A Critical Review Essay of Anver M. Emon's *Islamic Natural Law Theories*

Rami Koujah[*]

Abstract

The concept of "natural law" is not one that is commonly associated with Islamic law. In his monograph, Islamic Natural Theories, Anver M. Emon attempts to shed light on this issue and uncover a natural law tradition in the legal theories of a number of premodern Muslim jurists. In doing so, Emon draws a distinction between the Hard Naturalists and the Soft Naturalists, two schools of natural law that differ on theological points but ultimately find common ground in their conclusions. For Emon, the conception of natural law concerns the extent to which reason is granted the ontological authority to determine norms, as opposed to a textualist approach to producing law. This essay investigates the primary sources relied on by Emon in his study and questions his reading of the texts, his arguments, and his conclusions. I conclude that Emon's study, ambitious in its goals and important as a first step, presents a strained reading of the texts and struggles to convince the reader of the genuineness of a natural law tradition in Islamic legal theory as he presents it.

***Keywords**: Natural law, Maslaha, Maqasid al-shariah, Usul al-fiqh, Islamic law, Shariah*

Anver M. Emon's book, *Islamic Natural Law Theories* (2010), is an ambitious work that attempts to tackle a subject about Islamic law which has generally not been given much scholarly attention. In the field of Islamic law, what this book aspires to is certainly unique. Many works have dealt with Islamic legal theory given its many intricately layered concepts, and other works have treated in depth issues of Islamic ethical theories and theology separately. Until recently, however, few have managed to link the two fields of study to illustrate the overlapping frameworks and structures that shaped Islamic legal theories and philosophies. Emon's *Islamic Natural Law Theories* is one such attempt. But while what this book aspires to is unique, and the potential is promising, what we are ultimately left with is less so. Unfortunately, Emon's study, contrasting and comparing Muʿtazilite and Ashʿarite jurists and their respective theories of natural law (which he refers to as "Hard Naturalists" and "Soft Naturalists," respectively), leaves much to be desired.

For students of Islamic law not overly familiar with Islamic theology and ethical theories, Emon's arguments will raise some eyebrows, particularly in his treatment of the Soft Naturalists. Many assume, for instance, that the Ashʿarites ascribed to a positivistic legal theory, or a strict Divine Command ethics.[1] Emon certainly

* Rami Koujah is a J.D. candidate at the University of Virginia School of Law. The author of this paper owes his gratitude to the invaluable support and mentorship of Professor Khaled Abou El Fadl.

challenges such notions, and the weight of his arguments is dealt with below. While challenging these flawed assumptions is necessary, Emon's attempt to reshape our understanding of Islamic legal theory falls short of its potential. As already implied, the ties between Islamic theology, ethics, and legal theory have received greater scholarly attention in recent years, and it is partly due to this growing interest that a critical assessment of Emon's book is useful to the development and continued reassessment of this field.

Emon's book is divided into an introduction, three main chapters that are the body of his thesis, and a conclusion. Chapter two discusses the Hard Naturalists, or those jurists that held that the fusion of value in nature, created by God, is fixed and unchanging (thus the term "hard"). This section features a study of the writings of Abū Bakr al-Jaṣṣāṣ (d. 370/981), al-Qāḍī ʿAbd al-Jabbār (d. 414 or 415/1025), and Abū al-Ḥusayn al-Baṣrī (d. 436/1044). The latter two are ardent Muʿtazilites while the former has Muʿtazilite leanings. As such, these jurists ascribed to the doctrine of "objectivism," which held that the ethical value of actions is real, fixed, and discoverable by reason. Building on a theology of divine justice, ethical objectivism, and the doctrine that God created nature for the benefit of humanity, these jurists see a world in which fact is infused with value, thereby allowing jurists to derive normative judgments based on their observation of nature.

The third chapter discusses the Ashʿarite/Ḥanbalite critique of ethical objectivism and their theory of voluntarism, or divine subjectivism. According to the Ashʿarites, God's omnipotence renders him the sole arbiter of ethical value. Against the Muʿtazilites, they argued that the intellect is unable to determine the ethical value of acts that would render them normative. While an individual may be able to consider something good because it serves his interest, that does not allow one to derive a norm, or duty, therefrom.

In Chapter four, the voluntarists, or the Soft Naturalists, ultimately theorize about a world in which fact and value are infused, albeit in different terms than the Muʿtazilites. In order to maintain God's omnipotence, the voluntarists used terms like *maṣlaḥa* and *manfaʿa* (both meaning 'benefit' or 'interest') to infuse the natural world with value. God created the world for the benefit of humankind, not because He must have necessarily done so, but out of His grace (*faḍl*). Through the works of Abū Ḥāmid al-Ghazālī (d. 505/1111), Fakhr al-Dīn al-Rāzī (d. 606/1209), Shihāb al-Dīn al-Qarāfī (d. 684/1284), Najm al-Dīn al-Ṭūfī (d. 716/1316), and Abū Isḥāq al-Shāṭibī (d. 790/1388), Emon elaborates a legal theory held by these jurists that carved room for reason's ontological authority to derive normative determinations from nature.

1. *See* Wael B. Hallaq, Sharīʿa: Theory, Practice, Transformations 502 (2009) ("Ashʿarite legal theology, considerably dominating the Sunnite scene, and sustaining therein most pre-modern legal theories of *uṣūl*, held human intellect [*sic*] to be largely incapable of any determination of the rationale behind God's revelation. God's ultimate wisdom was, in his theology, simply incomprehensible. Thus, the rationale for legal rules and guidance was to be sought in intimations and indications within the structures of the revealed texts, a phenomenon that readily explains the paramount status of the texts. So beyond these textual indications, nothing was to be attributed to God's rationale and intention.").

The concepts of the Hard Naturalists depended on the terms *ḥusn* (good) and *qubḥ* (bad), terms of ethical value, in order to advance their theory. Good and bad are discoverable by reason, and from these meta-ethical evaluations, one can derive normative evaluations. The Soft Naturalists, on the other hand, denied reason's ability to move from the *is* to the *ought*. Good and bad are discovered through God's command, or His voluntaristic will. Therefore, the Soft Naturalists used concepts such as *maṣlaḥa* and *maṣāliḥ mursala* in order to theorize about a world created by God for the benefit of humanity from which reason can derive normative judgments. Ultimately, both the Hard and Soft Naturalists view a world that is infused with value, but they theorize to this end differently in accordance with their theological doctrines. This is ultimately reflected in their theories on the relationship between reason, revelation, and jurisprudence.

In his writing about the Soft Naturalists, most of what Emon references has to do with *maṣāliḥ mursala*, a type of legal analysis that considers the wellbeing and benefit of a legal ruling when the source-texts (Qurʾān and Sunna) are silent. Often, some of the material Emon draws on does not prove to be fruitful or relevant to the subject matter. Furthermore, one of the weakest points of Emon's book is that he reaches erroneous conclusions that arise from misreadings and misunderstandings of the text. These faulty conclusions seem to result from Emon's eagerness to find a commonality between the Hard Naturalist and Soft Naturalist theories on "fusing fact and value in nature" and reason's ontological authority. The idea of fusing fact and value in nature suggests that if nature, that which is fact, holds an objective or normative value, invested in it by God, then it can serve as a source for reasoned deliberation to derive law.

The ethical evaluations of *ḥusn* (good) and *qubḥ* (bad) are central to Emon's discourse. The Hard Naturalists and Soft Naturalists differed as to what extent reason could offer value judgments on what is good and what is bad. Emon notes that, generally, the Hard Naturalists considered value judgments on *ḥusn* and *qubḥ* to be normative, whereas the Soft Naturalists limited this judgment without granting it any legal or normative authority. For the Soft Naturalists, value judgments are inevitable, however, they do not hold normative weight. Considering the importance of this discussion and its ties to natural law theories in the mind of the jurists, Emon does not reference the chapters on *ḥusn* and *qubḥ* in the five Soft Naturalist jurists he relies on for his analysis. The brief discussion he does mention regarding *ḥusn* and *qubḥ* in Soft Naturalist legal discourse — which Emon takes mostly from Imām al-Ḥaramayn al-Juwaynī (d. 478/1085), Abū Bakr al-Baqillānī (d. 403/1013), Abū Ḥāmid al-Ghazālī (d. 505/1111) (albeit not from his chapter dealing with *ḥusn* and *qubḥ*), and Ibn ʿAqīl (d. 513/1119) — is loosely connected to the crux of his analysis on Soft Naturalist legal theory and natural reasoning.

The significance of *ḥusn* and *qubḥ* is important for understanding the notion of fusing fact and value in nature. This concept is easily readily apparent with regards to the Hard Naturalists. Emon presents an argument showing that they more openly assert a theory that permits reasoned deliberation to reach normative rulings

by assessing a nature created by God that possesses a normative value invested in it by God. On the other hand, the Soft Naturalists do not openly assert such a theory. Rather, according to Emon, they effectually reach the same understanding of a nature fused with fact and value by producing different theological arguments: for the Hard Naturalists, the value of nature is an objective quality; for the Soft Naturalists, nature is fused with value in so much as it is provided value by God.

This paper will asses all five of the Soft Naturalist jurists whom Emon relies on for his study (Abū Ḥāmid al-Ghazālī, Fakhr al-Dīn al-Rāzī, Shihāb al-Dīn al-Qarāfī, Najm al-Dīn al-Ṭūfī, and Abū Isḥāq al-Shāṭibī) in addition to two of the Hard Naturalists (Abū Bakr al-Jaṣṣāṣ and Abū al-Ḥusayn al-Baṣrī). Limiting ourselves to a few sections allows us to call attention to the most consequential mistakes in Emon's study. In a review of the book, Andrew F. March has critiqued Emon's problematic terminology and conceptual framework. However, while March notes that Emon's terminology and framework are often "forced" on the source material,[2] the present review will go further to show to what extent Emon's reading and interpretation of the texts is forced. Therefore, this review will mainly draw on a comparison between Emon's analysis and the source texts, and will focus on Emon's misreadings of the texts and the erroneous conclusions that follow.

Abū Ḥāmid al-Ghazālī (d. 505/1111)

To begin, a significant point of Emon's analysis of Abū Ḥāmid al-Ghazālī's natural law theory comes from a misreading of the quote he takes from pages 133-134 in al-Ghazālī's *Shifā' al-Ghalīl*. The passage he quotes is a discussion on al-Ghazālī's classification of *munāsaba* into different grades (similar to the ranked classification of *maqāṣid*). Before we proceed, two key terms of art must be defined: al-Ghazālī defines *munāsaba* as being an element of a ruling's *ratio legis* that is appropriate for the facilitation of the aims of the law;[3] *maṣlaḥa*, in this usage, is defined by al-Ghazālī as that which procures benefit and deters harm.[4] The very beginning of the passage referenced by Emon, which is not quoted or referenced in his book, reads as follows: "The grades of *munāsaba* differ… the highest grade falls under the category of necessity (*ḍarūrāt*), such as the preservation of life. This is the aim of the Lawgiver (*maqṣūd al-shāriʿ*) and it is a necessary [objective] for creation…"[5] Emon translates the following sentence in this passage as: "Reason evaluates [the *maṣlaḥa*] and judges whether or not there is express law (*laū lā wurūd al-sharā'iʿ*) [substantiating it]." The first portion of the quote that is in brackets, "the *maṣlaḥa,"* comes from a misappropriation of the Arabic pronoun, which appears in this sentence: "*wa al-ʿuqūl mushīra ilay**hi** wa qāḍīya bi**hi** — laū lā wurūd al-sharā'iʿ*." Since there is no

2. Andrew F. March, [Review] *Islamic Natural Law Theories*, 26 J.L. & Relig. 675, 678 (2010-2011) ("There thus appears in the book a tendency at times to force the author's chosen terminology and framework on the source material…").
3. Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī, Shifā' al-ghalīl fī bayān al-shabah wa al-mukhīl wa masālik al-ta'līl 150 (Ḥamad 'Ubayd al-Kubaysī ed., 1971) [hereinafter Al-Ghazālī].
4. *Id.* at 159.
5. *Id.* at 162.

mention of *maṣlaḥa* in the previous passage, nor mentioned anywhere close enough for the pronoun to refer to *maṣlaḥa*, the pronoun's subject has been misappropriated and misunderstood by Emon. The pronoun actually refers to "*maqṣūd al-shāri* '" (the aim of the Lawgiver). This understanding of the pronoun is more appropriate because the passage is a discussion about the highest degree of *munāsabāt*, and *munāsabāt* are the qualities of the *ratio legis* that appropriately procure the aim of the Lawgiver (*riʿāyat al-maqāṣid*).[6] Al-Ghazālī is stating that reason is capable of evaluating the preservation of life as being an aim of the Lawgiver, i.e. God, and that reason judges with this aim in mind, regardless of there being express law regarding this aim. The pronoun also references the aim of the Lawgiver, not *maṣlaḥa*, in the following sentence, which Emon has translated as: "No law can be without [*maṣlaḥa*]…" Where the term *maṣlaḥa* arises in this passage, Emon refrains from translating it as a technical term; instead, he maintains its transliteration in the parentheses.

In commenting on this quote, Emon concludes that al-Ghazālī implies that empirical findings are infused with normative content due to the "correlation between the fact of the good in the world and the fact that God has chosen to benefit humanity."[7] This seems to be a rather strained argument. The passage discusses reason's capacity to discern the good and bad, reason's discernment of the desire for the good, and God's choice to legislate that which is for the benefit of mankind, all with respect to that which is necessary for creation (*ḍarūrat al-khalq*). Al-Ghazālī states that reason evaluates and judges by that which is necessary for creation — the example he mentions is the preservation of life — even if there is no revelation regarding it. However, God has decided to legislate with these necessities in mind out of His grace and mercy. The passage discusses how God has chosen to benefit humanity with what He has *legislated*, not with nature in general. Furthermore, this passage is an elaboration on the level of the necessary *munāsaba*, not *maṣlaḥa*. *Munāsaba* is that which signifies the *maṣlaḥa* and relates to cultivating an aim of the law; it is a nexus between the *maṣlaḥa* and the aim of the Lawgiver.[8] In this passage, al-Ghazālī discusses the role of reason in identifying the aim of the Lawgiver, not the *maṣlaḥa*, because the aim of the Lawgiver *is* the *maṣlaḥa* of creation. This is an important distinction. There is nothing in the passage which indicates that al-Ghazālī infused empirical findings with normative content because the discussion on good and benefit, as intended by God, is restricted to what He has *legislated*, not what He has *created*. Al-Ghazālī has not fused fact and value in nature in this passage. The discussion revolves around good and benefit in law — not in nature — which is evaluated by reason. The conflation between *maṣlaḥa* in God's law and *maṣlaḥa* in God's creation is a recurrent mistake that Emon makes and something he makes central to his argument for an Islamic theory of natural law.

What has been mentioned thus far on Emon's analysis of al-Ghazālī's Soft Natural Law theory falls under the section heading titled, "The Authority of

6. *Id.* at 159.
7. Anver M. Emon, Islamic Natural Law Theories 133 (2010).
8. Al-Ghazālī, *supra* note 3, at 159.

Maṣlaḥa-Reasoning: al-Ghazālī's Natural Law Theory." This section references only the above-mentioned quotation. However, the passage quoted from al-Ghazālī is about the relationship between *munāsaba*, the aim of the Lawgiver, and reason; the discussion on *maṣlaḥa* is a secondary matter. Furthermore, the passage is not a discussion on the authority of *maṣlaḥa*-reasoning, nor on *maṣlaḥa*-reasoning in general. In this passage, al-Ghazālī reserves reason for identifying the aim of the Lawgiver with respect to the necessities of creation, not to assess empirical values and derive normative content therefrom. This proves to be problematic to Emon's assessment due to the fact that he refers to the assumption of the fusion between fact and value, argued from this quote, later on in his writing.

Maṣlaḥa was used above to mean anything that procures benefit and repels harm. In the next section of Emon's analysis of al-Ghazālī titled "*Maṣlaḥa*, *Maqāṣid*, and Practical Reasoning," *maṣlaḥa* is used in a second register to mean anything that preserves the five aims of the law. The five aims of the law are outlined by al-Ghazālī as follows: the preservation of religion, life, reason, lineage, and property. Emon accurately identifies al-Ghazālī's act of limiting reasoned deliberation. Al-Ghazālī reserves exercised reason in legal derivation to fulfilling a *maṣlaḥa* that fulfills certain qualifications: the law neither affirms nor repudiates the *maṣlaḥa* and the *maṣlaḥa* must fall under the category of necessity. A couple of notes are worth mentioning, however. As Emon has noted, al-Ghazālī distinguishes between *maṣlaḥa* that upholds and preserves the purpose of the divine law (the subject matter of this section) and *maṣlaḥa* that obtains benefit and repels harm. Emon, however, fails to mention the implications and nuances of this distinction in al-Ghazālī's discourse. Al-Ghazālī claims that the latter *maṣlaḥa* is that which pertains to the aims of creation (*maqāṣid al-khalq*) in contrast to the former *maṣlaḥa*, which pertains to the aims of the Lawgiver. Al-Ghazālī writes that the benefit for creation is in fulfilling their human goals (*ṣalāḥ al-khalq fī taḥṣīl maqāṣidihim*).[9] The implications of this are significant for Emon's conclusions. This distinction between the aims of creation and the aims of the Lawgiver, and the *maṣlaḥa* involved in each, casts significant doubt on the fusion between fact and value that Emon may have concluded from al-Ghazālī's writings. Therefore, according to al-Ghazālī, what creation considers beneficial for humanity has no normative weight. Rather, in this discussion, *maṣlaḥa*, which upholds the aims of the law, is that which the law has deemed to be beneficial for creation. The fact that these aims fall in accordance with the aims of creation are due to God's grace. In effect, not all what creation holds to procure a *maṣlaḥa* is considered by the law. Therefore, fact and value cannot be fused in nature because *maṣlaḥa*, as defined by al-Ghazālī in this register, is constrained to legal matters outlined by God and not general evaluations of creation and actions. When *maṣlaḥa* in nature falls in accordance with the law it is because that is the aim of the Lawgiver and it is not the identification of that *maṣlaḥa* that makes it law.

In the chapter section "From *Maṣlaḥa* to the *Ratio Legis* of a Rule," Emon discusses al-Ghazālī's nexus between *maṣlaḥa* and the rule of law (*ḥukm*) in the

9. 2 Abū Ḥāmid Muḥammad al-Ghazālī, Al-Mustaṣfā *min* ʿilm al-uṣūl 481 (Hamza b. Zuhayr Hāfiẓ ed., 1993).

munāsaba. Emon claims that this is a part of al-Ghazālī's process of practical reasoning. It seems, however, that Emon misunderstands the role of *maṣlaḥa* in al-Ghazālī's discussion in the chapter he is referencing. Previously, when Emon first references this section of *Shifā' al-Ghalīl*, he does so with the definition of *maṣlaḥa* as a general jurisprudential theme that is employed to fuse fact and value in nature and render reason an ontological authority. The conclusion he derived was that al-Ghazālī renders *maṣlaḥa*-reasoning ontologically authoritative. When referring again to the same chapter of al-Ghazālī's *Shifā' al-Ghalīl*, Emon appears to have understood the term *maṣlaḥa* in the second register, i.e., a specific and context-sensitive principle of good meant to fulfill the aims of the law. This shows a lack of consistency and understanding on Emon's part in referencing and understanding al-Ghazālī's usage of the term *maṣlaḥa*. Furthermore, the entire book of *Shifā' al-Ghalīl* is a discussion on *qiyās* (legal analogy), the method by which a ruling from an original source-text is applied to a similar scenario not addressed by the source-text. Emon does not adequately explain how *maṣlaḥa* in this area of legal theory, i.e., *qiyās*, relates to natural reasoning, the ontological authority of reason, or the normative content of empirical findings. Prior, he states that the *maṣlaḥa* that is used with *qiyās* is not the type of *maṣlaḥa* that relates to natural reasoning. *Maṣlaḥa*, in the context of *qiyās*, is offered as a criterion used when imposing the ruling (*ḥukm*) of an act explicitly referenced by scripture on a similar or related act that scripture has not spoken to. In fact, this is the type of *maṣlaḥa* which al-Ghazālī refers to in *al-Mustaṣfá* — which Emon mentions as the first type of *maṣlaḥa* — the type of *maṣlaḥa* which scripture has positively affirmed. Al-Ghazālī mentions that this type of *maṣlaḥa* is related to *qiyās* and Emon identifies it as being irrelevant to the discussion on natural reasoning.[10] This demonstrates Emon's misunderstanding in the usage of *maṣlaḥa*. He has conflated the *maṣlaḥa* in this chapter of *Shifā' al-Ghalīl* with the type of *maṣlaḥa* on which scripture is silent: "al-Ghazālī required the silent *maṣlaḥa* to pose a third nexus, namely to the specific rule (*ḥukm*) to be created."[11] This inconsistency hinders the conclusions Emon arrives at on al-Ghazālī's "Soft Natural law."

Emon's conclusions are misrepresentative of al-Ghazālī's views on several accounts, as has been noted above. Al-Ghazālī acknowledges that God legislates to benefit humanity; however, contrary to what Emon asserts, al-Ghazālī never claims that God "chose to create the *world* to benefit humanity."[12] This negates Emon's conclusion that al-Ghazālī fuses fact and value in nature. Emon does correctly conclude that al-Ghazālī "severely limits the scope of reasoned deliberation."[13] Al-Ghazālī strictly constrains the scope of natural reasoning to exercise its ontological authority. However, the *maṣlaḥa* to which reason grants normativity is derived from the *maṣlaḥa* in what God has legislated and not the *maṣlaḥa* that is empirically observed in nature.

10. *Id.* at 478.
11. Emon, *supra* note 7, at 144.
12. *Id.* at 146 (emphasis added).
13. *Id.*

Fakhr al-Dīn al-Rāzī (d. 606/1209) and Shihāb al-Dīn al-Qarāfī (d. 684/1284)

Indeed, as Emon suggests, Fakhr al-Dīn al-Rāzī stresses the fact that God legislates for the *maṣlaḥa* of mankind more than al-Ghazālī. Al-Rāzī offers six arguments to prove this, not four, as Emon states.[14] Emon makes a similar mistake in his analysis of al-Rāzī to his analysis of al-Ghazālī. Emon writes that al-Rāzī argued that: "God created nature to benefit humanity."[15] However, al-Rāzī's text does not state that God created *nature* for humanity's benefit. Rather, what the text states — and this is quoted by Emon — is that God *legislated* for the benefit of humanity (*sharaʿa al-aḥkām li-maṣāliḥ al-ʿibād*).[16] This distinction is important to consider when Emon argues for al-Rāzī's fusion of fact and value in nature. From what Emon references, al-Rāzī states that God legislates due to a prevailing notion (*murajjiḥ*); there is nothing written in this passage by al-Rāzī to indicate that al-Rāzī held that God created nature to benefit humanity.[17]

Emon mentions two of al-Rāzī's arguments concerning the fact that God acts pursuant of a *maṣlaḥa*. Firstly, al-Rāzī argues that the prevailing rationale (*murajjiḥ*) must be for the sake of humanity rather than for the sake of God, and secondly, since God is wise (*ḥakīm*) he acts pursuant of a *maṣlaḥa*. Emon notes that Shihāb al-Dīn al-Qarāfī disagrees with the first two arguments mentioned by al-Rāzī. Emon states that al-Qarāfī's disagreement is due to al-Qarāfī's fear that al-Rāzī is opening the door to the theology of the Hard Naturalists. Emon makes mention of one of al-Qarāfī's three contentions against al-Rāzī. Emon mentions al-Qarāfī's contention that God does not necessarily act, out of His wisdom, to uphold good; rather, God acts pursuant to His will (*irāda*).[18] In fact, al-Qarāfī offers more significant contentions against al-Rāzī, which are not mentioned by Emon. Firstly, al-Qarāfī considers the prevailing rationale (*murajjiḥ*) to be God's will (*irāda*) rather than being the pursuit of an end.[19] Therefore, al-Qarāfī claims that God's legislation has to do with Himself, primarily, and not with creation.[20] Secondly, al-Qarāfī finds that al-Rāzī's claim of *ijmāʿ* (consensus) is unfounded with regards to the fact that God legislates with a prevailing rationale (*murajjiḥ*) that does not relate to Himself.[21] Third is al-Qarāfī's contention against al-Rāzī's use of the word "*ḥakīm*." As Emon notes, al-Qarāfī disagrees with al-Rāzī's argument because he finds it to be too close to the theology of the Hard Naturalists. Emon mentions that al-Qarāfī notes that the Hard Naturalists use the word "*ḥakīm*" to mean that "God upholds the good (*yurāʿī al-maṣāliḥ*)."[22]

14. *Id.* at 147.
15. *Id.*
16. 5 Fakhr al-Dīn Muḥammad b. ʿUmar al-Rāzī, Al-Maḥṣūl fī ʿilm uṣūl al-fiqh 172 (Tāhā Jābir Fayād al-ʿIlwānī ed., 3d ed. 1997) [hereinafter Al-Rāzī].
17. Emon, *supra* note 7, at 147; Al-Rāzī, *supra* note 16, at 172.
18. Emon, *supra* note 7, at 148.
19. 7 Aḥmad b. Idrīs al-Qarāfī, Nafāʾis al-uṣūl fī sharḥ al-maḥṣūl 3308 (ʿĀdil Aḥmad ʿAbd al-Mawjūd ed., 1997) [hereinafter Al-Qarāfī].
20. *Id.*
21. *Id.*
22. Emon, *supra* note 7, at 148.

In fact, what Emon does not mention in his analysis is that al-Qarāfī goes one step further and claims that it is possible that God would act for no purpose and that His actions cannot be measured by human standards of right and wrong.[23]

Al-Rāzī's third argument, for the fact that God legislates pursuant of *maṣlaḥa*, is that God created human beings as honorable and noble. Emon concludes that the notion that humanity is created noble "leads to the presumption that they are predisposed to seek the noble and the good."[24] Emon's conclusion does not fully represent al-Rāzī's account. He is correct in noting al-Rāzī's position that individuals are predisposed to seek the good since they are created noble. However, Emon fails to make mention of what al-Rāzī uses to argue that God legislates pursuant of a *maṣlaḥa*. The crux of al-Rāzī's argument, regarding this matter, is his claim that to assume humanity was created honorable and noble would merit the assumption that God would legislate that which benefits them (*la yashraʿu illā ma yakūnu maṣlaḥa lahum*).[25] In other words, since God has created humanity with such loftiness, it is only appropriate that He legislates for them that which benefits them. Furthermore, al-Rāzī's point is not to fuse fact and value in human disposition; rather, his point was to argue a correlation between humanity's innate nobility and God's legislation that is suitable to that nobility.

Emon manages to present two implications from al-Rāzī's theology. Firstly, al-Rāzī asserts that God legislates in order to uphold *maṣlaḥa* for people by His grace, not out of obligation, thereby upholding God's omnipotence. Secondly, Emon contends that al-Rāzī's position offers jurisprudential implications: the fusion of fact and value in nature and, consequentially, the ontological authority of natural reason as a source of law.[26] The mistake Emon has made here, however, is that he has confused al-Rāzī's discussion to revolve around *maṣlaḥa* that God has infused in *nature* rather than *maṣlaḥa* that God has infused in the *law*. Al-Rāzī's resort to *maṣlaḥa* is meant as an elaboration on the spirit of the law and the spirit by which the law should be understood. Emon's conclusion that al-Rāzī is philosophizing about natural reasoning is not well supported by this passage. The quote Emon references mentions that God "does not *act* except in light of what poses a *maṣlaḥa* for His servants."[27] From the context of this quote, however, we can safely assume that God's "acts" refer to His legislation. Right after this quote al-Rāzī writes that, "we know that [God] does not legislate except for a *maṣlaḥa*."[28]

Emon writes that, "Al-Rāzī was keen to render reason an authoritative source of law, but remained mindful of the implication his philosophy of law might have on Voluntarist theological propositions."[29] Emon's argument to present al-Rāzī as being eager to grant reason ontological authority is strained for a number of reasons.

23. Al-Qarāfī, *supra* note 19, at 3309.the page numbersthe page numbers
24. Emon, *supra* note 7, at 149.
25. Al-Rāzī, *supra* note 16, at 174.
26. Emon, *supra* note 7, at 150.
27. *Id.* (emphasis added).
28. Al-Rāzī, *supra* note 16, at 176.
29. Emon, *supra* note 7, at 151.

There does not appear to be enough evidence to conclude that what al-Rāzī had in mind was to grant reason ontological authority or yet, that he was "keen" to do so. Instead, al-Rāzī is arguing for a methodology of legal derivation and identification. What al-Rāzī is writing about, in this chapter of his book, is that the *maṣlaḥa* of a ruling is an element that is considered in legal derivation because God legislates for the *maṣlaḥa* of mankind. The *maṣlaḥa* is an element of the *ratio legis* (*ʿilla*) of a ruling. Therefore, Emon's claim of al-Rāzī's eagerness to grant reason ontological authority is wanting.

The remainder of Emon's analysis focuses on al-Rāzī's discussion on the relationship between *munāsaba*, *maṣlaḥa*, and the aims of the law (*maqāṣid*). Emon presents an accurate account of al-Rāzī's and al-Qarāfī's views. The majority of what al-Rāzī has to say is similar to what al-Ghazālī argued. He even mentions the same hypothetical scenarios as al-Ghazālī. Emon ends by concluding that al-Rāzī and al-Qarāfī fused fact and value in nature using the term *maṣlaḥa*. It is due to God's grace (*faḍl*), Emon maintains, that reason is granted ontological authority.[30] There is no evidence, however, from either of their writings, that grants credence to this statement. What al-Rāzī argues is that *maṣlaḥa* for humanity is considered in God's legislation and not in the entirety of His creation. In fact, when a *maṣlaḥa* must be considered which is not addressed by revelation, the jurist knows the appropriate way to respond not based on an ontologically authoritative reasoned inquiry, but rather, the jurist knows the proper way to act based on a deep familiarity with the aims of the law. The source from which values are mined, therefore, is the *corpus juris* and revelation, not reason. In the example of the use of Muslim human shields, al-Rāzī argues that the *maṣlaḥa* lies in risking the lives of a few for the protection of the rest of the Muslims. The reason being that the preservation of the majority of Muslim lives over a few lives is nearer to the aims of the law (*aqrabu li-maqṣūd al-shar*ʿ).[31] Emon exaggerates the ontological authority that al-Rāzī, al-Qarāfī, and al-Ghazālī gave to reasoned deliberation. Undoubtedly, there is a level of authority they grant to reason. However, Emon's conclusions stray away from the spirit of their arguments. The texts of these jurists do not fuse fact and value in nature. They argue that God legislates for the *maṣlaḥa* of mankind through His divine grace, not out of an obligation to do so. Concerning the *maṣlaḥa* about which the text is silent, reason is not granted ontological authority to identify what is good and bad. Rather, what all three jurists have written is that the *maṣlaḥa* is identified because it serves the aims of the law. Al-Ghazālī makes this explicit when he differentiates between the aims of creation and the aims of the law. Al-Ghazālī argues that the *maṣlaḥa* that is to be considered when the text is silent is that which fulfills the aim of the law and not that which brings benefit and deters harm. It is by God's grace that such a *maṣlaḥa* exists in the aims of the law, or legislation in general. In short, these jurists are not fusing fact and value in nature. They are arguing that the law, not nature, is imbued with a spirit that considers the *maṣlaḥa* of creation by the grace of God. Emon remains cor-

30. *Id.* at 159.

31. Al-Rāzī, *supra* note 16, at 164.

rect, however, in noting that the Soft Naturalists limit the scope of natural reasoning. They limit natural reasoning to identifying when a *maṣlaḥa* falls in accordance with the aims of the law when the source-text is silent.

Najm al-Dīn al-Ṭūfī (d. 716/1316)

The present analysis is limited to Najm al-Dīn al-Ṭūfī's discussion of *maṣlaḥa* in his commentary on ḥadīth (reports attributed to what the Prophet Muḥammad said or did). This is the only text of al-Ṭūfī that Emon references. This analysis will not mention al-Ṭūfī's better known book on legal theory, *Sharḥ Mukhtaṣar al-Rawḍa*, although, such a study would provide a more complete and accurate understanding of al-Ṭūfī's true theory of *maṣlaḥa*.[32] Perhaps of equal importance is al-Ṭūfī's work on ethical theory, *Dar' al-qawl al-qabīḥ bi-al-taḥsīn wa al-taqbīḥ*, which discusses meta-ethics, normative ethics, and the implications that such doctrines have on legal theory, positive law, and theology.[33] Unfortunately, Emon's failure to reference these works puts his assessment of natural law in al-Ṭūfī's theory in a weak position from the outset.

In his analysis on Najm al-Dīn al-Ṭūfī's theory of Soft Natural Law, Emon relies on al-Ṭūfī's commentary of the following ḥadīth: "There is no harm and no injury" (*lā ḍarar wa lā ḍirār*). As Emon notes, al-Ṭūfī asserts that "the presumptive state of things is that, as a matter of law, pain and harm are to be avoided, unless evidence to the contrary exists."[34] Additionally, God also desires the good, *maṣlaḥa*, for people.[35] Any legislation that necessitates harm is to be considered an exception to the presumptive state of affairs. Al-Ṭūfī prioritizes this ḥadīth over all other legal proofs.[36]

As Emon mentions, al-Ṭūfī recognized *ijmāʿ* and the source-texts (*naṣṣ*) as the most ontologically authoritative sources of law.[37] If these sources contradict the presumptive state of affairs, i.e. preventing harm and promoting *maṣlaḥa*, Emon writes, al-Ṭūfī then suggests that these sources would need to be reinterpreted.[38] In actual fact, this is not what al-Ṭūfī claims in his writing. Instead, what al-Ṭūfī suggests is that if *ijmāʿ* or source-texts legislate something harmful, then the ruling is considered an exception to the general rule of avoiding harm; al-Ṭūfī does not call for a reinterpretation of the ruling. An example is the punishments carried out for criminal offenses.[39] It is not clear how Emon made this mistake considering that he mentions the correct understanding later on in his writing.

32. I owe thanks to Osman Umarji for bringing this important source to my attention.
33. Najm al-Dīn al-Ṭūfī, Dar' al-qawl al-qabīḥ bi-al-taḥsīn wa al-taqbīḥ (A. Shihadeh ed., 2005).
34. Emon, *supra* note 7, at 160.
35. *Id.* at 161.
36. Najm al-Dīn al-Ṭūfī, *al-Ḥadīth al-thānī wa al-thalāthūn*, in Al-Maṣlaḥa fī al-tashrīʿ al- islāmī wa Najm al-dīn al- Ṭūfī 208 (Muṣṭafā Zayd ed., 2d ed. 1964) [hereinafter Al-Ṭūfī].
37. Emon, *supra* note 7, at 162.
38. *Id.*
39. Al-Ṭūfī, *supra* note 36, at 209-10.

Emon's claim that al-Ṭūfī's *maṣlaḥa*-reasoning "provides content to the law" is not founded in al-Ṭūfī's text.[40] Neither, as he writes, are source-text-based and consensus-based rules "interpreted so as to conform with the presumption of upholding the good."[41] In actuality, what al-Ṭūfī suggests is that evidences are weighed against each other depending on their promotion of *maṣlaḥa*. The entirety of al-Ṭūfī's text aims to prove that the law's presumptive state of *maṣlaḥa* must be prioritized over *ijmāʿ* and source-texts. *Maṣlaḥa*, therefore, is used to balance and weigh between evidences. *Maṣlaḥa* is a decisive criterion through which the sources are weighed and applied. Al-Ṭūfī considers the proof for the fact that the law's aim to uphold *maṣlaḥa* is a source of law to be stronger than the proof for *ijmāʿ*.[42] In other words, upholding *maṣlaḥa* is a stronger legal indicator than *ijmāʿ*. What al-Ṭūfī means by this is that an evidence that is backed by *maṣlaḥa* is stronger than an evidence that is not, the same way an evidence that is backed by *ijmāʿ* is stronger than an evidence that is not. *Maṣlaḥa*, therefore, is an element that provides weight to the evidence for a ruling. For instance, if the source-text can offer an interpretation for ruling X, and another interpretation for ruling Y, the one that promotes a greater *maṣlaḥa* is the chosen ruling. For al-Ṭūfī, rulings are not derived from *maṣlaḥa*-reasoning, but rather, rulings are derived from *ijmāʿ* and source-texts and the rulings themselves may or may not uphold a *maṣlaḥa*. An evidence that upholds a *maṣlaḥa*, however, weighs more heavily.[43] This leads us to the point in which Emon has missed the essence of al-Ṭūfī's *maṣlaḥa*-reasoning. Al-Ṭūfī writes that the law knows best what upholds *maṣlaḥa* for mankind; furthermore, *maṣlaḥa*-reasoning does not grant one the authority to reject a text if it does not uphold a *maṣlaḥa*.[44] Instead, a text is rejected, or given less authoritative weight, by another text that conforms to the ḥadīth of preventing harm.[45] Al-Ṭūfī, however, while providing a methodology of prioritizing *maṣāliḥ*,[46] does not provide a methodology for identifying *maṣāliḥ*. He merely claims that people know *maṣlaḥa* by custom and reason (more elaboration on this fact would prove fruitful to an analysis on al-Ṭūfī's natural reasoning).[47] Therefore, what Emon fell short of demonstrating is that al-Ṭūfī's theory of *maṣlaḥa* differs significantly from the *maṣlaḥa* discussed in the writings of the above Soft Naturalist authors. Al-Ṭūfī's theory of *maṣlaḥa* provides a methodology in light of the *telos* of the law where different evidences are weighed in comparison to how well they uphold *maṣlaḥa*. In other words, al-Ṭūfī's *maṣlaḥa* grants certain evidences greater epistemological authority. If an evidence offers a ruling that does not uphold a *maṣlaḥa*, or inflicts harm, and it is reconcilable with the presumptive state of affairs, then it is considered to be an exception to the rule. However, if an evidence offers a ruling that does not uphold

40. Emon, *supra* note 7, at 163.
41. *Id.*
42. Al-Ṭūfī, *supra* note 36, at 210.
43. *Id.* at 212-13.
44. *Id.* at 233.
45. *Id.*
46. *Id.* at 238-39.
47. *Id.* at 240.

maṣlaḥa and is irreconcilable, then the evidence is deemed to be less authoritative than an evidence that does uphold *maṣlaḥa*.[48]

Emon skews the concepts of *maṣlaḥa* in the writings of the previous authors and al-Ṭūfī when he compares them together. Al-Ṭūfī does not give *maṣlaḥa*-reasoning a broader scope of application in comparison to the previous Soft Naturalist jurists, contrary to what Emon argues.[49] Rather, al-Ṭūfī provides an entirely *different* scope of application. For the previous authors, *maṣlaḥa* was used as a criterion that must be considered in deriving the *ratio legis* of a ruling in order to uphold the aims of the law. For al-Ṭūfī, the presence of *maṣlaḥa* grants evidence greater epistemological authority when compared to other evidences. Al-Ṭūfī, therefore, does not fuse fact and value in nature. For him, *maṣlaḥa* is restricted to being used to weigh between evidences, and it is not used to derive value from empirical findings.

Abū Isḥāq al-Shāṭibī (d. 790/1388)

With regards to Abū Isḥāq al-Shāṭibī, Emon relies on two of his works: *al-Muwāfaqāt* and *al-Iʿtiṣām*. Emon writes that in *al-Muwāfaqāt*, al-Shāṭibī's "paramount interest was to philosophize about the authority of reason as a source of Sharīʿa, and to develop a mode of practical reasoning in Sharīʿa."[50] This is too bold and general a claim to make about al-Shāṭibī's entire four-volume work, which discusses many things other than the authority of reason. Furthermore, it contradicts the statement in the previous paragraph, which states that *al-Muwāfaqāt* was written to bridge the theoretical gaps between the Mālikite and Ḥanafite schools.[51] Nevertheless, Emon has managed to derive pieces of al-Shāṭibī's philosophy from different parts of his book and put forth a coherent analysis.

Emon writes that al-Shāṭibī's theory relies on the general, overarching principles of the law. For instance, the preservation of the five aims of the law, which has been discussed by the previous authors, is among these principles.[52] Similar to the previous authors, al-Shāṭibī also outlines the three categories — necessities, needs, and perfectionist interests — that the rule of law must pose a nexus to.[53] Significantly, Emon notes that al-Shāṭibī considered reason as authoritative "to the extent source-texts provide."[54] Reason, for al-Shāṭibī, operates under the ambit of the source-texts. Emon writes that al-Shāṭibī's reliance on source-texts allowed al-Shāṭibī to uphold the omnipotence of God, as the Soft Naturalists do, while at the same time granting reason space as an authoritative source of law.[55] However, it does not seem that al-Shāṭibī offered reason as a source *qua* source of law. Rather, it would appear, from the evidence Emon has provided, that reason is employed as a tool of derivation and

48. *Id.* at 238.
49. Emon, *supra* note 7, at 164.
50. *Id.* at 165.
51. *Id.*
52. *Id.* at 166.
53. *Id.* at 167.
54. *Id.*
55. *Id.*

not a source of derivation. This notion is further evidenced by a quote Emon takes from al-Shāṭibī's work: "*al-ʿaql laysa bi-shāriʿ*" (reason is not a legislative agent) and "reason cannot determine the good or the bad."[56]

Like the Soft Naturalists before him, al-Shāṭibī does indeed limit the authority of reason. Also like the previous authors, al-Shāṭibī writes that God legislates to uphold the interests of humanity. Significantly, al-Shāṭibī does not write that God *acts* with the purpose of upholding the interests of humanity. Rather, he writes that God *legislates* with the purpose of upholding the interests of humanity (*waḍʿ al-sharāʾiʿ innamā huwa li-maṣāliḥ al-ʿibād*).[57] This distinction, which Emon fails to make, has significant implications on the possibility of the fusion between fact and value in *nature*. It is important to note that, like the authors before him, al-Shāṭibī affirmed *maṣlaḥa* in God's law but did not make its presence explicit in the rest of God's creation, or God's acts.

Emon elaborates on the degrees of nexus between the *maṣlaḥa* and the aims of the law that are necessities, needs, or perfectionist interests.[58] His explanation of each nexus becomes rather repetitive at this point, considering the fact that the reader has become more than familiar with them by now. In this regard, al-Shāṭibī offers nothing new to what al-Ghazālī and al-Rāzī wrote about. A novel point that Emon draws from al-Shāṭibī's writing here is that al-Shāṭibī distances the theological implications from his legal philosophy.[59] According to Emon, al-Shāṭibī is thereby able to elaborate on his legal theory and the authority of reason without running into any problematic theological implications.

Previously in his writing, Emon mentions a point of contention between the Hard Naturalists and Soft Naturalists that revolves around the debate of determinacy in nature. Emon analyzes al-Shāṭibī's contribution to this matter. As a Soft Naturalist, al-Shāṭibī contends that nature is indeterminate. As Emon notes, al-Shāṭibī holds that the matters of this world offer benefit with a concomitant detriment or vice versa.[60] Emon argues that this allows al-Shāṭibī to accept the indeterminacy of good as a matter of fact.[61] Determinacy in nature, however, is distinguished from determinacy in law. Emon identifies this original distinction made by al-Shāṭibī, which serves as an important factor in his legal philosophy. What is taken into consideration is the aspect that is predominant; if something is predominantly good, it is considered good, and if it is predominantly bad, it is considered bad. However, Emon misreads al-Shāṭibī's text, which causes him to reach some inaccurate conclusions. In order for al-Shāṭibī to elaborate on the method of judging things as good or bad, he first draws on a non-legal example and then applies it to the legal realm to make his argument clearer. Emon misunderstands al-Shāṭibī's non-legal example as being the crux of

56. *Id.*
57. 1 Abū Isḥāq al-Shāṭibī, al-Muwāfaqāt fī uṣūl al-sharīʿa 262 (ʿAbd Allāh Darāz ed., 2006) [hereinafter Al-Shāṭibī].
58. Emon, *supra* note 7, at 168-69.
59. *Id.* at 170.
60. *Id.* at 171.
61. *Id.*

his argument where, in fact, it is not. This causes Emon to misread (and mistranslate) one of al-Shāṭibī's passages. Al-Shāṭibī distinguishes between *maṣāliḥ dunyawīya* (benefits pertaining to worldly matters) and *maṣlaḥa* pertaining to matters of the law. Al-Shāṭibī first writes about *maṣāliḥ dunyawīya* and offers his conclusions to explain the *maṣāliḥ* that are found in the law.[62] Emon translates al-Shāṭibī's passage in which he writes about *maṣāliḥ dunyawīya* as follows: "Good and corrupt acts in the world are understood in terms of the [aspect] that is predominant (*ghalaba*)… Consequently the act has both qualities [as a matter of fact] but is identified, [as a matter of law], with the aspect that is dominant."[63] A more accurate translation would read as follows: "Good and corrupt acts *concerning worldly matters* are understood in terms of the [aspect] that is predominant…"[64] The difference in understanding the text has significant implications for Emon's conclusion. Furthermore, there is nothing in the text at this point that would justify the latter two bracketed statements Emon has included in his translation. Al-Shāṭibī has not yet discussed *maṣlaḥa* in terms of law; thus far, he is only providing an example on how human beings understand *maṣlaḥa* in their worldly matters. Al-Shāṭibī begins his discussion with this example in order to clarify how *maṣlaḥa* is to be understood in terms of the law. When discussing legal matters, al-Shāṭibī writes that if a matter of legislation is predominantly good or bad, then it is to be considered according to the predominant quality. In other words, the aim of the law carries the value that is predominant.[65] Again, this is an important distinction between *maṣlaḥa* that is existent in God's creation and *maṣlaḥa* that is existent in God's legislation, which further carries important implications about the fusion of fact and value in nature. Emon's conclusion that al-Shāṭibī's reliance "on the normative thrust of custom to get around issues of factual indeterminacy"[66] requires more nuance. Custom does offer insight into how to understand the law, but only as an example of how human beings reason about good and bad. Custom is not what determines that which is good and bad as a matter of law, as Emon seems to imply. Rather, custom illustrates the example of how we judge things to be good and bad according to the quality that predominates, and therefore, the quality that predominates in legal matters can be understood as capturing the intent of the law. Emon's assertion that al-Shāṭibī, by his present claim, fuses fact and value in nature does not have ample evidence given Emon's misreading of the text.[67] Al-Shāṭibī differentiates between evaluating the *maṣlaḥa* in worldly matters and evaluating the *maṣlaḥa* in legal matters; the method of the former is only offered to illustrate the method of the latter. Nevertheless, Emon's main concern is regarding the fact that al-Shāṭibī offers a position that stands against charges of indeterminacy.[68] This conclusion is sound and founded in al-Shāṭibī's writings.

62. Al-Shāṭibī, *supra* note 57, at 277-78.
63. Emon, *supra* note 7, at 171.71edsis mine49, at .
64. Al-Shāṭibī, *supra* note 57, at 277.
65. Al-Shāṭibī, *supra* note 57, at 278.
66. Emon, *supra* note 7, at 171.
67. *Id.*
68. *Id.*

Emon elaborates on another one of al-Shāṭibī's novel contributions regarding his context-sensitive inquiry into determining *maṣlaḥa*. However, this subject does not prove to be very fruitful to the overall discourse, as it remains rather vague and open ended. Al-Shāṭibī seemingly mentions it in passing, whereas Emon takes it as an important point of al-Shāṭibī's theory. Emon concludes that considering the context of an act shows that determining the value of an act "is a complex matter and cannot be reduced to a principle of general application alone."[69] This is a fair assessment. A minor mistake, however, that arises from Emon's misreading comes in his understanding of the Arabic statement "*fa hiya al-maqṣūda shar'an*."[70] This statement arises with regards to the predominant quality of an act. Emon renders its meaning as "it is pursued as a matter of law."[71] A more correct understanding of the phrase is that the predominant aspect is the *aim* of the law. This difference in understanding relates to the distinction between *maṣlaḥa* concerning worldly matters and *maṣlaḥa* concerning legal matters. If the predominant aspect as a matter of fact is "pursued as a matter of law," then that would entail that *maṣlaḥa* perceived in nature is pursued in the law. This is not what al-Shāṭibī says, however. Al-Shāṭibī writes this phrase when discussing the predominant aspect of legal matters. If a legal matter has a predominant aspect, al-Shāṭibī writes, then it can be concluded that that is what the law intended.[72] This error causes Emon to misunderstand al-Shāṭibī's text and usage of this phrase.

Al-Shāṭibī offers a unique perspective on determining the value of certain acts. Emon discusses al-Shāṭibī's assertion that good that is sought and harm that is repelled, as matters of law, are first and foremost considered in light of living the worldly life for the sake of the hereafter.[73] In other words, what the law offers that is good is meant to fall in accordance with the good that is to be attained after death and not the good that is considered by human whimsy and desire. Readers would have profited from a discussion of the implications that an eschatological perspective with respect to legal theory has on natural reasoning concerned with fact and value in nature.

Emon accurately presents al-Shāṭibī's theory that accounts for human disposition and capacity. Al-Shāṭibī argues that human dispositions are meant to be channeled, an act that requires discipline, in order to uphold the good and avoid harm.[74] God does not legislate impossible obligations but He does impose ones that may be difficult or challenging; this allows human beings to avoid indulging their whims and helps them seek salvation in the hereafter.[75] Emon identifies that it is al-Shāṭibī's *telos* of salvation that serves as a "limit on the animating force of human disposition."[76] Again, however, Emon misreads the text. Emon writes: "For al-Shāṭibī, to

69. *Id.* at 173.
70. *Id.* at. 172-73.
71. *Id.* at 173.
72. Al-Shāṭibī, *supra* note 57, at 278.
73. Emon, *supra* note 7, at 173.
74. *Id.* at 175.
75. *Id.*
76. *Id.* at 176.

infuse human disposition with normative content as a matter of law is not tantamount to exceeding the bounds of the law (*ḥudūd al-sharʿ*)."[77] In fact, what al-Shāṭibī is saying has nothing to do with infusing human disposition with normative content. Al-Shāṭibī is merely saying that human disposition does not necessarily fall outside of the limits of the law. In other words, it is possible that human disposition can fall within the bounds of the Sharīʿa and it is not always the case that human disposition goes contrary to the Sharīʿa (since he established prior that the Sharīʿa calls for the disciplining of human whimsy and desire).[78] Emon then quotes al-Shāṭibī to have written that commands and prohibitions channel human disposition "'…except where he adopts them under the auspices of the law.'"[79] Emon has misunderstood the Arabic word "*ḥattā*" to mean "except," where, in fact, it actually means "in order that" in this context. In actuality, al-Shāṭibī's text should read: "Commands and prohibitions lead [the individual] away from his natural dispositions and the indulgence of his aims in order that he adopt them under the auspices of the law."[80] Emon's conclusion from this section of al-Shāṭibī's writing, that al-Shāṭibī fuses fact and value in human disposition, is not actually supported by the text. In this passage, al-Shāṭibī is writing how the *maṣlaḥa* in the law relates to the benefit of humanity (as opposed to God) according to what the law has delimited and not according to human whimsy and desire.[81] Al-Shāṭibī is not infusing human disposition with normative content, as Emon asserts. Rather, he is merely stating a correlation between *maṣlaḥa* in the law and human aims. Therefore, as long as human disposition lies within the bounds of the law it can be pursued.

The error Emon has made in reading al-Shāṭibī's text carries on to the next several passages of his work regarding natural dispositions, inspiration (*ilhām*), and the concept of *khāriqa* (what Emon has translated as "unprecedented matters"). The misunderstandings Emon has in this section are significant. Emon writes that al-Shāṭibī limits the authority of humanity's natural disposition with inspiration and considered reflection. Emon notes that al-Shāṭibī wrote that the Prophet "guided people by decisions on unique issues (*muqtaḍā al-khawāriq*) on the basis of his conscientious perspicacity (*al-firāsa al-ṣādiqa*), true inspiration (*al-ilhām al-ṣaḥīḥ*), clear insights (*al-kashf al-wāḍiḥ*), and good vision (*al-ruʾyā al-ṣāliḥa*)."[82] Al-Shāṭibī asserts that such capacities are available to all of humanity as well. Emon has seriously misunderstood the meaning of "*khawāriq*" (sing. "*khāriqa*"). "*Khawāriq*" does not mean "unique issues" or "unprecedented matters." Rather, a "*khāriqa*" is a preternatural phenomenon. What al-Shāṭibī is saying is that the Prophet guided peopled based on decisions in accordance with his preternatural dispositions (*muqtadā al-khawāriq*) among which are his conscientious perspicacity (*al-firāsa al-ṣādiqa*), true inspiration (*al-ilhām al-ṣaḥīḥ*), clear insight (*al-kashf al-wāḍiḥ*), and good vision (*al-ruʾyā*

77. *Id.* at 177.
78. Al-Shāṭibī, *supra* note 57, at 382.
79. Emon, *supra* note 7, at 177.
80. Al-Shāṭibī, *supra* note 57, at 382.
81. *Id.*
82. Emon, *supra* note 7, at 177.

al-ṣāliḥa).[83] These preternatural dispositions are not exclusive to the Prophet according to al-Shāṭibī. The examples cited by al-Shāṭibī, which Emon makes mention of, are instances where people exercised such preternatural dispositions. The examples al-Shāṭibī cites provide additional support for this understanding and are more consistent with the meaning of the text.[84] Emon's findings from this section are a misrepresentation of al-Shāṭibī's text. Al-Shāṭibī writes that any issue regarding the exercise of a preternatural phenomenon that does not fall within the ambit of the Prophet's own preternatural phenomena is invalid and devilish. In other words, a preternatural phenomenon exercised at the hands of a follower of the Prophet must be related to, or derived from, one of the preternatural phenomena of the Prophet and how it was exercised by him.[85] The examples that Emon cites al-Shāṭibī to have used make more sense with this understanding of "*khāriqa*." A "*khāriqa*" is not valid if it contravenes an established rule of law since the law can only be established by God and His Prophet.

Emon delves into the issue of human conventions for which al-Shāṭibī offers thorough and original insight. Emon writes that al-Shāṭibī divides conventions into those that are addressed by a source-text and those that are not. The latter type of conventions, the silent conventions, is either static or changing. The ones that remain consistent, such as the human dispositions of hunger, speech, and courage, offer a normative ground for practical reasoning. Silent conventions that change must be deconstructed in order to identify a static element underlying them, which can then serve as a basis of law.[86] Emon offers a refreshing analysis on this part of al-Shāṭibī's work. It stands out from the works of the previous authors, as far as what Emon has written about them, as being an essential point of insight and a novel factor to be considered in legal reasoning. Emon writes that, "conventions that are enduring have the ontological authority to be the foundation for new rules of law."[87] It is a stretch to conclude from al-Shāṭibī's writing that he considers such conventions to be foundations for *new* rules of law. From the examples Emon cites al-Shāṭibī to have used, such as identifying the age of maturity and upright character of a man from his headgear, it would appear that conventions serve to help in identifying when and how a rule of law is applied. For a silent convention to be authoritative in this sense, it must uphold an underlying principle of the Sharīʿa and must be enduring and unchanging. Emon's assertion that fact and value are fused in these conventions remains sound.

The remainder of Emon's analysis of al-Shāṭibī's writings revolves around al-Shāṭibī's discussion on *maṣlaḥa mursala* in his book *al-Iʿtiṣām*. Much of what Emon offers regarding al-Shāṭibī's discussion is very similar to what has already been mentioned by al-Ghazālī and al-Rāzī. The discussions revolve around the relationship between the terms *maṣlaḥa*, *munāsaba*, *ḍarūrīyāt*, and *maqāṣid*, all of which

83. Al-Shāṭibī, *supra* note 57, at 445-46.
84. *Id.* at 446-47.
85. *Id.* at 445.
86. Emon, *supra* note 7, at 178-80.
87. *Id.* at 181.

is very familiar to the reader by now.[88] Realizing this, Emon limits his analysis to a brief survey.

Abū Bakr al-Jaṣṣāṣ (d. 370/981)

Emon begins his survey of Hard Naturalist natural law theories with Abū Bakr al-Jaṣṣāṣ. Abū Bakr al-Jaṣṣāṣ is categorized as a Hard Naturalist because he holds the theological viewpoint that nature, created with the teleological end of human benefit, is fixed and not subject to a divine "change of mind." In short, Emon concludes that al-Jaṣṣāṣ's theology fuses fact and value in nature and thereby provides it a normative foundation for reasoned deliberation on obligations and prohibitions. As I shall soon argue, Emon frequently misreads al-Jaṣṣāṣ's work, gleaning over the fine nuances, which leads him to draw faulty and exaggerated conclusions. These mistakes are often driven by a projection of Emon's own underlying assumptions on al-Jaṣṣāṣ's text that appear to arise as a consequence of categorizing al-Jaṣṣāṣ as a Hard Naturalist.

To begin, the section of al-Jaṣṣāṣ's work, which Emon employs for his analysis, is a chapter titled, "On what is said with regards to the rulings (*aḥkām*) of things prior to the advent of revelation concerning prohibition (*ḥaẓr*) and permissibility (*ibāḥa*)." This chapter is taken from his work on legal theory titled, *al-Fuṣūl fī al-uṣūl*. A critical point of Emon's theory is his understanding of *ibāḥa* (the presumption of permissibility) as the point at which al-Jaṣṣāṣ fuses fact and value in nature. "This principle," Emon writes, "reflects the idea that all of creation is primordially a positive good that human beings can make use of." This fact is central to al-Jaṣṣāṣ's notion of reason as a source of law.[89] As I shall soon make note of, *ibāḥa* (permissibility), is not the mode by which fact and value in nature are fused. *Ibāḥa* is a normative value ascribed to human actions. It is the concept of *nafʿ* (benefit) and *ḍarr* (harm), which Emon later correctly identifies, that is the point in which fact and value are fused in nature. This understanding will be further elaborated upon below.

Emon frames al-Jaṣṣāṣ's theory as a discussion formulated on the concepts of *ḥusn* and *qubḥ*.[90] This appears to be an assumption that Emon has imposed on the text. In actual fact, it does not seem that al-Jaṣṣāṣ is writing with the known debate on reason vis-à-vis *ḥusn* (good) and *qubḥ* (bad) in mind. The word "*ḥusn*" is only used once, and not in the register Emon here understands it as, while *qubḥ* is used more regularly. Instead, the thrust of al-Jaṣṣāṣ's argument rests on the term *manfaʿa* (benefit). To distinguish between *ḥusn* and *manfaʿa* is of consequence, certainly given Emon's claim that "what seems to be at stake is the authority to make determinations of obligation with a divine imprint."[91] In actuality, it is difficult to tell that al-Jaṣṣāṣ even considered this.

Al-Jaṣṣāṣ classifies actions under one of three legal norms: obligatory (*wājib*), prohibited (*maḥẓūr*), and permissible (*mubāḥ*). An actor is rewarded for fulfilling

88. *Id.* at 182-83.
89. Emon, *supra* note 7, at 45.
90. *Id.* at 46.
91. *Id.*

an obligation and punished for omitting it. A prohibited act merits a punishment when fulfilled and a reward when omitted. Lastly, a permissible act earns the actor neither a reward nor a punishment whether it is fulfilled or omitted.[92] Emon correctly notes that in al-Jaṣṣāṣ's theory, prior to the advent of revelation, there are certain actions that are obligatory (*wājib*) and others that are prohibited (*maḥẓūr*). Such actions are universal, unchanging, and unalterable.[93] An example of something obligatory is belief in God and thanking the Benefactor (*al-īmān bi-llāh wa shukr al-munʿim*). Prohibited acts are inherently bad (*qabīḥ li-nafsihi*), such as disbelief in God and oppression (*al-kufr wa al-ẓulm*).[94] The crux of al-Jaṣṣāṣ's discussion, and where Emon makes his most critical error, is with regards to permissible (*mubāḥ*) acts. Al-Jaṣṣāṣ writes that whatever is not of the first two categories is *mubāḥ* prior to the advent of revelation, as long as the harm in it does not outweigh the benefit.[95] Emon understands the permissible acts to be acts the legal ruling of which changes with circumstance and can be determined, on the basis of reason alone, to be obligatory, prohibited, or permissible.[96] This is a gross misreading of the text. What al-Jaṣṣāṣ says, in actuality, is that acts which are permissible are acts that are rationally open to the possibility of being among any one of the three legal norms. After listing what is rationally deemed to be obligatory and rationally deemed to be prohibited, he writes: "And of [the ruling of actions prior to the advent of revelation] is what the intellect can sometimes possibly deem permissible, other times prohibited, and other times obligatory depending on the consequences of the action being of benefit or harm to the people" (*wa minhā mā huwa dhū jawāz fī al-ʿaql: yajūz ibāḥatahu tāra wa ḥaẓruhu ukhrā wa ījābuhu ukhrā ʿalā ḥasab mā yataʿallaq bi-fiʿlihi min manāfiʿ al-mukallafīn wa maḍārihim*).[97] Emon misunderstands the word "*yajūz*" in this context to be "it is allowed," when in fact, it means "possible" or "open to the possibility of." Thus, actions which are permissible (*mubāḥ*) are those for which a legal norm cannot be determined since it is possible that they fall under any one of the three categories of legal norms. In contrast, actions prior to revelation which are rationally known to be obligatory or prohibited are necessarily so, and it is impossible for them to be otherwise. What gives further support to this understanding is that al-Jaṣṣāṣ says, regarding permissible actions, that revelation can later come and pronounce these permissible actions as either prohibited, obligatory, or permissible, depending on their benefit (*wa yajūz majīʾ al-samʿ tāra bi-ḥadhrihi wa tāra bi-ibāḥatihi wa ukhrā bi-ījābihi ʿala ḥasab al-maṣāliḥ*).[98] In addition, Emon's understanding is contradictory since an action cannot have two legal norms attributed to it at once. If prior to revelation all actions are permissible, how can they also be determined

92. 3 Abū Bakr Aḥmad b. ʿAlī al-Jaṣṣāṣ, Uṣūl al-Jaṣṣāṣ: al-fuṣūl fī al-uṣūl 247 (ʿAjīl Jāsim al-Nashmī ed., 1994) [hereinafter Al-Jaṣṣāṣ].
93. *Id.* at 248.
94. *Id.*
95. *Id.*
96. Emon, *supra* note 7, at 48.
97. Al-Jaṣṣāṣ, *supra* note 92, at 248.
98. *Id.*

to be obligatory or prohibited?[99] Emon has misunderstood the phrase "*qabla majī' al-sam'*" to mean "whatever is not addressed by scripture,"[100] where in fact it means "prior to the advent of revelation"—a correction that is readily apparent upon reading the title of the section in al-Jaṣṣāṣ's text that is under discussion. Emon's lack of awareness to the discussion's context leads to his mistaken conclusions.

Al-Jaṣṣāṣ gives an argument for the fact that nature was created for human benefit (*li-manāfiʿ al-nās*).[101] Emon writes that the terms "*naf'*" (benefit) and "*ḍarr*" (harm) are also points at which fact and value are fused.[102] From this, Emon concludes: "By so holding, al-Jaṣṣāṣ preserved nature as an empirical base while also infusing into nature a normative foundation to justify and legitimate reasoned determinations of obligations and prohibitions."[103] Again, Emon's conclusion strays from the mark al-Jaṣṣāṣ aimed at when writing about the benefit God infused into nature. Al-Jaṣṣāṣ's argument for the fact that nature is created for the benefit of mankind is mentioned by Emon and it is based on the theological assumption that it is unbefitting for God to have created nature for any other purpose.[104] After establishing that nature was created for the benefit of mankind, al-Jaṣṣāṣ holds that it follows from this fact that mankind can benefit (*intifāʿ*) from it in any way as long as the harm does not outweigh the benefit.[105] Al-Jaṣṣāṣ's proof for this is that had benefitting from nature been prohibited, then God would have provided an indication by which that could be known to us.[106] Therefore, al-Jaṣṣāṣ is not trying to "justify and legitimate reasoned determinations of obligations and prohibitions" as Emon argues. Rather, he is merely trying to justify that since there is no way to infer that benefitting from nature is prohibited prior to the advent of revelation, it is permissible by default. Emon's conclusion goes beyond what the text suggests. Just because there is benefit in nature, and it is permissible to obtain these benefits, it does not suggest that there is a normative basis on which obligation and prohibition can be rationally determined.

After arguing that all actions that are neither necessarily obligatory (e.g. belief in God) or prohibited (e.g. disbelief in God) are permissible, since there is no indication that they are prohibited, al-Jaṣṣāṣ gives the reader more to consider for his argument. He states that deeming such things as prohibited would impose an undue harm and hardship and it is not possible (*ghayr jā'iz*) for people to engage in self-harm without benefiting. Further, there is no rational argument that would lead to such a conclusion; therefore, to consider these actions prohibited is detestable (*qubḥ*).[107] In

99. Emon writes, "On a purely reasoned basis, we may determine these acts to be permissible, prohibited, or obligatory pursuant to the benefits and harms arising from the acts in question. Importantly, whatever is not addressed by scripture and is not among the universal values is *presumptively permissible if the act poses a greater benefit than harm*." Emon, *supra* note 7, at 48 (emphasis added).
100. *Id.*
101. Al-Jaṣṣāṣ, *supra* note 92, at 248.
102. Emon, *supra* note 7, at 48-49.
103. ,*Id.* at 49.
104. ,*Id.* at 48.
105. Al-Jaṣṣāṣ, *supra* note 92, at 248.
106. *Id.* at 249.
107. *Id.* at 250.

addition to this consideration, al-Jaṣṣāṣ adds that the imposition of an obligation is a grace from God in being consistent with what the intellect can reasonably hold to be obligatory. In other words, it is due to the fact that God's obligation accords with what the intellect deems to be possible as an obligation that the obligation is good (*ḥusn*).[108] It is here where we first encounter al-Jaṣṣāṣ's use of the term "*ḥusn*" in contradistinction to *qubḥ*. It would be wrong to say, as Emon suggests, that al-Jaṣṣāṣ argues that what the intellect deems to be good can become an obligation. Rather, what is apparent from the text is that *ḥusn* can be ascribed to an obligation since the obligation is reasonable. Thus, what is implied is that *ḥusn* cannot be imputed to an action until after the advent of revelation. *Ḥusn* becomes apparent when revelation imposes a duty and that duty is reasonable (i.e. reason holds that it is possible that revelation can impose such a duty). Simply because something is beneficial does not make it *ḥusn*, nor does it make it grounds for an obligation.

In concluding his chapter, al-Jaṣṣāṣ writes: "and all that we have presented is a discussion on the normative ruling (*ḥukm*) of things in the intellect prior to the advent of revelation. Revelation then came to confirm what was already deemed permissible by the intellect [i.e. the permissibility of benefitting from creation]."[109] Al-Jaṣṣāṣ then proceeds to quote different Qur'ānic verses and ḥadīths that indicate that benefitting from creation is permissible. This is telling to the extent that what al-Jaṣṣāṣ held the intellect to deem obligatory, prohibited, and permissible are all normative judgments prior to revelation. In other words, al-Jaṣṣāṣ is not arguing for reason's authority to make obligatory and prohibited determinations based on a normative foundation in nature. Rather, what is obligatory and prohibited is known and objective, but also very limited. The crux of the argument is that what is not necessarily obligatory or prohibited, as long as the harm does not outweigh the benefit, is merely permissible to pursue. Al-Jaṣṣāṣ's aim, then, is to argue that we can rationally know that benefitting from creation is permissible since there is no indication that leads us to the conclusion that doing such is prohibited. Revelation has also provided confirmation to this notion. The upshot seems to be that if after its advent revelation is silent on a matter, then the default ruling is that the action is permissible so long as the harm does not outweigh the benefit. Al-Jaṣṣāṣ has not made an effort to claim that reason can determine obligations or prohibitions; his entire discussion is about permissibility. Emon's conclusions have gone too far beyond the text. In the end, it seems that reason, in actuality, has not truly conferred a normative ruling to any action. Instead, al-Jaṣṣāṣ has provided a rational argument to what revelation has already confirmed: accruing benefit from God's creation.

To summarize, al-Jaṣṣāṣ holds that whatever reason cannot necessarily deem obligatory or prohibited, and is open to the possibility of being either, then the default ruling is that such actions are permissible. We know that such actions are permissible because nature was created for the benefit of mankind, and had such actions been prohibited, God would have provided an indicator to inform us. Since He has not,

108. *Id.*
109. *Id.* at 252.

the default ruling is that such actions are permissible so long as the harm does not outweigh the benefit.

Understanding terms in the text of Abū al-Ḥusayn al-Baṣrī (d. 436/1044)

Similar to his discussion on al-Jaṣṣāṣ, Emon's failure to contextualize Abū al-Ḥusayn al-Baṣrī's text proves problematic in the overall understanding. The chapter that Emon references for his present discussion is about al-Baṣrī's discussion on how the actions of the Prophet are assessed to derive legal rulings. The aim, al-Baṣrī says, is to see if the actions of the Prophet can indicate a legal ruling (*ḥukm*) and if so, which legal ruling they indicate. Al-Baṣrī says that prior to answering these questions, we are required to outline how actions are divided according to their qualification of being good (*ḥusn*) or bad (*qubḥ*). After outlining this categorization of actions, al-Baṣrī says that he will go on to discuss how the actions of able-minded people can be either good or bad, followed by an answer to the question of whether reason (*ʿaql*) or revelation (*samʿ*) can indicate an obligation to do the same actions as the Prophet did.[110] Other issues regarding how to assess the actions of the Prophet are discussed, however, they are not of relevance to our present discussion. It remains important to contextualize the text that Emon references in order to get a fuller understanding of the aim and meaning of al-Baṣrī's discourse.

Al-Baṣrī offers a tripartite assessment of actions. Emon mentions that, according to al-Baṣrī, based on reason (*ʿaql*) or scriptural authority (*samʿ*), actions can be either *ḥusn*, *qubḥ*, obligatory, or prohibited.[111] What al-Baṣrī writes is that actions are assessed in three ways: (1) their being either *ḥusn* or *qubḥ*, (2) how their rulings relate to the doer of the action and others, and (3) whether an action is established by revelation (*sharʿīya*), reason (*ʿaqlīya*), and whether an action is a cause (*sabab*) for the ruling of another action.[112]

Al-Baṣrī defines the term *qubḥ* more strictly than *ḥusn*. As Emon mentions, an action that is bad (*qabīḥ*) should be avoided by those who are capable of knowing and performing the act. Such an action deserves blame.[113] These can be major bad acts (*kabīr*) or minor bad acts (*ṣaghīr*). The former involves actions in which the punishment outweighs the reward, and the latter involves actions in which the rewards outweigh the punishment.[114] Emon's understanding of a good action (*ḥasan*) is an action that "should be performed."[115] Al-Baṣrī first defines *ḥasan* in relation to *qabīḥ*: an action that is *ḥasan* is one that does not merit blame (*lam yakun lahu taʾthīr fī istiḥqāq al-dhamm*).[116] Shortly thereafter, he mentions that actions that are *ḥasan* fall into one of two categories. First are actions that do not have an extra quality beyond their being

110. Abū al-Ḥusayn Muḥammad b. ʿAlī b. al-Ṭayyib al-Baṣrī, al-Muʿtamad fī uṣūl al-fiqh 363 (1983) [hereinafter Al-Baṣrī].
111. Emon, *supra* note 7, at 75.
112. Al-Baṣrī, *supra* note 110, at 363-64.
113. Emon, *supra* note 7, at 75-76; *Id.* at 363.
114. Emon, *supra* note 7, at 76; Al-Baṣrī, *supra* note 110, at 364.
115. Emon, *supra* note 7, at 76.
116. Al-Baṣrī, *supra* note 110, at 364.

ḥasan that merits praise; such actions are permissible (*mubāḥ*). The other category of *ḥusn* are actions that do have an extra quality beyond their being *ḥasan* that merits praise; such actions are approved and can be recommended, obligatory, etc.[117] This is a more accurate understanding of the text than Emon's division of *ḥasan* acts as being either actions that invoke praise or actions that are permissible (*mubāḥ*).[118] Actions that are permissible, in fact, are actions that do not invoke praise, not the other way around. The correct reading of al-Baṣrī's text shows that, at minimum, for an action to be *ḥasan*, it must not be *qabīḥ*. Therefore, it is not necessarily so that such an action *should* be performed, as Emon mentions. In a later passage in which al-Baṣrī offers a clearer definition of *ḥusn*, he mentions that it can be an act which does not merit blame.[119] Unlike Emon, I am not inclined to say that an action that is *mubāḥ* is "affirmatively good, as opposed to being value neutral."[120] Al-Baṣrī's understanding of *ḥusn* is somewhat loose. According to him, as long as an action is not *qabīḥ*, i.e. it does not merit blame, then it is *ḥasan* and it is not necessary that it merit praise. In this sense, *ḥusn* should not be understood as meaning "good;" a more accurate understanding would be that it means "not bad," or "not *qubḥ*." It seems that an action that is *ḥasan* can indeed be "value neutral" when it neither merits blame nor praise.

There are many ways by which an action that is *qabīḥ* can be described according to al-Baṣrī. These words, which describe bad actions, entail a customary (*ʿurf*) understanding of how God views these actions.[121] Emon projects theological assumptions onto al-Baṣrī's present discussion. To do so, based on this passage alone, can present a distorted understanding of the text. Emon asserts that al-Baṣrī's Hard Natural Law theology is in the background of the discussion on how *qubḥ* actions are understood. Emon writes: "al-Baṣrī considered bad acts to constitute sinful acts (*maʿṣiyya* [sic.]) that God dislikes (*anahū fiʿl yakrahuhu Allāh*)."[122] Al-Baṣrī's use of the term "*maʿṣiya*" is to show one of the ways in which bad actions are described as (*yūṣaf bi-awṣāf*). Al-Baṣrī actually says that to deem an action as *maʿṣiya* is customarily understood (*iṭlāq dhālika fi al-ʿurf yufīd*) that such an action is disliked by God.[123] Emon's understanding of *maḥẓūr* (prohibited) actions is correct in this regard.[124] Al-Baṣrī describes actions that are *qabīḥ* with terms used to denote a legal ruling or invoke censure. He presents the customary understanding of how these words are in relation to how God perceives them. It is interesting to note that al-Baṣrī is using terms that are understood and used customarily. Whereas he has already mentioned how actions that are *qabīḥ* merit blame and should not be done, here he appears to be explaining how people customarily understand actions to be *qabīḥ* and

117. *Id.* at 364-365.
118. Emon, *supra* note 7, at 76.
119. Al-Baṣrī, *supra* note 110 at 366.
120. Emon, *supra* note 7, at 77.
121. Al-Baṣrī, *supra* note 110, at 365-66.
122. Emon, *supra* note 7, at 77.
123. Al-Baṣrī, *supra* note 110, at 365.
124. Emon, *supra* note 7, at 77 (He accurately describes al-Baṣrī's definition of *maḥẓūr;* although, he mentions that this is a description of *qubḥ* rather than the definition of *maḥẓūr*).

why they should not be done. These definitions employ terms that are understood to invoke a divine sanction, rather than being understood as actions that are harmful, detrimental, or bad in an abstract sense. In other words, al-Baṣrī is more clearly outlining the sense in which *qabīḥ* actions merit blame by connecting them to the divine will. At face value, this appears to be closer in line to Soft Natural Law in that he describes actions that merit blame in relation to God's sanction, rather than in relation to an objective standard or bad outcome of such actions. However, this passage does not provide us with enough information to draw any theological conclusions. Emon writes, "a bad action is not just bad on rational grounds. It is bad because of a quality that runs through it contrary to the divine will."[125] Thus far, from the passages that have been taken under consideration, there is nothing to suggest that al-Baṣrī assesses bad actions on rational grounds. He has merely stated that an action that is *qabīḥ* should not be done and that it merits blame. Al-Baṣrī has not yet mentioned why an action should not be done or why it merits blame. It is in this passage where we first are introduced to why actions can be considered *qabīḥ*; the reasons mentioned all involve a divine censure or sanction and not a rationally deduced consequence. If the action is only bad because of the divine will, it would then appear that this is closer to a Soft Natural theology. Given that our survey of al-Baṣrī's work is limited, however, we are not yet justified to draw any theological conclusions. The point of contention, therefore, is that Emon does not offer evidence or citations for the theological postulates he ascribes to al-Baṣrī, whether or not they are correct.

Al-Baṣrī offers a parallel assessment of the term *ḥasan*. Similarly, he mentions different words that describe actions that are *ḥasan*.[126] As was previously mentioned, when a *ḥasan* action does not merit any praise it is deemed *mubāḥ* (permissible). Emon mentions the term *mubāḥ* (permissible), which al-Baṣrī defines as involving "the removal of prohibition (*ḥaẓr*) and impediments (*manʿ*) [established via] deterrent mechanisms, threats or other means."[127] Emon writes: "Judgments about the good and the bad are not merely human assessments but reflect the will of God."[128] Emon, again, assumes that al-Baṣrī has considered the usage of *ḥusn* and *qubḥ*, when applied to actions, to be human assessments. Again, al-Baṣrī has only mentioned that actions that are *ḥasan* are not *qabīḥ*, or that they merit praise. Al-Baṣrī also writes that *mubāḥ* means that God has made it known to mankind, or indicated (*adallanā*), that such an action is *ḥasan* and God has not prohibited us from it.[129] This indicates, in fact, that *mubāḥ* actions are known by a divine indication and not merely human reason.

Emon concludes this section by writing: "…terms like *ḥusn* and *qubḥ* are theoretically used to recognize and legitimate the use of naturalistic reasoning as an instrument for understanding the divine will."[130] From the passages Emon relies on,

125. Emon, *supra* note 7, at 77.
126. Al-Baṣrī, *supra* note 110, at 366-67.
127. *Id.* at 366; Emon, *supra* note 7, at 77 (translation by Emon).
128. Emon, *supra* note 7, at 78.
129. Al-Baṣrī, *supra* note 110, at 366.
130. Emon, *supra* note 7, at 78.

and as has already been mentioned, al-Baṣrī does not indicate the rational grounds on which an action is deemed to be *ḥasan* or *qabīḥ*. All we are told is that *ḥasan* actions are either not *qabīḥ* or merit praise and *qabīḥ* actions merit blame. In order for al-Baṣrī to have legitimated the use of naturalistic reasoning, and to provide a more concrete understanding of these terms, he would have had to mention the rational basis on which these actions are deemed praiseworthy or blameworthy. He does not mention that such actions involve benefit, harm, or other such terms that may be assessed empirically. What Emon's argument suffers from is that he often makes unsupported assumptions in his reading of al-Baṣrī's text. He assumes that al-Baṣrī considers *ḥusn* and *qubḥ* to be judgments evaluated by human reason. Al-Baṣrī links terms that describe *ḥusn* and *qubḥ* to terms that denote divine sanction. Here it becomes clearer why such actions are blameworthy or praiseworthy. I have not made the claim that these are the final conclusions of al-Baṣrī's writings. What I am drawing attention to is Emon's narrow and limited reading coupled with his assumptions that are projected onto the text that remain unsatisfactory in his conclusions and analysis of al-Baṣrī's natural law and theology.

This brief exposition illustrates only some of the problems we encounter with Emon's assessment of al-Baṣrī's text. We find that Emon's understanding of certain terms does not fully align with the definition presented by al-Baṣrī. Further, Emon frequently projects his own assumption onto al-Baṣrī's text without providing any textual basis to support his claims. Finally, we are not able to fully appreciate the meaning of this text without providing the context. This section of al-Baṣrī's text is meant to explain how the actions of the Prophet fall under different legal categories. It serves as a preliminary to discussing the actions of the Prophet and how legal rulings are derived from them. Without this contextual understanding, we are unable to draw accurate conclusions.

Conclusion

As has been demonstrated, Emon's arguments are often misrepresentative of the texts from which they are derived. The crux of Emon's thesis is that Hard Naturalists and Soft Naturalists both fused fact and value in nature in order to grant reason ontological authority. By now, it is clear that what these jurists argued for, in fact, was a nuanced methodology of legal reasoning that affirmed *maṣlaḥa* in God's law but did not consider *maṣlaḥa* in God's creation, or nature. Due to this fact, Emon's argument is too often strained. Emon's eagerness to present a novel discussion on Islamic natural law and find a common ground between Hard and Soft Naturalists is lacking in textual support.

Emon writes that the Soft Naturalists "developed a jurisprudence that allows us to reason about God's will through the medium of nature."[131] Statements such as this detract credibility from Emon's argument when compared to the primary sources. It is simply unfounded, at least in the presently discussed works of these jurists, that

131. Emon, *supra* note 7, at 185.

nature — whatever that means[132] — was used as a "medium" to reason about God's will. A proper understanding of the jurists' texts offers a more consistent analysis with regards to the jurists' theological viewpoints and their opinions on *ḥusn*, *qubḥ*, and reasoned deliberation. It is significant, therefore, that Emon does not reference the chapters from the works of al-Ghazālī, al-Rāzī, and al-Qarāfī where they discuss their theories of ethical value, or at least how they define *ḥusn* and *qubḥ*.[133]

Emon's representation of the term "*maṣlaḥa*" is confusing and misleading. As has been noted above, he often misunderstands the different registers in which *maṣlaḥa* is used. A case in point is al-Ṭūfī's use of the term *maṣlaḥa* in comparison to the rest of the jurists, as well as al-Ghazālī's use of *maṣlaḥa* in different capacities. In short, *maṣlaḥa*, as a legal term of art, is a nuanced and multi-layered concept. To state that the "Soft Naturalists fused fact and value in nature with their use of the term *maṣlaḥa*" is misleading.

As for Emon's survey of the Hard Naturalists, we run into different but equally significant problems. With Abū Bakr al-Jaṣṣāṣ, Emon's conclusions often stray too far from what can be appropriately understood from the text. We find similar problems in Emon's section on al-Baṣrī. Without providing the context in which the sections of the original text occur in, and by not relating the material accurately without providing cited evidence to ground certain assumptions, Emon's methodology appears to be a method of cherry picking portions of the text that he feels can serve as a basis for his argument.

Another significant concern is Emon's neat categorization of the jurists as Hard Naturalists and Soft Naturalists. It is quite clear that Emon uses these terms to distinguish between Muʿtazilite and Ashʿarite theologians despite some caveats he expresses as to the Muʿtazilism of some of the Hard Naturalists. Nevertheless, the dichotomy presents a simplistic and reductionist picture. For this reason, too often is Emon's book repetitive and offers little insight on the subtleties and nuances of the juristic discourse. In order to present a more comprehensive and accurate study, it is insufficient to rely on books of legal theory when drawing on theological postulates that drive the works of these jurists (using al-Qādī ʿAbd al-Jabbār's *al-Mughnī* is the only exception to this). Many of these jurists, most notably al-Ghazāli and al-Rāzī, wrote extensively on theological matters. A later study would do well to consult these texts and tie them into the jurisprudential works.[134] A close and comprehensive reading of works on theology by these jurists would also point out the subtle distinctions in their different theological viewpoints.[135] Emon's study relies too heavily on theological postulates and cannot afford to ignore such crucial texts. What is most sur-

132. March, *supra* note 2, at 678.

133. For instance, *See* Sherman A. Jackson, *The Alchemy of Domination? Some Ash'arite Responses to Mu'tazilite Ethics,* 31 Int'l J. of Middle Eastern Studies 185 (1999); Ayman Shihadeh, *Theories of Ethical Value in Kalām: A New Interpretation,* Oxford Handbooks Online (April 4, 2014), http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199696703.001.0001/oxfordhb-9780199696703-e-007.

134. Such has been done for al-Rāzī's theory of *mach ha*. *See* Ayman Shihadeh, The Teleological Ethics of Fakhr al-Dīn al-Rāzī (2006).

135. *Id.*

prising is that despite the heavy discourse revolving around the concepts of *ḥusn* and *qubḥ*, Emon does not reference the chapters on *ḥusn* and *qubḥ* in any of the writings of these jurists. Al-Ghazālī, al-Rāzī, and al-Qarāfī each have chapters in their works of legal theory that explicitly deal with the issues of *ḥusn* and *qubḥ*.[136]

None of this critique is to say that Islamic law does not recognize a theory of natural law. The present analysis only demonstrates that Emon's study is misrepresentative, contains many errors, and that his study of this subject is far from adequate. I have attempted to demonstrate the inconsistencies and inaccuracies in Emon's arguments with the hope of bringing to light the challenges that researches on Islamic natural law face ahead in tackling the primary sources, sifting through terminological nuances, and incorporating relevant works outside the ambit of technical legal theory.

Bibliography

Al-Baṣrī, Abū al-Ḥusayn Muḥammad b. ʿAlī b. al-Ṭayyib. *al-Muʿtamad fī Uṣūl al-Fiqh*. Beirut: Dār al-Kutub al-ʿIlmiyya, n.d.

Emon, Anver M. *Islamic Natural Law Theories*. New York: Oxford University Press, 2010.

Al-Ghazālī, Abū Hāmid Muhammad b. Muhammad. *Al-Mustaṣfā min ʿIlm al-Uṣūl*. Hamza Ibn Zuhayr Hafidh (ed). Madinah: al-Jāmiʿah al-Islāmiyyah, 1993.

———. *Shifā' al-Ghalīl fī Bayān al-Shabh wa al-Mukhīl wa Masālik al-Taʿlīl*. Muhammad al-Kubaysī (ed). Baghdad: Raʿāsa Diwān al-Awqāf, 1971.

Hallaq, Wael B. *Sharīʿa: Theory, Practice, Transformations*. Cambridge, UK: Cambridge UP, 2009.

Jackson, Sherman A. "The Alchemy of Domination? Some Ashʿarite Responses to Muʿtazilite Ethics." International Journal of Middle East Studies 31.2 (1999): 185-201.

Al-Jaṣṣāṣ, Abū Bakr Aḥmad b. ʿAlī. *Uṣūl al-Jaṣṣāṣ: al-Fuṣūl fī al-Uṣūl*. ʿAjīl Jāsim al-Nashmī (ed). Wizārat al-Awqāf wa al-Shu'ūn al-Islāmiyya, 1994.

March, Andrew F. Rev. of *Islamic Natural Law Theories*, by Anver Emon. *Journal of Law and Religion* 26, no 2 (2011-2011): 675-683.

Al-Qarāfī, Shihāb al-Dīn Abū Abū al-ʿAbbās Ahmad b. Idrīs b. ʿabd al-Rahmān. *Nafā'is al-Uṣūl fī Sharḥ al-Maḥṣūl*. ʿĀdil Ahmad ʿAbd al-Mawjūd (ed). 9 vols. Makkah: Maktabat Nizār Mustafā al-Bāz, 1997.

———. *Sharh Tanqīh al-Fuṣūl fī Ikhtisār al-Maḥsūl fī al-Uṣūl*. Taha ʿAbd al-Qādir ʿAtā (ed). Cairo: Dār al-Fikr, 1973.

Al-Rāzī, Fakhr al-Dīn Muhammad b. ʿumar. *Al-Maḥsūl fī ʿIlm Uṣūl al-Fiqh*. Tāhā Jābir Fayād al-ʿIlwānī (ed). 6 vols. 3rd ed, Beirut: Mu'assasa al-Risāla, 1997.

Al-Shāṭibī, Abū Isḥāq b. Ibrāhīm b. Mūsā b. Muhammad. *Al-Iʿtiṣām*. Salīm b. ʿīd al-Halālī (ed). Khobar: Dār Ibn ʿAffān, 1997.

———. *Al-Muwāfaqāt fī Uṣūl al-Sharīʿah*. ʿabd Allāh Darāz et al (eds). 2 vols. Cairo: Dār al-Hadīth, 2006.

Shihadeh, Ayman. "Theories of Ethical Value in Kalām: A New Interpretation." Oxford Handbooks Online. 2014-04-01. Oxford University Press. Date of access 25 April. 2014, <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199696703.001.0001/oxfordhb-9780199696703-e-007>

Al-Ṭūfī, Najm al-Dīn. *al-Hadīth al-Thānī wa al-Thalāthūn*.' In Mustafā Zayd. *Al-Maṣlaḥa fī al-Tashrīʿ al-Islāmī wa Najm al-Dīn al-Ṭūfī*. 2nd edn, n.p.: Dār al-Fikr al-ʿArabī, 1964.

136. All of them are discussed in Jackson, *supra* note 133.