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Never Say Never: Searching for Common Ground between Muslim and Western Nations on the Issues of Human Dignity and Human Rights

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NEVER SAY NEVER: SEARCHING FOR COMMON GROUND BETWEEN MUSLIM AND WESTERN NATIONS ON THE ISSUES OF HUMAN DIGNITY AND HUMAN RIGHTS

Travis Suren Weber

INTRODUCTION

Whatever school of jurisprudence one adheres to, it is likely that value judgments are made at some point during its implementation—whether positivism, realism, natural law, formalism, or some other jurisprudence. Though not believing their value judgments to be of a moral nature, individuals nonetheless are making value judgments in their reasoning that determine the rightness and wrongness of others' behavior. For example, the formalist makes a value judgment in claiming that his rigid legal analysis is the “best” way of arriving at legal conclusions. The pragmatist makes a value judgment in his claim that “nothing would be more immoral” than to not put the welfare of the group first, for this produces the “best” end result. The positivist makes a value judgment in claiming that the only legitimate law is the prescribed, written code. From these few examples, it is observed that value judgments and their accompanying morality within the various theories of jurisprudence reflect the observation that “laws are nothing but the outcome of the quest for clear and definite standards of valuation whenever action is involved.”

If all theories of jurisprudence ultimately involve value judgments—which are comparable to moral judgments—then the theories of jurisprudence with more subtle value judgments, such as positivism and realism, should be the most acceptable theories to a group of citizens with different views of morality and religion. But for the reasons that follow in this article, the inadequacy of this view will be shown. This article will demonstrate that the current world-wide increase in religious interest and activity, including the spread of Islam, and the version of morality that Islam brings to the law, drives the need to explore theories of jurisprudence containing a moral component, such as natural law. This relevance of this issue is illustrated by the situation at the United Nations (“UN”), where the increasingly powerful Islamic bloc promotes policies aimed at the protection of Islam and its accompanying principles. Due to this shift in the balance of power at the

1 LEO STRAUSS, NATURAL RIGHT AND HISTORY 112 (1953) (emphasis added).
UN, and because the focus of these Islamic bloc nations has grown increasingly pious, it is essential for Western nations to focus more acutely on moral issues at the UN if they want the UN as a whole to be productive as it moves into the near future. In the context of this UN illustration, common moral ground between Western and Muslim nations can be found in the idea of “human dignity”—the notion that human life has inherent worth and value. Through the “lodestar” of human dignity, a platform of individual human rights acceptable to a larger number of nations, including both Western and Muslim nations at the UN, is a realistic possibility.

Agreement on human dignity (and the rights that flow from it) at the UN will be best served by a jurisprudence that provides for and emphasizes common ground, as opposed to one that emphasizes the differences between Muslim and Western nations. If the focus of this conflict remains on the differences in religion or ideology between the two groups, the common ground the currently exists on human dignity will continue to be ignored; viz., a strict adherence to the jurisprudence of positivism will result in a deadlocked situation with Muslims focused on Islamic texts and Westerners focused on Christian or humanist texts. But natural law provides common ground, for generally both Muslims and Westerners have a variation of morality, seen in the content of the natural law, which informs their definition of human dignity. When the focus is on the common ground the two sides share on human dignity (as opposed to the differences), the general definition of human dignity and set of human rights that are produced can be acceptable to both Muslims and Westerners.

Using the illustration of the current situation at the UN, this article proposes that an agreed-upon definition of “human dignity” and its attached human rights as informed by natural law is the best hope for achieving common ground between Muslims and Westerners. There are two reasons that natural law is the best jurisprudential approach for this task: (1) it has a moral component, which is essential to Muslims, and (2) it provides a basis for law that is not rooted in any text or authority belonging to one group or the other (like the Qur’an for Muslims or the Bible for Christians).

This article begins with Section I examining some significant proclamations of human rights law from both the Western and Islamic blocs at the UN. Section II examines why certain jurisprudential approaches will not work to bridge the gap between these proclamations.

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2 The terms “Muslim nations,” “Islamic nations,” and “Muslim-majority nations” admittedly mean slightly different things, but are used interchangeably throughout this article. For the purposes of this article, the terms are used simply to refer to nations with large Muslim populations and/or Islamic governments that vigorously promote Islamic law as their positive law.
Section III examines other approaches that partially work to bridge the gap. Section IV examines why a justice theory of jurisprudence is informative and somewhat helpful here. Section V examines why a natural law approach focused on a general view of human dignity and its attached rights provides the most hope for bridging the gap between Muslim and Western views. Section VI examines the evidence for natural law content; how the bonds between Westerners and Muslims on human rights are greater than is appreciated. The article will conclude in Section VII with suggestions for how this view of human dignity and its attached human rights, based on common ground between Muslim and Western nations, can be realized to a greater extent.

I. OVERVIEW OF SIGNIFICANT HUMAN RIGHTS DECLARATIONS

When the UN was formed in 1945, its members were predominately Western powers. The few Islamic nations that participated had little economic and political clout. Over the past sixty-five years, Muslim-majority nations participating in and influencing the UN have grown in number and economic power. This trend has exaggerated disagreements on definitions of human rights and on what directions policy should take, as the representatives of Muslim-majority nations often introduce ideas informed by Islam, while Western countries remain tied to ostensibly secular ideals.

A. Universal Declaration of Human Rights

When the Universal Declaration of Human Rights ("UDHR") was proclaimed in 1948, Western powers were still firmly in control at the UN. The Western ideals seen in the UDHR reflect the influence of the large majority Western states held in the UN at that time; nations with large Muslim populations were sorely outnumbered. The UDHR arose out of the post-World War II world in which it was widely recognized that an enumeration of human rights was needed to adequately reflect the idea that the dignity of humanity should

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6 See UN Member States, supra note 3.
transcend national boundaries. Yet the countries that came to this conclusion comprised people who shared assumptions about this human dignity, and their representatives at the UN reflected this pattern.

At its inception, the UDHR was the first truly international proclamation of individual rights that all parties would seek to protect. The UDHR upholds the right to life, the right to marry, the right to freedom of thought, conscience, and religion (including the freedom to change religion and practice religion), and the right to freedom of opinion and expression, among others. It also proclaims that the included rights may not “be exercised contrary to the purposes and principles of the United Nations,” and “[n]othing in [the UDHR] may be interpreted as implying . . . any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms” in the UDHR.

B. International Covenant on Civil and Political Rights

Approximately two decades later, the International Covenant on Civil and Political Rights (“ICCPR”) came into existence. Like the UDHR, the ICCPR was informed primarily by Western thought at the UN. The ICCPR basically put much of the UDHR into treaty form, including provisions regarding the right to life, the right to marry, the right to freedom of opinion, and the right to freedom of expression, which is subject to certain restrictions when the protection of others’ rights or the public order requires it. The ICCPR also protects the right to freedom of thought, conscience, and religion (including the freedom to change one’s religion and manifest one’s religion through practice and

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9 UDHR, supra note 4, art. 3.
10 Id. art. 16.
11 Id. art. 18.
12 Id. art. 19.
13 Id. art. 29(3).
14 Id. art. 30.
16 Id. art. 6(1).
17 Id. art. 23.
18 Id. art. 19(1).
19 Id. art. 19(2).
20 Id. art. 19(3).
The “[f]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

Like the UDHR, the ICCPR provides that “[n]othing in the [ICCPR] may be interpreted as implying . . . any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized” in the ICCPR.

But unlike the UDHR, the ICCPR includes a provision prohibiting interpretations that limit its enumerated rights “to a greater extent than is provided for” by the ICCPR.

The ICCPR goes even beyond the protections offered by the UDHR in one instance and provides for protection against coercion to adopt a certain religion, stating that “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”

The rights provided for by the UDHR and ICCPR are common throughout the political and legal systems of Western civilizations, and clearly show the Western influence of those documents.

C. Cairo Declaration on Human Rights in Islam

Over two decades after the development of the ICCPR, the Cairo Declaration on Human Rights in Islam (“Cairo Declaration”) came into existence. The Cairo Declaration was the product of a group of Muslim countries that believed the UDHR was too “Western” and did not adequately reflect their beliefs. Illustrative of how the Cairo Declaration was to be juxtaposed against the UDHR and ICCPR is the declaration of Iran’s UN representative “that the [UDHR] represented a secular interpretation of the Judeo-Christian tradition, which could not be implemented by Muslims; if a choice had to be made . . . between [the UDHR’s] stipulations and ‘the divine law of the country,’ Iran would always choose Islamic law.”

As a result of its different source of authority (Islamic law), the Cairo Declaration contains some significant

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21 Id. art. 18(1).
22 Id. art. 18(3).
23 Id. art. 5.
24 Id.
25 Id. art. 18(2).
27 Id.
differences from the UDHR, along with language indicating that the
drafters clearly tried to establish that their motivations were not like
those of the UDHR drafters. For example, the Cairo Declaration states
that there shall be “no crime or punishment except as provided for in the
Shari'ah,” and provides for freedom of expression subject to Shari'ah.
In sweeping language, the Cairo Declaration also provides that “[a]ll the
rights and freedoms stipulated in [the Cairo] Declaration are subject to
the Islamic Shari'ah,” and “[t]he Islamic Shari'ah is the only source of
reference for the explanation or clarification [of] any of the articles of [the
Cairo] Declaration.”

Nevertheless, the Cairo Declaration upholds some rights that
appear congruent with Western ideals and the UDHR—the dignity of
humanity, the right to life, the right to marry, and the right to live
securely in one’s religion.

D. Comparing the UDHR, ICCPR, and Cairo Declaration

In examining the differences between these three declarations, it
becomes clear how different sources of law and authority have led the
Western and Muslim worlds to different conclusions on what human
rights should be enumerated and protected. A Muslim positivist
jurisprudence that looks to the Qur’an and shari’ah law logically arrives
at the proclamations in the Cairo Declaration, leaving a gap to the
UDHR and ICCPR that cannot be crossed. Only by looking to the content
of the natural law can this gap be narrowed, and possibly eliminated.

Two issues emerge from an examination of the UDHR, ICCPR,
and Cairo Declaration: (1) the creation of all three was rooted in some
type of higher morality; it is just that in the case of the Cairo
Declaration, that morality has a different source than the UDHR and
ICCPR, and (2) the documents will remain irreconcilable as long as the
focus remains on their conflicting sources of authority, which generally
were Christian-influenced rational thought for the UDHR and ICCPR.

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29 Cairo Declaration, supra note 26, art. 19(d) (emphasis added). What constitutes
“shari’ah” is not certain and invokes a much larger discussion that is outside the scope of
this article, but a sufficient, summarized definition for the purpose of this article could be
the following: The “path” or “way” of faith for a Muslim, to include not only law, but many
different aspects of life. Ataullah Siddiqui, Christian-Muslim Dialogue in the
Twentieth Century 62 (1997).
30 Id. art. 22(a)-(c) (emphasis added).
31 Id. art. 24 (emphasis added).
32 Id. art. 25 (emphasis added).
33 Id. art. 1.
34 Id. art. 2.
35 Id. art. 5.
36 Id. art. 18(a).
and the Qur’an and other Islamic religious authorities for the Cairo Declaration.

II. METHODS OF JURISPRUDENCE THAT WILL NOT WORK

Before examining sources of jurisprudence that may help bridge the gap between the Islamic and Western worlds on the issues of human rights and human dignity, it must be shown why some jurisprudential methods will not help with this problem. The following analysis is not intended to completely discredit these theories, but only to explain why they are inadequate to the task at hand. Furthermore, the following is only a very brief overview of each of these methods. Full explanations of these theories would obviously take much longer. These short summaries are only intended to provide context for this article and briefly explain why these theories will not work for the issue at hand, allowing them to be contrasted with later analysis of theories of jurisprudence that will work to provide common ground for Islam and the West on human rights and human dignity.

A. Positivism

Positivism is not capable of exposing common ground on human dignity between Western and Islamic nations because it simply explains the validity of law as that which has the power to coerce backed up by force, but does not expound on how law relates to human nature. Several prominent theorists demonstrate this conundrum. Jeremy Bentham claims that a law is valid if it is given by the authority “recognised as possessing the power of making laws.”\(^\text{37}\) H.L.A. Hart asserts that a command is a valid law if it has the conditions of being (1) general, and (2) given by those who demand obedience.\(^\text{38}\) Though positivism has been further refined and tweaked over the years by various other theorists,\(^\text{39}\) these summary statements are sufficient to illustrate the theory’s inadequacy for the task at hand—a condition that exists because positivism is limited to explaining the relationship between a command and how it is applied. In sum, positivism never considers that the law “ought” to be anything other than some variation of what is being commanded.


Therefore, in trying to harmonize proclamations of significantly different sets of human rights at the UN, rigid positivism is useless for the purpose of bridging the gap between the Western “ought” and the Islamic “ought.” Conservative Muslims use the positive law of the Qur’an and other authorities in Islam to inform their notions of human dignity and human rights. Westerners, including Jews, Christians, and atheists, use the positive law of a variety of documents that reflect principles of Judeo/Christian or rational humanist ethics to inform their notions of human dignity. Thus, positivism—though clarifying and simplifying an understanding of the law within either of these groups—is ineffective in the context of seeking a common definition of human dignity. The Western and Islamic worlds are bound to their separate frames of reference on human rights and human dignity under the theory of positivism.

The debate over whether it was by “law” or “morality” that war criminals were tried after World War II illustrates the bankruptcy of positivism in attempting to solve the issue at hand, and is strikingly similar to the current conflict at the UN. Germany had its own positive law and rest of the world had other positive law. Though the Nuremburg trials were ostensibly based on the positive international law of the time, the Tribunal’s suggestion that “justice” demanded its existence provides evidence of how natural law prevails when humanity perceives the inadequacy of relying solely on the positive law in a certain situation. Natural law is the only mechanism for finding substantial common ground on the conflict presented in this article; positivism and other theories simply will not work.

B. Formalism

Like positivism, the theory of formalism explains the structure of law but provides no way of integrating morality into humanity’s problems and bridging differences in law between different groups, such as those at the UN. Rather, formalism aims for law to be so clear that it “repel[s] interpretation,” and for legal problems to be worked out from the rules and the facts.

Formalism, as explained above, will not help here because in order to arrive at the “hard-line” rule that a formalist would want in international agreements such as those at the UN, the parties would first have to agree on what the “hard-line” rule is. And with their

\[\text{\textsuperscript{40}} \text{See ALEXANDER PASSERIN D’ENTREVES, NATURAL LAW 106–07 (7th prtg., Transaction Pub. 1994) (1951).}\]
\[\text{\textsuperscript{41}} \text{ANALYTIC JURISPRUDENCE ANTHOLOGY, supra note 39, at 134.}\]
\[\text{\textsuperscript{42}} \text{Id. at 135.}\]
different viewpoints, the parties will very likely not agree, at least according to a *prima facie* analysis of this conflict. It is not that formalism is an unworkable method; it is just that the theory is irrelevant to the conflict that is the topic of this article because formalism will not serve to *bring* the parties to a place of agreement founded on common ground on the issues of human dignity and human rights.

C. Realism

Realism is slightly more promising for the task at hand than the theories explained above, but still fails because it does not provide a framework from which to work toward common ground. Realism, according to Oliver Wendell Holmes and Karl Llewellyn, is a theory that claims the law is only a prediction of what the judge will do.43 Likewise, in his explanation of realism, Jerome Frank asserts that the judge’s decision is the law, and judges make decisions in part based on legal rules, but also on their hunches, personal biases and policy views.44

Realism will not work in this situation because it does not leave any room for common ground or for moving forward. Though realism is more flexible, and defers somewhat to the moral judgments of the decision-maker, it still does not provoke change, but leaves the situation as it finds it. If the law is the prediction of the judge’s decision (here being the UN), as opposed to the rule, document, or other authority, there is still no impetus toward common ground on human rights. For instance, increasingly radical Muslim groups may influence the Muslim human rights decision-makers toward their position, and realism will let that result stand. To call this prediction of increasing radicalism the law does not help reveal common ground, as the demands of these increasingly radical countries at the UN may only pull them further away from the demands of Western countries, thus widening the gap instead of closing it. It may be that more moderate voices will influence Muslim decision-makers, and the realist would call this closing gap the law. But the result is still left to chance, and therefore, realism is not a helpful tool for the problem discussed in this article.

D. Pragmatism

Pragmatism will not work here because it offers no common ground for the problem at hand. A summarized theory of pragmatism states that many cases are difficult because they fall between groups of

43 *Id.* at 181–82.
44 *Id.* at 183–88.
cases that may be clearly governed by rules, and slight factual differences between cases will change what works in deciding each case. Pragmatism criticizes plain meaning as an attempt to provide consistency, but as an oversimplification of the law. Rather than accept such legal rigidity, the pragmatist contents himself with using the most suitable means to achieve the desired result.

Pragmatism is not only not helpful here, but may be detrimental to finding common ground because the theory not only allows, but justifies different entities coming to different conclusions based on different circumstances—the very thing this article aims to avoid in the Muslim and Western conflict on human rights at the UN. Moreover, proceeding on the assumption that all humans call upon morality to guide their actions at some point, pragmatism only moves this matter further away from any common ground, as different entities at the UN would be permitted to make, and justified in making, ridiculous moral claims regarding human dignity in the name of pragmatism.

E. Community Interpretation

Stanley Fish’s jurisprudence of community interpretation will likewise be ineffective for finding common ground here because this theory does not uphold a fixed legal rule with a fixed meaning. Rather, it gives legitimacy to whatever meaning the reader wants to give the material being read, for “the meaning lies with the community of readers and not with the text.”

According to Fish’s theory, the entrenched positions of Islamic and Western nations will remain as they are, as any authorities or documents referred to would produce different meanings as the two groups read them, and no definition of human dignity or set of human rights with a fixed meaning could ever be agreed upon. The status quo will remain, conferring legitimacy and allowing a free pass to entities that sign onto a document then disregard their obligations, for “by themselves, interpretations take us nowhere.” While this state of events may seem to support the fact that community interpretive jurisprudence is a reality, a simple acknowledgment of the theory’s existence does not move the problem expressed in this article toward any resolution; because “truth” is “interpretation,” a legal gap remains.

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45 See id. at 219–25.
46 Id. at 226–27.
47 Id. at 238.
49 Id. at 127.
F. Patterson’s “Postmodern Jurisprudence”

Postmodern jurisprudence also offers no opportunity for finding common ground, for this theory simply means that a “sufficiently well placed speaker who used the words in that way would be fully warranted in counting the statement as true of that situation.”\(^{50}\)

The theory’s focus on the elusiveness of language and its role in the law\(^ {51}\) results in no standard that can be used to confront the problem at hand. If linguistic use is what makes law normative, Islamic and Western nations will continue to disagree as long as their linguistic uses are different, and in turn, they will fail to find a common definition of human dignity and agreement on human rights.

III. METHODS OF JURISPRUDENCE THAT PARTIALLY WORK

The following theories all have aspects that will help find the common ground between Islamic and Western nations on human dignity and human rights, though they are unlikely to suffice. Nevertheless, helpful aspects of the theories are highlighted in this section.

A. Law as Interpretation

Dworkin’s theory of interpretation is somewhat useful in the quest of finding common ground on human rights, as the theory provides that regardless of other factors like purpose and precedent, law must be “consistent with moral principle.”\(^ {52}\) But the ability of Dworkin’s theory to accomplish the task at hand is hurt by its insistence on interpretation,\(^ {53}\) for this makes the results relative to Islamic and Western cultures.

The advantage of this theory is that it provides for a normative morality at some level. The disadvantage of this theory is that it may be difficult to get Islamic and Western groups to actually agree on that normative reality, as they may not interpret law in the same way. Because “truth” is “individual interpretation,” a gap still fills what could be common ground between Islamic and Western countries when using Dworkin’s theory of interpretation.

\(^{50}\) Id. (quoting Hilary Putnam, Representation and Reality 115 (1988)).
\(^{51}\) Id. at 165–69.
\(^{52}\) Id. at 78.
\(^{53}\) See id. at 80–86.
B. Bobbitt’s Modal Account

The theory titled “truth in law: a modal account,” which claims that legitimate jurisprudence is established by a proper order of various forms of argument (modalities) in the context of U.S. constitutional law, may be helpful here because it appeals to morality in certain cases of conflict in the form of an “ethical” modality. Even though the forms of argument (modalities) themselves are not inherently legitimate, obedience to their proper order and use gives consistency, and legitimacy. This proper order includes permission to resort to the “individual conscience” when the modes of argument conflict.

While it is helpful that this theory allows a place for morality that is useful in bridging the gap between Islamic and Western nations on the issues of human dignity and human rights, the disadvantage of this theory is that it is not completely on-point to the problem at hand. The problem at hand is not one of constitutional interpretation, which is the main focus of this theory, but rather that of drafting; an entirely new “constitution” is needed—a fresh document offering a definition of human dignity and set of human rights that both Islamic and Western nations can agree to. Philip Bobbitt’s allowance for individual conscience at least recognizes morality’s legitimate role in forming law, which is what is needed to find agreement on the issue of human dignity. But agreement on how to read a certain document (which Bobbitt deals with by speaking to issues of constitutional interpretation) will not create common ground between Islamic and Western nations, for what is needed here instead is a new, more finely-tuned document (covering a definition of human dignity and a list of individual rights) based on a common morality.

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54 Id. at 128.
55 Id. at 137.
56 Id. at 129.
57 Id. at 135–38.
58 Id. at 149.
59 See id. at 128–50.
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IV. D’AMATO’S JUSTICE THEORY OF JURISPRUDENCE REVEALS COMMON GROUND THAT STRENGTHENS THE NATURAL LAW ARGUMENT

The justice theory is even more helpful to the task at hand because it offers the advantage of allowing for the possibility of different groups, though belonging to different religions, agreeing to use “justice” based on conscience, which will result in their agreement on at least some principles. This theory also supports the idea that humans recognize injustice and justice without completely being able to describe them.60 Most individuals’ sense of justice “overlaps” in some way with that of other individuals,61 though admittedly, there is likely to be more overlap with members of one’s own community.62

Hans Kelsen claims this theory is invalid because it is not objective, for “justice” is a subjective, individual determination.63 Kelsen’s critique, however, has two shortfalls. One is that he fails to consider natural law as a serious option, likely ruling it out as “subjective” even though it really is objective. The second problem is that Kelsen’s theory doesn’t adequately address the intensely religious nature

60 ANALYTIC JURISPRUDENCE ANTHOLOGY, supra note 39, at 249. D’Amato also critiques Professor Hart’s view of justice, using hypothetical cases about Islamic laws that Westerners may find repugnant. Id. at 252. D’Amato asks what the reader would think if he saw a Muslim man beating his wife for some transgression, which is considered “just” under that nation’s laws and culture. Id. I would respond to D’Amato’s question about the use of the term “justice” by noting that the beating is an incorrect use of the term “justice,” and whoever agrees otherwise is using the term incorrectly. Id. (question 4). My assertion is based on the natural law applying to all men, and at some level, all having the same sense of what is just and unjust. This response also answers the next question about which side is correct if one party disagrees and claims to be in the right—the party who correctly applies natural law is the one in the right, for natural law principles provide an absolute answer to justice. Id. (question 5). I would answer the next question in the negative—justice is not served, for the natural law is being violated by such inequality of the sexes in human society. Id. at 252–53 (question 6). Professor Hart’s conclusion is wrong because it allows for “justice” to ultimately be relative to the situation, id. at 253 (question 7), but that is not true “justice.” True “justice” is absolute, a quality provided by natural law principles. Hart’s conclusion is logical in using positivism, id. (question 8), which is why positivism has been shown to be ill-suited to the task in this article. See supra Part II.A. Positivism is wrong for the same reason Hart’s argument is wrong; relative justice is not truly “just.” ANALYTIC JURISPRUDENCE ANTHOLOGY, supra note 39, at 253 (question 9). The answer to the final question is a resounding “yes”—justice is carried out when the natural law is applied to all! Id. (question 10).

This series of questions has been answered here because it shows why natural law offers hope for solving the issue at hand; viz., a case can be made for its universal application to the human race.

61 Id. at 250.
62 Id. at 251.
63 Id. at 250.
of international politics (which in turn impact law) today. Muslims insist that their law include a religiously-derived quality. Kelsen dismisses the theory of justice because there is constant disagreement on what is “just,” but in doing so, he admits the truth of the foundation of this entire conflict between Muslims and Westerners: that people need their laws to be moral. Of course, Kelsen’s positivism could never offer a solution to this problem, and he indicates no interest in solving it, though admittedly the religious nature of world affairs today may be appearing more vividly that it did during Kelsen’s time.

The true disadvantage of the justice theory is that if different groups’ notions of justice are too influenced by their respective sources of authority—the Qur’an and Islamic law documents, and the Bible and Western human rights documents—and by their environments, disagreement on what is “just” will persist. But because this theory at least appeals to a sense of justice (which is derived from conscience and deals with morality) the justice theory provides some hope for common ground between Islamic and Western nations on the issues of human dignity and human rights. The challenge will be finding agreement on the same sense of “justice” that would lead to that common ground.

V. THE CONTENT OF A NATURAL LAW FRAMEWORK PROVIDES THE BEST BASIS FOR COMMON GROUND

Natural law is the best hope for addressing the challenge of finding common ground on human rights between Islamic and Western nations because its precepts are universally applicable to all individuals on both sides of this conflict. If all people cannot avoid certain principles to which their consciences obligate them, then Muslims and Westerners are both bound by the natural law. There certainly will still be disagreement among nations even if natural law is accepted as a basic foundation of human dignity and human rights. But at least there will be agreement on the source causing that disagreement. Under the status quo, in which some recognize the Qur’an and Islamic authorities, while others recognize the Bible and Western authorities as sources of human dignity and human rights, there is little hope of reconciliation.


65 See ANALYTIC JURISPRUDENCE ANTHOLOGY, supra note 39, at 250.

66 Circumstances exist already in international law and at the UN that demand an appeal to some kind of internal moral judgment. For example, Human Rights Committee members must be of “high moral character.” ICCPR, supra note Error! Bookmark not defined., art. 28(2). The violation of this standard, however, is revealed by the low moral character of some of the current members of the Human Rights Committee, which can be
One reason natural law is so helpful for the issue at hand is that its “real significance” may be “sought in its function rather than in the doctrine itself.” Its “intrinsic value,” rather than value in forcing obedience through compulsion, is exactly what is needed to bridge the gap between Islamic and Western nations, both of which are so entrenched in their positions that neither is likely to be successful in its attempts to compel the other to adopt its point of view.

Admittedly, there is the difficulty of Muslims not accepting natural law as the basis of morality even though they agree with the actual morality; they will likely want to use Islamic law as the basis. So this jurisprudence will work in theory by revealing areas of agreement between Muslims and Westerners, but will have problems being recognized if Muslims are not willing to acknowledge it as a basis of authority for morals. In spite of this possible obstacle, natural law must be offered as the only workable solution for achieving common ground in this area for the reasons explained below.

A. The Long History of Natural Law Increases Its Credibility for Dealing with the Issues of Today

The notion of a natural law unifying and binding all humanity is seen as far back as the time of the Roman law. Laws “common to all men,” and “what natural reason establishe[d] among all men and [was] observed by all peoples alike” became “the law which all nations employ[ed].” The natural law, or ius naturale, was reflected and clearly identified in the “law of nations,” or ius gentium. One example of this interplay is the Roman Emperor Justinian’s Corpus Juris Civilis, which was held to be universally valid because it was not based on religion, but on reason. It was apparent at the time that “[t]he notion that all men are equal is [] deduced from the very existence of a bond that unites them. Human equality is the direct consequence of natural law, its first and essential tenet.”

recognized as a matter of conscience. It is not necessary to refer to Muslim or Christian authorities to judge these members by Article 28(2). This shows that a shared conscience that informs human dignity and human rights is possible, for Muslims and Westerners can point to certain violators of human rights as not of “high moral character” without referring to any religious texts or other external standards of judgment.

67 d’Entrevies, supra note 40, at 35.
68 Id.
69 G. Inst. 1.1 (S.P. Scott trans.); see also infra Part V.C.
70 d’Entrevies, supra note 40, at 33; see also infra Part V.C.
71 d’Entrevies, supra note 40, at 23.
72 Id. at 26.
Centuries later, Saint Thomas Aquinas claimed that law is something that pertains to reason, which, as the “first principle of human acts,” human beings use in order to reach the end that they see as best. Aquinas noted that “universal propositions of practical reason, which are ordered toward actions, have the character of law.” The expression of reason in the law is illustrated by how human beings interact with their neighbors, specifically in the notion that “a people is . . . brought together by consent to the law,” an idea Aquinas concurred with, but Cicero stated in Augustine’s *De Civitate Dei* 2. Aquinas also claimed that because humans ultimately strive to achieve happiness as a result of their actions, law is an ordering that leads to happiness—a law Aristotle would affirm as just.

Approximately six centuries after Aquinas, the French recognized “indisputable principles” and the American Colonists acknowledged “self-evident” truths in their respective declarations of citizens’ rights. Both of these declarations were based on rationalist principles, which were also reflected by Grotius in his position that a defined system of law applicable to all men was possible apart from theological presuppositions. Around this time natural law began to fill the mold of natural rights through way of reason, which has been expressed in the view that “[t]he aim of all political association is the preservation of the natural and imprescriptible rights of man.”

The strength of the historical view of natural law is that its jurisprudence has been refined through time, and it has been proven by widespread use throughout history. Other jurisprudential frameworks, or at least their formulations, have only been developed relatively recently. The weakness of the historical view, however, is its apparent irrelevance, as some will argue that current international conditions never before seen require the old, ineffective law (natural law) to be discarded, and new positive law to be developed in its place.

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74 *Id.* at 3.
75 *Id.* at 216.
76 *Id.* at 229.
77 *Id.* at 4.
78 *D’Entreves, supra* note 40, at 51–52.
79 *Id.* at 53.
80 *Id.* at 55–56.
81 *Id.* at 62.
82 *Declaration of the Rights of Man* art. 2 (Fr. 1789).
83 *See, e.g., John Finnis, Natural Law and Natural Rights* (1980).
B. The Morality Inherent in the Philosophical View of Natural Law Makes it an Ideal Lens Through Which to View Today's Intensely Religious World

Some may argue that differences in culture, environment, and outlook are so great among different people groups that certain notions of morality will never be agreed to, and certain gaps of culture will never be crossed. Yet this pessimism is refuted by what has been recognized by Alexander Passerin d'Entreves, John Finnis, and others: from the first precept—the common desire of all human beings to do good and avoid evil—comes the shared concern of all societies for some of the same good ends. Among these good ends are the procreation of new life to sustain societies (absent special circumstances), having some type of rule-making regarding sexual activity, not lying, working toward the common good, upholding obligations between individuals in society, and having some type of religious system. Another universally recognized principle is the promotion of cultural institutions; the fact that all people can see the purpose of certain institutions or endeavors (though they may radically disagree on what those institutions accomplish) is evidence of the goodness of this idea among all human beings.

Another natural law precept is the preservation and advancement of human life. Though this may not seem evident from the statements and behavior of certain radical groups like Al-Qaeda, it is necessary to keep in mind two points: (1) it must be recognized that this behavior is the result of much teaching and infusion of radical thought that is contrary to human nature, so the conscience is suppressed, but still present, in individuals belonging to these groups, and (2) if “life” is defined as including the afterlife, then even radical individuals follow this principle because often their motivation for martyrdom is “life” in the afterlife.

The appeal of the philosophical view of natural law is that it does not have the irrelevance sometimes attributed to the historical view. But its weakness is that its authority is not made clear by a historical record. Nevertheless, universal agreement that certain precepts are good is clear even without an extensive historical record. If all human beings share the desire for these basic goods, should not all be able to inform their view of individual liberties by them? It seems likely that both Muslims and Westerners should be able to agree on the same liberties. After all, most would agree they like the rule “I’ll treat you as you treat me”—an

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84 Id. at 83–84; D’Entreves, supra note 40, at 80.
85 Finnis, supra note 83, at 83–84; D’Entreves, supra note 40, at 80.
86 Finnis, supra note 83, at 84–85.
87 Id.
idea that supports the principle of preserving and advancing human life. Nevertheless, even where there is disagreement on certain rules of natural law, the very fact that there are so many different notions of right and wrong reveals the presence of a natural law construct.\textsuperscript{88} As the philosopher Leo Strauss points out, the “realization of the variety of notions of right is the incentive for the quest for natural right;” thus, this disagreement “is the essential [pre]condition” for the search for natural law precepts.\textsuperscript{89}

\textbf{C. Customary International Law Reflects Natural Law}

These natural law precepts are reflected in widespread agreement among nations on certain rights and wrongs, which are established as customary international law. All people, or at least substantially all people with a few dissenters, agree that certain behaviors are wrong, and certain crimes are universal; thus, anyone who commits them is guilty to some degree. How do all people agree on such things? The only logical explanation is the existence of some type of moral “compass” reflecting a conscience within all human beings.

This moral “compass” is seen in the obedience of many nations to the rule “I’ll treat you as you treat me”\textsuperscript{90}—a more colloquial phrase for the “law of nations,” or \textit{ius gentium}, the law “which men have devised for their mutual intercourse.”\textsuperscript{91} The universality of the law of nations is reflected in the consensus on issues like genocide, crimes against humanity, and piracy. These are evidence that natural law rules are being followed by most groups of people throughout the world. The universality of the law of nations is also reflected in the notion of “universal jurisdiction”—the idea that some crimes are so horrible that any authority should be able to adjudicate them anywhere at anytime. This idea has currently received much attention and more widespread acceptance, but what explains it? The only reasonable explanation is that all human beings in all cultures on some level agree that certain behaviors are wrong and certain behaviors are right—this is a judgment people make based on their shared conscience and humanity.\textsuperscript{92}

\textsuperscript{88} \textit{Strauss}, supra note 1, at 10.
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} See supra Part V.B.
\textsuperscript{91} \textit{D’Entrevex}, supra note 40, at 24.
VI. THE COMMON GROUND OF SHARED HUMANITY BETWEEN MUSLIMS AND WESTERNERS IS GREATER THAN HAS BEEN APPRECIATED

The bonds of humanity and morality between Muslims and Westerners, seen in shared obedience to the content of natural law, are stronger than they appear. The hallmark of natural law that differentiates it from other jurisprudential methods is its intertwinement with morality.\(^{93}\) It is inseparable from morality. If morality is extracted from law, the natural law framework proposed here falls apart. This is promising for the Muslims who have a problem with a system of law devoid of religion, as Islam is so integrated with the Muslim's view of society. This integration of morality into Islamic law and society is consistent with Western standards in several areas.

A. Consistency with Western Human Rights Standards

Islamic authorities have explained and enumerated human rights that are consistent with Islam and natural law.\(^{94}\) This shows it is possible for Muslims to proffer human rights that satisfy their morality, support the idea of “human dignity,” and are still consistent with Islam.

Early in the history of Islam, Muslim scholars and jurists offered a degree of protection to human rights that was often greater than what is being offered in Muslim nations today. Fourteenth-century Muslim jurists believed the purpose of *shari'ah* law was to “ensure the welfare of human beings,” and formulated sets of rights, including the protection of life, family, property, intellect, and religion.\(^{95}\) More recently, during the twentieth-century, Muslim writer and political philosopher Abul A’ala Maududi, in language quite similar to that of the natural law, claimed that the human conscience always leads to a “uniform verdict in favor of certain moral qualities being good.”\(^{96}\)

One Muslim who has consistently proclaimed human rights with which Western nations can agree is Sheikh Ali Goma’a, the Grand Mufti of Egypt. Ali Goma’a has stated that

*Shari'ah* is meant to protect Islam for Muslims, and protect the religions of all people who follow texts that proclaim the

\(^{93}\) See D’Entreves, *supra* note 40, at 79–92.

\(^{94}\) I will not attempt an exegesis of the Qur’an or other Islamic writings myself in order to draw out Islamic positions on law or other items for several reasons. First, I am not a Muslim, and second, I do not read or speak Arabic, two qualifications in the eyes of many Muslims in order to legitimately expound on the Qur’an. Therefore, I will limit my explanations of Islamic law to what Muslims say about their own religion.


\(^{96}\) ABUL A’ALA MAUDUDI, *ISLAMIC WAY OF LIFE* 8–25 (1980).

Ali Goma’a believes that “what the best Muslim jurists have always done is to focus on the intent of shari’ah to foster faithfulness, dignity, intellectual growth, and other core values.”\footnote{Jay Tolson, Egypt’s Grand Mufti Counters the Tide of Islamic Extremism, US NEWS & WORLD REP., Mar. 6, 2008, http://www.usnews.com/articles/news/world/2008/03/06/egypts-grand-mufti-counters-the-tide-of-islamic-extremism.html.}

It is clear that Ali Goma’a places the importance of human dignity over any interpretation of Islam that would seem to deride human dignity and its attached rights. Ali Goma’a’s Islamic definition of human dignity as avoiding “anything that reduces a human being to an object” is at least consistent with a Western view of human dignity. If the Grand Mufti of Egypt can take this position, there is hope that other learned Muslims can be open to similar ideas.

Other views of human dignity and human rights as informed by Islam further illustrate consistency with Western human rights standards. Esteemed Islamic scholars have stated that the punishment of death for apostasy either does not apply to modern times, or was never true at all.\footnote{See, e.g., When Muslims Become Christians, BBC NEWS MAG., Apr. 21, 2008, http://news.bbc.co.uk/2/hi/7355515.stm. The presence of these views among Muslims might seem to indicate that there is little conflict over human rights. But the problem is not that there are no Muslims proclaiming human rights consistent with Western standards; these Muslims exist—others like Ali Goma’a exist. Rather, the problem is that the world-wide flow of news, information, and ideas is skewed to the average observer, and access to information is warped by the tendency of news information sources to report on radical Islam due to its attention-grabbing qualities. Non-violent Muslims of different views do not offer such shocking news footage. But when only the violent views are reported, it creates the perception that only those views exist. Thus, many Westerners have an inflated perception of the number of violent Muslims, and the voices and viewpoints of these violent individuals and groups are falsely magnified and unfairly drowned out their opposition. This perception exists even in Muslim nations among their own populations, though in a slightly different form: Violent Muslims obtain a choke-hold on public opinion through threats and fear, which are methods that people like Ali Goma’a do not use. And so the voices of violent Muslims are again falsely magnified and unfairly promoted. For this reason, it is even more important to promote the views of recent dissenters from radical, violent Islam.} Muslims’ views on human rights and law are often influenced by social factors and not just the Qur’an and the Hadith in
the abstract. Even so, “Shari’a[h] principles are basically consistent with most human rights norms, with the exception of some specific and very serious aspects of the rights of women and non-Muslims and the freedom of religion and belief.”

Also supportive of a common definition of human dignity is “the Islamic principle of reciprocity;” in other words, the common-sense idea that we treat others the same way we would like to be treated, which in turn entitles us to be treated the same way. This Muslim principle of reciprocity is identical to the natural law rule, “I’ll treat you as you treat me” that is seen in the law of nations. This is an area of very high consistency between Islamic and Western law, wedded together by natural law, and illustrated by the law of nations.

The fact that the humanity of Muslims is the same humanity held by Westerners strengthens hope for shared obedience to natural law precepts. As relationships are built between Muslims and Westerners, and are challenged by different cultural conflicts at different times, common ground may be uncovered. During these conflicts, when the conscience is pricked by different issues, Muslims and non-Muslims are communicating using the same “language” of natural law. The shared obedience to natural law is more widespread than is commonly recognized, and is the key to finding more common ground between Muslims and Westerners.

B. The Human Conscience Causes Dissent and Debate

Some very recent proclamations from prominent Muslim scholars arising out of debates within radical Islam are evidence of a crisis of conscience within the ranks of its religious scholars. In 2008, a

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101 Id. at 111.
102 Id. at 136.
103 See supra notes 90–91 and accompanying text. This is also known as the “golden rule,” and with slight variations, is reflected in many belief systems from around the world throughout history. JEFFREY WATTLES, THE GOLDEN RULE 1–12 (1996).
104 See Ted Dekker & Carl Medearis, Loving Bin Laden: What Does Jesus Expect Us to Do?, MISSION FRONTIERS, Mar.–Apr. 2010, at 6, 6–9, available at http://www.missionfrontiers.org/pdf/2010/02/06-09%20Loving%20Bin%20Laden.pdf. Often, the official representative of a Western government is identified as the “Western enemy,” and when that person reaches out to Muslims, they put up a personal barrier in conversation and want nothing to do with that representative. But when others who are not associated with the Western government reach out, the barrier may come down, and the Muslim conscience is revealed in the resulting interchange during conversation. See id. Obedience to natural law principles requires consciences that have been pricked. Because the Muslim conscience can be pricked, see id., natural law can work to solve the problem at hand in this article, which is the current state of widely divergent understandings of human dignity and human rights.
former associate of Al-Qaeda leader Ayman al-Zawahiri named Sayyid Imam al-Sharif, commonly known as “Dr. Fadl,” issued a publication in which he renounced his former ways, and condemned the killing of innocents that Al-Qaeda currently justifies in the name of Islam. Dr. Fahl was one of the ideological founders of Al-Qaeda, and had authored extreme writings like *The Compendium of the Pursuit of Divine Knowledge*, in which he denounced democracy and claimed that government workers, police, and those who tried to work for peaceful change, including Muslims, were infidels who deserved to be killed. But Dr. Fadl has since changed his views.

In his recent publication *Rationalizing Jihad in Egypt and the World*, he asserts that Islamic law puts strict limits on the use of violence, and does not authorize violent warfare in which fellow Muslims are injured. Dr. Fadl also denounces the “unwarranted spilling of blood,” and criticizes those who justify the ends by the means in the name of Islam, such as is the case with stealing to finance jihad. He makes the striking claim that the enemy must be identified in order to prevent harm to innocents caught in the cross-fire, a position Bin Laden and other radicals do not even come close to taking. Dr. Fadl also claims that non-Muslim foreigners in Muslim nations should not be attacked, as they may have been invited there to work. Furthermore, because Muslims in non-Muslim lands are treated fairly, Muslims should treat non-Muslims in their lands the same way.

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106 Id.


108 Wright, supra note 105.

109 Id.

110 See Letter from the World Islamic Front Urging Jihad Against Jews and Crusaders to the Al-Quds al-‘Arabi Newspaper (Feb. 23, 1998), available at http://www.mideastweb.org/osamabinladen2.htm (“The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it . . . .”).

111 Id.

112 Wright, supra note 105. Ayman Zawahiri, currently a leader of Al-Qaeda, fails to see that what he perceives as oppression against Muslims actually applies to all citizens of certain societies, not just Muslims:

To dispute [Dr.] Fadl’s assertion that Muslims living in non-Islamic countries are treated fairly, Zawahiri points out that in some Western countries Muslim girls are forbidden to wear hijab to school. Muslim men are prevented from marrying more than one wife, and from beating their wives, as allowed by some interpretations of Sharia. Zawahiri seems to overlook the fact that there is no discrimination based on religion in this situation, so there is still free exercise of religion, even defined broadly, to include
illustration of how the Islamic principle of reciprocity is consistent with natural law and the law of nations.\textsuperscript{113} Though Dr. Fadl is claiming to reinterpret Islamic law, which at first would appear to leave this example within the framework of positivism, the fact is that his reinterpretation of Islamic law is based on conscience and morality. Whatever his motivation, which is slightly unclear,\textsuperscript{114} his shifting views show such changes are possible even among extreme radicals, and more importantly, demonstrate that a former radical like himself can listen to his own conscience. In addition to his conscience informing his support for the Islamic principle of reciprocity, Dr. Fadl pointed out the unnecessary spilling of Muslim blood in Gaza,\textsuperscript{115} itself a moral judgment on when to take human life.

His recent claims have the appearance of natural law precepts that include Islamic law as filler-material. For instance, “Dr. Fadl claims he came to realize that the haphazard use of violence by Islamist groups causes more harm than good with respect to Islamic law, an idea he had been pondering since he left terrorism in the early 1990s.”\textsuperscript{116} Though seeming to interpret Islamic law, Dr. Fadl has just revealed his obedience to the natural law principle of promoting one’s culture and principles,\textsuperscript{117} in that he realized his old ideas were bringing so much harm to Islamic culture that it would be decimated unless he changed his views.

When Dr. Fadl was the leader of Al Jihad (a radical anti-Egyptian government Islamist group), a bombing intended for Egypt’s Prime Minister instead killed a twelve-year old schoolgirl.\textsuperscript{118} The group’s members were “embarrassed by [the] failure,”\textsuperscript{119} which is a testimony to an internal law of moral conscience. If these members of Al Jihad were

\begin{flushleft}\footnotesize variations of free exercise outside of the U.S. legal system. Regarding the terrorist attacks of September 11, 2001, Zawahiri writes,

\textquote{The mujahedeen didn’t attack the West in its home country with suicide attacks in order to break treaties, or out of a desire to spill blood, or because they were half-mad, or because they suffer from frustration and failure, as many imagine. They attacked it because they were forced to defend their community and their sacred religion from centuries of aggression. They had no means other than suicide attacks to defend themselves.\textquote{Id. Here, instead of just ignoring a legal argument, Zawahiri is not even being rational or reasonable. His statement would only be accurate if he was using his interpretation of the law of war (based on his extreme view of Islam), which is significantly different from the law of war as commonly understood by almost all members of the United Nations.}
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\textsuperscript{118} See supra notes 90–91 and 102–06 and accompanying text.
\textsuperscript{114} Wright, supra note 105.
\textsuperscript{115} Brachman, supra note 107.
\textsuperscript{116} Id.
\textsuperscript{117} See supra note 85 and accompanying text.
\textsuperscript{118} Wright, supra note 105.
\textsuperscript{119} Id.
not able to be influenced by matters of conscience, they would not be embarrassed. In an online forum in which Zawahiri answered questions about Al-Qaeda, the common theme throughout many questions posed by Muslims was their concern for the collateral damage of dead civilians in Al-Qaeda attacks, almost all Muslims. This shows the presence of either the natural law of preservation of life or preservation of culture among these Muslims, for they are upset at either the unnecessary death of their fellow Muslims, or the destruction of their people group and culture. In either case, they have active consciences, unlike Zawahiri, who author Lawrence Wright characterized as “a surgeon [that] transformed from a healer into a killer, but only [because] the candle of individual conscience had been extinguished.”

The impact of the value and promotion of human life on some segments of Muslim society is seen in the recent defection of Mosab Hassan Yousef, who, as the son of a Hamas founder, left radical Islam partly because of how his conscience was impacted. As Yousef says, “I’d seen enough killing. I was a witness to lots of death . . . Saving a human life was something really, really beautiful . . . no matter who they are. Not only Israeli people owe me their lives. I guarantee many terrorists, many Palestinian leaders, owe me their lives.” Obeying to the principle of the promotion of human life is also seen, though in a slightly different variation, in reporter Lawrence Wright’s observation about young Egyptians during a recent trip there: “[T]hey were impatient with Islamist dogma, which had done little to help ordinary Egyptians.” If young Egyptians care about their quality of life on this earth, despite the contrary Islamic teaching on martyrdom prevalent in Egyptian society, it seems they are sharing obedience with Westerners to the natural law rule of seeking joy and satisfaction in life. Although the issue here is the quality of life, as opposed to life itself, Wright’s observation nevertheless reveals different views among Muslims on how to act out the precept of advancing human life—some pursue martyrdom to find “life” in the afterlife, while others desire to improve the state of their lives on earth. Either way, there is obedience to the precept of preserving and advancing human life in the Muslim community.

Another extreme Islamist who eventually softened his stance is Karam Zuhdy, one of the founders of a radical organization known as the Islamic Group. Zuhdy notes that he and others “began to read books and reconsider” their tactics as they began to notice life passing them by, all

120 Id.
121 Id.
123 Wright, supra note 105 (emphasis added).
the while observing how their endeavors were not producing the desired results. The very existence of this debate within radical Islam threatened the credibility of several different groups, and, as a consequence, the dissenter’s lives were immediately threatened. This reconsideration of one’s actions is affirmed by a former leader of the radical group Al-Jihad, Kamal Habib, who stated, “When [the jihadist is] in battle, he doesn’t wonder if he’s wrong or he’s right. When he’s arrested, he has time to wonder.” Statements like this show the ability of the conscience to bring to the forefront of even the hardened radical’s mind the natural law precept that the preservation of life on earth is a good thing.

Eventually, many leaders of Al Jihad began to accept non-violent tactics, and a position that was easily sidelined a few years ago began to be considered legitimate. Some would claim that these “revisionists,” or re-interpreters of Islamic law, are just trying to curry favor with the Egyptian government. But many among them have already received death sentences and have nothing to lose. One of the imprisoned jihadists who had already been sentenced to death exclaimed, “I’m not offering these revisions for [the Egyptian President] Mubarak! I don’t care about this government. What is important is that I killed people—Copts, innocent persons—and before I meet God I should declare my sins.” Then the man burst into tears. The most likely explanation for an outburst like this, and for the phenomenon of many jihadists changing their positions, is that even among human beings who at first glance may seem intransigent in their views, there exists ongoing debate and dissent that is driven by various considerations. At work among these considerations is the human conscience, driving human reason and helping to change viewpoints.

A hardened Muslim prisoner with a death sentence is convicted by his conscience. A promising young radical who is the son of a terrorist leader chooses to leave a culture of death and enter a culture of life. A well-respected Imam advocates for treating your neighbor as he treats you. These are only a few examples of Muslims exhibiting the humanity that they share with many Westerners. The presence of this shared humanity can be a springboard for the acceptance among Muslim and

124 Id.
125 Id.
126 Id.
127 Id.
128 Id. (emphasis added). This excerpt is powerful evidence of the presence of human conscience. As explained throughout this article, if the appeal to conscience is accepted and integrated into finding common ground between Muslims and Westerners on the issues of human dignity and human rights, it will strengthen progress and make the task much easier.
Western nations of a definition of human dignity and the rights that flow from it.

VII. SUGGESTIONS FOR REALIZING THE COMMON GROUND BETWEEN MUSLIMS AND WESTERNERS TO A GREATER EXTENT

There are several solutions available to the current disagreement between Western and Muslim nations on how to correctly enumerate human rights. Examining this gap in the context of the makeup of the UN, one solution is to split the UN into several world bodies: Christian nations, Muslim nations, and others. Though this suggestion seems unreasonable and would be very difficult to manage, it would at least solve one issue—positivism’s inability to fix disagreement at the UN. A split like this would allow Muslim and Western nations to continue to look to their own preferred explanations of human dignity and human rights within their respective catalogues of positive law. Though both sides would remain entrenched in their positions, there would be no need for unification because the separation blocs could offer separate declarations of human rights.

But even if this solution is accepted, other problems remain. Though it might solve conflict in the context of the makeup of the UN, the conflict between Islamic and Western societies worldwide is much larger and has ramifications that spill over outside the context of the UN.129 In fact, the majority of this conflict is played out in other venues, and the UN is just a useful lens through which to observe part of it. Thus, a better solution is to deal with the decision-making philosophies of individuals and their collective bodies, which this article attempts to do through natural law, providing a rational explanation of human dignity and human rights. If the “UN solution” is not accepted, then in order to end this conflict over human dignity and human rights, philosophical assumptions must be dealt with. The best way to deal with these assumptions is to accept natural law as a starting point.

A. Moving Forward: Debate and Democracy

The Muslim world is, in some respects, today where Western Europe was before the Protestant Reformation. The turbulent period of

129 See Mashood A. Baderin, International Human Rights and Islamic Law 1–9 (2003); see also Asaf Ali Asghar Fyee, Outlines of Muhammadan Law (4th ed. 1974) (providing overview of cases decided according to a version of Islamic law, revealing differences from Western and English law); Ahmad Ibn Naqib Al-Misri, Reliance of the Traveller (Nuh Ha Mim Keller trans., 1999) (providing overview of Islamic law principles, revealing differences with Western legal principles).
the Protestant Reformation marked the birth of the idea that the church and state occupied different spheres of authority, and ushered in widespread acceptance of the idea that members of civil society could differ on religion while co-existing peacefully under the same government—issues that Muslims are grappling with right now around the world as they seek to determine the jurisdictional boundaries of law, religion, morality, and government. If law governs society and morality governs the individual, then “legal experience is tied to the notion of a community.” In this community the law does not seek to prohibit all evil, but only that which is harmful to society, as the law’s aim is simply peaceful coexistence, not the perfection of virtue in every man. This in turn leads toward human rights, as opposed to “Islamic rights.” Open debate in which the right to speak freely and without fear is protected is crucial to the success of this “Islamic Reformation.”

The acceptance of a definition of human dignity among Muslims that is also shared by Westerners will very likely have to be accompanied by the increasing democratization of Muslim-majority countries, for one of the key aspects of democratization is the protection of individual liberties such as speech, religion, and opinion. Until these liberties are protected, Muslims in favor of accepting a common human dignity shared by the West will be afraid to express their views, and without their voices, there will be no change in public opinion. There needs to be “civic reason”—public debate with civility and mutual respect—in order to effect social change.

Muslim nations’ acceptance of a definition of human dignity and platform of human rights that is shared with Western nations is more likely to occur with increasing democratization. Rousseau himself pointed out that democracy allows the moral obligation to obey the law and the legal compulsion to obey the law to coincide. Only democracy solves “the problem of ensuring that laws are obeyed not only out of fear but out of conviction,” as those being governed consent to their

\[131\] D’Entrevess, supra note 40, at 84.
\[132\] Id. at 84.
\[135\] An-Na‘īm, supra note 100, at 85.
\[136\] D’Entrevess, supra note 40, at 141.
government and laws. Until that occurs, however, politician, human rights advocate, and author Natan Sharansky’s observation that citizens will despise a nation to which their oppressive leaders are allied will continue to be vindicated by observations such as that of author Lawrence Wright’s:

Decades ago, I taught English at the American University in Cairo, and since then I’ve watched the vast, moody city go through wrenching changes. I was living there when Nasser died, in 1970. At that time, there were no diplomatic relations between the U.S. and Egypt, and there were only a few hundred Americans in the country, but the Egyptian people loved America and what it stood for. When I visited the country in 2002, a few months after 9/11, I found the situation utterly reversed. The U.S. and Egyptian governments were close, but the Egyptian people were alienated and angry.

When the population does not approve of its government, but cannot get rid of it, the population will become agitated, and the government will respond with repression. When this occurs, honest debate is hindered due to fear and suppression of viewpoints.

Muslims would likely agree with the natural law principle that “each and every law is indeed nothing other than a ‘normative’ translation of a particular value.” The only difference between their view and that of most Westerners is that their starting point for value is Islamic authorities, while the Westerner’s is Judeo/Christian authorities or humanist principles. Hope for a common definition of human dignity lies in revealing whatever common ground currently exists between Muslim and Western laws, for if this can be shown, “natural law [will] provide that ‘common ground where we can begin to draw all men, everywhere, together in a unity that reflects what is common to human beings as human beings.’” The “absence of an international moral sense” will make it more difficult to find this common ground. Among many Muslim nations today, the presence or absence of this “international moral sense” is uncertain because what appears to be moral obligation to Islamic law may actually be obedience out of fear of the religious authorities and government. This is why the

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137 Id. (emphasis added).
139 Wright, supra note 105.
140 D’ENTREVES, supra note 40, at 161.
141 Id. at 172.
142 Id.
143 Id.
144 The difficulty in determining true motives in this situation is similar to the difficulty found in determining the true beliefs of individuals under a repressive regime, for individuals may outwardly portray one view while concealing their true view due to fear of
Travis Weber

democratization of Islamic countries is essential to developing a common platform of human rights that citizens feel personally invested in following. Democratization, in fact, is essential to the development of these rights themselves.

If democratization does not occur, whatever rights are offered will be at the hands of radicals ruling the government or society through fear. Moreover, citizens’ views of rights emerging from Muslim nations may be tinged with falsehoods, as many may be offering their views out of “doublethink”—a phenomenon that occurs when people publicly express one view out of fear of the government, while they truly believe something else in their hearts and minds.144

It is essential that a debate be fostered within Islam in order for Islamic countries to emerge with a definition of human dignity and platform of human rights that is agreeable to Western nations. This goal, though formidable, has support from Islamic law scholars who urge the necessity of a human rights framework being developed from within a Muslim cultural and legal framework, rather than human rights principles being imposed on that culture from the outside and forced to mesh with it.145 It is not necessary that Muslims accept the term “natural law,” but only that they accept the principles driven by natural law that are not inconsistent with Islamic law. In Islamic law, if the Qur’an has nothing to say about an issue, then the sunnah (“hadith” or “traditions”) are examined, and if they have nothing to say about an issue, then fiqh (later Islamic jurisprudence) is used.146 This hierarchy, allowing last resort to jurisprudence, including legal analysis and legal reasoning, demonstrates that Islamic law has the flexibility to be consistent with natural law principles to a greater degree than is commonly thought possible.

There certainly is room for change among Muslim nations on the issue of democracy. The Middle-East is home to the largest concentration of Muslims in the world, and is still one of the most under-democratized

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144 SHARANSKY, supra note 133, at 43–47. Sharansky uses the term “doublethink” to describe how individuals behave in repressive societies: They publicly express the safe view—the one sanctioned by the government—while they often actually believe something else. But their true views are only expressed in private, for that is the only place that is safe. Because of this phenomenon, polls conducted on populations in repressive regimes often produce inaccurate statistics. Only when a society is opened up for debate do the members of its population express their true views, and, as a result, this type of open democracy that is based on honest expression will produce a government that truly has the consent of the people. Id. at 47–53.

145 E.g., Baderin, supra note 95, at 73.

146 Id. at 76–77.
areas on earth.\textsuperscript{147} Of its many dictatorships, most have not changed from a period of tribal rule in which authority was handed down within the family.\textsuperscript{148} It is obvious that Western notions of authority are strikingly different, and Westerners often cannot comprehend events taking place in the Middle-East because they fail to perceive them from a Middle-Eastern viewpoint. Nevertheless, democracy in the Middle-East must precede the widespread acceptance of a common definition of human dignity among Muslim populations. Muslims must be able to hear the different views promoting and detracting from this definition, and must be set free from bondage to the more radical voices that monopolize the marketplace of ideas out of fear. Only when this occurs will there be hope that the free exchange of information will lead to wide-spread acceptance in the Muslim world of a definition of human dignity and view of human rights that are compatible with those of the West.

These political developments must pave the way for acceptance of natural law principles because only through public dialogue can the conscience be confirmed, tweaked, and understood to be accepted by many. Though many may be aware of their consciences informing their views on public issues, as long as radical groups like the Taliban—who seek to dominate both the religious and civic aspects of society—monopolize the debate by enforcing their interpretation of Islamic law on all, the consciences of many will grow dull because the lack of other public choices results in a “staleness” of conscience devoid of any questioning of the status quo. Though many refuse to consider the idea, or have concluded otherwise, “civic reason” is in fact compatible with Islam.\textsuperscript{149} But in order for “civic reason” to be accepted, there must be some degree of separation of church and state authority in Islam,\textsuperscript{150} as is necessary in any functioning democracy.

If the term “church” is interpreted to mean any religious or religiously-motivated institution, then clearly Muslim-majority societies, generally speaking, have no separation of the church and state as is known in the West. Until this separation is attained, there are no grounds for public debate and human reasoning even between those belonging to different groups within Islam, as Islamic law often is issued by religious authorities who have a uniform view and a monopoly on power. This leaves no place for natural law principles to inform a definition of human dignity, for any such definition would be drawn

\textsuperscript{148} See, e.g., id. at 9–10, 252, 349, 367, 398.
\textsuperscript{149} AN-NA’IM, supra note 100, at 93–139.
\textsuperscript{150} Id. at 93.
directly from a one-sided interpretation of Islamic law with no public
debate.

It is hopeful for the applicability of natural law jurisprudence
here that Muslims’ views on human rights and law are often influenced
by social factors and not just the Qur’an and the Hadith in the
abstract.\textsuperscript{151} It is also hopeful that “Shari’a principles are basically
consistent with most human rights norms, with the exception of some
specific and very serious aspects of the rights of women and non-
Muslims and the freedom of religion and belief.”\textsuperscript{152} The choice cannot be
presented to Muslims as being \textit{between their religion and human rights},
but \textit{rather should be a transformation of the understanding of human
rights in the context of their religion}.\textsuperscript{153} While Muslim countries will need
to examine human rights in the context of the desires of their own
people, they cannot simply outright reject all prevailing human rights
norms like the UDHR and ICCPR as “Western,” for to be consistent, they
would then have to reject other Western ideas territorial sovereignty,
Western financial systems, and other Western ideas.\textsuperscript{154}

Likewise, some may criticize Muslim participation in a
discussion of human dignity based on reason and conscience on the
grounds that it is a Western idea drawn from natural law. But as long as
Muslims continue to live in countries based on Western notions of
territorial sovereignty left over from the Colonial era, and those
countries take part in organizations like the United Nations that are
based on a Western view of state sovereignty that requires
constitutionalism, human rights, and citizenship to function properly,\textsuperscript{155}
it is at least arguable that Muslims must accept \textit{some aspects} of Western
ideas about human dignity in order to be logically consistent with their
larger acquiescence to Western ideas.

This form of human dignity can hopefully be one with roots in
both Islamic and Western religious authorities. But this debate must be
guided by “civic reason,” must be open to non-Muslims, and must be
protected by the implementation of constitutions, human rights, and
citizenship.\textsuperscript{156} This does not relegate Islam to the sidelines; it only
prevents the religion from being used by political authorities to force
their view on everyone.\textsuperscript{157} There is widespread disagreement among
Muslims on many issues—apostasy, blasphemy, and heresy are some
examples—that are debated using much material from sources besides

\textsuperscript{151} Id. at 111.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 115.
\textsuperscript{155} Id. at 137.
\textsuperscript{156} Id. at 139.
\textsuperscript{157} Id. at 138–39.
the Qur’an. The fact that certain entities are invoking many sources with varying degrees of legitimacy to keep their hold on power only indicates a bigger need for Muslims to be able to legitimately debate these issues without fear of being harmed for expressing their views, especially in deciding how they will deal with modernizing cultures and changing times. Moreover, the confusion on these issues in Islamic law only makes the different positions more vulnerable to being hijacked by various religious groups for their own purposes.

An example of a crucial issue upon which open debate is needed is the citation by violent jihadists to the Qur’anic passages revealed during the Prophet Muhammad’s time in Medina, which prescribe offensive, war-like jihad and the subordination of women to men and non-Muslims to Muslims. Though these verses’ alleged justification for violence dominates current headlines, other views exist. For example, as emphasized by the scholar Ustadh Mahmoud Mohamed Taaha, the Medina passages were revealed in light of a specific historical context that called for war. Moreover, these verses were actually revealed after the Mecca passages, which promote peace and coexistence, and for which a convincing case exists that they were meant to be universal and apply to all Muslims in society in all places and all times.

Another example of dissent is a recent statement of Abdul-Azeez ibn Abdullaah Aal ash-Shaikh, the Grand Mufti of Saudi Arabia, in which he warned Muslims not to support “unauthorized” jihadist activities. He was referring to war-time activities that were “authorized” by other alleged religious authorities for the purpose of drawing Muslims to Iraq to fight U.S. forces. Though this dissent could be seen as falling within the bounds of positivism because the disagreement is over the interpretation of the Qur’an and other authorities, the notable point here is that there is dissent, which requires the exercise of the mental faculties in the direction of reason, and at times the conscience too. This dissent shows that Muslims, even very strict, scholarly Muslims, do exercise reason over certain issues of interpretation.

Viewed through positivism, the radical Islamist’s view of law is closer to that of the nominalist, who believes that law is the binding

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158 Id. at 118–22.
159 Id. at 122.
160 Id. at 122–23.
161 Id. at 135.
162 Id.
164 Id.
force of God’s will, regardless of its foundation in nature. But even here the relevant universality aspect of natural law can be extracted and added to the solution in this article. If appeal is made to the human conscience as making one simply accountable to God—as opposed to shifting the terminology to identify God with Christianity or Islam—then there is a possibility that two moral peoples, Muslims and Westerners, can at least agree that a morality of some sort obligates them to a higher power. Any more specific religious terms will only hinder agreement between Muslims and Westerners.

Islamic authorities throughout history have supported rights congruent with a Western idea of human dignity; it is only rather recently that radical voices have dominated the public debate. Recently there has been increasing radicalization of populations in parts of the Middle-East. The reversal of this radicalization through open debate is crucial to bringing human dignity back in accordance with historical Muslim practices, and away from forces that have more recently hijacked Islamic law for their own ends. Just like consideration should be given to the historical development of the natural law, consideration should be given to the “consensus of [Muslim] believers over the centuries” as opposed to the abruptly formed views of more radical groups today, when developing a common platform of human rights.

Islamic law is not incompatible with Western ideas of human rights. The very presence of legal remedies in Islamic law shows that it gives human beings dignity in that they are accorded protection from certain behaviors of others. The fact that Islamic law makes appeals to “justice” and other notions that are determined by conscience shows that the system would likely be compatible with natural law principles. Islamic law makes reference to “human dignity,” and upholds it, for example, by giving rights to the unborn and the dead (for a proper burial). Scholars have pointed out that the Qur’anic account of the creation of mankind affords men and women dignity. In the view of some scholars, the Qur’an prescribes rights to women, the right to life (as the state may only take a life by way of justice and rule of law), the right to the sanctity of property, the right to privacy, the right to freedom of expression, the right to freedom of religion and conscience, the right to freedom of association, the right to freedom of assembly, the right to protest, and the right to resist oppression.

165 D’Entreves, supra note 40, at 69.
166 See id. at 153–54.
167 AN-NA’IM, supra note 100, at 135.
168 Baderin, supra note 95, at 83.
169 Id. at 90–91.
170 E.g., id. at 93–95.
But not all agree, and open debate on these issues must be allowed. If Muslims embrace a resumption of the use of *ijtihad*, defined as independent judgment by jurists,\textsuperscript{171} or independent legal reasoning,\textsuperscript{172} which has been closed since the thirteenth century,\textsuperscript{173} development of new platforms of human rights congruent with conscience can occur much more quickly.

If it is true that the Prophet Muhammad encouraged Muslims to seek knowledge where it may be found, including non-Muslim countries like China,\textsuperscript{174} then Muslims should be able to at least listen and consider human rights based on reason and human dignity as shaped by the human conscience. These principles, which are good for all human beings, will be all the more accepted when, as pointed out by one scholar, Muslims remember the Qur’an’s encouragement that Allah “does not want to put [them] in difficulties” on earth.\textsuperscript{175} For the Qur’an to say this, it must have *assumed* something affirmed earlier in this article\textsuperscript{176}—that Muslims would want to avoid difficulty in their lives on earth.

The conflict between Western and Islamic cultures is not going to disappear any time soon. The world-wide influence of the traditionally dominant Western powers is waning, and as Muslim populations and oil wealth continue to increase,\textsuperscript{177} Muslim nations will continue to grow in power.\textsuperscript{178} The consequences of this present conflict will be dire if the different sides do not proceed into the future looking for common ground on human dignity and human rights.

**B. A Model Set of Rights**

In light of this overview of common ground between Muslim and Western views of human dignity and human rights, a model set of human rights based on human dignity will be enumerated in an effort to establish more common ground. In this article, it has been observed that Muslims can agree with Westerners on several natural law precepts, one of which is the idea of reciprocity—that it is good that we treat others as they treat us, or it is good that others treat us as we treat them. Muslim and Westerners share a distinct focus on human beings as God’s creatures, which, although shown in their own ways, results in a heightened standard of human dignity that can be the basis for a shared

\textsuperscript{171} KHALED ABOU EL FADL, REBELLION AND VIOLENCE IN ISLAMIC LAW 44 (2001).
\textsuperscript{172} Baderin, *supra* note 95, at 78.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 82.
\textsuperscript{175} Id. at 106.
\textsuperscript{176} See *supra* Part VI.B.
\textsuperscript{177} ARAB HUMAN DEVELOPMENT REPORT 2009, *supra* note 134, at 3.
\textsuperscript{178} Id. at 9–10.
definition. Based on Muslim and Western notions of human dignity, it seems that both groups clearly would agree to uphold basic principles like (1) the right to (and preservation of) life, (2) the right to religion, and (3) the right to property. Though some Muslim scholars take the view that there are more areas of agreement, only those areas of rights that the majority of Muslims would agree to uphold should be explored.

Beyond these basic precepts, there remain areas of dispute in which some Muslim scholars find agreement with certain universal rules, while other, more rigid Islamic authorities do not. For example, it remains to be seen if the “right to religion” can be expanded to the “right to freedom of religion.” If *ijtihad* is allowed back into the development of Islamic law, reason will be more widely accepted in interpreting Islamic authorities, making it more likely that a “right to freedom of religion” compatible with Islam would be formulated. Further rights also stand to be acknowledged with *ijtihad* taking part in the development of the law. A crucial part of this development will be obedience to the principle of reciprocity. If this principle is followed, the rights of women stand to be advanced. Through *ijtihad*, womens’ rights very well may be found to not conflict with Islam, contrary to much of the Islamic law being proclaimed today. The rights composing this new set of rights will not be “Western” rights imposed on Islam from the outside, but rights that Muslims themselves offer to the world. Moreover, because “human dignity,” as informed by reason, is the basis of these rights, no religion is imposed through their proclamation. And most importantly, because natural law morality drives this search for common ground, Muslims do not have to abandon their own morality in accepting this definition of human dignity and enumeration of human rights.

**CONCLUSION**

This article opened with an examination of how the conflict between the Islamic and Western worlds is being played out at the UN in the form of differing proclamations of human rights. This venue is only one manifestation of the conflict, which is the result of vastly different sources of positive law informing notions of human dignity and human rights. The article then briefly reviewed some major theories of jurisprudence and why they would not help solve this problem. Next, theories of justice and natural law were examined, and it was seen why their moral qualities were helpful in finding common ground between Islamic and Western cultures, which both value morality, but which have different sources for it. Then, shared notions of human dignity between Islamic and Western scholars were reviewed, with the conclusion that the two cultures share more than is commonly thought.
This article concluded by observing that open debate and democracy are crucial to drawing out the common humanity Muslim societies share with their Western counterparts, which will increase the momentum toward a shared definition of human dignity and platform of human rights.

Progress in this area will not be easy. Though this article lays out some suggestions and methods for accomplishing the task, this in no way should imply that progress will occur quickly; it will likely take time. It will also likely require individuals of humility willing to personally reach across cultural boundaries and put aside personal interests and pride in their own ways of thinking. When this occurs, relationships will be forged, leading to a percolation of ideas that will help reveal the common humanity of Westerners and Muslims. At times, circumstances may seem to crush hope of a better future for the relationship between Islam and the West. But hope remains, because as respect is built through the humanity of personal relationships, the natural law precepts explained in this article will be honored by both sides, and common ground can be forged between Islamic and Western nations on a definition of human dignity that informs a defined set of human rights.