

Why Do We Study Religious Law? Lessons from the Islamic Experience

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I. An Alternative Paradigm

Before I begin with the substance of my remarks, two prefatory notes are in order. The first is that even though I have been given the honor of speaking at a panel on Jewish law, I know relatively little about Jewish law. I have always considered this a problem, a shortcoming of which I am frequently made aware by my friend and mentor George Fletcher. It seems to me as a student of Islamic law and the Muslim legal tradition that were I better schooled in Jewish law there would be considerable material upon which to draw for the purposes of comparative analysis. This might shed greater light not only on these two rich and valuable traditions, but also on the nature of legal evolution generally. Indeed, the very purpose of my talk is to point out at least some of the methodological issues that surround the study of any religious law, a matter that would have been made much easier with deeper knowledge of the Jewish tradition.

At the same time, as a student of Islamic law, I am particularly sensitive to journalistic and pedestrian claims of expertise in Islamic law—thoughts on Wahhabism, or millenarian Shi'ism, for example, from people who wouldn't know which way was up if handed a page of Arabic text. The number of papers that come across my desk from seemingly aspiring Islamic law “experts” asking for comments and betraying a startling level of basic and fundamental ignorance towards the tradition (some sympathetic to anything with the word “Islamic” in the front, others precisely the opposite) is quite frankly startling. I would hardly want to make the same mistake with another legal tradition. I speak no Hebrew, and I have no grounding in the area. I will therefore focus my remarks primarily on the Muslim tradition, and hope that they might provide at least something of value to those interested primarily in Jewish law. This can at least in theory be done, as one of the most enlightening talks I have heard in the past several years, and one that played no small role in the development of my own ideas here presented, came from Suzanne Stone speaking of varying Jewish law positions on the possibility of the secular state.

The second prefatory note, and the one that leads me into the topic I wish to address, is that the italics in the title provided for this paper are intentional and important. There are absolutely any number of important and valuable reasons to study religious law, whether it be Jewish, Islamic or any other tradition. These reasons may be theological, as a guide to the faithful, or academic, as a means of approaching or understanding the traditions on their own terms. I do not question the value of those approaches in the slightest. However, I do want to ask what it is that we, as legal academics, and specifically *American* legal academics, may add to the discourse. And if I have a criticism of the manner in which Islamic law at least is studied and

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taught in American law schools, it is that it does not attempt to employ methodologies that are more familiar to us as legal academics. These methodologies might well provide us a wonderful opportunity to approach and view religious law from a perspective that is currently deeply understudied. In other words, there is much that we could do if we would only approach this subject as American *lawyers*, not as academics in Islamic studies departments or theologians might.

This is not to proffer something so arrogant as that every single academic in an American law school teaching a religious law course needs to change their ways. To begin with, there are quite a few religious studies individuals who are not lawyers who teach religious law in American law schools (often as adjunct professors). There are also those with joint degrees with scant interest in legal pedagogy and analysis, devoted instead nearly exclusively to studying religious traditions in more traditional terms and along more traditional lines. Perspectives from such scholars are valuable and welcome. Nevertheless, there are quite a few of us who are lawyers first and foremost, and who have been trained using a particular, modern, and uniquely American pedagogy, and attempting, in many cases badly, to replicate methodologies not familiar to us when another promising approach seems available.

To demonstrate, I turn to the basic material from which Islamic law is made—the exegeses of the learned doctors of the classical era, which are compilations of rulings and determinations derived from Sacred Text (usually the Qur’an and the actions or statements of the Prophet Muhammad) at least ostensibly using particularly approved methodological principles (primarily analogy and consensus).² Thus, to use a simple example, Muhammad banned the sale of gold, silver, salt, dates, barley and wheat when traded for itself, with gain (meaning the trade, for example, of 2 kg of dates for 1 kg) or through delayed exchange (meaning the trade of dates now for dates in the future).³ From this single sentence-long prohibition, jurists of different schools, analogizing from the items listed, spun out a dizzying array of rules concerning what items were covered by the ban.⁴ For some, the relevant categories of items that could not be traded with gain or through delay were those measurable by weight and those measurable by volume, for others, foodstuffs and precious metals, and so on.⁵ Rules such as these, developed by these learned doctors, are the corpus of what is known as the *shari’a*,⁶ often loosely, and colloquially, translated as “Islamic law.”

The translation, however, of *shari’a* to Islamic law is fraught with difficulty, as this is not law as I have been taught it, and indeed as I teach it, in an American law school. The guilds in

² N.J. COULSON, A HISTORY OF ISLAMIC LAW 76 (1964)

³ SARAKHSI, KITAB AL MABSUT 12:110 (1993)

⁴ See Abdul Razzaq Al-Sanhuri, MASADIR AL-HAQQ FI AL-FIQH AL-ISLAMI, DIRASA MUQARINA MA’ AL-FIQH AL-GHARBI (*The Sources of Truth in Islamic Jurisprudence: A Comparative Study with Western Jurisprudence*), Vol. 3, 178-94 (1967).

⁵ Id.

⁶ CLARK LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT 11 (2006)

which the learned doctors operate are independent of the state.⁷ Their compendia are not state codes.⁸ Their rulings address hypothetical situations only, not actual ones.⁹ In some cases, the compendia seem entirely divorced from any form of actual social order, as in the rules of *jihad*, which generally presume a preposterous Manichean universe that resembles nothing that has ever existed on earth.¹⁰ In other cases, they often present rules that we know as a historical fact have been, in the words of my colleague Bernard Freamon, an authority on the subject of Islam and slavery, “spectacularly ignored.”¹¹ On still other occasions, such as commercial law, there is not much we know about how relevant the juristic rules were, but we can surmise that not all of them were followed, because if they were, commerce would have ground to a halt.¹²

To be clear, not all rules fit one of the above paradigms, and my examples above are selective and unfair to an extent. There is excellent work being done in Islamic studies departments that try to determine precisely what the relationship between *shari’a* and Muslim praxis has been in the past.¹³ Certainly the answer is far more nuanced than my selected examples have made it seem. Yet even with this *caveat*, the *shari’a* is not law as I have been taught it, and as I teach it to my students. Law is not related in some manner to the actual regulation of the social order, it is *by definition* the regulation of that social order. The corpus of our American legal material is cases, not casuistry, issued by state officials, not learned doctors, and intended to be binding, often through the force of the state, on the parties concerned.

To be clear, I do not mean to suggest that separation from the state in and of itself renders something not to be “law”, though there are certainly quite a few of our colleagues who would take this position. Still, others are legal pluralists and I do not intend to take a position in this paper on the debate of whether or not law may exist separately from the state. In some of my work, I have been happy to accept the rulings and *fatwas* of Ayatollah Sistani, for example, as a form of “law” in that they have some central characteristics of law.¹⁴ They are issued through a process that conforms to a “rule of recognition”,¹⁵ the believers consider them binding, and

⁷ *Id.* at 15.

⁸ SHERMAN JACKSON, *ISLAMIC LAW AND THE STATE* xv (1996).

⁹ FRANK E. VOGEL AND SAMUEL L. HAYES III, *ISLAMIC LAW AND FINANCE: RELIGION, RISK AND RETURN* 43 (1998).

¹⁰ *See* section II *infra*.

¹¹ Bernard Freamon, *Slavery, Freedom and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 53 (1998).

¹² *See* Vogel and Hayes, *supra* note 9 at 132 n. 4.

¹³ For some discussion on this subject, see Jorn Thielmann, *A Critical Survey of Western Law Studies in Arab-Muslim Countries* in *LEGAL PLURALISM IN THE ARAB WORLD* 42-45 (Badaouin Dupret, Maurits Berger and Laila al-Zwaini eds.) (1999) [hereinafter “LEGAL PLURALISM”].

¹⁴ Haider Ala Hamoudi, *Baghdad Booksellers, Basra Carpet Merchants and the Law of God and Man, Legal Pluralism and the Contemporary Muslim Experience*, 1 BERK. J. MID. E. & ISL. L. (2008).

¹⁵ Specifically, when Sistani wishes to issue a standalone binding order to the believers in the form of a *fatwa*, it is issued as an official pronouncement, often handwritten, but stamped as originating from his office. Likewise, Sistani’s issuance of lengthy religious rules, whether they be rules of worship or of marriage and inheritance, appear in widely published compilations, most notably the work known as the *risala amaliyya*. Much is said and done in Sistani’s name, some perhaps with his assent and some almost surely without it, but only when a rule

certainly there are extra-state means of binding enforcement, through tribes, shaming, exclusion from a relevant commercial community and the like.¹⁶ There may therefore be some basis to examine as a form of law to which we are accustomed and trained the final determinations of an identified nonstate figure or body issuing an order through some sort of quasi official process that is expected to be binding and enforced in one way or another. Yet the treatment of law as being composed of the aggregation of bodies of largely conflicting rules developed from any number of medieval jurists (none necessarily more authoritative than any other) seems far removed from law as I study or teach it, particularly when in many cases its relationship to the actual social order is tenuous at best.

Nevertheless, I wish to emphasize that I do not suggest that the bulk of the *shari'a* is therefore silly, or irrelevant, or unworthy of consideration in any context. There are large numbers of sincere and devout believers and religious leaders, not to mention secular students of these traditions in our universities, who take this aggregate corpus very seriously, and are entitled to. I therefore make no claim respecting the material in question, but this: it is not law.

Moreover, and this is particularly important in the Islamic context, though I would surmise not to be ignored in the Jewish context either, the vast majority of religious law revivalists who seek to import greater degrees of religious law into the social order are thorough positivists themselves, whatever ambivalence classical law may have had towards this question. When, for example, the Muslim Brotherhood seeks to Islamize Egypt, or Hamas desires to Islamize Gaza (when politically expedient), the manner through which this is done is not to pull back state authority, allow room for jurists to operate, develop more compendia, and then reinstitute a relationship of some sort between a body of conflicting juristic rules as contained in compendia, state regulation, and social practice. Rather, it is to *codify* the conclusions of the learned doctors; that is, to replace the learned doctor with the *state*, both its legislature as rule giver and its judiciary as rule interpreter.¹⁷ In Iraq, the need to marry the state to the religious rules is not as acute precisely because there is an identifiable body of jurists, organized in a form of hierarchy (and in this respect somewhat distinct from medieval modalities of juristic operation), whose rules can be made binding in nonstate processes.¹⁸ In either case, the underlying assumption of law as being the *positive* determinations of a state or nonstate body proclaiming final, binding rules through some sort of enactment process is not seriously questioned.

As lawyers, I think we understand this and might be able to comment on such a phenomenon much more extensively than we do. Instead, we find ourselves ignoring the

either appears as part of a compilation, or when it is issued from his office, is it really understood to be a command to the believers.

¹⁶ Hamoudi, *supra* note 14; see also Haider Ala Hamoudi, *Money Laundering Amidst Mortars: Legislative Process and State Authority in Post-Invasion Iraq*, 16 TRANS. L. & CONTEMP. PROB. 523, 537-38 (2007).

¹⁷ See, e.g., Jackson, *supra* note 8 at xvi.

¹⁸ Hamoudi, *supra* note 16 at 537.

techniques of investigation, analysis and pedagogy in which we have been trained to develop some sort of theory of “contract” based on medieval rules that any commercial law professor would immediately recognize as impossible in any historical period.¹⁹ This is problematic even for study of law of the classical past, but when brought into present day analysis of Islamic “law” seems entirely misguided. Rather than approaching Islamic law and Islamic movements might, instead we ruminate wistfully on the era of juristic authority as being a sort of golden period, the destruction of which has led to many of the deep problems the Muslim world, and Islam, faces today.²⁰ To me, given my own, distinctly legal, biases, shared by a considerable number of Muslim lawyers whom I know, there is something of obsessing over the dodo bird in all of this.

There is something else, for we are not only positivists, for the most part, but we are also almost all Realists to one extent or another. Not only are we focused on rules as they might affect the social order, but we also understand the role of choice in judicial decisionmaking, and we know that rules can often, some might say always, be applied in any number of ways, with something more than interpretation of text or doctrine often at work. Political, economic and social factors may influence the result, as might the ideological predisposition of the judge. We emphasize to students the uncertainties inherent in legal reasoning, the fact that other considerations might be involved, and indeed encourage them to think about what some of the external influences might be. That Chief Justice Marshall cleverly managed in *Marbury v. Madison* to rule in favor of his nemesis President Jefferson while simultaneously enhancing the Court’s power at the executive’s expense is, I think, commonly known by law students. Many of us contracts professors continue to teach Judge Cardozo’s brilliant *Wood v. Lady Duff Gordon* case not because of its early limitation on the doctrine of illusory promise (we could simply point to the UCC for the modern rule, at least in the sale of goods) but for the manner that Cardozo artfully extended from the thin air a requirement of reasonable efforts that did not previously exist in such a convincing fashion that it left no doubt as to its necessary correctness.²¹ It is the argument, the *rhetoric*, that we find so exciting, and so valuable to introduce to our law students. The doctrine is, for many of us, the rather tedious end product to memorize for the bar exam.

It is entirely possible to take an entirely different view of American law, of course, and indeed historically law students were trained on more theoretical texts (specifically those of Blackstone, Coke and Kent) than they are at present, with scant attention to external factors that might affect adjudicative decisions. Nothing would preclude a law professor from paying only secondary attention to statutes and the cases decided under them, deciding instead to study commercial law as being the ruminations of wise, older learned men and women, irrespective of their relationship to actual adjudicative decisions or how those decisions were actually reached.

¹⁹ See Vogel and Hayes, *supra* note 9 at 132 n. 4.

²⁰ KHALED ABOU EL FADL, *THE GREAT THEFT* 26-44 (2005); NOAH FELDMAN, *THE RISE AND FALL OF THE ISLAMIC STATE* 57-102(2008).

²¹ For an excellent rendition of the magnificent advocacy contained in *Lady Duff Gordon*, see Karl Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 637-38 (1962).

The professor might then well indicate that she is not entirely sure the extent to which any of this comported with modern practice. She might urge her students to look into this question. However, actual practice would not necessarily concern such a professor, because law was only an elaboration of academic theories, developed by the learned, under which practice was *supposed* to be controlled. Practice might well be affected by modern theories of economics, or by the material interests of institutions of influence, or by external political processes such as colonialism, but this would not be “law” to such a professor, only what happens to law when it is actually applied. Such an approach would be, however, unusual in our academy. Most of us are attuned to some degree to Realist ideas. Some of us, me absolutely included, would like our American law classes to be even *more* Realist, to introduce more social science, to pay more attention to trial determinations that might affect appellate outcomes that we focus so much upon, to understand an even lower level of law enforcement (by police officers, prosecutors and the like) where most determinations are made. Nevertheless, I think it is fair to say that very few of us feel that we have paid too much attention to law on the ground, and that more Blackstone and less UCC is what is needed to study, teach and understand commercial law.

In the Islamic context, perhaps because of a misplaced excess of concern for disrespect for religious belief, the healthy skepticism of the stuff from which decisions are made is to my mind depressingly absent when the decisions being discussed are not a judge’s interpretation of a statute, or even a Constitution, but rather the human derivation of Sacred Text meant to be binding on a polity. There are exceptions. Russ Powell for example has pointed out rather provocatively that Pakistan has shown more flexibility in applying *shari’a* than the Catholic Church has in modifying canon law in the area of marriage and divorce precisely because Pakistan actually has to enforce the codes, while the Church, itself happily divorced from law making, can simply turn a blind eye to social reality.²² Yet all too often a certain formalism pervades that I think we would discredited in the American law context, and there is then a corresponding reluctance to delve into motives beyond a faithful application of classical doctrine. A fair amount of *shari’a* scholarship in law review articles, for example, makes much of the “purposes” of the *shari’a*, set forth by the classical doctors and employed even today in courts applying *shari’a*.²³ These are, in basic form (though they tend to vary slightly depending on the source used), the protection of life, property, religion, family and mind.²⁴ Even the slightest dose of Realism would lead a lawyer to approach such abstraction with a very high degree of skepticism as to its ability to provide anything by way of guidance in an actual dispute.

²² See Russell Powell, *Catharine McKinnon May Not Be Enough: Legal Change and Religion In Catholic and Sunni Jurisprudence*, 8 GEORGETOWN J. GEND. & L. 1, ___ (2007)

²³ See, e.g., Asifa Qureishi, *Interpreting the Qur’an and the Constitution: Similarities in Text, Tradition and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67, 101-02 (2007); see also Lombardi, *supra* note **Error! Bookmark not defined.** at 32-34; Khaled Abou El Fadl, *Constitutionalism and the Islamic Sunni Legacy*, 1 UCLA J. ISL. & N.E. L. 67, 101 (2001).

²⁴ *Id.*

Other examples exist. My favorite formalism has been the reference in the leading scholarly work on Islamic finance to the importance of selecting the proper rules of the classical doctors so as to ensure that the “internal logic” of the Islamic system is preserved.²⁵ The irony of the word selection, “logic” as being the life of the (Islamic) law, is particularly rich given the Justice Holmes adage that many of have long internalized: The life of the law has not been logic, it has been experience.²⁶

II. Positivism and Realism in Application in the Law of War

To this point, perhaps my remarks have veered to the abstract, and thus their import might be less radical than I intend them to be, for I really do call for a paradigm shift, and an important one, in the manner in which Islamic law might be studied (primarily, not exclusively) in our academy. In my work and study, the area in which I focus most in order to raise the profile of Realism, and positivism, in understanding and approaching Islamic law is the area of Islamic finance and Muslim commerce.²⁷ I could, I suppose, attempt a summary on this work, but I feel that it might be difficult to summarize in the short amount of time I have remaining, and thus would refer the interested reader to my other work for an exposition on the subject. Instead, I would like to make reference to an area of law that I think might be more salient to this audience, *jihad*, or the Muslim law of war,²⁸ in order to show how a more positivist and Realist account of Muslim rules might well add to rather than detract from the discourse.

The general way in which the subject of *jihad* under Islamic law is approached is through primary reference to the texts of our long time friends, the learned medieval doctors, and their compendia of rules. From them, we learn that the world is divided into two distinct polities, the House of War and the House of Islam. The House of Islam is led by a single leader, to whom all owe fealty, and those who do not provide it are guilty of rebellion, for which the penalty is severe, often cross amputation and crucifixion. The House of War is everything else. War is then divided into two types, aggressive, to spread the House of Islam, and defensive, to repel attacks against it. Aggressive war requires the caliph’s call to arms, and only men who have obtained parental permission, have no outstanding debts, are known to be loyal to the caliph and meet other specified criteria are permitted to fight. Defensive war, to repel an attack, does not require the caliph’s call, and rules such as parental permission, fiscal soundness and even being of the male gender may be suspended to defend the realm. This is obviously a highly reduced,

²⁵ Vogel and Hayes, *supra* note 9 at 38.

²⁶ OLIVER WENDELL HOLMES JR, *THE COMMON LAW* 1 (1881)

²⁷ See Haider Ala Hamoudi, *The Muezzin’s Call and the Tolling of the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law*, 56 AM. J. COMP. L. 423 (2008).

²⁸ It should be noted that the term *jihad* has become a loaded one in our era, and that many modern Muslims are quick to argue that the most important form of *jihad* is supposed to be the personal form, of a struggle for the purification of the soul. See, e.g., EL FADL, *supra* note 16 at 188. This Article focuses on the form of *jihad* that would be of more interest to jurists and legal scholars, namely, the articulation of the Muslim law of war.

but to my mind largely accurate, summation of the juristic rules, which could be considerably qualified and expanded to a virtually limitless degree.²⁹

Much is made of these rules and whether they are capable of being interpreted in a manner that would comport with modern notions of international comity, by Islamophobe, Muslim apologist, and everyone in between.³⁰ But while we wax on about the House of War, and the House of Islam, and caliphs and emirs, we might lose track of the actual reality of the Muslim world today.³¹ In fact, I fear that too often we do.

Even a casual, Realist look at the Muslim world today would raise immediate questions about the potential usefulness of the medieval paradigm to determine how Muslims might approach the law of war Islamically. What House of Islam? Muslims live in nation states. Who calls for the aggressive war if there is no caliph? What of the Shi'a movements and states such as Hizbollah and Iran, when in Shi'a doctrine the only leader capable of calling for aggressive war, the Infallible Imam, has been in hiding for a millennium?³² What counts as defending the House of Islam? If defensive war includes fighting against Israel and India because they were once in the House of Islam, then why not Spain and Sicily? This is not to suggest that the medieval doctrine must be ignored entirely, only that in approaching what Islamist movements have to say about war, perhaps we might be Realists and rule skeptical about the extent to which any of this derives from medieval thought. The world seems quite a different place, after all. We also might wish to take some note of the fact that few Muslim states ever claim to be contravening Islam in their international affairs and yet all have signed the UN charter which requires respect for the territorial integrity of other nations and specifically prohibits the use of force for territorial gain.³³

Moreover, once we add positivism into the mix, that is, if we look first and foremost at the states and organizations *actually engaged* in self proclaimed Islamic war, more confusion appears. To begin with, not a single *jihadist* organization I can think of (and I absolutely include Al Qaeda), claims to be doing anything but defending Islam from attack. Hamas and Hezbollah

²⁹ An excellent rendition of these rules appears in Majid Khadduri's seminal work on the subject. MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* (1955).

³⁰ See Sherman Jackson, *Jihad and the Modern World*, 7 J. ISL. L. & CUL. 1, 2(2002) (describing the controversy over classical rules).

³¹ Regrettably, one important area that I have chosen not to address in this paper is the emphasis that should be placed on the past of Islamic law relative to its present. Not being an historian, and acutely aware that my students are not taking a course in Islamic law to learn of the 14th century rules of in kind trades, my biases heavily favor the present. However, I believe that the ideas I raise here are no less applicable to the Muslim past than they are to the present. Harun al-Rashid's decision, for example, to ally with Charlemagne against a Muslim rival in Spain surely may be examined, in a Realist and positivist fashion, as the manner in which Islamic law is applied and practiced, separately from what the jurists may have said.

³² Khadduri, *supra* note 25.

³³ U.N. Charter, Article 2.

make frequent reference to “occupation” as the *raison d’être* for their violent activities.³⁴ The Afghan³⁵ and Iraqi³⁶ *jihads* drew international Muslim support precisely because they were perceived by Muslims to be a form of resistance to foreign occupation and aggression. Even Bin Laden refers to the “occupation” of American soldiers in Saudi Arabia, Zionist “incursion” on Muslim holy lands, and a litany of other activities, all described as acts of unjustifiable aggression against Islam, as the basis for his *jihad*.³⁷ Despite the obvious differences among these various movements, all of them claimed to be acting in defense.

Moreover, most Islamist movements, and here I will exclude Al Qaeda, are remarkably nationalist in their outlook and aims. On their websites and in the speeches and interviews of their leaders, both Hamas and Hezbollah make frequent nationalist references and indeed use the more nationalist term *muqawama*, or resistance, more often than they do *jihad*.³⁸ Related to this, the language of both of these organizations, not to mention nations like Iran and even the rhetoric from Bin Laden, is more reminiscent of leftist militants of the last century than it is medieval Muslim. Even the dress of Hezbollah fighters, depicted hagiographically by Hezbollah itself in its promotional materials—military camouflage, berets, combat boots—recalls almost deliberately images of Che and Castro, not Ibn Taymiyya and Ibn Rushd. References among Islamic movements and states to colonialism and regional and national liberation, utterly meaningless to the law doctors of old, appear with some frequency as centerpieces to Islamic ideology.³⁹ Zionism, and the very presence of Israel, as a *colonial* project and an *occupation*, an outpost of Western aggression on Islam, is central to the rhetoric.⁴⁰ While this hostility can and does melt into the notion of Israel as an attack on the House of Islam,⁴¹ thereby triggering defensive *jihad*, no real attempt is made to distinguish the case from that of, say, Spain, and even if some justification were offered, any Realist approach would at least offer, given the other rhetoric, that little of this has much to do with the classical doctors.

Perhaps most importantly, much of this has salience in the Muslim world. The notion that Islam might be understood to permit unprovoked attacks on other polities in order to expand the House of Islam is in many cases as obsolete as slavery, even among those guilty of the most

³⁴ See www.mogawama.org/israel (website of Hezbollah, last checked October 30, 2008); <http://www.globalsecurity.org/military/world/para/hamas.htm> (information respecting Hamas, last checked October 30, 2008).

³⁵ DAVID B. EDWARDS, BEFORE TALIBAN: GENEALOGIES OF THE AFGHAN JIHAD 266-72 (2002).

³⁶ GEORGE PACKER, THE ASSASSIN’S GATE 308-12 (2005)

³⁷ See, e.g., PETER BERGEN, THE OSAMA BIN LADEN I KNOW 164-65 (2005) (“It should not be hidden from you that the people of Islam have suffered from aggression, iniquity and injustice imposed on them by the Zionist-Crusader alliance and their collaborators to the extent that the Muslims’ blood became the cheapest and their wealth as loot in the hands of the enemies.”)

³⁸ See, e.g., <http://www.palestine-info.info/arabic/> (Unofficial Website of Hamas, last checked December 12, 2008); www.mogawama.org/israel (website of Hezbollah, last checked October 30, 2008).

³⁹ Hamoudi, *supra* note 23 at 464-65.

⁴⁰ *Id.*

⁴¹ See, e.g., WAHBA AL-ZUHAYLI, INTERNATIONAL RELATIONS IN ISLAM: A COMPARISON WITH MODERN INTERNATIONAL LAW [AL-‘ALAQAT AL-DUWALIYYA FI AL-ISLAM: MUQARANA BI-L-QANUN AL-DAWLI AL-HADITH] (Mu’assasat al-risala: Beirut, 1981).

horrific and condemnable acts of terrorism of our times. Indeed, it is the presumed fact of Western *aggression* that provides the supposed justification for the violence. The idea that Islam abhors aggression, but that it embraces “resistance” to colonialism and aggression in a manner that specifically *exempts* such activities from any definition of terrorism, is so popular that it has been repeated in communiqués of the Organization of the Islamic Conference more than once, with specific reference in at least one instance to the Lebanese and Palestinian “resistance”.⁴²

And here we come to the essential problem concerning the manner in which Islamic law, in this case *jihad*, is approached in our legal academy. As noted above, always, or nearly always, the subject begins in law reviews with a recitation of medieval rules, which, as I noted, are not law under any definition I would use elsewhere. Once this is set as the backdrop, as the essence of the law, then everything else can, and often is, dismissed as perversion. It is not so much under this approach law as it is politics, perhaps even influential politics, masquerading as law, with the true law remaining that of the doctors of old. Islamic law scholars in our legal academy are not necessarily hostile, and in some ways can be welcoming, to the idea of introducing Hamas or Hezbollah in the classroom, but more as an example of the nonsense that happens to the law in practice rather than what the law is. I find this backwards. What Hamas and Hezbollah do *is* the law of *jihad*, or at least one important manifestation of it, and understanding that is fundamental to understanding how *jihad* might operate in the modern world from a legal perspective. Ultimately the law of war in Islam, under the definition of law as I have been trained to approach it, is precisely the decisions and determinations of states and organizations engaged in acts of war in the name of Islam.

Naturally, the Hamas and Hezbollah *jihad* has its detractors in the Muslim community, people like me, and I do not wish to be suggesting even the slightest degree of sympathy with these organizations or their worldview. Rather, the point is that in teaching *jihad* in the modern world, we could and as lawyers we should begin not with medieval doctrine, but with the premise that Hamas, Hezbollah, and Haider Ala Hamoudi all agree on the same principle; that there is no such thing as a permissible aggressive war to spread the House of Islam. The actual, legal disagreements on this issue within our community are going to lie in two areas; namely, permissible *tactics* of self-defense, and secondly, what the necessary *elements* of self-defense are. These areas might, or might not, be discussed within the community with reference to medieval doctrine, but the use of that doctrine should not obscure the fact that the true legal disputes have nothing to do with the medieval notion of spreading the House of Islam, and there is no significant justificatory effort on the part of any militant organization in this direction.

Such a legal approach might be used in any area of modern Islamic law. A positivist approach to Islamic finance would look to the thought of people like Muhammad Baqer al-

⁴² Kuala Lumpur Declaration on International Terrorism (adopted April 1-3, 2002), Organization of the Islamic Conference, arts.10-12.

Sadr,⁴³ whose ideas on Islamic economics were the template for state economic organization in Iran immediately following the revolution,⁴⁴ and the court decision of Judge Usmani in Pakistan to declare interest unlawful,⁴⁵ more than it would look to what medievals may have thought of the trade of grain for salt, and how that might be extended today. A Realist would hardly take seriously the notion that medieval rules on in kind barter could provide anything by way of useful guidance for modern rules of commerce and finance.

Likewise, a focus on actual court cases in family law, or of actual criminal statutes that claim Islamic origins, is far more useful to understanding the manner in which *shari'a* might operate *legally* in those areas. The medieval doctrine may be one influence over this law, but it is only one of many. Understood in this way, the repeated claim by at least one commentator that Islamic law makes its more draconian punishments nearly impossible to enforce⁴⁶ would be analyzing the matter completely backwards, as it renders “law” an academic reconstruction of a medieval scholarly project. The fact is that in recent times there have been states, such as Taliban Afghanistan, that purport to apply Islamic law and seem to have no problem employing the most draconian punishments available,⁴⁷ and there are states, such as the Maldives, which also claim an Islamic criminal code, that have eliminated entirely some of the harsher punishments, including stoning for unlawful sexual intercourse.⁴⁸ That is to say nothing of the largest group, those Muslim states purporting to be Islamic, including relatively religious ones such as Iraq, that have decided that medieval Muslim criminal law has no place in a modern criminal code.⁴⁹ This latter case is frequently dismissed by Islamic law scholars as more of a rejection of Islamic law than an interpretation of it, but the matter should give us some pause. If a state, such as Iraq, where religious parties are by far the most powerful, feels comfortable with a secular criminal code, and does not seek to disturb it, we might well ask ourselves not the conventional question—does Iraq adopt Islamic law, but rather whether Muslim state understandings of the *shari'a* have evolved in a manner that renders historic criminal prohibitions largely obsolete, akin to the *de facto* current *shari'a* prohibition on slavery, notwithstanding the widespread historic practice. For while the medieval doctrine may say whatever it does on the topic of slavery, the reality is that the overwhelming consensus of Muslims is that *Islam* (not just modern Muslim states) itself prohibits it and sowed the seeds of its destruction in its earliest texts. Perhaps the stoning of adulterers is will ultimately suffer the same fate.

⁴³ Muhammad Baqir al-Sadr, *IQITISADUNA* (3d. ed. 1969)

⁴⁴ Chibli Mallat, *The Renewal of Islamic Law* 146-57 (1993)

⁴⁵ Shari'ah Appellate Bench, Pakistan Supreme Court, *Opinion Concerning Riba* (J. Usmani section) (Dec. 22, 1999).

⁴⁶ Noah Feldman, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* 72 (2003); NOAH FELDMAN, *THE RISE AND FALL OF THE ISLAMIC STATE* 48 (2008).

⁴⁷ *Id.* at 72 (dismissing such application as not truly a product of *shari'a*).

⁴⁸ Paul Robinson et. al. *Codifying Shari'a: International Norms, Legality & the Freedom to Invent New Forms*, 2 *JOURNAL OF COMPARATIVE LAW (BRITISH)* 1, 17-18 (2007)

⁴⁹ *See generally* QANUN AL AQUBAT AL IRAQI RAQM 111 LI SANA 1969 (IRAQI LAW OF CRIMINAL SANCTION OF 1969)

III. So What?

Having sufficiently I hoped engaged and perhaps disturbed no small number of you with these questions, I thought I would conclude with perhaps a recitation of some of the advantages of what I believe this approach might do. Some I hope will be particularly salient to those of you working in the Jewish Law tradition, while others might be less relevant beyond Islam. Again, I must emphasize that I do not advocate this as the exclusive means through which to study Islamic law, or religious law, but a valuable perspective that many of us as American lawyers might be able to provide.

First, and perhaps most importantly, I think that this approach might help to tear down some of the extraordinary Orientalist barriers to the study of the Muslim world generally. I do not intend in a concluding statement or two to begin to take on Edward Said's position on Western study of the East, or to address the question of whether or not a Western observer can provide a perspective on the East that is not simultaneously fascinated by exoticism while contemptuous of perceived inferiority. However, I will point out that our scholarship currently highlights the exoticism, and the obsolescence, of "Islamic law" at the expense in many cases of social, political and economic reality. Musings about mythical Houses of Islam and Houses of War are perhaps the most obvious manifestation, but certainly not the only one. While it would be fair for some to point out that constructions like the House of Islam/House of War have some salience among some Islamist movements throughout the world, I would only retort that the relevance, whatever it might be, pales in comparison to the near exclusive manner in which Muslim war is described insistently through its lens.

Secondly, the approach I advance necessarily involves looking at Muslim law not in a vacuum but tied vitally to political and social institutions (the state, a clerical authority) with any number of social and economic interests, providing a fuller picture of the operation of law as we understand it. To understand why Islamic law might operate differently in Iraq than it does in Egypt, for example, a look at the *shari'a* as discussed by the medievals in isolation is not helpful, nor is some antiseptic attempt to modernize the *shari'a* likely to provide much insight as to legal outcome. What will help, however, is understand the relative power of the Iraqi and Egyptian clerical authorities, their relationship to the state, and the interest of the state in projecting itself as the sole source of Islamicity, as opposed to an entity divorced from determinations of this kind. Looking at this sort of interaction, and the manner that it transforms doctrine, in the first instance (with the original doctrine playing a secondary role) sheds better light on the nature of the legal process.

Finally, this methodological approach, because it is how we have been trained to understand and approach law, is better equipped to predict legal outcomes in the Muslim world in any given state. I know that some Islamic law teachers tend to focus on medieval doctrine, and then in a final examination provide an American style fact pattern for students to analyze and

apply using that medieval doctrine, on matters ranging from polygamy to commerce. As I have tried to note as many times as I can, I welcome all sorts of approaches, but I cannot entirely see the point of this exercise, unless it is to reinforce the notion that should be self-evident to any upper level law student, that rules are slippery things that can be read in any number of ways. This type of test absolutely does not provide much guidance on how a court applying Islamic law is likely to approach the material and decide the case. This is because no Islamic court I know of shares the biases and ideological predispositions of my law students and therefore it is exceedingly unlikely to understand medieval material as my students might. But a positivist and Realist focus on Islamic law will give students the necessary insight, as it will involve reading *cases* from *courts* applying Islamic law in given jurisdictions, something that is easier for them to do and precisely what a Muslim lawyer operating in the relevant jurisdiction would do. From this, an understanding might well develop, less as to where Islamic law is coming from, but more as to where it might be heading. And looking to the future of the Muslim world rather than its past seems to me a project well worth undertaking.