

Groundwork of the Moral Law: A New Look at the Qur'ān and the Genesis of Shari'a*

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Abstract

By reevaluating modernist assumptions in Islamicist scholarship and in Western moral and legal philosophy, I arrive at the conclusion that the Qur'ān was a source of Islamic law since the early Meccan period, when the Prophet Muḥammad began to receive the Revelation. This conclusion, supported by extensive evidence from the Qur'ān itself, compels a modification in the standard narrative about the genesis of Islamic law.

Keywords

Qur'ān, moral philosophy, ethics, law, fact/value distinction, good works

When historians do their work, they often underestimate the crucial role their own assumptions play in shaping the historical accounts they produce, that is, if they are aware of these assumptions. Some altogether miss the profound importance of such self-awareness, and go on to construct histories that describe more the figment of their own imagination than the historical subject they purportedly study. The role of the Qur'ān in the initial formation of Islamic law, properly known as Shari'a,¹ is one area in which the problem of lack of self-consciousness

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¹⁾ On the problematic use of the expression “Islamic law,” see my *Shari'a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 1–3.

has been most pronounced,² with results that have had staggering effects on our understanding of Shari'a's formative period. In this article, I propose to put into the balance the various theories (including my own)³ that have been advanced about the Qur'an as a historically, i.e., diachronically,⁴ founding text. My findings entail wider conclusions that directly bear upon the genesis of the Shari'a and its history during the first century of Islam.

I. The Qur'an's Legal Role in Modernist Scholarship

It was the work of Joseph Schacht which set, in Western academia, the standard for the study of the Qur'an as a contributing source to the formation of early Islamic law. Schacht propounded the idea that the Qur'an came to supply legal norms at a relatively later stage in Shari'a's history, perhaps as late as the dawn of the second century H. (ca. 720 CE), if not later.⁵ The framework of Schacht's assertions about the Qur'anic legal materials is found in his influential work *Origins of Muhammadan Jurisprudence*,⁶ essentially a project about Prophetic (and other) *ḥadīth*, which represented for Schacht the benchmark of legal evolution. Why the *ḥadīth* should have constituted the benchmark, Schacht never explained. "We may take the importance of the Koranic element for granted," Schacht wrote on the second page of his book, but promptly added the crucial caveat that "we shall have to qualify this for the earliest period," by which he meant the entire first century

² On the theoretical importance of self-consciousness, see *ibid.*, 6-13.

³ *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 19-25; *idem*, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), 3-7.

⁴ As opposed to being a theologically or metaphysically founding text, or even a structurally founding legal text that emerged as such during the post-formative centuries.

⁵ Joseph Schacht, *Origins of Muhammadan Jurisprudence* (Oxford: The Clarendon Press, 1950), 224.

⁶ Schacht reiterated his position in summary fashion in his *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964), where, having dedicated a chapter to the "legislative" role of the Qur'an (pp. 10-15), he nonetheless continued to insist (p. 18) that "any but the most perfunctory attention given to the Koranic norms, and any but the most elementary conclusions drawn from them, belong *almost invariably* to a secondary stage in the development of the doctrine" (emphasis mine).

H.⁷ It turns out that the footnote given at the end of this statement refers us to a later chapter in the book, containing less than four pages (the book's text is 328 pages), entitled "The Koranic Element in Early Muḥammadan Law."⁸ One would think that relegating a discussion of the Qur'ān to a secondary, minuscule chapter would require substantial justification, especially in light of the text's staggering importance for Muslims and for their law. Yet Schacht does not make even a passing remark about this instance.

In that very short chapter, we are told that "Muḥammadan law did not derive directly from the Kuran but developed ... out of popular and administrative practice under the Umayyads, and this practice often diverged from the intentions and even the explicit wording of the Kuran."⁹ In a book concerned almost exclusively with *ḥadīth* and legal reasoning—not with the Qur'ān itself—this is a daring judgment. More daring still is Schacht's own appointment of himself as a judge of intentions, especially in light of the extraordinarily thin evidence he produced. Nor can such minimal evidence of "divergences" in both the "wording" and the alleged "intentions" justify his statement that the Qur'ān "can hardly be called the first and foremost basis of early legal theory."¹⁰

The body of evidence Schacht produced in support of his thesis on the Qur'ān consists of about a dozen technical legal questions chosen to show that the Qur'ānic material appears to be a secondary layer that was superimposed on the original materials and lines of reasoning.¹¹

⁷) As will become clear in the next few paragraphs.

⁸) Schacht, *Origins*, 224–27.

⁹) *Ibid.*, 224; see also the preface, p. v.

¹⁰) *Ibid.*, 224.

¹¹) Typical of this evidence is the obligatory gift from husband to wife in the case of divorce (*ibid.*, 226, 101–02). Here Schacht cites material about judges who were, in around 120 H. (ca. 740 A.D.), apparently inconsistent in imposing this gift. Having stated this, he swiftly moves to the stunning conclusion that "this doctrine, based on a sweeping interpretation of Koran ii.236, 241, was an innovation" (102). How this inconsistency in application proves later adoption of Qur'ānic material, Schacht does not say. Nor does he explain how the interpretation was a sweeping one or how its sweeping nature proves a later adoption of Qur'ānic doctrine. We are supposed to take his word for it, as we are supposed simply to accept his assertion that "the problem of where the divorced wife ought to live" became associated with the Qur'ānic doctrine at a later date (226, 197–98). Beyond

The brevity, not only of Schacht's chapter on the Qur'ān, but also of his overall discussion of these questions, is striking. The total evidence he adduces in addition to the "analysis" he deploys—in all cross-references—amounts to no more than six, perfunctory, pages.

It is obvious from every one of the dozen or so examples Schacht adduces in favor of his thesis¹² that his entire project about the Qur'ān is not only undigested but also entirely derivative of his larger thesis about the *ḥadīth*. In every single instance, the *ḥadīth* is the primary subject matter and the Qur'ān secondary, and in all cases but two, Schacht refers us in the chapter about the Qur'ān to other parts of his book for evidence. It does not seem to have occurred to him that none of the examples he introduces speaks to the issue of when the Qur'ān began to be regarded as a source of "Islamic law." All that Schacht can legitimately claim—provided we admit the evidential value of his examples—is that only in these cases does the Qur'ān prove itself to be a later imposition. But what about the 500 or so verses that provided rich hermeneutical sources for a large number of *fiqh* doctrines? Schacht does not allude to any such issues, since it is the *ḥadīth* that constitutes his real concern. And since, as we have seen, Schacht's evidence is

this assertion, Schacht offers nothing. He does not bother to explain, even in a skeletal fashion, what his evidence really means and how it was interpreted by him. Nor does he justify his silence in the face of evidence from the first decades of Islam, taking for granted what he aims to prove. Another example Schacht gives is the "problem of giving battle to unbelievers who shield themselves behind Muslim infants" (227), a problem presumably illustrating the incorporation of the Qur'ān at a later stage of legal development. Awzā'ī (d. 157/774), Schacht claims, "refers to Koran xlviii.25. But the passage is not at all relevant and is obviously an argument on second thoughts against the opposite opinion which clearly reflects the rough-and-ready practice" (ibid). Apart from its linguistic infelicity, this terse statement represents no more than an inflated title to an unwritten essay, for much more needs to be said as to how the Qur'ānic passage is "irrelevant" (a claim that cannot be sustained without recourse to various Qur'ānic commentaries, among many other sources). Equally important, Schacht does not say what the "second thoughts" and "opposite opinion" are. Nor is there any allowance for the possibility that someone before Awzā'ī may have cited this or other Qur'ānic material with regard to this case. As he does so often throughout *Origins*, Schacht relies on the *argumentum e silentio*, and here in particular on a highly presumptive form of it (see Ẓufar Ishāq Anṣārī, "The Early Development of Islamic Fiqh in Kūfa with Special Reference to the Works of Abū Yūsuf and Shaybānī" (McGill: Ph.D. dissertation, 1966), 235-43).

¹² See previous note.

unconvincing,¹³ his overall position on the Qurʾān cannot be taken seriously.

That Schacht does not bother to address the Qurʾān on its own terms (as he does with the *ḥadīth*) is not his only shortcoming. Another error is the manner in which he portrays the Qurʾān's content, reducing it—when he does acknowledge its “legal” significance—¹⁴ to substantive technical provisions for individual legal “problems.” Later on, I will examine this error in greater detail, which is certainly not Schacht's alone. Yet, Schacht's dry, technical and narrowly mechanical approach has characteristically, here as elsewhere, clouded his vision. His attitude is that of a contemporary historian who thinks he can study and understand the legal structures of a fifteenth-century Sumatran society by studying a provisional compilation of its *adat* made by a nineteenth-century Dutch Orientalist.¹⁵

If Schacht's thesis about the Qurʾān derives from his *ḥadīth* project, then the fate of his thesis is inextricably connected with that project. The validity of that thesis is vitally linked to success or failure of the *ḥadīth* project.

Harald Motzki, one of the most serious and respected *ḥadīth* scholars in the West, has taken Schacht's project further, using earlier and richer sources than those available to Schacht, and arriving at conclusions that soundly refute the latter's theses. He objects to Schacht's dating of the “beginnings of Islamic law,” extending these origins some seventy years earlier than Schacht had claimed.¹⁶ He argues that Schacht's position on the Qurʾān is untenable, and that throughout the first Islamic century “people consciously resorted to the Qurʾān” as a source of law.¹⁷

¹³ See n. 11, above.

¹⁴ In his *Introduction*, 19, Schacht declared: “During the greater part of the first century Islamic law, in the technical meaning of the term, did not as yet exist. As had been the case in the time of the Prophet, law as such fell outside the sphere of religion.” See sections III–V, below, for a refutation of this position.

¹⁵ On the Malay *adat* and the manner in which they were used by European colonialists, see Hallaq, *Shariʿa*, 384–86, 388–95; M.B. Hooker, *Adat Laws in Modern Malaya: Land Tenure, Traditional Government, and Religion* (Kuala Lumpur: Oxford University Press, 1972).

¹⁶ Motzki, *The Origins of Islamic Jurisprudence: Meccan Fiqh before the Classical Schools*, trans. Marion H. Katz (Leiden: Brill, 2002), 295–96.

¹⁷ *Ibid.*, 115–17, 295.

As important for us is Motzki's thoroughgoing demonstration that the *ḥadīth* went back to a much earlier period than Schacht thought, providing a *coup de grace* to the latter's *ḥadīth* project. The invalidation of Schacht's project entails the collapse of his thesis about the Qur'ān.

Although the Qur'ān remains a consciously tangential issue in Motzki's project, his early dating of its juristic relevance is important and represents a distinct advance over Schacht's work. Yet, although his otherwise promising thesis is *substantively* far less flawed than that of Schacht, the advance is only one of degree. For while his notion of what it means for the Qur'ān to be a source of law is the same as that of Schacht, his evidence of this role coming into historical play points to a markedly earlier time. Although he dates the jurisprudential relevance of the Qur'ān to a much earlier period (to around 20/640 or 30/650 instead of ca. 100/720), he still is unable to measure the "legislative" role of the Qur'ān in conceptual and morally-based terms. In other words, in these respects, Motzki continues to labor under the same assumptions as those adopted by Schacht.¹⁸

Unconcerned with the technical criticism of *ḥadīth*, and aiming to provide a general account of Shari'a's early formation, N.J. Coulson appears to posit the Qur'ān's relevance to the early Muslim community in the years immediately following the Prophet's death. In his view, customary and popular legal practices were gradually and constantly modified by Qur'ānic legislation during the first century.¹⁹ This position²⁰ is somewhat of an improvement over Motzki, and a marked advance over Schacht. Yet, Coulson remains unimpressed by the "quantity" of the "legal" content of the Qur'ān, sharply contrasting it with its ethical injunctions. Of the 500 or so verses which are "legislative" in nature,²¹ he claims, only about "eighty verses deal with legal topics in the strict sense of the term."²² The others are dismissed as concerned merely with "the religious duties and ritual practices of

¹⁸) See n. 14, above.

¹⁹) N.J. Coulson, *Introduction to Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 34.

²⁰) See n. 29, below.

²¹) These verses are enumerated and interpreted in Muqātil b. Sulaymān, *Kitāb Tafṣīr al-Khams Mā'at Āya min al-Qur'ān*, ed. I. Goldfeld (Shafā'amr: Al-Mashriq Press, 1980).

²²) Coulson, *Introduction*, 12.

prayer, fasting and pilgrimage.”²³ Although the legal verses cover a great many details, they are “*ad hoc* solutions for particular problems rather than attempts to deal with any general topic comprehensively.”²⁴ Note here not only Coulson’s disappointment but, as importantly, his expectations. He regards the Qur’ān as a code of law, and as such it disappoints in its massive lacunae and “*ad hoc*” treatment whenever law, “in the strict sense of the term,” is introduced. The problem is aggravated by the fact that most of the Qur’ānic “ethical” pronouncements are not backed up by actual, i.e., earthly, enforcement. Only when they do does Coulson accept them as possessing truly “legal implications.”²⁵ And so law is truly law when it neatly fits into an Austinian concept of command and coercive enforcement, whether explicit or implicit.²⁶ If these pronouncements do not fit thus, then they are vacuous ethical judgments carrying no more force than a pious exhortation. Even Hell is seen as a nominal entity, marginal when compared to the state. This is evidenced in Coulson’s attitude to the concept of usury which, he writes, “had been simply prohibited [in the Qur’ān]. But it is hardly too cynical to suggest that the potential lender or borrower might be at least as interested in the effect of his dealings on his pocket or his person as he would be in the prospect of eternal damnation.”²⁷ Coulson is more Austinian than Austin, for Austin himself no doubt would have recognized the force of transcendentalism and eschatology, at least in another culture and time. Not Coulson, who appears to have been unaware that modernity produced a new brand of cynicism, especially where purely moral values are concerned. However, this is another issue, the implications of which will be taken up, along other related matters, later in this paper.²⁸

²³) Ibid.

²⁴) Ibid, 13.

²⁵) Ibid, 17–18.

²⁶) John Austin’s concept of law as command is discussed in the fifth and sixth lectures of his *The Province of Jurisprudence Determined*, ed. Wilfred E. Rumble (Cambridge: Cambridge University Press, 1995), especially 117 ff. See also section II, below.

²⁷) Coulson, *Introduction*, 17.

²⁸) See section II, below.

S.D. Goitein generally agrees with Coulson's position²⁹ but apparently seeks to determine with more precision the point at which the Qur'ān "turned legal."³⁰ Obviously, Goitein must have had in mind a sharp distinction between that which is legal and that which is not. He looks in the Qur'ān for evidence indicating the emergence of Islamic *legal* concepts, in clear contradistinction with pervasive moral imperatives which he sets aside. The specifically legal dimension of the Qur'ān, he argues, emerged around the year 5/626-27, when a substantial portion of Sūrah 5, especially vv. 42-51, were revealed. In verse 48, God says: "We have revealed unto you the Book with the Truth, confirming whatever Scripture was before it ... so judge between them by that which God had revealed, and do not follow their desires away from the Truth ... *for we have made for each of you* [i.e., Muslims, Christians and Jews] *a law and a normative way to follow*. If God had willed, He would have made all of you one community" (italics mine).

I have always found Goitein's argument compelling,³¹ and its validity has not entirely diminished even now. Textually, the Qur'ān here exhibits a moment of self-awareness, but the verse does not proffer evidence that such awareness signals "law's" genesis. As we shall see, even on the basis of Goitein's narrow type of textual evidence, the dating must be brought back to the middle *Meccan* period, if not earlier.³²

²⁹ I.e., with the position *qua* position, since Goitein published his article a few years before Coulson's *Introduction* came out.

³⁰ In his "The Birth-Hour of Muslim Law? An Essay in Exegesis," *Muslim World*, 50, 1 (1960): 23-29, at 25, Goitein observes that "one has to concede that many Medinan Surahs ... contain little or no legal material." He then asks the question (p. 26): "Why, then, were so few of these legal decisions incorporated in the many Surahs of the early Medinan period? To my mind, the answer to this question can only be that it occurred to Muḥammad only at a relatively late period that even strictly legal matters were not religiously irrelevant, but were part and parcel of the divine revelation and were included in the heavenly book, which was the source of all religions."

³¹ Hallaq, *History*, 4-5; idem, *Origins*, 20-21.

³² See below, section V, when we discuss Qur'ān 42.8-13, 21, and 45.16-18. It is worth noting that my own appreciation of stylistic, thematic and other structures in the Qur'ān compels me to prefer a chronology of the text more akin to that advanced by Theodor Nöldeke (see n. 172, below) and his followers. On these Qur'ān scholars, see Gerhard Böwering's useful account in *Encyclopaedia of the Qur'ān*, ed. Jane D. McAuliffe, 5 vols. (Brill: Leiden, 2001-2006), I, 315-35, esp. at 322-31. Furthermore, in the context of this article, two further arguments may be advanced against the critics of this chronology: (1)

Thus, a major problem with Goitein's argument is that it rests on assumptions that have led to half truths, so to speak; and a half truth is as good as a lie, for this is how many larger and more successful lies are built. But one must be fair: neither I nor Goitein (nor for that matter Schacht, Motzki or Coulson) has deliberately lied. We have lied—however big or small our lies may have been—because we did not know any better; for, as Nietzsche averred, it is normal as well as a “duty to lie according to a fixed convention.”³³ But the convention has to change—and with it our lie—because we now have better reasons to make that change.

Our lie will hold up as a truth only if we posit a distinction between law and morality, whatever these two concepts mean (for now). However, we have no reason to persist in the espousal of this distinction, for, as I will show, it has led us to gross misunderstandings. It would be an error of the first order to judge the Other, any Other, by standards that are inappropriate and effectively exterior and foreign to it. To understand the Other (unlike understanding the Self)³⁴ means to

A denial of Nöldeke's chronology, or anything close to it, amounts to rejecting events and sequential narratives that would make nonsense of Qur'ānic conceptual structures, for these latter are generally grounded in these narratives and often depend on their sequence; and, more importantly, (2) my argument here does not, at the end of the day, require precise chronology, even though I make reference to an early, middle and late Meccan or Medinan periods. It is one of the conclusions of this article that the Qur'ānic message is *morally* structured, as opposed to being structured in political, economic or other forms; which is to say that its individual verses and passages, no matter when they were revealed, are invariably subsets of an over-arching moral message. In other words, to argue that the evidence presented in this article belongs to the later, not the earlier, phases in the Qur'ānic revelation amounts to making the claim that there was a qualitative shift in the moral outlook of the Qur'ānic message, this outlook having appeared out of nowhere, so to speak. I find such a position untenable.

³³ F. Nietzsche, “On Truth and Lies in a Nonmoral Sense,” in Daniel Breazeale, ed. and trans., *Philosophy and Truth: Selections from Nietzsche's Notebooks of the Early 1870's* (New Jersey: Humanities Press, 1979), 80–86, at 81, 83.

³⁴ I take the position that the “critical distance” required—and that is indeed indispensable—for the study of the Self is one that is tautological in the case of studying the Other, because the very essence of the Other and the relationships it ontologically creates *qua* Other entail, both *ipso facto* and *a fortiori*, the “critical distance” required. The challenge in the successful study of the Other stands therefore diametrically opposed to that which poses itself in the case of studying the Self.

sympathize with it,³⁵ to try to enter its soul and spirit, to identify with its worldview and cosmology.

In studying the role of the Qur'ān in so-called Islamic law, we have imposed—among much else—our distinctly and distinctively modern notions and standards of law and morality, separating the inseparable and joining together that which cannot or never could be joined. Our scholarship has been tainted by conceptual categories, distinctions and binarisms³⁶ that originated in modern Europe, mainly from the time of Kant, if not that of Hobbes. We have, unconsciously, taken these categories and applied them to other nations and communities, to other histories and anthropologies. Our struggle now is to free ourselves of our controlling and hegemonic ideas whose vehicle is our language, our conceptual slave-driver.³⁷

Thus, to understand when and how the Qur'ān played a role in fashioning an Islamic legal ethic, we must begin by shedding our own modern biases, especially about distinctions between, and conceptual categories of, law and morality. To evaluate the “legal” function of the Qur'ān in first/seventh century Islam (i.e., the “legal” that encompasses the moral and vice versa), it is essential that we should understand what the moderns—Kant, Austin and others—have represented, and how their representations (not, ironically, those of the Shari'a, Qur'ān or Islam) have mirrored, and exercised, the greatest influence upon our thinking. Without understanding such influential figures, and what

³⁵ For an excellent account of sympathy, see Max Scheler, *The Nature of Sympathy*, trans. Peter Heath (London: Routledge and Kegan Paul, 1954), 51-66 and passim. See also David E. Cartwright, “Schopenhauer's Narrower Sense of Morality,” in Christopher Janaway, ed., *The Cambridge Companion to Schopenhauer* (Cambridge: Cambridge University Press, 1999), 252-92, at 268-85.

³⁶ The critique of binarisms imbuing Western thought has perhaps been most efficiently advanced in feminist studies. See, e.g., Nancy Jay, “Dichotomies,” *Feminist Studies*, 1, 7 (1981): 38-56; also the two entries by Lorraine Code, “Binaries/Bipolarity” and “Dichotomies” in *Encyclopedia of Feminist Theories*, ed. L. Code (London: Routledge, 2000), 44, 135.

³⁷ This characterization, I venture to say, would receive the enthusiastic support of Wittgenstein. For a general but good survey of the latter's ideas on language as a philosophical problem, especially as expounded in his *Tractatus*, see A.C. Grayling, *Wittgenstein: A Very Short Introduction* (Oxford: Oxford University press, 1996), 16-65. For his philosophical insights in the context of the fact/value split, see Iris Murdoch, *Metaphysics as a Guide to Morals* (London: Random House, 1992), 25-57.

their writings imply (and have implied for two or three centuries) about modern state and society, we have no hope of understanding our own biases about the Qur'ān or any aspect of the Sharī'a. We can begin to make some headway only when we have recognized these eccentricities and biases, a recognition that potentially can free our minds of the tyranny of modernity's trenchant and, intellectually speaking, pernicious assumptions.

II. The Split in Western Moral and Legal Philosophy

I begin by noting the deceptively simple, yet colossal and ubiquitous, phenomenon of the modern state and the multifarious institutions to which it gave rise, a phenomenon so much taken for granted in our lives that little analytical note has been made of it, especially in this field of ours.³⁸

This is unsurprising, as the state has posed and continues to pose for the social sciences a challenge not only to scholarship and analytical acumen as much, but to the very analytical tools employed in its study (tools that are themselves contaminated by the very ideology of the state).³⁹ For once we take for granted, as we have often done, one or more of those pervasive assumptions created and entrenched in our culture by the state, our scholarship can hardly be sufficiently critical of the state and its culture as the purported subjects of our enquiry. Indeed, in one sense, a sort of *petitio principii* is involved here as well, for this exercise amounts to taking for granted what one aims to prove.

³⁸) Marxist interpreters and analysts have for long been active on this front, but mainstream scholarship in political science has largely been complicit in the acceptance of the state as a matter of course. See the rest of the current paragraph. On the other hand, in Islamic legal studies, a primary example of indistinct methodological approaches to the state is Knut Vikør's *Between God and the Sultan: A History of Islamic Law* (Oxford: University Press, 2005). For an introductory theorizing of the state in the context of Sharī'a and its history, see Hallaq, *Sharī'a*, 357-70, 459 ff.

³⁹) Philip Abrams, "Notes on the Difficulty of Studying the State," *Journal of Historical Sociology*, 1, 1 (1988): 58-89; Pierre Bourdieu, "Rethinking the State: Genesis and Structure of the Bureaucratic Field," in George Steinmetz, ed., *State/Culture: State Formation after the Cultural Turn* (Ithaca: Cornell University Press, 1999), 53-75; Timothy Mitchell, "Limits of the State: Beyond Statist Approaches and their Critics," *American Political Science Review*, 85, 1 (1991): 77-96; Yael Navaro-Yashin, *Faces of the State: Secularism and Public Life in Turkey* (New Jersey: Princeton University Press, 2002), 117-87.

Be that as it may, the modern state has distinguished itself, among several fundamental and constitutive features, by its monopoly over law-making and violence, as well as over the culture of legal education, which accounts in part for why legal scholarship has been thus contaminated. The state, and therefore modern law with it, have imposed themselves on the social order like never before,⁴⁰ fashioning this order in its *epistemological* image and making and remaking it as an integral part of an overarching project of social engineering.⁴¹

By the beginning of the nineteenth century, when John Austin was writing his famous lectures on jurisprudence,⁴² the state had become such a dominating legal reality that any respectable consideration of jurisprudence had to take serious account of the state's imposing legal project. In fact, this accounting of the state's role was also noticeable in Hobbes⁴³ who had already argued that the only source of the law is the will of the sovereign. Law can achieve validity only by virtue of a government that has the power to command and to declare the law to be valid. If English judges make law, Hobbes asserted, it is by virtue of the fact that their legal findings and discoveries unravel the sovereign's will to power.⁴⁴ Furthermore, and as added background to the later rise of analytical positivism—generally regarded as having been founded by Austin himself—Hobbes held the standards of ethical judgment to turn on man himself, not on a cosmic order or a divine plan. Moral rules are discovered by human reason, dictated by considerations of the well-being of the social order, of the importance of preserving life, and of curbing violence by one man against another.⁴⁵ To say that Hobbes'

⁴⁰ See generally on this theme, Marc Galanter, "The Modernization of Law," in Myron Weiner, ed., *Modernization: The Dynamics of Growth* (New York: Basic Books, 1966), 153-65.

⁴¹ On the state's project of social engineering in the Muslim world, see Hallaq, *Shari'a*, 357-70, 443-73, and sources cited therein. For a simplified version, see idem, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009), ch. 8.

⁴² Austin, *Province of Jurisprudence Determined*.

⁴³ On the relevance of Hobbes to the nineteenth century and his epistemic anticipation of it, see Hannah Arendt, *The Origins of Totalitarianism* (San Diego: Harcourt, 1976), 139-57, esp. at 146, 156. See also n. 45, below.

⁴⁴ Carl J. Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago: University of Chicago Press, 1963), 84, 89-90.

⁴⁵ On this theme in the context of ethics, see Alasdair MacIntyre, *A Short History of Ethics* (London: Routledge, 1998), 127-35. For a brilliant analysis of the relationship between

theory—i.e., that morality and ethics must rest on objective laws discovered by human reason, not on tradition or scriptural authority—ushered in a new, modern conception of the relationship between law and morality is to state what is now taken for granted in Western philosophical circles.

Transcending Hobbes—and even Hume and Bentham⁴⁶—Austin brought the sovereign's law to the forefront of the debate over law and morality. He took strong exception, for instance, to Sir William Blackstone's thesis that no human law can be deemed valid if it should conflict with divine or natural law. "The existence of law," Austin declared, "is one thing; its merit or demerit is another. Whatever it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law."⁴⁷ In one of the most revealing passages for Shari'a specialists, Austin writes that in his assertion Blackstone may have meant

... that all human laws ought to conform to the Divine law. If this be his meaning, I assent to it without hesitation [because] the obligations they impose are consequently paramount to those imposed by any other laws, and if human commands conflict with the Divine law, we ought to disobey the command which is enforced by the less powerful sanction; this is implied in the term *ought*; *the proposition is identical, and therefore perfectly indisputable*—it is our interest to choose the smaller and more uncertain evil, in preference to the greater and surer. If this be Blackstone's meaning, I assent to his *proposition*, and have only to object to it, that *it tells us just nothing*.⁴⁸

What Blackstone must have meant, Austin writes, is that no human law that contradicts Divine law *is* law. And if this be Blackstone's

and among violence, (im)morality and the sovereign's power in Hobbes's thought, see Arendt, *Origins*, 139–47. On p. 144, Arendt perceptively remarks that: "Hobbes's deep distrust of the whole Western tradition of political thought will not surprise us if we remember that he wanted nothing more nor less than the justification of Tyranny which, though it has occurred many times in Western history, has never been honored with a philosophical foundation."

⁴⁶ On the latter two, see Friedrich, *Philosophy of Law*, 93–100. See also Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (New York: Dover, 2007), 4, 309–30,

⁴⁷ Austin, *Province of Jurisprudence Determined*, 157.

⁴⁸ Ibid, 158; italics after "*ought*" are mine.

meaning, then, Austin announces, it is nothing but “stark nonsense.” The most pernicious laws standing in opposition to the Divine law “have been and are continually enforced as laws by judicial tribunals.”⁴⁹

Austin’s sharp conceptual separation between law and morality reflects the most fundamental tenet of legal positivists—such as the influential J.C. Gray, Justice Holmes and others—who take it that law, irrespective of how immoral it may be, remains the valid law of a commanding sovereign.⁵⁰ The essential epistemological character of legal positivism is then the denial of a logical entailment or of any necessary connection between law as it *is* and law as it *ought* to be.⁵¹

This important distinction between the *is* and the *ought*, between the ontological and the deontological, is by no means uniquely Austinian. It has indeed permeated, in the most complex of ways, the fiber of modern moral philosophy. As Charles Taylor has cogently argued, “the fact/value split” has become “a dominant theme in our [twentieth] century” and has undergirded “a new understanding and valuation of freedom and dignity.”⁵² Representing a cornerstone of the Enlightenment project, and expressed powerfully by the Kantian notion of autonomy,⁵³ freedom ceases to denote God’s omnipotence and capacity of absolute choice, and becomes instead an expression of man’s own natural powers of reasoning. Human reason, in the here and now, becomes the sole arbiter in the project of objectifying the world, of submitting it to its own demands, which are instrumentalist in the first order. The pursuit of happiness, utility and much else that is subservient to these imperatives—such as preservation of life and protection of

⁴⁹ Ibid.

⁵⁰ Nicholas Unwin, “Morality, Law, and the Evaluation of Values,” *Mind*, 94, 376 (Oct. 1985): 538-49, at 538; Anton Donoso, “Jurisprudence Today: Naturalism vs. Positivism,” in Harold J. Spaeth, ed., *The Predicament of Modern Politics* (Detroit: University of Detroit Press, 1969), 55-79, at 57. See also Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: The Belknap Press, 1986), 6-11.

⁵¹ See W. Rumble’s introduction to Austin’s *Province of Jurisprudence Determined*, xviii.

⁵² Charles Taylor, “Justice After Virtue,” in John Horton and Susan Mendus, eds., *After MacIntyre: Critical Perspectives on the Work of Alasdair MacIntyre* (Cambridge: Polity Press, 1994), 16-43, at 18. See also Murdoch, *Metaphysics as a Guide to Morals*, 25-57, especially at 40.

⁵³ See Kant’s manifesto, “An Answer to the Question: What is Enlightenment?” in Mary J. Gregor, ed., *Immanuel Kant* (Cambridge: Cambridge University Press, 1996), 17-22.

private property—become natural rights derivable from the natural order by what is/was seen as far-sighted, calculating reason. Earlier restricted by the power of revelation, reason now becomes free, expanding to overtake the authority of all scriptural competitors.

The most central theme here is that the sources of reason—and thus of obligation, duty and such notions as the Kantian Categorical Imperative⁵⁴—now reside within the self, an inner human power,⁵⁵ not an intellectual emanation of a cosmic order (be it Aristotelian, Platonic or otherwise) or an anthropological, Protagorean reality;⁵⁶ whence freedom, which, much like reason, breached its relations with an external world to become part of the self, originating and operating entirely within its confines. Human dignity now also attaches to the notion of sovereign reason, for dignity can be attained only by the realization of this sovereignty in the regulation of human affairs. This, I think, is where the appeal of Kant's Categorical Imperative lies, an appeal that has absurdly persisted in Western philosophy overall, despite the fact that this philosophical tradition at the same time effectively debunked Kant's arguments, showing them to be at best vacuous and at worst groundless.⁵⁷

⁵⁴ I. Kant, *The Moral Law: Groundwork of the Metaphysic of Morals*, trans. H.J. Paton (London: Routledge, 2005), 14–15 (translator's epitome), 63–78 and passim. For an excellent overview of Kant's Categorical Imperative, see J.B. Schneewind, "Autonomy, Obligation, and Virtue: An Overview of Kant's Moral Philosophy," in Paul Guyer, ed., *The Cambridge Companion to Kant* (Cambridge: Cambridge University Press, 1992), 309–33.

⁵⁵ Arendt, *Origins*, 290 f.

⁵⁶ On Protagoras, see G.B. Kerferd, *The Sophistic Movement* (Cambridge: Cambridge University Press, 1999), 84–93, 139–48; Richard Taylor, *Good and Evil* (Amherst, N.Y.: Prometheus Books, 2000), 56–67; Richard Norman, *The Moral Philosophers: An Introduction to Ethics* (New York: Oxford University Press, 1998), 7–8; J. Margolis, *The Truth about Relativism* (Oxford: Blackwell, 1991). See also the concluding paragraph of this article.

⁵⁷ For criticism of Kant's Categorical Imperative, see Schneewind, "Autonomy, Obligation, and Virtue," 314–25; G.C. Field, "A Criticism of Kant," in W. Sellars and J. Hospers, eds., *Readings in Ethical Theory* (New York: Appleton, Century, Crofts, 1952), 487–91; Cartwright, "Schopenhauer's Narrower Sense of Morality," 254–63; Tara Smith, *Viable Values* (Lanham: Rowan and Littlefield Publishers, 2000), 38 ff.; Henry E. Allison, "Kant," *Oxford Companion to Philosophy*, ed. Ted Honderich (Oxford: Oxford University Press, 1995), 437. For a pro-Kantian approach, see Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1978).

The *is/ought* dichotomy is therefore representative of the conflict between the instrumentalist manifestations of reason and, to a great extent, the remnants of the Christian legacy of morality and virtue. This is precisely why, in an influential article, G.E.M. Anscombe made (and rightly so) the grave charge against Kant's notion of duty, that it is a Christian intrusion, a leftover from religious Europe that was surreptitiously allowed to wear an Enlightenment garb of reason within his notion of the Categorical Imperative.⁵⁸ The *is/ought* distinction, as Nietzsche had recognized,⁵⁹ is the outcome of particular historical circumstances, of a certain philosophical development that has given new meanings to the notions of dignity, freedom and reason.⁶⁰ This is also why Charles Taylor asserted, along with Alasdair MacIntyre, that "the modern meta-ethics of fact/value dichotomy does not stand as a timeless truth, at last discovered" in the way we have come to discover the "circulation of blood. It makes sense only within certain ethical outlooks."⁶¹ But the fact is that it was—like much else in modernity—made to be a sort of timeless and, moreover, universal truth designed to "outrageously fix the rules of discourse in the interests of one outlook, forcing rival views into incoherence."⁶² The outrageousness of this state of affairs stems not only from the biases involved and the tyrannical suppression of competing philosophical narratives, but also from the distinct likelihood of its being entirely false. Both Taylor and MacIntyre have advocated the contingent, contextual nature of the split, and argued that no moral reasoning can "do without modes of thinking which the split rules out."⁶³ Moreover, in some juristic circles it is now

⁵⁸ G.E.M. Anscombe, "Modern Moral Philosophy," *Philosophy*, vol. 33, no. 124 (1958): 1-19, at 1-2, 5; see also Alasdair MacIntyre, *After Virtue*, 3rd ed. (Notre Dame, Indiana: University of Notre dame Press, 2007), 55.

⁵⁹ Raymond Geuss, *Morality, Culture, and History* (Cambridge: Cambridge University Press, 1999), 170.

⁶⁰ Paul Guyer rightly argues that Kant's concept of freedom was most central, underlying his notions of reason and morality, and in effect overshadowing them. See his *Kant on Freedom, Law, and Happiness* (Cambridge: Cambridge University Press, 2000), 5, 8, 39-42, 51-59, 129-38.

⁶¹ Taylor, "Justice After Virtue," 20; MacIntyre, *After Virtue*, 56-61, 79-87; idem, *Short History of Ethics*, 130-31, 166-71, 189-91.

⁶² Taylor, "Justice After Virtue," 20.

⁶³ Ibid, 20-21.

recognized that the absolute distinction between the *is* and the *ought*—the result of Cartesian dualism⁶⁴—has generated and aggravated the crises in American and European legal theory.⁶⁵

If the split between facts and values was initially occasioned by Descartes, philosophically problematised by Hume,⁶⁶ and translated into legal positivism by Austin, it was Nietzsche who raised the bar by effectively denying the validity of the split altogether, a denial not effected by harmonizing the two or at the expense of the fact-side of the equation; rather, the denial was made by sacrificing value (the *ought* and the deontological) which appears in his doctrine to be deprived of all value. Nietzsche's concept of truth as it relates to his doctrine of the will-to-power makes the *ought* entirely vacuous and illusory.⁶⁷ As Raymond Geuss argued, Nietzsche thought it impossible to have a hold on “what ‘ought’ could conceivably mean at all,” on “what non-illusory sense it might have for anyone to think that something ‘ought’ to be the case which in fact is not.... [T]he world is just what it is, a huge, historically and spatially extended brute fact.”⁶⁸

Nietzsche, in other words, has taken Descartes' dualism to its most extreme conclusion. In many ways, Nietzsche turned European Christian morality of the Thomist type right on its head: the organic connection between the *ought* and the *is* in Christendom was bifurcated in Descartes and Kant, and obliterated altogether by Nietzsche. True, Austinian legal positivism did not go so far as Nietzsche's scheme, but it certainly allocated no place for the moral in the law (a position

⁶⁴ For a critique of this binarism, among others, see sources listed in n. 36, above.

⁶⁵ Donoso, “Jurisprudence Today,” 55, 66.

⁶⁶ See, for instance, his discussion in the *Treatise of Human Nature*, in T.V. Smith and M. Greene, eds., *Berkeley, Hume, and Kant* (Chicago: University of Chicago Press, 1957), 247f.

⁶⁷ Friedrich Nietzsche, *The Will to Power*, trans. W. Kaufmann and R.J. Hollingdale (New York: Vintage Books, 1967), 326: “The deeper one looks, the more our valuations disappear We have *created* the world that possesses values! Knowing this, we know, too, that reverence for truth is already the consequence of an illusion—and that one should value more than truth the force that forms, simplifies, shapes, invents. ‘Everything is false! Everything is permitted’”; also see idem, *Twilight of the Idols*, trans. R.J. Hollingdale (New York: Penguin Classics, 1977), 46.

⁶⁸ Geuss, *Morality, Culture and History*, 189.

slightly modified later by H.L. A. Hart's critics, who advocated what they called the "internal" moralistic interventions in the law).⁶⁹

The point I wish to make here is that the split, which meant treating morality as an intruder on the otherwise *determined province* of jurisprudence (the very language in Austin's title), was not only the result of particular philosophical and historical developments within Europe between the sixteenth and nineteenth centuries, but also constitutive—and, moreover, representative—of the very culture that produced this philosophical discourse. Islamic legal studies in Europe's academies came into being when this development within European society, law and philosophy reached full maturity, when the split became unquestionable, culturally embedded, and taken for granted as a truth—and a universal truth nonetheless. The universalization of the conception of the split renders those legal systems that do not recognize it as exceptions to the rule, as aberrances and curiosities that "fail" to distinguish concepts and to break them down analytically. This distinction is the hallmark of modern systems, of modern epistemology and the modern self. Thus, any system or discursive practice that does not conform to such typological categories becomes *ipso facto* retrograde, un-modern and downright primitive. Islamic law thus becomes, like much of Islam as a whole, a conglomerate of absences and bland non-distinctions, such that one may confidently declare that Islamic law "does not possess a theory of contract," that it "does not separate between substantive and procedural law," that it "does not distinguish between the moral and the legal," and so on.

III. Qur'ānic Metaphysics of the Moral Law

In pre-modern Islamic discourse and practice, including that of the Qur'ān, the legal and the moral were not recognized as dichotomous

⁶⁹ For Hart, see his *The Concept of Law*, 2nd edition (Oxford: Clarendon Press, 1994). For the exchange between Hart and Lon Fuller, see H.A. Olafson, ed., *Society, Law, and Morality* (Englewood Cliffs: Prentice-Hall, 1961), 439-70 (for Hart), and 471-506 (for Fuller). See also Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964). For a general introduction to the debate, see Raymond Wacks, *Law: A Very Short Introduction* (Oxford: Oxford University Press, 2008), 67-74.

categories. Hence, to appreciate the “legal” role that the Qur’ān came to play from the first moment that the Prophet began to receive it, we must rid ourselves of the notion of boundaries and lines of separation between what is legal and what is moral. *The boundaries did not exist in any of the ways we have come to draw them in this modern world of ours.*

Nor did such a distinction exist in pre-Enlightenment Europe. The conceptual and linguistic transformation that occurred within the Enlightenment was to be more or less replicated about a century or two later in *modernized* Islam. The leading moral philosopher Alasdair MacIntyre has aptly observed that in Latin, the *lingua franca* of pre-Enlightenment Europe, as well as in ancient Greek, “there is *no* word correctly translated by our word ‘moral’; or rather there is no such word until our word ‘moral’ is translated back into Latin,” i.e., *moralis*.⁷⁰ The same is true of pre-nineteenth century Arabic—also the *lingua franca* of Shari‘a and Islam—and, insofar as I know, of all other major pre-modern Islamic languages: the word “moral” has no precise equivalent and bears none of the major connotations we now associate with the term in moral and legal philosophy. Nowadays, many insist that the term “*akhlāq*” (as used by Ibn Miskawayh⁷¹ and his ilk and also in semi-juristic works)⁷² is equivalent to our modern term “moral.” On both historical and philosophical-linguistic (mainly Wittgensteinian) grounds,⁷³ however, this claim may easily be falsified. As MacIntyre has observed with regard to the post-Enlightenment context, the same process of projecting the present onto the past, and of retrieving a modernized past into the present, took place in Islam as well. The “moral” was brought to bear upon the linguistic (not conceptual)

⁷⁰ MacIntyre, *After Virtue*, 38.

⁷¹ See n. 74, below.

⁷² Which I label, for lack of a better expression, the “*Makārim al-Akhlāq*” genre. See, for example, Raḍī al-Dīn b. Ḥasan al-Ṭabarsī, *Makārim al-Akhlāq* (Beirut: Mu‘assasat al-Kharasān [al-Khursān?] lil-Maṭbū‘at, 1427/2006); ‘Abd Allāh Ibn Abī al-Dunyā, *Makārim al-Akhlāq*, ed. Bashīr ‘Uyūn (Damascus: Maktabat Dār al-Bayān, 1423/2002); ‘Abd al-Ḥayy al-Ḥasanī, *Tahdhīb al-Akhlāq*, ed. Sayyid al-Ghawrī (Damascus: Maktabat al-Fārābī, 1423/2002). See also n. 74, below.

⁷³ See, by way of background, David Bloor, “The Question of Linguistic Idealism Revisited,” in H. Sluga and D.G. Stern, *The Cambridge Companion to Wittgenstein* (Cambridge: Cambridge University Press, 1996), 354–82.

repertoire of medieval Islam, retrieving from it “*akhlāq*” as an equivalent, if not as a synonym.⁷⁴

If the term “moral” as we understand it in modernity did not exist in pre-modern Islam, then the distinction between the “moral” and the “legal” could not have existed, either in the Sharī‘a at large⁷⁵ or in the Qur’ān in particular. One can argue even further, as I have done elsewhere,⁷⁶ that the very term “law” is ideologically charged with Foucauldian notions of surveillance, inconspicuous punishment, hegemony and subordination of the docile subject, all of which mechanisms of control (at the very least) make our modern notion of law, and therefore of morality, quite different from any earlier legal system, and therefore from earlier notions of “law”—those of pre-sixteenth-century Europe included. What is “legal” in the Qur’ān is also equally “moral,”

⁷⁴) Lexically, the pre-modern concept “*akhlāq*” was associated with innate qualities having to do more with *ṭab’* (nature, but not second-nature) and *sajjiyya* (disposition, character) than with ethics and morality, especially as these latter two have come to acquire modern meanings. See Jamāl al-Dīn Muḥammad Ibn Manẓūr, *Lisān al-‘Arab*, 16 vols. (Beirut: Dār ‘ādir, 1972), X, 86-87. In the pre-modern Islamic conception, *akhlāq* was susceptible to acculturation and refinement, as the treatises listed in n. 72, above, and the following works abundantly attest: On the role of Sharī‘a in fashioning the moral subject, see Aḥmad b. Muḥammad Ibn Miskawayh, *Tahdhīb al-Akhlāq wa-Taṭhīr al-‘Arāq* (Cairo: al-Maṭba‘a al-Miṣriyya, 1978), 41-46, 126-28, 143-45 and passim; Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī, *Iḥyā’ ‘Ulūm al-Dīn*, 5 vols. (Aleppo: Dār al-Wa‘y, 1425/2004); Wael B. Hallaq, “Fashioning the Moral Subject: Sharī‘a’s Technologies of the Self” (Unpublished ms.).

The processes by which *akhlāq* are cultivated and refined revolve precisely around the absence of distinction between law and morality, injecting in them a heavy “legal” (not to mention theological) ingredient that the modern notions of morality lack. For an illustration of the contrast—both substantive and semantic—between pre-modern and modern concepts of *akhlāq*, compare Ḥasanī’s (d. 1341/1922) *Tahdhīb al-Akhlāq* with the work of the distinguished contemporary Muslim moral philosopher Ṭāha ‘Abd al-Raḥmān, *Rūḥ al-Ḥadātha: al-Madkhal ilā Ta’īs al-Ḥadātha al-Islāmiyya* (Casablanca: al-Markaz al-Thaqāfi al-Maghribi, 2006), and, in particular, the same author’s *Su’al al-Akhlāq: Musāhama fi al-Naqd al-Akhlāq lil-Ḥadātha al-Gharbiyya* (Casablanca: al-Markaz al-Thaqāfi al-Maghribi, 2000).

⁷⁵) In his *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999), Baber Johansen admirably struggles with what he sees as the “legal/ethical” dichotomy in the *fiqh* but, insofar as I can tell, he is never concerned with either the Qur’ān or the Sharī‘a during the first few decades of Islam.

⁷⁶) Hallaq, *Sharī‘a*, 1-3.

and vice versa. In fact, we might even reverse the modern bias and argue (conceding for the moment to modern vocabulary)⁷⁷ that the legal was an organically derivative category of the moral, the latter being the archetype. Accordingly, to understand the legal role and jural contributions of the Qurʾān to the formation of early Shariʿa, we must understand and appreciate its “moral” message and structure as integral to, and as enveloping, its “legal” conception and discursive practice.

I contend that the Qurʾān has, *ab initio*, provided Muslim believers with a cosmology entirely grounded in *moral* natural laws, a cosmology⁷⁸ with perhaps far more persuasive power than any of its Enlightenment metaphysical counterparts, and one that had powerful and deep psychological effects. Indeed, Qurʾānic morality and moral cosmology came to compete with the already powerful moral and religious system of the tribal Arabs,⁷⁹ and therefore had to proffer a trenchantly persuasive and superior system. The Qurʾānic moral arsenal was thus embedded in a holistic system of belief, in a cosmology that comprised a metaphysic. In fact, it may be argued that this cosmology was itself part of an enveloping moral system that transcended the categories of theology, theosophy, and metaphysics. In this broadest sense of cosmology, we might argue that the Qurʾān offers no less than a theory of *moral*

⁷⁷) The problem, however, is insoluble, as I have argued, on the basis of Nietzsche, in “What is Shariʿa?” in *Yearbook of Islamic and Middle Eastern Law*, 2005–06, XII (Leiden: Brill, 2007): 151–80, at 151 f. The nature of this problem should therefore explain why I continue to use such terms as “law” and “morality” since, as Nietzsche convincingly argued, they have become “legislated.” See Nietzsche, “On Truth and Lies in a Nonmoral Sense.”

⁷⁸) Note here that I take a different approach to Qurʾānic cosmology than that adopted by Angelika Neuwirth in her otherwise commendable entry in the *Encyclopaedia of the Qurʾān*, ed. Jane D. McAuliffe, 5 vols. (Brill: Leiden, 2001–2006), I, 440–57.

⁷⁹) T. Izutsu, *Ethico-Religious Concepts in the Qurʾān* (Montreal: McGill University Press, 1966), 251–52: “[M]any of the key concepts relating to the basic relations between God and man were just a subtly transformed continuation of the pre-Islamic, genuinely Arab conception We would be seriously mistaken ... if we imagined ... that [the pre-Islamic Arabs] were devoid of high moral values. On the contrary, their life was in reality regulated by the rigorous moral code of *murūʿah*, consisting of a number of important concepts such as ‘courage’, ‘patience’, ‘generosity’, and ‘imperturbable mind’. These moral concepts would be recognized in any age and by any people The[se] old values, thus radically transformed and entirely cut off from the traditional tribal mode of life, were reborn as new ethico-religious values and came to form an integral part of the Islamic system.”

cosmology of the first order, which is to say that Qur'ānic cosmology is not only profoundly moral but also constructed, both in form and content, out of a moral fiber. Everything that this universe contains was created for humans to enjoy, not in a utilitarian manner, but rather in ways that show *deep*⁸⁰ moral accountability, translating into an acknowledgement that what we do we do for ourselves—certainly as individuals, but *more importantly* as members of a social group. Actions, therefore, have universal consequences despite our, and their own, ephemeral existence.

The Qur'ānic narrative of creation is single-mindedly geared toward laying down the foundations of moral cosmology. The heavens and the earth were brought into being according to the divine principle of Truth and Justice (*ḥaqq*), Sūrah 39.5 announces. Here, a strong conceptual connection is forged with the profoundly significant declaration, made in the same Sūrah two verses earlier, that the Qur'ān itself was likewise revealed on account of the same principle of *ḥaqq* (39.2: “*innā anzalnā ilayka al-kitāba bil-ḥaqq*,” promptly followed by 39.4-5: “*huwa Allāh al-Wāḥid al-Qaḥḥār, khalāqa al-samāwāti wal-arḍa bil-ḥaqq*”). The message of the Qur'ān, destined to a human society, is therefore an extension, if not an integral part, of the entire project of creation, sanctioned, moreover, by the same rules and principles.

Yet, God's creativity is not only about bringing into existence the colossal and magnificent universe *ex nihilo*, but more often, and ultimately, about His secondary laws of generation and corruption.⁸¹ The marvel of macroscopic creation is posited largely as the background against which colorful and lively micro-events of creation and “creative” destruction are elaborated in a nearly infinite manner. Here, the physical world is not a scientific site, subject to cold and bland rational explanation, but rather a natural world saturated with spirituality and psychology, one wholly subservient to moral actions taken by the

⁸⁰ As used here, “deep” bears the moral sense given to it in the movement of Deep Ecology, championed by Arne Naess, Pierre-Félix Guattari and others. See, e.g., Arne Naess, *The Selected Works of Arne Naess*, vol. X (Dordrecht: Springer, 2005), 13-55.

⁸¹ The theme of inducing life from death and death from life is a common one in the Qur'ān. See 2.164, 259; 6.95; 26.81; 30.19, 24, 50; 35.9; and in the context of moral conduct, see 67.2.

very humans that were created by God.⁸² If mountains tremble,⁸³ seas split,⁸⁴ and “nations” are abruptly wiped from the face of this earth,⁸⁵ it is all because of moral failure, or at least because of morally precipitated laws of nature.⁸⁶ The same is true of the rise and setting of the sun,⁸⁷ the boon of plowed fields and good earth,⁸⁸ famines,⁸⁹ earthquakes,⁹⁰ storms⁹¹ and the consequent devastation of the earth’s produce. Every thing in the universe “runs with an appointed term” (*kullun yajrī ilā ajalīn musammā*),⁹² a term whose end arrives with the Day of Judgment, the Day of Reckoning, when the Divine Scales will weigh, for everyone, even the smallest acts one had performed, those “atoms of good” that will be measured against the “atoms of evil.”⁹³

The Qur’ānic laws of nature are thus moral and not physical. They are set in motion for explicable reasons, but reasons that are ultimately grounded in moral laws. If things come into being or evaporate into nothingness, it is because the moving force—the philosophers’ Prime Mover—is determined by moral inertia. The entire enterprise of creation, re-creation and death—that is, the series of laws governing the operation of the universe—is specifically designed by divine munificence and power for the single purpose of challenging humans to do good. This Qur’ānic narrative of “doing good” is all-pervasive, captured

⁸² Q. 30.8: “Have they not pondered upon themselves? God created not the Heavens and the earth, and that which is between them, save with the truth and for a destined end.” More specifically, 53.31: “And to God belongs whatever is in the heavens and whatever is in the earth, that He may reward those who do evil with that which they have done, and reward those who do good with goodness.” Observe the total effect of the foregoing verses as combined with: 6.13, 59, 63, 65, 95, 96, 102; 13.1–43; 18.7; 22.5–6, 18; 23.1–16; 30.11, 12, 15, 19, 27; 31.29–34; 52.9; 53.31, 42–62; 81.1–29; 82.1–19; 89.1–30; and more systematically and extensively, Sūrahs 30 and 67. See also n. 98, below.

⁸³ Q. 18.47; 19.90; 20.105; 27.88; 52.10.

⁸⁴ Q. 2.50; 20.77.

⁸⁵ Q. 41.13–17; 51.41; 89.6.

⁸⁶ See n. 99, below.

⁸⁷ Q. 21.33; 31.29; 35.13; 71.16.

⁸⁸ Q. 2.60; 6.141; 16.11; 45.5; 50.6–11; 54.12.

⁸⁹ Q. 2.155; 16.112.

⁹⁰ Q. 7.78, 91; 16.26; 17.37; 29.37; 69.5; 99.1–2.

⁹¹ Q. 17.69; 33.9; 41.16; 51.41; 69.6.

⁹² Q. 13.2; 30.8; 31.29.

⁹³ Q. 99.7–8.

most potently in the opening verses of Sūrah 67 (aptly titled Sūrat al-Mulk = Sovereignty), where God's omnipotence is causally and exclusively tied to the natural project of generation and corruption, which is in turn causally connected to the challenge God poses to humans to undertake good works: "Blessed is He the possessor of Sovereignty, the Omnipotent, He who created death and life that He may try you: which of you is best in conduct; and He is Almighty, All-Forgiving."⁹⁴ Newton for one, and even the highly spiritual Einstein, not to mention Austin and his kind, would have been dazzled by the Qur'ān's moral anchoring of the physical laws of nature. The Qur'ān, even in its early Meccan period, had already succeeded in establishing an extraordinary benchmark by which all human conduct is evaluated with exclusive reference to a divinely grounded moral principle.⁹⁵

In commenting on Sūrah 30, M. Pickthall observes that the prophecies in this Sūrah are

only the prelude to a proclamation of God's universal kingdom, which is shown to be an actual sovereignty. The laws of nature are expounded as the laws of Allah in the physical world, and in the moral and political spheres mankind is informed that there are similar laws of life and death, of good and evil, action and inaction, and their consequences—laws which no one can escape by wisdom or by cunning Those who do good earn His favor, and those who do ill earn His wrath, no matter what may be their creed or race; and no one, by the lip of profession of a creed, is able to escape His law of consequences.⁹⁶

⁹⁴ Q. 67.1-2: "*Tabāraka al-ladhī bi-yadihi al-mulku wa-huwa 'alā kulli shay'in qadīr. Al-ladhī khalāqa al-mawta wal-ḥayāta li-yablūwakum ayyukum aḥsanu 'amalā, wa-huwa al-'azīz al-ghafūr.*" Most Qur'ān translations render "*al-ladhī bi-yadihi al-mulku*" as "in whose hands is the Sovereignty." While this manner of translation is eminently reasonable, it is equally plausible to attach to "*yad*" the more emphatic meaning of possession, a common connotation in old and middle Arabic. See also n. 97, below. (It should be noted that I have generally sought aid and often heavily depended on standard Qur'ān translations, particularly those of M. Pickthall and—the very recent—T. Khalidi. However, in certain instances I have given my own translation of the text, and when departures are significant, I made note of them.)

⁹⁵ See also Izutsu, *Ethico-Religious Concepts*, 106.

⁹⁶ M. Pickthall, *The Meanings of the Glorious Koran* (New York: Mentor Classics, n.d.), 289-90.

The law of consequences is thus the law of nature, put in the service of accomplishing the greatest grade of good. *Life and living are in effect the ultimate test*, for the Qurʾān is abundantly clear as to why man was created: “We have placed all that is in the earth as an ornament thereof that We may try them: which of them is best in conduct.”⁹⁷ Ignorance may lead some people away from this truth, making them—despite the fact that they are always given a second chance to repent (*yatūbūna*) and join the Straight Path⁹⁸—completely fail to comprehend the *test*’s importance. Hopeless groups, such as ‘Ād and Thamūd, were swiftly condemned in the Here and Now, for their destiny could be foretold before their being any accounting in the Hereafter.⁹⁹ In such instances, the laws of nature are designed to serve the promotion of good in, as well as the elimination of evil from, this world: good-doers (*muṣliḥūn*) are blessed with God’s bounties that range from abundantly productive land—naturally irrigated—to pleasant living and healthy and happy families and children. The abundance of the earth and good family and social surroundings are replaced in the Hereafter by wondrous rivers and beautiful maidens. In other words, the Hereafter is the continuation of this life,¹⁰⁰ with a difference: this life continues to be a long test aimed

⁹⁷ Q. 11.7: “He it is Who created the heavens and the earth in six days ... that He might try you: Which of you is best in conduct” (*li-yablūwakum ayyukum aḥsanu ‘amalā*) ; 18.7: “Lo, We have placed all that is in the earth as an ornament thereof that we may try them: Which of them is best in conduct” (*li-yablūwakum ayyukum aḥsanu ‘amalā*). See also n. 94, above.

⁹⁸ Q. 5.39; 6.54; 25.70. See also next note.

⁹⁹ Q. 41.13–17: “When their messengers came unto them from before them and behind them, saying: Worship none but Allah, they said: If our Lord had willed, He surely would have sent down angels, so we are disbelievers in that wherewith you have sent down. As for ‘Ād, they were arrogant in the land without right, and they said: Who is mightier than us in power? Could they not see that Allah created them, He was mightier than them in power? And they denied Our Revelations. Therefore, We let loose on them a raging wind in evil days, that We might make them taste the torment of disgrace in the life of the world.... As for Thamūd, We gave them guidance but they preferred blindness to the guidance, so the bolt of the doom of humiliation overtook them because of what they used to earn.” See also the entirety of Sūrah 55 (Sūrat al-Raḥmān). For an instructive discussion of Thamūd in the Qurʾān, see Jaroslav Stetkevych, *Muḥammad and the Golden Baugh: Reconstructing Arabian Myths* (Bloomington: Indiana University Press, 1996), 17–29.

¹⁰⁰ See Izutsu, *Ethico-Religious Concepts*, 108, who asserts that the structure of the present world in the Qurʾān “is most profoundly determined by the ultimate (eschatological) end to which the present world (*al-dunyā*) is destined.”

at persuading the evil-doers (*muḥsidūn*, *mujrimūn*) to change their ways, to repent, unless, of course, they belong to the hopeless and hapless type represented by ‘Ād and Thamūd,¹⁰¹ groups that invite an immediate judgment, in the Here and Now. The Hereafter, on the other hand, awaits the results of this test; it is the place where people are classified once and for all. The fire of Hell is the perfected equivalent of storms and earthquakes that destroyed hopeless “nations,” while Paradise represents the actualized supreme ideal of good earthly living. The laws of nature are thus everywhere, operative both in this life and in the hereafter, although they may present themselves in various forms according to need. But whatever the laws of nature may be, they are ultimately God’s laws that He designed and installed with a view to accomplishing a moral purpose in the world. Nothing other than doing—and being—good seems to matter.

If God’s laws of nature are grounded primarily—if not entirely and exclusively—in conative moral principles, then the universe is imbued with, and woven from, a moral fiber whose warp and woof are designed to promote good and suppress evil (*al-amr bil-ma‘rūf wal-nahy ‘an al-munkar*).¹⁰² This conativeness dictates that, as part of the indefinable omnipotence through which God created the World, there must be, and therefore there is, an omniscience whose main trajectory and ultimate task is the implementation of the moral laws of nature. If the laws are intelligent, so are the forces by which they are set in motion and operation. If it is important for God to be *the* All-Listener and *the* All-Knowing, it is precisely because He has an omnipresent net of surveillance that knows of and evaluates the smallest act in moral terms.

But what does God want from His human creatures? Why does He repeatedly urge them to believe in Him? What does it mean to believe, or to be a believer (*mu’min*), in the first place? To begin with, being Self-Sufficient and All-Powerful, God does not really need the human kind, although, strikingly, He is grateful (*shakūr/shākir*)¹⁰³ for their good deeds. This gratefulness, which stems from His kindness and

¹⁰¹) See n. 99, above.

¹⁰²) Q. 3.104, 110; 9.67, 71, 112; 22.41.

¹⁰³) Q. 2.158; 4.147; 35.30; 76.22.

mercy (*rahma*), should not be mistaken as a reflection of any favors that human beings do for Him. If anything, He is the Bounty-giver (*Razzāq*)¹⁰⁴ Who has “honored the children of Adam” and Who “carried them on the land and the sea, giving them distinct preference over many of those whom [He] created.”¹⁰⁵ All forms of human subsistence, indeed, their very existence, are owed to Him, to His boundless mercy and giving. The Qur’ānic God expects humankind to be appreciative of His blessings and all that He created for humanity to enjoy and cherish. What He dislikes is not only a lack of appreciation, but also misconduct and abuse (*tughyān*) of these gifts and blessings.¹⁰⁶ Those “oppressors” and, therefore, deniers of God’s graces and bounties are the *ṭāghūn*, the *kāfirs*. As Izutsu has convincingly argued, the conceptual derivatives of *K.F.R.* are among the most outstanding vocabularies in the Qur’ān, with a “semantic field” that engenders the deepest and richest relationship to the concept of “belief” (*īmān*),¹⁰⁷ another central Qur’ānic concept. To be a *kāfir*, a non-believer, is to deny God’s good works in nature, to deny the blessings (*ni’am*, sing., *ni’ma*) that humans live by and experience in every moment of their existence, and to behave badly towards other people and things, which is to say that one is behaving badly toward God’s work and creation. Human beings thus owe God the duty of genuine appreciation (*shukr*), the indicant and measure of *īmān*.

Thus, to be a true believer (*mu’min*), a genuine Muslim (*min al-muslimīn*), is to appreciate the facts of having been born (*khuliqal khalq*), of having been given family solidarity, family love and compassion (*dhawī al-qurbā*), of having received the gifts of food and pleasant beverages, especially the simplest boon of life-giving water; in sum, of enjoying all the blessings of the world that surround humankind by virtue of God’s infinite generosity. To behave badly towards any of these God-given gifts is not only to be thankless or to deny (*yakfur/kāfir*) God’s Signs (*āyāt*), but also to transgress (*mujrim*, *ẓālim*).¹⁰⁸ And the

¹⁰⁴ See next note.

¹⁰⁵ Q. 17.70. Also see 2.57, 172; 5.88; 6.142; 7.50, 160; 8.26; 16.72, 114; 40.64.

¹⁰⁶ Q. 55.3–13; 96.6.

¹⁰⁷ Izutsu, *Ethico-Religious Concepts*, 120, 124–25.

¹⁰⁸ On *mujrimūn* and other derivatives of *J.R.M.*, see Q. 6.124; 10.13; 11.35; 20.74; 30.47. On *ẓālimūn* and other derivatives of *Z.L.M.*, see Q. 2.59, 272; 3.135; 8.60; 39.51; 46.12.

Qur'ān makes it all too clear that a transgressor's final lodging is in the scorching and eternally tormenting fire of Hell (*yuslā nāran ... wa-sā'at maṣīrā*).¹⁰⁹

We have thus far remarked on the Qur'ānic conceptual dichotomy and antonymic distinction between "believing/*īmān*" and "disbelieving/*kufṛ*." He who does not deny God's blessings and His sole sovereignty is a believer, the diametrical opposite of the *kāfir*. But what is it that constitutes the Qur'ānic believer, the *mu'min*, beyond his or her full acknowledgment of, and gratitude for, God's blessings? Does the believer's gratitude require him or her to be, on the basis of this emotive state, involved proactively? Any reader of the Qur'ān will immediately note the heavy emphasis placed throughout the text on the "act of performing good" (*ya'malūn al-ṣāliḥāt*).¹¹⁰ In its different variants, it occurs at least one hundred and twenty times, without counting other conceptual cognates such as *khayrāt* and *aḥsanat/ḥasanāt* (e.g., "*taṭaw-wa'a khayran*," "*mā yaf'al min khayr*," "*man jā'a bil-ḥasana*," all of which mean "to do good").¹¹¹ Like the derivatives of *H.S.N.*—mentioned more than 100 times throughout the text—it is one of the most common and oft-repeated expressions in the Qur'ānic repertoire.

Ṣāliḥāt is conceptually associated with *ajr*, the latter meaning a "fee," "reward," "remuneration." Those who perform *ṣāliḥāt* will enter paradise, as many verses attest.¹¹² But the conceptual relationship here is also significantly contractual. *Īmān* must be proven, and only good works can be the effectual means. Once performed as solid proof of *īmān*, the *ṣāliḥāt* will yield an *ajr*, resulting from performance. Thus, God in effect makes a contractual offer (amounting to calling the individual to Islam), and the believer enters into a covenant/contract/

¹⁰⁹ Q. 2.126; 4.10, 97, 115; 8.16; 22.72; 57.15; 64.10; 87.12; 111.3.

¹¹⁰ See, e.g., Q. 2.25, 62, 82, 277; 3.57; 4.57, 122, 173; 5.9, 69, 93; 7.42; 10.4, 9; 11.11, 23; 13.29; 16.97; 18.30, 88, 107; 19.60; 20.75, 82; 25.70, 71; 28.67, 80; 30.44; 45.15. For all relevant entries, see Fu'ād 'Abd al-Bāqī, *al-Mu'jam al-Mufaḥris li-Alfāz al-Qur'ān al-Karīm* (Cairo: Dār al-Kutub al-Miṣriyya, 1945), 410-12. It will be noted that the form "*aṣlaḥa*" has an added meaning of "to become good," in the sense of reforming oneself from a state of *ẓulm* (transgression) and *fasād* (doing ill) to one of *taqwā* (piety) and *īmān*. In this sense, the Qur'ān contains at least a dozen references, e.g., 6.54; 7.35.

¹¹¹ Q. 2.184; 3.30, 115.

¹¹² Q. 16.97; 18.30-31, 107, 110; 35.7, 29; 41.8.

'*abd* with God should he accept God's offer. The entitlement to the *ajr*, the consideration, is the very fact of performance, but the consideration itself is a ticket to Paradise. Hence the inviolability of the logical and epistemological connection between belief/*īmān* and good works/*ṣāliḥāt*. Izutsu, who conducted the most detailed and serious research on Qur'ānic semantics, avers that "the strongest tie of semantic relationship binds *ṣāliḥ[āt]* and *īmān* into an almost inseparable unit [W]here there is *īmān* there are *ṣāliḥāt* or, 'good works,' so much so that we may almost feel justified defining the former in terms of the latter, and the latter in terms of the former."¹¹³ Thus, the Qur'ān makes it abundantly clear that "doing good" is the outer expression of "belief,"¹¹⁴ the way one shows his gratitude to God. "Doing good" is genuine *īmān*, belief, "fully expressed in outward conduct."¹¹⁵

There is thus an inextricable organic and structural relationship between "belief" and "good conduct," that is, between *īmān* and *ṣāliḥāt*. If one entails the other, then there is also an immediate logical and epistemic connection, which is to say that the presence of belief apodictically entails the presence of good works and vice versa. To believe in God as the sole sovereign is at once to accept, as Izutsu soundly puts it, a "whole practical code of conduct."¹¹⁶

The immediacy of this relationship, I also contend, is psychologically and epistemologically superior to any Enlightenment "metaphysical" foundations of morality, be it a Humean psychology, a Kantian

¹¹³ Izutsu, *Ethico-Religious Concepts*, 204. See, for example, Q. 2.112; 16.97; 18.2, 30, 107, 110; 30.44-45; 32.19-20; 34.4; 41.7-8; 95.6. See also Camilla Adang, "Belief and Unbelief," *Encyclopaedia of the Qur'ān*, ed. Jane D. McAuliffe, 5 vols. (Brill: Leiden, 2001-2006), I, 218-26, at 220.

¹¹⁴ The organic connection between "doing good" and "*īmān*" is also viewed as one between *ḥasanāt* (also doing good) and upholding God's unity (*tawḥīd*), perhaps the most important tenet of belief (*īmān*), as it presupposes other doctrines of omnipotence, omniscience, etc. See Muqātil's *Kitāb Tafṣīr al-Khams Ma'at Aya*, 12-13, where it is stated, on the authority of Ka'b the Companion, that "*ḥasana is tawḥīd*," i.e., that "doing good" is, in and of itself, a recognition of God as the One (*al-Wāḥid*), undivided, omnipotent and therefore sole creator of everything.

¹¹⁵ Izutsu, *Ethico-Religious Concepts*, 204; see also Q. 18.30, 30.45; 31.8; 35.7; 41.7; 95.6.

¹¹⁶ Izutsu, *Ethico-Religious Concepts*, 106. It is significant and telling that Izutsu's work, published almost half a century ago, never became a standard or even important reference in the field of early Islamic legal history, when its findings should have easily made it so.

Categorical Imperative or a Schopenhauerian will and compassion. The absoluteness of God's power as reflected in the operation of moral cosmology creates a foundation for the moral law that defied and, even today, continues to defy the artificial powers of the moralizing modern state, ideology, and "pure" reason. At the least, we need not even demonstrate the truthfulness of the proposition that, for the new Muslim believer, faith and belief (both subsumed under *īmān*) in the One God was a powerful psychological substrate that automatically involved a particular mode of conduct.

We now must address the question: What did it mean, in practical terms, to be a *mu'min*, a commissioner, indeed practitioner, of *ṣālihāt*?

IV. Qur'ānic Law as Substantive Morality

In Sūras 17, 23 and 25—all of them Meccan, and confirmed later by the very early Medinan Sūra 2 and others—the following categories were the first installment deployed toward defining what it is that makes a true believer, a true commissioner of good works: (1) worship of God, always with the strong implication that He is One, All-Powerful and Owner of the universe;¹¹⁷ (2) this worship may take different forms, but prayer (*ṣalāt*) is the method *par excellence*,¹¹⁸ and constitutes the first and most oft-repeated requirement throughout the entire Meccan period;¹¹⁹ (3) payment of alms-tax (*zakāt*), almost as frequently commanded as *ṣalāt*;¹²⁰ (4) compassion toward parents and next of kin;¹²¹ (5) speaking well to, and of, others;¹²² (6) helping the orphans and the poor, and forbidding the embezzlement of the orphans' property;¹²³ (7) distinct preference towards forgiveness;¹²⁴ (8) forbidding

¹¹⁷ Q. 2.83; 14.31; 17.22; 18.110.

¹¹⁸ On Qur'ānic and pre-Qur'ānic prayer, see S.D. Goitein, *Studies in Islamic History and Institutions* (Leiden: E.J. Brill, 1968), 73-89.

¹¹⁹ Q. 2.83; 14.31; 21.73; 23.2, 9; 27.3.

¹²⁰ Q. 2.83; 21.73; 23.4; 27.3; 41.7.

¹²¹ Q. 2.83; 17.23-24, 26.

¹²² Q. 23.3.

¹²³ Q. 2.83; 17.26, 34.

¹²⁴ Q. 2.109, 237; 4.149; 41.34; 42.40.

homicide without just cause;¹²⁵ (9) forbidding the murder/burial of infants;¹²⁶ (10) forbidding *zinā* (adultery and fornication) and decrying sexually immoral conduct;¹²⁷ (11) respecting contracts and commitments, a general injunction, in essence amounting to the doctrine of *pacta sunt servanda*;¹²⁸ and (12) forbidding commercial fraud in weights and measures.¹²⁹

These commandments, which range from “ritual” to “civil” and criminal provisions, constituted—during the Meccan period—part and parcel of that larger body of works belonging to *ṣāliḥāt*. Indeed, there is no reason to think that any area of human conduct is excluded from the deontology of *ṣāliḥāt*, for the overarching divine message is that wherever and whenever one can do something, it must be done with *īmān*, i.e., in a good manner and with conduct that is ethical, moral, even honorable. Therefore, the major premise in the divine syllogism had been completed and established as early as the Meccan period, and what ensued in the middle Meccan period was no more than an array of minor premises that provided the fuller form of the syllogism, thereby yielding numerous conclusions but hardly adding to, or modifying in any form, the momentous moral event that is the major premise.

We therefore need not, in every single instance, look to the semantic and logical connections between *ṣāliḥāt*, on the one hand, and “substantive” and ritual provisions, on the other, in order to ascertain the moral connection between the latter provisions and the “legal” contribution of the Qur’ān. Each and every provision was at once, and *indistinguishably*, legal and moral, the extension of the overarching *ṣāliḥāt* performance. “Speaking kindly” to people was as significant a *ṣāliḥāt*-conduct as respecting contracts and refraining from the commission of infanticide and homicide. In fact it was not only ranked with *ṣalāt* and *zakāt*, but also commanded along with them, as well as with allotting inheritance shares, in the same verses.¹³⁰ To speak kindly to people, to greet them, and to show them human compassion are

¹²⁵ Q. 17.33 (and in connection with *ṣāliḥāt* and *iḥsān* in vv. 7–9, 25); 25.68.

¹²⁶ Q. 17.31. Infanticide was said to have been motivated by poverty.

¹²⁷ Q. 17.32; 23.5–6.

¹²⁸ Q. 17.34; 23.8; see also 2.177; 5.1, and possibly 16.91.

¹²⁹ Q. 17.35.

¹³⁰ Q. 2.83; 4.8.

attributes that have the same level of importance as those that we have come to call “strictly legal” conduct.

Already in the Meccan period, acts assumed to belong to, but undoubtedly subsumed under, *ṣāliḥāt* came to be stipulated. The promotion of what I have elsewhere called the “spending ethic”¹³¹ was a constant Meccan concern,¹³² laying down the foundations for a significant evolution in the Sharī‘a (i.e., *waqf*, *ṣadaqa*, *zakāt*, and, as a consequence of these, a trenchant civil society).¹³³ Speaking and behaving humbly was enjoined,¹³⁴ usury was condemned¹³⁵ and the consumption of pork, carrion and blood prohibited.¹³⁶ The Qur’ānic trend of “getting into details” continued after the migration to Medina, but now with marked intensity. In Medina, in other words, there was no change in the overarching Meccan message, the archetypal command to perform *ṣāliḥāt* as the practical, outward expression of *īmān*. Henceforth, what was to happen was (merely) the allotment of the minor premises (which, nearly in the same spirit, was to be continued by ‘Umar I and other Companions).¹³⁷ These included, among other things, the following: (1) reiterating the commandments in regard to speaking well to people, treating relatives and the poor kindly, performing prayer and paying *zakāt*, staying away from pork, blood, and carrion;¹³⁸ (2) specifying regulations in respect of major and minor pilgrimage (*ḥajj* and *‘umra*);¹³⁹ (3) further specification in the laws of homicide;¹⁴⁰ (4) bequests and estates;¹⁴¹ (5) fasting (*ṣawm*, *ṣīyām*)¹⁴² and

¹³¹ Hallaq, *Sharī‘a*, 296 ff.

¹³² See, e.g., Q. 14.31; 34.39; 35.29.

¹³³ Hallaq, *Sharī‘a*, 142-46, 159-221, 231-34.

¹³⁴ Q. 31.18.

¹³⁵ Q. 30.39.

¹³⁶ Q. 16.115.

¹³⁷ As attested, among other things, in the “legislation” barring the consumption of *khamr* and all intoxicants, classifying them as *ḥudūd* (pl. of *ḥadd*). See ‘Alī Muḥammad b. Ḥabīb al-Māwardī, *al-Ḥāwī al-Kabīr*, eds., ‘Alī Mu‘awwad and ‘Ādil ‘Abd al-Mawjūd, 18 vols. (Beirut: Dār al-Kutub al-‘Ilmiyya, 1994), XIII, 409, 412-13..

¹³⁸ Q. 2.83, 173, 177; 5.3.

¹³⁹ Q. 2.158, 196.

¹⁴⁰ Q. 2.178; 5.45.

¹⁴¹ Q. 2.180-82, 240; 4.7, 11-12; 5.106.

¹⁴² On Qur’ānic and pre-Qur’ānic fasting, see Goitein, *Studies in Islamic History*, 90-110.

further details on *ṣalāt*;¹⁴³ (6) fraud and fair dealing;¹⁴⁴ (7) *jihād*;¹⁴⁵ (8) spending ethic (*infāq*; *anfiqū*);¹⁴⁶ (9) wine and gambling;¹⁴⁷ (10) treatment of orphans;¹⁴⁸ (11) marriage to Muslim and non-Muslim women;¹⁴⁹ (12) mediation in marital disputes;¹⁵⁰ (13) menstruation and waiting periods;¹⁵¹ (14) divorce;¹⁵² (15) usury;¹⁵³ (16) suckling infants and family support;¹⁵⁴ (17) debts, witnesses and writing down contracts;¹⁵⁵ (18) divisions of booty;¹⁵⁶ and, in great detail, (19) inheritance.¹⁵⁷

We must note in passing that the Qur'ānic juridico-moral subject matter shares with the *fiqh* works about thirty topics (out of fifty-seven),¹⁵⁸ some in incidental detail, but most in more fundamental ways, either laying down the foundations of general legal principles (as in the doctrine of *pacta sunt servanda*, inheritance, the spending ethic, and usury) and/or providing generous or exquisite detail (as in *jihād* and inheritance).

V. Legislative Self-Awareness in the Qur'ān

According to Goitein, the middle Medinan period (ca. 5 H.) represents the moment when the Qur'ān consciously upheld the new religion to be legislatively independent, after, and because of, the rift between the Prophet and the Jewish tribes of Medina had occurred. His argument,

¹⁴³) Q. 2.183-85, 4.102-03; 5.6.

¹⁴⁴) Q. 2.188; 4.29-30.

¹⁴⁵) Q. 2.190-94, 216-18, 244-46; 4.74-76, 91, 95.

¹⁴⁶) Q. 2.195, 215, 254, 261-74; 4.34, 38-40.

¹⁴⁷) Q. 2.219; 4.43; 5.90-91.

¹⁴⁸) Q. 2.220; 4.2-3, 6, 10, 127.

¹⁴⁹) Q. 2.221; 4.22-25.

¹⁵⁰) Q. 4.35, 128.

¹⁵¹) Q. 2.222, 234.

¹⁵²) Q. 2.226-32, 236-37, 241.

¹⁵³) Q. 2.275-76.

¹⁵⁴) Q. 2.233.

¹⁵⁵) Q. 2.282.

¹⁵⁶) Q. 8.41, 69-70.

¹⁵⁷) Q. 4.7-12, 19.

¹⁵⁸) Hallaq, *Sharī'a*, 553-55.

based on a narrow interpretation of Q. 5.43-48, is that the rift led the Prophet to declare Islam to be as fully endowed with a “law” as were the two monotheistic forerunners, Judaism and Christianity.¹⁵⁹

In light of my arguments thus far, we must reject Goitein’s narrow interpretation, for, having made a clean break with the superficial and utterly alien distinction between “law” and “morality,” we have come to see that the very belief (*īmān*) that makes one a Muslim is the performance of *ṣāliḥāt*, which indistinguishably combine, from a non-modernist perspective, both “strictly legal” provisions and the entire range of moral prescriptions. But this is not the only decisive evidence that can be marshaled against Goitein, who must be credited with the earliest dating of the Qur’ān as a “legal” instrument. There is in fact a much stronger body of evidence which suggests that the Qur’ān was an incontrovertible and foundational source of the Shari‘a already in the first half of the Meccan period.

I begin by noting the obvious but fundamental fact that the Qur’ān, deliberately cast in a language the Arabs could understand,¹⁶⁰ was conceptually structured in a manner befitting the Near Eastern tradition, having been privy to a wide range of Biblical narratives that appear to transcend Judaic-Christian history in that region.¹⁶¹ Furthermore, we have no reason to assume that the Qur’ān (as a conceptual and anthropological entity) was any less an heir to the ancient Near Eastern traditions from the times of Ur-Nammu and Hammurabi (both of whom legislated in the name of god Shamash)¹⁶² than Christianity and Judaism had been. In other words, despite its innovative and reformative moral bent (our main argument in section III, above), Islam and its Prophet accepted and operated within the general Near Eastern religious, moral, and political traditions—there being no other model

¹⁵⁹ Goitein, “Birth-Hour,” 26.

¹⁶⁰ Q. 26.195; 13.37.

¹⁶¹ On the awareness of the Qur’ān of the Ten Commandments, see William M. Brinner, “An Islamic Decalogue,” in W.M. Brinner, and S.D. Ricks, eds., *Studies in Islamic and Judaic Traditions* (Atlanta: Scholars Press, 1986), 67-84. See also Montgomery Watt, “The Arabian Background of the Qur’ān,” in *Studies in the History of Arabia*, Pt. I (Riyadh: University of Riyadh Press, 1399/1979), 3-13.

¹⁶² Clear references to those who worshiped the sun are found in Q. 27.24 and 41.37. Shamash, the Sun-god, was one of the most important deities of the ancient Near East, heavily associated with justice and law-giving.

at hand. This much is admitted by the Muslim tradition itself, especially in the notion of tacitly sanctioned Prophetic Sunna.

Moreover, within this extensive and long tradition the major gods were, as a rule, law-givers, the reason for this being, again, that in these religions there was no distinction between the *is* and the *ought*, between what one actually does and what one should do. If God is about religion, and if religion is about living life correctly, meaningfully and morally, then God—at least in part—is about how one should behave toward every one and every thing. The question of how one should behave is thus a question *equally applicable* to law and morality, even when these two are separated and viewed through a modernist prism.

It was most natural in this Near Eastern milieu for a god to legislate. And it was equally natural that both the Prophet and the Qurʾān should have taken this tradition for granted. It would have been inconceivable for either to view the world otherwise when in fact no other major culture or “civilization” in that region appears to have done so. Thus, to think of this matter otherwise is to adopt a myopic vision of the Near East, from the time of the ancient Babylonians down to Islam itself. In the Qurʾān, and for Muḥammad and the vast majority of people who lived then and long afterwards, God, every god, legislated. The question was which god was the true god, the True Law-giver.

Furthermore, how could the Islamic God have been less than such a Legislator, from the first moment He began to communicate his message to the Prophet, and less than an exclusive Legislator at that? To argue that He bore lesser functions of legislation or no functions at all would amount to logical and epistemic incoherence, and not only to historical and historiographical implausibility. For, in order to propound religion (*dīn*), morality *and* law had to be either legislated or ratified by implication, by no lesser authority than God Himself. And that is precisely what happened in the Meccan period. God claimed total and exclusive authority over legislation, over everything and every person in this world.

The God of the Qurʾān could not have been any lesser god or lesser legislator, because such a scenario—of an incapacitated legislator—would readily constitute a contradiction in our (and, more importantly, the Muslims’) understanding of Him as an Omnipotent and Omniscient entity, One who is All-Merciful, Transcendent, All-Hearing, All-Seeing, Guide, Maker and Un-maker of everything, Creator

of the universe, and Regulator of its course of operation.¹⁶³ This unbounded authority makes nonsense of the claim that the Qur'ān was not a source of moral *and* legal legislation from the very beginning, that God was capable of creating the entirety of the universe and to regulate it throughout, yet somehow failed in the relatively modest task of legislating human conduct.

Such a view not only would entail profound contradictions but also run against Qur'ānic evidence which Goitein—and we with him—neglected to see or appreciate. Strikingly, this evidence is of the same type he had uncovered, although it belongs to the Meccan and earlier Medinan periods. Indeed, around the middle Meccan period, the Qur'ān speaks with language similar to 5.42-51, on which Goitein relied for his argument. Sūrah 42.8 states: “Had God willed, He would have made them one community (*umma*),”¹⁶⁴ implying that some communities are not deserving of His Mercy which He embedded in Revelation and which had been bestowed on the true believers among the People of the Book and Muslims. Two verses later (v. 10), the Qur'ān explicitly adds: “Whatever you disagree on, its *ḥukm* belongs to Allah who is my Lord on whom I rely and to whom I delegate [my affairs] (*'alayhi tawakkaltu wa-ilayhi unīb*).” The word “*ḥukm*” here clearly means a “ruling,” a “verdict,” a “judgment,”¹⁶⁵ a meaning also attested in Q. 39.3, yet another Meccan verse. Equally clear are the meanings of “*tawakkala*” and “*anāba*,” which connote that disputes in society should be “raised to,” “delegated to,” “surrendered to” the judgment of a higher authority. The term “*tawakkala*” is both conceptually and legally cognate with the later *fiqh* term *wakāla*, which is the proper juristic term for agency and procuration.¹⁶⁶ God, Sūrah 39.62 emphatically declares, is the *wakīl par excellence*, the One who has the ultimate agency through which total creation is effected: “God created every-

¹⁶³ Citations attesting to the Qur'ānic characterization of God in such terms would fill several pages; see, for example, 2.255; 6.3, 13, 17, 59, 61, 63, 65, 96, 102; 42.8, 49; 53.31, 42, 44, 51; 67.1-3.

¹⁶⁴ Cf. Q. 5.48.

¹⁶⁵ Both Pickthall and Khalidi translate this term as “verdict” (Pickthall, *Meanings*, 344; Tarīf Khalīdī, *The Qur'an: A New Translation* [London: Penguin Classics, 2008], 394).

¹⁶⁶ Hallaq, *Sharī'a*, 261-64.

thing, for He is the *wakīl* over every thing" (*Allāhu khalaqa kulla shay'in, wa-huwa 'alā kulli shay'in wakīl*").

The connotations of "*anāba*" are as significant. The noun *nā'iba*, Ibn Manẓūr tells us, refers to "events and happenings that befall human beings," i.e., a "*nāzila*," which has the same meaning as *nā'iba* and which is one of the most frequently used words in *fatwās* and *fiqh* to indicate "a new question that requires a solution."¹⁶⁷ The verbal form *nāba* means "to take the place of," "to speak and act on behalf of someone," "to represent him," and "to be in his place," all of which meanings enhance the notion of *tawakkal/wakīl*. Ibn Manẓūr then turns to the various uses of the term in the Qur'an, saying that the expression connotes "reliance on what God commanded, not swerving from any thing He ordered."¹⁶⁸

The Medinan language of Sūrah 5.42-51 finds a striking parallel and structural resemblance in Sūrah 45.16-18, also from the middle Meccan period: "And verily We gave the Children of Israel the Scripture, the Command (again "*ḥukm*" is used here) and the Prophethood, and provided them with the goods [of the earth] and favored them above all [other] peoples. [17] And We gave them plain Commandments, but they differed among themselves [18] Thereafter, We set for your [i.e., Muḥammad's and/or Muslims'] affairs a *Sharī'a*, so follow it and follow not the whims of those who know not." These three verses, it must be stressed, come on the heels of stern advice enjoining listeners to do *ṣāliḥāt* [vv. 14-15] whose worth will be evaluated in accordance with the rules of moral cosmology [vv. 3-6, 12-13] (see section III,

¹⁶⁷ Ibn Manẓūr, *Lisān al-'Arab*, I, 774. See also Muḥammad Murtaḍā al-Zabīdī, *Tāj al-'Arūs min Jawābir al-Qāmūs*, ed. 'Alī Shīrī, 20 vols. (Beirut: Dar al-Fikr, 1414/1994), II, 455-56. Also, see such terminology in titles and contents of works in Wael Hallaq, "From *Fatwās* to *Furū'*: Growth and Change in Islamic Substantive Law," *Islamic Law and Society*, 1, 1 (1994): 29-65, especially 29-38.

¹⁶⁸ Ibn Manẓūr, *Lisān al-'Arab*, I, 775. See also Zabīdī, *Tāj al-'Arūs*, II, 455, who writes that "*nāba*" means to "direct oneself toward God," "to obey Him," and "to heed His command." In Akkadian, as most probably in other ancient Semitic languages, the term is associated not only with "invoking the name of God" but also "to decree" and "to ordain" a law. See *Akkadian Dictionary*, available at: http://www.premiumwanadoo.com/cuneiform.languages/dictionary/index_en.php

above). More importantly, these verses sum up the essential ideas of 5.46-48 and predate them by at least a few years, if not a whole decade.¹⁶⁹

Returning to Sūrah 42, we also note, in vv. 13 and 21, the use of the root *SH.R.* There, and again after invoking the moral cosmology [vv. 11-12], the Qur'ān says: "He legislated for you a religion (*shara'a lakum min al-dīn*) which He commanded unto Noah and that which We revealed unto you, and that which We commanded unto Abraham, Moses, Jesus" In the next few verses, justice and good works are emphasized, followed by v. 21, which rhetorically asks: "Or have they acquired partners [alongside God] who have made lawful unto them in religion (*shara'ū lahum min al-dīn*) that which God did not permit?"

The meaning of religion (*dīn*) here is nothing other than that which Muḥammad understood, namely, a comprehensive set of good works, ranging over the entire spectrum of life. In other words, religion finds its sum total in the very notion of *al-a'mālu al-ṣāliḥāt*, those acts which are the subject of command, the subject of the divine act of *shir'al shara'a*. The connection between the concepts of *dīn/shir'al shara'a*, on the one hand, and that of the Biblical Prophets mentioned in 42.13, on the other, is also found in 2.82-83, where God's covenant with the Children of Israel includes, among the *ṣāliḥāt*, all the essential elements we have enumerated above (God's unity, kindness to parents, next of kin, the poor, the orphans, performance of *ṣalāt* and payment of *zakāt*). The connection had in fact already been made in the Meccan Sūrah 21.72-73, where Lot, Isaac and Abraham—because they were *ṣāliḥāt*-doers (i.e., *ṣāliḥīn*)—were made chiefs/prophets who "lead in accordance with our Command (*bi-amrinā*) and whom we inspired to do good (*khayrāt*), to perform prayer, pay *zakāt*, and worship Us."

Goitein observed that the Qur'ān, after 5 H., tended to elaborate an increasingly independent stance vis-à-vis the Jews and Christians. This is true, but the stance was not about the adoption of a new conception of law. Rather, it was about increasing the number of what we have

¹⁶⁹ The tenor of all these verses, 5.46-48 included, is also confirmed by 13.37 whose date of revelation is either at the very end of the Meccan period or during 1 H. at the latest: "And We thus revealed it an Arabic code of law (*ḥukman 'Arabiyyan*), and if you follow their desires after the knowledge that has come to you, then God will be neither a friend nor a protector." See also the Qur'ān's translation by Khalidi, *Qur'an*, 199.

labeled “minor premises” which might be changed in accordance with the increasing social and political complexity of the new religion. The Qur’ānic revelation began and ended with the foundational assumption that Islam is a correction to the then current practices of Jews and Christians, and that it is no more than a restatement of the original Biblical religion of Abraham the *ḥanīf*, Ishmael, Isaac, Jacob, Moses, and Jesus. The Medinan Sūrah 3.84, exactly representing the Meccan stance toward Christianity and Judaism, commands the Prophet to “[s]ay: We believe in God and that which is revealed unto us and that which was revealed unto Abraham, Ishmael, Isaac, Jacob and the tribes, and that which was vouchsafed unto Moses and Jesus ... We make no distinction between any of them, and unto Him we have surrendered.”¹⁷⁰ To be a Muslim is therefore to believe in the laws (= religion, *dīn*) revealed unto all these prophets, without *any* differentiation between and among them whatever.¹⁷¹ The notion of God’s law, which is a guide to the entire range of *ṣāliḥāt* works, had been in existence from the time of the ancient prophets, and the Qur’ān was not only aware of its existence but was also constituted by this very narrative.

That God’s law as expressed in the Qur’ān (and the revelations of the ancient prophets) was the ultimate arbiter of disputes is thus a cardinal creed in Qur’ānic discourse. Meccan Sūrahs 16.64; 42.10, 13, 21; 45.18; 46.30; and 13.37¹⁷² represent antecedents to the Medinan Sūrahs 2.213; 3.23; 4.105; and 5.5, 43, 44. Conversely, the Meccan injunction that “disputes among you” are resolved through “God’s judgment”¹⁷³ is confirmed by the Medinan assertions that “We have revealed unto you the Book with the truth in order that you may adjudicate amongst people with that which God has revealed/shown to you.”¹⁷⁴

¹⁷⁰ Several Meccan Sūrahs acknowledge these Prophets as examples to be revered; see Q. 12.6, 38; 38.45–47.

¹⁷¹ Muḥammad Ibn Jarīr al-Ṭabarī, *Tafsīr al-Ṭabarī al-Musammā Jāmi’ al-Bayān fī Ta’wīl al-Qur’ān* (Beirut: Dār al-Kutub al-‘Ilmiyya, 1426/2005), III, 337; Abū al-Fidā’ Ibn Kathīr, *Tafsīr al-Qur’ān al-‘Aẓīm*, ed. Ḥusayn Zahrān, 4 vols. (Beirut: Dār al-Kutub al-‘Ilmiyya, n.d.), I, 567.

¹⁷² Sūrah 13 is Meccan for the most part. See Theodor Nöldeke, *Geschichte des Qorāns*, 3 vols. (Wiesbaden: Georg Olms Verlagsbuchhandlung Hildesheim, 1961), I, 162–63.

¹⁷³ Q. 42.10.

¹⁷⁴ Q. 4.105, and also the very similar language in 2.213.

Yet, as mentioned earlier, there is no reason to discard Goitein's conclusions. To the contrary, the evidence advanced here compels us to expand his conclusions dramatically, taking them to be valid for even the earliest Meccan period. However, we no longer can accept his view "that it occurred to Muḥammad only at a relatively late period that even strictly legal matters were not religiously irrelevant."¹⁷⁵ To view the matter thus or to ascribe to the Schachtian view that the Qur'ān did not constitute, from the very beginning, the foremost source of law—whether the view is about theory or practice—would be, to use Austin's aforementioned language about Blackstone, "stark nonsense."

VI. (Non-)Final Remarks

I deploy Austin's stern language in order to highlight, for our context, the utter inapplicability of the distinction between law and morality on which he insisted. If, for Austin, Blackstone belonged to, and represented, a Christian-based conception of law, where law and morals are intimately intertwined, then his attack on Blackstone justifies a counter-attack, now from the Muslim perspective, on the distinction he insisted upon. If it was "stark nonsense" to conflate law and morality in, and for, early nineteenth-century Europe—when Austin was writing—it is equally nonsensical to impose this distinction on an age and culture that could never have conceived of such a distinction in the first place. The distinction would have negated, as it in fact did, the very foundational tenets on which that culture and age rested. To search for the "strictly legal" and to isolate it from the overarching landscape of the moral would be not only to misunderstand what the Qur'ān was all about, but to deform the structure and episteme of the Sharī'a at large.¹⁷⁶

If we accept the Qur'ān as embodying a moral cosmology, as we must, then we are bound to view the "strictly legal" elements in it as wholly derivative of the larger and indeed cosmic moral order.¹⁷⁷ In this

¹⁷⁵) Goitein, "Birth-Hour," 26.

¹⁷⁶) On Sharī'a's episteme, see Hallaq, *Sharī'a*, 13-18.

¹⁷⁷) In her excellent work *Logic, Rhetoric, and Legal Reasoning in the Qur'ān: God's Arguments* (London: Routledge/Curzon, 2004), Rosalind W. Gwynne argues that "in the Qur'ān all history is sacred history and began with the cosmic rule that is the Covenant" whereby a

order, “law”—as we conceive it in our modernist parlance—is subordinated to morals. We must insist, along with Nietzsche, that religions, like individuals and particulars, are unique, that they cannot be genuinely similar in any significant respect.¹⁷⁸ Which is to say that we cannot apply the standards of any other religion or culture to Islam and its Qur’ān, certainly not those of a secularized modern Europe. To judge a moral phenomenon by the conceptual yardstick of a “strictly legal” value-set is to exacerbate an already serious problem of one morality—or one culture, for that matter—judging the other.¹⁷⁹ Law, like morality itself, cannot be universalized. Law and morality, as much-forgotten Protagoras argued, are unique manifestations, the results of particular societies and context-specific social experiences.¹⁸⁰ In fact, it was Nietzsche himself who vehemently argued that it is immoral to apply the same moral code to all.¹⁸¹ Nietzsche, I suspect, would not have objected to the inclusion of law under this judgment, though his concern was with militating against Christian morality. The point remains, however, that to genuinely understand a phenomenon—Islam and the Qur’ān included—one must approach it on its own terms. And since the Qur’ānic terms are pervasively and cosmologically moral, “law” took off where and when morality began, with the revelation of the first Sūrahs in Mecca. It was then and there that “Islamic Law” began, and it was thence that the intricate moral blueprint was to be given further “legal” and other elaborations. These elaborations became the full-fledged Sharī’a, one that was morally grounded and supremely Qur’ānic, from the very start.

contract is made between God and human beings to the effect that the latter will undertake “to hold in trust with gratitude and reverence” all things the former created for human enjoyment. This Covenant, as a cosmic rule, “generates countless sub-rules,” which is to say that the acceptance of the Covenant entails the acceptance of these sub-rules (205). Yet, although Gwynne also unmask in the imaginative Qur’ānic language “different forms of reasoning, such as legal arguments” (206) she does not take the next step of linking her conclusions to the debate over the role of the Qur’ān in the earliest formation of Islamic law.

¹⁷⁸) Geuss, *Morality*, 168.

¹⁷⁹) On this theme, see Hallaq, *Sharī’a*, 1–6.

¹⁸⁰) See n. 56, above.

¹⁸¹) F. Nietzsche, *Beyond Good and Evil*, in Walter Kaufmann, trans., *Basic Writings of Nietzsche* (New York: The Modern Library, 2000), 243.

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