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**REPORT**

# ISPU

## Sharia and Diversity: Why Some Americans are Missing the Point

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## Executive Summary

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The lens of state power is not the only way to see law. Jewish *halakha* is one example. The scholar-created doctrines of Islamic law are another. Both are complete systems of law that do not need state power in order to govern individual behavior. This is why, when American Muslims say that they live according to sharia, this does not mean that they want government enactment of Islamic law. Their request that American law recognize their choice of religious rules in their lives is not a demand that American law legislate Islamic law for everyone. To think so is to fundamentally misunderstand what Islamic law is, the fact that it differentiates between God’s Law and the human interpretations thereof, and how Islamic law operates in practice. Much of the confusion in the United States regarding sharia would be untangled if Americans could appreciate these realities, however unfamiliar.

Sharia is, for Muslims, Divine Law—the Law of God. But it takes human scholarly study of scripture to articulate and elaborate that Divine Law in the form of legal rules. Those legal rules are called “*fiqh*,” crafted by religious legal scholars with a self-conscious awareness of their own human fallibility. As a result, there are many *fiqh* schools of law. According to Islamic legal theory, no *fiqh* rule can demand obedience because every such rule is the product of human (and thus fallible) interpretation. This pluralism allows the divine sharia “recipe” to be tangible enough for everyday Muslim use, yet flexible enough to accommodate personal choice.

Pluralism in *fiqh* (human articulation of Divine Law) illustrates the dynamic interactive engagement that sharia (Divine Law) has had with many different human environments. In other words, Muslim religious scholars have always treated sharia (Divine Law) as a recipe that is meant to be *made* (with all the natural diversity that results from that process), not one frozen in pristine condition decorating a kitchen bookshelf.

The enactment of so-called “sharia laws” in Muslim-majority countries is a modern mutation. Pre-modern Muslim governments formally recognized *fiqh*, but not by legislating it as the uniform law of the land. Instead, there was a separation of legal authority between the realms of *fiqh* (human articulation of Divine Law) and ruler-made laws for public order (*siyasa*). This separation enabled pre-modern Muslim legal systems to preserve the pluralism of *fiqh* and the principle of individual personal choice between *fiqh* schools, while still enabling Muslim rulers to make laws in order to serve the public good (*siyasa*). In stark contrast to this history, most Muslim-majority countries today have a very different constitutional framework, inherited

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or borrowed from the European nation-state model in which all law is controlled by the government. Modern Muslim legal systems no longer formally separate the realms of *fiqh* (human articulation of Divine Law) and state-made law (*siyasa*). Instead, the only formally recognized law in most of these countries is the law made by the government. Thus, the phenomenon of “sharia legislation” exists not because sharia (Divine Law) demands it, but rather, because of a complicated series of political events in these countries.

From the perspective of Islamic legal theory and history, there are two major problems with the idea that a Muslim government must enact “sharia legislation.” First, enacting a collection of (often politically) selected rules of *fiqh* (human articulation of Divine Law) as the uniform law of the land undermines the legal pluralism that religious communities (Muslim and non-Muslim) used to enjoy in pre-modern Muslim legal systems. That is, before the legal monism of the nation-state, Muslim governments often accommodated a “to each his own” approach to religious law that included not just the many Muslim *fiqh* legal schools, but also the religious law of Christians, Jews, and others. Second, the idea of government codification of sharia (Divine Law) contradicts the core epistemology of Islamic jurisprudence: that no human can claim to know God’s Law with certainty. Thus, when Muslim governments enact “sharia legislation” today, they not only reject the humility exhibited by centuries of *fiqh* scholars, but also the historical practice of centuries of Muslim rulers finding ways to enforce sharia while still respecting *fiqh* pluralism.

Here in the United States, there is no threat to American law presented by American Muslims seeking to live by sharia. There is also nothing particularly novel about some Americans wanting to follow religious laws that differ from the law of the land. American Muslims are merely the latest of many religious groups in the United States whose religious practices have presented continuing opportunities for American law to define the contours of what religious freedom means in our constitutional system that protects the free exercise of religion. American courts have never automatically dismissed individual requests for legal accommodation of religious law. On the other hand, religious freedom in the United States, like all constitutionally protected rights, is not absolute. It is weighed against other constitutional values and social policies. The main tools used by American courts in these cases are comity, public policy, and unconscionability. As a result, as with the religious practices of all American religious groups, American Muslims’ *fiqh*-based legal arguments are sometimes honored by American

courts, and are sometimes rejected. Simply put, the American legal system honors the desire of many American Muslims to organize their legal lives according to their understanding of sharia (Divine Law), within the limits of American public policy. To see this as a threat is to mistake religious freedom for religious invasion.

It is important to realize that one of the themes of the anti-sharia campaign in the United States is that “creeping sharia” proves the dangerousness of multiculturalism. More specifically, the argument is that multiculturalism is flawed because it causes us to compromise our American values in order to accommodate Muslim desires to follow (allegedly oppressive and offensive) sharia. In this way, the anti-sharia controversy is part of a larger conservative-liberal political debate over the role of multiculturalism in America. Appreciating this context is important to engaging the topic of sharia in America.

In doing so, it is important for Americans (both Muslim and non-Muslim) to stop talking about sharia in a way that supports the rhetoric of those who manipulate the concept of sharia for political gain. Both within and outside of the United States, it is common to see the term “sharia” used interchangeably for not just the Islamic ideal of Divine Law, but also to refer to the fallible rules of *fiqh* (human articulation of Divine Law). Confusing sharia with *fiqh* is dangerous and misleading because it blurs the line between the divine and human voice, hiding the self-consciously human process that created the *fiqh* rules and the pluralistic schools of *fiqh* doctrine.

Conflating *fiqh* (human articulation of Divine Law) with sharia (Divine Law) causes people to assume that each fallible *fiqh* rule represents uncontested Divine Law for Muslims, and that Muslims believe that these *fiqh* rules must be legislated as the law of the land. In Muslim circles, this sets the stage for political actors to push through their preferred *fiqh* rule with little or no opposition because the Muslim public assumes that the rule is divinely-directed, rather than being just one of many equally legitimate *fiqh* choices. This is often the technique used to support “sharia legislation” in Muslim majority countries today. It is also similar to a strategy used by anti-sharia activists in the United States whereby a few objectionable *fiqh* rules are selected to argue that sharia itself is offensive. In both cases, linguistic sleight of hand is being used to manipulate an unknowing public.

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As this report explains, one (or even more than one) *fiqh* rule (human articulation of Divine Law) does not define sharia (Divine Law). It suggests the following three guidelines to avoid the most common pitfalls and misunderstandings that occur in public discourses about sharia.

(1) Use the word “sharia” only to refer to the concept of perfect, divine Law of God in Islam; use the word “*fiqh*” when referring to the humanly-created doctrinal rules created by Muslim religious legal scholars as the result of their efforts to understand and articulate<sup>1</sup> sharia;

(2) Remember that *fiqh* (human articulation of Divine Law) is pluralistic, made up of multiple variations of equally-legitimate schools of law and their respective doctrines, all of which are available to individual Muslims to choose from as they seek to live by sharia (Divine Law);

(3) Do not refer to the laws in Muslim-majority countries (even those claiming to be “Islamic states”) as “sharia.” They are merely a legislated selection of humanly-created *fiqh* rules; they cannot be said to be conclusively dictated by sharia itself.

## Introduction

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Is sharia a threat to this country that must be stopped, or a matter of religious freedom that should be protected? An aggressive anti-sharia campaign in the United States has recently placed this question squarely (and repeatedly) before the American public.<sup>2</sup> Unfortunately, most Americans have very little credible information with which to answer it. Those who try to find out about sharia themselves have to wade through multiple definitions and counter-definitions. With little to no background to help sift fact from fiction, acquiring a clear understanding of the subject is nearly impossible.

American Muslims face many of the same frustrations. Because the typical Muslim generally needs to know only the particular rules by which he or she has chosen to live, most are unequipped to discuss sharia at the macro level at which it is currently challenged. To really engage with the current discourse about sharia requires knowledge of Islamic legal theory (especially the phenomenon of Islamic legal pluralism), the scope and viability of legal reform, and the nature of lawmaking in Muslim-majority countries today. But, just as the average law-abiding American citizen does not need to know much about the scope, depth, and implications of American constitutional law (let alone how to explain them to others), these major concepts are not second-nature to most Muslims, even those devout ones who desire to live according to sharia (Divine Law).<sup>3</sup>

By depicting sharia as “Public Enemy Number One” the anti-sharia movement in the United States has put American Muslims in a difficult position. As never before, Muslims who are not experts in the study of sharia (Divine Law) are now expected to explain it (and defend their own desire to follow it) to fellow Americans, who also know little to nothing about the subject. Even worse, this is demanded in a social context that is increasingly suspicious of American Muslims’ patriotism, often with suggestions that adherence to sharia means that they do not share American values, and may even threaten our national security.

This report is for American Muslims who want to better understand sharia in order to explain it to others, and for non-Muslim Americans who seek an explanation of sharia at a higher level of sophistication than is available in popular media. It should be noted that this report does not seek to change the minds of anti-sharia advocates or to provide point-by-point responses to their propaganda. Rather, it seeks to provide an informed exposition of some basic concepts of Islamic law so that Americans can intelligently engage in and raise the quality of this ongoing public conversation.

# What is Sharia?

## Some Important Definitions

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Unfortunately, the same word “sharia” is used to refer to a variety of different things, creating confusion and the problem of people talking past each other. Much of this can be untangled if terms are more carefully defined and consistently used. Sharia, usually translated as “Islamic law,” is often used to refer to two different things: 1) the Islamic idea of Divine Law and 2) the specific doctrinal rules articulated in books of Islamic law. Unfortunately, using the same word for these two concepts confuses what is divine and uncontested with what is fallible and subject to debate in Islamic law. I therefore always use the term sharia to refer to the Islamic ideal Divine Law (indicated in English with a capital “L”), but not the doctrinal legal rules articulated by Muslim religious jurists (Ar. “*fuqaha*”). For the latter, I use the very different word, *fiqh* (“understanding”), which means the human articulation and elaboration of that Law through jurisprudential analysis (Ar. “*ijtihad*”) of scriptural sources. Thus, in this report, “sharia” is the Divine Law of God, and *fiqh* is the body of legal rules created for those who want to live by that Law. Below, I will explain in more detail why I believe this is the appropriate usage for these terms, and why it is important to linguistically keep the concepts and terms “sharia” (Divine Law) and “*fiqh*” (human articulation of Divine Law) distinct.

## Think of Sharia as the Recipe, Not the Result

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If you have ever followed a recipe, then you already know a bit about what it is like to follow sharia. Literally meaning “way” or “street,” sharia refers to the way that God has advised Muslims to live, as documented in the Quran and exemplified in the practices of Prophet Muhammad. In other words, sharia can be understood as the Islamic “recipe” for living a good life. But, of course, no one can taste a recipe. We can only taste the product of a chef’s efforts to follow one. In addition, different chefs can follow the same recipe and still come up with quite varied results. Thus, it is very hard to be sure exactly how the “true” recipe is supposed to taste—especially if all the chefs are experts. It is much the same with sharia: the divine “recipe” of sharia is known only through human interpretations of that recipe. And, as it turns out, there are quite a few of them. Over the last fourteen centuries, countless Muslim legal scholars (*fuqaha*)—we might think of them as the sharia “chefs”—have produced (and continue to produce) collections of specific rules and principles derived from their jurisprudential analysis (*ijtihad*) of the Qur’an and Prophet Muhammad’s life example. Because they did not (and still do not) always agree with each other, many Muslim schools of law eventually developed, each with its own collection of rules on a variety of legal topics such as property, contracts, and family and criminal law.

To understand the authority of these scholarly-created legal rules, it is important to appreciate how the religious scholars themselves understood their relationship with Divine Law. As they depicted it, divine revelation represents absolute truth, but all human attempts to understand and elaborate that truth will necessarily be imperfect and potentially flawed. This realization was hardwired into the foundations of Islamic jurisprudence. As a result, even as they worked hard to understand and articulate Divine Law in the form of specific legal rules, Muslim religious-legal scholars (*fuqaha*) remained aware that they might make mistakes. To use the recipe metaphor, imagine a restaurant full of expert chefs following a famous recipe. Without the recipe’s author present, no chef can claim to have produced the “correct” version of that recipe. Similarly, because only God knows who is right, no Muslim religious-legal scholar can insist that his or her<sup>4</sup> conclusions are the correct articulation of sharia as against all others.

Importantly, the self-conscious awareness of human fallibility did not stop Muslim religious-legal scholars from studying and elaborating Divine Law. Instead, it merely functioned as a warning to do it with humility, always aware that although the object of their work is sharia, they do not (and cannot) speak for God. This core epistemological premise is responsible for the legal pluralism that has characterized Islamic law for centuries.

## There is One *Sharia* but Many Schools of *Fiqh*

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*...each Muslim seeking to live by sharia is entitled to choose which of many equally valid—but often differing—fiqh rules by which to live.*

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Muslim religious-legal scholars' acknowledgement of human fallibility is illustrated, among other things, by their use of the word *fiqh* for the legal rules that they produced. *Fiqh* literally means “understanding,” underscoring the principle that every *fiqh* rule is only a scholar's best understanding of Divine Law.<sup>5</sup> That is why a fundamental principle of Islamic legal theory is that the validity of *fiqh* (human articulation of Divine Law) is based on probability, not certainty. That is, in order for a *fiqh* rule to be legitimate, it does not have to be the correct understanding of God's Law, but rather, only a probably correct understanding. The status of probability is acquired through soul-searchingly exhaustive efforts of legal analysis (*ijtihad*) undertaken by fully qualified scholars (*fuqaha'*). As long as it is the product of this jurisprudential effort (*ijtihad*), a *fiqh* rule qualifies as a probable—and thus legitimate—articulation of sharia (Divine Law).<sup>6</sup> Moreover, since every *fiqh* rule has the same epistemological status, all scholars must respect and tolerate the *fiqh* conclusions of their peers as equally valid articulations of sharia (Divine Law), even if they disagree with them.

The natural consequence of this probability-based law is a healthy legal pluralism. Thus, for Muslims there has always been one Law of God (sharia), but many schools of *fiqh* articulating that Law here on earth.<sup>7</sup> This creates a “marketplace of *fiqh*” from which, as a theological matter, Muslims are free to choose which understanding of sharia (Divine Law) they wish to follow. Using the recipe metaphor again, the world of *fiqh* is like a restaurant of many expert chefs all making the same recipe: as long as they have followed the recipe to the best of their ability, all chefs are entitled to have their dish served to customers. It is up to the customers to decide if they prefer one chef's interpretation to another. Likewise, each Muslim seeking to live by sharia is entitled to choose which of many equally valid—but often differing—*fiqh* rules by which to live.

From hundreds of early *fiqh* schools, five remain famous today: the Maliki, Hanafi, Shafi'i, Hanbali, and Ja'fari (Shi'a). *Fiqh* doctrinal differences often fall along school lines, although there are always minority views within each school. It is important to recognize that there are real life consequences to the differences between *fiqh* schools. To mention just a few examples, the grounds for a woman-initiated divorce in classical Hanafi doctrine *fiqh* are vastly more restrictive than those allowed in Maliki *fiqh*. On the other hand, it is far easier for a Hanafi woman to marry on her own initiative than it is for a Maliki woman to do so. As another example, the Hanbali theory of contract tends to be more robust than that of the other

schools, thereby making it more hospitable to many contractual conditions that do not fare as well in other schools. Finally, in criminal law, only classical Maliki doctrine would allow a state to prosecute a woman for extra-marital sex (*zina*) solely on the basis of an unwed pregnancy; all other schools insist on four eyewitnesses before such a case can proceed.<sup>8</sup>

Taken all together, pluralism in *fiqh* (human articulation of Divine Law) allows the divine sharia “recipe” to be tangible enough for everyday Muslim use, yet flexible enough to accommodate personal choice. Personal choice results from the fact that, by itself, no *fiqh* rule can demand obedience<sup>9</sup> because every such rule is the product of human (and thus fallible) jurisprudential analysis (*ijtihad*).<sup>10</sup> *Fiqh* pluralism also illustrates the dynamic interactive engagement that sharia interpretation has had with many different human environments. Sharia, in other words, is a recipe that is meant to be made—with all the natural diversity that results from that process—not to sit in pristine condition decorating a kitchen bookshelf.

## The (Unfortunate) Use of Sharia by Muslim Governments Today

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This description of sharia is very different from the impression one gets from observing lawmaking in most Muslim-majority countries today. With so many of these governments enacting “sharia legislation” and enforcing it as the law of the land, what has become of the multiple schools of *fiqh* (human articulation of Divine Law) and the principle that individual Muslims are entitled to choose which *fiqh* school to follow? The answer lies in the fact that most Muslim-majority countries today follow a structure of government that is a stark departure from that of nearly every pre-modern Muslim system.

Pre-modern Muslim governments formally recognized *fiqh*, but not by legislating it as the uniform law of the land. Instead, there was a separation of legal authority between *fiqh* scholars and government lawmakers, and consequently of the types of law that each created. More specifically, most Muslim rulers made and enforced laws for public order (*siyasa*) but they did not make or codify *fiqh* (human articulation of Divine Law), for that was the domain of the religious-legal scholars (*fuqaha*).<sup>11</sup> This separation enabled pre-modern Muslim legal systems to preserve the pluralism of *fiqh* and the principle of individual personal choice between *fiqh* schools, while still enabling Muslim rulers to create laws in order to serve the public good (*siyasa*). To make this work, when Muslim rulers enforced sharia they generally did so with an accommodation of *fiqh* pluralism by, for example, appointing judges of many different *fiqh* schools as needed by diverse Muslim populations. Meanwhile, parallel to the *fiqh*-based courts were tribunals adjudicating cases based on ruler-made public-order laws (*siyasa*). This division of *fiqh* and *siyasa* realms of law was not accidental: it was a hard-fought accomplishment of Muslim religious scholars early in Islamic history, and it became characteristic of nearly every Muslim government from then until the modern era.<sup>12</sup>

In contrast, most Muslim-majority countries today have a very different constitutional framework, inherited or borrowed from the European nation-state model in which all law is controlled by the government. Modern Muslim legal systems no longer formally separate the realms of *fiqh* (human articulation of Divine Law) and state-made law (*siyasa*). Instead, the only formally recognized law in most of these countries is the law made by the government. This centralized legal monism<sup>13</sup> is the real reason for the modern phenomenon of “sharia legislation.” Rather than challenging the centralized, state-controlled “one law for all” nature of the nation-state system, “political Islam” and “Islamic state” movements instead simply assume this system as a given, and then try to make it more “Islamic.” When government-made law is the only type

of officially recognized law, Islamically-oriented political parties (and governments) focus on legislative enactment (or executive order) to have sharia recognized in these countries. This can result in the selection of a few *fiqh* rules to be deemed “sharia legislation” and therefore enforced uniformly upon an entire population. This is often supported by large numbers in the Muslim public because many believe that such “sharia lawmaking” is what an “Islamic government” must do. Unfortunately, many modern Muslims are virtually unaware of *fiqh* pluralism. As a result, government assertions that something is “the” sharia rule are often blindly accepted as true, even when there are actually multiple *fiqh* opinions on the topic. Moreover, lay Muslims often will defend “sharia legislation” as if defending their very faith.

In sum, the phenomenon of “sharia legislation” exists not because sharia (Divine Law) demands it, but rather, because of a complicated series of political events in these countries. In fact, from the perspective of Islamic legal theory and history, there are two major problems with the idea that a Muslim government must enact “sharia legislation.” First, enacting a collection of (often politically) selected rules of *fiqh* (human articulation of Divine Law) as the uniform law of the land undermines the legal pluralism that religious communities (Muslim and non-Muslim) used to enjoy in pre-modern Muslim legal systems. Before the legal monism of the nation-state, Muslim governments often accommodated a “to each his own” approach to religious law that included not just the many Muslim *fiqh* legal schools, but also the religious law of Christians, Jews, and others. Second, the idea of government codification of sharia (Divine Law) contradicts the core epistemology of Islamic jurisprudence: that no human can claim to know God’s Law with certainty. Thus, when Muslim governments enact “sharia legislation” today, they not only reject the humility exhibited by centuries of *fiqh* scholars, but also the historical practice of centuries of Muslim rulers of respecting *fiqh* pluralism. The theocratic dangers of the current situation should offend not only secularists who feel that state law should be separated from religion but also Muslims because it allows the state to claim control over what used to be left to the autonomy of independent *fiqh* scholars.

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## Sharia in the United States

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The phenomenon of “sharia legislation” in Muslim-majority countries has fueled fears of sharia in the United States. But the so-called sharia laws of these countries are no indication of what American Muslims want in the United States, any more than the laws of the Jewish state of Israel indicate what American Jews want to enact into law in America. To more fully appreciate why the sharia-seeking practices of American Muslims do not threaten American rule of law, this section will summarize what sharia means in the lives of American Muslims, and how American courts have handled the legal implications of these practices.

First, it must be understood that Muslims, like any religious group, are not monolithic. The degree to which sharia governs an average American Muslim’s life depends on many factors, including degree of religiosity, preferred *fiqh* school (if any), and which *fiqh* rules are believed relevant. For some, this translates to following some religious rituals, such as prayer or fasting, but not much else that would be considered “legal” under American law. Other American Muslims - a significant number, in fact - do seek to follow sharia in their worldly affairs, and this can have legal implications in things like marriage, estate planning, and business and property transactions.<sup>14</sup> For example, many American Muslims organize their investments according to *fiqh* rules that prohibit usury and restrict highly speculative market transactions. Many get married according to *fiqh* rules dictating a valid Muslim marriage, and likewise wish their divorces to be legitimate under the same rules. Finally, when writing their wills, many American Muslims seek advice from *fiqh* experts to ensure compliance with the mandatory inheritance distribution rules of *fiqh*.

There is also nothing particularly novel about some Americans wanting to follow religious laws that differ from the law of the land. American Muslims are the latest of many religious groups in the United States whose religious practices have presented continuing opportunities for American law to define the contours of what religious freedom means in our constitutional system that protects the free exercise of religion. American courts have never automatically dismissed individual requests for legal accommodation of religious law. On the other hand, religious freedom in the United States, like all constitutionally protected rights, is not absolute. It is weighed against other constitutional values and social policies. The main tools used by American courts in these cases are comity, public policy, and unconscionability. As a result, as with the religious practices of all American religious groups, American Muslims’ *fiqh*-based legal arguments are sometimes honored by American courts, and they are sometimes

rejected. Following is a brief summary of some of the *fiqh*-based issues commonly raised before American judges and how they have responded.

The most common way in which sharia shows up in American courts is by contractual reference in a formal agreement between individual Muslims. Muslim marriage contracts,<sup>15</sup> for example, usually include reference to sharia, and usually include a provision for the husband's payment of a bridal gift (*mahr*) deferred to the time of divorce. This means that Muslim divorce litigation often involves *fiqh*-based claims for or against the enforcement of the bridal gift, which can sometimes amount to a significant financial sum. These cases are especially interesting because, in addition to freedom of religion, they involve another freedom recognized by American law: freedom of contract. It is a longstanding principle in American law to give legal effect to the meeting of the minds between contracting parties, including a foreign choice of law, so long as it does not violate public policy. In the words of one New Jersey judge:

Why should a contract for the promise to pay money be less of a contract just because it was entered into at the time of an Islamic marriage ceremony? If the Court can apply "neutral principles of law" to the enforcement of a *mahr* agreement, though religious in appearance, then the *mahr* agreement is not void for any constitutional reasons. Clearly, this Court can enforce so much of a contract as is not in contravention of established law or public policy.<sup>16</sup>

In other words, American judges have generally adjudicated Muslim marriage contracts not as religious law, but simply according to the rules of American contract law. This means that vague contract terms (such as a provision stating that the wife would get "a ring advanced and half of husband's possessions postponed")<sup>17</sup> could prove fatal to contract enforcement, not because of the religious aspect of the bridal gift (*mahr*) clause, but because of basic contract drafting principles. In sum, American judges often enforce Muslim marriage contracts, like any other contract, unless they are found to violate public policy.

Which sharia-based claims have been considered a violation of public policy? The results are not always the same from state to state, but a few examples are nevertheless illustrative. For example, American judges will not enforce a bridal gift (*mahr*) clause if they conclude there was coercion or a lack of understanding by one of the parties.<sup>18</sup> Similarly, divorces effected

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*We must be careful  
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entanglement  
with religion.*

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only by the means of a husband's unilateral no-fault divorce (*talaq*) have been rejected by some courts citing a lack of due process and fair hearing given to the wife.<sup>19</sup> Also, *fiqh* rules of child custody and guardianship that follow strict gendered and patriarchal social presumptions are often rejected as conflicting with the public policy seeking the "best interests of the child" standard, now prevailing in all states.<sup>20</sup>

Taken together, these cases show that, contrary to arguments that sharia is "creeping" into American law through judicial accommodation of sharia, American judges routinely reject sharia-based claims that violate public policy or American constitutional principles. There is thus no "shariatization" of American law. Rather, if one looks at what sharia really is, what American Muslims actually want, and how American law actually works (including the constitution's prohibition of state religious lawmaking),<sup>21</sup> it is quite clear that there is no "sharia threat" in the United States. Muslims who bring up *fiqh*-based claims in American courtrooms are not attempting to change the prevailing secular law or force anyone else to follow sharia. Muslim couples who opt-out of state community property laws, for example, do not threaten American law any more than do couples who use a prenuptial agreement to opt-out of prevailing community property laws, or an orthodox Jewish couple preferring a Beth Din arbitration tribunal to mediate the terms of their divorce. There is a difference, after all, between an opt-out and a take-over.

Simply put, American courts honor the choice of many American Muslims to organize their legal lives according to rules of *fiqh* (human articulation of Divine Law), within the limits of American public policy. To see this as a threat is to mistake religious freedom for religious invasion. The First Amendment includes two valuable principles that, although they exist in some mutual tension, should not be conflated: the Establishment Clause prohibits the government from establishing religion, and the Free Exercise Clause requires the government not to interfere with the free exercise of religion. We must be careful not to confuse the use of government authority to respect religious choices with government entanglement with religion. This is why judicial respect for sharia-based practices does not mean that America has begun to establish sharia as the law of the land. (Nor does it make us more vulnerable to terrorist attacks.) But it does exemplify how Americans value religious freedom and religious pluralism without discriminating between religions, and that we believe our nation is better for it.

## Conclusion

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One of the arguments of the anti-sharia campaign in the United States is that “creeping sharia” proves the dangerousness of multiculturalism.<sup>22</sup> The assertion is that multiculturalism, with its “demand to view all cultures as equally deserving of treatment and respect,”<sup>23</sup> is flawed because it causes us to compromise our American values in order to accommodate Muslim desires to follow (allegedly oppressive and offensive) sharia laws instead. In this way, the anti-sharia controversy is part of a larger conservative-liberal political debate over the role of multiculturalism in America.

The debate over multiculturalism has centuries-old philosophical roots. It involves deep questions like, “Is there such a thing as objective truth?” and “If not—if our understandings of right and wrong, good and evil, are nothing more than our subjective opinions—then what does that mean for our rule of law?” These are serious questions, with serious consequences for a legal system. After all, how can a legal system operate if even crime and non-crime are relative? America has long been trying to figure out how to answer these questions without losing itself in a sea of chaotic relativism and the end of shared values. Understandably, many respond by insisting on principles that they fervently believe to be true, on the premise that surely *some* things *are* objectively knowable. This position usually leaves no room for difference of opinion on those matters; steadfast uniformity on a few important truths, it is asserted, protects us from relativism and the loss of our collective moral compass. Multiculturalism, on the other hand, challenges many of these assertions. Multiculturalists argue that the differences in our practices, values, and beliefs should all be respected because there is no objective standard upon which to declare one correct and others wrong. Instead, honoring difference is itself an important value, enabling us to learn from each other and more about ourselves. For multiculturalists, then, citizenship should not require sameness, unity does not demand uniformity, and forced uniformity and assimilation is oppressive.

What is missing from this modern American discourse is an intriguing (and rather ironic) fact: Islamic legal history illustrates that a stable legal system can be built even when the correct answer is ultimately unknowable—about something as important as Divine Law. Using the currency of probability rather than certainty as the basis of legitimacy for *fiqh* articulations of Divine Law, Islamic jurisprudence did not choose between either absolute relativism or forced uniformity, but instead found a way to embrace legal multiplicity in response to the unknown. In this lies the more profound reason why sharia is not a threat to America. From the

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*Rather than being a threat to American rule of law, the insights of Islamic legal theory could provide valuable insight into how to honor multiplicity without giving up individual values and identities, or unity of the whole.*

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perspective of Islamic jurisprudence, oppression results when awareness of human fallibility and respect for pluralism is lost—when some become so sure of their answers that they use them as a basis to control others. This is what makes extremists so radical to mainstream Muslim thought. Radical Islam is not so much about extreme *fiqh* rules (for these can always be rebutted in the marketplace of *fiqh* pluralism), but instead about the single-mindedness that one's preferred *fiqh* rules are the *only* right way to live. That is, radical Muslims generally reject the core epistemological premise of all of Islamic jurisprudence by refusing to entertain the possibility that they might be wrong. Instead, they are so sure that they are right that they are willing to force others to comply with their views—sometimes by force and violence. This attitude displays a lack of humility in the face of Divine Law and the reality of human fallibility.

From the perspective of Islamic jurisprudence, intolerant legal uniformity is radicalism. Ironically, but perhaps not surprisingly, staunch anti-sharia advocates sound very much like radical Muslims. Both the anti-sharia movement's leaders and radical Muslims insist on a rigidly unitary definition of sharia, each arguing in their own way that this is the only possible meaning of sharia. Like most extremist Muslims, anti-sharia activists ignore *fiqh* pluralism and refuse to adopt a larger, more tolerant worldview. Within the realm of American law, anti-sharia advocates promote uniformity over diversity and reject the accommodation of multiple approaches to legal order. Like radical Muslims who are sure that their rules should be imposed on everyone, anti-sharia advocates insist on "one law for all,"<sup>24</sup> envisaging a legally homogenous American society based upon only those rules that they consider correct, as if assimilation and uniformity is essential to a society's survival.

American public discourse and politics today reflect a split, almost right down the middle, on the implications of multiculturalism and diversity. From affirmative action to racial profiling, Americans are wrestling with complicated questions about what twenty-first century America will be like. Census predictions estimate that by mid-century the United States will no longer be a white-majority country.<sup>25</sup> We Americans are facing big questions. How do we want to proceed as a nation populated by diverse races, classes, cultures, and religions? Should we try to balance our multicultural, multi-religious, multiracial, multi-ideological, and multi-gendered realities, or should we establish one homogeneous standard to which all are held? What will be the contours of religious pluralism, cultural diversity, and personal life choices that are enabled to thrive in the United States of the twenty-first century?

Perhaps we could embrace our multiple-minority future now and become an example of how to move forward productively in a pluralistic, globalized world. This is not an easy task, to be sure. The answers will have to be worked out carefully, with participation from all American experiences and ideologies. But seeking out realistic ways to embrace our diversity without losing cohesiveness as a nation would surely be a worthwhile undertaking.

What if, in that undertaking, Americans found that sharia—the very thing that has been so demonized in American public discourse lately—could actually *help* Americans navigate our pluralistic future? Rather than being a threat to American rule of law, the insights of Islamic legal theory could provide valuable insight into how to honor multiplicity without giving up individual values and identities, or unity of the whole.

A comparative look at Muslim and American history indicates that both are at their worst when they insist upon rigidity and sameness—especially when the government tries to enforce it. And both histories illustrate that societies can thrive when they are not scared by difference—they might even be at their best when they find ways to understand and learn from the reality of human variety. So, as we wrestle with multiculturalism and diversity, it might be worth reminding ourselves that we can often learn from those who we thought had nothing to teach us. Perhaps America could learn from the Muslim world’s experiences with sharia if only it could stop painting it as something that it is not.

## Recommendations

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*One simple yet powerful way to counteract this dynamic would be for the current discourse about sharia to shift to more accurate and careful language.*

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It is important to stop talking about sharia in a way that supports the rhetoric of those who manipulate sharia for political gain—both within and outside of the United States. It is common to see the term “sharia” used interchangeably for not just the Islamic ideal of Divine Law, but also to refer to the fallible rules of *fiqh* (human articulation of Divine Law). This is dangerous and misleading because it implies divine mandate for what are actually fallible humanly-created rules. In Muslim circles, this sets the stage for any political actor to push through his or her preferred *fiqh* rule (selected out of many equally legitimate alternatives), with little or no opposition because the Muslim public assumes that the rule is divinely-directed. This is often the technique used to support “sharia legislation” in Muslim majority countries today. It is also similar to a strategy used by anti-sharia activists in the United States whereby a few objectionable *fiqh* rules are selected to argue that sharia itself is offensive.<sup>26</sup> In both cases, linguistic sleight of hand is being used to manipulate an unknowing public. As should be obvious by now, one (or even more than one) *fiqh* rule (human articulation of Divine Law) does not define sharia (Divine Law). Likewise, it was not the Constitution that endorsed the oppression of black schoolchildren in the American south, it was one *interpretation* of the Constitution that did so.

Using the word sharia when one is really talking about *fiqh* is dangerous because it blurs the line between the divine and human voice, hiding the self-consciously human process that created the *fiqh* rules and the pluralistic schools of *fiqh* doctrine. Conflating *fiqh* (human articulation of Divine Law) with sharia (Divine Law) causes people to assume that each fallible *fiqh* rule is uncontestable Divine Law for Muslims, and that Muslims believe that these *fiqh* rules must be legislated as the law of the land wherever they are.

One simple yet powerful way to counteract this dynamic would be for the current discourse about sharia to shift to more accurate and careful language. As a start, I recommend observing the following three guidelines.

- 1) Do not use “sharia” for “*fiqh*.” If the word “sharia” were to be reserved to refer to the Islamic ideal, perfect Law of God, it would be kept conceptually distinct from the humanly-created (and thus contestable) doctrinal rules created by Muslim religious-legal scholars. This can be accomplished by referring to the latter with different terminology, such as “*fiqh*,” “*fiqh* laws” or “the legal rules created by the scholars of sharia.”

- 2) Remember that *fiqh* is pluralistic. When discussing *fiqh* (human articulations of Divine Law), it is important to maintain an awareness of the multiple variations of legitimate *fiqh* schools and their respective doctrines. It is essential not to misunderstand the nature of *fiqh* by filtering it through Euro-centric or Christian presumptions about religious law. *Fiqh* is indeed Islamic religious law, but it does not come in the form of monolithic, uniform, clerically-decreed rules.
- 3) Do not refer to the laws in Muslim-majority countries as “sharia.” Just as *fiqh* is humanly-created, so are the laws enacted by Muslim-majority governments—even those claiming to be “Islamic states.” To refer to these enacted laws as sharia is to imply that these laws are uncontested Divine Law, rather than merely an exercise of human jurisprudential interpretation that have been enacted as the law of the land for political reasons. Even if drawn from *fiqh* doctrine every legislated code is ultimately nothing more than the results of political choices selecting among many equally valid rules of *fiqh* (human articulations of Divine Law). They cannot be said to be sharia (Divine Law) itself.

## Appendix 1: The Methodologies of the *Fiqh* Schools

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It is important to understand that the *fiqh* schools are not the Muslim equivalent of “sects” as understood in the Judeo-Christian sense. The dividing lines between *fiqh* schools are not theological fallings-out about creed, and they cannot be placed on any orthodox-to-reform or even conservative-to-liberal spectrum of Islamic practice. Rather, they are schools of legal *method*, corresponding to methodological decisions of how to understand the primary sources of sharia (Divine Law), what tools to use toward that end, and how to use them.<sup>27</sup> Following the above “sharia as recipe” metaphor, the differences in *fiqh* schools can be understood like this: just as one chef might buy only organic produce and another might always use a favorite brand of cookware, each *fiqh* school has developed its own methods of scriptural interpretation and has its preferred tools for extrapolating legal rules therefrom.

For example, all *fiqh* schools begin with Quranic text and heed the Qur’anic command to follow the Prophet’s example, but they disagree on how best to know that example. More specifically, the Shafi’i school insists on well-recorded narrations (*hadith*), the Shi’a schools prioritize reports from the Prophet’s family and those believed to be his divinely-inspired descendants, and the Malikis emphasize the historical practices of the people of Medina, the Prophet’s home and governing capital. And that just determines the source texts—the “ingredients” of the sharia “recipe.” Next is the question of which tools to use to extrapolate rules from those texts, how to use them, and in what order. Not surprisingly, each *fiqh* school has its own signature toolbox and techniques. The Hanafis, for example, enthusiastically use analogical reasoning (*qiyas*) to expand the rule of a text beyond its original holding, whereas the Hanbalis, who prefer to hew as closely as possible to any available source text, grudgingly use analogy only as a last resort. Further, some schools use equity (*istihsan*) or believe in lawmaking based on the idea of preventive harm (*sadd adh-dhara’i*), whereas others do not. All of the schools factor in social custom (*urf*) and public welfare (*maslaha*), but not in the same way. They also agree that consensus (*ijma’*) is a powerful lawmaking tool, but do not share a common definition of what it is.

Understanding the nuances of the interpretive methodologies of the classical *fiqh* schools is important not only to understanding the differences between them, but also to the nature and viability of *fiqh* legal reform and the possibility of the emergence of new *fiqh* schools, both very important issues in contemporary Islamic legal discourse.<sup>28</sup>

## Appendix 2: Law and Government in Pre-Modern Muslim History: A Brief Summary

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Before the modern era, law and power in most Muslim lands was arranged in quite a different way than that familiar to us today. The details differed with time and place but, generally speaking, in the political-legal systems used by Muslim rulers before colonialism, law was divided into two types: *fiqh* and *siyasa*. *Fiqh* rules (human articulation of sharia, Divine Law) were the product of jurisprudential analysis (*ijtihad*) of scriptural sources by religious-legal scholars (*fuqaha*). *Siyasa* (meaning “administration” or “management”) rules, on the other hand, were different from *fiqh* both in kind and application. *Siyasa* laws were created by the ruler (i.e. whoever held temporal sovereign power, such as a caliph, king, or sultan) based not on scriptural study, but rather by the ruler’s determination of what was necessary to maintain public order and the public good (*maslaha*). These laws covered many topics on which the scripture had little or nothing to say, such as civil taxes, zoning, marketplace regulations, economics, public safety, and so on.

The legal realms of *fiqh* and *siyasa* operated separately from each other, but in an interdependent relationship that often worked in a checking and balancing manner.<sup>29</sup> Significantly, the religious-legal scholars jealously guarded their academic freedom to interpret scripture and articulate *fiqh* rules without ruler interference and Muslim rulers generally respected the scholars’ autonomy over the interpretation of Divine Law (sharia). Borrowing from the above metaphor of sharia as recipe, the classical relationship between Muslim rulers and scholars might be compared to the division of power in a restaurant: the *fiqh* scholars are like the chefs interpreting the recipes and preparing the meals, whereas the *siyasa* rulers are like the managers who keep the restaurant running in a safe, orderly, and sanitary way. The managers make and enforce restaurant regulations, but they do not decide on the recipes, their ingredients, or seek to influence the chefs’ expert cooking choices. Like the separate but linked worlds of chef and restaurant manager, the realms of *fiqh* and *siyasa* worked in a mutually interdependent way to meet the public’s needs in Muslim history.

An appreciation of the separation of *fiqh* and *siyasa* makes clear why it is incorrect to say that sharia requires theocratic government. The *fiqh-siyasa* structure of law and government in Muslim history was not theocratic because, simply put, the rulers and the religious legal scholars were not the same people. The religious scholars did not, as a general rule, wield political power, and the rulers did not create religious law. Instead, the scholars’ hard-fought insistence<sup>30</sup> that the content of *fiqh* remain beyond the state’s power created a separation between those who made religious law and those who held police power. That is not theocracy.

But neither is it secularism. It is important not to confuse the separation of *fiqh* and *siyasa* with western presumptions about the separation of church and state. Muslim rulers in *fiqh-siyasa* systems were still characteristically Muslim in ways that would challenge American notions of secularism (such as doing things like leading congregational prayer and funding religious schools). But their non-secular nature proves an important point: a government does not have to separate itself completely from religion in order to avoid becoming a theocracy. In contrast to European experiences with state churches (and the resulting religious oppression and violence) that has convinced most Americans of the necessity of the separation of church and state as a necessary constitutional prerequisite to religious freedom, Muslim history illustrates that there is another way: a separation of types of law. Namely, religious freedom can be preserved by distinguishing ruler-made law (*siyasa*) from scholar-crafted religious law (*fiqh*) and clearly marking the legislative boundaries between them.

In making these comparisons, it is important to recognize how much the Muslim world's experience of law, religion and government is different from western experiences with church and state. Whereas Europe experienced recurring religious wars when states assumed a religious identity, pre-modern Muslim governments did not use their *siyasa* power to take over the articulation of religious law, and vice versa—the Muslim legal scholars did not seek political power in order to enforce a monolithic version of *fiqh* upon the population. In fact, there are many examples in Muslim history of the scholars resisting *siyasa* attempts to establish a uniform *fiqh* legal code.<sup>31</sup> Instead, *siyasa* rulers had to accommodate *fiqh* pluralism. Thus, while rulers often created and enforced uniform *siyasa* laws (after all, it makes sense to have uniform zoning, traffic safety, and health codes), they usually respected and facilitated pluralism in the *fiqh* realm. It was usually possible for a follower of the Maliki school of *fiqh*, for example, to have access to Maliki judges, even if the rulers favored the Hanafi school. This phenomenon also made it possible for Jews and Christians and other religious groups to seek legal resolution of their disputes according to their own religious law.

That is not to say that pre-modern Muslim governments did not favor one *fiqh* school over another (most did) and even did what they could to make that school dominant. But it is crucial to realize that (unlike so many Christian governments) they did not do so by merging religious lawmaking power with political lawmaking power and thus create a theocracy. Thus, while the West's separation of church and state may have been a solution to western problems of law and religion, it is not necessarily an appropriate demand to make of Muslims, who

have quite a different history. Most significantly, Muslims never merged “church” and state. Not only was there no Muslim “church” in the first place, but Muslim scholars realized early on how dangerous it is to let the state speak for God, and insisted that the articulation of religious law be kept in the private realm of Muslim legal scholars. Without a Muslim “church” to take over or be co-opted by government power, the realms of *fiqh* and *siyasa* law operated separately from each other, and the scholars aggressively preserved the pluralism of religious legal doctrines in the *fiqh* realm. This solution represents a unique and creative constitutional structure for religious government. It allows such a government to formally recognize and facilitate citizen access to religious law (*fiqh*), but it also protects the plurality and flexibility of religious law enabling it to adjust to different contexts and, importantly, facilitates individual choice of what religious law to follow.

Because westerners tend to think of law as something always emanating from a state, *fiqh* is sometimes hard for Americans to conceptualize accurately. If one always thinks of law and government simultaneously, then law is that mechanism by which the state directs behavior. To a western mind, the idea of religious law usually presumes state direction of religious behavior. This is why secularism is seen as necessary to religious freedom - because it keeps the state out of religious lawmaking, preserving a safe space for religious practice to be self-directed from one’s own conscience. But what the western narrative misses is that the separation of *fiqh* and *siyasa* in Muslim history preserves a similar safe space - it kept pre-modern Muslim governments out of the business of religious lawmaking, but not through strict secularism.

In other words, the lens of state power is not the only way to see law. Much of the confusion regarding sharia would be untangled if Americans could appreciate that reality, however unfamiliar. As my colleague Marc Galanter has eloquently put it, “[j]ust as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions.”<sup>32</sup> Jewish halakha is one example. *Fiqh* is another. Both are complete systems of law that do not need state power in order to govern individual behavior. This is why, when American Muslims say that they live according to sharia, this does not mean that they want government enactment of *fiqh* laws. Their request that American law recognize their choice of *fiqh* rules in their lives is not a demand that American law legislate *fiqh* for everyone. To think so is to define all law through a western filter, and therefore to fundamentally misunderstand what *fiqh* is and how it operates.

Today, the *fiqh-siyasa* bifurcation of legal authority has all but disappeared in the Muslim world. The governments of most contemporary Muslim-majority countries follow a nation-state model of government inherited from the colonial era. Rather than separating *fiqh* religious law from *siyasa* government law, this model instead centralizes all lawmaking power with the government. In short, law is now conceived in western terms: in order to be officially recognized, laws must be created by the government. Moreover, political Islam and “Islamic state” movements do not look beyond their colonial past for a different constitutional model. Instead, they assume the centralized nation-state system, and instead merely seek ways to make it more “Islamic.” This usually means that a selection of *fiqh* rules (often called “sharia”) is enacted and enforced by the state on everyone, regardless of their *fiqh* school affiliation, because there is no recognized separate realm for *fiqh* pluralism.

Unfortunately, by using state power to enact uniform “sharia laws,” these contemporary “Islamic states” are effectively operating as theocracies, imposing religious law as the law of the land through state codification of (selected) *fiqh* rules. Even more unfortunately, many think that this is demanded by sharia. What most people do not realize is that this is a new phenomenon in Muslim world history.<sup>33</sup> The pre-modern separation of *fiqh* and *siyasa* law created systems that did not easily lend themselves to uniform legislation and enforcement of *fiqh* through government power. What is going on in nearly every “Muslim” government today is a drastic departure from traditional Muslim governmental systems that kept rulers out of the business of religious lawmaking and protected religious freedom by preserving a pluralistic *fiqh* realm. Instead, contemporary “Muslim governments” use the nation-state monopoly over law to claim religious legal authority far beyond that of pre-modern Muslim rulers. Muslim amnesia about Muslim history, combined with global dominance of western conceptions of law and religion, has obscured the fact that the current state of affairs in these countries is due to a variety of political events in the modern era, not because sharia demands it.

## Endnotes

1 The work of the *fiqh* scholars to understand and articulate sharia should not be described as merely “applying” the sharia. *Fiqh* literature is largely written in an academic and abstract form, based on theoretical analysis and hypotheticals. While those hypotheticals are based on a reflection of how this would work in real life (hence “applying” the scripture to real life), to say that religious scholars “apply” sharia would confuse the role of judge and *fiqh* scholar too much. Properly construed, the *application* of sharia is the job of judges who apply the (scholar-created) *fiqh* in individual cases. These roles are largely the same in a common law system like the United States, where the judges’ opinions actually *are* the law, but things are very different in a *fiqh* context.

2 The “anti-sharia” campaign in the United States insists that sharia is a mortal threat to Western civilization and to American rule of law, arguing that “stealth jihadists” are manipulating our legal system so sharia can creep in, slowly and steadily eroding our secular laws until sharia has overtaken the Constitution as the supreme law of the land. See Newt Gingrich, Speech to the American Enterprise Institute, July 29, 2010, <http://www.youtube.com/watch?v=oMvQ95ftvYI>. The fight against sharia in the United States is, in their perspective, “the civil rights struggle of the 21st century.” See American Public Policy Alliance, [http://publicpolicyalliance.org/?page\\_id=195](http://publicpolicyalliance.org/?page_id=195). In response, this campaign has launched a pre-emptive strike, promoting state and federal legislation to ban consideration of sharia in all American courtrooms. See, for example, Senate Bill 1028, as introduced in March 2011, <http://www.capitol.tn.gov/Bills/107/Bill/SB1028.pdf>. (Tennessee bill that would have made it a felony to support any state-designated sharia organization); State Question No. 755, available at <http://www.sos.ok.gov/documents/questions/755.pdf>. (Oklahoma “Save Our State” amendment prohibiting Oklahoma courts from considering international law or sharia law”); <http://publicpolicyalliance.org> (“American Laws for American Courts (ALAC),” model legislation which does not specifically prohibit sharia per se, but sharia is clearly its primary target).

3 The concept described here is that of a Muslim desiring to live by Divine Law. In practice, of course, this means that the rules that are followed are humanly-articulated *fiqh*. But because the *desire* is to follow Divine Law (not fallible *fiqh*), I use the term sharia to more accurately depict the concept.

4 The pronoun “her” is not anachronistic. Many Muslim religious-legal scholars (*fuqaha*) were (and are) women, as there were no gender-based substantive restrictions on performing Islamic legal scholarship. There are far too many examples to list here, but for a general introduction, see [Wiebke Walther, Women in Islam: From Medieval to Modern Times](#) (1993); Akram Nadvi, [Al-Muhaddithat: The Women Scholars in Islam](#) (2010) (preface to forthcoming forty-volume biographical dictionary); Khaled About El Fadl, [Women Jurists in Islamic History](#) (1994 seminar lecture to American Muslims Intent on Learning and Activism (AMILA)), available at [/www.youtube.com/watch?v=mvDCdcELq1I](http://www.youtube.com/watch?v=mvDCdcELq1I).

5 Another indication of Muslim religious-legal scholars’ collective humility is indicated by the phrase “God knows best” (Ar.: “*Allahu a’lam*”), which appears repeatedly throughout *fiqh* literature.

6 Again, there are far too many references to this principle to cite exhaustively here, but for one concise summary with reference to comparative legal theory, see Anver Emon, [To Most Likely Know the Law: Objectivity, Authority and Interpretation in Islamic Law](#), 4 *Hebraic Political Studies* 415-440 (2009).

7 The recipe metaphor illustrates how *fiqh* can be considered both a subset of and also different from sharia. When a group of scholars (*fuqaha*) followed a similar method and style (often that of their teacher), they tended to organize themselves into a school of law (*madhhab*).

8 For more on the methodological differences between the *fiqh* schools, see Appendix 1, “The Methodologies of the *Fiqh* Schools.”

9 Obedience to a *fiqh* rule could be ordered as part of judge’s order, where the judge is ruling on some *fiqh*-based issue, but this is because of the unique government-based role of the judge, not because of the ultimate correctness of the judge’s jurisprudential effort (*ijtihad*). Separate from a courtroom context, *fiqh*-based answers to individual factual questions—called “*fatwas*”—have only persuasive, not binding, authority over those who seek them.

10 There is a one exception to this rule: the *fiqh* opinions of the Shi’a imams, who are believed to have the unique attribute of infallibility. In practical terms, however, after the occultation of the imam in mainstream Shi’i theology, there is no infallible imam present today for most Shi’as, so Shi’a religious-legal scholars operate in the same epistemological reality as their Sunni counterparts.

11 For more on the nature of law and government, and the relationship between *fiqh* and *siyasa* in pre-modern Muslim legal systems, see Appendix 2 “Law and Government in Pre-Modern Muslim History: A Brief Summary.”

12 Early attempts by rulers to control how scripture would be interpreted is called the “*mihna*,” when Abbasid caliphs tried to dictate belief by requiring political and religious leaders take a theologically-based oath, rewarding refusal with imprisonment, torture, and sometimes death. Prolonged scholarly resistance ultimately ended the attempt, ultimately leading to (among other things) the separation of *fiqh* and *siyasa* legal realms). See Marshall G.S. Hodgson, *The Venture of Islam: Conscience and History in a World Civilization I: The Classical Age of Islam* (UCP, Chicago 1974) 285-319, 479-89; Khaled Abou El Fadl, *Speaking in God’s Name: Islamic Law, Authority and Women* 26 (2001) (“after the age of *mihna* . . . [the *fuqaha*’, or Muslim legal scholars] establish[ed] themselves as the exclusive interpreters and articulators of the Divine law. . . . [T]he inquisition was a concerted effort by the State to control the juristic class and the method by which Shari’ah law was generated. Ultimately, however, the inquisition failed and, at least until the modern age, the [*fuqaha*’, or Muslim legal scholars] retained a near exclusive monopoly over the right to interpret the Divine law.”).

13 I have borrowed this term from Sherman Jackson. See Sherman A. Jackson, *Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?* 30 *Fordham International Law Journal* 158 (2006).

14 Here, I disagree with the implications of Julie MacFarlane’s recent study (“Shari’a Law: Coming to a Courthouse to You? What Sharia’ Really Means to American Muslims,” ISPU Report (1/30/2012)). There, she suggests that American Muslims generally are not interested in American judicial recognition of their *fiqh*-based rights. See *id.* at p. 11 (“while many described the importance of being able to appeal to the formal legal system when necessary (particularly to enforce private agreements), respondents wanted continued access to their Islamic traditions in an informal family setting. All understood their private family law-related choices as separate from the formal legal system.”). Based on my legal research and interviews with family law attorneys representing Muslim clients before American judges, I believe that MacFarlane’s study does not completely reflect the full volume of American Muslims interested in judicial recognition of their *fiqh*-based claims.

15 For a more detailed discussion of many of the cases referenced in this section, see Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: An Introduction to Islamic Family Law in US Courts*, in Women's Rights and Islamic Family Law: Perspectives on Reform (Lynn Welchman, editor, 2004).

16 Odatalla v. Odatalla, 810 A.2d 93 (2002).

17 Habibi-Fahnrich v. Fahnrich, WL 507388 (NY Supp. 1995).

18 In Re Marriage of Obaidi v. Qayoum, 154 Wash. App. 609, 226 P. 3d 787 (2010); Zawahiri v. Alwattar, 2008 Ohio 3473 (Ohio Ct. App. 2008).

19 Aleem v. Aleem, 931 A. 2d 1123 (2008). Note that this is not necessarily the case for *talaq* divorces completed overseas and registered under the law of another country that recognizes such divorces. In such a case, principles of comity may cause the divorce to be recognized here.

20 Malak v. Malak, 182 Cal. App. 3d 1018 (1986). Again, if there is a formal custody ruling from another country that happens to follow gendered principles, this may be recognized here under principles of comity.

21 The First Amendment of the United States Constitution prohibits religious law from being enacted as the law of the land. There would thus be a fundamental constitutional problem with any attempts to introduce sharia as the basis of law in the United States. Thus, without repealing the First Amendment (again, highly unlikely), a sharia takeover of the law of the land would be quickly struck down as unconstitutional.

22 See, for example, Salim Mansour, *Delectable Lie: A Liberal Refutation of Multiculturalism* (2011).

23 Andrea Elliott, *The Man Behind the Anti-Sharia Movement*, New York Times (July 30, 2011), available at [www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all](http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all).

24 Ultimately, the anti-Islamic advocates won the day in Canada. "There will be no Sharia law in Ontario," said Ontario Premier Dalton McGuinty. "There will be no religious arbitration in Ontario. There will be one law for all Ontarians." See [http://www.ctv.ca/CTVNews/TopStories/20050912/mcguinty\\_shariah\\_050911/](http://www.ctv.ca/CTVNews/TopStories/20050912/mcguinty_shariah_050911/).

25 See [www.huffingtonpost.com/2010/06/10/us-minority-population-co\\_n\\_607369.html](http://www.huffingtonpost.com/2010/06/10/us-minority-population-co_n_607369.html) ("The nation's minority population is steadily rising and now makes up 35 percent of the United States, advancing an unmistakable trend that could make minorities the new American majority by midcentury.")

26 The anti-sharia campaigners, for example, frequently cite objectionable *fiqh* rules – say, punishing apostasy or limiting women's testimony—call them "sharia" and, on that basis, condemn sharia as oppressive to women and religious minorities. See <http://shariahthethreat.org/> ("Shariah institutionalizes discrimination against women, deprives people of freedom of expression and association, criminalizes sexual freedom, and incites hatred and violence against people of certain social groups. As manifested in countries officially ruled by Islamic law, shariah condones or commands abhorrent behavior, including underage and forced marriage, "honor killing" (usually of women and girls) to preserve family "honor," female genital mutilation, polygamy and domestic abuse, and even marital rape.").

27 For a more detailed study of the *fiqh* school methodologies, with comparison to the methodologies of interpretation in American constitutional law. See Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition and Reason in Islamic and American Jurisprudence*, 28 *Cardozo L. Rev.* 67 (2006).

28 For a summary of some of the key issues, see my forthcoming ISPU Policy Brief on Islamic Law Reform.

29 For more detail, see Asifa Quraishi, *The Separation of Powers in the Tradition of Muslim Governments*, in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, (Oxford University Press 2011, Tilmann Roder, Rainer Grote & Katrin Geenen, eds.).

30 See summary of the “*mihna*,” at supra note 13.

31 For example, the Abbasid Caliph al-Mansur approached Malik ibn Anas, the eponym of the *Maliki* school of *fiqh*, to adopt Malik's law book, “*al-Muwatta*,” as the official law of the empire. See Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (2000) 314-15 (also noting later Caliphs al-Mahdi and Harun al-Rashid making the same request). Malik did not like the idea. According to one report, Malik asserted that it would be “too severe to force the people of different regions to give up practices that they believed to be correct and which were supported by the *hadith* and legal opinions that had reached them.” Umar Faruq Abd-Allah, *Malik's Concept of 'Amal in the Light of Maliki Legal Theory* 100 (1978) (D.Phil University of Chicago 1978).

32 Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 *Journal of Legal Pluralism* 1 (1981).

33 Many point to Iran's theocratic system as an example of what sharia demands of Muslim governments. But it is important to realize that the Islamic Republic of Iran is a unique experiment in Islamic government that does not follow classical Muslim models of government, nor even mainstream Shia political theory. In brief, classical Shi'a legal and political theory centers the authority of decision-making (for *fiqh* and *siyasa* law) in the infallibility of a divinely-inspired *imām* descended from the Prophet. Shi'a theology holds that *fiqh* religious scholars should not hold political power without the presence of the *imām*. However, when the last Shi' *imām* went into occultation, this aspect of Shi'a law ceased to have practical impact, and Shia *fiqh* scholars found themselves in much the same position as their Sunni counterparts. So, at least until the imam's return, both Sunni and Shi'a *fiqh* scholars agree on this non-theocratic principle: *fiqh* scholars should not be the *siyasa* rulers. This long-standing principle was challenged by Ayatollah Khomeini's theory of the *velayat-e faqih*, which argued that today's *fiqh* scholars *should* take over the Iranian state, and this became the political doctrine of legitimacy of the Islamic Republic of Iran after 1979. For those concerned about the implications of Islamic government it is crucially important to recognize that Khomeini's theory drastically diverted from classical Shi'a political theory. It is a mistake, therefore, to look at Iran as a predictor of what will happen if Muslim political parties win power in Muslim majority countries today. If modern Muslim governments fall into the theocratic model of Iran, it will not be because sharia demands it.

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