

## **SOUL SEARCHING AND THE SPIRIT OF SHARI‘A: A REVIEW OF BERNARD WEISS’S THE SPIRIT OF ISLAMIC LAW**

THE SPIRIT OF ISLAMIC LAW. By Bernard G. Weiss. Athens, GA:  
University of Georgia Press, 1998. Pp. 211.

*Reviewed by Khaled Abou El Fadl\**

Islamic law is one of the most complex and influential legal systems the world has known, but it is one of the most understudied, oversimplified, and overgeneralized systems as well. Although there is a virtual dearth of sophisticated studies on Islamic law, scholars from two distinct persuasions, the Muslim fundamentalist and Western orientalist, have produced a large number of books in which they make sweeping (and largely unfounded) generalizations about the history and nature of Islamic law. Scholars from these two persuasions have contributed to the oversimplification of the Islamic legal tradition to the point that Islamic law today fails to attract the attention of serious scholars of comparative law. This, in part, is because both fundamentalists and orientalists have failed to give Islamic law its due as a legal system that is a product of a technical legal culture and practice. Rather, they have treated Islamic law as a branch of Islamic theology and, consequently, tended to see Islamic law as idealistic, speculative, and, to a large extent, not as law at all but as a form of ideology.<sup>1</sup> Both fundamentalists and orientalists have tended to read a determinacy, and even an inevitability, into Islamic law that the technical evolvement of the Islamic legal tradition hardly sustains. Compounding the problem is the fact that generations of scholars have theorized about inherent and unitary characteristics of Islamic law throughout its more than fourteen hundred years of history without sufficiently being grounded in its various branches, historical epochs, and technical micro-discourses.

Bernard Weiss's book, *The Spirit of Islamic Law*, is a good, but not entirely effective, antidote to the simplistic and essentialistic works that have

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\* Acting Professor, U.C.L.A. School of Law, The Omar and Azmeralda Alfi Distinguished Fellow in Islamic Law. I am grateful to Grace, my wife, and Anver Emon for their assistance with this essay.

1. See IGNAZ GOLDZIHNER, INTRODUCTION TO ISLAMIC THEOLOGY AND LAW 63 (Andras and Ruth Hamori trans., 1981). Goldziher argues that acting under the influence of a "theological spirit," Muslim jurists engaged in quibbling discriminations. *Id.* He goes on to describe Muslim juristic activity as marred in "absurd sophistry" and "dreary exegetical trifling." *Id.*

plagued the field of Islamic legal studies to date. Weiss renders the layperson a service by summarizing the historical development and main theoretical paradigms of Islamic law. However, Weiss does not manage to avoid entirely the misinformed and careless assumptions made by orientalist about Islamic law. There is no doubt that Weiss is sensitized against many of the unfortunate prejudices that have marked previous Western scholarship in this field. Ultimately, however, he tries to reconcile and balance between some of the long-held orientalist prejudices about Islamic law and the more careful and conscientious recent works. His effort at integrating orientalist approaches (which tend to make sweeping generalizations about the nature and mechanisms of Islamic law) with the more recent nuanced approaches (which tend to ground themselves in the micro-discourses and detailed processes of the law) have resulted in a rather hybrid book that suffers from significant inconsistencies and confusion. Consequently, Weiss's book is a useful introduction to the Islamic legal tradition, but in some respects, it is also a flawed work.

Weiss does not explain what he means by the "spirit of Islamic law," and whether legal systems actually possess a unitary and coherent spirit. He does not explore whether the methodologies, ideological premises, specific determinations, institutional structures, or claimed objectives define the spirit of a legal system. He does, however, seem to presume that one can find the spirit of Islamic law in its avowed jurisprudential theory and not necessarily in its actual processes. In order to identify the spirit of Islamic law, Weiss focuses on what Muslim jurists claim they are doing rather than what they actually end up doing. As discussed below, by paying inadequate attention to the microlevel practices of Muslim jurists, it becomes easier to generalize Islamic law in ways that ignore its doctrinal and institutional richness. In addition, it ends up perpetuating one of the most prevalent orientalist claims about Islamic law, which is that Muslim jurists were less interested in the actual practice of law than they were in legal theory. In Weiss's estimation, Muslim jurists were preoccupied more with the law as it ought to be than they were in the law as actually practiced.<sup>2</sup> Weiss does not fully explain the basis for this assertion or its implications. However, he does intimate that Muslim jurists were more interested in the systematic exposition of the theoretical basis for the law than in its practical implementation. This type of approach has led prominent orientalist, such as Joseph Schacht, to conclude that "[i]t might therefore seem as if it were not correct to speak of an Islamic

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2. BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 7 (1998).

law at all, as if the concept of law did not exist in Islam.”<sup>3</sup> Although on several occasions Weiss cites Schacht’s arguments as being authoritative, it is not clear whether Weiss would agree that Islamic law is so theoretical and speculative that it would not qualify as law at all.

In one of the few occasions in which Weiss explicitly addresses the meaning of the spirit of law, he juxtaposes literalist approaches and moralist approaches to legal interpretation. Weiss argues that literalism consists of a focus on the letter of law, in the sense of focusing on its explicit prohibitions and commands of textual sources. Moralism consists of a focus on the principles derivable from the same textual sources, sometimes in contradiction to the unambiguous pronouncements of the text. But Weiss argues, in the case of Islamic law, that the “spirit of the law” did not entail an opposition between the spirit and letter. This is because Muslim jurists were both moralists and literalists. They derived divinely ordained principles from the text, and, according to Weiss, “conformity to the dictates of the texts upon which the law is based is an integral part of that juristic mentality that we are here calling the ‘spirit of Islamic law.’”<sup>4</sup> Hence, Muslim jurists are moralists because they adhere to principles, but they also are literalists because they base those principles on the literal explications of the text. Weiss implies that this type of dynamic between literalism and moralism—the fidelity to authoritative texts and to the principles derived from those texts—is unique to Islamic law, or, at least, not shared by Western law. Therefore, unlike Western law, which Weiss contends the writings of St. Paul influenced, Islamic law did not differentiate between the spirit and letter of the law because for Muslim jurists they were one and the same.<sup>5</sup> Pedagogically, this approach is not helpful because it fails to clarify the general role of authority and authoritative texts in legal systems.

Legal systems are authority bound, and quite often a legal system will have a set of texts that it considers authoritative and binding. Jurists functioning within a particular legal culture normally do not feel at liberty to ignore authoritative texts considered central to that culture. If jurists aim to achieve particular normative objectives, they do so by engaging in a linguistic practice according to which they creatively interpret or construct the meaning of authoritative texts.<sup>6</sup> Furthermore, interpretive communities

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3. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 200 (1964).

4. WEISS, *supra* note 2, at 169.

5. *Id.*

6. See JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE AND POWER 106, 129 (1998) (discussing the linguistic practices of jurists). See generally KHALED ABOU EL FADL, REBELLION AND VIOLENCE IN ISLAMIC LAW (2001) (discussing the creative process underlying the formation of Islamic law).

form around these authoritative legal texts. These communities create chains of authority that bind jurists working within a specific legal culture.<sup>7</sup> Importantly, juristic interpretive communities, as communities of technical experts, engage in a variety of roles. They do not simply interpret the text, but rather utilize it as a medium in order to accomplish a variety of objectives. Jurists engage in social engineering, resolve conflicts, seek to establish order and justice, and negotiate with power through the channels of authority established within a legal system. Abiding by the channels of authority is crucial for the legitimacy of a juristic culture, and necessary if a juristic culture will obtain deference from the social or political order in which it exists.<sup>8</sup>

Considering the centrality of textual authority to all developed legal systems, it is difficult to understand Weiss's point about the spirit and letter of the law in the Islamic legal system. All developed legal systems base themselves on textual authority, and cumulative interpretive communities that develop around certain core texts provide such authority. As such, one can examine the determinations of a particular interpretive community at a particular point in time and analyze the specific ways in which an interpretive community negotiates the text. However, it is an oversimplification to contend that Western legal systems differentiate between the spirit and letter of the law while the Islamic legal system does not. For instance, it is unhelpful to attempt to make a broad statement characterizing whether the Jewish law, Common law, or Civil law systems are literalists or not. However, scholars have been making such broad and sweeping generalizations about Islamic law, and because they have afforded inadequate attention to the microdynamics of Muslim jurists, such generalizations have gone unchallenged for too long.

Aside from the failure to explain the intended meaning behind the phrase "spirit of the law," Weiss systematically sets out what he argues are the essential features of Islamic law. In the eight chapters of the book, he identifies those features as the espousal of divine sovereignty in law. As the source of all law and legitimacy, Muslim jurists considered God to be the sole sovereign and legislator. Accordingly, Muslim jurists were fixated upon sacred texts considered the repositories of divine revelation. Muslim jurists also evidenced an uncompromising intentionalist approach to the interpretation of these texts. By intentionalist, Weiss means that Muslim

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7. See generally KHALED ABOU EL FADL, *SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN* (2001) (discussing interpretive communities and Islamic law).

8. On the functions of law, see Richard L. Abel, *Redirecting Social Studies of Law*, 14 L. & SOC'Y REV. 805 (1980); ABOU EL FADL, *supra* note 6, at 23-26.

jurists focused on investigating the authorial intent behind the sacred text. It is the author of the text that determined its meaning, and the job of Muslim jurists consisted of discovering the intentions and will of the author. Weiss asserts, however, that Muslim jurists frankly acknowledged the uncertainty and fallibility of human efforts at capturing the divine intent. As a result, Muslim jurists accepted probabilism as the foundation of valid interpretation. By probabilism, Weiss means that Muslim jurists accepted that human efforts at uncovering the divine intent are imperfect and fallible. Therefore, Muslim jurists acknowledged that laws may be based on a probability, and not necessarily a certainty, of belief about the correctness of the textual interpretations.

Weiss argues that Muslim jurists were tolerant of legal diversity, and were willing to disseminate juristic authority among multiple schools of legal thought. Although Muslim jurists were textualists and all authority and legitimacy for them derived from the text, they also exhibited a moralistic bent grounded in a particular social vision. Weiss does not sufficiently elaborate upon this social vision, but he does argue that Muslim jurists demonstrated a preoccupation with both defining the limits of the power of government and regulating the affairs of private individuals. In this regard, Weiss claims that even though Muslim jurists considered the rights of God to be coterminous with public interests, they primarily concerned themselves with dealing with private individual interactions. Public law, Weiss asserts, was considered to be in the service of private law, and “of free human interaction regulated by private rights.”<sup>9</sup>

Weiss's detailed discussion on the various characteristics of Islamic law is competent and often insightful. His exposition, however, suffers from a persistent methodological fallacy that has marred the works of many orientalist, termed here “the fallacy of legal exceptionalism.” The fallacy of legal exceptionalism is the tendency among scholars to presume that one should study and understand Islamic law by exclusive reference to its processes and doctrines. This methodological trend does not understand Islamic law in the context of general sociologies of law, or by reliance on the comparative processes of urban legal systems. Rather, legal exceptionalism views the Islamic legal system as an exotic phenomenon that is intrinsically and distinctively Islamic. Accordingly, Muslim jurists are not considered practitioners in a legal culture, but are thought of as articulators of Islamic culture. Muslim jurists are treated as Muslims first and as lawyers second. The insights of legal theory or sociology on the functions of law, or the

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9. WEISS, *supra* note 2, at 185.

characteristics of legal cultures, are treated as irrelevant or non-generalizable to the Islamic context. For instance, while the primary preoccupation of jurists functioning within a variety of legal systems is the resolution of disputes and the establishment of order, this logic is not considered relevant to the processes of Islamic law.<sup>10</sup> It is as if Muslim juristic culture is determined by its unique set of normative ideas and principles rather than by identifiable processes of legal systems. The end result of the methodology of legal exceptionalism is to make Islamic law somewhat of an oddity in the history of legal systems.

There are various manifestations of the fallacy of legal exceptionalism in Weiss's book. However, I do not wish to overstate the point because Weiss does, in fact, avoid many of the orientalist legacies. Weiss's earlier book on Islamic law is one of the most detailed works on Islamic jurisprudential theory.<sup>11</sup> Furthermore, Weiss is to be commended for avoiding the orientalist obsession with the origins of Islamic law. Since the beginning of this century, orientalist scholars seem to assume that every Islamic legal institution and concept must have been borrowed or co-opted from either Jewish or Roman law.<sup>12</sup> As if those scholars deem it inconceivable that the Muslim civilization could have produced anything original, they presume that Islamic law must have depended thoroughly on the intellectual product of non-Islamic cultures.<sup>13</sup> Blissfully, however, Weiss averts the dogmatic trap of searching for the origins of Islamic law, and he deals with Islamic jurisprudence as a significant contribution to the intellectual human heritage.

Unfortunately, Weiss does perpetuate another unfortunate legacy: the presumption of mass fabrications. Weiss cites Joseph Schacht and Norman Calder in arguing that the great majority of Islamic traditions were fabricated,

10. See ALAN WATSON, *THE NATURE OF LAW* 40-41 (1977) (stating that the primary function of law is to resolve conflicts and establish order).

11. See BERNARD G. WEISS, *THE SEARCH FOR GOD'S LAW: ISLAMIC JURISPRUDENCE IN THE WRITINGS OF SAYF AL-DĪN AL-ĀMIDĪ* (1992). For a related collection of articles, see *STUDIES IN ISLAMIC LEGAL THEORY* (Bernard G. Weiss ed., 2002).

12. See PATRICIA CRONE, *ROMAN, PROVINCIAL AND ISLAMIC LAW: THE ORIGINS OF THE ISLAMIC PATRONATE* 92-93 (1987). Crone states "the Sharī'a is provincial law recast with Jewish concepts at its backbone and numerous Jewish (and other foreign) elements in its substantive provisions." *Id.* at 93. See also A. J. Wensinck, *Die Entstehung der muslimischen Reinheitsgesetzgebung*, 5 *DER ISLAM* 1 (1914) (discussing the idea that Islamic law is an amelioration of Rabbinic law). For a critique of this thesis, see S.V. Fitzgerald, *The Alleged Debt of Islamic to Roman Law*, 67 *L.Q. REV.* 81, 81-102 (1951); Wael B. Hallaq, *The Use and Abuse of Evidence: The Question of Provincial and Roman Influences on Islamic Law*, 110 *J. ORIENTAL AM. SOC'Y* 79, 79-91 (1990).

13. See PATRICIA CRONE & MICHAEL COOK, *HAGARISM: THE MAKING OF THE ISLAMIC WORLD* 30-32, 37-38, 180 n.11 (1977); JOSEPH SCHACHT, *THE ORIGINS OF MUHAMMADAN JURISPRUDENCE* 83, 95, 99, 182, 187, 216 (1950) [hereinafter SCHACHT, *ORIGINS*]; SCHACHT, *supra* note 3, at 13, 15-27.

presumably by early Muslim jurists or their students.<sup>14</sup> Muslim jurists, according to Weiss, were strict monotheists who recognized God as the source of all authority. The various early schools of Islamic law felt increasingly pressured to base their views on divinely inspired textual sources. Since God was the source of all authority, personal views or customary practices unsupported by divinely inspired text would not suffice to establish the legitimacy of the jurists. Consequently, according to orientalists, Muslim jurists, in a creative and dialectical process, fabricated a large number of traditions, which they then attributed to the Prophet or one of the Prophet's companions.<sup>15</sup> Weiss uncritically accepts these speculative arguments by orientalists such as Schacht and Calder, and ignores the far more nuanced and reasoned studies on this subject by scholars such as Fazlur Rahman and Ahmed Hasan.<sup>16</sup>

The point is that this long-standing presumption of widespread fabrication of traditions reflects the phenomenon that I have described as the fallacy of legal exceptionalism. It is highly doubtful that a juristic culture, Islamic or not, might engage in the active invention of the textual sources from which it derives authority.<sup>17</sup> Orientalists, rather incoherently, have maintained that, on the one hand, Muslim jurists are strict textualists, as they base all their determinations on constructions of the authoritative texts from which they derive authority. However, on the other hand, Muslim jurists invented and fabricated the texts upon which they base this authority. From a comparative perspective, I am not aware of any other urban legal culture that has engaged in a similar dynamic of first developing a legal practice, then inventing the textual authority for this legal practice and projecting backwards the invented texts to the very genesis of the legal system, and then finally adhering strictly and literally to the texts that they fabricated. Such odd behavior in the history of law ought to be proven using something more systematic than speculative textual analysis.<sup>18</sup>

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14. WEISS, *supra* note 2, at 10-13.

15. *Id.* On the widespread fabrication of Islamic legal traditions, see SCHACHT, ORIGINS, *supra* note 13, at 138-89; SCHACHT, *supra* note 3, at 28-48; GOLDZIHNER, *supra* note 1, at 38-39; N.J. COULSON, A HISTORY OF ISLAMIC LAW 42-43, 64-65 (1964). See also NORMAN CALDER, STUDIES IN EARLY MUSLIM JURISPRUDENCE 209-14 (1993); JOHN E. WANSBROUGH, QUR'ANIC STUDIES: SOURCES AND METHODS OF SCRIPTURAL INTERPRETATION (1977).

16. See FAZLUR RAHMAN, ISLAMIC METHODOLOGY IN HISTORY (1965); AHMAD HASAN, THE EARLY DEVELOPMENT OF ISLAMIC JURISPRUDENCE (1970).

17. See ABOU EL FADL, *supra* note 7, at 103-10 (arguing that Prophetic traditions are a product of a cumulative and evolving authorial enterprise).

18. For an example of such speculative textual analysis, see CALDER, *supra* note 15, at 19, 198-222, 244-47. Weiss, however, describes Calder's speculations as "seminal." WEISS, *supra* note 2, at 11. For a refutation of Calder's arguments, see Yasin Dutton, Book Review, 5 J. ISLAMIC STUD. 102 (1994) (reviewing CALDER, *supra* note 15). For a refutation of the thesis of mass fabrications, see

At a more basic methodological level, Weiss, following in the steps of many earlier scholars, defers too quickly to what Muslim jurists assert about their own intentions and processes. As noted above, Weiss sees Muslim jurists as strict monotheists who cannot conceive of a source of authority other than God. Therefore, Weiss argues that Islamic jurisprudence is fundamentally and unequivocally about the search for the divine will as revealed in the text. Nonetheless, Weiss recognizes the considerable amount of indeterminism in Islamic jurisprudence. In fact, anyone who has done research in Islamic jurisprudence is struck by the enormous diversity of juristic opinions on nearly every major and minor point of law. Ignaz Goldziher, the prominent Western orientalist, considered this as evidence of sophistry and pedantic quibbling among Muslim jurists.<sup>19</sup> It would seem, however, that this indeterminacy and willingness to engage in speculative exercises is inconsistent with the avowed intentionalist orientation of Muslim jurists. However, Weiss does not believe so because in the most fundamental sense Muslim jurists were searching for the divine will. Muslim jurists realized that, in most cases, one cannot discover the divine will with a level of certainty, and, as a result, they contented themselves with the probabilities.

Essentially, Weiss is correct, but this intentionalist orientation, quite popular with Western orientalists and Muslim fundamentalists, is not all that helpful in understanding the actual processes of Islamic law. As noted above, legal systems, by their very nature, are authority-bound, and it is a rare jurist indeed who would claim to rely on his unfettered discretion in expounding the law. Regardless of whether jurists claim to rely on the will of God, the original intent of the founding fathers, the will of the people, custom or habit, or the indisputable dictates of reason, they search for an authority higher than themselves.<sup>20</sup> Interestingly, as Weiss recognizes, Muslim jurists often considered the legal precedents of their juristic predecessors to be dispositive authority.<sup>21</sup> In fact, the explicit or implicit reliance on the practice and prior determinations of jurists is a common feature of legal systems.<sup>22</sup> Weiss

MOHAMMAD MUSTAFA AZAMI, *STUDIES IN EARLY HADITH LITERATURE* (1968); IFTIKHAR ZAMAN, *THE EVOLUTION OF A HADITH: TRANSMISSION, GROWTH, AND THE SCIENCE OF RIJAL IN A HADITH OF SA'D B. ABI WAQQAS* (1991).

19. In reality, the reliance on hypotheticals and speculative thought is a common characteristic of all the major legal systems of the world. See Alan Watson & Khaled Abou El Fadl, *Fox Hunting, Pheasant Shooting, and Comparative Law*, 48 AM. J. COMP. L. 1 (2000).

20. See ALAN WATSON, *THE EVOLUTION OF LAW* 117 (1985).

21. WEISS, *supra* note 2, at 136. Weiss acknowledges Sherman Jackson's work, which persuasively establishes this point. See SHERMAN JACKSON, *ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI* 69-96 (1996).

22. See generally YASIN DUTTON, *THE ORIGINS OF ISLAMIC LAW: THE QUR'AN, THE MUWATTA' AND MADINAN 'AMAL* (1999) (stating that the actions of men ('amal) preserved the true



acknowledges that Muslim jurists most often would rely on and interpret juristic precedent within their legal school of thought instead of relying on de novo interpretations of the original sources of law.<sup>23</sup> Consequently, the question is: Considering the role of precedents and the reliance on cumulative communities of legal interpretation, how meaningful is the claim of juristic intentionalism?

In this regard, one should keep several points in mind. Although Weiss does not mention this fact, there was an explicit debate in early Islam on the issue of God's sovereignty. This was known as the *hakimiyyah* debate between a seditious group known as the Khawarij, and the factions supporting Ali b. Abi Talib, the Prophet's cousin and the fourth Muslim Caliph. The Khawarij rebelled against Ali, accusing him, among other things, of compromising God's sovereignty by accepting arbitration that was supposed to resolve a political dispute between Ali and his opponents. The Khawarij contended that God's sovereignty would be meaningless unless God's will is both determinable and effective, while Ali argued that humans were responsible for mediating the assertion of God's sovereignty. The efforts of human beings are to be considered their best efforts, but such efforts are not conterminous with the sovereign will of God.<sup>24</sup>

Partly due to this earlier theological schism between Ali and the Khawarij, Muslim jurists do not focus on the *hakimiyyah* debate in their works of jurisprudence. Rather, as Weiss recognizes, they divide into two main camps. The first camp, the *mukhatti'ah*, argues that on most jurisprudential issues, jurists will be rewarded for their best efforts. In the Hereafter, those who have managed to discover the divine will be rewarded more generously than those who, despite their best efforts, failed to do so. Ultimately, however, both those who discover the divine will and those who fail to do so will receive the bliss of God if they did the best they could with the available evidence. The second camp, the *musawwibah*, argues that there are no correct answers to most jurisprudential issues. God's will is simply that people exert an effort in studying the law; ultimately, however, He wills for people to act according to what they individually believe to be the truth in jurisprudential matters. In that sense, the will of God is contingent on the best efforts and sincerity of belief on the part of each individual jurist. According to the *musawwibah*, God's law is relative because the divine will is

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expression of Islamic law).

23. See WEISS, *supra* note 2, at 114-18. The original sources of law were the Qur'an and the traditions of the Prophet and his companions.

24. See ABOU EL FADL, *supra* note 7, at 23-24.

contingent on the human will.<sup>25</sup>

The other significant point to consider in this regard is that Weiss does not deal with a variety of elements of indeterminacy in Islamic law, such as custom (*urf*), public interest (*maslahah*), or equity (*istislah*), and he does not give adequate attention to the elements of *tarjih* (the various factors that jurists consider in weighing the evidence before reaching a legal determination).<sup>26</sup> Although custom, public interest, and equity could be extratextual sources of law, Muslim jurists often used the text as a hook in the pursuit of these goals. As Weiss explains, Muslim jurists considered the ultimate objectives of the law in determining the mandates of the text. The text did not constrain the maneuverability of Islamic law, not only because Muslim jurists were skilled interpreters of the text, but also because the relevant textual sources were numerous and complex. As Weiss concedes, “the textual landscape [of Islamic law] was not only vast but indeterminate.”<sup>27</sup>

The indeterminacy and vastness of Islamic text, and the numerous interpretive methods utilized by Muslim jurists in the construction of meaning, should put the notion of intentionalism in the proper perspective. Participants in technical juristic cultures will purport to represent the will of the legislator, the sovereign, the forefathers, or the well-established principles of justice. These, however, are part of the symbolism of authority in law, and the technique of a juristic linguistic practice. Whether in fact there is any sublime will being uncovered in the process of legal interpretation is a different matter altogether. Put differently, Muslim jurists, like most jurists in any legal culture, do claim that they are uncovering the will of an authority higher than themselves. Even when the will being discovered is that of God, the intervention of legal precedents, interpretation, and hermeneutics and the utilization of discretion in the interpretive process add layers of complexity to the claim of intentionalism. It is an oversimplification to think of Islamic law

25. See WEISS, *supra* note 2, at 117-21. Weiss refers to the *musawwibah* school of thought as “the infallibilists,” but he does not explore the implications of their arguments about the divine will. See ABOU EL FADL, *supra* note 7, at 148-50. Peculiarly, Weiss contends that Muslim jurists considered the divine will to be no less discoverable than the intent of a human author or speaker. WEISS, *supra* note 2, at 58, 64.

26. See Ihsan Abdul-Wajid Baghby, *Utility in Classical Islamic Law: The Concept of ‘Maslahah’* in ‘Usul al-Fiqh’ (1986) (unpublished Ph.D. dissertation, University of Michigan) (on file with author); John Makdisi, *Legal Logic and Equity in Islamic Law*, 33 AM. J. COMP. L. 63 (1985); MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 245-96 (1991); Felicitas Opwis, *Maslaha: An Intellectual History of a Core Concept of Islamic Legal Theory* (2001) (unpublished Ph.D. dissertation, Yale University) (on file with author); ABOU EL FADL, *supra* note 7, at 37-47; WAEL B. HALLAQ, *AUTHORITY, CONTINUITY, AND CHANGE IN ISLAMIC LAW* 127-32 (2001); WEISS, *supra* note 11, at 729-38.

27. WEISS, *supra* note 2, at 110.

as an indefatigable search for God's will. Perhaps the divine will is the stated aspiration of Muslim jurists, but that does not mean that this aspirational foundation can explain the actual processes and dynamics of Islamic law. For instance, numerous justices that once sat on the U.S. Supreme Court have claimed that they implemented the original intent behind the text of the Constitution. It would be rather simplistic, however, to attempt to describe the development of U.S. constitutional law as a protracted intentionalist exercise.

At times, the fallacy of legal exceptionalism has contributed to some of the most incoherent assumptions about Islamic law. Frankly, these assumptions appear at times to be the product of social biases inherited from the Age of Colonialism, when scholars attached to the colonial forces presumed Islamic law to be primitive, impractical, and unworkable, and therefore, replaceable by more so-called progressive legal systems.<sup>28</sup> One of the most trenchant biases is the belief that Islamic law was idealistic, and that Muslim jurists were interested more in the law as it ought to be than as practiced.<sup>29</sup> In evaluation of an orientalist such as Schacht, Islamic law represented "an extreme case of jurists' law." Muslim jurists were not motivated by juridical technique or by the needs of practice. Rather, the primary motivation for Muslim jurists was religious zeal, which tempted Muslim jurists to engage in speculative explorations into the will of God.<sup>30</sup> Due to its idealistic and moralistic character, Islamic law ultimately was unworkable. It remained theoretical, impractical, and perhaps even a sociological failure. For example, Schacht, whom Weiss cites approvingly throughout his book, not only concludes that Islamic law is not law at all, as noted above, but even suggests that as a legal system it is not workable for modern lawyers.<sup>31</sup> According to both Schacht and Weiss, Islamic law possesses a pronounced individualistic and private character.<sup>32</sup> Muslim jurists were concerned primarily with the resolution of private disputes. As part of this paradigm, Islamic criminal law remained largely private in character. The family of the victim had the right of tallion, but there were no crimes against society. After explaining that Muslim juristic thinking does not

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28. See generally EDWARD W. SAID, *ORIENTALISM* (1978); BRYAN S. TURNER, *ORIENTALISM, POSTMODERNISM AND GLOBALISM* (1994).

29. WEISS, *supra* note 2, at 7.

30. SCHACHT, *supra* note 3, at 209.

31. Schacht states, "[Islamic law] has, therefore, not easily lent itself to the technical treatment applied to it by modern lawyers in the majority of contemporary Islamic states." *Id.* at 4. Weiss states that "we cannot automatically equate the rules of the Shari'a [Islamic law] with law." WEISS, *supra* note 2, at 20.

32. See SCHACHT, *supra* note 3, at 4; WEISS, *supra* note 2, at 184-85.

understand the concept of a corporate person, and does not regard the state or its people as legal entities, Weiss asserts the following: “Strictly speaking, the concept of crime as understood in Western societies does not exist in their thinking. There is no such thing as an offense against the state or against society, since these have no status in the law.”<sup>33</sup> Nevertheless, Weiss notes that Muslim jurists were concerned with limiting the power of the state in relation to its subjects, but they did so primarily by addressing private concerns. In doing so, Muslim jurists believed that they could keep the state within its divinely ordained limits.<sup>34</sup>

These various generalizations about Islamic law and the practice of Muslim jurists are not based on any microlevel sociological studies. Furthermore, these generalizations amount to the implication that Islamic law is a primitive legal system. As A. S. Diamond pointed out years ago, since the works of Maine on ancient law, a widespread misconception that pre-modern legal systems did not distinguish between crimes and civil injuries has existed. However, as Diamond has noted, this distinction may be perennial, but it was not always easily observable.<sup>35</sup>

The irony, however, is that Muslim jurists explicitly state that in cases of intentional injuries the rights of the state are not contingent on the rights of the individual. For instance, the family of a murder victim can demand punishment or compensation, or the family may simply forgive the perpetrator. Nevertheless, if the family of the victim chooses compensation or forgiveness, the state still may impose a separate punishment on the perpetrator in defense of the rights of the public.<sup>36</sup> In addition, there are crimes such as *hirabah* (banditry and highway robbery) that, by definition, the law considers crimes against society. The state does not give the victim of such a crime the option to forgive or demand compensation, and the state must punish the perpetrator.<sup>37</sup> In addition, Islamic legal literature is replete with treatises on the laws of taxation, the regulation of public works and trusts, and administrative law.

However, there is a much more basic issue implicated here. Orientalist scholars consistently have employed the distinction between private and public law as if this division is natural and self-evident. For example, not a single orientalist has attempted to define this distinction by reference to

33. WEISS, *supra* note 2, at 181. Schacht makes the same point. See SCHACHT, *supra* note 3, at 187.

34. See WEISS, *supra* note 2, at 183.

35. See A. S. DIAMOND, PRIMITIVE LAW 279-80 (1935).

36. See IBN RUSHD, BIDAYAT AL-MUJTAHID WA NIHAYAT AL-MUQTASID 724 (1999); I ‘ABD AL-QADIR ‘UUDAH, AL-TASHRI’ AL-JINA’I AL-ISLAMI 774-76.

37. See *id.* at 763-67; ABOU EL FADL, *supra* note 6, at 131-38.

general works on jurisprudence. In reality, however, the distinction is subtle, difficult, and, in the opinion of some jurists, indefensible. Historically, while the Roman and Civil law systems differentiated between public and private affairs, the Common Law system did not, except perhaps in the case of crimes against the majesty, which the Common Law system considered treasonous.<sup>38</sup> Nevertheless, one suspects that orientalist are not making a jurisprudential point, but rather a cultural one. Orientalists seem to labor under cultural assumptions about the development of Muslim societies. Purportedly, Muslim societies have not developed at-large ways of thinking about the state or society. The very notions of citizenry, human legislation, or fictional legal entities, such as corporations, were absent from Muslim thinking as if strong monotheistic belief prevented the development of the political notion of the state. Purportedly, Muslims thought of the members of society, first and foremost, as God's faithful subjects. Presumably, people may have interacted with each other in their individual capacity, but the only thing that united them as a collectivity was their relationship to God.<sup>39</sup> Importantly, these cultural assumptions are at the heart of the notion of oriental despotism, or what at times has been called sultanistic regimes.<sup>40</sup>

This is not the place to analyze the concept of oriental despotism, but it is important to note that these socio-historical biases do tend to distract from microlevel examinations of the actual practices of Islamic law, and intend to support fallacies of legal exceptionalism. Even more, the habit of legal exceptionalism forces orientalist scholars into intellectually forced positions. Effectively, Islamic law is read in such a way as to confirm the cultural suppositions about Muslim religious thinking. For instance, as already noted above, Weiss and others argue that Muslim jurists were idealistic, moralistic, and often speculative.<sup>41</sup> According to Weiss, Muslim jurists made law for the Hereafter. In Weiss's words: "The fundamental preoccupation of Muslim

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38. See THOMAS ERSKINE HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* 366-70 (1937); JULIUS STONE, *THE PROVINCE AND FUNCTION OF LAW* 103-4, 491-92 (2d prtg. 1950).

39. See WEISS, *supra* note 2, at 159 (arguing that Islamic law does not know the concept of the corporate person); SCHACHT, *supra* note 3, at 206 (arguing that the whole concept of institutions is absent in Islamic law); BERNARD LEWIS, *WHAT WENT WRONG?: WESTERN IMPACT AND MIDDLE EASTERN RESPONSE* 111 (2002) (arguing that unlike Roman law, Islamic law did not recognize the concept of corporate legal persons); GEORGE MAKDISI, *THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST* 224 (1981) (arguing that the corporate concept of the medieval European university could not have come from the Muslim world because Islamic thought lacks the notion of a corporate person); BERNARD LEWIS, *THE POLITICAL LANGUAGE OF ISLAM* 63 (1988) [hereinafter LEWIS, *POLITICAL LANGUAGE*] (arguing that there is no concept of citizenship in Islam).

40. See generally PATRICIA SPRINGBORG, *WESTERN REPUBLICANISM AND THE ORIENTAL PRINCE* 18-20 (1992); KARL AUGUST WITTFOGEL, *ORIENTAL DESPOTISM: A COMPARATIVE STUDY OF TOTAL POWER* (1957); *SULTANISTIC REGIMES* (H.E. Chehabi & Juan J. Linz eds., 1998).

41. See *supra* text accompanying notes 29-31.

thinking about the Shari‘a is with duties that human beings have toward God and with sanctions that belong to the world to come, not to this world.”<sup>42</sup>

This claim is consistent with the tendency to think of Islamic law as a moralistic and theoretical discourse rather than actual law. Weiss does cite the works of scholars such as David Powers, Sherman Jackson, and Baber Johansen on the practice of Islamic law, as well as the active dynamics between Muslim jurists and social realities, but he does not explore the implications of these studies adequately.<sup>43</sup>

Interestingly, Weiss recognizes that Muslim jurists often differentiated between the legal consequences of an act on this earth and the results in the Hereafter. Some legal acts could be valid, although ultimately considered sinful in the eyes of God, and some acts legally are invalid even if they are lawful in the eyes of God. The division between the temporal and divine consequences of legal acts is one of the most salient features of classical Islamic jurisprudence. This was treated partly as a matter of jurisdiction; the state and its courts did not possess jurisdiction to punish every sinful act.<sup>44</sup> Certain sinful behavior such as acts of sexual immodesty or lewdness, short of adultery or fornication, or fraud or duress in contracts and transactions, short of actual theft, were left to the discretion of the human legislator to punish or not. Courts, however, do not have jurisdiction to punish the failure to pray or perform pilgrimage to Mecca.<sup>45</sup> Furthermore, abusing the power of divorce or using God’s name in vain were considered sinful acts, but the state did not possess the power to punish them.<sup>46</sup>

42. WEISS, *supra* note 2, at 20.

43. For reasons that are not clear to me, Weiss does not discuss the influential studies of Wael Hallaq on Islamic law. *See generally* HALLAQ, *supra* note 26; Wael B. Hallaq, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNĪ USŪL AL-FIQH (1997); Wael B. Hallaq, LAW AND LEGAL THEORY IN CLASSICAL AND MEDIEVAL ISLAM (1995).

44. *See* KHALED ABOU EL FADL, AND GOD KNOWS THE SOLDIERS: THE AUTHORITATIVE AND AUTHORITARIAN IN ISLAMIC DISCOURSES 88 (2001); ABOU EL FADL, *supra* note 7, at 149-50.

45. Muslim jurists argued that the only exception is if the failure to pray or perform other religious rites constitutes an act of apostasy. Apostasy is a technical legal category with specified elements. The crime of apostasy is established when a Muslim converts to another religion or denies one of the fundamental precepts of the Islamic faith. In classical jurisprudence, the offender is given three nights and days to repent, and if he/she does not, he/she will be executed. Repentance is accomplished by repeating the testament of faith, stating that there is no God but God, and that Muhammad is the Prophet of God. According to the majority view, if the offender pronounces the testament of faith, no further proceedings are permissible against him/her and the offender must be released. *See* 2 ‘ABD AL-QADIR ‘UUDAH, AL-TASHRI’ AL-JINA’I 706-31. *See also* MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW 49-58, 61-64 (1982) (discussing the classical law of apostasy and arguing that the classical position is not supported by the Qur’an, and therefore should be abrogated in the modern age).

46. Interestingly, modern Islamic puritans or fundamentalists eradicate the distinction between the temporal and divine, and seem to empower the state to punish all sinful acts.

The essential point here is that what orientalists often describe as idealistic or speculative thought is a common feature of all legal systems.<sup>47</sup> Meanwhile, Muslim juristic thought exhibits a technical legalism and realism that is the earmark of a functioning and socially-engaged legal system. The fact that Islamic law did not develop institutions that mimic the development of the Roman and Civil legal systems cannot support a claim of exceptionalism. In fact, as is the case with most systems of law over matters related to jurisdiction over legal acts, Muslim jurists revealed a preoccupation with the temporal consequences, often to the exclusion of the sacred.<sup>48</sup>

Part of the legacy of the presupposition of oriental despotism is the long-held belief that Muslim jurists were realists in one important regard: their recognition of despotic governments. Accordingly, orientalists often contend that Muslim jurists legitimated despotism and recognized the ruler as having the right to demand absolute obedience from his subjects in all matters that did not involve a direct violation of God's divine command. In the words of Weiss: "[Muslim jurists] were all, almost without exception, political conservatives and upholders of the status quo, even to the extent of regarding tyranny as better than revolution."<sup>49</sup> Therefore, according to the prevailing orientalist paradigm, Muslim jurists were idealists and moralists, but not when it came to recognizing tyranny. Here they were realists in the most vulgar sense of the word. In fact, there is an extended amount of literature emphasizing that Muslim jurists legitimated the usurpation of power, accepted most forms of despotism, and were political quietists.<sup>50</sup> I have

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47. See Watson & Abou El Fadl, *supra* note 19, at 3-35; ALAN WATSON, SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY, at xiii (1984).

48. Schacht seems to have noticed that Islamic law is often technical and formalistic, and that this aspect often trumps vague moral standards such as fairness, justice, and truth. Surprisingly, though, Schacht ascribes this to the fact that Muslim jurists were interested in providing "concrete and material standards" and not "formal rules on the play of contending interests, which is the aim of secular laws." SCHACHT, *supra* note 3, at 203-4. Schacht is confused by the fact that Muslim jurists act like lawyers instead of moral philosophers, but instead of acknowledging this fact, he pronounces a distinction between concrete material standards and formal rules for contending interests. This distinction is not only unknown to jurisprudence, but it also is entirely incoherent. Schacht seems to confuse substantive laws with rules of procedure. Interestingly, he accuses Muslim jurists of mixing substantive law with rules of procedure because, according to him, Muslim jurists did not understand the difference. *Id.* at 188-98. Schacht, however, ignores the fact that rules of procedure differ from one historical period to another, and from one legal jurisdiction to another. In legal hornbooks, Muslim jurists make passing reference to laws of procedure, but their main goal is to elucidate substantive law. Books on administrative law often set out rules of procedure.

49. WEISS, *supra* note 2, at 178.

50. See H.A.R. Gibb, *Constitutional Organization*, in 1 LAW IN THE MIDDLE EAST: ORIGIN AND DEVELOPMENT OF ISLAMIC LAW 3-27 (Majid Khadduri & Herbert J. Liebesny eds., 1955); ANN K.S. LAMBTON, STATE AND GOVERNMENT IN MEDIEVAL ISLAM: AN INTRODUCTION TO THE STUDY OF ISLAMIC POLITICAL THEORY: THE JURISTS 242-63 (1981); HANNA MIKHAIL, POLITICS AND REVELATION: MĀWARDĪ AND AFTER (1995); LEWIS, POLITICAL LANGUAGE, *supra* note 39, at 91,

challenged already the coherence of this view in an extensive study on Muslim juridical discourses on rebellion.<sup>51</sup> The belief that Muslim jurists legitimated tyranny and forbade all forms of rebellion is defensible only if one ignores the actual micro-discourses of Muslim jurists. In addition, once again, this long-held view regarding Muslim juristic discourses is a direct product of legal exceptionalism. It ignores the comparative discourses of other legal cultures and the details of juristic practice in relation to the sociological function of legal orders.

Other than the issue of obedience to rulers, Weiss seems to believe that despotism and hierarchies of power are a pervasive aspect of Islamic law. Reasonably enough, Weiss argues that classical Islamic law is patriarchal in nature in that it considers the men to be the head of their families and expects them to be the providers, protectors, and leaders. Weiss, however, goes further than the mere recognition that all legal systems, including Islamic, are patriarchal and biased towards men. In a surprising statement, he argues as follows:

Only the patriarchal extended family can function with optimal effectiveness as the cradle and safe haven of human life. *Any restructuring of the family along other lines can be said most assuredly to be contrary to the spirit of Islamic law.* Family life requires a hierarchy in which females and children are under the authority of males, although males must exercise that authority responsibly and with kindness.<sup>52</sup>

This statement brings us full circle to the ambiguity surrounding the notion of the “spirit of Islamic law.” One could interpret Weiss to be making a normative argument—any attempt at effecting family law reform so as to alter the relations of patriarchy is a violation of the spirit of Islamic law. Alternatively, one could interpret him to be making a descriptive argument—Muslim jurists would consider any attempt at restructuring the family to be a violation. However, if the statement is descriptive, then it is puzzling. Muslim jurists did not talk in terms of the spirit of Islamic law, and there are aspects of Islamic family law that one would consider under modern

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101-02; Michael Cook, *Activism and Quietism in Islam: The Case of the Early Murji'a*, in ISLAM AND POWER 21-22 (Alexander S. Cudsi and Ali E. Hillal Dessouki eds., 1981).

51. See generally ABOU EL FADL, *supra* note 6. Hanna Mikhail raised questions about the soundness of the accepted Western position regarding Islamic political thought. See MIKHAIL, *supra* note 50, at 15-56. More recently, Azami challenged this position from a historical perspective. See AZIZ AL-AZMEH, *MUSLIM KINGSHIP: POWER AND THE SACRED IN MUSLIM, CHRISTIAN, AND PAGAN POLITIES* (1997).

52. WEISS, *supra* note 2, at 153 (emphasis added).



standards to be quite liberal.<sup>53</sup> It seems, however, that Weiss sees a coherence in the social vision of Muslim jurists that they faithfully and persistently served.<sup>54</sup> Unfortunately, this social vision was both patriarchal and despotic. One must wonder, however, if the so-called spirit of Islamic law is part of a projected image of oriental societies that reflects the belief system of Western scholars, or if it is a genuine spirit that Muslim jurists endorsed.

Weiss's book reflects several other misconceptions about Islamic law that are worth noting. Weiss assumes that Islamic law mandates the segregation of the sexes,<sup>55</sup> that women should remain at home at all times, and that women should not venture outside, unless they receive permission from their husbands and are in the company of a male relative.<sup>56</sup> In the field of ritual, Weiss assumes that according to Islamic law, all commercial establishments must be closed down during Friday services, and that the state has the obligation, or duty, to force males to attend the Friday congregational prayers.<sup>57</sup> Both of these assumptions are consistent with what Weiss contends is the social vision of Muslim jurists. Nonetheless, the necessity of forbidding the mixing of the sexes in public forums is contested in Islamic sources partly because the Prophet's community was not segregated.<sup>58</sup> In addition, Muslim jurists disagreed on whether the law required a male relative to chaperone a woman when traveling out of her town. The vast majority of jurists did not claim that a woman needs a chaperone simply when leaving her home.<sup>59</sup> Similarly, while Muslim jurists did debate whether a contract of sale concluded after the call for congregational prayer on Fridays is valid, it is presumptuous to contend that the state had the power to compel Muslims

53. For instance, a large number of Muslim jurists held that a woman may insert conditions in her marriage contract that state that she does not have to do housework, may divorce herself if her husband raises his voice to her, may have an equal power of divorce to that of her husband, or does not have to obey her husband. TAQI AL-DIN AHMAD IBN 'ABD AL-HALIM IBN TAYMIYYA, 29 MAJMU' FATAWA 126-38, 145-76, 342-53 ('Abd al-Rahman b. Muhammad b. Qasim al-'Asimi ed.) [hereinafter 29 MAJMU' FATAWA]; TAQI AL-DIN AHMAD IBN 'ABD AL-HALIM IBN TAYMIYYA, 32 MAJMU' FATAWA 157-70 ('Abd al-Rahman b. Muhammad b. Qasim al-'Asimi ed.); 3 ABU AL-WALID MUHAMMAD IBN RUSHD, AL-BAYAN WA AL-TAHSIL 7-10, 29, 35-36, 45, 100-01, 108, 138, 263, 386-95, 313-18, 327, 334-36, 395-96, 402-07, 432-36, 440-47, 477-82 (Muhammad al-'Aryashi ed., 1984).

54. Weiss states: "The Muslim jurists were animated by a social vision that they firmly believed to be of divine provenance and that they saw the law as always serving." WEISS, *supra* note 2, at 146. It is rather essentialistic to talk about a social vision that all Muslim jurists had regardless of time, place, and school of thought that persisted over a span of more than fourteen hundred years.

55. *Id.* at 185.

56. *Id.* at 157.

57. *Id.* at 149, 185.

58. See ABOU EL FADL, *supra* note 7, at 190-92, 232-47; 'ABD AL-KARIM ZAIDAN, AL-MUFASSAL FI AHKAM AL-MAR'AH WA AL-BAYT AL-MUSLIM FI AL-SHARI'AH AL-ISLAMIYYAH (1994).

59. ABOU EL FADL, *supra* note 7, at 183-85.

to attend services. In the modern age, a few Muslim countries, such as Saudi Arabia, do enforce strict segregation of the sexes, and do compel men to attend congregational prayers, but it is telling that these laws are not put into effect in most Muslim countries.<sup>60</sup> The reality is that the legal and sociological practices of Muslims are more complex than the social visions that Western scholars tend to project onto them.

Other misconceptions in Weiss's book relate to the presumed world vision of Muslim jurists. According to the received wisdom of much Western and Muslim contemporary scholarship, Muslim jurists divided the world into two abodes, the abode of Islam (*dar al-Islam*) and the abode of war (*dar al-harb*). The abode of Islam is where Muslims hold the reins of power and the government is Islamic. The rest of the world is considered the abode of war. Muslims may enter into temporary peace agreements with non-Muslims, but ultimately Muslims must fight the unbelievers until Islam is supreme around the world.<sup>61</sup> This doctrine long has captured the imagination of orientalist scholars, being projected as a core part of the Muslim worldview. Nonetheless, the actual linguistic practice of Muslim jurists seriously challenges this paradigm. For one, Muslim jurists could not agree on the definitions of the abodes of either Islam or non-Muslims. The end result was that Muslim jurists used the abode of Islam as a loose category to signify territories that belong to Muslims.

However, Muslim jurists did not speak simply of the abode of Islam versus the abode of war, but rather of a multitude of abodes. They often spoke of the abode of faith, the abode of justice, the abode of safety, the abode of suspended judgment, the abode of treaty, the abode of non-belligerence, and others. All of these abodes reflected a variety of normative judgments about the moral worth and political status of a variety of polities and territories that Muslim jurists encountered at different times. In fact, according to Muslim jurists, non-Muslims could rule some territories and those territories still would be considered part of the abode of Islam.<sup>62</sup>

60. Most Muslim juristic sources discuss whether congregational Friday prayers are obligatory for adult males, and under what circumstances. However, the simple fact that an act is mandated before God does not mean that the state has the power to enforce it in the temporal life. See ABD AL-RAHMAN AL-JAZIRI, *KITAB AL-FIQH 'ALA AL-MADHAHIB AL-ARBA'AH* 395-96 (Ibrahim Muhammad Ramadan ed., Beirut 1993) (1928); MUHAMMAD JAWAD MUGHNIYAH, *AL-FIQH 'ALA AL-MADHAHIB AL-KHAMSA* 120 (1992).

61. WEISS, *supra* note 2, at 149-51. See also LEWIS, *POLITICAL LANGUAGE*, *supra* note 39, at 73; MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 62-66 (1955).

62. Khaled Abou El Fadl, *Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the 2<sup>nd</sup>/8<sup>th</sup> to the 11<sup>th</sup>/17<sup>th</sup> Centuries*, 1 J. ISLAMIC L. & SOC'Y 141, 144-57 (1994); Khaled Abou El Fadl, *The Use and Abuse of "Holy War,"* 14 ETHICS & INT'L AFFAIRS 133, 136-37 (2000) [hereinafter Abou El Fadl, *Use and Abuse*].

Furthermore, Muslim jurists disagreed on what constitutes a just cause for fighting non-Muslims. Some jurists argued that Muslims fight non-Muslims simply because they are non-Muslims, and therefore, in principle, they ought to be fought until they either convert or submit to Muslim sovereignty. Other jurists argued, however, that Muslims should fight non-Muslims only if they pose a danger to Muslims. Consequently, if non-Muslims are non-belligerent towards Muslims, Muslims ought not to fight them.<sup>63</sup>

In addition, the status of treaties with non-Muslims is rather complex. The practice of entering into permanent treaties of any kind is a fairly modern phenomenon. Pre-modern nations typically entered into treaties limited to a term of years, and even many of the contemporary bilateral treaties possess fixed terms of ninety-nine years. Surprisingly, however, many of the medieval Muslim jurists held that treaties ought to have maximum terms of ten years but that parties may renew treaties indefinitely for ten-year increments. A large number of jurists argued that a peace treaty may be of any duration as long as it contains sufficient conditions guaranteeing the well-being and safety of Muslims. Others, such as Ibn Taymiyya, challenged the basis for the ten-year limit doctrine arguing that treaties may in fact be indefinite or permanent.<sup>64</sup> These various doctrinal complexities are a function of the fact that the Muslim world view, like the Muslim social view, was diverse, evolving, and non-essential.

Bernard Weiss is one of the most accomplished and influential scholars of Islamic law in the West. Considering the state of the field of Islamic law, *The Spirit of Islamic Law* is one of the best available introductions to the subject. In many ways, the difficulties one encounters in the book are not Weiss's. These difficulties say much more about the state of the field of Islamic legal studies than about Weiss's work. For too long, orientalist treated Islamic law as an exception to the field of legal studies, and avoided comparative approaches to Muslim juristic discourses. In addition, there has been a long-established tradition of ignoring the microlevel dynamics and linguistic practices of Islamic law, and projecting onto Islamic law presumed social

63. See Khaled Abou El Fadl, *The Rules of Killing at War: An Inquiry into Classical Sources*, 89 MUSLIM WORLD 144, 152 (1999); Abou El Fadl, *Use and Abuse*, *supra* note 62, at 137-38.

64. See 29 MAJMU' FATAWA, *supra* note 53, at 140-41. See also ABU BAKR AL-QAFFAL AL-MARWAZI, HILYAT AL-'ULAMA' FI MA'RIFAT MADHAHIB AL-FUQAHA' 718-21 (1988); 1 ABU AL-HASAN AL-MARGHINANI, AL-HIDAYAH: SHARH BIDAYAT AL-MUBTADI 138-39 (1975); 3 ABU ISHAQ BURHAN IBN MUFLIH, AL-MUBDI' FI SHARH AL-MUQNI' 398-99 ('Ali b. 'Abd Allah Al Thani ed., 1973); 14 ABU AL-HASAN AL-MAWARDI, AL-HAWI AL-KABIR FI FIQH MADHHAB AL-IMAM AL-SHAFI'I 352-53 ('Ali Muhammad Mu'awwad & 'Adil Ahmad 'Abd al-Mawjud eds., 1994); 8 SHAMS AL-DIN AL-RAMLI, NIHAYAT AL-MUHTAJ ILA SHARH AL-MINHAJ 107 (3d ed. 1992); 8 ABU MUHAMMAD IBN QUDAMAH, AL-MUGHNI 460-61 (Dar al-Kitab al-'Arabi 1983); 3 SHAMS AL-DIN AL-SARAKHSI, SHARH KITAB AL-SIYAR AL-KABIR 46-47 (Abu 'Abd Allah Muhammad Hasan Isma'il ed., 1997).

visions or world views.

In reality, however, these social visions and world views tell us much more about the cultural assumptions of Western scholars regarding the exotic other than they tell us about the culture of Muslim jurists. This insistence on finding a so-called Muslim worldview that permeates the minds and consciousness of all Muslims, including Muslim jurists, has resulted in assertions that are essentialistic and contradictory. Therefore, Muslim jurists are described simultaneously as moralists and idealists and, consequently, as conservative realists. Muslim jurists are intentionalists wedded to the divine will and text, but Islamic law is indeterminate and speculative. Muslim jurists were staunch monotheists who believed in submission to God, but they also favored absolute obedience to temporal rules. Muslim jurists were text-bound, confined by divine texts that defined their world view, but Muslims either fabricated these texts or borrowed them from Jews and Romans. To make things worse, Muslim jurists had no conception of crime, public offenses, public law, constitutional jurisprudence, or corporate legal entities, and they labored under a world view that was unrelentingly belligerent toward the outside world.

Although few modern orientalists will concede the point openly, the basic impetus seems to be the desire to explain the spirit of the failure of Islamic law. It is as if orientalists presume that Islamic law was a failed experiment, and then proceed to investigate the ways that Islamic law must differ from Western law. However, due to the practice of legal exceptionalism, they fail to understand the microdynamics of Islamic law, and, for that matter, Western law.