



Digital Commons@

Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 29

Number 4 *Symposia—The Religious Voice in the
Public Square and Executing the Wrong Person:
The Professionals' Ethical Dilemmas*

Article 20

6-1-1996

Muslim Minorities and Self-Restraint in Liberal Democracies

Khaled Abou El Fadl

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Khaled A. El Fadl, *Muslim Minorities and Self-Restraint in Liberal Democracies*, 29 Loy. L.A. L. Rev. 1525 (1996).

Available at: <https://digitalcommons.lmu.edu/llr/vol29/iss4/20>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

MUSLIM MINORITIES AND SELF-RESTRAINT IN LIBERAL DEMOCRACIES

*Khaled Abou El Fadl**

Islam embodies a comprehensive view for the Herein and Hereafter. It is often stated that Islamic theology and law regulates every aspect of a Muslim's life.¹ Islamic law is comprehensive and sacred; yet, it is not irrational. Islamic law was not created through an irrational process of divine revelation; rather, it was deduced from principles and moral rules extracted from texts believed to be divine. The process seeks to discover the will of God in this life and the Hereafter. Divine command compels the drive to discover the divine will. *The Qur'an*, the divine book of Islam, states: "And those who do not judge by God's revelations are unjust."²

The *Qur'an* contains only a few specific legal injunctions. For the most part it expounds comprehensive moral organizing principles. Most of the legal rules of Islam are extracted from the reported practices (the *Sunna*) of Muhammad, the Prophet of Islam, and his oral injunctions (the *Hadith*). The *Qur'an* and *Sunna* constitute the source of divinity in Islamic law. A Muslim jurist, using a variety of jurisprudential methods and legal principles, searches for the divine will in these two sources. This search is called *ijtihad* (striving) and the result of this search produces a rule of *fiqh* (literally, understanding).³ The enormous corpus of Islamic law is generally called *fiqh*. But the

* I would like to thank my wife Grace for all her help, Waheed Hussein for his many insights, and all the participants in my unscientific survey of Muslim views. I thank Professor Kurt T. Lash for forcing me to exhaust my reservoir of excuses and come on board for this unique project.

1. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 1-5 (1964). Incidentally, I disagree with this view.

2. THE QUR'AN 5:45 [hereinafter QUR'AN]. I altered some of the quoted translations throughout this Essay to reflect my sense of the original. All translations are inspired by Ahmed Ali, *Al-Qur'an*. These verses and others command Jews, Christians, and Muslims to govern themselves by their respective revelations. *Id.* at 5:44.

3. See generally MOHAMMAD H. KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 366-92 (1991) (discussing the underlying principal of Islamic law); SOBHI MAHMASSANI, THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM (Farhat Ziadeh trans., 1987) (discussing the philosophy of Islamic jurisprudence).

principles and *Qur'anic* injunctions as well as the rules of *fiqh* are given the all-inclusive name *Sharia* (literally, the way).

Throughout history Muslim discourses have emphasized the unwavering obligation of all Muslims to live by the dictates of *Sharia* (God's law). Joseph Schacht, the well-known orientalist, gives us a sense of the centrality of *Sharia* discourses in Muslim life when he states: "Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself."⁴ In this famous and lengthy passage, the Muslim jurist Muhammad Ibn Qayyim (d. 751/1350-51) conveys a sense of the reverence and adoration with which the *Sharia* was held in Islamic history. He states:

The *Sharia* is God's justice among His servants, and His mercy among His creatures. It is God's shadow on this earth. It is His wisdom which leads to Him in the most exact way and the most exact affirmation of the truthfulness of His Prophet. It is His light which enlightens the seekers and His guidance for the rightly guided. It is the absolute cure for all ills and the straight path which if followed will lead to righteousness It is life and nutrition, the medicine, the light, the cure and the safeguard. Every good in this life is derived from it and achieved through it, and every deficiency in existence results from its dissipation. If it had not been for the fact that some of its rules remain [in this world] this world would become corrupted and the universe would be dissipated If God would wish to destroy the world and dissolve existence, He would void whatever remains of its injunctions. For the *Sharia* which was sent to His Prophet . . . is the pillar of existence and the key to success in this world and the Hereafter.⁵

Ibn Qayyim's language is more colorful than most but its essential message is by no means unusual in Muslim discourses. The *Sharia* should guide and inspire every Muslim.

Nevertheless, there is no formal church in Islam. No single institution can formulate a single comprehensive view for all Muslims to adopt. Every Muslim must discharge God's covenant by living

4. SCHACHT, *supra* note 1, at 1. Although Schacht uses the expression "Islamic law," he means *Sharia*.

5. 3 MUHAMMAD IBN QAYYIM, *A'LAM AL-MUWAQQI'IN* 3 (this is my translation of the original).

according to his or her personal understanding of the *Sharia*. Yet, personal individual understandings cannot be entirely autonomous. There are two main restrictions. First, the personal understanding must be consciously and reflectively held. The individual may not adhere to a position without full awareness of its evidentiary basis and its consequences. Second, the individually held position must engage and, at times, yield to a consensus-building process called *ijma'*. In that sense, orthodoxy in Islam develops through a process of consensus building in Islamic society.

The Islamic civilization has produced a large number of Islamic theological and legal schools emphasizing a variety of *Sharia*-based comprehensive views. Most of these schools have become extinct, but through the process of consensus building a few survived into the contemporary age. In the Sunni world, the main schools are the Shafi'ites, the Hanafites, the Malikites, and the Hanbalites. Additionally, several schools emerged in the contemporary age such as the Wahabis of Saudi Arabia and the synchronist school of the Salafis. In the Shi'ite world, three schools, the Ja'faris, the Isma'ilis, and the Zaydis, survived into the contemporary age. Furthermore, there is the Kharajite Ibadite school which predominates in Oman.⁶

The main discursive mechanism for consensus building is the duty to enjoin the good and forbid the bad. The *Qur'an* describes the truly pious as those who "enjoin the good and forbid the bad and maintain the limits of God."⁷ Elsewhere the *Qur'an* states: "You were the best nation sent to people [because you] enjoin the good and forbid the bad."⁸ The duty to enjoin the good and forbid the bad is both individual and collective. It is incumbent upon every individual, man and woman, and it is imperative that the Muslim nation as a whole discharge the same obligation. Integral to this process is a duty of mutual consultation (*shura*). The *Qur'an* describes those who are rightly guided as those "[w]ho obey the commands of their Lord, fulfill their devotional obligations and whose affairs are settled by mutual consultation."⁹

What is "good" or "bad" is held individually and subjectively. But through the discursive process of consultation a consensus is reached on collective notions of the good and the bad. However the

6. See NOEL J. COULSON, A HISTORY OF ISLAMIC LAW 36-73, 86-119 (1964).

7. QUR'AN, *supra* note 2, at 9:112.

8. *Id.* at 3:109.

9. *Id.* at 42:38 (emphasis added).

consultative process does not end here. Since the *Qur'an* insists on individual accountability,¹⁰ each person must continuously engage in a conscious and reflective process of discovering the divine will. Consequently, the discursive consultative process of enjoining the good and forbidding the bad continues within society in a dynamic process of *new* consensus building. As long as the divine will is attainable only through individual subjective comprehensions, and as long as individual subjective comprehensions continue to shift and develop, the discursive consultative process must continue to search for new grounds for consensus building.

Muslim publicists had assumed that the consensus-building process would take place in *dar al-Islam* (the lands of Islam), and that the government would be organized according to the principles of *al-khilafa* or *imama* (Islamic government). What exactly defines *dar al-Islam* and what are the organizing principles of Islamic government are hotly contested issues in Islamic history. The vast majority of Muslim publicists, however, insisted that the primary duties of an Islamic government were enforcing the *Sharia* and maintaining security and order. As Islamic history testifies, these two obligations often existed in a state of tension. In order to achieve stability and order it is, at times, not possible to indulge the substantial restrictions of *Sharia* law. More importantly, however, which *Sharia*-based comprehensive view must the state enforce? And how does an Islamic state give institutional force to the process of discourse and consensus building? The responses to these interrelated questions are complex. Furthermore, Islamic historical practices in these areas have been varied and diverse.

For the purposes of this Essay, it is sufficient to note that although Muslim publicists have often argued that the Islamic state must enforce the *Sharia*, they have not conceded the power of definition to the state. In other words, they have not recognized the state's power to define the one authentic *Sharia*-based comprehensive view. The overwhelming majority of Muslim jurists have insisted that the jurists of Islam should retain the power of definition. Significantly, through Islamic history no single *Sharia*-based comprehensive view has emerged as a clear winner to the exclusion of others. Any researcher in Islamic law and theology is struck by the amount of diversity, debate, and disagreement on many essential points.

10. *Id.* at 2:281, 14:51, 52:21, 74:38.

Nonetheless, this historical richness might be on its way to being reversed in the contemporary age.

Islamic discourse, being fundamentally a religious discourse, runs two distinct risks. For one, it excludes comprehensive views not based on an interpretation of the divine will from the consensus-building process. This is especially the case in relation to non-Muslims. Even if non-Muslim comprehensive views are based on interpretations of the divine will, that they are not Islamic renders them problematic. Generally, the premodern solution to this problem was to create segregated legal jurisdictions. Muslims were to be governed by their own laws and Christians and Jews, called the People of the Book, as well as some other minorities, were to be governed by their own laws. In a sense, Muslims would have their own discourses and non-Muslim discourses occupied their own space, separate and apart from Muslim discourses. One does not want to overstate the case, however, because Islamic history is replete with examples of cooperation and integration between Muslims and non-Muslims. But, at least theoretically, non-Muslims had their own laws, courts, and jurisdictions. We will return to this point later in the Essay.

The second problem arises when one Islamic comprehensive view attempts to preempt and exclude all other Islamic comprehensive views. Alternatively, a consensus reached at one historical point might attempt to preempt any further consultation and consensus building. Arguably, if one firmly believes that he or she has correctly understood the divine will, he or she might refuse to engage in any further discourse and might attempt to impose his or her comprehensive view on all others. This scenario has taken place several times, with varying degrees of success and failure, in Islamic history. Today, the Wahabis and a variety of Islamic movements seem intent on preempting and excluding all other *Sharia*-based comprehensive views. Furthermore, the religious discourse might become so polarized and divisive that it is not conducive to any form of consensus building. This has taken place several times in Islamic history, most notably between the Sunnis and the Shi'ites.

Whatever the problems may be, the *Sharia* and the discourse on the *Sharia* are at the core of Islam. The *Sharia* binds and obligates all Muslims wherever they may reside. A Muslim living in a land not dedicated to a discourse on the *Sharia* and not committed to applying any *Sharia*-based comprehensive view creates an intricate problem. What if the state considers *Sharia* discourses irrelevant or even unhelpful in the public realm? It must be emphasized that this

problem could arise in Muslim or non-Muslim territory. For example, it is possible that a government ruling over a largely Muslim population would be hostile to all *Sharia* discourses. This situation exists in many Muslim countries today, partly accounting for the tumultuous nature of the politics surrounding Islamic movements.

For purposes of this Essay, we will not focus on the problem as it relates to Muslims living in countries with Muslim majorities. Our focus is on Muslims who live in non-Muslim territories, particularly those who live in pluralist liberal democracies such as the United States.

In a secular liberal democracy, the state may not enforce a religious comprehensive view. In the United States, the government may not establish any religion. To state the obvious, the state may not decide to establish *Sharia* law as the law of the land or adopt Islam as the religion of the state. Kent Greenawalt and other scholars have argued that religious and other comprehensive views are inaccessible to the public at large. Public officials and private citizens should exercise a degree of self-restraint in public discourses. Public officials and private citizens entering the public realm should refrain from making inaccessible arguments which rely on religious or other comprehensive views. Furthermore, Greenawalt differentiates between the amount of self-restraint that executives, legislators, judicial officials, and private citizens must exercise. The judiciary must exercise the most self-restraint, followed by the executive. As to legislators and private citizens, Greenawalt seems to advocate a kind of balancing act with a presumption in favor of self-restraint. Legislators must exercise greater self-restraint than private citizens. But on certain crucial unsettled public issues or outrageous public policies, legislators may explicitly bring comprehensive views, religious or otherwise, to bear.¹¹ Greenawalt does not advocate an unequivocal and complete exclusion of religious comprehensive views from all public discourses.

If a Muslim decides to reside in or become the citizen of a secular liberal democracy, what becomes of the obligation to live according to a *Sharia*-based comprehensive view? To put it more directly, what becomes of the obligation to obey God's divine law?

11. See KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 158-64 (1995).

How is a Muslim to discharge the discursive obligation of enjoining the good and forbidding the bad?

Some non-Muslim writers have argued that these questions present Muslims with irresolvable dilemmas.¹² In fact, some writers claim that Islamic communities pose a major threat to the stability of Europe.¹³ In the words of one writer:

The religious freedoms in the West are a source of trouble. Islam is a communal way of life and the vast majority of emigrants and their European-born children live together isolated from, and hostile to, the society around them. The separation of Church and State contradicts and conflicts with the tenets of Islam, hence is a constant source of tension. The Muslim communities demand to be allowed to retain all aspects of Islam, including laws of *Urf* (a traditional Arabian law that has been absorbed into the Islamic order and legal system), some of which may be unacceptable in the West. They also seek the imposition of Islamic law, seeing it as superior to the civil law of the land that is secular, liberal, and based Judeo-Christian values. [sic] For believers, the mere acceptance of Western law means a contradiction of Islam's tenet that the *Sharia* is the world's supreme law.¹⁴

There is an obvious tone of paranoia and hostility to Muslim communities in this quote. Nonetheless, from this quote one can make three observations that will be addressed later in this Essay. First, a tension exists between the obligation to obey the *Sharia* and the obligation to obey some of the laws that may exist in a secular liberal democracy. Second, this quote claims that liberal democracies are based on Judeo-Christian values. This claim, casually made by several observers, is, for many Muslims, believed to be a nonaccessible and exclusionary view. In response, several Muslims have insisted that Western civilization is based on Judeo-Christian-

12. See Khaled Abou El Fadl, *Legal Debates on Muslim Minorities*, 22 J. RELIGIOUS ETHICS 127, 128 (1994).

13. YOSSEF BODANSKY, *TARGET AMERICA & THE WEST* 256 (1993). This quote was originally part of an unpublished report entitled "Iran's European Springboard?" issued September 1, 1992 by the House Republican Research Committee's Task Force on Terrorism and Unconventional Warfare. Bodansky was the Director of the Republican Task Force on Terrorism and Unconventional Warfare of the U.S. Congress.

14. *Id.* at 257-58.

Muslim values. Third, Islam and Muslims in the West generate suspicion and hostility in some quarters.¹⁵

The *Sharia* itself does not clearly resolve the issue of Muslim residence in non-Muslim lands. As noted above, the word *Sharia* is an inclusive term. It includes the *Qur'an*, the Sunna, and the general principles and specific rules deduced by Muslim jurists. The *Qur'an* and Sunna are inconclusive on this matter. The *Qur'an* commands the oppressed to escape oppression by migrating to other lands. It states:

As for those whose souls are taken by the angels [at death] while in a state of injustice against themselves, they will be asked by the angels: 'What state were you in?' They will answer: 'We were oppressed in the land.' And the angels will say: 'Was not God's earth large enough for you to migrate?' Whosoever migrates in the cause of God will find many places of refuge and abundance.¹⁶

These *Qur'anic* verses contain several ambiguities. What is "a state of injustice against oneself"? What is oppression? And to where should one migrate? Nevertheless, the reference to "God's earth being large enough" implies that migration could be to any land in which one can escape oppression. The earth was not Muslim when these verses were revealed and remains as such. But if one escapes to lands that are not Muslim, what becomes of the obligation to live by God's commands?

The Sunna is equally inconclusive. Some reports, attributed to the Prophet, forbid Muslims from residing in non-Muslim territories. Other reports contradict this injunction.¹⁷

Significantly, Muslim historical practices and juridical opinions reflect the same complexity. Muslims have resided in non-Muslim territories since the second/eighth century and today about one-third of all Muslims live in non-Muslim lands. Muslim jurists have expressed a variety of positions on the legality of Muslims residing in non-Muslim lands.

15. See, e.g., Daniel Pipes, *Fundamental Questions About Muslims*, WALL ST. J., Oct. 30, 1992, at A11; Daniel Pipes, *The Muslims Are Coming! The Muslims Are Coming!*, NAT'L REV., Nov. 19, 1990, at 28; Elaine Sciolino, *The Red Menace is Gone. But Here's Islam*, N.Y. TIMES, Jan. 21, 1996, at 1.

16. QUR'AN, *supra* note 2, at 4:97-100.

17. See Khaled Abou El Fadl, *Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries*, 1 ISLAMIC L. & SOC'Y 141, 141-44 (1994).

The majority of Maliki jurists maintained that it is illegal for Muslims to reside in non-Muslim territories. Muslims, they argue, should always reside in territories where *Sharia* law either is supreme or could be supreme. Complex historical reasons account for this unequivocal position, but they are not relevant for the purposes of this Essay.

Hanbali and Shi'ite jurists argue that it is preferable that Muslims reside in Muslim territory. Nonetheless, if Muslims are able to practice their religion freely or, as these jurists often explain it, if they are able to "manifest Islam," they may reside in non-Muslim territory. Hanafi and Shafi'i jurists concur that all things being equal, it is preferable that Muslims reside in Muslim lands. But if Muslims are able to manifest their religion, they *may* reside in non-Muslim lands. If Muslims are able to manifest their religion and openly advocate Islam, it is *recommended* that they continue residing among non-Muslims. Shafi'i jurists go further, arguing that if Muslims are able to maintain a degree of autonomy and self-protection, it is their *obligation* to continue residing in non-Muslim territory.¹⁸

Other jurists, from a variety of legal schools, have argued that regardless of whether a territory is Muslim or non-Muslim, Muslims must migrate from territories in which they feel insecure, where there is widespread corruption, or in which injustice prevails. Other jurists argue that Muslims may only live where they can freely enjoin the good and forbid the bad. Whether the territory is formally Muslim or non-Muslim is immaterial.¹⁹

The question at this point is how much of Islam must be "manifested" before residence in non-Muslim territory becomes legal? Alternatively, how much injustice or oppression must be suffered in the lands of Islam before it becomes legal to migrate to non-Muslim territories? Finally, how much freedom to enjoin the good and forbid the bad must be awarded before the residence can become legal? Bernard Lewis argued that since Muslims allowed non-Muslims to retain their own laws, Muslims expected reciprocity—a degree of communal autonomy in which they could apply their own laws.²⁰

18. *Id.* at 143-64.

19. *See id.* at 152-53.

20. Bernard Lewis, *Legal and Historical Reflections on the Position of Muslim Populations Under Non-Muslim Rule*, in *ISLAM AND THE WEST* 53-55 (1993).

However the historical and doctrinal sources do not support this conclusion.²¹

It is unclear how much of Islam had to be manifested before residence in non-Muslim territory could be considered legal. In *responsa (fatawa)* literature, Muslim jurists have argued that even if Muslims are not able to fully discharge *Sharia* obligations they do not have to migrate from non-Muslim territory. Furthermore, the Hanafi school has argued that the public laws of Islam—commercial, civil, and criminal laws—are not applicable in non-Muslim territories. The other Islamic schools maintained that while the laws of *Sharia* morally bind Muslims wherever they may reside, these laws may not be enforced in non-Muslim territory. These schools argued that if a Muslim violates the law of *Sharia* he or she incurs a sin. However, the sinner may not be prosecuted for the violation unless he or she enters Muslim territory.²²

Fundamentally, the ambiguity of Muslim discourses on the issue of manifesting Islam points out the fact that it is impossible to set precise standards in this area. Muslim minorities encounter a variety of specific circumstances and contexts. Any strict standard enunciated is bound to be ineffectual. Muslim minorities, within the bounds of general principles, must be allowed to work out context-specific compromises.

Muslim jurists assumed that Muslims residing in or entering non-Muslim territories would do so under an agreement of *aman* (safe conduct). The agreement would specify the rights and duties of the Muslim population. If an explicit agreement did not exist, Islamic law considered an agreement implied by law. Under an implied by law agreement, a Muslim may not commit hostile acts against the host state and may not commit acts of treachery, deceit, fraud, betrayal, or usurpation. In all other circumstances, a Muslim is strictly bound by the terms of the *aman* agreement. A violation of an explicit or implied agreement could be prosecuted in Muslim territory.²³

At one level, the discussion above might propose a solution to the issue of Muslims in a liberal democracy. A Muslim in the United States whether a visitor, resident, or citizen signs application papers promising to obey the laws of the United States. This procedure might be considered an *aman* agreement. Therefore, while a Muslim

21. See El Fadl, *supra* note 17, at 158-59.

22. *Id.* at 172-81.

23. *Id.* at 175-77.

is ethically bound by *Sharia* law, *Sharia* law itself obligates a Muslim to observe the terms of the *aman* agreement. According to this argument, a Muslim is separate and apart from the non-Muslim society in which he or she lives and maintains a special status through a specific contractual relationship with the non-Muslim society. Meanwhile, it could be argued that a Muslim, through involvement in the public sphere, might attempt to negotiate concessions to his or her desire to implement his or her *Sharia*-based comprehensive view. In other words, a Muslim does not become involved in the public sphere as an insider but as an outsider enjoying a special relationship trying to negotiate special privileges. As to native-born Muslims, arguably the mere fact of citizenship implies an *aman* agreement and, hence, the same logic pertains.

Although some Muslim activists espouse this view, it poses certain difficulties. According to this view, Muslims are involved in the political process for the sole purpose of obtaining concessions for their *Sharia*-based comprehensive view. For example, they might argue for the application of Muslim family law or personal law to Muslims living in the United States or Europe. Obviously, in the United States this type of scenario would pose insurmountable problems for the separation of church and state doctrine and establishment clause jurisprudence. But more fundamentally, since this view limits Muslim participation in the political process to advocating their own *Sharia*-based comprehensive views, it effectively excludes Muslims from occupying public functions, particularly executory and judicial functions. According to this view, Muslims would effectively limit themselves to advocating inaccessible comprehensive views. Their sole goal would be to implement Muslim law exclusively. This leaves Muslims practically no space in executory or judicial functions. Even more, unless a Muslim represents an exclusively Muslim constituency, this view also excludes Muslims from legislative functions.

Essentially, this view advocates self-exclusion from all accessible public issues. Muslims would self-exclude themselves from participating in any public issue unless it relates to their *aman* contract or to their ability to apply the *Sharia*. Several Muslim activists have argued that this view is isolationist, insular, and that it conflicts with their understanding of the duty to enjoin the good and forbid the bad. Self-exclusion in the public sphere and limiting oneself to what might be called *Sharia* issues, these activists argue, renders the duty to enjoin the good and forbid the bad to that of enjoining what is good

for Muslims and forbidding what is bad for Muslims. Islamic doctrinal sources do not warrant this restrictive view of the duty to enjoin the good and forbid the bad.

Other Muslim scholars have argued that the *Sharia* imposes upon Muslims a primary duty to protect the general welfare. Muslims must never permit themselves to become powerless, and they must, under all circumstances, be in a position to safeguard their own interests (*masalih*).²⁴ The necessity of protecting the welfare of Muslims must be at the cornerstone of any *Sharia*-based comprehensive view.²⁵ Consequently, *Sharia* obligations are altered and reformulated in light of context-specific circumstances and needs.²⁶ If Muslims adopt an isolationist and insular stance, the argument continues, they are bound to become powerless. As noted above, there are writers who regard Muslim communities with much suspicion if not outright hostility. Because of the lack of familiarity with Islam and, at times hostility towards Muslims, the isolationist stance is contrary to the welfare of Muslims. Hence, the *Sharia* imposes a duty upon Muslims to become involved in the political process in order to safeguard their interests.

Admittedly, I find the enjoining-the-good-and-forbidding-the-bad argument and the protection-of-interests argument somewhat vague and of limited persuasiveness. As justifications for Muslim involvement in the public sphere, they are useful but incomplete. These arguments explain why Muslims must not adopt an isolationist and insular stance, but they do not elucidate the form that Muslim involvement in the political process should take. It is unclear whether according to these arguments Muslims should only be concerned about public issues that directly affect Muslim interests. Additionally, even if one would adopt an expansive view of these arguments, it is not clear how Muslims should articulate their concerns in the public sphere. If a Muslim, while involved in the public sphere, bases himself or herself on a *Sharia*-based comprehensive view, this view will necessarily be exclusionary and inaccessible to non-Muslims. Arguably Muslim private citizens may appropriately advocate any comprehensive view they deem necessary in the public sphere. But

24. *Id.* at 180. There are several legal maxims such as "hardship begets facility" or "necessities permit the forbidden" which are often cited in support of this argument. See MAHMASSANI, *supra* note 3, at 152-59.

25. For views on public welfare or interests and *Sharia*, see MAHMASSANI, *supra* note 3, at 87-89, 116-17.

26. *See id.* at 105-19 (discussing changes in Islamic law).

those arguments do not clarify whether the same behavior is appropriate in the case of Muslims occupying official public positions.

I think the real issue is whether Muslims, despite their *Sharia*-based comprehensive views, can participate in a pluralist cooperative venture with non-Muslims in order to produce justice. Is it possible to find commonly accessible grounds on which to discuss public issues, with the goal of finding solutions that are fair to all?

In preparation for this Essay I posed several questions to Muslims, all of whom are United States citizens.²⁷ I asked the participants if they considered it offensive if a judge in justifying a legal decision cites Christian values, Judeo-Christian values, Jesus Christ, or "our Christian traditions." All of the participants said that they would consider this offensive. I posed the same hypothetical but involving an executive—the president, a justice department official, or the secretary of education. Most of the participants stated that they would also deem this offensive.²⁸ In relation to the legislature, there seemed to be some distinction as to whether the reference occurs in a preamble to a statute or in floor debates. The vast majority of the participants said that they would be offended by the above-mentioned references if they occurred in a preamble to a statute.²⁹ The majority of the participants stated that these references by a legislator in floor debates would be offensive as well.³⁰ I asked the participants if they would think it is inappropriate for private citizens to make the same references when testifying before Congress, writing an article in a newspaper, or writing a letter to the president. Three participants said that they would deem it inappropriate and three were unsure. The responses of the remaining participants ranged from "it's okay" to "it's their right."³¹

27. I conducted interviews between January 15 and 26, 1996, with 26 participants from Texas, New Jersey, Pennsylvania, Illinois, California, New York, Florida, Arizona, and Indiana. Five participants identified themselves as politically active, three said that they do not follow political events, and the rest said that they consider themselves politically aware.

28. Two participants stated that a reference to Judeo-Christian values is not offensive.

29. One participant said that a reference to Judeo-Christian values is not offensive.

30. Three participants said that they would not be offended, but two of them added that they would not vote for that legislator.

31. I asked the participants if they think it is appropriate for a Muslim judge to start his opinion by stating, "In the name of God the all Merciful, the all Compassionate." This is a well-known Muslim phrase pronounced before commencing any act. Ironically, eight participants said that this is appropriate.

Of course, this is not a scientific survey and one must be very cautious as to the conclusions that could be drawn. But it does seem that the reason most of the participants objected to Christian or Jewish references by the judiciary, executive, or legislative branches is that these references are not accessible to Muslims. The psychological impact of these references is to exclude Muslims. Phrasing judicial, executory, or legislative decisions or arguments in nonaccessible or exclusionary terms creates what Greenawalt calls a "perceived unfairness."³²

The responses of the participants seem to indicate a belief that, as citizens, the political process should take their sensitivities into account—that the political discourse should be phrased in terms that are accessible to them. The logical point that follows is one of reciprocity. If Muslim citizens demand access to political discourse and process, it necessarily follows that as participants in the political process, they must allow the political process to be accessible to others. Consequently, as participants in the political process a degree of self-restraint is necessary to justify decisions and arguments on equally accessible grounds.

We noted earlier that Muslim historical practices allowed a relationship of reciprocity—Christians and Jews implemented their own laws while Muslims retained their laws. Each comprehensive view was adhered to and applied by its adherents. In a liberal democracy, the state differentiates between a political perspective, which is accessible and nonexclusive, and a comprehensive perspective, which is nonaccessible and exclusionary. The liberal democratic state refrains from adopting a comprehensive view leaving the political realm open to all. If non-Muslims promise to refrain from forcing their comprehensive views upon Muslims, reciprocally, Muslims should refrain from forcing their comprehensive views upon others.

This relationship of reciprocity is particularly applicable to Muslims functioning as public officials. As a public official, a citizen represents the political process, not an individual comprehensive view. Most of the participants in our questionnaire distinguished between public officials invoking nonaccessible grounds and advocacy on the basis of nonaccessible grounds by private citizens. I suspect that most Muslims in the United States would argue that it is entirely appropri-

32. GREENAWALT, *supra* note 11, at 24.

ate for private citizens to advocate their own comprehensive views in the political process. My own inclination is that if social and political discourses are to avoid polarization, a degree of self-restraint is necessary. I would argue that as a discrete and often discriminated against minority, Muslims are better off in a nonpolarized society. Although one must be careful, if one insists that all public issues be discussed from political perspectives, rather than comprehensive perspectives, there is a risk that pluralism in society would suffer.

Everything said so far pertains to the issue of how Muslims should conduct themselves in the political process. If Muslims become involved in the political process, they should respect a rule of reciprocity which, in turn, requires self-restraint. However, considering that at least some Muslims base their lives on a *Sharia*-based comprehensive view, should they become involved in the political process in the first place? The two views discussed above—the enjoining-the-good-and-forbidding-the-bad argument and the protection-of-interests argument—are designed to provide responses to this problem. However, I would like to draw attention to an additional significant fact.

The majority of Muslim jurists who permitted Muslims to reside in non-Muslim territory also argued that Muslims may serve as public officials. The only restriction is that they may not commit acts directly detrimental to the interests of other Muslims. Additionally, they may not commit infractions against the religious laws of Islam such as lying, cheating, drinking alcohol, eating pork, or having extramarital sex. These jurists did not demand that Muslim public officials working in non-Muslim territories implement the Islamic public laws such as commercial and criminal regulations.

Shi'ite jurists addressed a closely related scenario. They discussed whether Shi'ites may serve as judges or other public officials in Sunni territories. In these positions Shi'ites may have to implement Sunni laws and observe Sunni regulations. Shi'ite jurists stated that a Shi'ite may do so as long as he or she does not vouch for the correctness of the law being implemented. In all circumstances, a Shi'ite is under an obligation to use discretion to implement justice. On issues on which a Shi'ite has no discretion, a Shi'ite performs the official task without personally adopting the Sunni comprehensive view. On issues which allow discretion, a Shi'ite is obligated to implement personal notions of justice. The difficulty confronted here is that this discourse addresses the involvement of a Shi'ite in a polity that is *not* neutral towards all comprehensive views. Rather the

Shi'ite is functioning in a polity which actively and openly espouses a Sunni comprehensive view—a comprehensive view which is antithetical to Shi'ite comprehensive views.

This dynamic is less problematic in a secular liberal democracy. Here, the system does not adopt a comprehensive view and, in theory, should not be hostile to any comprehensive view. The pluralist reality of the state forces it to be neutral towards all comprehensive views. A Muslim public official represents this pluralist reality and, therefore, must base policies and decisions on grounds that are accessible to all. For example, a Muslim who happens to adhere to a *Sharia*-based comprehensive view, may accept a position as a judge in a liberal democracy. The judge is confronted with a case in which the death penalty is at issue. The judge becomes persuaded that pursuant to the law of the state a death sentence is warranted but pursuant to his or her *Sharia* view a death sentence is not warranted. It is not appropriate for the judge to rule according to his or her *Sharia*-based comprehensive view. But what if the judge encounters a case in which the law of the state is ambiguous? If the law of the state is equivocal on whether a death sentence is warranted, may the Muslim judge, at this point, adjudicate in accordance with a personal comprehensive view? The Shi'ite position would seem to hold that this is a situation in which the judge may exercise discretion in accordance with the judge's own comprehensive view. I believe that in a liberal democracy the Shi'ite view would be indefensible. Even if the judge has discretion, that discretion must be exercised on grounds that are accessible to all, especially the defendant in the case. The judge must make every effort to reason and explain that reasoning in accessible terms. Reversing the scenario, assuming that the defendant is Muslim and the judge holds a comprehensive Christian view, I doubt very much if the Muslim defendant would think it fair that the judge used his or her discretion in accordance with Christian values.

In the Muslim community, there are two commonly heard objections to the argument in favor of excluding religious comprehensive views from public functions. First, in reality this is a Judeo-Christian culture. The political system, far from being neutral, is based on the comprehensive views of Judeo-Christian values. The arguments in favor of accessible political grounds are nothing more than a guise for excluding other comprehensive views from influencing the political system or altering the already dominant comprehensive view. Second, insistence on self-restraint or self-exclusion in the

public realm will lead to an immoral and valueless society. When public discourses become value neutral they quickly descend to a position lacking values. Both objections are rather popular in the Muslim community.

As to the first objection, I have to admit that I find the claim, often made by politicians, that the values of a liberal democracy are based on a Judeo-Christian tradition incomprehensible.³³ But even if one accepts this position, it implies that Muslims should be allowed to implement their own system based on their own comprehensive views. In other words, if one believes that the present system is fundamentally Judeo-Christian, the reciprocal argument is that Muslims should be allowed to live under a system that is fundamentally Muslim. It is not an argument against self-restraint; it is an argument for separation. It is not an argument that enables a Muslim to work within the system; rather, it requires a Muslim to opt out of the system altogether. Take for example the situation of the Muslim judge mentioned above. That Muslim judge, upon taking office, takes an oath promising to uphold the law—a law supposedly based on the Judeo-Christian tradition. A judge who adjudicates cases according to a personal Islamic comprehensive view violates that oath. In Islamic terms, the judge violated the terms of his or her *aman*. According to the *Sharia*, he or she cannot take an oath he or she does not intend to keep. Consequently, if the Muslim judge believes that the law of the state is Judeo-Christian, he or she must self-exclude himself or herself from any official position. One might argue that according to the Shi'ite view discussed above, the Muslim judge can implement Judeo-Christian law except in cases in which he or she has discretion. But the law of *aman* has no application between Shi'ites and Sunnis; consequently, it is an entirely different relationship. According to the law of *aman*, the Muslim judge cannot use discretion to implement a *Sharia*-based comprehensive view unless the contract of *aman* specifically permits it.

The second objection is more formidable. The political system in a liberal democracy is not valueless; it is value specific. The primary values are accessibility, inclusion, and equal respect. Individuals in society can and should adhere to their own values resulting from their own comprehensive views. When the state

33. See Arthur Schlesinger, Jr., *The Opening of the American Mind*, N.Y. TIMES BOOK REV., July 23, 1989, at 26.

outlaws polygamy, or imposes the death sentence, or allows credit cards to collect twenty percent interest rates on debts, the state necessarily offends the comprehensive views of some and possibly even most of its citizens. The theory of liberal democracy requires public officials to justify these policies on accessible grounds. Citizens may seek to change these laws because they might believe that they are fundamentally immoral. If they succeed in changing these laws, the state, again, must justify the change in the law on accessible grounds. Liberal democracy theory advocates accessibility, not immorality. I do not believe accessibility must necessarily lead to immorality. The objection as articulated by some members of the Muslim community protests the state's failure to *preach* morality. However, what if the morality preached by the state excludes Muslims or even discriminates against Muslims? To argue that the remedy is for Muslims to engage the political process and change this fact assumes that minorities have an equal power to convince and persuade, an unrealistic assumption.

In conclusion, Muslims in the United States are far from attaining a consensus on the terms of conduct or debate in a liberal democracy. Muslim doctrinal sources provide several competing values to consider and weigh. Different Muslims could resolve the inherent conflicts and tensions differently. I have argued that an ethic of self-restraint in public discourse and acts affords the Muslim minority in the United States the most protection. The recent hysteria concerning Islamic fundamentalism and terrorism proves that Muslims are well-advised to seek a system that affords them the greatest protection. But a rule of reciprocity requires that Muslims exercise the same self-restraint in discharging public duties and phrasing public discourses.

There is no single *Sharia*-based comprehensive view. Throughout Islamic history there have been a variety of Islamic comprehensive views. Muslims have a rich history of discourse between the various *Sharia*-based comprehensive views in which self-restraint and consensus building were practiced. Muslims in the United States are well-advised to develop their own tradition of self-restraint, equal respect, and consensus building and, of course, non-Muslims owe them the same duties.