Commodifying "Islamic Law" in the U.S. Legal Academy

Lena Salaymeh

At a recent symposium on Islamic law, I spoke with a young U.S. law professor who told me about his experience at the Association of American Law Schools' hiring conference. Apparently, his law school adviser had instructed him to sit in the lobby with a copy of the Qurʾān open in his lap. The adviser was confident this would attract attention. Someone would ask him about his interest in Islamic law, the conversation would lead to more interviews with law schools, and…

Reacting to market demands, some legal scholars choose to add an Islamic component to their CVs for the express purpose of attracting potential employers (law schools) and enhancing their professional standing. In some cases, this decision is a response to pressure from law school advisers who presume that the trendiness of Islamic law is a golden ticket of some kind. The interest in appearing in vogue with the latest scholarly trend is not uncommon in the academy at large, but the peripheral place of Islamic law in U.S. legal academies means that there are minimal checks on the fad. These are high stakes: when law schools give pseudo-experts a platform, the ensuing misinformation spreads beyond law schools and into the general public; and when law schools compose questions about Islamic law, scholars from beyond law schools rush to formulate appeasing answers. How and why Islamic law is commodified in the U.S. legal academy deserves investigation.

It is not unusual for U.S. law professors to claim that their law school needs an "Islamic law" scholar. But what is an "Islamic law" scholar? Often, these law professors seek a colleague who can answer questions about Muslim beliefs, practices, or societies. In other words, they want a colleague who can explain that altogether ubiquitous "Other"—who can tell "Us" about "Them." In some cases, law schools seek a Muslim for identity politics reasons and thereby make the offensive and egregious error of confusing "Islamic law scholar" with "Muslim." In other cases, law schools want an "Islamic law" scholar in order to solicit funding from Muslim donors or will only consider an Islamic legal specialist once they have obtained substantial funding for

Lena Salaymeh is Robbins Postdoctoral Fellow in Islamic Law, UC Berkeley School of Law.
I thank Daniel Crane, Mohammad Fadel, Rhiannon Graybill, Ira Lapidus, Laurent Mayali, Christopher Tomlins, and the editors of the Journal of Legal Education for their comments and suggestions.

an endowed chair or program. Since law and law teaching are not the main motivations, the interests of U.S. legal academics may be debatable on their own terms. But rather than scrutinize those motivations, I want to explore their outcomes because the nature of the U.S. legal academy's interest in "Islamic law" has detrimental consequences for scholarship. Without focused expectations or standards for legal scholarship that touches upon Islamic topics, U.S. legal academics inadvertently encourage this expanding field to veer toward the amateurish (or worse) in responding to a rigid set of stale and narrow questions.

Elsewhere, I have commented on how market forces shape what areas of research receive attention in Islamic studies and how such influences construct a problematic discursive framework.[1] In that essay, I identified government agencies, grant-awarding institutions, university administrators, and the general public as interest groups who pose questions about Islam prompted by current events; I argued that by concentrating on replying to those ideological or political questions, scholars miss valuable opportunities to introduce new and critical ways of thinking about Islamic studies. In line with the broad dynamics I presented there, standard topics in Islamic legal scholarship include violence (either war or "harsh" criminal punishments) and the legal status of minorities and women.[2] Scholarly research on these precise topics generally disassociates Islamic doctrines from their historical or legal contexts: Islamic legal sanctions of violence are not measured against contemporaneous legal systems; the status of women and non-Muslims in Islamic legal history is not linked to socio-political and economic realities or connected to the situation of slaves, children, or laborers. Much Islamic law scholarship is framed as an attempt to establish the (in)compatibility of Islamic law and modernity, thereby channeling Bernard Lewis's misleading claims about a "clash" between Islam and modernity. Even more prevalent in the U.S. legal academy is the contemporary "clash of civilizations" myth (propounded by Samuel Huntington and others), which triggers scholarly attention on the presumed or questioned incongruence of Islamic law and democracy or Islamic law and human rights. Legal scholars spend much intellectual energy attempting to justify the (in)compatibility between Islamic law and neo-liberal norms, but far less energy describing and defending those norms themselves. Of course, neither modernity nor neo-liberal norms are easily definable—let alone accepted as a universal objective. This market-driven attention provokes limited analyses of Islamic law by circling around the same crude questions. Consequently, scholarship neglects to consider many substantive areas of Islamic legal practices (court procedures, property

1. Lena Salaymeh, Normative demands of Islamic studies scholarship, The Immanent Frame, *available at* http://blogs.ssrc.org/tif/2011/08/18/normative-demands-of-islamic-studies-scholarship/.

2. Of course, this selective interest in limited Islamic legal topics reflects both how "Us" sees "Them" and what "Us" does not fully confront about itself: considering the wars, problems of racial discrimination, and systemic gender inequality in the U.S., perhaps it is not surprising that U.S. scholars would veer toward these topics.

laws, rules of evidence, employment law, or environmental law) and of Islamic legal theory (legal reasoning or legal hermeneutics). In other words, the contemporary production of Islamic scholarship indicates that "cherry picking" is widespread and that the cherries are picked to please the tastes of an audience.

Undoubtedly, delivering scholarship for an audience with market power is commonplace. Yet in the case of Islamic scholarship in the U.S. legal academy, the situation is compounded and complicated by the absence of a robust peer-review process and by an insufficient number of trained Islamic law experts in law schools who can "regulate" scholarship in their field (since many Islamic law specialists are housed in the humanities or social sciences) or who can mentor younger scholars. Consequently, scholarship on "Islamic law" produced in the U.S. for the consumption of law school audiences often reiterates sound bites while reflecting wildly divergent levels of expertise. What passes as "Islamic law" scholarship is at times journalistic, poorly researched, and simply inaccurate. Moreover, even experienced Islamic law specialists are pressured to succumb to the market forces of U.S. law schools and of political discourse in their framing of research questions or translation of Islamic legal ideas because of the lucrative career incentives. For instance, demands for expert witnesses in cases that implicate Islamic legal issues (especially terrorism cases) lead scholars to be politically complacent and generally uncritical in an (impossible) attempt to exude neutrality. In addition, media inquiries and speaking invitations demand that scholars answer the same stale and narrow questions about Islamic law that are often framed in problematic terms. Intending to communicate and to collaborate with colleagues, we inadvertently neglect fine distinctions to answer the very questions about Islamic law that we know are poorly formulated. Adding to this convoluted situation, the field of Islamic legal studies itself is acutely fragmented, with overlapping methodological and ideological factions that may not be obvious to scholars outside the field. Unfortunately, because the average U.S. law professor has little means to evaluate what is presented as "Islamic law," this tendency is likely to persist.

One obvious substantive example of these problems is the usage of the term "*sharīʿah*" to lump together the legal traditions and systems of more than 1,000 years of history, more than a billion people, and approximately 50 independent states.[3] Resorting to this term in this way suggests that the discourse of the U.S. legal academy is no more refined in its understanding of Islamic legal history and Muslim legal cultures than the country's political mainstream. A serious challenge for scholars of Islamic law is how to educate and to converse with diverse audiences without relying on the misleading terminology that permeates contemporary discourse—"*sharīʿah*" offers an indispensable illustration.

3. I discussed this issue previously in Lena Salaymeh, The politics of inaccuracy and a case for "Islamic law," The Immanent Frame, *available at* http://blogs.ssrc.org/tif/2011/07/07/the-politics-of-inaccuracy-and-a-case-for-islamic-law/.

To remedy the analytical errors in Islamic legal studies, it is essential to recognize the profound historical and substantive distinctions between "Islamic law" and "law in Muslim societies." The former term refers to juristic interpretations of divine law (*sharīʿah*) and it is a translation of the term *fiqh*; the latter term refers to law in Muslim societies, whether Muslims are the majority or minority. Law in modern Muslim societies may be either state law or the legal practices of non-state Muslim communities. I classify these two fields of scholarship as "Islamic jurisprudence and legal history" and "Muslim legalities." The key distinction between these two overlapping objects of study is that Islamic jurisprudence is generated by an interpretive process anchored in canonical Islamic texts, whereas Muslim legalities are generated by an interpretive process anchored in a state or other legal system that may or may not be Islamic and with a population that may or may not be majority Muslim.

Some might argue that this classification is too historical or traditional or any number of other such characterizations. I am certainly open to modifying these categories and I recognize that sometimes the boundaries are indistinguishable. Still, some form of classificatory clarity is desperately needed, particularly since such distinctions are recognized in other legal systems. To draw on an obvious comparison, we might correlate the historical (and implicitly geographic) distinction to the difference between "Jewish law" (what some might describe as rabbinic law or Talmudic hermeneutics) and "law in contemporary Jewish communities." A scholar of Jewish jurisprudence is trained in analyzing the Talmud and other rabbinic legal texts in the original languages (Aramaic and Hebrew) in order to understand both the methodology and historical context of pre-modern Jewish law. (It should be noted that, despite any overlap in linguistic or textual training with Talmud studies, a scholar of the Bible or Midrash is not a Jewish law expert because these are distinct fields of learning.) By comparison, a scholar of modern Jewish law may not have extensive training in rabbinic legal texts but can offer insights into legal issues in contemporary Jewish communities. While these specializations necessitate different forms of training, some scholars do cross over and research both the historical and contemporary legal texts and contexts. This example from Jewish legal studies corresponds well to Islamic legal studies.

Specialists in Islamic jurisprudence (both its methodology and history) receive extensive training in Islamic legal genres from the late antique and medieval periods, which is most often offered through a doctoral program in Islamic studies (i.e. history, religious studies, or Near Eastern studies). Since the majority of Islamic legal texts are only available in Arabic, knowledge of medieval Arabic is a necessary (but by no means sufficient) prerequisite for this area of study. (Notably, as in the case of biblical or midrashic studies, Qurʾānic exegesis and ḥadīth studies are specialized fields distinguishable from Islamic jurisprudential studies.) In comparison, specialists in modern Muslim legalities receive training in a broad variety of fields and may hold J.D.s or Ph.D.s; a wide range of language training likewise may be relevant,

reflecting the diversity of contemporary Muslim societies. The point is that just as a Talmud scholar is not the same as a modern Jewish law scholar, an Islamic law scholar is not the same as a Muslim legalities scholar, in both descriptive and prescriptive terms. This is not a value judgment: I am not arguing that one kind of scholar is superior to another in any way. Likewise, it is not my objective to create barriers for scholarly engagement. Instead, I want to emphasize that meaningful scholarly conversations depend upon specialized training and deep knowledge. Moreover, the distinction between the study of Islamic legal history and the study of law in contemporary Muslim societies needs to be unambiguous because of the ideological and political consequences of the prevailing vagueness.

Recognizing these distinctions between Islamic legal systems and Muslim legalities remains crucial to countering particularly detrimental features of Orientalism and contemporary Islamophobia: the failure to acknowledge historical change in Muslim societies; the failure to see a Muslim society as shaped by any force other than "religion"; and the failure to recognize that Islamic legal systems function much like many other legal systems. Indeed, Islamophobia is itself one of the market forces that drives Islamic legal scholarship toward a scripted set of questions and renders Islamic legal specialization as inconsequential. The intellectual traps that I have delineated—about the (in) compatibility of Islamic law and modernity or Islamic law and neo-liberal norms—are themselves byproducts of contemporary Islamophobia. In spite of the rhetoric, Islamic law cannot be offered as the sole causal explanation for the contemporary or historical situation of any Muslim society, because no legal system operates in isolation from socio-economic and political dynamics. Dispelling the myriad historical and geographic distinctions of Islamic legal systems—evident in clichéd references to "*sharīʿah*"—is an ideological strategy that expresses itself in how the academy perceives scholarly specialization.

How market demands and ideology permeate academic specialization can be clarified more explicitly. Muslim jurists developed an orthodox jurisprudential methodology (*uṣūl al-fiqh*) in the medieval period and it remains relevant to contemporary law in Muslim societies and to the daily life of Muslims globally. But it is by no means the sole source in the legal life of Muslims today. A scholar who has the extensive training necessary for expertise in Islamic legal history and canonical Islamic texts is not, ipso facto, an expert on law in contemporary Muslim societies, in the Middle East or beyond. Likewise, a scholar who researches the legal system of a modern nation-state with a Muslim majority population is not, ipso facto, an expert on Islamic jurisprudence. There are myriad historical, geographic, political and legal-textual differences between "Islamic jurisprudence" and "law in Muslim societies." What is missing from the landscape of the U.S. legal academy is recognition that states with Muslim-majority populations have independent legal systems: Indonesian law, Pakistani law, Turkish law, Mauritanian law, Algerian law, Senegalese law, etc. Every Muslim-majority state has a distinct national history—intertwined with either a colonial power (British or French) or

a European sphere of influence—that shaped the basic structure (e.g. common law or civil law) of its legal system. All of these diverse legal systems exist within modern state structures that simply cannot be described as "Islamic law." To do so would be as incoherent as describing modern Italian law as Catholic "canon law."

These terminological distinctions are not mere academic hairsplitting. The market's commodified version of "Islamic law" has tangible consequences for the production of knowledge. By way of example, U.S. legal academics recently focused disproportionate attention on the reference to "Islamic law" as a source of law in the drafting of the Egyptian and Tunisian constitutions. Yet this issue is only one of many—perhaps more significant—legal questions being debated in both countries, including restorative justice, legal accountability for corruption, the legal status of constitution drafting, judicial reform, the legal limits of political expression and dissent, legal protections for protestors or political prisoners, and the law's role in economic justice. In these debates, the specific legal history of each state is vitally important and neither the Egyptian nor Tunisian legal system can be described as purely "Islamic" or even simply a derivative of Islamic jurisprudence. Indeed, both Egypt and Tunisia have developed independent legal systems based on French civil law that integrate Islamic legal traditions in distinct ways.

Instead of recognizing the variety, complexity, and diversity of law in contemporary Muslim societies, U.S. legal academics fetishize Islamic law, manifested in the erroneous use of the term "*sharīʿah*." The existence of this fetishizing phenomenon produces a centrifugal force, encouraging scholars to neglect identifying or appreciating the distinctions enumerated above. For example, Egyptian law experts might present their scholarship as relating to Islamic law even if the subject of the research has absolutely no connection to an Islamic sacred text, or the orthodox Islamic jurisprudential methodology, or canonical Islamic legal texts. More importantly, scholars who choose to concentrate on the "Islamic" dimensions of law in contemporary Muslim societies neglect the vast areas of law unrelated to specifically Islamic traditions. Consequently, modern nation-states, their legal histories, and their unique legal systems are misinterpreted by inaccurate "Islamic law" rhetoric.

This rhetoric is also pernicious in its distortion of the relationship between Islamic law and Muslim women. While the universal category of woman has been soundly critiqued elsewhere by feminists and other scholars, Muslim women continue to be perceived as a cohesive, homogenous group affected by Islamic law in a uniform way, regardless of time or place. By way of example, in the post-colonial era, emerging nation-states with Muslim majority populations typically made family law the main repository of Islamic legal doctrines in the state's legal system. Much contemporary scholarship looks to family law codes as signifiers for both Islamic law and the status of Muslim women in the contemporary world. In addition to subsuming women's status to the family, this ignores both the breadth of contemporary Islamic legal practices (beyond the confines of state legal systems) and the multiplicity of Muslim women's

experiences (beyond the family). Because the market demands "reporting" on women and on Islamic law—rather than penetrating analysis of the diverse socio-economic realities of Muslim women or of how Islamic law is the site of controversies over cultural authenticity—subtleties remain unrecognized.

Additionally, it is imperative to recognize when Islamic law is not the most pertinent category for understanding the situations of Muslims—regardless of gender. The topic of female circumcision is a poignant example of how market dynamics mold scholarship. Although the practice is local (primarily in a few regions of Africa) and cultural, it is regularly (and incorrectly) associated with Islam. Moreover, the international community has likely paid disproportionate attention to female circumcision when compared to, for example, the sex slave trade, which devastates far more women in number and by geography. That the cultural practice (female circumcision) receives proportionally more attention than the economic reality (sex slavery) is reflected in other areas of study. The market's demands for stereotypes about the status of women under Islamic law results in a skewed understanding of law in contemporary Muslim communities.

Some readers may question the existence of evidence to support the claims presented here; I could certainly cite to specific articles, scholars, or personal experiences that demonstrate the weaknesses, errors, and even prejudices previously mentioned. But that type of individualized attack is entirely unproductive and risks distracting the reader from the broad dynamics I have sought to elucidate. Teaching and research focused on Muslim legalities, Islamic jurisprudence, and Islamic legal history can make (and already have made) valuable contributions to the U.S. legal academy. But law schools should reassess the value of the "Islamic law" commodity being traded in legal academia. There are some easy steps law professors can take to estimate the worth, rather than marketability, of legal scholarship related to the Muslim world. In addition to seeking anonymous external reviews from appropriate Islamic law or Muslim legalities experts, law school faculties should closely scrutinize footnotes for references to primary sources (usually not translations), question the details of any evidentiary claim, and support and recognize peer-review publications in specialized journals. With attention to how "Islamic law" is commodified both in public and academic discourses, I hope U.S. law faculties will feel encouraged to discuss the place of Islamic legal studies in the academy. Perhaps these conversations can develop into new kinds of market demands that will animate more rigorous scholarship and more professional judgment in the production of that scholarship. After all, innovation develops from critical assessment, not inertia.