Islamic Law, Muslims and American Politics

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Abstract

In this article I ask whether and how Islamic law constricts American Muslims in their ability to negotiate the applied socio-political order. Assuming *sharī'ah* to be their point of departure, I ask if their efforts are religiously legitimate or purely pragmatic and necessarily oblivious to Islamic law. In this context, I explore how Islamic law is negotiated across space and time, the degree of recognition it accords to local (including non-Muslim) custom, and the distinction between jurisdiction of law and jurisdiction of fact. I also investigate the question of *sharī'ah’s* overall scope and jurisdiction and how this impinges upon Islamic law’s relationship with the secular. Among the arguments I make is that numerous aspects of the American socio-political order fall outside the parameters of the strictly *sharī‘a* and, as such, Muslims may negotiate these without relying upon or giving offense to Islamic law.

Introduction

In our post-9/11 world, politics is among the most awkward challenges confronting American Muslims, especially those with a practical attachment to the legacy of *sharī‘a*. By “politics,” however, I am referring not to any specific political issue, such as the Patriot Act, health care or gun control, or even to basic procedural questions, such as voting or holding public office. By “politics,” rather, I am trying to get at something more fundamental. The whole point of modern politics is essentially to negotiate society’s socio-political and

* This is an expanded, annotated version of the lecture, “Islamic Law, Muslims and Politics,” delivered at Harvard University on 21 November, 2013, as part of the H.A.R. Gibb Arabic and Islamic Studies Lecture Series. The author would like to thank Professor William Granara for inviting him to deliver these lectures. The author would also like to express his appreciation to Professor David Powers and the anonymous ILS readers for their constructive comments and criticisms on the present article.
economic order through the medium of law, determining who gets or does not get what, who must, can or cannot do what, and what kinds of preconditions and consequences attend these rights, restrictions and obligations. Given the secular and largely liberal\(^1\) nomos of American political culture, the theoretical point of departure in all of this is individual autonomy, accented by a free-market mindset, reinforced by the separation between church and state and constrained, at least in theory, only by the broad procedural and thin substantive dictates of the Constitution. In this political universe, moral and practical considerations extend only as far as the terrestrial horizon, and even such transcendent commitments as might exist are socio-historically rather than divinely determined or legitimated. As such, they remain open to challenge, modification or even outright abandonment, by popular will.

By contrast, Islamic law is ultimately grounded in foundation-documents believed by Muslims to be permanently binding, transcendent and archivally closed. At the same time, in contradistinction to the individual autonomy or “self-law” implied by secular liberalism, shari‘ah entails a commitment to heteronomy in its recognition of God as the ground and primary source of law outside the individual or collective self. To this we may add Islam’s eschatological vision, which extends its moral and practical gaze beyond the earthly realm and problematises any notion of removing “God’s law” from the public domain. All of this complicates if not rules out any full embrace of “popular sovereignty,”\(^2\) leaving, or so it would seem, little ground upon which Muslims

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1 By liberal, I refer here not to any substantive political or moral commitments, such as support for minority rights or “big government” but to the basic commitment to freedom of choice and its concomitant individualism. Liberalism, in other words, as one theorist put it, connotes “the society and politics of choice, the society and politics of competition, the society and politics of the market.” See C.B. Macpherson, *The Real World of Democracy*, 9th printing (New York: Oxford University Press, 1982), 6.

2 Cf., e.g., K. Abou El-Fadl, “Islam and Democratic Commitment,” *Fordham International Law Journal* 27: 4 (2003): 4–71 at 7: “[I]f Muslim jurists considered law derived from a sovereign monarch to be inherently illegitimate and whimsical, what is the legitimacy of a system in which the law is derived from a sovereign, but where the sovereign is made up of the citizens of a Nation? The brunt of the challenge to Islam is: If God is the only sovereign and source of law in Islam, is it meaningful to speak of a democracy within Islam ...?” Abou El Fadl goes on to speak in terms that seem to imply a fundamental difference between ascertaining the will of God as opposed to that of the people. What is held to be the “will of the people,” however, is often little more than substantively indeterminate aggregates of air scented by the tendency of the political, economic and socio-cultural haves’ to ignore or misrepresent the will of the have-nots. In this light, one might ask whether state law is any more the actual will of “the people” than it might be the actual will of God? More recently, Sheldon Wolin has stated the matter as follows: “Majority rule,
might legitimately negotiate the socio-political or economic order, especially with non-Muslims. It is this question of “legitimate negotiation,” i.e., negotiation that takes the sharī‘ah tradition seriously as its point of departure, that is the primary focus of my inquiry into the relationship between Islamic law, Muslims and American “politics”. My approach in this regard stands in contradiction to that of American Muslims who might take a more plainly pragmatic tack or simply cede the “political” entirely to ‘secular’ apparatuses and logic. It also reflects an alternative to the sometimes hasty resort to the ‘supra-legal’ ethics implied by the modern maqāṣid al-sharī‘ah approach, where, rather than processing classical rules through internally generated mechanisms, the aim is essentially to substitute the authority of sharī‘ah-rules and precepts with that of ostensibly ‘universal’ principles.3

Of course, any discussion of sharī‘ah in the U.S. raises the question of Islamic law’s position on America’s legitimacy or moral status as a non-Muslim polity. While space will not accommodate a full answer here, I would like to frame my remarks with a caution against the tendency to equate “Islamic” with “moral” and then going on to render “morality” the highest if not exclusive measure of commitment to Islamic law. On this understanding, no other principles (e.g., order, privacy, security) are capable of competing with morality, and any articulation of Islamic law that does not privilege morality is looked upon with suspicion, as either a compromise with immorality or as an attempt to mask duplicity. But when the Qur‘ān insists on four eye-witnesses to substantiate a charge of adultery [24:13] or it upholds pre-existing incestuous marriages [4:22–23], or when the Prophet assigns children’s agnatic lineage to the marital bed (al-walad li ‘l-firāsh), clearly some salutary consideration other than morality is being privileged. Yet, these Qur‘ānic and Prophetic positions remain by definition Islamic. And it would be erroneous if not disingenuous to impute insincerity to the Qur‘ān’s or the Prophet’s condemnation of adultery or incest based on these scriptural indications.

democracy’s power-principle, is fictitious; majorities are artifacts manufactured by money, organization and the media.” See his Politics and Vision: Continuity and Change in Western Political Thought (Princeton: Princeton University Press, 2006), 601.

3 Of course, all legal interpretation proceeds on the basis of interpretive principles. What I am trying to highlight here, however, is the tendency to marginalize rules that are deemed, for example, to be discriminatory or barbaric (compulsory inheritance or certain criminal sanctions) based on such ‘universal’ principles as equality or human rights rather than processing these rules through concrete sharī‘ah-based calibrators such as custom, lenity, particularizing the general (takhṣīṣ al-‘āmm), the distinction between law and fact and the like.
My point here is to highlight the distinction between “legitimacy” and “morality” and to underscore the fact that a good-faith *shari'ah* approach might hold the American political sphere to be entirely legitimate even if it does not deem it to be entirely “moral,” from the perspective of Islamic law. As a political entity, America is instantiated by a constitution, not by common blood, culture or history. What renders this constitution operative, moreover, is not Americans’ moral agreement over the substance of its provisions but their willingness to recognize the latter’s authority to regulate the political sphere. In terms of substance, Americans (Muslims and non-Muslims alike) might find aspects of the Constitution morally objectionable; they may simply deem some of its provisions to be of limited utility. In this light, rather than a statement of moral principle, the Constitution might simply be viewed as an existential, political fact into which one’s birth as an American automatically delivers one. And, privileging the First Amendment’s guarantee of religious freedom, a *shari'ah*-minded approach could, in good faith, recognize the Constitution’s overall legitimacy, despite moral reservations about this or that detail thereof.

This distinction between morality and legitimacy finds precedence in Islamic law, going back to the Prophet. During negotiations over the Treaty of Ḥudaybiya, the Meccans refused to recognize God as “the All-Merciful, the Mercy-Giving” (*al-raḥmān al-raḥīm*), the Prophet as Prophet, and the Muslims’ pan-Arabian right to visit the Sacred House. The Prophet looked past these infringements and agreed to the treaty. Clearly, however, the Prophet recognized a distinction between the detailed substance of the treaty (aspects of which he did not see as “moral”) and the treaty’s overall effect and thus legitimacy as a binding agreement. Moreover, the binding authority of the treaty was not a function of *shari'ah* having unilaterally dictated its substance. Rather, *shari'ah* simply posed no barriers to the treaty’s ratification that could not be overcome on the basis of *shari'ah*’s own logic, priorities and interests.

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4 For example, on moral grounds, one might object to the Constitution’s defining blacks as 3/5 of a person or the imposition or repeal of prohibition.


6 See my *Islam and the Blackamerican: Looking Towards the Third Resurrection* (New York: Oxford University Press, 2005), 145–6. Of course, one can also be delivered into this fact through naturalization (as opposed to birth). But naturalization is usually on a much more explicitly voluntary basis.
On these considerations, my argument is that it is not necessary to betray or abandon *sharī'ah* in order to recognize the basic legitimacy of the American political sphere. Of course, such pastel recognition may fall short of the kind of loyalty being demanded of Muslims in the West today. For in addition to calling upon Muslims to recognize America's legitimacy in theory, this demand includes a call to an affective commitment akin to what Supreme Court Justice Felix Frankfurter referred to as "cohesive sentiment." This demand, however, seems to be rooted, at least in large part, in the unspoken assumption that Islam is the most operative impediment to the development of such loyalty. And this assumption seems, in turn, to be influenced by the tendency to equate "Muslim" in America with "immigrant from the Muslim world."

This approach ignores the fact, however, that a major contingent of Muslims in America consists of native-born Blackamericans. And this oversight can lead us to overlook the fact that Islam, let alone *sharī'ah*, may not be the most operative inhibitor of cohesive sentiment among American Muslims. On the eve of the 20th century, the towering Blackamerican intellectual W.E.B. DuBois famously asked, "Am I an American or am I a Negro? Can I be both? Or is it my duty to cease to be a Negro as soon as possible and become an American?" Near the end of the 20th century, the Blackamerican Nobel laureate and Princeton professor Toni Morrison offered a disquieting (albeit indirect) partial response: "At no moment of my life have I ever felt as though I were an American." These are not isolated sentiments; nor are they unique to Blackamericans on

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11 Cited in A. Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* (New York: Scribner, 2003), 45. Morrison explains her alienation in another work: "To identify someone as South African is to say very little; we need the adjective 'white' or 'black' or 'colored' to make our meaning clear. In this country it is quite the reverse. American means white ...". See T. Morrison, *Playing in the Dark: Whiteness and the Literary Imagination* (New York: Vintage Books, 1993), 47.
the socio-economic margins of society. Yet, these sentiments hardly translate into a widespread rejection of the basic legitimacy of the American political sphere, let alone a mandate to destroy or undermine it. Similarly, Muslims in America (Blackamerican or ‘immigrant’) may be ‘alienated’ to a degree that forestalls or attenuates cohesive sentiment. But this does not necessarily undermine their recognition of the legitimacy of the Constitution or the American public sphere. Nor does it translate into a religious duty to destroy or subjugate the U.S.

Again, however, for most Western observers, not history but Islam cum-
\textit{sharī'ah} remains the chief determinant of the behavior and attitudes of Muslims in the West. And this understanding informs the criteria they bring to the question of the proper scope and modality of Muslim political participation. Such criteria proceed on the unspoken assumption (or explicit assertion) that Islam is either incapable of (or disinterested in) moralizing political power or that the régime of morality it seeks to impose on the use of power (i.e., \textit{sharī'ah}) is unacceptable, as a threat to freedom, equality, human rights and pluralism. On this assumption, the focus subtly shifts from the basic presumption of the Muslim right to political participation to questions of the least hazardous terms of such participation, or even perhaps to whether or not Muslims (qua Muslims) should be granted full participation at all, with the corollary aim of minimizing or neutralizing any substantive impact they might exert on the applied order. Thus, drawing on the Rawlsian drive to domesticate religion, a particular strain of political liberalism insists that Muslims adjust their religious commitments to the demands of an “overlapping consensus” with non-Muslims, especially secular liberals, a consensus that Muslims are expect-

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\item See also note 74 below on the hegemonic diffusion of Protestant notions of religion in American law and society.
\item For example, the European Court of Human Rights described \textit{sharī'ah} in the following terms: “Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it … It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on Sharia … particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.” See \textit{Sharī'a in the West} ed. R. Ahdar and N. Aroney (Oxford: Oxford University Press, 2010), 22.
\item “Unlike Locke, for whom toleration meant removing state control over religion, Rawls contends that toleration is insufficient and that religion must importantly conform to what the state needs.” See S.S. Wolin, \textit{Politics and Vision: Continuity and Innovation in Western Political Thought} (Princeton: Princeton University Press, 2006), 540.
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ed to join rather than coproduce. Meanwhile, more conservative voices (that would otherwise welcome a public role for religion) strive to ensure that Muslims do not threaten the “Anglo-Protestant” ethos of America through their practice and diffusion of religious values and sensibilities that come from outside the Western archive. On these concerns, some conservatives question the propriety of extending to Muslims rights and accommodations normally accepted as part of the Constitution’s provisions of religious freedom, on the argument that “Islam is different.”

While significant in their own right, these non-shari‘ah impositions on the question of Muslim political participation fall outside the purview of the present article. Instead, I shall restrict myself to the question of whether and how shari‘ah constrains American Muslims politically, assuming, (as I have) Islamic law’s basic recognition of the legitimacy of the American political sphere. My primary point of departure will be two insights highlighted by the great 7th/13th century Egyptian Mālikī jurist, Shihāb al-Dīn al-Qarāfī (d. 684/1285). The first of these is the importance al-Qarāfī attaches to the distinction between law and fact in processing the Islamic legal tradition across space and time. The second is the importance he attaches to the jurisdictional boundaries or functional limits of Islamic law and thus of what may and may not be deemed a violation of shari‘ah’s presumptive monopoly on the adjudication of  

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16 See, e.g., S.P. Huntington, Who Are We? The Challenges to America’s National Identity (New York: Simon and Schuster, 2005), xv–xvii, 59–80; see also S.P. Huntington, “The Erosion of American National Interests,” Foreign Affairs, 76:5 (1997): 28–49 at 33, where he notes that, rather than representing the threat of being pressured to assimilate, coming to America is now seen by many immigrants as the greatest guarantor of their right to remain themselves.


quotidian reality. These two insights are ultimately connected and converge to highlight the tendency in some very influential modern discussions of Islamic law to ignore or overlook the extent to which Muslim jurists negotiated the substance of *sharī’ah*-rules through the vagaries of change and predicament and contemplated *sharī’ah*’s jurisdictional parameters based on an awareness of the degree to which failure to define law’s province might transform it into an instrument of abuse by either the state or the jurists. Meanwhile, this attention to boundaries preempted the need to stave off would-be encroachments of “the secular,” as a means of preserving the authority and integrity of the religious law. In other words, neither the state nor any other ‘secularizing’ forces would have to pry open and police a space for the ‘secular’ by imposing limits upon *sharī’ah* from without. Cumulatively, my aim is to describe in more precise terms the ways in which Islamic law does and does not constrain American Muslims in their attempts and aspirations to negotiate the applied order.

**Preliminary Considerations**

Before turning to my topic proper, however, two issues merit more critical consideration. The first is the question, “What is Islamic law?” Or, more precisely, what do we mean, substantively, when we invoke the Islamic legal tradition? This question acquires particular significance in an American context, because Islamic law is routinely assumed to be located in a distant time and place and to be authentically articulated, therefore, only by those who speak or act from such distances. I am not speaking here of the tendency to take classical legal methodology (*uṣūl al-fiqh*) or categorical rules (e.g., *al-ma’lūm min al-dīn bi ’l-ḍarūrah*) as an authoritative point of departure (an approach reflected in my own invocation of al-Qarāfī) but to a certain mode of absolutizing a particular application of this methodology19 alongside the habit of assuming the legal

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19 I have in mind here the tendency to restrict the functional (as opposed to the theoretical) authority and normativeness of Islamic interpretive methodology to the four primary, agreed-upon sources (i.e., Qur’ān, Sunna, Unanimous Consensus and Analogy) and either to effectively ignore disputed or secondary sources (*istiḥsān*, *mašlahah mursalah*, *sadd al-dharāʾi’* or *qawā’id*, e.g.) or to treat their practical invocation as a symptom of failure or capitulation. Whereas Muslim jurists tended to understand disputed, secondary sources as qualifiers or supplements in the service of the primary sources, this particular approach to the study of Islamic law effectively treats the practical application of the disputed sources as a contradiction or violation of the agreed upon sources. Thus, e.g., Wael Hallaq dismisses the invocation of *mašlahah* by the likes of Rashīd Riḍā and ‘Abd al-Wahhāb Khallāf as essentially an apology for their capitulation to the demands of modernity, as
concretions of the classical tradition to be the last (or last truly authoritative) word on what can constitute bona fide articulations of sharī'ah. Given the

opposed to a good-faith effort to apply recognized approaches to changed circumstances. See W.B. Hallaq, *Sharī'a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 504–10, esp. 508, where he states that Rida's approach, “amounts, in the final analysis, to a total negation of traditional legal theory.” Several scholars, meanwhile, contradict this tendency to ignore or downplay the normative role of disputed sources and methods in Islamic law. See, for example, S.A. Jackson, “Literalism, Empiricism and Induction: Apprehending and Applying the Maqāṣid al-Sharī'ah in the Modern World,” *Michigan State University Law Review* 6 (2006): 1469–1486; A. March, “Sources of Moral Obligation to non-Muslims in the ‘Jurisprudence of Muslim Minorities (Fiqh al-aqalliyyāt)’ Discourse,” *Islamic Law and Society* 16 (2009): 34–94; F. Opwis, *Maṣlaḥah and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th /10th to 8th/14th Century* (Leiden: E.J. Brill, 2010); I. Rabb, “Islamic Maxims as Substantive Canons of Construction: Hudūd-Avoidance in Cases of Doubt,” *Islamic Law and Society* 17 (2010): 63–125; F. Vogel, *Islamic Law and Legal System* (Leiden: E.J. Brill, 2000), esp. pp. 169–221; K. Masud, *Shāṭibī's Philosophy of Islamic Law* (Delhi: Kitab Bhavan, 1998); A. Qureishi, “Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence,” *Cardoza Law Review* 28a (2007): 67–121, esp. 101–11. For example, in assessing some of the ‘progressive’ views of Shaykh Abd Allah b. Bayyah, Andrew March asks, “What is Islamic about these arguments?” See *Islam and Liberal Citizenship*, 232. March goes on to offer a would-be vindication of Bin Bayyah's views through a select body of verses from the Qur'an, seemingly implying that a sola scriptura approach might bind or vindicate Bin Bayyah. March does note that Bin Bayyah "step[s] back from the texts and simply note[s] the substantive overlap in broader values and aims.” Still, he questions whether this "resolve[s] the concern expressed here about the concrete Islamic metaphysical grounding for such principles ...”. *Islam and Liberal Citizenship*, 233–34. It is reasonable for March to reject the notion that Islamic law is mere assertion devoid of proof (dalīl). But Bin Bayyah adduced explicit proofs mediated through recognized interpretive approaches. Thus, one wonders if by “Islamic,” March has in mind something other than proof. In Muslim tradition, meanwhile, “Islamic” is not the same as “correct,” which is why the schools of law contradicted each other without casting each other’s view as “un-Islamic.” At the same time, Muslim jurists routinely wrote fātwaṣ in which the Qur’anic text (or hadith) was nowhere mentioned (see, e.g., my “Kramer Versus Kramer in a 10th/16th Century Egyptian Court: Post-Formative Jurisprudence Between Exigency and Law,” *Islamic Law and Society*, 8: 1 (2001): 27–51). March does not ask what is “Islamic” about any of the views of the classical Muslim jurists he cites. Nor does he subject the pre-modern jurists’ invocation of such concepts as dār al-harb (the abode of war), which does not appear in the Qur’an, to the kind of criterion he apparently seeks to impose on Bin Bayyah. My main concern here is with the apparent implication that there is some criterion for “Islamicity,” to which March has access, beyond that implied by a major modern authority on Islamic law. If Bin Bayyah's massive training in the tradition of Islamic law alongside his global recognition among Muslims as a major sharī'ah-authority is not
brevity of Islam's communal tenure in the U.S. (we know of no sustained communities prior to the 20th century\textsuperscript{21}), it is reasonable to assume a level of intellectual dependency upon the Muslim heartlands and Islamic past. This reliance should not, however, be assumed to be either absolute or static. Yet, this assumption is precisely what we see in the tendency of some non-Muslim critics and scholars to restrict themselves to pre-modern or foreign fatwās and manuals (and in some cases the Qur'ān itself) as evidence of what shari’āh must really aspire to in America. We see this same presumption at work in the preference among American Muslims for bygone authorities or overseas perspectives and expertise. In both cases, essentialist hermeneutics tend to dominate: these books and scholars tell us not what Islamic law was or is when or where but what it was, is, shall or should be for all times and places to come. It is the exception rather than the rule that these sources or authorities are engaged with any attention to processing their pronouncements through the vagaries of history, vogue\textsuperscript{22} or circumstance. Nor is there any hint that the classical tradition recognized the necessity of continuous negotiation between the ideal and the real. The cumulative effect of all of this is often a credibility gap: American Muslims who speak about Islamic law in ways that deviate from the “rules on the books” or the stock practices of the Muslim world or the views or actions of radical shari’āh-advocates abroad are regarded with suspicion, deemed to be uninformed or capitulatory, or dismissed as practitioners of dissimulation (taqīyah).

\textsuperscript{21} While the presence of Muslims among America's slave population is an uncontested fact, the transgenerational, communal presence of Muslims in America is largely a 20th century phenomenon. See, e.g., S.A. Diouf, \textit{Servants of Allah: Muslims Enslaved in the Americas} 2nd ed. (New York: New York University Press, 2013), 277–78: “In contrast to the remnants of Islam in Latin America and the Caribbean, there is no evidence in the United States of any Islamic continuity into the twentieth century. Though there were still Muslims and their children alive in the early 1900s, and though African American Muslims today represent a quarter of the Muslim population, no hard evidence so far shows any direct connection between the two groups.”

\textsuperscript{22} For example, in 1982, Islamist newspapers in Egypt (e.g., \textit{al-Liwā' al-Islāmī}), Muslim activists and even some Azhari shaykhs were rather strident in condemning birth-control pills, some seeing them as part of a Western conspiracy to limit Muslim populations. When I returned less than five years later, however, there was barely a word on the topic, the vogue having apparently expired.
Like American Muslim scholars, American socio-political and cultural reality is similarly assigned a feeble role in determining what Islamic law is, can or will be in America. This is strange, given that the classical tradition tacitly implicated in this circumscription openly acknowledges the primacy of local life and deliberation. Within a classical school (madhhab), views invariably competed for the coveted status of the mashhūr or “going opinion” (among other designations), which was the view generally recognized by the informal leaders of a school and given pride of place in school manuals, the issuing of fatwās and courtroom application. The actual identity of this view, however, often differed according to time or place. Thus, for example, the Arabian Mālikī jurist Ibn Farhūn (d. 799/1403) points out that Egyptian, Iraqi and North African Mālikīs routinely differed on what they recognized as the going opinion. By contrast, the modern Mauritanian Mālikī jurist, al-Maḥfūz b. Bayyah (father of the contemporary ‘Abd Allāh b. Bayyah) privileges the works of al-Qāḍī ‘Abd al-Wahhāb (Iraq), Ibn Rushd the Grandfather (Andalusia) and al-Māzarī (Sicily) as repositories of the going opinion. Even when school-authorities agreed on a particular mashhūr-opinion, however, this could be offset by the applied order or ‘amal of a particular locale, even as it might be displaced by considerations of scripturally mandated communal interest (maṣlaḥah) or extenuating circumstances. Thus the 13th/19th century Syrian Ḥanafī jurist Ibn ‘Ābidīn (d. 1258/1842) notes that the masters of his school explicitly sanctioned the practice of acting on a “weak opinion” (qawl ḍa‘īf), which was specifically recognized as not representing the going opinion, in cases of vital necessity (ḍarūrah), changes in custom, or the general spread of corruption. In sum, at any given point in time, an entry in a law manual might reflect the going opinion or applied order of a given time or place, or it might not, depending, inter alia, on prevailing circumstances.

25 Ibid., 117, where he cites the Mauritanian jurist Muḥammad al-Māmī who states that clinging to the contents of legal manuals without giving due consideration to juristic practice, extenuating need (darūrah) or local custom can be a manifestation of ignorance.
26 See, e.g., Shams al-Dīn Muḥammad b. ‘Arafah al-Dasūqī, Ḥāshiyat al-dasūqī ‘alā al-sharḥ al-kabīr, 4 vols. (Cairo: Dār al-Fikr, N.d.), 4130, where he recognizes the legitimacy of adopting and applying a weak opinion in instances of established material necessity.
The same recognition, I think, should be extended to American Muslim scholars in conversation with American socio-political, cultural or economic reality. Discussions of Islamic law in America should at least make some attempt to ascertain what American Muslim scholars recognize as their going opinion, as well as what they hold to be justifiable divergences therefrom, along with what they deem to be the juristically relevant (or perhaps disposi-
tive) aspects of the American landscape, instead of assuming them to be relig-
iously bound by essentialist, untrained or unsophisticated readings of the presumably static contents of classical sharī'ah-manuals or modern deploy-
ments of fiqh in the Middle East.28 I should add here that by “American Muslim

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28 While most examples of American Muslim jurists who dissent from the views of jurists in the Muslim world are not formally archived, this should not blind us to the reality. In 2006, for example, the Grand Mufti of Egypt 'Ali Jum'ah issued a fatwā in which he autho-
rized Muslims in America to sell alcohol to non-Muslims, grounding this permission in certain features of the classical tradition, especially the position of the Ḥanafī school. In response, the Egyptian-born jurist Ṣalāḥ Sulṭān, resident in America for a number of years at the time, wrote a rebuttal that resonated throughout the American Muslim commu-
nity. Indeed, the American jurist, Suhaib Webb, translated it and posted it on his website: http://www.suhaibwebb.com/islam-studies/selling-pork-in-the-hood-come-and-taste-the-method-of-a-contermporary-faqih/. One might note as well the fatwā of Shaykh Ṭāhā J. al-‘Alwānī, also resident in America for several years at the time, regarding the Supreme Court Frieze, which diverged from standard views on sculptured human figures upheld in the Muslim world. (See T.J. al-‘Alwānī, "Fatwā Concerning the United States Supreme Courtroom Frieze," Journal of Law and Religion, 15:1–2 (2000–2001): 1–28.) Indeed, in a conversation with a major Salafī leader in the U.S., I was told that Salafīs could not blindly apply all the fatwās issued by their shaykhhs in Saudi Arabia and that if these shaykhhs themselves were to spend six months in America the substance of many of these fatwās would change. This is reminiscent of an incident in 1999 in Dallas, TX, at the first confer-
ence of the Sharī'a Scholars' Association of North America (SSANA) (of which I was presi-
dent at the time). Our keynote speaker was the Kurdish jurist, Shaykh 'Ali al-Qara Dāghī. When he rose to deliver his address, he prefaced it by saying that upon his arrival the previous evening he had been asked a question to which he gave a fatwā. Now, however, he was changing his fatwā. From here he went on to challenge the attending jurists, not-
ing that if he had changed his fatwā in less than twenty-four hours, how much more change there might be in the views of jurists who had been in this country for twenty-four years! (Incidentally, my presentation was on the sharī'ah-status of Halloween, which, I argued, is not forbidden (harām), though the question of whether Muslim parents should actually allow their children to go Trick-or-Treating is a separate issue.) Mean-
while, we should not always expect the views of American Muslim jurists to be more ‘accommodating’, as demonstrated by the aforementioned response of Ṣalāḥ Sulṭān, as well as that of the Salafī jurist Ṣalāḥ al-Ṣāwī to the controversial "al-Qaraḍāwī fatwā" on Muslims serving in the U.S. military at the time of the U.S. invasion of Afghanistan. See B.
scholars,” I do not restrict myself to those who were born in this country. The issue is whether American socio-political, cultural and economic reality is the focal point of one’s juristic deliberations and whether American experience and ‘socio-political literacy’ sufficiently shape the prism through which these realities are processed.29

The second issue calling for comment relates to the fact that what I referred to at the outset as “politics” can involve at least two distinct types or areas of concern. On the one hand, there are those generally agreed-upon provisions of sharī’ah for which Muslims might want to seek accommodation by the American state, e.g., mandatory bridal gifts (mahr) or rules pertaining to compulsory inheritance. These are joined by controversial or unprecedented issues, such as how Muslims may or may not adjust the sharī’ah-rules on ‘interest’ (ribā) to the demands of American economic life or how conversion to Islam can or cannot be reconciled with the rules of compulsory inheritance.30 On the other hand, American Muslims confront rules, regulations and policies that issue not from sharī’ah but from the general will and deliberation of the American people, e.g., zoning laws, FAA regulations or whether or not to tax soda. These too fall within the parameters of my reference to “politics” and the question of whether or how attachment to Islamic law affects Muslims’ ability to negotiate the applied order.


29 The importance of local socio-political literacy is further alluded to by al-Qarāfī when he insists, e.g., that, “When a petitioner comes seeking a fatwā from a jurist and the jurist does not know that this person is a resident of the land where he lives and normally gives fatwās, the jurist should not give the answer he would normally give until he first ascertains the petitioner’s place of residence.” See al-Qarāfī, al-Iḥkām fī tamyīz al-fatāwā ‘an al-ābštām wa taṣārruṣfāt al-qāḏī wa ‘l-imām, ed. ‘A. Abū Ghuddah (Aleppo: Matbūʿāt al-Islāmīyah, 1387/1967), 249. And again: “... do not spend your life clinging slavishly to what is recorded in (fiqh) manuals. Rather, if a man comes to you from another land asking for a fatwā, do not hold him to the custom of your land. Ask him about the custom of his land, and hold him to that. Give him a fatwā according to this custom and not according to the custom of your land or what is recorded in your books. This is the clear truth. Indeed, clinging slavishly to transmitted material always constitutes error in religion and ignorance of the aims of the Muslim scholars and the Pious Ancestors of old.” See al-Qarāfī, al-Furūq, 4 vols. (Beirut: ‘Ālam al-Kutub, N.d.), 1: 176–77.

30 E.g., whether the rule blocking inheritance between Muslims and non-Muslims can be reconciled with the fact that it may discourage Americans from wealthy families from converting to Islam. For an interesting discussion of this problem in classical Islam, see Ibn Qayyim al-Jawzīyah, Aḥkām ahl al-dhimmah, ed. Y. al-Bakry and S. al-‘Ārūrā, 3 vols. (Beirut: Dār Ibn Ḥazm, 1418/1997), 2:853–72.
and we should not assume that Islamic law impinges upon them both with
equal, undifferentiated effect.

Law Versus Fact

With these considerations in mind, we may proceed to al-Qarāfī. Among his
major contributions to Islamic legal thought is his insistence on a very clear
and explicit distinction between jurisdiction of law and jurisdiction of fact.31
The importance of this distinction is that it imposes clear (or certainly clearer)
limits on what can or cannot properly be proclaimed or accepted as binding
law. This differentiation frees subsequent (or distant) generations from labor-
ing under the non-scripture based factual assessments and other time- or
space-bound calculations of former (or distant) generations in the name of the
authority conferred by sharī'ah. Such recognition has obvious implications for
how modern Muslim and non-Muslim scholars might optimally approach an-
cient texts. And, duly considered, it can significantly inform our understanding
of what American Muslims might actually be up against or aspiring to if or
when they invoke Islamic law. At the same time, in those instances in which
Muslims do not invoke Islamic law, sensitivity to this law-versus-fact distinc-
tion can promote a more balanced assessment of the degree to which this deci-
sion not to adduce sharī'ah (or fiqh) entails or not a violation or flaunting of
Islamic law in favor of some other presumably ‘Western’ or “secular” standard
of judgment.

According to al-Qarāfī, the function of the jurist qua jurist is essentially to
translate the meaning of God’s – and by extension God’s Messenger’s – speech
to those who do not understand its legal implications.32 In technical terms,
jurists identify the various legal causes (asbāb/ s. sabab), prerequisites (shurūṭ/
s. sharṭ) and impediments (mawānī'/s. mānī') that give rise to the various legal
statuses (aḥkām/ s. hukm), or degrees of obligation, permission or their oppo-
site. For example, death is a legal cause that gives rise to the right to inherit,
alongside the individual or communal obligation to convey the deceased’s es-
tate to lawful heirs. Certain family or blood-ties, meanwhile, are a legal prereq-
uisite to the production of this right or obligation.Murdering a family member,

31 See my State, 123–29. See also, S.A. Jackson, “Jihād: Between Law, Fact and Orientalism,”
Mélanges de l’Université Saint Joseph, 1xii (2009); 307–24, esp. 316–19; and S.A. Jackson,
“Shari’ah, Democracy, and the Modern Nation-State: Some Reflections on Islam, Popular
on the other hand, even if one would normally inherit from him or her, is a legal impediment to the right or obligation to receive or transmit this inheritance. Now, al-Qarâfī makes it clear that only what jurists pronounce regarding the status of a thing or occurrence as a legal cause, prerequisite or impediment is legally authoritative. This excludes what they pronounce regarding the actual occurrence of these things as a matter of fact. As he put it, the role of the jurist is to provide information regarding the “mashrû‘iyat al-sabab” (legal status of a thing as a legal cause) not its actual occurrence, i.e., “wuqū‘ al-sabab”. As such, to follow a jurist or the contents of a law-manual on a question of fact would constitute what he refers to as an improper act of following (taqlīd lā yaṣiḥḥ), as it would wrongly clothe a non-legal conclusion with the authority of law. Of course, al-Qarâfī’s primary audience here is not the common layperson, who, in his time, would have had limited access to his writing, but senior and, especially, ‘junior’ jurists, as well as government officials who, intentionally or not, might blur or abuse the boundary between law and fact.

A demonstrative example of this liability appears in al-Qarâfī’s conflict with his fellow Mâlikîs over the question of whether public buildings, lands and utilities left standing in Egypt at the time of the Muslim conquests might be owned and transferred as private property. This controversy began with the Mâlikî rule that lands taken by force are not transferable but left for the benefit of the generality of Muslims. This is in contradistinction to lands and utilities acquired by virtue of a treaty, in which case the Imâm, or Muslim state, can distribute or sell this realty to individuals who, in turn, may own and transfer it as private property. Mâlik (d. 179/795) forbade such sales and transfers in Egypt, based on his conclusion that Egypt had been conquered by force. In turn, his 7th/13th century Cairene partisans upheld this ruling in their own time. Al-Qarâfī protested, however, that in so doing his fellow Mâlikîs are flatly wrong, because Mâlik’s statement regarding the manner in which Egypt came under Muslim rule was not an interpretation of the sources of law but a para-legal statement of fact. As such, it is wrong to take it as an unassailable basis upon which the law is to be extended or applied. According to al-Qarâfī, to take Mâlik as one’s Imâm and follow him when he states that privately owning or transferring conquered lands is forbidden is correct (taqlīd ṣaḥīḥ); for this is following him regarding his pronouncement on a legal status, i.e., forbidden. To follow him when he states that all conquered lands receive this ruling is also correct; for this is following him regarding his pronouncement on a thing’s status as a legal cause (sababiyat al-sabab).

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But to follow Mālik in that forced despoilment and conquest actually occurred in Egypt – or Mecca for that matter – is an act of improper following (taqlīd lā yaṣiḥḥ); for this is following him regarding the occurrence of a legal cause. As such, no legal rulings are to be based on this kind of following, either in general or with regard to any specific case.\(^{34}\)

Classical law manuals, like their modern descendants, invariably include an admixture of statements of law alongside presumptions of fact. This is because the basic aim of the jurist qua jurist (i.e., not as a legal theoretician) is to address concrete rather than abstract reality. A jurist’s factual assessments, however, are not always simple attempts to discover the presence or absence of scripture-based causes, prerequisites or impediments. Rather, following Robert Cover’s description of legal thinking in general, we might say that Muslim jurists are informed by a communal nomos, or set of experiences, narratives and visions, that direct their legal deliberations towards goals or interests that actually precede, at least in part, these deliberations themselves.\(^ {35}\) This nomos invariably introduces an ex ante element into their factual determinations, and we might be most justified in inferring the influence thereof when little or no scriptural or empirical evidence is adduced to support a position, or when the evidence adduced might just as easily support an opposing view. For example, beyond the uncontested right of mothers to child-custody in cases of divorce, the sequence of custodians is routinely unsupported by the Qurān or widely recognized Prophetic reports, clear analogy (qiyās jali) or even by claims of unanimous consensus (ijmā’).\(^ {36}\) And it is often not at all obvious that this sequence itself might not be modified or even reversed without jeopardizing the purported interest at stake.

Of course, the presence of these extra-scriptural factors and influences raises obvious questions about the possible disparity between bygone and contemporary (or local and distant) ‘factual reality’ as the presumed basis for

\(^{34}\) Tamyīz, 208. Of course, al-Qarāfī’s point here is not that one is obligated to follow Mālik on any of these questions but that one would be justified in recognizing his views on these legal questions as legally authoritative.


processing or applying the rules of *sharī'ah*, either as deduced directly from scripture or as upheld in the schools of law. For his part, al-Qarāfī has no primary interest in second-guessing the ancients’ factual assessments per se; nor does he seek to dislodge any particular ancient factual analysis as necessarily wrong. Rather, al-Qarāfī wants to ensure that those who follow bygone jurists do not impute to them the authority to adjudicate contemporary or geographically distant reality on the basis of historically or geographically alien factual conclusions or presuppositions. Indeed, even where prior generations of scholars are *correct* on the facts – and in most instances there is no reason to assume that they were not – al-Qarāfī wants to clarify that moderns or geographically distant communities are not required to accept these facts as the basis for processing or applying the law to modern or distant life. Rather, both modern and local communities have the right and responsibility to assess the facts implied by their own state of affairs, of which no one should be considered more knowledgeable than they. Al-Qarāfī is emphatic on this point. And perhaps nowhere is this more plainly demonstrated than in his treatment of the matter of custom.

**Custom**

Standard depictions of custom (*'urf* or *'ādah) in Islamic legal methodology revolve around the idea of widely diffused, spontaneous and habitual ways of doing things that are looked upon with approval by people of “sound disposition” (*ṭabā'i' salīmah*). The legitimacy of a custom is based not merely on

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37 One might imagine, in other words, an 18th century Muslim jurist on a southern plantation in the United States issuing a *fatwā* to the effect that it is forbidden for any African Muslim male to marry a white American female, based on an *ex ante* factual assessment of the likely harm that such a union would bring to the Muslim community. Al-Qarāfī’s point is that even if this factual assessment were correct, this would in no way bind contemporary or geographically distant Muslims whose factual assessment of their reality differed from this. Thus both the bygone jurists who held such marriages to be forbidden and the moderns who held them to be permissible might be correct and equally representative of Islamic law, based entirely on differences of fact.

38 At *Tamyīz*, 213, for example, al-Qarāfī notes that al-Layth b. Sa’d (d. 175/791) who, while a follower of Mālik, was an Egyptian who disagreed with the latter on the question of whether Egypt was conquered by force. Al-Qarāfī intimates that al-Layth’s opinion should be given equal if not more weight than Mālik’s assessment.

provenance but on the requisite degree of spontaneous, habitual diffusion (which might be presumed to vouch for its efficiency) and basic consistency with the moral-cum-legal parameters of the religious law. On this criterion, a custom that is grounded in pagan or non-Muslim practice may be just as probative as one that is based on a practice traditionally upheld by Muslims. For, again, the basic probative value of a custom inheres not in which group or community brought it into existence but in its wide diffusion, practical efficiency and moral acceptability. On this understanding, contemporary Muslims (or those outside the central lands of Islam) might be as justified as the Muslim ancients (or those abroad) in taking the spontaneous, widely diffused, morally unobjectionable habits and conventions of their societies as legally probative customs.

On this insight, al-Qarāfī criticizes his fellow Mālikī jurists who insist on holding people to the legal force of certain verbal formulae traditionally used to execute divorce, simply because these had been catalogued and handed down as such in authoritative manuals of the Mālikī school. These formulae, argued al-Qarāfī, had not been established by the Qur’ān or Sunna; they merely reflected the customary manner in which divorce had been pronounced at the time of Mālik or earlier. There is nothing in these words themselves that render them formulae for divorce. It is, rather, custom (or customary usage) that transformed them from plain speech into legal speech with legally valid effect. At present, however, al-Qarāfī insisted that the custom is changed and with it so are the legal implications of these words. It is thus wrong to hold contemporary Egyptians to the legal implications of words that had been

\[ \text{\textit{dhajam}} \ (\text{Damascus: Dār al-Fikr, 2003), 28–30. See also Ḥasan b. Muḥammad al-Mashāṭ, \textit{al-Jawāhir al-thamīnah fī bayān adillat ‘ālim al-madīnah}, ed. ‘A. Abū Sulaymān (Beirut: Dār al-Gharb al-Islāmī, 1411/1990), 269–72, where some of al-Qarāfī’s views on ‘urf are critically engaged.} \]

40 In this context, a custom such as dating (implying premarital sex) would not be recognized by Islamic law. But a convention such as “course of dealing and usage of trade,” which determines, e.g., whether a buyer or a seller has the obligation to deliver a good and what constitutes failure to do so, would be recognized, even though this convention originated in non-Muslim America and even if there was nothing in the classical manuals of Islamic law that explicitly sanctioned it.

41 Indeed, we might note in this context that Muslims remained a numerical minority in the central lands of Islam outside Arabia for well over two centuries following the Muslim conquests. As such, all of the eponymous Imāms who operated in these areas lived and died as ‘minorities’ (Abū Ḥanīfā [d. 150/767], al-Shāfi‘ī [d. 204/819], Ibn Ḥanbal [d. 241/855]). Clearly neither they nor the Muslims in general were the source of all of the customs that factored into their legal deliberations and became a part of Islamic law.
handed down from Malik as formulae for divorce, simply because Malik had catalogued them as such. For, as al-Qarafi protested in 7th/13th century Egypt,

You know that you do not hear anyone using these phrases today for this purpose. On the contrary, whole lifetimes pass and no one hears anyone say to his wife when he wants to divorce her, “you are devoid of obligation,” or “I have given you to your family.” No one hears anyone use these phrases for this purpose today, either to sever the marital bond or to designate the desired number of divorces.42

We should be clear about what is going on here. Al-Qarafi, the Malikis, is proclaiming that his eponymous Imam, Malik, does not have jurisdiction of fact. While Malik can assess and report the facts as he sees them and even incorporate these into his legal deliberations, his status as a master-jurist does not lend any legal authority to these views per se. Rather, the authority accruing to such statements of fact reverts to the specific training, presumed expertise or direct access assumed to be possessed by the finder thereof. And in this regard, a layperson, who could never compete with Malik or any contemporary jurist on questions of law, might have greater knowledge and thus greater authority than any of these legal experts with regard to a particular question of fact. This is the point behind al-Qarafi’s insistence that reliable knowledge about what is

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42 Tamyiz, 238. This general perspective on rules changing based on changes in custom is limited neither to al-Qarafi nor to the Malikis. Speaking in this regard, the Hanafi Ibn ‘Abidin writes: “Know that legal rulings are based either on explicit [scriptural] texts ... or on some exercise of unmediated interpretation (ijtihad) and informed juridical opinion (ra’y). In the latter case, many of these rulings are grounded in the mujtahid’s assessment of the prevailing customs of his time, such that were he to live in the time of a new custom, he would advocate something different from what he did in the first instance. This is why the jurists stipulate that among the requirements of one who engages in unmediated interpretation is that s/he know the customary habits of the people. For many rulings will change according to changes in time, due to changes in the customs of the people or the emergence of unanticipated necessities or corruption among them. Were the ruling to remain what it was in the first instance, however, this would bring hardship and difficulty to the people and violate the interpretive principles of the religious law (qawaid al-shar’iah), which are based on the mitigation of unwarranted difficulty, the facilitation of legitimate ease and the repulsion of hardship and corruption ... For this reason, you see the masters of the madhhab going against the view of their eponymous Imam in many instances in which the latter based his opinion on the reality of his time, due to their knowledge that were he to live in their time he would advocate the opinion they now advocate, based on the interpretive principles of his madhhab.” See Ibn ‘Abidin, Nashr al-‘arf, 1325.
and what is not a custom is often gained not from jurists but from the common folk.

It is not enough that a jurist believes that a particular expression has become customary. For his belief of what has become customary may stem from his training in his school of law and his persistent study and disputation in legal circles. Rather, an expression becomes customary when the common people of a particular locale come to understand one thing only whenever they hear it, not from one of the jurists, but from one of their own and according to their usage of this expression for this particular purpose. This is the “becoming customary” (al-\(\text{ishtihār}\)) that is sufficient to transform the literal meaning of an expression into a legal meaning based on custom.\(^43\)

“Wrong Following” Between Muslims and Non-Muslims

Al-Qarāfī’s efforts were all directed at his fellow Muslim jurists and, by extension, their constituents, including state officials. The lesson he imparts, however, should not be lost on contemporary non-Muslim scholars and their constituents who seek to deploy the results of Western shari‘ah-scholarship as a means of explaining or evaluating the goals and aspirations of American Muslims. For to ignore al-Qarāfī’s corrective is to risk perpetuating the very practice he seeks to curtail, namely, that of reading ancient shari‘ah-manuals in a manner that imputes an over-inclusive domain of jurisdiction to Muslim jurists and a false immutability to Islamic law,\(^44\) effectively stripping contemporary American Muslim jurists – and non-jurists! – of all agency in determining the substance of shari‘ah in America. At the same time, such readings virtually doom non-Muslim Americans to negative predispositions towards Islamic law, by portraying it as a fideistic system that is entirely closed to secular reason, insensitive to socio-political or cultural diversity and hostile to any notion of evolution. Add to this the mania spawned by 9–11, and even the most

\(^43\) Tamyīz, 243. Emphasis mine.

\(^44\) Islamic law, not unlike American law, displays a preference for disguising rather than acknowledging change, a tendency, according to Alan Watson, found in all legal systems. See his The Nature of Law (Edinburgh: Edinburgh University Press, 1977), 95. Those insufficiently grounded in the Islamic legal tradition often fail, as a result, to detect change, even where it actually exists. On the preference for disguising rather than acknowledging change in American law, see J. Frank, Law and the Modern Mind (New York: Doubleday, 1963). Frank’s book originally appeared in 1930.
fair-minded non-Muslim American might find himself in the grips of disquieting doubt, fear and blind prejudice vis-à-vis his Muslim compatriots.

For example, in a recent work on Islam and liberal citizenship, the North African jurist al-Wansharīsī (d. 914/1508) is cited as proof of shari‘ah’s negative predisposition towards Muslims merely residing in non-Muslim lands, let alone participating in the political life thereof. Almost all of the reasons adduced by al-Wansharīsī to support this position, however, are grounded in claims of fact. For example, such residence is said to result in “the loss and abandonment of prayer, fasting, paying of the zakāt, jihād, the exaltation of the word of God, bearing witness to the Truth [read: God] and protecting it [Him] from the scorn of the infidels and the derision of the immoral”; 45 and the list goes on. Now, if, based on such indications, Muslims are understood (and perhaps understand themselves) to be living in sin by merely residing in non-Muslim America, how unjustified can non-Muslims be in their fears and suspicions about Muslim perfidy, ill-will and a presumed Islamic obligation to conquer America in order to render her a Muslim polity wherein Muslims can live in good conscience? And yet, following al-Qarāfī’s lead, why should the limits of al-Wansharīsī’s factual knowledge, experience or political imagination in 9th/15th century Morocco (Granada having fallen to Christians, incidentally, in 1492) be allowed to blind us to what we know about the constitutional protections that Muslims enjoy in 21st century America?46 And even if we allow that al-Wansharīsī’s assessment of 9th/15th century Andalusia could be rightly applied to 21st century American socio-cultural reality, i.e., that the word of God would be subjected to “the scorn of the infidels and the derision of the immoral,” why should this be taken as a justification for clothing his recommendation of non-residence with binding legal authority? Should we simply ignore the fact that the Internet, Twitter, Text-Messaging, Smart Phones and satellite T.V. now render such would-be solutions largely ineffectual if not counterproductive? 47 And does this not amount to precisely the kind of “wrong follow-

46 In fairness to al-Wansharīsī, he does state at one point: “Thus, these harms, actual and anticipated, establish the impermissibility of such residing (in non-Muslim lands). See al-Mīyār al-murīb wa ‘l-jāmi‘ al-maghrib ‘an fatāwā ‘ulamā’ ifriqiyyah wa ‘l-andalus wa ‘l-maghrib, 13 vols. ed. M. Ḥajjī et al (Beirut: Dār al-Gharb al-Islāmī, 1401/1981), 2: 141. In other words, the issue is these specific harms and not the mere fact that they occur in non-Muslim lands.
47 Indeed, it was Muslims outside Denmark and outside America who seemed to be most
ing” that al-Qarāfī highlighted and condemned in his Muslim compatriots? More importantly, such examples clearly demonstrate that non-Muslim scholars of Islamic law are as susceptible as Muslims to falling into “wrong following” (taqlīd lā yaṣiḥḥ) and that the practical impact of this infelicity is no less distorting and no less devastating in effect.48

*Sharī’ah* and American Socio-Political and Cultural Reality

Regarding the *sharī’ah* side of Muslim politics in America, then, whatever the provisions of Islamic law that American Muslims seek accommodation for might be, they are not necessarily identical with the contents of bygone *sharī’ah* manuals, no matter how correct in their own right these manuals might be and no matter how much authority they might otherwise enjoy. For beyond the question of what American Muslims adopt as their own “going opinion,” i.e., on questions of law, differences between bygone and modern factual realities or assumptions may significantly modify these rules or their application. None of this, meanwhile, is grounded in any unspoken capitulation to liberalism or to Islam’s presumed failure as a modern project; nor can it be fairly cast as “a practical adaptation that amounts to accepting de facto secularization,”49 at least not on any modern, Western understanding of the term “secular”.50 Rather, all of these adjustments are based on principles, precepts and institutionalized approaches to *sharī’ah* that were endorsed by Muslim jurists long before the advent of modern, Western liberalism or secularism.

This is not to minimize, negate or try to camouflage the difficulty of reconciling any number of *sharī’ah*-provisions with American law or society. Even with al-Qarāfī as our guide, the strictly legal aspects of much classical doctrine will retain a prima facie presumption of correctness. American Muslims will continue, for example, to presume that they and their non-Muslim relatives affected by, yet least able to do anything about, the Danish cartoons or the ‘film’ “Innocence of Muhammad”.

48 This tendency to attribute positions to Islamic law on the basis of “wrong following” is painfully demonstrated in *Shariah: The Threat to America* (Washington, DC: Center for Security Policy Press, 2010), a “report” issued by a group including, inter alia, former CIA director James Woolsey, former Deputy Undersecretary of Defense for Intelligence William G. (Jerry) Boykin and former Assistant Secretary for International Security Policy Frank J. Gaffney, Jr.


50 See my discussion below, pp. 282–285 on the concept of the secular in Islam.
cannot receive Qur’ānically prescribed shares of inheritance from each other. And the established doctrine holding dog-saliva to be ritually impure will prompt many a Muslim cabdriver to refuse service to persons with seeing-eye dogs. Court decrees that award child-custody to an apostate parent\textsuperscript{51} or that bind ex-wives (Muslim or non-Muslim) to pay child-support to Muslim fathers will run afoul of \textit{sharī'ah} rules. And Muslim judges, magistrates and police officers will invariably be called upon to punish or allow actions explicitly allowed or prohibited, respectively, by \textit{sharī'ah}. Culturally speaking, meanwhile, even the most imaginative execution of unmediated interpretation (\textit{ijtihād}) will not convincingly reconcile Islamic law with “hook-up dating” or drinking at the corporate retreat. In sum, neither tinkering with the facts, relying on the probative value of custom, or even outright \textit{ijtihād} will always be enough to resolve these and related issues. Rather, at a certain level, American Muslims will have to acknowledge a certain tension, if not outright contradiction, between any number of \textit{sharī'ah}-provisions and the dominant legal and or socio-cultural order. Such acknowledgment, however, only sets them apart from many Jews, Christians, Native Americans and other religiously committed Americans in degree rather than in kind. In fact, the situation confronting American Muslims in this regard does not differ categorically from that of many Muslims in the so-called Muslim world\textsuperscript{52}

Meanwhile, one might argue that part of the socio-political value of Islam (and religion in general) resides in its ability and willingness to challenge dominant cultures and resist the overwhelming power of the modern state.\textsuperscript{53} In

\textsuperscript{51} For a modern alternative to the classical law holding apostasy to be a capital offense, see T.J. ‘Alwānī, \textit{Lā īkrāha fī al-dīn: ishkālīyat al-riddah wa al-murtaddīn min ṣadr al-islām ilā al-yawm} (Cairo: Maktabat al-Shurūq al-Dawlīyah, 1427/2006).

\textsuperscript{52} For an interesting comparison, for example, between the Egyptian and Islamic laws on adultery and fornication, see U. ‘Afīfī, \textit{‘A’shān mā tindirabsh ‘alā afāk: ḥaqquka ma‘a al-shurṭah} (That You May Avoid Being Abused: Your Rights with the Police), 2nd ed. (Cairo: Maktabat Madbūlī, 2008), 190–202. I do not want to overstate matters. Despite the dissonance between \textit{sharī'ah} and the applied legal order, Muslims in the Muslim world enjoy a number of advantages over their Western co-religionists, including a deeper sense of belonging, community, socio-cultural empowerment and even spiritual osmosis.

\textsuperscript{53} See, e.g., S.L. Carter, \textit{God’s Name in Vain: The Wrongs and Rights of Religion in Politics} (New York: Basic Books, 2000), 2, 30–2, 185 and passim; S. Hauerwas, “Character, Narrative, and Growth in the Christian Life,” \textit{The Hauerwas Reader}, ed. J. Berkman and M. Cartwright (Durham: Duke University Press, 2001), 221–54, esp. 252. This ability to counter the power of the state was demonstrably more present in classical Islam, e.g., in the form of the \textit{madhhab}. Today, by contrast, the religious establishment in virtually every majority-Sunni state has almost entirely lost its ability to challenge the state, resulting in what one might call “voluntary totalitarianism,” according to which, even if governments do not
such light, for Muslims to seek to bring *shari‘ah* into blanket conformity with every aspect of the dominant culture or every law or policy of the American state would diminish if not undermine Islam’s socio-political significance. After all, if Islam merely confirms every value that secular, liberal democracy produces on its own, it is not entirely clear what Islam’s practical relevance might be and why it should not be privatized. At the same time, if the Constitution intended to privatize religion entirely and to scour the public square clean of religious influence, it is difficult to imagine the point or wisdom behind a free-exercise clause. In such light, Muslim cabdrivers who refuse service to patrons with seeing-eye dogs should be deemed no less eligible for First Amendment protection than are “closely held” Christian corporations that refuse to provide their employees with birth-control coverage. And, on the level of social interaction (where the issue is not the state but society at large), Muslims who refuse to drink alcohol or engage in hook-up sex should not be looked upon as any less *American* than are Christians, Jews or Mormons who refuse the same.

In sum, my point in highlighting al-Qarāfī’s law-versus-fact dichotomy is not to show the way to complete compatibility between *shari‘ah* and every feature of American life. It is to caution against unschooled or essentialist readings of Islamic law that constrict or negatively pre-determine the realm of legitimate possibility. As the eminent Orientalist Joseph Schacht once noted, Islamic law seek a monopoly on power (which they certainly do) they come to enjoy it by default, given the erosion of sustained centers of countervailing collective commitment. For the basis of this idea, see S.S. Wolin, *Politics and Vision*, xvi (and 591 ff.), where the author speaks of “inverted totalitarianism” and suggests that the total fragmentation of alternative centers of authority or power, “mak[e] it difficult to form effective majorities and easier to divide and rule.” Meanwhile, as extreme and misguided as some contemporary Islamist movements might be, restoring (and, alas, in instances, tipping) this ‘balance’ is a major goal among them.

54 Of course, the most immediate analogy connoted by this kind of argument is that of relying on religion to justify refusing blacks or other minorities service on the basis of race. First, the counter-argument of black Christians (or Jews, Mormons, etc.) should go a long way in problematizing such claims, unless the government is willing to assert that whites are more authoritative representatives of religious orthodoxy than are blacks. Second, placed in the concrete historical context of American socio-political evolution, it is difficult to imagine a religion that explicitly embraces racism surviving the fierce competition of the American ‘market’ of religion. Third, it is the dog in this case and not the person that is the real target of discrimination. The situation is thus more analogous to apartment buildings that do not allow pets than it is to apartment managers who attempt to keep out minorities. On another note, there is no consensus in Islam on the ritual impurity of dogs or dog saliva. The Mālikī school, traditionally the second largest school numerically, does not hold dogs or dog saliva to be ritually impure.
is not a code that transcends society in its entirety but an on-going argument across space and time in which various authoritative deployments and concretions are made, unmade and remade. In this light, it may not always be possible to know what Islamic law has to say on a particular American issue, as the issue may not have been debated long or widely enough to produce a settled opinion. Assuming, however, as Islamic law does, the role of legitimate local custom, local scholarship and the distinction between law and fact, whatever sharī'ah-view(s) American Muslims settle upon or seek accommodation for may ultimately turn out to be a lot less “foreign,” “hostile,” “retroflexed” or “socio-culturally insensitive” than is commonly assumed.

To take one example, among the most oft-cited proofs of Islamic law’s socio-cultural regressiveness and insensitivity is its allowance of polygyny. In this light, it has been suggested that modern Muslim states should simply ban the practice via the discretionary powers (siyāsah) granted them by classical sharī'ah or by resort to the invocation of secular “public reason”.

See his “Problems of Modern Islamic Legislation” in Studia Islamica 12 (1960): 99–129, esp. 108: “[T]raditionnal Islamic law, being a doctrine and a method rather than a code ... is by its nature incompatible with being codified, and every codification must subtly distort it ....” See also ibid, 128–9: “It was the task of the early lawyers of Islam, in the first and at the beginning of the second century of the hegira, to test the realities of law and society which they found around them, by Islamic standards and to combine them into a coherent normative system; it is the task of the modern Islamic jurists and legislators to do the same with different materials and to arrive at a new synthesis.”

See M. Fadel, “Public Reason,” 10ff. In note 34 (p. 11) Fadel writes: “Tunisian legislation prohibiting polygamy, however, is an example of Islamic modernist legislation that violates public reason because the justification given is theological, namely that the Qur‘ān, properly read, prohibits polygamy, rather than being rooted in public reason, for example, that it is harmful to women or children.” One wonders, however, on such articulations, whether sufficient attention is paid to the question of who actually owns this public reason. One thinks here of the declaration of Edward Bernays: “The conscious and intelligent manipulation of the organized habits and opinions of the masses is an important element in democratic society. Those who manipulate this unseen mechanism of society constitute an invisible government which is the true ruling power of our country.” E. Bernays, Propaganda (New York: Ig Publishing, 2005), 37. Or perhaps more explicit is the prognostication of Nietzsche, who spoke of the need to “prepare the way for that still distant state of things in which the good Europeans will come into possession of their great task: the direction and supervision of the total culture of the earth.” See F. Nietzsche, Human, All Too Human: A Book for free Spirits, transl. R.J. Hollingdale (Cambridge: Cambridge University Press, 2012), 332. Emphasis original. One might ask in this light why appeals from “public reason” should be deemed any more accessible than are appeals from religion. And, as I note elsewhere, “[I]f the very definition of ‘Negro’ continues to connote ‘intellectual inferiority’ and if part of what makes one ‘Western’ as opposed to
course (and this is what makes this suggestion relevant for Muslims in the West) is that, in tandem with the zeitgeist of the age, this proscription could gain *de jure* status by means of the sheer weight and durability of its *de facto* tenure, as occurred, e.g., with slavery. It is easy to imagine, however, how some might find this approach to be profoundly problematic. After all, if a Muslim state can so easily prohibit a man from taking more than one wife, what is to prohibit it from banning him from having more than one child, or more than one car? And if the issue is purely a matter of assessing the public good, even through the ostensible medium of “public reason,” why should a Muslim state’s banning polygyny be any different from its banning the consumption of alcohol, gender-mixing, Western tourism or certain sports, on the argument that these activities are harmful to society? In this light, a more streamlined approach might be that implied by the late Sayyid Sābiq, who, incidentally, was neither a liberal nor a progressive, but a Salafī. According to Sābiq, in a society in which monogamy is the presumed custom, a man’s taking a second wife might be deemed a breach of contract that grants his first wife an automatic right to an annulment (*faskh*), even if no explicit stipulations against polygyny were included in the initial marriage contract. Of course, we should allow for the possibility that even in America there may be segments of society where the presumption that monogamy is the normative custom applies and others where it does not. Clearly, however, it would be American reality and the American Muslim assessment of that reality – not Sayyid Sābiq’s – that exerted this potentially far-reaching impact on Islamic law in America, in clear and principled recognition of the latter’s societal customs and norms.

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57 In other words, would the liberal concerns and sensibilities that inspire the banning of polygyny in the name of the public good support these non-liberal proscriptions in the name of the public good as defined by Muslims?

58 See, e.g., B. Nafi, “*Fatwā* and War,” 103–04.

59 See S. Sābiq, *Fiqh al-Sunna*, 3 vols. (Cairo: Dār al-Rayyān li ‘l-Turāth, 1411/1990), 2: 249. Sābiq is relying here on a version of the widely recognized legal maxim, “what is known to be customary functions as an implied stipulation in all contracts” (*al-ma‘rūf ‘urfūn ka ‘l-mashrūṭ shartun*).
The Functional Limits of *Sharī'ah* and Muslim Political Negotiation

As for that aspect of American “politics” that begins for Muslims not with *sharī'ah* but with the general will of the American people, here the question becomes how to justify and proceed in negotiating non-*sharī'ah* laws and policies, while assuming a commitment to Islamic law as one’s point of departure. If these rules and regulations are neither “Islamic” nor derive from *sharī'ah*, what normative posture should a committed, *sharī'ah*-minded, Muslim assume towards them? Does actively engaging, let alone endorsing, these laws and policies entail the flaunting of *sharī'ah* or the secularization of Muslims? Indeed, what is the relationship between Islamic law and the secular? This takes us to the second of al-Qarāfī’s above-cited insights: the functional *limits* of Islamic law.

In two of his works, *al-Iḥkām fī Tamyīz al-Fatāwā ‘an al-Aḥkām wa Taṣarrufāt al-Qāḍī wa ‘l-Imām* (*The Book of Perfection in Distinguishing Legal Opinions from Judicial Rulings and the Discretionary Actions of Judges and Caliphs*) and *al-Furūq* (*Distinctions* – on legal precepts) al-Qarāfī lays down what I refer to elsewhere as a “pure law doctrine.”60 As the Mālikī school was a political minority in Cairo at the time, al-Qarāfī was committed to both a strong Muslim state and the basic legal autonomy of the Muslim community, especially the jurists and their schools. Key to this balance was recognizing the law as a basis and means of empowering the state, on the one hand, yet carefully defining the parameters of the law, as a means of imposing limits on the state’s use of power, on the other. After all, to provide explicitly legal backing to the state’s use of power while leaving the law itself poorly defined would invite totalitarianism.61 Moreover, such a lack of definition would leave the authority of the jurists ill-defined, effectively turning them into experts or authorities on aspects of life on which they had no specific expertise, even as it took legal sanctions and judgments themselves into places these were never intended to go. Thus, al-Qarāfī sets out to define “law” in more precise terms, the better to

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60 See my *Islamic Law and the State*, 114–27.
61 Of course, Muslims commonly invoke as a sufficient check on state power the principle gleaned from a statement attributed to the Prophet: “There is no obedience due any creature in disobedience to the Creator” (*lā ṭā'ah li makḥlūq fī maṣīyat al-khāliq*). But this invocation is clearly inadequate, as the state might press economic, administrative, educational or social policies that do not necessarily entail any disobedience to God but clearly spell disaster in worldly terms. For example, where the state decides to impose bureaucratic red tape that impedes efficiency or easy access to goods and services, there may be nothing in this that can be concretely defined as disobedience to God, despite the material harm it brings to the community.
minimize if not eliminate abuse or misapplication by either the state or the jurists.

Al-Qarāfī’s pure-law excursus is intricate.62 For our purposes, its most important feature is that it places “sharʿī,” i.e., that which derives from and/or is concretely validated by the sources of the religious law, in contradistinction to “non-sharʿī,” or that which derives from and/or is validated through ‘secular’ deliberations. According to al-Qarāfī, “pure law” or “madhhab,” as the repository of juristic authority, consists of: “juristic rulings on practical matters arrived at through independent interpretation (of the sources) along with the causes, prerequisites and impediments that accompany these rulings and the various forms of courtroom evidence accepted as a basis for establishing their factual presence.”63 This is immediately followed by a more detailed explanation in which he affirms that “sharʿī” excludes “such rational pursuits as mathematics, geometry or sense-perception (al-ʿaqliyāt ka ʿl-ḥisāb wa ʿl-handasah wa ʿl-ḥissīyāt). In other words, what the jurists or law books say regarding these matters is not law in the proper sense and cannot be clothed with legal authority. For al-Qarāfī, the importance of this distinction between law and non-law is that it restricts the capacity of both the jurists and the state to call upon the law to authenticate or insulate non-sharʿī pronouncements. An important corollary of this distinction, meanwhile, is that it recognizes a ‘secular’ application of reason, sense perception and the like that can be engaged in without in any way violating, abandoning or encroaching upon Islamic law.64

62 See note 31 above.
64 In his famous biographical confession, al-Ghazālī (d. 505/1111) enumerates several ‘sciences’ of non-Muslim origin, including astronomy, mathematics, and the natural sciences, that neither recline upon, violate or challenge sharʿah. He complains, however, of “ignorant friends of Islam” who think that Islam is aided by denying the validity of everything attributable to non-Muslims. “Thus they negate the validity of all of their sciences and proclaim their ignorance, to the point of denying their teachings on solar and lunar eclipses, claiming that what they say in this regard violates the religious law. When these words reach the ears of those who know that these teachings are based on definitive proof, the latter do not entertain any doubt about these proofs but merely conclude that Islam is based on ignorance and the denial of definitive proofs. This in turn increases their love for the philosophers and their hatred of Islam. Alas, enormous is the offense committed against religion by those who think that Islam is aided by denying the validity of these sciences, while the religious law has nothing to say about these sciences, either positively or negatively.” See Abū Ḥāmid al-Ghazālī, al-Munqidh min al-ḍalāl wa ʿl-muwaṣṣsil ilā dhī...
The relevance of this non-sharī')}}
realm to the enterprise of Muslim political negotiation begins with the realization that so many of the rules and policies that affect our daily lives are grounded in amoral – to be distinguished from immoral – secular, material considerations such as order, safety, efficiency, long-term resource management, and the like. One wakes up in the morning, takes a shower, eats breakfast, gets in one's car, turns on the radio and goes to work. Rules grounded in secular logic press their claims at almost every step of the way: landlords are legally bound to provide heat and hot water, as these are deemed to be basic necessities; the ingredients in our breakfast are regulated by food-safety standards; we must carry driver's licenses and honor traffic laws; FCC regulations bring us public-service announcements; and in our offices and classrooms, building codes and zoning regulations all press their claims.

To the extent that such rules and regulations are grounded in secular logic that falls outside the parameters of what is strictly “sharī’”, Muslims can contemplate and negotiate them without relying on or giving offense to Islamic law. To argue, in other words, that the legal age for driving should be fifteen or seventeen or that pesticides that use atrazine should be banned would not revert to any strictly sharī’ dictates (at least not in the first instance) but to such secular considerations as safety, order, thrift, bio-chemistry and the like, none of whose inherent authority derives from or necessarily contradicts the religious law. 65 The same would apply to (aspects of) health-care, gun-control, immigration, FCC regulations and an endless list of issues in the public domain.

I do not wish to overstate my case. Numerous challenges and complications lurk beneath the surface. To begin with, even to qualify for contemplation as a legitimate Muslim indulgence, the matter in question would have to be deemed at least “not prohibited” by God. In the case of taxes on soda, for example, many Muslims might reject excise taxes altogether as forbidden by sharī’ah, in which case their argument against a tax on soda would be strictly sharī’, and there would be nothing to engage them on beyond this. But for Muslims who hold a different view on excise taxes, presumably on principled rather than purely pragmatic grounds, the secular logic they invoke for or against a tax on

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65 Tamyīz, 196. Elsewhere, in a more general context, al-Qarāfī specifies that the “sharī’” contrasts “the rational and empirical, such as mathematics, i.e., that three times three equals nine, as well as the non-mathematical, such as geometry, music or other pursuits.” See Sharḥ tanqīḥ al-fuṣūl fī ikhtiṣār al-maḥṣūl fī l-uṣūl, ed. Ţ'A. Sa'id (Cairo: Maktabat al-Kulliyāt al-Azhariyyah, 1393/1973), 17; Sharḥ tanqīḥ al-fuṣūl fī ikhtiṣār al-maḥṣūl fī l-uṣūl, ed. A.F. al-Mazīdī (Beirut: Dār al-Kutub al-Ilmīyah, 2007), 45.

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soda would be generically indistinguishable from that of their non-Muslim compatriots. Islamic law would pose no barriers to their weighing in on this issue or to their compatriots’ ability to engage them on a formally equal footing, namely, the secular calculus of safety, order, resource-allocation, health-implications and the like. This takes us, of course, to a second complication, namely my unencumbered use of the word “secular” as a presumably legitimate Muslim indulgence.

Pure Law and the Islamic Secular

The term “secular” is protean and fraught with semantic ambiguity. Charles Taylor adumbrates three distinct uses of the word: 1) the emptying of the public, (e.g., political or economic) space of God; 2) a voluntary public and private falling away from God, religious belief, practice and institutions; and 3) a societal state wherein belief in God moves from being unchallenged to extremely difficult to sustain. Others have used the term to refer to “state neutrality” or as a complement to French *laïcité*. Still others have cast secularism as an ideology that opposes living life in a manner that puts God first. In all these usages, however, the “religious” and the “secular” are assumed to be in conflict. And when “secular” is deployed as a tool for analyzing or understanding Islam, this conflict is assumed, *a fortiori*, to be all but complete. All of this is predi-

70 On this understanding of the relationship between the secular and Islam, acts are assumed to be either secular or Islamic but not both simultaneously. For example, in an informative article analyzing modern Muslim juristic discourse on sports, two co-authors conclude that some jurists seek essentially to override the secular nature of sports in order to render them licit: “By regulating sporting activities along religio-legal lines, jurists seek to Islamize a secular phenomenon and to emphasize the encompassing nature of Islamic law.” See U. Shavit and O. Winter, “Sports in Contemporary Islamic Law,” *Islamic Law and Society* 18:2 (2011): 250–80 at 279.
cated, meanwhile, upon a singular understanding and history of the relationship between "religion" and "secular": that of the Christian West.

If we take, however, the pre-modern Muslim lexicon and legacy as our point of departure, a different picture emerges. "Secular," i.e., *dunyā* or *dunyawī*, simply refers to the “this-worldly,” which the Qur’ān juxtaposes not to *dīn* or ‘religion’ but to *ākhirah*, i.e., the “other-worldly.” To be sure, there is tension between Islam as religion, given its eschatological focus, and the this-worldly as a quotidian obsession, given the human tendency to privilege immediate over long-term interests (*dunyā* literally means “the near/nearest”). Read holistically, however, neither the Qur’ān nor Sunna assumes a categorical contradiction between *dunyā* and *dīn*. Rather, while the Qur’ān consistently warns against the dangers of placing *dunyā* over *ākhirah*, it acknowledges nonetheless the value and importance of the this-worldly to the religious enterprise. Thus, we read staple criticisms of those who flaunt the truth, e.g., “That is because they prefer the life of this world over the afterlife ...” (16:107), but also warnings against ‘hyper- or mismanaged religionism’ and the neglect of legitimate worldly interests: “Say, ‘Who has forbidden the adornments of God and the good provisions He has brought forth for His servants?’ “Say, ‘These are in this life (al-ḥayāt al-dunyā) for those who believe, who alone shall enjoy them in the life to come’” (7:32); “Seek, through what God has given you, the abode of the afterlife, but do not forget your portion from this world” (28:77).

Of course, it is not nature but divine fiat that imbues acts and entities with their respective degrees of otherworldly value or relevance. And in this line-drawing exercise, Islam might be seen as actually creating its own “secular” and giving it scope and meaning. This secular emerges, in other words, as a constituent or complement rather than as an adversary or contradiction of re-

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72 Prophetic statements generally follow the same pattern as the Qur’ān, juxtaposing *dunyā* to *ākhirah* rather than to *dīn* (though *dīn* is occasionally used metonymically to refer to living life with an awareness of the life to come).
ligion. And it operates on two levels. On one level, as al-Qarāfī insists, judicial rulings are valid only when they address this-worldly disputes (al-tanāzuʿ li-
maṣāliḥ al-dunyā), in contradistinction to “religious observances and the like (al-ibādāt wa naḥwuhā).”73 In this sense, the focus of the applied law is explicitly recognized as the secular, this-worldly realm, even as the law itself assumes a monopoly on validating (in concrete terms) the other-worldly implications of a broad range of worldly actions and non-actions. On another level, however (and this is the one most relevant to our discussion), there is a realm beyond the scope of the law where, outside a basic license to act or not act, neither the practical nor the other-worldly implications of acts can be determined on an explicitly scriptural or juristic (i.e., sharʿī) basis. Again, however, this ‘secular’ is not an anti-religious or even completely non-religious realm; it is simply a subsidiary, sustentative, non-ultimate one. One still petitions God for guidance, aid and facilitation regarding one’s endeavors in this domain,74 but such guidance, unlike that of the Qur’an or Sunna, does not come in the form of an objectively accessible archive; nor can its presence or substance be concretely validated in formal, sharʿī terms.

It has been argued, of course, that Christianity also played a critical role in producing what would become the modern (Western) secular. This secular, however, is said to have emerged out of “an acceptance of the fact that the divine law and sacred ideals of justice have to be violated in the temporal world.”75 In other words, in order to protect the religious law’s integrity from the ravages of temporal expediency, the Church sought to insulate the religious law by recognizing a separate, explicitly non-religious realm where non-religious, secular logic held sway.76 By contrast, against the pretensions of the temporal world,

73 Tamyīz, 20, 23, 69.
76 See Stolzenberg, “Profanity,” 41–51. I am not arguing that this explanation of the emergence of a distinctly secular realm is the view of all Christians, either contemporaneously or historically. There does appear, however, to be a tradition in Protestantism that is explicitly committed to this approach. One authority summarizes the view of Luther as follows: “In his tract On Trading and Usury (1524), his argument began by laying down the strict Christian teachings on the subject; soon, however, he was led to admit that the Christian ethic was of little utility here inasmuch as most members of society did not act as Christians. His solution was to abandon the Christian argument and to invoke, instead,
Muslim jurists sought to expand the scope of the religious law (e.g., by means of *qiyās* or analogy) and to develop mechanisms (such as *istihsān* ['equity'], *sadd al-dhara‘ī* ['blocking the means'], legal precepts and the like) to accommodate would-be violations or compromises. In other words, instead of placing all prima facie violations outside the sanctum of law, Muslim jurists sought to augment the extent to which these could be kept within the law by recognizing conformity itself as a broad, differentiated, protean construct. Meanwhile, where the law does reach its self-imposed jurisdictional limits, i.e., the limits of its ability to validate in concrete, *shar‘ī* terms, this constitutes an iteration of Islam’s ‘secular’. But, again, this secular is neither anti-religious, inevitably in conflict with religion, nor even necessarily entirely non-religious. It is simply non-*shar‘ī*.

This is the key to understanding my point regarding the ‘secularity’ of drivers’ licenses or speed limits and how their particulars may be contemplated without relying on the religious law, on the one hand, and without giving offense to it, on the other. Simply stated, to posit a realm that is beyond the religious law is not the same as positing one that is beyond the religion. There are views, in other words, that are not called forth by the religious law per se nor can be insulated, validated nor invalidated by it, even if they (or their practical concretion) might be informed by broader religious values, meanings or imperatives. Safety, for example, like patience, is a religious imperative. But concrete, specific views about what actually is or is not safe or the proper degree or duration of patience cannot (at least not always) claim *shar‘ī* or scriptural backing. For such views are grounded not in scripture or extensions thereof

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77 In other words, if a Muslim who is choking drinks wine or a Muslim in America buys a home through a traditional mortgage or takes out an insurance policy, relying, e.g., on valid *fatwās* that build on such principles as *istihsān* (equity) or *maslahah* (unarticulated interest) or (in the case of mortgages or insurance) that such actions find precedence in modified understandings of classical doctrine, his action does not violate *shar‘ī*ah but is actually in compliance with it! If the issuer and user of this *fatwa* exercise due diligence, the latter may be assumed to incur no censure or punishment in the afterlife.
but in such media as empirical experience, observation, actuarial statistics, rational deduction or even religious imagination. It is in this sense that the question of whether the speed limit should be 50 or 60 mph may be said to fall outside the interpretive apparatus of *sharī'ah*. And it is for this reason that Muslims can engage such issues politically, without invoking, on the one hand, Islamic law, and without violating, offending or abandoning it, on the other, and without in any way deprecating its value or authority.

Of course, at a certain point all of this begins to sound like a restatement of al-Qarāfī’s law-versus-fact dichotomy. While there is overlap here, there are at least two important distinctions. First, al-Qarāfī’s disagreement with his co-religionists over the law-fact division was about the authority attached to a statement regarding the factual occurrence of something that the law itself had identified as a legal cause. Everyone agreed that conquest and treaty were legal causes that affect the status of public utilities; the conflict was over whether Mālik’s conclusion regarding their actual occurrence should be clothed with legal authority. By contrast, neither scripture nor the religious law per se identifies any concrete speed limit in and of itself as a legal cause, either directly or by analogy. Thus, the status of any particular speed limit might be more analogous to a question such as whether a person should wear black or brown shoes or drink caffeinated as opposed to decaffeinated coffee. Of course, one might object here that all of this is just a roundabout way of saying that the religious law holds all these things to be neutral (*mubāḥ*). The problem with this objection, however, is that it effectively relocates rather than solves the issue. For countless alternatives to 50 or 60 mph or brown or black shoes are also neutral. The question is whether the practical assessments that result in one’s concrete decisions regarding these permitted acts can or should be considered *shar‘i* or not.\(^78\) This takes us to the second difference with the law-fact dichotomy.

In the classical controversy over the status of human acts before the coming of revelation, al-Qarāfī sided with those who insisted that there is no *shar‘i* rul-

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\(^78\) A number of early jurists insisted that a “neutral” (*mubāḥ*) action falls outside the scope of God’s concern. In fact, we see reiterations of this view as late as Ibn Rushd the Grandson (d. 595/1198). The view that ultimately triumphed, however, was that a neutral act falls within the boundaries of God’s address, occupying an intermediate position between obligatory and forbidden. This was obviously an important development whose reinvestigation might yield interesting insights. On this issue, see further A.K. Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought* (Albany: State University of New York Press, 1995), 128ff. For Ibn Rushd, see his *Talkhīṣ al-mustaṣfā*, ed. J. Alaoui (Beirut: Dār al-Gharb al-Islāmī, 1994), 47–8.
ing and that such acts simply remain unaddressed.\textsuperscript{79} He acknowledged, however, our ability to know by reason the quotidian good or evil of these acts, at least in terms of the harm or benefit they bring to humans here and now; reason simply cannot assign them any soteriological value. But ‘reason’ is entirely and independently capable of knowing, e.g., “that five times five equals twenty-five, just as it knows mathematics and geometry in general, along with the identity of the various customs, bounteous things, and the like.” Indeed, al-Qarāfī affirms, “Knowledge of none of these things reverts to scriptural sources (\textit{sharā'ī}).”\textsuperscript{80} In other words, beyond \textit{sharī'ah} there is a realm in which secular reason (or experience or sense perception or social convention) can legitimately function with dispositive effect. One can know that wearing brown shoes or driving at 50 mph or using atrazine is “good” or “bad” in terms of quotidian benefit or harm, even if the religious \textit{law} does not tell one so, and even if there is no prior \textit{shar'ī} ruling that requires, recommends, discourages or prohibits any of this. Al-Qarāfī alludes directly to this fact when he states in the context of his discussion of the status of acts before revelation: “Good as a category is broader than the legal ruling” (\textit{al-ḥasan a'amm min 'l-ḥukm al-shar'ī}).\textsuperscript{81} In fact, this was a standard Ash'arī argument against the Mu'tazilīs (who affirmed reason’s ability to know the soteriological implications of acts independent of revelation). Ash'arīs divided the assessment of acts into ‘rational’ (‘\textit{aqli}’) and juristic (\textit{shar'ī}) and argued that only the \textit{latter} must be based on revelation.

A thing’s goodness or evil refers to (1) the degree to which it agrees with or contradicts human nature (\textit{al-ṭab’}), e.g., saving a drowning person or falsely accusing an innocent person; or (2) the degree to which it constitutes a virtue or a flaw, such as (when we say that) knowledge is good and ignorance is evil; or (3) the degree to which it warrants praise or condemnation on religious grounds. The first two are rational (‘\textit{aqli}’) by unanimous consensus, while the third is juristic (\textit{shar'ī}).\textsuperscript{82}


\textsuperscript{80} \textit{Sharḥ}, 109 (ed. al-Mazīdī). Al-Qarāfī, who was an Ash'arī, incidentally, goes on to insist that on the basis of reason (or more specifically sense perception) we can know things about God, e.g., that God endowed musk with its scent and snow with its color, without being told any of this directly by scripture.


\textsuperscript{82} Al-Qarāfī, \textit{Sharḥ tanqīḥ al-fuṣūl}, 108 (ed. al-Mazīdī). Cf., however, W. Hallaq, \textit{Sharī'a}, 504, where this understanding of the relationship between reason and revelation as expressed by Muḥammad ‘Abduh is described as a “break with pre-modern theological and juristic
Clearly, “rational” here goes well beyond the faculty of formal reasoning to include such things as sense perception, spiritual epiphany, social convention or even prudence, i.e., common sense imbued with the lessons of history. Equally important, however, “good” and “evil” here are not simply factual determinations but actual value judgments. In other words, beyond its role as part of the formal apparatus of juristic methodology, reason (like experience, sense perception and the like) can be the basis of value judgments and is not strictly limited to determining the factual occurrence of scripturally grounded causes, prerequisites or impediments.

While al-Qarāfī was a committed Ash’arī, this was not an exclusively Ash’arī position. Even jurists who took issue with Ash’arī theology recognized the functional limits of sharī’ah, beyond whose parameters assessments of practicality and value, including decisions to act, would recline upon some other calculus. The Māturīdī Ḥanafīs, Kamāl al-Dīn al-Maqdisī (d. 905/1499–1500) and ‘Abd al-Raḥīm Shaykh Zādeh (d. 944/1537), for example, affirm our ability to know through independent ‘reason’ such socially informed judgments as the goodness of knowledge, the evil of ignorance and what appeals to or repulses people. Meanwhile, the Ḥanbali Traditionalist Ibn Taymiya insists that the Qur’ān and Sunna cannot explicitly provide all the answers – not even through analogy – that a believer might need to secure his or her worldly or other-worldly interests.

conceptions.” Indeed, in describing ‘Abduh’s approach, Hallaq writes: “Thus the use of reason is maximized, yet the religious tenor is not set aside. But the balance stands clearly in favor of an unprecedentedly favorable approach to materialism, whereby Muslims are called upon not to concern themselves overly with the hereafter to the detriment of worldly life, since the best way to live as a Muslim is to pursue material progress.” Sharī’ah, 504.

83 The Prophet himself tacitly confirms the propriety of relying on non-shar’ī sources and calculates. When he passed by some farmers pollinating trees, he is reported to have advised them against this practice. The trees died (or failed) and, when he was informed about this, he responded: “If they found benefit in their action, they should (have continued to) do it. I, on the other hand, merely expressed an idea I had. So do not hold me accountable for mere (non-revelational) ideas. But when I inform you of something on the authority of God, take it. For I will never invent lies against God.” See Muslim b. Ḥajjāj, Šahīh Muslim, 5 vols. (Beirut: Dār Ibn Ḥazm, 1416/1995), 4:1464. In this same context, the Prophet is reported to have said, “You are more knowledgeable (than I am) regarding your worldly affairs (antum a’lam bi amr dunyākum).” See Muslim, Šahīh, 4:1464.

Even were we to assume that a person came to know every command and every prohibition in the Qur’ān and Sunna, the Qur’ān and Sunna would simply address matters of general, categorical import, as it is impossible to do other than this. They would not mention that which is specific to each and every individual. And for this reason, humanity has been commanded to ask for guidance (hudā) to the straight path.85

Neither al-Qarāfī nor the Ash’arīs, Māturīdīs, Ibn Taymiya (nor even the Mu’tazilis, for that matter) had any interest in promoting “secularization,” according to any of its modern, Western meanings. Nor, more importantly, does their explicit recognition of the functional limits of Islamic law – indeed of scripture itself – entail any parallel limits on religion per se.86 Rather, their message is essentially that Islamic law is not the kind of all-encompassing, rational “system” envisioned by the Aufklärer champions of the Enlightenment, the value and function of which resides in its ability to answer all questions in a manner that reflects and reinforces its own internal logic, consistency and authority. For, were Islamic law such a “system,” there would be no point in seeking divine guidance (hudā) beyond the initial act of assent. Ultimately, this panacean view of sharī’ah would render irrelevant the whole psycho-dynamic relationship between humans and God. And this – not any recognition of sharī’ah’s jurisdictional boundaries – would spell the real “secularization” of both Islam and its religious law.

Conclusion

In the context of American politics, popular sovereignty is routinely thought and spoken of in absolute terms. In fact, however, it is both constrained and domesticated by the U.S. Constitution. This stands to reason, given that part of the point of a constitution, at least in theory, is to insulate certain fundamental

86 In fact, with the exception of the Mu’tazilis, all of the theological schools seem to imply that, beyond the interpreted Word itself, believers must cultivate what might be considered a “proper religious imagination.” We see glimpses of what may be a basis for this in Qur’ānic critiques of communities who lack it. On the one hand, we read criticisms of faulty or corrupted religious imagination, e.g., “Do you argue with me on the basis of appellations concocted by you and your forefathers for which God has sent down no authority?” [7: 71]. On the other hand, we find a critique of a lack of religious imagination altogether, e.g., “Do you find it so incredible that a reminder should come to you from your Lord through a flesh-and-blood man from amongst you? [7: 64; 7: 69].
rights along with certain prerogatives of government from the dictates of the democratic process, based on the fact that there are limits to the amount of trust we are willing to lend that process. In this regard, the Constitution is both limiting – in its impact on the scope and reach of popular sovereignty – and self-limiting – in its self-imposed inability to expropriate it. In a similar fashion, I have tried to show that sharī‘ah is not only limiting (as commonly assumed) but also self-limiting, in the jurisdictional boundaries that Muslim jurists such as al-Qarāfī impute to it. These boundaries, however, have both a hard and a soft side. On the one hand, there are rules and principles deemed permanent and unchanging, as a matter of unanimous consensus (ijmā‘). On the other hand, there are disputed rules, ‘sources’ and principles (mukhtalaf fīh) that promote a broad range of interpretive latitude and variation. All of this, meanwhile, is mediated through such variables as the law-fact dichotomy, custom, empirical verification and the overall distinction between what is and what is not properly shar‘ī, i.e., derived from and/or explicitly validated by the sources of the religious law.

In effect, these variables call into being a realm in which Muslims must rely on a palpable degree of individual autonomy and, collectively, something approaching popular sovereignty. For none of the issues deliberated in this realm can be validated in concrete shar‘ī terms. Rather, herein Muslims are consigned to secular ‘reason’ and negotiation. And while this area is limited in proportion to the scope of authority and jurisdiction claimed by the shar‘ī realm, depending on time, place and circumstances, it can be substantial. This division between shar‘ī and non-shar‘ī acquires direct meaning and relevance in the context of American politics, as this is precisely the realm, as I have tried to show, in which countless “political” issues reside. Inasmuch as these issues are negotiated through secular ‘reason’, it makes little difference whether Mus-

88 While my language here is conventional, I wish neither to push the liberal notion of “sovereignty” too far nor to make too close an identification between it and the idea of “the public,” which I believe to be closer to the general position of Islamic law. Dewey, for example, described the public as that collection of people who pursue general goods the benefits of which do not necessarily accrue directly to those who contribute most immediately to their procurement. One might think here of sitting on tenure and promotion committees, which tax one personally in return for no direct personal gain, but which serve to maintain the standards and integrity of the system of which one is a part. While “sovereignty” more readily connotes “interest,” including those that do not necessarily look beyond the group or individual pursuing them, the general connotation of such concepts as maslalah, istihsān, sadd al-dharā‘ī, even the ‘illah in qiyās, seems closer to the idea of promoting public goods.
lims are negotiating among themselves or with non-Muslims. In fact, here it might be both legitimate and reasonable to imagine and work towards an “overlapping consensus,” at least with regard to some issues. For to the extent that *sharī'ah* circumscribes, albeit negatively, the parameters of the non-*shar'ī* realm, it also reduces the likelihood of the latter’s contents encroaching upon the province of Islamic law or vice-versa.

And yet, neither this negotiation nor this pursuit of a limited overlapping consensus is secular in the sense of being “a-religious,” let alone “anti-religious”. Normatively speaking, God-consciousness continues to inform these enterprises, even if its actual presence or absence might not be concretely verifiable. In the end, what may ultimately separate the *sharī'ah*-minded from the non- or anti-*sharī'ah*-minded on the question of American “politics” is neither the intrusion of God-consciousness nor *sharī'ah* per se but the extent to which the “Islamic secular” continues to atrophy under the weight, authority and hegemonic deployment of the “Western secular,” entrapping Muslims and non-Muslims alike in a false dichotomization between Islam as religion, *sharī'ah* as religious law, and the temporal world of ‘reasoned’ deliberation.

89 In fact, regarding this non-*shar'ī* realm, I agree, at least partly, with Professor Abou El Fadl that at least many of the rules and policies of a Muslim state will constitute laws and rules of the state, not laws and rules of God. See his “Islam and Democratic Commitment,” 61–71, esp., 68–69. But whereas Abou El Fadl holds that state law is not God’s law because it is mediated through fallible human interpretive apparatuses, I see state law (or at least much of it) as simply falling outside the *shar'ī* realm. Of course, there is still the question of how much authority such non-*shar'ī* rules can properly claim in light of what many deem a fundamental dictate of Islamic monotheism, i.e., there is no god, including no lawgiver, but God. I hope to return to this question in a later effort.

90 Of course, this recognition of the precarious presence of God-consciousness will prove a tad disappointing for many Muslims. But the Qur'ān is replete with verses that settle the matter: “Then you will be returned to the Knower of the seen and the unseen, and He will inform you of what you worked” (9:94); “To God will be the return of you all, and He will inform you of those things about which you differed” (5:48). See also, 5:105, 6:60, 6:164, 9:105, 39:7.

91 My point here is not that God-conscious assessments of “safety” or “efficiency” are never likely to contradict such assessments that dispense with any consideration of God but rather that there is nothing to prevent them *necessarily* from agreeing, e.g., on 50 mph. Moreover, two non-religious or anti-religious approaches to such issues could just as easily result in mutually contradictory conclusions.

92 It is interesting that the third edition of the *Hans Wehr Arabic-English Dictionary*, published in 1976, gives “layman (in distinction from the clergy)” as the English equivalent of “‘almānī,” which is now commonly used to mean “secularist” in the sense of opposing or challenging the authority of religion.