

LAW AS FAITH, FAITH AS LAW: THE LEGALIZATION OF THEOLOGY  
IN ISLAM AND JUDAISM IN THE THOUGHT OF AL-GHAZALI AND  
MAIMONIDES

*Shlomo C. Pill<sup>1</sup>*

I. INTRODUCTION

Legal systems tend to draw critical distinctions between members and nonmembers of the legal-political community. Typically, citizens, by virtue of shouldering the burden of legal obligations, enjoy more expansive legal rights and powers than noncitizens. While many modern legal regimes do offer significant human rights protections to non-citizens within their respective jurisdictions, even these liberal legal systems routinely discriminate between citizens and non-citizens with respect to rights, entitlements, obligations, and the capacity to act in legally significant ways. In light of these distinctions, it is not surprising that modern legal systems spend considerable effort delineating the differences between citizen and noncitizen, as well as the processes for obtaining or relinquishing citizenship.

As nomocentric, or law-based faith traditions, Islam and Judaism also draw important distinctions between Muslims and non-Muslims, Jews and non-Jews. In Judaism, only Jews are required to abide by Jewish law, or *halakha*, and consequently only Jews may rightfully demand the entitlements that Jewish law duties create, while the justice owed by Jews to non-Jews is governed by a general rule of reciprocity. Also, according to Jewish law, only Jews can marry other Jews, and only Jews have the legal capacity to perform certain religious acts, such as leading a congregation in prayer, slaughtering an animal for kosher consumption, and serving as a witness to create legal realities by formally certifying certain acts. The question of “who is a Jew” has thus loomed large in Jewish law and thought for millennia.

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1. S.J.D. candidate in Law and Religion, Emory University School of Law and Emory University Center for the Study of Law and Religion; L.L.M. in Law and Religion, Emory Law School, 2013; J.D., Fordham University School of Law, 2012. The author thanks Vincent Cornell and Devin Stewart for their helpful comments on earlier drafts of this article, and the staff of the *Berkeley Journal of Middle Eastern & Islamic Law* for their excellent editorial comments, which have greatly improved this piece.

Similarly, in Islam, only Muslims must abide by Islamic law, or *fiqh*, and only Muslims are entitled to the rights and privileges that Islamic law obligations create, while the rights and duties of non-Muslims are governed by a variety of other systems of law. Additionally, Islamic law prescribes that only Muslims have the legal capacity to perform certain religious acts, such as serving as a leader in congregational prayer, witnessing an Islamic marriage, or serving as a judge on an Islamic law court. Thus, the issue of “who is a Muslim” is an important one in Islamic jurisprudence and theology.

In Islam and Judaism, faith traditions that are both religious and legal, determinations of “who is a Jew” or “who is a Muslim” cannot avoid addressing both the legalistic and theological indicators of religiosity. Being a Jew means accepting certain posited truths or dogmas, but also hinges on adherence to behavioral norms of Jewish law. Similarly, being a Muslim entails practicing Islamic law, as well as maintaining correct Islamic beliefs. In both traditions, one can to an extent be a sinner or theological freethinker while still remaining a Jew or Muslim, but at some point violations of religious law and rejections of religious dogmas place a person firmly outside the religious community. It is this line, the demarcation between Jew and non-Jew, Muslim and non-Muslim that is often hardest to conscientiously draw.

The ways in which Jewish and Islamic law have determined who is a Jew and who is a Muslim have changed significantly over time. Before the 9<sup>th</sup> century, Judaism and Islam measured religiosity primarily in terms of individuals’ adherence to religious law in practice; a person was a Jew or a Muslim by virtue of their external practice of Jewish or Islamic law, irrespective of their unarticulated internal beliefs. By the 13<sup>th</sup> century, however, both Judaism and Islam were evaluating religiosity largely in terms of individuals’ theological beliefs; orthodoxy rather than orthopraxy had become the principle yardstick for determining whether a person was a Jew or non-Jew, Muslim or non-Muslim.

This paper highlights the dynamic, symbiotic relationship between faith and law in the Jewish and Islamic traditions. Specifically, this paper suggests that during the time that Jewish and Islamic religiosity were closely correlated to orthopraxy, theology was largely seen as a useful but nonessential handmaid to right action. However, as each of these law-based faith traditions began to define themselves in terms of correct beliefs, they began to define some previously extant legal categories—particularly apostasy—in theological terms, while also assigning practical legal consequences to maintaining the wrong beliefs. Additionally, this paper suggests that the medieval Jewish scholar Maimonides’s incorporation of systematic theology into Jewish thought and law was significantly influenced by Islam’s own prior shift from orthopraxy to orthodoxy as the hallmark of religiosity. The Islamic emphasis on correct theological belief influenced Muslim jurists like Imam al-Shafi’i and Abu Hamid al-Ghazali’s

juristic rulings about apostasy. Similarly, the Jewish emphasis on orthodox belief, which resulted in the legalization of theology and dogmatization of law, is reflected in Maimonides's theological and juristic works, especially his rulings on conversion to and apostasy from Judaism.

## II. THE LEGALIZATION OF THEOLOGY IN ISLAM

### A. *The Move from Orthopraxy to Orthodoxy in Islam*

In the centuries following the death of the Prophet Mohammad in 632, the lodestar of Islamic religiosity evolved from an initial emphasis on orthopraxy, performing good works and adhering to the behavioral norms of the *Sharia*, to a subsequent focus on orthodoxy, maintaining right beliefs consistent with Islamic dogma. While this shift was likely the product of complex internal and external stimuli,<sup>2</sup> two interrelated factors in particular contributed significantly to this phenomenon. First, Muslims began defining Islam in theological terms in part as a response to the praxis-centered ideology of the Khawarij, a small but violent sect that caused significant turmoil in the Muslim world during the first few centuries of Islam.<sup>3</sup> Second, this theology-focused effort to counter the Khawarij resulted in many scholars focusing their efforts on deconstructing and systematizing the theological teachings of the Qur'an and *Hadith*.<sup>4</sup> As Muslims began paying more

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2. For a detailed treatment of the social, intellectual, ideological and political actors that helped contribute to the development of Islamic thought in the early centuries of Islam, see WILLIAM MONTGOMERY WATT, *THE FORMATIVE PERIOD OF ISLAMIC THOUGHT* (2002).

3. For a comprehensive discussion of the origins, history, and ideology of the Khawarij see JEFFREY T. KENNEY, *MUSLIM REBELS: KHARIJITES AND THE POLITICS OF EXTREMISM IN EGYPT 19-54* (2006); Watt, *supra* note 2, at 9-37; ELIE A. SALEM, *POLITICAL THEORY AND INSTITUTIONS OF THE KHAWARIJ* (1956).

4. In Islamic thought, "the Qur'an is the most sacred source of law, embodying the knowledge that God had revealed about human beliefs, about God himself, and about how the believer should conduct himself or herself in this world." WAEL B. HALLAQ, *AN INTRODUCTION TO ISLAMIC LAW* 16 (2009). The Qur'an is not the sum total of God's revelation, however. "God also sent down a prophet, called Muhammad, whose personal conduct was exemplary . . . Muhammad was God's chosen messenger; he understood God's intentions better than anyone else, and acted upon them in his daily life." *Id.* The *Sunnah* is the exemplary biographical tradition of Muhammad's words and deeds, which over time "took the form of specific narratives that became known as *hadith*." *Id.* For the first few hundred years of Islam, the *Sunnah* was transmitted from teacher to student through the oral recital of *hadith*; in the late 9th and 10th centuries, several scholars sifted through the mass of orally transmitted prophetic traditions and systematically organized what they considered authentic *sunnah* in what became several almost canonical collections of *hadith*. See JONATHAN A.C. BROWN, *HADITH: MUHAMMAD'S LEGACY IN THE MEDIEVAL AND MODERN WORLD* 15-66 (2009).

attention to matters of dogma, doctrinal differences over spiritual beliefs became important markers of religious virtue and identity.<sup>5</sup>

Following the death of the Prophet Mohammad in 632, the members of the young Muslim *umma* began to dispute the meaning of his message, which led to “sectarian and ideological differentiation” within Islam.<sup>6</sup> Initially, these sectarian differences focused on the correct understanding of the Qur’an and *Sunnah* on issues of ritual and civil law, and the “legitimate administration and shaping of the earthly Muslim community.”<sup>7</sup> Later, Muslims began to dispute “over matters concerning God and the afterlife,” and thus started to develop systematic Islamic theology and dogma.<sup>8</sup> Disagreement among the Muslims in each of these spheres of inquiry—the legal and the theological—was in part a consequence of the lack of any comprehensive or systematic treatment of these issues in the primary sources of revelation. According to Islamic tradition, this absence was not accidental. The Qur’an and the *Sunnah* were not meant to serve as an organized, systematic, and comprehensive code of law or theological doctrine. On the contrary, the Qur’an and *Sunnah* comprise a series of teachings revealed at particular junctures in the early historical experience of the Muslim community in response to particular needs.<sup>9</sup> Indeed, the vast majority these teachings consist not of prescriptive pronouncement of law and theology, but of instructions to the Muslims about how they are to respond to particular situations.<sup>10</sup> Thus, while Islamic revelation contains the broad outlines and some specifics on a variety of matters, “[p]rophets are not theologians,”<sup>11</sup> and “the Qur’an, as a text in the genre of Semitic prophecy, does not contain a single sustained argument of the kind familiar in the elite literature of the Greco-Roman world.”<sup>12</sup> Unsurprisingly, then, following the death of Mohammad and the opportunity for direct divine revelation, Muslims began to dispute the meaning of this message as they began to systematize and apply it to new realities.

The Khawarij, by many accounts one of the first Islamic sects, were a product of the first *fitna*, or civil war, within Islam, and their religious views were

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5. See Khalid Blankinship, *The Early Creed*, in *THE CAMBRIDGE COMPANION TO CLASSICAL ISLAMIC THEOLOGY* 34-35 (Tim Winter ed., 2008).

6. *Id.* at 35.

7. *Id.*

8. *Id.*

9. See MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 16-21, 25 (3d ed. 2003).

10. *Id.* at 19-20.

11. IGNAZ GOLDZIHNER, *INTRODUCTION TO ISLAMIC THEOLOGY AND LAW* 67 (Andras and Ruth Hamori trans., 1981).

12. See Blankinship, *supra* note 5.

in turn a product of the religio-legal concerns that gave rise to that conflict.<sup>13</sup> The third Caliph, Uthman ibn Affan, was assassinated in Medina in 656 by a group of Muslims who claimed that Uthman had committed a variety of legal offenses, including giving grant of conquered Iraqi land to individual supporters, giving important governorships to members of his own family and clan, and failing to carry out the *hudud* punishments required by the Qur'an for certain offenses.<sup>14</sup> Following Uthman's death, Ali ibn Abi Talib was appointed the new Caliph by the Muslims of Medina, but was opposed by Mu'awiya ibn Abi Safyan, a member of Uthman's family and the governor of Syria, who accused Ali of failing to punish those responsible for Uthman's murder.<sup>15</sup> The two opposing forces met at Siffin in 657, and after an inconclusive skirmish Ali and Mu'awiya agreed to resolve their dispute through *tahkim*, or arbitration in accordance with Quranic norms.<sup>16</sup> In response to this agreement, some of Ali's supporters, who would become known as the Khawarij, rebelled against their former leader. Under the slogan, *la hukm illa li-llah* ("No judgment, but God's!"), these separatists claimed that Ali had sinned by agreeing to submit the resolution of his dispute with Mu'awiya to human judges. The Khawarij ultimately succeeded in assassinating

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13. See Watt, *supra* note 2, at 9.

14. The so-called *hudud* (sing. *hadd*) offenses are those religio-legal crimes that are prescribed and regulated by the Qur'an itself. These offenses include *zina*, or adulterous intercourse; *qadhif*, or a false accusation of *zina*; *shurub al-khamr*, or the consumption of alcohol; *sariqa*, or clandestine burglary; and *hiraba*, or highway robbery. Jurists of the Maliki school of law also classify *baghi*, or rebellion against lawful Islamic political authority, and *ridda*, or apostasy, as *hudud* offenses. See WAEL B. HALLAQ, SHARIA: THEORY, PRACTICE, TRANSFORMATIONS 311-18 (2009). Islamic jurisprudence maintains that since these offenses are regulated unambiguously by the Qur'an itself, they are "offenses whose punishments are fixed and are God's right." *Id.* at 310. Jurists are thus legally compelled to punish these offenses as prescribed by the Qur'an whenever the elements of the crime are fully met. *Id.* at 36.

15. Watt, *supra* note 2, at 12.

16. *Tahkim* is a relatively informal arbitration process in which disputants select third-party decision makers and commit themselves to adhere to the arbitrators' *hukm*, or ruling issued in accordance with Islamic legal norms. See AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER: A CLASSICAL MANUAL OF ISLAMIC SACRED LAW 624 (Nu Ha Mim Keller trans., 2011) ("It is permissible for two parties to select a third party to judge between them if he is competent for judgeship . . . It is obligatory for them to accept his decision on their case."); SHEIKH BURHANUDDIN ABI AL HASAN ALI MARGHINANI, THE HIDAYA: COMMENTARY ON THE ISLAMIC LAWS 752 (Charles Hamilton, trans., Z. Baintner, ed., 2005) ("If two persons appoint an arbitrator, and express their satisfaction with the award pronounced by him, such award is valid; because as these two person [sic] have a power with respect to themselves, they consequently possess a right to appoint an arbitrator between them, and his award is therefore binding upon them.")

Ali for his alleged impiety, and continued to be a thorn in the sides of Muslim rulers for some time to come.<sup>17</sup>

Khawarij doctrine was characterized by its near-unilateral focus on good works and practical adherence to the Qur'an itself—unmitigated by human interpretation—as the hallmarks of Islam.<sup>18</sup> According to the Khawarij the commission of a grave sin was tantamount to *kufir*, or unbelief, and a sinning Muslim was not a Muslim but an apostate from Islam and liable to be killed by any good Muslim with the ability to do so.<sup>19</sup> As William Montgomery Watt notes, there was a close correlation between the Khawarij's founding mantra, and their extreme view on the religious status of a sinner. "Implicit in the slogan ["No judgment but God's"], or at least in the practice associated with it, is the conception of a righteous community, which knows the Divine law and practices it, and which opposes communities and individuals which either do not know or do not practice the law."<sup>20</sup> For the Khawarij, then, one who committed a grave sin supplanted God's judgment for his own, thereby excluded himself from the community of believers, and obligated every true Muslim to try to kill him.<sup>21</sup> In practice, this extreme position meant that no Muslim who was not a Kharijite was safe from attack. Either one was a grave sinner and apostate because one's substantive practices differed from the Khawarij own understanding of Quranic law, or one was an unbeliever because of one's failure to actively seek the deaths of unbelievers, which was itself a grave sin.<sup>22</sup> This position led to incessant Khawarij violence against fellow Muslims, and made the Khawarij and their doctrines unpopular among the general public and scholarly elite.<sup>23</sup>

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17. See JEFFREY T. KENNEY, *MUSLIM REBELS: KHARIJITES AND THE POLITICS OF EXTREMISM IN EGYPT* 22-23 (2006); see also Watt, *supra* note 2, at 19; G.R. HAWTING, *THE FIRST DYNASTY OF ISLAM: THE Umayyad Caliphate A.D. 661-750* 24-33 (1986).

18. Watt, *supra* note 2, at 14-15.

19. See JEFFREY T. KENNEY, *MUSLIM REBELS: KHARIJITES AND THE POLITICS OF EXTREMISM IN EGYPT* 22-23 (2006). According to William Montgomery Watt, there is a close correlation between the Khawarij slogan, "No judgment but God's," and their doctrinal view that sinning Muslims are apostates. *Supra* note 2, at 15. "Implicit in the slogan, or at least in the practice associated with it, is the conception of a righteous community, which knows the divine law and practices it, and which opposes communities and individuals which either do not know or do not practice the law. The doctrine . . . that the grave sinner is excluded from the community follows from the above statement, since the grave sinner is a man who does not forbid (in the sense of regarding as forbidden for himself) that which God and his messenger have forbidden; because of this, it becomes a duty to fight against him, and exclusion from the community is then presupposed." *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. See Blankinship, *supra* note 5, at 38.

Many Muslims recoiled in horror and distaste from the extreme factionalism and violence propagated by the Khawarij. In response to the Khawarij threat, a number of 8<sup>th</sup> century Muslim sects developed religious doctrines designed to oppose the Khawarij's doctrinal correlation between sin and unbelief.<sup>24</sup> This de-emphasis of right praxis resulted in a shift in focus of Islamic religiosity from orthopraxy to orthodoxy. Indeed, the turn to belief began from within the Khawarij camp itself. Some Khawarij supported the principle Khawarij doctrine that envisions a perfect community of correctly practicing Muslims but realized that the only way to immediately fulfill this ideal was to kill every non-Khawarij Muslim—an undesirable and impossible solution. The Sufrites, a subgroup of the Khawarij movement, thus found a way to live with non-Khawarij Muslims, who in their view were unbelievers deserving of death, by maintaining that a grave sinner was a *kafir*, a unbeliever, but also being passive and not attacking all such unbelievers was not itself an act of unbelief.<sup>25</sup> Another sub-sect, the Ibadites, took the moderation of Khawarij doctrine even further, and injected a theological test into the mainly praxis-oriented doctrine.<sup>26</sup> The Ibadites distinguished between a *kafir* (unbeliever) and a *mushrik* (idolater). They held that all grave sinners were unbelievers, but only Muslims who were ignorant of or denied God were idolaters and liable to be killed.<sup>27</sup>

The sectarian conflicts stemming from the first *fitna*,<sup>28</sup> which were fueled by the Khawarij and which culminated in the second *fitna*,<sup>29</sup> contributed to the rise of the Murji'a, or "Deferrers," who eschewed making definitive judgments about the religiosity of other Muslims, and about leaders of the *umma* in particular.<sup>30</sup> The Murji'a countered the Khawarij condemnation of sinners as unbelievers and apostates, and instead held that sinning Muslims remained Muslims, albeit misguided ones (*mu'minun dullal*).<sup>31</sup> This conciliatory principle was made

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24. See Kenney, *supra* note 19, at 20. ("The Kharijites . . . were fashioned to represent an attitude toward authority and violence that the ascendant Sunni orthodox wanted to preserve as a negative paradigm.")

25. See Watt, *supra* note 2, at 28-29.

26. *Id.* at 29-30.

27. *Id.* at 25-31.

28. The First Fitna, or Islamic civil war, also referred to as *fitnat maqtal Uthman*, the fitna of the killing of Uthman, is the name given to the five-year long conflict that erupted following the death of the Caliph Uthman in 656. See IRA M. LAPIDUS, A HISTORY OF ISLAMIC SOCIETIES 45-55 (2002).

29. The Second Fitna refers to a period of civil unrest and military disorder within the Islamic Middle East, which lasted from around 680 until around 690 A.D., and involved the suppression of two separate rebellions against the Umayyad Caliphs. See KAREN ARMSTRONG, ISLAM: A SHORT HISTORY 41-44 (2002).

30. See Watt, *supra* note 2, at 119, 126-32.

31. See Blankinship, *supra* note 5, at 43.

possible in part by the Murji'a making the important claim that "interior faith rather than external actions was the hallmark of a believer."<sup>32</sup> Over time, Murji'a doctrine came to center on this point; "there came to be a heavy emphasis on faith being separate from works," with one's status as a Muslim being contingent on the former rather than the latter.<sup>33</sup> Thus, Dirar ibn Amr, a 7<sup>th</sup> century Murji'a scholar, emphasized belief as the basic hallmark of Islam.<sup>34</sup> Amr suggested that the faith sufficient to make one a believing Muslim consisted only of internal belief plus the verbal expression of such belief; no other actions, such as perfect conformity to the behavioral norms of the *Sharia* were required.<sup>35</sup>

The Murji'a emphasis on belief rather than good works formed the foundation for Islamic systematic theology, or *kalam*.<sup>36</sup> Indeed, *al-Fiqh al-Akbar I*, one of the earliest surviving Muslim creeds, and an early example of the development of *kalam* as an Islamic intellectual discipline, contained many of the theological teachings of Imam Abu Hanifa (d. 767), a jurist and theologian associated with the Murji'a school.<sup>37</sup> Other important creeds, like *Wasiyat Abi Hanifa* and *al-Fiqh al-Akbar II*, and *al-Aqidah al-Tahawiyah*, which sought "to define theological 'orthodoxy,'"<sup>38</sup> in a comprehensive and systematic way also contained articles affirming that transgressors of the law that nevertheless remain in their Islamic faith are not unbelievers.<sup>39</sup>

This turn to orthodoxy influenced subsequent doctrinal developments in the principle schools of *kalam*, which in turn drew understandings of Islamic

32. *Id.*

33. *Id.* at 45. See also Watt, *supra* note 2, at 128-30 for a more complete discussion of the Murji'ite distinction between *iman*, belief, defined as internal acceptance and external profession of theological dogmas, and *Islam*, defined as practical service to God through adherence to His law.

34. See DAVID THOMAS, ABU 'AMR DIRAR IBN 'AMR AL-GHATAFANI L-KUFI, CHRISTIAN-MUSLIM RELATIONS: A BIBLIOGRAPHICAL HISTORY (David Thomas ed., 2010), [http://referenceworks.brillonline.com/entries/christian-muslim-relations/abu-amr-dirar-ibn-amr-al-ghatafani-l-kufi-COM\\_23551](http://referenceworks.brillonline.com/entries/christian-muslim-relations/abu-amr-dirar-ibn-amr-al-ghatafani-l-kufi-COM_23551) (last visited Mar. 5, 2014).

35. See Blankinship, *supra* note 5, at 45-46.

36. *Kalam*, or *Ilm al-Kalam* ("the science of discourse"), is the Islamic philosophical discipline that seeks to discover and organize theological principles through rationalistic process of dialectic, debate, and argument in the tradition of ancient Greek philosophy. See Tim J. Winter, *Introduction*, in THE CAMBRIDGE COMPANION TO CLASSICAL ISLAMIC THEOLOGY (Tim J. Winter ed., 2008).

37. See Blankinship, *supra* note 5, at 44.

38. David L. Johnston, *The Great Theft: Wrestling Islam from the Extremists*, 22 *Journal of Islamic Social Sciences*, part 4, at 97 (2006) (book review).

39. See, e.g., A.J. WENSINK, THE MUSLIM CREED: ITS GENESIS AND HISTORICAL DEVELOPMENT 125, 140 (1965); THE CREED OF AL-TAHAWI: AL-AQIDAH AL-TAHAWWIYA 66, 68 (Hamza Yusuf trans., 2009); see also Watt, *supra* note 2, at 132-33.



religiosity ever more into the realm of doctrinal belief.<sup>40</sup> As Khalid Blankinship notes, the Murji'a focus on faith rather than works as the hallmark for basic Islamic belief was "later adopted as part of the mainstream Sunni synthesis" of early Islamic theological movements.<sup>41</sup> Of course, at this same time, Muslim jurists were developing their own complex doctrines about the *usul* (methodological roots) and *furu* (substantive branches) of Islamic law, or *fiqh*, and correct action in accordance with religious law became an important element of Muslim life.<sup>42</sup> Nevertheless, correct lawful practice increasingly came to be seen as an expression of right beliefs about theological matters rather than a chief feature of Islamic religiosity in its own right. In other words, while orthopraxy continued to be necessary to the correct adherence to Islam, orthodoxy alone was increasingly viewed as sufficient for one to earn and keep their membership in the Muslim *umma*.<sup>43</sup>

*B. Al-Ghazali's Rule of Interpretation and the Belief-Based Boundaries of Orthodoxy, Heterodoxy, and Heresy*

As the focus of Islamic religiosity turned to orthodox belief, the *mutakallimun*, or scholars of *kalam*, worked to systematize these necessary beliefs into comprehensive dogmatic creeds.<sup>44</sup> Some of these theologians were also jurists (*fuqaha*) engaged in the explication and application of Islamic law, and began to integrate the legal and theological sciences. This synthesis was symbiotic; the legitimate bounds of theological belief became a legal concern, and the legal doctrines came to be defined in terms of theological belief. For example, Abu Hamid al-Ghazali, an 11<sup>th</sup> century theologian, philosopher and legal scholar, applied juristic methodologies to the study of theology.<sup>45</sup> Al-Ghazali argued that it was possible to accurately test the legitimacy of theological and philosophical claims by examining them through the lens of legalistic principles of textual interpretation.<sup>46</sup> Theological beliefs were also used to clarify and define Islamic legal categories and doctrines. For example, Imam al-Shafi'i, founder of the

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40. Cf. Watt, *supra* note 2, at 141-42.

41. Blankinship, *supra* note 5, at 45.

42. On the development of Islamic legalism see generally Wael B. Hallaq, *Sharia: Theory, Practices, Transformations* 27-71 (2009) and Devin J. Stewart, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System* 1-59 (1998).

43. See Devin J. Stewart, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System* 46-47 (1998).

44. See William Montgomery Watt, *Islamic Creeds: A Selection* 3-9 (1994).

45. See Frank Griffel, *Toleration and Exclusion: Al-Shafi'i and al-Ghazali on the Treatment of Apostates*, 64 *Bulletin of the Sch. of Oriental and African Studies* pt. 3, at 339-54 (2001); see also Frank Griffel, *Al-Ghazali's Philosophical Theology* 24-40 (2009)

46. See *infra* text accompanying notes 50-64.

Shafi'i school of law and arguably the first Muslim scholar to develop a comprehensive approach to *usul al-fiqh*, or the methodology of legal interpretation and decision making,<sup>47</sup> used theological dogma as the principle criteria for the legal category of *irtidad*, or apostasy,<sup>48</sup> a view that was later taken up by al-Ghazali who was himself a jurist of the Shafi'i school.<sup>49</sup>

Among al-Ghazali's many contributions to Islamic thought was his legalization of Islamic theology and philosophy, perhaps best typified by the concluding chapter of his work, *Tahafut al-falasifa* (The Incoherence of the Philosophers).<sup>50</sup> This book was written as a response to the metaphysical claims of Muslim philosophers, which al-Ghazali thought were inconsistent with the correct understandings of the Qur'an and *Hadith*.<sup>51</sup> According to Frank Griffel, the book's final chapter is a *fatwa*, a legal ruling issued in response to a question.<sup>52</sup> In this ruling, Al-Ghazali legalized Islamic theology by listing three doctrinal positions that qualified as *kufr*, or unbelief, and rendered those who held them apostates, a technical legal category with technical legal consequences.<sup>53</sup>

Al-Ghazali further enmeshed theological thought with legal doctrine by arguing that a scholar could determine whether particular faith claims were orthodox, heterodox, or heretical by using a legalistic "Rule of Interpretation" to determine whether such beliefs represent correct, incorrect but legitimate, or wholly illegitimate understandings of the Qur'an and authenticated *Hadith*.<sup>54</sup> According to Al-Ghazali, a theological claim is heretical if it amounts to an

47. See MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 4-6 (2003).

48. See *infra* text accompanying notes 70-76.

49. See Frank Griffel, *Toleration and Exclusion: Al-Shafi'i and al Ghazali on the Treatment of Apostates*, 64 BULLETIN OF THE SCH. OF ORIENTAL AND AFRICAN STUDIES pt. 3, at 364; see also FRANK GRIFFEL, AL-GHAZALI'S PHILOSOPHICAL THEOLOGY 24-40 (2009); *infra* text accompanying notes 77-81.

50. ABU HAMID AL-GHAZALI, THE INCOHERENCE OF THE PHILOSOPHERS (Michael E. Marmura, transl., ed. 2000).

51. See *id.* at xv-xxii.

52. See FRANK GRIFFEL, AL-GHAZALI'S PHILOSOPHICAL THEOLOGY 101 (2009). On the generally standard form for *fatwas*, see KNUT S. VIKOR, BETWEEN GOD AND SULTAN: A HISTORY OF ISLAMIC LAW 148-150 (2005); MUHAMMAD KHALID MASUD & BRINKLEY MESSICK, ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS 3-34 (1996).

53. See Al-Ghazali, *supra* note 50, at 226-27. These heretical beliefs were (1) the eternity of the world, (2) that God does not have knowledge of particulars, and (3) the denial of bodily reward and punishment in the next life. The substance of the views Al-Ghazali condemned as heretical, however, is less important in this context than the fact that he applied a legal designation to particular theological claims.

54. On Al-Ghazali's Rule of Interpretation, see generally FRANK GRIFFEL, AL-GHAZALI'S PHILOSOPHICAL THEOLOGY 111-122 (2009), and SHERMAN JACKSON, ON THE BOUNDARIES OF THEOLOGICAL TOLERANCE IN ISLAM: ABU HAMID AL-GHAZALI'S FAYSAL AL-TAFRIQA BAYNA AL-ISLAM WA AL-ZANDAQA (2002).

absolute denial of the truth of a statement of the Prophet.<sup>55</sup> The Rule of Interpretation presumes that a statement in revelation can be true in one, many, or all of five senses: a statement may be true in a literal (*dhati*) sense, a sensible (*hissi*) sense, an imaginative (*khayali*) sense, a conceptual (*'aqli*) sense, and an analogical (*shabahi*) sense.<sup>56</sup> Each of these five senses in which a statement in revelation may be true “correspond to a descending hierarchy of literalness.”<sup>57</sup> According to Al-Ghazali, when a Muslim seeks to understand a statement of the Prophet, he must begin with the presumption that the statement corresponds to a literal existence. If the statement at issue can be rationally sustained as literally true, that understanding establishes its principle, orthodox meaning, though lower levels of literalness can be also be used to glean ancillary insights from the text.<sup>58</sup> However, if it is demonstrably shown through deductive proofs that the statement in question cannot be understood in its literal sense, the interpreter must instead adopt the next proximate level of meaning at which the statement can be rationally sustained.<sup>59</sup> Al-Ghazali explained that while the highest sense in which a statement can be rationally sustained as true establishes its principle, orthodox meaning, the statement can also encompass lower—but not higher—levels of meaning, provided that such insights are understood to be ancillary to the statement’s principle connotation.

Al-Ghazali supposed that correct application of the “Rule of Interpretation” could identify orthodox, heterodox, and heretical beliefs. The belief that is consistent with the principle meaning of a prophetic statement is the correct and orthodox view;<sup>60</sup> beliefs that embrace levels of meaning that are lower than but still encompassed by a prophetic statement’s principle meaning are heterodoxical, but not completely illegitimate;<sup>61</sup> and beliefs that entail accepting levels of meaning that are deductively disproven, or beliefs that suggest that a prophetic statement does not correspond to any of the five levels of being, are heretical.<sup>62</sup> According to al-Ghazali, only belief in heretical ideas legally renders a person an apostate; belief in heterodoxical claims, while incorrect, is not beyond

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55. See FRANK GRIFFEL, AL-GHAZALI’S PHILOSOPHICAL THEOLOGY 111-22 (2009).

56. See Abu Hamid al-Ghazali, *The Clear Criterion for Distinguishing between Islam and Godlessness* 129, in AL-GHAZALI: DELIVERANCE FROM ERROR (R.J. McCarthy, trans., ed. 1980) (“Unbelief is taxing the Apostle – blessings and peace be upon him! – with lying with reference to anything he brought.”)

57. SHERMAN JACKSON, ON THE BOUNDARIES OF THEOLOGICAL TOLERANCE IN ISLAM: ABU HAMID AL-GHAZALI’S FAYSAL AL-TAFRIQA BAYNA AL-ISLAM WA AL-ZANDAQA 50 (2002).

58. See Al-Ghazali, *supra* note 56, at 135.

59. See Jackson, *supra* note 57, at 50-51.

60. See Al-Ghazali, *supra* note 56, at 134-35.

61. *Id.*

62. *Id.*

the pale of Islam.<sup>63</sup> Thus, Al-Ghazali writes: “Know that everyone who interprets a statement of the Lawgiver in accordance with [one of the five levels of existence] has deemed such statements to be true. Deeming a statement to be a lie (*takdhib*), on the other hand, is to deny its correspondence to any of these levels and to claim that it represents no reality at all . . . This is pure unbelief.”<sup>64</sup> By subjecting theological speculation to a legalistic hermeneutical test like the Rule of Interpretation, Al-Ghazali took an important step towards merging the Islamic emphasis on orthodoxy with its unavoidable recognition of a rigorous, all-encompassing rule of law.

Developments in the Islamic law of apostasy in between the 10<sup>th</sup> and 12<sup>th</sup> centuries illustrate that alongside the application of legalism to theological inquiry, Muslim scholars also began thinking about legal questions in theological terms. Many scholars trace the emergence of the law of *irtidad*, which punishes Muslims for apostatizing and forsaking Islam, to the first two centuries of Islamic history.<sup>65</sup> While the Qur’an contains only veiled references to consequences for abandoning Islam,<sup>66</sup> several *hadith* provide a solid legal basis for imposing the death penalty as punishment for legally proven apostasy.<sup>67</sup> In early Islam, apostasy was defined in terms consistent with the general religious focus on orthopraxy. In this view, a Muslim became an apostate by committing the external, objectively verifiable act of openly renouncing Islam to follow a different religion; holding heretical beliefs alone was not sufficient to render an

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63. See Jackson, *supra* note 57, at 100-01.

64. *Id.* at 101.

65. See Frank Griffel, *Toleration and Exclusion: Al-Shafi’i and al Ghazali on the Treatment of Apostates*, BULLETIN OF THE SCH. OF ORIENTAL AND AFRICAN STUDIES, Vol. 64:3, pp. 342-43 (2001). See also TAHA JABIR AL-ALWANI, APOSTASY IN ISLAM: A HISTORICAL AND SCRIPTURAL ANALYSIS 65-66 (2011) and SYED BARKAT AHMAD, CONVERSION FROM ISLAM 3-25, IN THE ISLAMIC WORLD FROM CLASSICAL TO MODERN TIMES: ESSAYS IN HONOR OF BERNARD LEWIS (C.E. Bosworth, et. al., eds. 1991), who both conclude that the Qur’an and *Sunnah* do not comprehensively define legal apostasy or require any particular penalty for renouncing Islam, leading to the conclusion that the law of apostasy must have been developed by jurists in the early decades after the Prophet’s death.

66. See, e.g., Qur’an 2:217 (“If any of you should turn away from his faith and die as a denier of the truth – these are whose works will go for naught in this world and in the life to come.”); *id.* at 3:177 (“Verily, they who have bought a denial of the truth at the price of faith can in no way harm God, but grievous suffering awaits them.”); *id.* at 16:106 (“As for anyone who denies God after having once attained faith . . . upon all such people is God’s condemnation, and tremendous suffering awaits them”). See generally TAHA JABIR AL-ALWANI, APOSTASY IN ISLAM: A HISTORICAL AND SCRIPTURAL ANALYSIS 25-27 (2011).

67. See Frank Griffel, *Toleration and Exclusion: Al-Shafi’i and al Ghazali on the Treatment of Apostates*, BULLETIN OF THE SCH. OF ORIENTAL AND AFRICAN STUDIES, Vol. 64:3, pp. 340-341 (2001). For an extensive modern account of the law of apostasy from a historical and jurisprudential perspective see Taha Jabir Al-Alwani, APOSTASY IN ISLAM: A HISTORICAL AND SCRIPTURAL ANALYSIS (2011).

otherwise observant Muslim an apostate.<sup>68</sup> Indeed, a Muslim accused of apostasy could avoid a formal conviction simply by reciting the *shahada*, the Muslim profession of commitment to revelation of God and the Prophet,<sup>69</sup> even if he continued to believe heretical doctrines, provided they remained unarticulated.<sup>70</sup> Early Islamic apostasy law thus distinguished between internal unbelief, which was essentially a non-justiciable matter between man and God, and external acts of apostasy from Islam, which could be adjudicated and punished by a court of law.

As Islamic religiosity came to emphasize orthodox belief, the law of apostasy began to change. By the 11<sup>th</sup> century, jurists of the Shafi'i school, consistent with the by then well-established focus on orthodoxy as a test for Islamic religiosity, began to think of *irtidad* in theological terms. Early Islamic scholars distinguished between a *kafir* (unbeliever) and *murtadd* (apostate).<sup>71</sup> In the late 7<sup>th</sup> century, however, Imam Al-Shafi'i himself ruled that "one cannot separate the concept of apostasy from unbelief, since the legal term 'apostasy' (*irtidad*) cannot be understood without referring to the theological concept of unbelief."<sup>72</sup> Scholars of the Shafi'i school were not alone in defining legal apostasy in theological terms. Imam Abu Hanifa, the founder of the Hanafi school of Islamic law viewed proper belief as the hallmark of Islam,<sup>73</sup> and jurists of the Hanbali school, including the school's founder Ahmad ibn Hanbal himself, equated theological unbelief with legal apostasy, holding that "the unbeliever should be deprived of his civil rights or put to death."<sup>74</sup> Legal scholars of the

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68. See Michael Schwartz, *Frank Griffel, Apostasie und Toleranz im Islam; die Entwicklung zu al-Ghazali's Urteil gegen die Philosophie und die Reaktionen der Philosophen*, in 27 *Jerusalem Studies in Arabic and Islam* 592 (2002) (book review).

69. The *shahada*, which literally means "the testimony," is the Islamic declaration of faith that affirms belief in the oneness of God, and acceptance of Muhammad as God's prophet. The text of the *shahada* reads: "There is no god but God, and Muhammad is God's messenger/prophet."

70. See Frank Griffel, *Toleration and Exclusion: Al-Shafi'i and al Ghazali on the Treatment of Apostates*, *BULLETIN OF THE SCH. OF ORIENTAL AND AFRICAN STUDIES*, Vol. 64:3, pp. 344-45 (2001) (quoting 6 IMAM AL-SHAFI'I, *KITAB AL-UMM* 156) ("[N]obody should be killed who professes publically his return to Islam."); see *id.* at 345 ("According to al-Shafi'i the only criterion for distinguishing between a Muslim and an apostate is the public profession of Islam by pronouncing the most basic Islamic creed. Whoever pronounces the *shahada* and thereby confesses his belief in one single God and in Muhammad as His messenger was regarded by al-Shafi'i as a Muslim.")

71. *Id.* at 347-48.

72. *Id.* at 348-49.

73. See *supra* notes 38-39 and accompanying text.

74. Michael Schwartz, *Frank Griffel, Apostasie und Toleranz im Islam; die Entwicklung zu al-Ghazali's Urteil gegen die Philosophie und die Reaktionen der Philosophen*, in 27 *Jerusalem Studies in Arabic and Islam* 595 (2002) (book review).

Maliki school followed course, and during the period of Almoravid rule in North Africa and Andalusia they too “allowed no distinction between ‘belief’ and ‘Islam,’ and excluded from the Muslim community any person whom they called an unbeliever.”<sup>75</sup>

Despite this focus on theology, the correlation between legal apostasy and correct beliefs continued to retain a vestige of the earlier praxis-focused understanding of Islamic religiosity. Early Shafi’i and Hanafi jurists ruled that “unbelief” qualified as apostasy, but also maintained that a finding of “unbelief” required that an accused apostate make a public announcement of his inward rejection of Islamic dogma. This stance created a curious wrinkle in Islamic apostasy law. Internal unbelief, though technically apostasy, was not punishable unless and until it was externally manifested by a public pronouncement of one’s internal unbelief. A genuine apostate could thus avoid conviction and punishment for his offense by disingenuously paying public lip service to the Muslim creed.<sup>76</sup>

Imam al-Ghazali took this to be a legal problem in need of resolution. Al-Ghazali’s solution was to fall back on the doctrine of *zandaqa*, or “clandestine apostasy.”<sup>77</sup> According to Al-Ghazali, it is a Muslim’s inner religion, and not his outward appearance, that determines whether he has apostatized. A publicly repentant apostate may therefore be a *zindiq*, and secret apostate, if his internal faith does not match his external professions of correct theological belief.<sup>78</sup> Al-Ghazali, a Shafi’i jurist reluctant to break with the established legal rulings of his legal school, granted that an apostate could in theory repent by publicly professing orthodox beliefs.<sup>79</sup> Al-Ghazali reasoned, however, that to be valid any

75. *Id.* at 599.

76. See Nabil Al-Tikriti, *Kalam in the Service of the State: Apostasy and the Defining of Ottoman Islamic Identity*, available at <http://naltikriti.umwblogs.org/files/2010/11/Kufr-Final-Proofs1.pdf>.

77. See Griffel, *supra* note 70, at 343. Early Islamic jurists used the word *zindiq* to refer to “a suspected apostate who conceals his (supposed) apostasy behind a public profession of Islam.” *Id.* According to a significant group of early jurists, a *zindiq* is the most reprehensible kind of unbeliever on account of his deception. On this view, individuals suspected of secret apostasy were not given the benefit of *istitaba*, or an opportunity to repent one’s unbelief and return to one’s former status as a Muslim. Jurists reasoned that “*zanadiqa* should not be asked to repent and should not be given the right to return to their former status because they lacked credibility in their public statements” of Islamic faith. *Id.* at 343-44.

78. See Bernard Lewis, *Some Observations on the Significance of Heresy in the History of Islam*, 1 *STUDIA ISLAMICA* 43, 54-55 (1953) (“The term most commonly translated as heresy is *zandaqa*—the faith of the *zindiq* . . . [T]he word was at first applied . . . especially to those who held dualist doctrines while making a nominal profession of Islam.”)

79. See Griffel, *supra* note 70, at 351 (quoting al-Ghazali as holding that an apostate who professes the *shahada* may nevertheless be killed, but only because “we are convinced that he stays an unbeliever who sticks to his unbelief . . . .”)

such public profession of belief must signal a genuine inner return to Islam.<sup>80</sup> In practice, therefore, al-Ghazali ruled that once a Muslim was found to have held heretical beliefs, he could be adjudged an apostate and executed despite any subsequent outward affirmations of Islamic faith. Al-Ghazali reasoned that because the accused apostate had surely lied at least once about his true inner religion—having until now lived as an outwardly religious but inwardly heretical Muslim—it may be assumed that his public pronouncements of faith are also disingenuous and do not reflect his true inner beliefs.<sup>81</sup>

The focal shift from orthopraxy to orthodoxy as the principle indicator of Islamic religiosity that took place in the wake of the Khawarij rebellions of the 7<sup>th</sup> and 8<sup>th</sup> centuries thus had a profound impact in the relationship between law and faith in Islam. The emphasis on correct beliefs necessitated the development of a comprehensive, compelling, and uniquely Islamic systematic theology.<sup>82</sup> In order to give theological speculation a measure of intellectual rigor, theologians like al-Ghazali, who were also accomplished jurists, began to apply objective legalistic methodologies to evaluate the legitimacy of faith-claims, thereby establishing legally relevant boundaries of Islamic orthodoxy, heterodoxy, and heresy.<sup>83</sup> As law was applied to theology, theology was also applied to law. As the focus of Islamic religiosity shifted from good deeds to correct beliefs, the legal definition of apostasy evolved as well.<sup>84</sup> Jurists of all four schools of Sunni Islamic law came to define apostasy as the outward articulation of heretical beliefs,<sup>85</sup> and al-Ghazali went so far as to hold that even a Muslim's unexpressed heretical convictions legally categorized him as an apostate.<sup>86</sup>

### III. THE LEGALIZATION OF THEOLOGY IN JUDAISM

#### A. *The Move from Orthopraxy to Orthodoxy in Judaism*

The medieval evolution in thinking about religiosity from a focus on good works and adherence to divine law to an emphasis on holding the right theological beliefs was not confined to Islam. Judaism experienced a similar change in the centuries surrounding the turn of the second millennium. The Talmud, the 5<sup>th</sup>

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80. *See id.* at 352-53.

81. *Id.* at 350-54.

82. *See infra* text accompanying notes 18-43.

83. *See infra* text accompanying notes 50-64.

84. *See infra* text accompanying notes 71-81.

85. *See infra* text accompanying note 76.

86. *See infra* text accompanying notes 77-81.

century canonical compilation of Jewish law and thought,<sup>87</sup> suggests that Jewish religiosity is primarily a function of punctilious adherence to Jewish law reinforced by a commitment to a few very general beliefs respecting the existence of God and the divinity of the Torah.<sup>88</sup> By the early 13<sup>th</sup> century, however, the great Jewish philosopher-jurist, Maimonides,<sup>89</sup> was able to authoritatively declare that Jewish religiosity is fundamentally a matter of accepting the truth of a series of theological propositions.<sup>90</sup>

The Torah does not explicitly command the acceptance of any articles of faith or theological dogmas. While numerous verses in the Torah do *teach* certain very general truths about God, reward and punishment, and other theological matters,<sup>91</sup> the Torah never directs that such assertions must be accepted as true in order for one to be a Jew.<sup>92</sup> The Torah, in other words, teaches various theological truths as foundations for the entire edifice of Jewish law and practice, and exhorts Jews to accept these assertions in order to lend religious meaning to their lives,

87. The Talmud is a comprehensive work of Jewish law and thought compiled around the year 500 A.D. in modern day Iraq. The text of the Talmud actually includes two main components; the Mishnah, a textual record of Jewish legal practices compiled in Judea at the end of the second century A.D., and the Gemara, the interpretations, debates, legal rulings, and homiletic exegesis of Babylonian and Persian Jewish scholars known as Amora'im, usually centered on understanding earlier Mishnaic texts. See 3 MENACHEM MAIMONIDES, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 1098-1100 (1994). After it was redacted around 500 A.D., the Talmud became "the sole authoritative source for the entire *corpus juris* of Jewish law," and all subsequent Jewish legal discourse in the rabbinic tradition has taken the Talmud as both the point of departure, and ultimately inviolable source of legal norms. See *id.* at 1099.

88. See *infra* text accompanying notes 97-103.

89. Rabbi Moshe ben Maimon, or Maimonides, as he is more commonly known, was a preeminent Jewish law scholar, philosopher, and physician who lived in Spain, Morocco, and Egypt from 1135-1204. His best known works include the *Commentary on the Mishnah*, an extensive explanatory commentary on the Mishnah written originally in Judeo-Arabic, the *Mishnah Torah*, the first systematized codification of Talmudic law, and *The Guide for the Perplexed*, a philosophical treatise that aimed at harmonizing Aristotelian philosophy and Jewish theology. See generally SARA STROUMSA, *MAIMONIDES IN HIS WORLD: PORTRAIT OF A MEDITERRANEAN THINKER* (2009).

90. See *infra* text accompanying notes 116-121. While Maimonides was a sufficiently well established scholar that his theological formulations were not lightly dismissed, many of his positions on matters of dogma and belief were disputed by his contemporaries, especially medieval European Jewish scholars, some of whom considered his philosophical works heretical. For a thorough discussion of the opposition to Maimonides's Thirteen Principles of Faith as a comprehensive creed of Jewish belief, see MARC B. SHAPIRO, *THE LIMITS OF ORTHODOX THEOLOGY: MAIMONIDES' THIRTEEN PRINCIPLES REAPPRAISED* (2004).

91. See, e.g., *Exodus* 34:6-7 (God's attributes); *Deuteronomy* 6:4 (God's oneness); *Deuteronomy* 30:19 (human free will).

92. See generally MENACHEM KELLNER, *MUST A JEW BELIEVE ANYTHING?* 14-25 (2d ed. 2006).



but the Torah does not make Judaism or one's Jewishness contingent on one's internal acceptance of the truth of these propositions. As Menachem Kellner puts it, "classical Judaism . . . emphasized 'belief in' over 'belief that.'"<sup>93</sup>

The Talmud takes a similar stance, embracing the concept of faith *in* God as a general assumption underlying meaningful *halakhic* observance, but paying no mind to articulating specific beliefs about theological matters that must be accepted in order for one to become and remain a Jew.<sup>94</sup> Indeed, in discussing the process whereby a gentile can become a Jew, the Talmud noticeably fails to consider the convert's need to accept any theological dogmas, and focuses instead on his accepting the duty to abide by the practical rules of Jewish law.<sup>95</sup> "Our Rabbis taught: If a man desires to become a proselyte . . . he is accepted and given instruction about some of the minor and major commandments."<sup>96</sup> The entire focus is on ensuring that the convert will be able to practice as a Jew; "[t]here is not a breath of a whisper of any sort of theological test."<sup>97</sup>

One Talmudic passage, a Mishnah<sup>98</sup> at the beginning of the tenth chapter of tractate Sanhedrin, does seem to embrace theology as a litmus test for Jewish religiosity. On further examination, however, it appears that this passage embraces orthopraxy rather than orthodoxy as the true criteria for religious virtue in Rabbinic Judaism. The Mishnah states: "[T]he following [Jews] have no share in the world to come: He who says the Torah does not teach resurrection, that the Torah is not from heaven, and an *apikores*."<sup>99</sup> Rabbi Akiva said, 'Even he who reads external books, or whispers over a wound.' Abba Shaul said, 'even he who pronounces the [ineffable] name [of God] according to its spelling.'<sup>100</sup> At first glance, it seems that the Mishnah is asserting that belief in resurrection and the divinity of the Torah are theological dogmas, the denial of which bars a Jew from

93. *Id.* at 45.

94. *Id.* at 26-43.

95. See Michael J. Broyde, *Proselytism in Jewish Law: Inreach, Outreach, and the Jewish Tradition*, in SHARING THE BOOK: RELIGIOUS PERSPECTIVES ON THE RIGHTS AND WRONGS OF PROSELYTISM 45, 52-59 (John Witte, Jr. & Richard C. Martin eds., 1999).

96. *Babylonian Talmud, Yevamos* 47a-b.

97. Kellner, *supra* note 92, at 29.

98. For a brief explanation of the Mishna see *supra* note 87. For a more comprehensive treatment see 3 MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 1042-82 (1994).

99. The term "*apikores*" is used in rabbinic literature to connote a Jewish individual who has abandoned Judaism, usually by holding heretical beliefs or by rejecting central tenets of the Torah and Jewish thought. The term is likely derived from the name of the Greek philosopher Epicurus as Jewish Epicureans rejected central tenets of Judaism. See generally Apikoros (pl. Apikorsim), THE JEWISH ENCYCLOPEDIA (1906), available at <http://www.jewishencyclopedia.com/articles/1640-apikoros>.

100. *Mishnah, Sanhedrin* 10:1.

the world to come. Read in context, however, it is more likely that the Mishnah is condemning the act of proclaiming such beliefs rather than the beliefs themselves. This reading is supported by the fact that the offenses that Abba Shaul and Rabbi Akiva hold prevent a Jew from entering the world to come refer to acts, not beliefs. Additionally, the Talmud understands the Mishnah's ruling that an *apikores* has no share in the world to come as referring not to a theological heretic but to one who shows manifest disrespect to a legitimate rabbinic authority by disregarding his practical *halakhic* rulings.<sup>101</sup> This context implies that the other things the Mishnah asserts deny one entry to the world to come also refer to acts rather than internal beliefs, an understanding that is supported by the Mishnah's specifically characterizing these offenses as "saying" rather than "believing" or "thinking" that the Torah is not divine or does not teach resurrection.<sup>102</sup> Taken in context, then, the Mishnah's condemnation of those who deny resurrection or the divinity of the Torah is best understood as condemning the outward expression of such beliefs rather than the beliefs themselves. This understanding is further supported by the fact that the following Mishnaic passages discuss individuals and groups that have no share in the world to come, all of whom are condemned because of their wrongful conduct rather than their erroneous beliefs.<sup>103</sup>

The Talmud's focus on correct practice does not mean that Talmudic Judaism was completely indifferent to matters of belief. While "the Torah always emphasized the life rightly lived over the belief rightly held, and . . . never taught the specifics of these beliefs,"<sup>104</sup> the Torah and Talmud do contain teachings of a theological nature.<sup>105</sup> Nevertheless, from the Talmud's vantage, "religious faith—*emunah*—was understood as a particular relationship with God, and not as a group of affirmations about God."<sup>106</sup> In other words, theological faith-claims were about establishing a foundation upon which a life of meaningful *halakhic* observance could be built. Thus, while "[Talmudic] Judaism indeed affirm[ed] a large number of teachings of a theological nature . . . . [I]t consistently focuse[d] on the sort of life one is to lead in pursuit of those teachings, rather than on the teachings themselves."<sup>107</sup>

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101. See, e.g., *Babylonian Talmud, Sanhedrin* 38b, 99b-100a ("An Apikores: Rav and Rabbi Chanina both taught that this means one who disrespects a Torah scholar."); *Jerusalem Talmud, Sanhedrin* 10:1.

102. Kellner, *supra* note 92, at 33-38.

103. See *Mishnah, Sanhedrin* 10:2-4.

104. Kellner, *supra* note 92, at 30.

105. See *id.* at 16-17 ("The Torah obviously assumes God's existence . . . The Torah also clearly teaches that God is one . . . The Torah also teaches explicit beliefs about human beings . . . [such as the idea that] human behavior is free, not determined.")

106. *Id.* at 31.

107. *Id.* at 43.

Thus, pre-Maimonidean Judaism did not view correct theological beliefs as a litmus test for Jewishness or as the sum-total of Jewish religiosity. Instead, “rabbinic Judaism understood itself first and foremost as a system of commandments and values adhered to by a group of individuals defined in the first instance by shared descent.”<sup>108</sup> In other words, a Jew was a Jew by dint of being born to a Jewish mother,<sup>109</sup> and a Jew was a good Jew if he accepted and adhered to the laws and values of the Torah.<sup>110</sup> Systematic theology and belief in the truth of particular dogmas may have provided a conceptual framework and basis for obeying the practical demands of Jewish law, but were irrelevant to one’s status as a Jew.<sup>111</sup>

This early focus on orthopraxy as the lodestar of Jewish religiosity began to shift in the 10<sup>th</sup> century when Saadia Gaon, the head of the Talmudic Academy at Sura,<sup>112</sup> wrote his *Kitāb al-’amānāt wal-i’ṭiqādāt* (The Book of the Articles of Faith and Doctrines of Dogma), which was later translated into Hebrew by Yehudah ibn Tibbon (d. 1186) under the title *Sefer Emunos V’deos* (The Book of Beliefs and Knowledge).<sup>113</sup> This work was Judaism’s first notable effort to deal with theology in a systematic way. However, although Saadia considered “speculation about the basic dogmas of religion” to be a positive religious duty,<sup>114</sup> his theological work fell short of prescribing correct belief as a litmus test for an individual’s Jewishness.<sup>115</sup>

Writing in the 12<sup>th</sup> century, Maimonides took the next step. He posited a creed of thirteen necessary dogmas, and ruled that understanding and accepting the truth of these theological propositions was both necessary *and sufficient* for

108. *Id.* at 45.

109. Jewish law maintains that Jewishness is transferred via matrilineal descent. Thus, the child of a Jewish mother is a Jew, even if the child’s father is not Jewish. Conversely, the offspring of a Jewish father and non-Jewish mother are not considered Jewish under Jewish law. *See Babylonian Talmud, Yevamos 23a; Babylonian Talmud, Kiddushin 68b* (“Your child from a Jewess is called “your child” [i.e., is a Jew], but your child from a non-Jewish woman is not called “your child” [in terms of Jewishness].”)

110. *See Kellner, supra* note 92, at 43.

111. *See id.* at 33 (“Theological views did find expression in classical Judaism, [but] no attempt was ever made to systematize them, to compare them, to bring them into a consistent whole, or even to determine which were correct and how they were to be understood.”); *id.* at 43 (“[Talmudic] Judaism indeed affirms a large number of teachings of a theological nature. But it consistently focuses on the sort of life one is to lead in pursuit of those teachings, rather than on the teachings themselves.”)

112. On Saadia Gaon, *see* Charles Manekin, *Introduction, in* MEDIEVAL JEWISH PHILOSOPHICAL WRITINGS x-xiii (Charles Manekin ed., 2007).

113. SAADIA GAON, *THE BOOK OF BELIEFS AND OPINIONS* (Samuel Rosenblatt trans., 1989).

114. *Id.* at XXV.

115. *See Kellner, supra* note 92, at 80-81; MENACHEM KELLNER, *DOGMA IN MEDIEVAL JEWISH THOUGHT: FROM MAIMONIDES TO ABARVANEL* 1-6 (2004).

one to be a Jew.<sup>116</sup> Maimonides set down his systematic collection of necessary Jewish beliefs, colloquially referred to as the “*Yud Gimmel Ikarei Emuna*” (Thirteen Foundations of Faith),<sup>117</sup> in his commentary on the aforementioned Mishnah at the beginning of the tenth chapter of tractate Sanhedrin.<sup>118</sup> These beliefs, each of which Maimonides developed at some length, include the existence of the Creator; God’s unity; the superiority of the prophecy of Moses; the divinity and immutability of the Torah; God’s knowledge of particulars; and resurrection, among others.<sup>119</sup> Maimonides concluded his discussion of these principles with an unambiguous affirmation of the essentiality of orthodox belief in Judaism, which was to have a powerful impact on virtually all subsequent Jewish thought.<sup>120</sup>

When these foundations are perfectly understood and believed in by a person, he enters the community of Israel, and one is obligated to . . . act towards him in all the ways in which the Creator has commanded that one should act towards his [Jewish] brother, with love and fraternity. Even were he to commit every possible transgression . . . he will be punished according to his rebelliousness, but he has a portion [of the world to come]; he is one of the sinners of Israel. But if a man doubts any of these foundations, he leaves the community [of Israel], denies the essential, and is called a *min, apikores*, and one who ‘cuts among the plantings’ [rabbinic terms and aphorisms used to refer to heretics]. One is required to hate him and destroy him.<sup>121</sup>

The Maimonidean turn from orthopraxy to orthodoxy was likely influenced at least in part by the earlier, similar shift in Islamic thought. The similarities between Islamic and Jewish law and thought made it relatively easy for early medieval Jews to convert from Judaism to Islam, a move that was made

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116. See generally MENACHEM KELLNER, DOGMA IN MEDIEVAL JEWISH THOUGHT: FROM MAIMONIDES TO ABARVANEL 10-65 (2004).

117. A full text of Maimonides’s Thirteen Principles can be found in Kellner, *supra* note 92 at 164-76.

118. See *supra* note 100 and accompanying text.

119. For an accessible translation directly from Maimonides’s original commentary in Arabic, see DAVID R. BLUMENTHAL, THE COMMENTARY OF R. HOTER BEN SHELOMOH TO THE THIRTEEN PRINCIPLES OF MAIMONIDES (1974).

120. Kellner, *supra* note 92, at 66-109.

121. Maimonides, Commentary on the Mishnah, *Sanhedrin* 10:1 (s.v. *kol yisrael yesh la-hem chelek l’olam habah*), substantially translated in Kellner, *supra* note 116, at 16. For a discussion on the lasting impact on Maimonides’s turn to orthodoxy as the criterion for Jewish religiosity, see Kellner, *supra* note 92, at 66-109.

more enticing by Islam's intellectually rigorous systematic theology, which many Jews likely thought provided more complete answers to metaphysical questions than praxis-oriented Judaism.<sup>122</sup> The appeal of Islamic theology to medieval Jews living in the Muslim world is exemplified by Saadia Gaon's aforementioned 10<sup>th</sup> century theological treatise, *Kitāb ul-'amānāt wal-i'tiqādāt*.<sup>123</sup> While this work was written primarily as a polemic against an anti-rabbinic Jewish sect, the Kaarites, its structure and mode of argumentation draws heavily and directly on Islamic Mutazilite theological literature,<sup>124</sup> indicating that such works may have enjoyed wide appeal and influence among the Jewish public of that period.<sup>125</sup>

Maimonides may therefore have developed his creed of necessary orthodox beliefs as a polemical response to the appeal of the highly developed Islamic theology of his time. Indeed, Don Yitzchak Abarvanel, a 15<sup>th</sup> century Jewish rabbi and philosopher, argued that Maimonides was "brought to postulate [theological] principles in the divine Torah only because they [the Jews] were drawn after the custom of gentile scholars [to engage in systematic theology] as described in their books."<sup>126</sup> More recently, the 19<sup>th</sup> century Judaic scholar Solomon Schechter argued that "living among followers of the 'imitating creeds' (as he calls Christianity and Mohamedism), who claims that their religion had superseded the Law of Moses, Maimonides, consciously or unconsciously, felt himself compelled to assert the [theological] superiority of the prophecy of Moses."<sup>127</sup> Some have questioned the extent to which Maimonides' systematic creed of Jewish belief was purely a polemical response to Islamic theology rather than a genuine belief on Maimonides's part that Jewish religiosity did indeed require such belief.<sup>128</sup> Nevertheless, it is almost impossible to suggest that Maimonides's thinking about Judaism in terms of orthodoxy rather than

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122. See Kellner, *supra* note 92, at 49-51.

123. See *supra* note 113. For a brief discussion of indications of Islamic influences in Saadia Gaon's works, see Manekin, *supra* note 112, at xi-xii; Samuel Rosenblatt, *Introduction*, in SAADIA GAON, THE BOOK OF BELIEFS AND OPINIONS xxiii-xxxii (Samuel Rosenblatt trans., 1989).

124. See Manekin, *supra* note 112 at xi-xii.

125. See Sarah Stroumsa, *Saadya and Jewish Kalam*, in THE CAMBRIDGE COMPANION TO MEDIEVAL JEWISH PHILOSOPHY 71-90 (Daniel H. Frank & Oliver Leaman eds., 2003).

126. DON YITZCHAK ABARVANEL, ROSH AMANA: PRINCIPLES OF FAITH 194 (Menachem Kellner trans., 1982).

127. Solomon Schechter, *The Dogmas of Judaism*, in STUDIES IN JUDAISM: FIRST SERIES (1896) Chapter IV, available at <http://www.sacred-texts.com/jud/studies.htm>.

128. See Kellner, *supra* note 116, at 35-41 (discussing the controversy over whether Maimonides's theological writings were influenced or motivated by his experiences with Islamic thought).

orthopraxy was not to some extent a product of the Islamic intellectual milieu in which he lived and worked.<sup>129</sup>

*B. Who is a Jew?: Maimonides's Juristic Definition of Apostasy from Judaism, and Innovative Characterization of the Role of Belief in Jewish Law*

The turn to orthodoxy in Judaism, like the similar, earlier evolution in the Islamic world, resulted in a powerful enmeshing of law and theology. The Talmud seems to have thought of law and belief as thoroughly separate spheres, and did not define the legal doctrines of conversion to and apostasy from Judaism in theological terms.<sup>130</sup> Maimonides, by contrast, understood correct belief as a necessary and sufficient cause for one becoming and remaining Jewish, and thus posited legal rules for conversion and apostasy that reflected their being contingent on dogma.<sup>131</sup> Moreover, at several points in his legal writings, Maimonides maintained that one's internal theological beliefs could have external, justiciable consequences.<sup>132</sup> Thus, as in the case of Islam, the move from orthopraxy to orthodoxy in Judaism entailed a shift in religious focus that resulted in a strong symbiotic relationship between faith and law.

In the closing paragraph of his statement of the Thirteen Principles of Faith,<sup>133</sup> Maimonides asserted that it is the acceptance of the foregoing dogmas that determined whether a person is a Jew or non-Jew.<sup>134</sup> This theological test for Jewishness illustrates how a focus on orthodoxy can result in legal issues being defined in theological terms.

Maimonides's juristic magnum opus, a massive codification of all of Jewish law entitled *Mishnah Torah*,<sup>135</sup> also contains numerous ruling that impute legal consequences to theological beliefs and define legal categories in theological terms. For example, in one long passage in his *Laws of Repentance*, Maimonides discusses the legal implications and status of a Jew that denies any of the fundamental faith claims that Maimonides held were essential criteria of Jewishness.<sup>136</sup> In this passage, Maimonides defined the legal category of *min* (sectarian) as a person that doubts or denies the truth of any of the first five of his

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129. *See id.*; *see also id.* at 2-6.

130. *See infra* text accompanying notes 94-111.

131. *See infra* text accompanying notes 145-150.

132. *See infra* text accompanying notes 134-144.

133. *See supra* note 117.

134. *See infra* text accompanying notes 116-121.

135. *See supra* note 89.

136. *See* Maimonides, *Mishnah Torah, The Laws of Repentance* 3:6-9.

Thirteen Principles.<sup>137</sup> In Maimonides's view, doubting any of these dogmas and being legally classified as a *min* has serious practical implications. A *min* is equated with an idolater and called a "wanton unbeliever"; one may not converse with a *min* or even respond to a *min*'s greeting.<sup>138</sup> Similarly, Maimonides defines the legal designation "*apikores*" as one who denies the sixth, seventh, or tenth principles of his creed.<sup>139</sup> Here too, holding particular theological beliefs entails legal consequences: an *apikores* cannot serve as a witness,<sup>140</sup> cannot validly slaughter an animal for consumption by a Jew,<sup>141</sup> and cannot write Torah scrolls or other holy scriptures used to perform ritual obligations.<sup>142</sup> Indeed, according to Maimonides, an *apikores* must be killed,<sup>143</sup> and his death is not to be mourned in the typical manner prescribed by *halakha*, but is instead to be celebrated.<sup>144</sup>

Maimonides's use of proper belief as a litmus test for Jewishness entailed applying theological dogmas to the law of conversion as well. According to the Talmud, the only criteria for a potential proselyte to convert is his identification with the Jewish people and his accepting the duty to follow *halakha* after having been taught some of the practical details of some of the major and minor

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137. See *id* at 3:7.

138. See *id.* at 2:5. It is interesting to note that with respect to those classified as *minim*, Maimonides adopts a position starkly similar to that staked out by Al-Ghazali in his doctrine pertaining to *zandaqa*. In order to solve the problem in Shafi'i *fiqh* whereby an unbeliever could avoid being convicted as an apostate by lying and publicly professing his allegiance to the Islamic faith, Al-Ghazali proposed that once it was established that a person had knowingly adopted heretical beliefs, that person should be presumed to be a secret apostate and denied the opportunity to repent by publicly reciting the *shahhada* because his word could not be trusted. See Frank Griffel, *Toleration and Exclusion: Al-Shafi'i and al Ghazali on the Treatment of Apostates*, in 64 BULLETIN OF THE SCH. OF ORIENTAL AND AFRICAN STUDIES, pt. 3, at 351-52 (2001). In one response, a questioner asked Maimonides how he reconciled his stated position in *Mishnah Torah, The Laws of Idolatry* 2:5 that repentance by a *min* is not accepted with his ruling that "nothing stands in the way of repentance," *Maimonides, Mishnah Torah, The Laws of Repentance* 3:14. Maimonides answered, practically echoing Al-Ghazali, that the Jewish community cannot accept the repentance of a *min* because they cannot be certain that his professions of faith are sincere; God, however, does accept the repentance of a sincerely repentant *min*. From a practical standpoint, however, once a *min* always a *min*, and condemned to suffer the legal incapacities assigned to *minim* in perpetuity. See MAIMONIDES, *RESPONSA PE'ER HADOR*, §§ 263-264, at 495-501 (Joshua Blau et al. eds., 1957); see also Kellner, *supra* note 116, at 19-20.

139. See Maimonides, *supra* note 136, at 3:8.

140. See Maimonides, *Mishnah Torah, The Laws of Testimony* 11:10.

141. See Maimonides, *Mishnah Torah, The Laws of Ritual Slaughter* 4:14.

142. See Maimonides, *Mishnah Torah, The Laws of Tefilin (Phylacteries)* 1:13.

143. See Maimonides, *Mishnah Torah, The Laws of Idolatry* 10:1.

144. See Maimonides, *Mishnah Torah, The Laws of Mourning* 1:10.

commandments.<sup>145</sup> Maimonides, however, radically altered the Talmudic requirements for conversion.<sup>146</sup> In *The Laws of Forbidden Intercourse*, Maimonides sets out his own rules for the process of conversion to Judaism.<sup>147</sup> In addition to the Talmudic requirements, Maimonides ruled that a potential proselyte “should be made acquainted with the principles of the faith . . . These matters should be discussed in great detail.”<sup>148</sup> Thus, whereas the Talmud excluded theological instruction from the conversion process entirely, Maimonides included it, and indeed ruled that matters of orthodox belief should be discussed in detail while also stating that instruction in the requirements of practical *halakha* “should not be at great length.”<sup>149</sup> Thus, for Maimonides, defining Judaism primarily in terms of correct beliefs meant that a convert could legally become a member of the Jewish community by simply understanding and accepting the truth of particular dogmas, just as a Jew leaves the community simply by doubting or denying any of those same theological propositions.<sup>150</sup>

For Maimonides, the importance of orthodox theology also entailed adopting a belief-centered view of the general relationship between Jewish faith and Jewish law. In his major philosophical treatise, *dalālatul ḥā’irīn*, or *The Guide for the Perplexed*, Maimonides went so far as to suggest that perfect adherence to the *halakha* is contingent on Jews’ first holding certain correct beliefs: “Do you not see . . . That God, may his mention be exalted, wished us to be perfected and the state of our societies improved by His laws regarding actions. Now this can come about only after the adoption of [correct] intellectual beliefs.”<sup>151</sup> For Maimonides, proper observance of *halakha* was conditioned on maintaining the correct conception of God, the Torah, and the relationship between God, Torah, Man, and the World, which in turn required one to understand and accept the truth of his thirteen posited dogmas.<sup>152</sup> Thus, like the evolved Islamic conception of religio-legal practice in a theology-dominated intellectual milieu, Maimonides held that orthopraxy was essentially the outward expression and manifestation of orthodoxy, and that it was right belief rather than right action that was the true marker of basic religiosity.

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145. See *supra* note 96 and accompanying text.

146. See Kellner, *supra* note 92, at 58-60.

147. See 8:3.

148. *Id.*

149. See Kellner, *supra* note 92, at 59.

150. *Id.* at 60.

151. MAIMONIDES, MOREH NEVUCHIM [Guide for the Perplexed] 7-8 (Yitzchak Kapach trans., 1972), cited in Kellner, *supra* note 116, at 39.

152. See Kellner, *supra* note 116, at 43-44.



#### IV. CONCLUSION

Law and religion enjoy a complex, often mutually supportive, but sometimes antagonistic relationship. Whether out of necessity or utility, legal systems often address the religious bases of their laws, as well as the relationships between their laws and the religious commitments of their subjects. Likewise, theological systems must contend with the legal obligations and limitations imposed on them and their adherents by state authorities, as well as the compatibility of their own internally-posed religio-legal norms and values with their fundamental dogmas.

In the case of the nomocentric faith-traditions of Judaism and Islam, the relationship between law and religion seems to be particularly involved. “[I]n Jewish thought . . . law is understood to be inseparable from religion . . . . Islam . . . shares the same point of view.”<sup>153</sup> Each of these religions maintain that both faith and law stem from a single divine source, and thus, in theory at least, law and religion are understood as compatible, mutually supportive phenomena.

This paper has shown that in the Islamic and Jewish traditions, theory and practice regarding the relationship between faith and law have not always coincided. In the early centuries of Islam, Muslims viewed their religion largely as a matter of law, and religious virtue as a function of proper adherence to the behavioral and constitutional norms of the *Sharia*. Judaism too, up to the early Middle Ages, tended to think of law and faith as separate spheres, with orthopraxy and correct adherence to *halakha* being the key element of Jewish religiosity. For different internal and external reasons, both Islam and Judaism ultimately moved away from orthopraxy-centered conceptions of their respective traditions, and proceeded to embrace orthodox belief as the key to membership in the religious community. In both faiths, the turn towards orthodoxy as a necessary and sufficient criterion of religiosity brought religion and law into much closer dialogue with each other. Theological speculation was made more rigorous by the application of legal consequences to internal beliefs, and abstract legal doctrines were brought into closer harmony with religious realities by defining some jurisprudential categories in theological terms.

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153. EDWIN B. FIRMAGE ET AL., *RELIGION AND LAW: BIBLICAL-JUDAIC AND ISLAMIC PERSPECTIVES* vii (1990).