

Introduction: Genealogies of Islamic Law

What does it mean to encounter Islamic law from the perspective of the society that began elaborating it? With the establishment of a Muslim community in late antique Arabia, Islamic law began as a simultaneously revolutionary and customary normative tradition.¹ The Prophet's preaching in Mecca disturbed the social, political, and economic order in which he had been raised. That very same preaching claimed historical and divine legitimacy by continuing customary practices. This interplay between innovation and tradition had lasting echoes in Islamic jurisprudence. Generations of Muslim legal actors, historians, and leaders who succeeded the Prophet interpreted scripture and precedents in ways that simultaneously renewed and perpetuated legal traditions. They created a dialect of Islamic law; this book is an exercise in listening to its discourses.

To hear Islamic law's beginnings, I fine-tuned my instruments. Immersing myself in the world of jurists, I absorbed Islamic law's operational logics. To comprehend Islamic law more fully as one dialect of the language of law, I explored other legal traditions and observed a common legal grammar. Through the lens of jurisprudence, I observed expressions of Islamic law that did not conform to scholarly depictions, to public perceptions, or to my own assumptions. The language of jurisprudence revealed law's rootedness in historically situated societies. Because law and history are intertwined, this book attends to them separately and in conjunction. To address the interchange between law and history, I have designed an alternating two-part structure in this book, with odd-numbered chapters focusing on historiography and even-numbered chapters focusing on historical jurisprudence.

¹ The temporal classification of late antiquity (as well as medieval) will be discussed below.

Contours

Defining law is an elusive endeavor. Yet, as challenging as it may be, it is necessary to begin with a definition because conventional Islamic legal historiography focuses on what makes Islamic law *Islamic*, rather than what makes it *law*. In this book, I define law as a system of interacting norms and practices.² Law encompasses both non-state law and institutionalized state law. (My use of the term “state” refers to a political system of governance and not a modern nation-state.³) Law, as Dirk Heirbaut has observed, “is not a fixed body of norms, but an interpretative praxis, in which a community constantly justifies its own legal decisions.”⁴ I differentiate between a legal tradition (roughly, jurisprudence and legal doctrines) and a legal system (a system of legal rules supported by an enforcement mechanism).⁵ Written documents, official courts, professional judges, professional jurists, and states are not necessary for the operation of law. Correspondingly, individuals who functioned as judges or jurists will be identified as such, even if they were not specialized as judges or jurists.⁶

Since law exists wherever communities engage a legal-interpretive praxis, Islamic law began when a Muslim community began. Thus, I define “Islamic law” as the diverse legal traditions that have been and continue to be produced with the objective of being part of the Islamic movement.⁷ As a result, the subject of this book is not only “Islamic law” but also Islamic societies, their institutions, and their social and legal

² On defining law broadly, see Brian Z. Tamanaha, “Understanding legal pluralism: past to present, local to global,” *Sydney Law Review* 30:3 (2008): 375–511; William Twining, *General jurisprudence: understanding law from a global perspective*, Law in context (Cambridge: Cambridge University Press, 2009); William Twining, “Normative and legal pluralism: a global perspective,” *Duke Journal of Comparative & International Law* 20:3 (2010): 473–518.

³ I define “state” based on the work of Bevir and Rhodes, who describe “the state as a series of contingent and unstable cultural practices, which in turn consist of the political activity of specific human agents.” Mark Bevir and R. A. W. Rhodes, *The state as cultural practice* (Oxford: Oxford University Press, 2010), 1.

⁴ Dirk Heirbaut, “An unknown treasure for historians of early medieval Europe: the debate of German legal historians on the nature of medieval law,” In *Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte*, ed. by Thomas Duve (Frankfurt am Main: Vittorio Klostermann GmbH, 2010), 89.

⁵ On legal traditions, see H. Patrick Glenn, *Legal traditions of the world: sustainable diversity in law* (Oxford; New York: Oxford University Press, 2007), xxvii.

⁶ I do not use problematic developmental terminology – such as “proto-judges” – to describe individuals or aspects of law prior to the institutionalization of Islamic legal schools. For instance, the Prophet’s Companions were not only pious figures, but also teachers and practitioners of law.

⁷ The Islamic movement should be understood broadly as group action in the name of Islam; this movement began when the Prophet began seeking followers.

practices. Similarly, I do not focus on “sources” of Islamic law (such as the Qurʾān), but rather on legal traditions. The term “Islamic law” can be misleading because in actuality Islamic law is generated by multiple groups and institutions (legal polycentricity) and non-Islamic legal traditions coexist with Islamic ones (legal pluralism).⁸ (Notably, I prefer to use “Islamic,” the adjectival form of Islam, although the demands of clarity and grace result in some use of the term as a noun.⁹)

Conventional Historiography's Limitations: Developmentalism and Essentialism

To uncover Islamic legal history, we have to immerse ourselves in an Islamic legal past without assuming that that past inescapably leads to an Islamic legal present. Contemporary conceptualizations of Islamic legal history are often historically inaccurate because they do not fully appreciate that Islamic law could have been very different – it could have been something else entirely. The objective of this book is to sketch what that something else might have been. I apply a genealogical-historical approach in order to elucidate that historical processes comprise, as Mark Bevir describes, “a series of contingent even accidental appropriations, modifications, and transformations from the old to the new.”¹⁰ Because the past does not lead inevitably to the present, this book highlights the problematic implications of terms and concepts that are embedded in developmental – or determinist, or progressive, or unilinear – historiographies. I advocate adopting a non-developmental (such as radical historicist) approach to historiography in order to refine understandings of Islamic legal history.¹¹

⁸ Reza Banakar. “Power, culture and method in comparative law.” *International Journal of Law in Context* 5:1 (2009): 69–85 at 82 (“the diversity of sources and forms of law within the same social space (legal pluralism) or within the same legal system (legal polycentricity).”). On legal pluralism generally, see Sally Engle Merry. “Legal pluralism.” *Law & Society Review* 22:5 (1988): 869–96.

⁹ I avoid ascribing agency to Islam because, as Robinson has exhorted, “let us abandon ‘Islam’ as a term of historical explanation.” Chase F. Robinson, “Reconstructing early Islam: truth and consequences,” in *Method and theory in the study of Islamic origins*, ed. by Herbert Berg (Leiden: Brill, 2003), 101–35 at 134.

¹⁰ Mark Bevir. “What is genealogy?” *Journal of the Philosophy of History* 2:3 (2008): 263–75 at 267.

¹¹ Whereas dominant historicist approaches in Islamic studies are developmental in orientation, this book implements radical historicism as defined by Bevir: “when other people believe that certain social norms or ways of life are natural or inevitable, radical historicists denaturalize these norms and ways of life by suggesting that they arose out of contingent historical contests.” *Ibid.*, 271. Radical historicism is inspired by Nietzsche and Foucault. See Friedrich Wilhelm Nietzsche, *The use and abuse of history* (New York: Liberal Arts Press, 1957); Michel Foucault, “Nietzsche, genealogy, history.” In *The Foucault reader*, ed. and trans. by Paul Rabinow (New York: Pantheon, 1984) 76–100.

My critical approach is necessary because much conventional Islamic legal historiography imagines Islamic law as having an “origin” and as developing in a linear (or evolutionary) trajectory. (The scholarship briefly reviewed in this book is representative of the prevailing historiographic discourse in the field.¹² More recent scholarship indicates productive changes, but the “origins” paradigm critiqued here remains influential and dominant.) I outline these common developmental conceptions in the odd-numbered chapters, which focus on a set of scholarly terms and ideas that I identify as “origins”-terminology. “Origins” is both explicit and implicit in the rhetoric of Islamic legal studies. Marc Bloch critiqued the “obsession with origins” for having two problematic implications: denoting a total causal explanation and conveying (or concealing) value judgments.¹³ Bloch’s observation resonates in “origins”-oriented historiography of Islamic law. Developmental terms (such as “formative” and “classical”) distort Islamic legal history in myriad ways. In this book, I will focus on how “origins”-related terminology in conventional Islamic legal historiography (in the West) frames three distinct issues: (1) when Islamic law began; (2) which pre-Islamic laws were integrated into Islamic law; and (3) when Islamic legal orthodoxy became dominant. This “origins”-terminology (and its developmental misunderstandings) is misleading because it implies that these three issues are equivalent to Islamic law’s (1) conception, (2) parentage, and (3) maturation.¹⁴ By highlighting the interconnections between “origins”-terminology and these anthropomorphic metaphors, I reveal how a developmental framework both organizes and constrains much Islamic legal historiography. Notably, a mere alteration of terminology (such as from “origins” to beginnings) would not be sufficient to ameliorate the underlying conceptual problems in conventional historiography: terms reflect methods and methods determine substantive knowledge.

Scholarly identifications of Islamic law’s (metaphorical) date of birth, place of birth, parentage, or maturity also reflect a misunderstanding of “Islam.” Conventional definitions of Islam (mis)identify it as having

¹² For an overview, see Knut S. Vikør, “The origins of the sharia.” In *The Ashgate research companion to Islamic law*, ed. by Rudolph Peters and P. J. Bearman (Farnham: Ashgate, 2014), 13–26.

¹³ Marc Bloch, *The historian’s craft* (New York: Knopf, 1953), 29–31.

¹⁴ These anthropomorphic metaphors are both explicit and implicit in conventional Islamic legal historiography. I engage these metaphors because they are not only inherent in language, but they also reveal meanings in ways that are not always easily perceptible. On how metaphors shape our conceptual understandings, see George Lakoff and Mark Johnson, *Metaphors we live by* (Chicago, IL: University of Chicago Press, 1980).

an essence; correspondingly, Islamic law is also perceived as having an essence.¹⁵ These conventional definitions assume that in order for law to be Islamic, it must have specific attributes. Contrary to such essentialist presumptions, however, what makes law Islamic is that it is generated as part of the Islamic movement and not that it has particular attributes.¹⁶ An important goal of this book is to de-essentialize Islamic law by presenting its contingency, its multivalence, and its legal-hermeneutic centrifuges. Each of the three case studies (in the even-numbered chapters) in this book exposes how a particular area of law is shaped by legal hermeneutics and by socio-political conditions in distinct ways. These chapters display multiple expressions of Islamic law and thereby challenge essentialist assumptions.

Essentialist thinking often mistakenly correlates Islamic law's essence with "orthodoxy." I use the term "orthodoxy" to delineate normative aspects of Islamic traditions that are reinforced through a network of power. More specifically, legal orthodoxy implies the existence of a hierarchical legal institution or group (not necessarily empowered by a state) that can label norms or practices as deviant and can punish – through social pressure or otherwise – deviance. I recognize the problems with using the term "orthodoxy," but do so in the absence of an adequate alternative.¹⁷ As Talal Asad explains, "orthodoxy is not a mere body of opinion but a distinctive relationship – a relationship of power. Wherever Muslims have the power to regulate, uphold, require, or adjust *correct* practices, and to condemn, exclude, undermine, or replace *incorrect* ones, there is the domain of orthodoxy."¹⁸ (Notably, "Islamic orthodoxy" is not equivalent to Sunnism, just as "Jewish orthodoxy" is not equivalent to rabbinic Judaism.¹⁹ Because orthodoxy is itself a shifting relational category, the dichotomy between orthodoxy and heresy exists even within normative

¹⁵ Essentialism is the assumption that an entity has necessary qualities or characteristics. Philosophical debates about essentialism have a long history, as evident in Aristotle's *Metaphysics*. As Foucault observed, "he who listens to history finds that things have no pre-existing essence." Foucault, "Nietzsche, genealogy, history," 78.

¹⁶ Essentialism is problematic because, by discounting variability and historical change, it is reductionist. Philosophical critiques of essentialism vary widely; key philosophers who critiqued essentialism include Marx, Hegel, Sartre, and Kierkegaard.

¹⁷ M. Brett Wilson. "The failure of nomenclature: the concept of 'orthodoxy' in the study of Islam." *Comparative Islamic Studies* 3:2 (2007): 169–94.

¹⁸ Talal Asad, *The idea of an anthropology of Islam* (Washington, DC: Center for Contemporary Arab Studies, Georgetown University, 1986), 15.

¹⁹ See A. Kevin Reinhart, "On Sunni Sectarianism*," in *Living Islamic history: studies in honour of Professor Carole Hillenbrand*, ed. by Yasir Suleiman (Edinburgh: Edinburgh University Press, 2010), 209–25.

categories, such as Sunnism or rabbinic Judaism.) At any given historical moment, Islamic law – like all legal systems – was shaped by a struggle for legal-political authority. It is important to recognize these dynamics because medieval Islamic legal orthodoxy is ordinarily, but incorrectly, identified as the essence of Islamic law. Yet minority and extinct legal opinions provide important evidence of diversity and heterodoxy – particularly in late antiquity – that negate the assumption that orthodoxy is the essence of Islamic law.²⁰ With the aim of decoupling essence and orthodoxy, each case study (in the even-numbered chapters) examines an Islamic legal beginning in order to highlight how particular legal perspectives became orthodox over time.²¹

Countering Developmental and Essentialist Approaches

A crucial objective of this book is to challenge essentialist and orthodox assumptions about Islamic law. These twin objectives are realized by strategically situating Islamic law within diverse contexts. By “context,” I refer to three overlapping notions: temporal (late antique and medieval), geographic (the “Near East”), and intellectual (pagan, Jewish, and Christian intertextuality). I acknowledge, as Gabrielle Spiegel succinctly explains, that “historical contexts do not exist in themselves; they must be defined, and in that sense, constructed, by the historian before the interpretive work of producing meaning, of interpreting the past, can begin.”²² Although I recognize its potential pitfalls, historical contextualization is a crucial deconstructive tool that needs to be exercised in Islamic legal studies in order to lay the groundwork for more productive scholarship.²³ Notwithstanding the vulnerabilities of contextualism, I do not collapse

²⁰ I delineate the late antique Islamic period as from the beginning of Islam to approximately 800 CE. This period is commonly described by scholars as “early Islam.” I will address my alternative periodization throughout this book.

²¹ This historical-anthropological approach to Islamic legal beginnings is evident in the work of Mohammed Hocine Benkheira, “Jouir sans enfanter? Concubines, filiation et coït interrompu au début de l’Islam.” *Der Islam* 90:2 (2013): 245–305; Mohammed Hocine Benkheira, “Un libre peut-il épouser une esclave? Esquisse d’histoire d’un débat, des origines à al-Shāfi’i (m.204/820).” *Der Islam* 84:2 (2008): 246–355; Lahcen Daaïf. “Le prix du sang (*diya*) au premier siècle de l’Islam.” *Hypothèses* 1:10 (2007): 329–42.

²² Gabrielle M. Spiegel, *The past as text: the theory and practice of medieval historiography* (Baltimore, MD: Johns Hopkins University Press, 1997), xix.

²³ On reconciling postfoundationalism with historicist contextualization, see Mark Bevir. “How to be an intentionalist.” *History and Theory* 41:2 (2002): 166–75. Benjamin critiqued historicism in Walter Benjamin, “Theses on the philosophy of history.” In *Illuminations*, ed. by Hannah Arendt (New York: Schocken Books, 2007), 253–64.

Islamic law into its contexts, nor do I claim that the meaning of Islamic law depends entirely on contextual circumstances.²⁴ While this book is a work of socio-legal history (i.e., it fuses the approaches and sources of social and intellectual history), it does not present Islamic law as merely contingent, indeterminate, or plural.²⁵ Instead, contextualism instigates a process of reassessing how to narrate Islamic legal historiography and why. Historical contextualization simultaneously demonstrates that Islamic law did not develop in a unilinear fashion and that attributes conventionally identified as essential to Islamic law (such as legal orthodoxy) are the result of contingent or accidental historical events.

Temporal contextualization. I situate the beginnings of Islamic law in its temporal context by using the terms “late antique Islamic” and “Islamic late antiquity.”²⁶ With the objective of respecting the unique chronology and dynamics of Islamic history, much scholarship employs a periodization of Islam that is wholly based on events internal to Islamic history, without reference to other global historical periods. For instance, many scholars continue to accept a problematic periodization that differentiates between “late antiquity” and “early Islam.”²⁷ However, late antiquity persisted into the eighth and even ninth centuries.²⁸ “Islamic late antiquity” refers roughly to the period from the beginning of Islamic history to the end of the eighth century CE. I also use the term ‘Islamic late antiquity’

²⁴ Chris Tomlins elaborates this critique of historicist contextualism in much of his writing. See especially Christopher Tomlins, “Historicism and materiality in legal theory.” In *Law, theory and history: new essays on a neglected dialogue*, ed. by Maksymilian Del Mar and Michael Lobban (Oxford: Hart Publishing, 2016).

²⁵ Tomlins critiques historicism and contextualization for producing contingency, indeterminacy, and plurality. Christopher Tomlins, “What is left of the law and society paradigm after critique? Revisiting Gordon’s ‘Critical Legal Histories’.” *Law & Social Inquiry* 37:1 (2012): 155–66.

²⁶ In doing so, I follow Thomas Sizgorich, “Narrative and community in Islamic late antiquity.” *Past & Present* 185:1 (2004): 9–42; and *Violence and belief in late antiquity: militant devotion in Christianity and Islam* (Philadelphia, PA: University of Pennsylvania Press, 2008).

²⁷ This is evident in scholarship that distinguishes between the late antique context and the rise of Islam. See Chase F. Robinson (ed.), *The formation of the Islamic world, sixth to eleventh centuries*, The new Cambridge history of Islam vol. I (Cambridge: Cambridge University Press, 2011). Similarly, al-Azmeh’s recent book does not recognize late antique Islam as a category in and of itself and relies instead on the term “Paleo-Islam.” Aziz A. Al-Azmeh, *The emergence of Islam in late antiquity: Allah and his people* (Cambridge: Cambridge University Press, 2014). In addition, some scholars employ an “origins” approach by identifying Islam “as a child of Late Antiquity.” Robert G. Hoyland, “Early Islam as a late antique religion.” In *The Oxford handbook of late antiquity*, ed. by Scott Fitzgerald Johnson (Oxford; New York: Oxford University Press, 2012), 1053–77 at 1069.

²⁸ The integration of Islamic history within late antique studies was initiated by Peter Brown and continued by scholars such as Thomas Sizgorich. See Peter R. L. Brown, *The world of late antiquity: from Marcus Aurelius to Muhammad*, Library of European civilization (London: Thames and Hudson, 1971); and *The world of late antiquity: AD 150–750* (New York: W.W. Norton, 1989). See also Sizgorich, “Narrative and community in Islamic late antiquity.”

to describe a period of Islamic legal heterodoxy that preceded the consolidation and dominance of orthodox Islamic legal schools.²⁹ The emerging scholarly trend of accepting the period of late antiquity as relevant for framing Islamic history leads, in turn, to accepting its corollary, the medieval era. “Medieval” refers roughly to the period from the beginning of the ninth century to the fifteenth century CE. To emphasize the distinctiveness of post-late antique legal authorities, I use both “medieval” and “professional” to describe jurists affiliated with orthodox legal schools. (The term “professional” refers to a broad and protracted process of professionalization and specialization of Muslim legal authorities.)

In this book, “late antique” and “medieval” represent blocks of time that link Islamic history to both regional and global dynamics.³⁰ Although I make use of these global historical classifications, I do so without relying on common assumptions about the substantive or Eurocentric content of these periods.³¹ The minimization of “medieval Islamic history” as a salient category inadvertently informs the prejudicial (and incorrectly evolutionary) idea that because Islam was not part of the medieval era, it has not yet entered modernity. This is evident in contemporary propaganda that characterizes Islamic law as a “medieval” legal system. To be clear, I am not arguing against a periodization of Islamic history that focuses on internal dynamics, but rather against the exclusive use of such a periodization. In Chapter 5, I present both an internal and regional periodization.

Geographic contextualization. As noted, Islamic law is “Islamic” because it is generated by an interpretive process anchored in Islamic sources (broadly defined). Nevertheless, Islamic law is also more than simply “Islamic” because it assimilated and generated diverse “Near Eastern” legal traditions. Therefore, I use the term “Islamicate” to refer to the heterogeneous contexts in which Islamic law existed.³² Marshall Hodgson defined

²⁹ I have used the terms “late antique Islam” and “Islamic late antiquity” in numerous previous publications.

³⁰ Richard Maxwell Eaton, *Islamic history as global history*, Essays on Global and Comparative History (Washington, DC: American Historical Association, 1990); Marshall G. S. Hodgson, *Rethinking world history: essays on Europe, Islam, and world history*, ed. by Edmund Burke (Cambridge; New York: Cambridge University Press, 1993).

³¹ On the complexities of global (or world) history periodization, see Jerry H. Bentley, “Cross-cultural interaction and periodization in world history,” *The American Historical Review* 101:3 (1996): 749–70; William A. Green, “Periodizing world history,” *History and Theory* 34:2 (1995): 99–111. Despite the limitations of periodization, I rely upon it as a framework for explaining historical changes. For a recent questioning of periodization, see Jacques Le Goff, *Must we divide history into periods?* Trans. by M. B. DeBevoise (New York: Columbia University Press, 2015).

³² The term Islamicate only applies to regions under Islamic empires; for pre-Islamic history, I refer to the “Near East.”

“Islamicate” as referring “not directly to the religion, Islam, itself, but to the social and cultural complex historically associated with Islam and the Muslims, both among Muslims themselves and even when found among non-Muslims.”³³ The category of Islamicate is a heuristic tool that enriches our understanding of Islamic legal history by recognizing that Islamic law, from its beginning, structured relationships between and among Muslims and non-Muslims. The result was Islamicate legal syncretism.³⁴

The geographical focus of this book is Southwestern Asia, commonly identified as the “Near East.” The “Near East” is a problematic political (specifically, British colonial) category lacking an apparent geographic boundary. I would prefer to use the more geographically descriptive (and less geopolitically constructed) term Southwest Asia. (I also appreciate Garth Fowden’s suggestions of “Eurasian hinge.”³⁵) Toward the end of the late antique period (i.e., approximately 800 CE), the Islamic empire encompassed much of modern-day Spain, the northern parts of Africa, the Levant, the Arabian peninsula, Mesopotamia, Persia, and parts of South and Central Asia. In this book, I concentrate on Southwestern Asia (rather than North Africa or Central Asia). While geographical specification – at the micro-level of local communities – is a worthy intellectual endeavor, it is not my objective.³⁶ I rely on a flexible correlation between sources and their geographic location because the geographic reach of both literary and documentary sources does not neatly correspond to their place of production or discovery. Historical texts simultaneously reflect their local contexts and broader regional trends. For instance, although much of the surviving Arabic papyri have been recovered in Egypt, the authors and subjects of these documents are not limited to Egypt.³⁷ Instead of reconstructing local practices or localizing historical sources, this book embraces a wide-ranging view of Islamic legal history.

³³ Marshall G. S. Hodgson, *The venture of Islam: conscience and history in a world civilization*, vol. I (Chicago, IL: University of Chicago Press, 1974), 59.

³⁴ Laurent Mayali. “Introduction. De la raison à la foi: l’entrée du droit en religion.” *Revue de l’histoire des religions* 4 (2011): 475–82 at 482.

³⁵ Garth Fowden, *Before and after Muhammad: the first millennium refocused* (Princeton, NJ: Princeton University Press, 2014).

³⁶ An outstanding model for geographic specificity of late antique Islamic materials is Mohammed Hocine Benkheira. “L’impuissance sexuelle, motif légal de rupture du lien matrimonial.” *Islamic Law and Society* 21:1–2 (2014): 1–48.

³⁷ On the geographic range of Arabic papyri, see Lennart Sundelin, “Introduction: papyrology and the study of early Islamic Egypt.” In *Papyrology and the history of early Islamic Egypt*, ed. by Petra Sijpesteijn and Lennart Sundelin (Leiden; Boston, MA: Brill, 2004), 1–19 at 7, n. 20.

Intellectual contextualization. Although contextualization guides us to the notion of Islamicate, it should not be understood as directing us toward comparison. Indeed, this book is a critique of conventional comparison – both implicit and explicit – because it obscures Islamic legal historiography. It is commonplace for Islamic legal historiography to describe and to evaluate Islamic law in *comparison* to modern Western law (a secular legal archetype) or to rabbinic Jewish law (a “religious” legal archetype). Both comparisons impose interpretations and assumptions about Islamic law that are incongruent with historical evidence and laden with problematic value judgments.

Most scholarly comparisons with modern Western law are made implicitly. These comparisons are evident in the way Islamic law is described in modern discourse, both academic and popular. The very identification of Islamic law as a “religious” legal system marks it as non-secular and often implies that it is not rational and is not generated through formal processes. By way of example, the Weberian myth of “Kadijustiz” (*sic*) caricatures Islamic law as an irrational, arbitrary legal system, the antithesis of liberal and predictable, modern (secular) law.³⁸ While generations of scholars have refuted the Weberian stereotype, the underlying dichotomization of modern Western law and Islamic law remains germane to scholarship (and public discourse). Comparisons between medieval Islamic jurisprudence and modern Western law are incongruent and thereby reinforce stereotypes about Islamic law’s illiberality, violence, or rigidity. In contemporary discourse, the dominant trope about Islamic law is that it is “different” – different from modern, secular law. This is one reason why the othering of Islamic law should be resisted, as I have argued elsewhere.³⁹

Although the Islamic versus modern/Western comparative framework is relevant to my portrayal of Islamic law in this book, a complementary modality may be more pertinent: “comparing” Islamic law and Jewish law. Standard scholarly comparisons of Jewish and Islamic legal traditions perceive them as “similar.” This characterization is, undoubtedly, a plausible one since these legal traditions produced legal literature that appears analogous: canonical legal texts in Islamic and Jewish traditions resemble each other in significant ways; moreover, much of Islamic and Jewish legal

³⁸ Max Weber, *Economy and society: an outline of interpretive sociology* (Berkeley, CA: University of California Press, 1978), 2: 976–8 (discussing “kadijustice”).

³⁹ Lena Salaymeh, “The politics of inaccuracy and a case for ‘Islamic law,’” *The Immanent Frame* (July 7, 2011), <http://blogs.ssrc.org/tif/2011/07/07/the-politics-of-inaccuracy-and-a-case-for-islamic-law>; and “Commodifying ‘Islamic law’ in the U.S. legal academy,” *Journal of Legal Education* 63:4 (May 2014): 640–6.