

# REVOLUTIONARY ISLAMIC JURISPRUDENCE: A RESTATEMENT OF THE ARAB SPRING

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*In early 2011, a wave of uprisings swept through the Middle East, ushering in a year of protest and radical change. The events came to be known as the Arab Spring and forever altered prior conventions. One outcome was the initiation of a vibrant discourse on Islamic law's stance regarding revolution. It juxtaposed two sides: advocates for the status quo and agitators for change. The first group rejected any opposition to the state, especially the executive. The second wanted a new path that would encompass the public's desire for freedom, dignity, and justice. These were the underlying values of the protests and, along with the legitimacy of protesting itself, proved to be highly contentious. In particular, a fierce debate about these values ensued among jurists of Islamic law. Hoping to capitalize on the potency of religious law among sizable parts of their populations, governing authorities dispatched sympathetic Islamic jurists to delegitimize the uprisings. In response, other jurists from across the Middle East issued fatwas (advisory legal opinions) advocating for continued protest. These protesting jurists faced a daunting task: develop new meanings to facilitate rapid legal change while deriving legitimacy from tradition. In the process, they gave life to a new Sunni legal discourse on non-violent revolution.*

*This Article identifies two types of pro-uprising legal arguments that emerged in this period: textual and policy-based. By focusing on fatwas from 2011, the first year of the uprisings, this Article will demonstrate how jurists pursued both formalist and realist approaches to legal interpretation. They crafted creative approaches to remain firmly within "conventional" Islamic law and its reasoning, while also exploring unconventional avenues to fortify their arguments in favor of protest. By showing how jurists brought new readings to Islam's constitutional sources, expanded the category of legal obligations, and incorporated aspects of a contemporary rights discourse, this Article provides new insights into how rapidly Islamic law can adapt to radical change in the world it inhabits.*

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## I. INTRODUCTION

In early 2011, a wave of uprisings swept across the Middle East, ushering in a year of protest and radical change. The events altered prior conceptions and initiated a vibrant legal discourse around Islamic law's position on revolution. It juxtaposed two sides, those advocating a rigid adherence to the status quo legal tradition versus those agitating for a more dynamic approach to accepted conventions.<sup>1</sup> This dynamism did not rely on a whiggish approach to modernity, but rather centered around crafting an authentic Islamic legal vision for revolutionary change based on values such as liberty, justice, and dignity. The absence of a centralized religious authority meant

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1. The use of the term "legal" here, and throughout this Article, is in reference to Islamic law and not the law of any one country in the Middle East. Therefore, the Islamic "legal" discourse should not be confused with the legal discourse of a particular state. Furthermore, as explained in more detail later, this is specifically a Sunni Islamic legal discourse. The Shi'i discourse, a subset of the larger discourse, is more developed and requires separate treatment elsewhere.

that constructing an argument for revolutionary change was a collective process of creatively engaging the social realities of the present while remaining firmly rooted in the religious past. Through this engagement, new meanings were developed to confront the status quo, forever shifting the terms of the debate on revolution.

Robert M. Cover's observation that "because law is the attempt to build future worlds, the essential tension in law is between elaboration of legal meaning and the exercise of or resistance to the violence of social control" captures the process that took place in 2011.<sup>2</sup> This tension was present in the "Arab Spring,"<sup>3</sup> as new legal meanings developed from within the same legal tradition that demanded obedience to the state. Cover also notes that the "significance or meaning that is achieved must be experienced or understood in vastly different ways depending upon whether one suffers that violence or not."<sup>4</sup> The relationship of meaning to the violence suffered is also evident as legal opinions supporting the Arab Spring uprisings were defined by a jurist's operating circumstances and the state's response to them. In general, even though judicial decision-making in the American legal system was the primary focus of Cover's remarks, his observations are applicable to other contexts, even ones where judges are no longer participating in lawmaking and adjudication. While arguably an imperfect application, Cover's ideas resonate in the non-statist context of "lawmaking" in revolution, where the entire purpose is to create new worlds and meanings out of a backdrop of violence. There is a vast difference between what is typically understood as lawmaking and what Islamic jurists engaged in during the Arab Spring. Their lawmaking consisted of elaborating and creating new legal rules that lacked both formal au-

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2. Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1602 n.2 (1986).

3. There has been much debate as to whether this was truly an Arab "Spring" due to the mixed outcomes. I think any assessment at this stage on the success or failure of these uprisings would be premature. What can be comfortably commented on, however, are the ways in which the events of the Arab Spring changed the discourse. One aspect of this change is examined here.

4. Cover, *supra* note 2, at 1602 n.2.

thority and binding application.<sup>5</sup> The Arab Spring context and the elaboration of legal meaning were deeply tied to Islam from the earliest days.<sup>6</sup> Islamic law's impact partially arises from the demographic dominance of Muslims in the region. According to the Pew Research Center, as of 2010, ninety-three percent of the Middle East-North Africa region is Muslim.<sup>7</sup>

Islamic law's role is illustrated by a story the Moroccan jurist, Aḥmad al-Raysūnī,<sup>8</sup> mentions at the beginning of his 2013 book, *The Law of Revolution (Fiqh al-Thawra)*.<sup>9</sup> He recounts a night in February 2011, during the first days of the Arab Spring, when he received a call from a young man involved in the ongoing protests.<sup>10</sup> The call came directly from Tahrir Square, the epicenter of the Egyptian uprising, and, in

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5. Accordingly, it was neither lawmaking in the legislative nor the judicial sense.

6. The "start" of the Arab Spring was arguably on December 17, 2010 when a twenty-six-year old Tunisian man, Mohammad Bouazizi, stood in front of the Sidi Bouzid governor's office and set himself on fire to protest the local police confiscating the produce he was selling, ostensibly because he lacked a vendor's permit. JEAN-PIERRE FILIU, *THE ARAB REVOLUTION: TEN LESSONS FROM DEMOCRATIC UPRISINGS* 19 (2011); see also Peter Beaumont, *Mohammed Bouazizi: the dutiful son whose death changed Tunisia's fate*, *THE GUARDIAN* (Jan. 20, 2011), <http://www.theguardian.com/world/2011/jan/20/tunisian-fruit-seller-mohammed-bouazizi>. This act itself was not directly connected to Islam, but research suggests that "religion was a significant motivating factor in the Arab Spring" protests that followed. Michael Hoffman and Amaney Jamal, *Religion in the Arab Spring: Between Two Competing Narratives*, 76 *J. OF POL.* 593, 605 (July 2014). In addition, Fridays, the day of Muslim congregational prayer, became crucial days of protest, turning into not just times of prayer, but of "symbolic power." This was most powerfully represented in Egypt on Friday, January 28, 2011, a "turning point in the Arab Spring," when hundreds of thousands gathered in Tahrir Square to pray. Mairi Mackay, *Prayer and Politics: How Friday Became the Middle East's Day of Protest*, *CNN*, June 20, 2011, <http://www.cnn.com/2011/WORLD/meast/06/17/friday.middle.east.protests/>.

7. PEW RESEARCH CENTER, *THE FUTURE OF THE WORLD'S RELIGIONS: POPULATION GROWTH PROJECTIONS, 2010-2050* 154 (Apr. 2, 2015). The remaining demographic breakdown is Christian (3.1%) and Jewish (1.4%). *Id.*

8. Born in 1953, Aḥmad al-Raysūnī is a jurist best known for his works on the higher objectives of the law (*maqāṣid al-sharʿa*) and currently directs a research center in Rabat, Morocco. He previously served as Vice President of the International Union of Muslim Scholars. Personal Website of Aḥmad al-Raysūnī, <http://www.raissouni.ma/index.php/raissouni/biographie.html>.

9. AḤMAD AL-RAYSŪNĪ, *FIQH AL-THAWRA* ("LAW OF REVOLUTION") (2013).

10. *Id.* at 7.

a “distressful” tone, the protestor relayed the “confusion” being caused by anti-protest *fatwas* (advisory legal opinions) circulating in the square.<sup>11</sup> They included the opinions of numerous jurists affiliated with the Salafi movement and, more importantly, with the *Dār al-Iftāʾ*, Egypt’s official body issuing *fatwas*.<sup>12</sup> These legal opinions stated that protests, demonstrations, and sit-ins were prohibited under Islamic law and it was a legal obligation to obey the *walī al-amr*, a reference to the head of state.<sup>13</sup> The young man asked for Raysūnī’s opinion whether, in light of these *fatwas*, Islamic law sanctioned the protestors’ activities.<sup>14</sup> In response, Raysūnī recounts “spending all night” writing a legal opinion entitled “The Legal Obligation to Remove the Egyptian President and Try Him in Court” (*Wujūb ʿazl al-raʾīs al-miṣrī wa muḥākamatahu*).<sup>15</sup> In it, he made clear the Islamic legal basis for supporting the protests.<sup>16</sup>

This story highlights some of the key points examined here. The Arab Spring protestors raised the profile of values such as freedom, dignity, and justice to challenge the status quo governing their lives. The anti-protest *fatwas* confused the young protestor because they juxtaposed these values with an Islamic legal “orthodoxy” that said, outside rare occasions, an

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11. *Id.*

12. *Id.*

13. *Fatāwā al-ʿulamāʾ fi al-muzāharāt wa al-irtisāmāt* [Legal Opinions of Religious Scholars on Demonstrations and Sit-Ins], AL-SAKĪNA (Jan. 13, 2011) [hereinafter Anti-Uprising Fatwa], <http://www.assakina.com/fatwa/6255.html>.

14. RAYSŪNĪ, *supra* note 9.

15. RAYSŪNĪ, *supra* note 9. Raysūnī’s book represents a potential new “genre” of legal writing in Islamic law addressing, among other things, questions related to non-violent revolution. While armed rebellion and armed struggle have been the subject of Islamic legal treatises before, this specific type of writing appears to be a product of the Arab Spring. These books touch on a host of related topics, including the role of citizens, the idea of governance, and the place of Islamic law post-revolution. I hope to provide a more detailed treatment of books written in this genre in a forthcoming article.

16. Presumably, Raysūnī’s opinion was subsequently circulated among the protestors. I have primarily relied on the version published here: Aḥmad al-Raysūnī, *Wujūb ʿazl al-raʾīs al-miṣrī wa muḥākamatahu* [The Legal Obligation to Remove the Egyptian President and Try Him in Court], TIZPRESS (Feb. 8, 2011), <http://www.tizpress.com/?p=7253>.

executive should not be overthrown.<sup>17</sup> Accordingly, protestors were caught between two competing desires: the pursuit of universal values and fidelity to their faith. Understanding this, states deployed their own Islamic legal jurists to promote the status quo's orthodoxy and delegitimize revolutionary behavior. In response, protestors sought out jurists who might challenge the traditional legal position opposing revolution. Their aim was to validate both the behavior they were already engaged in and the values motivating it. The fact that these competing interests, status quo and revolutionary, each had *fatwas* circulating in the heart of the protests illustrates the essential space Islamic law occupies in determining what the public considers lawful behavior. While many have sought to understand the Arab Spring's religious discourse by focusing on Islamist political parties, another subset of the population provides far greater insights in this regard—the jurists (*fuqahā*). In addition, Raysūnī's story also indicates an enhanced role for the public in Islamic law. Not only did their actions drive the development of a legal discourse on protests, but they featured prominently in the arguments that developed subsequently.

At a broader level, this Article seeks to examine the way in which societies embrace certain values and legitimize them through “law.” In particular, it focuses on how this process occurs during a revolution, when all systems linked to the state—including the judiciary—are rejected. During this period, alternative sources of legal authority are sought to validate the goals of the revolution. This is a case study of one revolutionary context, the Arab Spring, and how Islamic law served as its validating mechanism. Specifically, this Article analyzes the type of legal reasoning and argumentation used by jurists supporting the Arab Spring uprisings (hereinafter, “pro-uprising jurists”) to demonstrate how Islamic law provides validation for revolutionary goals. The focus will be on a selection of *fatwas* issued in 2011, the first year of the uprisings, by jurists

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17. M. CHERIF BASSIOUNI, *THE SHARI'AH AND ISLAMIC CRIMINAL JUSTICE IN TIME OF WAR AND PEACE* 214 (2014) (describing the traditional position the “imperative of obedience to the ruler”). However, even the status quo had one exception: there are justifiable grounds for removing a head of state who openly rejects Islam after coming to power. RUDOLPH PETERS, *JIHAD IN CLASSICAL AND MODERN ISLAM: A READER* 7 (1960) (noting that Islamic law only allows revolt in “very rare circumstances” one of which is “when a ruler abandons his belief”).

from a range of Arabic-speaking countries who were engaged in legitimizing the events as they unfolded. Using jurists from multiple states provides the perspective of different local contexts while also demonstrating the transnational character of Islamic law and its legal opinions.<sup>18</sup> Aside from written *fatwas*, I also examine other media that jurists employed to engage the public. This includes television appearances on call-in shows, where jurists answer Islamic legal questions, and video clips of *fatwas* issued directly from the protests. One of the aims of the Article is to show how jurists' arguments contain both formalist aspects of traditional Islamic legal methodology and realist accommodations to the modern sensibilities of their respective constituencies. In other words, while the public was requesting *fatwas* to support their protest activities, protestors also influenced the content of the legal opinions that were issued in response.

The content of these *fatwas* was also impacted by the unique rhetoric of the uprisings, a revolutionary language consisting of both religious and secular (or universal) elements that represented the values at stake.<sup>19</sup> In fact, while "past revolutionary occasions across the Arabic-speaking world" centered on the traditional Muslim rallying cry of "God is Greater" (*Allahu Akbar*), during the Arab Spring, this slogan was often overshadowed by calls for "Freedom, freedom!" (*Hurriya, hurriya*) or "Peacefully, peacefully" (*Silmiyya, silmiyya*).<sup>20</sup> Khaled Abou El Fadl has observed that the relationship between relig-

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18. As I show later on, these jurists are not territory specific because Islamic law is not necessarily tied to any one territory. Yet, they will often give deference to legal rulings that arise out of a specific territory and pertain to an issue from that territory.

19. Khaled Abou El Fadl, *Conceptualizing Shari'a in the Modern State*, 56 VILL. L. REV. 803, 804 (2012). In Syria, one of the popular slogans used at the protests was "God, Syria, freedom and nothing else" (*Allah, sūriyya, ḥurriyya, wa bass*). See Jawad Qureshi, *The Discourses of the Damascene Sunni Ulama during the 2011 Revolution*, in STATE AND ISLAM IN BAATHIST SYRIA: CONFRONTATION OR CO-OPTATION? 59, 68 (2012).

20. Abou El Fadl, *supra* note 19, at 804. Arguably, one of the more popular slogans was "the people want to try the President" (*al-sha'ab yurid muhakat al-ra'is*). CHIBLI MALLAT, PHILOSOPHY OF NONVIOLENCE: REVOLUTION, CONSTITUTIONALISM AND JUSTICE BEYOND THE MIDDLE EAST 221, 237 (2015) ("[A] request echoed all over the revolutions of the Middle East"). More importantly, the entry of Islam into the protests did not use the popular Brotherhood slogan "Islam is the Solution" (*al-Islam huwa al-Hal*). CARRIE R. WICKHAM, THE MUSLIM BROTHERHOOD: EVOLUTION OF AN ISLAMIST MOVE-

ion—specifically Islamic law—and universal values such as freedom and justice were seen by protestors as “natural, innate and organic.”<sup>21</sup> While generally correct, this issue is slightly less settled for protestors than Abou El Fadl suggests. Al-Raysūnī’s anecdote concerning the disruptive effect of anti-protest *fatwas* demonstrates that protestors still needed to be convinced that their *understanding* of these values, and the methods used to bring them about, were organic to the faith. In other words, even though these values are represented in Islamic legal tradition, contemporary notions of what constitutes “freedom,” or “justice” may not necessarily align with premodern definitions.<sup>22</sup> As a result, a process must exist to reconcile the contemporary formulations of these values with Islamic law in order for the organic relationship to persist.

With this in mind, two common orthodoxies in Islamic legal studies are addressed in this Article. The first, relating to the values-reconciliation process mentioned above, contends that a layman “affects neither Islamic positive law nor its legal methodology.”<sup>23</sup> As this Article will show, the public’s impact on Islamic law took two primary forms. Initially, they were able to drive the development of a legal discourse on revolution because of their actions against the state. Once the uprisings engulfed the region, jurists began to debate the legitimacy of mobilizing to overthrow a government. Furthermore, the public also began to feature in the legal arguments jurists constructed to support the uprisings; the public’s preferences and concerns became a component of the evaluation. The second orthodoxy relates to the supposed passivity of jurists in the political sphere. My challenge to this orthodoxy builds on the critique offered by Khaled Abou El Fadl in his seminal work

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MENT 161 (2013) (“[W]e didn’t raise the slogan ‘Islam is the Solution’ or anything like that.”).

21. Abou El Fadl, *supra* note 19, at 816.

22. For example, protestors were arguably defining “freedom” as various forms of “political freedoms” that they were lacking, whereas historically “freedom” in the Islamic context was connected to “personal freedom” and thought of in contrast to slavery. Michael Cook, *Freedom*, in THE PRINCETON ENCYCLOPEDIA OF ISLAMIC POLITICAL THOUGHT 174, 175 (Gerhard Bowering ed., 2012) (noting that political freedom “lacks an explicit precedent in the Islamic tradition”). That said, the idea of political freedom is now part of the “standard vocabulary of political discussion in the Islamic world.” *Id.*

23. Aharon Layish, *Islamic Law in the Modern World: Nationalization, Islamization, Reinstatement*, 21 ISLAMIC L. & SOC. 276, 281 (2014).



on rebellion and violence in Islamic law. He challenges the generalization that jurists have “traded in an extreme form of political idealism for an equally extreme form of political pragmatism, and in doing so have advocated politically passive or quietist positions.”<sup>24</sup> The subsequent discussion will show that, from the very beginning of the Arab Spring uprisings, Islamic jurists staked out positions challenging the idea of their passivity. In addition, they confronted long-standing traditions by creatively formulating legal arguments in both conventional and unconventional ways.

Part II provides a brief look at the sources of Islamic law, Islamic legal authority, and Islamic legal opinions. This Part will provide the necessary background for understanding the methodological approach jurists took during the Arab Spring. It will also shed light on how legal authority functions in Muslim-majority countries, both within state institutions and external to them. The Part then turns to the Arab Spring and explores the ways in which it constituted a radical departure from the pre-existing legal framework and required entirely new ways of thinking about the issues at stake. Specifically, Islamic law was utilized by both sides in the debate for and against the protests to argue for the religious legitimacy of their respective positions. Part III provides a broad overview of the six points raised by anti-uprising jurists in their critique of the protests. These include the absence of proof-texts permitting protests, the attempt to designate protests as rebellion, the framing of protests as a form of Western civil disobedience, the potential consequences of protests for society at large, the likelihood of violence, and the futility of protesting. It also sketches the approaches used by pro-uprising jurists in responding to these critiques, specifically the textual and policy approaches. Part IV is a closer look at the textual arguments jurists made in support of the protests. Three primary types of textual arguments will be examined. First, arguments that center around definitions of key terms with legal implications for protests. Second, how jurists utilize proof-texts from Islam’s constitutional sources, the Qur’an and Prophetic tradition, even though no proof-text speaks directly to the issue of protest. Third, the use of persuasive authority from respected

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24. KHALED ABOU EL FADL, *REBELLION AND VIOLENCE IN ISLAMIC LAW* 4 (2001).

personalities in the past. Their words and behavior provide explicit or tacit approval of certain textual interpretations. Part V examines the policy arguments pro-uprising jurists make. There are two primary variations. First, they expand certain concepts, such as legal obligation, to encompass various acts including rising against a ruler. In the process they not only permit acts of protest, but often require their performance. Second, jurists incorporate new formulations of certain legal concepts, such as “rights,” to enhance their arguments for protest. While these concepts have precursors in Islamic legal tradition, the jurists are concerned primarily with their contemporary articulation.<sup>25</sup>

## II. ISLAMIC LAW, AUTHORITY, AND REVOLUTIONARY VALUES

Before proceeding, it will be useful to provide a brief sketch of the essential elements of Islamic law and how authority functions within it. This will allow a general frame of reference for the subsequent discussion. The focus in this Part will be to elaborate on three essential components of Islamic law: legal sources, legal authority, and *fatwas* or legal opinions. Due to space limitations, the aim will be to only highlight the elements of these components that are relevant to the current discussion. In addition, this Part will also examine how revolutionary values figured into the juristic discourse and resulted in reoriented classical methods of interpretation.

### A. *Islamic Legal Sources and Interpretive Tools*

Islamic law contains no document similar to the American Constitution, but rather “constitutional” sources or *Sharī'a* from which the law is derived.<sup>26</sup> These sources are the Qur'an,

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25. For details on the idea of rights in pre-modern Islamic law, see Joseph E. Lowry, *Rights*, in THE PRINCETON ENCYCLOPEDIA OF ISLAMIC POLITICAL THOUGHT 474, 478 (Gerhard Bowering ed., 2012) (noting that the concept of rights in a “technical legal sense” existed in the pre-modern period).

26. As explained later, Islamic law is an inexact common translation of *Sharī'a*. Technically, *Sharī'a* refers to the constitutional sources of Islamic law, the Qur'an and Sunna, but the law derived from these sources is known as *fiqh*. In common parlance, however, *Sharī'a* is used both for the sources and the derived law. Context usually determines which meaning is intended. In addition, unlike the U.S. Constitution, these constitutional sources do not bring a state into being. What they constitute is more akin to a body of Islamic positive law.

the Muslim holy scripture, and the Sunna, a documented history of the Prophet Muḥammad's sayings and practices (commonly referred to as the "Prophetic tradition").<sup>27</sup> In general, these sources contain some substantive law with explicit instructions regarding behavior in particular circumstances, as well as principles from which substantive law can be developed.<sup>28</sup> What constitutes "law" for Muslim jurists is much broader and more intrusive than the conception of law in secular systems.<sup>29</sup> Law consists of not only matters regulating the state's relationship with its citizens, but also how the individual regulates their own life and the relationships within it. It is a mixture of both private and public law.<sup>30</sup> Accordingly, Islamic legal texts dealing with positive law will contain sections relating to the administration of criminal punishments, collection of taxes, and prosecution of war alongside rules regarding ritual purity and proper procedures for prayer.<sup>31</sup> These texts are developed by jurists who mine the constitutional sources for guidance and then utilize a series of interpretive tools to create law.<sup>32</sup> Among the tools considered canonical are analogical reasoning (*qiyās*), consensus (*ijmā'*), custom (*ʿurf*), and deductive reasoning (*ʿaql*).<sup>33</sup> Over time various schools of thought

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27. MAWIL IZZI DIEN, *ISLAMIC LAW: FROM HISTORICAL FOUNDATIONS TO CONTEMPORARY PRACTICE* 5 (2004). This is the case for both Sunni and Shi'a, except that the latter also include the sayings and practices of certain historic personalities, the Imams, considered to have special insights on religious matters. These "Imams" should not be confused with the generic use of imam for Muslim clergy. For a good summary of different views on the Shi'i Imamate, see NAJAM HAIDER, *SHI'Ī ISLAM: AN INTRODUCTION* 45–48 (2014).

28. See generally MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* (3d ed. 1991).

29. AARON W. HUGHES, *MUSLIM IDENTITIES: AN INTRODUCTION TO ISLAM* 136 (2013) (noting that it is "important to be aware that the concept of 'law' in the Muslim sense is much broader than our modern and non-Muslim understanding of it").

30. BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 172 (1998) (discussing the presence of private and public law in Islamic legal works).

31. See, e.g., I IBN RUSHD, *THE DISTINGUISHED JURIST'S PRIMER (BIDĀYAT AL-MUJTAHID)* v–vii (Imran Ahsan Khan Nyazee trans., 2000) (showing the table of contents for the work).

32. WAEL B. HALLAQ, *SHARĪʿA: THEORY, PRACTICE, TRANSFORMATIONS* 75–76 (2009).

33. On Islamic legal theory and methodology, see generally WAEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES* (1997); HOSSEIN MODARRESSI, *AN INTRODUCTION TO SHI'Ī LAW* (1984); JOSEPH LOWRY, *EARLY ISLAMIC LEGAL THEORY: THE RISĀLA OF MUḤAMMAD IBN IDRĪS AL-SHĀFI'Ī* (2007).

emerged that emphasized different tools and created distinct methodologies for arriving at the law. The law derived from these constitutional sources is referred to as *fiqh* and is generally considered the reserve of the jurists.<sup>34</sup> In addition, jurists also developed a series of legal maxims to aid in the process of moving law from theory to practice.<sup>35</sup> These maxims accounted for external considerations that were not part of the jurist's idealized law, but necessary to ensure that the law's higher objectives, such as justice and fairness, were not violated.<sup>36</sup>

### B. *Islamic Legal Authority*

In order to understand how jurists utilize law, derived from Islam's constitutional sources, to validate new values, it is important to appreciate how authority functions in the Islamic legal context. The state and jurists have arguably played the primary lawmaking roles in Islamic history, though this is a point of some debate among scholars.<sup>37</sup> For many in the field of Islamic legal studies, it is accepted orthodoxy that after the first few centuries, jurists became the "exclusive interpreters of the *sharī'a*" for the bulk of subsequent Islamic legal history.<sup>38</sup> Very early in Islamic history, jurists "gained vast power to de-

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34. IZZI DIEN, *supra* note 27, at 95.

35. For a detailed survey of Islamic legal maxims, see generally INTISAR RABB, *DOUBT IN ISLAMIC LAW: A HISTORY OF LEGAL MAXIMS, INTERPRETATION AND CRIMINAL LAW* (2015); see also Wolfhart Heinrichs, *Qawā'id as a Genre of Legal Literature*, in *STUDIES IN ISLAMIC LEGAL THEORY* 365–84 (Bernard Weiss ed., 2002).

36. RABB, *supra* note 35, at 59.

37. See Nimrod Hurvitz, *The Contribution of Early Islamic Rulers to Adjudication and Legislation: The Case of the Mazalim Tribunals*, in *LAW AND EMPIRE: IDEAS, PRACTICES, ACTORS* 135, 135–40 (Jeroen Duindam et al. eds., 2008) (arguing that rulers played a more active role). See generally Layish, *supra* note 23 (arguing the standard view that the state played a nominal role in lawmaking). It should be noted that I am using the term "state" in its broadest sense and not simply in reference to the nation-state. Thus, it encompasses various types of governing authority: rulers, caliphates, sultanates, etc.

38. Layish, *supra* note 23, at 277 (arguing this was until *Sharī'a* became incorporated into statutory laws of countries); see also BEHNAMEH SADEGHI, *THE LOGIC OF LAW MAKING IN ISLAM* 2 (2013) ("Islamic law evolved as the judgment of the jurists."). There is a tendency for these commentators to exaggerate the level of displacement jurists have experienced in modern times as a result of statutory law and codification.

fine Islamic law by successfully asserting a superior institutional competence to articulate religious morality.”<sup>39</sup> But it was not simply religious morality being articulated; instead, these jurists gained a “near monopoly on legal affairs in a state where God’s law was accepted as paramount.”<sup>40</sup> One of the ways in which they exercised this power was to “impose constitutional constraints on [the] legitimate exercise” of state power.<sup>41</sup>

In the contemporary period, Islamic law in most Muslim countries operates both inside and outside the formal legal system.<sup>42</sup> Most states have found ways to incorporate certain parts of Islamic law as statutory law.<sup>43</sup> As a result, the judiciary in many Muslim countries comment on Islamic law as it relates to cases that come before them.<sup>44</sup> These cases generally relate to

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39. Intisar Rabb, “Reasonable Doubt” in *Islamic Law*, 40 *YALE J. INT’L L.* 41, 69 (2015).

40. NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* 6 (2008).

41. Rabb, *supra* note 35, at 69.

42. In the modern period, “national debates about Islamic law” have led to a greater presence of Islamic law within the formal legal system. Clark B. Lombardi and R. Michael Feener, *Why Study Islamic Legal Professionals?*, 21 *PAC. RIM. L. & POL’Y J.* 1, 7-8 (2012) (noting that during this modern period “many majority Muslim states have increased significantly the role that Islamic law plays in their national legal systems.”). However, at the same time, legal experts operating outside the formal legal system also serve as authoritative voices on Islamic law, primarily by issuing advisory legal opinions (*fatwā*) that carry significant weight with the public. See generally *ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS* (Muhammad Khalid Masud, et. al, eds., 1996) [hereinafter *ISLAMIC LEGAL INTERPRETATION*]. The role of these legal experts was even more pronounced historically. See FELDMAN, *supra* note 40, at 22 (“The self-regulating community of scholars expert in the law was as much a part of the legal system as was the judge . . . . But unlike judges, who became part of the state apparatus. . . members of the scholarly class were not named by anyone connected to the government.”).

43. Layish, *supra* note 23, at 277.

44. For instance, courts in different Muslim countries routinely comment on Islamic family law, see generally, *ADJUDICATING FAMILY LAW IN MUSLIM COURTS* (Elisa Giunchi ed., 2014) (discussing Lebanon, Egypt, Pakistan, Iran, Morocco and Turkey). For a more detailed study of this relationship between Islamic law and the judiciary in the specific case of Egypt, see generally CLARK B. LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI‘A INTO EGYPTIAN CONSTITUTIONAL LAW* (2006). For a look at the application of Islamic criminal law in Pakistani courts, see generally TAHIR WASTI, *THE APPLICATION OF ISLAMIC CRIMINAL LAW IN PAKISTAN: SHARIA IN PRACTICE* (2009). In fact, some judiciaries assert themselves quite boldly. For example, in 1959, Pakistan’s High Court in Lahore said

four areas of law: marriage, divorce, inheritance, and, in a few jurisdictions, criminal law.<sup>45</sup> Judicial opinions, however, are only binding as they relate to state law; they are never binding as interpretations of Islamic law.<sup>46</sup> Most of Islamic law's jurisprudence exists, and has existed, outside the formal legal system and this "external" jurisprudence is generally given greater weight.<sup>47</sup> The jurists considered most competent to address Islamic legal questions are rarely members of the judiciary, but rather members of civil society functioning independent of the state.<sup>48</sup> In addition, a jurist's authority is not necessarily bound to a particular jurisdiction. Many of the most important jurists have transnational authority, their legal opinions reaching far beyond the borders of their country of residence. This is because juristic authority generally hinges on two primary factors.<sup>49</sup> First, the extent of a jurist's legal training, pedigree, and erudition, including the length of their tenure as a jurist; the institutions and teachers they studied with; and the scholarship they have produced. Second, it is my contention that the level of reception and acceptance a jurist receives from the public, both domestically and internationally, is even more dispositive of their authority. Essentially, people must consider the jurist's opinion authoritative enough to con-

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they would prioritize their interpretations over traditional authorities, a radical departure from historical practice. MUHAMMAD QASIM ZAMAN, *THE ULAMA IN CONTEMPORARY ISLAM: CUSTODIANS OF CHANGE* 101 (2002) (quoting the court: "if we be clear as to what the meaning of a verse in the Qur'an is, it will be our duty to give effect to that interpretation irrespective of what has been stated by [the medieval] jurists.").

45. For a list of penal codes based on Islamic law, see RABB, *supra* note 35, at 6 n.11. See generally RUDOLPH PETERS, *CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY* (2006).

46. See WAEL B. HALLAQ, *AN INTRODUCTION TO ISLAMIC LAW* 10 (2009) (noting the absence of *stare decisis* for decisions of judges).

47. See generally HALLAQ, *supra* note 33.

48. Even where Muslim countries appoint jurists in an official capacity as "Grand Muftis" or similar titles, it does not necessarily lead to elevated authority.

49. It should be noted that this is primarily the case among Sunnis. The authority of the jurist among the Shi'a is different because of a more formalized structure and hierarchy as it relates to certain titles indicating the jurists level of learning. But even with more formal structures in place, the relative authority of Shi'i jurists is still dependent on who follows them or takes them as a source of emulation (*marja' al-taqlid*). HAIDER, *supra* note 27, at 162.

form their behavior to it; jurists are only as relevant as the number of people willing to listen to them.

### C. Fatwas: *Islamic Legal Opinions*

One of the most efficient tools in Islamic law for asserting a legal opinion on any matter is the *fatwa*. Historically, it has been one of the “principal means” of elaborating, expanding, and modifying the law to “meet the exigencies of changing times.”<sup>50</sup> The *fatwa*’s efficiency comes from the fact that it is a brief response to a legal question posed by either a real or hypothetical petitioner.<sup>51</sup> The jurist generally provides a concise answer containing their legal argument particularized to the petitioner’s specific case, but potentially applicable to a broader universe of circumstances.<sup>52</sup> While historically there were certain formalities surrounding how a *fatwa* should be issued and who could issue it, in contemporary times there has been wide latitude regarding the format and, to some degree, the issuer of the *fatwa*.<sup>53</sup> As a result of modern technology, most of these *fatwas* are also available on the internet and petitioners often have the option of getting official legal responses

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50. ZAMAN, *supra* note 44, at 38 (applying to legal commentaries as well).

51. HALLAQ, *supra* note 33, at 10.

52. *Id.* at 9.

53. Muḥammad Khalid Masud, *The Significance of Istiftā’ in the Fatwā Discourse*, 48 ISLAMIC STUDIES 341, 342 (2009) (noting that the *fatwa* became a formal institution by the eleventh century). Even though, historically, *fatwas* were collected into volumes and in many cases not by the *mufti* originally issuing the legal opinion, there is no requirement that the *fatwa* be written. Communicating a legal opinion verbally without recording it down was quite common. This might be attributed to two key factors. First, Muslim societies retained a rich oral culture and writing was not always seen as essential. Second, *fatwas* are not legally binding on the petitioner nor do they establish binding precedent for future parties. The petitioner has voluntarily presented their case in order to receive some guidance from religious law. They maintain the option to reject the legal opinion or follow it. As in other cases, “divine accountability” plays an important role in instructing behavior. Hence, while this individual is not obligated to follow the legal opinion, they will “theoretically” be held accountable by God for ignoring the *fatwa* simply because it did not provide the result they sought. For more on *fatwas*, see generally ISLAMIC LEGAL INTERPRETATION, *supra* note 42 and Wael B. Hallaq, *From Fatwās to Furu’i: Growth and Change in Islamic Substantive Law*, 1 ISLAMIC L. & SOC. 29 (1994).

online from specific jurists anywhere in the world.<sup>54</sup> Hence, an additional element of the *fatwa*'s efficiency, in addition to brevity and accessibility, is the relatively short turnaround between petitioning on a matter and receiving a response.

This last point is particularly relevant in the present discussion because the Arab Spring inspired numerous *fatwas* that sought to expeditiously address the mass protests already underway across the Middle East. These protests occurred in countries with both a history of autocratic rule and a legal tradition generally in opposition to the idea of popular uprising, even non-violent ones. As a result, the jurists who issued their legal opinions in favor of the uprisings navigated centuries of legal tradition alongside people's desire to pursue certain universal values such as justice, dignity, and freedom.<sup>55</sup>

#### D. *Religion, Revolutionary Values and the Arab Spring*

In addition to seeking Islamic law's validation of the methods they were using to bring about change, protestors also sought legitimacy for the values underlying the Arab Spring. By receiving validation, not only do these values gain a measure of legal protection, but to some degree they acquire a sense of *permanence*. Once embedded in the contemporary legal discourse, it is far harder to remove these values than it was to initially include them. Normally, one might seek out the formal legal system to provide this legitimacy, but during revolution all parts of the status quo are shunned as extensions of the state. While international law can also provide legitimacy to an uprising, during the Arab Spring, religious law proved to be a far more potent and influential source of legitimation. In countries impacted by the Arab Spring, the influence of Islamic law on their respective populations is arguably unmatched by any other legal system, domestic or international.<sup>56</sup>

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54. See generally GARY R. BUNT, *ISLAM IN THE DIGITAL AGE: E-JIHAD, ONLINE FATWAS AND CYBER ISLAMIC ENVIRONMENTS* (2003).

55. This occurred in the past as well, including in situations involving rebellion. Muslim jurists would respond to "their understanding of political and social demands through a variety of creative acts." ABOU EL FADL, *supra* note 24, at 3.

56. According to Pew data from 2012, a median of seventy-four percent of Muslims in the Middle East-North Africa support making "sharia the law of the land." THE PEW RESEARCH CENTER'S FORUM ON RELIGION & PUBLIC



One of the telling features of the Arab Spring was that religious political parties did not initiate any of the uprisings and remained on the sidelines for much of the initial period.<sup>57</sup> This was especially odd since these parties, particularly in Tunisia and Egypt, were arguably the most experienced and robust opposition prior to the uprisings. Instead, a combination of cynicism about the effectiveness of mass protest, political calculation, and underestimating the potential to bring about meaningful change resulted in their absence from the revolution's start.<sup>58</sup> Accordingly, the slogans dominating the demonstrations rarely expressed their goals in purely religious terms.<sup>59</sup> This is not to say that there were no religious chants used, but that chants for "liberty" or "freedom" (*hurriya*) were arguably more widespread alongside other slogans demanding respect for universal values of justice and dignity.<sup>60</sup>

The values at the center of the Arab Spring were universal ones, but at points required reconciliation with a competing set of values given equal, if not more, weight—religious values. Ordinarily, there is no inherent conflict between these two value sets.<sup>61</sup> However, during the uprisings, one religious value

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LIFE, *THE WORLD'S MUSLIMS: RELIGION, POLITICS AND SOCIETY* 16 (2013). When asked whether it was good or bad that the laws in their countries did not follow *Shari'a*, a majority of Muslims in nearly every country surveyed said it was bad. *Id.* at 58.

57. See ANNETTE RANKO, *THE MUSLIM BROTHERHOOD AND ITS QUEST FOR HEGEMONY IN EGYPT: STATE DISCOURSE AND ISLAMIST COUNTER-DISCOURSE* 171 (2012) (noting that at an organizational level the parties were absent, but individual members did participate as "private persons"). This illustrated the generational divide between younger members that took to the streets and the older political leaders who remained skeptical and on the sidelines. Even when the Egyptian Brotherhood officially joined the protests, it was the youth who drove their participation. WICKHAM, *supra* note 20, at 163 ("Brotherhood youth replaced their elders as the prime movers of events . . .").

58. In fact, the Egyptian Muslim Brotherhood "initially called its members not to participate in the 25th of January protests." RANKO, *supra* note 57, at 171. Their spokesman, Esam al-Aryan, articulated a few different reasons why they were not participating, including lack of coordination and the sensitivity of the date. WICKHAM, *supra* note 20, at 161.

59. ANTONI ABAT I NINET & MARK TUSHNET, *THE ARAB SPRING: AN ESSAY ON REVOLUTION AND CONSTITUTIONALISM* 40 (Rosalind Dixon et al. eds., 2015).

60. See sources cited *supra* note 20.

61. By values here I am not speaking of any particular body of law or specific rules. Instead, I am speaking of broad ideas commonly found in most legal systems. This is not to suggest that the substantive law in these

that presented a central challenge is the opposition to social disorder (*fitna*). In order to pursue freedom, the current autocratic system had to be overturned, a process that is inevitably disruptive. Revolutionaries are therefore faced with a dilemma: their intuitive support for universal values that all human beings fundamentally desire cannot be achieved without creating disruption that, on its face, conflicts with their religious values. How do they reconcile this? Furthermore, beyond reconciliation, can Islamic law legitimate the universal values at stake and revolutionary actions in support of them?

Jurists recognized this early in the revolution and immediately began connecting universal values to faith. As Usama al-Rifai<sup>62</sup> stated in a sermon soon after the uprisings began in Damascus, a person who has “lost their freedom” has lost “a significant part of their humanity because what distinguishes humans from others is this freedom, this ability to choose.”<sup>63</sup> Moaz al-Khatib,<sup>64</sup> the former imam of the Umayyad Mosque in Damascus, stated in a eulogy at the start of the Syrian uprising that “freedom is God’s greatest blessing to humanity” and that “faith cannot be true without freedom.”<sup>65</sup> Aḥmad al-Raysūnī makes an even more categorical connection between freedom

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legal systems is inherently compatible, but that many of their broader values often are.

62. Born in 1944, Usama al-Rifai is a prominent jurist from Syria who currently lives in exile in Turkey. He preached at the Rifai Mosque in Damascus and served as the Vice President of the Syrian Islamic Scholars Association (*Rābiṭa ‘Ulamā’ al-Shām*). *Profiles of Syrian Sunni Clerics in the Uprising*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Mar. 25, 2013), <http://carnegieendowment.org/syriaincrisis/?fa=51284>.

63. IloveSyria, *Khuṭba al-Shaykh Usāma al-Rifā’ī: al-Dīn al-Naṣīḥa, al-Juz’ 2* [Sermon of Shaykh Usama al-Rifai: Religion is Good Counsel, Part 2], YOUTUBE (Mar. 30, 2011), <https://www.youtube.com/watch?v=oq2VGD1JA38>; see also Qureshi, *supra* note 19, at 79 (mentioning Muḥammad al-Yaqoubi’s sermon from Apr. 8, 2011 that also speaks of “freedoms that God has made intrinsic to humanity”).

64. Born in 1960, Moaz al-Khatib is former imam of the famed Umayyad Mosque in Damascus and taught Islamic law at various institutes in the city. He is the former president of the National Coalition for Syrian Revolutionary and Opposition Forces. *Profile: Syrian Opposition’s Ahmed Moaz al-Khatib*, BBC NEWS (Mar. 24, 2013), <http://www.bbc.com/news/world-middle-east-20300356>.

65. Truthjhon, *Muwādh al-Khatīb fī ‘azā’ maḍamiya al-Shām* [Moaz al-Khatib at a Bereavement in Madamiya, Damascus], YOUTUBE (Apr. 6, 2011), <https://www.youtube.com/watch?v=nQJfz1DtSpk>.

and God by stating that “the will of the people is an extension of the will of God” (*iradat al-sh'ūb min iradat Allāh*).<sup>66</sup> ‘Abd al-Wahhab al-Daylamī,<sup>67</sup> a Yemeni jurist, implies a slightly different relationship between Islam and freedom. He says that after the advent of Islam people learned the “pride of Islam and the sweetness of freedom under Islam until the command of freedom became fixed in their minds, unable to be displaced.”<sup>68</sup>

In essence, jurists are demonstrating the “organic relationship” Abou El Fadl speaks of between the *Shar'ī'a* and these universal values. Most of the jurists invoke a discourse of natural rights, connecting these values to both faith and something fundamentally human.<sup>69</sup> Raysūnī goes so far as to elevate the “will of the people” to God’s will in what is a radical departure from medieval Islamic political thought. While the “public interest” is often a consideration for medieval jurists, the people’s “will” is not a central concern in pre-modern jurisprudence. On the other hand, Daylamī pursues a more conservative approach suggesting that universal values are actually products of Islam itself and refrains from making any broader claims about their connection to humanity at large. What is instructive, however, is that despite his reservations about framing these values as universal, Daylamī insists on creating an explicit link to Islam, suggesting the importance he gives the values themselves.

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66. Momken, *Risālat al-'Alāma Ahmad al-Raysūnī li-l-shabāb* [Statement of the Scholar Ahmad al-Raysuni to the Youth], YOUTUBE (May 19, 2011), <https://www.youtube.com/watch?v=li4bTO32I2M>.

67. Born in 1938, ‘Abd al-Wahhab al-Daylamī was a former Minister of Justice in Yemen and prominent religious leader in the country.

68. ‘Abd al-Wahhāb al-Daylamī, *Laysa khurūjan ‘alā al-hākim* [This is Not Rebellion Against the Ruler], MAREB PRESS (Mar. 14, 2011), <http://marebpress.net/articles.php?lng=arabic&id=9459>.

69. In a speech on April 5, 2011, Moaz al-Khatīb evoked a natural rights discourse, stating that “freedom is a blessing from God, not from a ruler, nor a government, nor a state.” Ahmadgseem, *Kalima al-Shaykh Ahmad Mu'ādh al-Khatīb fī bidāya al-thawra* [Speech of Moaz al-Khatib from the beginning of the revolution], YOUTUBE (Nov.11, 2012), <https://www.youtube.com/watch?v=CnYQcbHIOPo>.

### III. *FATWAS* IN THE ARAB SPRING: STATUS QUO VS. REVOLUTION

This Part provides a broad overview of the positions of the state's (status quo) jurists and those of the revolutionaries regarding the uprising. The purpose of this Part is to frame the more detailed discussion that will follow in Parts IV and V and allow the reader to appreciate where the points of contention are between the two opposing factions. While Parts IV and V will focus exclusively on the pro-uprising jurists, this section begins by outlining the main contentions put forward by the status quo jurists. Subsequently, I identify five types of legal arguments in the pro-uprising *fatwas*: (a) creating definitional distinctions, (b) appealing to proof-texts<sup>70</sup> from Islam's "constitutional" sources, (c) arguing from the historical record of persuasive authorities, (d) expanding legal obligations, and (e) incorporating revolutionary-value formulations into the Islamic legal discourse. The evidence will show that pro-uprising jurists were required to formulate a broad framework to react to the diverse range of criticisms they received while also proactively constructing support for the legitimacy of pursuing revolution in the Arab Spring.

#### A. *Status Quo Position: The Anti-Uprising Jurists*

The status quo Islamic legal position considered the events of the Arab Spring a form of rebellion (*khurūj*) against the state, an act that is generally prohibited. This is based on a legal disposition favoring stability over disorder and the operating assumption that even a known tyrannical ruler is a less disruptive force than an unknown alternative.<sup>71</sup> The basis for this position is a series of Prophetic traditions that seem to support obedience to rulers, even unjust ones. For instance, one tradition recounts the Prophet saying "rulers will come after me who do not follow my guidance nor my path, and among them will be men with devils' hearts in human bodies."<sup>72</sup> An interlocutor raises the question of what should be done about these men, to which Muḥammad replies: "you

70. "Proof-text" is a term for texts from religious scripture used in support of an argument or position.

71. ABOU EL FADL, *supra* note 24, at 15–16.

72. Sahih Muslim 1847, Book 33, Hadith 82, <http://sunnah.com/muslim/33/82>; see also Anti-Uprising Fatwa, *supra* note 13.

should listen and obey them even if the ruler abuses you and confiscates the property.”<sup>73</sup> In another tradition, Muḥammad notes that even with the worst rulers, “if you find something hateful from them, hate their actions but do not withdraw your obedience.”<sup>74</sup> This position received additional support from many medieval jurists, who suggested that a “consensus” existed which required obedience to a ruler, regardless of his behavior, except if he commands his subjects to sin.<sup>75</sup> The ruler’s personal sinfulness was not sufficient reason for revolt, but his commanding others to sin necessitated his impeachment and removal. Despite a default position that seemed to favor “enduring injustice” the jurist’s opinion is dependent on a cost-benefit analysis of rebellious behavior. A ruler’s personal sinfulness is harmful simply because of the influence his status carries. That harm, however, does not justify the cost associated with rebellion. On the other hand, in situations where the ruler essentially legislates sin, then jurists clearly consider the benefit of rebelling as outweighing its costs.<sup>76</sup>

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73. Sahih Muslim 1847, Book 33, Hadith 82, *supra* note 72.

74. Sahih Muslim 1855, Book 33, Hadith 101, <http://sunnah.com/muslim/33/101>; *see also* Anti-Uprising Fatwa, *supra* note 13. This comes with the caveat that they continue to “establish prayer.”

75. MICHAEL COOK, COMMANDING RIGHT AND FORBIDDING WRONG IN ISLAMIC THOUGHT 479 (2001) (“[I]n the face of the delinquency of the ruler, there is a clear mainstream position: rebuke is endorsed while rebellion is rejected.”). This perspective from the medieval period continues to be supported today. *See* Etty Terem, *al-Mahdī al-Wazzānī (d. 1342/1923)*, in ISLAMIC LEGAL THOUGHT: A COMPENDIUM OF MUSLIM JURISTS 449 (Oussama Arabi, et. al, eds., 2013) (quoting *al-Mahdī al-Wazzānī* that “enduring the roughness of Muslim rulers and the prohibition to rebel against them (*al-khurūj ‘anhum*) even if they commit injustice, is prescribed in the law and recorded in many Prophetic traditions”). Muḥammad ‘Abd al-Maqṣūd, an Egyptian jurist, addresses the opinion that there is a legal consensus that the Prophetic tradition prohibits rising up against a ruler and that doing so would be rebellion. Maqṣūd notes that a full reading of the commentary by Nawawī where this claim of consensus is made shows that he is speaking of violent rebellion and in fact later obligates speaking out non-violently against a ruler. Familyy (Muḥammad ‘Abd al-Maqṣūd), *Mā ḥukm al-muzā[h]arāt wa al-khurūj ‘alā al-ḥākīm* [What is the Ruling on Protests and Rebelling Against the Ruler], YOUTUBE (Feb. 6, 2011), <https://www.youtube.com/watch?v=xMkY4HzT7eg>.

76. *See* AHMED AL-DAWOODY, THE ISLAMIC LAW OF WAR: JUSTIFICATIONS AND REGULATIONS 156 (2011) (“[I]f the good of rebellion outweighs its expected harm, then it is permissible, otherwise it is not.”). For a more sophisticated understanding of how rebellion and violence are regulated in Islamic law, *see generally* ABOU EL FADL, *supra* note 24.

The anti-uprising jurists built six primary legal objections on the above background. First, they claimed that no legal proof texts from Islam's constitutional sources, the Qur'an and Prophetic tradition, permit protesting, nor is there any support for it from persuasive authorities in the historical record.<sup>77</sup> Second, protests should be considered a form of rebellion and rebellion is designated as impermissible in Islamic law.<sup>78</sup> Third, not only do protests lack a legal basis in Islamic law, but they are adopted forms of Western civil disobedience and have no Islamic legal standing.<sup>79</sup> Fourth, protests and similar behavior have high potential for triggering actions that would be deemed impermissible under Islamic law, specifically public disorder, property damage, and public indecency resulting from the co-mingling of males and females.<sup>80</sup> Fifth, protests will inevitably lead to some form of violence and violation of laws leading to individuals being physically harmed or arrested.<sup>81</sup> Finally, they insist that protests are futile because the rationale behind them, restoring people's rights, cannot be accomplished. In the absence of this rationale, Islamic law nullifies the legality of protest.<sup>82</sup>

All of the anti-uprising critiques outlined above have some connection, no matter how tenuous, to Islam's constitutional sources. This is because many of the anti-uprising jurists do not consider other legal justifications persuasive in light of their methodological commitments. More importantly, anti-uprising jurists understand that only scriptural evidence can counter the potency of values such as freedom and justice. As a result, they appeal to both scriptural proof-texts that prohibit

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77. Anti-Uprising Fatwa, *supra* note 13; Council of Scholars for the Jordanian Muslim Brotherhood, *Islamic Legal Opinion on Protests* (Mar. 3, 2011) [hereinafter Jordanian Muslim Brotherhood], <https://www.assawsana.com/portal/pages.php?newsid=45697>; ʿAbd al-Razzāq al-Saʿdī, *Demonstrations and their Islamic Legal Basis*, ISLAM SYRIA (Jan. 3, 2011), <http://www.islamsyria.com/portal/consult/show/253>.

78. Anti-Uprising Fatwa, *supra* note 13; Yusuf al-Qaradawi, *Response to Jurists Prohibiting Demonstrations*, YOUTUBE (Feb. 11, 2011), [https://www.youtube.com/watch?v=ZT1SF\\_XHLMQ](https://www.youtube.com/watch?v=ZT1SF_XHLMQ); ʿAmir Abū Salāmah, *Islamic Legal Ruling on Demonstrations in Syria*, ISLAM SYRIA, <http://www.islamsyria.com/portal/consult/show/261>.

79. Jordanian Muslim Brotherhood, *supra* note 77.

80. *Id.*; Abū Salamah, *supra* note 78.

81. Jordanian Muslim Brotherhood, *supra* note 77.

82. *Id.*

rebellion and also proof-texts with comparatively minor prohibitions on “imitating” non-Muslim behavior or the potential for public indecency.<sup>83</sup> They make a conservative appeal to maintaining order, preserving modesty, opposing external influences, and requiring an affirmative prescription from Islamic law before deeming an act lawful.<sup>84</sup>

### B. *The Revolutionary Response: Pro Uprising Jurists*

From the start of the revolution, protestors solicited legal opinions from jurists to legitimize both what they were protesting for and the methods they were using.<sup>85</sup> The importance of legal questions on the permissibility of the uprisings is evident from jurists providing answers even in the midst of protest. Usually, a hypothetical question would be announced during the protest, often one that presented a critique, and a jurist would use a megaphone or loud speaker to present his legal argument in response.<sup>86</sup>

The pro-uprising jurists address each of the status quo contentions against the uprisings by employing five main responses grouped into two broad categories of legal argument. The first category is textual arguments consisting of three components: definitions, proof-texts, and persuasive authority. Jurists generally begin with textual arguments in order to lay the foundation for their overall position. This is the standard juristic approach in Islamic law stemming from the pronounced role played by the scripture or core texts. The first textual component focuses on definitions, specifically key terms that

83. Anti-Uprising Fatwa, *supra* note 13.

84. *Id.*

85. Abou El Fadl, *supra* note 19, at 813–14 (noting that calls to impose Islamic law or a “set of positive legal commandments” were “conspicuously absent” from the protests with emphasis instead on “civil society, civic duties and rights, rule of law”).

86. ʿAbd al-Maḡṣūd, *supra* note 75 (showing a video of the Egyptian jurist Muḡammad ʿAbd al-Maḡṣud using a megaphone to deliver a legal edict on protests in Tahrir Square). There are numerous other examples, for instance, see Al-Khatib, *supra* note 69 (showing the Syrian jurist Moaz al-Khatib issuing legal edicts on protesting to a crowd of protestors). This is not to mention how jurists also utilized weekly Friday sermons during communal prayers at the protests to issue their legal opinions. See GhurabaMedia (Al-Jazeera Arabic), Khutbah in Midan Tahrir [Al-Qaradawi], YouTube (Feb. 18, 2011), <https://www.youtube.com/watch?v=Haxwcqa2btA> (showing Yusuf al-Qaradawi’s famous sermon to the protestors in Egypt’s Tahrir Square).

require reframing to make them compatible with the pro-uprising legal argument. Three terms in particular receive the most attention: “rebellion” (*khurūj*), “demonstrations,” (*muzāharāt*), and “public disorder” (*fitna*). Next jurists argue using proof-texts from Islam’s constitutional sources. There are no explicit texts that address the issue of protest, either permitting or prohibiting it, but principles and guidelines derived from scripture are employed by both sides to support their positions. For the pro-uprising jurists this is a critical exercise because their argument must counter the perception that the Islamic legal tradition is opposed to protest.

The third component of the textual category is the use of persuasive authority from the historical record. This authority is not ipso facto binding, but when jurists utilize it they imply that it should be. In order to understand how this persuasive authority falls within the category of a textual legal argument, we have to depart from our own conventions. The persuasive authority being spoken of does not arise from court opinions, but rather the inferences drawn from the behavior and opinions of certain “luminaries” in Islamic history. A useful analogy to this authority might be the manner in which the Federalist Papers or opinions of the founding fathers function in our attempts to understand the Constitution. The authority of these luminaries, like that of jurists generally, does not stem from any textual directive, at least in Sunni legal discourse, but rather the public’s acknowledgement that these individuals are authoritative and worthy of emulation. This acknowledgement usually rests on two primary factors—reputation and proximity. With regard to reputation, of specific interest is the perceived piety and legal acumen of the luminary. The luminary’s reputation is a pre-requisite for any further inquiry; an individual who is neither pious nor has any legal acumen requires no additional consideration. If these two attributes are present, however, then the extent of their authority will be tied directly to their proximity to Muḥammad, in all its aspects. The assumption is that the closer a luminary lived to the time of Muḥammad the greater their familiarity with him and, by extension, their authority on legal matters. It should be noted that this persuasive authority has no place within Islamic law’s



theoretical hierarchy of sources.<sup>87</sup> That is because it is technically *only* valuable as commentary on authoritative sources, in either words or acts, not as a source itself.<sup>88</sup> The textual connection is that this commentary either interprets a proof-text, confirms (or disputes) a consensus legal position, or presents an application of analogical reasoning. The entire concept is based on the assumption that these pious historical actors would not pursue any behavior contrary to Islamic law, thus their behavior carries *de facto* authority.<sup>89</sup>

The second category of legal argument can be roughly classified as policy arguments. Whereas the textual category contains more rigid parameters of legal interpretation, the policy category explores more fluid notions of how new circumstances can be incorporated into Islamic legal reasoning through the expansion of legal meaning. This is done in two primary ways: expanding the category of what constitutes legal obligation and broadening the objectives of the law to include the revolution's values. The first approach centers around the base inquiry underpinning Islamic law: what act(s) is an individual (or state) obligated to perform or obligated to abstain from?<sup>90</sup> The pro-uprising jurists pursue the question of legal obligation by first dispelling the opposing sides' argument that it is obligatory to abstain from protest and then expanding the category by arguing that protesting during the Arab Spring is in fact required.<sup>91</sup> The second policy approach is to incorpo-

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87. With the exception of those situations where there is a consensus of the earliest luminaries on a particular matter.

88. This is the case in theory. In practice, jurists often seem to actually be using these persuasive authorities and their historical practice as a source of law and simply paying lip service to how their behavior or words connect with proof texts or other sources of law.

89. IBN RUSHD, *supra* note 31, at 318 (explaining that Abū Bakr could not have possibly acted contrary to Islamic law because he was a close companion of Muhammad's and would have known better). Although luminaries like Abu Bakr are not considered infallible, the possibility of their having made a "mistake" is rarely considered except when another similarly situated luminary offers an opposing view.

90. AHMAD HASAN, *PRINCIPLES OF ISLAMIC JURISPRUDENCE: THE COMMAND OF THE SHARI'AH AND JURIDICAL NORM* 34 (1993) (discussing the idea that legal rules are God's demands for legally obligated persons to do or not do certain things).

91. See, e.g., Al-Jazeera Arabic, *al-Sharī'a wa al-Hayāh—al-Thawra . . . Fitna am Raḥma?* [Shari'a and Life: The Revolution . . . Disorder or Mercy? —with Mohammad al-Yaqoubi], YOUTUBE (Sept. 11, 2011) [hereinafter Yaqoubi],

rate new formulations of certain universal values as part of their legal arguments.<sup>92</sup> Of course, shades of these values were present in the medieval Islamic legal discourse, but were not framed in the same way nor as explicit.<sup>93</sup>

Although we are speaking of pro-uprising and anti-uprising positions, most jurists do not see these as absolutist positions.<sup>94</sup> The Iraqi jurist, ʿAbd al-Malik al-Saʿdī,<sup>95</sup> states upfront in his *fatwa* that “an absolutist position either permitting or prohibiting protest is invalid.”<sup>96</sup> Similarly, the Syrian jurist, ʿĀmir Abū Salāmah,<sup>97</sup> prefaces his opinion by noting that a *Sharʿa* ruling will “differ based on the time, place and person” such that permitting it in one country “does not mean that it is permissible in every country or vice versa.”<sup>98</sup> In fact, he gives

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<https://www.youtube.com/watch?v=jigNsFX9exc> (proposing narrowly tailoring past jurisprudence demanding obedience to rulers and obligating participation in demonstrations); Ḥātim b. ʿĀrif al-ʿAwnī, *Legal Ruling on Peaceful Protests* (May 19, 2014), <http://www.dr-alawni.com/articles.php?show=45> (arguing that protesting becomes obligatory when it becomes necessary for correcting abusive state practices).

92. See, e.g., ʿAbd al-Razzāq, *supra* note 77 (arguing that protesting can be legitimate when it seeks to recover one’s rights); Abū Salāmah, *supra* note 78 (characterizing protest as a human right).

93. Abou El Fadl, *supra* note 19, at 815 (mentioning the relationship between Islamic law and various values).

94. Most jurists include guidelines for protests alongside their approval of them. For instance, they insist that the goals of the protest must be legal, property should remain secure from looting, people should not be harmed, and the benefits should outweigh the costs. See, e.g., Abū Salāmah, *supra* note 78; ʿAbd al-Razzāq, *supra* note 77; Jordanian Muslim Brotherhood, *supra* note 77; Saʿad ʿAtiyah al-Azharī, *Fatwa: Is Protesting Permissible?*, VIRTUAL MOSQUE (Suhaib Webb trans., Feb. 3, 2011), <http://www.virtualmosque.com/society/activism-and-civil-rights/is-protesting-permissible/>.

95. Born in 1937, ʿAbd al-Malik al-Saʿdī is “one of Iraq’s most senior Sunni scholars” and was appointed to the board of trustees of Saddam University for Islamic Studies in 1992. In 2001, he relocated to take a teaching position at Mutah University in Amman, Jordan. In 2007, he was elected Grand Mufti of Iraq, but refused. See Ali Abel Sadah, *Sunni Sheikh Takes Larger Role in Protests Against Maliki*, AL-MONITOR (Feb. 5, 2013), <http://www.al-monitor.com/pulse/originals/2013/02/iraq-new-sunni-sheikh.htm> l#.

96. ʿAbd al-Malik al-Saʿdī, *Islamic Legal Ruling Regarding the Demonstrations Underway in the Arab and Islamic World*, ISLAM SYRIA (Mar. 3, 2011), <http://www.islamsyria.com/portal/consult/show/255>.

97. ʿĀmir Abū Salāmah is a Syrian jurist, popular writer on the revolution and affiliated with the Syrian Muslim Brotherhood.

98. Abū Salāmah, *supra* note 78.

precedence to opinions by jurists from the particular country where demonstrations are taking place since they are more familiar with the context.<sup>99</sup> While context is important to any determination of an Islamic legal ruling, jurists are not required to be nationals of a particular country to issue advisory legal opinions regarding what transpires there. Their authority can extend beyond the jurisdiction where they reside. They feel comfortable issuing these opinions because they either have sufficient familiarity with the context, resulting from frequent contact, or because the issues at stake are universal enough to transcend jurisdictional limitations.

The subsequent Part examines the legal reasoning of propounding jurists in greater detail. The focus will be on *fatwas* from Sunni jurists in Egypt, Syria, Saudi Arabia, Jordan, Iraq, and Qatar that are supportive of protests. It should be noted that there is a glaring absence of Shi'i jurists from my analysis, especially those from Bahrain, Yemen, and Saudi Arabia. The main reason is that while Sunni and Shi'i share a common history, there are certain points that receive disproportionately more attention by one as opposed to the other. In particular, the events surrounding the martyrdom of Muḥammad's grandson, al-Ḥusayn, in the town of Karbala, Iraq, and the Iranian Revolution of 1979 have arguably played a more pivotal role in shaping Shi'i perspectives on opposing a tyrannical ruler as compared to Sunni.<sup>100</sup> Thus, the discourse on revolution, protest, and uprisings is far more developed among Shi'i

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99. *Id.*

100. This statement also requires qualification. It is not meant to support the common misconception that Shi'i jurists default to favoring protest. There is a wide range of opinions among Shi'i jurists themselves particularly those jurists who are tied to the status quo. For instance, while Iranian jurists were on the whole quite supportive of the Arab Spring uprisings, many of them, especially those closely tied to the state, took a very different approach when it came to the Iranian "Green Revolution" in 2009 or even to the 2011 Syrian uprisings against the Assad regime. See Dieter Bednarz, *End of the Green Revolution? The Power of Iran's Iron Fist*, SPIEGEL ONLINE (June 29, 2009), <http://www.spiegel.de/international/world/end-of-the-green-revolution-the-power-of-iran-s-iron-fist-a-633144.html> (reporting on the Islamic Republic's brutal response to mass protests against election irregularities); AFSHON OSTOVAR, *VANGUARD OF THE IMAM: RELIGION, POLITICS AND IRAN'S REVOLUTIONARY GUARDS* 192 (2016) (showing Iran's "bipolar policies," supporting protestors in some Arab countries, even condemning violence against them, but backing Assad's brutal crackdown against Syrian protestors).

jurists and the Arab Spring does not serve as the same type of defining moment.<sup>101</sup> For instance, one example is the late Saudi Arabian Shi'i jurist Nimr b. Bāqir b. Amīn Āl Nimr (1959-2016), also known as "Shaykh Nimr." For more than a decade before the Arab Spring, he argued that protests were permissible as a way of "recovering rights" and that prohibiting people from voicing their opinions was a violation of "human rights" guaranteed by Islamic law.<sup>102</sup> During the Arab Spring, Shaykh Nimr's *fatwas* developed this discourse even further including creating different categories of rights.<sup>103</sup> Therefore, the Shi'i juristic discourse during the Arab Spring requires a separate, fuller treatment, which I hope to do elsewhere.

#### IV. THE TEXTUAL ARGUMENT FOR PROTEST

This section examines in more detail the types of textual arguments that jurists made during the Arab Spring to justify the uprisings. The aim will be to demonstrate how jurists use arguments that revolve around interpretation of terms, ideas, and concepts in Islam's constitutional sources to both counter the criticism against them and construct support for their position independent of that criticism. The discussion will show that, while textual arguments are constrained by certain considerations, jurists are still able to exercise creative techniques and readings to challenge the status quo. In addition, at different points they also reveal evidence of the public's enhanced role in this discourse as compared to the past. This is in con-

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101. It should also be noted that while the discourse on non-violent protest may not have been as developed among Sunni jurists prior to the Arab Spring, it did exist. See, e.g., STÉPHANE LACROIX, *AWAKENING ISLAM: THE POLITICS OF RELIGIOUS DISSENT IN CONTEMPORARY SAUDI ARABIA* 257 (George Holoch trans., 2011) (discussing the blending of democracy and Islam in the "civil jihad" protest of Sahwi activists against the Saudi government beginning in 2003).

102. Nimr b. Bāqir b. Amīn Āl Nimr, *Risāla Ayatullah al-Nimr li-l-ḥakūma al-Saudiyya yanfī fiha al-tuham al-muwajaha ilayhī wa yaṣifū maẓlūmiyatihi* [Letter from Ayatullah al-Nimr to the Saudi Government Denying Charges Against Him and Describing Their Oppression of Him], SKNEMER (June 27, 2013), <https://www.skemer.com/web/article/view/240>.

103. Nimr b. Bāqir b. Amīn Āl Nimr, *Ayyuhā al-aḥrar lakum huqūq mashrū'a, Ān al-awān li-rafa' saqf muṭālabkum bihā* [Freemen, You Have Legal Rights, it is Time for You to Raise the Ceiling of Your Demands to Them], SKNEMER (Mar.18, 2011), <https://www.skemer.com/web/article/view/269>.

trast to their counterparts supporting the status quo and seemingly ignoring the public completely.

### A. *Redefining Terms*

Most of the pro-uprising *fatwas* begin by discussing key terms with legal implications for both the revolutionaries and the state. The pro-uprising jurists address these terms for two primary purposes. First, some terms need to have definitions that create pre-requisites for legitimate protests; these prerequisites can then be met by the events that were underway in the Arab Spring. Second, other terms need to have their definitions narrowly tailored to *exclude* the Arab Spring uprisings. This is because certain terms are either *ipso facto* unlawful or trigger a more involved set of regulations. The terms whose legal definitions are at stake include “demonstrations” (*muzāharāt*) or “protests” (*ihtijāj*), “rebellion” (*khurūj*), and “public disorder” (*fitna*).<sup>104</sup>

Terms referring to “demonstrations,” “protests,” and similar activities usually receive attention first. The objective for most jurists is to provide a distinction between a peaceful demonstration and a violent rebellion. Hence, jurists begin with a negative definition, outlining what protests “are not.” They first take up the accusation that these protests are a form of rebellion. Jurists focus particular attention to the claim that protestors are like the *Khawārij*, one of the earliest and universally reviled rebel groups in Islamic history.<sup>105</sup> The Qatari-

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104. It should be noted that the term *fitna* actually has numerous meanings depending on the context in which it is used. Here, I believe the most appropriate meaning is “public disorder.”

105. The *khawārij* were a puritanical group that emerged in the mid-seventh century who were responsible for assassinating the fourth ruler after the death of Muhammad: Alī b. Abī Ṭalib. Their ideology classified certain individuals as sinners because their actions “jeopardized the spiritual good of the whole.” These sinners were to be purged from society. The most extreme faction among the *Khawārij*, the *Azariqa*, determined that even the “wives and children of grave sinners were subject to death.” Through the seventh and ninth centuries they carried out numerous uprisings challenging the authority and legitimacy of rulers they deemed to be sinners. By 1000 A.D. “historical references to the *Khawārij* took on a generic meaning of ‘rebels.’” Jeffrey T. Kenny, *Khawārij*, in *ENCYCLOPEDIA OF ISLAM* 432 (Juan E. Campo ed., 2009).

based Egyptian jurist, Yusuf al-Qaradawi,<sup>106</sup> suggests that the label of *khawārij* cannot be applied to protestors because their rebellion is not with “weapons” but their “tongues.”<sup>107</sup> This is a common distinction that jurists make, implying that non-violence cannot be labelled rebellion.<sup>108</sup> Muḥammad al-Yaqoubi,<sup>109</sup> a Syrian jurist, takes a different approach. Instead of focusing on their methods (i.e. violence versus non-violence), he focuses on their objectives. He distinguishes *khawārij* from the protestors by citing the opinion of an earlier jurist, ‘Alā al-Dīn al-Ḥaṣkafi (d. 1677), who said the problem with the *khawārij* was that they “came out against a righteous” leader without “good reason.”<sup>110</sup> In the Syrian context, Yaqoubi implies that neither are the leaders righteous nor is there an absence of good reason to protest.<sup>111</sup> In his *fatwa*, he raises no issues with the type of violent rebellion the *khawārij* pursued, but simply that it was not warranted because certain conditions had not been met.<sup>112</sup>

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106. Born in 1926, Yusuf al-Qaradawi is considered “the most prominent scholar and preacher in Sunni Islam at the beginning of the twenty-first century.” He is the president of the European Council of Fatwa and Research and founding chairman of the International Union of Muslim Scholars. ROXANNE L. EUBEN & MUḤAMMAD QASIM ZAMAN, *PRINCETON READINGS IN ISLAMIST THOUGHT* 224 (2009).

107. Mr01aziz12 (Al-Jazeera Arabic), *Faḥḥilat al-Shaykh Yūsuf al-Qaradāwī yarud alā man harama al-muzāharāt* [*The Honorable Shaykh Yusuf al-Qaradawi’s Response to People Who Prohibit Demonstrations*], YOUTUBE (Feb. 18, 2011) [hereinafter *Qaradawi*], [https://www.youtube.com/watch?v=ZT1SF\\_XHLMQ](https://www.youtube.com/watch?v=ZT1SF_XHLMQ). This is not to say that Qaradawi considers non-violence the only option. If the uprising met the legal requirements for *jihād* then violence would presumably be legitimate.

108. NIAZ SHAH, *ISLAMIC LAW AND THE LAW OF ARMED CONFLICT* 62 (2011) (describing the requirements for being categorized as a rebel).

109. Born in 1963, Muḥammad al-Yaqoubi is a Syrian jurist who was based in Damascus prior to going into exile. He preached at numerous mosques in the city and has a “large international following as a result of years teaching in North America and Europe.” Qureshi, *supra* note 19, at 78.

110. Yaqoubi, *supra* note 91. This focus probably has to do with the fact that Yaqoubi was speaking as a Syrian jurist where the regime’s brutality against the protestors already indicated that violent revolution was a strong possibility. Focusing on the objectives as opposed to the methods gave him greater flexibility on future legal opinions once the nature of the revolution changed.

111. *Id.*

112. *Id.*

Another term that pro-uprising jurists address is “public disorder” (*fitna*). The accusation they address here is that protests lead to chaos which is a form of social disorder.<sup>113</sup> Public disorder is strictly prohibited in Islamic law and hence, just as jurists want to avoid having protests classified as rebellion, they also do not want them labeled as causing public disorder.<sup>114</sup> Pro-uprising jurists employ different techniques to prevent this from happening. ʿAmir Abū Salāmah begins by stressing the non-violent angle, arguing that protestors cannot be the cause of chaos because they were “not carrying weapons” and their acts were compliant with Islamic law.<sup>115</sup> He then pursues a more proactive approach by suggesting that it was impossible for protestors to cause chaos because they were in fact doing the opposite: “speaking truth,” “denouncing tyranny,” “fighting against repression,” and “carrying the nation.”<sup>116</sup> In fact, he claims that, given the state of affairs, it would actually be a form of “public disorder” if “no one rose up” to address the repression.<sup>117</sup> This last point is one that ʿAbd al-Wahhāb al-Daylamī also argues. He suggests comparing the consequences of the protestors’ behavior with that of the state and then determining which is more disruptive. Daylamī’s argument is that the actual definition of “public disorder” is not what the protestors’ are doing, but rather the head of state’s behavior, which includes “humiliation” of his people, “depriving them of their rights,” and “rejecting the text of the *Sharʿa* and the Constitution.”<sup>118</sup> Daylamī defines public disorder as essentially failing to fulfill the duties of the head of state.<sup>119</sup> The Council of Scholars for the Jordanian Muslim Brotherhood also reject the idea of protests causing public disorder for a more basic reason: “causing disorder” is a criticism of the potential outcome of protest, but not of protests themselves.<sup>120</sup> They argue that a protest can be regulated by Islamic law to prevent any disorder.

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113. Anti-Uprising Fatwa, *supra* note 13.

114. DAWOODY, *supra* note 76, at 157 (noting that the majority of jurists prohibit rebellion against even unjust rulers in order to maintain public order).

115. Abu Salāmah, *supra* note 78.

116. *Id.*

117. *Id.*

118. Daylamī, *supra* note 68.

119. *Id.*

120. Jordanian Muslim Brotherhood, *supra* note 77.

der, but there is nothing inherent in protests that must lead to public disorder.<sup>121</sup>

The final term that jurists define is “demonstration” or “protest.” Some jurists begin by noting that protests are a means of communication. The Iraqi jurist, ‘Abd al-Razzāq al-Sa‘di,<sup>122</sup> considers protest a means for the community to “raise its voice,” where individuals publicly demand their legal rights from the head of state. However, he includes a condition: these demands must be made privately before making them public through protest.<sup>123</sup> While he is one of the few to raise this as a condition, it does betray an inclination among many Sunni jurists to avoid public disruption if a matter can be resolved in private. The Saudi scholar, al-Sharīf Ḥātim al-Awnī, says that demonstrations are a “means of communication that give expression to one’s opinion” and in this way function as a way of changing society by exerting pressure on a ruler to acquiesce to people’s desires.<sup>124</sup> Here we see that the pro-uprising jurists are placing the public front and center. Protests become legitimate because they are a means for the public to communicate with the executive. In essence, jurists empower the public by sanctioning their ability to engage the power structure and increase their relevance by taking them into consideration when formulating legal arguments.

Departing from this piecemeal method for defining terms, Aḥmad al-Raysūnī takes a more holistic approach. He considers definitional issues to be a central cause of confusion on most legal matters.<sup>125</sup> Accordingly, he outlines a procedure for analyzing terms. He separates meaning out into two types: technical and legal. Raysūnī begins by examining the technical meaning of a term in its sphere of operation.<sup>126</sup> Then he con-

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121. *Id.*

122. Born in 1949, ‘Abd al-Razzāq al-Sa‘di is a prominent Iraqi jurist and preacher who is the brother of ‘Abd al-Malik al-Sa‘di.

123. ‘Abd al-Razzāq, *supra* note 78. He also mentions two legitimate reasons for protesting: a failure to grant people their rights and negligence with regard to the affairs of state. *Id.*

124. ‘Awnī, *supra* note 91.

125. Muṣṭafā Bokran, *Al-Shaykh Aḥmad al-Raysūnī . . . faqih al-ḥuriyya* [Sh. Ahmad al-Raysuni . . . jurist of freedom], *MAGHREES* (Mar. 27, 2011), <http://www.maghrees.com/hespress/29625>.

126. *Id.*



siders how it functions within the legal or *Sharī'a* context.<sup>127</sup> If the term is explicitly mentioned in a constitutional source, then a comparative analysis takes place between the meaning implied by the *Sharī'a* and how the term functions in its original field.<sup>128</sup> If this doesn't lead to a clear Islamic legal ruling, then Raysūnī suggests departing from this framework and instead utilizing the law's "higher" objectives (*maqāṣid al-sharī'a*) to understand the term.<sup>129</sup>

As the above discussion shows, jurists recognized the need to define the key terms at stake in the debate over the uprising's legitimacy. These terms appear consistently throughout the legal discourse and thus had to have a secure and compliant definition. The use of negative definitions seems partly strategic for the jurists. Since in practice many of these terms may include a wide range of behavior, it was a better strategy to define what they are not as opposed to what they are. Especially in 2011, when the uprisings were just getting underway and there was a fair amount of uncertainty, having broad terms of reference made sense. There was no telling the direction the uprisings would take, and rigid definitions would not offer the same level of interpretive flexibility later on. Additionally, already in their definitions jurists begin to craft legal arguments featuring the public. They conceive of the public as important stakeholders whose interests must be considered alongside the state's interests. This is a departure from how Islamic legal thinking is traditionally considered.

### B. Utilizing Proof-Texts

Arguably, the most persuasive legal arguments in Islamic law are constructed on the basis of proof-texts from Islam's constitutional sources, the Qur'an and Prophetic Tradition (*Sunna*). Both these sources are not only foundational, but

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127. *Id.*

128. *Id.*

129. *Id.* The main objective of the "*maqāṣid al-sharī'a* doctrine" was to provide a "rational basis" for the "authority of law" in addition to God's will. Muḥammad Khalid Masud, *Shāṭibi's Theory of Meaning*, 32 ISLAMIC STUDIES 5, 5 (1993). Hence, the jurists articulated a series of values that the *Sharī'a* seeks to "protect and promote." They also validate measures that preserve and advance these values: protection of faith, life, lineage, intellect and property. MOHAMMAD HASHIM KAMALI, *MAQĀSID AL-SHARĪ'AH MADE SIMPLE* 4 (2008).

carry claims of “divinity,” which in theory is always superior to human reason. The Qur’an’s divinity is derived from the belief that it contains God’s actual words, whereas the Prophetic Tradition, with weaker claims of epistemological certainty, attains quasi-divine status because it relays the deeds and words of Muḥammad, who communicated directly with God.<sup>130</sup> Accordingly, it is not surprising that during the Arab Spring legal arguments for and against the uprisings often relied on proof-texts to reinforce their stances. Of course, the major limitation that both sides faced was that neither of the two constitutional sources explicitly addresses the idea of protest, so the debate centers on whether derived rules and principles on related topics could apply. For the pro-uprising jurists, one of the central criticisms they try to address through proof-texts is the claim that the Arab Spring uprisings have no legal justification from Islam’s constitutional sources; in other words, that there is no explicit permission. This critique, and the jurists’ attempt at addressing it, reveal a more complicated development in Islamic law. The very fact that the critique is posed in this manner, where a demand is being made for an affirmative command of legal sanction from the sources, is a departure from how pre-modern jurists addressed legal questions. The default legal position was always permissibility, but here the default position is prohibition.<sup>131</sup> Some pro-uprising jurists raise this point, indicating that the onus is not on them to prove that protests are permissible, but for others to prove that they are not.<sup>132</sup> The modern Islamic legal discourse, however, is often characterized by deference to a default position essentially requiring proof of permission.<sup>133</sup>

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130. WEISS, *supra* note 30, at 45–48.

131. See LOUAY FATOHI, *ABROGATION IN THE QUR’AN AND ISLAMIC LAW* 231 (2012) (“[T]he default status of anything is “permissible” unless it has been forbidden.”).

132. Jordanian Muslim Brotherhood, *supra* note 77.

133. YUSUF AL-QARADAWI, *THE LAWFUL AND THE PROHIBITED IN ISLAM* 13–18 (Kemal El-Helbawy, et al. trans., 1994) (noting that the default position is permissibility, but that a distinction exists between acts of worship and other acts). While beyond the scope of this Article, virtually all scholars agree in principle that the default position is permissibility. However, they include an important caveat that requires proof of permissibility for acts of worship. Many use an expansive definition of what constitutes an act of worship and in the process create the default position requiring proof of permission.

Pro-uprising jurists approach the absence of proof text in two ways. Some present proof texts that speak in support of broad legal principles they contend demonstrate the validity of protests. Others argue that proof texts are not required in this case. With regard to the first group, ʿAbd al-Malik al-Saʿdī quotes an oft-repeated verse in the Qurʾan that says people must “command right and forbid wrong” (*yaʾmurūna biʾl-maʾrūf wa-yanhawna ʿani ʾl-munkar*).<sup>134</sup> This is a particularly useful Qurʾanic prescription since “right” and “wrong” can be read quite broadly to encompass different ideas. Hence, ʿAbd al-Malik is able to argue that protests fulfill this Qurʾanic directive by raising the “wrong” committed by the government.<sup>135</sup> ʿAmir Abū Salāmah also considers protests from this perspective, noting that “young people who went into the streets did not do so to destroy or create disorder in the land, but only command what is right by demanding freedom and justice” and by “forbidding what is wrong” through removing injustice, calling for emergency laws to be lifted, and fighting to “release political prisoners.”<sup>136</sup> Thus, ʿAbū Salāmah extends the ideas of right and wrong and incorporates his immediate political circumstances into his reading of the sources.

In addition to the “right/wrong” (*amr/nahy*) verses, jurists also use other verses with broad prescriptions on fighting for justice and against oppression. Yusuf al-Qaradawi says protestors on the streets are rising up against oppression and then quotes verses from the Qurʾan that speak of God’s dislike for oppression and oppressors.<sup>137</sup> The Jordanian Brotherhood Scholars also focus on the idea of fighting oppression and quote the Qurʾanic verse which commands people to seek “reconciliation” between “two groups of believers” that are fighting, but if “one of them is oppressing the other, fight the

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134. ʿAbd al-Malik, *supra* note 96 (citing Q 22/ *al-Ḥajj*: 41).

135. *Id.*

136. Abū Salāmah, *supra* note 78. ʿAbd al-Majīd al-Zindānī, when rejecting the characterization of protests as rebellion, states that they are actually fulfilling this Qurʾanic command. FalkZad, *Ḥukm al-Muzaharāt—al-Shaykh ʿAbd al-Majīd al-Zindānī* [Ruling on Protests—Sh. ʿAbd al-Majīd al-Zindānī], YOUTUBE (June 9, 2011)[hereinafter Zindānī], <https://www.youtube.com/watch?v=D8QHVo5uaLU>.

137. Qaradawi, *supra* note 107.

oppressors until they submit to God's command."<sup>138</sup> While this verse is often understood to mean physically fighting the oppressors, the Jordanian Brotherhood suggests that even non-violent protests are a form of "fighting" oppression. Muḥammad al-Didaw al-Shanqīṭi utilizes the verse of the Qur'an which commands believers to "stand up for justice" as "witnesses before God" and considers the protestors as fulfilling this obligation.<sup>139</sup>

Jurists also seek proof texts from the Prophetic tradition. Qaradawi and others note Muḥammad's saying that "the highest form of *jihād* is speaking truth in the presence of a tyrant ruler" (*yaqūlūn kalimat ḥaqq 'inda sultān jā'ir*).<sup>140</sup> This tradition plays a key role for many jurists because its narrative fits the Arab Spring: protests were speaking truth against heads of state who could be classified as tyrants. Arguably, the most frequently cited proof text in support of protests is a famous Prophetic saying: "whoever among you sees something reprehensible, let him change it with his hand, and if not that, then with his tongue, and if not that, then with his heart, but this is the weakest of faith."<sup>141</sup> A related tradition, which is even more applicable, is also cited in which the Prophet reportedly said: "after me there will be rulers who say what they do not do and do what they were not commanded, then whoever wages *jihād* against them with his hands is a believer, whoever wages *jihād* against them with his tongue, he is a believer, and whoever wages *jihād* against them with their heart he is a believer. Anything less is not faith."<sup>142</sup> These Prophetic traditions are supposed to indicate different methods for struggling (*jihād*) on God's behalf. Changing something with the hands has meant

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138. Jordanian Muslim Brotherhood, *supra* note 77. The verse quoted in the text is Q 49/*al-Hujurat*: 9.

139. PjLWjL (Interview with Muḥammad al-Didawī al-Shanqīṭi), *Ḥukm al-muḥāhirāt* [Ruling on Protests], YOUTUBE (Dec. 3, 2011), <https://www.youtube.com/watch?v=iwWaIK41JKo>.

140. Qaradawī, *supra* note 107; *see also*, Abū Salāmah, *supra* note 78 (quoting the same tradition except instead of "tyrant ruler" (*sultān jā'ir*) the tradition he mentions uses "oppressive ruler" (*ḥakim zālim*)); Zindānī, *supra* note 136.

141. JONATHAN A.C. BROWN, MISQUOTING MUḤAMMAD: THE CHALLENGES AND CHOICES OF INTERPRETING THE PROPHET'S LEGACY 130 (2014) (reference contains the exact translation used in the text); *see also* 40 Hadith Nawawī 34, <http://sunnah.com/nawawi40/34>.

142. Jordanian Muslim Brotherhood, *supra* note 77.

taking “action,” or even fighting with the sword.<sup>143</sup> Changing something with one’s tongue is self-evident: speaking out against reprehensible acts. Finally, change through one’s heart is often either indicative of battling one’s “own sinful inclinations” or silently hating evil even if one is powerless against it.<sup>144</sup> The pro-uprising jurists suggest that this Prophetic saying is supportive of protests because protests are both taking action and raising one’s voice—change with one’s hands and tongue.<sup>145</sup>

Other pro-uprising jurists take a different approach to the use of proof texts, arguing from a minimalist perspective that they are simply not necessary in this context. Ḥatīm al-ʿAwnī contends that proof texts are not required because demonstrations are “methods” (*wasāʾil*) which are classified as *al-maṣāliḥ al-mursala*: acts consistent with *Sharʿa* objectives, but not derived from a proof text.<sup>146</sup> As a result, ʿAwnī argues the “legitimacy” of protesting is due to its conformity with the “objectives of the law,” as opposed to derivation from a proof-text.<sup>147</sup> The Jordanian Brotherhood Scholars similarly argue that while there is “no explicit” proof-text from the Qur’an or Prophetic tradition regarding protests, there is notably no explicit prohibition either, which is the more relevant point for them.<sup>148</sup>

This section shows the creative ways in which jurists addressed the absence of explicit proof-texts supporting protests. Recognizing the unparalleled authority of scripture in any debate involving Islamic law, jurists sought other proof-texts that support their cause. In particular, proof-texts containing vague ideas of “right/wrong,” “justice,” and “oppression” were malle-

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143. This Prophetic tradition is most often cited in the *jihād* discourse. RUEVEN FIRESTONE, *JIHAD: THE ORIGIN OF HOLY WAR IN ISLAM* 17 (1999).

144. *Id.*

145. Qaradawi, *supra* note 107.

146. ʿAwnī, *supra* note 91. The term *al-maṣāliḥ al-mursala* is often translated as “public interest,” but that definition does not seem to fully capture its function. Some have translated the term as “unrestricted interests,” meaning they are not “explicitly identified by any text,” but are “generally agreed upon based on circumstances which arise in human society.” AHMAD AL-RAYSUNĪ, *AL-SHURA: THE QUR’ANIC PRINCIPLE OF CONSULTATION* 184 (Nancy Roberts trans., 2011). Of course, these interests have to be “harmonious with the objectives” of Islamic law. TAHA JABIR ALALWANI, *THE ETHICS OF DISAGREEMENT IN ISLAM* 138 (Abdul Wahid Hamid trans., 1993).

147. ʿAwnī, *supra* note 91.

148. Jordanian Muslim Brotherhood, *supra* note 77.

able and could apply to the present circumstances. Even when the actual usage in the constitutional sources was narrow, jurists would find a broader application. Furthermore, the proof-texts that jurists chose did not simply present value judgments about ideals such as justice and oppression. They demanded action. Hence, the verses “command” right, urge believers to “fight” oppression and use their “hands” and “tongue” to bring about change. These proof-texts not only supported the values underlying protests, but also encouraged bringing these values to life. Finally, some jurists also raise the idea of legal minimalism as it applies to Islamic law. By suggesting that there is no need for an affirming proof-text, jurists are limiting the scope of Islamic law. In essence, they are arguing that the absence of proof-texts does not have any bearing on permissibility, but rather suggests this matter is outside the scope of religious law.

### C. *Persuasive Authorities in the Historical Record*

Persuasive authority of the type considered here is not typically thought of as “textual,” but its use by Muslim jurists, particularly during the Arab Spring, is intrinsically tied to text. The persuasive authorities are relevant here for two reasons. First, they may provide an explicit interpretation of a constitutional source and this interpretation is given preference. Second, their behavior is always considered consistent with the sources, and therefore serves as a *de facto* interpretation. These historical personalities, or “luminaries,” are assumed to have a higher level of interpretive authority, and therefore their opinions are often presented as controlling, or at least persuasive, on various matters. For this reason, the criticism of a lack of proof-texts is usually accompanied by a similar critique that no persuasive authority from the historical record exists to support protests either.<sup>149</sup>

One of the earliest historical examples of protest that surprising jurists cite is when Muḥammad allowed two of his companions, ʿUmar b. al-Khaṭṭāb and Ḥamza b. ʿAbd al-Muṭṭalib, to pray openly for the first time at the Kaaba in Mecca, in open defiance of the political forces opposing the nascent religion.<sup>150</sup> While this stretches the definition of protest, the

149. Jordanian Muslim Brotherhood, *supra* note 77.

150. Qaradawi, *supra* note 107; *see also* Jordanian Muslim Brotherhood, *supra* note 77 (discussing how Ḥamza and ʿUmar led two ranks of believers in

Jordanian Brotherhood goes one-step further and suggests that when Muḥammad relocated to Medina, at the invitation of the city's political leaders, the people who came out to greet him were also an example of a popular demonstration to "express their love."<sup>151</sup> Here, the Brotherhood takes a very broad meaning of the term popular demonstration, essentially equating any collective, public expression of an opinion, positive or negative, to be a "demonstration."<sup>152</sup> In the same vein, they cite the example of what happened to the Muslim army that retreated from the Battle of Mu'ta. Upon returning to the city the forces were apparently met by numerous people "deploring them, throwing sand in their faces," and calling them "cowards."<sup>153</sup> The Jordanian jurists argue that these acts were protests as well, and since Muḥammad, who was present, did not prohibit them, it means he must have given them tacit approval.<sup>154</sup>

The pro-uprising jurists also cite Muhammad's Companions as routinely conducting what they now view as protests. ʿAwnī reinterprets parts of Islamic history to argue this point. For instance, the Battle of Camel, one of the most famous battles after the death of Muḥammad, pitted two camps of Muslims against each other in dispute over the appropriate response to the assassination of ʿUthmān b. ʿAffān, the third Caliph after Muḥammad.<sup>155</sup> The newly appointed Caliph, ʿAlī b. Abī Ṭālib, led one of the camps, while the others were comprised of a host of luminaries from early Islam: al-Zubayr b. al-ʿAwām, Ṭalḥa b. ʿUbayd Allah, and ʿĀ'isha, a wife of Muḥam-

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a procession to the Kaaba after ʿUmar beseeched the Prophet not to "remain hidden" since they were "on the path of truth"); ʿAbd al-Razzāq, *supra* note 77 (arguing that despite this being a weak hadith you can still "take virtuous deeds" from it because it "speaks of repelling injustice and speaking truth").

151. Jordanian Muslim Brotherhood, *supra* note 77.

152. *Id.* They are not the only ones to use such a broad definition of protest. ʿAbd al-Razzāq al-Saʿdī argues that when ʿUmar tried to limit the value of bridal gifts (*mahr*) during his reign, women voiced their displeasure, which was their protest. Similarly, the Battle of Badr transpired because Muḥammad led a group of people to protest before a Qurayshi trade caravan about their stolen property. ʿAbd al-Razzāq, *supra* note 77.

153. Jordanian Muslim Brotherhood, *supra* note 77.

154. *Id.*

155. IRA LAPIDUS, A HISTORY OF ISLAMIC SOCIETIES 66–67 (3d ed. 2014).

mad.<sup>156</sup> ʿAwnī argues that this latter group did not “depart with the purpose of engaging in a fight” when they set off to confront ʿAlī over his decision to pardon the assassins of ʿUthmān.<sup>157</sup> Rather, ʿAwnī argues that their initial intention was simply to protest and “make known their objection to the absence of retribution for the assassination” and to “put pressure on Caliph ʿAlī” to do something.<sup>158</sup> ʿAwnī goes so far as to refer to this as “the Pious Ancestors Demonstration” (*muḏāhara salafiyya*).<sup>159</sup> Furthermore, he argues that ʿAlī recognized this as a protest and not a call to arms or rebellion and that is why he did not reject their “core action,” never denied them the right to gather, nor slandered them even though the actions were directed against him.<sup>160</sup> Thus, ʿAwnī argues that both ʿAlī’s allowance of the protest and the presence of luminaries in the protest mean that this type of action is permissible.<sup>161</sup>

In addition, the jurists don’t restrict themselves to this earliest period to establish precedent for protest. They point to other instances throughout Islamic history where well-known personalities, including jurists, took stands on various issues and voiced their opposition to the ruler. One of the more famous incidents they point to was when Caliph ʿAbd Allāh al-Maʾmūn (813-833 A.D.) attempted to impose a religious test and loyalty oath in Baghdad.<sup>162</sup> These events elicited a strong reaction from civil society. The pro-uprising jurists specifically point to the actions of the religious scholar Aḥmad b. Ḥanbal (“Ibn Ḥanbal”). The Jordanian Brotherhood Scholars note that Ibn Ḥanbal gathered “hundreds, possibly

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156. *Id.*

157. ʿAwnī, *supra* note 91.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* He also reinterprets another historical moment. During the speech that Abū Bakr al-Ṣiddīq makes upon assuming leadership of the Muslim community after Muḥammad’s death, he puts forward a principle that ʿAwnī considers the basis of an individual’s right to protest against a ruler. Abū Bakr noted that if he “does something well” then people should help him, but that if he “did something wrong” then people should “set him right.” For ʿAwnī this required the population to check their leaders and exert pressure on them when they are in the wrong. *Id.*

162. LAPIDUS, *supra* note 155, at 104–05 (providing details on the trials (*mihna*) where these tests and oaths would take place, as well as the response to them).



thousands,” of people to oppose the position of Caliph al-Ma'mūn, eschewing “private counsel” for public “resistance.”<sup>163</sup>

As the above analysis shows, the power of this persuasive authority comes from the assumption that certain luminaries from the past would never behave in contravention to the constitutional sources. As a result, their behavior is ipso facto an interpretation of these sources. In the historical record, this appears in two primary ways in relation to protests. On the one hand, a luminary may have engaged in a protest, thus making it licit behavior. On the other hand, a luminary like ʿAlī may have refused to take action against a protest, thus giving it tacit approval. In order to have the broadest applicability possible, pro-uprising jurists classified a range of historical activities as protest or demonstration. This classification included activities ranging from voicing public displeasure to revolution, even armed ones, like those of al-Husayn b. ʿAlī, ʿAbd Allāh b. al-Zubayr, and Ibn al-Ashʿath.<sup>164</sup> Of course, it is not clear that medieval jurists would have understood these events in the same way; today’s jurists are clearly viewing these historical events through a modern lens.

In general, the textual arguments made by pro-uprising jurists demonstrate the continued centrality of language and text in Islamic legal argumentation. Even in the absence of any explicit proof-texts supporting their position, jurists are required to make overtures to principles and tangential proofs that might be found in the textual sources in order to fortify their argument. In doing so, they rely primarily on analogical reasoning (*qiyās*), a method considered central to pre-modern Islamic legal theory. In many instances, however, there is no analogy to be made with the cited proof-texts. Instead, jurists focus on demonstrating consistency or non-conflict with Islamic legal principles, engaging in what might be broadly termed “policy” arguments.

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163. Jordanian Muslim Brotherhood, *supra* note 77. They go further and seem to address their Salafī critics directly by noting that they themselves arose out of the Wahhabi movement in the Arabian Gulf that did far more than demonstrate: they pursued armed rebellion.

164. *Id.*

## V. THE POLICY ARGUMENTS FOR PROTEST

This Part discusses the policy arguments that pro-uprising jurists make in support of their position. These arguments are comprised of two main types. The first type of argument centers on expanding a pre-existing concept in Islamic law to include a wider set of behavior, including protest. The most pertinent example is their classification of protest as a legal obligation or duty. The second type of policy argument centers around incorporating new formulations of certain legal concepts into Islamic law. These concepts often have precursors within pre-modern Islamic law, but jurists are more concerned with using their modern articulation as part of their arguments. Since these policy arguments are not constrained by the confines of texts, jurists take greater liberties and exercise creative license in the policy arguments they make. In the process they demonstrate the responsiveness of Islamic law to the circumstances in which it exists. In essence, they show how jurists employ legal realism, alongside formalism, to argue for protest.

### A. *Expanding Pre-Existing Concepts*

The policy category includes a broad set of legal concepts and principles that pro-uprising jurists utilize. Given the absence of any bright-line rules derived from explicit texts, this category of argument is far less constrained than its textual counterpart. As a result, it becomes a focal point for not simply giving legal sanction to protests, but elevating their value. The jurist is able to exercise wide latitude in deciding what he considers relevant to his argument. This Section discusses the first technique, which looks to *expand* concepts that are already present in Islamic legal discourse in order to allow new cases and situations to be encompassed by them. Specifically, jurists focus on legal obligation or duty and seek to characterize protests as obligatory acts. They use four primary arguments for making this characterization: the duty to give good counsel, the duty to oppose an unjust ruler and support the oppressed, the duty to fulfill contracts and the obligation to protest because it is necessary to meet other obligations.<sup>165</sup>

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165. It should be clear that these obligations are also derived from general proof-texts in the Qur'an and Prophetic tradition. For instance, the obliga-

Pro-uprising jurists did not simply wish to give legal sanction to protests and their objectives, but were concerned with taking a more affirmative stance. As a result, many of them began to frame protests and their objectives as activities and goals that were obligatory (*farḍ*) in Islamic law. Islamic law centers on acts one is required to perform and those that one should abstain from, with many acts in between. As the textual discussion above indicates, pro-uprising jurists are often in a defensive position arguing why protests are not acts that one should abstain from, addressing the critique that one is obligated *not* to participate. It is a far more difficult legal proposition to argue that Islamic law not only allows Muslims to take part in these Arab Spring protests, but actually *requires* their participation. Yet, this is precisely the legal argument that the pro-uprising jurists make, and in the process they expand how Islamic legal obligations are understood.

Islamic legal obligations consist of two main categories: individual obligations (*farḍ ‘ayn*) and collective duties (*farḍ kifāya*). Individual obligations are those acts that every Muslim, assuming they satisfy the pre-requisites for legal responsibility, is required to fulfill.<sup>166</sup> An example of such an obligation is prayer.<sup>167</sup> Collective duties are a unique set of obligations where a few individuals (or possibly just one) performing a duty will satisfy everyone else’s obligation.<sup>168</sup> Historically, an example of this collective duty was volunteering for a military campaign; as long as some people stepped forward to meet the state’s need for soldiers, not everyone was required to volunteer.<sup>169</sup> Over time, these duties came to represent a wide array of activities that often centered on cultivating a communal

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tion to give good counsel comes from the Prophetic tradition that says “religion is good counsel” (*al-dīn al-naṣīḥah*). See 40 Hadith Nawawi 7, <http://sunnah.com/nawawi40/7>. Similarly, the obligation to abide by one’s contracts comes from Qur’anic verses like Q5/*al-Mā’idah*: 1, that tells believers to “fulfill your contracts” (*awfū bi-l-uqūd*). THE QUR’AN 67 (M.A.S. Abdel Haleem, trans., 2004). Despite the connection to these proof-texts, they really operate in the background as outlining general principles as opposed to the central role of proof-texts in the earlier arguments cited. As noted elsewhere, virtually every argument that falls within the rubric of Islamic law will trace back to some proof-text that gives it explicit or implicit sanction.

166. HASAN, *supra* note 90, at 61.

167. *Id.*

168. *Id.* at 62.

169. *Id.* at 63.

ethic. Pro-uprising jurists seize upon the communal ethic feature of collective duties to argue for its expansion during the Arab Spring.

Some jurists argue that protesting is a collective duty to give “good counsel” to the powers that be. They take the pre-existing duty to give good counsel and expand it to include protesting as one manner of fulfilling the obligation. The Jordanian Brotherhood Scholars argue that “demonstrations, marches, sit-ins, etc.” are “not only permissible” but “at certain points even rise to the level of collective duty.”<sup>170</sup> They argue that these actions are methods to “collectively express” an opinion on an issue of public concern and the manner in which one makes “their point of view known.”<sup>171</sup> Anticipating the counterargument that these matters should be discussed in private, the Brotherhood Council notes that when a “ruler is oppressive” it is a “public violation” and its rebuke must be voiced publicly.<sup>172</sup> In fact, they suggest that these activities existed in the past, but were simply not widespread enough to merit comment; it is due to their prevalence today that “it is necessary to promulgate a ruling” from Islamic law to validate them.<sup>173</sup> This seems to be their reason for elevating these acts to the level of obligation.<sup>174</sup> Sa‘ad ‘Atiyah al-Azharī, an Egyptian jurist, argues that protesting during the Arab Spring was obligatory on the Muslim community collectively as a means of “clarify(ing) their position” and “encouraging the leadership to implement what they hope for.”<sup>175</sup> He goes on to say that protests are how specific issues are brought to the attention of

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170. Jordanian Muslim Brotherhood, *supra* note 77.

171. *Id.*

172. *Id.*

173. *Id.*

174. They argue that the majority of jurists agree that these are legal acts, but differ as to the type of legality we are speaking of. Some argue that they are simply permissible (*mubāha*), others that they are actually commendable (*mustahiba*) and finally those who consider it obligatory. This last opinion includes the scholars of al-Azhar, the scholars of the Brotherhood (including Hasan al-Banna), the International Union of Muslim Scholars (including Shaykh Yusuf al-Qaradawi), as well as numerous scholars identifying with the Salafi school of thought including Shaykh ‘Abd al-Rahman ‘Abd al-Khāliq, Sh. Salmān al-‘Awda, and Sh. Muḥammad al-Ḥasan al-Shanqīṭī. Jordanian Muslim Brotherhood, *supra* note 77. They also mention that numerous scholars from across the Muslim world are in support of this position. *Id.*

175. ‘Atiyah, *supra* note 94.

the authorities and are obligatory precisely because they inform “governments about the concerns of the governed.”<sup>176</sup>

With regard to the duty to oppose an unjust ruler and support the oppressed, Muḥammad al-Yaqoubi issued a *fatwa* that obligated participation in demonstrations in Syria based on what he considers a *Sharʿa* requirement to oppose a tyrannical or unjust ruler.<sup>177</sup> Realizing the potential controversy of this statement, he immediately addresses the contrary Prophetic tradition requiring obedience to a ruler.<sup>178</sup> For Yaqoubi, these conflicting rulings can be reconciled by narrowly tailoring the meaning of the second ruling.<sup>179</sup> He notes that obedience to a ruler is contingent on that ruler being “just.”<sup>180</sup> He subsequently outlines different types of rulers, citing medieval authorities to support his position, each requiring a different type of engagement from the public.<sup>181</sup> ʿAwnī says that permissible peaceful protest becomes “obligatory” if it is not possible to “fix abusive practices” of the state without them.<sup>182</sup> ʿĀmir Abū Salāmah makes the same point, but characterizes this right as a “human right” to “non-violent *jihād*,” something he says is acknowledged by “constitutions around the world.”<sup>183</sup> He then suggests that God will reward them for this “great obligation” because it is the “greatest of *jihads*,” since its participants are “speaking words of justice to unjust power.”<sup>184</sup> What he does here is enhance the protest obliga-

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176. *Id.*

177. Yaqoubi, *supra* note 91.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* For instance, he notes that a disbelieving ruler, or more accurately one who eschews Islam after coming to power, should be removed. Then he speaks of corrupt, tyrannical and unjust rulers. Corrupt rulers are to be preserved, according to authorities like Yaḥyā b. Sharaf al-Nawawī who considered opposition to such rulers as too costly in comparison to the benefits because of the chaos that would ensue. However, a tyrannical ruler, Yaqoubi notes, according to different medieval authorities like Juwaynī and Taftāzānī, must be removed, even by force, if his injustice has become widespread and he refuses to stop. Yaqoubi cites the medieval jurist Ibn ʿĀbidīn as saying that anyone who rises up against a ruler and is in the right cannot be classified as a rebel, in other words, the laws pertaining to rebellion do not apply. In fact, Ibn ʿĀbidīn obligates helping them. *Id.*

182. ʿAwnī, *supra* note 91.

183. Abū Salāmah, *supra* note 78.

184. *Id.*

tion even further by not simply classifying it as a means to restore obligatory rights, but as a form of *jihād* and so obligatory in itself. Similar to the duty to oppose an unjust ruler, jurists claim a duty to support those people he is oppressing. Yaqoubi expands the legal obligation to not only prohibit siding with the unjust, but also require “securing victory for the oppressed.”<sup>185</sup> ʿAbd al-Razzāq al-Saʿdī notes that protests can be a duty because they show “support to brethren in other countries.”<sup>186</sup> Saʿad ʿAtiyah al-Azharī echoes this point by stating that protests are a means of showing “those who oppress the innocent, that the Muslim community is not negligent of their plight.”<sup>187</sup>

Jurists lack constraint in how they utilize the category of legal obligation. It is arguable whether any affirmative duty to rise against an oppressor existed or whether this was simply a commendable act. Likewise, it is not clear from pre-modern Islamic law that supporting the oppressed was considered a duty or simply an optional good deed. What is evident, though, is that jurists stretch the reasoning behind these duties beyond what would be found traditionally. The idea of demonstrating empathy for others’ plight or expressing solidarity seems to arise out of a legal realist approach the jurist takes to his context as opposed to a formalist reasoning with broader application.

Building on this last point, certain pro-uprising jurists also expand the duty to oppose an unjust ruler, but specifically in reference to a foreign occupier. For instance, ʿAbd al-Malik al-Saʿdī lays out six types of executive behavior that require protest. These are disavowal of religion,<sup>188</sup> embezzlement of pub-

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185. Yaqoubi, *supra* note 91.

186. ʿAbd al-Razzāq, *supra* note 77. He goes on to note that removal of an executive can also be a goal of these protests if his tyranny and corruption are negatively impacting the community and he is colluding and conspiring against the country with its enemies. He suggests a broader legal maxim controls here: what benefits the community takes precedence over what benefits an individual ruler. *Id.*

187. ʿAtiyah, *supra* note 94.

188. This requirement derives directly from medieval legal discourse where religious belief determined civic relationships in the state, such that any disavowal amounted to a treasonous act. BROWN, *supra* note 141, at 188 (noting that jurists consider apostasy to be a form of high treason). Its application in the modern context is fraught with serious difficulties, but beyond the scope of this Article.

lic funds, favoritism towards one sub-section of the population, exercising excessive police power over the citizenry, utilizing state institutions to secure power, and colluding with a hostile or occupying state.<sup>189</sup> ‘Abd al-Malik’s concern is not with creating broad formalist principles, but with creating conditions narrowly tailored to his context: Iraq.<sup>190</sup> In other words, his expansion of the legal obligation does not arise from theory but practical considerations and the demands of his particular constituencies. At another place, he attempts to place this position within pre-modern Islamic legal theory’s concern for the essential elements of religion (*ḍurūriyyāt al-dīn*).<sup>191</sup> He notes that opposition to occupation is obligatory because it “constitutes a defense of religion, one’s life, honor and property,” essentially suggesting that four of the five essential elements of religion are threatened by occupation.<sup>192</sup> Hence, he also obligates the use of protests to oppose occupation or as a “defense against chaos and oppression.”<sup>193</sup>

Another argument as to why protests, and their objectives, are obligatory is based on contractual obligations in Islamic law. The summary of this argument is that Muslim populations are in a contractual agreement with the head of state through which they are guaranteed certain rights. The country’s constitution usually represents this contract. When the executive becomes oppressive and curtails people’s rights, he violates the Constitution, which is a violation of the executive’s contract with the population. Since fulfilling contracts is an obligation under Islamic law, the executive’s actions are a breach of this

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189. ‘Abd al-Malik, *supra* note 96.

190. *Id.* While he mentions no specifics, his subtle references to American occupation and Iranian influence are evident when he says a head of state must be removed if he remains “loyal to an occupying or hostile state” with ambitions to “dominate over Muslim countries and subject them to its own ideology, politics or religion.” *Id.*

191. ‘Abd al-Malik al-Sa‘dī, *Ra’y fī al-muḥārahāt fī al-Iraq* [Opinion Regarding Demonstrations in Iraq], ISLAM SYRIA (Feb. 22, 2011), <http://www.islamsyria.com/portal/consult/show/254>. While he uses the term “essential elements of religion” (*ḍurūriyyāt al-dīn*), these points are more commonly known in Islamic legal theory as the “higher objectives of the law” (*maqāṣid al-sharī‘a*). See MOHAMMAD HASHIM KAMALI, MAQĀSID AL-SHARĪ‘AH MADE SIMPLE 4 (2008) (“the essential interests are enumerated at five, namely faith, life, lineage, intellect and property.”).

192. ‘Abd al-Malik, *supra* note 191.

193. *Id.*

obligation and must be corrected. Protests are the means by which populations serve notice of the violation and begin the corrective process.

The Jordanian Brotherhood states categorically that protests are a “pursuit of the rights that the ruler agreed to with his people through the Constitution.”<sup>194</sup> They add an additional element by saying that not only are people obligated to respond to the breach of contract, but also that one of the rights denied to them is the very right to protest.<sup>195</sup> They consider protests an “enforcement” of the “contract between two parties”: the head of state and his constituents.<sup>196</sup> ʿAbd al-Malik al-Saʿdī also states that the head of state is in power because “the people permitted” him to rule over them in exchange for various things, such as “services,” “the establishment of justice,” being provided the “comforts of life,” and “security.”<sup>197</sup> If the head of state does not fulfill his duties then it becomes necessary for some people to rise up to demand he fulfill them.<sup>198</sup> One of the most interesting arguments made on this point is by ʿAbd al-Wahhab al-Daylamī, who analogizes the relationship of the head of state and his people to that of a lessor and lessee. He notes that a lease ends when the term of the contract ends, except in those situations where the lessor “breached a condition of the contract.”<sup>199</sup> Similarly, the head of state is a “lessor to the people” and “the contract between them is the Constitution.”<sup>200</sup> Daylamī says that the head of state in Yemen, Abdullah Saleh, “swore an oath to uphold the Constitution, but then violated it.”<sup>201</sup> Since violating one’s oaths and contracts is against the *Sharʿa*, Daylamī considers a breach of the constitution to be a breach of *Sharʿa*.<sup>202</sup> In each of these arguments the public is again given a featured place. Medieval jurists generally do not conceive of the relationship between the ruler and public to be one in which he was contractually bound to serve them. Yet, this is essentially how the

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194. Jordanian Muslim Brotherhood, *supra* note 77.

195. *Id.*

196. *Id.*

197. ʿAbd al-Malik, *supra* note 96.

198. *Id.*

199. Daylamī, *supra* note 68.

200. *Id.*

201. *Id.*

202. *Id.*



pro-uprising jurists are configuring the roles of the two parties. The jurists are simply defining the relationship between the executive and public as contractual and placing the central grievances of the protests as stipulations within that contract.

Finally, the expansion of legal obligations to include protests also occurs through the use of a legal maxim from pre-modern Islamic law. This maxim notes that “anything that is required for an obligation to be completed is obligatory itself” (*mā lā yatim al-wajīb illā bihi fa huwa wājib*).<sup>203</sup> ʿĀmir Abū Salāmah suggests that three primary obligations are being fulfilled here which cannot be completed without protesting. First, the obligation to command what is right and forbid what is wrong, second, to provide good counsel and, third, to engage in *jihād*, specifically what he considers to be the most laudable form of *jihād*: “non-violent” *jihād*.<sup>204</sup> These acts are all obligatory because they pursue necessary goals of “reform,” “restoration of rights,” and “confronting injustice.”<sup>205</sup> As a result, since protests are in pursuit of these obligations, they also become obligatory themselves.<sup>206</sup> ʿAbd al-Razzāq al-Saʿdī says that not only are protests permissible, but they become obligatory in certain cases using the same maxim mentioned above. For instance, he notes that one of the ways of completing the obligatory acts of “repelling aggression, stopping injustice, helping people recover their rights, [and] preventing corruption in the performance of duties” is “peaceful, civilized demonstration.”<sup>207</sup> Thus, it is an obligation for believers to participate in demonstrations.<sup>208</sup>

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203. Abū Salāmah, *supra* note 78.

204. *Id.*

205. *Id.*

206. *Id.*

207. ʿAbd al-Razzāq, *supra* note 77.

208. *Id.* He actually begins by noting that protests are an area ungoverned by any preexisting rule or explicit proof-text. As a result, they fall under the guidance of the legal maxim that “the default position in any matter is permissibility” (*al-aṣl fī al-ashyāʾ al-ibāha*). *Id.* In other words, it is not the responsibility of the pro-uprising jurists to prove protests are licit acts, but rather for the other side to prove that they are illicit. *Id.* The scholars of the Jordanian Brotherhood also use this maxim. They argue that the maxim governs communication and forms of action—not the substance, but the method—because there is no preexisting rule. See Jordanian Muslim Brotherhood, *supra* note 77. They also note that protests are legitimate based on the maxim that “the means are evaluated based on the legitimacy of the aims” (*li-l-wasāʾil*

In some respects, this legal maxim is also at the heart of the argument put forward by Kamal al-Halbawi, a former spokesperson of the Egyptian Muslim Brotherhood, even though he does not explicitly mention it. He suggests that demonstrations are actually an individual obligation on every Egyptian “until the demands of the revolution are met,” but that the sit-in that took place in Tahrir Square in Cairo was only a collective duty.<sup>209</sup> He expands this argument five months later by arguing the situation now requires sit-ins to also be individually obligated and mandatory for every Egyptian until the revolution is complete.<sup>210</sup> Whereas before he considered the protests a “primary means to put pressure in order to achieve the legitimate demands of the revolution,” he now suggests that circumstances have changed such that protestors involved in the sit-in are now the “primary lobby group” necessary to complete the revolution.<sup>211</sup> Notably, Halbawi is basing the legal obligation purely on what is most effective for realizing the revolution. The assumption he is operating on is that the objectives of the revolution are already obligatory, thus making the means of achieving them obligations as well. Hence, the level of obligation of an act increases as it becomes more essential to achieving the objective.

This Section shows how jurists expanded four pre-existing duties and maxims to support the inclusion of protests as a legal obligation. These include the duty to give good counsel,

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*ahkām al-maqāṣid*). This is again a default position not meant to suggest that the ends always justify the means, but that when initially evaluating means for which there is no other guidance, the aims are a vital consideration. Here, the aims of the protests are laudable and permissible so the protests are similarly legitimate. This seems to be a variation of the legal maxim that Intisar Rabb has called “the Intentionality Principle,” which states that “acts are to be evaluated according to their aims: *al-umūr bi-maqāṣidihā*.” RABB, *supra* note 35 at 353.

209. Salah Labib, *Al-Halbawī: The Sit-in at Tahrir Square is a Collective Duty*, MASRIS (July 7, 2011), <http://www.masress.com/alwafd/69161>. In fact, in a statement to *Bawāba al-Wafd* he noted this distinction was why political forces should not blame the Brotherhood for failing to join the sit-in at Tahrir immediately; they were only required to participate in the demonstrations since those were individually obligated, but the sit-ins were collective duties that others were fulfilling.

210. *Id.*

211. Ahmed Mamduh & Muhab Mahmud, *Kamal al-Halbawī: Sit-ins Have Become Individual Obligations*, AL-YAWM AL-SABI (Dec. 26, 2011), <http://www.youm7.com/story/0000/0/0/-/563339#.VrJ2xRNVhBc>.

the duty to oppose an unjust ruler and support the oppressed, the duty to fulfill contracts and the obligation to protest as a means to accomplish other obligations. In each case, jurists outlined various objectives that are accomplished by protests to demonstrate how they can be encompassed by these pre-existing duties. In the process, they added a vital new dimension to the legal discourse on protest. In all other legal arguments, jurists are concerned primarily with showing protests as permissible acts under Islamic law. This policy argument elevates the status of protests much higher by mandating them on the people.

### B. *Incorporating New Formulations*

This Section focuses on a second discursive technique employed by pro-uprising jurists that falls within the policy category: incorporating modern formulations of universal legal concepts to support Islamic law's legitimation of protests. The particular focus here will be on the concept of rights. Rights, and other concepts, have precursors in Islamic legal tradition. As some have argued, an "organic relationship" exists between *Sharī'a* and values such as justice and dignity due to a variety of historical influences such that they are not simply present due to "an interaction with contemporary Western values."<sup>212</sup>

While bearing this in mind, it is apparent that the last century's discourse on international law and its norms—especially human rights—has been a primary influence on the jurists formulating these values.<sup>213</sup> That said, jurists rarely refer to international law to justify their position. On occasion they will mention the practices of other countries as a way to support their opinion,<sup>214</sup> but they are mindful of how international law may actually undermine their Islamic legal argument. One of the common critiques these jurists face is that protesting is actually a borrowed method from "the West" and that Islamic law prohibits replication of any non-Muslim practice.<sup>215</sup>

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212. Abou El Fadl, *supra* note 19, at 814.

213. *Id.* at 817.

214. For instance, the Jordanian Brotherhood Scholars cite protests as part of the European renaissance alongside those against various dictators in Sudan, Iran, Tunisia, and Egypt. Jordanian Muslim Brotherhood, *supra* note 77.

215. As a result, pro-uprising jurists spend considerable space defending against this charge. The Jordanian Brotherhood Scholars argue that because

Pro-uprising jurists use the terminology of rights for two primary purposes: to create a right to protest and to permit securing rights through protest. Regarding a right to protest, the Jordanian Brotherhood Scholars explicitly state that “peaceful demonstrations” are a right guaranteed by numerous constitutions around the world.<sup>216</sup> Similarly ʿAmir Abū Salāmah characterizes protesting as a “human right.”<sup>217</sup> ʿAbd al-Malik al-Saʿdī states that people have the right to pursue their complaints against the state in public or private without interference from law enforcement.<sup>218</sup> As for securing one’s rights through protest, the Jordanian Brotherhood Scholars put forward an interesting analogy to a historical incident involving property rights. In this case, a man approached Muḥammad and inquired about someone who had attempted to take away his property. Muḥammad instructed the man to prevent this person from doing so even if it involves having to “fight” him or if it results in either person’s death.<sup>219</sup> Picking up on this seemingly vigorous defense of one’s right to retain personal property, the Brotherhood asks how it can be legal to defend one’s individual right, but it be illegal to defend a “public right.”<sup>220</sup> ʿAbd al-Malik al-Saʿdī speaks more broadly to the same point suggesting that the *Sharʿa* “guarantees everyone legal rights” and “withholding these rights from someone is oppression.”<sup>221</sup> ʿAmir Abū Salāmah speaks of “stolen rights,” and the “restoration of rights” as part of what one can legiti-

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protesting is a “means” to achieve an “end,” its religious legitimacy is only contingent on whether the “end” itself is legitimate. To illustrate this, they cite two historical precedents from the time of Muḥammad: his use of a Persian trench-building technique and his adoption of a “seal” to placate a requirement of non-Arab kings. *Id.* ʿAbd al-Razzāq al-Saʿdī argues that there is no blanket prohibition on borrowing methods from non-Muslims, arguing that if this were the case Muslims would not be permitted to use various forms of modern technology. Instead, he offers a legal maxim as a guide for evaluation: “everything that brings good and defends against evil finds no objection in *Sharʿa*.” ʿAbd al-Razzāq, *supra* note 77. Yusuf al-Qaradawi adds to this by suggesting that the prohibition against replication applies only in matters of religion, but not “one’s worldly life” where we borrow plenty of things from other traditions. Qaradawi, *supra* note 107.

216. Jordanian Muslim Brotherhood, *supra* note 77.

217. Abū Salāmah, *supra* note 78.

218. ʿAbd al-Malik, *supra* note 191.

219. Jordanian Muslim Brotherhood, *supra* note 77.

220. *Id.*

221. ʿAbd al-Malik, *supra* note 191.

mately pursue.<sup>222</sup> Likewise, ʿAbd al-Razzāq al-Saʿdī suggests that there are two legitimate reasons for protesting: demonstrating against “a failure to grant people their rights” and in pursuit of “recovering” one’s rights.<sup>223</sup> ʿAbd al-Wahhab al-Daylamī says that when people’s “religious or worldly rights” are taken then it becomes their “right to defend themselves and demand their legal rights.”<sup>224</sup>

In addition to these references, jurists frequently refer to securing rights in other legal arguments supporting protests. When speaking of rights, jurists are intent on advancing a modern conception of rights that rests on the “idea that individuals have inherent rights of various kinds, especially political rights consisting mostly of privileges and immunities against the state.”<sup>225</sup> This contrasts with political rights as pre-modern Muslim jurists conceived of them, essentially “limitations on state power” and the right to be left alone.<sup>226</sup> In essence, jurists are using terms that are familiar to the Islamic legal discourse, but presenting them with a uniquely modern understanding. The type of relationship between the state and its constituents that the jurists speak of is unfamiliar to the medieval context and thus to pre-modern Islamic law. However, jurists seamlessly incorporate their modern sensibilities into the larger corpus of Islamic law, recognizing a compatibility between modern formulations of rights and Islamic law’s principles and higher objectives.

## VI. CONCLUSION

In describing the opponents of protests, ʿAbd al-Razzāq al-Saʿdī captures the mindset of pro-uprising jurists in 2011 as they attempted to use Islamic law to address the events around them. He says that anti-uprising jurists “do not live in the reality of today” and are not “situated like the average person.”<sup>227</sup> He proceeds to say they “live lives of comfort and luxury, unable to appreciate the difficulties of daily life.”<sup>228</sup> During the

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222. Abū Salāmah, *supra* note 78.

223. ʿAbd al-Razzāq, *supra* note 77.

224. Daylamī, *supra* note 68.

225. Lowry, *supra* note 25, at 477.

226. *Id.*

227. ʿAbd al-Razzāq, *supra* note 77.

228. *Id.*

Arab Spring, pro-uprising jurists crafted their legal reasoning justifying protests to appreciate the events of the day; they functioned as legal realists. The events had infused the values of justice, freedom and dignity with a new energy generated by the masses. Jurists were products of the societies that were revolting. Their friends, families, followers, and students were on the streets. Some of them were there too.<sup>229</sup> The primary challenge that these pro-uprising jurists faced was how to justify protests in light of the traditional legal orthodoxy that shunned disruption and rising up against an executive. The Arab Spring exposed a familiar conflict between proponents of legal change and those resistant to it. Pro-uprising jurists understood that tradition itself could not be swept aside; it was far too central to the Islamic legal enterprise. Instead, it needed to be creatively engaged in order to put forward counter-arguments to the status quo's resistance to change and criticism of protests. These jurists also understood that the stakes were high, that they were presenting their legal opinions on events as they unfolded, and that legal support was critical to the legitimacy of these events.

In the process of developing legal arguments for protests, pro-uprising jurists provided insights into a few different matters. First, in times of revolution people still seek out mechanisms for validating their actions and objectives even as they reject the legal system. It is an indication of the central role that Islamic law plays in many countries that the masses sought its approval for their pursuit of universal values. Second, in crafting their legal reasoning for protests, jurists utilized both a traditional textual approach and a more innovative policy approach. In their engagement with texts, they relied on broad principles present in proof-texts to counter claims that the constitutional sources do not support protest. Others used the opportunity to make a statement regarding legal minimalism, arguing that the absence of a proof-text on protests simply meant the matter was outside the scope of religious law. They challenged the contemporary tendency to require proving per-

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229. Yasmine Saleh, *Senior al-Azhar Sheikh Emad Effat Shot Dead During Cairo Protests*, *FaithWorld*, REUTERS (Dec. 18, 2011), <http://blogs.reuters.com/faithworld/2011/12/18/senior-al-azhar-sheikh-emad-effat-shot-dead-during-cairo-protests/> (reporting on the death of a pro-uprising jurist participating in the protests).

missibility as opposed to pre-modern Islamic law which emphasizes proving impermissibility. Pro-uprising jurists also read protests into the historical record in ways that departed from traditional understandings. Their policy approach found creative ways to expand legal concepts and incorporate new understandings, highlighting how fluid Islamic law can be at its edges. They not only crafted arguments defending protests, but used the idea of legal obligation and rights to proactively advocate for the necessity of pursuing protests in the Arab Spring. In the process, these jurists demonstrate how the methodology they employed in revolution can be “probative in understanding the process by which Islamic law changes and develops.”<sup>230</sup>

Finally, another lesson from their legal reasoning is the enhanced role played by the public in shaping the content of Islamic law. This counters the historically passive role that the public is supposed to have played in Islamic law’s development. Unlike in ordinary circumstances, during periods of radical social change jurists seemingly take greater account of “public opinion” for legal interpretation, featuring it within their legal arguments and at times placing it at the heart of their justifications. In part, these jurists implicitly understand that Islamic law’s continued relevance, and their own authority, is connected to the public. Hence, while the public sought out Islamic law to legitimate certain values and actions during the Arab Spring, it also had the potential to delegitimize Islamic law, and its jurists. This is because a failure to validate the universal aims of the protests or the protests themselves could potentially shatter the organic relationship between universal values and *Sharī’a*. The likely outcome would be to decrease the influence of the jurists and, in turn, Islamic law. Therefore, Islamic law in these revolutionary contexts is both dynamic and insecure. It is an authority independent of the state, that has the power to confer legitimacy. But its own legitimacy depends on its accommodation of changing circumstances.

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230. ABOU EL FADL, *supra* note 24, at 5. Abou El Fadl makes this claim about the Islamic law of rebellion, but I would say the same for revolutionary Islamic jurisprudence in the Arab Spring.

