BRILL

Islamic Law and Society 17 (2010) 126-157

Islamic Law and Society
www.brill.nl/ils

Wael B. Hallaq on the Origins of Islamic Law: A Review Essay*

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Abstract

In his *The Origins and Evolution of Islamic Law*, Wael B. Hallaq seeks to create a new paradigm for the scholarly understanding of the origins of Islamic law. In this essay, I review Hallaq's *Origins* and four other publications of his in an effort to assess his achievement. A comparison of Hallaq's vision of legal developments during the first two centuries AH with that of Joseph Schacht suggests that the differences between the two scholars are minor and that much scholarly work remains to be done on the emergence of Islamic legal doctrine.

Keywords

historiography, Islamic law, legal orientalism, P. Crone, W. Hallaq, J. Schacht

Wael B. Hallaq is one of the most prominent, talented, prolific, and influential scholars in the field of Islamic legal studies, living or dead. With his unrivalled command of the Arabic sources and keen eye for important issues, Hallaq not only has charted the textual space relating to the history of Islamic jurisprudence (*uṣūl al-fiqh*) in the 500 years between al-Shāfiʿī (d. 820) and al-Shāṭibī (d. 1388), but also produced a sophisticated narrative description of this subject. Along the way he has called into question many basic scholarly assumptions about the historical processes that culminated in the formation and development of Islamic jurisprudence.

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* I wish to express my gratitude to colleagues who read earlier drafts of this essay and provided important suggestions for improvement.

DOI: 10.1163/092893809X12587131153384

Much of Hallaq's formidable intellectual energy centers on the father of Islamic legal studies in the twentieth century, the legal historian Joseph Schacht. Born in 1902 in Upper Silesia (then Germany, now Poland), Schacht studied Latin, Greek, French and English at the Humanistisches Gymnasium in his hometown of Ratibor. An intellectual prodigy, in 1920 Schacht matriculated at the University of Breslau, where he studied classical and Semitic languages with several distinguished scholars, including the Semitist Gotthelf Bergsträsser; one year later, in 1921, he completed his thesis, an edition of a tenth-century Arabic treatise on legal stratagems, with a partial translation and commentary. In 1927, at the age of twenty-five, Schacht was appointed associate professor of Islamic studies at Freiburg im Breisgau; at that time he was the youngest professor at any university in Germany.[1]

Anticipating the threat to independent scholarship posed by the immanent rise of the Third Reich, Schacht, whose father was a Roman Catholic, left Germany in 1934. Shortly thereafter he ceased to write in German. During the interwar period, Schacht lived, studied and taught in the Middle East for several years, spending much of his time in the great manuscript libraries of Istanbul and Cairo. Between 1923 and 1935 he published the first scholarly editions of seven hitherto unknown or little known early Islamic legal texts. These materials provided the foundations for Schacht's publications on the origins of Islamic law. Building upon the work of Goldziher (1850-1921) and Snouck Hurgronje (1857-1936), Schacht studied and analyzed *ḥadīth* reports relating to law. The results of his researches were first announced in his 1949 article, "A Revalution of Islamic Legal Traditions," which was followed one year later by *The Origins of Muhammadan Jurisprudence* (1950).[2]

According to Schacht, Islamic law, as we know it, did not exist during the first century AH. His analysis of legal *ḥadīth*s led him to the conclusion that most if not all of these texts are historical fabrications that reflect the opinions and views of Muslims who lived two or three

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1) Jeanette Wakin, "Remembering Joseph Schacht (1902-1969)," Harvard Legal Studies Program, Occasional Publications, 4 (January 2003), 1-41, at 2-3.
2) Ibid., 4-6.

centuries after Muḥammad's death rather than those of the Prophet and his Companions. Much of the raw material that became the building blocks of Islamic law originated in unacknowledged borrowings from Near Eastern law and/or in Umayyad administrative regulations. In the second/eighth century, circles of legal scholars arose in Mecca, Medina, Egypt, Kufa, Basra, and the Yemen; over the course of the next century, these geographically oriented "ancient schools of law" were transformed into personal schools organized around an eponymous founder (for the Sunnis, Mālik b. Anas, al-Shāfiʿī, Abū Ḥanīfa, and Aḥmad b. Ḥanbal). The key figure in the history of Islamic jurisprudence—according to Schacht—was al-Shāfiʿī (d. 820), who created the methodology for the discipline known as *uṣūl al-fiqh*. Within a century after al-Shāfiʿī's death, however, the gates of *ijtihād* or independent legal reasoning were closed, Schacht argued, with the result that the thinking of Muslim jurists quickly "hardened" and became increasingly "rigid." From this it follows that al-Shāfiʿī's legal thinking represents the acme of jurisprudential thought in Muslim civilization down to modern times. Although Schacht conceded that Muslim jurists living in the centuries following the supposed closing of the gates of *ijtihād* and operating within the constraints of a putatively rigid and unchanging system of law *might* engage in new and creative legal thinking, he never demonstrated that they did do so.

In a series of seminal articles published over a period of two decades, beginning in 1984, Hallaq has attempted to raze what has been called Schacht's "citadel." According to Hallaq, Muslim jurists themselves have long acknowledged "the precarious epistemological status" of *ḥadīth* texts, from which it follows that the fascination of Schacht and others with the "pseudo-problem" of authenticity is gratuitous, at best.[3] Hallaq has also disputed Schacht's account of the formation of the law schools, arguing that the latter's "geographical" schools never existed, and that, although a transformation did occur, it was from schools oriented around individual juristic doctrines to schools oriented around the doctrines of groups of like-minded scholars.[4] As for Schacht's assessment

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[3] Wael B. Hallaq, "The Authenticity of Prophetic *Ḥadīth*: a Pseudo-problem," *Studia Islamica* 89 (1999), 75-89.

[4] Idem, "From Regional to Personal Schools of Law? A Reevaluation," *Islamic Law and Society* 8 (2001), 1-26.

of al-Shāfiʿī's contribution to *uṣūl al-fiqh*, Hallaq argues that this discipline did not attain its mature form for at least 100 years after al-Shāfiʿī's death and that Islamic legal thinking became even *more* sophisticated in the centuries that followed.[5] Hallaq has also reoriented scholarly thinking about the closing of the gates of *ijtihād* by demonstrating that the controversy over the status of *ijtihād* began only in the sixth/twelfth century and that Muslim societies continued to produce *mujtahid*s until the tenth/sixteenth century.[6] Finally, Hallaq has shown that new and creative juristic ideas were produced by *muftī*s in the centuries following the alleged closure of the gates of *ijtihād* and that these new ideas were incorporated into later legal doctrine through the vehicle of *fatwās*.[7]

During the past decade, Hallaq has turned from the medium of the scholarly article to that of the scholarly monograph. Synthesizing his findings and placing them within a larger conceptual framework, he has written three important monographs published by Cambridge University Press: *A History of Islamic Legal Theories* (1997); *Authority, Continuity, and Change in Islamic Law* (2001), and *The Origins and Evolution of Islamic Law* (2004),[8] a stunning accomplishment for a man of his age.[9] Suffice it to say that when Wael B. Hallaq speaks, historians of Islamic law listen.

Although it is too early to assess Hallaq's lasting contribution to Islamic legal studies, I propose here an initial assessment of five of his recent publications dealing with the formation of Islamic law.[10] With

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5) Idem, "Was al-Shāfiʿī the Master Architect of Islamic Jurisprudence?" *International Journal of Middle East Studies* 4 (1993), 587-605.

6) Idem, "Was the gate of *ijtihād* Closed?" *International Journal of Middle East Studies* 16 (1984), 3-41; idem, "On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihād," *Studia Islamica* 63 (1986), 129-41.

7) Idem, "From *Fatwā*s to *Furūʿ*: Growth and Change in Islamic Substantive Law," *Islamic Law and Society* 1 (1994), 17-56.

8) See now also Wael B. Hallaq, *Sharīʿa: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), published after the present essay was completed.

9) Hallaq was born in 1955. Inexplicably, the publication page in *The Formation of Islamic Law*, edited by Hallaq, gives his date of birth once as 1995 (British Library CIP data) and a second time as 1966 (US Library of Congress CIP data). To add insult to injury, several pages of the Introduction are printed out of order.

10) In addition to these five publications, see also Hallaq's substantial entry, "Law and the Qurʾān," in *EQ*, vol. 3, 149-71.

the exception of one article published in 1990, all of the scholarship to be examined in this essay appeared within a span of three years between 2002 and 2004:

> Wael B. Hallaq, "The Use and Abuse of Evidence: The Question of Provincial and Roman Influences on Early Islamic Law," *Journal of the American Oriental Society* 110.1 (1990), 79-91.
> ———. "The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse," *UCLA Journal of Islamic and Near Eastern Law* 2 (2002-03), 1-32.
> ———. "'Muslim Rage' and Islamic Law," *Hastings Law Journal* 54 (2003), 1705-19.
> ——— (ed.). *The Formation of Islamic Law*, The Formation of the Classical Islamic World, vol. 27, general editor Lawrence I. Conrad. Aldershot: Ashgate, 2004.
> ———. *The Origins and Evolution of Islamic Law*. Themes in Islamic Law, 1. Cambridge and New York: Cambridge University Press, 2005.

Except for "Muslim Rage" (where Hallaq addresses the question, "How does [Islamic] law figure in the equation of violence?"—referring to 9/11 and its aftermath), all of these publications treat one or another aspect of the origins and formation of Islamic law. Hallaq surely regards the individual publications as components of a single, larger project, the over-arching unity of which is reflected in its self-referential nature.[11]

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[11] "Quest for Origins" looks backwards to "Use and Abuse" (notes 29, 35, 36, 39, and 44) and forwards to *Origins and Evolution*, as indicated by Hallaq's pronouncement at the end of the article: "In short, the legal history of the first three centuries of Islam has yet to be written and must, in the process, abandon the archaic assumptions that have dominated Orientalism so far" (p. 30). In Hallaq's Introduction to *Formation*, he presents a critique of two dominant paradigms on the formation of Islamic law, one traditional, the other western critical. Here Hallaq looks backwards to "Use and Abuse" (notes 8, 22, and 32) and "Quest for Origins" (notes 6, 18, 24, 31, 33, and 36); and in note 23 of the Introduction, he explains that he will attempt to make the case for the Hijazi origins of Islamic law in his soon to appear *Origins and Evolution*. Similarly, *Origins and Evolution* opens with a reference to the "selective interests of modern scholarship and their political implications," about which the first note refers the reader to "Quest for Origins" and to the Introduction to *Formation* (a reference to "Use and Abuse" follows on p. 27, note 43). Finally, "Muslim Rage" triggers one reference to "Quest" (footnote 9) and three to *Origins* (footnotes 2, 7, and 8)—even though the essay does not treat the origins of Islamic law.

In "Quest for Origins" Hallaq lays out the methodology and principles of what he regards as a "third paradigm" for writing the history of Islamic law during its first three centuries.[12] This essay merits attention because it contains the principles that guide Hallaq's reconstruction of the formation of Islamic law in *Origins and Evolution*.

"The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse"

On p. 1 of "Quest for Origins," Hallaq draws attention to the connection between the beginnings of western interest in Islamic law and European colonialism.

Serious and sustained scholarship on Islamic law by western scholars emerged in the middle of the nineteenth century, during the era of European colonial expansion, and many of the first studies of the subject were written by men who were not only citizens of the colonial powers, but also long-time residents of the colonies and active participants in the colonial project. These men produced the first translations of Islamic legal texts, the first monographs on discrete legal institutions, and the first comprehensive studies of Islamic law, thereby laying the foundations for the modern discipline of Islamic legal history.[13] Many of these scholars did not hesitate to express their contempt for the subjects of the colonial powers, or their views—often negative—about Islam and Muslims.[14]

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[12] See *Formation*, p. xxxiii, where, after stating that neither doctrine nor religious narrative is a substitute for scholarship, Hallaq asks, "Will there be a third, paradigmatic account?"

[13] For a guide to French colonial scholarship, see Jean-Robert Henry and François Balique, *La Doctrine coloniale du droit musulman algérien: bibliographie systématique et introduction critique* (Paris: Centre National de la Recherche Scientifique, 1979). See also Jean-Claude Vatin, "Exotisme et rationalité: A l'origine de l'enseignement du droit en Algérie (1879-1909)," in *Connaissances du Maghreb: Sciences Sociales et Colonisation*, ed. Jean-Claude Vatin (Paris: Centre National de la Recherche Scientifique, 1984); Allen Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (Princeton: Princeton University Press, 1985).

[14] The entanglement of Western scholars in the colonial project and their ideological commitment to the colonial enterprise is exemplified in the writings of three French jurists on the subject of Muslim religious endowments or *habous*: Ernest Zeys, Ernest Mercier, and Marcel Morand. [1] In 1881, at the height of settler political influence and land speculation and in the midst of a campaign to abolish Muslim courts, Zeys was appointed

While building upon previous scholarship, Hallaq's approach to the connections between European colonialism and the study of Islamic legal history differs from that of his predecessors in three respects: (1) Whereas earlier scholars focused on the colonial period, Hallaq studies the post-colonial period, with special attention to the second half of the twentieth century; (2) whereas earlier scholars exposed the biases of individual jurists who were directly involved in the colonial project, Hallaq identifies and characterizes the "epistemological assumptions" of an entire field of scholarship; and (3) whereas earlier scholars paid greater attention to the impact of colonialism upon modern legal developments, Hallaq focuses his attention on the formative period of Islamic legal history.

At the outset of "Quest for Origins" Hallaq states that he proposes to do for Islamic law what Edward Said has done for Islamic Studies.[15] "What concerns me in this essay," he writes, is how the "Orientalist

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to a chair of Islamic law at the Ecole de Droit d'Alger. Although he did not know a word of Arabic at the time of his appointment, four years later, in 1885, he published a two-volume textbook on Islamic law, *Traité élémentaire de droit musulman algérien*, based on his lectures at the Ecole. It may have been Zeys who first articulated the notion that the very legality of *habous* was contested by early Muslim jurists on the grounds that the institution was used to circumvent the Qur'ānic inheritance laws, an argument that became the linchpin of the French attack on the institution of *habous*. [2] Mercier was a prominent politician in Constantine, a city with a substantial and prosperous Muslim population. Like Zeys, he was a jurist. In 1899, Mercier published the first full-length monograph on *habous*. Following the line of argument begun by Zeys, Mercier pronounced the institution to be a "flagrant violation of the Quranic law" and a "veritable sacrilege." [3] Another French jurist who was deeply involved in the French colonial project was Marcel Morand, who hoped to establish an empire of academic experts on *le droit Musulman-algérien* and be its *doyen*. In 1904, Morand published a seminal article on the juridical nature of *habous* in which he formulated a definitive rationalization of French colonial land policy. Like Zeys and Mercier, Morand argued that *habous* was an illegitimate means of circumventing the effects of the Islamic law of inheritance. Since its origin, he wrote, "*habous* has been ... nothing more than an expedient invented in order to weaken certain prescriptions of Islamic law [viz., the law of inheritance]." See David S. Powers, "Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India," *Comparative Studies in Society and History* 31 (1989), 535-71.

15) Edward W. Said, *Orientalism* (New York: Pantheon Books, 1987). In addition to Said, Hallaq draws upon the scholarship of Martin Bernal, *Black Athena: The Afroasiatic Roots of Classical Civilization* (London: Free Association Books, 1987); and Ashis Nandy (ed.), *Science, Hegemony and Violence: A Requiem for Modernity* (Delhi: Oxford University Press, 1990). See "Quest for Origins," notes 16 and 41.

project" has "appropriated Islamic law as a field of knowledge, and, specifically, how this project has dealt with the question of law's origins and its subsequent formative phase" (p. 2). He goes on to define what he calls *paradigmatic Orientalism* as a "doctrine possessed of a largely constant nature" (p. 3). His final assessment of the body of knowledge produced by paradigmatic Orientalism is unequivocal. As a field of knowledge, he concludes, this body of scholarship is "essentially imperialist" (p. 3).

Inasmuch as Islamic law is a sub-discipline of the larger field of Islamic studies, the number of scholars who have written on the former—albeit not trivial—is much smaller than the number of those who have written on the latter. If we limit ourselves to the last quarter of a century, and to scholarship on the formative period, any list of legal Orientalists would include, in alphabetical order: Alshech, Brockopp, Cilardo, Cook, Crone, E. Francesca, Hawting, Hurvitz, Hennigan, B. Johansen, Juynboll, M.H. Katz, Kimber, Maghen, Melchert, Mitter, Motzki, R. Peters, Powers, U. Rubin, I. Schneider, Spectorsky, Udovitch, Yanagihashi, and Zysow, to name just a few. A comprehensive and systematic analysis of the publications of these and other scholars in an effort to elicit the specific contours of paradigmatic Orientalist doctrine would be no small task.

The volume of scholarship available for examination is not a problem for Hallaq because, like Said, he does not hold himself under any obligation to analyze *everything* that has been written by legal Orientalists. If it is true, he argues, that legal Orientalism is a paradigmatic doctrine, then it follows, logically, that this doctrine has "little to do with the particulars of diverse positive scholarship" (p. 3). The specific arguments advanced by individual scholars are thus of little importance to Hallaq. Nor is he interested in disagreements over methods and/or conclusions between and among these scholars. Indeed, he denies—here—the very possibility of such disagreements. This is because legal Orientalism is a "doctrine" which, "by definition," is composed of certain "constitutive tenets" that are shared by "most if not all Orientalists" (p. 2). This doctrine purportedly has shaped and constrained not only the questions that legal Orientalists ask but also the answers that they give.

Hallaq offers the following list of the tenets that "Orientalism [sic] has always believed and wanted to believe about the 'core and kernel

of Islam'": (1) Islamic law began to develop only a century after the appearance of the Prophet; (2) *ḥadīth* reports must be assumed to be spurious until the contrary is proven; (3) the textual and practical sources of the *sharī'a* are to be found in the Fertile Crescent, not in Arabia; (4) al-Shāfi'ī was the first Muslim jurist to establish a personal school of law (*madhhab*) and his legal thinking represents the acme of Islamic jurisprudential thought; and (5) soon after al-Shāfi'ī died, the gates of *ijtihād* were closed, and Islamic legal thinking was stricken by stagnation, a condition from which it continues to suffer even in modern times (p. 15).

These five tenets of legal Orientalism are recognizable as a summary of the scholarly views of Joseph Schacht on the origins of Islamic law (see above). Whereas Schacht no doubt regarded his findings about the origins of Islamic law as products of western principles of scholarly investigation, Hallaq thinks otherwise. He claims that Schacht did not understand—indeed, was incapable of understanding—that his scholarship on the origins of Islamic law was a direct product of a "hegemonic discursive tradition" rather than a "dispassionate" search for the truth (p. 30). By *hegemony* Hallaq has in mind the West's political control of much of the Muslim world during the colonial period and its extensive cultural and economic domination of that area of the globe in the post-colonial period. In his view, this hegemonic discursive tradition continues to emit its "malevolent" effects down to the present (p. 30).

Schacht is not the only scholar trapped within the web of this hegemonic discursive tradition. Like the master, his disciples also operate within a "closed epistemological network from which they could by no means escape, even if they wanted to" (p. 30). In fact, Hallaq does acknowledge a handful of exceptions to the rule, among whom he singles out, in a footnote, five scholars who have produced "positive findings": B. Johansen, H. Motzki, G. Schoeler, M. Muranyi, and U. Mitter (p. 15, note 4). Although it would be interesting to know how these five scholars managed to escape from the closed epistemological net in which other scholars are trapped, Hallaq does not ask this question. Be that as it may—and apart from these five exceptions—Hallaq contends that every single western scholar who is engaged in the "business of scientific inquiry" fails to understand that his or her

"paradigmatic scholarship is a doctrine that reflects [his or her] cultural and political attitudes towards Islam" (p. 30 and note 54). Although contemporary scholars may claim to engage in dispassionate scientific investigations, this is merely a pretense. Hallaq summarizes his argument as follows:

> Little did Schacht know how central his writings would become to the Orientalist discourse or how they were the direct result of a hegemonic discursive tradition that would continue to emit malevolent effects even in the 21st century CE. It is even doubtful that Schacht and today's Orientalists realize that their paradigmatic scholarship is a doctrine that reflects their cultural and political attitudes towards Islam; that the doctrine, in its essentialist elements, has been transmitted to them from their 19th century CE predecessors nearly without change; that the doctrine is no less entangled in ideological structures than is Islamic scholarship itself; that all elements of the doctrine (whether dealing with the "origins," the modern-reformist period or otherwise) are ideologically interconnected; and that the aggregate effect of these seemingly disparate elements is to generate a verdict on Islamic law as a cultural expression heavily indebted to the West both during its crucial formative years and after it presumably suffered from a prolonged stagnation and paralysis before the West came again to its aid. All in all, this doctrine constitutes a discursive euphemism set in the service of power and domination (p. 30).

At the end of "Quest for Origins," Hallaq states that the Orientalist establishment must "at any cost" resist anyone who challenges the Orientalist paradigm, "including this very writing" (p. 31). Having thrown down the gauntlet, he no doubt anticipates a response. Some would argue that the very act of responding to Hallaq is unjustifiably to dignify his charges. Certainly, anyone who considers taking up the challenge must be careful not to fall into the trap laid by Hallaq, who no doubt will dismiss any response from a legal Orientalist as another manifestation of that establishment's pernicious doctrine.[16]

As a preeminent scholar in the field of Islamic legal studies, Hallaq's views merit attention. "Quest for Origins" is the methodological prolegomena to *The Origins and Evolution of Islamic Law*, which, according to its author, not only breaks new ground in the approach to the

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16) As Hallaq did, following Crone's brief response to his critique of her work, published in *Arabica*, 39 (1992), 216-40, at 239-40. See "Quest for Origins," 9.

study of the origins of Islamic law but also constitutes a paradigm shift. The first in a series of monographs on Islamic law currently being published by Cambridge University Press, *Origins* already has taken its place as a standard reference-work in the field of Islamic legal studies. It therefore behooves historians of Islamic law to pay careful attention to Hallaq's methodology and conclusions.

My response to Hallaq's challenge will unfold in two parts. First, I will enumerate six principles of historical investigation identified by Hallaq as being important to him and which he has applied to the scholarship of others; and I will then apply these principles to his scholarship. Second, I will discuss those chapters of *The Origins and Evolution of Islamic Law* that deal with the emergence of legal doctrine during the first two centuries AH.

Historical Methodology

In "Use and Abuse of Evidence," Hallaq states that the following principles of historical investigation are important to him:

1 historical scholarship should be fair-minded, objective, and dispassionate;
2 historical scholarship should be unaffected by ideological biases, latent or manifest;
3 historical generalizations should be accurate and reliable;
4 the historian should represent the work of scholars with whom he disagrees accurately;
5 conclusions should be based upon the careful assessment of evidence, not upon chains of inferences;
6 the historian should be consistent.[17]

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[17] See "Use and Abuse," 81, 83 (and note 20), 84-91. Hallaq mentions four additional historical principles that are of importance to him: (7) the historian should consider all evidence relevant to his thesis and should acknowledge previous scholarship on the same topic; (8) the historian should mention important evidence—especially evidence that may undermine his thesis—at the outset of an article or monograph rather than burying it in a footnote, withholding it until the end or suppressing it altogether; (9) a hypothesis should be driven by the evidence and not vice-versa; and (10) the historian should avoid evidence that is dubious or that emanates from a questionable source, even if it is convenient to his argument.

1. *Historical scholarship should be fair-minded, objective, and dispassionate*

In "Quest for Origins," Hallaq expresses contempt for legal Orientalists, using sarcasm and hyperbole to attack his academic opponents.

Hallaq's sharpest linguistic barbs are reserved for Joseph Schacht and Patricia Crone and those who express admiration for their work. He criticizes Schacht for his "overzealous" concern to revive Goldziher's views about the authenticity of Prophetic *ḥadīth*s and characterizes Schacht's history of the first Islamic century as "vacuous" (p. 19); he dismisses Schacht's understanding of the formation of the law schools as "inept" and "naive" "figments of his imagination" (p. 26); and he rejects as "nonsense" Schacht's conclusions about al-Shāfiʿī's contribution to Islamic legal theory (p. 26). Schacht, he says, was a more enthusiastic fan of al-Shāfiʿī than Muslims themselves are, and, he adds, Schacht was "certainly less critical" of al-Shāfiʿī than Muslims are (p. 27). After stating that legal Orientalists treat even trivial remarks by Schacht as dogma, to be questioned "at one's peril, and only when supported by ample evidence," Hallaq adds that "Schacht himself often does not bother to provide" such evidence (p. 14).

Hallaq's final assessment of Schacht's academic legacy is devastating:

> [Schacht's] writings, especially in *Origins* and *An Introduction*[*to Islamic Law*], have led to a slowdown, if not retarding, of the sub-field of Islamic legal studies during the past five decades ... [T]here is not one single major thesis that he advanced which has proven to be sound or which has positively paved the way for further, more advanced research. If his scholarship has engaged the field, it has done so in a way that has provoked research with new beginnings, as if he either never wrote or as if in diametrical opposition to his work (p. 14).

As for Crone, Hallaq judges her arguments to be "ninth rate" (p. 5); dismisses her response to his critique of her work as "vacuous"; qualifies her assertion that the *sharīʿa* is "a work of pure scholarship" as a "typically profound" utterance made with "unjustified confidence" (p. 29); characterizes her *Roman, Provincial and Islamic Law* as "hopelessly deficient"; says that she, together with the late Martin Hinds, accused Muslim jurists of "hijacking" caliphal law at the end of the Umayyad period (p. 25); and avers that Crone "might just as well have left [*Roman,*

Provincial and Islamic Law and *God's Caliph*] unwritten, for these two monographs give no more sustenance to the progress of scholarship on Islamic law than Schacht's *Origins*" (p. 14).[18]

Hallaq's invective may be related to his sense of victimization at the hands of "the Orientalist establishment" in North America and Europe, an establishment from which he seeks to distance himself. After suggesting that Schacht exercises "saintly authority" over the minds of "living Orientalists" who specialize in Islamic law, Hallaq explains that any scholar who dares to criticize the master at a scholarly meeting invariably encounters "enthusiastic and unanimous censure" (p. 14), presumably because legal Orientalists suffer from "epistemological xenophobia" and cannot tolerate "intruders and heretics" (p. 21). The legal Orientalist establishment's resistance to criticism of Schacht is compounded when such criticism is voiced by an "Oriental," i.e., a scholar born in the Middle East. This, Hallaq explains, is because Orientalist doctrine holds that an Oriental can be nothing more than an object of knowledge. It follows that an Oriental who has been trained in the West is "incapable of possessing" knowledge of the Orient, for one cannot simultaneously be both "the knower and the known, the actor and the acted upon" (p. 21). Indeed, "wooly," "flimsy," and "even fraudulent" scholarship produced by an Orientalist is superior to that of an Oriental, no matter how "well-documented, well-reasoned, and sound" the latter may be (p. 21).

2. *Historical scholarship should be free of ideological biases*

Contemporary legal Orientalists, Hallaq states, perpetuate a vicious and false doctrine about Islam and Muslims.[19]

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[18] Cf. "Use and Abuse," 91, where Hallaq offers the following assessment of Crone's *Roman, Provincial and Islamic Law*: "Crone's book says nothing of value that has not been said better before. For one, von Kremer's statement on the subject in his *Culturgeschichte*, written over a century ago, remains superior to that of Crone. There is no important argument she adduces which was not stated more succinctly and more *prudently* by von Kremer ... Crone's work, in contrast, is confused, methodologically deficient, and definitely a step in the wrong direction. Her thesis does not even meet the minimal requirements of a working hypothesis" (emphasis in original).

[19] This is a serious charge, and it is unfortunate that Hallaq makes no attempt to connect the doctrine perpetuated by legal Orientalists with their life histories and personal experiences. For example, he might have argued that certain aspects of Schacht's career are

Given the importance attached by Hallaq to the relationship between a scholar's political views and cultural attitudes, on the one hand, and his or her scholarship, on the other, it is noteworthy that he does not say anything about his political views and cultural attitudes.

3. Historical generalizations should be accurate and reliable

One of the fundamental responsibilities of an historian is to provide an accurate and reliable assessment of the results of previous scholarship.

Hallaq argues that in their drive for power and knowledge, legal Orientalists have focused their attention exclusively on two periods of Islamic history: the formative period (600-900) and the modern period (beginning ca. 1800). Legal Orientalists, he writes, have treated the period between al-Shāfiʿī and the Tanzimat as "little more than a historical vacuum filled with motionless history that needed to be injected with life and vibrancy by the benevolent European powers" ("Quest," p. 29). Obviously, if nothing of importance happened during this middle period, there is no reason for the historian to study it. It is this attitude—Hallaq argues—that explains the striking disregard of legal Orientalists for the middle period of Islamic legal history. He writes:

> Until recently, and with the single, partial exception of Ottoman law, there has been very little serious work treating Islamic law between the 4th/10th and the 10th/16th centuries. The legal history of this expansive period remains depressingly a *terra incognita* ("Quest," p. 3).

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relevant to his scholarship, e.g., the fact that Schacht found himself in England at the outbreak of World War II and volunteered his services to the Allies; that he directed a unit in the British Ministry of Information devoted to publications in Arabic and Persian and made broadcasts in Arabic on the BBC; that in 1947 the Arabian American Oil Company (ARAMCO) invited him to the United States to deliver a series of lectures at Harvard Law School; that in 1950 the British Colonial Office sent him on a research trip to Northern Nigeria, then the most important Muslim territory in British West Africa; and that in 1952, eight years before Algeria would win its independence from France, Schacht was a visiting professor at the Law School of the University of Algiers, which awarded him an honorary degree. See Wakin, "Remembering Joseph Schacht," 7-8. Similarly, it might be important to know if Crone, who was born in Denmark, received her academic training in the United Kingdom, and currently resides in the United States, supports or opposes Danish, British and/or American foreign policy in the Middle East; or if she has worked for an intelligence service. However, if, as Hallaq contends, legal Orientalism is a doctrine, there is no need to ask these fundamentally historical questions.

Whereas the first sentence in this quotation suggests that some serious work is currently being produced, the second sentence asserts that our understanding of the middle period nevertheless remains a black hole. Which is it? In this instance we are aided by Hallaq's reformulation of this point at the beginning of *Origins and Evolution*, where he writes, "Worse still is the state of scholarship on the intervening periods, which *continue* to be a virtual *terra incognita*" (p. 1, emphasis added). According to Hallaq, the middle period of Islamic legal history has been, and continues to be, virtual *terra incognita*, down to 2004, the year in which *Origins and Evolution* was published.

In order to assess the accuracy of Hallaq's generalization, one would have to consider the entire body of scholarship on the middle period written by legal Orientalists. As is well-known, the study of Muslim courts and the application of Islamic law in the period between 1000 and 1500 CE is hampered by the fact that most of the documents produced by qadis and personnel associated with their courts are no longer extant, even though we know—thanks to Hallaq—that qadis kept careful records of the activities that transpired in their courts. The most likely explanation for the disappearance of the majority of these records is that they were passed from one qadi to his successor and that there was no central repository for their preservation.[20] Be that as it may, smaller caches of qadi records have survived in different parts of the Muslim world, the most prominent example being the Ḥaram documents discovered at the Islamic Museum in Jerusalem between 1974 and 1976. This is a collection of approximately 900 documents, a large number of them issued by a single Shāfiʿī qadi during the last decade of the eighth/fourteenth century.

The Ḥaram documents are a treasure trove of information about Muslim courts, and they include, *inter alia,* estate inventories, legal depositions, court records, contracts, legal opinions, and financial statements. These documents have made it possible for historians of the Mamluk period (1250-1517) to study the workings of qadi courts and the Islamic legal system. The systematic study of the Ḥaram documents is most closely associated with the name of Donald Little, Hallaq's

[20] Wael B. Hallaq, "The *Qāḍī's Dīwān* (*Sijill*) before the Ottomans," *Bulletin of the School of Oriental and African Studies* 61 (1998): 415-36.

colleague at McGill University until his retirement at the end of 1999. Little's *Catalogue of the Islamic Documents from al-Ḥaram aš-Šarīf in Jerusalem* has greatly facilitated the study and analysis of these documents.[21] For more than a quarter of a century, Little has been engaged in the difficult, tedious, and often thankless task of transcribing, translating, and analyzing individual documents. In this manner, he has shed important light on court practice in Mamluk Jerusalem, addressing issues such as how qadis were selected, the types of cases they heard, the procedures they followed (including the use of witnesses, oaths, and court certifications), the justifications they gave for their rulings, and the extra-judicial functions that they performed. By comparing the results of his research on the Ḥaram documents with Mamluk period notarial manuals and other literary sources, Little has shown that there is a striking correlation between the theory and practice of law in Jerusalem in the eighth/fourteenth century.[22]

D. Little is not the only scholar who has studied the workings of the Islamic legal system in the Mamluk period. In 1984 his student, Joseph Escovitz, published a monograph on the office of the chief judgeship in Cairo between 1264 and 1382.[23] In 1996 Sherman Jackson published a monograph on the constitutional jurisprudence of al-Qarāfī (d. 1283 or 1285), a Mālikī jurist whose lifetime straddled the threshold between the Ayyubids and the Mamluks.[24] Nor is recent scholarship on the middle period of Islamic legal history limited to Mamluk Egypt and

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21) Beirut: Franz Steiner, 1984.

22) See Donald P. Little, "The Significance of the Ḥaram Documents for the Study of Medieval Islamic History," *Der Islam* 57 (1980), 189-217; idem, "Two Fourteenth Century Court Records From Jerusalem Concerning the Disposition of Slaves by Minors," *Arabica* 29 (1982), 16-49; idem, "Ḥaram Documents Related to the Jews of Late Fourteenth Century Jerusalem," *Journal of Semitic Studies* 30 (1985), 227-64; idem, "Documents Related to the Estates of a Merchant and His Wife in Late Fourteenth Century Jerusalem," *Mamluk Studies Review* 2 (1998), 93-190.

23) Joseph Escovitz, *The Office of Qâḍî al-Quḍât in Cairo under the Baḥrī Mamlûks* (Berlin: Klaus Schwarz Verlag, 1984).

24) Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: E.J. Brill, 1987). See idem, "*Kramer Versus Kramer* in a tenth/sixteenth Century Egyptian Court: Post-Formative Jurisprudence Between Exigency and Law," *Islamic Law and Society* 8:1 (2001), 27-51. See also Huda Lutfi, "A Study of Six Fourteenth Century *Iqrār*s from al-Quds relating to Muslim women," *Journal of the Economic and Social History of the Orient* 26 (1983), 246-94; and Yossef Rapoport, "Legal

Palestine. Numerous scholars have published articles and monographs on the workings of Muslim courts in al-Andalus during the Almoravid and Almohad periods[25] and in the Maghrib during the Marinid period.[26] *Pace* Hallaq, it may be said that "legal Orientalists" have produced a sizeable body of scholarship on Egypt, al-Andalus, and the Maghrib in the period between 1000 and 1500 CE. Although we may not be on

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Diversity in the Age of *Taqlīd*: The Four Chief *Qāḍī*s under the Mamluks," *Islamic Law and Society* 10 (2003), 210-28.

25) On Muslim courts and Islamic law in al-Andalus, see, in alphabetical order: Ana Férnandez Félix, *Cuestiones legales del Islam temprano: La ʿUtbiyya y el proceso de formación de la sociedad Islámica andalusí* (Madrid: Consejo Superior de Investigaciones Científicas, 2003); Maribel Fierro, "Accusations of "*Zandaqa*" in al-Andalus," *Quaderni di Studi Arabi* 5-6 (1987-88), 251-8; idem, "Andalusian '*Fatāwā*' on Blasphemy," *Annales Islamologiques* 25 (1990), 103-17; idem, "El processo contra Ibn Ḥātim al-Ṭulayṭulī (años 457/1064--464/1072)," *Estudios Onomástico-Biográficos de al-Andalus (Homenaje a José M.ª Fórneas)*, VI (Madrid, 1994), 187-215; idem, "The Legal Policies of the Almohad Caliphs and Ibn Rushd's *Bidāyat al-Mujtahid*," *Journal of Islamic Studies* 10:3 (1999), 226-48; Wael B. Hallaq, "Murder in Cordoba: *Ijtihād*, *Iftāʾ* and the Evolution of Substantive Law in Medieval Islam," *Acta Orientalia* 55 (1994), 55-83; Vincent Lagardère, "Abū l-Walīd b. Rušd *qāḍī al-quḍāt* de Cordoue," *Revue des Etudes Islamiques* LIV (1986), 203-24; idem, "La haute judicature a l'époque almoravide en al-Andalus," *Al-Qanṭara* 7 (1986), 135-228; idem, *Histoire et Société en Occident Musulman au Moyen Âge: Analyse du Miʿyār d'al-Wanṣarīsī* (Madrid: Consejo Superior de Investigaciones Científicas, 1995); Christian Müller, *Gerichtspraxis im Stadtstaat Córdoba: Zum Recht der Gesellschaft in einer mālikitisch-islamischen Rechtstradition des 5.11. Jahrhunderts* (Leiden: E.J. Brill, 1999); idem, "Judging with God's Law on Earth: Judicial Powers of the *Qāḍī al-jamāʿa* of Cordoba in the Fifth/Eleventh Century," *Islamic Law and Society* 7:2 (2000), 159-86; idem, "*Šahāda* und *kitāb al-istiʿā'* in der Rechtspraxis: Zur Rolle von Zeugen und Notaren in Gerichtsprozessen des 5./11. Jahrhunderts," in *Tagungsband des XXVII. Deutschen Orientalistentag Bonn 1998* (Würzburg: Ergon-Verlag, 2001); Delfina Serrano, "Legal practice in an Andalusī-Maghribī Source from the Twelfth Century CE: The *Madhāhib al-Ḥukkām fī nawāzil al-aḥkām*," *Islamic Law and Society* 7:2 (2000), 187-234.

26) On Muslim courts in the Maghrib, see David S. Powers, "A Court Case from Fourteenth-Century North Africa," *Journal of the American Oriental Society* 110:2 (1990), 229-54; idem, "*Fatwā*s as Sources for Legal and Social History: A Dispute over Endowment Revenues from Fourteenth-Century Fez," *Al-Qanṭara* 11 (1990), 295-341; idem, "On Judicial Review in Islamic Law," *Law & Society Review* 26:2 (1992), 315-41; idem, "Legal Consultation (*Futya*) in Medieval Spain and North Africa," in Chibli Mallat (ed.), *Islam and Public Law* (London: Graham and Trotman, 1993), 1-21; idem, *Law, Society, and Culture in the Maghrib, 1300-1500* (Cambridge, Cambridge University Press, 2002). See also Henry Toledano, *Judicial Practice and Family Law in Morocco: The Chapter on Marriage from Sijilmāsī's al-ʿAmal al-Muṭlaq* (Boulder, CO: Social Science Monographs, 1981).

terra firma, our understanding of the workings of Muslim courts and the application of Islamic law in this period is hardly *terra incognita*.

How are we to explain Hallaq's assertion that our understanding of the middle period "remains depressingly *terra incognita*"? The answer to this question may be found in his argument that legal Orientalism is a doctrine; that legal Orientalists unwittingly serve the interests of modern states motivated by the desire for power and domination; and that, for these reasons, legal Orientalists focus their attention exclusively on the formative and modern periods of Islamic legal history. If so, then Hallaq *must* assert–even if he cannot demonstrate—that legal Orientalists have totally ignored the middle period of Islamic legal history. In his attempt to expose, debunk, and transcend legal Orientalist doctrine, he has fallen into the trap of creating a counter-doctrine which, for convenience, may be called *anti-Orientalism*. In my view, it is Hallaq's commitment to anti-Orientalism that best explains his misrepresentation of western scholarship on the middle period of Islamic legal history.[27]

4. *The historian should represent the scholarship of those with whom he disagrees accurately*

Hallaq claims that Crone and other scholars misread texts ("Use and Abuse," p. 84). Let us consider his reading of Crone's "Two Legal Problems Bearing on the Early History of the Qur'ān,"[28] one of the articles that he selected for inclusion in *The Formation of Islamic Law*.

Formation opens with a substantial introduction in which Hallaq summarizes and evaluates the conclusions reached by the author of each essay included in the volume. In his assessment of Crone's article, Hallaq focuses his attention on her claim that "there is less continuity between Qur'ānic and Islamic law than one would expect" (p. xxv). He notes that Crone adduces two examples of a disjunction between Qur'ānic legal doctrine and the *sharī'a*; and that these two examples, in her view, provide confirmation for six other exegetical problems in

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[27] Alternatively, it is possible that when Hallaq referred to the middle period as *terra incognita*, he had in mind not positive law, but jurisprudence; in that case, however, he would have been ignoring his own substantial contributions to our understanding of jurisprudence in the middle period of Islamic history.

[28] Originally published in *Jerusalem Studies in Arabic and Islam*, 18 (1994), 1-37.

the Qur'ān identified by "other scholars." Although Hallaq does not mention the names of these other scholars, he does specify, in a footnote, the six additional exegetical cruxes: *jizya ʿan yadⁱⁿ*, *al-ṣamad*, *kalāla*, *īlāf*, the stoning penalty v. whipping, and written documents v. oral testimony (full documentation may be found in notes 3-7 of Crone's article).

The two examples adduced by Crone are, first, the meaning of the term *kitāb* in Q. 24:33 and, second, a legal maxim relating to the devolution of property belonging to freedmen and freedwomen ("cognates or *dhawū 'l-arḥām* exclude patrons"—a maxim which, for convenience, she calls the DAEP rule). With regard to *kitāb*, Crone observes that "*all* [emphasis in original] Muslim commentators understand *kitāb* as a contract of manumission in return for payment of a specified sum in installments over a specified period of time (usually known as *kitāba* or *mukātaba*)." Against the standard view, Crone states, "There can be no doubt that the word means a marriage contract here (cf. Hebrew *ketubah*)" ("Two Legal Problems," pp. 4-5). For Crone, this is yet another example of a rupture or discontinuity between the Qur'ān as it was understood by Muḥammad and his Companions and the Qur'ān as it was understood by Muslims living a century or more after the Prophet's death. How is it, she asks, that "the meaning of such terminology [was] forgotten if the rules it (i.e. the Qur'ān) formulated were explained and applied from the moment of their revelation?" About this question, Hallaq observes: "[O]ne should not expect much in terms of an answer ..., for Crone herself expressly admits her inability to provide a solution" (p. xxv, referring to Crone, "Two Problems," p. 21).

Hallaq's observation is inaccurate and misleading. On pp. 20 and 21 of "Two Legal Problems," Crone summarizes the views of John Burton and John Wansbrough regarding the codification and canonization of the Qur'ān, drawing attention to the wide chronological gap between the respective positions of these two scholars: Whereas Burton held that it was the Prophet himself who collected the revelations, Wansbrough argued that the Qur'ān was not codified and did not assume its canonical status until ca. 800 CE. When Crone states on p. 21 of "Two Legal Problems" that she does not know how the solution to *this* historical problem should be envisaged, she is referring to codification and canonization. With regard to this problem, she states, the answer "must

lie somewhere in between" (p. 21) the two very different theories of Burton and Wansbrough.

What concerns Crone, however, is the apparent inability of Muslims living a century or more after Muḥammad's death to understand certain words in the Qur'ān. After conceding that she does not know how to resolve the differences between Burton and Wansbrough, Crone continues:

> I must accordingly confine myself to the observation that a theory of belated codification and canonization works very well in the present context, not only in that it would allow us to explain all of the examples so far known of exegetical ignorance of, and juristic lack of attention to, the import of Qur'ānic passages, but also that it could be assumed to work for future examples as well ("Two Problems," p. 21).

This is Crone's answer to the question that she posed. By ignoring her answer, Hallaq has misrepresented her scholarship.

5. *Conclusions should be based upon the careful assessment of evidence, not upon chains of inferences*

Even if Crone had been unable to answer her own question (sometimes merely posing a question can make a contribution to scholarship), it remains the case that Hallaq must account for the eight exegetical cruxes adduced by Crone and others. In this instance, Hallaq fulfills his scholarly obligation by means of a logical demonstration. Suppose for the sake of argument, he posits, that the eight exegetical problems are (1) genuine, and (2) sufficient as a group to create doubt about the early Muslim community's relationship to the Qur'ān. If so, he concedes, then Crone's charge would be serious, and it would be his obligation as an historian to explain the evidence adduced by her and others.

As for the first premise (genuineness), Hallaq focuses his attention on two of the eight Qur'ānic cruxes: the meaning of *kitāb* in Q. 24:23, and the meaning of *kalāla* in Q. 4:12. He writes:

> [T]he two problems associated with *kitāb* and *kalāla* ... may not turn out to be a problem at all, a fact that reduces the importance of the remaining problems, relegating them to the problem of marginal exceptions rather than serious issues pointing to a marked discontinuity (*Formation*, p. xxv).

One may ask why these two problems are not a problem. The answer to this question would require an analysis of historical evidence and scholarly arguments.[29] It also would require some type of demonstration—historical, linguistic, or theological. Neither task is performed by Hallaq, who leaves the reader with the impression that these two problems are marginal issues.

As for his second premise (sufficiency), Hallaq explains that even if he were to concede, for the sake of argument, that all eight of the exegetical problems are genuine, "they can prove nothing beyond what the problems themselves present" (p. xxv). I disagree. If all eight of the exegetical problems are "genuine," this surely is evidence of a gap or discontinuity between how the Qur'ān was understood by Muḥammad and how it was understood by later generations of Muslims. Such evidence may be relevant to the question of the collection and codification of the Qur'ān. On the strength of a syllogism, however, Hallaq dismisses the problem, thereby reneging on his obligation to address the evidence contained in the historical record. For Hallaq, the Qur'ān is nothing more and nothing less than what the Qur'ān says about itself and what Islamic tradition says about it. The text of the Qur'ān is clear and transparent, and there is no need to examine critically the traditional understanding of its legal verses.

Like his assessment of scholarship on the middle period of Islamic law, Hallaq's misreading of Crone appears to be driven by anti-Orientalism.

6. *The historian should be consistent*

Hallaq criticizes Schacht and Crone for being inconsistent. He writes that Schacht's discussion of the first/seventh century in his *Introduction* opens "with an accurate characterization," but is "quickly contradicted by what follows thereafter, which is consistent with Schacht's views expressed in *Origins*" ("Quest," p. 16, note 63). Similarly, he accuses Crone of suppressing in a later publication facts that she acknowledged in an earlier one ("Use and Abuse," p. 80, note 15). Is Hallaq consistent? Let us consider two examples.

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[29] On *kalāla*, see David S. Powers, *Studies in Qur'ān and Ḥadīth: The Formation of the Islamic Law of Inheritance* (Berkeley: University of California Press, 1986), chapter 1.

6.1. The Middle Period, Revisited

In both "Quest" and *Origins*, Hallaq asserts that Western scholarship on the middle period of Islamic legal history has been, and continues to be, "a virtual *terra incognita*."

On March 5, 2003, Hallaq delivered the Justice Matthew O. Tobriner Memorial Lecture at the University of California's Hastings Law School. Later that year, the lecture was published in the *Hastings Law Journal* under the title "'Muslim Rage' and Islamic Law." The title alludes to Bernard Lewis' well known and controversial article, "The Roots of Muslim Rage."[30] In his "Muslim Rage," Hallaq argues that there is a connection, on the one hand, between the demise of the *sharī'a* in modern times, and, on the other, the upsurge of authoritarian regimes in the Muslim world and the readiness of Muslims to engage in acts of political violence directed against non-Muslims. He begins the essay with a reference to recent scholarship on Islamic law in the West:

> Recent scholarship on the history of Islamic law—especially in the United States, Canada, and Germany—has shown the impressive extent to which Islamic law was a working system that evolved in tandem with the developments that Islamic societies from Transoxania to Andalusia and the Maghreb experienced over the centuries (p. 1710).

Hallaq's assertion here that scholars in America, Canada, and Germany have all contributed to a better understanding of how Islamic law was applied in practice in Muslim societies from al-Andalus to Central Asia contradicts his assertion in both "Quest" and *Origins* that the middle period of Islamic legal history has been and continues to be a virtual *terra incognita*.

6.2. Legal Orientalism is a fixed and unchanging doctrine

Whereas in "Quest" Hallaq denies the possibility of disagreements between and among legal Orientalists (see above), in *Formation* he states that "legal orientalism has produced several, often considerably divergent, strands of thought" (p. xix).

In "Quest" Hallaq argues that legal Orientalism is a doctrine from which Western scholars cannot escape, even if they wish to do so; that the body of knowledge associated with this doctrine is imperialist; and

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30) *The Atlantic Monthly*, September, 1990.

that the essentialist elements of this doctrine have been transmitted "nearly without change" from the nineteenth century to the present ("Quest," pp. 3, 30). He identifies five tenets that legal Orientalists have "always believed and wanted to believe about 'the core and kernel of Islam'" (p. 15). According to his fifth tenet, in the years following the alleged closure of the gates of *ijtihād*, ca. 1000 CE, Islamic legal thinking was stricken by stagnation, a condition from which it has not emerged even in modern times ("Quest," p. 15).

In "Muslim Rage," by contrast, Hallaq asserts that in the post-colonial period, western scholars have freed themselves from the cultural assumptions of colonial domination. He writes:

> The result has been a near total revolution in Islamic legal studies, especially during the last two decades. It is readily acknowledged nowadays that there was no dislocation between Islamic law and the society that it served; that law was socially linked throughout; and that it responded to the challenges of social and economic change until its near total decimation in the nineteenth and early twentieth centuries" (p. 1711).

The word "revolution" here points to a profound transformation in the field of Islamic legal studies. How is it that legal Orientalism no longer emits its "malevolent" effects? What are the underlying historical causes of this transformation? Who are the scholars who stormed the barricades and led the charge against the ancient regime? How did they manage to extricate themselves from the tentacles of paradigmatic legal Orientalism? Hallaq does not say.[31]

When we apply Hallaq's principles of historical investigation to his own scholarship, we find that he can be intemperate, may have his own ideological biases, makes historical generalizations that are inaccurate and unreliable, misrepresents the arguments of scholars with whom he disagrees, bases important conclusions on chains of inferences rather than historical evidence, and is inconsistent. We turn now to Hallaq's *Origins and Evolution of Islamic Law*.

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31) Hallaq may be referring to the four German scholars (Johansen, Motzki, Schoeler, and Mitter) and one German-speaking Hungarian scholar (Muranyi) mentioned in "Quest for Origins" (p. 15, note 4). However, he does not identify the Canadian and American scholars who have contributed to this positive body of scholarship. The only footnote in this paragraph refers the reader to "Quest for Origins"—a dead end.

The Origins and Evolution of Islamic Law

Origins and Evolution opens with a blanket dismissal of modern Western scholarship on the origins of Islamic law. Hallaq draws attention to "at least three works" on Islamic law published in the past half century that include the word "Origins" in their titles, referring to monographs by Schacht, Motzki, and Dutton, respectively (p. 1, note 2). None of these books, Hallaq says, "offers a history of Islamic law during the first three or four centuries of its life" (p. 1). All three suffer from a narrow focus (p. 2) and, with respect to the issue of "beginnings," they are based upon "unproven" assumptions (p. 3).

Hallaq does not mention two well-known general surveys of Islamic legal history published in 1964: *An Introduction to Islamic Law* by Joseph Schacht and *A History of Islamic Law* by N.J. Coulson. Although neither book contains the word "Origins" in its title, both offer a survey of Islamic legal history during the first three or four centuries of its life—and beyond. In light of his position on legal Orientalism, Hallaq's omission of these two surveys is understandable. Both were written by legal Orientalists. In place of their "unproven" assumptions, he promises to substitute "real historical evidence." His goal is to produce a book that "truly" captures the historical processes relating to the formation of Islamic law in the first four centuries AH. Be that as it may, the benchmark to be used in assessing *Origins and Evolution* is not the three specialized monographs mentioned by Hallaq but rather the general surveys written by Schacht and Coulson.

Hallaq "plots" the starting-point and endpoint of his investigation by identifying the "essential attributes" of the Islamic legal system and distinguishing them from "accidental attributes." He singles out for analysis four essential attributes: (1) the judiciary, (2) legal doctrine, (3) legal methodology, and (4) doctrinal law schools. Only when all four of these essential attributes have reached maturity can the formative period be said to have come to an end. While acknowledging that religion is an "essential attribute" of the Islamic legal system, he does not isolate religion for the purpose of analysis on the grounds that it "falls under" one or more of the four essential attributes that are of concern to him (p. 3). Although religion is not *accidental*, it is somehow *subordinate* to Hallaq's four essential attributes and therefore does not receive separate treatment in *Origins*.

In Chapter 1, Hallaq refutes the contention of legal Orientalists that the first Muslims "borrowed" their legal institutions from the inhabitants of the Near East in the years following the Arab conquests. Legal Orientalists, he says, have a distorted image of the early Muslim community. They regard the Arabs of pre-Islamic Arabia as "impoverished" nomads who were "desperately in search of new cultural forms or an identity" (p. 26). This explains why, in the minds of legal Orientalists, it was necessary for the first Muslims to "borrow" laws and institutions from the Byzantines and Persians. Against the view that Islamic law is derivative, Hallaq argues that it is original and creative. He highlights the fact that in the sixth and seventh centuries CE, Arabia was—physically, culturally, and economically—an integral part of the Near East. He also emphasizes the high level of cultural and institutional continuity between Arabia and the Fertile Crescent, a point that is important to his overall argument because it supports his contention that the Qur'ān contains several Near Eastern legal institutions. About these Near Eastern legal institutions, however, Hallaq appears to be of two minds. On p. 8 of *Origins* he writes, "Prior to the Arab expansion in the name of Islam, Arabian society had developed the same types of *institutions* and forms of culture that were established in the imperial societies to the south and the north" (emphasis mine). On page 17, however, he writes that although the peninsular Arabs were familiar with Near Eastern cultural forms and material products, "the peninsula's geographical conditions did not allow the full absorption of southern and northern empire *institutions*" (emphasis added). The reader is not sure which of the two statements is operative; and Hallaq does not provide an example of a Near Eastern institution that was only partially absorbed by the Arabs.

Prior to the rise of Islam, Arabs interacted with and participated in the Near Eastern economy and its society. Hallaq notes the importance of camel-nomadism, long-distance trade, and markets. After Mecca became a commercial center, elements of Byzantine, Roman (and no doubt Persian) culture entered the Hijaz. These cultural elements were not "borrowed" but rather "absorbed" (p. 17), according to Hallaq, by Arabs who had adopted a sedentary lifestyle. This may explain why, on p. 16, he writes that Arabia was "largely sedentary." As support for this assertion, he refers to the archaeologist G. King who, after excavating

al-Rabadha, concluded that in the distant past, land use in this region "was not solely nomadic" (p. 16). It does not follow from the assertion that the region around al-Rabadha was not solely nomadic that Arabia was largely sedentary.

Hallaq emphasizes the resemblance between the legal culture of Arabia and that of the Near East. The Arabs were traders who carried out their commercial transactions using pecuniary and commercial contracts. Citing Schacht—here with apparent approval (but see above)—he states that the form of these contracts "can be traced back to the empires of Babylonia and Assyria" (p. 35, note 10). Citing Schacht again, Hallaq states that these ancient Near Eastern contracts were incorporated into mature Islamic law (p. 25, note 39). Another important component of Arabian legal culture were the *minhagim* or customs practiced by Jews who had been living in the Hijaz for many generations prior to the birth of Muḥammad. However, Hallaq does not mention a specific example of a Jewish custom that was absorbed by the Hijazi Arabs (p. 22).[32]

On the eve of the rise of Islam, Hallaq observes, Arab merchants visited Hira, Bosra, Palmyra and other towns and cities in the Near East, and Muḥammad himself was familiar with Near Eastern legal practices. During the Meccan and first half of the Medinan period it was Arabian customary law that prevailed within the Muslim community. Following Goitein—another Orientalist–Hallaq identifies the year 5 AH as the "birth-hour" of Islamic law. Without entering into the vexing problem of how to determine the date of individual revelations, Hallaq identifies Q. 5:48 ("... for We have made for each of you [i.e., Muslims, Christians, and Jews] a law and a normative way to follow ...") as "the beginning of substantive legislation in the Quran" (p. 21).[33] This verse was followed by others dealing with laws relating to the status of pork and wine, alms-tax, theft, marriage, divorce, and inheritance, to name just a few. Taken as a whole, the Qur'ānic legislation

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[32] Hallaq translates *minhāg* as "law" (*Origins*, p. 21); in fact, it means "custom." See Marcus Jastrow, *Dictionary of Talmud Babli, Yerushalmi, Midrashic Literature and Targumim*, 2 vols. (New York: Pardes, 1950), s.v. *minhāg*.

[33] See now Wael B. Hallaq, "Groundwork of the Moral Law: A New Look at the Qur'ān and the Genesis of Sharī'a," *Islamic Law and Society* 16:3 (2009), 239-79, where Hallaq pushes the beginnings of Qur'ānic law back to the early Meccan period.

points to the emergence of a "basic legal structure" even if these rules "surely did not constitute a system" (p. 24). The basis of the legal system remained Arabian customary law which, he says, was "largely unchallenged" (pp. 24-5) even after the introduction of new Qur'ānic rules. This assertion is difficult to accept. Adoption, for example, was practiced by the inhabitants of the Near East as far back as the second millennium BCE. Prior to the rise of Islam it was practiced by Hijazi Arabs, including Muḥammad, who adopted a son ca. 605 CE. In the year 5 AH, however, the Arabian custom is said to have been abolished by Q. 33:4-5. Similarly, the Qur'ānic inheritance rules mark a significant departure from Arabian customary law, e.g., by elevating daughters, mothers, sisters, and wives to the status of heirs and by severely reducing the power of testation.[34]

According to Schacht, it will be recalled, the first Muslims paid only perfunctory attention to the Qur'ānic legislation during the first century AH. Hallaq disagrees. While conceding that Arabian customary law remained in force during the years immediately following the Prophet's death, Hallaq states that customary law was modified, first, by the Qur'ānic legislation and, second, by caliphal law, that is to say, by ordinances and regulations relating to the administration of the state promulgated by ʿUmar I and the caliphs who followed (p. 32). Hallaq asserts that the Qur'ān served as an important "legal guide" for the Muslim community "from the very beginning" (p. 63), but he also acknowledges that several Qur'ānic rules were ignored for three quarters of a century following the Prophet's death. For example, Q. 5:92, which is understood as prohibiting the consumption of wine (*khamr*), was "not immediately enforced and remained largely inoperative" until 89/707 (pp. 40-1). It took some time, Hallaq explains, for the Qur'ānic imperatives to penetrate the "Muslim psyche" (p. 69). In that case, the religious ethos that suffuses the Qur'ān played only a limited role in Muslim society until the third quarter of the first century AH.

Evidence relating to the status of the Qur'ānic legislation in the first century AH may be found, according to Hallaq, in reports about the

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34) With regard to inheritance law, Hallaq writes that the deceased's male agnates are his sole heirs (*Origins*, p. 48). Q. 4:12 awards shares of the estate to wives and uterine siblings. Neither are agnates.

first Muslim judicial authorities. These "proto-qadis" and, later, the first qadis—many of whom were storytellers—issued rulings on an arbitrary basis (p. 35), based on three sources: (1) Qur'ān (but see above); (2) *sunan*, a term that Hallaq defines as the "established continuous practice that had become a model to follow"; and (3) discretionary opinion or *ra'y*. Of these three sources, *sunan* and *ra'y* were the most important ones in the first century AH. On p. 70, Hallaq states that for much of the first century AH, it was the *sunan* of Companions and Successors that was "central"—as evidenced by the fact that the majority of the legal doctrines attributed to al-Zuhrī (d. 124/741) are based on the *sunan* of Companions. On p. 75, however, Hallaq says that it was discretionary opinion that "dominated throughout the early period and until the middle of the second/eighth century."

Notably absent from this picture is the *sunna* of the Prophet. In "Quest," it will be recalled, Hallaq criticizes legal Orientalists who claim that prophetic *ḥadīth* were "forged" by projecting statements attributed to Companions and early caliphs back onto the Prophet. In *Origins*, Hallaq dismisses the claim of "forgery" as "unjustifiable" (p. 70). How then did the *ḥadīth* come into existence?

"Prophetic *sunan*," Hallaq says, existed "from the very beginning" (p. 104), and some prophetic *dicta* began to circulate "during the first decades after Muḥammad's death" (p. 52). The first attestations of the "*sunna* of the Prophet" date to ca. 20/640; as examples, he mentions two "decisions of the Prophet," one relating to adultery, the other to inheritance (p. 48).[35] Like the Qur'ānic legislation, however, the available Prophetic *sunan* did not yet have any legal force. The first Muslims did not regard the *sunna* of the Prophet as an "exclusive" source of law (p. 71) nor did they regard it as superior to other sources of law (pp. 69-70). The Prophet's authority as a source of law emerged only in the decade between 60 and 70 AH (p. 78), that is to say, at a time when only a handful of Companions were still alive. Qadis *cum* storytellers, members of the second and third generations of Muslims, were the first

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35) Hallaq writes that the Prophet instructed 'Umar b. al-Khaṭṭāb to allot distant relatives the shares of inheritance to which they are entitled (*Origins*, p. 48). Cp. 'Abd al-Razzāq, *Muṣannaf*, 10:302, no. 19185, where 'Umar is said to have bemoaned the fact that the Prophet died *without* specifying the inheritance rights of distant relatives.

ones to pay close attention to the *sunna* of the Prophet and to transmit narratives that took the form of *ḥadīth*. Gradually, the pace at which Prophetic *sunna* was adopted increased substantially (p. 56). By the year 100 AH, the *sunna* of the Prophet had taken its place "as the queen of all *sunan*" (p. 69)—although on the same page Hallaq states that two decades later, ca. 120 AH, the authority of Prophetic *sunna* was merely "on the rise." It was in the second half of the second century AH that al-Shāfiʿī (d. 204/820) and his followers began to advance the view that the law must rest squarely on Prophetic *ḥadīth*, a position known as Traditionalism (p. 74). As the Traditionalist movement gained momentum, increasing numbers of prophetic *ḥadīth* were produced (p. 76). According to Hallaq, "massive" quantities of Prophetic *ḥadīth* were created. They were not "forged" but rather "fabricated" (p. 103). Drawing with approval on the results of "modern research"–without specific attribution–Hallaq explains that the "fabrication" of *ḥadīth* was the result of a "long and complex process" that unfolded over two stages (p. 104). In the first stage, someone—presumably a jurist living in a garrison town—would tell a story in which a long-dead Companion purported to recall something that the Prophet had said or done; the resulting narrative was accompanied by an *isnād* that ended with the Companion to whom the historical memory had been attributed. In a second stage, the *isnād* would be "projected" or "extended" back to the Prophet himself (p. 102). It is therefore undeniable that much of the *ḥadīth* is "inauthentic" (p. 104). It was in the garrison towns that "masses" of *ḥadīth* were put into circulation, many of which "contradicted the memory and practice of Muslim communities" (ibid.). Only at the beginning of the third/ninth century did the *sunna* of the Prophet take its place as an exclusive source of model behavior (p. 49). We appear to have come full circle: Hallaq's characterization of the emergence of *ḥadīth* is one with which Schacht, were he alive, could not disagree.

Whereas during the first half of the first century AH, law was a matter of practice, beginning in 80 AH law became a textual activity. At the end of the first century AH, there were not enough prophetic *ḥadīth* to serve "as the basis of a substantial doctrine of positive law" (p. 69), and it was only at this time that pious Muslims began to pay close attention to the subtleties of the Qurʾānic legislation, a process that

Hallaq refers to as the "textualization" of the law. In the four decades between 80 and 120 AH, *ḥalqa*s or scholarly circles emerged in Mecca, Medina, Fustat, Kufa, Basra, Damascus, the Yemen, and Khurasan; and the first legal specialists began to work out the details of the law, including the doctrine of *naskh* or abrogation (p. 67). By the end of the second century AH, positive legal doctrine—the second of Hallaq's four essential attributes—was fully formed.

For legal historians, Hallaq's failure to explain *how* this legal doctrine was created is the most disappointing aspect of a book devoted to the origins and evolution of Islamic law. During the past half century, legal historians have produced a substantial body of knowledge relating to the historical development of Islamic legal institutions, including abrogation,[36] ritual purity,[37] commercial transactions and the avoidance of *ribā*,[38] marriage and divorce,[39] inheritance,[40] *waqf*,[41] paternity and

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[36] John Burton, *The Sources of Islamic Law: Islamic Theories of Abrogation* (Edinburgh: Edinburgh University Press, 1990).

[37] R. Kevin Reinhart, "Impurity/No Danger," *History of Religions* 30 (1990-91), 1-24; Marion Holmes Katz, *Body of Text: The Emergence of the Sunni Law of Ritual Purity* (Albany: State University of New York Press, 2002); Ze'ev Maghen, "Dead Tradition: Joseph Schacht and the Origins of "Popular Practice,'" *Islamic Law and Society* 10 (2003): 276-347.

[38] Abraham L. Udovitch, *Partnership and Profit in Medieval Islam* (Princeton: Princeton University Press, 1970); Ersilia Francesca, *Teoria e Pratica del Commercio Nell'Islām Medievale: I contratti di vendita e di commenda nel diritto ibāḍita* (Roma: Istituto per L'Oriente C.A. Nallino, 2002); Hiroyuki Yanagihashi, *A History of the Early Islamic Law of Property: Reconstructing the Legal Development, 7th-9th centuries* (Leiden: Brill, 2004).

[39] Ya'akov Meron, *L'Obligation alimentaire entre époux en Droit Musulman Hanéfite* (Paris: Librairie Générale de Droit et de Jurisprudence, 1971); G.R. Hawting, "The Role of Qur'ān and *Ḥadīth* in the legal controversy about the rights of a divorced woman during her 'waiting period' (*'idda*)," *BSOAS* 52 (1989): 430-45; Susan A. Spectorsky, *Chapters on Marriage and Divorce: Responses of Ibn Ḥanbal and Ibn Rāhwayh* (Austin: University of Texas Press, 1993).

[40] Powers, *Studies In Qur'an and Ḥadīth*; Martha Mundy, "The Family, Inheritance, and Islam: A Re-examination of the Sociology of *Fara'id* Law," in *Islamic Law: Social and Historical Contexts,* ed. Aziz al-Azmeh (New York: Routledge, 1988), 1-123; Hiroyuki Yanagihashi, "Doctrinal Development of *Maraḍ al-Mawt* in the Formative Period of Islamic Law," *Islamic Law and Society* 3 (1996), 326-58; Richard Kimber, "The Qur'anic Law of Inheritance," *Islamic Law and Society* 5 (1998), 291-325.

[41] Gil Verbit, *The Origins of the Trust* (XLibris, 2002); Peter Hennigan, *The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A.H. Ḥanafī Legal Discourse* (Leiden/Boston: Brill, 2004).

zinā,[42] slavery,[43] manumission and patronage,[44] the *qasāma* oath,[45] and the law of rebellion,[46] to name a few. This accumulated body of knowledge awaits the scholar who will attempt to explain how the basic institutions of Islamic law developed from their rudimentary beginnings into a fully formed legal doctrine. These developments took place during the first two centuries AH, not only in Arabia and Iraq but throughout the Muslim world. As Hallaq puts it, by the beginning of the third/ninth century, "legal doctrine (or substantive law) had ... become more comprehensive and detailed in coverage" (p. 122). How this happened, he does not say.

Conclusion

In "Quest for Origins" Hallaq razed Schacht's citadel and buried the master. In *Origins*, he appears to have exhumed the body and begun the process of rehabilitating his image.

Much of what Hallaq says about the first two centuries of Islamic legal history is recognizable as Schachtian doctrine, albeit with qualifications. According to Schacht, Muḥammad "borrowed" legal institutions from Near Eastern law, and the true origins of Islamic law are to be found in Iraq; according to Hallaq, the pre-Islamic Arabs "absorbed" Iraqi and other Near Eastern legal institutions that were later incorporated into Islamic law, whereas the true origins of Islamic law are to be found in the Hijaz. According to Schacht, the first Muslims

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42) Uri Rubin, "'*Al-Walad li-l-firāsh*': on the Islamic campaign against '*Zinā*'," *Studia Islamica* 78 (1993): 5-26.

43) Irene Schneider, *Kinderverkauf und Schuldknechtschaft: Untersuchungen zur frühen Phase des islamischen Rechts* (Stuttgart: F. Steiner, 1999); John Brockopp, *Early Mālikī Law: Ibn 'Abd al-Ḥakam and his Major Compendium of Jurisprudence* (Leiden: Brill, 2000).

44) Patricia Crone, *Roman, Provincial, and Islamic law* (Cambridge: Cambridge University Press, 1987); Ulrike Mitter, "Unconditional Manumission of Slaves in Early Islamic Law: A *ḥadīth* Analysis," *Der Islam* 78 (2001), 35-72.

45) Patricia Crone, "Jāhilī and Jewish Law: the *qasāma*," *Jerusalem Studies in Arabic and Islam* 4 (1984), 153-202; Rudolph Peters, "Murder in Khaybar: Some Thoughts on the Origins of the *Qasāma* Procedure in Islamic Law," *Islamic Law and Society* 9 (2002), 132-67.

46) Khaled Abou El Fadl, *Rebellion & Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001).

ignored the Qur'ānic legislation for a century or so and drew only elementary conclusions from the sacred text; according to Hallaq the Qur'ān served as an important spiritual and legal guide for Muslims "from the beginning," although certain Qur'ānic laws were ignored until the last decade of the first century AH. According to Schacht, the first qadis transformed Umayyad administrative practice into religious law or *fiqh*; according to Hallaq, proto-qadis issued decisions on the basis of established practices (*sunan*), including Umayyad caliphal law. According to Schacht, the first judges and jurists relied heavily on *ra'y* or discretionary opinion; Hallaq concurs. According to Schacht, prophetic *ḥadīth* began to emerge at the beginning of the second century AH; according to Hallaq, prophetic *ḥadīth* began to emerge in the decade between 60 and 70 AH. According to Schacht, jurists in Iraq and elsewhere projected their "living tradition" backwards, first to local figures, then to prominent Companions, and finally to the Prophet himself; Hallaq concurs. According to Schacht, large numbers of prophetic *ḥadīth* were "forged"; according to Hallaq, "massive" numbers of prophetic *ḥadīth* were fabricated.[47]

Historical scholarship develops slowly. As new evidence is discovered and old evidence is re-examined, earlier assessments of the past may be modified. The scholarly enterprise requires the continuous reassessment of one's own work as well as that of others. Blanket and unsubstantiated attacks on colleagues and predecessors do little to advance the enterprise in which historians are engaged.

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47) It is conceivable that Hallaq changed his mind about Schacht and legal Orientalism in the short interval between the publication of "Quest" and that of *Origins*. Recall that in "Quest," Hallaq argues that Schacht did not make a single positive contribution to the field of Islamic legal studies; and that when Schacht characterized Islamic law as the "most typical manifestation of the Islamic way of life, the core and kernel of Islam itself," he was making a statement about long-established Orientalist doctrine ("Quest," p. 2). In "Muslim Rage," Hallaq cites the same text, albeit to the opposite effect. Here Schacht is "the distinguished father of Islamic legal studies in the West." Here Schacht's statement is an accurate characterization of history, not a manifestation of Orientalist doctrine. Hallaq writes, "With the benefit of hindsight, and considering the developments that have taken place since the Islamic revolution of Iran in 1979, Schacht's acute observations are more true [sic] now than ever" (p. 1707). Alternatively, it is possible—and in my view likely—that Hallaq chooses to speak to different audiences in different voices.