

MISUNDERSTANDING ISLAM ON THE USE OF VIOLENCE

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I. INTRODUCTION

Islam remains misunderstood by many in the West essentially because it has not been part of the Western cultural tradition. Negative perceptions in the West are enhanced by popular reactions to abhorrent practices committed by some Muslims, even when those practices clearly contradict the teachings of Islam.¹ These negative perceptions are also enhanced by Islamophobia.² Conversely, the West's double standards are

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1. See M. CHERIF BASSIOUNI, *SHARĪ'A AND ISLAMIC CRIMINAL JUSTICE IN TIME OF WAR AND PEACE* 1 (2014).

2. In the United States for example, as a result of both ignorance and Islamophobic tendencies, there has been displayed an unwarranted and unjustified concern that the estimated six million Muslim Americans might influence federal and state laws to adopt

particularly felt among Muslims. This applies inter alia to: the United States' military practices in Afghanistan since 2001 and the use of torture against civilians there; the use of drone attacks in Afghanistan and Pakistan since 2003 causing civilian casualties;³ the practice of torture in Iraq, Guantanamo, and elsewhere;⁴ Israeli practices against Palestinians; anti-Islam

the *shari'ā*. In recent years, many U.S. state legislators have lobbied for laws or constitutional amendments barring courts from applying international, Islamic, or *shari'ā* law. Such a constitutional amendment passed in Oklahoma in 2010. Jacob Gerhsman, *Oklahoma Ban on Sharia Law Unconstitutional, US Judge Says*, WALL ST. J. (Aug. 16, 2013), <http://blogs.wsj.com/law/2013/08/16/oklahoma-ban-on-sharia-law-unconstitutional-us-judge-rules>. However, in January 2012 a federal appeals court struck it down, stating that appellants "did not know of even a single instance where an Oklahoma court had applied *shari'ā* law or used the legal precepts of other nations or cultures, let alone that such applications or uses had resulted in concrete problems in Oklahoma." Press Release, ACLU, Court Upholds Ruling Blocking Oklahoma Sharia and International Law Ban (Jan. 10, 2012), <https://www.aclu.org/religion-belief/court-upholds-ruling-blocking-oklahoma-sharia-and-international-law-ban>. Most of the concern surrounds the notoriety of the penalties for *hudūd* crimes, which are only applied in a handful of Muslim states. Moreover, only three *hudūd* crimes include the death penalty (which is still legal and practiced in the United States), only one prescribes stoning to death (which is part of the Judeo-Christian tradition as well). A handful of states include stoning as a punishment in their codified laws, including Pakistan, Saudi Arabia, Sudan, the United Arab Emirates, Yemen, and parts of Nigeria, however, the actual practice is very rare. In recent years, isolated cases of stoning have taken place in Afghanistan, Iraq, Mali, Nigeria, Somalia, and Sudan. BASSIOUNI, *supra* note 1, at 1 n.1. For a well-known Islamophobic author, see generally STEVEN EMERSON, AMERICAN JIHAD: THE TERRORISTS LIVING AMONG US (2002).

3. INT'L HUMAN RIGHTS & CONFLICT RESOLUTION CLINIC AT STANFORD LAW SCH. & GLOBAL JUSTICE CLINIC AT NYU SCH. OF LAW, LIVING UNDER DRONES: DEATH, INJURY AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN (2012), available at <http://www.livingunderdrones.org/wp-content/uploads/2013/10/Stanford-NYU-Living-Under-Drones.pdf>; *Afghanistan: No Justice for Thousands of Civilians Killed in US/NATO Operations*, AMNESTY INT'L (Aug. 11, 2014), <https://www.amnesty.org/en/articles/news/2014/08/afghanistan-no-justice-thousands-civilians-killed-usnato-operations>; see, e.g., LETTA TAYLER, HUMAN RIGHTS WATCH, A WEDDING THAT BECAME A FUNERAL: US DRONE ATTACK ON MARRIAGE PROCESSION IN YEMEN (2014), available at http://www.hrw.org/sites/default/files/reports/yemen0214_ForUpload_0.pdf (discussing a suspected U.S. drone attack that killed twelve civilians).

4. M. CHERIF BASSIOUNI, THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION: IS ANYONE RESPONSIBLE? 2 (2010); see SENATE SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM 2-3 (2014), available at <http://www.intelligence.senate.gov/study2014/sscistudy1.pdf> (discussing a program of indefinite secret detention and the use of brutal interrogation techniques initiated by CIA personnel).

feelings by Westerners (particularly right-wing parties, groups, and individuals); and cartoons and other symbols of disparagement of Islam's holy symbols in the name of "free speech." In conclusion, Muslims have felt alienated, rejected, and discriminated against by the West, which when compared with the West's double standards, its disregard of the harm suffered by Muslims not only from the West but also from other Muslims, and Muslims' own deficit in human, social, and economic development has led to the present confrontational crisis.

Western perceptions also fail to take into account Muslim societies' cultural diversity and their respective human, social, and economic conditions.⁵ These societies are still struggling with their relatively recent emergence from colonization and the negative influences of Western neo-imperialism that have kept non-democratic forms of government in place for nearly a century since the dismantling of the Ottoman Empire in 1922 C.E. of which they were a part.⁶

Contrary to what many in the West believe, Muslims have suffered the most from the wrongful, violent practices and erroneous or misleading religious beliefs held by some Muslims, mostly based on the erroneous teachings of unqualified lay-preachers. Since WWII the number of Muslims killed by Muslims far exceeds the number of Muslims killed by non-Muslims.⁷

5. This is evident in Arab Muslim states. See UNITED NATIONS DEV. PROGRAM, ARAB HUMAN DEVELOPMENT REPORT 4-5 (2009).

6. BASSIOUNI, *supra* note 1; see M. ŞÜKRÜ HANIOĞLU, A BRIEF HISTORY OF THE LATE OTTOMAN EMPIRE 192-93 (2008) (discussing the collapse of the Ottoman Empire and the effect of this collapse on various Muslim societies). See generally DONALD QUATAERT, THE OTTOMAN EMPIRE, 1700-1922 (2d ed. 2000).

7. M. CHERIF BASSIOUNI, THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE (2010). Consider, for instance, that since 2003 in Iraq it is estimated that more than 300,000 Muslims and as many as 20,000 Christians have been killed by Muslims in a sectarian struggle, which cannot find any justification under the respective sects' best interpretations. Prior to that, during Saddam Hussein's rule, another 300,000 Muslims were killed by Muslims, and in the Iran-Iraq War of the 1980s, an estimated one million Muslims from these two countries were killed, including from the use of chemical weapons. The same is true in Afghanistan, where since the Russians withdrew in 1989, an estimated 400,000 Afghan and Pakistani Muslims have been killed by other Afghan and Pakistani Muslims. Even though the Taliban and others today claim to fight against a foreign occupier, the

But in the West, these facts are under-reported, while the victimization of Westerners is highly emphasized. Whereas the attack on the Charlie Hebdo offices resulted in twelve deaths,⁸ DAESH/ISIS/ISIL (hereinafter referred to as “IS”) executed 1,878 people in approximately the last six months of 2014, which averages a little more than ten executions every single day.⁹ And on January 3, 2015, *Boko Haram* is estimated to have killed over 2,000 people in the taking of the town of Baga, Nigeria.¹⁰ The numbers of these Muslim deaths in Muslim countries are multiple orders of magnitude greater than those that took place in Paris, but they have not received anywhere near the Western media attention of the Charlie Hebdo attack. This too heightens Muslim’s anti-Western sentiments and enhances the disaffection of Muslims particularly among the youth.

In the end, all of this increases radicalization of Muslims, especially among the youth, and escalates the confrontation between Muslims and the West.¹¹

number of Afghan Muslims killed by the Taliban is far greater than the total number killed by western foreign occupiers. Similarly, when Bangladesh declared its independence from Pakistan in 1971, close to a million Bengali Muslims were killed by pro-Pakistan Muslim forces. *Id.* What is presently happening in Syria is the most recent glaring example of Muslims’ violations of the *shari‘a* and Islamic law (*fiqh*), as well as secular international humanitarian law (IHL) and international human rights law (IHRL). Christopher Mullins, *Armed Conflicts Involving Muslim States, in SHARI‘A AND ISLAMIC CRIMINAL JUSTICE IN TIME OF WAR AND PEACE* app. B, 296–304 (2014).

8. Charles Bremner, *Islamists Kill 12 in Attack on French Satirical Magazine Charlie Hebdo*, *TIMES* (Jan. 7, 2015), <http://www.thetimes.co.uk/tto/news/world/europe/article4316408.ece>.

9. See Oliver Holmes, *Islamic State Executed 1,878 in 6 Months, Monitors Say*, *REUTERS* (Dec. 28, 2014), <http://www.reuters.com/article/2014/12/28/mideast-crisis-casualties-idUSL6N0UC0E620141228>; *About 2000 People Killed by Islamic State Since the Establishment of “Caliphate”*, *SYRIAN OBSERVATORY FOR HUM. RTS.*, (Dec. 28, 2014), <http://syriahr.com/en/2014/12/about-2000-people-killed-by-islamic-state-since-the-establishment-of-caliphate> [hereinafter SYRIAN OBSERVATORY].

10. Press Release, Amnesty Int’l, *Nigeria: Massacre Possibly Deadliest in Boko Haram’s History* (Jan. 9, 2015), <http://www.amnesty.org/en/for-media/press-releases/nigeria-massacre-possibly-deadliest-boko-haram-s-history-2015-01-09-0> [hereinafter Amnesty International Press Release]; see *Satellite Images Show Horrific Scale of Boko Haram Attack on Baga*, *AMNESTY INT’L* (Jan. 15, 2015), <http://www.amnestyusa.org/news/news-item/nigeria-satellite-images-show-horrific-scale-of-boko-haram-attack-on-baga>.

11. For a view predicting an inevitable clash between the West and Islam, see generally SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1998). Unlike Huntington, this Author does not believe in the

Suicide bombings, the killing of non-combatants, and particularly the indiscriminate killing of civilians, including women and children, persons *hors de combat* such as the sick and the injured, the destruction of religious places, and torture, are prohibited in Islam, and there are no excuses or justifications for them.¹² These acts are criminal under the *shari'ā* and Islamic law, and no amount of doctrinal rationalization by certain politically motivated or insufficiently informed Muslim theologians and political activists can alter this conclusion.¹³ Any cursory reading of the *Qur'ān* leads to this conclusion, notwithstanding the *fatāwa* (plural of *fatwa*) of politically-motivated religious and political leaders, most of whom are unqualified to issue any edict whatsoever.¹⁴

inevitability of this clash even at a time when, after the “Charlie Hebdo” killings, the entire world is standing up in opposition to this type of violence, and the backlash in Europe and America, driving the anti-Muslim political right-wing parties to increase their denunciations of Islam and Muslims.

12. For the prohibition of these acts in Islamic law, see Muhammad ibn al-Hasan Shaybani (b. 749, d. 805), who was an early Muslim jurist from Iraq and father of international law in Islam. His treatise *AL-SIYYAR AL-KABĪR*, was written at the end of the 18th century C.E. See *THE ISLAMIC LAW OF NATIONS: SHAYBANI'S SIYAR* (Majid Khadduri trans., Johns Hopkins Univ. Press, rev. ed. 2001) [hereinafter *THE ISLAMIC LAW OF NATIONS*], for a modern translation. See also BASSIOUNI, *supra* note 1, at 175–81 (discussing both general prohibitions against killing and harming others as well as a number of specific protections for specific persons and places contained in the *Qur'ān*).

13. BASSIOUNI, *supra* note 1, at 175–81.

14. The issuance of a *fatwa* has several substantive requirements, but more importantly, the scholar issuing it must possess a number of qualifications. The late Osama bin Laden, like so many other political/religious chieftains of movements throughout Muslim societies, did not meet these qualifications. These abuses exist throughout the Muslim world. Recently, an Egyptian cleric purporting to speak on behalf of the Fatwa Committee of Egypt's highest Islamic authority, Al-Azhar, publicly pronounced that fighting against protesters who oppose the Muslim Brotherhood, even to death, is a righteous act. The Islamic Research Academy of Al-Azhar publicly condemned the unofficial fatwa. See Warren Moise, *Sharia Law Part II: How Does It Work?*, S.C. LAW. 13–15 (2014) (describing *fatwa* as an “Islamic legal pronouncement, issued by an expert in religious law (mufti), pertaining to a specific issue, usually at the request of an individual or judge to resolve an issue where Islamic jurisprudence (fiqh), is unclear”); see also *Egypt's Al-Azhar Condemns Cleric Speaking in Its Name*, AL-AHRAM ENGLISH (Aug. 16, 2012), <http://english.ahram.org.eg/NewsContent/1/64/50590/Egypt/Politics-/Egypts-ALAzhar-condemns-cleric-speaking-in-its-nam.aspx>. This phenomenon of pseudo-*fatwas* prevailed between the 1960s and 1980s in Egypt with jihadist groups who justified assassinations and attacks upon foreign tourists. BASSIOUNI, *supra* note 1, at 3 n.10.

Islam rejects the postulate that “the ends justify the means”¹⁵ because it is a religion grounded in higher values and principles thus requiring that the ends and the means conform to these values and principles and to its specific legal dictates. Thus, violent conduct towards Muslim and non-Muslim civilians is contrary to Islam, whether it is committed by groups such as IS,¹⁶ the *Shabaab* in Somalia,¹⁷ the *Boko Haram* in Nigeria,¹⁸ the *Ansar Dine* in Mali,¹⁹ the Taliban in Afghanistan,²⁰ or suicide bombings by Palestinian freedom fighters.²¹

The Muslim world must assume its responsibilities, not only in terms of progressively developing its laws and legal systems, but also in ensuring accountability and ending impunity for International Humanitarian Law violators in conflicts occurring within their societies.²² This has not yet occurred. Regrettably,

15. The dictum is attributed to NICCOLÒ MACHIAVELLI *IL PRINCIPE: LE GRANDI OPERE POLITICHE* (G. M. Anselmi & E. Menetti trans., 1992).

16. See, e.g., SYRIAN OBSERVATORY, *supra* note 9.

17. See, e.g., LAETITIA BADER, HUMAN RIGHTS WATCH, *NO PLACE FOR CHILDREN: CHILD RECRUITMENT, FORCED MARRIAGE, AND ATTACKS ON SCHOOLS IN SOMALIA* (2012), available at http://www.hrw.org/sites/default/files/reports/somalia0212ForUpload_0.pdf.

18. See, e.g., Amnesty International Press Release, *supra* note 10; Adam Nossiter, *Child Bombs Nigeria Market, Killing 20*, N.Y. TIMES, Jan. 11, 2015, at A8.

19. See, e.g., Adam Nossiter, *Saying Mali 'Is Our Country,' Militias Train to Oust Islamists*, N.Y. TIMES, Aug. 6, 2012, at A1; see also *Mali Crisis: Key Players*, BBC NEWS (Mar. 12, 2013), <http://www.bbc.com/news/world-africa-17582909>.

20. See generally ANAND GOPAL, *NO GOOD MEN AMONG THE LIVING: AMERICA, THE TALIBAN, AND THE WAR THROUGH AFGHAN EYES* (2014). See also *THE TALIBAN AND THE CRISIS OF AFGHANISTAN* (Robert D. Crews & Amin Tarzi eds., 2008). See also Atia Abawi, *Afghan Woman Whose Nose, Ears Cut Off Travels to U.S.*, CNN (Aug. 4, 2010), <http://edition.cnn.com/2010/WORLD/asiapcf/08/04/afghanistan.mutilated.girl.update/index.html>. The story recounts the story of a 16-year old girl named Aisha, who was sold into marriage to an abusive Taliban fighter to pay off a family debt. Aisha ran away from her husband. When she was found, she was tried before a court, which sentenced her to having her nose cut off and being left in the mountains to die. She survived and subsequently traveled to Los Angeles for reconstructive surgery. *Id.*; see Comm'n on Human Rights, *Report of the Independent Expert on the Situation of Human Rights in Afghanistan*, U.N. DOC. A/59/370 (Sept. 21, 2004); see also Comm'n on Human Rights, *Report of the Independent Expert on the Situation of Human Rights in Afghanistan*, U.N. DOC. E/CN.4/2005/122 (Mar. 11, 2005).

21. ROBERT PAPE & JAMES K. FELDMAN, *CUTTING THE FUSE: THE EXPLOSION OF GLOBAL SUICIDE TERRORISM AND HOW TO STOP IT* (2010); see ROBERT PAPE, *DYING TO WIN: THE STRATEGIC LOGIC OF SUICIDE TERRORISM* (2005).

22. See BASSIOUNI, *supra* note 1, at 81.

major world powers have also failed in this respect, and have invoked exceptionalism as in the case of the United States, Russia, and China.²³ Others, like Israel, simply employ a double standard that self-justifies their use of violence as is evident in the 2008–2009 incursion into Gaza, the Report of a U.N. Commission of Inquiry regarding the incursion,²⁴ and the 2014 incursion that is presently under investigation by a similar U.N. Commission of Inquiry.²⁵ The combination of these factors enhances the disaffection of Muslims and particularly young Muslims who are therefore likely to be drawn into groups engaged in politically-motivated terror-violence.²⁶

II. CONTEMPORARY POLITICALLY MOTIVATED VIOLENCE AND THE CRISIS OF ISLAM IN THE MODERN WORLD

Over the past century Muslim societies have had to grapple with a number of existentially fundamental economic, social, and political issues that they have not been able to address, let alone to resolve. Among them is how to adapt the needs of

23. SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD (1997). See, e.g., DONALD E. PEASE, THE NEW AMERICAN EXCEPTIONALISM (2009).

24. Human Rights Council, *Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, U.N. DOC. A/HRC/12/48 (Sept. 25, 2009).

25. Human Rights Council Res. S-21/1, Ensuring Respect for International in the Occupied Palestine Territory, Including East Jerusalem, 21st Sess., July 23, 2014, U.N. DOC. A/HRC/RES/S-21/1 (July 24, 2014).

26. For an extended discussion of various factors drawing Muslims into violence, see generally EVOLVING APPROACHES TO JIHAD: FROM SELF-DEFENSE TO REVOLUTIONARY AND REGIME-CHANGE POLITICAL VIOLENCE IN JIHAD: CHALLENGES TO INTERNATIONAL AND DOMESTIC LAW (M. Cherif Bassiouni & Amna Guellali eds., 2010); YŪSUF AL-QARADĀWĪ, FIQH AL-JIHĀD: DIRĀSAH MUQĀRANA LI-AHKĀMIHI WA-FALSAFATIHI FĪ DAW' AL-QUR'ĀN WA-AL-SUNNA [The Law of War: a Comparative Study of its Rulings and Philosophy in the Light of the Qur'an and Sunna] (2009); M. Cherif Bassiouni, *Evolving Approaches to Jihad: From Self-Defense to Revolutionary Regime-Change Political Violence*, 8 CHI. J. INT'L L. 119, 142 (2007) [hereinafter Bassiouni, *Evolving Approaches to Jihad*]; YŪSUF AL-QARADĀWĪ, ISLAMIC AWAKENING BETWEEN REJECTION AND EXTREMISM (Int'l Inst. of Islamic Thought, 4th ed. 2006); 2 M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM (2002); M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L. J. 83 (2002); YŪSUF AL-QARADĀWĪ, THE LAWFUL AND PROHIBITED IN ISLAM (1995); M. CHERIF BASSIOUNI, LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS (1988); M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIMES (1975).

modernity to Islam and vice-versa. For all too many Muslims the very juxtaposition of the words Islam and modernity is an anathema. Muslim reformists, particularly those who resort to scientific ways of demonstrating the need for change, are derogatorily referred to as *‘ilmani* (scientific) by some Muslim scholars and preachers, along with their followers, with the implication that such *‘ilmani* Muslims border on the heretical.²⁷ Yet the *Qur’ān* refers to the word *‘ilm* (science) 880 times in positive terms. For all practical purposes, anyone who does not accept the vision of Islam that was fixed by the 12th century C.E.²⁸ and urges progressive theological and legal interpretation of the norms of the *shari‘ā* and Islamic law, is viewed as deviant, a heretic, or even a *kāfir* (an unbeliever, or one who rejects God or denies the truth revealed by God).²⁹

The contemporary phenomenon of violence by Muslims reveals a strong link between populist theological and doctrinal teachings to ideologically motivated violence.³⁰ This is largely due to the level of ignorance and/or misguided knowledge about Islam among the masses in the Muslim world. And this in turn is essentially due to a deficit in these societies’ human development and the misleading teachings of Islam by unqualified *mullahs*, *imāms*, *sheikhs*, and other (self) titled religious “leaders” that reach the masses directly, without having a corrective filter provided by the better informed religious leaders. Political actors seeking to advance their views

27. M. Cherif Bassiouni & Gamal M. Badr, *The Shari‘ah: Sources, Interpretation, and Rulemaking*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 145 (2002). The term is also used to describe Muslim secularists.

28. Note that progressive, open theological thought in Islam was frozen by the 12th century C.E. in most parts of the Muslim *ummah*, except in Andalusia, where it survived for almost another century. *Id.*, at 177–78. There too, however, it varied from region to region as Andalusia became fragmented, and different areas were lost from Muslim control at different times. See generally HUGH KENNEDY, *MUSLIM SPAIN AND PORTUGAL: A POLITICAL HISTORY OF AL-ANDALUS* (1997); see also W. MONTGOMERY WATT & PIERRE CACHIA, *A HISTORY OF ISLAMIC SPAIN* (2007); see also JAMIL M. ABUN-NASR, *A HISTORY OF THE MAGHRIB IN THE ISLAMIC PERIOD* (3d ed. 1987).

29. Bassiouni & Badr, *supra* note 27, at 171–72. This is no different than the position of certain orthodox Jews and fundamentalist Christians with respect to anyone of their faith who does not accept literal interpretations. This analogy does not, however, justify any such theological approaches.

30. See Bassiouni, *Evolving Approaches to Jihad*, *supra* note 26, at 120.

by propagating erroneous notions of Islam that the largely ignorant masses are ready to accept and follow have supplanted traditional scholars, teachers, and Imams. The latter have, therefore, have not only been displaced, but their impact on the masses has been substantially blunted. Suffice it to observe that self-styled exponents of certain erroneous views of the *shari'ah* are doing this right now in places like: Afghanistan, Egypt, Iraq, Libya, Mali, Nigeria, Pakistan, Somalia, Syria and Yemen.³¹ Regrettably, all too few Muslim theologians, intellectuals, and political leaders raise their voices in opposition to these practices.³²

This is violence in the name of Islam, but not violence permitted by Islam. Acts of violence, whether against Muslims or non-Muslims, such as: indiscriminate killings, beheadings, rapes, slavery, destruction of public and private property, pillage, and theft, violate the *shari'ah* and Islamic law.

Pseudo-*ulamma* of the populist genre, have used the doctrine of *Jihad* to propagate the legal foundation for a resort to violence and more significantly as a justification for the use of violence prohibited by the *shari'ah* and Islamic law.³³ But *Jihad* is subject to a number of legal pre-conditions, only then does it allow for the derogation of prohibitions on the use of violence, but it still does not allow derogation of the ways and means in

31. See SYRIAN OBSERVATORY, *supra* note 9; Amnesty International Press Release, *supra* note 10; BADER, *supra* note 17; Nossiter, *supra* note 18; Nossiter, *supra* note 19; GOPAL, *supra* note 20; PAPE, *supra* note 21.

32. This was also at issue in Iran in 1979 when elements of the Revolutionary Guard seized the U.S. embassy in Tehran and held 52 diplomats hostage for 444 days. This Writer opposed the practice. See M. Cherif Bassiouni, *The Protection of Diplomats Under Islamic Law*, 74 AM. J. INT'L L. 609, 610–11, 626 (1980) (arguing that there is a Koranic mandate that Muslim states must protect envoys and that sanction is the only action to be taken against them). The International Court of Justice upheld the U.S. position and condemned Iran. *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (May 24). More recently, again in Pakistan, two parents murdered their teenage girl with acid for having looked at a boy who passed their home. The parents claimed that the girl's death was necessary in order to preserve the honor of the family. Zulfiqar Ali, *Girl Killed in Pakistani-Administered Kashmir Acid Attack*, BBC NEWS (Nov. 1, 2012), <http://www.bbc.co.uk/news/world-asia-20173484>.

33. Bassiouni, *Evolving Approaches to Jihad*, *supra* note 26, at 138–39.

the carrying out of permissible violence. This is equivalent in international law to the *jus ad bellum* and the *jus in bello*.³⁴

As stated above, the violence that we are witnessing by certain groups in the Muslim world also has socio-economic and political causes. They include: ignorance, poverty, frustration, anger, and political oppression. But much of it is also due to the low level of knowledge among those who are, or claim to be, Muslim scholars and whose teachings are contrary to Islam, or at least contrary to a better and more enlightened understanding of Islam. This is not only by contemporary standards, but also by the standards established by the Prophet in Madinah during Islam's first decade (622 and 632 C.E.) and reinforced by the practice of the Muslim *ummah* over the following 200 years.

34. Mohamed Abdel Dayem & Fatima Ayub, *In the Path of Allah: Evolving Interpretations of Jihad and its Modern Challenges*, 7 UCLA J. ISLAMIC & NEAR E. L. 67, 86–92 (2008) (“[J]ihad carries a range of guidelines tantamount to its own *jus ad bellum* and *jus in bello*.”). For more information see generally: THE ISLAMIC LAW OF NATIONS, *supra* note 12; BASSIOUNI, *supra* note 1; AHMED AL-DAWOODY, THE ISLAMIC LAW OF WAR: JUSTIFICATIONS AND REGULATIONS (2011); NIAZ SHAH, ISLAMIC LAW AND THE LAW OF ARMED CONFLICT 93–117 (2011); Muhammad Munir, *The Layha for the Mujahideen: An Analysis of the Code of Conduct for the Taliban Fighters Under Islamic Law*, 93 INT’L R. RED CROSS 81, 85 (2011); AL-WATHĀ’IQ AL-DAWLIYYA WA AL-IQLĪMIYYA AL-MA’NIYYAA BI HUQŪQ AL-INSĀN [Regional and International Documents on Human Rights] (M. Cherif Bassiouni & Khaled Mohey El Din eds., 2011); M. CHERIF BASSIOUNI, AL-QĀNŪN AL-DAWLĪ AL-INSĀNĪ [International Humanitarian Law] (2007); MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM (Law Book Exch., Ltd., reprinted 2006) (1995); Muhammad Munir, *Public International Law and Islamic International Law: Identical Expressions of World Order*, 1 ISLAMABAD L. REV. 369, 425 (2003); MUHAMMED HAMIDULLAH, MUSLIM CONDUCT OF STATE (1977); MOHAMMAD TALAT AL-GHUNAYMI, THE MUSLIM CONCEPTION OF INTERNATIONAL LAW AND THE WESTERN APPROACH (1968); MUHAMMAD ABŪ ZAHRA, AL-ĀLĀQĀT AL-DAWLIYYA FĪ AL-ISLĀM [International Relations in Islam] (1964); SAID RAMADAN, ISLAMIC LAW: ITS SCOPE AND EQUITY (1961); Hanse Kruse, *al-Shaybani on International Instruments*, 1 J. PAK. HIST. SOC’Y 90 (1953); Edmund Rabbath, *Pour Une Theorie du Droit International Musulman*, 6 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 1 (1950); Mohamed Abdallah Deraz, *Le Droit Internationale De Islam*, 5 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 17 (1949); Ahmed Rechid, *Islam et le Droit des Genes*, 60 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INT. DE LA HAYE 371 (1937) (Fr.); NAJIB ARMANAZI, L’ISLAM ET LE DROIT INT. (1929) (Fr.); Sayid Abdel Majjid, *The Muslim International Law*, 28 L. Q. REV. 89 (1912).

III. THE THEOLOGICAL BAGGAGE

The theological and legal doctrinal developments that blossomed in the Islamic *ummah* during its “Golden Age” from the 8th to the 12th centuries C.E. came to an end with the Mogul and Seljuk invasions that devastated what was left of the Abbasid period.³⁵ Beginning in the 10th century C.E., however, *Sunni* scholars became concerned with the influx of new knowledge systems and their respective methods that came from other civilizations.³⁶ This influx was an inevitable consequence of the

35. BASSIOUNI, *supra* note 1, at 7. The exact years considered to comprise the “Golden Age” of Islam, and in what part of the Muslim *ummah*, varies amongst historians. Most, however, agree that it includes the Abbasid period (in Iraq, 132–655 A.H./750–1258 C.E.), the Fatimid period (in Egypt, 296–566 A.H./909–1171 C.E.), and the Andalusian period (in Spain, 138–633 A.H./756–1236 C.E.). Political scientists see the Abbasid period as the most relevant (with some adding the preceding Syrian Umayyad period from 40–132 A.H./661 to 750 C.E.), relegating the two others to the level of sideshows. *Id.* For an extended discussion of the “Golden Age” scholars of Islam and works produced during this period, see generally: ABU NASR AL-FARABI, ON THE PERFECT STATE (Richard Walzer trans., 1998); AL-FARABI, LA CITTA VIRTUOSA (1996); D. Black, *Al-Farabi*, in HISTORY OF ISLAMIC PHILOSOPHY 178–97 (Oliver Leaman & S. Nasr eds., 1996); AVICENNA (IBN SINA) ON THEOLOGY (A.J. Arberry trans., 2007); SHAMS INATI, IBN SINA AND MYSTICISM: REMARKS AND ADMONITIONS (1996); Shams Inati, *Ibn Sina*, in HISTORY OF ISLAMIC PHILOSOPHY 231–46 (Oliver Leaman & S. Nasr eds., 1996); IBN SINA, REMARKS AND ADMONITIONS, PART ONE: LOGIC (Shams Inati trans., 1984); IBN SINA, THE LIFE OF IBN SINA: A CRITICAL EDITION AND ANNOTATED TRANSLATION (W. Gohlman ed. & trans., 1974); IBRAHIM NAJJAR, FAITH AND REASON IN ISLAM: AVERROES’ EXPOSITION OF RELIGIOUS ARGUMENTS (2001); IBN RUSHD, KITAB FASL AL-MAQAL [On the Harmony of Religion and Philosophy] (G. Hourani ed., 1959); IBN RUSHD, AVERROES’ COMMENTARY ON PLATO’S REPUBLIC (E. Rosenthal ed. & trans., 1978); IBN RUSHD, AVERROES’ TAHAFUT AL-TAHAFUT [The Incoherence of the Incoherence] (M. Bouyges ed., 1992); IBN RUSHD, LE LIVRE DU DISCOURS DECISIF [The Book of Decisive Discourse] (M. Geoffroy trans., 1996); IBN RUSHD, L’INCOERENZA DELL’INCOERENZA DEI FILOSOFI [On the Perfect State] (M. Campanini trans., 1997); IBN KHALDUN, AL-MUQADDIMAT (F. Rosenthal trans., 1958).

36. BASSIOUNI, *supra* note 1, at 7. These scholarly books trace the origins and evolution of Islam and Islamic law, including the internal and external factors that had an impact on this evolution: LESLEY HAZLETON, AFTER THE PROPHET: THE EPIC STORY OF THE SHIA-SUNNI SPLIT (2010); RICHARD M. FRANK, EARLY ISLAMIC THEOLOGY: THE MU’TAZILITES AND AL-AZHARI, TEXTS AND STUDIES ON THE DEVELOPMENT AND HISTORY OF KALAM (2007); WAEL HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW (2005); JONATHAN P. BERKEY, THE FORMATION OF ISLAM: RELIGION AND SOCIETY IN THE NEAR EAST 600–1800 (2003); YASIN DUTTON, THE ORIGINS OF ISLAMIC LAW (1999); BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW (1999); RICHARD C. MARTIN ET AL., DEFENDERS OF REASON IN ISLAM: MU’TAZILISM AND RATIONAL THEOLOGY FROM MEDIEVAL SCHOOL TO

Muslim expansion into territories formerly occupied by the Roman Byzantine Empire, Assyria, Babylonia, Mesopotamia, Persia, parts of the Indian subcontinent, and parts of Spain and Southern Europe, as well as the migration of ideas, intellectual systems, and their methods from Greece and Byzantium. These intellectual systems and their methods had an impact on exegesis and hermeneutics within the *ummah*, thus causing concern in the more conservative Muslim theological community, in particular those who came from Arabia.³⁷ These theological conservatives saw the outcomes of intellectual openness as causing Islam's splintering into different religious movements. The *Sunni/Shī'a* split that resulted in the rise of the Umayyad dynasty in the 8th century C.E.,³⁸ and such movements as the *Khawārij* and the *Mu'tazila*,³⁹ were sufficient reasons for conservative scholars to pull back the reins on intellectual openness, thus leading back to rigid literalism in interpretation and to the denial of the role of reason as the framework for interpretation, or even as a method of interpretation. A summary by a contemporary non-Muslim expert states:

The schools [of thought] varied in the amount of leeway they allowed in interpreting Sharia (Islamic law) and whether they believed those interpretations could be made by individual scholars or had to be endorsed by a consensus of scholars. The Malikis and the Hanbalis read the scripture and hadith quite literally, scorning the use of human reason as it was employed by the other two, more interpretive schools. The Hanafis used analogy and reason, especially in untangling conflicting statements attributed to the Prophet. The Shafis sought to concentrate on the most authentic oral reports and looked to find a consensus among scholars on interpretive rulings. The issue was—and still is—extremely important, because such interpretations became part of the Sharia, which Muslims consider to be the divinely revealed law of Islam.

MODERN SYMBOL (1997).

37. See *supra* text accompanying note 35.

38. HAZLETON, *supra* note 36, at 63–64, 206.

39. FRANK, *supra* note 36, at 499–500; MARTIN ET AL., *supra* note 36.

In the tenth century, orthodox Sunni ulama argued that there had been enough of this independent reasoning and warned that it could not continue without distorting Islam. They maintained that the Sharia was completely and finally assembled within three centuries of Muhammad's death and it was time to "close the gates of *ijtihad*," or rational interpretation. This argument gained ground and was finally formalized in the fourteenth century, when Sunni ulama agreed that contemporary questions could be answered only by a literal reading of the Sharia and not by new interpretation.

But many Muslim reformers, from the eleventh century on, objected to such a "mechanistic," literal approach to scripture and argued that the schools of law were too rigid in defining Sharia. Much debate has centered around the hadith, with reformers questioning the vast number of oral histories, the often conflicting interpretations of the hadith, and the ulama's ability to verify the Prophet's sayings as they were passed down through the ages by his friends, his family, and community members. Reformers in the past, and especially in the nineteenth century, attempted to portray the hadith as parables, not to be construed as religious doctrine or law—and certainly not to be used to diminish the exercise of God-given reason in addressing contemporary challenges. Different approaches to Sharia not only divided Sunni, but also sharpened the divisions and struggles between Sunni and Shii, because the Sunni believe the Sharia is complete, while the Shii consider it evolving jurisprudence.⁴⁰

In the 12th century C.E., the development of theological and legal doctrines stopped in their tracks for all practical purposes. Since then, there has been an almost constant avoidance of progressive legal methods, approaches, and techniques.⁴¹ This

40. VARTAN GREGORIAN, ISLAM: A MOSAIC, NOT A MONOLITH 25–26 (2003) (citations omitted).

41. One of the most influential thinkers of the time, whose views are followed by contemporary *Salafī*, is Ibn Taymiyya (661–728 A.H./1263–1328 C.E.). For more information on Ibn Taymiyya, see generally: IBN TAYMIYYA, TAQĪ AL-DĪN AĤMAD, KITĀB AL-IMĀN [Book of Faith] (2009); YOSSEF RAPOPORT & SHAHAB AHMED, IBN TAYMIYYA AND

regression was opposed slightly by progressive scholars between the 10th and 12th centuries C.E., particularly those who had settled in Andalusia,⁴² but conservative scholars deemed it more important, as they saw it, to preserve the unity of Islam through orthodoxy than to achieve theological and legal progressive development. This trend was even then referred to as *usūliyya* (fundamentalism), which included the rejection of reason as a method of interpretation.⁴³ But what was acceptable in the 10th to 12th centuries C.E., reflecting a relatively limited gap of two centuries, can hardly be deemed acceptable now when the gap is more than twelve centuries, particularly the rejection of reason based on scientific knowledge.⁴⁴

HIS TIMES (2010); MUHAMMAD BIN SĀLEH AL-^cUTHAYMĪN, SHARH KITĀB AL-SIYĀSSA AL-SHARʿIYYA BI SHEIKH AL-ISLĀM IBN TAYMIYYA [Explanation of the Book on the Religious Policy According to Sheikh al-Islam Ibn Taymiyya] (2004); WAEL HALLAQ, IBN TAYMIYYA AGAINST THE GREEK LOGICIANS (1993); ^cALI IBN MUHAMMAD AL-MĀWARDĪ, AL-AHKĀM AL-SULTĀNIYYA [The Ordinances of Government] (E. Fagan trans., 1915).

42. BASSIOUNI, *supra* note 1, at 9. For an extended discussion on the progressive view, see generally: ABU NASR AL-FARABI, ON THE PERFECT STATE (Richard Walzer trans., 1998); AL-FARABI, LA CITTA VIRTUOSA (M. Campanini trans., 1996); D. Black, *supra* note 35, at 178–97. On Ibn Sina (Avicenna), see: AVICENNA (IBN SINA) ON THEOLOGY (A.J. Arberry trans., 2007); IBN SINA AND MYSTICISM, *supra* note 35; *Ibn Sina*, *supra* note 35, at 231–46; REMARKS AND ADMONITIONS, PART ONE: LOGIC, *supra* note 35; THE LIFE OF IBN SINA, *supra* note 35. On Averroes or Ibn Rushd, see: IBRAHIM NAJJAR, *supra* note 35; KITAB FASL AL-MAQAL, *supra* note 35; AVERROES' COMMENTARY ON PLATO'S REPUBLIC, *supra* note 35; TAHAFUT AL-TAHAFUT, *supra* note 35; LE LIVRE DU DISCOURS DECISIF, *supra* note 35; L'INCOERENZA DELL'INCOERENZA DEI FILOSOFI, *supra* note 35. See also IBN KHALDUN, *supra* note 35.

43. BASSIOUNI, *supra* note 1, at 9; see IBN TAYMIYYAH, *supra* note 41; AL-MAWARDI *supra* note 41; HARRY AUSTRYN WOLFSON, PHILOSOPHY OF THE KALAM (1976). This rejectionism was also due to several methods of analysis based on Greek methods that were then lumped under the heading of *kalam*.

44. For example, the simple question of determining the correct times for the five daily prayers could be easily answered by following the cycle of sunrise to sunset. However, such a method does not apply above or below the Arctic Circle or in outer space. While this question may not pose many difficulties to most Muslims, it is nevertheless the method by which one reaches a solution to a practical question that is being posed. If one adopts a method based on reason for purposes of determining prayer time, which is self-evident, then surely one should be able to adopt the same method based on reason for so many other questions pertaining to the exigencies of modernity. As someone who has traveled to both the Arctic and the Antarctic and who prays five times a day, this Writer simply divided the day into twelve-hour cycles and determined a reasonable space of time between morning, noon, early afternoon, sunset, and night prayers. A similar question arose when a Muslim Malaysian astronaut asked for a *fatwa* in order to know

The rigidity that developed between the 10th and 12th centuries C.E. is also attributed to the closing of the door of *ijtihad*, which is a method of intellectual reasoning based on analogy, logic, and the purposes and policies of the *shari'ah* with respect to facts that have not been previously addressed.⁴⁵ This occurred because Muslim theologians felt comfortable with what was and safe from having to face anything new that they might not be able to address. As history has taught us, there is nothing more fearsome and challenging than change.⁴⁶ Even today, classic Muslim theologians are anchored in the knowledge of what was past because it offers a sense of security and ensures the continuity of what they know and from which they can derive power and wealth. Paradoxically, during Islam's "Golden Age" between 750 and 1258 C.E., these regressive conceptions were opposed and progressive ones offered a beacon of enlightenment to Western civilization.⁴⁷ One contemporary scholar aptly summarized it as follows:

what times he should adhere to for prayer while orbiting the earth in outer space. The *Salafi*, for example, consider that in order to be a proper adherent of Islam one must follow what they consider to be the *sunna* and wear a certain type of *jalaba* and a certain type of sandal, which they believe (without proof) that the Prophet wore during his lifetime. BASSIOUNI, *supra* note 1, at 10 n. 41; PROGRESSIVE MUSLIMS 55–57 (Omid Safi, ed., 2003). My guess is that if the Prophet lived in Chicago, as this Writer does, or in Alaska or Norway, he would have probably worn shoes, woolen socks, and warm clothes, which do not allow the air to penetrate. This is not to begrudge the *Salafi* for choosing their own garb, it is simply that this Writer opposes the imposition of their garb on others, particularly when it goes against reason in certain environments.

45. M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 164–65, 177 (2002); see generally IMRAN A. NYAZEE, *THEORIES OF ISLAMIC LAW: THE METHODOLOGY OF IJTihad* (Kazi Publ'n, 1996).

46. See MACHIAVELLI, *supra* note 15, at 4–5.

47. But see HALLAQ, *supra* note 36, at 90–101, 198–206 (detailing changes in Islamic conceptions and regimes, coupled with western ideas and explaining the progressive nature of the Western system). For more information, see generally: DUTTON, *supra* note 36; BERKEY, *supra* note 36; WEISS, *supra* note 36. The overlap between the 8th and 12th centuries C.E., for purposes of distinguishing the "Golden Age" and the regressive period, has to do with location. By the 10th century C.E., regressive trends were visible all over the *ummah*, but mostly in Makkah and Madinah. They became dominant across the *ummah* by the 12th century C.E., except for certain intellectual circles in Iraq, Egypt, and Andalusia, where the "Golden Age" continued into the mid-1200s C.E.

It is clear that the influence of Islam on Western Christendom is greater than is usually realized. Not only did Islam share with Western Europe many material products and technological discoveries; not only did it stimulate Europe intellectually in the fields of science and philosophy; but it provoked Europe into forming a new image of itself. Because Europe was reacting against Islam, it belittled the influence [of Muslim scholarship]. . . . So today, an important task for our Western Europeans, as we move into the era of the one world, is to correct this false emphasis and to acknowledge fully our debt to the Arab and Islamic world.

During those five “golden” centuries, Muslim realms became the world’s unrivaled intellectual centers of science, medicine, philosophy, and education. The Abbasids championed the role of knowledge and are renowned for such enlightened achievements as creating a “House of Wisdom” in Baghdad, the city they built on the banks of the Tigris river. At this Abbasid institute, Muslim and non-Muslim scholars—including Nestorian Christians and star-worshipping Sabians—sought to bring all the world’s written knowledge into Arabic. Classic works by Aristotle, Archimedes, Euclid, Hypocrites, Plutarch, Ptolemy, and others were translated. Christian monks created Arabic versions of the Bible, and many Jewish philosophers wrote in Arabic. Without these Arabic translations, it is interesting to note, many classic works of antiquity would have been lost.

Furthermore, from the eleventh to the thirteenth centuries, many Arabic translations of classic works were, in turn, translated into Turkish, Persian, Hebrew, and Latin. Thus the thirteenth-century Catholic theologian St. Thomas Aquinas apparently made his famous integration of faith and reason after reading Aristotle’s philosophy in a translation by Abbasid scholars, including Abu Ali ibn Sina, known in the West as Avicenna. Avicenna was an eleventh-century philosopher and physician who wrote an encyclopedia of philosophy and some 200 influential treatises on medicine, including one on ethics, which were widely read in Europe. The twelfth-century philosopher Abu

al-Walid Muhammad ibn Ahmad ibn Muhammad ibn Rushd, better known in the West as Averroës, a preeminent authority on Aristotle, as well as a judge and a physician, is also known for having synthesized Greek and Arabic philosophies. Meanwhile, al-Farabi tried to show that the ideal political system envisaged in Plato's utopia and in the divine law of Islam were one and the same.

.....

. . . This period in Islam was indeed a cauldron of cultures, religions, learning, and knowledge—one that created great civilizations and influenced others from Africa to China. The Muslim Golden Age has been hailed for its open embrace of a universal science. There was just one science—not a separate “Christian science,” “Jewish science,” “Muslim science,” “Zoroastrian science,” or “Hindu science”—for the Abbasids, who were apparently influenced by numerous Qur’anic references to honoring God by learning about the wonders of the universe. Thus, reason and faith, both being God-given, were combined, mutually inclusive, and supportive; Islam was anything but isolationist. Non-Muslims—as well as today’s doctrinaire Muslims who preach against “Western” values and “Western” science—may be shocked by the Abbasids’ receptiveness to science and philosophies that challenged orthodoxy.⁴⁸

48. GREGORIAN, *supra* note 40, at 26–29 (citations omitted). Gregorian continued:

The Abbasids were not alone in the Islamic pursuit of knowledge. Rival Muslim dynasties—the Fatimids in Egypt and Umayyads in al-Andalus, or Islamic Spain—were also intellectual and cultural centers during parts of this period. Al-Andalus, captured from its Gothic rulers, became part of the Islamic empire in 714 and rivaled Baghdad and Cairo in scholarship. Córdoba, its capital, is believed to have had seventy libraries, including one in the Alcázar with 400,000 volumes. Religious freedom, although limited, helped attract Jewish and Christian intellectuals and spawned the greatest period of creativity in philosophy during the Middle Ages as networks of Muslim, Jewish, and Christian philosophers interacted in the eleventh and twelfth centuries. Andalus was a great literary center, and its poetry about courtly, chaste, and chivalrous relationships has even been credited with helping shape European ideas about romantic love.

Together, Abbasid, Fatimid, and Umayyad scholars opened up new fields of study and significantly advanced contemporary knowledge of astronomy,

All of this came to almost a complete halt with the advent of the Crusades⁴⁹ and after the 12th century C.E. with fundamentalism prevailing.⁵⁰

The reader must be mindful of the fact that the *shari'ah* and Islamic law are distinct from one another. The latter is complementary to the *shari'ah*, which is the primary source, or *asl* (*uṣūl*, plural). The *Qur'ān* is controlling, and only those portions of the *sunna* (the deeds and sayings of the Prophet) that are interpretative of the *Qur'ān* are deemed part of the *shari'ah*. The *shari'ah* is not subject to all of the *sunna*, as some fundamentalists claim.

The *shari'ah* and Islamic law have evolved over some fourteen centuries and is not entirely devoid of influences from other legal systems and the experiences of other cultures, which the Islamic *ummah* has been in contact with. During the course of this evolution, *Qur'ānic* exegesis and hermeneutics have been subject to different approaches reflected in the four traditional *Sunni* schools (the *Hanbalī*, *Hanafī*, *Shāfi'ī*, and *Mālikī*), with a number of sub-schools under each, and several *Shī'a* movements that have spawned three major authoritative schools of thought (the *Ithna 'ashriyya*, *Za'idī*, and *Ismā'īlī*).⁵¹

architecture, art, botany, ethics, geography, history, literature, mathematics, music, mechanics, medicine, mineralogy, philosophy, physics, and even veterinary medicine and zoology. During the Abbasid period, mathematicians pioneered integral calculus and spherical trigonometry, promoted the use of the "Arabic numerals," 0 through 9, and gave the world *al-jabr*, our algebra. In science, the Abbasids revised Ptolemaic astronomy, named stars, developed *al-kemia*, our chemistry, and demonstrated that science was, well, a science. Some may also thank, or damn, Abbasids for *al-kuhl*, our alcohol, which they learned to distill, but were subsequently forbidden to drink.

Id. at 29–30 (citations omitted).

49. For more information, see generally: JAMES RESTON, JR., DEFENDERS OF THE FAITH: CHRISTIANITY AND ISLAM BATTLE FOR THE SOUL OF EUROPE 1520–36 (2009); CHRISTOPHER TYERMAN, GOD'S WAR: A NEW HISTORY OF THE CRUSADES 51–57 (2009); STANLEY LANE-POOLE, SALAH EL-DIN AND THE FALL OF THE KINGDOM OF JERUSALEM (The Other Press, 2007); AMIN MAALOUF, THE CRUSADES THROUGH ARAB EYES 261 (1989).

50. See KENNEDY, *supra* note 28, at 249–79 (explaining instances in which fundamentalism prevailed, such as ongoing battles with the Christians and the constant changes in ruling regimes).

51. For an extended discussion of the above concepts, see HALLAQ, *supra* note 36, at

IV. THE BAGGAGE OF HISTORY AND *FIQH* AND ITS DAUNTING CONSEQUENCES

From the 7th to the 16th century C.E., mostly Muslims wrote about what was happening within the different parts of the *Ummah*. The *Ummah* was initially substantially cohesive and relatively simple as a society, and that lasted for about forty years after the Prophet's death. After that, it was also uniquely and unquestionably guided by the Prophet's *Sunnah*.⁵² After the challenges to Ali's *Khilafa* started in 657 C.E. and the assumption of power of the Bani Umayya with the Caliphate's seat in Damascus in 661 C.E. (until 750 C.E.), the *Ummah* lost its innocence and initial simplicity. It also developed contacts with neighboring civilizations and cultures. The people of the Levant (Syria and Lebanon), who became part of the Muslim *Ummah* after those in Palestine and Egypt between 637–642 C.E., were mostly Christians and Jews who, along with many others, were part of the Roman Byzantine Empire that occupied these lands for the preceding centuries. The Muslim Arabs from the Southern Arabian Peninsula were confronted with different religions, philosophies, cultures, ways of life, methods of thinking, social mores, customs, economic systems, and governance

150–77, 202.

52. THE HISTORY OF PROPHETS AND KINGS, commonly referred to as *TARIKH AL-TABARĪ*, was written by Abu Ja'afar Muhammad ibn Jarir al-Tabarī (839–923 C.E.). The State University of New York Press translated it into a 39-volume English edition from 1985–2007, though it had been translated into other languages starting in the 19th century. It is considered the most important universal historical compilation on Islam reflecting on the history of the *Ummah* and recording major *fiqh* events up to that period. Al-Tabarī's history was not only history, as we now understand it, but a more holistic approach to describing history which is more consonant with the holistic nature of Islam. His works, for he had many other works besides the monumental *TARIKH*, reveal his understanding of *fiqh*, both from a theological perspective and from a historical/political one. Ibn Khaldun wrote *AL-MUQADEMA* in 1377 C.E. *AL-MUQADEMA* is translated as *PROLEGOMENON* or *INTRODUCTION*. MUSHIN MAHDI, *IBN KHALDUN'S PHILOSOPHY OF HISTORY: A STUDY IN THE PHILOSOPHIC FOUNDATION OF THE SCIENCE OF CULTURE* 73–84 (Islamic Book Trust, 2009). Unlike al-Tabarī, who weaves together political history and *fiqh*, ibn Khaldun provides a different insightful approach to the faith. This is similar to the Greek genre that blends philosophical, political, social and other considerations. But it was not until the Ottoman period that Western writers took an interest in Muslim history. See WILLIAM MONTGOMERY WATT, *THE FORMATIVE PERIOD OF ISLAMIC THOUGHT* 256–58 (1998) (detailing the Prophet's *Sunnah* contributions and guidance emanating from his writings).

practices. The Muslim Arabs adapted, changed, and evolved. Still they were left to themselves to write their own history.⁵³ Muslim historians described not only things past or present, but they wrote about their contemporaries' thinking about the past or the present. Whether it was for recordation, teaching, or advocacy, their styles were without confrontation or critique from others in the West. This all came after the Turkish Ottoman Empire gobbled up the *Ummah*.⁵⁴

Islamic historiography differed accordingly. During the classical and formative period, the self-described historians wrote about *tarīqh* as past or present history. They were *mu'arīqhīn* (historians). After the 9th century C.E., the *Ummah* was no longer Arab dominated and consisted of many civilizations and cultures that had their own intellectual methods. This meant that history, or more appropriately historiography,⁵⁵ became different from the classical years, which were more marked by the Arab culture of the time. Nevertheless, the Arab language remained dominant in Islam because the *Qur'ān* and the *Sunnah* are in Arabic.⁵⁶

The shift from the Arab linguistic methodological approach started in the Umayyad period (661–750 C.E.), incorporating a variety of non-Arab methods and techniques started in the Abbasid period (750–1517 C.E.).⁵⁷ Yet, some modern writers examine Muslim history from a more cohesive and inter-

53. See, e.g., MARSHALL G.S. HODGSON, *THE VENTURE OF ISLAM: CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION 187–230* (1977) (in which this process is revealed through a knowledgeable and insightful vision of how Muslim history evolved, essentially through Muslim eyes until the 16th century C.E.); see also MARGARET MESERVE, *EMPIRES OF ISLAM IN RENAISSANCE HISTORICAL THOUGHT* 4–12 (2008) (detailing the changes in history and the writing of history through such instances as the Italian Renaissance and Orientalist interpretation).

54. See HANIOĞLU, *supra* note 6, at 98 (suggesting that the interaction between the Ottoman Empire and the West is what exposed Muslim historiography to western interpretation).

55. See CHASE F. ROBINSON, *ISLAMIC HISTORIOGRAPHY* 6–17, 40–51 (2002) (noting the difference between history, the study of past events, and historiography, the study of historical writing).

56. *Id.* at 14–15. This gave Arab linguists and grammarians a dominant role in exegesis.

57. FRANZ ROSENTHAL, *A HISTORY OF MUSLIM HISTORIOGRAPHY* 63 (2d ed. 1997); see TARIF KHALIDI, *ARABIC HISTORIC THOUGHT IN THE CLASSICAL PERIOD* (1996).

disciplinary perspective that reflects a modern Western cultural approach and thus, inadequately explains what was what and why at that time.⁵⁸

The various periods of Arab and Muslim history cannot be understood without a deep understanding of the evolution of Islamic theological doctrine and that means the history and evolution of the *Fiqh*. In turn that depends on understanding the political contexts and dynamics of so many events, including, the personalities of the caliphs and those aspiring to become caliphs, internal and regional power plays, and geopolitical factors. The extraordinary history of the Muslim world, its diversity, and many other factors resulted at some point in a yearning for returning to the early periods of a simpler, gentler, and better Islam. Thus, the Salafi movement. That movement with all its attending political considerations remained more of a festering aspiration than a reality until modern times when it became a political reality. This, as well as the Sunni/Shi'ā divide and the rise of sects and movements, is why I assert that the history of Islam cannot be understood without the history of *fiqh* and *ilm Usūl al-fiqh*.⁵⁹

58. ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 53–54, 242 (1992); EUGENE ROGAN, THE ARABS: A HISTORY 3 (2009); IRA LAPIDUS, A HISTORY OF ISLAMIC SOCIETIES 879–90, 915–17 (Cambridge Univ. Press, 2d ed. 2002).

59. The Islamic legal system is described contextually and in specific historic terms in the following scholarly writings: WAEL B. HALLAQ, ISLAMIC LAW IN HISTORY AND PRACTICE (2009); MOHAMMED HASHIM KAMALI, THE INTRODUCTION TO THE *SHARĀH* (2008); SHARĀ: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT (Abbas Amanat & Frank Griffel, eds., 2007); H. PATRICK GLENN, THE LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (2d ed. 2007); BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW 113–44 (2d ed. 2006); MAHMOUD M. AYOUB, ISLAM: FAITH AND PRACTICE (2005); WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW (2005); MAWIL IZZI DIEN, ISLAMIC LAW: FROM HISTORICAL FOUNDATIONS TO CONTEMPORARY PRACTICE (2005); YASIN DUTTON, THE ORIGINS OF ISLAMIC LAW (2d ed. 2002); WAEL B. HALLAQ, AUTHORITY, CONTINUITY AND CHANGE IN ISLAMIC LAW (2001); MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE (1999); THE QUR'AN: FORMATIVE INTERPRETATION (Andrew Rippin ed., 1999); WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI USŪL AL-FIQH (1997); COLIN IMBER, ABU SU'UD: THE ISLAMIC LEGAL TRADITION (1997); CHRISTOPHER MELCHERT, THE FORMATION OF THE SUNNI SCHOOLS OF LAW, 9TH–10TH CENTURIES C.E. (1997); NORMAN CALDER, STUDIES IN EARLY ISLAMIC JURISPRUDENCE (1993); IGNAZ GOLDZIHNER, INTRODUCTION TO ISLAMIC THEOLOGY AND LAW (Andras Hamori ed., 1981); NOEL J. COULSON, A HISTORY OF ISLAMIC LAW (1965); ASAF A.A. FYZEE, OUTLINES OF MUHAMMADAN LAW (3d ed. 1964);

The development of the *shari'ā* and Islamic law could also be measured by the social, political, and economic circumstances of the Muslim *ummah*. The first century was characterized by succinct and direct jurisprudential and doctrinal statements. During the life of the Prophet, since he was the revealer of the word of God, it was understandable that his followers would give almost the same standing to his *ḥadīth* as to a verse of the *Qur'ān*.⁶⁰ This was reinforced by a number of verses in the *Qur'ān* which explicitly and repeatedly urged, if not enjoined, Muslims to obey the Prophet and to emulate his actions, thus meaning to follow the *sunna* and the *ḥadīth*.⁶¹ The four *Sunni* and three major *Shī'a* schools that are relied upon in this book combine the *Qur'ān*, the *sunna*, and the *ḥadīth* as being nearly co-equal sources.⁶² Occasionally, in *Shī'a* scholarship, the *sunna* and *ḥadīth* are relied upon by themselves and thus, by implication, appear to be a co-equal source with the *Qur'ān*. At the very least they can be used in the absence of anything specific in the *Qur'ān*.

Religion and politics have mixed in every society. Those in the political establishment seek the legitimacy and moral authority of religion in support of their power and wealth; and those in the religious establishment advance their own selfish ambitions for power and wealth with those in power or seeking power. This phenomenon is evident in the historic evolution of the interpretation and application of the *shari'ā* and Islamic law

JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW (1964); JOSEPH SCHACHT, THE ORIGINS OF MUHAMMADAN JURISPRUDENCE (1950).

60. See BASSIOUNI, *supra* note 1, at 64–66.

61. Among these verses are: “*Sūrat al-Nisā'*: O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: That is best, and most suitable for final determination.” 4:59 [Ali Translation]. “*Sūrat al-Nisā'*: He who obeys the Messenger, obeys Allah: But if any turn away, we have not sent thee to watch over their (evil deeds).” 4:80 [Ali Translation]. “*Sūrat al-Ḥadīd*: Believe in Allah and His messenger, and spend (in charity) out of the (substance) whereof He has made you heirs. For, those of you who believe and spend (in charity), for them is a great Reward.” 57:7 [Ali Translation]. “*Sūrat al-Aḥzāb*: Ye have indeed in the Messenger of Allah a beautiful pattern (of conduct) for any one whose hope is in Allah and the Final Day, and who engages much in the Praise of Allah.” 33:21 [Ali Translation].

62. See BASSIOUNI, *supra* note 1, at 24.

through the various *Sunni* and *Shīʿa* schools, their sub-schools, and the many doctrinal writings by religious scholars, pseudo-scholars, and those claiming the mantle of religious knowledge to advance their own personal or political goals.

In Islam, theology controls the law, and theological doctrine controls legal doctrine. Theology has evolved from the Prophet's days when he was the source of all theology, particularly after the written recordation of the *Qur'ān*, the *sunna*, and the *ḥadīth*, some forty and one-hundred fifty years after his death, respectively. The development of methodologies of *Qur'ānic* interpretation, *ʿilm uṣūl al-fiqh*, and similar ones for the authentication and interpretation of the *sunna* and *ḥadīth*, evolved over the first five centuries of Islam as described below. Because they have continued to evolve since the 12th century C.E., they constitute a formidable historical, theological, and legal baggage that cannot be understood without extensive study, particularly because of the differences in the four major *Sunni* and three major *Shīʿa* schools of theology, and the variances that have evolved from them over a period of nearly fourteen centuries.⁶³

Any attempt to define Islamic theology by reference to certain historic periods is necessarily fraught with the dangers of generalization and oversimplification.⁶⁴ What follows is only intended to provide some historic parameters for the reader to contextualize the salient lines of theological developments. What should be noted is that the core beliefs of Islam have remained constant and that theological developments, which have controlled the history of law, have consistently expressed the value-oriented goal of preserving the unity of Islam. Nevertheless, the diversity of theological interpretations and their range throughout the centuries have been significant, notwithstanding the efforts of theologians to minimize and harmonize them.

Islam's major theological developments, meaning *fiqh* (theological science) and *ʿilm uṣūl al-fiqh* (the methodology of

63. *Id.* at 25.

64. For two non-Muslim scholarly perspectives, see TILMAN NAGEL, *THE HISTORY OF ISLAMIC THEOLOGY* (2006); IGNAZ GOLDZIEHER, *INTRODUCTION TO ISLAMIC THEOLOGY AND LAW* 3–9 (1981).

theological science), occurred between its first and fifth century, namely the 7th to 12th centuries C.E. Since then, there have been many refinements and additions to the legacy of that period. Theological development was arrested in the 12th century C.E. in large part because the *Sunni* schools announced that the door to *ijtihād* (progressive development) was closed.⁶⁵ It was a policy-oriented decision that reflected theological and political considerations.⁶⁶ The arresting of *ijtihād* was accompanied by rigidity, *jumūd*, which stultified theological developments, even when unrelated to *ijtihād*. The trickle-down effect of this decision has been felt ever since.

The ostensible political reason for the closing of *ijtihād* was that non-Arab philosophies, knowledge systems and methods would tear apart the unity of Islam. However, by then, the *ummah* was going through difficult times. First there was the *fitnah* of Mu^ʿāwīyya, who took the *khilāfa* from ʿAli by force and established the Umayyad caliphate, which was in turn followed by the Abbasid defeat of the Umayyad, and the overtaking of the *ummah* by non-Arab Muslims from the Caucuses and trans-Caucuses. The first among these were the Seljuk's (428–706 A.H./1037–1307 C.E.), who were followed by the Mongols (602–807 A.H./1206–1405 C.E.), who burned and destroyed whole cities of the Muslim world, and whose cruel and destructive actions had no connection to anything Islamic. The Seljuks and the Mongols did not speak Arabic and their cultures were warlike. In comparison to other civilizations, these cultures were barbaric. Their conversion to Islam showed few signs of their understanding of its values, and they did not follow its

65. BASSIOUNI, *supra* note 1, at 26; see AHMAD ATIF AHMAD, THE FATIGUE OF THE SHARI'A 49–53 (2012); see also IMRAN A. NYAZEE, *supra* note 45.

66. Some of the considerations discussed in the text that follows are ascribed to the four *Sunni* schools seeking to preserve their influence over succeeding generations. Another explanation was the fear that foreign converts who overtook that *ummah* by force, such as the Seljuks, the Mongols, and others, might subvert Islam. No matter what the reason was for closing *ijtihād*, it led to rigidity in all aspects of life. Society became stultified and traditional cultural practices became part of established religious. These include the circumcision of women which is nothing more than sexual mutilation, women's wearing of garb that entirely covers them from head to toe, except for the eyes, male dominance over women, permissible abuse of power by leaders, and other social and political and injustices and inequalities.

prescriptions and proscriptions, except for some ritualistic aspects such as prayers. Muslim theologians feared that these new barbarian rulers would impose theological interpretations of Islam that would give legitimacy to their non-Islamic customs and practices, and they thus argued for closing the door to the development of Islam in order to forestall this possibility. Perhaps the real reason for the closing of *ijtihād*, though, was that traditionalists—at the time almost all *Sunni*—were fearful of the growing intellectual influence of philosophies and knowledge-systems deriving from cultures stemming from earlier and more sophisticated civilizations such as the Greeks, Romans, Persians, and Hindus, whose influence would challenge Muslim traditionalists' views. Notwithstanding the views of traditionalists, these foreign knowledge-systems reflecting different methods of analysis, as well as different cultural perspectives, did influence the Islamic theological discourse.

Traditionalist theologians, as of the second century of Islam, were mostly non-Arabs who largely accepted the Arabo-centric approach to Islam developed by earlier Arab Muslim theologians. As stated above, most theologians by the 12th century C.E. were concerned with preserving Islam's integrity and preventing its potential splinter, and they also feared that falsity, or *bid'ā*, could be introduced into it. This fear was justified in light of the power struggles that erupted within the *ummah*, starting with the challenge to 'Ali's *khilāfa* by Mu'āwiyya, the later wresting control of the *khilāfa* by others, and the related justification of the use of force, which was unprecedented. This was both a traumatic and transformative event in the history of Islam.⁶⁷ It ended the era of *shūra* (consultancy) on the selection of the *khalīfa*, limited as it was, and ushered in an era of the violent transfer of power. In a sense it was that end of consensus-based form of government and the beginning of the legitimation of the use of power. As these experiences were repeated in time, the acquisition of power and governance became less subject to consensus, however defined, and increasingly subject to the rule of might. In turn, this meant that Muslim leaders became more

67. LESLEY HAZLETON, AFTER THE PROPHET: THE EPIC STORY OF THE SHI'A-SUNNI SPLIT (2010).

despotic, less observant of the law, and more inclined to violate human rights and social justice dictates. This condition has existed more or less consistently throughout Islam's history. Whether as a cause or a consequence, or both, a number of sects and movements sprung up which caused splinters in Islam, producing other fissures, which opened in the once homogenous and cohesive world of Islam under the Prophet and the first four successors. The need to contain these splinters and fissures reinforced a theological trend centered on a return to what became known as the fundamentalist period of the Prophet's days and the days of the first four *khulafā'* that followed him. This broad movement among theologians, particularly the *Sunni*, focused on literal and anthropomorphic exegesis of the *Qur'ān* and the *ḥadīth*.⁶⁸ This approach was linked both to the Arabic language's linguistic and grammatical structure and rules and to the Arab cultural context of this language, thus providing, as stated above, an Arabo-centric character to Islamic theology.

The rigidity, *jumūd*, mentioned above, which followed the 12th century C.E. closing of *ijtihād*, brought about a stultification of theology with a regressive tendency that reversed the progressive tradition that existed between the 9th and 12th centuries C.E. This regressive trend was reinforced in time by an increasing deficit in the human development of Muslim societies from the 12th century C.E. to date, with the exception of certain resurgent periods during the Ottoman Empire (626–1341 A.H./1299–1922 C.E.) and the Fatimids in Egypt and Spain

68. The theological development of Islam is heavily marked by the Prophet's *sunna*, which is enhanced by the legends that surround him and which grew in time. In a paradoxical way, Muḥammad, who fought his fellow Makkans to bring down idolatry, has been placed by so many of his followers on such a high pedestal that he is very close to being a noumenon in contravention to Islam's rigid monotheism. For the *Sunni*, the Prophet, as a model of rectitude, is followed by the first four *khulafā'* in the order of their succession, while for the *Shī'a*, the Prophet is followed by ʿAlī, whom they believe is the rightful heir to his cousin and father in law, the Prophet Muḥammad, and then the descendants of ʿAlī, and his two sons, Hassan and Hussein. In fact, the admiration of the Prophet frequently goes beyond what is consistent with Islam. The idealization of the Prophet sometimes places him high above all other humans. One cannot help think of the same idealization that led to making Jesus part of the Christian trinity. For a discussion of the *sunna* and the *ḥadīth*, see BASSIOUNI, *supra* note 1, at 31–33.

(296–566 A.H./909–1171 C.E.). Since then, the Muslim world's human development deficit has increased, particularly in relationship to the western world's consistent economic, social, cultural, scientific, and technological progress since the end of the Middle Ages.

The selection and identification of major theological developments is necessarily subjective. What occurred at a given time in history and what consequences ensued are not viewed the same by different scholars.⁶⁹ Historians, theologians, philosophers, and social scientists differ as to what constitutes a significant event in the affairs of a given culture or with respect to a religion's evolutionary course. Arguably, the most significant developments in Muslim theology were: the transcription of the *Qur'ān* during the ʿUthmān's *khalīfa* (23–35 A.H./644–656 C.E.); the compilation of the Prophet's *aḥādīth* by Al-Bukhari and Muslim in 849 C.E.; the *Sunni/Shīʿa* split and the development of the four major *Sunni* schools and three major *Shīʿa* sects; the *Muʿtazila* movement; the *Sūfi* movement; and the contemporary secular-democratic reformation revisionist movement among Muslim intellectuals.⁷⁰ There have been other major or salient historical events that have significantly impacted theological perspectives and which are covered in historical scholarly works.⁷¹ Each such event became in turn a catalyst for other historical developments, and in turn, the latter had an impact on theological and legal developments.⁷²

69. For non-Muslims scholars, see KAREN ARMSTRONG, *MUHAMMAD: A WESTERN ATTEMPT TO UNDERSTAND ISLAM* (1991); GOLDZIEHER, *supra* note 64; NAGEL, *supra* note 64.

70. ABDULLAHI AN-NA'IM, *ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARICA* 45–66 (2008); TARIQ RAMADAN, *RADICAL REFORM: ISLAMIC ETHICS AND LIBERATION* (2008); ABDULLAHI AN-NA'IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* (1996).

71. See, e.g., KAREN ARMSTRONG, *ISLAM: A SHORT HISTORY* (2000) (treating the *Fitnab*, Crusades, and Safavid Empire as theologically important historic events).

72. The process is no different from similar experiences in other civilizations and in inter-civilizational impact. For a discussion on the relationship between renaissances of institutions, laws, and philosophies, renaissances of language, literatures, and visual arts, and renaissances of religions, see ARNOLD TOYNBEE, *A STUDY OF HISTORY* 455–73 (1995).

The formative period of Islamic theology and legal doctrine came during the Prophet's days, when he was both the revealer of God's Word, the *Qur'ān*, and also its sole interpreter. That influence was carried throughout Islam's history by means of the *sunna*, the Prophet's words and deeds. The Prophet was followed by *al-Khulafā' al-Rāshidūn*,⁷³ the first four wise *khulafā'*, as they were called, who not only succeeded him, but followed more closely than others in his path. The years between 611–661 C.E. were a period of relative theological simplicity marked by literalism of the *Qur'ān*'s interpretation and adherence to the Prophet's teachings. The four successors were the closest acknowledged followers of the Prophet's style, method, and manner of government. They were pious and honest, acted with integrity, held themselves publicly accountable, were accessible to the people, and behaved with the humility befitting those entrusted with power in the service of God.⁷⁴ As stated above, during that period of time, the teachings of the *Qur'ān* derived almost exclusively from the Prophet's *sunna*.⁷⁵

These are only some considerations on the historic wealth of Islam's *Fiqh* and *ʿilm Usūl al-Fiqh*. But the historical baggage is much greater. And its legacy much heavier to carry by succeeding generations.

73. For a concise history, see ARMSTRONG, *supra* note 71. For a more complete history, see ABU JA'FAR MUHAMMAD IBN JARIR AL-TABARI, *TARIKH AL TABARI* (1988–2007) (including all 39 volumes).

74. The Prophet was referred to as Muhammad or as *Rasūl Allah*, pronounced *Rasūlillāh* (the prophet of Allah). The first *khalīfa* (successor), Abū Bakr, was called by his name, as was the case with the Prophet. ʿUmar, the second *khalīfa*, took the title of *Amīr al Mu'minīn* (the leader of the faithful). He was known to be rigidly honest, but was also intemperate and at times violent; these characteristics showed in his warring activities. Bassiouni, *Evolving Approaches to Jihad*, *supra* note 26, at 132 n.57, 140–41. ʿUthmān, the third *khalīfa*, was a more pragmatic leader. Timur Kuran, *The Provision of Public Goods Under Islamic Law: Origins, Impact, and Limitations of the Waqf System*, 35 *LAW & SOC'Y REV.* 841, 846, 870 (2001). ʿAli, the fourth, was the Prophet's cousin and son-in-law. He was the most spiritual and gentle of the four. ʿAli is believed by the *Shīʿa* to be the first rightful *khalīfa* of the Prophet. Bassiouni, *Evolving Approaches to Jihad*, *supra* note 26, at 135.

75. See BASSIOUNI, *supra* note 1, at 32–35, 62–64. The *Mālikī* school of jurisprudence is based on the life and practices of the Prophet, mostly in Madinah. ʿALĀ' AL-DĪN ABU BAKR IBN MASʿUD AL-KĀSĀNĪ, *BADĀ'Ī' AL-ŞANĀ'Ī' FĪ TARTĪB AL-SHARĀ'Ī'* [The Creativity of the Creator in the Order of Islamic Law] (1997); ʿABD AL-SALĀM IBN SAʿĪD SAḤNŪN, *AL-MUDAWWANAH AL-KUBRA* [The Great Code] (1940).

Appearances were saved; more room was left to accommodate different and even divergent views. The process of accommodation served the political interests of those in the *Khilafa* and the economic and power interests of those in the clergy, particularly those who were part of major schools of thought and major institutions of learning. In the end, as the late Professor Muhammad Abu Zahra once told me under the guise of a joke, if there is impurity on a wall because a dog urinated against it, *fiqh* went from the need to tear down the wall and rebuild it, if it was where people prayed, to a little bit of water cleansing it. Almost everything can be found in *fiqh* that covers a range of interpretations, particularly by resorting to *fatwa*. In a perverse way, IS has taken to finding precedential practices as a basis for its aberrations. But there is very little rebuttal by Muslim scholars and intellectuals using traditional doctrinal approaches.

The accumulation of this fourteen century old baggage means that almost everything can be debated and that precedents can be found that are valid, invalid, and of questionable merit for almost anything. Those with some knowledge have an advantage in the debate, much as the old saying goes that in the realm of the blind, the one-eyed man is king. But what of the others who have knowledge? How can their relative outspokenness be explained?

Most Muslims have given up on the debate and go on with their own simplified way of interpreting Islam, or simply overlook that enormous accumulation of historic knowledge and make things up as they go. The more there is to know, the less people resort to that knowledge because the task becomes too arduous, frustrating and often without a satisfactory outcome.

V. CONCLUSION

Since the 20th century C.E., there have not been many progressive intellectuals within or outside Muslim societies who have made their voices heard to the Muslim leaders of the world, let alone the Muslim masses.⁷⁶ Since the 1960s, most of them

76. Among the notable exceptions are Sheikh Muḥammad ʿAbdū (b. 1849 C.E., d. 1905 C.E.), an Egyptian theologian/jurist and liberal religious reformer. He was a disciple of an earlier reformist, Jamāl al-Dīn al-Afghānī (b. 1838 C.E., d. 1897 C.E.). The

have sought a way around the accumulation of some fourteen centuries of knowledge in order to make an end-run around the obstacles thrown in the way of progressive development by fundamentalists.⁷⁷ Their views are rejected by fundamentalists and even classical Muslim scholars.

The global Muslim population in 2015 is estimated to be 1.6 billion, and the Pew Forum on Religion and Public Life estimates that number to grow to 2.2 billion by 2030.⁷⁸ Fifty-seven of the world's 198 countries are members of the Organization of Islamic Cooperation (OIC).⁷⁹ While these states are deemed to be Muslim, not all of them consider the *shari'ā* to be the only or principal source of law under their respective constitutions or other basic laws. Considering that diversity, it is little wonder

works of al-Afghānī, ʿAbdū, and other reformists are described in H.A.R. GIBB, MODERN TRENDS IN ISLAM 39–43 (1946). ʿAbdū was most well-known for his thoughts on the spirituality of the unity of God in his RISALAT AL TAWHID [The Message of Unity]. For an English translation, see THE THEOLOGY OF UNITY 30 (Ishaq Mussacad & Kenneth Cragg trans., 2004). By the end of ʿAbdū's distinguished career, he was Egypt's Grand Mufti. See SAMĪR ABŪ ḤAMDĀN, IMĀM MUḤAMMAD ʿABDŪ: JADALIYYAT AL-ʿAQL WA AL-NAḤḌAH [Imam Muhammad ʿAbdu: The Dialectic of Reason and Renaissance] (1992); ALI ZAYʿUR, AL-KHIṬĀB AL-TARBĀWĪ WA AL-FALSAFĪ CIND MUḤAMMAD ʿABDŪ [The Educational and Philosophical Language of Muhammad ʿAbdu] (1988). See also Sheikh Maḥmūd Shaltūt (b. 1893, d. 1963), who was the Rector of Al-Azhar University, AL-ISLAM, ʿAQIDA WA SHARIʿĀ [Islam, Belief, and the *Shari'ā*] (Dar el-Shorouq, 19th ed., 2007).

77. For example: TARIQ RAMADAN, ISLAM AND THE ARAB AWAKENING (2012); ABDULLAHI AN-NAʿIM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARIʿĀ 45–66 (2008); TARIQ RAMADAN, RADICAL REFORM: ISLAMIC ETHICS AND LIBERATION (2008). For a collection of authors, see PROGRESSIVE MUSLIMS (Omid Safi ed., 2003).

78. PEW RESEARCH CTR., THE FUTURE OF THE GLOBAL MUSLIM POPULATION: PROJECTIONS FOR 2010–2030 (2011), <http://www.pewforum.org/files/2011/01/FutureGlobalMuslimPopulation-WebPDF-Feb10.pdf>.

79. The Organization of Islamic Cooperation was formerly the Organization of the Islamic Conference, but changed its name in 2011. The members of the OIC are Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Brunei-Darussalam, Burkina-Faso, Cameroon, Chad, Comoros, Cote d'Ivoire, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Guyana, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Malaysia, Maldives, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Suriname, Syria, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, Uzbekistan, and Yemen. ORG. OF ISLAMIC COOPERATION, <http://www.oic-oci.org/oicv2/states> (last visited April 2, 2015).

that the question frequently arises as to who speaks for Islam.⁸⁰ The same question has frequently arisen throughout the fourteen-century history of Islam as the Islamic *ummah* splintered into different regimes, and ultimately became independent states after the fall of the Turkish Ottoman Empire in 1922 C.E. However, even before the rise of the Ottoman Empire in 1453 C.E., the Islamic *ummah* had splintered and reconstituted itself several times under different regimes. As one author described it, Islam is much more of a mosaic than a monolith, and more so now than ever.⁸¹ From a theological perspective, the history of Islam is no different than that of Judaism and Christianity, in that all three religions have gone through different phases of linkages and breaks with their respective secular powers in different parts of the world. That in turn brought about different religious movements, sects, and schools of thought.⁸²

As recently stated by Professor Seyala Benhabib of Yale University:

80. JOHN L. ESPOSITO & DALIA MOGAHED, WHO SPEAKS FOR ISLAM? WHAT A BILLION MUSLIMS REALLY THINK (2007). This question has been asked throughout the history of Islam in part because, unlike Catholicism for example, there is no hierarchical clergy with a pope sitting at the helm who is the final authoritative word on religious matters. This is, however, what the *Shi'a villayet al-faqih* doctrine replicates. ROY MOTTAAHEDEH, LOYALTY AND LEADERSHIP IN AN EARLY ISLAMIC SOCIETY (I.B. Tauris, rev. ed. 2001).

81. For an in depth discussion of the idea that "Islam is a Mosaic, not a Monolith," see GREGORIAN, *supra* note 40.

82. Judaism in contemporary times has settled into three major theological movements (Orthodox, Conservative, and Reform). SACHA STERN, SECTS AND SECTARIANISM IN JEWISH HISTORY 188 (2011); ISRAEL SHAHAK, JEWISH HISTORY, JEWISH RELIGION: THE WEIGHT OF THREE THOUSAND YEARS 123 (1997). The 16th Century Reformation split Christianity into Catholicism and Protestants, both of which subsequently spawned many different schools of theology and religious movements. Catholicism remains the single most cohesive religious compact of Christians, whose numbers throughout the world are equivalent to that of Muslims and whose presence is in nearly as many countries as Islam. BASSIOUNI, *supra* note 1, at 14 n. 54. For more information, see: MICHAEL D. COOGAN, A BRIEF INTRODUCTION TO THE OLD TESTAMENT: THE HEBREW BIBLE INTO CONTEXT (2009); DANIEL BOYARIN, BORDER LINES: THE PARTITION OF JUDEO-CHRISTIANITY (2004); THE OXFORD HISTORY OF CHRISTIANITY 649 (John McManners, ed., 2d ed. 2002); INTRODUCTION TO THE HISTORY OF CHRISTIANITY (T. Dowley ed., 2d ed. 2013); RICHARD WALKER ET AL., A HISTORY OF THE CHRISTIAN CHURCH (4th ed. 1985).

The greatest casualty of the cruel mayhem and turmoil in France is that, more than a decade after September 11, 2001, those who seek a global confrontation between Islam and the West may gain the upper hand, while those of us who have sought dialogue, conversation and critique across these cultural divides with Muslim intellectuals and academics may appear as “anti-, anti-Islamophobes.”

....

On the same day as the attack on Charlie Hebdo 26 died in an attack in Yemen, more than that number in Iraq. Who is counting anymore? Two weeks ago more than 130 school children were massacred in Peshawar, Pakistan. Every week hundreds of refugees arrive on the shores of Europe from Syria, Iraq, Afghanistan, Libya, Somalia, etc. A big swath of the globe, extending from North and Eastern North Africa to vast regions of the Middle East and all the way to the mountains of Afghanistan is caught in a death spiral, with states and societies disintegrating at dizzying speeds. What is happening in this swath of the world? And how exactly is it related to the recent violence in Europe, in Australia, in Canada, and most likely soon again, in the United States as well?

It is not enough to repeat the old bromides about Islam and violence; the Koran and the anti-Enlightenment; the need to stand up for the West Yes, yes, all that is true but does it help us understand why, with the exception of countries like Turkey, Jordan, Iran, Morocco and Tunus, the center does not hold in Syria, Egypt, Libya, Pakistan, Afghanistan, Yemen? Or when it does, as in the Arab Emirates and Saudi Arabia, it does so at the cost of unmitigated repression and corruption?

The condition of these societies is not only generating blind rage among many young Muslims (men in particular), but also something deeper that I will call “civilizational despair.” You cannot cure this by declaring war on Jihad. For many young Muslims there seems no way out of the cycle of violence, corruption, and poverty. Coupled with the condition of unemployment and marginalization, contempt and sarcasm, exploitation

and scorn that many suffer—whether in Paris or London, Berlin or Athens, Rome or Amsterdam, Oslo or Copenhagen—the fertile ground is there for recruiting and training Jihadists to join the hundreds of groups that have now mushroomed in the Middle East. The Kouachi brothers were trained in Yemen and had traveled through Syria. They are clearly part of a global network of fighters who are now circulating in and out of the conflict zones in the Middle East, North Africa, Pakistan, Afghanistan, and even Chechnya. Many Chechens are reported to be fighting with ISIS or ISIL in Syria.⁸³

The present escalation of ideologically-motivated violence, using Islam as a justification, is succeeding in the escalation of the confrontation between Islam and the West. This is enhanced by the factors discussed in this article. Whether it will lead to an inevitable clash of civilizations is still to be seen.⁸⁴ In this writer's opinion, it will not. Instead, like the rise of ideologically-motivated violence in the 1960s and 1970s,⁸⁵ it will wither away.⁸⁶ But this era will bring about a renewal of Islamic reformation ideas, much as was the case with Christianity in the 1600s. And just as the Salafists of ibn Taymiyya's day and those of today, particularly the Wahhabi, whatever is left of a monolithic Salafist Islam will crumble. Maybe they will then do what the Catholics did by creating the equivalent of a Pope in the form of a religious Caliphate that may or may not have a temporal state,⁸⁷ while the rest of the Muslims will have many

83. Seyla Benhabib, *Piety or Rage? On the Charlie Hebdo Massacres*, HANNAH ARENDT CTR. BLOG, 1–2, <http://www.hannaharendtcenter.org/wp-content/uploads/2015/01/Piety-or-Rage.pdf> (last visited Jan. 10, 2015).

84. For a detailed discussion of “The Clash of Civilizations and The Remaking of World Order,” see HUNTINGTON, *supra* note 11, at 183–254.

85. For authors discussing the Jihad and political violence, see *supra* text accompanying note 26.

86. This was the case with the Red Brigades, the Baader-Meinhof Group, and other leftist radical revolutionary groups. The only one left of that era is the FARC in Columbia, and it is also on the way to extinction.

87. The Papacy first lost temporal power when Napoléon Bonaparte conquered the Papal States and incorporated them into the French Empire. This power was then restored during the 1815 Congress of Vienna. The remaining Papal States were eventually all unified, independent of the Church, under King Victor Emmanuel II with the capture of

tariqa, or ways, as do the Sufi and the Protestants. These new *tariqa* are not necessarily new in Islam, as there are, for the last 1300 years or so, four major Sunni schools and several sub-schools, three major Shi'ā schools with as many as twelve other schools and various Sufi ways, and others. The notion of a monolithic Islam has long gone *de facto*, even though the appearance has survived. But it was essentially about face-saving. In the end what will remain as a unifying factor is the *Shehada* and probably the other four pillars, namely: prayers, Haj, Zakat and fasting in Ramadan.

The controversial issues that have been hushed-up for centuries will be freely debated and unexpected outcomes are going to be likely. The Salafists of all forms will claim that this is the end of Islam; reformists will claim that this is how Islam remains eternal and universal. In the end one thought will prevail, namely: if there is only one God whose nature is beyond our comprehension, and who created this universe (and maybe others) of which we are a part of as a connected humankind, then there can only be but one set of fundamental values and principles that link each one of us to God and to one another. What we can and will differ about, as we have for so long, is about the devotional practices and other rules of conduct. But then, cultures are also different and so are their customs, norms, and laws, which has not necessarily meant that we cannot peacefully co-exist as human beings.

The *Qur'ān* may well have anticipated this forthcoming new twist of events in two verses, which establish God's fundamental values about humankind. They are:

أَكْرَمَكُمْ إِنَّ لَتَعَارَفُوا وَقَبَائِلَ شُعُوبًا وَجَعَلْنَاكُمْ وَأَنْتَى ذَكَرٍ مِنْ خَلْقِنَاكُمْ إِنَّا النَّاسُ أَهْمًا يَا
خَبِيرٌ عَلِيمٌ اللَّهُ إِنْ أَنْتَقَاكُمْ اللَّهُ عِنْدَ

Sūrat al-Hujurāt, 49:13

Rome on September 20, 1870. A small amount of temporal power was returned to the Pope in 1929 when, in return for the Catholic Church accepting no further role in Italian political affairs, the Church was given the role as the formal government of the Vatican City as an independent Catholic State. See *Papacy*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/441722/papacy> (last updated Dec. 30, 2014).

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Oh Mankind! We have created you men and women,
peoples and tribes, [in order that you may] know one
another.

Verily, the best among you is the most pious [the best in
conduct].

عَلَىٰ وَفَضَّلْنَا هُمُ الطَّيِّبَاتِ مِنْ وَرَزَقْنَاهُمْ وَالْبَحْرِ الْبُرِّ فِي وَحَمَلْنَا هُمْ آدَمَ بَنِي كَرَمْنَا وَقَدْ
تَفْضِيلًا خَلَقْنَا مِمَّنْ كَثِيرٍ

Sūrat al-Isrā', 17:70

Indeed, [Lo] We have honored [conferred dignity] on the
descendants

[progeny] of Adam, and we have carried [borne] them
over land and sea,

and provided for them sustenance out of the good things
of life,

and favored them far above most of Our creation.