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EDITOR'S NOTE

FOREWORD

ARTICLES

Islamic Legal Histories

Nahshid Booksellers, Basra Carpet Merchants, and the Law of God and Man: Legal Pluralism and the Contemporary Muslim Experience

Hamada D. Zahawi

George Bisharat

Haider Ala Hamoudi

Scholar Series on Islamic Law & Society

Nashid Booksellers' Demands: The Stoning of Women: A Description of Islamic Law and Constitutionalism

Reem Salahi

Asifa Quraishi

Islamic Finance Symposium

Islamic Finance in the Gulf: A Practitioner's Perspective

Contemporary Islamic Law and Finance: The Tradeoff Between Brand-Name

Oliver Agha

Mahmoud El-Gamal
# Islamic Legal Histories

Amr A. Shalakany

<table>
<thead>
<tr>
<th>Introduction</th>
<th>2</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Dominant Historiography Defined: The Scriptural Approach</td>
<td>4</td>
</tr>
<tr>
<td>A. The Four Premises of Dominant Historiography</td>
<td>9</td>
</tr>
<tr>
<td>1. Islamic Law is <em>Shari'a</em></td>
<td>10</td>
</tr>
<tr>
<td>2. <em>Shari'a</em> is not <em>Siyasa</em></td>
<td>16</td>
</tr>
<tr>
<td>3. <em>Shari'a/Siyasa</em>: History up to the Colonial Encounter</td>
<td>21</td>
</tr>
<tr>
<td>B. The Difficulty with Naming the Dominant Historiography</td>
<td>28</td>
</tr>
<tr>
<td>1. Why are Schacht and Coulson not just Orientalists?</td>
<td>28</td>
</tr>
<tr>
<td>2. Scripturalism and the Modern Transformation of Islam</td>
<td>33</td>
</tr>
<tr>
<td>II. Dominant Historiography Applied: Scriptural Sodomy Law</td>
<td>39</td>
</tr>
<tr>
<td>A. Premise #1 Applied: Liwat under <em>Shari'a</em></td>
<td>40</td>
</tr>
<tr>
<td>1. Foreground Norms on <em>Liwat</em></td>
<td>42</td>
</tr>
<tr>
<td>2. Background Norms on Evidence and Procedure</td>
<td>46</td>
</tr>
<tr>
<td>B. Premises #2 and #3 Applied: Sodomy under Ottoman <em>Qanun</em></td>
<td>51</td>
</tr>
<tr>
<td>C. Premise #4 Applied: <em>Liwat/Fujur</em> and Modernity/Tradition</td>
<td>56</td>
</tr>
<tr>
<td>III. Dominant Historiography Reconsidered: From Variations to a New Stream?</td>
<td>59</td>
</tr>
<tr>
<td>A. Anti-Orientalist Variations on the Dominant Historiography</td>
<td>62</td>
</tr>
<tr>
<td>1. Variation #1: Refine <em>Shari'a</em> Stages of Development</td>
<td>63</td>
</tr>
<tr>
<td>2. Variation #2: Refine Closing the Gate of Ijtihad</td>
<td>64</td>
</tr>
<tr>
<td>3. Variation #3: Refine the Minor Sources of <em>Shari'a</em></td>
<td>66</td>
</tr>
<tr>
<td>B. Towards a New Historiography?</td>
<td>67</td>
</tr>
<tr>
<td>1. <em>Siyasa</em> and Mamlik Evidence Law</td>
<td>68</td>
</tr>
<tr>
<td>2. Early Ottoman Interlude: <em>Qanun</em> and <em>Siyasa</em></td>
<td>72</td>
</tr>
<tr>
<td>3. <em>Siyasa</em> and 19th Century Reforms</td>
<td>74</td>
</tr>
</tbody>
</table>

Conclusion: In Pursuit of New Plots | 78 |
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

The writing of history has sometimes been compared to the fishing of a "plot," both in the annoyingly literal 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. The subject of this essay is Islamic law historiography, and as with any other topic of 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 last 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 essays thus litter every section of the pages that follow, all aimed to deflect criticism from the kind of epic-overgeneralizations 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." Validating 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." 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. Rather, I merely seek to describe what I take

3. I am, however, interested in exploring these questions in detail. See AMR SHALAKANY, THE RENEWAL OF SHARIA IN EGYPTIAN LEGAL THOUGHT: 1798 TO THE PRESENT, Carnegie Scholar-funded research project for 2008-2010 (draft manuscript available 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 Ab-Nu'man. For a methodological critique of some of these authors' scholarship, see Lana Abu-Ohud, The Politics of Misrecognition: Islamic Law Pedagogy in American Academia, 52 AM. J. COMP. L.
The scriptural approach defined:

**Dominant Historical Tradition Defined:**

The socio-political and historical forces that shape the scriptural tradition in Islamic law.

**Siyar al-shari‘ah, the sacred law of Islam:** An overview of major legal scholars and their contributions to Islamic law.

Joseph Schacht, Gnomony of Arabic technical terms.

The academic approach:

1. **The Scriptural Approach Defined:**
   - The socio-political and historical forces that shape the scriptural tradition in Islamic law.
   - Siyar al-shari‘ah, the sacred law of Islam.

2. **The Historical Approach Defined:**
   - The socio-political and historical forces that shape the legal tradition in Islamic law.
   - The history of Islamic law, the Western world, and the scholarly tradition.

3. **The Sociological Approach Defined:**
   - The socio-political and historical forces that shape the legal tradition in Islamic law.
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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. 11

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. 12 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 etiologically 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. 13 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. 14

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. 15 There is therefore a legal historiography of and about jurisprudence—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 as exegetical books, not law in action, to be found in the ideals of a religious tradition, not in the Realist aphorism of “what officials do about disputes.” 16 In all that, scripturalism is a decidedly pre-Realist historiography.

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 64-72.

12. See generally GEERZ, supra note 1.


14. For an earlier argument besmearing 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’Islande, 1937 ARCHIVES DE L’HISTORIE DU DROIT ORIENTAL 461.

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.


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.” 17 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 the same as 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-style” 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 pernicious exceptions to shar’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,
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 legal 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." 18 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. 19

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. 20 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 20th century social sciences.” See Anna M. GLENDEN et al., COMPARATIVE LEGAL TRADITIONS 11 (1996). 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 funny, humanist sensibility that impedes serious policy analysis, or betrays an apollitical 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, 25 HARV. INT’L L.J. 411 (1983). For other perspectives assessing functionalism, see the special issue, 66 AM. J. COMP. L. 657 (1988); 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 3358-44 (2002). For the first two leading expositions of functionalism, see AUGUSTE COMTE, CULTURE ET CIVILISATION (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 its 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., RENE DAVID, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS (1992) (discussing Islamic law as a non-Western “family” of law); Ian Edgell, supra note 10, at 46 (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. MFURUYAN et al., LAW IN RAUCOUSLY DIFFERENT CULTURES 5-15 (1983) (noting that distinctions between 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).

2008 ISLAMIC LEGAL HISTORIES

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. 21

The most swift and 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. 22 Yet my goal in the following pages is not to critique dominant Islamic law historiography for committing such methodological sins 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. 23 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 scripturist (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.

22. On defining the charge of Orientalism as used by Edward Said, see infra pp. 28-33.
23. See infra pp. 36-39.
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 "shari'a" 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 fiqh, or administrative justice.

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. There-

24. "shari'a, shari'a, the sacred law of Islam, 1, and passim; opposed to fiqH, administrative justice." SCHACHT, supra note 5, at 502.
25. See generally SCHACHT, supra note 5, at 195-211; COULSON, supra note 6, at 1-9.
consensus of the community of the faithful.\textsuperscript{29} The latter, however, has been commonly dismissed under \textit{fis\textsuperscript{h}} as an essentially dead source of law. Following the success of Arab military conquests and the dispersion of Muslims across Islam's nascent empire, \textit{jima'} became impossible to ascertain in practice, and so its normative legitimacy as a source of \textit{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 \textit{shari'a} norms, namely \textit{qi\textsuperscript{ya}s}. In its most rudimentary form, \textit{qi\textsuperscript{ya}s} is a form of analogical reasoning through which prescribed norms in the Qur'an, Sunna or \textit{jima'} can be extended to unregulated legal problems if they share the same 'illa, or ratio leg\textit{e}gis. 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 \textit{qi\textsuperscript{ya}s} extended the wine prohibition to all other intoxicating substances.\textsuperscript{30}

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 irrefutable conflict between two conceptions of Islamic law (namely \textit{ah\textsuperscript{li} al ra'y}, or party of opinion, and \textit{ah\textsuperscript{li} al-hadith}, or party of tradition), and instead came to settle on the general contours of \textit{fis\textsuperscript{h}} as described above.\textsuperscript{31} This was followed by a "classical" period during which \textit{fis\textsuperscript{h}} flowered into its true coming of age as an integrated legal theory adopted across the four principal schools of jurisprudence, known as \textit{maz\textsuperscript{h}abs}. Each of these schools is named after a founding jurist and are thus called the Maliki, Hanafi, Shafi'i and Hanbali \textit{maz\textsuperscript{h}abs}, and each was historically associated with some regional influence such as the Maliki \textit{maz\textsuperscript{h}ab} in Morocco or the Shafi'i \textit{maz\textsuperscript{h}ab} in lower Egypt. By the end of the "classical" period (around the mid ninth century CE), all \textit{q\textsuperscript{a}d\textsuperscript{h}i} were required to be trained under one of these four \textit{maz\textsuperscript{h}abs}, and all were expected to settle disputes in accordance with the authoritative views on the proper \textit{shari'a} law developed under their respective \textit{maz\textsuperscript{h}abs}.\textsuperscript{32}

In tracing the move from the "formative" to "classical" periods of \textit{fis\textsuperscript{h}}, both Schacht and Coulson accredit the jurist Shafi'i (767-820 CE) as the father of Islamic law's legitimation theory by giving \textit{fis\textsuperscript{h}} its first coherent articulation in his treatise \textit{al-Ris\textsuperscript{a}a}.\textsuperscript{33} 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 \textit{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 \textit{jima'}, there is nonetheless a role for human reasoning in ascertaining the proper \textit{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 \textit{qi\textsuperscript{ya}s}. 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.\textsuperscript{34} Following Shafi'i's thesis, all the four \textit{maz\textsuperscript{h}abs} of \textit{fis\textsuperscript{h}} came into a consensus on the above four sources of \textit{shari'a}, although some disagreement remained in ordering the importance of secondary sources of law among jurists of the four \textit{maz\textsuperscript{h}abs}.\textsuperscript{35}

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 \textit{taq\textsuperscript{a}li} period of \textit{fis\textsuperscript{h}}, commencing with juristic recognition across the four \textit{maz\textsuperscript{h}abs} that the creative power of \textit{ijt\texthbox{had}} had been exhausted (shortly after the death of Shafi'i), and that the role of jurists thereafter lay in the act of \textit{taq\textsuperscript{a}li}, or juristic replication, of each \textit{maz\textsuperscript{h}ab}'s founders' scholarship. This historical development is typically referred to as the "closing of the door of ijt\texthbox{had}," and is best exemplified by the fact that from the tenth to the nineteenth centuries, Sunni \textit{fis\textsuperscript{h}i} settled on only the four \textit{maz\textsuperscript{h}abs} mentioned above, and no new schools of jurisprudence came to be formally recognized thereafter.\textsuperscript{34} In Coulson's words, from the tenth century onwards, "every jurist was an 'imitator' (\textit{mug\textsuperscript{a}f\textsuperscript{a}lid}) bound to accept and follow the doctrine established by his predecessors."\textsuperscript{37}

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

\footnotesize{\textsuperscript{29} Both Schacht and Coulson agree that the notion of \textit{jima'} 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.}
\footnotesize{\textsuperscript{30} On the historical development of the notion of \textit{qi\textsuperscript{ya}s} and its eventual distinction from \textit{ra'y}, see SCHACHT, supra note 5, at 199-211; COULSON, supra note 6, at 72-80.}
\footnotesize{\textsuperscript{31} SCHACHT, supra note 5, at 15-75.}
\footnotesize{\textsuperscript{32} Id. at 15-68.}
\footnotesize{\textsuperscript{33} For the full text, see MA\textsc{id} AL-KHA\textsc{di}, AL-SHAF\textsc{fi}'S RIS\textsc{a}A (1997).}
\footnotesize{\textsuperscript{34} See generally SCHACHT, supra note 5, at 57-48; COULSON, supra note 6, at 53-61.}
\footnotesize{\textsuperscript{35} On secondary sources of \textit{shari'a}, see generally SCHACHT, supra note 5, at 60-62, 152-57; COULSON, supra note 6, at 80-102.}
\footnotesize{\textsuperscript{36} On \textit{taq\textsuperscript{a}li}, see generally SCHACHT, supra note 5, at 69-75; COULSON, supra note 6, at 80-85.}
\footnotesize{\textsuperscript{37} COULSON, supra note 6, at 80-81.}
these treaties and legal opinions or fatwas issued by later jurists. These treaties all are connected through their exegetical commitment to the fiqh theory of separation of powers expanded 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, qisas/diyaya, and ta’zir—a division that was accepted across the four madhabs of fiqh and has been conceptually settled in Islamic criminal law through the "classical" and "ja’fri" 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, qisas/diyaya 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 qisas 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.38

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 madhabs are generally in agreement on the following general contours for criminalizing zina under shari’a.39 First, the Qur’an explicitly prescribes the flogging hadd of 100 lashes if the convicted offender were not mukhsan (that is, if he or she had not consummated a legal marriage).40 Second, the Sunna prescribes the hadd of stoning to death if the offender were mukhsan, whether male or female.41 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 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.42

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. This shari’a’s normative legitimacy rests on it being God’s law, and the term therefore only applies to these doctrines enunciated 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 flowed into that ideal in the "classical" period (850-950 CE) during which Shafi’i articulated his theory on sources and interpretation, and the four madhabs 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 taqfid (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 millenial 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

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. See QUR’AN 24:2. “The fornicator and the fornicatrix for each of them a hundred stripes. Let not thy pity withhold thee in their case, is a punishment prescribed by Allah, if thou believest 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-BUKHARI, hadith no. 819. For the text of an alternative Sunna to the same effect in Arabic, see AR-RIBAT AL-MASABHI, pp. 377-79 (no publication date). The one dissenting opinion is that of the Azaq(a), an off-shoot of the Khaarijites. They refuse to rely except on hadith mutanawari and do not consider the hadith as such.

42. Despite agreement on the above, jurists across the four madhabs nonetheless disagreed on issues of detail, such as whether “exile” is also a hadd, or should be applied to non-mukhsan offenders. On this issue, the majority opinion among Shafi’i and Hanbali madhabs holds exile to be a required hadd whose normative source is prophetic Sunna authenticated by authoritative issued, jurists of the Maliki madhabs generally agreed with that view but limited exile to only male offenders; and by contrast, majority opinion among jurists of the Hanafi madhabs 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 discretion of the judge. Jurists across the four madhabs also disagreed on the proper meaning of exile; with the majority opinion among Maliki and Hanbali 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.I. Coulson, Regulation of Sexual Behavior under Traditional Islamic Law, in SOCIETY AND THE SEXES IN MEDIEVAL ISLAM 38-68 (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 makhabs 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 Coupland 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. 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 of good courts. Its hold was strongest in the law of family (marriage, divorce, maintenance, etc.), of inheritance, and of minor 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.

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 other sets of norms governing what we might call private law relations. The first is ‘urf; or customary practices. The second is legal subterfuges, or hajal, often in the form of inserting conditions, or sharura, in contractual agreements, which though done in reliance on the internal logic fiqih, effectively subverted its requirements by turning customary practices into contractual obligations. Between ‘urf, hajal, and sharura, 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.

43. Schacht, supra note 5, at 302.
44. Id. at 76.
45. Coupland 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.”

46. Schacht, supra note 5, at 51.
complaints “concerning miscarriages or denial of justice or other allegedly unlawful acts of the [qaddis], difficulties in securing the execution of judgments, wrongs committed by government officials or powerful individuals and the like... [as well as] the more important suits concerning property.” 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. 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.” The office of muhtasib also survived into Ottoman times and possibly mutated into the powers of the police or shurtu 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 inspired 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.” 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 'iyasa or shar‘iyat, 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 [qaddis] 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.31

The explicit theory Schacht is referring to here is 'iyasa or shar‘iyat, which does not emerge in its fully developed form until the thirteenth century, under the Mamluk dynasty. Schacht defines 'iyasa or shar‘iyat 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.”

As we will see, Schacht and Coulson hesitate to admit that 'iyasa is occurring by the “strict theory of Islamic law.” For Coulson, 'iyasa is defined as “government in accordance with the revealed law,” and he accounts for its emergence along similar lines to those of Schacht above, though he does elaborate on the second reason for 'iyasa'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 judge to exercise discretion. 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,” and who had the power to “deal summarily with petty offences committed in the market place.”

Second, Coulson argues criminal justice rested in the hands of police, or the walli 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.

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

47. Id.
48. Id. at 51-52.
49. See infra pp. 48-51.
50. Id., at 52.
51. Id. at 53.
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 origin, 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 qanun was not actually a breach of shari'a. His conflicted assessment can be discerned in his description of qanun below:

In perfect good faith they [the Ottomans] enacted kāmil or kāmil-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 kāmil nāmes, that of Sultan Mehmed 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'zir, 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 kāmil-nāme of Sultan Süleyman I, which in its major parts seems to have been compiled previously under Bayezid II (1481-1512), shows a considerable development along these lines; it treats in greater detail of military fines, of the position of non-Muslim subjects, of matters of police and penal law, of land law, and of the law of war.

Though Schacht finds the Ottomans acting in “perfect good faith” to supplement the shari’a with “real laws,” Schacht nonetheless remains unconvinced that these qanun merely supplemented the shari’a with the will of the ruler. Instead, he finds the qanun 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. Therefore, Ottoman qanun from Süleyman I onwards, laid down different punishments for zina. These punishments applied whenever the suspect could not be convicted under strict shari’a rules. Süleyman’s komunname, for example, and the earlier Durladır code, both institute monetary fines as the proper punishment for zina where the shari’a is not applied.

It is therefore not surprising that in assessing mazālim, the muhatab, and the qanun, and indeed in discussing hikay, zinat, 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 kāmil-nāmes, were completely ignored by the theory.
perpetual problem, that of the contrast between theory and practice, was already posed."

Along the same lines, Coulson also starts his introduction by considering 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." 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." 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."

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 subfields of hukm and shurut which private law actors took into expanding 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 in the siyasa eminents of maslak, hibah, 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.

I 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 more 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-

understood 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 ihjihad 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 'ulama' ('scholars'), the specialists in religious law and the political authorities came into being. The 'ulama' themselves were conscious of this; they expressed their conviction of the ever-increasing corruption of contemporary conditions (fisal al-azami), and, in the absence of a dispensing authority, formulated the doctrine that necessity (durr) displaced 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."

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 "casuistic 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. 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 qanun 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. mazhab]." These many differences between the un-evolving shari'a and the ever-evolving siyasa can thus be summarized under the basic binary shari'a/siyasa:

88. Id. at 309.
89. COULSON, supra note 6, at 1.
90. Id. at 2.
91. Id. at 5.
92. SCHACHT, supra note 5, at 84.
93. Id. at 5.
94. Id. at 52.
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 thoughtful 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.” Some two hundred pages later, Schacht puts his very last sentence thus: “The traditionalism of Islamic law, which is perhaps its most essential feature, is typical of a ‘sacred law’.” 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 remained basically static, and for this reason Shari‘a’s 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 civilization 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 *iqal* (or strict adherence to established doctrine), an apparently irreconcilable conflict was now produced between the traditional law and the needs of Muslim society, in as 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.

Thus between Napoleon’s invasion of Egypt in 1798, and the adoption of the “Native Courts” in 1833, 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.” 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 inapplicable to the modernist view was the traditional form of criminal jurisdiction, not only because such potential penalities as the cutting off of the hand for theft and the stoning to death for adultery were offensive to humanitarian principles, but 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 organized on a modern basis; but more particularly because modern ideas of government could
not tolerate the wide arbitrary powers vested in the political sovereign under the
Shari'a doctrine "of deterrence". 79

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 defi-
nition hostile to what Coulson described above as "modern ideas of govern-
ment" (read liberal legality), and given the urgent need to reform the legal sys-
tem 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 un-
avoidably to a conflict with the shari'a". 80 Reforms accelerated under Mah-
mud's successor, Sultan Abdul-Mejid (1839-1861) who issued the Ghiyane
Edict (1839) using for the first time the term "citizens" to uniformly describe
both Muslim and non-Muslim subjects of the Ottoman Empire, combining lib-
eral notions of rulership with an emerging sense of nationalist identity. A list
of codes then ensued, all leading the way to a large-scale adoption of various Euro-
pean 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 1835, which was a translation of the French Penal Code,
the traditional hadd or defined punishments of Shari'a law were all abolished ex-
cept 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 Nizamiyiyah courts was established, and it was because all civil jurisdiction (ex-
cepting 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 Meijileh or Meijileh. 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. 81

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


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 con-
tained only a few provisions drawn from the Shari'a." 83

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 ad-
ministration, and above all contact with Western notions of liberal legality. Nei-
ther does he pay much credit to Ottoman and Egyptian rulers' attempts to le-
gitimate these reforms as compatible with "Islamic" 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 con-
cerned. Thus he argues that:

Islamic legal tradition had always recognised the right of the ruler, through his
Mejelleh 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
would appear as 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 personal regulations and in particu-
lar his power of "deterrence" (i.e. to punish) was not, perhaps, a purely formal and su-
perficial attempt to justify them. 84

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:

<table>
<thead>
<tr>
<th>Traditional</th>
<th>Modern/Rational</th>
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<tbody>
<tr>
<td>Shari'a</td>
<td>Western Law</td>
</tr>
<tr>
<td>Islamic</td>
<td>Secular</td>
</tr>
<tr>
<td>Rigid</td>
<td>Evolving</td>
</tr>
<tr>
<td>Tribal Society</td>
<td>Nation State</td>
</tr>
<tr>
<td>Qadi Courts</td>
<td>Native Courts</td>
</tr>
<tr>
<td>Four Mafhabs</td>
<td>Single Code</td>
</tr>
<tr>
<td>Unsystematized Private Law</td>
<td>Calculable Private Law</td>
</tr>
<tr>
<td>Offensive Criminal Law</td>
<td>Humanist Criminal Law</td>
</tr>
<tr>
<td>Arbitrary State Power</td>
<td>Unswerving Liberal Legality</td>
</tr>
</tbody>
</table>


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 analy-
sis, Serif Arif Muslin, Some Explanatory Notes on the Origins of the "Mejelleh" (Mejileh), 51 THE
MUSLIM WORLD 139, 274 (1961).
83. COULSON, supra note 6, at 152.
84. Id. at 161.
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 marshaling an exhaustive genealogy that links Schacht and Coulson’s scholarship to earlier and similar views developed by such stalwarts of Orientalism as Gibe, 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‘a‘al‘iyya and tradition/modernity.

And so, rather than provide 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.

I. 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 favor among specialists, due to both its “vagueness” as an academic label, as well as its connotation of “the high-handed executive attitude of nineteenth- and early twentieth-century European colonialism,”23 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.’”24 This leads to the

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83. See EDWARD SAID, ORIENTALISM 2 (1979).
84. Id.
85. Said mentions two books of Foucault as particularly useful in identifying Orientalism as a discourse, namely THE ARCHAEOLOGY OF KNOWLEDGE and DISCIPLE AND PUNISH. Id. at 3.
86. Id.
87. Id.
88. SCHACHT, supra note 5, at 1.
89. 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, the latter remains today the dominant approach in tracing the historical development of law in Western societies, and includes in its intellectual genealogy such luminaries 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 negative nature of the theory; deviations from the norm are both atypical and bad.)

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 hardly described, by contrast, as that of a law with a traditional internal logic that dysfunctional 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." 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." 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.
95. EARL OF CROMER, MODERN EGYPT 516 (1908).
101. For the latest corpus of this in Islamic law, see MUHAMMAD, Taking Islamic Law Seriously: INQDS 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, -historical, static, and traditional, at its most 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 real 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 Orientals, 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, 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


2008 ISLAMIC LEGAL HISTORIES 33

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 unchallenged as teachable wisdom (in academic, 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. 85

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 doctrine; 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 having 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?

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 religious 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 religious 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 expect 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. 104

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 in the Western and Eastern most edges of the geographic "World of Islam."105 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 "illuminations" 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 redoubtable strategies available for gauging religious change, Geertz counts four already-existing methods, namely the indexical, typological, world-acculturative and the evolutionary. Under these four, change can either be indexed in literate 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 worldly-historical trends ... are postulated as intrinsic to human culture, and a so-

104. GDPR, supra note 1, at 56.
105. Id.
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, raising numbers of pilgrims performing the hajj, all crystalized 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," "uncorrocted," "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-Quran and neo-modernity revivalists like Jamal Ad-Din Al-Afghani or Muhammad Abduh (which by the 1920s was very extensive) did not so much change the direction of santri thought as complete it.14

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 ta'lis, 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 scriptural 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; 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 scriptural 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."15

The dominant historiography of Islamic law, summarized in the four premises discussed earlier, is therefore deeply connected with the emergence of scriptural 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

108. ISLAMIC LEGAL HISTORIES 37

110. Id. at 69.
111. See OCTAVE MANNONI, CLES POUR L'IMAGINAIRE (1968).
112. See SLAVOŽ ŽIŽEK, ON BELIEF (2001).
113. GEERTZ, supra note 1, at 65.
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 Abdel and Afghani, one can go through a short list including such principle figures of modern Egyptian legal thought like Fatih Zaghlul (a student of Abdul's and judge in the new Native Courts), whose 1900 book on Al-Muhammah, or lawyering, set the tone for distinguishing shari'a from aja'ib, lamenting the traditionalism of the latter, and celebrating the legal reforms of 1883 as signs of a modern nationalist resurgence. In the same tone, the list should include all other leading Egyptian judges and law professors who contributed articles to the fifty-yearbook celebration of the 1883 reforms. Most importantly, the list should culminate with major twentieth century legal thinkers such as Abdel-Razzak Al-Sanheri, who in anxious envy of Western legal developments, when shari'a lay its aja'ib period, sought defensively to show that shari'a had always been as "social" and "modern" as the latest developments of French civil law. Abdel-Qader Ouha, 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. Moreover, the scripturist 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, to the Muslim Brotherhood affiliated.

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 "scripturists" in the sense identified by Geertz because that all limit shari'a to the Qur'an, Sunna, and cast a ja'farist commentary thereon, because all subtract aja'ib 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-

117. See Al-Kitaab Al-Zahabi Li-Masakhim Al-Arabiyya (1937).
118. See Amir Shakur, The Origins of Comparative Law in the Arab World, or how sometimes loving your da'wah can be good for you, in RESTORING THE MASTERs OF COMPARATIVE LAW (Idarael Rifat ed., 2001); Between Identity and Redistribution: Sanheri, Genealogy and the Will to Islamize, 5 ISLAMIC L. & SOCY J. 201 (2001).
119. See Abdel-Qader Ouha, supra note 4).
120. See, e.g., Latifa Salim, Al-Nezm Al-Qada'i Al-Meri Al-Hadihi (1986).
121. See, e.g., Tarek Al-Biruni, Al-Wad Al-Qabloni Al-Mu'aker Rawf Al-Shari'a Al-Islamiyya Wa-Qanun Al-Wad'i (1990); Souri Abi-Taler, Tareq Al-Shar'i Al-Islamiyya Fil-Hilal Al-'Arabiyta (1995).
122. Said, supra note 45, at 326.
123. Earl of Cromer, supra note 95, at 316.
As a scripturalist historian, I argue that crime and punishment for sodomy under shari'a is inextricably one and the same across time from the "classical period" in 9th CE Baghdad, just as it would through the end of shari'a's "faqilid period" in 1850 CE Cairo. I rely on restatements of the authoritative views of fiqhaha across the four Sunni mazhabha, as found in treatises of varying lengths and types, mostly available in twenty 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. History reaches a radical break in the year 1883, when shari'a's 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 ijaza), I provide some very brief examples of Ottoman ganaus governing sodomy to illustrate how certain institutional structures and normative arrangements associated with ijaza would fall outside my scope of study as a scripturalist historian. I also jump Premise #3 (the binary shari'a/ijaza 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 līta, meaning "to attach oneself to," or alternatively a denominative of the noun Līti, the name of the Biblical

124. The term relied on here are primarily the legal opinions (fadḥah, singular: fara'ah) and treatises (sharh, singular: sharḥ) of these medieval scholars deemed authoritative in 20th century Islamic jurisprudence across the four mazhabha. A meticulous survey of these fadḥah and sharḥ can be found in Abdel-Rahman Al-Jaza'i, Al-Farq: "Ala Al-Mazhab Al-Arab" (1971). I cite the primary text where available, and refer to Al-Jaza'iy'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. 42-44.

125. See also "Liwat" in 5 ENCYCLOPEDIA OF ISLAM 777 (P. Bernard et al. eds., 2008) at http://www.brillonline.nl/subscription?ey=eyQ%3d%3aisyam%26v%3d46679 (last visited April 27, 2008).

126. Arabic term: riyāsah.

127. As with any comparative law exercise, it is almost never possible to analyze concepts of one legal system to those of another. See WILKINSON and KOPE, supra note 21, at 28-96, submodule against conceptual comparisons and pleading functionalism instead. The most significant functional difference between liwat and sodomy under U.S. law (else of course in the definition of the criminalized act). The legal meaning of sodomy has changed across US jurisdictions, altered with time from one century to the next, and mostly stabilized in the 20th century through the simultaneous assignation of incommunicable "act" and "identity" articulations to the crime. As such, sodomy prohibitions have come to include both erotic/sexual and genital/sexual conduct. By contrast, liwat is more resonant as a crime derivative from heterosexual activity or sex, and as such limited to genital/sexual contacts only. Yet the vagueness of sodomy laws is precisely what warrants their homonocial comparisons 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 (inflating contemporary U.S. jurisprudence), see Kendall Thomas, Beyond the Privacy Principle, 92 COLUM. L. REV. 143, 14 1432-34 (1992). Finally, for the Qur'anic exegesis on the subject, 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 mosaic English language scholarship available on liwat, offering what is in my mind the most thoroughly researched and theoretically conscious contribution in the subject. For a critique of Orientalism on the subject, see Joseph A. Massad, Desiring Arabs 169-90 (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: Until al-Farq emerged during the 19th century and stabilized some two centuries later into a full fledged doctrinal 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). White Islamic law jurists of 19th Century Egypt shared much the same juridical 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 (2000).
there is a normative structure unified in condemnation of the act yet richly multi-vocal on the question of punishment. 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, *zina*, or extra-marital sex, is the paradigmatic *hadd* with respect to sexual offenses under *fiqih*, 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 *mahsoum*, that is, had never consummated a legally valid marriage, while the *Sunnah* prescribes the *hadd* of stoning to death in the case of *mahsoum* offenders. While all four *mazhab* agree on these penalties, *fiqih* is nonetheless rife with *ikhtilaaf*, or juristic disagreement, as to prescribing "exile" as a *hadd* to couple the penalty for non-*mahsoum* offenders, as well as to the practical implications of exile as a punishment.

By contrast, only three of the four *mazhab* classify *liwat* as a *hadd* offense (namely the Malikis, Hanbalis and Shafi‘i’s *mazhab*), while the authoritative opinion among jurists of the Hanafi *mazhab* classifies *liwat* as a *ta‘zir* crime and leaves its prescription to the discretion of judicial and administrative authorities. Moreover, even among the three *mazhab* classifying *liwat* as a *hadd* offense, jurists nonetheless disagreed on the normative source for *liwat* criminalization in *shari‘a* — whether its penalty was directly prescribed under *Sunnah* or derived by analogy or *qiyas* to *zina*. In order to appreciate the significance of the above juristic *ikhtilaaf* 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 PETRUS, CRIME AND PUNISHMENT IN ISLAMIC LAW 6 (2005). See also, to the same extent on Islamic family law, LINA ABU-OCHS, MODERNIZING MUSLIM FAMILY LAW: THE CASE OF EGYPT, 37 VAND. J. TRANSNAT'L L. 1043 (2006) (testing general juristic agreements 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 OLDA, supra note 41. For a summary of differences between Western and Islamic criminal law, see also PETRUS, supra note 129 at 1-5, 174-81 for fundamental conflicts with International human rights law today.

131. See supra pp. 44-15.

132. See supra note 40.

133. See supra note 41.

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


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 damnation for the practice of *liwat* by the people of Lot. See THE QUR‘AN, 27:54-56, and 56:160-173.

137. “For whenever repeats the act of the people of Lot, kill both the active and the passive offenders.” See AL-KAZZABI, supra note 124, pl. 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 “Liwa‘” supra note 125. Needless to say, these hadiths come in varying grades of *nail* and statements 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-MAWAWI, AL-NIYABA (see publication date available).

140. For example, neither Hanafi nor Shafi‘i’s 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 AL-ROUAYEB, supra note 127, at 118-20.
on the punishment of ḥuwaṣ and receive 100 lashes if not, and the ḥadd would apply equally to both active and passive partners.  

Between the Maliki and Hanafi mashahs we find the Shafi'i and Hanbali jurists whose majority opinion relies on the Sunna to classify ḥuwaṣ as a ḥadd offense independent of zina, and accordingly prescribe the death penalty for both active and passive partners, whether muḥāsan 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, ḥuwaṣ is analogized to zina, and the ḥadd prescribed for the latter offense applies to both passive and active partners, with stoning if the offender is muḥāsan and 100 lashes if not; and, on the other hand, a minority of Shafi'i and Hanbali jurists reserve the ḥadd of stoning to only the active partner, whether muḥāsan or not, and base this opinion on the Sunna. As for the passive partner, the same jurists prescribe the zina ḥadd of 100 lashes whether muḥāsan or not, on the understanding that the full conditions of the stoning ḥadd can never be satisfied in the case of the passive offender since the ḥadd applies only to vaginal intercourse. If the reader is now confused as to the required punishment of ḥuwaṣ 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 mashahs 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 taʾzir 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 taʾzir punishment depending on the “degree of debauchery” to which the offensive act of ḥuwaṣ rises, with some jurists distinguishing anal penetration, which would trigger the maximum punishment available, and other lesser acts of ḥuwaṣ which do not rise to the level of penetration and accordingly deserve the mitigation of the taʾzir penalty. Indeed, these internal differences among the jurists within each mashah, not to mention between jurists of the four mashahs, makes it very difficult to offer anything but an approximation of the reigning views under each. The following table is an attempt at collecting these ḥiqāl opinions on ḥuwaṣ in some easily traceable form:

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141. See generally “Liwaṭ,” supra note 125. See also AL-NAWAWI, AL-NIHAYA, supra note 139.

142. For detailed analysis, see AL-JAZIRI, supra note 124, pt. V, kitāb al-hadad.

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

144. The operative ḥadd is the Prophet stating: “Sex between men is adulterous.” See AL-JAZIRI, supra note 124, pt. V, at 102-96.


146. See, to this effect, SAID IBN AL-MUGATA'B, ATA'A IBN ABD-RAZAAQ, AL-HASAN AL-BAIRY, AL-NIHAYA, AL-TAWRI, AL-KAWA'I. See generally, supra note 124, pt. V, at 102-96.

147. For example, differences among each school seem 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 outliers, precluding the death sentence for both. See generally, HUSSEIN AL-AL-MU'TASEERI, I ET TETB AL-HUSOUD 143-66 (no publication date). Other areas of deviant sexuality are no less confusing: dissenting opinions rely on weaker ḥadd, such as on bestiality. See OUDI, supra note 41, at 355. Lesbian offenses entitle to taʾzir punishments,
<table>
<thead>
<tr>
<th>School of Jurisprudence</th>
<th>Source of Law</th>
<th>Punishment</th>
<th>Marital Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maliki</td>
<td>Hadd</td>
<td>Stoning to death</td>
<td>Stoning to death</td>
</tr>
<tr>
<td>Majority Shafi'i &amp; Hanbali</td>
<td>Hadd</td>
<td>Stoning to death</td>
<td>Stoning to death</td>
</tr>
<tr>
<td>Minority Shafi'i &amp; Hanbali</td>
<td>Hadd</td>
<td>Stoning to death for active offender, 100 lashes and exile for passive offender</td>
<td>n/a</td>
</tr>
<tr>
<td>Minority Shafi'i &amp; Hanbali</td>
<td>Qiyas to zina</td>
<td>n/a</td>
<td>Married stoned to death. Unmarried 100 lashes and exile.</td>
</tr>
<tr>
<td>Majority Hanafi</td>
<td>Ta'zir</td>
<td>No required punishment: Discretionary in severity and duration</td>
<td>No required punishment: Discretionary in severity and duration</td>
</tr>
<tr>
<td>Minority Hanafi</td>
<td>Hadd</td>
<td>Qiyas to zina</td>
<td>n/a</td>
</tr>
</tbody>
</table>

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 refusal to take the oath in denial of committing liwat. 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. 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. These conditions apply regardless of whether the confessing offender was the active or passive partner in liwat and without attention to whether he is married or not. Alternatively, if conviction of liwat is based on witness testimony, then the majority opinion in the Maliki, Shafi'i and Hanbali mazhaba 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 reputation must testify to having personally seen the act of “ihaj” 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 mazhaba 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 qasf, and should therefore receive the prescribed punishment of 80 lashes. By contrast, if we follow the Hanafi mazhaba and classify liwat as a ta'zir offense, we find that Hanafi jurists do away with the evidentiary requirements associated with zina.

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 to mitigate 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

149. This last requirement changed however. See Bahr Ahmad, Signs as Evidence: The Doctrine of Ibn Taymiyyah (1265-1328) and Ibn Qayyim Al-Jawziyya (D. 1350) on Proof, 9 ISLAMIC L. & SOC'Y 8, 168 (2002).
150. Al-Muntazamy, supra note 144, at 149-53.
152. Id. at 103. See generally Peters, supra note 128, at 61-62.
it Hanafi jurists may therefore appear as the most liberal school in dealing with *liwat*, the *ta'sir* classification entails lower evidentiary barriers to conviction, making the *ta'sir* penalty more readily available than the application of the *hadd* under the other three *mathabs*. 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 Ghazzali's influential medieval treatise on *The Rebirth of Religious Sciences* may better clarify this point. Repeating a story found in other treatises, Ghazzali 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 beat the hapless man in his home. But the man recanted back with assurance: While he had indeed broken one law of God by his offense, the Caliph had by contract breached three rules of the divine law. First, the Caliph had "spied and spied" despite the *Qur'anic* injunction against such acts as ensinred in 49:12. 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. Finally, the Caliph had neither asked for permission in entering the home nor did he offer the requisite salutations, once again in all breach of *Qur'anic* injunctions to the contrary. In response to these three arguments, the Caliph Omar did not enforce the requisite *hadd* or *ta'sir* penalties on the offender he had caught red handed, and instead left the man be, merely asking him to repent for his sins.

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*.

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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 90 (2000). Cook's excellent restate provides the most systematic compilation and analysis I know of on the regulation of commanding rights under Islamic law in English.

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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. 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.

By contrast, the Sunna on "Forbidding Wrong" proves to be more helpful. There is a plethora of *hadd* by Prophet Mohammed commenting on the nature of the duty, which is entrusted to its and its mode of enforcement. Yet the details offered in these *hadiths* catalyse the doctrine in two competing directions. On the one hand, the most canonical *hadd* 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." Other *hadiths* also confirm the same interventionist streak and threaten the entire community with unpleasant repercussions if they fail to enforce this duty. 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, and 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;" 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...
offender only in private if possible. This is generally referred to under the term sair. 164

Relying on the above sources from the Qur'an and Sunna, jurists from the four mazhabas 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 mazhabas 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 sair.

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.

<table>
<thead>
<tr>
<th>School of Jurisprudence</th>
<th>Classification of Liwat</th>
<th>Reprobative Device</th>
<th>Duty to Forbid Wrong</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maliki</td>
<td>Hadd</td>
<td>Confession OR</td>
<td>Duty to forbid wrong is triggered if: 1. Liwat is committed in public (munkar zahir) OR 2. Actual knowledge of Liwat committed in private AND Duty is mitigated by Sunna on sair</td>
</tr>
<tr>
<td>Majority Sha`fi &amp; Hanbali</td>
<td>Hadd</td>
<td>Four Witnesses OR Refusal to take oath</td>
<td></td>
</tr>
<tr>
<td>Minority Hanbali</td>
<td>Hadd</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Majority Hanbali</td>
<td>Ta`zir</td>
<td>Two witnesses (or circumstantial evidence?)</td>
<td></td>
</tr>
</tbody>
</table>

B. Premises #2 and #3 Applied: Shari`a is not Sisyphean—Ottoman Qanun on sodomy is NOT liwat under shari`a—The binary shari`a/qlanun 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." 165 Given the explicit criminalization of liwat under shari`a and the harsh hadd punishments prescribed for the crime under three of the four mazhabas, 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. 166 This argument is often supported by referencing

164. For example: "He who keeps concealed something that would displease 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 (sori) what would disgrace a believer, it is as though he had strangled a hurted baby girl to life from her mother." Id. at 81.

165. See "Liwat," supra note 125.

166. See, e.g., As'ad AbuKhalil, A Note on the Study of Homosexuality in the doc/Isamic Civilization, THE AXS: 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, by pointing to the various pre-colonial books on sexuality which openly discussed the love of ghilmare in Orientalist travel accounts to the Ottoman Empire that commented on the availability of sexual experiences unobtainable with the same brazen facility in Europe, and in the biographies of famous historical figures and chronicles of contemporary events leading up to the nineteenth century.

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 Abbasids, Mamluks 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 foremost 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's 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 HOMOSEXUALITY 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 MUFAKHATUfal-JAWARI WAL-GHILMAN (1957).
170. For example, Sheikh Hassan al-Atrash, whose open practice of sodomy did not impede his appointment by the viceroy of Egypt to the highest post of Sunnite Islamic learning in the land, namely the Sheik of al-Azhar University. See PETER GRIAN, ISLAMIC ROOTS OF CAPITALISM EGYPT 1760-1804 (1979). Perhaps al-Jahzari, the prolific Egyptian historian living at the turn of the nineteenth century, provides the most historically rich portrait of sodomy as readily available with out serious consequences. Dusen summarized most of Jahzari's stories thus: "Homosexual practices existed at all social levels. Thus the real Shaykh Shalaym of Nashiya al-Atrash surrounded himself with 'one hundred and sixty' handsome beardless youths and plied them with jewels and other bric-a-brac; Muhammad Ali traveled among his palaces accompanied by 'comelines and boys' ... and rovedy and ravishing soldiers often engaged in homosexual practices." Dusen, supra note 169, at 109.
171. See supra p. 21.
172. See supra p. 20.
173. HEYD, supra note 59, at 167.
174. Id. at 172.

Rather, criminal law enforcement from the early Abbasids onwards rested not in the hands of gadi courts applying shari'a, but rather fell in the ambit of what Coulson described as extra-Shari'a jurisdictions. By the twelfth century, these jurisdictions received ex-post legitimation under the doctrine of siyasa sharifya, and since the fifteenth century at least, Ottoman rulers relied on the notion of siyasa to legislate codes of law on qamus, under which the keeping of law and order was regulated across their empire. While these qamus were "real laws," to use Schacht's terms, 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 qamus nonetheless fall outside the history of Islamic law on sodomy since, quite simply, they are not shari'a norms on liwat as properly defined under fiqh.

For this reason, I do not seek to offer here any detailed analysis of qamus governing sodomy under Ottoman siyasa juridictions. Instead, I will only proffer some brief and general comments on Ottoman qamus, and follow that with a quick glance at some qamus 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 qamus 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. kâdîn-ı yerî, kâdîn-ı yerî-ye; 

(b) a single statute of secular law enacted by the sultan, a regulation: e.g. bu kâdîn kânta mahkûfî, 'this kânta (statute) is contrary to the kânta (in the meaning of [droll]);

(c) a collection of such regulations relating to a certain matter or certain matters, a code or kântanwie: e.g. Kântîn-î Yûrfûkîn, Kântîn-î Aley;

(d) the whole body of institution of each secular state law, as opposed to the shari'a: e.g. şarî'î ve kânta mahkûfî.

In principle, a qamus was valid only during the lifetime of the Sultan who had enacted it. In practice, however, each new sultan would generally confirm the qamus enacted by preceding rulers since the latter were often merely a legalization of current applicable law. Thus in substance, Heyd argues that...
qanun were often meant to codify current customary law or ‘urf, and would include injunctions to qads for the application of the reigning opinion of one of the four mazhab, typically Hanafi, or the opinion of particular jurists within that mazhab in areas of law where disagreement prevails between majority and minority mazhab opinions. Perhaps criminal justice was the most important area where qanun 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 qads applying shari'a, or where common people needed protection against the oppression of officials and theft-holders. In explaining the relation between doctrines derived from qanun versus fiqh, Heyd argues that the most important substantive distinction lay in the imposition of fines instead of applying the corporal hadath punishments. Thus qanun required fines for zina if no capital punishment could be inflicted for procedural or evidentiary reasons, “for homicide or for the knocked 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.”

Finally, in explaining the legitimacy of qanun under “Islamic law” normativity, Heyd argues qanun were issued in application of stvasa 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 qanun often included norms departing and conflicting with those of shari'a, and some jurists explicitly viewed the reference to stvasa as merely an attempt to provide a veneer of shar'i's legitimacy for what was essentially “secular” laws that flowed the hadath provided in Qur'an and Sunna. Thus in fiwat of Ottoman sheikhullislams, qanun were often referred to as mesteri, that is, in accordance with the shari'a. At the same time, in Ottoman official usage the term ‘shar’i, ‘according to the shari’a’, tended to acquire the meaning of ‘legally’ in the broadest sense. And while the legal basis for qanun rested on the will of the Sultan, their binding power did not require some confirmation or sanction by sheikhullislams regarding the qanun compatibility with shari'a. Indeed, “in many cases long after . . . qanun and other decrees of the Sultan had been issued did sheikhullislams and other scholars confirm (or, more rarely, reject) the legality of some of them in accordance with the shari'a.” And even in cases where Ottoman sheikhullislams

175. Thus basic problems of private law were settled under qanun organizing the distinction between ownership and possession. For example, in casas 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 Suleyman the Magnificent instructed qads to follow Abu Yusuf’s view since it would lead the actual occupants to be more vigilant.

176. HERYD, supra note 59, at 176.

177. Id. at 181.

178. Id. at 180.

179. Id. at 187.

180. Id. at 174.

2008

ISLAMIC LEGAL HISTORIES

issued fiwat finding some qanun contradictory to shari'a, judges were nonetheless required to ignore the fatwas and apply the qanun since they were employees of the Sultan and hence bound by the issuance of fiwats or edicts from the Grand Vizir or Qadi Askar’s offices, and not by the office of sheikhullislam. Indeed, since sheikhullislams often started their career as qads, Heyd finds it only understandable that after following the karum for so long in their law courts, how could they suddenly, on their promotion to the position of chief malik, come to regard it as a matter of no concern to them, or even of desirable legality?

Thus Heyd leaves us with a wary assessment of qanun’s legitimacy under fiqh, and indeed of the compatibility of stvasa 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, translation of various Ottoman qanun into English. In particular, Heyd appendes to his book the kârimname compiled and enacted during the reign of Sultan Suleyman 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 kârimname for Dulkadir. Following Heyd’s translation, we find various articles in these two qanuns governing questions of sodomy law. To get a clearer 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 (bilig), [the ped] 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.”

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.”

Article 33: "And if the person who commits sodomy is unmarried—from a rich one 160 akçe shall be collected as a fine; from one in average circumstances 50 [akçe], and from a poor one 30 [akçe].”

Article 13: "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 (masnun), the

181. Id. at 188.

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

183. HERYD, 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 (bad) 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].”

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

Barley 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 proceeded 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. 187 Why the Native Courts were established in such haste following British occupation is a subject discussed in Part III of this paper.188 Suffice it to say for now that both Schacht and Coulson (as representatives of English-language scripturialist historiography) on the one hand, and Zaghlu, Sanhuri and Onda (as representatives of Arabic-language scripturialist 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 (himself translated to Arabic) applied by newly established Native Courts that were also modeled after the French example. Shari’a norms on lhwat 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 [fujoor] and indecency [flaq];” Article 350 which penalized “whoever violated in any way the regulations concerning prevailing vice [flaq] and debauchery [fujoor];” and, Article 247 which penalized, among other crimes, “whoever rapes a [female] virgin or non-virgin or practices debauchery [fujoor] with her by force.” 189 The 1883 Code was eventually replaced by an “Egyptianized” new

186. The same article above appears in the English title of “Alb” al-Dawlaah but differently: “If this is done out of affection (mutaseb bih),” instead of可爱的 (musahab). Id at 136.
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 1937,190 and Article 249 of the old code survived as Article 270 in the 1937 Code. The latter replaces 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. 191

The use of the Arabic term fujoor in the above articles thus seems to be a literal translation of the French term “la lascivie” contained in the 1810 French code. More importantly, the term fujoor as it appeared in both the 1883 and 1937 Criminal Codes applied to both male and female subjects of the law interchangeably. Contemplative 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 guerrilla operations aimed at the British army’s presence in the Suez Canal zone. Legalized prostitution was thus targeted by many strains 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. 192

Drafters of the new anti-prostitution law used the term fujoor for the first time to describe male prostitution, as opposed to the term d’ara which criminalized female prostitution. 193 As mentioned above, fujoor had been applied interchangeably to both male and female sexual offences since 1883. After 1951, however, the term took a more 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 … (6) Whoever habitually engages in debauchery [fujoor] or prostitution [d’ara].” 194

191. For a detailed history of legalized prostitution in Egypt, see EMAD HALIL, AL-BAQAYA FI MISR: DIRASA TARIKHIYYA ITISHMATYYA (2001); MOHAMMED SAYYID KILANI, FI RUBU’ AL-ABZAKHTYA (1956).
192. See HUMAN RIGHTS WATCH, supra note 189, at 131-33.
193. Parliamentary minutes indicate the committee responsible for drafting the law employed fujoor on the understanding that Egyptian courts had already been using that term to refer exclusively to male prostitution. My research has not uncovered any pre-1951 court decisions to that effect. See, AME SHAKSHAK, FROM LAVAT TO FUJOOR: ORIENTALISM, ISLAMIC SCRIPTURIALISMS AND FEMINIST SUBORDINATIVE 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. 195 The standard for conviction in male prostitution or furuz received its settled interpretation by the Egyptian Court of Cassation in an important decision issued in May 1975. 196 Unlike shar'i'a norms on liwwat, which extended punishment to both passive and active sexual partners, the Court of Cassation effectively limited the crime of furuz 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. 197 The Court of Cassation's 1975 decision has settled into the category of jurisprudence constante in Egyptian law today, 198 and was therefore relied on in the notorious Queen-Marie case some thirty years later, where convictions depended on either the suspect's confession to practicing furuz, or on forensic examinations proving that the suspect's rectum was "used. 199

More importantly, in an attempt to confirm that shar'i'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. 200 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 liwwat. However, none of these Islamic codes were promulgated by parliament, and the sense that Egyptian criminal law remains a Western secular transplant in conflict with shar'i'a remains today. 201 In the case of sodomy law, this tension between shar'i'a and modern Egyptian law became the subject of a decision by the Egyptian Supreme Constitutional Court in May 1992. In response to an appeal 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 shar'i'a criminal norms on the subjects of zina, liwwat and al-aqara 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 shar'i'a. 202

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 203

Almost a quarter of Schacht's Introduction to Islamic Law is composed of bibliography—sixty pages to be exact. 204 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." 205 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. 206 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 "taglid" 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 ijihad" has been a central


197. A detailed discussion of the Court of Cassation's decision, see DABI, supra note 197, at 23-36.


199. See a brief discussion of criminalized male sexual roles under Egyptian law, see AMR SHAHAN, On a Certain Queer Discomfot with Criminality, 101 AM. SOC. ENG'Y L. PROCEEDING 7 (2007).

200. For a succinct discussion of the 1980 constitutional amendment and its impact on judicial review in Egypt, see MAHMOUD BEHRAND-MAKGISIEN, LA POLITIQUE A L'EPIDOU DU JUDICIAL: LA JUSTICE CONSTITUTIONNELLE EN EGYPTE, 139-85 (2002).

201. See SUDI ABU-TALIB, supra note 121. See also MOHAMMAD MAHMOOD, TAYAWOR AL-DAWLA WA-QADIM FI MIR AL-HADITHA (1998).

202. MARTABAT AKBAR AL-MASHAGHON AL-ARASHIYYA AL-ULYIA, supra note 196.

203. Gochu, supra note 13, at 68.

204. SCHECHT, supra note 5, at 215-85.

205. Edge, supra note 10, at 206.

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 mashabs' or
original founders. Such criticisms of Schacht and Coulson's scholarship pub-
lished 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 doc-
trines in fields as diverse as contract law and land ownership, and thus contest the
dominant vision of shari'a's history as one of a legal system that dysfunction-
ally resisted evolution. What these scholars offer, instead, are glimpses 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 evolu-
tion 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 (Pramise
#2). In that sense, these anti-Orientalist criticisms are essentially a refine-
ment 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 ver-
sus 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 con-
clude 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 histori-
goigraphy 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 concep-
tion 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 crimi-
nal justice administration) were not preliminary try-outs at legal Westernization,
or even 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 enclavements on shari'a, nor instances of secular-
ization "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 historiogra-
phy. 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 pre-

tsents us with a possible alternative to the shari'a siyasa and modernity/tradition

binary 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, fatwa, etc.), and thus invariably present
us with a legal history written from the perspective of jurists, new stream schol-
ars, 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 compar-
ison a legal history written from the subaltern (instead of juridical) perspective.
Relying on the "archives" for primary materials, new stream historians take the
siyasa courts, and the qamus 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 be-

tween shari'a as divine law versus siyasa courts and qamus 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, sub-
altern legal history given its permutation by subaltern narratives. Yet, some of this
interesting new work continues to rely on juridical texts for primary research ma-
terials, occasionally deals with abstract doctrines divorced from the context of
court application, and often juxtaposes subaltern narratives of the law with per-
spectives 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 nine-
teenth century siyasa courts and qamus 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 potentialities are still largely
unexplored. Second, by recounting the stories of both state administrators and
subalterns of the law, this scholarship tells of a time when Islam as a re-
ligion seems to have been understood differently, a time when "anxious envy" of
the west and "defensive pride" about Islamic law, both of which Geertz asso-
ciates with the late nineteenth century rise of scripturalist Islam, had all been cu-
rimously 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 separate legal traditions, the one dynamically secular, the other statically divine. In short, the "newest" thing about the new historians is the possibility they are willing to hold the idea 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 qanun as part of their study (in violation of Premise #1 and #2), they would consider the history of functionally-evolving muraqqa' 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 up to the year 1996.209 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 2004.210 Taken together, Edge and Zubaida map out what I think are three anti-Orientalist variations on the dominant scripturalist historiography.

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209. NORMAN CALDER, STUDIES IN EARLY MUSLIM JURISPRUDENCE (1995). Calder's book is also notable in its use of non-legal primary material (especially religious), and instead the nafenai literature of North Africa and the adeh 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.


212. Edge, supra note 10, at xxii.


214. Id. at 3-4.
call Islamic law.215 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 scriptural historiography: The history of Islamic law is that of shari’a (Premise #1), the masalim 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 was assessed in the same way we saw in Schacht and Coulson’s work, and perhaps most astonishingly, masalim tribunals are described as both “sporadic and ephemeral.”216 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,217 and mutating with the same stability under the Ottomans,218 before making it into modern practice in both Yemen,219 and Saudi Arabia.220 Another sign of the enduring scriptural 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.221

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 Abdurahman, the call to re-open the gate of ijtihad has become almost a given among many Islamist thinkers today.222 It has also become a marker of anti-Orientalist schol-
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 fatwa) 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 find 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-scriptural scholarship typically considers “minor sources” of the shari’a—such as istislah or masalah, 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.239 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 defines rationalist human reasoning outside qiyas.240

Orientalist assessments of Islamic legal thought as doggedly religious and hostile to humanistic consideration in legal reasoning inform John Makkul’s seminal 1985 article on equity in Islamic law.231 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,”232 Makkul offers a wide-ranging review of opinions on the role of istislah in fiqih, culminating with a functionalist assessment of istislah as analogous to the “reasoned distinction of precedent” in American legal thought. Makkul’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 masalah, hisba, or qamun.

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:

239. See supra pp. 21-24.

240. See IBN BADAY, UTILITY IN CLASSICAL ISLAMIC LAW: THE CONCEPT OF MASALAH IN IBN AL-PIHI (1965).


232. Id. at 64.

233. ZUBAIDA, supra note 208, at 51.

234. Edge, supra note 10, at xv.

235. Id.
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 witnesses if the crime is considered a hadath, 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 siyyasa.

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.” Baber 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. 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.

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 indubitable and certain knowledge (‘ilm yaqin). Such knowledge is to be found only in the revelation, i.e. the Qur’an, the Sunna, and the consensus of the jurists (ijma‘); 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.

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 mante of fiqh. Thus in property disputes, architectural elements such as beams between houses were admissible to establish division between property rights; 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 ‘asb cases after attempts to apply scriptural 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 ‘alim from Syria, Iraq, Anatolia and other regions to Egypt during the thirteenth century 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 hadd, 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.

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 fiqh 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 ‘alim ‘alim 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-Hambali and Maliki jurists who

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, Feuille de torture: la communauté et droit musulman entre le Xe et le XIIe siècle, in LA VIOLENCE (Françoise Héritier ed., 1996); La découverte des chasses qui parient. La législation de la torture judiciaire en droit musulman (XIe-XIIe siècle), 7 ENQUÊTES 175 (1998).

237. In doing so, Johansen is following Chaîf Chihatsa’s stages.

238. Johansen, supra note 149, at 169.

239. Id. at 170.

240. To this end, Johansen relies on a fascinating study, Robert Hessing, Urban Life medieval et Droit Musulman, REVUE DES ÉTUDES ISLAMIQUE 127-55 (1947).


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 sa-
cred 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 be-
longed 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 reli-
gious purpose underlying these norms in its practical political form. The concept
underlines the necessity of a strong political apparatus for the practice of reli-
igion and assigns a religious dimension to the exercise of all public functions
(wilayat), all of which are supposed to fulfill the hisba commandment, that is to
command the good and forbid the evil.243

Thus for Ibn Taymiyya and Ibn Qayyim al-Jawziyya, there was no religious
rational 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-
Dilmuk fiqh norms on evidence and procedure. Unlike other jurists such as
Mawardi, who tried to define the norms governing public functions and distin-
guish the division of tasks between judges and administrators,244 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 Qay-

243. Id. at 184.
244. See Amedav, supra note 218.
245. Johansen, supra note 149, at 185.
246. Id. at 192.

247. Id. at 188.
248. Id. at 191.
Fourthly, and directly related 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.²⁴⁹

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 mahábbih, názálim, shari‘a, and qánum are all dismissed as “secular” aberrations from the religious “Islamic law” defined by the ‘ulama’ under figh (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 historical subject of scholarship (Premise #3). Schacht and Coulson, in turn, are clearly 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.²⁵⁰ By contrast, Johansen’s discussion on the historical emergence of the ayyása shar‘iyya doctrine, and the admission of circumstantial evidence under its aegis in ‘ulama trials in particular, renders all such offices and laws consonant with the larger notion of “shar‘i” 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 Jurisprudence: Qanun and Siyyása Shar‘iyya

As discussed earlier,²⁵¹ qánum can be loosely translated as “code of law” containing statutes that define crimes and punishments largely outside the substantive, procedural and evidentiary requirements of figh. While qánum were issued by rulers in Manlib, Abbasid, and even Umayyad times, Schacht and Coulson find the Ottomans to have been the most prolific producers of this form of law.²⁵² Their scholarship touches only tangentially on Ottoman qánum, because qánum in general are part of siyyása and not shari‘a (Premise #2). For the

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


²⁵¹. See supra pp. 16-31.

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

2008 ISLAMIC LEGAL HISTORIES

most exhaustive analysis, we must turn back again to Hedy’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, Hedy’s study points towards a subtle conception in which qánum and ayyása in general, were viewed as part and parcel of shari‘a.

A closer look at some characteristics of qánum will demonstrate its compatibility with shari‘a. For example, a qánum was valid only during the lifetime of the Sultan who had enacted it. In practice, however, each new Sultan would generally confirm the qánum enacted by preceding rulers because the latter were often merely a legalization of current applicable law.²⁵³ Hedy thus argues that in substance, qánum were meant to codify current customary law or ‘urf, and that their legitimacy was derived from the fact that ‘urf is binding under figh. Qánum often began with a preamble that restates this fact by reference to maxims such as “Custom is legal text” (“al ‘āda kal nafs”), “Custom is one of the shari‘a proofs in matters on which there is no written authority” (“al ‘āda iha al hujaj al shar‘iyya fima la yunass fih”), “What the believers consider right is right with God” (“Ma ra‘ah al mumínin hasanat fihum wa thallah hasan”), and most interestingly, “What is proper according to common usage is like what is legal according to holy law” (“al ma‘rif ‘ofsan kal makhri‘ shar‘i‘an”).²⁵⁴

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

Although Hedy argues that many qánum were issued in contravention of figh,²⁵⁶ and some jurists viewed the reference to siyyása as merely an attempt to provide a viceroy of shari‘a’s legitimacy, he also provides several examples where the terms siyyása and shari‘a are treated as the same. For example, in the fawa‘is of Ottoman sháhibhuláms, reference to qánum and decrees were often made as masbú‘, that is in accordance with the shari‘a. At the same time, in Ottoman official usage, the term shar‘i‘, meaning according to the shari‘a, tended to acquire the meaning of “legally” in the broadest sense.²⁵⁷ While the legal basis for qánum rested on the will of the Sultan, their binding power did not require some confirmation or sanction by sháhibhuláms regarding the qánum’s compatibility
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. 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.” Peters argues that Baer “failed to grasp the precise relationship” between the pre-1883 reforms on the one hand, and the qaḍi 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 Sharia’s justice and created institutions to insure the correct application of the Islamic criminal provisions.”

Peters starting point is the insistence on connecting the pre-1883 reforms with the Ottoman tradition of qaḍa. 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 exhaustively detailed English-language survey of these laws available to date. These laws begin with the short penal code promulgated in 1829. The penal code designated some offenses to be punished with siyyasa, 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-Mulkī. 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‘yiyah Al-Haqeeqyyah was created in Cairo to try serious offenses and also act as an appellate court. Al-Jam‘yiyah Al-Haqeeqyyah was replaced in 1849 with Majlis al-A‘lkham, which had the same jurisdiction. In 1865, a new tier of appellate courts called Majlis Al-Fist‘iyyah 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.” 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).
262. Id.
A system of four tiers came into being with at the top the Supreme Judicial Council (Majlis al Adlawi) 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. 266

Concurrent with the above reforms to the judicial body, a series of qamus were enacted following the 1829 penal code mentioned above. The 1829 penal code promulgated such criminal offenses as murder, highway robbery, counterfeiting, extortion by officials, theft and embezzlement. A Code of Agriculture (Qanun al-Fliah) 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 Qanun al-Adl al-Maghribi in the first half of the 1850s. 267

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 qamus and on the other hand other criminal offenses such as homicide, wounding, and sexual offenses were also tried in the qadai courts, with often the same dispute heard between these two legal systems. Peters notes that cases would first be tried before the qadai 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 qamus mentioned above. In demonstrating the above, Peters does numerous cases through the registers of this dual court system and argues that its legitimacy, from the litigant's perspective, rested on the shari'a principles.

Much in the same vein, Khaled Fahmy's work also relies on court archives to draw an alternative history of Islamic law in 19th 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 perspective, 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 1600s as it was in the 1960s, what then was the reaction of lower classes to the incessant attempts by the medical and legal authorities to lay claim 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: exhuming burials within the confines of cemeteries; necessitating medical examination before burials; preventing funerals from passing through the city; forbidding the professionals’ practice of their trade by wailing behind the horses; and, in suspicious cases, seizing the body to conduct an autopsy in state hospitals? 268

The answers Fahmy provides for these questions come in two phases of scholarship. The first appears to be intentionally subtle in perspective, and the general argument is that members of the lower classes, both in urban and rural areas of 19th Century Egypt understood the difference between shari'a and shi'a 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 "saints." Indeed, none of the doctors, police inspectors, or lawyers involved in these cases seem to have believed that what was being done was contrary to the shari’a. 269

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 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-siyasa with "secular law," or thinking that there was a fundamental clash between the two. What is most clear in Fahmy’s account of the legal system that was only hazy in the century and in much twentieth-century "modernization theory" literature, referred to as a "defence, 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 siyasa laws were often thought of as a means by which people could achieve what they understood as their shari’a rights. 270

267. Id. at 138. See also to the same effect, Khaled Fahmy, The Police and the People in Nineteenth-Century Egypt, 39 THE WORLD OF ISLAM 340 (1999).
268. Id. at 138. See also to the same effect, Khaled Fahmy, The Police and the People in Nineteenth-Century Egypt, 39 THE WORLD OF ISLAM 340 (1999).
269. Id. at 138. See also to the same effect, Khaled Fahmy, The Police and the People in Nineteenth-Century Egypt, 39 THE WORLD OF ISLAM 340 (1999).
270. Fahmy, supra note 268, at 362. In a footnote to this text, Fahmy comments: "Not, 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 broadly structuralist terms, I claimed that scripturalist historiography is fundamentally rife with two sets of binary opposites: shari‘a/diyasa and tradition/modernity. These binaries distinguish what fits under the historical plot of Islamic law and what doesn’t (shari‘a’s yes; diyasa 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.). In this essay I 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 glimpses 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 chosen 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’s rules on lwhat as the only Islamic law governing sodomy. By contrast, new historians might include Ottoman gawwar 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 distributive consequences, is instrumental in shaping our understanding of how Islamic law impacted sexual acts, orientations or identities prior to the colonial 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 diyasa and ‘orf from the scriptural ambit of shari‘a and limit our scope of historical investigation to what we find in myriads medieval and early modern jurisprudential treatises. By contrast, if diyasa and ‘orf are included in our historical plot of Islamic law, we might start recognizing in these two supposedly extra-shari‘a’s jurisdictions the same functionally evolving characteristics dominant in Western law historiography. As comparatists, we might even come to imagine the relationship between diyasa 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 diyasa 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,271 so we might think Islamic law history unimaginable without affording maslaha, hikma 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‘a/diyasa 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. Abul and Sahnur relied on notions of da‘wah (necessity) and maslaha (utilitarian policy considerations) to endow bank interest with Islamic normative legitimacy. Shahry 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 polygyny and trim the husband’s unilateral right of no-fault divorce, or reinterpretations of shari‘a’s corporal punish-

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 of shari‘i usuliyasa and tradition/modernity and provides another rehearsal of 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 miraculoseness 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‘i usuliyasa and tradition/modernity poses a set of distributive, discursive, and developmental implications in the many ways briefly discussed above. Most importantly, the poststructuralist 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 laws, one can imagine scriptural shari’a norms on l salesman carry a better distributive effect from a queerer perspective than collapsing the binary shari‘i usuliyasa and including Ottoman qanunts on sodomy in our historical plot of Islamic law. Laments under shari’a is so heavily laden with high evidentiary barriers to conviction that demanding its literal enforcement as part of an Islamicist agenda for “return to shari’a” might afford a higher protection against sodomy convictions than would legislating new qanunts with potentially more lax-proof requirements.

272. Abbasi, Manichek and Andalusian court records appear only exist there but also are yet to be found in any substantial size. Until that happens, the voluminous Ottoman court records seem like the most valuable option available to the Islamic law historian seeking primary archival materials of systematically preserved and indexed sort. On the existence of pre-Ottoman court records, see Ward Hall, The qadi’s divan (ijtihād) before the Ottomans, 61 BULLETIN OF OSAS 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 Doro Ze’evi, The Use of Ottoman Shari’a Court Records as a Source for Middle Eastern Social History: A Reappraisal, 3
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-siyasa with “secular law,” or thinking that there was a fundamental clash between it and the shari’ah, 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 stern laws were often thought of as a means by which people could achieve what they understood as their shari’ rights.273

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’ah 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.”274 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.

273. Fahmy, supra note 369, at 362.
274. Id., fn. 39, at 362.