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# Islamic Legal Histories

Amr A. Shalakany\*

## INTRODUCTION

*All the social sciences suffer from the notion that to have named something is to have understood it.*

Clifford Geertz, *Islam Observed*<sup>1</sup>

The writing of history has sometimes been compared to the hatching of a “plot,” both in the amusingly literary sense of the term, as in the intriguing plot or plan of action underlying a good novel or play, as well as in the more scheming and darkly conspiratorial sense that plotting might otherwise suggest.<sup>2</sup> The subject of this essay is Islamic law historiography, and as with any other topic of

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\* Assistant Professor of Law, The American University in Cairo. I would like to thank Lama Abu-Odeh, Hossam Bahgat, Shiva Balaghi, Joel Beinin, Karen Engle, Mohamed el-Far, Katherine Franke, Janet Halley, David Kennedy and Satyel Larson for their very helpful comments on earlier drafts. The idea for this paper stems from a wondrously bright kitchen conversation with Chantal Thomas and owes its present form to unfailing La Bodega engagements with Alejandro Lorite, Tanya Monforte, and Hani Sayed. To these four friends I owe my biggest gratitude. Part II of this essay was delivered as talks at various workshops and conferences and greatly benefited from comments received there. My thanks go to Columbia University, Program for the Study of Sexuality, Gender, Health and Human Rights; the City University of New York, the Graduate Center Symposium on Law and Order in Egypt; the Yale Middle East Legal Studies Seminar; the University of Texas School of Law, Bernard and Audre Rapoport Center for Human Rights and Justice; and The American University in Cairo Faculty Brownbag Lunches. I am especially indebted to Khaled Fahmy for generously introducing me to the nineteenth century—to new primary materials and emerging scholarship that were blind-spotted by my own law school training. His draft book chapter on the “The Silence of the Law: Sharia and Siyasa” was enormously instrumental in imagining this essay and has left (consciously or not) an indelible imprint on the arguments developed here.

1. CLIFFORD GEERTZ, *ISLAM OBSERVED: RELIGIOUS DEVELOPMENT IN MOROCCO AND INDONESIA* 23 (1968).

2. I take the term “plot” as the English translation of the French word “*intrigue*,” a term that Paul Veyne uses to underscore the changing function of a “plot” in *Annales* historiography—in vulgar terms, the notion that there is no single history out there, but rather histories of (or “*les histoires de...*”) which vary depending on the *intrigue* settled upon by the historian to tell her story. Veyne’s approach has much in common with Foucault’s genealogical historiography. See PAUL VEYNE, *COMMENT ON ÉCRIT L’HISTOIRE* (1996), and of course by default, MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (1972).

historical research and writing, I argue the story of Islamic-law-past has also been woven around a certain “plot,” one that relies on a certain set of primary materials, features certain key actors and events, leaves others outside its narrative, and thus implicitly subscribes to a number of foundational premises to define what counts as “Islamic” and what passes for “law” in the historian’s tale.

The first goal of this essay is to sketch-out and describe what I take to be the dominant plot in which Islamic law history has been narrated in English by two of its foremost twentieth-century scholars, namely Joseph Schacht and Noel Coulson. I collectively refer to the premises underpinning this plot as *dominant Islamic law historiography*. My second goal here is to investigate how recent scholarship spanning the past three decades or so has come to question, challenge, and in some instances perhaps even derail some aspects of this dominant historiography. Finally, I close this essay by proffering some thoughts on the future direction of research in Islamic law history—an exploration of alternative plots in which the story of Islamic law might be retold in other histories out there.

The above is certainly a tall order for one essay to carry through—even at the extended length generously afforded by this Journal’s editors. Multiple caveats thus litter every section of the pages that follow, all aimed to deflect criticism from the kind of epic-over-generalizations I’ve found inevitable in sketching the big-picture arguments explored here. Next to these many caveats, I would now like to add a final note of caution, one that has less to do with the diligent mapping of different practices in Islamic law historiography, and more with the impulse that triggered such mapping energy in the first place.

Much of what I have to say here is animated by a hunch about the slippery meaning of three key terms without which the historian of Islamic law cannot do much plotting, namely: “Islamic,” “secular,” and “law.” Vindicating that hunch in detail, however, is not the purpose of this essay. I offer no strict taxonomy of competing definitions for these three terms, nor do I argue in support of one meaning or another for such things as “Islam,” “secularism,” or “law.”<sup>3</sup> And though aware my hunch inherently carries political implications for contemporary debates over Islamic law reform (how you define Islamic-law-past can certainly impact present calls for a “return to *shari’a*” in myriad ideological directions), my goal here is neither to mediate some perceived tension between Islamic law and liberal legality, nor to come up with new definitions of *shari’a* that bring its norms more in line with Western notions of democracy, human rights, gender equality, or the like.<sup>4</sup> Rather, I merely seek to describe what I take

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3. I am, however, interested in exploring these questions in detail. See AMR SHALAKANY, *THE REDEFINITION OF SHARI’A IN EGYPTIAN LEGAL THOUGHT: 1798 TO THE PRESENT*, Carnegie Scholar funded research project for 2008-2010 (draft manuscript on file with author).

4. I have in mind, particularly, the combined scholarship of such law professors interested in liberal interpretations of Islamic law as Khaled Abou El Fadl, Azizah Al-Hibri, and Abdullahi An-Na’im. For a methodological critique of some of these authors’ scholarship, see Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L.

as the standard story of Islamic law, juxtapose that with new scholarship that hints at another story (or maybe stories), and leave the task of culling and theorizing all this to another opportunity—when more work has been done, and with more space available to opine at an even greater length.

To my mind then, the plural *histories* featuring in the title of this essay is as yet a future possibility, something to hint at and have a hunch about, and nothing more concrete than that. The essay is divided in three parts. Part I maps-out and describes dominant Islamic law historiography, boils it down to four foundational premises, and claims that a *scripturalist* (and not just *Orientalist*) plot ties these four premises together. Part II offers an application of dominant historiography in the case of Egypt. I take the last two hundred years of “sodomy law” as a substantive example that illustrates which norms and institutions of yore fall within the dominant plot of Islamic law history, and which aspects of the country’s legal past fall outside that plot. Part III seeks to reconsider the dominant historiography in light of recent scholarship. I start with examining anti-*Orientalist* variations on the dominant historiography, then move to offer a closer reading of an alternative set of scholarship which I claim bears the potential of authoring new plots in Islamic law history. I conclude with some brief remarks on the future direction of Islamic law historiography.

## I

### DOMINANT HISTORIOGRAPHY DEFINED: THE SCRIPTURAL APPROACH

*Shar’*, *shari’*a, the sacred law of Islam . . . opposed to *siyasa*, administrative justice.

Joseph Schacht, Glossary of Arabic technical terms<sup>5</sup>

*The notion of historical process in law was wholly alien to classical Islamic jurisprudence. Legal history, in the Western sense, was not only a subject of study devoid of purpose; it simply did not exist.*

N.J. Coulson, A History of Islamic Law<sup>6</sup>

Academic scholarship on the history of Islamic law available in English since the mid-twentieth century has overwhelmingly subscribed to a set of enduring propositions in defining the field of “*Islamic law history*” and demarcating the researcher’s scope of inquiry within its scholarly confines.<sup>7</sup> Taken to-

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789 (2004); for a more recent example in constitutional law, see NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE (2008).

5. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 302 (1982).

6. N.J. COULSON, A HISTORY OF ISLAMIC LAW 4 (1994).

7. This rather grand sounding statement is subject to the following caveats. First, in terms of timeline, I take the 1959 publication of Schacht’s article on contemporary Islamic law as the cut off

gether, these propositions amount to what I call the dominant plot of Islamic law historiography.

Reduced to its bare essentials, this plot tells us four things. First, which institutional structures and normative arrangements that existed in the past deserve historical study as “Islamic law” today, namely those that qualify under the term “*shari'a*.” Second, which of these past norms and institutions fall outside the scope of “Islamic law” history proper, principally those collected under the fuzzy term *siyasa*, and by default also those of customary law or *'orf*. Third, how the great dichotomy *shari'a/siyasa* defines the very *nature* of Islamic law as an historical phenomenon existing up to the colonial encounter, namely that of a sacred law of the books routinely flouted in profane action. And fourth, how a second great dichotomy, tradition/modernity, accounts for the historical development of Islamic law from the colonial encounter up to the present day, namely as that of a historically ossified legal system, fettered by a theocratic theory of legitimation that defies historicism, and which impeded Islamic law’s evolution to meet the changing needs of law in a modern world.

My goal now is to unpack the plot underlying dominant Islamic law historiography into what I hope are four more manageable premises, namely that: (i) the history of Islamic law *IS* the history of *shari'a*; (ii) the history of *shari'a* is *NOT* the history of *siyasa*; (iii) that the great dichotomy *shari'a/siyasa* defines the historical nature of Islamic law up to the moment of the “colonial encounter”; and (iv) that the other great dichotomy, tradition/modernity, explains the postcolonial condition of Islamic law today.

I rely on two seminal textbooks of Islamic law history to support the above argument, namely Joseph Schacht’s *An Introduction to Islamic Law*, and N.J. Coulson’s *A History of Islamic Law*.<sup>8</sup> Despite attracting numerous objections even before the publication of Edward Said’s *Orientalism* in 1979,<sup>9</sup> I nonetheless hold that the basic historiographic framework underlying Schacht and Coulson’s scholarship has remained largely intact, and that their books, which exemplify the above four premises, continue to be viewed as foundational reading materials in the field today.<sup>10</sup> Thus, where I cite Schacht and Coulson in the

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date for the above statement; see Joseph Schacht, *Islamic Law in Contemporary States*, 8 AM. J. COMP. L. 133 (1959). Second, I mean to speak here only of scholarship on the history of Sunni “Islamic law” and not that of Shi’a history. For a concise introduction to Shi’a Islamic law, see MOOJAN MOMEN, *AN INTRODUCTION TO SHI’I ISLAM* (1985). Third, the history of Islamic law explored here is limited geographically to what can be called the Islamic “Eastern Mediterranean,” an undeniably fuzzy term that included Spain at one moment in history and the Balkans at another, but which keeps the Arab World and Turkey as core, and does not include East Asia or sub-Saharan Africa under its scope. This limitation makes sense to me because of the dominance of Arabic as the juristic language of *shari'a* within this duly limited geographic scope.

8. See *supra*, note 5 and 6.

9. For details, see *infra* pp. 59-60.

10. See, e.g., Ian Edge, *Introduction: Material Available on Islamic Law in English, in ISLAMIC LAW AND LEGAL THEORY* (Ian Edge ed., 1996), at xxi (noting “the best introduction to the history of Islamic law is still Professor Noel Coulson’s”), and at xxii (describing Schacht’s book to

pages that follow, I do so only to illustrate propositions that I think most Islamic law scholars writing in the dominant historiography would accept most of the time today.<sup>11</sup>

To my mind, the term “scripturalism,” as employed by Clifford Geertz, works best to describe the dominant plot underlying Schacht and Coulson’s history of Islamic law.<sup>12</sup> The story they tell of Islamic law is a scripturalist story in two key senses: First, and in a most literal application of the term, their historical attention is exclusively focused on such norms-and-institutions-past as is ontologically consonant with the divinely revealed scriptures of the *Qur’an* and *Sunna*. This means that a lot of what your average American post-realist lawyer would take for legal history happens to fall outside the dominant plot of Islamic law historiography.<sup>13</sup> For example, the commercial customs of medieval traders, the administrative rules of the Abbasid bureaucracy, the criminal justice measures of Mamluk princes, or the norms and structures of Ottoman political governance—all are expressions of man-made law without scriptural legitimacy in the *Qur’an* or *Sunna*, and therefore all are ingredients in the social, economic, or political (but not strictly legal) history of Islam.<sup>14</sup>

The implications of this scripturalist approach in defining what can be called “Islamic law in history” is perhaps at its most apparent in the kind of primary research materials on which the Schacht and Coulson overwhelmingly rely, namely juristic treatises of different sizes and genres, mostly written over the past millennium or so.<sup>15</sup> Theirs is therefore a *legal historiography of and about jurists*—not law as it was applied by courts, followed in customary practices, or administered and enforced by state representatives. Rather, it is a plot of law in exegetical books, not law in action, to be found in the ideal norms of a religious tradition, not in the Realist aphorism of “what officials do about disputes.”<sup>16</sup> In all that, scripturalism is a decidedly pre-Realist historiography.

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“contain the distillation of the thought and research of one of the giants of western scholarship in this field” which “stood the test of time better than Coulson’s.”); BABER JOHANSEN, *THE ISLAMIC LAW ON LAND TAX AND RENT: THE PEASANT’S LOSS OF PROPERTY RIGHTS AS INTERPRETED IN THE HANAFI LEGAL LITERATURE OF THE MAMLUKE AND OTTOMAN PERIODS I* (1988) (describing Schacht and Coulson’s work (along with Chafik Chehata) as that of the “three scholars who—in this century—have contributed most to our understanding of the history and culture of Islamic law”).

11. Schacht’s book was published before Coulson’s, and understandably the latter disagrees with some of the former’s findings, most distinctively on the collection and authentication of *Sunna*. See COULSON, *supra* note 6, at 64-73.

12. See generally GEERTZ, *supra* note 1.

13. See generally Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

14. For an earlier argument bemoaning the absence of such fields of study from the scope of Islamic law history (but without the scriptural implications explored in this article), see J. H. Kramers, *Droit islamique et droit de l’islam*, 1937 ARCHIVES DE L’HISTOIRE DU DROIT ORIENTAL 401.

15. For an elegantly succinct and extremely helpful introduction to the primary source materials on which scripturalist Islamic law historians rely, see Edge, *supra* note 10.

16. See KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1950).

In a second and more complicated sense, dominant Islamic law historiography is scriptural in a way that can be loosely described as existential, phenomenological, or both at once. A comparison between anthropologists of Muslim societies (like Geertz) and historians of Islamic law (like Schacht and Coulson) might make this point clearer. Like all good social scientists, anthropologists of religion are expected to frame, describe, and assess their object of study *independently* from it—so while devout Muslims might think their religion immutable and unchanging (for what is faith, after all, but embracing some a-historical eternal truth?), the anthropologist, by contrast, is free to discuss and demonstrate how Islam *did actually change* regardless of what its adherents believe. This allows Geertz to endow the term “scriptural Islam” with both descriptive *and* prescriptive implications. On the one hand, the term signifies contemporary religious belief in “the Koran, the Hadith, and the Sharia, together with various standard commentaries upon them, as the only acceptable bases of religious authority.”<sup>17</sup> On the other hand, “scriptural Islam” is also the barometer Geertz uses to gauge how Islam as a religion *has changed* within the larger global dynamics of capitalism, colonialism, and nationalism over the past two hundred years. Accordingly, scriptural Islam is not just the name of dominant Islamic religious beliefs today; it is, more importantly, the name of an ontologically *new* Islam—an Islam that is measurably different from the “classical-styles” of the Islamic religion that once preceded it.

Unlike Geertz the anthropologist, Schacht and Coulson the historians of Islamic law *cannot* describe their object of study as mutable, evolving, or changing—and if they do so, as the following pages will demonstrate, it is in the strained and wary notes of examining potentially perfidious exceptions to *shari'a*, some tricky secular travesty of its religious scriptural kernel. Their mark of scholarly objectivity, of telling a “careful” or “respectful” story of Islamic law past, thus lies in the existential fusion of their historian perspective with a particular set of heavenly beliefs held by their objects of academic inquiry. Thus, while Geertz can argue Islam has indeed changed to *become a scripturalist religion* in places like Morocco and Indonesia over the past two centuries, and is accordingly free to assess Islamic law’s contemporary scripturalism *as itself a modern development*, Schacht and Coulson, by contrast, cannot narrate the story of Islamic law from anything but a scriptural plot—as historians, they virtually become scriptural Muslims for the duration of research and writing, and therefore systematically refuse to include in their narrative anything that might suggest that the Scriptural Islam is not how Islam, as a religion, always and forever existed in the past.

The scripturalist plot followed by Schacht and Coulson in telling the story of Islamic law can be handily opposed to the “evolutionary functionalist” plot dominant in Western legal historiography. I borrow the term “evolutionary functionalism” from Robert Gordon’s seminal essay on *Critical Legal Histories*,

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17. GEERTZ, *supra* note 1, at 65.



where he argues that the dominant vision of what can be called “Western law in history” is that of an evolving normative corpus, progressively altering with time to reflect and/or engineer society’s changing functionalist needs. Stated baldly, dominant Western law historiography holds that “the natural and proper evolution of a [progressive] society . . . is towards the type of liberal capitalism seen in the advanced Western nations (especially the United States), and that the natural and proper function of a legal system is to facilitate such an evolution.”<sup>18</sup> This evolutionary-functionalist plot informs the history of both Civil and Common Law systems, just as functionalism also provides the dominant method in comparative law scholarship today.<sup>19</sup>

It is little wonder, then, that relying on Schacht or Coulson’s historiography, many comparatists have posited Islamic law as the consummate *Other* of Western law, the former religious, immutable, and fundamentally a-historical, the latter secular, innovative and historical in the most liberal and progressive sense of the word.<sup>20</sup> If evolutionary-functionalism defines the dominant plot of Western legal historiography, then, by contrast, a type of *dysfunctional resistance to evolution* is what defines its Islamic legal Other. Zweigert and Kötz, in their *Introduction to Comparative Law*, make this point very clearly:

18. Gordon, *supra* note 13, at 59.

19. As the discipline’s reigning methodology since the end of the Second World War, functionalism has been largely celebrated as “comparative law’s principal gift to 20<sup>th</sup> century legal science.” See MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 11 (1994). Over the years of its long reign, a wide host of diverse and often conflicting weaknesses have been ascribed to functionalism: a technical method devoid of humanist sensibility; a fuzzy humanist sensibility that impedes serious policy analysis, or betrays an apolitical sentiment in general. Many of these critiques animate Gordon’s map of new historiographies, see generally Gordon, *supra* note 13, at 107-16. For a clear and critical assessment of functionalism in comparative law, see Günter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT’L L.J. 411 (1985). For other perspectives assessing functionalism, see the special issue, 46 AM. J. COMP. L. 657 (1998); David Kennedy, *The Methods and Politics of Comparative Law*, in *COMPARATIVE LEGAL STUDIES, TRADITIONS AND TRANSITIONS* (Pierre Legrand & Roderick Munday eds., 2003). For a general introduction to the history of functionalism in the social sciences, see INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 5838-44 (2002). For the first two leading expositions of functionalism, see AUGUSTE COMTE, *CULTURE ET CIVILIZATION* (1969); HERBERT SPENCER, *THE PRINCIPLES OF SOCIOLOGY* (1909). Durkheim’s application of functionalism as the method of the emerging discipline of sociology is itself a combination of Comte and Spencer’s insights. Durkheim’s analysis is based on the idea that functionalism alone cannot explain everything, and adds a series of causal analyses that complement his functional explanations. See generally ÉMILE DURKHEIM, *DE LA DIVISION DU TRAVAIL SOCIAL* (1893); ÉMILE DURKHEIM, *LES FORMES ÉLÉMENTAIRES DE LA VIE RELIGIEUSE* (1912).

20. See, e.g., RENÉ DAVID, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* (1982) (discussing Islamic law as a non-Western “family” of law); Ian Edge, *supra* note 10, at xv (referring to Islamic law as “one of the major non-western legal systems in the world today”); RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 283-313 (1998) (addressing the “problem of classifying legal systems” where Islamic law fits by default as the Other of western law); JOHN H. MERRYMAN ET AL., *LAW IN RADICALLY DIFFERENT CULTURES* 5-15 (1983) (noting what distinguishes Western law and culture from the Islamic variant), and also at 16-39 (specifying how the heritage of Islamic law complicates Egyptian receptions of French legal transplants).

Islamic law is in principle immutable, for it is the law revealed by God. Western legal systems generally recognize that the content of law alters as it is adapted to changing needs by the legislator, the judges, and all other social forces which have a part in the creation of law, but Islam starts from the proposition that all existing law comes from ALLAH who at a certain moment in history revealed it to man through his prophet MUHAMMAD. Thus Islamic legal theory cannot accept the historical approach of studying law as a function of the changing conditions of life in a particular society. On the contrary, the law of ALLAH was given to man once and for all: society must adapt itself to the law rather than generate laws of its own as a response to the constantly changing stimulus of the problems of life.<sup>21</sup>

The most swiftly intuitive left-of-center response to the above quote is to charge Zweigert and Kötz (and by default Schacht and Coulson) with adopting an Orientalist view of Islamic law.<sup>22</sup> Yet my goal in the following pages is *not* to critique dominant Islamic law historiography for committing such method-crimes of *Orientalism* as Said expounded in his widely influential book. Rather, I argue the label “Orientalist” is too unsatisfying a description for the overarching methodology informing Schacht and Coulson’s scholarship—not least because the plot underpinning their historiography is also shared to a large extent by leading Egyptian Muslim comparative lawyers as well.<sup>23</sup> Moreover, it is by reading Schacht and Coulson that I have come to learn a great deal about many things we might call Islamic law, and despite setting up their books as my chosen target of attack here, I do so principally to demonstrate a particular *plot* in writing Islamic law history, and thus still find their books immensely learned and thoughtful and in that sense still subscribe to much of the historical details expounded therein.

With some requisite caveats thus exhausted, let me now turn to fleshing out what I think are the four foundational premises that define the plot of dominant Islamic law historiography as penned by Schacht and Coulson. This will be followed by a more careful consideration for why these premises might best be tagged collectively as representing a *scripturalist* (as opposed to *Orientalist*) method of historiography.

#### A. *The Four Premises of Dominant Historiography*

What follows is something of a laundry list for Islamic law history, summarized and distilled into four basic premises. As such, these premises might strike veteran scholars as an outrageously reduced way-macro guidebook, a sort of *all-you-wanted-to-know-in-five-minutes* about the life and times of “Islamic law” past. My description of Schacht and Coulson’s arguments is also bound to appear lacking in the variegated subtlety that informs and indeed distinguishes these two scholars’ work. But even if an impressive amount of detail is left out-

21. K. ZWIGERT & H. KÖTZ, 1 AN INTRODUCTION TO COMPARATIVE LAW 373-74 (1987).

22. On defining the charge of *Orientalism* as used by Edward Said, see *infra* pp. 28-33.

23. See *infra* pp. 38-39.

side the picture I am about to paint here, I still think most veterans in the field would nod in affirmative acknowledgement at the broad and thick brushstrokes in which the four premises are described below.

*1. Islamic Law is Shari'a—Shari'a is the subject of Islamic legal history*

Before a single word is written on the history of Islamic law, scholars writing in the dominant historiography make the following implicit though important move: they define their subject of historical investigation as the *shari'a*, and only tangentially explain that choice as the humdrum outcome of an already predicated translation. This move is so implicit, it does not even merit passing discussion by Schacht and Coulson in their foundational textbooks on “Islamic law” history. Instead, it is best discerned by examining how these two authors structured their books and what terminological choices they made. In a striking way, Schacht and Coulson represent mirror reflections of the same foundational premise: Islamic law is *shari'a*, *shari'a* is Islamic law, and the two terms are interchangeable, one in Arabic, the other in English.

To begin with Schacht's *Introduction to Islamic Law*, the book proceeds without once defining the term *shari'a*, and the word does not appear in the table of contents or the index. Instead, Schacht relied on the term “Islamic law” to reference his overall subject of historical inquiry, using *shari'a* only sparingly throughout the book, and always then as synonymous to “Islamic law.” The term is defined once, however, in the book's glossary, and the definition there tells us two things: first, that the words “*shar*” and “*shari'a*” are both the Arabic names of the sacred law of Islam, and hence apply to everything written on “Islamic law” from page one of Schacht's *Introduction* onwards; and, second, that *shari'a* can be referenced as a negatively defined term, its meaning explained in opposition to what it is not, namely *siyasa*, or administrative justice.<sup>24</sup>

Coulson's *History of Islamic Law* also uses the terms “*shari'a*” and “Islamic law” interchangeably. In contrast to Schacht, however, Coulson describes his subject of historical inquiry as *shari'a* throughout the book, and resorts to the term “Islamic law” only sparingly as a synonym. And while Schacht's Arabic glossary defines “*shari'a*” as mentioned above, the same term is understandably absent from Coulson's glossary since the word “*shari'a*” applies to the subject of his entire book.

If Schacht and Coulson use the terms “Islamic law” and “*shari'a*” with such interchangeable ease, it is because both scholars theorize the law's internal logic for normative legitimacy on the same lines. Specifically, they both interpret the *shari'a* as a “divine,” “religious,” or “sacred” law representing the will of God as expressed in revealed scriptures to the Prophet Muhammad.<sup>25</sup> There-

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24. “*shar*’, *shari'a*, the sacred law of Islam, 1, and *passim*; opposed to *siyasa*, administrative justice.” SCHACHT, *supra* note 5, at 302.

25. See generally SCHACHT, *supra* note 5, at 199-211; COULSON, *supra* note 6, at 1-9.

fore, what makes past law deserve historical study as Islamic law or *shari'a* is the law's conformity to a particular theory of jurisprudence that defines its legitimate normative sources and expounds its proper tools of interpretation. The Arabic term both Schacht and Coulson offer for this theory of jurisprudence is *usul al fiqh*, or *fiqh* for short. The normative corpus of black-letter rules and standards determined in accordance with its tenets is what both authors interchangeably call *shari'a* or Islamic law.<sup>26</sup>

Understood as the jurisprudential framework grounding Islamic law's revealed or sacred normative legitimacy, both Schacht and Coulson describe *fiqh* in terms very much akin to the idea of separation of powers. Under *fiqh*, the right to legislate resides only with God; His legislation is known to man in the scriptural form of divinely-sanctioned texts, and the role of human reason is to discover that divine law and adjudicate all disputes in accordance with its revealed norms. The *shari'a* is therefore the corpus of rules and standards with either (1) a direct scriptural basis in the *Qur'an*, the *Sunna* (Prophetic tradition), and *Ijma'* (the consensus of the community), or (2) *shari'a* represents the myriad rules and standards derived from these three scriptural sources of law by way of analogical reasoning, or *qiyas*. The jurist operating under these *fiqh*-commanded sources of law is referred to as *faqih* (pl. *fuqaha'*), while *ijtihad* is the term Schacht and Coulson use to describe the intellectual process by which a *faqih* derives concrete *shari'a* norms from these sources of law.<sup>27</sup>

Following the above understanding of *shari'a* sources, Schacht and Coulson summarize the steps a *faqih* seeking to find the divinely sanctioned answer to any legal problem as follows:<sup>28</sup> the Muslim jurist must first examine the *Qur'an* for a revealed law on the issue researched, and if the holy text proves silent on the issue, the *faqih* should then move on to the second source of Islamic law, namely the *Sunna* or "tradition" as laid out by Prophet Mohammed, and typically located in verbal sayings, or *hadiths*. In doing so, the jurist uses six canonical collections that report written *Sunna*. Their authenticity has been confirmed under the rubric of *Ilm al-rijal*, or the "science of men," and the reliability of their chain of transmitters, or *isnad*, has been judged as either widely transmitted (*mutawatir*), well-known (*mashhur*), or solitary (*khobar al-wahid*). If *Sunna* in its various degrees of reliability proves silent on the issue researched, or if the *faqih* is not convinced by the *isnad* of available *Sunna*, he should then turn to the third scriptural source of *shari'a*, namely *Ijma'* or the

26. Schacht's glossary defines *usul al fiqh* as "the 'roots' or theoretical basis of Islamic law"; SCHACHT, *supra* note 5, at 303; Coulson in turn defines it as "the sources of law or the principles of jurisprudence"; COULSON, *supra* note 6, at 235.

27. This is summarized in Schacht's comment regarding *usul's* introduction of a legal theory "which not only ignored but denied the existence in it of all elements that were not in the narrowest possible sense Islamic, and which reduced its material sources to the *Qur'an* and the example of the Prophet." See SCHACHT, *supra* note 5, at 3.

28. My description is intentionally simplified here. For more details, see generally SCHACHT, *supra* note 5, at 37-48; COULSON, *supra* note 6, at 75-85.

consensus of the community of the faithful.<sup>29</sup> The latter, however, has been commonly dismissed under *fiqh* as an essentially dead source of law. Following the success of Arab military conquests and the dispersion of Muslims across Islam's nascent empire, *Ijma'* became impossible to ascertain in practice, and so its normative legitimacy as a source of *shari'a* is usually limited to consensus preceding the Prophet's death in 632 CE.

As is often the case, the above three scriptural sources will not always yield a rule to settle the question at hand. In that case, the jurist should resort to what is effectively the fourth and perhaps most important source of *shari'a* norms, namely *qiyas*. In its most rudimentary form, *qiyas* is a form of analogical reasoning through which prescribed norms in the *Qur'an*, *Sunna* or *Ijma'* can be extended to unregulated legal problems if they share the same *'illa*, or *ratio legis*. The most typical example here is the *Qur'anic* prohibition on drinking wine. While the holy text does not touch on other forms of alcohol, jurists argued that the *'illa* of prohibiting wine-drinking lay in the substance's intoxicating effect, and relying on *qiyas* extended the wine prohibition to all other intoxicating substances.<sup>30</sup>

Thus, Schacht's history of Islamic law is divided into three principal stages: first, a "formative" period extending from the death of the Prophet in 632 CE up to the middle of the ninth century, a period in which Muslim jurists moved away from the seemingly irreconcilable conflict between two conceptions of Islamic law (namely *ahl al ra'y*, or party of opinion, and *ahl al-hadith*, or party of tradition), and instead came to settle on the general contours of *fiqh* as described above.<sup>31</sup> This was followed by a "classical" period during which *fiqh* flowered into its true coming of age as an integrated legal theory adopted across the four principal schools of jurisprudence, known as *mazhabs*. Each of these schools is named after a founding jurist and are thus called the Maliki, Hanafi, Shafi'i and Hanbali *mazhabs*, and each was historically associated with some regional influence such as the Maliki *mazhab* in Morocco or the Shafi'i *mazhab* in lower Egypt. By the end of the "classical" period (around the mid ninth century CE), all *qadis* were required to be trained under one of these four *mazhabs*, and all were expected to settle disputes in accordance with the authoritative views on the proper *shari'a* law developed under their respective *mazhabs*.<sup>32</sup>

In tracing the move from the "formative" to "classical" periods of *fiqh*, both Schacht and Coulson accredit the jurist Shafi'i (767-820 CE) as the father of Islamic law's legitimation theory by giving *fiqh* its first coherent articulation

29. Both Schacht and Coulson agree that the notion of *Ijma'* changed with time and seems to have settled only in Shafi'i's time. SCHACHT, *supra* note 5, at 67; COULSON, *supra* note 6, at 76-81.

30. On the historical development of the notion of *qiyas* and its eventual distinction from *ra'y*, see SCHACHT, *supra* note 5, at 199-211; COULSON, *supra* note 6, at 72-80.

31. SCHACHT, *supra* note 5, at 15-75.

32. *Id.* at 15-68.

in his treatise *al-Risala*.<sup>33</sup> Shafi'i's primary achievement in that book was to institute a particular mode of mediating the tension between reason and revelation in accounting for the legitimate sources of the *shari'a*. He did so by arguing that while the law itself is contained in the divinely sanctioned sources of the *Qur'an*, *Sunna* and *Ijma'*, there is nonetheless a role for human reasoning in ascertaining the proper *shari'a* by either discovering the law within these three sources, or by extending the rules expounded therein to other non-regulated questions of law through analogical reasoning or *qiyas*. In doing so, Shafi'i is particularly celebrated for two jurisprudential advances: first, developing a doctrine of abrogation which transformed the *Sunna* into an authoritative source of law effectively on par with the *Qur'an*; and, secondly, marshalling a relentless critique against non-scriptural sources of law which relied on human reasoning alone.<sup>34</sup> Following Shafi'i's thesis, all the four *mazhabs* of *fiqh* came into a consensus on the above four sources of *shari'a*, although some disagreement remained in ordering the importance of secondary sources of law among jurists of the four *mazhabs*.<sup>35</sup>

Finally, the third stage in Schacht and Coulson's history of Islamic law starts around the tenth century CE and extends uninterrupted until the colonial encounter, typically marked by Napoleon's invasion of Egypt in 1798. This is known as the *taqlid* period of *fiqh*, commencing with juristic recognition across the four *mazhabs* that the creative power of *ijtihad* had been exhausted (shortly after the death of Shafi'i), and that the role of jurists thereafter lay in the act of *taqlid*, or juristic replication, of each *mazhab*'s founders' scholarship. This historical development is typically referred to as the "closing of the door of *ijtihad*," and is best exemplified by the fact that from the tenth to the nineteenth centuries, Sunni *fiqh* settled on only the four *mazhabs* mentioned above, and no new schools of jurisprudence came to be formally recognized thereafter.<sup>36</sup> In Coulson's words, from the tenth century onwards, "every jurist was an 'imitator' (*muqallid*) bound to accept and follow the doctrine established by his predecessors."<sup>37</sup>

Accordingly, the mass of black letter rules and standards comprising the doctrinal corpus of *shari'a* thus ossified over 800 years (approximately 1000—1798 CE). Historians of Islamic law seeking to ascertain *shari'a*'s substantive legal solutions to specific problems of public or private law during the *taqlid* period mostly relied on the canonical compendia of juristic treatises accepted as authoritative under each of the four *mazhabs*, as well as later commentaries on

33. For the full text, see MAJID KHADDURI, *AL-SHAFI'I'S RISALA* (1997).

34. See generally SCHACHT, *supra* note 5, at 37-48; COULSON, *supra* note 6, at 53-61.

35. On secondary sources of *shari'a*, see generally SCHACHT, *supra* note 5, at 60-62, 152-57; COULSON, *supra* note 6, at 86-102.

36. On *taqlid*, see generally SCHACHT, *supra* note 5, at 69-75; COULSON, *supra* note 6, at 80-85.

37. COULSON, *supra* note 6, at 80-81.

these treatises and legal opinions or *fatawa* issued by later jurists. These treatises all are connected through their exegetical commitment to the *fiqh* theory of separation of powers expounded above, making the history of Islamic law always only the history of God's law, whose source lies in the *Qur'an*, *Sunna*, or *Ijma'*, and whose doctrines are detailed in various juristic texts.

If we turn to the more concrete example of Islamic criminal law, we find that Islamic law jurists working in accordance with the *fiqh* formula for the sources of law have historically classified crimes and punishments under one of three categories, namely *hadd*, *qasas/diyya*, and *ta'zir*—a division that was accepted across the four *mazhabs* of *fiqh* and has been conceptually settled in Islamic criminal law through the “classical” and “taqlid” periods of its history. In essence, Schacht and Coulson summarize the differences between these three conceptual categories of crime and punishment as follows: first, *hadd* offenses entail fixed penalties which are considered to be “the right of God,” meaning the judge has no discretionary power in the *hadd*'s application, and the punishment must be enforced even if the plaintiff forfeits his private standing in the dispute. Second, *qasas/diyya* offenses also entail fixed penalties with no judicial discretion in their application, but these penalties are considered to be the “right of man” and accordingly discretion is invested in the private plaintiff to choose between optional *qasas* and *diyya* penalties. Finally, *ta'zir* offenses do not have prescribed penalties and hence the definition of crime and punishment is left to the discretion of judicial and administrative authorities.<sup>38</sup>

Extramarital sex, or *zina*, is the paradigmatic *hadd* with respect to sexual offenses under *fiqh*. Both Schacht and Coulson report that jurists belonging to the four *mazhabs* are generally in agreement on the following general contours for criminalizing *zina* under *shari'a*:<sup>39</sup> first, the *Qur'an* explicitly prescribes the flogging *hadd* of 100 lashes if the convicted offender were not *muhsan* (that is, if he or she had never consummated a legal marriage).<sup>40</sup> Second, the *Sunna* prescribes the *hadd* of stoning to death if the offender were *muhsan*, whether male or female.<sup>41</sup> And finally, these prescribed *hadd* punishments for *zina* cannot be enforced unless the *shari'a*'s evidentiary barriers to conviction are satisfied. In this, both Schacht and Coulson are once again in full agreement that *shari'a*

38. See generally on criminal law and procedure, SCHACHT, *supra* note 5, at 175-98; COULSON, *supra* note 6, at 120-34.

39. On *zina*, see generally SCHACHT, *supra* note 5, at 175-78; COULSON, *supra* note 6, at 90-91, 157-59.

40. THE QUR'AN 24:2. “The fornicator and the fornicatress flog each of them with a hundred stripes. Let not pity withhold you in their case, in a punishment prescribed by Allah, if you believe in Allah and the Last Day and let a party of the believers witness their punishment.” MEANINGS OF QUR'AN, at 466.

41. For the leading *Sunna* on the subject, see 8 SAHIH AL BOKHARI, hadith no. 819. For the text of an alternative *Sunna* to the same effect in Arabic, see ABDEL-QADER OUDA, AL-TASHRI'A AL-JINA'I AL-ISLAMI MUQARANAN BIL-QANUN AL-WAD'I 377-79 (no publication date). The one dissenting opinion is that of the Azareqa, an off-shoot of the Khawarij. They refuse to rely except on *hadith mutawatir* and do not consider the *hadith* as such.

does not permit circumstantial evidence as a method of proof generally, and that in the case of *zina* particularly, conviction can be found only by relying on (a) the confession of the suspect, or (b) the witness testimony of four males of good religious and social standing who can attest to having seen the same act of *ilaj*, or penetration.<sup>42</sup>

In sum, for Schacht and Coulson, the study of Islamic law is the study of a corpus of black letter rules and standards known as the *shari'a*. The *shari'a*'s normative legitimacy rests on it being God's law, and the term therefore only applies to those doctrines adduced in accordance with *fiqh*. The term "*fiqh*" is commonly described by Schacht and Coulson as "Islamic jurisprudence," since it provides the theoretical framework prescribing *shari'a*'s scriptural sources (*Qur'an*, *Sunna*, and *Ijma'*). Additionally, *fiqh* articulates the role of human reason in interpreting these sources and expanding their application through analogical reasoning or *qiyas*.

Given how the terms *fiqh* and *shari'a* are so intertwined, Schacht and Coulson effectively recount the history of Islamic law as developing in three phases. First, Islamic law struggled towards the ideal theory of *fiqh* during the "formative" period (632-850 CE). Secondly, it flowered into that ideal in the "classical" period (850-950 CE) during which Shafi'i articulated his theory on sources and interpretation, and the four *mazhabs* coalesced around Shafi'i's epistemological framework. From there, Schacht and Coulson move on to the third phase in the history of Islamic law, namely the *taqlid* (replication) period, during which the doctrinal corpus of *shari'a* ossified under the immutable sources and interpretive tools of *fiqh*. Indeed its rules and standards remained fundamentally the same until modernity shocked *shari'a* out of this millennial slumber with Napoleon's invasion of Egypt in 1798.

In constructing the above historical narrative, Schacht and Coulson rely on the *Qur'an* and *Sunna* as foundational reference texts. Yet both scholars are also aware that the *Qur'an* and *Sunna* alone will yield little by way of historical knowledge of the substantive, procedural and evidentiary corpus of *shari'a* black-letter norms. For that, they both turn to a wide variety of juristic treatises

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42. Despite agreement on the above, jurists across the four *mazhabs* nonetheless disagreed on issues of detail, such as whether "exile" is also a *hadd* that should be coupled with the *Qur'an* sanctioned penalty of flogging for non-*muhsan* offenders? On this issue, the majority opinion among Shafi'i and Hanbali *mazhabs* holds exile to be a required *hadd* whose normative source is prophetic *Sunna* authenticated by authoritative *isnad*; jurists of the Maliki *mazhab* generally agreed with that view but limited exile to only male offenders; and by contrast, majority opinion among jurists of the Hanafi *mazhab* argue that exile is not explicitly prescribed under the *Qur'an*, *Sunna* or *Ijma'* and is therefore merely a *ta'zir* punishment whose application is left in the discretionary power of the judge. Jurists across the four *mazhabs* also disagreed on the proper meaning of "exile," with the majority opinion among Maliki and Hanafi schools holding it to mean imprisonment in a town other than the one where *zina* was committed, while Shafi'i and Hanbali jurists limit the *hadd* to exile in another town, under surveillance but without imprisonment. See generally N.J. Coulson, *Regulation of Sexual Behavior under Traditional Islamic Law*, in *SOCIETY AND THE SEXES IN MEDIEVAL ISLAM* 63-68 (Giorgio Levi Della Vida ed., 1979).



and legal opinions authored across the three phases of Islamic legal history, and almost always belonging to one of the four *mazhabs* of *fiqh*. It is those juristic treatises that truly constitute the primary source materials for the field's dominant tradition in historiography, and it is there that *shari'a* law can be discovered. It is therefore no surprise that both Schacht and Coulson regularly describe *shari'a* as an extreme case of pure "jurist law."

2. *Shari'a is not Siyasa*—*The history of Islamic law is NOT the history of siyasa*

The second foundational premise in dominant historiography stems from the first by default: *Islamic law is shari'a, shari'a is not siyasa, and the latter is therefore NOT the subject of Islamic legal history properly defined*. The logic of this premise is best exemplified in Schacht's glossary of Arabic terminology where *shari'a* is defined as the "sacred law of Islam" and then immediately contrasted to *siyasa* for further definitional clarity.<sup>43</sup> Therefore, the question to ask here is: what is *siyasa* and by what logic is it the binary opposite of *shari'a*? An initial answer can be found by examining the following quote, where Schacht argues that :

We can distinguish three types of legal subject matter . . . according to the degree to which the ideal theory of the *shari'a* succeeded in imposing itself on the practice[s of *qadi* courts]. Its hold was strongest in the law of family (marriage, divorce, maintenance, &c.), of inheritance, and of pious endowments; it was weakest, in some respects even non-existent, on penal law, taxation, constitutional law, and the law of war; and the law of contracts and obligations stands in the middle.<sup>44</sup>

Schacht thus provides an assessment of *shari'a*'s application in historical practice, one that is effectively limited to the laws of personal status and religious endowments. The third category, namely *shari'a* law on contracts and obligations, received only partial application throughout the history of Islamic law, since its norms historically competed (and often conflicted) with two other sets of norms governing what we might call private law relations. The first is '*orf*, or customary practices. The second is legal subterfuges, or *hiyal*, often in the form of inserting conditions, or *shurut*, in contractual agreements, which though done in reliance on the internal logic *fiqh*, effectively subverted its requirements by turning customary practices into contractual obligations. Between '*orf*, *hiyal*, and *shurut*, Schacht finds it safe to argue that private law questions of property, obligations, torts, contracts, and the like, were only partially governed by *shari'a* and often largely supplemented by institutional structures and normative arrangements that he fleetingly describes as secular.<sup>45</sup>

43. SCHACHT, *supra* note 5, at 302.

44. *Id.* at 76.

45. Coulson arrives at a similar view in another context, where he argues that "any appreciation of the part played by custom and case-law in Islam must rest upon the recognition of the gulf that exists between *Shari'a* doctrine on the one hand and actual Muslim legal practice on the other."

The third and final category described in the above quote, namely penal law, taxation, constitutional law, and the law of war, can be described as public law in liberal terminology since the subject matters all involved the state on some level. Furthermore, it is this *shari'a* public law that Schacht found most lacking in practical application throughout the history of Islamic Law—and indeed, in some respects, even non-existent to begin with. And it is also in this realm of public law, where *shari'a* application has historically been deemed absent, that we find the realm of *siyasa's* best-exemplified applications.

Schacht locates the development of *siyasa* in the larger picture of an Islamic empire expanding to become a major military power pushing the limits of both political geography and material wealth. The “formative” period of *shari'a* history begins also with the empire's first conquests outside Arabia, and ends as the conquests reach their apogee with the invasion of the Iberian Peninsula, roughly corresponding to the end of the Ummayyad dynasty (661–750 CE). The “classical” period of *shari'a* history, by contrast, takes places under the early Abbasids (750–850 CE), a dynasty that first sought to establish its legitimacy by displaying its rulers' commitment to the application of *shari'a*. It is therefore understandable that during this period, the four *mazhabs* solidified, the judiciary was formally organized, and *qadis* were officially instructed to adjudicate in accordance with *mazhab*-associated doctrines.

And yet, where questions of public law were concerned, the Abbasids and the Ummayyads had failed to follow existing *shari'a* on issues of public law, and especially so where criminal justice was concerned. Schacht offers us two reasons for this failure. First, the survival of pre-Islamic administrative traditions into the bureaucracy of the nascent Islamic empire led to the coexistence of *shari'a* courts with secular normative arrangements. Second, the formalistic procedures and high evidentiary barriers to conviction associated with *hadd* punishments in *shari'a*, which, if observed strictly, would rarely lead to the conviction of offenders and therefore threaten the maintenance of public order in the empire.

Beginning with the first reason, Schacht argues that the Abbasids, and possibly the Ummayyads, adopted a number of administrative structures that predated the Arab conquest and already existed under the Byzantine and Persian Empires. As the Islamic empire settled during the classical period of *fiqh* into the orderly administrative state of the early Abbasids, two significant examples of these pre-Islamic administrative structures were subsumed into the state bureaucracy, and entrusted by the caliph to settle disputes in accordance with laws whose normative legitimacy stood outside *fiqh*.

The first of these pre-Islamic administrative structures is *nazar fil mazalim*, or *mazalim* for short, which the Abbasids and Ummayyads borrowed from the Sassanian kings.<sup>46</sup> Under *mazalim*, the Caliph heard, investigated and settled

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N.J. Coulson, *Muslim Custom and Case Law*, 6 DIE WELT DES ISLAMIS 13, 23 (1959).

46. SCHACHT, *supra* note 5, at 51.

complaints “concerning miscarriage or denial of justice or other allegedly unlawful acts of the [q]adis, difficulties in securing the execution of judgments, wrongs committed by government officials or powerful individuals and the like . . . [as well as] the more important law suits concerning property.”<sup>47</sup> This later developed into a full-fledged Court of Complaints that survived in alternative forms throughout Ottoman times.

The second pre-Islamic administrative tradition Schacht discusses is the office of market inspector or *muhtasib*, who is entrusted with passing summary judgments on issues ranging from building and trade regulations to drunkenness and theft, often without much attention to the procedural (or substantive) norms of *shari'a*.<sup>48</sup> Much like *mazalim* jurisdiction, Schacht also argues that the office of *muhtasib* had already existed in Byzantine times, and was adopted by the Ummayyads and “superficially Islamicized” by the Abbasids who entrusted the *muhtasib* with enforcing the duty to “command right and prohibit wrong.”<sup>49</sup> The office of *muhtasib* also survived into Ottoman times and possibly mutated into the powers of the police or *shurta* from the sixteenth century onwards.

The above two administrative traditions encroached on the jurisdiction of *shari'a* courts and therefore posed a difficulty for any Islamic ruler committed to applying the *shari'a*: while the *shari'a*'s legitimacy rested in its nature as a divinely revealed law expounded by *fiqh* scholarship, *mazalim* and the *muhtasib*, by contrast, were both secular-based moral policy considerations. Unlike the *shari'a*, their legitimacy rested on the political powers of the caliph. This situation was particularly difficult under the Abbasids since, according to Schacht, “the main features of the *shari'a* had already been definitely established . . . [and] Islamic law had come to be recognized, in theory at least, as the only legitimate norm of behavior for Muslims.”<sup>50</sup> Both *mazalim* and *hisba* thus required a theory of legitimation that fit them coherently under the *fiqh* doctrine of distribution of powers where the right to legislate resides only with God. This theory of legitimation, which later came to be known as *siyasa shar'iyya*, finds its earliest theoretical manifestation in a solution developed by the Abbasids. Schacht explains:

the caliph himself had to be incorporated into the [*shari'a*] system. . . . The solution which was adopted was to endow the caliph with the attributes of a religious scholar and lawyer, to bind him to the sacred law in the same way that the [q]adis were bound to it, and to give him the same right to the exercise of personal opinion as was admitted by the schools of law.<sup>51</sup>

The explicit theory Schacht is referring to here is *siyasa shar'iyya*, which does not emerge in its fully developed form until the thirteenth century, under

47. *Id.*

48. *Id.* at 51-52.

49. *See infra* pp. 48-51.

50. *Id.*, at 52.

51. *Id.* at 53.

the Mamluk dynasty. Schacht defines *siyasa shar'iyya* as "the discretionary power of the sovereign which enables him, in theory, to apply and to complete the sacred Law and, in practice, to regulate by virtually independent legislation matters of police, taxation, and criminal justice." Moreover, "its existence is admitted even by the strict theory of Islamic law."<sup>52</sup>

As we will see, Schacht and Coulson hesitate to admit that *siyasa* is occurring by the "strict theory of Islamic law." For Coulson, *siyasa* is defined as "government in accordance with the revealed law,"<sup>53</sup> and he accounts for its emergence along similar lines to those of Schacht above, though he does elaborate on the second reason for *siyasa*'s emergence, namely the cumbersome rules of evidence and the "rigidly formulaic and mechanical nature of the *Shari'a* procedure" which left little room for the *qadi* to exercise discretion.<sup>54</sup> Coulson argues that this was particularly problematic in the area of criminal law where political power could not tolerate unwieldy *shari'a* procedures. Jurisdiction was thus transferred from the *shari'a* courts to the two other administrative bodies described above: first, the *muhtasib*, whom Coulson characterizes as "undoubtedly the most typically Islamic of the subsidiary administrative bodies entrusted with law application,"<sup>55</sup> and who had the power to "deal summarily with petty offences committed in the market place."<sup>56</sup> Second, Coulson argues criminal justice rested in the hands of police, or the *wali al-jara'im*. The role of the police is described as a particular instance of the *mazalim* jurisdiction, which gradually expanded beyond its original scope of addressing complaints against government officials to include important property disputes, particularly of landholdings granted by concession from the sovereign. Indeed, for Coulson, the *muhtasib* is also regarded as an instance of *mazalim* jurisdiction, which, unlike the *shari'a* courts,

considered circumstantial evidence, heard the testimony of witnesses of dubious character, put them on oath and cross-examined them; they imprisoned suspects, convicted on the basis of known character and previous offences, might make the accused swear the oath by a local saint instead of on the Qur'an, and in general could take such measures to discover guilt, including the extortion of confessions as they saw fit.<sup>57</sup>

Next to *mazalim* and *hisba*, Schacht and Coulson also discuss a third example of *siyasa* jurisdictions, namely the codes of law, or *qanuns*, which Ottoman sultans issued from the mid fifteenth century onwards, but which originated in the Abbasid and Umayyad empires. Schacht recognizes that the early Ottoman sultans who issued the most prominent *qanuns* were pious Muslims who

52. *Id.* at 54.

53. COULSON, *supra* note 6, at 129.

54. *Id.* 126.

55. Unlike Schacht who finds it a superficially Islamic institution of Byzantine origins, see *supra* p. 18.

56. *Id.* at 131.

57. *Id.* at 127-28.

genuinely sought to bring their legal system in conformity with the *shari'a*. Yet Schacht does not seem convinced that the Ottomans reliance on *siyasa* to issue *qanuns* was not actually a breach of *shari'a*. His conflicted assessment can be discerned in his description of *qanuns* below:

In perfect good faith they [the Ottomans] enacted *kānūns* or *kānūn-nāmes* which were real laws, convinced that in doing so they neither abrogated nor contradicted the sacred Law but supplemented it by religiously indifferent regulations. In fact the very first of these Ottoman *kānūn nāmes*, that of Sultan Mehemmed III (1451-81), repeatedly refers to Islamic law and freely uses its concepts. It treats, among other matters (office of the Grand Vizier, court ceremonial, financial ordinances), of penal law; it presupposes that the hadd punishments are obsolete and replaces them by *ta'zīr*, i.e. beating, and/or monetary fines which are graded according to the economic position of the culprit. In fact, these provisions go beyond merely supplementing the *shari'a* by the *siyasa* of the ruler, and amount to superseding it . . . The so called *kānūn-nāme* of Sultan Süleymān I, which in its major parts seems to have been compiled previously under Bāyezīd II (1481-1512), shows a considerable development along these lines; it treats in greater detail of military fiefs, of the position of non-Muslim subjects, of matters of police and penal law, of land law, and of the law of war."<sup>58</sup>

Though Schacht finds the Ottomans acting in "perfect good faith" to supplement the *shari'a* with "real laws," Schacht nonetheless remains unconvinced that these *qanuns* merely supplemented the *shari'a* with the will of the ruler. Instead, he finds the *qanuns* superseded the *shari'a* altogether. A good example of this is *shari'a* rules on adultery, or *zina*. As aforementioned, *zina* is a *hadd* crime under *shari'a*, and the four *mazhabs* that the required punishment for *zina* is either stoning to death if the perpetrator is *muhsan*, or flogging (and potential exile) if the offender is non-*muhsan*. These *hadd* punishments, however, came with such high evidentiary barriers to conviction, one might wonder how they were ever applied in practice.<sup>59</sup> Therefore, Ottoman *qanuns* from Suleyman I onwards, laid down different punishments for *zina*. These punishments applied whenever the suspect could not be convicted under strict *shari'a* rules. Suleyman's *kanunname*, for example, and the earlier Dulkadir code, both institute monetary fines as the proper punishment for *zina* where the *shari'a* is not applied.<sup>60</sup>

It is therefore not surprising that in assessing *mazalim*, the *muhtasib*, or the *qanuns*, and indeed in discussing *hiyal*, *shurut*, and customary commercial law more generally, Schacht explains that:

when the specialists of Islamic law had to take notice of them, the outlines of the system had already been firmly laid down, and this is why strict theory could admit them, as it were, only on sufferance. Still later developments, such as the Ottoman *kānūn-nāmes*, were completely ignored by the theory.<sup>61</sup>

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58. SCHACHT, *supra* note 5, at 91.

59. For the rarity of *rajm* application, see URIEL HEYD, *STUDIES IN OLD OTTOMAN CRIMINAL LAW* 263 (V.L. Ménage ed., 1973) at 263.

60. See generally *id.* at 95, 134.

61. SCHACHT, *supra* note 5, at 208.

Much like Schacht, Coulson also recognizes *qanuns* as formally legitimated by the doctrine of *siyasa shar'iyya*, but nonetheless maintains a wary assessment of *siyasa* as merely providing a veneer of *fiqh* legitimacy for rules that were essentially secular and therefore an exception to *shari'a* itself. Thus, Coulson uses the term "extra-*Shari'a* jurisdiction"<sup>62</sup> to collectively describe the *mazalim*, *muhtasib*, the police, and other normative arrangements and institutional structures legitimated under the *siyasa* doctrine, but which cannot be treated "as derivations from any ideal standard."<sup>63</sup> Rather, *siyasa shar'iyya* is viewed as a retroactive way of legitimizing "secular" laws and institutions that do not squarely fit the sacred nature of *shari'a*, but are rather the product of historical developments from the eleventh-century onwards involving a legal doctrine which justified the role the *shari'a* had in the organization of the Islamic state.<sup>64</sup> Unlike Schacht, however, Coulson distinguishes between the *shari'a* and what he calls the "Islamic legal system" and argues that the *shari'a* can only form part of the Islamic legal system, given the role of non-*shari'a* decisions in forming a comprehensive code of conduct.<sup>65</sup>

3. *The binary notion of shari'a/siyasa explains the historical nature of Islamic law up to the colonial encounter—Shari'a is law in books, Siyasa is law in action*

Detailed between the two covers of Schacht's book is a history of an "Islamic law" that is sacred and religious, a law of immutable rules and standards that resist variance over time, a law whose punishment for adultery, or *zina*, is the same when Schacht published his book as it was over a thousand years earlier. Schacht explains this traditional nature of "Islamic law" in history as a result of its being an "extreme case of 'jurists' law'" whose formation "took place neither under the impetus of the needs of practice, nor under that of juridical technique, but under that of religious and ethical ideas."<sup>66</sup> In adopting this view, Schacht makes it clear that he is merely following the internal logic of *fiqh*, *shari'a's* legitimation theory, which was introduced at a very early stage of Islamic law's historical development and thus tied *shari'a* to a "legal theory which not only ignored but denied the existence in it of all elements that were not in the narrowest possible sense Islamic, and which reduced its material sources to the Koran and the example of the Prophet."<sup>67</sup> Given this historical development, it is no wonder that Schacht concludes his assessment of the "nature" of Islamic law by arguing that at "the very time that Islamic law came into existence, its

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62. COULSON, *supra* note 6, at 134.

63. *Id.* at 134.

64. *Id.* at 129.

65. *Id.* at 134; *see also id.* at 147-48.

66. SCHACHT, *supra* note 5, at 209.

67. *Id.* at 3.

perpetual problem, that of the contrast between theory and practice, was already posed.”<sup>68</sup>

Along the same lines, Coulson also starts his introduction by assessing the “nature” of *shari’a* as developed under *fiqh*. Much like Schacht, he also finds the *shari’a* to be an “extreme example of a legal science divorced from historical considerations,”<sup>69</sup> with immutable sources in the *Qur’an*, *Sunna* and *Ijma’* that offer one right answer to every legal question across time and space, and therefore with “no notion of the law itself evolving as an historical phenomenon closely tied with the progress of society.”<sup>70</sup> And while Coulson does recognize the historical development of *fiqh* in determining the sources of Islamic law and refining its interpretive tools, this historical development is largely limited to the “formative” period between the seventh and ninth centuries, after which the “the law was cast in a rigid mould from which it did not really emerge until the twentieth century.” It is therefore little wonder that Coulson, much like Schacht, concludes:

From these brief remarks on the nature of the *shari’a*, it will be evident that the notion of historical process in law was wholly alien to classical Islamic jurisprudence. Legal history, in the Western sense, was not only a subject of study devoid of purpose; it simply did not exist.<sup>71</sup>

And yet, as we saw in the second premise discussed above, both Schacht and Coulson did recognize in passing the development of legal phenomena that fit the “Western sense” of a historically evolving law interacting with larger changes in society. For example, both scholars recognize the legal subterfuges of *hiyal* and *shurut* which private law actors took to inserting into their contractual arrangements; both scholars recognize the customary commercial practices, or *’urf*, which historically developed and changed to meet the dynamic needs of trade in a rich and decidedly commerce-oriented Islamic society for the last millennium if not more. Moreover, following Schacht and Coulson we can also recognize variations of a dynamic changing law in the *siyasa* emanations of *mazalim*, *hisba*, and *qanun* jurisdictions; we see a law that was historically instrumentalized to fulfill the political ends of public sovereign power, to maintain law and order, to administer the state, its employees, and its markets, and to settle property disputes of special significance, all this, needless to say, by evolving to meet the needs of both sovereign and people.

The above forms of functionally evolving law received only passing mention in Schacht and Coulson’s histories of “Islamic law,” and for good reason, for none fit under “Islamic law” as a subject of historical investigation. Rather, if anything, these functionally evolving historical forms of law are nothing but aberrations that confirm the norm, that serve to prove that *shari’a*, properly un-

68. *Id.* at 209.

69. COULSON, *supra* note 6, at 1.

70. *Id.* at 2.

71. *Id.* at 5.

derstood under *fiqh*, is by nature an eternal ideal of the books eternally ignored in practice. In particular, the very historical nature of Islamic law lies in this dichotomy between *shari'a* and *siyasa*, a dichotomy of religious law in the books and political power in action. Schacht argues that this theory/practice dichotomy lasted for over a millennium, from the closing of the gate of *ijtihad* up to the colonial encounter in the nineteenth century, a millennium in which "a balance established itself in most Islamic countries,

between legal theory and legal practice; an uneasy truce between the '*ulamā*' ('scholars'), the specialists in religious law and the political authorities came into being. The '*ulamā*' themselves were conscious of this; they expressed their conviction of the ever increasing corruption of contemporary conditions (*fasad al-zamān*), and, in the absence of a dispensing authority, formulated the doctrine that necessity (*darūra*) dispensed Muslims from observing the strict rules of the Law. Whereas traditional Islamic governments were unable to change it by legislation, the scholars half sanctioned the regulations which the rulers in fact enacted, by insisting on the duty, already emphasized in the *Koran* (sura iv. 59, 83, and elsewhere), of obedience to the established authorities. As long as the sacred Law received formal recognition as a religious ideal, it did not insist on being fully applied in practice.<sup>72</sup>

The dichotomy *shari'a/siyasa* therefore squarely corresponds to the dichotomy theory/practice described by Schacht above, and reflects a larger dichotomy between legitimate God's law under *fiqh* and human political laws under *siyasa*. At one end of the dichotomy, we find *shari'a* whose mode of legal thought Schacht describes as a "casuistical method which is closely connected with the structure of its legal concepts," something that makes *shari'a* norms by definition always "the outcome of an analogical, as opposed to an analytical, way of thinking," and therefore leaves *shari'a* as an immutable legal system whose doctrines are epistemologically incapable of evolution.<sup>73</sup> At the other end of that dichotomy, we find the opposite logic in *siyasa*, a policy-driven logic seeking the vindication of secular ethico-utilitarian values, not of God's revealed law, and whose *qanūns* in particular do not count as *shari'a* since "[s]trict Islamic law is by its nature not suitable for codification because it possesses authoritative character only in so far as it is taught in the traditional way by one of the recognized schools [i.e. *mazhabs*]."<sup>74</sup> These many differences between the unevolving *shari'a* and the ever-evolving *siyasa* can thus be summarized under the basic binary *shari'a/siyasa*:

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72. SCHACHT, *supra* note 5, at 84.

73. *Id.* at 5.

74. *Id.* at 92.



<i>Shari'a</i>	<i>Siyasa</i>
Sacred Law	Profane Law
Divine revelation	Human reasoning
<i>Qur'an, Sunna, Ijma</i>	Secular ethics/utility
Casuistical qiyas	Policy considerations
Jurists' Law	Sovereign's Law
Qadi Courts	Mazalim/Hisba
Multivocal Mazhabs	Univocal Qanun
Immutable	Changing
Theory	Practice
Law	Politics

4. *The binary tradition/modernity explains the historical development of "Islamic law" from the colonial encounter to the present day—Shari'a is ossified and traditional, Western law is functionally-evolving and modern*

Notably, Schacht's *Introduction to Islamic Law* begins and ends with an identical collection of words rearranged to express a single homologous reflection on the historical *nature* of "Islamic law" from its formative period up to the colonial encounter. The book's *introductory* section starts by informing readers that the "traditionalism of Islamic law, typical of a 'sacred law', is perhaps its most essential feature."<sup>75</sup> Some two hundred pages later, Schacht pens his very last sentence thus: "The traditionalism of Islamic law, which is perhaps its most essential feature, is typical of a 'sacred law.'"<sup>76</sup> There is no doubt about it, then: *Shari'a is traditional law exemplified.*

By the same token, Coulson holds out the immutable traditionalism of *shari'a* as responsible for its ensuing clash with modernity. Coulson argues that:

During the Middle Ages the structure of Muslim states and society had remained basically static, and for this reason Shari'a law had proved able to accommodate itself successfully to such internal requirements as the passage of time had produced. But the pressures which now arose from without confronted Islam with an entirely different situation. Politically, socially, and economically, Western civilisation was based on concepts and institutions fundamentally alien to Islamic tradition and to the Islamic law which expressed that tradition. Because of the essential rigidity of the Shari'a and the dominance of the theory of *taqlid* (or strict adherence to established doctrine), an apparently irreconcilable conflict was now produced between the traditional law and the needs of Muslim society, in so far as it aspired to organise itself by Western standards and values. Accordingly there seemed, initially at any rate, no alternative but to abandon the Shari'a and replace it with laws of Western inspiration in those spheres where Islam felt a particular urgency to adapt itself to modern conditions.<sup>77</sup>

Thus between Napoleon's invasion of Egypt in 1798, and the adoption of the "Native Courts" in 1883, a wide array of legal reforms were introduced into the Egyptian legal system and that of the Ottoman Empire more generally.

75. *Id.* at 5.

76. *Id.* at 211.

77. COULSON, *supra* note 6, at 149-50.

Schacht and Coulson provide us with the standard historical narrative discussing these legal reforms, their chronology, and the reasons behind their adoption. The many aspects of this narrative all fit neatly under the great dichotomy contrasting traditional and modern law, the one essentially rigid and Islamic, the other functionally evolving and Western. At its core historiographic framework, Schacht and Coulson's tradition/modernity narrative starts by recognizing that while French occupation of Egypt only lasted three years (1798-1801), the shock of "modernity" hitting Egyptian shores with Napoleonic gunboats, soldiers, and savants, left the Ottoman elite painfully aware of the urgent need to instigate domestic reforms necessary to catch up with the material advancement of Europe and meet the rising colonial challenge. If the legal order of the Ottoman Empire had once been far superior to that of contemporary Europe in the early sixteenth century, the "subsequent decadence of the empire could not fail to affect it adversely."<sup>78</sup> By the time Napoleon's troops had pulled out of Egypt in 1801, the Ottomans had identified the static and immutable nature of "Islamic law" as one of the primary reasons for the Empire's lag behind Europe, and became increasingly committed to instigating what legal reforms were necessary to bring about desired modernization and forestall the threat of European military power and expansion of capitalism (or what was called then "the advancement of commerce").

Of course, contact with European legal systems had existed in the Ottoman Empire since the sixteenth century in the form of "legal capitulations" granted by sultans to European trading powers with the aim of encouraging commerce, and which eventually allowed European citizens to litigate their disputes before their own consulates outside the jurisdiction of Ottoman courts. Napoleon took this a step further and introduced a number of legal reforms in Egypt, establishing new courts and introducing new laws during his brief occupation of the country. After the evacuation of French troops, the "westernizing" impact of his reforms were accelerated during the nineteenth century, particularly in the fields of public law (criminal and constitutional law), civil and commercial transactions, and the organization of the judiciary more generally. According to Coulson, it was precisely in these areas that "the deficiencies of the traditional Islamic system, from the standpoint of modern conditions, were most apparent." In particular:

The law of civil obligations . . . [proved] its total inadequacy to cater for modern systems of trade and economic development, at least as long as the only permissible methods of adaptation of the classical law were of the nature discussed . . . Equally insupportable to the modernist view was the traditional form of criminal jurisdiction, not only because such potential penalties as the amputation of the hand for theft and the stoning to death for adultery were offensive to humanitarian principles; nor because the notion of homicide as a civil injury, acceptable though it might be to a tribal society, was no longer suited to a state organised on a modern basis; but more particularly because modern ideas of government could

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78. SCHACHT, *supra* note 5, at 92.

not tolerate the wide arbitrary powers vested in the political sovereign under the Shaṛī'a doctrine "of deterrence".<sup>79</sup>

Since the "traditional" nature of "Islamic law" made it impossible to adapt its doctrines to the needs of a "modern" society, and indeed left *shari'a* by definition hostile to what Coulson described above as "modern ideas of government" (read liberal legality), and given the urgent need to reform the legal system and keep the sick man of Europe from actually expiring, Ottoman rulers proceeded to abolish "Islamic law" altogether and replace it with Western laws and systems of judicial organization. The first attempts at reform were instigated under Sultan Mahmud II (1808-1839), which according to Schacht "led unavoidably to a conflict with the *shari'a*."<sup>80</sup> Reforms accelerated under Mahmud's successor, Sultan Abdul-Mejid (1839-1861) who issued the Gülhane Edict (1839) using for the first time the term "citizens" to uniformly describe both Muslim and non-Muslim subjects of the Ottoman Empire, combining liberal notions of rulership with an emerging sense of nationalist identity. A list of codes then ensues, all leading the way to a large-scale adoption of various European laws under the *Tanzimat* reforms of 1839-1876. The list of laws adopted from Europe is indeed quite staggering. Coulson explains:

The Commercial Code promulgated in 1850 was in part a direct translation of the French Commercial Code, and included provisions for the payment of interest. Under the Penal Code of 1858, which was a translation of the French Penal Code, the traditional *hadd* or defined punishments of Shaṛī'a law were all abolished except that of the death penalty for apostasy. There followed a Code of Commercial Procedure in 1861 and a Code of Maritime Commerce in 1863, both of which, again, were basically French law. To apply these Codes a new system of secular or *Nizamiyya* courts was established, and it was because all civil jurisdiction (excepting cases of personal status) now fell within the competence of these courts that the basic law of obligations was also codified, between 1869 and 1876, in the compilation known as the *Majalla* or *Mejelle*. For, although the substance of this code owed nothing to European sources, but was derived entirely from Hanafi law, the secular courts could not be expected properly to ascertain that law from its traditional form of expression in the authoritative manuals.<sup>81</sup>

Schacht agrees with Coulson in assessing the above reforms as the direct result of Westernizing influences, and he also finds the *Mejelle* to have been "undertaken under the influence of European ideas and . . . is strictly speaking not an Islamic but secular code."<sup>82</sup> Moreover, both scholars argue Egypt went even further than the rest of the Ottoman Empire in its adoption of European reforms. Thus in 1875, Egypt agreed with European powers benefiting from "legal capitulations" to abolish the latter system and replace it with modern "Mixed Courts" modeled after the French example and entrusted with adjudicating all

79. COULSON, *supra* note 6, at 150.

80. SCHACHT, *supra* note 5, at 92.

81. COULSON, *supra* note 6, at 151.

82. SCHACHT, *supra* note 5, at 92. See also, for the same modernization/westernization analysis, Serif Arif Mardin, *Some Explanatory Notes on the Origins of the "Mecelle" (Medjelle)*, 51 THE MUSLIM WORLD 189, 274 (1961).

disputes involving foreigners living in Egypt under civil, commercial (and later criminal) codes directly imported from Europe. These Mixed Courts served as the model for an even more radical break with “Islamic law” barely six years later, namely the establishment of the “Native Courts” in 1883 which exercised exclusive jurisdiction in Civil, Commercial and Criminal disputes between Egyptians and according to laws “basically modelled on French law and contained only a few provisions drawn from the Shari’a.”<sup>83</sup>

Schacht does not waste much energy in dismissing all the above reforms as the direct result of contact with Western notions of law and criminal justice administration, and above all contact with Western notions of liberal legality. Neither does he pay much credit to Ottoman and Egyptian rulers’ attempts to legitimate these reforms as compatible with *siyasa* powers. Coulson, in turn, agrees with Schacht in the same assessment, though he adopts a more carefully deferential tone where the good religious faith of the modernizing elite is concerned. Thus he argues that:

Islamic legal tradition had always recognised the right of the ruler, through his *Mazalim* jurisdiction to supplement strict Shari’a doctrine in the fields of public law and general civil law, and the adoption of Western Codes in these spheres could appear as no more than a necessary extension of his admitted powers. From this standpoint the representation of the new Criminal Codes in the Middle East as an exercise of the sovereign’s prerogative of *siyasa* regulations and in particular his power of “deterrence” (*ta’zir*) was not, perhaps, a purely formal and superficial attempt to justify them.<sup>84</sup>

These many differences between an immutable *shari’a* unsuited for modern needs and Western legal transplants to Egypt (and the Ottoman Empire more generally) from the early nineteenth century onwards, can be summarized under the binary tradition/modernity below:

<b>Tradition</b>	<b>Modernity</b>
Shari’a	Western Law
Islamic	Secular
Rigid	Evolving
Tribal Society	Nation State
Qadi Courts	Native Courts
Four Mazhabs	Single Code
Unsystematized Private Law	Calculable Private Law
Offensive Criminal Law	Humanist Criminal Law
Arbitrary State Power	Unswerving Liberal Legality

83. COULSON, *supra* note 6, at 152.

84. *Id.* at 161.

### B. *The Difficulty with Naming the Dominant Historiography*

The label “Orientalist” so intuitively applies to much of what I have described under the four premises of dominant “Islamic law” historiography, I find no compunction in failing to support this label by marshalling an exhaustive genealogy that links Schacht and Coulson’s scholarship to earlier and similar views developed by such stalwarts of Orientalism as Gibb, Renan, or any of the other usual suspects. Such a detailed genealogy would fall outside the scope of this paper, and would be, more importantly, unnecessary precisely because the meaning of “Orientalism” has come to so firmly settle in postcolonial scholarship as to render the term logically inevitable as a description of the dominant historiography with its constitutive binary opposites of *shari’al-siyasa* and tradition/modernity.

And so, rather than proffer a genealogy of Orientalism in “Islamic law” historiography, I will instead take Said’s own definitions of “Orientalism” as a given and summarily proceed to illustrate how the bits and pieces of Schacht and Coulson’s scholarship discussed above might all snugly fit under “Orientalism’s” definitional reach. Having done that, I will then turn to argue that “Orientalism” nonetheless does not suffice as an accurate or comprehensive methodological gauge for the dominant historiography. Instead, I will borrow the term “scripturalism” as coined by Clifford Geertz and discuss why it might better fit as a label for the dominant vision encapsulated in the four premises of Islamic law historiography.

#### 1. *Why are Schacht and Coulson not just Orientalists?*

Said helpfully identified three interdependent meanings associated with his book title. In its first and most uncontroversial sense, Orientalism is the designation of an academic field of study where specific or general aspects of the Orient are taught, researched or written about by such diverse humanities scholars as anthropologists, sociologists, historians and philologists. Though the term fell out of favour among specialists, due to both its “vagueness” as an academic label, as well as its connotation of “the high-handed executive attitude of nineteenth-century and early twentieth-century European colonialism,”<sup>85</sup> Orientalism still circulates as an academic designation for many conferences, institutes, journals, etc. In a second and more enduring sense, Orientalism lives on as a thesis about the Orient and the Oriental, as a set of images associated with the people who live there, their customs and laws, their “mind” and its “nature,” all structured around a grand binary opposing East to West, and expressing a “style of thought based upon an ontological and epistemological distinction made between ‘the Orient’ and (most of the time) ‘the Occident.’”<sup>86</sup> This leads to the

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85. See EDWARD SAID, *ORIENTALISM* 2 (1979).

86. *Id.*

third and perhaps most concrete sense of Orientalism, namely that of a Foucauldian “discourse” with a strict genealogy beginning at the late eighteenth century and extending up-to the present day,<sup>87</sup> which achieved a certain Gramscian hegemony as a “corporate institution for dealing with the Orient –

dealing with it by making statements about it, authorizing views of it, describing it, by teaching it, settling it, ruling over it: in short, Orientalism as a Western style for dominating, restructuring and having authority over the Orient.”<sup>88</sup>

It seems plausible to describe the dominant plot of “Islamic law” historiography as Orientalist in all the above senses. For starters, Schacht and Coulson’s scholarship is structured around an epistemological and ontological distinction opposing “Western law” as the norm to “Islamic law” as its Other. The former is dynamic and evolving, secular and modern in the manner of Western liberal legality, while the latter represents the “essence” of Islamic civilization, its people and its culture, an essentially immutable and religious essence, neither differentiated in its traditionalism across centuries (witness the near-millennium of *taqlid*) nor distinguished in its uniformity across continents (for example the *hadd* of *zina* for Moroccan Muslims being always the same for their Indonesian co-religionists). The idea of *shari’a* as the static locus of a non-Western, Oriental essence, is perhaps best captured in Schacht’s now-famous phrase appearing in his book’s *Introductory* section, where Islamic law is described as the

epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself . . . the whole life of the Muslims, Arabic literature, and the Arabic and Islamic disciplines of learning are deeply imbued with the ideas of Islamic law; it is impossible to understand Islam without understanding Islamic law.<sup>89</sup>

Another essential feature in the “nature” of Islamic law is of course its lack of historicity as a sacred law of the jurists, “a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society,” where there can be “no notion of the law itself evolving as an historical phenomenon closely tied with the progress of society.”<sup>90</sup> As for those institutional structures and normative arrangements that did historically “progress” over time (whether those collected under *siyasa*, or those summarily described under customary law or *urf*), none fits the dominant historiography’s first premise that the history of Islamic law is that only of *shari’a*, and all are thus warily dismissed by Schacht and Coulson as perfidious travesties of the true and sacred nature of Islamic law, embodied in an a-historical, a-geographical, immutable and traditional essence.

Schacht and Coulson’s understanding of Islamic law’s historically immutable nature, captured in the binary *shari’alsiyasa*, and its eventual clash with the

87. Said mentions two books of Foucault as particularly useful in identifying Orientalism as a discourse, namely *THE ARCHEOLOGY OF KNOWLEDGE* and *DISCIPLINE AND PUNISH*. *Id.* at 3.

88. *Id.*

89. SCHACHT, *supra* note 5, at 1.

90. COULSON, *supra* note 6, at 2.

modern values of Western law, summarized in the binary tradition/modernity, all leaves “Islamic law” terribly lacking from the perspective of what Robert Gordon calls “evolutionary functionalist” historiography. As mentioned earlier,<sup>91</sup> the latter remains today the dominant approach in tracing the historical development of law in Western societies, and includes in its intellectual genealogy such luminary names as Montesquieu and Adam Smith for founders, Maine, Weber, and Marx for principal adherents, and a large host of both “formalist” and “realist” American law scholars, from Holmes to Pound, to Llewellyn and Hurst, only to count a few among many twentieth century jurists. According to Gordon, the vision of Western historiography in this evolutionary-functionalist approach holds “a single set of notions about historical change and the relation of law to such change,” notions which he baldly restates as arguing,

that the natural and proper evolution of a society (or at least of a “progressive” society, to use Maine’s qualification) is towards the type of liberal capitalism seen in the advanced Western nations (especially the United States), and that the “natural” and “proper” function of a legal system is to facilitate such an evolution. (The words “natural” and proper stress the normative nature of the theory; deviations from the norm are both atypical and bad.)<sup>92</sup>

If we follow Gordon and use the term “evolutionary functionalism” to describe the above ideal of Western legal historiography, then the nature of Islamic law can be handily described, by contrast, as that of a law with a traditional internal logic that *dysfunctionally defies evolution*, whose notion of “legal history, in the Western sense,” as Coulson aptly put it, “was not only a subject of study devoid of purpose; it simply did not exist.”<sup>93</sup> This idea of Islamic law’s dysfunctionally-unevolving nature or essence, positioning it as the pallid stunted Other of a healthy functionally-evolving Western law, cannot be just understood as instance of “pure knowledge,” or as knowledge produced of an Oriental legal tradition for the sole purpose of knowledge itself. Such an understanding, in Said’s words, only “obscures the highly if obscurely organized political circumstances obtaining when knowledge is produced.”<sup>94</sup> Rather, the dysfunctionally-unevolving nature of Islamic law is itself a discursive aspect of the dominant historiography’s Orientalism *precisely because* this assessment of Islamic law’s nature has served as “political knowledge” in at-least three principle moments associated with the rise of Western dominance over the Eastern Mediterranean from the late eighteenth century to the present day.

In this mode of understanding Orientalism as a “corporate institution for dealing with the Orient,” we can begin with the height of European imperialism during the nineteenth century, when colonial administrators relied on scholarly knowledge of Islamic law to “govern the natives” and improve their lot, either by introducing Islamic law reforms in the style of Western codifications such as

91. See *supra* pp. 7-8.

92. Gordon, *supra* note 13, at 59.

93. COULSON, *supra* note 6, at 4.

94. SAID, *supra* note 85, at 10.

Anglo-Muhammadan Law in British India, or the *Droit Musulman Algérien* in French-occupied Algeria, or by replacing Islamic Law altogether with Western legal transplants vaunted as a definite amelioration of the natives' pre-colonial legal condition (witness, for example, Lord Cromer's assessment that "no system of justice existed in Egypt" prior to the transplant of French-inspired courts and codes of law in 1883.)<sup>95</sup>

At a second and no less important moment, decolonization and the emergence of "Development" as a concrete academic discipline grounded in "Modernization Theory" in the 1950s, all posited static and traditional "Islamic law" as the kind of historical pitfall from which Islamic societies (and Egypt particularly) must rise if they seek to modernize along Western lines.<sup>96</sup> This idea underlies such foundational books as Daniel Lerner's widely influential study on modernizing the Middle East,<sup>97</sup> Farhat Ziadeh's history of Egyptian lawyers centering on the pursuit of liberal legal reforms for purposes of modernization,<sup>98</sup> and Donald Reid's study of lawyers and politics in the Arab World describing their gradual role in securing secularism as a condition for material development.<sup>99</sup> In all of these books and others,<sup>100</sup> the reform, secularization, or wholesale substitution of Islamic law by Western liberal legal transplants is taken as a *sine qua non* of economic and social development schemes.

Finally, knowledge of "Islamic law" in today's post-9/11 world is so inextricably linked to myriad forms of political power and civil-society governance as to require no more than passing reference, perhaps, to the Bush administration's drive to win over Muslim hearts and minds, or to the enduring anxiety in Western human rights scholarship and activism over the breach of universal international law instruments by Nigerian, Saudi or Iranian governments enforcing "Islamic law" today.<sup>101</sup>

Schacht and Couslon's historiography is therefore Orientalist in all three meanings identified by Said. Moreover, the four premises which I argue provide

95. EARL OF CROMER, *MODERN EGYPT* 516 (1908).

96. For an excellent summary of modernization theory, its Weberian origins and its view of a one-size fits-all Western ideal for development, see Chantal Thomas, *Max Weber, Talcott Parsons and the Sociology of Legal Reform: A Reassessment with Implications for Law and Development*, 15 *MINN. J. INT'L L.* 383 (2006); for a discussion of the impact of modernization theory on Middle East area studies in U.S. academia, see ZACHARY LOCKMAN, *CONTENDING VISIONS OF THE MIDDLE EAST* 133-40 (2004).

97. DANIEL LERNER, *THE PASSING OF TRADITIONAL SOCIETY: MODERNIZING THE MIDDLE EAST* (1958).

98. FARHAT J. ZIADEH, *LAWYERS, THE RULE OF LAW, AND LIBERALISM AND THE RULE OF LAW IN MODERN EGYPT* (1968).

99. DONALD M. REID, *LAWYERS AND POLITICS IN THE ARAB WORLD, 1880-1960* (1981).

100. See, e.g., *BEGINNINGS OF MODERNIZATION IN THE MIDDLE EAST* (William R. Polk & Richard L. Chambers eds., 1968).

101. For the latest *cris de coeur* on this issue discussed in lucid terms, see Naz K. Modirzadeh, *Taking Islamic Law Seriously, INGOs and the Battle for Muslim Hearts and Minds*, 191 *HARV. HUM. RTS. J.* 192 (2006).



the dominant plot to Schacht and Coulson's "Islamic law" history all serve to sustain this Orientalist vision as a solidly interconnected (and historically enduring) discursive phenomenon. Thus their history is grounded on "Islamic law" being the religious "Other" of secular Western law, with the English term "Islamic law" linguistically interchangeable only with the Arabic term *shari'a* (our Premise #1); Those historically-evolving doctrines and institutions (whether associated with *siyasa* or *'orf*) are viewed as too suspiciously secular to constitute *shari'a*-proper and are therefore relegated outside its historian's plot (our Premise #2); the opposition between *shari'a* and *siyasa* embodies for our two authors the very nature or essence of "Islamic law" as an extreme case of jurist-law, a-historical, static, and traditional, at its most only rarely applied in historical practice (Premise #3); and finally, that over the very same centuries of Islamic law's stagnation, Western law by contrast evolved and developed its liberal ideals, its market-friendly private law doctrines and its rights-affirming public law rules, thus inevitably leading to the tension between Islamic law and modernity/modernization (which happens to coincide with the heyday of European imperialism), a tension that continues to equally inform the sacred law's troubled postmodern condition today (Premise #4).

Of course, to call any piece of scholarship "Orientalist," whether it's the above four premises, or Schacht and Coulson's historiography as a whole, is by default to accuse the author of misrepresenting the "real" Islamic law, of distorting its history by such Orientalist method crimes as essentialism, lack of historicity, absence of geographical differentiation between the lived realities of many Orients, and so on.

And yet, the four premises described above are neither peculiar to the "Orientalist" scholarship of Schacht and Coulson alone, nor are they limited to "Orientalism" as the hegemonic Western discourse for knowledge-production about the Orient. Rather, these very same four premises equally inform the dominant historiography of "Islamic law" in Egypt today. As will be discussed below,<sup>102</sup> leading Egyptian historians all share the distinction between *shari'a* and *siyasa*, all limit their scholarship to the former, not the latter, and all generally assess the transformation of Islamic law from the late nineteenth century to the present day as the product of tradition/modernity tensions that inform questions of Islamic law reform in Egypt to this day. To put it even more bluntly (and anecdotally), my own education in Islamic law at Cairo University was built very much around these same four premises—although the books I was assigned to read as a student did not reference Schacht and Coulson or any other Western scholars, but rather referenced Arabic jurisprudential treatises and commentaries written by Muslim jurists both medieval and modern, some of them certainly the same jurists cited by Schacht and Coulson in their own work.

How do we explain this uncanny similarity? If Schacht and Coulson are Orientalists, would that make Egyptian historians of Islamic law subscribing to

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102. See *infra* pp. 38-39.

the same four premises themselves *self-Orientalizing* by reverse logic? If we follow Said's argument about Orientalism, one can be tempted to answer this question by engaging in a discussion about discursive autonomy, about who really influenced who, and possibly impute some causal link from Schacht, Coulson or other Orientalist historians to Egyptian historiography as written by Egyptians themselves. But even if that were case, history written by Egyptians for Arabic speaking readers just does not fit Orientalism fundamentally understood as a Western knowledge production about the Orient. And in all cases, Said's goal in *Orientalism* was *not* to expose the truth about the real Orient whose representation was distorted by Orientalist method crimes—rather, it was to demonstrate how Orientalism functions as a Western hegemonic discourse. On that note specifically, Said warns his readers,

never to assume that the structure of Orientalism is nothing more than a structure of lies or of myths which, were the truth about them to be told, would simply blow away . . . After all, any system of ideas that can remain unchanged as teachable wisdom (in academies, books, congresses, universities, foreign-service institutes) from the period of Ernest Renan in the late 1840s until the present in the United States must be something more formidable than a mere collection of lies.<sup>103</sup>

What accounts for the endurance of Orientalism that Said warns about? If the problem is not just one of exposing lies, might it be that there is some truth behind the four premises of dominant Islamic law historiography?

## 2. *Scripturalism and the Modern Transformation of Islam*

To start by stating the obvious: Islamic law is a religious law; *fiqh* is the jurisprudence of understanding a sacred and holy dogma; *shari'a* itself is nothing if not the normative manifestation of such academically nebulous (not to say inauspicious) notions as religious faith and/or belief. With this in mind, why should anyone worry if historians in both Cairo and the two English-speaking Cambridges share fundamentally the same premises of "Islamic law" historiography? Isn't religion the domain of the immutable? Shouldn't its law, by definition, always express the timeless kernel of some religious essence? Shouldn't historians of this religious law respect (if not always share) *shari'a*'s foundational beliefs as a divinely revealed law and be wary of including secular travesties like *siyasa* or *'orf* in its historiography? It is not obvious to everyone that religion *is* a conservative force of tradition in the legal domain, that the Nietzschean "death of God" and the Weberian "disenchantment" all came heaving in the same package with modernization writ-secular, legal and large? In short, wasn't *shari'a*, as a religious law, always already going to be in tension with the modern condition?

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103. SAID, *supra* note 85, at 6.

An emphatic yes to all these questions is possible only if we insist on seeing religion, specifically Islam, in such a manner: Stable, immutable, embodying an unchanging sacred essence, etc. Yet, as Clifford Geertz argues:

The notion that religions change seems in itself almost a heresy. For what is faith but a clinging to the eternal, worship but a celebration of the permanent? . . . Yet of course religions do change, and anyone, religious or not, with any knowledge of history or sense for the ways of the world knows that they have and expects that they will. For the believer this paradox presents a range of problems not properly my concern as such [and I add: not mine either]. But for the student of religion it presents one too: how comes it that an institution inherently dedicated to what is fixed in life has been such a splendid example of all that is changeful in it? Nothing, apparently, alters like the unalterable.<sup>104</sup>

Geertz offers these comments in his 1968 book *Islam Observed*, in which he sought to compare religious change in two Muslim countries, Morocco and Indonesia, located respectively at the Western and Eastern most edges of the geographic “World of Islam.”<sup>105</sup> Geertz argues that, in both countries, Islam had indeed changed over the past one hundred and fifty years, transforming from a “classical style” of Islam associated with “maraboutism” in Morocco and “illuminationism” in Indonesia, to a new “scripturalist” style in both countries today. This scripturalist Islam is not only recent, dating around two hundred years old, but most importantly its religious world-view is uncannily similar to the dominant tradition in Islamic law historiography I associate with Schacht and Coulson.

Unlike Orientalism, however, the term scripturalism is not intended to describe Western knowledge of “Islamic law,” but rather the Muslims’ own changing view of their own religion. In coining the term, Geertz was attempting to address the problems facing the student of religion at times of religious change—a problem that he insisted was just as methodological as was its solution: How to describe religious change from a “classical” to “scripturalist” Islam, and how to account for its effects in Morocco and Indonesia, without falling into the pitfalls of what little tools and strategies academic science offered for the task? In the bunch of redoubtful strategies available for gauging religious change, Geertz counts four already-existing methods, namely the indexical, typological, world-aculturative and the evolutionary. Under these four, change can either be indexed in literacy figures or miles of paved road compared over time; involve the set-up of ideal-type stages, such as primitive, medieval, modern, and “conceive change as a quantum-like breakthrough from one of these stages to the next;” posit such Western values and ideals like the rule of law or the small family as the acculturative stick-yard for measuring the degree of modernization in non-Western societies; or finally, adopt an evolutionary approach where “certain world-historical trends . . . are postulated as intrinsic to human culture, and a so-

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104. GEERTZ, *supra* note 1, at 56.

105. *Id.*

ciety's movement is measured in terms of the degree to which these trends have managed, against the lethargy of history, to express themselves."<sup>106</sup>

Geertz acknowledges that these four "strategies for studying change" can be, and indeed often are, combined in practice. Taking them as a bunch, the four more or less methodologically correspond to what is called Modernization Theory today (and are therefore also methodologically linked to the evolutionary-functional vision of Western legal historiography). And in dismissing these strategies as unhelpful in the study of religious change (what does such data have to do with religion to begin with?), Geertz raises one of the earliest and most enduringly instinctive objections to the evolutionary vision associated with Modernization Theory, namely its teleological historiography holding "that the way history has happened to happen is the way it has had to happen." Instead, Geertz argues for an alternative methodology where the scholar's primary attention is focused "neither on indices, stages, traits nor trends, but on processes, on the way things stop being what they are and become instead something else."<sup>107</sup>

In the case of Morocco and Indonesia, the history of Islam over the past two hundred years can best be described as the history of a "progressive increase in doubt"—but doubt of a "peculiar kind" at that, better associated with the loss of spiritual-confidence, or faith, than a loss of religion period.<sup>108</sup> According to Geertz, nearly everyone in these two countries remains religious today; there is no substantial increase in skepticism, in atheism or in agnosticism. Yet something changed with Islam in both countries, hegemonically robbing away its "classical styles" of maraboutism in Morocco (Utopian and centered around the warrior-saint), and illuminationism in Indonesia (Fabian and centered around the miracle or the trance). Both classical styles were challenged by an alternative vision of Islam as a scripturalist religion, centered around divinely revealed texts, the *Qur'an* and *Sunna*, and their juristic commentaries. This happened over a two-centuries-long period of this gradually "peculiar" doubt that left the absolute majority of Muslims in Morocco and Indonesia avowedly "religious" but not "religious-minded," the bulk of their populations still "holding religious convictions" that can be called Islamic, but not "held by them."

The classical religious symbols of maraboutist and illuminationist Islam "remain, in some general, overall, vaguely persuasive way, the basic religious orientations in their respective countries, the characteristic forms of faith," but concurrently transforming from "imagistic revelations of the divine, evidences of God, to ideological assertions of the divine's importance, badges of piety."<sup>109</sup> In short, Indonesian and Moroccan Islam changed over the past two hundred years in a decidedly subtle yet deeply vital way, whereby, as Geertz puts it,

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106. *Id.* at 57-59.

107. *Id.* at 59.

108. *Id.* at 61.

109. *Id.* at 17.

Once there was faith, there now are reasons, and not very convincing ones; what once were deliverances are now hypotheses, and rather strained ones. There is not much outright scepticism around, or even much conscious hypocrisy, but there is a good deal of solemn self-deception.<sup>110</sup>

Geertz attempted to capture the tenuous difference between religious faith and religious belief. The exact same difference was the subject of another essay also published in 1968: Octave Mannoni's "*Je sais bien, mais quand meme*,"<sup>111</sup> developing the distinction between faith ("*foi*") and belief ("*croyance*") as aspects of religious change in contemporary Western civilization. Relying on Mannoni's essay, Slavoy Žižek argued that this distinction between faith and belief, between the notion that one "can believe (have faith in) X without believing in X," itself lies at the very heart of the paradox he calls "Western Buddhism." Rather than presenting Western subjects of the postmodern condition with some spiritual escape from the material exigencies of global capitalism, it instead provides the perfect ideological supplement to it.<sup>112</sup>

Geertz's "scripturalist Islam" and Žižek's "Western Buddhism" are two sides of the same coin, markers of different religious changes wrought by the unleashing of the same three global forces on disparate societies in both Orient and Occident, namely the triad of capitalism, nationalism, and the intricate ebb and flow of Western cultural dominion over the world. For Geertz, the effect of these three forces combined helps explain the historical process by which religious faith split from religious belief, robbing maraboutist and illuminationist Islam from their once spiritual hegemony, and raising scripturalism into the gauge of Islamic belief over the past two centuries in both Morocco and Indonesia. Geertz argues that before colonialism, "men had been Muslims as a matter of circumstance; [while] now they were, increasingly, Muslims as a matter of policy."<sup>113</sup> The experience of Dutch and French colonialism, in Indonesia and Morocco respectively, moved religious faith in these two countries much closer to the center of "people's self-definition" than religion had been before. Colonialism produced a reaction not just against Western intrusion, but more importantly against the classical styles of maraboutist and illuminationist Islam, increasingly viewed as aberrations from the true beliefs of Islam and corrupt deviations responsible for the expansion of Western domination over Morocco and Indonesia animating both nationalist agitation against colonialism and the ensuing postcolonial nation-state's attempts to seek Islamic legitimacy.

This loss of faith in classical-style Islam, and its attenuating rise of a uniform set of scripturalist Islamic beliefs, was not just triggered by the brute military force of colonialism unleashed on the natives. Rather, religious change was as part of the larger process of material change brought by capitalist expansion

110. *Id.*

111. See OCTAVE MANNONI, *CLEFS POUR L'IMAGINAIRE* (1968).

112. See SLAVOJ ŽIŽEK, *ON BELIEF* (2001).

113. GEERTZ, *supra* note 1, at 65.

and evident as increasing social differentiation, the emergence of new urban communities, and the rise of individualism in Moroccan and Indonesian societies. Closer commercial links to the Arab core of the Ottoman Empire during the nineteenth century, increasing travel by students seeking to study there, rising numbers of pilgrims performing the *hajj*, all crystallized scriptural Islam in the Indonesian figure of the *santri*, the Javanese term for a religious student:

The rise throughout the Muslim World after 1880 of what has been called, rather vaguely and unsatisfactorily, Islamic Reform—the attempt to re-establish the “plain,” “original,” “uncorrupted,” “progressive” Islam of the Days of the Prophet and the Rightly Guided Caliphs—merely provided an explicit theological base for what, a good deal less reflectively, had been developing in Indonesia for at least half a century. Propagation of the arguments of Middle Eastern back-to-the-*Qur’an* and on-to-modernity revivalists like Jamal Ad-Din Al-Afghani or Muhammed Abduh (which by the 1920s was very extensive) did not so much change the direction of *santri* thought as complete it.<sup>114</sup>

We finally come to what, I think, is the core of Geertz’s argument. The transformation of religion in Indonesia and Morocco towards a scriptural Islam, where the south Asian *santri* finds an equivalent in the North African *talib*, the Arabic term for a *shari’a* student all share a common discursive genealogy with intellectual roots in the Arab lands of the late Ottoman Empire. By referencing the propagation of reformist thought associated with such Islamic thinkers as Abduh and Afghani, and holding it responsible for the solidification of scripturalist Islam in Indonesia and Morocco, everything Geertz says might as well apply to religious developments at the very core of the Ottoman Empire, in Egypt, the Fertile Crescent, and the Hijaz.

According to Geertz, the tension between *shari’a* and modernity is precisely what figures like Abduh and Afghani sought to mediate by preaching and writing about Islamic law reform in the Ottoman Empire. Both pointed fingers at the ossification of *shari’a*, over a millennium of *taqlid*, as responsible for the materially backward and militarily subjugated state of Muslims; both demanded a return to the *Qur’an* and *Sunna* as conditions for a modernizing leap in Islamic law reform; and both did so with a mixture of anxious envy and defensive pride whenever Islamic law came to be compared with its Western alternative. Like Geertz notes in the case of Morocco and Indonesia, Abduh and Afghani’s strategy had the same impact of canonizing a new scripturalist Islam in the Ottoman Empire itself, the “stepping backward seems often to have been taken for the leap itself” and what began as “rediscovery of the scriptures” came to represent “the last stages in its ideologization.”<sup>115</sup>

The dominant historiography of Islamic law, summarized in the four premises discussed earlier, is therefore deeply connected with the emergence of scripturalist Islam as a religion in places as far and wide as Morocco, Indonesia and Egypt. The split between religious faith and religious belief that beset these

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114. *Id.* at 69.

115. GEERTZ, *supra* note 1, at 69-70.

three countries, is embroiled with global factors such as the rising dominance of European colonialism and capitalism, and crystallized around a new scriptural Islam which, in the specific case of Egyptian legal historiography, produced a firm nationalist narrative, written by Egyptian lawyers, to describe the transformation of their country's legal system from "Islamic" to "modern" over the past century or so.

Starting from Abduh and Afghani, one can go through a short list including such principle figures of modern Egyptian legal thought like Fathi Zaghlul (a student of Abduh's and judge in the new Native Courts), whose 1900 book on *Al-Muhamah*, or lawyering, set the tone for distinguishing *shari'a* from *siyasa*, lamenting the traditionalism of the latter, and celebrating the legal reforms of 1883 as signs of a modern nationalist resurgence.<sup>116</sup> In the same tone, the list should include all other leading Egyptian judges and law professors who contributed articles to the fiftieth yearbook celebration of the 1883 reforms.<sup>117</sup> Most importantly, the list should culminate with major twentieth century legal thinkers such as Abdel-Razzak Al-Sanhuri, who in anxious envy of Western legal developments, when *shari'a* lay its *taqlid* period, sought defensively to show that *shari'a* had always been as "social" and "modern" as the latest developments of French civil law.<sup>118</sup> Abdel-Qader Ouda, who compared *shari'a* with the criminal codes that Egypt borrowed from France, attempting to prove how *shari'a*'s criminal norms were already as rationalist and humanist as any Westerner would hope his laws to be.<sup>119</sup> Moreover, the scripturalist strain in Egyptian legal historiography, as written by Egyptians, continues to manifest itself in more recent studies by historians of various political stripes, from the secular liberal nationalist,<sup>120</sup> to the Muslim Brotherhood affiliated.<sup>121</sup>

All the scions of modern Egyptian legal historiography mentioned above share the same four premises underlying the history of Islamic law as illustrated in Schacht and Coulson's scholarship. All are "scripturalists" in the sense identified by Geertz because that all limit *shari'a* to the *Qur'an*, *Sunna* and juristic commentaries thereon, because all subtract *siyasa* from *shari'a*'s divinely revealed purview, and because all understand *shari'a* to have been historically stagnant for centuries and in need of urgent reform if it is to ever meet the challenges of modernity. In summary, Orientalism does not work as a sufficient la-

116. See AHMED FATHI ZAGHLUL, *AL-MUHAMAH* (1900).

117. See AL-KITAB AL-ZAHABI LIL-MAHAKIM AL-AHLIYYA (1937).

118. See Amr Shalakany, *The Origins of Comparative Law in the Arab World, or how sometimes losing your Asalah can be Good for you*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* (Annelise Riles ed., 2001); *Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*, 8 *ISLAMIC L. & SOC'Y J.* 201 (2001).

119. See ABDEL-QADER OUDA, *supra* note 41.

120. See, e.g., LATIFA SALIM, *AL-NIZAM AL-QADA'I AL-MISRI AL-HADITH* (1986).

121. See, e.g., TAREQ AL-BISHRI, *AL-WAD' AL-QANUNI AL-MU'ASIR BAYN AL-SHARI'A AL-ISLAMIYYA WAL-QANUN AL-WAD'I* (1996); SOUFI ABU-TALEB, *TATBIQ AL-SHARI'A AL-ISLAMIYYA FIL-BILAD AL-'ARABIYYA* (1995).

bel to describe the dominant Islamic law historiography illustrated by Schacht and Coulson's scholarship. If we understand scriptural Islam to be a new phenomenon, an expression of Islamic religion as it changed over the past two hundred years, then what connects Schacht and Coulson with figures like Zaghlul, Sanhuri and Ouda is not just the Orientalism of the two Western scholars and the reverse-Orientalism of the three Egyptian jurists. Rather, what connects all of them is a shared vision in defining Islamic law, a scripturalist vision which itself, if we follow Geertz, expresses a purely modern phenomenon. It is little wonder, then that in discussing Orientalism now, Said has the following to say about Geertz:

Interesting work is most likely to be produced by scholars whose allegiance is to a discipline defined intellectually and not to a "field" like Orientalism defined either canonically, imperially or geographically. An excellent recent instance is the anthropology of Clifford Geertz, whose interest in Islam is discrete and concrete enough to be animated by the specific societies and problems he studies and not by the rituals, preconceptions and doctrines of Orientalism.<sup>122</sup>

## II

### DOMINANT HISTORIOGRAPHY APPLIED: SCRIPTURAL SODOMY LAW

*It is true that, prior to 1883, no system of justice existed in Egypt.*

The Earl of Cromer<sup>123</sup>

I have so far described four foundational premises underlying the dominant plot in Islamic law historiography, namely, that the historical study of Islamic law requires us: 1. To study *shari'a*; 2. Not to study *siyasa* (and by default 'orf); 3. To recognize, in the binary of *shari'alsiyasa* Islamic law's historically traditional nature: religious and immutable for almost a millennium, hampered by its internal logic from evolving to meet society's changing needs; and finally, 4. To read within the binary tradition/modernity the developmental crisis plaguing Islamic law's postcolonial condition. I have also argued that scripturalism, rather than Orientalism, works better as a universal description of this historiography. My goal now is to offer an application of this dominant historiography. I follow the above four premises to trace the history of "Islamic law" on sodomy from the "classical period" of *fiqh* up to the present day. Though my study is limited to Egypt, what I offer is a "scripturalist" historiography that boasts as much methodological credence under both Schacht and Coulson's scholarship, as it does under the historiographic perspective of such leading Egyptian historians of law as Sanhuri and Ouda.

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122. SAID, *supra* note 85, at 326.

123. EARL OF CROMER, *supra* note 95, at 516.



As a scripturalist historian, I argue that crime and punishment for sodomy under *shari'a* is immutably one and the same across time from the “classical period” in 850 CE Baghdad, just as it would through the end of *shari'a*’s “*taqlid* period” in 1850 CE Cairo. I rely on restatements of the authoritative views of *fuqaha*’ across the four *Sunni mazhabs*, as found in treatises of varying lengths and types, mostly available in twentieth century print editions. I would hold these views just as authoritative by nineteenth century Egyptian jurists as I would for their ancestors half a millennium earlier.<sup>124</sup> History reaches a radical break in the year 1883, when *shari'a* criminal norms were replaced in the Egyptian legal system by the transplant of French codes and courts, and the French-inspired reorganization of the curriculum at Cairo’s Khedivial Law School. The history from 1883 to the present day is therefore that of a postcolonial civil law transplant taking root in a foreign soil.

Understandably, the lengthiest and most detailed discussion I offer here is that related to the application of Premise #1 (Islamic law is *shari'a*) and Premise #4 (*shari'a*’s postcolonial condition described along the tradition/modernity axis). These two premises constitute the core of scripturalist historiography and it is under these two premises that the bulk of Islamic law history is written. Under Premise #2 (*shari'a* is not *siyasa*), I provide some very brief examples of Ottoman *qanuns* governing sodomy to illustrate how certain institutional structures and normative arrangements associated with *siyasa* would fall outside my scope of study as a scripturalist historian. I also lump Premise #3 (the binary *shari'alsiyasa*) in the same discussion with Premise #2—and since the argument there, quite frankly, is that nothing much happened to *shari'a* norms on sodomy for almost a millennium, the discussion under Premise #3 is, also understandably, exceedingly short and quite bereft of detail.

*A. Premise #1 Applied: Islamic Law is Shari'a—The history of sodomy under Islamic law IS the history of liwat under shari'a*

From the perspective of scripturalist historiography, *liwat* is the operative legal term under which *shari'a* criminalized consensual and noncommercial sex between men in nineteenth-century Egypt up to the reforms of 1883. Etymologically, the term *liwat* is either derived from the verb *lāta*, meaning “to attach oneself to,” or alternatively a denominative of the noun *Lūt*, the name of the Biblical

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124. The texts relied on here are primarily the legal opinions (*fatāwah*, singular: *fatwa*) and treatises (*shorōh*, singular: *sharh*) of those medieval scholars deemed authoritative in 19<sup>th</sup> century Islamic jurisprudence across the four *mazhabs*. A meticulous survey of these *fatāwah* and *shorōh* can be found in ABDEL-RAHMAN AL-JAZIRY, *AL-FIQH 'ALA AL-MAZAHIB AL-ARBA'A* (1971). I cite the primary text where available, and refer to al-Jaziry’s secondary materials when lacking the original. On the specific question of *liwat* under Islamic jurisprudence, the most authoritative English study available is EL-ROUAYHEB, *infra* note 127, at 111-51. As a scripturalist historian, I share el-Rouayheb’s analysis almost completely, except for minor differences in opinion, such as on the issue of which school of jurisprudence prescribed the most severe punishment for *liwat*. See *infra* pp. 42-46.

prophet Lot as narrated in the *Qur'an*.<sup>125</sup> For reasons explained hereunder, the criminalized act of *liwat* is limited to anal intercourse only and does not include other sexual acts such oral or vaginal intercourse.<sup>126</sup> Punishment is prescribed for both active and passive partners, and while *liwat* is commonly associated with sex between men, jurists have also used the term *al-liwātat al-sūghra*, or “minor *liwat*” to debate the legality of genital/anal intercourse between heterosexual couples. In all the above, the criminalization of *liwat* is functionally analogous to that of “sodomy” under American law, and I therefore use the two terms interchangeably throughout this section.<sup>127</sup>

My argument here can be summarized in two points.<sup>128</sup> First, while jurists from the four *mazhabs* were all in consensus on the criminalization of *liwat*, they nonetheless disagreed in determining the source of the crime’s illegality, its proper conceptual categorization, and therefore the requisite measure of its punishment.<sup>129</sup> To the extent one can speak of an “Islamic criminal law” on *liwat*,

125. See also “Liwāt,” in 5 ENCYCLOPAEDIA OF ISLAM 777 (P. Bearman et al. eds., 2008) available at [http://www.brillonline.nl/subscriber/entry?entry=islam\\_SIM-4677](http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-4677) (last visited April 27, 2008).

126. Arabic term: *mūfākhadhah*.

127. As with any comparative law exercise, it is almost never perfect to analogize concepts of one legal system to those of another. See ZWEIGERT and KÖTZ, *supra* note 21, at 28-46, admonishing against conceptual comparisons and pleading functionalism instead. The most significant functional difference between *liwat* and sodomy under U.S. law lies of course in the definition of the criminalized act. The legal meaning of sodomy has differed across US jurisdictions, altered with time from one century to the next, and barely stabilized in the 20<sup>th</sup> century through the simultaneous assignment of incommensurable “act” and “identity” articulations to the crime. As such, sodomy prohibitions have come to include both oral/genital and genital/anal contacts. By contrast, *liwat* is mostly reasoned as a crime derivative from heterosexual adultery or *zina*, and as such is limited to genital/anal contacts only. Yet the vagueness of sodomy laws is precisely what warrants their homologous comparison to the criminalization of *liwat*. For an excellent exposition of the changing meaning of sodomy under U.S. law, see Janet E. Halley, *Reasoning about Sodomy: Act and Identity in After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1733-40 (1993). For a brief and highly informative review of “sodomy” as an Old Testament term imbuing contemporary U.S. jurisprudence, see Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, fn. 4 1432-34 (1992). Finally, for the *Qur'anic* exegesis on the above, see KHALED EL-ROUAYHEB, *BEFORE HOMOSEXUALITY IN THE ARAB-ISLAMIC WORLD, 1500–1800* 17 (2005). El-Rouayheb’s book is a particularly valuable addition to the meager English language scholarship available on *liwat*, offering what is to my mind the most thoroughly researched and theoretically conscious contribution on the subject. For a critique of *Orientalism* on the subject, see JOSEPH A. MASSAD, *DESIRING ARABS* 160-90 (2007).

128. As a scripturalist historian, what I offer here is subject to the following caveats. See *supra* note 7. Also, a note on the references relied on in this section: *Usūl al-fih* emerged during the 10<sup>th</sup> century and stabilized some two centuries later into a full fledged theoretical framework outlining a hierarchy for the sources of Islamic law and prescribing the proper tools of its interpretation. For a historical survey, see WAEL HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES* (1997). While Islamic law jurists of 19<sup>th</sup> Century Egypt shared much the same juristic framework as their medieval colleagues, Islamic jurisprudence and the legal doctrines it generated did not remain static over the passing centuries. A great deal of work still needs to be done on this subject, and the leading study remains to my mind WAEL HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* (2005).

129. This is by no means peculiar to *liwat*. As Ruud Peters notes regarding Islamic criminal law more generally, “within one school there also existed various and contradictory opinions. In the course of time, jurists began to assess these different opinions and assign a hierarchy of authority.

there is a normative structure unified in condemnation of the act yet richly multi-vocal on the question of punishment.<sup>130</sup> Second, I argue that criminal norms on *liwat* provide us with only part of the juristic picture. Law defining the crime and prescribing its punishment are background rules governing questions of evidence and privacy, and setting such exceedingly high procedural barriers to conviction that one finds very difficult to imagine how any were ever enforced.

### 1. *Foreground Norms on Liwat*

As mentioned earlier,<sup>131</sup> *zina*, or extra-marital sex, is the paradigmatic *hadd* with respect to sexual offenses under *fiqh*, and as such its rules are often intertwined with those regulating *liwat*. For *zina*, the *Qur'an* explicitly prescribes a *hadd* of 100 lashes if the convicted offenders were not *muhsan*, that is, had never consummated a legally valid marriage,<sup>132</sup> while the *Sunna* prescribes the *hadd* of stoning to death in the case of *muhsan* offenders.<sup>133</sup> While all four *mazhabs* agree on these penalties, *fiqh* is nonetheless rife with *ikhtilaf*, or juristic disagreement, as to prescribing “exile” as a *hadd* to couple the penalty for non-*muhsan* offenders, as well as to the practical implications of exile as a punishment.<sup>134</sup>

By contrast, only three of the four *mazhabs* classify *liwat* as a *hadd* offense (namely the Maliki, Hanbali and Shafi'i *mazhabs*), while the authoritative opinion among jurists of the Hanafi *mazhab* classifies *liwat* as a *ta'zir* crime and leaves its punishment to the discretion of judicial and administrative authorities. Moreover, even among the three *mazhabs* classifying *liwat* as a *hadd* offence, jurists nonetheless disagreed on the normative source for *liwat* criminalization in *shari'a* and whether its penalty was directly prescribed under *Sunna* or derived by analogy or *qiyas* to *zina*. In order to appreciate the significance of this juristic *ikhtilaf* on sodomy, I will now take the reader through the three sources of

Some opinions were regarded as more correct than others. Although there was no complete unanimity about these hierarchies, they helped to make the legal discourse of one school manageable, especially for practitioners.” See RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW 6 (2005). See also, to the same effect on Islamic family law, Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043 (2004) (noting general juristic agreement on the contours of marriage and divorce doctrines, with disagreements in opinion on details both between and within the four schools of *Sunni* Islamic jurisprudence).

130. The term “Islamic Criminal Law” is of course itself a modern invention. As we shall see, penal classifications under Islamic law neither conform to those of the Civil Law or Common Law systems, nor are they limited to fields of “public law” alone. See generally OUDA, *supra* note 41. For a summary of differences between Western and Islamic criminal law, see also PETERS, *supra* note 129 at 1-5, 174-81 for fundamental conflicts with international human rights law today.

131. See *supra* pp.14-15.

132. See *supra* note 40.

133. See *supra* note 41.

134. For details, see *supra* pp. 14-15. For *ikhtilaf*, see *supra* note 42. See also OUDA, *supra* note 41, at 380-83.

*shari'a* authorized under *fiqh*, namely the *Qur'an*, *Sunna*, and *Ijma'*, and report the *mazhabs'* opinions on *liwat* under each of these three sources.

The *Qur'an* is the first source of *shari'a* norms. Implicit reference to *liwat* is made in several *Qur'anic* verses decrying the people of Lot for their corrupt practice of "*al-fahisha*" or depravity. That this depravity is *liwat* becomes clear in some of the verses on the topic such as: "You commit the carnal act, in lust, with men and not with women, you are indeed an impious people."<sup>135</sup> God's punishment is also stated explicitly in the *Qur'an*, namely a hailstorm of baked clay that rained upon Lot's village, killing every one there except for Lot's immediate family, save for his wife.<sup>136</sup> Based on these verses, jurists across the four *mazhabs* agree on two points. First, that sex between men is unequivocally condemned in the *Qur'an*; and second, that despite this blanket condemnation, the *Qur'an* does not prescribe any specific punishment for *liwat*.

By contrast, the second normative source of *shari'a* law, namely the *Sunna*, provides clearer indication both as to the severe legal punishment for *liwat* in this world, as well as the eternal damnation that awaits the offender in the after-life. There is a plethora of *hadiths* on the topic, one of which prescribes the death penalty for both active and passive *liwat* partners,<sup>137</sup> while another extends the death penalty to non-*muhsan* offenders as well, a punishment more severe than *zina* where *muhsan* culprits are punished by 100 lashes and possible imprisonment or exile.<sup>138</sup> Some of the *hadiths* also take an explicitly eschatological view of *liwat*, foretelling its prevalence at a corrupt future moment and making that a sign of the end of human civilization and the coming of the final Day of Judgment, where *liwat* offenders will find themselves "more reprehensible than a carrion," and shall "reek of revolting stink" as they stand before God, whose "throne trembles as the act is committed," and who in general "will suffer eternal damnation" absent God's pardon through repentance.<sup>139</sup>

As with all law derived from *Sunna*, jurists across the four *mazhabs* disagreed in giving weight to the above mentioned *hadiths* depending on the strength of *isnad* attached to each.<sup>140</sup> Moreover, despite the prevalence of *Sunna*

135. THE QUR'AN, *Surat al-A'raf*, 7:81.

136. THE QUR'AN 7:84. The story is retold in two other verses of the *Qur'an* with the same conclusion of God born death and destruction for the practice of *liwat* by the people of Lot. See THE QUR'AN, 27:54-58, and 26:160-173.

137. "For whomever repeats the act of the people of Lot, kill both the active and the passive offenders." See AL-JAZIRY, *supra* note 124, pt. V, at 102-06.

138. "Kill the active and the passive offenders, whether either of them is married or not." *Id.*

139. *Id.* see generally "Liwāt," *supra* note 125. Needless to say, these *hadiths* come in varying grades of *isnad* and assessments of their authenticity are thus also varied. For a comprehensive collection of *hadiths* on the topic of *liwat*, discussing the different claims to authenticity by each, see AL-NUWAYRI, AL-NIHAYA (no publication date available).

140. For example, neither Hanafi nor Shafi'i majority opinion relies on the *hadith* requiring the death penalty for both active and passive partners since said *hadith* was not included in the two most authoritative sources on *Sunna*, namely Bukhari and Muslim. See EL-ROUAYHEB, *supra* note 127, at 118-20.

on the punishment of *liwat* by death, there is also no indication as to how the penalty should be enforced. For this, we need to turn to the practice of the Prophet's companions, specifically under the reign of the first four caliphs of Islam following the Prophet's death. Yet because the caliphs practices diverged on the issue, jurists do not uniformly regard these practices as a source of *shari'a* under *Ijma'a*. For example, the first caliph, Abu-Bakr, is said to have condemned one man to death by burying him under the debris of a collapsing wall and another by burning him to death as an alternative punishment; the third caliph Uthman is said to have convicted a non-*muhsan* offender to a hundred whip lashes; and the fourth caliph Ali ordered the stoning of one man to death, and had another punished by throwing him head down from atop a minaret.<sup>141</sup>

Given the above state of *shari'a* sources on *liwat*, it is understandable that while jurists of all four *mazhabs* agreed on the condemnation of the act, they nonetheless disagreed in classifying the crime and therefore determining its due punishment. Their different opinions can be traced across a spectrum summarized thus:

At one end, we find the ruling opinion among jurists of the Maliki school of law who refuse the *qiyas* of *liwat* to *zina* and argue instead that *liwat* is an independently regulated *hadd* with its distinct penalty of stoning to death explicitly prescribed under the *Sunna*. By thus determining the source of law on *liwat*, the authoritative opinion among Maliki jurists is the stoning to death for both active and passive *liwat* partners, whether they be *muhsan* or not.<sup>142</sup>

By contrast, at the other end of the spectrum we find the majority opinion of the Hanafi *mazhab* where jurists refused to rely on the *hadiths* adopted by their Maliki colleagues, and argued instead the absence of authentic *Sunna* on *liwat* to merit the act's classification as a *hadd* offense. Moreover, the Hanafis restricted the *hadd* of *zina* is to "vaginal intercourse" only and accordingly refused to extend the *Qur'an* and *Sunna* punishments for *zina* by analogical reasoning or *qiyas* to *liwat*. Thus Hanafi jurists refuse to classify *liwat* as a *hadd* crime and instead relegate it under *ta'zir* offenses and accordingly leave its exact punishment in the discretion of judicial and executive authorities.<sup>143</sup> However, there is also a minority opinion among Hanafi jurists who share the majority's suspicion of the authenticity of the chain of transmitters regarding *Sunna* on *liwat* and refuse to treat it as an independently prescribed *hadd*, but then move on to analogize *liwat* to *zina* and extend the *hadd* of *zina* to sodomy through *qiyas*.<sup>144</sup> Under this minority opinion, the offender convicted of *liwat* should be

141. See generally "Liwāt," *supra* note 125. See also AL-NUWAYRI, AL-NIHAYA, *supra* note 139.

142. For detailed analysis, see AL-JAZIRY, *supra* note 124, pt. V, *kitab al-hudud*.

143. Al-Shawkani in his later commentaries points out the incongruity of the majority opinion in the school with the *Sunna*. On internal differences of opinion within each *mazhab*, see generally EL-ROUAYHEB, *supra* note 127, at 111-51.

144. The operative *hadith* has the prophet stating: "Sex between men is adultery." See AL-JAZIRY, *supra* note 124, pt. V, at 102-06.

stoned to death if *muhsan* and receive 100 lashes if not, and the *hadd* would apply equally to both active and passive partners.<sup>145</sup>

Between the Maliki and Hanafi *mazhabs* we find the Shafi'i and Hanbali jurists whose majority opinion relies on the *Sunna* to classify *liwat* as a *hadd* offense independent of *zina*, and accordingly prescribe the death penalty for both active and passive partners, whether *muhsan* or not. However, some Shafi'i and Hanbali jurists have also adopted two other minority opinions worth mentioning here. On the one hand, some adopted the minority opinion of Hanafi jurists mentioned above, that is, *liwat* is analogized to *zina*, and the *hadd* prescribed for the latter offence applies to both passive and active partners, with stoning if the offender is *muhsan* and 100 lashes if not; and, on the other hand, a minority of Shafi'i and Hanbali jurists reserve the *hadd* of stoning to only the active partner, whether *muhsan* or not, and base this opinion on the *Sunna*. As for the passive partner, the same jurists prescribe the *zina hadd* of 100 lashes whether *muhsan* or not, on the understanding that the full conditions of the stoning *hadd* can never be satisfied in the case of the passive offender since the *hadd* applies only to vaginal intercourse.<sup>146</sup>

If the reader is by now confused as to the required punishment of *liwat* under *shari'a*, she should rest assured her confusion is warranted. Attempting to produce a generalized assessment of the views of each school is a difficult task since, as we have seen, jurists belonging to each of the four *mazhabs* sometimes lean toward dissenting opinions within the rubric of the very school to which they belong. For example, some Hanafi jurists have recommended that the prescribed *ta'zir* penalty of 100 lashes be mitigated, with the jurist Ibn Hazm going as far as reducing the number of lashes to ten. Others have argued for internal differentiations in the *ta'zir* punishment depending on the "degree of debauchery" to which the offensive act of *liwat* rises, with some jurists distinguishing anal penetration, which would trigger the maximum punishment available, and other lesser acts of *liwat* which do not rise to the level of penetration and accordingly deserve the mitigation of the *ta'zir* penalty. Indeed, these internal differences among the jurists *within* each *mazhab*, not to mention *between* jurists of the four *mazhabs*, makes it very difficult to offer anything but an approximation of the reigning views under each.<sup>147</sup> The following table is an attempt at collecting these *ikhtilaf* opinions on *liwat* in some easily traceable form:

145. Opinion of Abu-Yusuf & Muhammad, see SHARH FAT' H AL-QADIR, pt. IV, at 150; SHARH BADAI' I AL-SANAI' I, pt. VII, at 24.

146. See, to this effect, SAID IBN AL-MUSSAYAB, ATA' A IBN ABI-RABAH', AL-HASSAN AL-BASRY, AL-NUKHAI' I, AL-THAWRI, AL-AWZA' II. See generally, AL-JAZIRY, *supra* note 124, pt. V, at 102-06.

147. For example, divergences within each school seems to point towards different doctrinal positions, so that even within the Shafi'i and Maliki schools, we find jurists who refuse to grant penal value to the distinction between married and unmarried culprits, prescribing the death sentence for both. See generally, HUSSEIN ALY AL-MUNTAZERY, I KITAB AL-HUDUD 143-66 (no publication date). Other areas of deviant sexuality are no less confusing: stricter opinions rely on weaker *hadith*, such as on bestiality. See OUDA, *supra* note 41, at 355. Lesbian offenses entail *ta'zir* punishments,

School of Jurisprudence	Classification of <i>Liwat</i>	Source of Law	Penalty	
			Active/Passive	<i>Muhsan/Non-Muhsan</i>
Maliki	<i>Hadd</i>	<i>Sunna</i>	Stoning to death	Stoning to death
Majority Shafi'i & Hanbali	<i>Hadd</i>	<i>Sunna</i>	Stoning to death	Stoning to death
Minority Shafi'i & Hanbali	<i>Hadd</i>	<i>Sunna and qiyas to zina</i>	Stoning to death for active offender. 100 lashes and exile for passive offender.	n/a
Minority Shafi'i & Hanbali	<i>Hadd</i>	<i>Qiyas to zina</i>	n/a	Married stoned to death. Unmarried 100 lashes and exile.
Majority Hanafi	<i>Ta'zir</i>	Judicial and executive discretion	No required punishment: Discretionary in severity and duration.	No required punishment: Discretionary in severity and duration.
Minority Hanafi	<i>Hadd</i>	<i>Qiyas to zina</i>	n/a	Married stoned to death. Unmarried 100 lashes and exile.

## 2. Background Norms on Evidence and Privacy

By disagreeing on whether to classify *liwat* as a *hadd* or *ta'zir* offense, jurists have by default also disagreed on the evidentiary requirements for *liwat* conviction. If we follow the majority opinion across the Maliki, Shafi'i and Hanbali schools of law and classify *liwat* as *hadd*, then the prescribed punishments cannot be triggered without satisfying one of three principle methods of proof, namely the offender's confession, witness testimony, or the offender's

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but no *qiyas to zina* can be made since there is no penetration because women lack the male sexual organ. However, the *ta'zir* penalty is diverse and some scholars prescribe the *hadd* of 100 lashes and/or exile instead. See OUDA, *supra* note 41, at 368.

refusal to take the oath in denial of committing *liwat*.<sup>148</sup> If the accused confesses, then his confession is acceptable only if he is of majority age, has full control of his mental faculties, and his words are free of duress.<sup>149</sup> Moreover, if the suspected offender does not repeat the same confession four times before the judge, then the *hadd* penalty cannot be enforced and the judge is instead free to apply the *ta'zir* punishment he deems fit for the case.<sup>150</sup> These conditions apply regardless of whether the confessing offender was the active or passive partner in *liwat* and without attention to whether he is *muhsan* or not.

Alternatively, if conviction of *liwat* is based on witness testimony, then the majority opinion in the Maliki, Shafi'i and Hanbali *mazhabs* rely on *qiyas* to extend the rules of evidence governing *zina* to that of *liwat*. Accordingly, four male witnesses of majority age and unblemished integrity of character and religious repute must testify to having personally seen the act of "ilqj" or penetration in *flagrante delicto*. Circumstantial evidence and hearsay therefore do not suffice to trigger the *hadd* punishment. Some medieval jurists require testimony to be delivered by the four witnesses in the same court session, while others allow each witness to testify independently of the others. The majority opinion across the three *mazhabs* also requires the four witnesses to testify on the same instance of *liwat*, that is, the four testimonies must relate to witnessing one and the same act. Finally, if the quorum of four witnesses is not satisfied, some jurists have argued that those witnesses who came forth with their testimony become liable for the *hadd* of slander or *qazf*, and should therefore receive the prescribed punishment of 80 lashes.<sup>151</sup> By contrast, if we follow the Hanafi *mazhab* and classify *liwat* as a *ta'zir* offense, we find that Hanafi jurists do away with the evidentiary requirements associated with *zina*.<sup>152</sup>

The above evidentiary requirements complicate the regulation of *liwat* in the following sense. On the one hand, the majority opinion of Maliki, Shafi'i and Hanbali jurists views *liwat* as a *hadd* and accordingly requires the severe punishments of stoning to death or flogging and exile as its due penalty. As a *hadd* offense, judicial and executive authorities have no discretionary power in mitigating the application of these punishments. However, by classifying *liwat* as *hadd*, those jurists also require a much higher standard of conviction which practically suspends the enforcement of the penalty absent confession. By contrast, the Hanafi school offers the most lenient criminal treatment of *liwat*, arguing the act constitutes a *ta'zir* offense and therefore leaves its required punishment to the discretion of judicial and executive authorities. While on the face of

148. See AL-JAZIRY, *supra* note 124, pt. V, at 55-80.

149. This last requirement changed however. See Baber Johansen, *Signs as Evidence: The Doctrine of Ibn Taymiyya (1263-1328) and Ibn Qayyim Al-Jawziyya (D. 1351) on Proof*, 9 ISLAMIC L. & SOC'Y J. 168 (2002).

150. AL-MUNTAZERY, *supra* note 147, at 149-53.

151. See generally AL-JAZIRY, *supra* note 124, pt. V, at 55-62, 102-03.

152. *Id.* at 103. See generally PETERS, *supra* note 129, at 61-62.



it Hanafi jurists may therefore appear as the most liberal school in dealing with *liwat*, the *ta'zir* classification entails lower evidentiary barriers to conviction, making the *ta'zir* penalty more readily available than the application of the *hadd* under the other three *mazhabs*. In short, the rules on evidence make it difficult to argue with any clarity which of the four schools is stricter on the issue *liwat*.

To complicate the picture even more, witness testimony is acceptable only within the bounds of another set of procedural rules governing what we might loosely classify as “privacy law” today. A celebrated example from Ghazali’s influential medieval treatise on *The Rebirth of Religious Sciences* may better clarify this point.<sup>153</sup> Repeating a story found in other treatises, Ghazali tells us that on the suspicion that acts of “wrongdoing” were being committed in a private home in Madina, the second Caliph Omar ibn al-Khattab stealthily climbed the wall of the suspected offender’s home and surprised its occupant who indeed turned out to be engaged in illicit act. From prior examples in the treatise, one suspects the offender was either drinking alcohol, playing a musical instrument or engaged in some prohibited sexual activity. In pursuing the offender, the Caliph was enforcing the injunction repeated in various forms across the *Qur’an* and *Sunna* to “command right and forbid wrong,” and thereon proceeded to berate the hapless man in his home. But the man retorted back with assurance: While he had indeed broken one law of God by his offense, the Caliph had by contrast breached three rules of the divine law. First, the Caliph had “spied and pried” despite the *Qur’anic* injunction against such acts as enshrined in 49:12.<sup>154</sup> Second, the Caliph had entered the man’s home by climbing its wall, in flagrant breach of *Qur’anic* verse 2:189 which commands entering private houses from their proper doors.<sup>155</sup> Finally, the Caliph had neither asked for permission in entering the home nor did he offer the requisite salutations, once again all in breach of *Qur’anic* injunctions to the contrary.<sup>156</sup> In response to these three arguments, the Caliph Omar did not enforce the requisite *hadd* or *ta'zir* penalties on the offender he had caught red handed, and instead left the man be, merely asking him to repent for his sins.<sup>157</sup>

The above story indicates some principal privacy restrictions emanating from the doctrine of “Commanding Right and Forbidding Wrong.” I will not offer here a detailed analysis of this doctrine; that would be far beyond the scope of this paper. Rather, I will briefly reflect on the doctrine’s normative sources under *shari’a* and offer some passing comments on how its enforcement would further hurdle the enforcement of *shari’a* punishments for *liwat*.

153. AL-IMAM AL-GHAZALI, *IHYA’ ULUM AL-DIN*, PART II 468-69 (Beirut 1992).

154. THE *QUR’AN*, 49:12.

155. THE *QUR’AN*, 2:189.

156. See THE *QUR’AN*, 24:27.

157. For alternative versions of the story, see MICHAEL COOK, *COMMANDING RIGHT AND FORBIDDING WRONG IN ISLAMIC THOUGHT* 80 (2000). Cook’s excellent treatise provides the most systematic collection and analysis I know of on the regulation of commanding rights under Islamic law in English.

To begin with the *Qur'an*, the injunction to “Command Right and Forbid Wrong” is repeated in different forms across eight verses of the Holy Book. However, none of these provides a clear framework for the doctrine nor delineates a specific route for its enforcement.<sup>158</sup> There is no indication as to what constitutes “right” and “wrong,” and whether the injunction is directed toward the entire Muslim community or just a select few. The verses are also unclear as to whether the duty can be entrusted to only a designated few who have achieved a high level of juristic learning and whether the judicial and executive authorities can exercise a monopoly in enforcing the injunction.<sup>159</sup>

By contrast, the *Sunna* on “Forbidding Wrong” proves to be more helpful. There is a plethora of *hadith* by Prophet Mohammed commenting on the nature of the duty, who is entrusted with it and its mode of enforcement. Yet the details offered in these *hadiths* catapult the doctrine in two competing directions. On the one hand, the most canonical *hadith* has the prophet saying: “Whoever sees wrong and is able to put it right with his hand, let him do so; if he can’t, then with his tongue; if he can’t, then with his heart, which is the bare minimum of faith.”<sup>160</sup> Other *hadiths* also confirm the same interventionist streak and threaten the entire community with unpleasant repercussions if they fail to enforce this duty.<sup>161</sup> On the other hand, a competing strand of *Sunna* points the reader in an opposite and more constrained direction: In its extreme, this *Sunna* suspends the duty to command right and forbid wrong at times of extreme corruption,<sup>162</sup> and till then sets three principle limitations on the doctrine’s enforcement. First, there is *Sunna* advising against futile acts of heroism which suspends the duty to forbid wrong if its enforcement subjects the actor to mortal danger; second, with respect to who should practice the duty, the Prophet is quoted as saying that one should not forbid wrong unless he is known for “civility, knowledge, and probity;”<sup>163</sup> and finally, there is a diversity of traditions advising on the respect for privacy, and requiring Muslims to neither spy nor scandalize their fellow Muslims for their wrongdoing and to rebuke the

158. See THE QUR’AN, 3:110; 3:114; 7:157; 9:71; 9:112; 22:41; 31:17.

159. For competing interpretations on the eight verses, see COOK, *supra* note 157, at 13-31, who concludes that the different medieval jurists’ “reading of the scripture tends to be informed by an understanding of forbidding wrong which cannot be derived directly from the verses themselves.” *Id.* at 31.

160. Quoted in *id.* at 33.

161. Indeed there even an eschatological streak in several of these traditions, foretelling of a time in the future when the state of Islam will be so weakened that Muslims will stop to command right and forbid wrong and the few remaining faithful should then prepare for the coming of the end of the world. For further details, see *id.* at 35-42.

162. In response to a question regarding 5:105 of the *Qur’an* which advises the believers to look into their own souls, the Prophet enjoined the community to command right and forbid wrong until they find themselves confronted with the utter corruption of values and then they should turn to look to themselves and forget the populace at large. See *id.* at 40.

163. *Id.* at 43.

offender only in private if possible. This is generally referred to under the term *satr*.<sup>164</sup>

Relying on the above sources from the *Qur'an* and *Sunna*, jurists from the four *mazhabs* developed the larger doctrine on commanding right and forbidding wrong. While there is significant *ikhtilaf* regarding the possibility of political revolt against the ruler for failing to enforce the doctrine, and more minor disagreements on the capacity of women and slaves to observe the injunction, jurists were nonetheless largely in agreement with respect to the doctrine's "privacy" aspects summarized above and sought to balance the two competing policies expressed in *Qur'an* and *Sunna*, namely the injunction to forbid wrong on the one hand, and the injunction not to spy, expose a fellow Muslim or enter houses without permission or salutation. To this end, jurists from the four *mazhabs* are in consensus on the following points. First, that the duty to forbid wrong is not triggered unless the offensive act is committed in public or constitutes a *munkar zahir*. Second, if there is suspicion of an offensive act committed in private, the majority opinion among jurists allows intervention only if there is good reason to believe a wrong is being committed, otherwise a higher standard of actual knowledge is required. And finally, even if the duty is triggered because the act was committed in public or the person entrusted with forbidding wrong has actual knowledge or good reason to believe an offense is indeed underway, the duty is nonetheless mitigated by the prophetic tradition on *satr*.

The following table summarizes the above doctrines. If we keep in mind the rules on evidence described earlier, and add to it the doctrines just summarized above regarding what we may call privacy law today, it becomes very difficult to imagine how *liwat* as a *hadd* could have ever been enforced in practice.

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164. For example: "He who keeps concealed something that would dishonor a Muslim will receive the same consideration from God." *Id.* at 43-44. In another canonical *hadith* the prophet is quoted to have said "Whoever keeps hidden (*satr*) what would disgrace a believer, it is as though he had restored a buried baby girl to life from her tomb." *Id.* at 81.

School of Jurisprudence	Classification of <i>Liwat</i>	Required Evidence	Privacy Restrictions
Maliki	<i>Hadd</i>	Confession OR	Duty to forbid wrong is triggered if: 1. <i>Liwat</i> is committed in public ( <i>munkar za-hir</i> ) OR 2. Actual knowledge of <i>Liwat</i> committed in private AND 2. Duty is mitigated by <i>Sunna on satr</i>
Majority Shafi'i & Hanbali	<i>Hadd</i>	Four Witnesses OR Refusal to take oath	
Minority Shafi'i & Hanbali	<i>Hadd</i>		
Minority Hanafi	<i>Hadd</i>		
Majority Hanafi	<i>Ta'zir</i>	Two witnesses (or circumstantial evidence?)	

*B. Premises #2 and #3 Applied: Shari'a is not Siyasa—Ottoman Qanun on sodomy is NOT liwat under shari'a—The binary shari'a/qanun defines the static "nature" of Islamic law on sodomy*

The entry under "*Liwat*" in the *Encyclopedia of Islam* concludes the legal section by stating that "homosexual relations have always been tolerated."<sup>165</sup> Given the explicit criminalization of *liwat* under *shari'a* and the harsh *hadd* punishments prescribed for the crime under three of the four *mazhabs*, one is tempted to see the Encyclopedia's assessment as very curious indeed. And yet the *Encyclopedia's* entry does not stand alone in making this assessment. Indeed, there is a wealth of scholarship which presents us with a similar assessment, arguing that "Islamic society" was historically tolerant of sodomy throughout the middle ages, that tolerance in the Muslim lands of the Middle East far exceeded what was on offer in Europe, and that creeping intolerance from the nineteenth century onwards can be blamed on the colonial encounter and the ensuing transplant of Victorian morality into the ranks of the native elite, who in seeking to demonstrate their moral worth for self-rule and demanding an end to foreign military occupation ended up adopting the homophobic morality of their colonial masters.<sup>166</sup> This argument is often supported by referencing

165. See "*Liwāt*," *supra* note 125.

166. See, e.g., As'ad AbuKhalil, *A Note on the Study of Homosexuality in the Arab/Islamic Civilization*, THE ARAB STUD. J. 32 (Fall 1993). AbuKhalil writes that "the professed homosexual identity among Arabs allowed homosexuals historically a degree of tolerance that was denied for centuries to homosexuals in the West." *Id.* at 33.

homoerotic materials in medieval and early modern poetry and prose,<sup>167</sup> or by pointing to the various pre-colonial books on sexuality which openly discussed the love of *ghilman*<sup>168</sup> in Orientalist travel accounts to the Ottoman Empire that commented on the availability of sexual experiences unobtainable with the same brazen facility in Europe,<sup>169</sup> and in the biographies of famous historical figures and chronicles of contemporary events leading up to the nineteenth century.<sup>170</sup>

It is tempting to add the “nature” of *shari’a* as an additional piece of evidence supporting this line of argument: If sodomy were indeed so tolerated in key historical periods under the Abbasid, Mamluk and Ottoman dynasties, that is because *shari’a* provisions on *liwat* were never applied in practice, and indeed how could they be if *shari’a*’s foreground norms defining *liwat* and prescribing its punishment are straddled with restrictive background norms on evidence and privacy as discussed above. Moreover, in all of this *liwat* is not an exceptional case; rather it is paradigmatic of the historical nature of *shari’a* criminal norms more generally. As discussed earlier, other *hadd* offenses such as *zina* and theft, whose prescribed punishment is based on the *Qur’an* and *Sunna*, are also straddled by the same high evidentiary barriers to conviction and were just as rarely enforced in practice. Indeed, it is in the very nature of “Islamic” criminal law to remain thus: an idealistic set of doctrines preserved by Muslim jurists, dissected in their legal logic through largely similar authoritative treatises, composed of eternally stable definitions for crime and punishment that defy social change, norms that rarely, if ever, made it into actual judicial practice.

167. For a collection on the subject in English, see HOMOEROTICISM IN CLASSICAL ARABIC LITERATURE (J.W. Wright & Everett Rowson eds., 1997).

168. The most typical example is Al-Jahiz’s comparisons on the different virtues of sex with women and male youths. See AL-JAHIZ, KITAB MUFAKHARAT AL-JAWARI WAL-GHILMAN (1957).

169. See Joseph Boone, *Vacation Cruises; or, The Homoerotics of Orientalism*, in POST-COLONIAL QUEER: THEORETICAL INTERSECTIONS (John C. Hawley ed., 2001). In the same vein, and in response to Boone’s critique of Said, JARROD HAYES, QUEER NATIONS: MARGINAL SEXUALITIES IN THE MAGHRIB 27-29 (2000). Much of the literature review provided in this section is deeply indebted to the groundbreaking work conducted by Boone and Hayes on the subject. For more specific examples of homoeroticism in Orientalist literature, see Joseph Boone, *A Mapping of Male Desire on Durrell’s Alexandria Quartet*, 88 S. ATLANTIC Q. 73 (1989); and *Rubbing Aladdin’s Lamp*, in NEGOTIATING LESBIAN AND GAY SUBJECTS (Monica Dorenkamp & Ricahrd Henke eds., 1995). Other mapping exercises include: AbuKhalil, *supra* note 166; Bruce Dunne, *Homosexuality in the Middle East: An Agenda for Historical Research*, 12 ARAB STUD. Q. 55 (Summer/Fall 1990).

170. For example, Sheikh Hassan Al-Attar, whose open practice of sodomy did not impede his appointment by the viceroy of Egypt to the highest post of Sunni Islamic learning in the land, namely the Sheikh of al-Azhar University. See PETER GRAN, ISLAMIC ROOTS OF CAPITALISM: EGYPT 1760-1804 127 (1979). Perhaps al-Jabarti, the prolific Egyptian historian living at the turn of the nineteenth century, provides the most historically rich portrait of sodomy as readily available without serious consequences. Dunne summarized some of Jabarti’s stories thus: “Homosexual practices existed at all social levels. Thus the rural Shaykh Sulayman of Nahiyat al-’Asal surrounded himself with ‘one hundred and sixty’ handsome beardless youth and piled them with jewels and other baubles; Muhammad Ali traveled among his palaces accompanied by ‘concubines and boys’ ... and rowdy and carousing soldiers often engaged in homosexual practices.” Dunne, *supra* note 169, at 109. ABD AL-RAHMAN AL-JABARTI, 7 AJA’IB AL-ATHAR FIL TARAJIM WAL AKHBAR 4-5 (1966).

Rather, criminal law enforcement from the early Abbasids onwards rested not in the hands of *qadi* courts applying *shari'a*, but rather fell in the ambit of what Coulson described as extra-*Shari'a* jurisdictions.<sup>171</sup> By the twelfth century, these jurisdictions received *ex-post* legitimation under the doctrine of *siyasa shariyya*, and since the fifteenth century at least, Ottoman rulers relied on the notion of *siyasa* to legislate codes of law or *qanuns*, under which the keeping of law and order was regulated across their empire. While these *qanuns* were “real laws,” to use Schacht’s term,<sup>172</sup> and were enforced by a host of military, judicial and administrative authorities in daily practice, and as such had an impact on the lives of those living in Ottoman lands for centuries, these *qanuns* nonetheless fall outside the history of Islamic law on sodomy since, quite simply, they are not *shar'ia* norms on *liwat* as properly defined under *fiqh*.

For this reason, I do not seek to offer here any detailed analysis of *qanuns* governing sodomy under Ottoman *siyasa* jurisdictions. Instead, I will only proffer some brief and general comments on Ottoman *qanuns*, and follow that with a quick glance at some *qanun* articles prescribing extra-*shari'a* punishments for sodomy. Their actual enforcement in practice would require close examination of the voluminous Ottoman court records, something I will also not do here. Rather, in what commentary follows, I exclusively rely on Heyd’s *Studies in Old Ottoman Law*, to my knowledge the most wide-ranging study on the topic available in English to date.

According to Heyd, the term *qanun* was used in Ottoman sources in the following four different meanings:

- (a) legal rules or prescriptions generally, including those of the religious law of Islam: e.g. *kānūn-i şer'*, *kavānīn-I şer'īye*;
- (b) a single statute of secular law enacted by the sultan, a regulation: e.g. *bu kānūn kānūna muhālifdir*, ‘this *kānūn* (statute) is contrary to the *kānūn* (in the meaning of [droit])’
- (c) a collection of such regulation relating to a certain matter or certain matters, a code or *kanūnname*: e.g. *Kānūn-I Yürükān*, *Kānūn-I Alay*;
- (d) the whole body of institution of such secular state law, as opposed to the *sharī'a*: e.g. *şer 'a ve kānūna muhālif*.<sup>173</sup>

In principle, a *qanun* was valid only during the lifetime of the Sultan who had enacted it. In practice, however, each new sultan would generally confirm the *qanuns* enacted by preceding rulers since the latter were often merely a legalization of current applicable law.<sup>174</sup> Thus in substance, Heyd argues that

171. See *supra* p. 21.

172. See *supra* p. 20.

173. HEYD, *supra* note 59, at 167.

174. *Id.* at 172.

*qanuns* were often meant to codify current customary law or *'urf*, and would include injunctions to *qadis* for the application of the reigning opinion of one of the four *mazhabs*, typically Hanafi, or the opinion of particular jurists within that *mazhab* in areas of law where disagreement prevails between majority and minority *mazhab* opinions.<sup>175</sup> Perhaps criminal justice was the most important area where *qanuns* were applied. Heyd argues that the chief object of *qanun* was the maintenance of law and order where doctrines derived from *fiqh* failed to preserve efficient criminal justice under the *qadis* applying *shari'a*, or where common people needed protection against the oppression of officials and fief-holders.<sup>176</sup> In explaining the relation between doctrines derived from *qanuns* versus *fiqh*, Heyd argues that the most important substantive distinction lay in the imposition of fines instead of applying the corporal *hadd* punishments. Thus *qanuns* required fines for *zina* if no capital punishment could be inflicted for procedural or evidentiary reasons, "for homicide or for the knocking out of an eye or tooth only if no retaliation is, or is to be, carried out; and for certain cases of theft only if the thief's hand is not to be cut off."<sup>177</sup>

Finally, in explaining the legitimacy of *qanuns* under "Islamic law" normativity, Heyd argues *qanuns* were issued in application of *siyasa shar'iyya* on the understanding that no order of the Sultan would be enforced if it conflicted with the rules of *shari'a*, but in practice many such *qanuns* often included norms departing and conflicting with those of *shari'a*,<sup>178</sup> and some jurists explicitly viewed the reference to *siyasa* as merely an attempt to provide a veneer of *shari'a* legitimacy for what was essentially "secular" laws that flouted the *hududs* provided in *Qur'an* and *Sunna*. Thus in fatwas of Ottoman *sheikhulislams*, *qanuns* were often referred to as *meshrū'*, that is, in accordance with the *shari'a*. At the same time, in Ottoman official usage the term "sher'an, 'according to the *shari'a*', tended to acquire the meaning of 'legally' in the broadest sense."<sup>179</sup> And while the legal basis for *qanuns* rested on the will of the Sultan, their binding power did not require some confirmation or sanction by *seyhülislāms* regarding the *qanuns* compatibility with *shari'a*. Indeed, "in many cases long after . . . *qanuns* and other decrees of the sultan had been issued did *seyhülislāms* and other *müftīs* confirm (or, more rarely, reject) the legality of some of them in accordance with the *shari'a*."<sup>180</sup> And even in cases where Ottoman *seyhülislāms*

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175. Thus basic problems of private law were settled under *qanuns* organizing the distinction between ownership and possession. For example, in cases where a guest is killed in someone's house and the murderer remained unknown. With respect to who should pay the blood money, Abu Hanifa's view was that the owner of the property was obliged to do so. However, his disciple Abu Yusuf argued that the occupant, if different from the owner, was responsible for the blood money. Ottoman *qanun* under Süleyman the Magnificent instructed *qadis* to follow Abu Yusuf's view since it would lead the actual occupants to be more vigilant.

176. HEYD, *supra* note 59, at 176.

177. *Id.* at 181.

178. *Id.* at 180.

179. *Id.* at 187.

180. *Id.* at 174.

issued *fatwas* finding some *qanun* contradictory to *shari'a*, judges were nonetheless required to ignore the *fatwa* and apply the *qanun* since they were employees of the Sultan and hence bound by the issuance of *firman*s or edicts from the Grand Vizir or Qadi Askar's offices, and not by the office of *şeyhülislām*. Indeed, since *şeyhülislāms* often started their career as *qadis*, Heyd finds it only understandable that after

following the *kanūn* for so long in their law courts, how could they suddenly, on their promotion to the position of chief mufti, come to regard it as a matter of no concern to them, or even of doubtful legality?<sup>181</sup>

Thus Heyd leaves us with a wary assessment of *qanun*'s legitimacy under *fiqh*, and indeed of the compatibility of *siyasa* jurisdictions with *shari'a* more generally. But since Heyd's subject of study is "Old Ottoman Law," he nonetheless provides us with the most extensive, if not always accurate,<sup>182</sup> translation of various Ottoman *qanuns* into English. In particular, Heyd appends to his book the *kānūnnāme* compiled and enacted during the reign of Sultan Süleymān the Magnificent, approximately between 1534 and 1545, and which he refers to in short as the "Ottoman Criminal Code," as well as the "Dulkadir Penal Code" which itself is a translation of the *kānūnnāme* for Bozok. Following Heyd's translation, we find various articles in these two *qanuns* governing questions of sodomy law. To get a closer sense of their contrast with *shari'a* norms on *liwat*, it is worth ending the discussion here by citing some of the main articles governing sodomy in these two *qanuns*:

*Article 27*: "Furthermore, if a person's son yields to a pederast—if [the youth] is of age (*bālig*), [the *cadi*] shall chastise the youth severely and a fine of one *akçe* shall be collected for each stroke; and if he is not of age, his father shall be chastised because he has not guarded [him], but no fine shall be collected."<sup>183</sup>

*Article 32*: "If a person who is of sound mind [and] of age commits sodomy—if he is married and is rich, a fine of 300 *akçe* shall be collected [from him]; and from a person in average circumstances a fine of 200 *akçe* shall be collected; and from a poor person a fine of 100 *akçe* shall be collected; and from a person in [even] worse circumstances a fine of 50 or 40 *akçe* shall be collected."<sup>184</sup>

*Article 33*: "And if the person who commits sodomy is unmarried—from a rich one 100 *akçe* shall be collected as a fine, from one in average circumstances 50 [akçe], and from a poor one 30 [akçe]."<sup>185</sup>

*Article 15*: "And if a boy is abducted, [the abductors] shall be castrated or else fined 24 gold pieces. And if [the abducted person] is a catamite (*muhannes*), the

181. *Id.* at 188.

182. In questioning Heyd's translation, see PETERS, *supra* note 129, at 73.

183. HEYD, *supra* note 59, at 102.

184. *Id.* at 103. However, this same article is also translated in one other manuscript as allowing the punishment of castration: *Id.*, fn. 7, at 265.

185. *Id.* at 103.



legal punishment (had) for fornication shall be inflicted on both parties; if it is not inflicted, each of them shall pay a fine like that for fornication [stated in OCC].”<sup>186</sup>

C. *Premise #4 Applied: Tradition/Modernity is the postcolonial condition for “Islamic law”*—From *liwat* under *shari’a* to *fujor* under Civil Law transplants.

Barely a year after British occupation of Egypt in 1882, a new set of “Native Courts” was established and gained exclusive jurisdiction to settle criminal disputes among Egyptian litigants. This was preceded in 1876 by the establishment of the “Mixed Courts” which exercised exclusive jurisdiction in the settlement of civil and commercial (and later criminal) disputes among foreigners residing in Egypt, as well as between foreigners and Egyptians.<sup>187</sup> Why the Native Courts were established in such haste following British occupation is a subject discussed in Part III of this paper.<sup>188</sup> Suffice it to say for now that both Schacht and Coulson (as representatives of English-language scripturalist historiography) on the one hand, and Zaghul, Sanhuri and Ouda (as representatives of Arabic-language scripturalist historiography) on the other hand, all agree that rulers of Egypt experimented during the first three quarters of the nineteenth century with Westernizing reforms into the Islamic criminal justice system, experiments that eventually culminated in 1883 with the full-fledged replacement of *shari’a* by a French criminal code (flimsily translated to Arabic) applied by newly established “Native Courts” that were also modeled after the French example. *Shari’a* norms on *liwat* thus formally disappeared from Egyptian judicial application in 1883 (and did so fully a decade later when the jurisdiction of Native Courts was extended to Upper Egypt).

The new Criminal Code of 1883 did not contain any articles governing sodomy as such. Rather, sexual offences governed in the new code came in three principle articles, namely Article 249 which punished anyone who “causes indecent assault by inducing young people of below 18 years to commit debauchery [*fujur*] and indecency [*fisq*];” Article 350 which penalized “whoever violated in any way the regulations concerning preventing vice [*fisq*] and debauchery [*fujor*];” and, Article 247 which penalized, among other crimes, “whoever rapes a [female] virgin or non-virgin or practices debauchery [*fujor*] with her by force.”<sup>189</sup> The 1883 Code was eventually replaced by an “Egyptianized” new

186. The same article above appears in the *Kānūnnāme* of ‘Alā’ al-Dawlabut differently: “If this is done out of affection (*muhabet bile*)” instead of *catamite* (*muhannes*). *Id.* at 136.

187. Though connected to the “Native Courts” as an example and precedent, the “Mixed Courts” lie outside the scope of my study here. The leading history of the Mixed Courts remains JASPER BRINTON, *THE MIXED COURTS OF EGYPT* (1968). See also BYRON CANNON, *POLITICS OF LAW AND THE COURTS IN NINETEENTH-CENTURY EGYPT* (1988).

188. See *infra* pp. 74-78.

189. Article 249 itself draws on Article 334 of the 1810 French Criminal Code. For a detailed discussion, see “Appendix: Laws Affecting Homosexual Conduct in Egypt” in HUMAN RIGHTS WATCH, *IN A TIME OF TORTURE: THE ASSAULT ON JUSTICE IN EGYPT’S CRACKDOWN ON*

Criminal Code in 1937,<sup>190</sup> and Article 249 of the old code survived as Article 270 in the 1937 Code. The latter remains the Criminal Code applied in Egypt today. Moreover, male (and of course female) prostitution was legalized in Egypt at the end of the nineteenth century, with registers of male and female prostitutes kept by the police and regular sanitary checkups organized by the Ministry of Health.<sup>191</sup>

The use of the Arabic term *fujor* in the above articles thus seems to be a literal translation of the French term “*la débauche*” contained in the 1810 French code. More importantly, the term *fujor* as it appeared in both the 1883 and 1937 Criminal Codes applied to both male and female subjects of the law interchangeably. Consensual and non-commercial sex between men was thus left without explicit criminal regulation in Egypt under both the 1883 and 1937 codes. This situation changed in 1951 when the Egyptian parliament passed Law No. 68 criminalizing both male and female prostitution. The law was passed at an intensely nationalist moment, three years after the Egyptian military’s defeat by Israel in the 1948 war, and in the midst of Egyptian guerilla operations aimed at the British army’s presence in the Suez Canal zone. Legalized prostitution was thus targeted by many stripes of Egyptian nationalists, whether secular, conservative or liberal feminist, as an endemic marker of the country’s failing social mores which lay responsible for the 1948 military defeat as well as the continuing British occupation of the country.<sup>192</sup>

Drafters of the new anti-prostitution law used the term *fujor* for the first time to describe male prostitution, as opposed to the term *di’ara* which criminalized female prostitution.<sup>193</sup> As mentioned above, *fujor* had been applied interchangeably to both male and female sexual offences since 1883. After 1951, however, the term took a concretely masculine gender-turn that continued to apply under the later anti-prostitution law no. 10 issued in 1961. Thus Article 9 of this law, which still applies in Egypt today, prescribed, among other offenses: “Punishment by imprisonment for a period not less than three months and not exceeding three years and a fine not less than 25 L.E. and not exceeding 300 L.E. . . . or one of these two punishments applies in the following cases . . . (c) Whoever habitually engages in debauchery [*fujor*] or prostitution [*di’ara*].”<sup>194</sup>

HOMOSEXUAL CONDUCT 129-36 (2004).

190. See FATHI NAGUIB, *AL-TANZIM AL-QADA’I AL-MISRI* (1998).

191. For a detailed history of legalized prostitution in Egypt, see EMAD HILAL, *AL-BAGHAYA FI MISR: DIRASA TARIKHIYYA IJTIMA’IYYA* (2001); MOHAMED SAYYID KILANI, *FI RUBO’ AL-AZBAKIYYA* (1958).

192. See HUMAN RIGHTS WATCH, *supra* note 189, at 131-33.

193. Parliamentary minutes indicate the committee responsible for drafting the law employed *fujor* on the understanding that Egyptian courts had already been using that term to refer exclusively to male prostitution. My research has not unearthed any pre-1951 court decisions to that effect. See, Amr Shalakany, *From Liwat to Fujor: Orientalism, Islamic Scripturalism and Feminist Subordination Theory* (forthcoming article, on file with author).

194. For the full English translation of Article 9, see HUMAN RIGHTS WATCH, *supra* note 189, at 130.

Although the intent of the legislator was to criminalize male and female prostitution, the law dispensed with monetary exchange as condition for conviction and instead required evidence of the “habitual” practice of “indiscriminate” sex as sufficient to indicate prostitution. Moreover, the law criminalized only the prostitute and left the client free of any charges.<sup>195</sup> The standard for conviction in male prostitution or *fujor* received its settled interpretation by the Egyptian Court of Cassation in an important decision issued in May 1975.<sup>196</sup> Unlike *shari’a* norms on *liwat*, which extended punishment to both passive and active sexual partners, the Court of Cassation effectively limited the crime of *fujor* to the passive male partner, analogizing his offense to that of the passive female prostitute, while the active male partner, or top, whether engaged in sex with a male or female prostitute, thus escapes conviction under the anti-prostitution law.<sup>197</sup> The Court of Cassation’s 1975 decision has settled into the category of *jurisprudence constante* in Egyptian law today,<sup>198</sup> and was therefore relied on in the notorious Queen-52 case some thirty years later, where convictions depended on either the suspect’s confession to practicing *fujor*, or on forensic examinations proving that the suspects’ rectum was “used.”<sup>199</sup>

More importantly, in an attempt to confirm that *shari’a* remained the law of the land in Egypt despite the French-inspired reforms of 1883 which remain constitutive of the country’s legal system today, Article 2 of the Egyptian Constitution was amended in 1980 to state that “the principles of sharia are the primary source of legislation in Egypt.”<sup>200</sup> Based on this amendment, a set of new Islamic codes were submitted for approval by the Egyptian parliament in the early 1980s, including an Islamic criminal code explicitly criminalizing *liwat*. However, none of these Islamic codes was promulgated by parliament, and the sense that Egyptian criminal law remains a Western secular transplant in conflict with *shari’a* remains today.<sup>201</sup> In the case of sodomy law, this tension between *shari’a* and modern Egyptian law became the subject of a decision by the Egyptian Supreme Constitutional Court issued in May 1992. In response to an appeal

195. See EDWAR GHALI AL-DAHABI, AL-JARA’IM AL-JINSIYYA 229-50 (1997).

196. MAKTABET AHKAM AL-MAHAKIOM AL-ARABIYYA AL-’ULYA, TA’N RAQAM 338 LISANAT 45 KADA’IYYA.

197. For a detailed discussion of the Court of Cassation’s decision, see DAHABI, *supra* note 197, at 23-36.

198. For the role of *jurisprudence constante* in French law and its relation to case law under the Common Law, see Mitch Lasser’s seminal, Mitchel de S.-O.-l’E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995).

199. For a brief discussion of criminalized male sexual roles under Egyptian law, see Amr Shakany, *On a Certain Queer Discomfort with Orientalism*, 101 AM. SOC’Y INT’L L. PROCEEDINGS 7 (2007).

200. For a succinct discussion of the 1980 constitutional amendment and its impact on judicial review in Egypt, see NATHALIE BERNARD-MAUGIRON, LA POLITIQUE A L’EPEUVE DU JUDICIAIRE: LA JUSTICE CONSTITUTIONNELLE EN EGYPT 339-95 (2003).

201. See SOUFI ABU-TALEB, *supra* note 121. See also MOHAMMAD MAHSUB, TATAWOR AL-DAWLA WAL-QANUN FI MISR AL-HADITHA (1998).

claiming the 1961 law against prostitution conflicted with Article 2 of the Egyptian constitution mentioned above, and demanding the law be struck down in favor of reinstating *shari'a* criminal norms on the subjects of *zina*, *liwat* and *di'ara* more generally, the Supreme Constitutional Court refused to exercise its constitutional review powers on the understanding that the anti-prostitution law was issued in 1961, thus before the amendment of Article 2 of the constitution, and that the latter only applied to laws promulgated *after* its adoption in 1980. By this logic, the Supreme Constitutional Court thus avoided entering into the larger thorny issue of Egyptian law's compatibility with *shari'a*.<sup>202</sup>

### III

#### DOMINANT HISTORIOGRAPHY RECONSIDERED: FROM VARIATIONS TO A NEW STREAM?

*Law schools tend to pick up mainstream intellectual opinion ten to fifteen years late.*

Robert Gordon, *Critical Legal Histories*<sup>203</sup>

Almost a quarter of Schacht's *Introduction to Islamic Law* is composed of bibliography—sixty pages to be exact.<sup>204</sup> Printed in 1965, Schacht's bibliography remains today an excellent starting point for any historian of Islamic law seeking reference material “ranging far and wide over original and secondary sources in a myriad of languages.”<sup>205</sup> An updated bibliography of Islamic law published nearly thirty years later is even far lengthier than Schacht's, its sheer volume strongly impressing the wealth of scholarly material that an explosion of interest in Islamic law has elicited since 1965.<sup>206</sup> One shudders to even contemplate the length of a post 9/11 bibliography as it may come to stand updated in say another ten years.

I say all of this in prelude to a caveat: What I provide in the few pages below does not aim at exhaustively mapping all the different critiques of Schacht and Coulson's scholarship available in English. Rather, my goal is to catalogue at the most abstract level a number of identifiable “moves” which proliferated in scholarship on Islamic law history since the late 1970s. These moves have one principle strain in common: They are all bent on demonstrating that Islamic law did not remain as stagnant during the “*taqlid*” period of *shari'a* history as one is apt to think following Schacht and Coulson's historiography. Naturally, these two authors' opinions on the “closing of the gate of *ijtihad*” has been a central

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202. MAKTABET AHKAM AL-MAHAKIOM AL-ARABIYYA AL-'ULYA, *supra* note 196.

203. Gordon, *supra* note 13, at 68.

204. SCHACHT, *supra* note 5, at 215-85

205. Edge, *supra* note 10, at xxii.

206. LAILA AL-ZWAINI & RUDOLPH PETERS, *BIBLIOGRAPHY OF ISLAMIC LAW 1980-1993* (1994).

object of criticism, but so also have been, for example, their periodization of Islamic law's stages of historical development (formative, classical, *taqlid* and modern), and their views on Shafi'i position as *shari'a*'s master-builder and on the blind juristic imitation by later scholars of the work of the four *mazhabs*' original founders. Such criticisms of Schacht and Coulson's scholarship published since the late 1970s can be described as "anti-Orientalist" insofar as their authors seek to dispute the a-historical immutability of *shari'a* black-letter doctrines in fields as diverse as contract law and land ownership, and thus contest the dominant vision of *shari'a* history as one of a legal system that dysfunctionally resisted evolution. What these scholars offer, instead, are glimmers of a *shari'a* history developing on an evolutionary-functionalist track that we might associate with Western historiography.

To my mind, however, these anti-Orientalist criticisms largely amount to mere variations on the four historiographic premises which I discuss in Section I of this paper. If they show that some areas of *shari'a* law had evolved, this evolution is demonstrated only within the *fiqh* sanctioned confines of Islamic law as a divinely revealed normative order, thus keeping their scholarship on Islamic law history limited to that of *shari'a* (Premise #1) and not that of *siyasa* (Premise #2). In that sense, these anti-Orientalist criticisms are essentially a refinement on the *shari'a* /*siyasa* dichotomy. They fine-tune our understanding of the *shari'a* side of this dichotomy without disturbing its binary logic of divine versus secular law, and thus without questioning the limitations this binary imposes on the historian's approach to his subject of inquiry. Moreover, these criticisms barely leave a mark on the other great dichotomy, tradition/modernity (Premise #4). Even as they show that *shari'a* had indeed functionally evolved during the *taqlid* period, we are still left with the dominant historiographic view of its creeping "Westernization" over much of the nineteenth century, and still conclude with the divine law's blanket replacement by secular liberal transplants of European law across almost all the Muslim World by the same century's end. For all these reasons, I will collectively tag these criticisms of Schacht and Coulson's work "anti-Orientalist variations" on the dominant historiography.

By contrast, a rather small but gradually rising stream of alternative historiography has been forming over the past ten to fifteen years. While its authors share the same anti-Orientalist sentiments, their work presents not just another variation on the four dominant historiographic premises, but rather an attempt at undoing the two foundational binaries that structure the dominant historiography. What interests me most in this new stream of Islamic law historiography are arguments that it presents us with: (a) that certain fields of *shari'a* (specifically the law on evidence) had historically transformed under an alternative conception of the divine law where *shari'a* and *siyasa* were considered one and the same, and *not* under the mantle of *fiqh*; and (b) that legal reforms over the first three quarters of the nineteenth century (specifically in criminal law and criminal justice administration) were not preliminary try-outs at legal Westernization, nor omens heralding *shari'a*'s eventual wholesale substitution by European

transplants at century end. Rather, these ostensibly “Westernizing” reforms were applications of *siyasa* legal tools that had existed prior to the colonial encounter, and were thus neither Western encroachments on *shari’a*, nor instances of secularization “experienced” in conflict with Islamic values, culture, or identity.

I intentionally put the verb experienced between quotes in the phrase just above in order to underscore what is at stake in this new stream of historiography. That is, a history of how subaltern subjects experienced the disciplinary power of legal reforms in their day-to-day life during the first three quarters of the nineteenth century. In this respect, this new stream of historiography presents us with a possible alternative to the *shari’a* /*siyasa* and modernity/tradition binaries that structure Islamic law’s dominant historiography (both in the Schacht and Coulson’s versions, as well as in the more recent Anti-Orientalist variations on it). Moreover, while scholars of the dominant historiography (and its variations) overwhelmingly rely in their historical research on jurisprudential texts for primarily materials (*shoroh*, *fatawa*, etc.), and thus invariably present us with a legal history written from the perspective of jurists, new stream scholars, by contrast, are pioneers in making use of Ottoman court and police records as their chief cache for primary research materials, and thus offer us by comparison a legal history written from the subaltern (instead of juristic) perspective. Relying on the “archives” for primary materials, new stream historians take the *siyasa* courts, and the *qanuns* applied there, as an integral part of Islamic law history—not least because these archival materials give voice to the stories of litigants and administrators who appear entirely unworried over the conflict between *shari’a* as divine law versus *siyasa* courts and *qanuns* as secular, un-Islamic aberrations therefrom.

We might call this stream of new historiography “archival” because of the important role Ottoman court and police records play in it, or alternatively subaltern legal history given its permeation by subaltern narrative. Yet, some of this interesting new work continues to rely on juristic texts for primary research materials, occasionally deals with abstract doctrines divorced from the context of court application, and often juxtaposes subaltern narratives of the law with perspectives from the legal system’s administrators. For these reasons, I will call these scholars “new historians” instead, and argue that this rather tired epithet is nonetheless quite apt here on two principle accounts. First, by studying nineteenth century *siyasa* courts and *qanuns* as Islamic law history, these scholars offer us a “new” historiography transcending the erstwhile *shari’a*/*siyasa* binary informing both dominant historiography and its anti-Orientalist variations. This move opens up an entirely new line of research whose potentials are still largely unexplored. Second, by recounting the stories of both state administrators and subaltern subjects of the law, this scholarship tells of a time when Islam as a religion seems to have been understood differently, a time when “anxious envy” of the west and “defensive pride” about Islamic law, both of which Geertz associates with the late nineteenth century rise of scripturalist Islam, had all been curiously absent, when modernization and perhaps even secularism were viewed

as Islamic. In that sense, the new historians offer the possibility of also transcending the modernity/tradition binary in which Western law and Islamic law are always contrasted as two opposite legal traditions, the one dynamically secular, the other statically divine. In short, the “newest” thing about the new historians is therefore the possibility their scholarship holds of an Islamic law historiography that does not conceive of Islam in scripturalist terms.

The difference between new historians and anti-Orientalist variations on Schacht and Coulson’s dominant historiography is perhaps at its most obvious if we compare each of their takes on the history of Islamic law on sodomy. New historians would include Ottoman *qanuns* as part of their study (in violation of Premises #1 and #2), they would consider the history of functionally-evolving *siyasa* courts and laws as integral to Islamic legal history (in violation of Premise #3), and most importantly, regard pre-1883 criminal justice reforms in Egypt as instances of Islamic law evolution as opposed to signs of insidious Westernization corrupting an authentic and unadulterated pre-colonial Islamic essence (thus violating Premise #4). By contrast, anti-Orientalist variations on the dominant historiography remain loyal to its scripturalist understanding of Islam, and therefore despite refining our understanding of *shari’a*, would still limit their study of Islamic law on sodomy to *shari’a* rules on *liwat* as pretty much described in Part II.

With these general comments distinguishing new historians of Islamic law from Anti-Orientalist variations on the dominant scripturalist historiography, let me now turn to discuss the main features of the scholarship under each of these streams in some detail.

#### A. *Anti-Orientalist Variations on the Dominant Historiography*

In his introduction to “Material Available on Islamic Legal Theory in English,” Ian Edge offers us a wonderfully succinct and instructive map of the principal developments in scholarship on Islamic law history up to the year 1996.<sup>207</sup> Taking Schacht and Coulson as the two vital sources on the subject, Edge catalogues, among other developments, three particular moves in which new scholarship has come to refine Schacht and Coulson’s views on the historically immutable “nature” of *shari’a*. Sami Zubaida presents the same three moves in *Law and Power in the Islamic World*, which meticulously updates Edge’s introduction up to 2004.<sup>208</sup> Taken together, Edge and Zubaida map out what I think are three anti-Orientalist variations on the dominant scripturalist historiography.

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207. Because essays included in the volume on Islamic Law and Legal Theory were unfortunately limited by the absence of book chapters, Edge uses the Introduction to intentionally fill the gaps caused by the limitation. See Edge, *supra* note 10.

208. SAMI ZUBAIDA, *LAW AND POWER IN THE ISLAMIC WORLD* (1994).

### 1. Variation #1: Refine Shari'a's Stages of Development

As opposed to the almost Hegelian linear progression of *shari'a's* historical development through a “formative,” “classical,” and then “*taqlid*” period, anti-Orientalist scholarship emphasizes historical contingency, backward projection, and political context, thus challenging the linear narrative of *shari'a's* three principal historical stages. Norman Calder’s work is particularly worth mentioning here. Its central argument is that the formulation of *shari'a* norms and reflection upon them had historically come first, followed by their legitimation in the opinions of *shari'a's* first master-jurists, Malik and Abu Hanifa. Prompted by competition between the four *mazhabs*, later jurists first sought to support their different opinions of *shari'a* norms in the *Sunna*, and when finally the conflict between the schools of *ra'y* and *hadith* was effectively won by the latter, justification for *shari'a's* hierarchy of normative sources was eventually sought in the *Qur'an*.<sup>209</sup> As Zubaida notes, Calder’s chronology is the “opposite of the ideological and expositional order of the *shari'a*,” canonized in both Schacht and Coulson’s narrative as it is by *shari'a* historians writing in Arabic today.<sup>210</sup> On the same note, John Burton’s work<sup>211</sup> fits here in its attempt to “to prove that the *Qur'an* was in fact collected together in its final form during the Prophet’s lifetime and that the exegetical discussion and interpretation of the *Qur'an* and its legal principles by Islamic jurists in the century and a half after the Prophet’s death were the origins of the *fiqh*: the rules of Islam’s jurisprudence.”<sup>212</sup>

Of a more visibly anti-Orientalist bent is Wael Hallaq’s magisterial rethinking of Islamic law’s origins and evolution.<sup>213</sup> Explicitly writing against the classic Orientalist creed that the Arabia of the Prophet was a culturally impoverished region, and that when the Arabs “built their sophisticated cities, empires and legal systems . . . they freely absorbed the cultural elements of the societies they eventually conquered,”<sup>214</sup> Hallaq begins by a close discussion of Pre-Islamic Arabian culture and proceeds to demonstrate that Islamic law came to contain all its major components by the middle of the tenth century AD, as opposed to the ninth century as per Schacht, making this new date a “cut-off point” after which all “later developments, including change in legal doctrine or practice, were ‘accidental attributes’ . . . that did not affect the constitution of the phenomenon we

209. NORMAN CALDER, *STUDIES IN EARLY MUSLIM JURISPRUDENCE* (1993). Calder’s book is also notable in its use of non-legal primary materials strictly defined, and instead on the *tabaqat* literature of North Africa and the *adab* literature of Iraq. For a summary of Calder’s work, see ZUBAIDA, *supra* note 208, at 18-24.

210. ZUBAIDA, *supra* note 208, at 22.

211. JOHN BURTON, *THE COLLECTION OF THE QUR’AN* (1977); see also JOHN BURTON, *THE SOURCES OF ISLAMIC LAW: ISLAMIC THEORIES OF ABROGATION* (1990).

212. Edge, *supra* note 10, at xxiii.

213. HALLAQ, *supra* note 128 (2005).

214. *Id.* at 3-4.



call Islamic law.<sup>215</sup> While Hallaq's goal is to demonstrate how classical Islam "offered a prime case of the rule of law," and though he does so quite convincingly, his analysis remains very much within the confines of scripturalist historiography: The history of Islamic law is that of *shari'a* (Premise #1), the *mazalim* are described as extra-judicial tribunals, echoing Coulson's description of them as "extra-*shari'a*" courts (Premise #2), their justification under *siyasa shar'iyya* is assessed in the same wary terms we saw in Schacht and Coulson's work,<sup>216</sup> and perhaps most astonishingly, *mazalim* tribunals are described as both "sporadic and ephemeral,"<sup>217</sup> a surprising assessment given the solidity with which they passed from the Abbasid period, on which Hallaq is writing, to a more settled and bureaucratized existence under the Mamluks,<sup>218</sup> and mutating with the same stability under the Ottomans,<sup>219</sup> before making it into modern practice in both Yemen,<sup>220</sup> and Saudi Arabia.<sup>221</sup> Another sign of the enduring scripturalist framework in Hallaq's work is that the other principal "extra-*shari'a*" jurisdiction, namely *hisba*, is entirely absent from *Origins and Evolution of Islamic Law*, as is any discussion of *siyasa shar'iyya* in his other magisterial study on the *History of Islamic Legal Theories*.<sup>222</sup>

## 2. Variation #2: Refine Closing the Gate of *Ijtihad*

The dominant historiography presents the closing of the gate of *ijtihad* as perhaps the most symbolically powerful marker of *shari'a*'s historical lapse into the static *taqlid* period, which extended to the nineteenth century and during which *shari'a* was resistant to innovation. A target of criticism by Islamic law reformers since the late nineteenth century (most notably Afghani and Abduh), the call to re-open the gate of *ijtihad* has become almost a given among many Islamist thinkers today.<sup>223</sup> It has also become a marker of anti-Orientalist schol-

215. *Id.* at 3.

216. *Mazalim* were theoretically "sanctioned by the powers assigned to the ruler to establish justice and equity according to the religious law (*siyasa shar'iyya*). In reality, however, they at times represented interference in the Shari'a." *Id.* at 99.

217. *Id.* at 101.

218. See JORGEN S. NIELSEN, SECULAR JUSTICE IN AN ISLAMIC STATE: MAZALIM UNDER THE BAHRI MAMLUKS 662/1264-798/1387 (1985); H. F. Amedroz, *The Mazalim Jurisdiction in the Ahkam Sultaniyya of Mawardi*. Note that both Nielsen and Amedroz refer to *mazalim* as a secular jurisdiction, very much echoing Schacht and Coulson's assessment on the same. See *supra* pp. 16-21. See also DOCUMENTS ARABES INÉDITS SUR LA VIE SOCIALE ET ÉCONOMIQUE EN OCCIDENT MUSULMAN AU MOYEN AGE (E. Lévi Provençal ed., 1955); SABER HUSSEIN, WILAYAT AL-MAZALIM WA MAJALISIHA (1984).

219. See EMILE TYAN, HISTOIRE DE L'ORGANISATION JUDICIAIRE EN PAYS DE L'ISLAM (1960).

220. See BRINKLEY MESSICK, THE CALLIGRAPHIC STATE: TEXTUAL DOMINATION AND HISTORY IN A MUSLIM SOCIETY (1993).

221. See FRANK VOGEL, ISLAMIC LAW AND LEGAL SYSTEMS, STUDIES OF SAUDI ARABIA (2000).

222. HALLAQ, *supra* note 128 (1997).

223. For a seminal review of different modern theories seeking challenging the closing of the

arship on Islamic law in English. Starting with Ya'akov Meron's 1969 essay questioning the closing of the gate of *ijtihad* in Hanafi texts,<sup>224</sup> through Bernard Weiss's refinement of *ijtihad*,<sup>225</sup> and perhaps most notably in Wael Hallaq's work on the same issue,<sup>226</sup> we find the core of a much more subtle understanding of how *shari'a's* substantive norms continued to evolve after the supposed closing of the gate of *ijtihad*. Without summarizing the arguments presented in these scholars work, what interests me here is that their project of demonstrating Islamic law's continued historical evolution, contra Schacht and Coulson, happens only within the confines of *shari'a* sanctioned under *fiqh*. *Siyasa* emanations such as *mazalim* or *hisba* remain outside this narrative, and finally the image of evolution they present us with strikes me, at least, as rather strained. For example, Hallaq remarks that "[o]f course, a reformulation of the substantive legal rulings belonging to the early period in accordance with the systematic demands of later legal theory was out of the question. For this, if it were to be carried out on any significant scale, would amount to a grave violation of consensus."<sup>227</sup>

Baber Johansen's insightful analysis on the transformation of Hanafi law regarding land tax and rent in Mamluk and Ottoman times offers a far more original approach to *shari'a's* evolution after the closing of the gate of *ijtihad* by concentrating on the concrete example of the peasants' historical loss of property rights.<sup>228</sup> Johansen outlines two methods of substantive legal change. First, the dominant opinions in each of the four *mazhabs* were contained in founding texts (*mutun*), to which generations of later scholars added their own exegetical take (*sharh*) on the *matn* margins. Intended as deductive applications of the *matn*, the *sharh* ended up introducing major policy changes in questions of land use. Specifically, until the eleventh or end of the twelfth century, Hanafi jurists required contracts for payment of rent on agricultural land. Beginning in the thirteenth century, jurists started to recognize local customary rules on land use and share-cropping as binding without explicit contractual agreement, a rule that evolved from the thirteenth to sixteenth century to conform with Turkish dynastic practices which regarded arable lands as state possessions. In a sense, this development represents the opposite version of Maine's famous line, a reverse move from contract to status, as the dispossessed peasants became subject to the

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gate of *ijtihad* and proposing a new agenda for Islamic law reform, see *id.* at 207-254.

224. Ya'akov Meron, *The Development of Legal Thought in Hanafi Texts*, 30 *STUDIA ISLAMICA* 73 (1969).

225. Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 *AM. J. COMP. L.* 199 (1978).

226. See Wael Hallaq, *Was the Gate of Ijtihad Closed?*, 16 *INT'L J. MID. E. STUD.* 3 (1984); and, HALLAQ, *supra* note 128, at 143-61 (1997).

227. HALLAQ, *supra* note 128, at 130 (1997).

228. BABER JOHANSEN, *THE ISLAMIC LAW ON LAND TAX: THE PEASANT'S LOSS OF PROPERTY RIGHTS AS INTERPRETED IN THE HANAFI LEGAL LITERATURE OF THE MAMLUKE AND OTTOMAN PERIODS* (1988); see also *Legal Literature and the Problem of Change: The Case of Land Rent, in ISLAM AND PUBLIC LAW* (Chibli Mallat ed., 1993).

authority of state rather than parties to contractual agreements. An uneasy coexistence thus emerged in which Hanafi jurists retained *matn* texts as the authority of legal education, but followed *sharh* (and *fatawa*) where new doctrines superseded old ones. In this sense, Johansen's historiography remains within the theory/practice bounds outlined in scripturalist Premise #2.

### 3. Variation #3: Refine the Significance of Shari'a's Minor Sources

Perhaps the key tenet of scripturalist Islam, as identified by Geertz, is the resolve to found all *shari'a* in the *Qur'an* or *Sunna*, making it by definition a scripturally-anchored normative order, and its dominant historiography by default that of an equally scripturally-moored law. Orientalist-scripturalist scholarship typically considers "minor sources" of the *shari'a*—such as *istihsan* or *maslaha*, which express the role of policy considerations (of an ethical or utilitarian nature) in the formation of *shari'a*—to have a negligible influence on the historical development of *shari'a*'s substantive rules.<sup>229</sup> The negligible role that non-scriptural legal reasoning is understood to have played in *shari'a*'s development further marks the divine law's rejection of profane human legislation, and imputes to *shari'a* an internal logic that defies rationalist human reasoning outside *qiyas*.<sup>230</sup>

Orientalist assessments of Islamic legal thought as doggedly religious and hostile to humanistic consideration in legal reasoning inform John Makdisi's seminal 1985 article on equity in Islamic law.<sup>231</sup> Reacting against such assessments by American judges, including for example Frankfurter's argument that his court does not "sit like a kadi under a tree dispensing justice according to considerations of individual expediency,"<sup>232</sup> Makdisi offers a wide ranging review of opinions on the role of *istihsan* in *fiqh*, culminating with a functionalist assessment of *istihsan* as analogous to the "reasoned distinction of precedent" in American legal thought. Makdisi's anti-Orientalist assessment, though highly original in perspective, nonetheless remains within the scriptural definition of *shari'a* insofar as it does not discuss non-scriptural jurisdictions and laws such as *mazalim*, *hisba*, or *qanun*.

Indeed, the same scriptural limitation applies in equal measure to all the above variations of anti-Orientalist scholarship that maintain the *shari'a/siyasa* binary intact. Thus even Zubaida effectively echoes Schacht and Coulson's assessment of these "secular" or "extra-*shari'a*" *siyasa* jurisdictions by concluding that:

229. See *supra* pp. 21-24.

230. See IHSAN BAGBY, *UTILITY IN CLASSICAL ISLAMIC LAW: THE CONCEPT OF MASLAHA IN USUL AL-FIQH* (1986).

231. John Makdisi, *Legal Logic and Equity in Islamic Law*, 33 AM. J. COMP. L. 63 (1985).

232. *Id.* at 64.

The qadi assumed a judicial function with a religious commitment. He judged (at least in theory) according to the *shari'a*, rules ultimately based, it is supposed, on revelation and sacred precedent . . . Qadi justice was the 'normal' or 'ideal type' of jurisdiction in Muslim theory. In practice however, it co-exists with a number of other jurisdictions, not bound by the *sharia*, and as such 'extraordinary.'<sup>233</sup>

Although the above variations manifest anti-Orientalist tendencies, the second binary tradition/modernity is also left largely intact. For example, Edge begins his Introduction by arguing that "Islamic law is one of the major non-Western legal systems in the world today."<sup>234</sup> While he insists that one of the "many misunderstandings of Islamic law is that it is a single unified system of law which is the same the world over," he nonetheless confirms the blanket tension between tradition and modernity as a central defining feature of Islamic law's postcolonial condition throughout the Arab World, where there,

exists in each and every Arab state a dynamic—a ready source of legal and political conflict—between what is perceived to be traditional Islamic law and modern secular law. Each state is at a particular stage in the development of this dynamic, based upon its separate and individual place within a framework which comprises Arab history, the influence of the west upon it during the period of colonial rule and its attitude to the law reform since independence—attained in most cases only comparatively recently.<sup>235</sup>

For the prospect of an alternative Islamic law historiography that can transcend the scriptural opposition of *siyasa/shari'a* on the one hand, and modernity/tradition on the other, we must now turn to a brief discussion of the work of the new historians.

#### B. *New Historian Scholarship: Towards a Non-Scriptural Historiography of Islamic law?*

I should start by acknowledging that, compared to scriptural historiography, what I take to be "new historian" scholarship on Islamic law is a decidedly tiny corpus of work, admittedly more of a "new trickle" than a "new stream" of scholarship. And though the impact of new historians' work on the field of Islamic law history remains to be seen, I take the work presented below as the single most promising option of moving beyond the foundational binaries of *shari' al-siyasa* and modernity/tradition that dominate scriptural historiography as it stands today. Needless to say, what follows is not an exhaustive reading of this new historian scholarship—rather, what I offer is a highly selective reading of only some of the arguments developed by historians discussed below.

233. ZUBAIDA, *supra* note 208, at 51.

234. Edge, *supra* note 10, at xv.

235. *Id.*

### 1. *Circumstantial Evidence and Siyasa Shar'iyah*

It is helpful to remember that the most important obstacle to applying *shari'a* punishments for *liwat* lies in the heavy evidentiary barriers to conviction discussed in Part II of this essay. Without the suspect's confession, or testimony of four witness if the crime is considered a *hadd*, none of the rules discussed earlier would make it into the sphere of application. More specifically, not only does *shari'a*'s rejection of "circumstantial evidence" in support of a *liwat* conviction make it highly unlikely that *liwat* punishments would be enforced in practice, but the very admission of "circumstantial evidence" by a court of law itself signifies for Schacht and Coulson a move towards the secular, extra-*shari'a*, or "extraordinary" (to use Zubaida's term) jurisdiction of *siyasa*.

To my mind, the most important intervention in English language scholarship to this conception of evidence under "Islamic law" comes from an article published five years ago by Baber Johansen and which powerfully argues, contra Schacht and Coulson, that "circumstantial evidence" not only existed in many forms admissible in "Islamic law" courts following *usul al-fiqh*, but that more importantly, the latter experienced such major upheavals in its doctrines of proof between 1200-1400, that "circumstantial evidence" was argued admissible from a perspective that blatantly qualifies as "Islamic law."<sup>236</sup> As such, I think Johansen's article merits some close reading here.

Johansen begins by discussing the law on evidence during the "old" and "classical" periods of *usul al-fiqh*, roughly from the end of the eighth to the end of the twelfth century.<sup>237</sup> During that period, "Sunni *fiqh* doctrine concerning proof and procedure was based on the notion that the most effective evidence is the word," and therefore limited the basis of a valid judgment to three methods of proof: the defendant's confession, witness testimonies, and the oath of the parties or their refusal to take the oath.<sup>238</sup> Yet even with this clear understanding of evidence law, Sunni jurists continued to exhibit what Johansen describes as a deep epistemological skepticism on the value of the spoken word to affirm truth. Verbal enunciations (*aqwāl*) only provided epistemic uncertainty, which the jurists had to accept as proof because they were required as such under the *Qur'an* and *Sunna*:

The word of an observer, contrary to the sensory experience of the individual, can never provide indisputable and certain knowledge (*'ilm yaqīn*). Such knowledge is to be found only in the revelation, i.e. the *Qur'ān*, the *Sunna*, and the consensus

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236. Johansen, *supra* note 149. Special volume on "Evidence in Islamic Law." This article builds on two other articles published earlier in French. See Baber Johansen, *Verite et torture: ius commune et droit musulman entre le Xe et e XIIIe siecle*, in DE LA VIOLENCE (Francoise Heritier ed., 1996); *La decouverte des choses qui parlent. La legalization de la torture judiciaire en droit musulman (XIIe-XIVe siecles)*, 7 ENQUETES 175 (1998).

237. In doing so, Johansen is following Chafic Chihata's stages.

238. Johansen, *supra* note 149, at 169.

of the jurists (*ijmā'*); alternatively, it may be the result of sensory experience. The first type of indisputably certain knowledge serves as the basis for the derivation of legal norms from the revelation, not as a means to establish the truth of the facts; the second type is too often out of the judge's reach. The judge must issue a judgment on the basis of acts that, most of the time, he did not observe and concerning which he must rely on the observation of witnesses or the acknowledgment of the defendant.<sup>239</sup>

Johansen argues that this deep epistemological skepticism regarding the strength of the spoken word as evidence of truth leads the jurists to admit in practice a wide array of circumstantial evidence under the mantle of *fiqh*. Thus in property disputes, architectural elements such as beams between houses were admissible to establish division between property rights,<sup>240</sup> expert opinion on the quality of silk was admitted, as was the market price of goods as evidence of its value, and indeed even the pregnancy of an unmarried woman was taken as evidence of adultery (*zina*) without the need for confession or witness testimony. Moreover, circumstantial evidence was also admitted in *ta'zir* cases after attempts to apply scripturalist rules of evidence had failed.

According to Johansen, however, the above rules on evidence experienced a deep jurisprudential upheaval between the thirteenth and fifteenth centuries, caused in part by changes in the legal profession during the Mamluk period and its attending political tensions. Johansen notes the mass migration of *'ulama* from Syria, Iran, Anatolia and other regions to Egypt during the thirteenth century,<sup>241</sup> and their need to form alliances with the new Mamluk ruling elite. Many rose up the echelons of the Mamluk state administration, and the office of judge was perceived as a prelude to further upward mobility in a professional career now spanning the army, jobs with state administration and high positions of control over financial stakes. Most importantly, this new legal elite was also responsible for applying *hudud*, with their strict evidentiary barriers to conviction under *fiqh*. Accordingly, this new system tended to "increase the judicial competence of military officers," thus increasing their knowledge of the law.<sup>242</sup>

Understandably, the ruling elite were suspicious of the ability to maintain law and order under the scripturalist conception of "Islamic law" which limits its rules to those derived from *Qur'an*, *Sunna* and *Ijma'*, or extended therefrom through *qiyas* under the principles of *fiqh*, and which straddles criminal punishments with formalistic procedures and seemingly insurmountable evidentiary barriers to conviction. A rift thus appeared: while the jurists or *'ulama* insisted that circumstantial evidence was marginal or wholly inadmissible under *fiqh*, those entrusted with deciding criminal cases resorted to circumstantial evidence as a matter of course. The new stream of neo-Hanbali and Maliki jurists who

239. *Id.* at 170.

240. To this end, Johansen relies on a fascinating study, Robert Brunschvig, *Urbanisme medieval et Droit Mussulman*, REVUE DES ETUDES ISLAMIQUE 127-55 (1947).

241. See CARL F. PETRY, *THE CIVILIAN ELITE OF CAIRO IN THE LATER MIDDLE AGES* (1981).

242. Johansen, *supra* note 149, at 180.

worked between the thirteenth and fourteenth centuries sought to bridge the gap between theory and practice, and developed the doctrine of “*siyasa shar’iyya*.”

Johansen translates this doctrine loosely as “the political function of the sacred law,” and accredits the neo-Hanbali jurist Ibn Taymiyya and his disciple Ibn Qayyim al-Jawziyya with providing the most sophisticated jurisprudential support for its religious legitimacy. Specifically, both jurists argued that rules of evidence derived under *fiqh*, which did not admit circumstantial evidence *per se*, did not constitute on their own the entire corpus of religious normativity or *shar’*. Rather, the jurists’ opinions did not represent “revealed law” and belonged only to the sphere of “free interpretation” and hence were binding only on those jurists who advocated their own views on the subject, and only to the extent their opinions conformed to indisputable texts. What mattered most was *siyasa shar’iyya*, understood not as a “system of rules and norms but the religious purpose underlying these norms in its practical political form. The concept underlines the necessity of a strong political apparatus for the practice of religion and assigns a religious dimension to the exercise of all public functions (*wilāyāt*), all of which are supposed to fulfill the *hisba* commandment, that is to command the good and forbid the evil.”<sup>243</sup>

Thus for Ibn Taymiyya and Ibn Qayyim al-Jawziyya, there was no religious rationale for the division of labor between the *qadi* applying his norms derived from *fiqh*, and the executive (military princes and administrators) maintaining law and order through a definition of crimes and punishment that flouted pre-Mamluk *fiqh* norms on evidence and procedure. Unlike other jurists such as Mawardi, who tried to define the norms governing public functions and distinguish the division of tasks between judges and administrators,<sup>244</sup> neo-Hanbali and Maliki jurists of that period collapsed that distinction and saw no reason to separate the competencies of judges and military princes. Rather, the injunction to command right and forbid wrong applied to all these officials, judges, administrators, military princes and so on. Indeed, Johansen quotes Ibn Qayyim’s legal realist argument that a “judge” was merely,

a name that applies to each and everyone who issues a decision in a conflict between two parties or who arbitrates between them, no matter whether he is a caliph, a sultan, a deputy, or a governor; or whether he was appointed in order to judge according to the sacred law; or as the deputy of such judge deciding in a conflict between parties, even if he judges (*yahkum*) nothing more than the quality of the handwriting among children who turned to him for this purpose.<sup>245</sup>

A new stream of *fiqh* on evidence thus emerged at the hands of this rising legal elite during the thirteenth and fourteenth centuries, developing new notions of proof and procedure which, from the fifteenth century onwards, became part and parcel of the post-classical legal doctrine.<sup>246</sup> Signs (*‘alāmāt*) and indications (*amārāt*) became admissible as evidence under this religious normativity. Thus,

243. *Id.* at 181.

244. See Amedroz, *supra* note 218.

245. Johansen, *supra* note 149, at 185.

246. *Id.* at 192.

an owner of chattel could prove his legal rights by demonstrating that the brand on an animal was his, and a religious endowment could prove its ownership of a building by demonstrating that the inscription on the building's wall was its own, and even the "physical resemblance between a child and an adult male may serve as proof of paternity and affiliation."<sup>247</sup> In these examples, evidence is established without the spoken word, and although this seems to go against the old and classical principles of evidence under *fiqh*, circumstantial evidence was nonetheless admissible based on the *siyasa shar'iyya* doctrine requiring the maintenance of order in society through commanding right and forbidding wrong.

Thus neo-Hanbali and Maliki jurists of the Mamluk period sought to bridge the gap between *qadis* and their *fiqh* norms on evidence on the one hand, and *hisba* officials with their separate definition of crimes, punishments and rules on proof on the other. Institutional structures and normative arrangements adopted by the *muhtasib* (and by default *mazalim* jurisdictions as well) were all considered legitimate under the *siyasa* doctrines of these jurists "whenever a suspect, be he a plaintiff, a witness or a defendant, cannot be convicted according to the procedural law of classical *fiqh* doctrine."<sup>248</sup> Unlike qadi jurisdiction which depended on lodging a private complaint, *hisba* trials could be instigated without the claim of a private plaintiff, and could be settled outside the *hudud* definition of crimes and punishments and without the need for confessions or witness testimony. Once again, it is worth quoting Johansen's assessment of these developments at length:

Texts written by prominent Maliki and Hanbali jurists of the thirteenth and fourteenth centuries . . . all bear marks of this development: they address not only the jurists and the qadis but also the higher echelons of the bureaucracy and the military officers as judges who are supposed to apply the law and guarantee the social and political order. These jurists deviated from the classical *fiqh* doctrine on proof and procedure in five respects.

Firstly, they do not assert the legal profession's control over the judiciary. Rather, they regard the dispensation of justice as a function to be fulfilled by all members of the political elite. Consequently, judgments can be based not only on *fiqh* norms but also on political considerations and state interest.

Secondly, and for reasons closely related to the previous point, these jurists highlight the model of behavior of charismatic figures of the early Muslim community, not in order to justify the legal categories that are the product of legal reasoning and its systematic constraints, but to downplay them.

Thirdly, their conception of proof is not centered on the utterances of litigants and witnesses. Circumstantial evidence of all kinds assumes a prominent place as a full and sufficient proof.

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247. *Id.* at 188.

248. *Id.* at 191.



Fourthly, and directly relation to this new conception of proof, the jurists do not legitimize the new doctrine in terms of epistemological scepticism. Rather, the new doctrine is characterized by the optimistic conviction that the judge, by relying on signs and indicators, has the ability to determine the truth and to base his judgment on it.

Finally, the goal of the new doctrine is not to guarantee the rights of the defendant, but to protect the public interest and the ability of the political authorities to control disturbances and lawlessness.<sup>249</sup>

What I find most striking in Johansen's article is its implications which go markedly against the scripturalist grain in defining "Islamic law." For Schacht and Coulson, the institutional structures and normative arrangements associated with the *muhtasib*, *mazalim*, *shurta*, and *qanun* are all dismissed as "secular" aberrations from the religious "Islamic law" defined by the '*ulama*' under *fiqh* (our Premises #1 and #2). Indeed, they are all evidence of the historical schism between theory and practice which characterizes the nature of "Islamic law" and renders it a scripturally ahistorical subject of scholarship (Premise #3). Schacht and Coulson are certainly not alone in this assessment. Their work resonates in other scholarship which habitually employs the term "secular" to describe these institutions and the norms they applied in settling disputes.<sup>250</sup> By contrast, Johansen's discussion on the historical emergence of the *siyasa shar'iyya* doctrine, and the admission of circumstantial evidence under its aegis in *hisba* trials in particular, render all such offices and laws consonant with the larger notion of "*shar*" or Islamic normativity. If we follow Johansen, the term "secular" can no longer be used with much certainty to describe these supposedly "extra-Islamic" institutional structures and normative arrangements. Rather, they would form part and parcel of the history of "Islamic law" proper.

## 2. Early Ottoman Interlude: *Qanun and Siyasa Shar'iyya*

As discussed earlier,<sup>251</sup> *qanun* can be loosely translated as "code of law" containing statutes that define crimes and punishments largely outside the substantive, procedural and evidentiary requirements of *fiqh*. While *qanuns* were issued by rulers in Mamluk, Abbasid, and even Ummayyad times, Schacht and Coulson find the Ottomans to have been the most prolific producers of this form of law.<sup>252</sup> Their scholarship touches only tangentially on Ottoman *qanuns*, because *qanuns* in general are part of *siyasa* and not *shari'a* (Premise #2). For the

249. *Id.* at 180. Paragraphing not in original text.

250. Jorgen Nielsen's study of *mazalim* under the Bahri Mamluks (1264-1387) repeatedly describes *mazalim* as "secular justice," adopts Mawardi's analysis as its base of discussion, and looks favorably at Ibn Khaldun's cynical dismissal of *mazalim* as the power of the sword opposed to the power of *shari'a*. See JORGEN S NIELSEN, SECULAR JUSTICE IN AN ISLAMIC STATE: MAZĀLIM UNDER THE BAHRĪ MAMLŪKS 662/1264-789/1387 (1985). See also HEYD, *supra* note 59, at 183, mentioning Ibn Khaldun's disapproval of *siyasa* as a separate "secular" law.

251. See *supra* pp. 16-21.

252. See generally SCHACHT, *supra* note 5, at 84, 87, 90-91; COULSON, *supra* note 6, at 173.

most exhaustive analysis, we must turn back again to Heyd's *Studies in Old Ottoman Law*, and my goal in doing so is to highlight one specific point: rather than being the opposite of *shari'a*, Heyd's study points towards a subtle conception in which *qanuns*, and *siyasa* in general, were viewed as part and parcel of *shari'a*.

A closer look at some characteristics of *qanun* will demonstrate its compatibility with *shari'a*. For example, a *qanun* was valid only during the lifetime of the Sultan who had enacted it. In practice, however, each new sultan would generally confirm the *qanuns* enacted by preceding rulers because the latter were often merely a legalization of current applicable law.<sup>253</sup> Heyd thus argues that in substance, *qanuns* were meant to codify current customary law or '*orf*', and that their legitimacy was derived from the fact that '*orf* is binding under *fiqh*. *Qanuns* often began with a preamble that restates this fact by reference to maxims such as "Custom is legal text" ("*al 'ada kal nass*"), "Custom is one of the *shari'a* proofs in matters on which there is no written authority" ("*al 'ada ihda al hujaj al shar'iyya fima la yunass fih*"), "What the believers consider right is right with God" ("*Ma ra'ah al muminu hasanan foha ind allah hassan*"), and most interestingly, "What is proper according to common usage is like what is legal according to holy law" ("*al ma'ruf 'orfan kal mashru' shar'an*").<sup>254</sup>

Further, in explaining the legitimacy of *qanuns* from an Islamic religious perspective, Heyd provides us with two competing analyses: First, *qanuns* were issued in application of *siyasa shar'iyya* on the understanding that no order of the Sultan would be enforceable if it conflicted with *fiqh*. Much like Johansen, Heyd cites Ibn Qayyim al-Jawziyya, along with other neo-Hanbali and Maliki jurists, who argued that the instruments of *siyasa*, such as *qanun*, were not only compatible with *shari'a*, but indeed formed an integral part of it. Accordingly, the *fiqh* treatises of some Maliki jurists even included *siyasa* rules in their exposition of criminal law, and the library of seventeenth century Ottoman *qadis* included treatises enumerating the various *qanuns* such as Dede Efendi's treatise on "*siyasa penal law*."<sup>255</sup>

Although Heyd argues that many *qanuns* were issued in contravention of *fiqh*,<sup>256</sup> and some jurists viewed the reference to *siyasa* as merely an attempt to provide a veneer of *shari'a* legitimacy, he also provides several examples where the terms *siyasa* and *shari'a* are treated as the same. For example, in the *fatwas* of Ottoman *sheikhulislams*, reference to *qanuns* and decrees were often made as *meshru'*, that is in accordance with the *shari'a*. At the same time, in Ottoman official usage, the term *sher'an*, meaning according to the *shari'a*, tended to acquire the meaning of 'legally' in the broadest sense.<sup>257</sup> While the legal basis for *qanuns* rested on the will of the Sultan, their binding power did not require some confirmation or sanction by *sheikhulislams* regarding the *qanuns*' compatibility

253. HEYD, *supra* note 59, at 172.

254. *Id.*

255. *Id.*

256. *Id.* at 180.

257. Johansen, *supra* note 149, at 187.

with *shari'a*. Indeed, “in many cases long after . . . kānūns and other decrees of the sultan had been issued did seyhūlislāms and other mūftīs confirm (or, more rarely, reject) the legality of some of them in accordance with the *shari'a*.”<sup>258</sup>

If we follow Johansen’s reading of the historical emergence of *siyasa shar’iyya*, and take Heyd’s historical analysis of early Ottoman *qanuns*, we find that *qanuns* would indeed fall under the larger scope of Islamic normativity or *shar’*. Yet for Schacht and Coulson, *qanuns* do not count as “Islamic law” for the same reasons that *hisba* or *mazālim* are dismissed outside its historical scope: all are “secular” aberrations from the rules of *fiqh*. And while both scholars recognize *qanuns* as formally legitimated by the doctrine of *siyasa shar’iyya*, both view *siyasa* as providing a veneer of *fiqh* legitimacy for rules that were essentially secular and therefore an exception to *shari'a*.<sup>259</sup>

### 3. *Siyasa and 19<sup>th</sup> Century Reforms*

As discussed earlier, the standard scriptural line on nineteenth century legal reforms in Egypt and the Ottoman Empire runs as follows: Napoleon’s invasion in 1798 lead to the adoption of westernizing legal reforms throughout the first three quarters of the nineteenth century, and culminated in the full scale replacement of *shari'a* by French transplants to Egypt in 1883. This settled narrative has come under intense critique over the past two decades or so, with the combined work of primarily Khaled Fahmy and Rudolph Peters offering the most radical rethinking on the subject of legal reforms where nineteenth century Egyptian criminal law is concerned, and is augmented by an emerging “stream” of new historical scholarship on the subject.

Fahmy and Peters’ combined argument can be summarized in two principle points: First, that Egyptian criminal law reforms in the first three quarters of the nineteenth century were a continuation of the Ottoman tradition of legislation through *qanun*, and not, as the standard scripturalist narrative holds, the result of Westernization coming at the heels of the colonial encounter. Second, they insist these reforms were not perceived as a departure from “Islamic law” per se, but rather an indigenous legal development finding its normative basis in the doctrine of *siyasa shar’iyya*.

Fahmy and Peters are pioneers in relying instead on the immense court records available at the Egyptian National Archives, and in studying these records with an eye for the subaltern subjects of the law meeting its disciplinary power in down to earth litigation. This is a departure from the standard scripturalist historiography exemplified by Schacht and Coulson, where primary materials are limited to the treatises of *fiqh* read in the grand political schema of ruling elites seeking modernization to catch up with Europe. If the scripturalist approach to nineteenth century reforms can best be described as a history of a static law, what Fahmy, Peters and others provide is a living and breathing law in action.

258. *Id.* at 174.

259. *See supra* pp. 16-21.

The work of Rudolph Peters has been particularly instrumental in redrawing the disciplinary contours for studying nineteenth century Egyptian criminal law. Peters stands in stark contrast to others such as Gabriel Baer. Baer published two articles examining criminal law reforms in Egypt before the full scale adoption of the Native Courts in 1883.<sup>260</sup> Baer operated under the same standard scriptural assumptions underlying Schacht and Coulson's assessment of the reforms described above, namely that "with the increasing modernization or westernization of Egypt, the importance of Sharia justice gradually diminished."<sup>261</sup> Peters argues that Baer "failed to grasp the precise relationship" between the pre-1883 reforms on the one hand, and the *qadi* courts on the other. Peters sets out to prove that "as a result of the centralization and better organization of the state, the state began to pay more respect to Shari'a justice and created institutions to insure the correct application of the Islamic criminal provisions."<sup>262</sup>

Peters starting point is the insistence on connecting the pre-1883 reforms with the Ottoman tradition of *qanuns*.<sup>263</sup> To this end, he embarks on a close genealogical investigation of the various criminal laws introduced from 1829 onward, and in the process provides us with the most exhaustive English language survey of these laws available to date.<sup>264</sup> These laws begin with the short penal code promulgated in 1829. The penal code designated some offenses to be punished with *siyasa*, but did not introduce any major changes in the procedures governing those trials. Serious offenses such as homicide, high treason and theft remained in the central jurisdiction of Cairo state councils such as Al-Majlis Al-'Ali Al-Mulki. Less serious offenses committed in Cairo fell under the jurisdiction of the police or the government body where the defendant was employed. Offenses committed outside Cairo were handled by local executive officials. This system came to an end in 1842 when Al-Jam'iyya Al-Haqaneyya was created in Cairo to try serious offenses and also act as an appellate court. Al-Jam'iyya Al-Haqaneyya was replaced in 1849 with Majlis al-Ahkam, which had the same jurisdiction. In 1865, a new tier of appellate courts called Majlis Al-Isti'naf was established in Cairo and Alexandria, followed by three more courts of appeal in 1871. Furthermore, the "base of the judicial pyramid was expanded" by the creation of local councils in small towns to act as a first instance trial court.<sup>265</sup> Thus, according to Peters,

260. See Gabriel Baer, *Tanzimat in Egypt—the Penal Code*, 26 BULLETIN OF SOAS 29 (1963); *The Transition from Traditional to Western Criminal Law in Turkey and Egypt*, 45 STUDIA ISLAMICA 139 (1977).

261. Rudolph Peters, *Shari'a and the State: Criminal Law in Nineteenth Century Egypt* (unpublished manuscript, copy on file with author).

262. *Id.*

263. See *The Codification of Criminal Law in 19<sup>th</sup> Century Egypt: Tradition or Modernization?*, in LAW, SOCIETY AND NATIONAL IDENTITY IN AFRICA (Jamil M. Abun-Nasr ed., 1990).

264. Rudolph Peters, *The Origins of Pre-1883 Egyptian Criminal Legislation*, paper presented at annual MESA meeting (1996) (copy on file with author).

265. For a succinct summary outlining principal developments, see PETERS, *supra* note 129, at 131-41. See generally Rudolph Peters, "Homicide on the Nile: homicide trials in 19<sup>th</sup> Century Egyptian Shari'a Courts," 30 DIE WELT DES ISLAMIS 95 (1990), *Administrators and Magistrates: The*

A system of four tiers came into being with at the top the Supreme Judicial Council [Majlis al Ahkam] acting as a supreme court that checked whether the lower councils applied the law correctly. But this newly created hierarchical judiciary remained subordinated to the khedive. It was abolished in 1883 (1889 in Upper Egypt), when national courts were set up to implement the newly introduced French-inspired codes.<sup>266</sup>

Concurrent with the above reforms to the judicial body, a series of *qanuns* were enacted following the 1829 penal code mentioned above. The 1829 penal code governed such criminal offenses as murder, highway robbery, counterfeiting, extortion by officials, theft and embezzlement. A Code of Agriculture (Qanun Al-Filaha) was introduced in 1830 defining crimes and punishments connected to village life, followed by Qanun al-Muntakhabat in 1848, which was a compilation of a number of criminal laws issued between 1830 and 1844, another Penal Code in 1849, and finally the Qanunnāme Al-Hamayuni in the first half of the 1850s.<sup>267</sup>

A dual system of criminal justice thus existed in nineteenth century Egypt prior to the 1883 reforms. On the one hand, the above mentioned "councils" were entrusted with applying these *qanuns* and on the other hand other criminal offenses such as homicide, wounding, and sexual offenses were also tried in the *qadi* courts, with often the same dispute heard between these two legal systems. Peters notes that cases would first be tried before the *qadi* courts, which often due to the "strict rules of procedure and evidence, . . . especially in homicide cases, rarely found for the plaintiff" and referred the case to the councils to apply the laws mentioned above. In demonstrating the above, Peters follows numerous cases through the registers of this dual court system and argues that its legitimacy, from the litigant's perspective, rested on the *siyasa* principles.

Much in the same vein, Khaled Fahmy's work also relies on court archives to draw an alternative history of Islamic law in 19<sup>th</sup> Century Egypt. In his work, Fahmy spares few words in expressing a conscious resistance to doing history as usual, that is, by relying on juristic treatises of the sort described earlier. Moreover, Fahmy seeks to consciously provide an alternative historiographic plot where the life of subaltern subjects of the law can be discerned from more mundane contexts as forensic evidence or the abolition of torture in modern Egypt. In all of this, Fahmy's perspective is consciously anti-Orientalist, seeking to prove that law did evolve in Egypt prior to the 1883 reforms. More importantly, Fahmy exhibits a clear methodological commitment to what can be called the post-modern or post-structuralist turn in legal historiography. The following quote best exemplifies these moves:

What was the reaction to autopsy of the lower classes in Cairo as well as in the countryside? Assuming that the principle of "dignifying the dead is to bury them [promptly]" was as strongly upheld in, say, the 1860s as it was in the 1960s, what then was the reaction of lower classes to the incessant attempts by the medical

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development of a secular judiciary in Egypt, 1842-1871, 39 DIE WELT DES ISLAMIS 378 (1999); "For his correction and as a deterrent example for others": Mehmed Ali's first Criminal Legislation (1829-1830), 6 ISLAMIC L. & SOC'Y J. 164 (1999).

266. PETERS, *supra* note 129, at 134.

267. *Id.* at 136.

and legal authorities to lay claims on the bodies of their dead relatives to conduct postmortem examinations and occasionally autopsies? How did members of these lower classes react to the state's interference in all matters of death: outlawing burials within the confines of cities; necessitating medical examination before burials; preventing funerals from passing through the city; forbidding the professional wailers from practicing their trade by wailing behind the hearse; and, in suspicious cases, seizing the body to conduct an autopsy in state hospitals?<sup>268</sup>

The answers Fahmy provides for these questions come in two phases of scholarship. The first appears to be intentionally subaltern in perspective, and the general argument is that members of the lower classes both in urban and rural areas of 19<sup>th</sup> Century Egypt understood the difference between *shari'a* and *siyasa* courts. The lower class members were aware that medical evidence, including autopsy, played an important role in legal applications, and were willing to go to great lengths to manipulate the legal system to their benefit. One case after another, Fahmy demonstrates that the legal system before the reforms of 1883 was not only open to evidence outside witness testimony (contra Schacht and Coulson) but that it was flexible to incorporate all kinds of other evidence, without being westernized:

What becomes clear from these cases is that, in spite of applying new legislations passed by the Khedives, the majalis were not ignoring the *shari'a* in their rulings. As demonstrated, these laws themselves were often referring to the *shari'a* . . . None of these medico-legal innovations was couched in a language that would be considered inimical to Islam, or something that should be seen as a polemical trick or clever ploy used to buy off the 'ulama'. Indeed, none of the doctors, police commissioners or legal magistrates mentioned in the sources seem to have believed that what was being done was contrary to the *shari'a*.<sup>269</sup>

In a second phase of his scholarship, Fahmy appears more interested in questioning the very binary separating legal theory from legal practice in Islamic law history. More specifically, his goal is to demonstrate how the practice of *majalis* and the laws they applied were not simply connected to *shari'a*, but rather how these practices actually informed Islamic legal theory itself. This is particularly evident in the lack of anxiety exhibited by both subjects and rulers regarding the Islamic identity of Egypt's legal system prior to 1883. Despite engaging in modernizing legal reforms on the lines detailed by Peters above, Fahmy demonstrates through case records that

nowhere do we see people confusing al-siyāsa with "secular law," or thinking that there was a fundamental clash between it and the *shari'a*, a legal system that was only later in the century and in much twentieth-century "modernization theory" literature, referred to as a defunct, obsolete religious law that had to give way to the rational, "modern" legal codes imported from Europe. Indeed, an analysis of the reasons for which people approached the police shows that the police with their *siyāsī* laws were often thought of as a means by which people could achieve what they understood as their *shar'ī* rights.<sup>270</sup>

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268. Khaled Fahmy, *Law, Medicine and Society in Nineteenth-Century Egypt*, 34 EGYPT/MONDE ARABE 17, 19 (1998).

269. *Id.* at 38. See also to the same effect, Khaled Fahmy, *The Police and the People in Nineteenth-Century Egypt*, 39 DIE WELT DES ISLAMIS 340 (1999).

270. Fahmy, *supra* note 269, at 362. In a footnote to this text, Fahmy continues: "Nor, it should

## CONCLUSION IN PURSUIT OF NEW PLOTS

This essay argued that scripturalism best describes the dominant plot in Islamic law historiography. Understood as a discursive phenomenon that can be analyzed in brazenly structuralist terms, I claimed that scripturalist historiography is foundationally rife with two sets of binary opposites: *shari' al-siyasa* and tradition/modernity. These binaries distinguish what fits under the historical plot of Islamic law and what doesn't (*shari'a* yes; *siyasa* and *'orf* generally not so), and also provide what is today the common sense understanding of Islamic law's postcolonial condition (traditional, immutable for a millennium, and in tension with Western law, liberal legality, modern life, etc). This essay has also argued the emergence of two types of revisionist scholarship on Islamic law history, the one representing anti-Orientalist variations on the two binaries structuring scripturalist historiography, the other by contrast offering glimmers of a "new historiography" that can take the study of Islamic-law-past into a new methodological sphere that transcends the binaries of dominant scriptural historiography.

My purpose now is to offer some concluding comments on where the mapping exercise that formed the bulk of this essay might lead us. I have three suggestions to offer here. First, the method choice between scriptural historiography and what I have tentatively called "new historian" scholarship has an immediate distributive impact in the kind of Islamic law norms one can imagine to have existed in history and impacted social, economic and political relations of many sorts. To return back to sodomy as our example of the dominant historiography applied, scriptural historians would posit *shari'a* rules on *liwat* as the *only* Islamic law governing sodomy. By contrast, new historians might include Ottoman *qanuns* penalizing consensual and noncommercial sex between men as an integral part of Islamic law's historiographic plot. The choice in method is a choice between lashing, stoning and *ta'zir* or alternatively, a criminal law regime where fines that vary depending on the offender's wealth constitute the chief penalty for sodomy. This choice in historiographic method, with its palpable distributional consequences, is instrumental in shaping our understanding of how Islamic law impacted sexual acts, orientations or identities prior to the co-

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be added, was there an apologetic attempt to show how "modern" al-shari'a was and how compatible it was with European law and with requirements of modern life. These mental acrobatics that characterized much of the intellectual output of so-called Islamic modernists is more linked to nationalist politics and its obsession with showing how the nation's "tradition" was always already "modern" and with demonstrating that the nation could easily "catch up" with the more "modern" West, than an accurate reflection of what law, both in its shar'i and siyasi aspects was commonly understood in much of the nineteenth century. How shari'a came to be perceived as incompatible with modernity, and how various nationalist intellectuals attempted to refuse this view are questions that require more detailed analysis, however, and as such fall beyond the scope of this study." *Id.*, fn. 39, at 362. See also Khaled Fahmy, *Islam and dissection in nineteenth-century Egypt*, paper presented at the conference on "Science and religion in the age of capital and empire," University of Michigan, Ann Arbor, Nov. 2-3, 2001.

lonial encounter. Indeed, one can imagine two diametrically opposed histories of sexuality under Islam depending on whether one adopts a scriptural plot in examining sodomy under Islamic law or departs from such a frame altogether.

Second, Islamic law is perceived as the consummate Other of Western law today. For comparative law scholars, the opposition of Western law to Islamic law is predicated on a scriptural method in defining, delimiting and describing what can be called Islamic-law-past. Islamic law can be viewed as the traditional, religious, and immutable opposite of functionally evolving Western law *only* if we insist on removing *siyasa* and *'orf* from the scriptural ambit of *shari'a* and limit our scope of historical investigation to what we find in myriad medieval and early modern jurisprudential treatises. By contrast, if *siyasa* and *'orf* are included in our historical plot of Islamic law, we might start recognizing in these two supposedly extra-*shari'a* jurisdictions the same functionally evolving characteristics dominant in Western law historiography. As comparatists, we might even come to imagine the relationship between *siyasa majalis* and *qadi* courts in early nineteenth century Egypt as we do in the relationship between the King's Courts and the Court of Chancery in early nineteenth century England, perhaps equating *shari'a* with the Common Law and *siyasa* with norms of Equity. Just as the plot of English legal history is unimaginable without the ingredients of Common Law and Equity, or US law without the pre-1800 fusion of positivism and naturalism, God's law and man's law,<sup>271</sup> so we might think Islamic law history unimaginable without affording *mazalim*, *hisba* and *qanun* the same power of narrational intrigue that scriptural *shari'a* enjoys in dominant historiography today.

Finally, the choice between scripturalism and a new historiography transcending the binaries of *shari'alsiyasa* and tradition/modernity also impacts the scholarly engagements of anyone interested in what can be called "Islamic law reform." I suppose I am not speaking for myself alone when I argue that much reformist scholarship offering modern liberal "re-interpretations" of the canonical scriptures of *Qur'an* and *Sunna* strikes me as just downright *strained*. For example, *shari'a's* prohibition of *riba* or usury is perceived as being in conflict with interest rates charged by modern banks, and as such has been drilled through one reinterpretation after another since the last quarter of the nineteenth century. Abduh and Sanhuri relied on notions of *darura* (necessity) and *maslaha* (utilitarian policy considerations) to endow bank interest with Islamic normative legitimacy. Shahrur more recently argued the prohibition against *riba* applies only to the pre-Islamic form of usury (excessively compounded and unscrupulously exploitative), whereas bank interest today seeks to vindicate such *shari'a*-friendly notions as controlling inflation or the management of the time value of money. The same applies to other supple acrobatics in modern reinterpretations of Islamic family law seeking to abolish polygamy and trim the husband's unilateral right of no-fault divorce, or reinterpretations of *shari'a* corporal punish-

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271. See DUNCAN KENNEDY, *FORM AND SUBSTANCE IN PRIVATE LAW ADJUDICATION 1725* (1998).



ments for certain crimes that conflict with modern instruments of human rights law.

In all these examples, the effort to reform Islamic law strikes me as strained in the most literal sense of the word, that is in pushing and stretching Islamic scriptures to an extreme plasticity of reinterpretation. Whether one finds such reformist arguments convincing or not is irrelevant—what matters is the sense of strain that pervades these arguments, a strain that comes from accepting scripturalism as the defining feature of Islam as a religion and of *shari'a* as its law. Reformist scholarship is thus strained because it is always written in reaction to the scripturalist strain of dominant Islamic law historiography. Rather than moving beyond scripturalism, Islamic law reform scholarship simply reproduces the two binaries *shari'alsiyasa* and tradition/modernity and provides another rehearsal of the tensions existing in both. What this scholarship offers us by way of scriptural reinterpretations usually boils down to the same conclusion: That *shari'a* was always already modern even before the arrival of modernity, that Islamic scriptures always already accepted bank interest, abolished polygamy, and did away with corporal punishment even prior to the invention of merchant banking in medieval Italy, the rise of bourgeois notions of love and monogamy in the nineteenth century English novel, or the adoption of the Universal Declaration of Human Rights in 1948.

The many projects of Islamic law reform are thus part of an inherently strained intellectual enterprise, strained by the kind of “anxious envy” Geertz ascribed to scriptural Islam’s relation to Western law, civilization and modernity, as well as strained by the “defensive pride” of showing that Islamic law is on par with (if not superior to) all these things at once. This strain is not just a quality of dominant Islamic law historiography alone, rather a quality of scriptural Islam accepted by the majority of that religion today. A good example of this outside the sphere of law is the emerging popularity of books on the “scientific miraculousness of the *Qur'an*,” on how one verse of the holy book or another contains in succinct scriptural form the entire theory of relativity or the dynamics of the atomic bomb in abstract but scientifically accurate exposition.

The argument I want to close by, then, is twofold. First, the choice between scripturalism and a new historiography transcending the binaries of *shari'alsiyasa* and tradition/modernity poses a set of distributive, discursive, and developmental implications in the many ways briefly discussed above. Most importantly, the post-structuralist appeal of seeing these binaries “collapsed” should not blind us into assuming that positive implications will automatically ensue for all left-of-center political stances. To return (for the last time) to the example of sodomy law, one can imagine scriptural *shari'a* norms on *liwat* carry a better distributive effect from a queer perspective than collapsing the binary *shari'alsiyasa* and including Ottoman *qanuns* on sodomy in our historical plot of Islamic law. *Liwat* under *shari'a* is so heavily laden with high evidentiary barriers to conviction that demanding its literal enforcement as part of an Islamist agenda for “return to *shari'a*” might afford a higher protection against sodomy convictions than would legislating new *qanuns* with potentially more lax proof requirements.

Second, fashioning of a new Islamic law historiography that collapses the binaries of *shari'alsiyasa* and tradition/modernity is a difficult intellectual goal to achieve. The scriptural grip on Islamic law historiography is methodologically enduring and strong, shared by Western and Muslim historians alike. The historian seeking to transcend the binaries in her work is therefore required to first imagine another moment in history when Islam as a religion took forms alternative to the scriptural one dominating today, and from there to inquire how the relationship between the laws and jurisdictions we distinguish today between *shari'a* and *siyasa* may all have been conceived under an alternative legal consciousness. To pursue this task, the historian must suspend both scriptural notions of Islamic law rampant today as well as liberal notions of Western law's evolutionary functionalist history—and to do all this while minding the translation gap between Arabic and English. For example, the binary *shari'alsiyasa* is most easily posed in English as equivalent to law/politics. The historian seeking a new method must therefore avoid the liberal lens of studying only law and not politics, and be open to imagining an alternative legal consciousness where the relation between law and politics may have been conceived differently than what we imagine it today. *Shari'alsiyasa* can also be translated as religious law/secular law, which means the historian must also mind liberal legality's impact on his understanding of legal secularism. If *shari'a* and *siyasa* can be collapsed as part of an Islamic legal history, that is fundamentally the history a religion, the historian must be open to encountering an alternative Islamic legal consciousness where the binary religious/secular could mean something very different from what it does today, or indeed where the term secularism does not even fit as a conceptual tool of analysis or account.

This is all very difficult, but not impossible. As I have attempted to demonstrate in Part III of this paper, there is a new stream of historians attempting to pursue many of the goals described above. Perhaps the most encouraging aspect of their work is its most mundane feature, namely the new historians' reliance on court records for primary research materials, as opposed to scriptural historiography's commitment to juristic treatises as the almost exclusive window into understanding Islamic-law-past. From the court records of quotidian adjudication, new historians are attempting to tell us something about Islamic law as it was understood by litigants and judges and not just by jurists, by subalterns and administrators alike and not just by legal scholars focused on abstract questions of hermeneutic exegeses. Considering that the voluminous Ottoman court records are the only extant archival material available in complete and well-preserved form,<sup>272</sup> new historians have already taken the first step of making use

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272. Abbasid, Mamluk or Andalusian court records apparently do exist out there also, but are yet to be found in any substantial size. Until that happens, the voluminous Ottoman court records seem like the most reasonable option available to the Islamic law historian seeking primary archival materials of a systematically preserved and indexed sort. On the existence of pre-Ottoman court records, see Wael Hallq, *The qadi's diwan (sijil) before the Ottomans*, 61 BULLETIN OF SOAS 415 (1998). On the role of Ottoman court records in guiding new historical research and the potential distance between the records and the reality they purport to represent, see Dror Ze'evi, *The Use of Ottoman Shari'a Court Records as a Source for Middle Eastern Social History: A Reappraisal*, 5

of Ottoman materials and presented us so far with a radical rethinking of the plot for nineteenth century Islamic law history beyond the scriptural scope of Schacht and Coulson's standard take on the topic. By relying on alternative primary source materials, new historians demonstrate the existence of a pre-scriptural moment in Islamic law history, a moment in which Khaled Fahmy points out,

nowhere do we see people confusing al-siyāsa with "secular law", or thinking that there was a fundamental clash between it and the shari'a, a legal system that was only later in the century and in much twentieth-century "modernization theory" literature, referred to as a defunct, obsolete religious law that had to give way to the rational, "modern" legal codes imported from Europe. Indeed, an analysis of the reasons for which people approached the police shows that the police with their siyasi laws were often thought of as a means by which people could achieve what they understood as their shar'i rights.<sup>273</sup>

In a footnote to the above text, Fahmy describes how these records describe a moment when there was no "apologetic attempt to show how 'modern' al-shari'a was and how compatible it was with European law and with requirements of modern life." This was a moment in Islamic law's history when the anxious envy and defensive pride of scriptural Islam's relation to modernity and the West was all curiously absent. The biggest challenge facing a new historiography of Islamic law (as well as its most enticing promise) is therefore to tell us how it happened that "sharia came to be perceived as incompatible with modernity, and how various nationalist intellectuals attempted to refute this view."<sup>274</sup> This is of course a history whose plot remains to be written, and perhaps when it is written, we may then imagine a new introduction to what might be called Islamic legal histories.

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ISLAMIC L. & SOC'Y J. 35 (1998).

273. Fahmy, *supra* note 269, at 362.

274. *Id.*, fn. 39, at 362.