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# Social Justice and Islamic Jurisprudence

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Russell Powell<sup>†</sup>

## I. INTRODUCTION

It is nearly impossible to read a newspaper or follow social media today without seeing references to “social justice.” However, whether it is used as a policy ideal or as a derisive moniker (“social justice warrior” or “SJW”),<sup>1</sup> it is fairly clear that there is little consensus regarding the definition of the term or its substantive legal implications. The first section of this essay will describe some of the most common normative understandings of social justice in order to highlight the variety of competing understandings, particularly in the United States. The second section of the essay will explore concepts in Islamic jurisprudence that might support theories of social justice as a comparative attempt to develop a more robust theory of the concept that is not blurred by the political or ideological fissures that typically exist in North American and European discourses.<sup>2</sup> This essay concludes by

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<sup>†</sup> The author is the Associate Provost for Global Engagement and Professor of Law at Seattle University and would like to thank his research assistant, Michael Mullen, for suggesting a range of helpful and insightful comments.

<sup>1</sup> Abby Ohlbeiser, *Why ‘social justice warrior,’ a Gamergate insult, is now a dictionary entry*, WASH. POST. (Oct. 7, 2016), [https://www.washingtonpost.com/news/the-intersect/wp/2015/10/07/why-social-justice-warrior-a-gamergate-insult-is-now-a-dictionary-entry/?utm\\_term=.77934a4f1d1a](https://www.washingtonpost.com/news/the-intersect/wp/2015/10/07/why-social-justice-warrior-a-gamergate-insult-is-now-a-dictionary-entry/?utm_term=.77934a4f1d1a) [perma.cc/E9X7-NHWL] (reporting that the term social justice warrior was once used neutrally or even complementarily, but it is now used to negatively describe progressives).

<sup>2</sup> Comparative analysis is often a helpful tool for interrogating prevailing assumptions and biases. Science fiction plays a similar function by removing subjects from existing frameworks, allowing writers as varied as George Orwell, Octavia Butler, Ursula K. LeGuin, and Gene Roddenberry to critique contemporary culture in ways that would be otherwise be taboo. *See, e.g.,* Thomas E. Weber, *Captain’s Log: an Introduction*, TIME, July 8, 2016, at 5 (noting that “alien life offered a singularly compelling way to hold a mirror up to humanity”).

identifying potentially fruitful directions for theorizing social justice as implied by Islamic jurisprudence.

## II. THEORIES OF SOCIAL JUSTICE

As a concept, social justice was first developed by the Jesuit, Luigi Taparelli, in the 1840s.<sup>3</sup> It was later developed in legal contexts in both Europe and the United States. Louis Brandeis and Roscoe Pound used the term in their scholarship to distinguish social justice as a subset of the broader concept of justice.<sup>4</sup> It is one of several forms of justice identified in law and political theory such as procedural justice, distributive justice, retributive justice, economic justice, and so on. Social justice is broadly understood to describe the quality of justice between an individual (or perhaps a group, particularly a marginalized group) and society. Society consists of more than government and legal institutions, but this essay will focus primarily on the implications social justice has for law. Social justice has been an attractive and effective justification for legal change. Thus, it has been used increasingly by theorists and activists over the past century. Its use by a variety of actors has led to drifts in meanings, which sometimes lead to contradictions and conflicts. As policies have been advocated for and implemented on the basis of social justice claims and as the meanings have become more apparently disputed, it has become common in journalistic and social media to label advocates who employ the language of social justice or who support policy actions typically associated with social justice in the popular press as “social justice warriors” or “SJW.” The terms are typically used to insult and discredit. Although people often use SJW as a dismissive

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<sup>3</sup> See Mary Clark, *Augustine and Justice*, in *AUGUSTINE AND SOCIAL JUSTICE*, 3–10 (Teresa Delgado et al. eds., 2015).

<sup>4</sup> See, e.g., *New York Cent. R. Co. v. Winfield*, 244 U.S. 147, 165 (1917) (Brandeis, J., dissenting); Roscoe Pound, *Social Justice and Legal Justice Address before the Allegheny County Bar Association* (Apr. 5, 1912) (transcript available at <https://babel.hathitrust.org/cgi/pt?id=hvd.32044053344701;view=1up;seq=5>) [perma.cc/By-52-TK3A].

ad hominem attack against people, groups, or ideas, they do sometimes use the term to address what can be authentic concerns regarding government overreach, totalizing governmental power, and limits on free expression.

This is a problem that arises in law school classrooms. Addressing questions of justice, including social justice, is a necessary and appropriate topic for legal education. Many law schools encourage professors to consider social justice as part of the broader justice concerns in our pedagogy. In my courses, I note that social justice is a lens through which we may evaluate competing policy objectives of particular legal rules. However, I always note that the term is disputed and that for class purposes it means the balancing of efficiency-maximizing goals and fairness or equity. Distributional concerns tend to be an important focus for social justice theorists. My classroom definition may be both over-simplistic and overbroad, but it does create a basis for discussion that I have found to be productive, and it sets aside the problem of competing and contradictory definitions. I have heard students complain about the use of the term because they have observed how it can be used as an inconsistent rhetorical device for achieving desired policy goals, rather than as a principled ideal.

The following sections explore some of the key approaches to the development of social justice theory, including their apparent conflicts. These sections broadly consider certain liberal, critical, and religious understandings of social justice.

### *A. Liberal Understandings of Social Justice*

Liberal understandings of justice and its subcategories are particularly important within the United States even for those who are ultimately critical of such understandings) because they are deeply embedded in its constitutional, statutory, and common law systems. John Locke's development of rights theory and its later incorporation within the United States Constitution emerged in very particular historical, economic, and social contexts. One consequence is that classical liberal rights theory tends

to emphasize the importance of individuals as the bearer of rights, the negative nature of enforceable rights requiring government inaction or neutrality, and the role of legal processes in protecting rights. Critiques of this approach argue that groups may also have rights, that all rights ultimately require some affirmative steps and costs made by government, and that process can be used to limit as well as protect rights.<sup>5</sup> These approaches have been incorporated in civil rights discourse, which has historically employed the language of social justice. Thus, civil rights is a reasonable starting point for considering social justice theory in the United States legal context. However, the role of Rawls and his theory of justice as fairness are also important in considering liberal understandings of social justice.<sup>6</sup> Finally, in this section, the increasing importance of law and economics theory merits a look at economic distribution and Pareto optimality to the extent that they inform understandings of social justice.<sup>7</sup>

### 1. Civil Rights

The idea of civil rights as a broad category is analogous to natural rights in the context of the relationship between citizens and government, and there is some general agreement regarding its core meanings. In the United States context, they include freedom of speech, freedom of the press, freedom of religion, freedom of assembly, freedom to vote, and property rights. They may also include certain rights typically understood as political rights, such as the rights to vote and petition and the right to due process. Although not exhaustive, these rights summarize early constitutional ideals. From the Reconstruction era<sup>8</sup> and onwards, these also include equal protection under the law. This shift to an emphasis on equal treatment becomes a theoretical basis for rejecting discrimination based on immutable traits both by

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<sup>5</sup> See *infra* Part II, Section A, Subsection 1.

<sup>6</sup> See *infra* Part II, Section A, Subsection 2.

<sup>7</sup> See *infra* Part II, Section A, Subsection 3.

<sup>8</sup> 1865–1877.

government and private actors. It was a primary legal argument against segregation and other forms of governmental discrimination in the Civil Rights Movement, and it ultimately led to the enactment of the Civil Rights Act of 1964, which expanded prohibitions of certain forms of discrimination by private actors in commercial settings.<sup>9</sup> Martin Luther King, Jr. explicitly described social justice as the ideal or goal of the Civil Rights Movement and a just future.<sup>10</sup> This remains the ideal of many successors to the Civil Rights Movement today.

There are a plethora of nongovernmental organizations that describe themselves as motivated by the ideals of social justice growing out of the Civil Rights Movement. Many women's rights, LGBTQ rights, disability rights, animal rights, healthcare rights, and education rights are rooted in civil rights antidiscrimination and distributional claims. However, the proliferation of movements and claims has inevitably led to greater potential inconsistency and conflict among groups making similar claims. Tension and disagreement have always existed (e.g., differing approaches by Martin Luther King, Jr. and Malcolm X; between first-wave, second-wave, and third-wave feminism; or between the Human Rights Campaign and Act Up). Several of these later movements reject many of the assumptions of classical liberalism and earlier civil rights discourse while continuing to uphold social justice as an ideal.<sup>11</sup> It is not the goal of this essay to further explore these critiques; however, it would be helpful to consider the arguably dominant liberal political theory of justice (including social justice).

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<sup>9</sup> See e.g. Thomas I Emerson, *Segregation and the Equal Protection Clause*, 34 MINN. L. REV. 289 (1950).

<sup>10</sup> See Dr. Martin Luther King, Jr., Address at Western Michigan University (Dec. 18, 1963), (transcript available at <http://www.wmich.edu/sites/default/files/attachments/MLK.pdf>) [<https://perma.cc/5BJM-UEA2>].

<sup>11</sup> See e.g., Ladelle McWhartor, *Queer Economies*, 14 FOUCAULT STUDIES 61 (2012).

## 2. Justice as Fairness

Although his work is heavily critiqued, John Rawls's theory of justice as fairness is arguably the dominant liberal theory of justice, with profound implications for understandings of social justice.<sup>12</sup> It is most thoroughly described in *A Theory of Justice*.<sup>13</sup> For Rawls, justice fundamentally requires fairness.<sup>14</sup> He assumes that rational persons not knowing what advantages or disadvantages they might be born with would negotiate for a legal system that would minimize their disadvantage even if it meant surrendering possible advantage should they be born with privilege.<sup>15</sup>

Rawls is a social contract theorist,<sup>16</sup> postulating a theoretical "initial position" similar to the classical "state of nature."<sup>17</sup> It can be distinguished from Hobbesian contract theory because it argues for a contract made without the benefit of knowing traits that would provide advantage or disadvantage. Rawls assumes that fair distribution of goods in society will not be achieved when those with advantage act in their self-interest. A "fair" social contract can only be achieved by imagining a "veil of ignorance,"<sup>18</sup> without access to knowledge of advantages or disadvantages (such as race, gender, wealth, status, orientation, disability, etc.).<sup>19</sup> Like many political and economic theorists, Rawls assumes a level of human rationality and risk-aversion, which he argues should reasonably lead to social contracts that sacrifice privilege in exchange for protections.<sup>20</sup> This sort of fairness implies a social justice model that goes beyond positive rights and legitimizes economic

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<sup>12</sup> See e.g., Sen, Amartya, *THE IDEA OF JUSTICE* (Belknap Press) pp. 52–74 (2009).

<sup>13</sup> See generally JOHN RAWLS, *A THEORY OF JUSTICE* (Belknap Press 2d ed. 1999) (1971).

<sup>14</sup> JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* xvi (Erin Kelly ed., Belknap Press 2d ed. 2001) [hereinafter RAWLS, *JUSTICE AS FAIRNESS*].

<sup>15</sup> See generally RAWLS, *A THEORY OF JUSTICE*, *supra* note 13.

<sup>16</sup> *Id.* at 10–11.

<sup>17</sup> See generally THOMAS HOBBS, *LEVIATHAN* (OXFORD UNIVERSITY PRESS 1651).

<sup>18</sup> *Id.* at 118–23.

<sup>19</sup> *Id.* at 33.

<sup>20</sup> *Id.* at 118–23.

rights (such as to healthcare or education) that people in the initial position would negotiate for.

Rawls has many detractors, including social justice theorists who insist that his brand of liberalism does not go far enough to provide meaningful fairness, particularly within systems that replicate hierarchies and oppression. However, his concern for fair distribution does at least raise economic questions important to many critical scholars.

### 3. Economics and Pareto Optimality

As it responded to Critical Legal Studies as well as pragmatic and empirical concerns addressed by law in the late 20th century, contemporary law and economics became an influential paradigm in many areas of United States legal scholarship, particularly at elite institutions, such as the University of Chicago and the University of Virginia. Many of my generation of lawyers (so-called “generation x”) were trained with this paradigm, particularly in torts, contracts, and business law. Although scholars within law and economics disagree as to certain assumptions, they agree that efficiency (however defined) is a goal of legal rules. Most scholars at least address the efficiency ideals of optimality proposed by Vilfredo Pareto.<sup>21</sup> He asserts that a system is optimal if no policy changes will increase utility (resources available) without harming someone.<sup>22</sup> A Pareto superior change is one that increases utility without causing harm to anyone.<sup>23</sup> Pareto optimality does not maximize overall efficiency, nor does it ensure the equitable distribution of resources. However, it does provide a helpful approach for considering proposed legal changes, even if it does not go as far as “justice as fairness” and social contract from the initial position. It can be used to perpetuate structures of inequity, but it provides an analytical tool for

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<sup>21</sup> See Charles K. Rowley, *Wealth Maximization in Normative Law and Economics: A Social Choice Analysis*, 6 GEO. MASON L. REV. 971, 982 (1988) (discussing Pareto’s influence on modern economic theory).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*



exposing those structures as well. There are theorists who include Pareto optimality in considering social justice, particularly in terms of distribution (as opposed to individual rights).<sup>24</sup>

#### 4. Objections to Liberal Accounts of Social Justice

To the extent that social justice refers to negative rights guaranteed by government, such as free speech and religion, there is relatively little liberal criticism of it. However, when it justifies affirmative economic rights or circumscribing the negative rights of others, it does raise objections. Assuming that negative rights do not require economic cost or redistribution,<sup>25</sup> no one is harmed. Affirmative rights such as education or healthcare require some redistribution of resources, which is objected to by many. Similarly, if social justice impinges on rights (particularly speech and religion) in its antidiscrimination claims, there are challenges. This is clear in the current line of cases related to denying commercial services for the weddings of same-sex couples<sup>26</sup> and to some extent in recent affirmative action cases.<sup>27</sup> There has been a shift in the past ten years from liberal objections of the definitions used by social justice theorists to popular rejection of social justice as a goal or an ideal at all. This has been particularly

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<sup>24</sup> For example, Amartya Sen. See Vivian Walsh, *Amartya Sen on Rationality and Freedom*, 71 *SCI. & SOC'Y* 59, 77–80 (2007).

<sup>25</sup> I do not make this assumption because I tend to agree with scholarship indicating that negative rights actually have significant costs. Major state universities have been forced to spend large sums of money ensuring safety for controversial conservative speakers over the past year. Some of these speakers have indicated that they are partly motivated by forcing states to spend money. See, e.g., Megan Schellong, *Here's how much security costs when an incendiary speaker comes to campus*, USA TODAY (Sep. 13, 2017), <http://college.usatoday.com/2017/09/13/heres-how-much-security-costs-when-an-incendiary-speaker-comes-to-campus/> [perma.cc/F7UP-YPJN].

<sup>26</sup> E.g., *Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), cert. granted, 85 U.S.L.W. 3600 (U.S. June 26, 2017) (No. 16-111); *State v. Arlene's Flowers, Inc.*, 187 Wash. 2d 804 (2017) (holding that a florist's floral arrangements do not constitute protected free speech and that providing flowers to a same-sex wedding would not serve as an endorsement of same-sex marriage).

<sup>27</sup> E.g., *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (remanding the case so that a school admissions process that considered race could be judged under strict scrutiny).

evident since 2011, when “social justice warrior” and “SJW” emerged as insults on Twitter and then more broadly.

### *B. Critical Understandings of Social Justice*

Critical theories in legal scholarship emerged largely from legal realism and were often influenced by critical studies traditions, such as the Frankfurt School.<sup>28</sup> Emerging from the civil rights movements and women’s movements as a counternarrative to earlier liberal justifications, critical legal studies,<sup>29</sup> feminist jurisprudence,<sup>30</sup> and critical race theories<sup>31</sup> are among the paradigms that rejected the assumptions of liberalism and provided counternarratives to critique dominant and oppressive legal structures. Although it may be over-simplistic, there is a distinction, both historically and theoretically, between social justice claims in the shift toward outsider scholarship.

### **I. Progressive Critical Perspectives**

Critical Legal Studies (CLS) in the 1970s created a body of scholarly literature and a community dedicated to exposing the tendency of law to perpetuate oppressive power structures.<sup>32</sup> The critiques addressed economic, political, and social dynamics.

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<sup>28</sup> The Frankfurt School is a school of critical theory, social research, and philosophy, which emerged at the Institute for Social Research of the University of Frankfurt beginning in the 1930s. They incorporated Marxian analysis when helpful, but they also drew on other schools of thought to fill in Marx’s perceived omissions. Max Weber exerted a major influence, as did Sigmund Freud. Herbert Marcuse, Eric Fromm, Theodor Adorno, Jurgen Habermas, and Max Horkheimer were the central figures of the Frankfurt School.

<sup>29</sup> See generally, e.g., RICHARD W. BAUMAN, *CRITICAL LEGAL STUDIES: A GUIDE TO THE LITERATURE* (Westview Press 1996).

<sup>30</sup> See generally, e.g., *FEMINIST LEGAL THEORY: FOUNDATIONS* (D. Kelly Weisberg ed., 1993).

<sup>31</sup> See Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 462 (1993).

<sup>32</sup> Critical Legal Studies scholarship argues that law is used to maintain entrenched power structures, thus codifying biases against marginalized groups. See generally, e.g., Bauman, *supra* note 30.

The movement provided discursive tools and some degree of legitimacy to outsider scholars influenced by the work. I believe that broadly critical understandings of social justice continue to impact social justice nongovernmental organizations (NGOs). When I entered academia, it was obvious that many in the generation above me were influenced by critical theories from the 1970s, which became a basis for progressive social justice activism. As these leaders and scholars have retired, there has been a notable shift toward embracing outsider critical understandings of social justice. This is especially true to the extent that CLS or progressivism was represented (or presumed to be represented) by straight white men.

## 2. Outsider Perspectives

Much of this scholarship is commonly referred to as outsider scholarship, but it has been impactful in promoting changes to legal rules in important cases.<sup>33</sup> This scholarship often privileges the standpoint of outsiders to project light onto oppressive legal structures.<sup>34</sup> Much of it also focuses on raising the consciousness of outsider groups as a method for promoting individual and group advocacy.<sup>35</sup> In addition to critical race theory and feminist theory, queer theory,<sup>36</sup> Latina/o critical theory, and disability theory

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<sup>33</sup> E.g., *THE VOTING RIGHTS ACT: SECURING THE BALLOT* (Richard M. Valelly et al. eds., 2006); *DIRECTIONS IN SEXUAL HARASSMENT LAW* (Catharine A. MacKinnon & Reva B. Seigel eds., 2004).

<sup>34</sup> See generally, e.g., *THE FEMINIST STANDPOINT THEORY READER: INTELLECTUAL AND POLITICAL CONTROVERSIES* (Sandra Harding ed., 2004).

<sup>35</sup> See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 854–58 (1990) (defining consciousness-raising in feminist legal thought). Bartlett explains:

Consciousness-raising is an interactive and collaborative process of articulating one's experiences and making meaning of them with others who also articulate their experiences. . . . [It] creates knowledge by exploring common experiences and patterns that emerge from shared tellings of life events. What were experiences as personal hurts individually suffered reveal themselves as a collective experience of oppression.

*Id.*

<sup>36</sup> See generally, e.g., William N. Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* (Harvard Univ. Pres. 2009).

have tended to move to intersectionality, which has actually brought many streams of thought into dialogue by acknowledging the complex dynamics of oppression.<sup>37</sup> Outsider social justice scholarship tends to highlight the need for formal legal protection from government and private actors. There is also often an explicit or implicit argument for redistributive solutions.

### 3. Objections to Critical Approaches to Social Justice

Typical objections to critical theories of social justice are rooted in classical liberal perspectives, but challenges come from a variety of perspectives, including formalist, economic, and critical arguments. To the extent that liberalism is in tension with critical perspectives (particularly when they explicitly embrace Marxian or other similar leftist arguments), scholars could reject critical understandings of social justice because they rely on objectionable assumptions regarding rights, the role of government, human nature, etc. Objections to outsider theories of social justice are thornier because they can devolve into identity politics. That is, outsider views may be dismissed because they are considered nonuniversal claims to “special” rights. When media personalities criticize social justice or social justice movements, I typically understand the objections to be of perceived critical and outsider assumptions they may rightly or wrongly attribute to the groups or views to which they object. Regardless of the perspective, it is troubling that public discourse often spirals to shaming and silencing.

#### *C. Religions Understandings of Social Justice*

So far, this essay has focused on secular understandings of social justice in the US, but it would be a gross oversight not to consider ways in which religious thought and tradition inform the construction of social justice for individuals and organizations. I will focus on the relationship between social

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<sup>37</sup> See generally Berta Hernandez-Truyol et al., *Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Practice*, 17 BERKELEY LA RAZA L.J. 169 (2006).

justice and Catholic Social Thought, because it has been a focus of some of my scholarship. I will note other United States religious approaches to social justice as well.

### 1. Catholic Social Thought

The elements of Catholic social thought include the dignity of the human person, the common good, natural law, subsidiarity, and the preferential option for the poor (described later).<sup>38</sup> These principles have formed the basis for understandings of social justice over the past two hundred years. In the late 19th century, social teaching of the Church took an official position defending the rights of labor.<sup>39</sup> Social justice was first used explicitly in the papal encyclical, *Quadragesimo Anno*,<sup>40</sup> by Pope Pius XI in 1931.<sup>41</sup> As an ideal, it is repeated in later teaching by the papacy and various councils of bishops (particularly in Latin America).<sup>42</sup> Social justice was explicitly embraced as a key principle by the Society of Jesus (Jesuits) under Father Pedro Arrupe in the documents of its 32nd General Congregation, which describe the mission of the Society as “the service of faith and the promotion of justice.”<sup>43</sup> Later Jesuit documents and policy focus explicitly on the importance of social justice as rooted in the principle of the dignity of the human person and the preferential option (privileging the needs of the poor).

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<sup>38</sup> See JOHN A. COLEMAN, S.J., MAKING THE CONNECTIONS: GLOBALIZATION AND CATHOLIC SOCIAL THOUGHT: PRESENT CRISIS, FUTURE HOPE 15–20 (John A. Coleman & William F. Ryan, eds., 2005).

<sup>39</sup> Leo XIII, *Rerum Novarum (The Condition of Labor)* (1891), reprinted in DAVID J. O'BRIEN & THOMAS A. SHANNON, CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 28 (J. O'BRIEN & THOMAS A. SHANNON, 1998).

<sup>40</sup> Pius XI, *Quadragesimo Anno (After Forty Years)* (1931) [hereinafter Pius XI, *Quadragesimo Anno*], reprinted in DAVID J. O'BRIEN & THOMAS A. SHANNON, CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE (1995) at 42.

<sup>41</sup> Pius XI, *Quadragesimo Anno*, *supra* note 40, at 62.

<sup>42</sup> See DONALD DORR, OPTION FOR THE POOR: A HUNDRED YEARS OF CATHOLIC SOCIAL TEACHING 167–70 (1992) (discussing the emerging Christian approach to poverty that would serve as a foundation for the Church's formal commitment to the poor).

<sup>43</sup> See *generally* Decree 4: Our Mission Today: The Service of Faith and the Promotion of Justice, in GENERAL CONGREGATION 32 OF THE SOCIETY OF JESUS (1995).

Structures (including the legal structure) of oppression are presumed to justify special concern for the poor. With its transnational network of nearly 200 higher education institutions, the Jesuit emphasis on social justice has undoubtedly impacted many.

Catholic Social Thought and the principle of human dignity tend to support property rights, but the common good and the preferential option for the poor may create a moral obligation to redistribute wealth.<sup>44</sup> Although Catholic social justice teaching may be informed by critical theory (particularly within the liberation theology tradition), it does not necessarily rely on critical (particularly Marxian) assumptions.<sup>45</sup> In fact, it is very likely that the tradition of Catholic social justice teaching has impacted both liberal and critical social justice scholarship.

## 2. Other Religious Perspectives

Catholic social thought is not the only religious tradition to incorporate ideals of social justice. Protestant liberation theology shares much in common with Catholic scholarship on these issues,<sup>46</sup> and the same might be said for liberation theology in non-Christian traditions as well. Outside liberation theology, many religious traditions embrace elements of social justice.<sup>47</sup> The

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<sup>44</sup> See *Acts* 2:45–46 (“And all who believed were together and had all things in common; and they sold their possessions and goods and distributed them to all, as any had need”).

<sup>45</sup> See, e.g., John Paul II, *Centesimus Annus (On the Hundredth Anniversary of Rerum Novarum)*, reprinted in DAVID J. O'BRIEN & THOMAS A. SHANNON, *CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE* § 26 (1995) (criticizing the exploitative elements of Marxism).

<sup>46</sup> See generally EMMANUEL MARTY, *AFRICAN THEOLOGY: INCULTURATION AND LIBERATION* (1993).

<sup>47</sup> See, e.g., *Thich Nhat Hanh*, BBC (Apr. 4, 2006), <http://www.bbc.co.uk/religion/religions/buddhism/people/thichnhathanh.shtml> (describing the Vietnam peace efforts of Thich Nhat Hanh, an acclaimed Buddhist teacher) [perma.cc/F5Y6-SKJL]; Alexander Goldberg, *The Reawakening of the Jewish Social Justice Movement*, THE GUARDIAN (May 20, 2011), <https://www.theguardian.com/commentisfree/belief/2011/may/20/jewish-social-justice-siach-conference> [perma.cc/J5CD-LUZ6].

role of social justice in traditional and contemporary Islamic contexts is described in Section III.

### 3. Typical Objections to Religious Articulations of Social Justice

Obviously, one approach to rejecting religious support for social justice is to object to the religious bases for the claims. This could be the case for nonreligious and outside or dissenting religious views. Nonreligious objections and objections by religious outsiders are inevitable when claims are based on scripture or teaching that is not universally accepted. The more interesting challenges to religious social justice claims come from community insiders. For example, there is growing objection to social justice progressivism within Jewish communities.<sup>48</sup> Similar objections are made within other religious traditions; however, this is more problematic in the Catholic context because Church teaching has explicitly embraced the language of social justice. Catholic critiques of social justice need to contextualize (and narrow) the content of Catholic social justice teaching and distinguish explicit social justice goals or claims as not authentically Catholic.<sup>49</sup>

## III. UNDERSTANDINGS OF JUSTICE IN ISLAMIC JURISPRUDENCE

Justice is a central category in Islamic thought and one of the names for Allah (*Al 'Adl*, or The Just).<sup>50</sup> The same root is used for justice (*'adala*). Some scholars have even translated this word as “social justice” in English.<sup>51</sup> As in

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<sup>48</sup> See, e.g., Josh Black, *Is Today's 'Social Justice' Jewish?*, TABLET (Dec. 11, 2017, 9:30 PM), <http://www.tabletmag.com/jewish-news-and-politics/250923/is-social-justice-jewish> [perma.cc/2E3K-SASJ].

<sup>49</sup> See, e.g., Dominic Lynch, *How Catholics Should Reboot the Social Justice Debate*, THE FEDERALIST (Jan. 15, 2016), <http://thefederalist.com/2016/01/15/how-catholics-should-reboot-the-social-justice-debate/> [perma.cc/BT28-YF9Z].

<sup>50</sup> See 'Ibrahīm bin 'Alī al-Kaf' amī, *AL-MAQĀM AL-ASNĀ FĪ TAFSĪR AL-ASMĀ' AL-ḤUSNĀ* at 40 (Beirut: Dār al-Hādī 1992).

<sup>51</sup> E.g., Samy Ayyoub, *Islam and Social Justice in Contemporary Egypt Presentation for the Islamic Law Section of the American Association of Law School Annual Conference* (Jan. 5, 2018).

many religious traditions, this justice connotes fairness, as in receiving what one deserves, rather than absolute equality.<sup>52</sup> There are commitments to equality (*musawa*), particularly in the sayings of the Prophet (the Hadith), but they do not appear to refer to absolute equality.<sup>53</sup> Although there is interesting scholarship elaborating rights frameworks within Islamic tradition,<sup>54</sup> God's justice (and to some extent, human justice) is tailored to individual merit and need. It is also intrinsically connected to the notion of obligation to God and the community. Christianity and Judaism have similar notions of grace or rights bundled with responsibilities, but these tend not to translate easily into liberal rights theory.<sup>55</sup> This section will describe both classical and contemporary approaches to social justice within Islam.

#### A. Classical Legal Tradition

Classical Islamic thought contains deep commitments to the poor and disadvantaged. Perhaps this is not surprising given the history of oppression in and eventual flight from Mecca (the Hijra), making the Muslims a refugee community. This is analogous to the accounts of Abraham's departure from

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<sup>52</sup> See generally Louis Pojman, *Justice as Desert*, 1 QUEENSLAND UNIVERSITY OF TECHNOLOGY LAW AND JUSTICE JOURNAL 88 (2001).

<sup>53</sup> For example, family law, rights to marry, divorce, and inheritance vary depending on gender. See, e.g., Russell Powell, *Catherine Mackinnon May Not Be Enough: Legal Change and Religion in Catholic and Sunni jurisprudence*, 8 GEO. J. GENDER & L. 1, 8–9 (2007).

<sup>54</sup> See generally, e.g., ABDULLAHI AN-NA'IM, *ISLAM AND HUMAN RIGHTS: SELECTED ESSAYS OF ABDULLAHI AN-NA'IM* (Mashood A. Baderin ed., 2010).

<sup>55</sup> See, e.g., *Rights and Responsibilities*, United States Conference of Catholic Bishops, <http://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/rights-and-responsibilities.cfm> [perma.cc/9RSJ-RNJJ].

The Catholic tradition teaches that human dignity can be protected and a healthy community can be achieved only if human rights are protected and responsibilities are met. Therefore, every person has a fundamental right to life and a right to those things required for human decency. Corresponding to these rights are duties and responsibilities—to one another, to our families, and to the larger society.

*Id.*



Ur, the Hebrew flight from Egypt, or the oppression of early Christians by Rome. Justice is a core theme of the Quran, and the early community in Medina was forced to address issues of economic inequality and poverty. To at least that extent, social justice is an Islamic concern.

### 1. Obligations to the Poor

There is a clear sense of obligation that believers have to their family, community, and the poor. The clearest expression of this obligation is in the requirement for almsgiving (*zakat*). This is a formal religious requirement with prescribed offering amounts based on property. An important characteristic is that it must be given for acceptable spiritual purposes, such as feeding the poor, supporting mosques (and their affiliated institutions), and promoting or spreading the faith.

### 2. Zakat and Waqf

*Zakat*<sup>56</sup> is one of the five pillars of Islam and is required by all believers.<sup>57</sup> The early Islamic community effectively collected *zakat* as a tax with proceeds distributed to the needy.<sup>58</sup> It is a complex system with a progressive tax exemption for basic living needs that considers both income and overall wealth.<sup>59</sup>

Property and property law is well defined in Islamic jurisprudence, but in an ultimate sense, all property belongs to God. Individuals are merely

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<sup>56</sup> ENCYCLOPAEDIA OF ISLAM (C.E. Bosworth ed., 2004) (“The obligatory payment by Muslims of a determinate portion of specified categories of their lawful property for the benefit of the poor and other enumerated classes or, as generally in Quranic usage, the portion of property so paid.”)

<sup>57</sup> JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH 92 (1988) (“This is not regarded as charity, since it is not really voluntary but instead is owed, by those who have received their wealth as a trust from God’s bounty, to the poor.”).

<sup>58</sup> MARSHALL G. S. HODGSON, THE VENTURE OF ISLAM: CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION: THE CLASSICAL AGE OF ISLAM 97, 98 (1985).

<sup>59</sup> See generally, e.g., Russell Powell, *Zakat: Drawing Insights for Legal Theory and Economic Policy from Islamic Jurisprudence*, 7 PITT. TAX REV. 43 (2010) [hereinafter Powell, *Zakat*].

stewards of what God has granted.<sup>60</sup> Legal ownership of property provides the same sorts of rights found in Roman and later common law (*usus, fructus, and abusus*), but recipients of *zakat* (particularly the poor) have a sort of right to receive alms.<sup>61</sup> The primary source for the jurisprudence of *zakat* is the Quran:

The alms are only for the poor and the needy, and those who collect them, and those whose hearts are to be reconciled, and to free the captives and the debtors, and for the cause of Allah, and [for] the wayfarer; a duty imposed by Allah. Allah is Knower, Wise.<sup>62</sup>

Hadith literature provides details relating to this obligation in practice and becomes a basis for the jurists in developing explicit legal rules.<sup>63</sup> *Zakat* has at times been collected by states, but it is traditionally given by believers to community leaders (such as the imam at a local mosque), but it may also be given directly to proper recipients such as the poor.<sup>64</sup>

This obligation to serve the community, and particularly the poor, received powerful leverage from the medieval financial mechanism, *waqf*, a form of trust or endowment.<sup>65</sup> A *waqf* could be created for a variety of purposes; they were often created for pious purposes such as feeding the poor, building mosques, providing public water service, funding schools, etc.<sup>66</sup> In fact, in 18th century Istanbul, approximately 30,000 people were fed daily by pious institutions supported by *waqf*.<sup>67</sup> The deep textual and legal commitments to the poor, along with financial innovations to build large charitable pious

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<sup>60</sup> See THE QURAN, *Surah* 57:7.

<sup>61</sup> See *id.* at *Surah* 70:24–25. This notion seems to resemble the notion of the “preferential option of the poor” found in Catholic social thought. See Russell Powell, *Theology in Public Reason and Legal Discourse: A Case for the Preferential Option for the Poor*, 15 WASH. & LEE J. CIV. RTS. & SOC. JUST. 327 (2009).

<sup>62</sup> THE QURAN, *Surah* 9:60.

<sup>63</sup> See generally Powell, *Zakat*, *supra* note 59.

<sup>64</sup> See Hodgson, *supra* note 58.

<sup>65</sup> See Timur Kuran, *The Provision of Public Goods Under Islamic Law: Origins, Impact, and Limitations of the Waqf System*, 35 LAW & SOC’Y REV. 841, 845–46 (2001).

<sup>66</sup> See, e.g., *id.* at 841–98

<sup>67</sup> *Id.* at 850.

institutions, provide a framework for understanding a commitment to something that might be understood as “social justice,” even in the classical and medieval periods.

### 3. Possible Internal Objections

Typical internal challenges to identifying traditional commitments to the poor and needy as a model for social justice fall in two general categories. The first argues that these commitments and the institutions that supported them were not sustainable or applicable to modern contexts.<sup>68</sup> A second challenge would be that the standards for Islamic piety stand on their own, neither needing nor accepting parallel or alternative definitions of justice.<sup>69</sup> There are similar critiques of human rights in discourse by some Muslim scholars.

#### *B. Contemporary Understandings*

Some scholars argue that medieval systems such as *zakat* need to be reimagined so that they remain relevant in modern contexts.<sup>70</sup> However, Muslim states that implement *zakat* are careful to justify it in traditional jurisprudential terms.<sup>71</sup> Although contemporary *zakat* practice provides some

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<sup>68</sup> *Id.* (arguing that the *waqf* system was ultimately crushed by its own proliferation). See also TIMUR KURAN, *ISLAM & MAMMON: THE ECONOMIC PREDICAMENTS OF ISLAMISM* (2005) (similarly criticizing the romanticization of *zakat*).

<sup>69</sup> See, e.g., DEINA ABDELKADER, *SOCIAL JUSTICE IN ISLAM* 29–38 (2000).

<sup>70</sup> See, e.g., ABDUL AZIZ BIN MUHAMMAD, *ZAKAT AND RURAL DEVELOPMENT IN MALAYSIA* 182–89 (Kuala Lumpur: Berita 1993), at 182–89 (recommending changes to *zakat* in Malaysia, some of which would necessitate new interpretations of the textual sources).

<sup>71</sup> See *Recommendations of the Third International Zakah Conference Held In Kuala Lumpur Malaysia 19-22 Shawwal 1401H*, in *INSTITUTIONAL FRAMEWORK OF ZAKAH: DIMENSIONS AND IMPLICATIONS* 379, 473-77 (Ahmed Abdel-Fattah el-Ashker & Muhammad Sirajul Haq eds., 1995).

The Conference calls upon *zakat* institutions to ensure that their performance of the collection and distribution of *zakat* must be compatible with the provisions of Shari’ah, bearing in mind that *zakat* is an act of financial worship. In addition,

support for the distributional concerns of social justice theory, it is the Muslim charities and NGOs that have arguably become primary advocates for Islamic social justice theory.

### 1. Traditionalist

Most expressions of social justice within contemporary Islam are in some sense traditional because they rely on the authoritative works of jurisprudence, which were written before the 14th century. Openly accepting new interpretations would constitute an opening of the “gates of *ijtihad*,”<sup>72</sup> which has been rejected by most Sunni jurists.<sup>73</sup> That said, many who hold traditional views are actively involved in Islamic charitable and civil rights organizations that embrace notions of social justice.<sup>74</sup> This is likely true of most Muslim NGOs. In my view, neither the Red Crescent (arguably the largest Muslim charitable organization) nor CAIR (Council on American-Islamic Relations, the largest US Muslim rights advocacy organization) attempt to create new interpretations of Islamic jurisprudence. That said, leaders in these organizations do actively engage social justice organizations and ideas.

### 2. Modernist

In Muslim theological and legal contexts, modernism has very specific meaning. It is typically used to describe shifts away from traditional legal rules, allowing for contemporary contextualization and interpretation of the

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this will help to promote the confidence and trust of the zakat-payers and increase the efficiency of zakat institutions.

*Id.*

<sup>72</sup> See Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi*, 5 STUDIES IN ISLAMIC LAW AND SOCIETY, 77-78 (1996).

<sup>73</sup> See generally Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT’L J. OF MIDDLE E. STUD. 3 (1984) (describing the dispute over whether the need for new interpretation ended in or shortly after the tenth century once legal rules in the school of jurisprudence were well-developed).

<sup>74</sup> Abdelkader, *supra* note 60, at 39-44.

texts of Islamic jurisprudence (*usul al-fiqh*).<sup>75</sup> There are modernist impulses in many Muslim social justice organizations. Participants in the Hizmet organizations regularly engage other social justice organizations in their educational, service, and advocacy work. Although they may consider themselves traditional, I have identified clear modernist moves in their underlying jurisprudence.<sup>76</sup> Abdullahi An-Na'im has advocated for reconsidering new interpretations of the textual tradition in his work engaging social justice concerns in human rights law practice and scholarship.<sup>77</sup> Muslims for Progressive Values, an NGO, was on an MTV News top ten list in 2016 for its support of LGBTQ victims and survivors after the Pulse massacre.<sup>78</sup>

### 3. Possible Objections

Some of the objections to contemporary Islamic understandings of social justice would mimic those described above with regard to the classical legal tradition. Traditionalists would likely be critical of modernist interpretive shifts as illegitimate. However, in the US context, social justice theory and organizations can address broad ethical commitments without having to wrestle with the theological challenges that arise in majority Muslim contexts, where the internal rules of Islamic jurisprudence are more directly applicable.

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<sup>75</sup> See generally MODERNIST ISLAM 1840-1940: A SOURCEBOOK ed. Charles Kurzman (Oxford 2001).

<sup>76</sup> See generally RUSSELL POWELL, SHARIA IN THE SECULAR STATE (2016).

<sup>77</sup> Abdullahi An-Na'im, ISLAM AND HUMAN RIGHTS: SELECTED ESSAYS OF ABDULLAHI AN-NA'IM (Routledge 2017).

<sup>78</sup> See Marcus Patrick Ellsworth, *10 Social Justice Organizations that Rocked 2016—and Need You in 2017* MTV NEWS (Dec. 7, 2016), <http://www.mtv.com/news/2960911/social-justice-in-2016/> [perma.cc/JCJ6-WGNY].

#### IV. IMPLICATIONS FOR UNDERSTANDING AND THEORIZING SOCIAL JUSTICE

This brief comparative consideration of Islamic approaches to notions of social justice provides at least five insights. First, social justice is not uniquely American, European, or Christian. Second, Non-US approaches have developed effective theories and institutions for promoting social justice. Third, internal cultural debate regarding the role of social justice as a goal is not unique. Fourth, like some other religious approaches to social justice, Islam emphasizes responsibility as a necessary component of rights discourse. Finally, Islamic approaches to social justice tend to emphasize communal solutions over state solutions.

Consideration for the justice accorded to individuals by God and society is a concern for Islamic thought, just as it is in other theistic religious systems, resulting in a discourse that may be considered analogous to secular liberal and critical theories. As I have argued in previous articles, legal change promoting social justice is more likely to be successful when it engages people of faith.<sup>79</sup> It is also important to build coalitions of solidarity among people of faith.

Many commentators assume US, European, and Christian superiority in ethics and political philosophy, including those working with social justice theory. However, Muslim societies have wrestled with many of the same issues for centuries, and in some cases, they developed sophisticated theological, legal, and economic frameworks for providing greater access to justice that exceeded the success and scope of similar developments in premodern Europe. Similarly, today, Muslim scholars and NGOs build sophisticated frameworks for justifying and promoting social justice ideals in historical and cultural contexts that are deeply racist and Islamophobic, while also engaging their own complex religious tradition.

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<sup>79</sup> See Russell Powell, *Theology in Public Reason and Legal Discourse: A Case for the Preferential Option for the Poor*, 15 WASH. & LEE J. C.R. & SOC. JUST. 327, 403–04 (2009).

The tension between traditionalism and modernism in Muslim communities is not unique. As described above, Catholic, Protestant, and Jewish communities face similar tensions. Secular intellectual traditions, like liberalism, also experience internal disagreement as well as external attacks (such as from critical legal movements). It is a fallacy to ascribe monolithic and homogeneous attributes to religious intellectual traditions when the same is not presumed to be true for secular or more familiar religious communities. One of the greatest and yet most obvious insights my Islamic law students discover is that Islamic legal traditions are diverse and pluralistic in some senses.

Many of the current critiques of social justice as an ideal express discomfort with the one-sided emphasis on rights as a validation of the expectation of tax-supported government benefits. Although the argument is typically overstated, the emphasis by Islamic approaches to social justice (which is true in other religions as described earlier) may serve as a counterbalance to a disproportionate emphasis on rights claims separated from personal and communal obligations.

Finally, like some other religious approaches to social justice, Muslim theorists and organizations tend to focus on communal rather than government solutions. This is true in the United States and Europe, largely because Muslim communities are subject to discrimination and are justifiably skeptical of governmental solutions to social problems. Although CAIR and some similar organizations do use law and government to promote change, there is a large amount of nongovernmental work done within Muslim communities and their neighbors. Even in predominantly Muslim countries, social justice activism tends to emphasize communal and charitable solutions rather than legal ones. I believe that this is a helpful perspective for US social justice theorists and activists who sometimes privilege hierarchical and governmental solutions when they may not be as effective as communal solutions.

## V. CONCLUSION

Islam clearly has concern for the relationship between individuals and society and provides insights and models for promoting justice in those relationships. Muslim scholars and activists are increasingly engaged in explicit social justice discourses, and it is important that their voices and experiences be recognized and seriously considered, particularly by those who seek to promote social justice from other perspectives. Over the past year, issues such as the “Muslim ban” and Deferred Action for Childhood Arrivals (DACA) revocation have brought attention to Muslim social justice scholars and advocates in new and constructive ways. For example, when the first “Muslim ban” was implemented, social justice organizations (especially those focusing on immigration issues) in the Seattle area coordinated with Muslim social justice organizations as they attempted to provide emergency legal assistance for those being held in detention at SeaTac airport, while at the same time prompting the local bar, the attorney general, and the American Civil Liberties Union (ACLU) to coordinate efforts efficiently. Muslim scholars, attorneys, and activists play a significant role in social justice discourse and work in Seattle and many other cities. For those who believe in social justice as an ideal, it will be increasingly important to consider Muslim experiences and perspectives.



