling his goods at a specific price, even if he would have preferred to sell them at a different one. What is crucial is not subjective agreement of the command's recipient with the command's substantive conformity with the rules of Islamic law as the recipient understands them; rather, what is important is that the public official has a good faith belief in the Islamic legitimacy of the rule he promulgated. If that is the case, then the recipient of the command, despite his substantive disagreement with its content, is under a *moral* obligation to comply, whether or not he would suffer a material consequence for disobedience. Note that there is no claim here that the obligation to obey arises because the ruler's command represents God's will or that the positive regulation at issue invalidates the contrary Shāfiʿī position. The obligation to obey according to al-Haytami, moreover, is moral and not prudential.[15] The only possible source of this moral duty is that the ruler, as a legitimate representative of the public, has validly obligated the public to abide by the regulation at issue.

But non-contradiction with Islamic moral norms was only one condition for the validity of a public act. Public acts also had to be *public* in the sense that they involved a *public* as opposed to a *private* right. This limitation on the power of public agents is implicit in Māwardī's statement that the contract of the caliphate entails a vesting in the caliph (and other public officials subsequently appointed by the caliph) of exclusive authority over the management of the community's public affairs (*al-umūr al-ʿāmma*).[16] By implication, then, the contract does not empower public officials to exercise the private rights of individuals. This principle is reflected in the substantive rule of *fiqh* which precludes a public official from waiving a natural person's private right to compensation from a highway robber, even in

[15] *ḥaythu kāna al-imām yarā jawāz al-tasʿīr wajabat ṭāʿatuhu wa law fī al-sirr*. Aḥmad ibn Muḥammad Ibn Ḥajar al-Haytamī, *Min al-fatāwá al-kubrá al-fiqhīyah*, Vol.1 (Bayrūt, Lubnān: Dār Ṣādir, 2000). 235-236.

[16] Māwardī, p.

circumstances when the legally mandated punishment for highway robbery lapsed, e.g., the voluntary surrender of the defendant. Explaining the basis of this rule, the Andalusian Muslim jurist Abū Bakr b. al-ʿArabī explained that "The ruler (*al-imām*) is not an agent of specific persons with regard to their specific rights; rather, he is their representative (*nāʾibuhum*) regarding their abstract, indeterminate rights (*ḥuquqihim al-mujmala al-mubhama*) which are not designated as belonging to specific persons."[17]

Because the jurisdiction of public officials is over public, and not private, interests, a public agent must exercise his powers for the exclusive benefit of his principal, i.e., the Muslim public, and not private interests. For example, the great Central Asian Ḥanafī jurist al-Sarakhsī, while he affirms the authority of the ruler to transfer public property to private parties (*iqṭāʾ*), he insists that this is not an unqualified power; rather, the power to give private persons particular property rights out of public property is conditional on such a grant not causing injury to the public's interest in its property. He explains this restriction on the grounds that the ruler's jurisdiction is limited to the protection of the public's interest (*lahu istīfāʾ ḥaqq al-ʿāmma lā wilāyat al-ibṭāl*) and thus he is not authorized to do any action that is contrary to those interests.

Assuming the relevant public act is substantively valid, and falls within the domain of the public and not the private sphere, jurists also derived from the agency relationship the requirement that the decision itself be *rational* from the point of view of the principal, i.e., the public. Accordingly, al-Qarāfī states that in determining whether a public act is valid, it must result in either a "pure benefit (*maṣlaḥa khāliṣa*)," or a "preponderant benefit (*maṣlaḥa rājiḥa*)." In economic terms, public decisions must either satisfy the requirements of Pareto efficiency (at least one person is made better off without making any one worse off), or the requirements of Kaldo-Hicks efficiency (the gain in welfare experienced by those

[17] Abū Bakr b. al-ʿArabī, Aḥkām al-Qurʾān.

made better off as a result of the policy is sufficiently great that they could compensate those made worse off by the policy). This requirement of rationality, of course, is directly tied to the fact that public officials are agents of the public, and are therefore required to act on behalf of their interest. The public requirement of rationality sharply distinguishes the decision making of public officials from that of natural persons, who are free to dispose of their property in any manner they see fit, even if that entails entering into unprofitable transactions.[18] This principle is reflected in numerous rules of substantive law. For example, while a private person is entitled to forego compensation for a tort, a public official, when acting as the guardian for an incapacitated person, is not permitted to waive any of his ward's claims without first receiving adequate compensation. So too, if a public official is acting as the guardian of a woman for purposes of contracting her marriage, he is not permitted to forego the requirement that her prospective suitor be her social equal.[19]

Finally, even if a public act was substantively consistent with Islamic law, was legitimately part of the public domain, and was rationally related to the public good, the public act is valid only if the responsible public official was acting within the explicit terms of his appointment. Because the scope of an official's power is determined by the terms of his delegation, his authority is necessarily limited by the terms of his appointment. Accordingly, a judge appointed to hear family law disputes, for example, could not make rules in other areas of the law, nor could an official delegated to govern Cairo, for example, make rules with respect to another city, e.g, Damascus. Thus, the jurisdiction of public officials was also limited by the subject matter over which they were appointed as well as the territorial bounds over which their jurisdiction could be exercised. The first three conditions, then, can be described as going to the prescriptive jurisdiction of public officials, while the last condition goes to a public official's

[18] Unless, of course, a natural person's established pattern of unprofitable dealings establishes a lack of contractual capacity.

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subject matter jurisdiction and personal jurisdiction (jurisdiction over persons). The validity of public acts, and whether they are binding, is conditional upon the public act in question satisfying the requirements of each of these jurisdictional elements.

5. Remedial Rules for the Violation of Law by Public Officials

A consistent theme of western writers on Islamic law has been the allegation that it failed to provide adequate remedies in the face of unlawful actions by public officials. For many writers, this omission was largely a result of the idealistic, even utopian assumptions that they claim were at the heart of Islamic law as developed by Muslim jurists.[20] One reason for such an allegation is probably the fact that, like many of the substantive rules discussed in Section 4, remedial rules were not organized systematically into one chapter of the *fiqh* such that it would be relatively easy for a researcher to identify the existence of rules designed to provide a remedy against unlawful government conduct. As was the case for the substantive rules of Islamic public law, however, pre-modern Islamic law's remedial rules were also scattered over many different substantive areas of the law. Another reason why the remedial rules of Islamic law may be overlooked is that nothing marks them out for special attention that distinguishes them from ordinary rules that apply to private persons. Accordingly, they arise almost imperceptibly in the course of general discussions of remedies as a special case of general rule.

The most important remedy was what an English lawyer might recognize as a kind of *ultra vires* remedy: declaration of the invalidity of a rule on the grounds that it was outside the jurisdictional authority of the public official and thus was of no legal effect. A purported command of a public official that is arbitrary or capricious because it failed to meet the minimal standards of rationality described above is invalid on jurisdictional grounds, i.e., it lacks any legal force because the prescriptive jurisdiction

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public officials enjoy does not extend to arbitrary decisions that do not respect the public good.[21] Accordingly, Ottoman-era jurists noted that the ruler's command for the people to engage in supererogatory acts of worship and fasting in connection with the prayer for rain, for example, is not binding because such acts are not constitutive of the public interest.[22] Jurists also explicitly acknowledged the right of citizens to challenge arbitrary and capricious transfers of public property that undermine the public good. Al-Sarakhsī, for example, stated that "With respect to [any grant of property] that harms [the public], any member of the public has the right to prevent the ruler from proceeding with a grant of property that violates his rights [as a member of the public]."[23]

Other public law remedies arise in circumstances where the party violating the public's rights is a natural person and not a public official, and public officials fail to protect the public's rights. Muslim jurists recognized the right of private individuals in such cases to bring claims on behalf of the public. For example, if a person creates or maintains a private nuisance which threatens the safety of the public, e.g., a poorly built or maintained wall adjoining a public path, any member of the public had standing to challenge the structure by lodging a legal complaint against the property's owner. When a private person brings such a suit, he is treated as a representative of the entire community because his claim seeks to vindicate public rights, and his suit is sufficient to render the owner strictly liable in the event that any member of the public is subsequently injured as a result of the private nuisance.[24]

Perhaps the most interesting application of ultra vires arises in connection with the interaction between tort law and illegal commands. As noted above, a command to commit sin was of no legal

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21 Qarāfī

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23 *lahu istīfāʾ ḥaqq al-ʿāmma lā wilāyat al-ibṭāl wa yuwaḍḍiḥuhu anna fīmā yaḍurru bihim li-kulli wāḥid minhum an yamnaʿa al-imām fī al-iqṭāʿ yakūn mubṭilan ḥaqqahu*. Al-Sarakhsī.

24 *hādhā ḥaqq al-ʿāmma fa-idhā qāma bihi al-baʿḍ ṣāra khaṣman ʿan al-bāqīn*.

effect. This meant as a practical matter that a defendant in a case of wrongful death could not offer as a defense that he was acting pursuant to his superior's command. The basic principle behind this rule is that when a public official issued a command that was contrary to law, he was no longer acting as a public official, but was treated as an ordinary private person, and pursuant to the independence principle, the orders of a private person are never entitled to obedience. This principle is manifested in numerous substantive rules of *fiqh*. For example, a defendant cannot offer as a defense to intentional murder that he was acting pursuant to the command of a public official in circumstances where the defendant knew that the victim was not guilty of a capital crime. Because no obedience is due if the command itself is unlawful – in this case, the killing of an innocent man – the public official is stripped of authority and his command is treated as the legal the equivalent of the command of a private person. A private person, of course, can never authorize the taking of another's life, whether the person is guilty or not of a capital crime with the result that compliance with that command cannot excuse the defendant's conduct. If the defendant did not know, however, that the defendant had been sentenced to death unjustly, he is free from liability because he is entitled to act upon the presumption that the sentence was legal. In this case, the public official who knowingly sentenced an innocent man to death is liable for murder, not the defendant who carried it out at his direction. If he killed another at the direction of a private person with no public position, however, he is liable in all cases because he is never obligated to obey the command of a private person.[25]

[25] *Wa law amara al-sulṭān rajulan fa-qatala ākhara fa-in kāna al-qātil yaʿlamu annahu lā yastaḥiqqu qatluhu fa-l-qiṣāṣ ʿalayhi dūna al-āmir li-annahu ghayru maʿdhūr fī fiʿlihi . . . kamā law amarahu ghayr al-sulṭān wa in lam yaʿlam dhālika fa-l-qiṣāṣ ʿalā al-āmir dūn al-maʾmūr li-ʾanna al-maʾmūr maʿdhūr li-wujū ṭāʿat al-imām fīmā laysa bi-maʿṣiya wa-l-ẓāhir annahu lā yaʾmuru illā bi-l-ḥaqq. . . wa in amarahu ghayr al-sulṭān min al-raʿiyya bi-l-qatl fa-qatala fa-l-qawad ʿalā al-maʾmūr bi-kull ḥāl ʿalima aw lam yaʿlam li-ʾannahu lā yalzamuhu ṭāʿatuhu wa laysa lahu al-qatl bi-ḥāl bi-khilāf al-sulṭān*. Ibn Qudāmah, Muwaffaq al-Dīn 'Abd Allāh ibn Aḥmad, 'Umar ibn al-Ḥusayn Khiraqī, Muḥammad Sālim Muḥaysin, and Sha'bān Muḥammad Ismā'īl, *al-Mughnī li-Ibn Qudāmah,* Vol. 7 (al-Qāhirah: Maktabat al-Jumhūrīyah al-'Arabīyah, 1968). 757-758.

Islamic law also provided remedies against private actors who aided and abetted the illegality of the powerful, even if they themselves acted only as their agents. For example, if a person was wrongfully coerced into selling his property to another, and that property had been sold, damaged, or its physical condition or value materially changed after it was taken from him, the true owner had the right to sue either the agent or the principal to recover either the fair market value of his property at the time of the suit or the proceeds which the agent or principal received when that property was sold to a third party. In such a case, the agent of the principal could not raise as a defense against the true owner's action the fact that his principal had coerced him into taking the plaintiff's property.[26]

Finally, in cases where a public official is acting lawfully in punishing a defendant, but is reckless in administering the punishment, or intentionally administers a punishment that leads to the defendant's death, the official is liable either in money damages or to retaliation, depending on his degree of culpability. This is in contrast to the result if the public official administers a lawful punishment with due care, and the defendant dies negligently, in which case, at least according to the Ḥanafīs, the treasury is liable to the defendant's family.[27]

6. Agency and Distributive Justice

Because public officials are deemed to be agents of the Muslim community whose individual members have equal claims to the community's property, public officials must take into account the demands of distributive justice by prioritizing the needs of the relatively poor members of that community over the

[26] Ḥaṭṭāb, Muḥammad ibn Muḥammad, Khalīl ibn Isḥāq al-Jundī, and Muḥammad ibn Yūsuf Mawwāq, *Mawāhib al-Jalīl li-sharḥ Mukhtaṣar Khalīl,* Vol. 4. (Ṭarābulus, Lībyā: Maktabat al-Najāḥ, 1969). 250.

[27] Shāfiʻī, Muḥammad ibn Idrīs, *al-Umm*, Vol.6 (al-Qāhirah: Sharikat al-Ṭibāʻah al-Fannīyah al-Muttaḥidah, 1861).176.

relatively well-off.[28] One application of this rule lies in the circumstances in which a tax collector can be liable for the unpaid tax obligations of a tax payer: if the tax payer waived the tax obligations of a wealthy tax payer, he became personally liable for the tax, but not if he waived the tax obligations of a needy tax payer.[29] The norms of distributive justice that regulate the distributive decisions of public officials also require treating similarly situated persons similarly. Ibn al-Subkī explained that this rule of distributive justice flows from the relationship of the public official to the individual members of society who constitute the public. Because the public official's role is essentially fiduciary, his role is not to endow individuals with property rights *ab initio* (*tamlīk*) but is instead limited to the division (*qisma*) of commonly-held property through the delineation of specific rights to particular individuals with respect to particular items that they hold in common. Because the public official is merely dividing commonly-held property, he must act fairly (*bi-l-ʿadl*), which means giving preference to the most needy, and treating persons whose needs are similar equally.[30]

7. Conclusion

This paper posed the question whether Sunnī jurists expressed a political conception which is meaningfully distinct from Islamic law viewed as an interpretive exercise. Contrary to prevailing opinion, I have showed that Islamic law, in its Sunnī version, expresses a political conception that includes a notion of sovereignty (the Muslim community) and a sovereign that represents that sovereign (the caliph and other public officials). These concepts are related by the moral ideal of agency, with the

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[28] Ḥamawī, Aḥmad ibn Muḥammad, *Ghamz ʻuyūn al-baṣā'ir: sharḥ kitāb al-Ashbāh wa-al-naẓā'ir li-Mawlānā Zayn al-ʻAbidīn Ibrāhīm al-shahīr bi-Ibn Nujaym al-Miṣrī*, Vol.1 (Bayrūt, Lubnān: Dār al-Kutub al-ʻIlmīyah, 1985). 369-370.

[29] Ḥamawī, Aḥmad ibn Muḥammad, *Ghamz ʻuyūn al-baṣā'ir: sharḥ kitāb al-Ashbāh wa-al-naẓā'ir li-Mawlānā Zayn al-ʻAbidīn Ibrāhīm al-shahīr bi-Ibn Nujaym al-Miṣrī*, Vol.1 (Bayrūt, Lubnān: Dār al-Kutub al-ʻIlmīyah, 1985).372-373.

[30] Ibid.

caliph and other public officials deemed to be ideal public agents, just as the principal is understood to be the ideal of the Muslim community. Political rationality is then expressed primarily not in the enforcement of pre-existing norms of Islamic law that have been derived through the interpretive methods described in the books of theoretical jurisprudence, but rather through the expression of the community's will, which, even though it is morally constituted by the substantive values of Islam in the form of certain mandatory negative and positive rules, provides for a real domain of freedom for that community to pursue its own conception of its rational good. The ideal of agency, when combined with the idea of the Muslim community as the principal, provides negative and positive limitations on the substantive powers of public officials, accounts for the moral duty of individuals to comply with the lawful commands of public officials that are not derivable from revelation, and finally provide for a normative framework for remediating breaches of the ideal of agency on the part of public officials.

None of this means, of course, that Muslim states actually observed any of these principles in their empirical practices. I have nothing to say about that issue. What I do wish to refute, and I hope that I have done so successfully, is the notion that Islamic law as an ideal made no room for a political domain that is constituted by its own rationality distinct from that of the juristic enterprise, an assumption that seems to be widespread among scholars of Islamic law. In that respect, it is probably worth addressing in passing the problem of obedience with which this paper began, and address the common assumption that Sunnī jurists solved this problem by requiring what amounted to absolute obedience to whoever seized effective power. There is little doubt that one can find numerous statements of Muslim jurists that require obedience to usurpers (*al-mutaghallib*) but it is not clear whether such statements should be taken to mean that Sunnī jurists abandoned all hope of a properly constructed public order. Indeed, one of the virtues of the Sunnī constitutional order was that it was capable of redeeming usurpers by taking them to be, via the legal fiction of validation (*taṣḥīh*), lawful representatives of the community. To make a comparison to the common law, usurpers were treated as

constructive trustees, with the result that their actions remained subject to legal review. This in turn led to an important distinction in Sunnī legal thought between obedience on moral grounds and obedience on prudential grounds: when the actions of a public official were in conformity with the substantive and jurisdictional requirements of Islamic law, they engendered a moral obligation of obedience, but when decisions did not meet these requirements, only a prudential duty to obey could exist. This is not, as one might believe, a distinction without a difference. When a moral duty of obedience existed, the obligation to obey was unqualified. If it was merely a prudential duty, individuals were entitled to ignore the command if they could do so without fear of causing injuries to others. In both cases, whether the duty is moral or prudential, however, the duty arises from one's relationship to fellow members of one's political community and never as a result of an inherent right in the ruler to be obeyed. When the state's action is lawful, one has a moral duty to abide by the lawful decisions of one's community; and when the state's action is illegal, one has a prudential duty to avoid harming one's fellows by obeying an unjust law, if it is likely that defiance would lead to such harms. Where one can defy unlawful commands without fear of harm to the public, however, then one has no reason to respect the illegal command.

Professor Crone, recognizing the incipient democratic potentialities of elements of Sunnī political thought, expressed regret in her recent work on Islamic political thought that Sunnī Muslims failed to establish councils or other representative institutions that could have served to limit arbitrary power. I would suggest that it is our bias as modern citizens of post-industrial democracies that leads us to assume that ex ante procedures such as elections and representative bodies are the best or may even be the only means of expressing effective representation of a public. In the slowly changing conditions of pre-modernity, with its poor communications and the vast distances between the various cities of Islamdom, however, there may have been good reasons for Muslims to adopt an ex post system of accountability in which courts, through the law, were given power to enforce the representative

character of the polity rather than through an ex ante system of selection which would, all things being equal, would immunize governmental decisions after the fact. If in fact there might have been good political reasons to prefer a system of judicial accountability rather than electoral (or something akin to electoral accountability), it might turn out that such norms were actually practiced in a non-trivial fashion in the Mamlūk and early Ottoman states. Just as scholarship had long assumed that nothing of interest occurred in post-formative jurisprudence until scholars began to read texts from that period closely, it may turn out that the legal tools described in this paper could have been meaningful in actualizing Muslim political ideals, but until we shed ourselves of the assumption that Islamic law was too utopian to have meaningfully furthered political life, we will never even bother to find out.