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REASON-GIVING AND THE DUTY TO OBEY: PERSPECTIVES FROM CLASSICAL ISLAMIC JURISPRUDENCE

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ABSTRACT

The duty to obey juristic injunctions in Islamic law is often assumed to follow a simple model: God commands, the jurists discover the meaning of those commands, and the faithful follow the jurists' interpretation. By examining the arguments advanced by some prominent classical Islamic jurisprudes in support of the claims for law's normativity, I show that the jurists saw themselves as representatives of their communities in the quest to formulate opinions about actions in a way that is faithful to revelation. This model can be summarized as follows: (1) the jurists, by virtue of their knowledge, inform individuals of how to act according to revelation; (2) the pronouncement of a jurist who is knowledgeable and fair may be followed without revisiting their justifications; (3) everyone has a duty to act according to revelation and to rebuke those who do not. A reasonable individual should be motivated to follow juristic pronouncements when all these conditions are present. My main claim is that the basic model wherein God is an authoritative commander and the jurists are informants is unsatisfactory. The jurists saw themselves as more than mere discoverers and informers. This Islamic model has unique features when it comes to understanding authority in general. The uniform commitment to a formal moral source, coupled with the contingent nature of the robust reasons given by the system, make the Islamic model distinct from some modern accounts. The Islamic model offers a view of legal authority that is specific to a cohesive community that shares a basic moral commitment. This model fits the classical need for a theory of authority that is both persuasive and authoritative.

KEYWORDS: Duty to obey, Islamic legal theory, reason-giving, authority, normativity

INTRODUCTION

This article examines the ways in which some classical Islamic jurisprudes thought about the reasons legal subjects have to obey juristic injunctions. To fully describe these classical arguments for the duty to obey Islamic substantive laws as formulated by the jurists, I also examine the nature and structure of juristic injunctions and the kinds of internal claim that they make. The question of whether there is a moral duty to obey legal injunctions is raised extensively at the intersection of modern legal, moral, and political theory.[1] Despite a wide interest in Islamic law and jurisprudence,

1 A classic article analyzing (and denying) such obligation is M. B. E. Smith, "Is There a Prima Facie Obligation to Obey the Law?" *Yale Law Journal* 82, no. 5 (1973): 950–76. A detailed descriptive account of the arguments for

this question has not been closely analyzed, even though, as I discuss below, it has been rigorously debated in the classical Islamic tradition.[2] This may be attributable to a particular view of how religious modes of compliance to divine commands operate.[3] In this view, God gives commands, human jurist-interpreters "discover" the meaning of those commands, and faithful followers obey them in the form disclosed to them by the jurist-interpreter. I have elsewhere termed the interpretive step in this view the *discovery model*.[4] In this model, the methods of inducement of compliance in a religious divine-command system are largely self-evident: God commands us because he is the omnipotent and omniscient Creator, and we follow the commands because this is what faith requires, either for moral reasons or for reasons of full and unquestioning compliance with divine authority. Human jurists, in that sense, are mere middlemen who do nothing more than *inform* the faithful of preexisting divine norms. The view that legislative authority belongs to God, and interpretive or epistemic authority belongs to the jurists, is common in the study of Islamic law. For example, Bernard Weiss argues that we should "distinguish between two types of authority in Islamic legal thought: legislative authority, which belongs to God alone and which becomes concretized as the authority of the foundational texts, and interpretive or declarative authority, which belongs to the jurists."[5] This division of labor, so to speak, is an intuitive understanding of how a system of law that is based on divine revelation gives its subjects reasons to act.[6]

My aim is to show that, while this intuitive account may be true at some level of analysis, the full picture is much more complicated. Influential classical jurisprudes formulated theories of juristic authority that portrayed juristic injunctions as containing elements of both formation and declaration of reasons for action, that is, they were designed to be both authoritative and persuasive. By

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such an obligation can be found in Bruce Landesman, "The Obligation to Obey the Law," *Social Theory and Practice* 2, no. 1 (1972): 67–84. Recently, Frederick Schauer argued that the use of force is the central reason for which subjects of modern legal systems obey the law: "although we know that a legal system could in theory exist without sanctions and without coercion, we know as well that, with somewhere between few and no exceptions, no such legal systems actually exist." Frederick Schauer, "Coercing Obedience," in *The Force of Law* (Cambridge, MA: Harvard University Press, 2015), 93–109, at 93. In addition to Schauer, this negative answer to the question was generally commonplace within the positivist tradition. See, for example, Joseph Raz, "The Obligation to Obey: Revision and Tradition," *Notre Dame Journal of Law, Ethics and Public Policy* 1, no. 1 (1985): 139–55. For an opposite position, see John Finnis, "Law as Co-ordination," *Ratio Juris* 2, no. 1 (1989): 97–104.

2 It is worth noting that, while the question of whether there is an obligation to obey a hypothetical, obviously unethical divine command is often raised in theological ethics and the philosophy of religion, the question often centers on the exceptional questionable divine command, not on the fact that a religious system of law succeeds to generate reasons for its followers to obey its commands. On that theological question see Wes Morriston, "What If God Commanded Something Terrible? A Worry for Divine-Command Meta-ethics," *Religious Studies* 45, no. 3 (2009): 249–67.

3 Wael Hallaq has alluded to the lack of serious engagement with Islamic legal theory at a theoretical level. His view is that "there remains a serious problem that continues to be—perhaps unnecessarily—a subject of great controversy. Many scholars have viewed legal theory as an exclusively theological discourse, studying it as though it were an extension of that genre. In doing so, they have in effect reduced it to a discourse that has little to do with [substantive laws], much less with the realia of judicial practice." Wael B. Hallaq, *Sharīʿa: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 73.

4 Omar Farahat, "Debating the Imperative Mood in Uṣūl Al-Fiqh: Collective Deliberation and Legal Validity," *Oriens* 46, no. 1–2 (2018): 159–85.

5 Bernard G. Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 2006), 114.

6 For another example of the view that the jurist's job is to discover God's will, see Robert Gleave, "Deriving Rules of Law," in *The Ashgate Research Companion to Islamic Law*, ed. Rudolph Peters and Peri Bearman (Farnham: Ashgate, 2014), 57–72, at 57.

focusing on the jurisprudence of the eleventh-century Ashʿarī[7] jurist and theologian Abū Bakr al-Bāqillānī (d. 1013 CE/AH 403) and his immediate successor, Abū Ḥāmid al-Ghazālī (d. 1111 CE/AH 505), I show that the duty to follow the jurists, while indeed, in its most basic form, rested on the jurists' epistemic function of informing non-jurists about the law, it was conceived by these scholars in a conditionally robust manner, leading to a duty to obey any jurist of the legal subject's choice who is deemed just and learned, without reexamining their reasoning. On the basis of a series of conditions pertaining to epistemic authority, the nature of the duty to study the law, and the constitutional relation between jurists, non-jurists, and hierarchies among the jurists, the duty to follow the jurists became a robust duty to follow a jurist that the non-jurist deems morally upright and knowledgeable.[8]

The reasons given by the jurists to non-jurists in Islamic jurisprudence are both epistemic and robust in the sense used by David Enoch: they are epistemic at their foundation, but conditionally and defeasibly robust in the way they apply by default to the relation between jurists and non-jurists. Enoch uses "epistemic reason-giving"[9] to refer to instances in which one indicates or shows to another "a reason that was there all along." Robust reason-giving, by contrast, takes place when one gives another a reason through a prescription, request, or command. This differs from "triggering" a reason, in which case one simply "manipulates the non-normative circumstances" to give another a reason, such as pointing a gun at someone's head.[10] The Islamic model of reason-giving, combining elements of the epistemic and robust categories, can be summarized as follows: (1) the jurists, by virtue of their knowledge, inform individuals of how to act according to revelation; (2) the pronouncement of a jurist who is knowledgeable and fair may be followed without revisiting their justifications; (3) everyone has a duty to act according to revelation and to rebuke those who do not. A reasonable individual should be motivated to follow juristic pronouncements when all these conditions are present. In what follows, I first elucidate this understanding of the duty to obey the jurists in Islamic jurisprudence. I then explore the way certain classical jurists conceived of the nature of juristic pronouncements and the law's

7 Ashʿarism, or Ashʿariyya, is an Islamic school of theology that believed, among other things, that it is impossible to know norms and actions independently of divine revelation, that humans are unable to fully comprehend God's design and judgment, and that the word of God is eternal, and not created. It is believed to have been a historically dominant school in Sunni Islam, although accounts of Ashʿarī dominance have been contested. For an overview of the development of this school, see Montgomery Watt, *The Formative Period of Islamic Thought* (Edinburgh: University Press, 1973). See also Juan E. Campo, "Ashari School," in *Encyclopedia of Islam*, ed. Juan E. Campo, 2nd ed. (New York: Facts on File, 2016), 66–67.

8 Relevant to this analysis of the nature and background of this jurisprudential position, in a rare study dedicated to the question of the duty to obey the jurists, Mohammad Fadel offers a helpful account of the prevalent position in classical jurisprudence on the duty to follow the jurists: "most individual Muslims were non-specialists (*muqallid*s) who were obligated to identify an appropriate scholar-specialist—one who has mastered the tools of jurisprudence (*mujtahid* or *mufti*)—and to follow the jurisprudential opinions of that scholar-specialist without affirming or rejecting that scholar-specialist's reasoning (*ijtihad*) in support of that opinion (*taqlid*)." Mohammad Fadel, "'*Istafti qalbaka wa in aftāka al-nasu wa aftūka*': The Ethical Obligations of the Muqallid between Autonomy and Trust," in *Islamic Law in Theory: Studies on Jurisprudence in Honour of Bernard Weiss*, ed. A. Kevin Reinhart and Robert Gleave (Leiden: Brill, 2014), 105–26, at 106.

9 The "epistemic reason" is one in which someone *indicates* or *shows* a reason for another. See David Enoch, "Reason-Giving and the Law," in *Oxford Studies in the Philosophy of Law*, ed. Leslie Green and Brian Leiter, vol. 1 (Oxford: Oxford University Press, 2011), 1–38, at 4.

10 Enoch, "Reason-Giving and the Law," 4–5.

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internal claims to obligation.[11] Finally, I examine this argument in light of some debates in contemporary analytic jurisprudence.

My main claim is that the basic model wherein God is an authoritative commander and the jurists are mere informants is unsatisfactory because the theory of juristic authority in classical jurisprudence saw the jurists as more than mere discoverers and informants. The Islamic model of reason-giving provides an example of how to conceive of the law's authority in self-governing communities that presumably share a formal moral commitment in a way that is simultaneously authoritative and persuasive. Although beyond the scope of my inquiry, the particularity of this model can be explained through historical contextualization. From a historical-political perspective, it is plausible that the composite nature of reason-giving and the duty to obey such reasons were necessary because the jurists largely developed their authority independently of state organs, and, therefore, needed to advance a theory of normativity that presents their rulings as both authoritative and persuasive.[12] To preserve self-rule as a key feature of classical Islamic law, the jurists advanced versions of the duty to obey that claimed to be both robust accounts of the law and accurate accounts of moral revelation-based behavior. While historical explanations are not within the scope of this article, I note that this framework is only possible to the extent that it assumes that acting according to an external, neutral source of moral authority, is a true motive possessed by all members of the community in question.

My focus on selected influential classical thinkers rather than providing a broad historical survey that aims to represent every noteworthy trend in the Islamic tradition is a deliberate methodological choice.[13] Much of the conversation in the modern study of classical legal theory adopts a view of the discipline as a functional project that played a particular historical role in the formation or justification of Islamic law as a historical corpus. The debate, therefore, tends to focus on what that function precisely was in the formation of substantive doctrines. My contention here is that, beyond what the historical function of Islamic legal theory may have been, it is a noteworthy model of legal theory.[14] To put it simply, the study of the Islamic legal-theoretical tradition is of obvious conceptual and philosophical interest: it says something about the nature of legal authority, validity, obligation, and reason-giving in general, from a distinct comparative perspective.[15]

11 Those two types of reason (internal and external) can be distinguished as the legal or internal and real or external reasons for action. The former can also be referred to as legal obligation, while the latter refers to a "political obligation," or law's "authority." For a helpful account of such distinctions, see Leslie Green, "Legal Obligation and Authority," in Stanford *Encyclopedia of Philosophy*, ed. Edward N. Zalta (2012), https://plato.stanford.edu/archives/win2012/entries/legal-obligation.

12 Wael Hallaq holds that "Islamic law could and did accommodate a measure of legal intervention by the political sovereign, but to an extent that did not exceed the peripheral or the marginal, especially in terms of determining the substance of the law." Hallaq, *Sharīʿa*, 361. The idea of Islamic law as a type of self-rule evolved into an arrangement that Hallaq terms "the Circle of Justice." Hallaq, *Sharīʿa*, 197–221, 361. Some studies have attempted to nuance the historical independence of Islamic law from the state, but, in the end, classical legal theory remains firmly committed, as I discuss below, to the idea that lawmaking was a domain of juristic knowledge. See, for example, Guy Burak, *The Second Formation of Islamic Law: The Ḥanafī School in the Early Modern Ottoman Empire* (New York: Cambridge University Press, 2015), 1–20.

13 Such a comprehensive survey can be found in Fadel, "'*Istafti qalbaka wa in aftāka al-nasu wa aftūka*'."

14 See, for example, Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Atlanta: Lockwood Press, 2013), 1, 49–51. Robert Gleave, "Deriving Rules of Law," 57; Sherman A. Jackson, "Fiction and Formalism: Toward a Functional Analysis of Usul Al-Fiqh," in Weiss, *Studies in Islamic Legal Theory*, 177–201.

15 The fact that the Islamic tradition developed a fairly elaborate theory of law is a fact that can, in turn, be explained through the discipline's historical function of providing the epistemological and institutional links between divine

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I offer this article to illustrate that it is possible to engage the Islamic legal tradition in conceptual and theoretical analysis.

THE DUTY TO OBEY ACCORDING TO AL-BĀQILLĀNĪI AND AL-GHAZĀLĪ

Abū Bakr al-Bāqillānī, as was common in classical jurisprudence, was of the view that non-jurists should act according to the rulings of the jurists. In *Al-Taqrīb wa l-irshād*, he explains that "a non-jurist must follow the jurists and rely on their pronouncements."[16] On the face of it, this position supports the view that juristic pronouncements were "robust" reasons for action (in Enoch's terms). The subjects of law, in this view, have reasons to follow a juristic ruling on any given matter of conduct to the exclusion of their own assessment of what might be the proper course of conduct. This expectation, however, is nuanced in two significant ways. First, al-Bāqillanī maintains that the duty of laypersons to follow one of the available juristic opinions is a duty not emerging from the status of jurists and non-jurist but from the fact that proper methods were used to attain these rulings: "the rulings of a school of law (*madhhab*) must be upheld [only] to the extent they are supported by proper evidence (*adilla*), not because of who pronounced them."[17] The epistemic or indicative aspect of reason-giving becomes clearer on examination of these conditions. Al-Bāqillānī explains: "it is possible to know the validity of an opinion or ruling based on its evidence (*dalīlihi*) and argumentation (*ḥujjatihi*) with no need to realize that this opinion was advanced or [even] known by anyone else . . . which shows us that *knowledge* of a ruling does not rely on its endorsement by a school of law, but [only] by knowledge of its justifications."[18]

The fact that juristic rulings in Islamic law are claims to knowledge is widely accepted by contemporary scholars of Islamic law.[19] What interests me is how these rulings claim to derive their authority. Al-Bāqillānī's claims above suggest that a pronouncement gains its status as a valid ruling not because of who issued it, but because there are acceptable signs showing that it follows from divine revelation. In theory, therefore, anyone, jurist or not, could issue legal pronouncements if they properly investigate divine revelation using appropriate linguistic, logical, and methodological methods. Also in theory, there is no distinct institutional process by which a ruling becomes authoritative. At its core, a juristic ruling is claimed to be normative when we can convincingly draw a line between that ruling and an external, neutral, and socially accepted source of authority: that is, divine revelation. Jurists, in this theory, do not create reasons for action in the purely robust sense, but mainly draw epistemic links between a body of indicants accepted by society as authoritative and their own conclusions as to what the proper course of conduct is in any given situation—an exercise that, theoretically, anyone with proper knowledge and training can undertake.

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revelation and human practical reasoning. For an analysis and historical account of the discipline, see Hallaq, *Sharīʿa*, 72–85.

16 Muḥammad b. al-Ṭayyib al-Bāqillānī, *Al-Taqrīb wa l-irshād al-ṣaghīr* [The simplicifation and guidance], ed. ʿAbd al-Ḥamīd ʿAlī Abū Zunayd, vol. 1 (Beirut: Muʾassasat al-Risāla, 1998), 306. All translations from the Arabic sources are mine.

17 Al-Bāqillānī, *Al-Taqrīb*, 305.

18 Al-Bāqillānī, 305 (emphasis added).

19 For example, Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law* (London: Hurst, 2005), 2–3. On the development of the law from juristic opinions, see Labeeb Ahmed Bsool, "The Emergence of the Major Schools of Islamic Law/*Madhhabs*," in *The Routledge Handbook of Islamic Law*, ed. Khaled Abou El Fadl, Ahmad Atif Ahmad, and Said Fares Hassan (London: Routledge, 2019), 141–55, at 141–42. See also Hallaq, *Sharīʿa*, 78–83.

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Even though juristic pronouncement was conceived as an exercise in argumentation on the basis of an authority external to the body of the jurists, al-Bāqillānī still found it imperative for laypersons as a whole to seek guidance in one of the numerous available juristic opinions to determine their conduct on any given matter. The key to explaining this difference between the epistemic nature of the ruling and the robust nature of the jurists' claim to authority, for al-Bāqillānī, lies in the idea of a societal obligation (*farḍ kifāya*) to seek knowledge of legal rulings: "the knowledge of the assessments of actions, which are known through the methods of jurisprudence, as well as the justifications for the legal rulings, is a duty upon society at large [represented by the jurists], and not upon individuals. The non-jurists ought [only] follow the opinions of the jurists."[20] Whereas the fact that the formulation of legal pronouncements (*fiqh*) was only incumbent upon the few was not controversial, some jurists believed that some knowledge of legal methodologies was obligatory upon everyone, a view that al-Bāqillānī dismissed.[21]

Two observations on al-Bāqillānī's argument for the social duty to know the law are necessary. First, the duty upon society, represented by a portion of it, (that is, *farḍ kifāya*) to know the divine law cannot in itself be a legal norm in the ordinary (first-order) sense. If it were, it would be open to juristic disagreement, which would mean that it is, at least in theory, conceivable for no one to know the law. This must therefore be a supralegal, perhaps a "constitutional," norm in some sense that is integral to the very nature of the community that al-Bāqillānī envisions would be governed by Islamic law and live according to the *sharī'a*. This is significant because it shows that the instructive epistemic function of rule-making by the jurists becomes enshrined within the jurists' conception of the system of *sharī'a* as a social arrangement, even when they are advancing a robust vision of the jurists' authority.

Second, at least up to this point, al-Bāqillānī speaks only of the commoners' "duty" to follow the jurists in terms of exemption from the general duty to know the law. The subjects of law are not so much *obligated* to follow the jurists as they are *permitted* to use their knowledge to their advantage in their quest to know the law. This is presented as plainly superior to the alternative: for everyone to have to study revealed texts, legal methodologies, and a whole host of other disciplines to attain legal knowledge.[22] Following the jurists as an "exemption" is a position that was more directly advanced by Abū Isḥāq al-Shīrāzī (d. 1083 CE/AH 476). For al-Shīrāzī, non-jurists are *not prohibited* from blindly following the jurists, since "if uncritical following of rules was prohibited, everyone would need to learn [legal methods], which would disrupt livelihood."[23] It is noteworthy that al-Shīrāzī formulated his position as a "lack of prohibition," rather than a duty to follow.

20 Ahmed al-Dawoody, "Jihad, Sovereignty, and Jurisdiction: The Issue of the Abode in Islam," in Fadl, Ahmad, and Hassan, *The Routledge Handbook of Islamic Law*, 301–12, at 306.

21 For more on the variation in the obligation to know the tenets of various classical Islamic disciplines, see Fadel, "'*Istafti qalbaka wa in aftāka al-nasu wa aftūka*,'" 105–07. The argument that, from the layperson's perspective, seeking legal knowledge is a *farḍ kifāya* can also be found in Imran Ahsan Nyazee, "The Scope of Taqlīd in Islamic Law," *Islamic Studies* 22, no. 4 (1983): 1–29, at 3.

22 Fadel explains this argument as such: "The *muqallid* does not, as discussed previously, defer to the *mujtahid* because he lacks the capacity for independent moral reasoning. Presumably, he chooses to be a *muqallid* because, given the various options available to him in his life, he would rather spend his time doing something, e.g. farming or trading, other than becoming a theological/ethical/legal specialist, a task that could very well be quite burdensome." See Fadel, "*Istafti qalbaka wa in aftāka al-nasu wa aftūka*,'" 120. My contention here is that this type of practical argument was one among several ways in which the jurists justified their authority, and that, at least in al-Bāqillānī's theory, deferring to the jurists was seen as a rational act.

23 Abū Isḥāq al-Shīrāzī, *Al-Luma' fi uṣūl al-fiqh* [The sparks in legal theory], ed. Maḥmūd Ḥusayn Abū Khalaf, 4th ed. (Cairo: al-Maktaba al-Tawfīqiyya, 2018), 505.

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Al-Shīrāzī's assumption is that, in theory, any Muslim is capable of engaging in legal reasoning (*ijtihād*), but that this act is delegated to a representative group for practical considerations.[24]

This logic of exemption from a more drastic obligation is usually inverted in modern discussions of juristic authority in Islam. What al-Bāqillānī conceived of as a service to the community is seen as a mere imposition of authority, and the return of law-making authority to all Muslims seen as a form of liberation.[25] Al-Bāqillānī's theory of duty to obey as an exemption from a greater duty thus says something valuable about the conception of juristic authority in classical Islam. It was assumed that the jurists were operating within a legal system characterized by a fundamental unity of moral purpose of all subjects, jurists included, in their motivation to follow a source of authority external to them. This of course does not negate the possibility of conflicting private interests, but assumes an overarching homogenous moral aim shared among society as a whole and individually. Jurists are not simply substituting their reasons for those of the legal subjects through a form of adjudication, as suggested by Joseph Raz, but are guiding individuals to the course of action that best suits *their own* moral purpose (which I discuss later in the article). Whereas the modern arguments for the privatization of rule-making in Islamic law are mainly driven by concerns about the legitimacy of this arrangement,[26] al-Bāqillānī was concerned with how to justify a public system of adjudication and guidance that assumes the homogeneity of private moral concerns in the community within which that system operates.

The concept of societal obligation (*farḍ kifāya*) to know legal rulings as a fundamental constitutional principle results in a duty to obey, to follow or "emulate" juristic rulings (*taqlīd*) that is both conditional and relative. It is conditional because, at the level of theory, following juristic opinions presupposes a lack of knowledge. The designation of non-jurists as "commoners" (*ʿawām*)[27] is designed to establish that, by definition, they lack the epistemic conditions required to give reasons for action based on divine revelation, and, therefore, are permitted/required to follow juristic rulings, and therefore to receive such reasons from the jurists. As previously suggested, the line between permission and requirement becomes blurred when we assume a general underlying obligation to know all practical injunctions based on divine revelation and that knowing these injunctions and following them is in fact a valid subjective motivation that is possessed by all individuals in that community. The gradual and relative nature of the duty/permission to follow juristic rulings becomes clear in al-Bāqillānī's treatment of whether jurists are bound by the opinions of other jurists:[28] "knowledge of norms is incumbent upon scholars, but not commoners, and if

24 Al-Shīrāzī, *Al-Lumaʿ fī uṣūl al-fiqh*, 508. Consistently with his position that unquestioning following is only a permission, he also held that the obligation to perform legal reasoning (*ijtihad*) is only conditional when it comes to the jurists. This obligation applies if a jurist has the time and means to conduct original legal reasoning in a given question, otherwise it is not necessary.

25 See for example, Rumee Ahmed, *Sharia Compliant: A User's Guide to Hacking Islamic Law* (Stanford: Stanford University Press, 2018). This entire book is dedicated to the question of how Muslims can claim back *fiqh* from the jurists who, Rumee claims, continue to monopolize, for no good reason, the production of *fiqh*. Another manifestation of the discontent with the seemingly excessive authority that classical jurisprudence granted to the jurists can be found in Fadel, "'*Istafti qalbaka wa in aftāka al-nasu wa aftūka*,'" 119–20.

26 For example Ahmed, *Sharia Compliant*, chapter 1.

27 Al-Bāqillānī, *Al-Taqrīb*, 306.

28 In reference to this relative nature of the obligation to follow the jurists among themselves, Wael Hallaq speaks of a "spectrum of *taqlid*." Wael B. Hallaq, "Taqlīd: Authority, Hermeneutics, and Function," in *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 86–120, at 87–89. Another discussion of the types of intra-*madhhab taqlid* that were permitted in classical jurisprudence can be found in Fadel, "'*Istafti qalbaka wa in aftāka al-nasu wa aftūka*,'" 114–19. The duty of jurists to follow other jurists in certain cases is not my main concern here. Unlike the duty of the non-jurist to follow the jurist, the

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some scholars achieve such knowledge, it stops being incumbent upon the others, except for matters that they encounter directly, in which case following another becomes prohibited upon a jurist with full expertise (*kamāli ālatihi*)."[29]

This passage shows that al-Bāqillānī did not think of reason-giving and reason-receiving as a pure dichotomy, but rather as a range of possibilities. Jurists must exercise their own reasoning in relation to cases presented to them by commoners, but may rely on other jurists' opinions to the extent that they may lack such knowledge themselves. It all depends on the level of expertise and ability to apply the proper methodologies in the study of revelation. Whereas, at its core, juristic reason-giving is epistemic in the sense that it is presented as knowledge constructed based on an external and recognizable source, it operates vis-à-vis nonexperts in a conditionally robust manner. I use *robust* here to mean that, because of the epistemic arrangement discussed above, the non-jurist need not revisit each ruling's justification. In addition to being, at its core, based on epistemic authority, this is also a conditional type of robust reason-giving. Whereas the commoners did not have to revisit the rules' justification for them to have a reason to follow them, it is important to note that jurists were to be followed only to the extent that they are known to possess the proper tools of formulation of legal rulings, based on revelation, and to be just and trustworthy: "what is required of commoners is to consult a jurist known to be learned within the community and morally upright . . . and to follow their legal opinion."[30] Thus, whereas the jurists needed to investigate the soundness of the ruling's justifications for them to accept or reject such rulings (depending on their seniority and place within the school of law),[31] non-jurists needed to be aware of the moral standing of the jurist individually, but were not expected to investigate the soundness of the opinion itself.[32]

Al-Ghazālī, in *Al-Mustaṣfā min ʿilm al-uṣūl*, also held that non-jurists are under an obligation to seek knowledge from the jurists and do not need to investigate the justifications of legal rulings for those determinations to be binding upon them.[33] A commoner, he argued, along the same lines as al-Bāqillānī, "is required to seek knowledge from and follow the guidance of the scholars."[34] He made this argument, however, based on partially different justifications. The first claim made by al-Ghazālī in justification of the duty to obey the jurists belongs squarely to the robust-authoritative type of claim. Unlike his predecessor, al-Ghazālī held the view that legal subjects must obey the jurists because this was the consensus of the Prophet's companions (*ijmāʿ al-ṣaḥāba*).[35] "Juristic consensus" here is invoked in the technical sense: it is a formal source of legal authority, along with divine speech and the tradition of the Prophet. Al-Ghazālī thus relied on a formal source of

relative authority of jurists within the school of law has been the subject of extensive research. Some noteworthy works on the subject include Sherman Jackson, "Kramer versus Kramer in a Tenth/Sixteenth Century Egyptian Court: Post-formative Jurisprudence between Exigency and Law," *Islamic Law and Society* 8, no. 1 (2001): 27–51. Wael B. Hallaq, "From Regional to Personal Schools of Law? A Reevaluation," *Islamic Law and Society* 8, no. 1 (2001): 1–26.

29 Al-Bāqillānī, *Al-Taqrīb*, 307.

30 Al-Bāqillānī, 308.

31 For an extensive historical analysis of the internal hierarchies and dynamics of the school of law in the Islamic legal tradition, see Hallaq, "Taqlīd."

32 This position was held by other legal theorists. See for example Abū Isḥāq al-Shāṭibī), *Al-Muwāfaqāt fī uṣūl al-sharīʿa* [The reconciliation of the fundamentals of Islamic law], ed. Muḥammad al-Fāḍilī, vol. 4 (Beirut: al-Maktaba al-ʿAṣriyya, 2007), 168.

33 Abū Ḥāmid al-Ghazālī, *Al-Mustaṣfā min ʿilm al-uṣūl* [The refined principles in the science of jurisprudence], ed. Tāha al-Shaykh (Cairo: Dār al-Tawfīqiyya lil-Tibāʿa, 2010), 690–95.

34 Al-Ghazālī, *Al-Mustaṣfā*, 693.

35 Al-Ghazālī, 693.

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authority to justify the duty to obey the jurists: "[the companions] used to provide legal opinions to the commoners, and did not require them to achieve the degree of juristic opinion-giving (*nayli darajati l-ijtihād*)."[36] The later Ashʿarī scholar Sayf al-Dīn al-Āmidī (d. 1233 CE/AH 621) sided with al-Ghazālī on nearly all aspects of this argument. For al-Āmidī, the legal subjects' obligation to obey the jurists stems from at least three sources of authority: it is prescribed by divine revelation, established through the consensus of the Prophet's companions, and made necessary by practical considerations of social harmony and advancement.[37] At the same time, as I discuss below, al-Āmidī shared the common view that the duty to obey is not a mere result of institutional authority. Rather, non-jurists are only bound to seek counsel (*istiftāʾ*) from scholars who are widely recognized by the community to be both capable of making legal determinations and of upright character (*ʿadāla*).[38]

In al-Ghazālī's and al-Āmidī's arguments, a more robust and formalized conception of authority is beginning to arise. The ability to issue legal pronouncements (*ijtihād*) is a "degree" that must first be "attained" before one is to be followed. It is not merely a duty that a few undertake for the benefit of the many, but it is also a formalized course of study that must follow a specific path and satisfy a set of criteria. This increased formalization moves al-Ghazālī's model closer to a preemptive model of legal authority in which the law adopts and eliminates the reasons of its constituents.[39] Al-Ghazālī's model continues to uphold, at least theoretically, the possibility that a commoner could become a legal expert and follow their own legal opinions. In fact, Al-Ghazālī formalized the two conditions of the duty to obey as criteria that must be present to qualify as a jurist: "the expert-jurist (*mujtahid*) [must fulfill] two conditions: first, he must master the ways of knowing the law and attaining probabilistic knowledge through reasoning . . . and second, to be an upright person who avoids character-tarnishing sin, so that commoners could rely on his opinions."[40] The "ways of knowing the law" consist of the revealed sources and methodologies (*uṣūl*), logic, language, the history of abrogation (*naskh*) of revealed texts and the verification of prophetic traditions.[41] This sense of formalization could also be seen in later jurisprudes. For example, a later scholar who conceived of the law as a practical and purposeful enterprise, Abū Isḥāq al-Shāṭibī (d. 1388 CE/AH 790), held that legal justifications were beyond the grasp of commoners and that they were categorically discouraged from engaging in reevaluating legal arguments. Al-Shāṭibī goes even further by declaring that "the commoner is unlike the scholar, for the former

36 Al-Ghazālī, *Al-Mustaṣfā*, 693. Al-Ghazālī relied on the authority of consensus to justify the authority of the jurists, which may appear circular: the consensus of the scholars (or, in this case, the Companions) is the source of authority of scholarly determinations. His attempt to escape the apparent circularity of this argument rested on an equivalence between consensus (*ijmāʿ*) and divine miracle (*muʿjiza*). Since, for al-Ghazālī, miracle is the most fundamental method of establishment of objective truth, ascribing the authority of consensus to miracle allowed him to argue that a layperson's uncritical acceptance of juristic pronouncements is, in fact, a rational stance, since it does ultimately rely on a justifiable form of authority.

37 Sayf al-Dīn al-Āmidī, *Al-Iḥkām fī uṣūl al-aḥkām* [The rigorous treatise in legal theory], ed. Ibrahim al-Ajūz, vol. 2 (Beirut: Dār al-Kutub al-ʿIlmiyya, 1985), 450–51.

38 Al-Āmidī, *Al-Iḥkām fī uṣūl al-aḥkām*, 453–54. Fadel also alludes to al-Ghazālī's argument from consensus to highlight the epistemological nature of the argument for the duty to obey the jurists. While I share Fadel's view that al-Ghazālī's position leans towards a strict formalized type of authority (for Fadel, that is contrary to moral autonomy), my analysis of al-Bāqillanī, I believe, shows that this duty was initially anchored in a range of rational considerations. See Fadel, "'*Istafti qalbaka wa in aftāka al-nasu wa aftūka*,'" 110.

39 On the "preemptive" function of legal authority, see Raz, *Ethics in the Public Domain*, 214. I discuss this later in the article.

40 Al-Ghazālī, *Al-Mustaṣfā*, 634.

41 Al-Ghazālī, *Al-Mustaṣfā*, 635–37.

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is only permitted to ask those in authority, and to defer to them categorically in matters of religion, and to treat their pronouncements in the same way they would [the determinations of] a lawmaker."[42] It is this wide divide between the jurist and non-jurist that some modern reformist accounts dismiss.[43]

Even though al-Ghazālī's conceptualization of the commoner-jurist encounter was closer to a clear dichotomy than al-Bāqillānī's, his reasoning was still grounded in the jurist's epistemic and moral qualities. The obligation to obey the jurist was still fundamentally grounded in epistemic qualities and conditional upon moral rectitude, even though the first condition became increasingly formalized. In addition to those arguments, al-Ghazālī directly claims that the arrangement wherein normative pronouncements produced by the juristic class are taken as reasons for action by non-jurists is justified by practical and epistemic necessity. He argues that, "all individuals of legal capacity are bearers of legal obligations, yet it is impossible for everyone to engage in the study of revealed sources and the formulation of legal norms."[44] It is therefore practically imperative for those who lack the knowledge of the law to defer to the authority of the scholars. The argument from epistemic practicality underscores the survival of the epistemic nature of reason-giving in al-Ghazālī's thought. For example, the commoner, al-Ghazālī further explains, should categorically refrain from consulting a jurist they know to be an ignorant," or even a jurist whose degree of knowledge is unclear. Thus, formalization notwithstanding, al-Ghazālī saw the status of jurist as insufficient to grant authority: the non-jurist is under a positive obligation to investigate and ascertain a jurist's level of expertise before they follow their legal rulings.[45]

There are small but important differences between al-Bāqillānī's argument for a societal obligation to know the law and al-Ghazālī's argument for the practical, or, as Raz puts it,[46] instrumentalist necessity of following the jurists. Both aim to establish the jurists as necessary representatives of non-jurists in the quest to know the law. Al-Bāqillānī anchors his view in a constitutional or supra-legal understanding of the community as collectively driven to abide by revelation. Al-Ghazālī, by contrast mentions only the individual duty to abide by the law that, he claims, is imposed by consensus, an authoritative source of law.[47] Al-Bāqillānī's conception of reason-giving, as I discuss in more detail below, allows for a greater sense in which juristic pronouncements align with the non-jurist's subjective motivations, whereas al-Ghazālī's conception of reason-giving does not emphasize that aspect. What follows from al-Ghazālī's argument is that it is reasonable to accept a situation in which commoners are represented by scholars in the process of formulating norms based on revelation, but that does not entail that a rational person should always take juristic pronouncements as reasons for action. Another way of understanding al-Ghazālī's argument is that it expresses a form of rule utilitarianism: since it would be undesirable if society as a rule rejected legal authority altogether, it would be desirable as well for each individual to accept

42 Al-Shāṭibī, *Al-Muwāfaqāt fī uṣūl al-sharīʿa*, 185.

43 For example, Fadel observes that, in certain respects, the *mujtahid* appears to be "a law unto himself." See Fadel, "'*Istafti qalbaka wa in aftāka al-nasu wa aftūka*,'" 119. This epistemic hierarchy between the knowledgeable jurist and the non-knowledgeable layperson appears to have had its counterpart in Shīʿī thought, as is evident in the thought of al-ʿAllāma al-Ḥillī (d. 1325 CE/AH 725): "It is incumbent upon the ordinary person (*al-ʿāmmī*) to practice *taqlid* in the practical norms of the Law if he is not capable of practicing *ijtihad*." John Cooper, ed. and trans., "ʿAllāma al-Ḥillī on the Imamate and Ijtihād," in *Authority and Political Culture in Shi'ism*, ed. Said Amir Arjomand (Albany: State University of New York Press, 1988), 240–49, at 247.

44 Al-Ghazālī, *Al-Mustaṣfā*, 693.

45 Al-Ghazālī, 694. For more on that argument, see Fadel, "'*Istafti qalbaka wa in aftāka al-nasu wa aftūka*,'" 108.

46 Raz, "The Obligation to Obey," 139.

47 For more on consensus as a source of juristic authority, see Nyazee, "The Scope of Taqlīd in Islamic Law," 5.

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such authority.[48] However, without a presumption of overlap between the jurist's and the commoner's motives for action, in the way advanced by al-Bāqillanī, it is hard to see how a consistent obligation to obey follows from al-Ghazālī's argument even in cases in which juristic opinions might be obviously opposed to a person's individual moral values.[49] At the surface, therefore, al-Ghazālī may appear to advance something resembling a purely robust notion of the commoner's duty to obey the jurists. Below, I discuss how an overlap between the law's and the legal subject's motives becomes clearer upon examining the internal normative content of juristic pronouncements as conceived by both al-Ghazālī and al-Bāqillānī.

THE LAW'S INTERNAL CLAIMS: JURISTIC PRONOUNCEMENTS AND LEGAL OBLIGATION

I argue above that al-Bāqillānī's and al-Ghazālī's justifications for the duty to obey the jurists combined elements that can be labeled both robust (it is conditionally required to follow a jurist without revisiting their justifications) and epistemic (jurists know the law and inform non-jurists of it). This is contrary to conventional wisdom that supposes that a religious system of law entails a sharp division between the role of legislation, which belongs to God, and that of interpretation or "discovery" of the law, which belongs to the jurists, or religious leaders, as the case may be. Below, I further clarify the conceptual foundations of the composite nature of the Islamic legal ideas of reason-giving. The arguments pertaining to the non-jurist's duty to follow a just and learned jurist can be squared with the classical jurisprude's conceptions of what legal pronouncements are and what kinds of normative claims they make internally. This correspondence between the internal claims of the law and the external duty to obey is also present in modern jurisprudence on the duty to obey the law.

The Nature of Juristic Pronouncements

Al-Bāqillānī understood the discipline *fiqh*, which deals with first-order juristic pronouncements, as "the knowledge of the normative attributes of action of legal subjects, attained through revelation-based reasoning."[50] There are two components of this definition that particularly interest us: that pronouncements are expressions of knowledge, rather than acts of judgment, and that they are declarations of attributes, rather than consequences. A. H. Abu Zayd, in his notes on al-Bāqillānī's text, observes that many of his successors avoided using "knowledge" to define substantive legal pronouncements. Saying that jurists had "knowledge" of normative attributes of all actions implied that juristic pronouncements were statements of verifiable hard fact, which would have been a controversial position. Other jurists used expressions reflecting more explicitly the contingent nature of legal pronouncements made by the jurists, such as realization (*idrāk*) or belief (*ẓann*).[51] Regardless, in all cases, the formulation of juristic pronouncement was understood as a process aimed at

48 For a critique of rule-utilitarianism, see Smith, "Is There a Prima Facie Obligation to Obey the Law?"

49 This constitutional argument, along with al-Ghazālī's argument from consensus, were also advanced by Abū l-Muẓaffar al-Samʿānī, *Qawāṭiʿal-adilla fi l-uṣūl* [The decisive proofs in legal theory], ed. Muḥammad Ḥasan Ismāʿīl al-Shāfiʿī, vol. 1 (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 363.

50 Al-Bāqillānī, *Al-Taqrīb*, 171.

51 The probabilistic pronouncement made by a jurist can also be seen as a "reasoned opinion," as described in Fadel, "'*Istafti qalbaka wa in aftāka al-nasu wa aftūka*,'" 105.

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attaining a particular state of knowledge. The second element of juristic pronouncement is that, rather than attach consequences to actions, it primarily characterizes actions using a specific set of attributes. As seen in al-Bāqillānī's definition, he saw juristic pronouncements as declarations about the "normative attributes of action." These normative attributes, he argued, are to be clearly distinguished from other characteristics of actions, such as their contingency, the physical objects involved, and their physical properties.[52] Physical knowledge of actions, al-Bāqillānī tells us, may be attained without revelation, with mere observation and logical reasoning.[53]

The nature of the process of ascription of "normative attributes" to potentially all human actions should help clarify the epistemic or robust nature of reason-giving as exercised by the jurists. Whether declarations of normative attributes involve a creative process of ascription, or a mere pursuit of knowledge, would be indicative of the kind of authority the jurists claimed. Whereas the above definition clearly sets up the search for normative attributes of action as a quest for knowledge, the specialized nature of this question was also highlighted by al-Bāqillānī. The distinction between types of attribute reflects that human actions have normative and nonnormative properties, and, importantly, that attaining knowledge of such properties should follow fundamentally different methods that belong to separate disciplines. This is evidenced by the fact that "there is no disagreement that the word *fiqh* cannot be used to describe the knowledge of grammar, medicine, and philosophy, and that none of the specialists in those areas is called a *faqīh* in ordinary language. This is a term used to describe those who know the legal-normative status of the actions of legal subjects."[54] The nonnormative attributes of action, such as the type of action and whether it is comprehensible and achievable, are called "rational" in the sense that they could be attained by independent reasoning without revelation. Normative attributes, by contrast, are unknowable prior to, or without divine revelation. Importantly, even though these normative attributes are not available through independent reasoning, the one to take up the task of knowing them must be of the highest possible intellect.[55] This anatomy of juristic pronouncement undergirds al-Bāqillānī's idea of reason-giving, outlined above. While rooted in an epistemic understanding of the exercise of reason-giving, the process of formulation of juristic pronouncement is a particular one that requires a set of specialized tools and methods, which implies that a certain degree of expertise is necessary.

With regards to their normative features, al-Bāqillānī placed all human actions into two categories: either they are permitted, or not.[56] This is a basic distinction that is known necessarily to be true, the same way we know by necessity that something either exists or not.[57] Among actions that are permitted, actions are further divided into two subcategories: those that are commanded, and those that are merely permitted. "Commanded" here is not the same as obligatory, in the sense I explain below. Rather, "commanded" actions are those that ought to be done, whether or not they are obligatory. Similarly, discouraged actions are those that ought to be avoided, whether or not they are strictly prohibited. We can gather from this categorization that divine injunctions —encouragement and discouragement of actions—serves to place actions into their basic normative categories: they are either positive actions (commanded) that ought to be performed, or negative

52 Al-Bāqillānī, *Al-Taqrīb*, 172.
53 Al-Bāqillānī, 172.
54 Al-Bāqillānī, 172.
55 Al-Bāqillānī, 267. See also Al-Ghazālī, *Al-Mustaṣfā*, 8–9.
56 Al-Bāqillānī, *Al-Taqrīb*, 286.
57 Al-Bāqillānī, 276.

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actions that ought to be avoided (discouraged).[58] Whereas in terms of normative degree all actions fall into those three categories, they really correspond to two basic possibilities: actions are either permitted or not. Al-Bāqillānī's insistence on this dichotomy is key to his understanding of the law's normative force. For al-Bāqillānī, those two basic categories correspond to a *moral* distinction: permitted actions are good (*ḥasan*), whereas prohibited actions are bad (*qabīh*).[59] By ascribing a normative value to an action, the jurist is invoking fundamental categories that, presumably, constitute important motives for the legal subjects.

The final element of juristic pronouncements is the reason-receiver, or the *mukallaf*. Elucidating the meaning of being a *mukallaf* introduces some of the intricacies of the law's internal normative claims. The concept of "capable legal subjects" here is an imperfect rendering of a more complicated notion, which is *mukallafīn*, meaning those "burdened" by the law.[60] In essence, the concept of *taklīf* (literally, burdening) pertains to a divine act of legislation, or imposing obligation, and therefore is important for my inquiry.[61] Al-Bāqillānī explains that being a legal subject or a *mukallaf,* can mean three different things when used by the jurists.[62] The range of burden-imposition that is allowed by al-Bāqillānī reflects the possibilities of reason-giving methods that he thought were possible. The first meaning relates to the most basic of religious duties, such as acknowledging God's existence, the truthfulness of the Prophet's message, and performing prayers. This fundamental but narrow scope of norms is what al-Bāqillānī aligns with an authoritarian model, in which bearing an obligation simply means "having been required to commit or omit an action."[63] The second sense in which one can perform legal actions is the conclusion of voluntary arrangements, such as contracts, marriage, and divorce. In that sense, being a *mukallaf* means that those acts are valid, and the person is bound by the consequences of such valid acts.[64] Finally, individuals may engage in legal actions that are not strictly mandatory, such as fasting while traveling or ill, in spite of the explicit legal license to break the fast. In those cases, the person is still considered a *mukallaf* to the extent that those are valid legal actions regardless of their non-binding nature. In short, there is a range of ways in which individuals fall within the scope of the law's authority, depending on the type of action in which they engage. Some of those correspond to an authoritarian or robust model; others align with voluntary or moralistic conceptions of law's authority.

Al-Ghāzalī agreed with his predecessor on the general parameters of what constitutes a juristic pronouncement. He explained that *fiqh* consisted of the "knowledge of normative attributes of

58 Al-Bāqillānī alludes to the theological issue of God's power to guide human actions. His view is that God is the *owner* of all things in the world, and that grants him the right to seek control of his creation. This argument will not concern us, since it is clear at this point that the normative force of legal injunctions cannot be reduced to mere divine will. Al-Bāqillānī, 286.

59 Al-Bāqillānī, 276–78.

60 Al-Bāqillānī, 239.

61 In an attempt to capture the complex nature of the concept, Nasir describes *taklīf* as "a commandment (of God) and obligation (for the subject)." Mohamed Nasrin Nasir, "The Concept of *Taklīf* According to Early Ash'arite Theologians," *Islamic Studies* 55, nos. 3–4 (2016): 291–99. Elsewhere, *taklīf* has been explained as "accountability before God." Aasim Padela and Afshan Mohiuddin, "Ethical Obligations and Clinical Goals in End-of-Life Care: Deriving a Quality-of-Life Construct Based on the Islamic Concept of Accountability Before God (Taklīf)," *American Journal of Bioethics* 15, no. 1 (2015): 3–13. The idea of *taklīf* thus appears to take on different connotations depending on one's perspective. For the purposes of the discussion of law's authority, *taklīf* is best understood, literally, as an act of burdening, and the *mukallaf* as the recipient of that burden, or the reason-receiver.

62 Al-Bāqillānī, *Al-Taqrīb*, 239.

63 Al-Bāqillānī, 239.

64 Al-Bāqillānī, 240.

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actions of legal subjects."[65] He further followed al-Bāqillānī in distinguishing between the normative and nonnormative attributes of actions, and considering the former to be the exclusive domain of the jurist.[66] Importantly, no conclusion pertaining to the normative status of action could be derived from pure observation. Only by reasoning based on divine revelation can one reach conclusions of the normative type, such as prohibition, permission, obligation, reprehensibility, license, validity, and invalidity, among other normative properties.[67] The general model of reason-giving described above can still be seen in this notion of pronouncement: jurists and non-jurists share a singular commitment to the same moral source, knowledge pertaining to this source requires a set of specialized methods, those of lesser knowledge would be rational to follow those of superior knowledge, on the condition of uprightness, and non-jurists are presumed to be less knowledgeable than jurists by default. As I discussed above, al-Ghazālī's understanding of the epistemic barriers to attaining true knowledge of the law was more pronounced and formalized than al-Bāqillānī's.

We can observe small but noteworthy differences with al-Bāqillānī in al-Ghazālī's understanding of what constitutes a "normative attribute of action." Al-Ghazālī identifies this attribute with divine revelation itself: "being obligatory means nothing other than being required by revelation while causing believers to feel that punishment is likely."[68] Normative attributes of action, for al-Ghazālī, are not only *declared* by revelation but effectively *constituted* by it.[69] This undergirds al-Ghazālī's idea that there are not only two different types of knowledge, that is, descriptive and normative, but in fact two different types of normative order: revealed (*sharʿī)* and observation or reasoning-based. Al-Ghazālī's definition of legal ruling as integral to divine speech reflects a conception of law as a set of normative judgments imposed on otherwise neutral actions. Outside of the world of revelation, juristic reasoning, and *sharʿī* reasoning, actions are devoid of normative weight as far as the law is concerned. This, again, explains the fact that al-Ghazālī advanced a more robust vision of reason-giving. Whereas al-Bāqillānī saw *all* actions as divisible into those allowed or commanded by God, and those discouraged by God, al-Ghazālī saw actions falling under the purview of divine law as limited: human actions, by default, are outside the domain of the law until there is proof to the contrary.[70] That is why al-Ghazālī classifies human actions in three categories: the commanded, the discouraged, and the neutral, unlike al-Bāqillānī, who advanced a basic two-part division of actions. What interests me is that this reflects a rather "hard" stance that al-Ghazālī

65 Al-Ghazālī, *Al-Mustaṣfā*, 8.

66 Al-Ghazālī, *Al-Mustaṣfā*, 8–9.

67 The nonnaturalistic stance that no proper legal-normative conclusions could be attained without divine revelation is typical of Ashʿarī doctrine. A history and overview of Ashʿarī doctrines can be found in Jan Thiele, "Between Cordoba and Nīsābūr: The Emergence and Consolidation of Ashʿarism (Fourth–Fifth/Tenth–Eleventh Century)," in *The Oxford Handbook of Islamic Theology*, ed. Sabine Schmidtke (Oxford: Oxford University Press, 2016), 225–41.

68 Al-Ghazālī, *Al-Mustaṣfā*, 80.

69 The identification of normative attributes (which here Bernard Weiss calls "Sharīʿa categorization") with divine revelation can be seen in later works of Ashʿarī jurisprudence, such as the work of Sayf al-Dīn al-Āmidī. See Bernard G. Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Din al-Amidi* (University of Utah Press, 2010), 93–95.

70 Later Ashʿarīs, such as Nāṣir al-Dīn al-Bayḍāwī (d. 1286 CE/AH 685), as reflected in the commentary on his *Minhāj al-wuṣūl* (The method of attainment of knowledge) by 'Umar b.'Alī al-Mulaqqin, appear to have sided with al-Ghazālī on this classification. Al-Bayḍāwī held that divine revelation divides human actions into either required (*muqtaḍā*) or permitted. The idea here is that most human actions would fall into the permitted category, whereas a small minority would be required, either positively or negatively. See 'Umar b.'Alī al-Mulaqqin, *Kāfī al-muḥtāj ilā sharḥ al-Minhāj* [Fulfilling the needs in the explanation of the method] (Beirut: Dār al-Kutub al-'Ilmiyya, 2016), 37.

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takes concerning the law's normativity: divine law, for him, is a system imposed upon human actions, designed to compel compliance through the feeling of possible pain and punishment.[71] This extrinsic nature of normative attributes makes the acquisition of legal knowledge even more remote for the untrained legal subject.

In line with his robust framework of reason-giving, al-Ghazālī's idea of being a bearer (*mukallaf*) of obligation was much stricter than al-Bāqillānī's. Since, for al-Ghazālī, the imposition of normative attributes is intrinsically linked to divine speech, being a *mukallaf* is simply a matter of understanding such speech and being able to carry out the actions in question. Being a *mukallaf*, for al-Ghazālī, is closely tied to being addressed by divine commands. In matters of agency, or contractual matters, al-Ghazālī's view is that these are only different configurations of factual conditions, which then trigger the normative consequences of divine commands in relation to legally capable persons under certain circumstances. Thus, while al-Ghazālī also allows for different situations in which one could be burdened by legal obligations, for him they are ultimately a matter of command of a sovereign legislator.[72] As I discuss below, al-Ghazālī also held a more authoritative conception of legal sanction, in which one is motivated by the likelihood of punishment, as opposed to social pressure in al-Bāqillānī. In spite of these differences, both models present more complex accounts of reason-giving than does the basic and intuitive "discovery model," in which God is absolutely authoritative and the jurists are mere informants.[73]

The Internal Notion of Obligation

Externally, the jurists conceived of their reason-giving abilities through a combination of formalized authority (such as juristic consensus) and persuasive powers (that is, superior knowledge of divine revelation). Just as the reasons to obey juristic pronouncements were advanced in different ways by classical jurists, so was their understanding of the normative claims the law made internally, that is, their conception of obligation. In general, understandings of the duty to obey the jurists tended to

71 Al-Mulaqqin, *Kāfī al-muḥtāj ilā sharḥ al-Minhāj*, 37. Al-Shīrāzī, by contrast, directly maintained that obligation and prohibition meant the imposition of reward and punishment. See Al-Shīrāzī, *Al-Lumaʿ fī uṣūl al-fiqh*, 76–77.

72 Al-Ghazālī, *Al-Mustaṣfā*, 119–20.

73 This intuitive model can be exemplified by some of the more practically inclined jurisprudes, such as Abū l-Muẓaffar al-Samʿānī (d.1066 CE/AH 562), who was of the view that "knowledge of legal rulings," even though it implies epistemological certainty, is a straightforward and appropriate way of explaining the discipline of *fiqh*. His view was that, even though juristic pronouncements themselves are probabilistic, they both derive from, and indicate certainties. For him, making legal pronouncements is akin to declaring that there will be a Day of Judgment: it is a type of belief in the sense that no one has, in fact, witnessed it, but it both derives from a certain source (divine revelation), and points to an inevitable outcome. Al-Samʿānī, like al-Ghazālī, maintained that juristic rulings are declarations of normative attributes that are imposed upon actions and known through divine revelation, as opposed to other attributes that can be known by mere observation. Al-Samʿānī, therefore, adopts a model of law-making closer to the "discovery" idea: jurists are, primarily, informants who seek to discover the law and declare it to the community. Everyone should have a motive to follow them simply by virtue of their being representations of divine commands. Al-Samʿānī's notion of *taklīf* did not differ significantly from al-Ghazālī's. Jurists and laypersons alike are "burdened" by these injunctions uniformly, as they are all under the sovereignty of the only lawmaker: God. The fact that the search for legal "truths" is the task of only a segment of society is a mere matter of practicality: if that was not the case, no life in society would be possible. Legal subjects ought to follow the jurists because they are closer to the truth, and therefore obedience allows them to obtain rewards and avoid punishments. Only jurists need to be aware of the justifications of rules: non-jurists simply need to follow juristic pronouncements. Al-Samʿānī, *Qawāṭiʿ al-adilla fī l-uṣūl*. The same with al-Shīrāzī, who maintained that *fiqh* consisted of "the knowledge of legal judgements through *ijtihād*." Al-Shīrāzī, *Al-Lumaʿ fī uṣūl al-fiqh*, 74.

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align with conceptions of juristic pronouncements and their internal claims. In an intuitive divine-command model, obligation would simply mean that a breach would result in divine punishment. As I discuss below, al-Bāqillānī's and al-Ghazālī's notions of obligation were much more complex. Their internal claims about how the law makes its own demands mandatory include both factors wholly generated by the law itself, and draw upon preexisting social factors.

A key discussion in which scholars of Islamic jurisprudence formulated their ideas on how the legal system internally claimed to induce compliance centered on the meaning of mandatoriness (*wujūb*). Al-Bāqillānī defined obligation as "the necessity of blame and reprimand (*al-lawm wa l-dhamm*) in case of omission."[74] What this means is that when an action is deemed and declared obligatory by the jurists based on a divine injunction, the meaning of this declaration of obligation is that blame ought to arise in the event of omission. Obligation, for him, also involved the praiseworthiness of the required action, although this does not set it apart from merely permissible and recommended actions, and therefore should, strictly speaking, not be part of the definition of obligation.[75] An objection to al-Bāqillānī's definition of obligation could stem from possible infinite regression. It appears that al-Bāqillānī presupposes a certain idea of obligation in the concept of the "necessity of reprimand" to explain what obligation means. If obligation is the necessity of blame in the event of omission, then how can we understand this necessity itself? The most plausible way out of this difficulty would be to consider the "necessity of reprimand" as a second-order principle that constitutes the very structure of the legal system. In that sense, when we say that someone has an obligation to commit an act, what we are saying is that, when not performed, reprimand ought to follow by virtue of the way the legal system is constituted and its categories are defined.[76]

Infinite regression could have been eschewed with a law-independent idea of blame, for example, one aligning with a natural-law conception of obligation. If "the necessity of blame" is a natural moral property of the omission of good and prescribed actions, legal obligation would exist just to confirm or enhance their pre-legal moral status. Such reliance on natural moral properties, however, would be contrary to the doctrines of the Ashʿarī school, of which al-Bāqillānī was one of the leading figures.[77] In this natural-law model, the possibility of blame would arise from the reprehensibility of neglecting one's obligations. Actual social pressure resulting in a sense of legal obligation in this case, however, would be a likely consequence of neglecting one's obligation, but not necessarily a defining element of what it means to have a legal obligation. Al-Bāqillānī needed a conception of the necessity of blame that went beyond the intrinsic value of actions on the one hand, and the likelihood of divine wrath on the other hand. Social pressure played exactly that role. If we accept this understanding of al-Bāqillānī's definition of obligation, we can see that, for him, the law draws upon normative attributes independent of it to claim its binding force, namely the idea of blame or reprimand. This is a significant position, and one that is not at all inevitable. Many conceptions of law view obligation as nothing more than the likelihood that legal institutions will mobilize to impose specific legal consequences in case of omission. In a common understanding

74 Al-Bāqillānī, *Al-Taqrīb*, 293.

75 Al-Bāqillānī, 293.

76 The idea of law being constituted of two different orders or types of rule was famously advanced by H. L. A. Hart, *The Concept of Law*, 2nd. ed. (Oxford: Clarendon Press, 1997), 79–99.

77 The Ashʿarīs argued that actions did not have intrinsic moral values, and that mere revelation-independent reasoning cannot reach categorical moral judgments. For a brief account of the rise of the Ashʿarī school and some of their basic views, see W. Montgomery Watt, *Islamic Philosophy and Theology* (Oxon: Routledge, 2017), 82–89, 106–33.

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of "religious" laws, one might imagine obligation to mean the possibility of incurring divine wrath or punishment in the event of non-performance.[78]

Although he rejected a natural-law understanding of the relation of norms to moral properties, al-Bāqillānī still held that legal categories accorded with moral ones. Following from his two-part division of human actions into commanded and not commanded, which I elucidated earlier, for al-Bāqillānī, saying an action is good means that "God has commanded us to praise the doer of good actions . . . and saying that an action is good has no other meaning."[79] Conversely, saying an action is evil means that "God has commanded us to scold and blame its doer to the extent that they have committed the action."[80] Because, as shown above, obligatory actions differ from merely "commanded" ones in that their omission requires blame, obligation is a composite category: obligation means that the action in question is *positive*, ought to be performed, or there is a reason to perform it, and not performing it is prohibited, so omission is a strictly *barred* course of action.[81] It is an attribute that combines social and moral features in its basic elements.

Al-Ghazālī does not conceive of obligation in terms of social blame, but rather as the inner subjective sense that punishment is likely.[82] He argues that an obligatory action is one that is required by divine revelation, with the added element of making the legal subject "feel" that there is a possibility of punishment. He explains his departure from al-Bāqillānī rather briefly. His response to his predecessor focuses on al-Bāqillānī's claim, which he rejected, that obligation is conceivable even in the absence of a threat of punishment. Al-Ghazālī's response is that this is simply not true as a matter of proper description of how the law works. For there to be a distinction between an act that is obligatory and another that is merely recommended or permitted, "performance must be made more compelling than omission *with respect to* [*human*] *purposes*."[83] If performance or omission are all the same in the context of mundane human considerations, then there is no point in deeming something "obligatory" in the first place. It is not hard to see that al-Ghazālī's response is inconclusive, since al-Bāqillānī could respond that fear of potential reprimand by one's society is sufficient to potentially give a rational person a reason to comply with the law. It is a sufficient internal claim to the law's normativity. Al-Ghazālī would simply disagree that, factually, this is likely to be a sufficient motive for compliance.

The disagreement between al-Bāqillānī and al-Ghazālī on the law's internal claims to obligation, therefore, reflects a deeper disagreement on human motives. This basic disagreement on what motivates human action defined their internal notions of obligation and, consequently, their conceptions of how the law gives reasons and induces compliance. Whereas al-Bāqillānī saw the moral pressure emerging within society as a result of the internalization of legal norms as a sufficient and effective tool for the inducement of compliance, al-Ghazālī held the more conservative position that, to give

78 This is a view that was indeed advanced by less theoretically inclined classical Muslim scholars such al-Samʿānī. For al-Samʿānī, an obligatory action is one for which one is rewarded, and for the omission of which one is punished. Al-Samʿānī uses a linguistic claim to make this argument: to "obligate" (*awjaba*) literally means to bind or to impose something. Obligation, therefore, is a burden placed by God on a person by the imposition of punishment in the case of omission. Al-Samʿānī, *Qawāṭiʿ al-adilla fī l-uṣūl*, 23.

79 Al-Bāqillānī, *Al-Taqrīb*, 280.

80 Al-Bāqillānī, 280.

81 A similar definition was offered by al-Bayḍāwī. As shown in al-Mulaqqin's commentary, al-Bayḍāwī held that obligation is the requirement to commit an act and refrain from the opposite, whereas requiring an act without prohibiting omission is mere recommendation. Permission (*ibāḥa*), by contrast, does not involve requiring an act at all. See al-Mulaqqin, *Kāfī al-muḥtāj ilā sharḥ al-Minhāj*, 43.

82 Al-Ghazālī, *Al-Mustaṣfā*, 94.

83 Al-Ghazālī, *Al-Mustaṣfā*, 95.

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a proper reason to act, the law must give rise to the sense that undesirable consequences are likely in the afterlife. It is important to note that, while both were Ashʿarī scholars committed to the idea that obligation follows from divine command, neither al-Ghazālī nor, to a larger extent, al-Bāqillānī, held the simple view that legal injunctions are obligatory merely because of divine authority. Again, this shows that the "discovery" model based on a simple view of divine-command and human compliance is unsatisfactory. The assumption that non-jurists ought to follow the jurists simply because their pronouncements are accounts of their attempts to discover divine will is inadequate. Their disagreement, on the other hand, is indicative of the intricate variations in conceiving of law's normativity in the classical tradition, even within the parts of it strictly committed to the authority of divine commands.

Al-Ghazālī also upheld the Ashʿarī view that good and evil in the moral sense cannot be known independently of revelation and offered a brief response to the Muʿtazilī theory that actions are intrinsically good or bad in a way known without divine revelation. In the Muʿtazilī doctrine, all actions are either good or bad, and we may be able to know the inherent goodness of actions by necessity, such as the goodness of saving those in danger, or by reasoning, such as the reprehensibility of lying, but in other cases we only know good and evil through revelation, such as in the case of worship.[84] Al-Ghazālī's response to the Muʿtazilīs is noteworthy in his distinction between "good" in the prudential sense as opposed to good in the moral sense. Al-Ghazālī's view is that things deemed "good" without divine revelation are necessarily only good in the prudential sense: they are good *for something*: "Saying 'this is good and this is evil' cannot be understood without understanding good and evil . . . Those meanings are threefold. First: the well-known colloquial meaning consists of dividing actions into those that serve the purpose of the agent and those that defeat [the purpose] . . . Second: calling good whatever has been characterized as such by the divine law by praising whoever commits it. Third: calling good whatever is permissible for the agent to do."[85] This move is a common one in critiques of naturalistic views of morality,[86] but here al-Ghazālī uses it to explain why normative attributes cannot be attached to actions without divine revelation. Importantly, for al-Ghazālī, only actions required by God are good in the moral sense, as opposed to neutral actions, which are not addressed by the law.

Al-Ghazālī did not conceive of those consequences as a promise or threat of punishment, but only as an "inner sense" that punishment is a likely outcome. Al-Ghazālī's idea of punishment, like the hard positivist one, is internal to the legal system: the command of the sovereign backed by a "feeling" of potential punishment is what makes something obligatory. Al-Bāqillānī, by contrast, refers to the extralegal idea of blame and reprimand to formulate his idea of obligation. Al-Bāqillānī does not rely on the feeling, much less threat, of punishment in his conception of the binding force of law but refers centrally to the likelihood of reprimand. These "institutional" variations on what the consequences of breaching obligations might be are, however, only one aspect of the law's internal claim to normativity in the classical tradition. This layer of normativity supposes a certain degree of adherence from the legal subjects: they must buy into the ideological or social framework that makes those potential effects meaningful to them. Another aspect to the law's internal claims of obligation that allows it to make claims of conformity with the subjects' motivations is the fact that obligation accords with underlying moral concepts.

84 An extensive account of Muʿtazilī theories of moral value can be found in Sophia Vasalou, *Moral Agents and Their Deserts: The Character of Muʿtazilite Ethics* (Princeton: Princeton University Press, 2008).

85 Al-Ghazālī, *Al-Mustaṣfā*, 81–82.

86 For example, George E. Moore, *Principia Ethica*, ed. Thomas Baldwin, 2nd ed. (Cambridge: Cambridge University Press, 1994).

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Both scholars, in sum, saw obligation as a normative attribute that attached to human actions. This is a distinctive outlook, and one that ensures that the law made a claim on the normative nature of actions, not merely on their consequences. By saying that there is a legal obligation, the classical Muslim jurist was not making a prediction about the action's consequences, but positively attributing a specific value to the act.[87] This value emerged from engagement with revelation, either because revelation signals obligation (for al-Bāqillānī), or because it constitutes it (for al-Ghazālī). The important point is that classical scholars used social, subjective, and moral concepts to define what they meant by obligation This is crucial to understanding the nature of the normative claims that the law makes internally, and to move beyond a simple view of the reasons to obey the law in a theocentric context.

SOME VIEWS ON THE DUTY TO OBEY IN WESTERN JURISPRUDENCE

Above, I have attempted a reconstruction of a classical Islamic model of reason-giving and the duty to obey that, I maintain, is clearly distinct from the intuitive divine-command model that is generally assumed in contemporary literature. In spite of subtle differences between the classical scholars I discuss, the framework of reason-giving and the duty to obey that I have so far reconstructed can, in general, be outlined as follows: (1) the jurists, by virtue of their knowledge, inform individuals of how to act according to revelation; (2) everyone has a duty to act according to revelation and to reprehend those who break the law; (3) a non-jurist ought to follow jurists who are knowledgeable and fair without revisiting their justifications. A reasonable member of society should be motivated to follow juristic pronouncements if those conditions are present. Modern debates on the duty to obey the law are difficult to invoke in conjunction with Islamic discussions for a rather obvious reason: they pertain to the authority of laws produced by modern states, which are radically different in their constitution and nature than a classical Islamic legal tradition that was developed by communities of scholars. Notwithstanding this radical difference, a brief examination of those debates in contemporary jurisprudence reflects some enlightening parallels between those theoretical accounts. The first parallel is that, like in the Islamic discussions above, views on the duty to obey the law tend to align with the jurisprude's views on what constitutes a valid legal ruling, that is, external claims tend to follow from internal ones. Second, the argument that legal subjects have a consistent duty to follow legal rulings tends to assume a certain socially accepted value that is law-independent. I clarify those two parallels below.

Moving from the law's internal claims to obligation to the position that legal subjects have a moral duty to obey poses what Raz called the "apparent paradox of authority" in his response to John Finnis's argument for the duty to obey the law based on the general goodness of having a legal system.[88] If the legal norm is good, according to Raz, then it ought to be followed regardless of whether or not it is law. If the rule is not good, then there is no law-independent reason to follow it. Either way, law's authority in itself would fail to provide any moral reason to induce human action in one way or another. In Raz's words, "To establish an obligation to obey the law one has to establish that it is relatively just. It is relatively just only if there is a moral obligation to do that which it imposes legal obligations to do. So the moral obligations on which the claim

87 Interestingly, in modern jurisprudence, the rare view of norms as "characteristics" of actions can be found in the writings of Karl Llewellyn, a legal realist. See, for example, Karl N. Llewellyn, *The Theory of Rules*, ed. Frederick Schauer (Chicago: University of Chicago Press, 2011).

88 Raz, "The Obligation to Obey."

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that the law is just is founded are prior to and independent of the moral obligation to obey the law." If that is the case, the obligation to obey is "at best redundant."[89] Raz attempted to address this problem through a three-part explanation of legal authority consisting of the "dependence thesis," the "normal justification thesis," and "the pre-emption thesis." What is most noteworthy about Raz's three-tier model of legal authority is that it supposes that the reasons advanced by the law are drawn from within the conflicting range of reasons already held by its subjects. Combined with the above understanding of the paradox of authority, it is no surprise that legal positivists by and large saw that the law made internal claims, but that there is no external duty to obey. If law, operating as an arbitrator, upholds reasons contrary to one's own, one naturally does not have a moral or political reason to obey the law, other than possibly avoiding its coercive powers.

Raz is of the view that the way the law claims authority in a modern legal system is akin to a process of mediation: interested legal subjects have often conflicting justifications that may result in opposed reasons for action. Such justifications are adopted by the mediator or legislator. Once a mediator's or legislator's directive is issued, the prior justifications become irrelevant. The ruling becomes authoritative only by virtue of it having been issued through the proper process of mediation/legislation. Raz summarizes the three theses as follows:

> The dependence thesis: All authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives and which bear on the circumstances covered by the directives. Such reasons I shall call dependent reasons. The normal justification thesis: The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow reasons which apply to him directly. The pre-emption thesis: The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should replace some of them.[90]

Some observations about this scheme are necessary. First, the middle part, called the "normal justification thesis," is an analytical account of what it means to say that someone has authority over someone else. The dependence thesis says that an authoritative directive must draw, among other factors, on reasons relevant to the circumstances addressed by the directive. Raz does not say what these other factors might be. It would seem that, for Raz, the only necessary reasons for an authoritative directive are the dependent reasons. This is where the Islamic model is different: it posits the motivation to follow revelation as consistently applicable to and in fact foundational of the entire system of justice of authority. The motivation to abide by revelation is too categorical and fundamental to qualify as a dependent reason in Raz's sense. In other words, the law is not a mediator that declares winners or losers but a guide that tells the subjects how best to live by reasons shared among them.

The preemption thesis is true of the Islamic model to the extent that, once declared by a valid legal pronouncement, this reason trumps any other motivation the legal subject may have had. However, this still operates differently in the Islamic context: juristic pronouncements do not preempt other reasons because of the jurist's authority, but because of the legal subject's pre-existing prioritization of revelation-based reasons over any other. The juristic pronouncement clarifies a

89 Raz, 140.

90 Raz, *Ethics in the Public Domain*, 214.

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reason that already had a preemptive power, it does not render a reason preemptive by virtue of juristic authority. Thus, inasmuch as the Islamic model claims that legal subjects do better to follow reasons given to them by the jurists than they do to follow other reasons that apply to them, it aligns with Raz's normal justification thesis. However, the persistence of epistemic superiority within the Islamic model means that the jurists, at some level, are merely elucidating to the subjects general reasons that they already had prior to the dispute at hand, and this process of elucidation fails if the jurist at any point does not meet the required conditions of knowledge and moral character. In that sense, it differs from the rest of Raz's framework, namely the dependence and preemption theses. In the end, Raz's model does not resolve the so-called paradox of authority, but confirms it. Because legal authority is constructed through the incorporation and then preemption of dependent reasons, legal subjects have no consistent or *prima facie* law-independent reasons to obey the law.

We can see at this point how the question of the external duty to obey aligns with the understanding of legal validity in modern jurisprudence, much like Islamic jurisprudence. For example, positivists tend to deny that legal subjects have a duty to obey the law unless it happens to accord with their own subjective moral beliefs, as seen in accounts advanced by Raz,[91] Smith,[92] and Enoch,[93] among others.[94] M. B. E. Smith, in a much-discussed article, surveyed and criticized several such arguments. Smith, as was Raz later,[95] was of the view that such a general *prima facie* obligation is often assumed by political theorists, such as Rawls, rather than properly proven.[96] Also like Raz, Smith reached the conclusion that there is a moral obligation to obey certain laws, but not others, and that this will depend on the content of each law and the perceived consequences of obedience or disobedience.[97] If that is indeed the case, then this obligation to obey is derivative of a deeper and more direct obligation to act in a fair and moral manner. Since the obligation to obey just laws would mean that one is under an obligation to simply behave in a just manner, then this obligation is generally redundant.[98] Smith's survey of arguments for the obligation to obey highlights the three most significant types of argument: (1) fair play arguments, advanced most notably by John Rawls,[99] (2) implicit consent arguments, and (3) various forms of utilitarian arguments. Rawls's view is that if one willingly invests in a cooperative enterprise and reaps benefits from such investment, they are under an obligation to follow the rules of such enterprise. Smith does not contest the validity of the argument itself, but rather points to the fact that modern state laws are "more complex" than Rawls suggested.[100]

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91 Raz, "The Obligation to Obey."

92 Smith, "Is There a Prima Facie Obligation to Obey the Law?," 950.

93 Enoch, although he argued that normativity, when seen clearly, was not a particularly puzzling issue, acknowledged that legal positivism is often seen to present a challenge to normativity because it sees law as a set of social facts. See Enoch, "Reason-Giving and the Law," 1–2.

94 See, for example, Schauer, *The Force of Law*. Recently, Schauer plausibly made the claim that, while a legal system in which the addressees of legal directives follow them only because it is good to obey the law is not inconceivable, such system does not presently exist. Schauer rested his argument, among other things, on the empirical claim that, by and large, most modern citizens obey the law to avoid its coercive powers.

95 Raz, "The Obligation to Obey."

96 Smith, "Is There a Prima Facie Obligation to Obey the Law?," 950–51.

97 Smith, 951; Raz, "The Obligation to Obey."

98 Raz, "The Obligation to Obey," 140.

99 John Rawls, "Legal Obligation and the Duty of Fair Play," in *Law and Philosophy: A Symposium*, ed. Sidney Hook (New York: New York University Press, 1964), 3–18, at 10.

100 "These arguments [from fair play] deserve great respect. Hart and Rawls appear to have isolated a kind of prima facie obligation overlooked by other philosophers and have thereby made a significant contribution to moral

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By contrast, a conception of law that sees it as advancing a law-independent positive value in society is more likely to result in the view that legal subjects have a general duty to obey the law. A noteworthy argument for a general duty to obey the law, which warranted a rebuttal by Raz,[101] followed from Finnis's idea of law as a necessary tool for the resolution of "coordination problems," which meant, for Finnis, that following the law is a morally reasonable course of action. Finnis understood coordination problems as "any situation where, if there were a coordination of action, significantly beneficial payoffs otherwise practically unattainable would be attained by significant numbers of persons, where there is sufficient shared interest to make some such coordination attractive, and where the problem is to select some appropriate pattern of coordination in such a way that coordination will actually occur."[102] The law, for Finnis, fulfills precisely this function. It determines the patterns of coordination necessary for the production of "significantly beneficial payoffs" for a significant segment of the community. It is not difficult to see how Finnis is right that coordination problems in that general sense are prevalent in any community, and that law does often play the role of arbiter in the determination of which pattern of coordination should prevail; contract law, for example, being a prominent example of this general pattern. What is less clear is whether this is *all* the law does, and even if it is, whether it always or even mostly does it well. It is not surprising that Raz's response highlighted those possible pitfalls, most notably, the fact that Finnis does not explain why we should regard the law as a seamless web where we are not justified to take some parts and leave others.[103] For there to be a categorical, or even a *prima facie*, duty to obey the law, it must be shown that it is always in the general interest to follow the law. Finnis does not show that this is indeed the case: there may be "sufficient shared interest" in a particular pattern of coordination, but that is not enough to give those whose interests are plainly opposed to such pattern an extralegal reason to follow the law to the exclusion of their own interests. What matters most is how Finnis's model compares with the classical Islamic model elucidated above. Like the Islamic model, Finnis believes that the law's authority derives from interests and motives external to the law itself.

Unlike the Islamic model, Finnis ascribes the law's goodness to a particular feature of human community, rather than merely a socially accepted, neutral source of moral authority.[104] The assumption that a community shares a basic and nonsubstantive moral commitment may be specific to a type of tightly knit community that is unavailable in the context in which Raz and Finnis are writing.

It must be reiterated that these differences and overlaps can be explained by the radically different historical and political context in which each set of jurisprudes is operating. The point of the

theory. However, the significance of their discovery to jurisprudence is less clear." Smith, "Is There a Prima Facie Obligation to Obey the Law?," 955.

101 Raz, "The Obligation to Obey."

102 John Finnis, "The Authority of Law in the Predicament of Contemporary Social Theory," *Notre Dame Journal of Law, Ethics, and Public Policy* 1, no. 1 (1985): 115–37, at 133.

103 Raz, "The Obligation to Obey," 150.

104 Historically, Islamic ideas of authority seem to have evolved closer to a Finnis-like model of social benefit. This can be seen, for example, in ideas of social interdependence and mutual interest as developed by, among others, al-ʿIzz b. ʿAbd al-Salām (d. 1262 CE/AH 660). For a recent study on ʾAbd al-Salām's theory of benefit, see Rami Koujah, "*Maṣlaḥa* as a Normative Claim of Islamic Jurisprudence: The Legal Philosophy of al-ʿIzz b. ʿAbd al-Salām," in *Locating the Sharīʿa: Legal Fluidity in Theory, History, and Practice*, ed. Sohaira Z. M. Siddiqui (Leiden: Brill, 2019), 127–50. On benefit and the purpose of law in general, see Felicitas Opwis, "A Comprehensive Theory of *Maṣlaḥa*," in *Maṣlaḥa and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century* (Leiden: Brill, 2010), 247–333.

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comparison, however, is to show that the question "why should anyone obey anyone else's authority?" is abstract enough as to constitute a universally valid concern of jurisprudes in historically and culturally diverse legal traditions.[105] In fact, the possibility of a consistent duty to obey the law in politico-cultural contexts different than the modern West was entertained and accepted by many legal positivists, including Raz, Enoch, and Schauer. Raz's account of this claim is the following:

> The government and the law are official or formal organs of the community. If they represent the community or express its will justly and accurately, then an entirely natural indication of a member's sense of belonging is one's attitude toward the community's organization and laws. I call such an attitude respect for law. It is a belief that one is under an obligation to obey because the law is one's law, and the law of one's country. Obeying it is a way of expressing confidence and trust in its justice. As such, it expresses one's identification with the community. Respect for law does not derive from consent. It grows, as friendships do; it develops as does one's sense of membership in a community. Nevertheless, respect for law grounds a quasi-voluntary obligation. An obligation to obey the law is in such cases *part and parcel of one's attitude toward the community*.[106]

The gist of Raz's rather lengthy discussion is that an obligation to obey arising from a sense of belonging to a community (in the Islamic context, corresponding to faithfulness to revelation) is entirely dependent on whether or not this sense of belonging in fact exists and is justified. It is not a necessary aspect of law as "official or formal organs of the community," as Raz puts it.[107] It is noteworthy that both the obligation to obey found in particular cohesive communities, but not necessarily or, rather, doubtfully in large nation-states, and the denial of a general *prima facie* obligation to obey are, in part, the result of Raz's analytical outlook as to the actual nature of modern laws. It is because we live in large, diverse, individualistic communities that our moral motives will inevitably only inconsistently accord with the motives of the law, which means that no general obligation to obey can be justified. The existence of a system of law in which authority derives consistently from a shared commitment, rather than coercion, is conceivable, but unlikely in a modern state context.[108]

CONCLUSION

The duty to obey juristic injunctions in Islamic law is usually assumed to follow a simple model: God makes commands, the jurists discover the meaning of those commands, and the faithful follow the jurists' interpretation. The duty follows in a straightforward way from the understanding that juristic pronouncements are accounts of divine will. My examination of the arguments advanced by some prominent classical Islamic jurisprudes in support of the claims for law's authority, both internal and external, suggests that the intuitive divine-command account that is prevalent in the contemporary study of Islamic law reflects a small part of the picture. Rather than discoverers of

105 For more on "comparative philosophy," see Ronnie Littlejohn, "Comparative Philosophy," Internet Encyclopedia of Philosophy, https://www.iep.utm.edu/comparat/, accessed November 27, 2020. On the importance of "historical philosophizing," see Bernard Williams, "Why Philosophy Needs History," *London Review of Books*, October 17, 2002, http://www.lrb.co.uk/the-paper/v24/n20/bernard-williams/why-philosophy-needs-history.

106 Raz, "The Obligation to Obey," 154.

107 Raz, 154.

108 This also aligns with Schauer's views. Schauer, *The Force of Law*.

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divine intent, the jurists saw themselves as representatives of their communities in the collective quest to formulate learned opinions about practical outcomes that are faithful to divine revelation. The model rests at a basic level on the epistemic authority of the jurists, but also advances practical and constitutional understandings of why it is necessary for the non-jurists to follow the jurists. The non-jurists, in this view, follow the jurists because they offer the most trustworthy accounts of how to live according to formal moral sources that are accepted by society at large. Furthermore, the authority of the jurist is always contingent on their reputation as a knowledgeable and upright member of the community, and nuanced by the fact that, at any given moment, the subject of law has a range of opinions at their disposal.[109] This model, in spite of variations between particular jurisprudes, reflects elements of epistemic and robust methods of reason-giving. In addition to being more elaborate than the basic divine-command model, this understanding of juristic authority also presents distinctive features in comparison to some prominent modern understandings of the duty to obey the law. The uniform commitment to a formal moral source, coupled with the contingent nature of the robust reasons given by the system, make the Islamic model distinct from some modern accounts of the duty to obey the law, or the lack thereof. Specifically, the Islamic model offers a view of legal authority that is specific to a cohesive community that shares a basic moral commitment. This model fits the classical need for a theory of authority that is both persuasive and authoritative.

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109 From a sociohistorical standpoint, it may be worth noting that the "reputation" of the jurists extended beyond mere intellectual status. As Nimrod Hurvitz explains, "in some cases the authoritative figures who led the lay adherents of the madhhabs were not outstanding experts of law but rather individuals whose religious prestige was based on other factors, such as piety and moral activism." Nimrod Hurvitz, "Authority within the Hanbali *Madhhab*: The Case of al-Barbahari," in *Religious Knowledge, Authority, and Charisma: Islamic and Jewish Perspectives*, ed. Daphna Ephrat and Meir Hatina (Salt Lake City: University of Utah Press, 2013), 36–47, at 36.