

UNDERSTANDING ISLAMIC LAW (*SHARĪ'AH*)

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UNDERSTANDING ISLAMIC LAW (*SHARĪ‘A*)

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MATTHEW  BENDER

We cannot do great things on this Earth, only small things with great love.
Blessed Mother Teresa of Calcutta (1910-1997)

Dedication

To the trinity of great women in my life —

My patient mother, ***Barbara Mae Mallory*** (1937-2003), who in the 1960s introduced me to the beauty of Islam through Islamic arts and calligraphy exhibited at the New York Metropolitan Museum, and to the spiritualism of Islam from the poetry of Maulana Jalâluddin Rumi (1207-1273), whom she read even on her last day.

My dear wife, ***Kara Tan Bhala***, who grew up in a Muslim country, Malaysia, in a Buddhist Chinese family and attended Catholic convent school, who has witnessed in many countries the evils of ignorance and extremism, and who rightly pushed me to write this book out of her compassion for people, regardless of their faith, so that they may be better educated.

Our little gift from God (Allāh), our daughter, ***Shera Tan Bhala***, who has travelled with us to no fewer than 23 countries, many of them Islamic, and helped us see them better through her loving eyes, generous heart, and empathetic spirit, and for whom I pray this book makes her future world more peaceful.

Preface

. . . One race did not settle everything, as I had thought it would.
One race is only the prelude to another.

— Sir Roger Bannister (1929–)

The Four-Minute Mile 225 (Guilford, Connecticut: The Lyons Press, 1981)
First person to run a sub-4 minute mile (3:59:4 on 6 May 1954 at the Iffley Road Track,
Oxford University)

No background in law, religion, history, or foreign languages is required to read *Understanding Islamic Law (Shari'a)*. Only a dedicated mind and open heart are needed. This book is designed for two audiences: law students and legal practitioners. It is a textbook for future lawyers and reference for current ones. But, it cannot possibly resolve all issues about Islamic Law. It is a prelude for further study and contemplation, a point intimated in the above quotation from one of my heroes about one of my favorite activities — running. Finishing this book after nearly 3 years, like finishing a long run, left me with the certitude I had more to learn, just as I could improve as a runner.

This book also is eminently suitable for students of other disciplines, and non-lawyers, who are interested in or need to know about the subject. Along with my law students, many non-law graduate students and professionals in other fields have completed successfully the Islamic Law (*Shari'a*) course at the University of Kansas School of Law since I first offered it in the fall 2003 semester. That also is true of the honorable men and women, for whom I have enormous respect, who took the course in the fall 2010 semester at the Command and General Staff College (CGSC) at Fort Leavenworth, Kansas. To all of them, I owe much. Hailing from Bangladesh, Canada, China, Egypt, India, Iran, Korea, Pakistan, Saudi Arabia, Syria, United Arab Emirates (UAE), and from cities, suburbs, or farms around Kansas and across the United States, the students taught the teacher about the subject, and constructively criticized earlier iterations of this book.

It sounds not only striking, but also supercilious, to state that *Understanding Islamic Law (Shari'a)* is the first comprehensive textbook and treatise on the topic ever written for the English-speaking market by an American law professor. The book is the first work to incorporate systematically comparisons and contrasts with American law and Catholic Christian teaching.¹ And, it is the first such work to address frankly controversial matters from abortion to Wall Street, paying particular attention to women's issues. Still, there is no genius on the part of the author, who is nothing more than a struggling student of the *Shari'a*. Rather, the book reflects the under-developed state of Islamic Law in American legal education and practice.

¹ For an overview of the American legal system, see Gerald Paul McAlinn, Dan Rosen & John P. Stern, *An Introduction to American Law* (Durham, North Carolina: Carolina Academic Press, 2d ed., 2010). For brief discussions of Catholicism, by the Chaplain to Cambridge University and a Professor of Philosophy at Boston College, respectively, see Alban McCoy, *An Intelligent Person's Guide to Catholicism* (London, England: Continuum, 2005) and Peter Kreeft, *Fundamentals of the Faith — Essays in Christian Apologetics* (San Francisco, California: Ignatius Press, 1988). For a monumental work on the religion and history of Christianity, see Diarmaid MacCulloch, *Christianity — The First Three Thousand Years* (New York, New York: Viking, 2009).

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True, Dr. Majid Khadduri (1909-2007) and Dr. Herbert J. Liebesny (1911-1985), edited a collection of 15 essays, *Law in the Middle East*, published by the Middle East Institute in Washington, D.C. in 1955. In 1975, Dr. Liebesny produced *The Law of the Near & Middle East — Readings, Cases, & Materials*, published by the State University of New York Press, which compiled materials from a graduate seminar he taught at The George Washington University. Nevertheless, and despite more books appearing on a variety of Islamic topics in the intervening decades, no full-length, English-language treatment of Muslim law, religion, and history, covering not just the Arab world (in which roughly 300 million Muslims live), but also East Asia, Africa, and other regions (where the other 1 billion Muslims live), has appeared.

That a major text and reference work did not emerge after the Iran Hostage Crisis, which ran for 444 days starting on 4 November 1979, is shocking. After all, that debacle was a rude awakening involving legal issues and *Shi'ite* Islam. Before the terrorist atrocities of 11 September 2001, discourse on Islamic Law was the province a small group of law professors, many of whom were Muslim, and a niche area of practice for precious few specialist practitioners. Since then, the circle has expanded only modestly, even though the group never was a cabal. To the contrary, *Shari'a* experts are delighted and pleasantly welcome newcomers to the field.

The problem has been a lack of attention to modernizing the international and comparative law curriculum and practice in the United States in the wake of paradigmatic shifts around the globe. More accurately, the problem has been a lack of including Islam and the *Shari'a* in the modernization plans. Perhaps we in the American legal academy have been too complacent in our familiar Euro-centrism. Perhaps now we are too dazzled by China, and forget that even the Chinese Communist Party (CCP) has an uneasy time in its rule over a vast Muslim population, the Uyghurs, in the Far West of the People's Republic. Perhaps we exalt too much the precious-placed law review article as a mode of scholarship over the old-fashioned book that is useful to students and practitioners. We use student law review editors as means to an end, especially when we leverage one journal over another. In so doing, we miss the opportunity to orient ourselves to be instruments of service through the patient preparation of teaching materials.

To be sure, Islamic legal scholarship is as old as Islam. Hence, there are innumerable volumes on the *Shari'a* — in Arabic, written by Muslims, with a Muslim audience in mind. There also are countless books in English, many written by Muslims, on the religion and history of Islam, and on specialty Islamic fields, such as Family Law, Inheritance Law, and International Law. Some such books are written originally in English. Others are in translation from Arabic, French, or German. With a few notable exceptions, many of which are cited herein, the authors tend not to be foreign lawyers or law professors. None of these books is oriented to the needs of the contemporary English-speaking legal classroom or demands of modern legal practice. Likewise, within the American legal academy and among practitioners, fine law review articles and books have been written on focused Islamic legal topics. But, the bottom-line is where can a newcomer, an average English-speaking law student or legal practitioner, learn about the breadth and depth of Islamic Law?

There certainly is nothing wrong with a book on Islamic Law written by a Muslim. But, it is not the same as one written by a non-Muslim. In first case, the author is writing from inside the system to which she adheres. It is difficult to see outside the paradigm, even if the author creatively and courageously advocates certain reforms against centuries

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of tradition and understanding. In the second case, the author is doing her best to empathize, but still is explaining and assessing the paradigm from the outside looking in. Her instincts may be less honed, her appreciation of nuances less sophisticated, than her Muslim counterpart. But, in contrast to her Muslim counterpart, perhaps she can view the paradigm more systemically and systematically, and ask different questions. One type of work is not better than the other. Both kinds of contributions are necessary for a full understanding and appraisal. Writing this book puts me in both positions. I am a non-Muslim writing about the *Shari'a*. I am an American lawyer and a Catholic comparing the subject to American law and Catholicism.

In the present age of globalization, such is the status of many law students and young lawyers in America. They — or shall I say, we? — are blended and mixed in ways scarcely imaginable when the last Kansan to become President, Dwight D. Eisenhower (1890-1969), occupied the White House. We are on the inside of some paradigms angling for a more holistic view, and on the outside of other systems yearning to get in. This problem is a good one to have. It suggests we are unwilling and even unable to be limited and defined by traditional boundaries. That spirit of adventure, along with a dedicated mind and open heart, surely ought to lead to greater peace, tolerance, and understanding.

In keeping with the present age and contemporary Kansas, *Understanding Islamic Law (Shari'a)* is the product of a decidedly mixed author: an imperfect Roman Catholic in love with his faith, who is proud of his half-Indian (Punjabi), half-Canadian (Scottish) heritage. These influences, plus the impressions of my Malaysian-Chinese wife, our blessedly mixed daughter, and our travels around the world, resonate throughout this book. I try to ensure they do so transparently, as teaching is not supposed to be an exercise in veiled indoctrination.

Accordingly, I confess a special exertion in respect of the influence of my faith. When drawing comparisons and contrasts to Catholic Christianity, I rely on the three recognized sources of Catholicism: Sacred Scripture (*i.e.*, the Bible), the Magisterium (*i.e.*, the teachings of the Church through the Popes, Cardinals, Bishops, Priests, and Nuns), and Sacred Tradition (*i.e.*, the practices of the Church, many of which are from its earliest days). The *Catechism of the Catholic Church* provides a single-volume summary of the substance of all three sources.²

Notably, in writing *Understanding Islamic Law (Shari'a)*, I am mindful of two quotes from such sources. First, there is the 2000 document, *Dominus Iesus*. In this Declaration, Pope John Paul II (1920-2005) states that “to consider the Church as one way of salvation alongside those constituted by the other religions” is “contrary to the faith.” Likewise, his successor, Pope Benedict XVI (1927-) warns repeatedly that one danger of relativism is the trivialization of different religions by equating them all. In turn, one consequence is false ecumenism and inauthentic inter-faith dialogue.

Second, in respect of Muslims, the Church teaches in the document from the Second Vatican Council, *Lumen Gentium*, that:

The plan of salvation also includes those who acknowledge the Creator, *in the first place amongst whom are the Muslims*; these profess to hold the faith of Abraham,

² See CATECHISM OF THE CATHOLIC CHURCH (United States Catholic Conference, Inc., Washington, D.C.: Libreria Editrice Vaticana, 2d ed. 1997).

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and together with us they adore the one merciful God, mankind's judge on the last day.³

Dominus Iesus is (*inter alia*) an admonition against relativism, against trivializing Catholicism by equating it with, or subordinating it to, other paths to salvation. *Lumen Gentium* is (*inter alia*) an admonition against pride, against arrogance. It is the province of God, not man, to judge fitness for salvation.

Until then, there are many joys from writing this book to cherish: a greater admiration for Islam and the *Shari'a*, a better appreciation of the gift of the Catholic faith, and a clearer understanding of the common points, amidst undeniable differences, shared by Muslims and Christians, and Muslim and Christian lawyers, in our common human dignity derived from God.

And for now, *Understanding Islamic Law (Shari'a)* spells the beginning of the end of one of the conventional excuses for not teaching a course in Islamic Law, namely, that there are no readily available, bound teaching materials. In time, there may well be more choices than this volume, and so there should be. Let 100 flowers bloom, particularly in a field as rich and elegant as the *Shari'a*.

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April 2011

³ *Lumen Gentium*, ¶ 16, quoted in CATECHISM, *supra*, at ¶ 841 (emphasis added).

Notes on Manuscript Preparation

Use of “Holy” and “PBUH”

It is respectful to refer to the sacred text of Islam, the Qur’ān, as the “Holy Qur’ān,” somewhat akin to the phraseology “Holy Bible.” Indeed, it is respectful to refer to insert “Holy” before each reference to the Qur’ān.”

Likewise, it is respectful to use the phrase “Peace Be Upon Him,” or “PBUH,” sometimes put in parentheses, after mentioning the name of the Prophet Muhammad (570/571-632 A.D.). Thus, traditional constructions would be “The Prophet (PBUH)” or “Muhammad, Peace Be Upon Him.” Similarly, following the name of special persons associated with Muhammad, such his Companions (*Ṣaḥābah*), a phrase after the name of a male Companion, like “May Allāh Be Pleased with Him” or “May the Blessing of Allāh Be Upon Him” (*Raḍia Allāhu ‘Anhu*) is respectful. And, a phrase like “May Allāh Be Pleased With Her” or “May the Blessing of Allāh Be Upon Her” (*Raḍia Allāhu ‘Anhā*) after invoking the name of his female Companions or his wives, particularly, Khadyja (*circa* 555-619) and ‘Ā’isha (614-678), is respectful.

The title Qur’ān and names “Prophet” and “Muhammad” are used a large number of times in *Understanding Islamic Law (Shari‘a)*. That also is true of the *Ṣaḥābah*, Khadyja, and ‘Ā’isha. I respect the conventions. Thus, I mean to say “Holy Qur’ān” and “PBUH” in every instance, and to include an expression of honor for the *Ṣaḥābah* and wives. Chapter titles manifest this respect explicitly. However, to repeat the prefix “Holy,” suffix “PBUH,” or phrase of honor throughout the text of every Chapter would consume space that may be dedicated to other substantive matters. The reader is sufficiently sensitive and sensible to appreciate my respect for the Qur’ān, Prophet, Companions, and wives, and mentally fill in the appropriate prefix or suffix. In other words, hereinafter all references to the Qur’ān implicitly mean “Holy Qur’ān,” all references to Muhammad implicitly include “PBUH,” and all references to the *Ṣaḥābah* and wives implicitly are followed by the customary phrase of honor.

Use of Diacritical Signs

Notwithstanding the matter of Arabic, I spice the text of *Understanding Islamic Law (Shari‘a)* heavily with Arabic terms, as well as quotations from the Qur’ān, *ḥadīth*, and Muslim scholars. I do not render Arabic terms into simpler, bowdlerized English words, such as “Koran.” Rather, two British scholars of Sikhism, W. Owen Cole and Piara Singh Sambhi, inspire me:

We have decided to retain Sikh words as much as possible in the hope that readers will make the attempt to *enter the world of Sikhism rather than try to bring it into their own*.⁴

Likewise, to help the law student or lawyer enter the Islamic legal mind, I endeavor to be

⁴ THE SIKHS, *supra*, at xiv (emphasis added).

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faithful to Arabic terms. I use diacritical marks on letters of Arabic terms to assist in their pronunciation.

The diacritics, and all Arabic terms, are explained in the Glossary in the final Part of this book. Also to make the text user-friendly, I put every Arabic term in italics, with five exceptions:

- Allāh
- Qur’ān
- Islam
- Muslim
- Proper nouns, specifically, names of persons (*e.g.*, Muhammad) or places (*e.g.*, Mecca).

Further, like a foreign language teacher, I repeat certain key terms so they become second nature and are incorporated into normal patterns of thought and discussion.

There is, of course, a considerable degree of variation in the English spelling of Arabic terms, as the title of the sacred text of Islam well illustrates. The distinctions present a problem not so much when I write a passage, but rather when I quote from another source with a spelling different from mine. Typically, my choice is to leave the different spelling in the quotation untouched rather than harmonize it with my own. (To be sure, the third option — to alter mine in conformity with the quote — is one I sometimes select.) I suspect I will not satisfy the reader who prefers perfect consistency when I report that my solution is *ad hoc*. On a case-by-case basis, I determine whether it seems in the best interests of a smooth and edifying text to leave original spellings in the quote, or to intrude and “correct” them for consistency. Certainly, I correct minor typographical and punctuation errors in any quote.

Key Primary Sources

As for quotations from the Qur’ān, I use the following English language hardcover edition: THE QUR’AN — *A New Translation by M.A.S. Abdel Haleem* (Oxford, England: Oxford University Press, 2004). Technically, any version of the Islamic holy scripture other than the Arabic is considered not authentic, but rather a translation, which necessarily involves interpretative judgments by the translator. The first English language translation did not appear until 1649, roughly 1,000 years after the Prophet Muhammad received revelations from God (Allāh). The edition I use happens to be widely available, in both hardbound and paperback form, and received strong review in no less a publication than *The Economist*.⁵

I confess a bias in favor of this translator, Professor Haleem, of the School of Oriental and African Studies (SOAS) of the University of London. He “argues it is time that English become one of the familiar languages of Islam, like Urdu.”⁶ Unless and until Islamic legal materials are available widely in English, and the Qur’ān itself is seen as

⁵ See *Found in Translation*, THE ECONOMIST, 22 May 2004, at 77 (stating the translator “has managed to transform the complex grammar and structure of the holy book into a form of modern English which reads easily and flows smoothly without taking liberties with the inviolable text”). [Hereinafter, *Found in Translation*.]

⁶ *Found in Translation*, *supra*.

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authentic in vernacular languages, like the Bible and other sacred texts, the claim of Islam to universality remains weaker than it might be. In any event, by no means is it the only esteemed English-language edition. One particularly beautiful one, approved by Cairo's renowned Al Ahzar University, is *An Interpretation of the Qur'an*.⁷ Readers may enjoy examining others to compare and contrast decisions on diction made by the translators.

For quotations of a *ḥadīth*, as far as possible I obtain them directly from either or both of the following sources:

- THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI, ARABIC-ENGLISH by Dr. Muhammad Muhsin Khan (Islamic University, Medina, Kingdom of Saudi Arabia: Dar Ahya Us-Sunnah, Al Nabawiya, March 1978), 8 volumes.
- SAHIH MUSLIM — BEING TRADITIONS OF THE SAYINGS AND DOINGS OF THE PROPHET MUHAMMAD AS NARRATED BY HIS COMPANIONS AND COMPILED UNDER THE TITLE AL-JAM'US-SAHIH BY IMAM MUSLIM, RENDERED INTO ENGLISH BY ABDUL ḤAMĪD ŞİDDĪQĪ, WITH EXPLANATORY NOTES AND BRIEF BIOGRAPHICAL SKETCHES OF MAJOR NARRATORS, CORRECTED AND REVISED BY DR. HASSAN (Lahore, Pakistan: Sh. Muhammad Ashraf Booksellers and Exporters, 1990), 8 volumes.

For the convenience of the reader, and in homage to the formidable work of the compilers, I introduce quotations from these sources by referring to “*Imām* Bukhari” and “*Imām* Muslim,” respectively.

Islamic religious and legal scholars regard as definitive any *ḥadīth* found in either, or better yet, both compilations. Fortunately, beautiful hard-bound multi-volume sets of *Bukhari* and *Muslim* are easily available in English. In certain instances, I take the liberty of correcting what are obvious, minor typographical errors apparently introduced by the Pakistani or other foreign printer, and left uncorrected by the editor or editors. Examples are corrections of a missing or wrong letter or punctuation mark. In no way do these corrections alter the substantive text or meaning of a *ḥadīth*. On occasion, I find it helpful to quote from a *ḥadīth* not recounted by *Imāms* Bukhari or Muslim. In such instances, I take them, with credit, from a secondary source.

Finally, all translations from the Bible are taken from *The Catholic Study Bible*. This edition, published by Oxford University Press (New York, New York) in 1990, is the New American Bible translation. It is highly appealing because of its prodigious yet accessible supplementary information and analysis. It contains a Readers Guide to every Book in the Old and New Testament, articles on key topics such as Biblical Texts and their Background, Biblical Archaeology, and the Geography of the Holy Land. It also has introductory notes, footnotes, and maps.

Citations

Each Chapter of this book is self-contained, though the topics are all related. Thus, footnotes are numbered consecutively in each Chapter. To some degree, the Blue Book system of citation familiar to American lawyers is used. However, that system conveys

⁷ See AN INTERPRETATION OF THE QUR'AN — ENGLISH TRANSLATION OF THE MEANINGS, A BILINGUAL EDITION (New York, New York: New York University Press, 2002, Majid Fakhry, trans.).

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insufficient information about some sources — for example, the name and location of a book publisher — which may be helpful to the reader seeking to access those sources. Moreover, that system uses abbreviations that may be unfamiliar to foreign readers. Thus, I have provided as full information as possible about each source, even if not called for by the Blue Book.

Acknowledgments

“Blessed” hardly is too strong a word to describe how I feel by my ten Research Assistants (RAs) at the University of Kansas, and their substantive contributions to the first edition of this book. It is not an overstatement to say that without the help of this elite but humble team, the end result would have been much diminished.

- Ahmed D. Alyousef

S.J.D. Candidate, University of Kansas School of Law. J.D., University of Kansas School of Law (Certificate in International Trade and Finance, and Certificate in Business and Commercial Law), 2009. LL.M., University of Missouri — Kansas City (UMKC) School of Law, 2006. LL.B., Imām Mohammed bin Saud University School of *Shari‘a* (Riyadh, Kingdom of Saudi Arabia), 2000.

Ahmed, a native of Quassim, which is 300 kilometers north of Riyadh, and of Ras Al Khaimah, United Arab Emirates (UAE), is fluent in Arabic and English, and works on international business matters, including Islamic insurance (*takaful*). “Ras Al Khaimah” literally means the “top of the tent,” which is appropriate as he is a leader at Kansas in both the International Law Society and Islamic Law Students Association.

Ahmed’s research memo on Islamic partnerships is the basis for the Chapters on Business Associations. His memos on risk (*gharar*), interest (*ribā*), and Islamic insurance are the bases for portions of the Chapters on those topics. His memos on the life of the Prophet Muhammad are the basis for portions of the Chapters on the Prophet. His personal pilgrimage figures into the account of the *Hajj* in the Chapter on the Five Pillars.

- Adam Casner

J.D., University of Kansas (Certificate in International Trade and Finance), 2010. B.A. (Italian, Economics Minor), University of Texas, 2005.

Before coming to the Law School at Kansas, Adam worked in business development for a mobile radiology company. He has lived in Rome, Italy and Limerick, Ireland, and speaks Italian and Spanish. While in Law School, he did litigation work in litigation in Kansas City, and now practices domestic and international business law in Texas.

Adam’s research memos on the Four-Rightly Guided Caliphs (*Rashidun*) and Islamic Law of War are the bases for the Chapters on those topics.

- Elena Delkhah

J.D. University of Kansas (Certificate in International Trade and Finance), expected 2011. B.B.A., Business Administration (Concentration in International Business), University of Kansas, 2006.

Elena was born and raised in Tehran, Iran, and migrated to Lawrence, Kansas in 1987. She speaks Farsi, and travels back to Iran.

Her research memo on the history of Iran, covering the *Sunni* — *Shi‘ite* split, *Safavid* Dynasty, regime of the Shah, 1978-79 Islamic Revolution, and Constitution of the Islamic Republic, factored into various Chapters.

- Adham Hashish

Acknowledgments

S.J.D. candidate, University of Kansas School of Law. L.L.M. (International and Comparative Law), The George Washington University School of Law, 2008. L.L.B. *magna cum laude*, Alexandria University Faculty of Law (Alexandria, Egypt), 2003. Graduate Diploma (International Law), Tanta University (Tanta, Egypt), 2004. Graduate Diploma (Public Law), AinShams University (Cairo, Egypt), 2005.

Adham, who is from Egypt, was appointed Lecturer on Law at Alexandria University Faculty of Law in 2006. His scholarship focuses on law and development, especially as it affects good governance, the ethics of multinational corporate conduct, and weaknesses in the legal infrastructure of developing countries. In 2005, he served as a Delegate Judge on the Egyptian Administrative Court (State Council).

Adham is fluent in Arabic and English, and gave indispensable help on the Glossary of Arabic Terms, the meaning of the word “Qur’ān,” and the wives of the Prophet Muhammad. Generously sharing his considerable knowledge and experience in Islamic Law, he provided invaluable insights and corrections on all of the Chapters.

- Beau Jackson

J.D., University of Kansas School of Law (Certificate in International Trade and Finance), 2009. B.A. (Political Science and History), University of Kansas, 2003.

Beau, originally from Wichita, Kansas, practices international trade law at Adduci, Mastriani & Schaumberg, L.L.P., in Washington, D.C. Before coming to the Law School, he served as a Peace Corps Volunteer in Cape Verde, West Africa. While at Kansas, he was President of the International Law Society and an editor on the *Kansas Journal of Law and Public Policy*.

Beau’s research memos on the *Umayyad* and *Abbasid* Caliphates, Crusades, economic development in the Muslim world, the Muslim Brotherhood, and *Al Qaeda* are the bases for the Chapters on those topics.

- Ayesha Sheharyar Mehdi

J.D. and M.H.S.A. (Masters in Health Services Administration), University of Kansas School of Law, 2009. B.B.A. (Bachelors in Business Administration), Walsh College of Accountancy and Business Administration, Troy, Michigan, 2004.

Ayesha immigrated in 2002 to the United States from her hometown of Lahore, Pakistan, where she had a career as a journalist. At Kansas, Ayesha served as an editor of the *Kansas Journal of Law and Public Policy* for two consecutive years, and participated in the National Health Law Moot Court Competition. She teaches health care law at the University of Nevada Las Vegas (UNLV), is an Executive Director of the Hope Cancer Care of Nevada, Las Vegas, and balances her responsibilities as a wife and mother.

Ayesha’s research memos on mixed marriages and inheritance are the bases for portions of the Chapters on Family Law and Inheritance Law, respectively.

- Matt Odom

J.D., University of Kansas School of Law (Certificate in International Trade and Finance), 2010. B.A. (Political Science), Fort Hays State University, 2004.

Before coming to the Law School at Kansas, Matt was a United States Army Enlisted Infantryman, and is a Veteran of Operation Iraqi Freedom, with service in Baghdad (2005-2006). He has a keen interest in international and comparative law, including

Acknowledgments

human rights and humanitarian law. Matt's practice interests are in international and comparative law.

Matt's research work on the Prophet as a military leader is the basis for part of the Chapter on Muhammad. His research memo on the twelve *Shī'ite Imāms* is the basis for part of the Chapter on *Shī'ism*. His memos on the compilation of the Qur'ān, *naskh* (repeal), and Islamic countries and international law on religious freedom, are the bases for discussion on those topics.

- Ellen O'Leary

J.D., University of Kansas School of Law (Certificate in International Trade and Finance), 2011. B.A. (Classics, Political Science), Truman State University, 2006.

Ellen is from Shawnee, Kansas. She studied Comparative Law in Istanbul, Turkey, and Bio Diversity Law in the United States Virgin Islands. Likewise, she has worked abroad and at home — with the Istanbul office of the British law firm Denton Wilde Sapte, and with the Lawrence, Kansas firm of Wisler, Trevino, and Rosenthal. In college, Ellen was inducted into the Classics Honor Society, *Eta Sigma Phi*, and at the Kansas Law School she earned top honors in Islamic Law. Active in the Law School community, she served as Treasurer for the International Law Society and Women in Law. Ellen is a referee for youth and adult soccer, and an instructor to teach others to be referees.

Ellen carefully edited virtually every Chapter, re-drafted sections of several Chapters, and her insights on many points added great value. Her research memoranda on analogical reasoning (*ijma'*), consensus (*qiyās*), and *ijtihād* (independent reasoning) formed part of the basis of the Chapter on the Four Sources of Islamic Law (*uṣūl al-fiqh*), and on additional sources. A Latin scholar, Ellen also provided all Latin translations.

- Jomana Jihad Qaddour

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Jomana's research memos on abortion, contraception, women's dress, and women's employment are the bases for portions of the Chapters on Family Law. Her memo on *hawāla* banking is the basis for a portion of a Chapter on Finance. Her memo on the meaning of "*jihād*" is the basis for a portion of a Chapter on International Law.

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Ben's research memos on non-Islamic debt instruments and insurance products, and on socially responsible investing, are the bases for portions of the Chapters on Islamic Finance. His memos on the Ottomans, Anglo-Muhammadan Law, Four *Sunnite* Schools, and *Shi'ite* legal doctrines are the bases for Chapters on those topics.

As the Research Assistants and I worked collaboratively on this book, they became part of my family. My wife, Kara, our daughter, Shera, and I miss them. We shall always remember them well.

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A fool finds no pleasure in understanding but delights in airing his own opinions.

THE BOOK OF PROVERBS (New International Version), 18:2

SYNOPSIS

- [1] What Does “*Shari‘a*” Mean?
- [2] What Does “Islam” Mean?
- [3] Use of Name “Allāh” and Promise of Muhammad to Saint Catherine (628 A.D.)?
- [4] Does Arabic Matter?
- [5] Sphere of Application of *Shari‘a*?
- [6] Apology for *Shari‘a*?
- [7] Attack on *Shari‘a*?
- [8] Importance of Understanding *Shari‘a*?
- [9] Compared To What?
- [10] Other Reasonable Comparisons?

[1] WHAT DOES “SHARĪ‘A” MEAN?

The word “*Shari‘a*” typically is translated as “Islamic Law.”⁸ That was not its original meaning, as Professor Seymour Gonne Vesey-Fitzgerald (1884-1954 A.D.) of the School of Oriental and African Studies (SOAS) at the University of London explained:

The word *shari‘a* originally meant the path or track by which camels were taken to water, and so by transfer the path ordained of God by which men achieve salvation. This conception of a path or way of life is very common in early Islam.⁹

Translating “*Shari‘a*” as “Islamic Law” is not wrong. But, from an American legal mindset, it is incomplete in two respects.

As to the first respect, consider what Professor Joseph Schacht (1902-1969) of Columbia University wrote:

Islamic Law is the epitome of the Islamic spirit, the most typical manifestation of the Islamic way of life, the kernel of Islam itself. For the majority of Muslims, the law has always been and still is of much greater practical importance than the

⁸ See, e.g., Michael J.T. McMillen, *International Legal Developments in Review: 2007 — Islamic Law Forum*, 42 THE INTERNATIONAL LAWYER 1017-1032 (Summer 2008) (stating the *Shari‘a* “is what is commonly referred to as Islamic law.”).

⁹ S.G. Vesey-Fitzgerald, *Nature and Sources of the Shari‘a*, in I LAW IN THE MIDDLE EAST 86 (Majid Khadduri & Herbert J. Liebesny, eds., Washington, D.C.: The Middle East Institute, 1955). [Hereinafter, Vesey-Fitzgerald.]

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dogma. Even today the law remains a decisive element in the struggle which is being fought in Islam between traditionalism and modernism under the impact of Western ideas.¹⁰

Similarly, Professor Vesey-Fitzgerald said:

Islam is not only a religion, it is a political system, and though in modern times devout Muslims have endeavored to separate the two aspects, Islam's whole classical literature is based upon the assumption that they are *inseparable*. *Most legal systems have at one time or another in their history been intimately connected with religion*; but the two great Semitic systems, the Jewish and the Islamic, are probably unique in the thoroughness with which they identify law with the personal command of a single Almighty God. . . .¹¹

In other words, the *Shari'a* occupies a much more prestigious place in the minds of Muslims than does American law in the minds of Americans. It is one thing to respect the American legal system for its various geniuses (*e.g.*, Bill of Rights, federalism, judicial independence, separation of powers, and transparency). It is quite another thing to revere a legal system because of its Divine characteristic.

As to the second reason why a straight equation of "*Shari'a*" with "Islamic Law" is incomplete, consider the contrast Professor Vesey-Fitzgerald draws:

To the Westerner, law is a system of commands enforced by the sanction of the state. This concept is wholly alien to Islamic theory. On the one hand, the state has from time to time enforced much which could not be called law; on the other hand, the law of God remains the law of God even though there is no one to enforce it, and even though in many of its details it is quite incapable of enforcement. Indeed, the law is revered for its divine character even by people who do not profess to obey it; and so we find communities living according to customs completely at variance with the divine command, yet on occasion imbued with religious fanaticism.

Law, then, in any sense in which a Western lawyer would recognize the term, is but a part of the whole Islamic system, or rather, it is not even a part but *one of several inextricably combined elements* thereof. *Shari'a*, the Islamic term which is commonly rendered in English by "law" is, rather, the "Whole Duty of Man." Moral and pastoral theology and ethics; high spiritual aspiration and the detailed ritualistic and formal observance which to some minds is a vehicle for such aspiration and to others a substitute for it; all aspects of law; public and private hygiene; and even courtesy and good manners are all part and parcel of the *Shari'a*, a system which sometimes appears to be rigid and inflexible; at other to be imbued with that dislike of extremes, that spirit of reasonable compromise which was part of the Prophet's own character.¹²

¹⁰ Joseph Schacht, *Pre-Islamic Background and Early Development of Jurisprudence*, in I LAW IN THE MIDDLE EAST 86 (Majid Khadduri & Herbert J. Lievesny, eds., Washington, D.C.: The Middle East Institute, 1955) (emphasis added) (extracted from JOSEPH SCHACHT, THE ORIGINS OF MUHAMMADAN JURISPRUDENCE (London, England: Oxford University Press 1950).

¹¹ Vesey-Fitzgerald, *supra*, at 85.

¹² Vesey-Fitzgerald, *supra*, at 85-86 (emphasis added).

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The reference to law as a system of commands is to the legal philosophy of John Austin (1790-1859), who in his 1832 book *The Province of Jurisprudence Determined* defined “law” as a command of a sovereign that is habitually obeyed under the threat of punishment. This “Command Theory” of law is classified as strict positivism, meaning there is no connection between law, on the one hand, and morality or religion, on the other hand.

Muslims find such a proposition puzzling, absurd, or even heretical. *Surah* (Chapter) 6, *ayah* (verse) 162 states:

Say [Prophet], “My prayers and sacrifice, my life and death are all for God, Lord of all the Worlds. . . .¹³

This passage connotes that the *Shari‘a* is to govern all of life. Thus, legal positivism, the proposition that law and morality are or ought to be separate, and the project of its modern-day exponents, like Judge Richard Posner (1939-) of the United States Court of Appeals for the Seventh Circuit, which is “the demystification of law and in particular the freeing of it from moral theory, a great mystifier,” are devilishly off track.¹⁴ God (Allāh) revealed a law, the *Shari‘a*, for all people, in all places, at all times. Why would man try to separate the inseparable, law from morality? Prominent Christian thinkers make the same point: Saints Augustine (354-430) and Thomas Aquinas (1225-1274) urged that a secular law that violates God’s law is no law at all, and the Reverend Dr. Martin Luther King (1929-1968) agreed, citing them in his powerful 13 April 1963 *Letter from a Birmingham Jail*.

In truth, the likes of Judge Posner make two fatal errors. First, they presume utilitarian analysis is not a moral theory. All they are doing is substituting one moral theory for another. Along with deontology and virtue ethics, utilitarian theory is a recognized framework in moral philosophy. All three address the same question: is an action moral?:

- In a deontological framework, championed by Immanuel Kant (1724-1804), the emphasis is on duty. Actions are intrinsically right or wrong, regardless of their consequences, if they conform to moral imperatives such as “do not steal” or “do not kill.”
- Under virtue ethics, originated by Aristotle (384-322 B.C.), the focus is not on the actions of an agent, but rather on the agent herself. Does she live an ethical life, possess virtues, and if so, which ones, and thereby have a moral character? If the agent has such a character, then her acts will be moral.
- Utilitarian theory is the most common form of consequentialism, and holds that whether an act is right depends not on the agent but the outcome of the act. It entails a cost-benefit calculation familiar in law and economics, with a judgment as to the morality of an act depending on whether that act maximizes the good, the good being defined as pleasure by Jeremy Bentham (1748-1832), or well-being by John Stuart Mill (1806-1873).

Notably, Christian theologians use all three of these moral frameworks in reasoning and

¹³ THE QUR’AN — *A New Translation by M.A.S. Abdel Haleem* 6:162 at 93 (Oxford, England: Oxford University Press, 2004) (emphasis added). [Hereinafter, Qur’an.]

¹⁴ RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* vii (Cambridge, Massachusetts: Harvard University Press, 1999).

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argumentation, which is a testament to how much more broad-minded they are than positivist thinkers.

The second error of legal positivism is it endeavors to separate the inseparable. Pope John Paul II (1920-2005) spoke for Christians and Muslims alike when he said:

Even if some are reluctant to refer to the religious dimension of human beings and human history, even if others want to consign religion to the private sphere, even if believing communities are persecuted, Christians will still proclaim that *religious experience is part of human experience. It is a vital element in shaping the person and the society to which people belong.*¹⁵

Likewise, Blessed Cardinal John Henry Newman (1801-1890) stated in 1865:

Liberalism . . . is the mistake of subjecting to human judgment those revealed doctrines which are in their nature beyond and independent of it, and of claiming to determine on intrinsic grounds the truth and value of propositions which rest for their reception simply on the external authority of the Divine Word.¹⁶

Stated differently, both reasoned and revealed truth are sources of Truth, and they are at times independent — but never contradictory — of one another. From a Muslim as well as Christian perspective, law, morality, and religion are inseparable. In turn, the scope of law is not restricted to working out hypothetical disputes between abstract parties, like plaintiffs and defendants, prosecution and accused, debtors and creditors, shareholders and management, benefactors and beneficiaries, and so forth. That scope encompasses such matters, but extends far beyond them to religious practice (such as the Five Pillars of Islam), personal attire (*i.e.*, how to dress in public versus private), and etiquette. They are not merely matters of religious or social habit, as a legal positivist would say. Rather, they are part of the law — Islamic Law — itself.

In sum, to think of “the *Sharī‘a*” and “Islamic Law” as synonyms is to ignore the reality that for Muslims, the *Sharī‘a* is an entire way of life linked to Allāh.

[2] WHAT DOES “ISLAM” MEAN?

“Islam” means “submission.” The purpose of life is to discern and submit to the Will of Allāh in preparation for a Day of Judgment. Through His mercy, God has made his will known, in an authoritative way, by the revelation of the Qur’ān to his Messenger, the Prophet Muhammad. Thus, during the last 14 centuries since the first revelation in 619 A.D., Muslims (especially Muslim scholars) have dedicated a large amount of time and attention to understanding precisely what it is God expects of them. They have studied and debated the Qur’ān, trying to derive from it the principles, requirements, rights, and duties that should govern their lives. And why bother considering submission to the Will of Allāh? Because a Day of Judgment will come, on which each person will be held accountable for his or her life, and merit entry into heaven or condemnation to hell based on the degree to which that person made a resolute effort to submit.

¹⁵ Pope John Paul II, 13 January 2001 Address to the Diplomatic Corps accredited to the Holy See (quoted in *Address of the Holy Father to the New Ambassador of Iraq to the Holy See*, 28 April 2001), posted at www.vatican.va (emphasis added).

¹⁶ JOHN HENRY NEWMAN, *APOLOGIA PRO VITA SUA* Appendix 2: Matter Peculiar to the 1865 Edition, Note A — Liberalism, at 493 (1864).

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Thus, Islam is a system built around an ideal. The ideal is to identify everything that a Muslim should do in order to lead life in accordance with Divine Will. The consequence of the many centuries of study and debate over the text of the Qur'ān, and the elaborations on that text by the Prophet Muhammad (*ḥadīth*) and Muslim scholars through analogical reasoning (*qiyās*) and consensus (*ijma'*), is one of the great intellectual achievements in history: the development of an authoritative body of “dos” and “don'ts,” an expression of those things a Muslim is supposed to do, and those things a Muslim is not supposed to do, so as to behave in accordance with the Will of Allāh and thereby gain entry into Paradise. Those “dos” and “don'ts” are the *Sharī'a*, or the “legislation” that is called “Islamic Law.”

It is sometimes remarked that Islam, like Judaism, is a legalistic system, because it focuses less on what a person believes about God than on what a person does or does not do in life. With the extraordinary elaboration of the Qur'ān and Qur'ānic-based legislation, the impression conveyed is that adhering to the *Sharī'a* is a merely ticking boxes. This characterization is wrong. The “legislation,” ultimately, is advisory in character. Its purpose is to facilitate the ability of Muslims to know how to conform their lives with the Will of Allāh. While Islam is a regime to lead life in accordance with this Will, and while “Islamic law” is that regime, Islam, like any religion, is about trust in what is not usually seen readily or experienced directly. It is about faith.

[3] USE OF NAME “ALLĀH” AND PROMISE OF MUHAMMAD TO SAINT CATHERINE (628 A.D.)?

We all worship the same God. All too often, religious extremists spread the poisonous message that our prayers are directed to different powers. The Ancient Greeks, Trojans, and Romans paid homage to the same deities, calling them different names. Yet, these Ancient peoples warred, as chronicled, for instance, in *The Iliad* by Homer (*circa* 8th century B.C.). In recent times, Islamist fanatics have asserted the name “Allāh” is reserved exclusively for Muslims. This assertion comes from quarters as disparate as Saudi Arabia and Malaysia. All adherents to it misunderstand pre-Islamic history and Islam itself, and attribute false motives to non-Muslims. These errors sow division where there is none, and in turn push all of us down the slippery slope toward violent conflict.

An example comes from Malaysia, which is home to approximately 850,000 Catholic Christians amidst a population of 25.7 million people. Of the total population, Muslims account for 60.4 percent, Buddhists 19.2 percent, Christians 9.1 percent (3.3 percent of whom are Catholic), and Hindus 6.3 percent.¹⁷ Taking the position that “Allāh” is an Islamic word, the Malaysian government banned non-Muslims from using the word “Allāh” to refer to “God.”¹⁸ The government, or its extremist backers, thought the Catholic Church posed a threat, namely, conversion of Muslims. There was an irony in that fear. Malaysia has four large ethnic groups: Malays (53 percent), Chinese (26 percent), Indian (8 percent), and Indigenous (12 percent); and Malays are required by the Constitution to be Muslim.¹⁹ Arguably, some Malays feel insecure amidst economic

¹⁷ See CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK, Malaysia*, posted at www.cia.gov/library/publications/the-world-factbook/geos/my.html. The data are as of July 2010.

¹⁸ See *Malaysian Court Rules Non-Muslims May Call God Allah*, BBC NEWS, 31 December 2009, posted at <http://news.bbc.co.uk>.

¹⁹ See Kevin Brown, *The “Allah” Spat Masks Ethnic Malays’ Feelings of Insecurity*, FINANCIAL TIMES, 13 January 2010, at 2. [Hereinafter, Brown.]

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reforms and political changes that undermine the dominance they have long enjoyed, partly through positive discrimination in their favor under the 1970 New Economic Policy implemented after race riots in 1969.²⁰

Nevertheless, in 2007, Malaysian government prohibited *The Herald*, a publication of the Catholic Church in Malaysia, from using “Allāh” to describe the Christian God. Arguing that the name “Allāh” needed protection from insults and abuse, and use of this name by non-Muslims confused Muslims, the Malaysian government effectively ordered *The Herald* to cease publication, because it insisted on its right to use the word “Allāh” to refer to the one God of both Muslims and Christians. The argument of the government was more than shockingly patronizing toward Malays. It ignored the manifestly respectful use of “Allāh” by non-Muslims, and was incongruous with Islamic tradition and illogical.²¹ That tradition holds there are 99 Names of Allāh, including *Al Rahman* (The All-Compassionate) and *Al Rahim* (The All Merciful). Surely the 100th name, “God,” would not confuse a people who have successfully navigated the other 99 names.

In 2007, *The Herald* filed suit. In December 2009, the High Court of Malaysia, in Kuala Lumpur, held that Christians have the right to use the word “Allāh” when referring to “God.” The High Court, in a decision by female Christian Chinese justice Lau Bee Lan, agreed with the argument of *The Herald* that Malay-speaking indigenous Christians in Malaysian Borneo (the states of Sabah and Sarawak) had used the word “Allāh” for decades, as there is no alternative in the Malay language, and Christians in Muslim countries like Egypt and Syria had used it for centuries.²² Moreover, the Court said Articles 10-12 of the Malaysian Constitution protects freedom of speech and religion, and use of the “Allāh” is part of the exercise of those freedoms. The High Court won plaudits for its judicial independence. But, its decision triggered a spate of fire bombings of churches, many of the Protestant, by a small number of extremists.²³

²⁰ See Brown, *supra*.

²¹ Anecdotally, in 2007 the *Majlis Agama Negeri Perlis* (Religious Assembly of the State of Perlis) — a large group of learned Muslim Malaysian *ulema* — issued a *fatwā* stating there is absolutely nothing wrong with non-Muslims using the word “Allāh.” The *fatwā* has not been circulated widely, but (assuming it exists) apparently the Malaysian government paid little heed to it. See Marina Mahathir and the Word Allah, 9 January 2010, posted at <http://all4one4all.wordpress.com/2010/01/09/marina-mahathir-the-word-allah/>. The blogger is the daughter of Dr. Mahathir bin Mohamad (1925-), who served as the Prime Minister of Malaysia from 1981-2003.

²² See *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri*, High Court in Malaya, No. R1-25-28-2009, 31 December 2009; Brown, *supra*; *God and Allah in Malaysia*, ASIA SENTINEL, 3 January 2010, posted at www.asiasentinel.com/index.php?Itemid=178&id=2217&option=com_content&task=view.

²³ The violence apparently caused the High Court to stay its own decision, pending a hearing of an appeal by the Malaysian government to the Federal Court of Malaysia (the apex of the Malaysian judiciary).

In March 2011, the Malaysian Home Ministry agreed to release 35,000 Bibles. For months it had impounded them because they used the word “Allāh”. The Bibles, printed in Indonesia, principally were for Christians in East Malaysia, i.e., the states of Sabah and Sarawak. Christians explained their Bibles have referred to “Allāh” since before September 1963, when Malaysia was formed as a federal state (along with Sabah, Sarawak, and Singapore) following independence from Britain in August 1957 as the Federation of Malay States. (In August 1965, Singapore became an independent

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Not surprisingly, I have no patience for such nonsense, and nor does the Qur'ān. *Surah* 22, *ayat* 39-40 states:

³⁹Those who have been attacked are permitted to take up arms because they have been wronged — God has the power to help them — ⁴⁰those who have been driven unjustly from their homes only for saying, “Our Lord is God.” *If God did not repel some people by means of others, many monasteries, churches, synagogues, and mosques, where God’s name is much invoked, would have been destroyed.* God is sure to help those who help His cause — God is strong and mighty. . . .²⁴

This passage is about more than self-defense. It calls for respect for houses of worship, in which the name of God is invoked and extolled.

Likewise, the Prophet Muhammad clearly established a tradition (*Sunnah*) of tolerance toward Christians. Dr. Muqtedar Khan, the Director of Islamic Studies at the University of Delaware, explains the context and meaning of “The Promise to Saint Catherine’s Monastery” by Muhammad, and quotes this extraordinary Promise in its entirety:

In 628 AD, a delegation from St. Catherine’s Monastery came to Prophet Muhammad and requested his protection. He responded by granting them a charter of rights, which I reproduce below in its entirety. St. Catherine’s Monastery is located at the foot of Mt. Sinai and is the world’s oldest monastery. It possesses a huge collection of Christian manuscripts, second only to the Vatican, and is a world heritage site. It also boasts the oldest collection of Christian icons. It is a treasure house of Christian history that has remained safe for 1400 years under Muslim protection.

The Promise to St. Catherine:

“This is a message from Muhammad ibn Abdullah, as a covenant to those who adopt Christianity, near and far, we are with them.

Verily I, the servants, the helpers, and my followers defend them, because Christians are my citizens; and by God! I hold out against anything that displeases them.

No compulsion is to be on them. Neither are their judges to be removed from their jobs nor their monks from their monasteries. No one is to destroy a house of their religion, to damage it, or to carry anything from it to the Muslims’ houses.

Should anyone take any of these, he would spoil God’s covenant and disobey His Prophet. Verily, they are my allies and have my secure charter against all that they hate.

No one is to force them to travel or to oblige them to fight. The Muslims are to fight for them. If a female Christian is married to a Muslim, it is not to take place without her approval. She is not to be prevented from visiting her church to pray. Their churches are to be respected. They are neither to be prevented from repairing them nor the sacredness of their covenants.

country). The Malaysian government insisted it took its decision to resolve inter-faith issues amicably, though political analysts suggested it sought increased support from Christian voters in future East Malaysian elections. *See Malaysia to Release 35,000 Bibles Amid “Allāh” Row*, BBC NEWS, 16 March 2011, *posted at* <http://www.bbc.co.uk/news>.

²⁴ QUR’AN, *supra*, 22:39-40 at 212.

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No one of the nation (Muslims) is to disobey the covenant till the Last Day (end of the world).”²⁵

The first and the final sentence of the charter are critical. They make the promise eternal and universal. Muhammad asserts that Muslims are with Christians near and far straight away rejecting any future attempts to limit the promise to St. Catherine alone. By ordering Muslims to obey it until the Day of Judgment the charter again undermines any future attempts to revoke the privileges. These rights are inalienable. Muhammad declared Christians, all of them, as his allies and he equated ill treatment of Christians with violating God’s covenant.

A remarkable aspect of the charter is that it imposes no conditions on Christians for enjoying its privileges. It is enough that they are Christians. They are not required to alter their beliefs, they do not have to make any payments and they do not have any obligations. This is a charter of rights without any duties!

The document is not a modern human rights treaty but even though it was penned in 628 A.D., it clearly protects the right to property, freedom of religion, freedom of work, and security of the person.

Accordingly, throughout *Understanding Islamic Law (Shari‘a)*, the names “God” and “Allāh” are used interchangeably. Often, the expression “God (Allāh)” is used as a deliberate reminder that we do indeed worship the same Almighty.

[4] DOES ARABIC MATTER?

The Qur’ān was recited to the Prophet Muhammad from Allāh through the Archangel Gabriel (Jibreel) between the years 610 and 632 A.D. in the Arabic language. The vast majority of Muslims do not speak Arabic, much less the Classical Arabic in which the Qur’ān is written and recited. Most non-Arab Muslims try to learn a bit of Arabic, perhaps enough to know a few verses (*ayat*) and chapters (*surat*), or even the entire text. But, aside from the call to prayer and certain readings from the Qur’ān in a mosque, most non-Arab Muslims live their religious and secular life in the vernacular.

Nonetheless, the fact, which is referred to in the Qur’ān, the revelation occurred in Arabic explains the reverence all Muslims, whether Arabs or not, have for Arabic. There is little if any analogy here to Latin and Catholic Christians. Different parts of the Bible were written in different original languages, notably Hebrew and Ancient Greek, and translated from them. For Catholics, there is nothing particularly sacrosanct about the original languages. To the contrary, Pentecost, which marks the end of the Easter Season in the Church calendar, is a seminal event in establishing the universality of the Christian message. As Jesus promised, the Holy Spirit came down from above, and as described in *The Acts of the Apostles*:

¹When the time for Pentecost was fulfilled, they [the Twelve Apostles, Peter, John, James, Andrew, Philip, Thomas, Bartholomew, Matthew, James (son of Alphaeus), Simon the Zealot, Judas (son of James), and Matthias] were all in one place together. ²And suddenly there came from the sky a noise like a strong driving wind,

²⁵ Dr. Muqtedar Khan, *Prophet Muhammad’s Promise to Christians*, AL JAZEERA MAGAZINE, 1 January 2010, posted at <http://aljazeera.com/news/articles/39/Prophet-Muhammads-promise-to-Christians.html>.

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and it filled the entire house in which they were. ³Then there appeared to them tongues as of fire, which parted and came to rest on each one of them. ⁴And *they were all filled with the Holy Spirit and began to speak in different tongues, as the Spirit enabled them to proclaim.*

⁵Now there were devout Jews from every nation under heaven staying in Jerusalem. ⁶At this sound, they gathered in a large crowd, but they were confused because each one heard them speaking in his own language. ⁷They were astounded, and in amazement they asked, “Are not all these people [the Apostles] who are speaking Galileans? ⁸Then how does each of us hear them in his own native language? ⁹We are Parthians, Medes, and Elamites, inhabitants of Mesopotamia, Judea and Cappadocia, Pontus and Asia, ¹⁰Phrygia and Pamphylia, Egypt and the districts of Libya, near Cyrene, as well as travelers from Rome, ¹¹both Jews and converts to Judaism, Cretans *and Arabs*, yet *we hear them speaking in our own tongues of the mighty acts of God.*”²⁶

Put simply, the Apostles spoke fluently in different languages, ones they never had studied, and each person listening to them understood what was said in his or her own native language. That each Apostle could convey the message in different languages, and that each listener could understand the other regardless of the language spoken, meant the Christian message was a universal one, and could be conveyed in any language.

Here, then, is an important contrast with implications for studying the *Shari‘a*. While Islam, like Christianity, proclaims a universal message, Islamic history knows no event like Pentecost. For one faith, the original language of its message matters. For the other faith, the message transcends the original medium of its expression.

Whether Arab or not, Muslims try to learn rudimentary Classical Arabic. To them, the proper way to comprehend completely the Qur‘ān is in that language. It is not possible to translate the Qur‘ān into any other language and call the resulting text an authentic “Qur‘ān.” This sacred text is to be read, recited, and heard in its original mode of expression. Any translation is an interpretation bearing the qualification (often in a subtitle) of “interpretation” or “translation.” Only in the language in which Allāh chose to reveal the Message is the full, accurate, and complete meaning conveyed.

Catholic Christians simply do not approach the Bible in a like manner. Certainly, knowledge of Hebrew, Ancient Greek, or Latin is encouraged for laity and non-specialists, as it can broaden and deepen understanding of that sacred text. But, over the last 6 centuries, the Bible has been printed in over 2,000 languages.²⁷ It may be added that Buddhists, like Catholics, do not take that view of sacred texts, including the earliest ones of Theravada Buddhism, which were composed in Pāli (and are called the *Tipitaka*, or *Pāli Canon*, written down in Sri Lanka in the 1st century B.C. at the Fourth Buddhist

²⁶ See *The Acts of the Apostles*, 2:1-11, in THE CATHOLIC STUDY BIBLE 186-187 (New York, New York: Oxford University Press, 1990, New American Bible trans.). (emphasis added). See also *Sermon by a Sixth Century African Author*, in THE DIVINE OFFICE — THE LITURGY OF THE HOURS vol. II (Lenten Season & Easter Season), second reading for Seventh Week of Easter, Saturday, at 1005-1007 (New York, New York: Catholic Book Publishing Co., 1976) (stating: “The disciples spoke in the language of every nation. At Pentecost God chose this means to indicate the presence of the Holy Spirit: whoever had received the Spirit spoke in every kind of tongue.”).

²⁷ See Beth Griffin, *Librarian Oversees Rare Collection of Bibles*, THE LEAVEN (Newspaper of the Archdiocese of Kansas City, Kansas) 4 June 2010, at 10.

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Council). To be sure, some monks, scholars, and practicing Buddhists study Pāli so as to read or chant the texts in the original. But, the message of these texts, too, is universal — catholic with a small “c.” Hence, for example, Tibetan monks read them in Tibetan.

As a further illustration of contrast, the relationship between the Qur’ān and Arabic is not analogous to the relationship between the sacred text of Sikhism and the original languages in which it was composed. That text is the *Adi Granth* (“First Book”), or *Sri Guru Granth Sahib*. Compiled initially in 1604 by the fifth of the 10 Sikh Gurus, Arjan Dev (1563-1606), and supplemented between 1704-1706 by the tenth one, Gobind Singh (1666-1708), it is written in Gurmukhi script.²⁸ This script, commonly called “Punjabi,” is used regardless of whether the passage (technically, hymn) originally was composed in medieval Hindi, Punjabi, or some other language such as Persian.²⁹ Following the passing of Guru Gobind Singh, as of 1708, the *Adi Granth* became the perpetual Guru for Sikhs, a fascinating transformation from a line of living, human Gurus to a single, scriptural one.³⁰ However, among all sacred scriptures in the world, the *Adi Granth* is unique in that it records passages from other faiths, namely, from Hinduism and Islam.³¹ The Sikh text is “catholic,” then, in this sense of inclusiveness, and it was Guru Arjan Dev who insisted on the use of a uniform script, namely, Gurmukhi.

In any event, the obvious problem for prospective students of the *Shari’a*, and interested legal practitioners, be they Muslim or not, is that most of them do not know Classical Arabic — and, frankly, never will. For English-speaking law students and lawyers, the problem is acute: few of them ever are likely to allocate the years of time required to master that beautiful language. Even if they would like to, they do not have the time. To some of them, this reality is a “deal breaker.” Paralyzed with insecurity about their linguistic limits, they over-react, and abandon the effort to learn about Islamic Law. Alas, the perfect (knowing Classical Arabic) becomes the enemy of the good (learning about the *Shari’a* in English). The consequences are potentially dreadful.

The vast majority of Muslims, like their non-Muslim sisters and brothers, are not intransigent about how to approach the *Shari’a*. They agree it is perfectly appropriate to “interpret” the Qur’ān. They welcome the interest and enthusiasm of non-Muslims to learn a bit about their law, religion, and history. Yet, should the project be abandoned, then a vital bridge to building peace, tolerance, and understanding (learning the *Shari’a* and Islamic religion and history from which it is inseparable) never gets built. Put bluntly, to remain paralyzed poses a national security threat to the United States and other non-Muslim countries. Law students are supposed to be at the forefront of bridge builders within and across countries, not remain behind walls of ignorance and prejudice buttressed by a fear of imperfection. An “us-versus-them” mentality sets in, those walls become fortresses, miscalculations occur, and violence erupts (again).

²⁸ “Guru” typically is translated as “teacher.” It comes from two words, “gu” (darkness) and “ru” (light). See W. OWEN COLE & PIARA SINGH SAMBHI, *THE SIKHS — THEIR RELIGIOUS BELIEFS AND PRACTICES* 50 (New York, New York: Routledge, 1978). [Hereinafter, *THE SIKHS*.] Hence, a Guru is “one who delivers a person from ignorance by giving him the message which liberates and the technique to realize it.” *Id.* at xxii.

²⁹ See *THE SIKHS*, *supra*, at 50.

³⁰ See *THE SIKHS*, *supra*, at 43.

³¹ See *THE SIKHS*, *supra*, at 52.

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[5] SPHERE OF APPLICATION OF SHARĪ'A?

To whom and when is Islamic Law applicable? The message of Islam and disciplines of the *Sharī'a* purport to be for all time, place, and people. Universally applicable, the precepts of Islam, and the *Sharī'a* at least in the sense of the personal obligations it establishes, such as the Five Pillars, bind all Muslims, regardless of when or where they live. This fact intimates there are two dimensions to discerning the scope of the *Sharī'a*.

First, is the person a Muslim or a non-Muslim? Generally, the *Sharī'a* is not imposed on non-Muslims. But, depending on the country and matter at issue, it may be. For example, non-Muslims are expected to respect the Islamic legal obligation not to drink alcohol when living or traveling in the Kingdom of Saudi Arabia. Should they commit the crime of drinking alcohol (*shurb al-khamr*), they risk having imposed on them a *Sharī'a* punishment (specifically, a “*ḥadd*,” or “limit,” sanction — flogging — which is associated with a *ḥaqq Allāh* offense, or “claim of God”). As another example, a non-Muslim doing business in a Muslim country with Muslims may want, or even have, to respect *Sharī'a* rules on banking and financial transactions, particularly as they concern interest (*ribā*).

Second, in what jurisdiction does the person, Muslim or non-Muslim, reside? Muslim countries can be divided into six categories in terms of whether, and how, they adhere to the *Sharī'a* on matters in the public sphere, such as Contracts, Property, Business Associations, Banking and Finance, Family Law, and Criminal Law. Consider the diversity in the Middle East, South Asia, and Far East:

(1) *Officially Islamic Country, but Secular Legal System* —

Islam is the official religion of the country. But, the *Sharī'a* plays little (if any) role in the legal life of the country. Islamic Law affects the private lives of Muslims, such as adherence to the Five Pillars, to the extent they are devout practitioners. Examples include Iraq before 2005.

(2) *Islamic Majority Country, but Secular Legal System* —

Islam is the official religion of a majority of people in the country. But, there is no official state religion. The *Sharī'a* plays little (if any) role in the legal life of the country. Again, it affects the private sphere, to the extent individual Muslims prefer. Examples include Jordan and Syria.

(3) *Secular Country and Legal System* —

Nothing is mentioned in the Constitution of the country about Islam as a religion or the *Sharī'a* as a legal system. Once again, adherence to the personal obligations associated with Islamic Law is regarded as a private matter. An example would be Turkey. Likewise, Iraq under Saddam Hussein was the most militantly secular country in the Arab Muslim World.

(4) *Islam is the Basis for Some Law* —

The country is all or majority Muslim, and Islam may or may not be declared as the official state religion. The legal system uses the *Sharī'a* in certain areas. Thus, Islamic Law governs not only the private sphere, but also some aspects of the public life. For example, Israel and Palestine adhere to the Millet System on matters of Personal Status. Under the secular Constitution of India, the minority Muslim community is permitted to follow Islamic Family Law.

(5) *Islam is Part of a Mixed Legal System* —

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Again the country is all or majority Muslim, and Islam may or may not be propounded as the official religion. The legal system is mixed, in that it has features from Common Law, Civil Law, and Islamic Law. Depending on the country, the *Shari'a* component in the legal system is increasingly prominent. Here again, Islamic Law matters in both the private and public spheres. Mixed, or hybrid legal systems characterize almost all Muslim countries on the Indian Subcontinent and in East Asia. They include Bangladesh, Brunei, Indonesia, Malaysia, and Pakistan.

(6) *Islam is the Legal System* —

Again the country is all or majority Muslim, but Islam almost certainly is the officially recognized state religion. Islam is the law itself, that is, the *Shari'a* is the “law of the land.” It is supplemented by governmental decrees of one form or another, but only when and to the extent necessary. Consequently, Islamic Law affects private behavior, plus all aspects of public life. The Kingdom of Saudi Arabia and Libya are examples. Indeed, adorning the green flag of the Kingdom is the *Shahada*. Certain violent extremist groups, most notoriously *Al Qaeda*, seek to impose the *Shari'a* in areas under their control or influence.

Table I-1 summarizes the two dimensions of the question of applicability of Islamic Law.

The Table also can be used diagonally, that is, to consider the applicability of the *Shari'a* to Muslims in a Muslim country entering into transactions with non-Muslims in a non-Muslim country (or vice versa). For example, does the *Shari'a* apply to a contract or banking transaction between a Muslim in Saudi Arabia and a non-Muslim in England? The answer is “it depends.” First, the Muslim party may prefer the transaction comport with Islamic Law, for example, have no interest (*ribā*), and the British party may agree. Alternatively, the British party may insist on non-Islamic rules (such as English banking law), which allow for interest. In this latter instance, the transaction still would be legally valid in Saudi Arabia. But, in the event of a dispute between the parties, a *Shari'a* court would not enforce the deal.



[6] APOLOGY FOR SHARĪ'A?

Two aspects are missing from *Understanding Islamic Law (Shari'a)*, and intentionally so. First, this book is not an apology for Islam or the *Shari'a*. In modern parlance, “apology” connotes a statement of sorrow, sometimes coupled with an explanation. The Latin root of the term “apology” refers to offering a reasoned defense of a proposition. The point here is not to defend Islam and the *Shari'a* against any and all challenges.

Yet, this book is not a mere regurgitation of Islamic legal precepts. To the contrary, it endeavors to show the reasons for them. Often, these reasons are impressive, appealing in an ecumenical sense, and even persuasive. Credit must be given where credit is due, and all the more so if doing so contributes to dialogue among faiths and legal systems by spotlighting areas of agreement and narrowing points of disagreement.

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**Table I-1:
Applicability of the *Sharī'a***

Country  Person 	<i>Muslim Country in which the Sharī'a is All or Part of the Legal System</i>	<i>Non-Muslim Country</i>
<i>Muslim</i>	The <i>Sharī'a</i> is applicable in both the public and private spheres.	The <i>Sharī'a</i> is applicable in the private sphere, to the extent the individual seeks to follow it.
<i>Non-Muslim</i>	The <i>Sharī'a</i> is not applicable in the private sphere, but may be applicable to certain transactions or events (<i>e.g.</i> , contracts, banking, and certain criminal matters) in the public sphere.	The <i>Sharī'a</i> is not applicable.

It is appropriate to emphasize reason in a book on Islamic Law. Not to do so is a terrible disservice to this sacred legal system. Reason — the application of the intellect manifest through non-violent discourse — has been a part of Islam since the Prophet Muhammad received the message of the Qur'ān from Allāh. *Surah* (chapter) 16, *ayah* (verse) 125 of the Qur'ān states clearly:

[Prophet Muhammad], call people to the way of your Lord *with wisdom and beautiful teaching. Argue with them in the most courteous way*, for your Lord knows best who has strayed from His way and who is rightly guided.³²

That *surah* 16 is a Meccan *surah*, meaning (*inter alia*) it was revealed to Muhammad early on, before the *Hijra*, is all the more evidence that reason is an innate part of Islam. Of course, the use of reason has ebbed and flowed in Islam, as in all religions. At different times, and led (sometimes misguided) by different leaders, reason has been de-emphasized at the expense of faith. At other times, the opposite has occurred.

To my mind, reason and faith are inseparable, as Pope John Paul II beautifully points out in his September 1998 Encyclical Letter, *Fides et Ratio*.³³ His successor, Pope Benedict XVI (1927-), calls for a re-balancing of faith and reason in Islam, with greater emphasis on reason, even independent reasoning (*ijtihād*). Many observers view this call as provocative, particularly in respect of the September 2006 address at Regensburg

³² QUR'AN, *supra* 16:125 at 174 (emphasis added).

³³ See Encyclical Letter, *Fides et Ratio*, of the Supreme Pontiff John Paul II to the Bishops of the Catholic Church on the Relationship Between Faith and Reason (14 September 1998), posted at www.vatican.va.

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University, Germany.³⁴ In that speech, the Holy Father quotes, without endorsing, a Byzantine ruler. The quote and the key paragraphs around it are as follows:

. . . I read the edition by Professor [Adel] Theodore Khoury (Münster) [a German Catholic theologian and expert on Islam (1930-)] of part of the dialogue carried on — perhaps in 1391 in the winter barracks near Ankara — by the erudite Byzantine emperor Manuel II Palaiologos [(1350-1425)] and an educated Persian on the subject of Christianity and Islam, and the truth of both. It was presumably the emperor himself who set down this dialogue, during the siege of Constantinople between 1394 and 1402; and this would explain why his arguments are given in greater detail than those of his Persian interlocutor. The dialogue ranges widely over the structures of faith contained in the Bible and in the Qur’an, and deals especially with the image of God and of man, while necessarily returning repeatedly to the relationship between — as they were called — three “Laws” or “rules of life:” the Old Testament, the New Testament and the Qur’an. It is not my intention to discuss this question in the present lecture; here I would like to discuss only one point — itself rather marginal to the dialogue as a whole — which, in the context of the issue of “faith and reason,” I found interesting and which can serve as the starting-point for my reflections on this issue.

In the seventh conversation . . . edited by Professor Khoury, the emperor touches on the theme of the holy war. The emperor must have known that surah 2, 256 reads: “There is no compulsion in religion.” According to some of the experts, this is probably one of the surahs of the early period, when Mohammed was still powerless and under threat. But naturally the emperor also knew the instructions, developed later and recorded in the Qur’an, concerning holy war. Without descending to details, such as the difference in treatment accorded to those who have the “Book” and the “infidels,” *he addresses his interlocutor with a startling brusqueness, a brusqueness that we find unacceptable*, on the central question about the relationship between religion and violence in general, saying:

“Show me just what Mohammed brought that was new, and there you will find things only evil and inhuman, such as his command to spread by the sword the faith he preached.”

The emperor, after having expressed himself so forcefully, goes on to explain in detail the reasons why spreading the faith through violence is something unreasonable. Violence is incompatible with the nature of God and the nature of the soul. “God”, he says,

“is not pleased by blood — and not acting reasonably . . . is contrary to God’s nature. Faith is born of the soul, not the body. Whoever would lead someone to faith needs the ability to speak well and to reason properly, without violence and threats. . . . To convince a reasonable soul, one does not need a strong arm, or weapons of any kind, or any other means of threatening a person with death. . . .”

The decisive statement in this argument against violent conversion is this: not to act in accordance with reason is contrary to God’s nature. The editor, Theodore Khoury, observes: For the emperor, as a Byzantine shaped by Greek philosophy, this statement

³⁴ For one synopsis of the controversy, see *Regensburg Lecture*, WIKIPEDIA, posted at http://en.wikipedia.org/wiki/Regensburg_lecture.

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is self-evident. But for Muslim teaching, God is absolutely transcendent. His will is not bound up with any of our categories, even that of rationality. Here Khoury quotes a work of the noted French Islamist R. Arnaldez, who points out that Ibn Hazm went so far as to state that God is not bound even by his own word, and that nothing would oblige him to reveal the truth to us. Were it God's will, we would even have to practice idolatry.

At this point, as far as understanding of God and thus the concrete practice of religion is concerned, we are faced with an unavoidable dilemma. Is the conviction that acting unreasonably contradicts God's nature merely a Greek idea, or is it always and intrinsically true? I believe that here we can see the profound harmony between what is Greek in the best sense of the word and the biblical understanding of faith in God.³⁵

Manifestly, the speech was drafted by an academic at heart for scholarly debate about faith, reason, and violence.³⁶

One reaction to the speech was:

It is not so much that what he says is controversial, but that people find it painful to hear.³⁷

This reaction is an intelligent, nuanced one. There were less open-minded and even violent responses, despite Pope Benedict adding in a footnote to the controversial quotation:

In the Muslim world, this quotation has unfortunately been taken as an expression of my personal position, thus arousing understandable indignation. I hope that the reader of my text can see immediately that this sentence does not express my personal view of the Qur'an, for which I have the respect due to the holy book of a great religion. In quoting the text of the Emperor Manuel II, I intended solely to draw out the essential relationship between faith and reason. On this point I am in agreement with Manuel II, but without endorsing his polemic.³⁸

The broader, deeper, and indispensable point made in *Fides et Ratio*, and exemplified in the Regensburg speech, is a courageous one: faith without reason leads to blind adherence, and even extremism; and reason without faith is a cold intellectual cul-de-sac that historically has justified hideously inhuman acts. Thus, as Pope John Paul II put it metaphorically, faith and reason are two wings of the same bird, without which the bird cannot fly, but with which it can soar.

³⁵ Papal Address at University of Regensburg, "Three Stages in the Program of De-Hellenization," Apostolic Journey of His Holiness Benedict XVI to München, Altötting and Regensburg, 9-14 September 2006, Meeting with the Representatives of Science, Lecture of the Holy Father, Aula Magna of the University of Regensburg (12 September 2006), Faith, Reason and the University — Memories and Reflections., *posted at* <http://www.zenit.org/article-16955?l=english> (official Vatican translation) (footnotes omitted, emphasis added, minor formatting and spelling changes). [Hereinafter, Regensburg Address.] The Address also is posted at www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html.

³⁶ *Quoted in A Chapter of Accidents*, THE ECONOMIST, 65, 66, 16 May 2009.

³⁷ *A Chapter of Accidents*, THE ECONOMIST, 65, 67, 16 May 2009 (*quoting* a "conservative Catholic layman in Rome").

³⁸ Regensburg Address, *supra*, at fn. 3.

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Extremism is antithetical to flight. It kills the bird. Yet, among some liberal, elite intellectual circles, it is popular to eschew use of the word “extremism.” Former British Foreign Secretary David Miliband (1965-) argued in a May 2009 speech to the Oxford Centre for Islamic Studies that habitual use of the distinction between “moderates” and “extremists” among Muslim political and religious movements results in lazy stereotypes.³⁹ Worse yet, the distinction obfuscates a variety of national territorial struggles with pan-Islamist *jihādi* struggles. Are Uyghur Muslims in Xinjiang Province, China, Kashmiri Muslims in northwest India and Pakistan, and Chechnyan Muslims in the Russian Caucasus all part of a broad *Al Qaeda* movement? Or, are they more an eclectic and diverse group of nationalist fighters? Ostensibly, the question is academic. They are violent, and commit heinous terrorist acts. But, if they are to be dealt successfully and justly, then the question matters. How to deal with them depends partly on who they are and how they think.

The Foreign Secretary makes a valid point. Nevertheless, I do rely on the distinction between “moderates” and “extremists” in various parts of this book. A person entirely unwilling to entertain the possibility of synthesizing faith and reason is an “extremist” in the lexicographic meaning, given by the *Oxford English Dictionary*, of the term: “lacking restraint or moderation,” “advocating immoderate measures,” “outermost,” “furthest from the center,” “situated at either end.” Its synonyms include “rigid,” “harsh,” “draconian,” “uncompromising,” “drastic,” “outrageous,” and “beyond the pale.” As do all faiths at one point or another in history, Islam is bedeviled by a small minority of “extremists.” That is no secret, including to Muslims, and to use euphemisms is to commit the same blunder: obfuscation of the truth.

[7] ATTACK ON *SHARĪ‘A*?

The second missing dimension is attack. This book is not an attack on Islam or the *Sharī‘a*. A prospective reader hoping for a polemical account, or castigation, of the religion and sacred legal tradition it has spawned will be disappointed. I have no interest in the level of discourse about Islam characteristic typical of the mainstream American media. Even after the horrors of 9/11 and the blunders in Iraq and Afghanistan, in the United States and throughout the English-speaking world, the inattentiveness, misunderstanding, ignorance, and prejudice toward Islam and its legal system remain dangerously high and widespread. The “danger” is that inattentiveness, misunderstanding, ignorance, and prejudice lead to clashes between civilizations. Given the destructive potential of modern weaponry, the world cannot afford such clashes. Our survival depends in part on proving that the thesis of Samuel Huntington, in *The Clash of Civilizations*, is wrong, or cannot be allowed to come true. Writing a tract would be orthogonal to the common interests of Muslims and non-Muslims alike.

That is not to say this book is uncritical of Islam or Islamic Law. If I am not an antagonist against Islam and the *Sharī‘a*, I also am not a cheerleader. There are plenty of points at which the book offers candid observations. The two leading examples, and the ones about which I cannot pretend to be objective, are religious freedom and the treatment of women. Bluntly put, on these topics, many parts of the Muslim world are backward, and some of the trends therein are depressing if not outrageous. Many of my Muslim friends not only agree with these points, but argue far more articulately than I do in

³⁹ See *Engaging Islamists — Miliband Asks Right Questions as Muslims Await Obama*, FINANCIAL TIMES, 22 May 2009, at 8.

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first-rate research publications like the *Arab Human Development Report*.

[8] IMPORTANCE OF UNDERSTANDING SHARĪ‘A?

The purpose of this book is aptly conveyed by the first word of the title — “Understanding.” The book is supposed to be a reasonably comprehensive and balanced treatment of a sacred legal system and the religion and history associated with that system. This treatment is designed for the student of the *Sharī‘a*, whether she is enrolled formally in a law school or other graduate program, or has moved on into professional legal practice or the academy.

Unless the world is content with rising tensions and deeper schisms that too often yield the poisons of incivility and violence, more understanding is needed than currently exists about Islam. Non-Muslims in the United States generally have little knowledge of Islam, and concomitantly, some prejudice against it. In January 2010, Gallup published *Religious Perceptions in America*. The report contains an in-depth analysis of the attitudes of in the United States toward Muslims and Islam. Among its most striking findings are:⁴⁰

- Of the four faiths studied, Judaism, Christianity, Islam, and Buddhism, Islam elicits the most negative views. Over half of Americans (53 percent) state that their opinion of Islam is “not favorable at all” (31 percent) or “not too favorable” (22 percent).
- Nearly two-thirds of Americans (63 percent) confess they have “very little knowledge” of Islam (40 percent), or “none at all” (23 percent).
- Americans view Islam more negatively than they view Muslims, suggesting an ability to distinguish between a religion and its adherents. But, Americans are more than twice as likely to hold negative feelings toward Muslims than toward Jews, Christians, or Buddhists. Nearly half of Americans (43 percent) confess they are “a little” prejudiced toward Muslims. Almost 1 in 10 Americans (9 percent) say they harbor “a great deal of prejudice” against them.
- In respect of individual prejudice, Americans who do not know a Muslim are twice as likely to say they are greatly prejudiced toward Muslims. Knowing the name of the Prophet of Islam (Muhammad) makes an American twice as likely to have “a great deal of prejudice” toward Islam.
- Notably, neither other faiths (except for their extreme fringes) nor adherence to them is to blame for prejudicial attitudes. A key variable associated with “a great deal of prejudice” by Americans against Muslims is absence (in terms of attendance less than once a week) from church or other religious service. In contrast, Americans who attend a service more than once a week are more than twice as likely to say they feel no prejudice against Muslims.
- On religious freedom, two-thirds of Americans (66 percent) feel Muslims are not accepting of other religions. A similar proportion (68 percent) disagrees with the proposition that the religious beliefs of Christians and Muslims are basically the same.
- On women and diversity, the vast majority of Americans (81 percent) do not agree that most Muslims believe women and men should have equal rights.

⁴⁰ See Gallup, *Religious Perceptions in America*, Executive Summary 4-5 (2009).

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Nearly half (47 percent) of Americans think most Muslims accept others from different races.

Lest it be thought this negativity is an American phenomenon, consider the result of an October 2010 opinion poll of Germans by ARD state television: 37 percent of Germans agreed with the proposition that “ ‘Germany without Islam’ would be a better place.”⁴¹

The mirror-image of many of these points also seems to be true. Muslims, both in the United States and around the world are not always familiar with those other faiths. That is especially true if they do not live in close proximity to persons of other faiths. This ignorance is a breeding ground for stereotypes and prejudice. One consolation in the Gallup findings is that nearly three-quarters of Americans (70 percent) agree that most Muslims want peace. There is reason to believe most Muslims would say the same about most Americans, and thus both groups would adduce the ability to differentiate individuals from governments, and people from policies.

My professional station in life is a teacher. A teacher is supposed to explain, and in doing so probe with a critical intellect and compassionate heart. The explanation is supposed to stimulate the student, which occurs only if the teacher is passionate about the subject matter. I am passionate about the study of Islam and the *Shari'a*. That is not to say I am a master of the subject — hardly.

My primary area of scholarship is International Trade Law. I know well, in my head and heart, that I do not have the confidence or command in writing about the *Shari'a* that I sense (perhaps foolishly so!) in Trade. That is, I am more cognizant of what I do not know in Trade than in Islamic Law. After all, through the 1,600 years since the advent of Islam, thousands upon thousands of scholars (who know Arabic, which I do not, aside from a few tutorials and limited vocabulary) have devoted their lives to the study of Islamic Law. I am not, and never will be, in their league.

Nevertheless, my sense of “mission” to write this book has never wavered, and indeed increased with each day of work on the project. The problem with that elite league is it has not engaged the contemporary English-speaking law student. Treatises on the *Shari'a*, written in Arabic, stacked away on some dusty shelf at a school of Qur'anic thought in Damascus, are inaccessible to this student. The grand scholarship of Islamic scholars through the ages plays little role in the life of the average American law student. That, by the way, is ironic. Many Anglo-American legal doctrines originate (directly or indirectly) in Islamic Law concepts, or bear an uncanny resemblance to them.

So, there is a choice: be paralyzed with fear of what I do not know, and do nothing, or try to bridge the gap with what I do know and can readily learn in a limited span of time. The teacher in me, moved by the critical period in world history in which my students are destined to practice, impelled me to write this book. In making that choice, I faced a stark truth: I cannot be objective. Indeed, I do not believe value-free scholarship is possible, or even desirable. C.S. Lewis (1898-1963) persuaded me of this truth through his 1944 book, *The Abolition of Man*.⁴²

⁴¹ Quentin Peel, *Merkel Needs to Reconcile the Economic and Political Realities*, FINANCIAL TIMES, 19 October 2010, at 2.

⁴² See C.S. LEWIS, *THE ABOLITION OF MAN — REFLECTIONS ON EDUCATION WITH SPECIAL REFERENCE TO THE TEACHING OF ENGLISH IN THE UPPER FORMS OF SCHOOLS* (1944, New York, New York: Harper Collins Publishers, Inc., 2001 ed.).

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[9] COMPARED TO WHAT?

Islamic Law as taught in American and other English-medium law schools is not a course in catechesis, though it certainly can have the positive benefit of helping students think through their own questions about religion. It is not, strictly speaking, a trade course in the sense of preparing students to practice Islamic Law, though it certainly can have that positive benefit. Instead, Islamic Law is a course that falls under the rubric of “Comparative Law.” For most of the post-Second World War era, that rubric was far narrower than it sounds: it meant comparing American Law to Civil Law, *i.e.*, it was a Euro-centric label under which most courses examined French or German Law.

In more recent decades, “Comparative Law” has come to encompass courses in Chinese Law, Japanese Law, the Law of Latin American countries, and the Law of Indigenous Peoples. That is a right and proper development, if for no other reason than to correct the prior imbalance in favor of the western European continent. An additional supporting rationale is the rising cultural, economic, and political importance of the non-western world. No law student, regardless of where he or she practices, is immune from influences from the “Third World.”

It is equally right and proper that Islamic Law has been incorporated into the Comparative Law curriculum of a large and growing number of American and English-medium law schools. It may well be the case that Islamic Law is increasingly mainstreamed into this curriculum, and viewed by Deans and faculties alike not as an “exotic” course, but rather as fairly important to producing educated, globally-minded lawyers — the way, for example, Chinese Law seems to be.

Yet, this happy trend begs a question: to what should Islamic Law be compared? The question is asked in any Comparative Law course. What, for instance, is the reference point for examining Chinese Law? At one level, it is important not to dwell on the question. The highest and noblest goal of a Comparative Law course is to develop a sense of empathy for the other legal system. That requires an effort to see the other legal system from within, and view it as lawyers and scholars in that legal system would view it. But, in a practical sense, a frame of reference — a starting point — always is helpful. It is in the nature of the legal mind to examine the unfamiliar by relating it to the known.

I answer the question of what the *Shari‘a* ought to be compared with as I suspect most lawyers and legal scholars do: I start with what I know. But, Islamic Law is a sacred legal system. It comes from God (Allāh), not just a secular parliament or court. That means the *Shari‘a* is best compared not only with a secular legal system, but also another sacred tradition. To compare an Islamic legal rule only with American law is a recipe for under-appreciating the richness and depth of *Shari‘a*, with no disrespect intended to American law. The dimension of the Divine cannot be extricated from Islamic Law, whereas it can and often is in respect of American Law. (Whether it should be is another, and hotly debated, question.)

Setting aside the insight most authors get from writing a book — the more they learn, the more they realize what they do not know — my familiarity is with a little bit of American Law and Catholic Christianity. Stress should be placed on “a little bit.” Much as I love and respect them, I do not claim to know either of these broad and deep areas well. I am fairly certain that in the pages of this book, experts in these fields, along with authentic scholars of the *Shari‘a*, will find I have goofed up various points. I apologize,

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of course, in advance, and assure that no disrespect is intended. I welcome corrections for a Second Edition. Yet, the facts remain I am educated in the American legal system, practiced at the Federal Reserve in New York, and am a (flawed) Roman Catholic. The American legal and Catholic Christian paradigms are the ones in which my mind, body, and soul operate everyday. I neither can nor wish to leave them at home when I go to work. They impart the reference points for comparisons with Islamic Law.

(1) Demographics Matter

Certainly, a less personally expedient, and more pragmatic, defense of comparing the *Shari'a* with American Law, and with Catholic Christianity, exists. Consider the following three arguments. First, demographics matter. They drive a great deal of life. There are now 1.57 billion Muslims in the world:⁴³

- 2.5 million Muslims are in the United States, accounting for 0.8 percent of the American population, and 0.2 percent of the global Islamic population.
- 315.3 million Muslims are in the Middle East and North Africa, accounting for 91.2 percent or more of the people in these regions, but just 20.1 percent of the global Islamic population.
- 972.5 million Muslims are in the Asia — Pacific region, accounting for over 61.9 percent of the global Islamic population.
- The largest Islamic country in the world is Indonesia, with roughly 220 million people, most of whom are Muslim. India is home to between 180-250 million Muslims. Bangladesh and Pakistan boast populations, almost all of which are Muslim, of about 170 million each. If the numbers of Muslims on the Indian Subcontinent, specifically, Bangladesh, India, and Pakistan, are summed together, they exceed the number of Hindus in India.
- Undergoing rapid population growth, Pakistan soon may be the fourth largest country in the world, following China, India, and the United States.⁴⁴ But, its decrepit infrastructure and corrupt political system render it incapable of supporting that population with a decent standard of living.
- With about 6.8 billion people on the planet, about one out of every four persons, or 22.9 percent of the population of the world, is a Muslim.
- Of the total Islamic population in the world, between 10-13 percent are *Shi'ites*, with between 68-80 percent of them living in Iran, Iraq, India, and Pakistan, and the remaining 87-90 percent of Muslims are *Sunnis*.

It must be added that two out of five people in the Arab world live on less than U.S. \$2 per day.⁴⁵ This last statistic is poignant in light of the oft-remarked link between poverty, or oppression more generally, on the one hand, and vulnerability to the evil temptation of

⁴³ Unless otherwise noted, these data are from an October 2009 study by the Pew Forum on Religion & Public Life, *Mapping the Global Muslim Population: A Report on the Size and Distribution of the World's Muslim Population*, and are based on research in over 200 countries. See <http://pewforum.org>. For further statistics, see, e.g., *CIA World Factbook*, posted at www.cia.gov/library/publications/the-world-factbook/.

⁴⁴ See www.businessinsider.com/10-countries-on-the-verge-of-a-demographic-crisis-2010-2#pakistan-167-billion-gdp-2. (The data are as of June 2010.)

⁴⁵ *Waking From Its Sleep*, THE ECONOMIST, 25 July 2009, at 9.

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extremism, on the other hand. Saudi Arabia is a case in point. Like Pakistan and Egypt, it is experiencing rapid population growth.⁴⁶ Over 60 percent of the Saudi population is less than 30 years old. But, it lacks the robust educational and job opportunities to match the aspirations of its young people, a disconnect that is all the more excruciating given the tight cultural, social, and religious milieu in the Kingdom.

There also are 1.13 billion Roman Catholics, and a further roughly 1.1 billion Protestants. Thus, one out of every three persons is Christian, with nearly out of every five being Catholic or Protestant. By comparing Islam and Catholic Christianity, over 40 percent of the professed faith of the world — nearly half — is covered. Insofar as adherents to Protestantism are familiar with Catholicism, the figure rises to almost 60 percent, or nearly two out of every three persons. In any work on Comparative Law, the opportunity to have that work resonate with such large percentages of the global community is rare.

As an important aside, one obvious inference from the above demographic statistics is that the tendency to equate “Arab” and “Muslim,” fueled by mainstream media coverage of Islam in the non-Muslim western world, is erroneous. Indeed, it can prove insulting to Arab and non-Arab Muslim communities around the world. The Muslim population of China probably exceeds the entire population of any Arab country.

Note some basic terminology: an “Arab” is a speaker of Arabic, regardless of his or her faith. The word “Islam” means “submission.” It is properly and specifically used to mean submission to the Will of Allāh. A “Muslim” is anyone who follows “Islam,” and thus who seeks to submit to the Will of Allāh. To submit to that Will, a Muslim must exert effort, or struggle, that is, practice a “*jihād al-akbar*,” to discern what it is God wants from him or her. Manifestly, not all Arabs are Muslims. Conversely, not all Muslims are Arabs. Indeed, the vast majority of Muslims are not Arabs. Rather, they make their home in East and South Asia. A large and growing number of Catholic Christians also make their home in East and South Asia. And, American influence — while arguably in relative decline vis-à-vis other powers — still is pre-eminent. It will be for decades. Thus, to study the *Shari‘a* with some comparisons to Catholic Christianity and American Law “works” to appreciate a bit about Islam in a pluralistic and somewhat American-oriented environment.

To be sure, Arabs play an important role in Islamic history. It was on the Arabian Peninsula the Qur’ān was revealed, in Arabic. It is to the Arabian Peninsula every Muslim goes, or tries to go, on the *Hajj* pilgrimage. Consequently, all Muslims have a special reverence for Arabs, Arab lands, and Arabic. But, there are rivalries, sometimes fierce and violent, between Arabs and non-Arab Muslims, such as Persians or Turks. Ironically, of the three largest countries in the Middle East — Iran, Turkey, and Egypt — only one of them, Egypt, is Arab. The demographic significance of Egypt is partly in its population density. As Herodotus said, Egypt is the gift of the Nile. Nearly all of its population lives around this river. Omitting the desert from the calculation makes Egypt the most densely populated place on earth, with 2,000 people per square kilometer, double that of Bangladesh.⁴⁷

⁴⁶ See www.businessinsider.com/10-countries-on-the-verge-of-a-demographic-crisis-2010-2#saudi-arabia-380-billion-gdp-4. (The data are as of June 2010).

⁴⁷ See www.businessinsider.com/10-countries-on-the-verge-of-a-demographic-crisis-2010-2#egypt-188-billion-gdp-3. (The data are as of June 2010).

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(2) History Matters

As for the second defense of the comparative undertaking here, it is this: history matters. It shapes our present consciousness and future dispositions. Christianity has known Islam since the birth of that great faith. Much of the early interaction was unpleasant, indeed violent. To this day, Christianity still is getting to know Islam better, and recover from past misinterpretations and misunderstandings.

The Catholic Church has global interests, not only in the doctrinal sense of proclaiming a universal message of salvation, but also in the practical sense of protecting Christian minorities in Muslim lands. As for the United States, in the post-Second World War era, or actually just before it with the discovery of oil on the Arabian Peninsula in the 1930s, it came into direct, sustained interaction with the Arab Muslim world. Since then, the contacts have metastasized throughout the Islamic world.

(3) Political Economy Matters

Third, political economy matters. It is about the grand issues of war and peace, and wealth and poverty. In the post-9/11 era, the United States must come to a peaceful accommodation with the Islamic world, and assist it in its continued economic development. The alternative is continued uneasy, unstable, and unpredictable relations.

As a (if not the) superpower, the United States has global interests. That is true whether the topic is energy and natural resources, democracy, nuclear proliferation, religious freedom, or women's rights. On virtually every topic of cross-border relevance, America cannot avoid Islam any more than Christianity can do so: Islam is a "fact on the ground," and a growing one at that.

Perhaps the greatest global interest America has is security. Security is unattainable when a sizeable percentage of the population of the world feels a sense of oppression and, rightly or wrongly, lists Americans or Christians as among the causes. Ironically, through more and richer comparisons among the *Shari'a*, American law, and Catholic Christianity, on many such topics, and on security itself, the three parties might well find themselves in agreement, even alliance. Americans and Muslims, as well as Christians and Muslims, know each other as brothers and sisters. And, yet, they do not. It is in their collective self-interest to do so.

[10] OTHER REASONABLE COMPARISONS?

I concede the argument that a better analogy than (1) Islamic Law-to-American Law and Islamic Law-to-Catholic Christian teaching would be (2) Islamic Law-to-Canon Law, (3) Islamic Law-to-Jewish Law, or (4) Islamic Law-to-Hindu Law. Indeed, what Jesuit Father John A. Hardon (1914-2000) writes of Canon Law easily be said of the *Shari'a*:

Canon Law is only an attempt to organize and systematize for prudential reasons the external aspects of what is essentially not juridical: *the will of God in its demands on the will of man.*⁴⁸

Thus, when making comparisons, why not draw them directly to another sacred legal

⁴⁸ JOHN A. HARDON, S.J., *THE CATHOLIC CATECHISM — A CONTEMPORARY CATECHISM OF THE TEACHINGS OF THE CATHOLIC CHURCH* 336 (New York, New York: Doubleday, 1981) (emphasis added).

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tradition? I offer two rather anemic answers.

First, my knowledge of Jewish and Hindu Law is woefully inadequate, and bested by only a marginal understanding of a few points in Canon Law. As the title connotes, the point of *Understanding Islamic Law (Shari'a)* is to understand Islamic Law. Comparisons to American law and Catholic Christian teaching are used to facilitate that understanding. Given my constraints, comparisons to other sacred legal systems would obfuscate matters and rightly subject the book to criticism.

Second, Canon, Jewish, and Hindu Law are of relatively limited applicability. The demographic and political economy factors render such a comparison relatively less compelling as a practical matter, however intellectually appealing they may be. Canon Law, which is the law of the Catholic Church itself, has its roots in the Council of Jerusalem (or Apostolic Conference), which occurred around 50 A.D. There are 1,752 canons. They govern ecclesiastical matters, particularly the actions of Bishops, who are responsible for all decisions in their dioceses and oversee the operations of their local churches. While there are a large number of Catholics in the world affected by that Law, the direct, daily impact is on the clergy and religious orders. The *Shari'a* is more expansive in scope than Canon Law, guiding not only Islamic clergy, but also extending into economic, social, and political realms. Perhaps this difference is based on the foundational sacred texts: while the New Testament of the Bible provides general guidelines and examples of virtue and sin, the Qur'an specifies punishments for those sins and metes out inheritance in a specific way.⁴⁹

There are approximately 14 million Jews in the world (with estimates ranging from 12 to over 17 million, based on different interpretations of who qualifies as a "Jew"), accounting for roughly 0.25 percent of the global population.⁵⁰ (To be sure, it is important to be mindful of the principle of human dignity in mind, and the Catholic Christian precept that each life is unique, unrepeatable, and of inestimable value. Hence, the importance of life must never be valued in a utilitarian calculation involving numbers.) Even Israel does not run itself entirely on Jewish Law.

As for Hindu Law, the majority population of India, the Hindus, are for the most part bound by the secular legal system of India guaranteed by the Constitution of that country and the principles of its founders, namely, Mahatma Gandhi (1869-1948) and Jawaharlal Nehru (1889-1964). Arguably India's finest post-Partition achievement is it is a home for adherents of all faiths, who live in relative peace alongside and integrated with one another, in the largest free-market democracy in the world.

A final point about comparisons is worth making. I try to avoid being profoundly stupid, though perhaps surrender an opportunity to be stunningly brave. That is, I eschew extending the comparison of the *Shari'a* along both the secular and sacred axes.

On the secular axis, I refer to "American" law, by which I mean the law of the United States at a federal or state level. Thus, I have resisted the temptation to use the term "Anglo-American" law, and thereby encompass the law of the United Kingdom. America received much law from England. England still provides America with legal inspiration.

⁴⁹ See JAMES A. BILL & JOHN ALDEN WILLIAMS, *ROMAN CATHOLICISM AND SHI'I MUSLIMS: PRAYER, PASSION, AND POLITICS* 97 (Chapel Hill, North Carolina: University of North Carolina Press, 2002).

⁵⁰ See www.adherents.com.

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Indubitably, there are comparisons and contrasts that are legitimate between Islamic and English law, but I best leave them to be drawn by others.

On the sacred axis, I dearly would like to include comparisons and contrasts to Protestant Christianity, at least as I understand it through mainstream denominations such as Anglicanism, Lutheranism, and Methodism. I occasionally do so in the classroom from the safety of standing behind the lecture podium. Yet, as with English law, I simply lack the competence to put these points in writing in any credible fashion. Consequently, at the risk of passing up some potentially edifying, and even obvious, comparisons and contrasts with Protestantism, I have erred on the side of caution. I would not want to perpetrate an intellectual injustice to my Protestant brothers and sisters. After all, it is quite enough of a task to try and get Islamic Law “right,” and not do too much damage in rendering comparisons to Catholic Christianity and American Law.

I ask the reader to accept my limitations, and of course forgive my mistakes. I hope that in doing so, the reader — regardless of the faith she follows or legal jurisdiction in which she resides — still will find *Understanding Islamic Law (Shari‘a)* to be an inclusive and thought-provoking text.

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