Muslims, Islamic Law, and the Sociopolitical Reality in the United States

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Abstract

Native born African-American Muslims and the Immigrant Muslim community forms two important groups within the American Muslim community. Whereas the sociopolitical reality is objectively the same for both groups, their subjective responses are quite different. Both are vulnerable to a "double Consciousness," i.e., an independently subjective consciousness, as well as seeing oneself through the eyes of the other, thus reducing one's self-image to an object of other's contempt. Between the confines of culture, politics, and law on the one hand and the "Islam as a way of life" on the other, Muslims must express their cultural genius and consciously discover linkages within the diverse Muslim community to avoid the threat of double consciousness.

The Threat of Double-Consciousness

Two basic challenges confront Muslims in America. The first is the enterprise of self-definition, that is, of defining for oneself who one is and, therefore, which actions and inactions are consistent with that choice. The second is the problem of self-determination, or, how to gain the requisite control or influence over the social and political institutions that affect one's life. These challenges are intimately connected to each other and to the issue of Muslims' social and political participation in American society. The need for Muslims' social and political participation in American society is obvious in the case of self-determination, and becomes equally obvi-

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ous in the case of self-definition once it is recognized that the real goal of any act of self-definition is both to affirm one's subjectivity vis-à-vis the objective world and to gain public recognition for one's subjectively chosen self. In other words, self-definition is always and fundamentally a social cum political act; it is never a purely intellectual one.

From the outset, the enterprise of Muslim self-definition was complicated by the heterogeneous make-up of America's Muslim community. American-born converts (the majority of whom are African-Americans) are a product of American history, as are their hopes, fears, fantasies, and ambitions. They are both repelled by the American experience, by virtue of their history as a marginalized minority, and attracted to it, by virtue of their connection to a uniquely rich Afro-American historical and cultural tradition. Their search for a bona fide Muslim-American identity is still in its exploratory stage.[1] To date, however, the record of successive turns and turnabouts has proven one thing if nothing else: Whatever this Muslim-Afro-American identity finally turns out to be, if it is to be life-affirming as opposed to paralyzing, it will have to embrace, however discriminately, rather than ignore the reality and history of African-Americans, just as effectively as it fortifies the boundaries between Islam and non-Islam.

Foreign-born Muslims, on the other hand, are heirs of a much older tradition of identity formation. For them, a basic feature of self-definition is the very preservation of the cultural tradition that has been handed down to them. To be sure, they too are engaged in a process of exploration as they seek to determine which aspects of the received tradition are essential and which coincidental. But this is done with extreme caution and in the context of a conscious rejection of the proposition that their coming to America imposes upon them any obligation to assimilate. In fact, as one observer has recently noted, coming to America is now seen by many immigrants as the greatest ensurer of the right to remain themselves![2] Thus, even as the notion of an "Islamic-American" identity gains acceptance among foreign-born Muslims (and especially among their children), whatever this Islamic-American identity turns out to be, it will have to accommodate, and in part confirm, received tradition. It will not be accorded (at least not in the foreseeable future) the authority to override or negate that tradition.

As these two groups of Muslims move closer to their respective choices of Islamic identity in America, one wonders if they are not at the same time moving away from each other, given the vast difference in the sources of their identities. In the meantime, both groups will have to confront the bat-

tle against what W.E.B. DuBois referred to as "double-consciousness," i.e., the seemingly inescapable tendency to look at oneself through the eyes of another, to "measur[e] one's soul by the tape of a world that looks on in amused contempt."[3] DuBois saw this phenomenon as contributing to the ineffectiveness (largely perceived as weakness) among blacks, because it foisted upon them what he called a "contradiction of double aims."[4] The black craftsman, for example, had to struggle to escape white contempt for being a mere craftsman while striving to use his skills for the needs of his people. This, DuBois observed, could only result in making him a poor craftsman because "he had but half a heart in either cause."[5] This double-consciousness and contradiction of double aims are an even greater threat to Muslim—black, white, or immigrant. The simultaneous struggle against being a Muslim alongside the struggle to be a Muslim necessarily reduces the amount of energy devoted to the latter. As such, the threat of double-consciousness has a direct bearing on the matter of salvation! Indeed, as in George Orwell's depiction, "How many fingers am I holding up, Winston?," this kind of psychological pressure can turn even the clearest Qur'anic verse into a matter of doubt and speculation, and even the most basic religious obligation into a matter of choice.[6] In the most profound sense, there can be no greater threat to the Muslim and Islam in North America.

We are brought back, then, to the issues of self-definition and self-determination in the most serious and meaningful sense. Given that both of these are always and necessarily sociopolitical activities, both foreign-born and American-born Muslims are equally confronted with the questions of how they should seek to influence American social and political institutions to gain public recognition and respect for themselves as Muslims and how to create a social reality that is free of double-consciousness. Whether in concert with each other, or as distinct and separate movements, American-born and foreign-born Muslims have to think about and develop approaches to this task.

Muslim Identity between Culture and Politics

No serious discussion of the Muslim role in shaping or influencing social and political institutions in America can avoid the question of whether it is legitimate for Muslims to participate in the social and the political life of a non-Muslim polity. At the same time, I would like to warn against the all-too common fallacy—or perhaps the ruse—of overpoliticizing matters

to the point that legislative politics (i.e., voting, nominating candidates, holding political office) emerges as the only or even main means of affecting social and political life in America. Legislative politics is neither the only nor, in every instance, the most effective means of influencing society. As such, we should be careful of uncritically surrendering to the loaded proposition: either get involved in legislative politics or forfeit the opportunity for self-definition, not to mention self-determination.

What is needed is a balanced approach in which the potential benefits, functional limitations, and possible religious impediments to Muslim participation in American social and political life all receive their due. For some time now, however, the matter has been construed and treated as a zero-sum equation. Some have stressed the practical benefits of Muslim involvement in legislative politics and equated this with religious obligation. Others have emphasized the religious impediments to such involvement, ignoring or resigning themselves to sacrificing the benefits thereof. In the meantime, very little attention has been paid to either the functional limitations of legislative politics, or to other possible means of affecting social and political change. This is a telling oversight that provides some useful insights into some of the inadequacies of Muslim thought in the West, and some of the obsessions and biases that tend to limit the scope of its vision. Before proceeding further, therefore, on the issue of Muslim participation in American legislative politics, I would like to register a few points about the limitations of that enterprise, with the aim of excavating a few conceptual tools that might aid us in our thinking about the possible modality of political participation and its relationship to other means of affecting social and political change.

On the Limits of Legislative Politics

I begin with an insight borrowed from the Italian neo-Marxist, Antonio Gramsci (d. 1937). Gramsci had witnessed the collapse of the American economic system during the Great Depression of 1929. He observed that, despite the economic ruin that came to many among the elite, there was virtually no change in the sociopolitical relations between America's haves and have-nots. Whereas one would have expected the haves' loss of wealth to reduce them—socially and politically—to the status of have-nots, one found that in the end they lost virtually nothing of their status as premier citizens who both assumed and received the right to deferential treatment. On the basis of this observation, Gramsci developed his concept of "hege-

mony" through which he concluded that it was not control over the means of material production that determined relations of power and authority in society but control over the means of producing and disseminating intellectual products, namely, ideas and images. It was the educational, cultural, and religious institutions, along with the media and entertainment industry, that held the keys to how people saw themselves and interacted with each other in society. Where there existed no challenge to the views and images created by these institutions, politics and economics would do little to change the status quo.

Gramsci's theory goes a long way in establishing the idea that the attitudes and assumptions, the stereotypes and habits of deferential or contemptuous treatment, which form the basis of how people see themselves and interact with others in society, are far more the product of how effectively ideas and images are manipulated through cultural and educational institutions than they are the product of pure politics or economics. One of the most glaring confirmations of this can be gleaned from developments in the United States during the 1960s, when black icons like the boxer Muhammad Ali ("I am the greatest!") and the singer James Brown ("Say it loud; I'm black and I'm proud!") succeeded in injecting a transformative discordance into the national master-narrative by altering the language and categories through which white supremacy had sustained its status as normal. By smashing the boundaries between the imaginable and the unimaginable, between the valued and the valueless, their contributions to the American cultural landscape paved the way for blackness to take on new meanings and to occupy psychological spaces theretofore unknown to it. Legislative politics would in turn confirm this transformation in the 1970s with the unprecedented proliferation of black-elected officials and other beneficiaries of such government initiatives as Title VII and Affirmative Action.[7]

Even the more overtly political successes of figures like Martin Luther King, Jr., were ultimately indebted to developments outside the realm of legislative politics. The touch-stone of King's genius lay in his success in developing what Hobbes referred to as a political "trump-card," i.e., a legally sanctioned activity outside of legislative politics through which concessions can be forced from a government. Trumps operate outside the realm of legislative politics precisely because governmental systems are not in the business of legislating themselves out of existence. As such, as long as one works within the system, change is almost always slow, almost

never radical, and invariably justified as being necessary to the health and survival of the system. "Dissidents," meanwhile, who wish to bring about more fundamental change must recognize and act in accordance with one basic rule: Where there is no recognized political trump-card, clubs become trumps! In other words, the government assumes the right to put down dissent through punitive and violent measures. Martin Luther King, Jr., located his trump card in the ability to subject the U.S. government to public shame and embarrassment. The daily images, televised and printed, of police dogs, billy clubs, and hoses turned against peaceful, unarmed blacks and nonblacks literally embarrassed this nation's government into instituting change.[8] But the secret behind King's success actually runs much deeper than this, for shame is not a sensibility into which the sponsors of unjust social and political orders are easily coerced. How was it that actions and attitudes that had for centuries been accepted as "normal" suddenly came to constitute a public embarrassment? It is indeed here, in the new attitude toward the meaning of blackness and, concomitantly, toward the unjust treatment of blacks, that we come to appreciate the aforementioned role of such icons as Muhammad Ali and James Brown.

By comparison, Muslim groups and organizations appear, at least most of the time, to miss the point. Whereas Martin Luther King, Jr., sought to transform social reality by appealing to, and ultimately modifying, white sensibilities and attitudes, Muslims appear to be satisfied with simply addressing outward behavior. As a result, those who misrepresent Islam or discriminate against Muslims are not asked to internalize any sense that their behavior is wrong or morally reprehensible, only that it is punishable, e.g., by legal sanctions—fleeting threats to their public image, or decreased market shares. They are no less psychologically or viscerally predisposed to anti-Muslim sentiments; nor do such sentiments violate their image of themselves as decent, patriotic folks. Indeed, anti-Muslim bias carries nothing near the opprobrium of anti-black racism. Yet, rather than confront this directly, Muslims remain resigned to the cliché that one cannot legislate morality. And what is even more troubling is that rather than seeing in this clear and incontrovertible proof of the limits of legislative politics, Muslims continue to find comfort in the thought that by responding to slanderous and discriminatory gestures after the fact they have done all that can be done.

If, however, the aim of Muslim participation in U.S. legislative politics is to promote a dignified existence for Muslims in America, and to contribute

to the fight against the plague of double-consciousness (not to indulge inflated egos or to feign inclusion in the American melting pot) the parallel necessity of affecting cultural change in America must certainly be accorded equal importance. An example of such cultural change would be changing the language and categories of thought and common experience in America, as well as developing and effectively using a Muslim trump card. The effectiveness of the former depends fundamentally on the success of the latter. Here, in the cultural realm, Muslims face the greater challenge. The politics of identity among Muslims (American born and immigrants) tends to obliterate the distinction between the successful indigenization of Islam as a positive achievement and proscribed capitulation to the "culture of disbelief." Indigenization would be seen as successful appropriation of some aspects of American culture and capitulation would be seen as assimilation into the ways of the slavemaster/colonizer. As long as this remains the case, there will be no unleashing the God-given talent and cultural imagination that will enable Muslims to engage in cultural production that is not doomed to being marginalized and treated as a spectacle. To a very real extent, the future of Islam in America depends not on whether Muslims can arrive at an understanding of scripture and tradition which allows for home mortgages or inheritance between Muslims and non-Muslims, but on whether that understanding liberates the Muslim cultural imagination and allows it to come into its own, here in America.[9] One can live with a lot of broken rules of Shariah,[10] but what repentance can there be from a broken soul or psyche? How can spiritual or psychic damage be avoided if the world outside the mosque reflects nothing of the Muslim's creative spirit and sense of self? How long could a New England aristocrat or an Appalachian hillbilly, for example, sustain his/her sanity in a world that always played the most excruciating Rap music? If Muslims are to establish a significant existence here in America, one that enables them not only to consume but to shape American reality, indeed to see themselves and America as partial products of each other, the Muslim cultural imagination has to be liberated. Once this is done, Muslims will be able to move beyond the relatively safe arena of sports into those of literature, theater, music,[11] fashion design, comedy, and interior decorating, just as Muslims have done throughout Islamic history, and just as Muslims now culturally participate in virtually every Muslim country in the world![12]

All of this has serious implications, of course, for such questions as "Muslim identity," "Islamic culture," and the legitimacy of Muslim

involvement in American society. This may explain why such issues as cultural production have received such scant and inadequate attention to date. It may be that the growing consensus among Muslims on the necessity of participating in legislative politics is in the end a cop-out, a safe retreat from the more difficult task of penetrating, appropriating, and redirecting American culture. Muslims may enjoy the initial warm feeling that goes along with this, but it may not be long before this cools and we are forced to acknowledge that we made a serious mistake! Even the most successful incursions into American law and politics, for example, will not change the reality of what it means to a woman (or girl) with a headscarf in America; nor will it challenge the tyranny of Muslim social institutions that are impervious to basic human needs and aspirations. On the other hand, who can deny that blacks did more to change their (and America's) social and political reality during the 1960s (when the doors to legislative politics were virtually closed to them) than they have in the subsequent era of so-called black political empowerment?[13]

The foregoing should be understood only as an attempt to point out some of the limitations of legislative politics, to insist that there is a dialectical relationship between culture and self-determination that power (or politics) contributes to but does not determine. At the same time, there are laws and policies in this country that have a devastating, or potentially devastating, effect on the every day life and religious practices of Muslims. One need only consider, e.g., the RICO act, the new anti-terrorism bill, banking regulations, divorce and inheritance laws, the Immigration and Naturalization Service's use of "secret evidence," or Child Protective Services' discriminatory intervention into Muslim family life. No amount of isolation will place Muslims beyond the reach of these laws and policies. Only through the medium of legislative politics are laws and policies made and unmade. Indeed, on purely practical grounds, there would seem to be no question about whether Muslims should get involved in legislative politics. The question, however, is whether such involvement can be legitimized on the basis of the Shari'ah.

Islam and American Legislative Politics

The prospect of the legitimacy of Muslim involvement in American legislative politics raises two important questions. The first is whether Muslims are permitted to live in a non-Muslim land. If it is not permissible for Muslims to live in a non-Muslim polity, it is, a fortiori, not permissible

for them to participate in its political system. The second question arises out of the assumption of a positive answer to the first. If it is permissible for Muslims to reside in a non-Muslim polity, what are the conditions and circumstances that warrant such a permission? What, if any, are the Muslims' obligations toward effecting self-determination once they have decided to live in a non-Muslim land? These two questions enjoy a rich and lively pedigree among premodern and even modern jurists.[14] Some of them have insisted that it is not permissible for Muslims to live in a non-Muslim land, that it is not permissible for Muslims even to travel to non-Muslim lands, and that it is incumbent upon those who convert to Islam in a non-Muslim land to migrate to the lands of Islam. Others have taken a more lenient approach, concluding that, depending on circumstances, it may not only be permissible to migrate to a non-Muslim land, it may even be forbidden to leave it! Between these two poles there is a lot of detail, much of which underscores the role played by history and experience—above and beyond formal interpretations of scripture—in informing the conclusions of the various schools and individuals. One thing, however, seems to emerge clearly from all of this: No school and no jurist has ever held that it is permissible for Muslims to reside in a non-Muslim land and remain completely passive, doing nothing to promote the safety and welfare of the Muslims and the dignity of Islam! This amounts, in effect, to what some jurists would deem to be a type of consensus (ijma') to the effect that if Muslims should decide to take up residence in a non-Muslim land they must, as a community (that is, as part of the responsibility of every individual—*'alā wajh al-kifāyah*), do everything that would appear necessary to ensure the safety and welfare of the Muslims and, above all, the dignity of Islam. This may or may not include participation in legislative politics. But once the permissibility of Muslims residing in a non-Muslim territory is conceded as a matter of Shari'ah (along with the obligation upon these Muslims to act in a manner appropriate to their circumstances) the question of the propriety of their involvement in legislative politics becomes a question of fact. Such involvement is subject to the discretionary judgments of Muslim groups and individuals. It cannot be treated as a question of law that is subject to a permanently binding assessment of the *wājib* (obligatory) or the *harām* (forbidden). This is a crucial point that is often confused. Since an adequate assessment of the positions taken in traditional Islamic law depends on a fair understanding of this distinction, I shall take a moment here to digress for clarification.

The Law/Fact Dichotomy in Islamic Jurisprudence

In a number of his jurisprudential works, the great Maliki jurist, Shihāb al-Din al-Qarāfī (d. 684/1285) takes up the issue of the distinction between jurisdiction of law and jurisdiction of fact. Basically, jurisdiction of law is the authority to interpret the meaning of scripture (Qur'an and Hadith). Jurisdiction of fact, on the other hand, is the authority to determine the existence of facts. Obviously, a medical doctor's authority to speak on the existence of certain diseases does not render him an authority when it comes to interpreting scripture. What is equally true, however—and this is al-Qarāfī's point—is that a jurist's mastery of scripture does not render him an authority when it comes to the determination of facts. According to al-Qarāfī:

> There is a difference between Malik's statement, "Engaging in homosexual relations necessitates stoning," and his statement, "So and so committed a homosexual act." We may follow him in the first statement but not in the second. Rather, this second statement falls into the category of testimony (*shahādah*). If three other upright witnesses testify along with Malik, the ruling is established; if not, it is not. In this regard, the testimony of any other upright witness would be absolutely equal to that of Malik. His status as a *mujtahid* would be of absolutely no consequences in this regard. Nor would the status of any of the other *mujtahids*.[15]

When it comes to questions of fact, e.g., "Did X occur?" or "Does X exist?" or "Is A likely to result from B?" the views of a jurist are not authoritative and should not be treated as such. Indeed, this law/fact dichotomy is of critical importance in maintaining the integrity of the Shari'ah, especially over space and time. Al-Qarāfī reports, however, that many errors had been committed by jurists as a result of their overlooking this distinction. As an example, he directs our attention to the position upheld in the Maliki school on the status of public lands and utilities in Egypt following the coming of the Muslims.

According to Malik, agricultural lands and public works of territories conquered by force are public trusts (*waqf*) for the general benefit of the community. As such, they are exempt from private ownership. It was also Malik's view that Egypt had been conquered by force. Based on these two views, Maliki jurists in al-Qarāfī's day upheld the ban on privately owning public lands and utilities in Egypt. Now, according to al-Qarāfī, it was proper (though not obligatory) to accept Malik's opinion regarding the legal

status of lands conquered by force, for this was a legal interpretation based on Malik's reading of scripture. But it was wholly improper for Maliki jurists to accept as authoritative Malik's factual assessment to the effect that Egypt (or any other territory) had been conquered by force, for this was a question of fact about which a follower of Malik (or any historian) might have greater knowledge than he. On this distinction, al-Qarāfī went against the position of his contemporary Maliki jurists and insisted that it was neither correct nor permissible to follow Malik on the question of assuming private ownership over agricultural lands in Egypt.[16]

Thus, if a jurist states that such and such is permissible or impermissible because of the existence of this or that fact, it remains the right—indeed, the responsibility—of individual Muslims to ascertain for themselves (or through other qualified determiners of specific facts), whether or not these facts actually exist. Then, on the basis of this conclusion they will determine whether or not the jurist's pronouncement of permissibility or impermissibility applies to the matter at hand. This may or may not lead to a consensus within a community. The fact remains that when it comes to observable facts, every individual Muslim is *prima facie* his or her own authority, or at least responsible for seeking out trusted determiners of specific facts.[17]

The Discussion Among the Schools of Law

We may now turn to the legal discussion among the Sunni schools of law[18] on the permissibility of Muslims residing in non-Muslim lands. Beginning with the Maliki school, we find that it is by far the strictest and least compromising on this question and, therefore, any concessions or insights gained from them may be justifiably assumed to apply to the others.

The Maliki tradition on Muslim residence in non-Muslim territory goes all the way back to Malik himself (d. 179/796). In the *Mudawwanah,* Sahnun (d. 240/854) asks the long-time disciple of Malik, Ibn al-Qasim (d. 190/805) if Malik disapproved of merchants traveling to non-Muslim territory for the purpose of conducting business. Ibn al-Qasim responds, "Yes, he strongly disapproved of this. And he used to say, 'They should not go to lands where they will become subject to the laws of polytheism (*ahkam al-shirk*).'"[19] Subsequent Maliki scholars confirm this position, and the basic prohibition on Muslims residing in non-Muslim territory is sustained in the Maliki school, with striking fidelity, right down to modern times.

The great Maliki authority from Cordoba, Ibn Rushd (d. 520/1122) for example, insisted that not only was it forbidden for Muslims to travel to non-Muslim territories, but that anyone who converted to Islam in a non-Muslim land had to emigrate to a Muslim polity. Such a danger did Ibn Rushd consider Muslim residence in non-Muslim lands that he proposed that check-points be built on land and sea to prevent Muslims from leaving the lands of Islam for non- Muslim territories.[20] These sentiments are repeated several centuries later in the fatwas of the great North African jurist, Ahmad b. Yahya al-Wansharisi (d. 914/1508). Writing after the fall of Granada in 898/1492, al-Wansharisi rejects, time and again, what would seem to be even the most plausible excuses and insists categorically that the Muslims must leave Spain for Muslim-controlled territory. At one point, for example, al-Wansharisi is asked about a Muslim who stayed behind in Spain and acted as an intermediary between the Christian authorities and the Muslim community, often gaining for the latter concessions that they would otherwise not have enjoyed. Al-Wansharisi rejects this as a justification for remaining in non-Muslim territory and insists that this man, and all other Muslim residents of Spain, must migrate to an Islamic polity, regardless of whatever material losses they might incur.[21] The great Nigerian Maliki jurist and reformer Shaykh 'Uthman b. Fudi (d. 1233/1817) eloquently laid out his position on the matter in a well-known book titled *Kitāb bayān wujūb al-hijrah 'alā al-'ibād wa bayān wujūb naṣb al-imān wa iqāmat al-jihād* (Clarifying the Obligation upon the Muslims to Migrate [from the Lands of Unbelief], Install an Imam, and Prosecute Jihad). The Shaykh cites several other Maliki authorities to authenticate his stance, insisting emphatically that it is absolutely forbidden for Muslims to reside in a non-Muslim territory. In fact, he states that this is a point of consensus (ijma') on which no two scholars disagree.[22] Indeed, all the way down through Shaykh Muhammad 'Ulaysh, who died in 1299/1882, this uncompromising Maliki position is repeated with astonishing fidelity.

Again, however, the basic reason underlying this position appears to have been the assumed fact that residing in non-Muslim territory would subject Muslims to the laws of the polytheist unbelievers (*aḥkām al-shirk, aḥkām al-mushrikīn*). It is important, however, in analyzing this position to understand exactly what this designation implied for these jurists. Falling under "the laws of the polytheist unbelievers" was not simply a matter of Muslims being subject to activities forbidden by Islam, e.g., certain criminal laws or certain commercial transactions, while at the same time enjoying the right

to maintain their faith and basic religious institutions and pass these on to posterity. Rather, "the laws of the polytheist unbelievers" was a much broader construct that assumed, first and foremost, the precariousness if not the impossibility of remaining Muslims.

This is clearly born out by the position of none other than the above-cited Ibn Rushd, who argues, for example, that it is permissible for Muslims to deal in *riba* with non-Muslims in a non-Muslim territory.[23] Such an activity, in other words, though normally forbidden, would not constitute a violation of Islamic law for Muslims in a non-Muslim land. In other words, the object of Ibn Rushd's fear and his understanding of falling under the laws of the unbelievers was not simply the threat of falling under un-Islamic rules; according to him, residence in non-Muslim territory conferred certain dispensations (*rukhaṣ*/sing. *rukhṣah*) upon Muslims that rendered any number of normally forbidden practices permissible. Rather, the object of his fear was not un-Islamic rules but the threat of being coerced into abandoning Islam altogether.

In a similar fashion one detects in the staunch position of 'Uthman b. Fudi a clear sense that syncretism, or the unjustified reworking of Islam to accommodate pagan beliefs and religious customs, is feared to be the inevitable result of African Muslims residing in non-Muslim African lands. This was apparently based on what he understood to be the cultural-political reality in the western Sudan of his time. At that time African Muslims who lived under non-Muslim African rulers were often and significantly influenced by the latters' religious ways and customs, which in African society permeated virtually every facet of life.[24] For this reason, even if the population of a country was overwhelmingly Muslim while its rulers were not Muslims, the Shaykh did not consider it a Muslim land.[25] Nor did he consider a land where the rulers were Muslims but the majority of the population was not a Muslim land.[26] In this latter case, it was feared that, since the majority of the people were not Muslims, the Muslims would be overwhelmed by popular pagan culture. Thus, for Shaykh 'Uthman b. Fudi, only lands where both the overwhelming majority and the rulers were Muslims qualified as Muslim lands. It was only in these lands, therefore, that Muslims could reside; only in these lands would Islam and Muslim identity be safe from corruption.

Turning to al-Wansharisi, we find again clear signs that his thinking was informed not simply by fear of the imposition of un-Islamic laws but by fear of the humiliation and possible forced apostasy that the Muslims might

suffer at the hands of Christians. In one of his fatwas, for example, in which he insisted that all Muslims must leave Spain following the Christian takeover, al-Wansharisi lays down the following list of reasons:

1. the "word of Islam and the testimony to truth" (*kalimat al-Islām wa shahādat al-ḥaqq*) would not be honored and respected but humiliated and debased;
2. the prayer (*salah*) would not be openly displayed but would be subject to humiliation, being scoffed at and made fun of, which could lead to its abandonment;
3. the zakah would be nullified, since there would be no imam to collect it;
4. the fast of Ramadan would be subject to nullification, since there would be no imam to oversee and validate its beginning and end;
5. the hajj would be rendered defunct, since it would fall outside the capability of the Muslims (*li 'adam istiṭā'atihim*);
6. the Muslims would suffer contempt and humiliation, while the Prophet has said, "The Muslim should not subject himself to humiliation";
7. the Muslims would suffer ridicule of a type and magnitude that no self-respecting person would needlessly tolerate;
8. the honor and integrity of the Muslims, and maybe their persons and property, would be jeopardized;
9. the Muslims would be constantly exposed to all manner of vice, impurities (*najāsāt*) and religiously questionable foods.[27]

Clearly, for scholars like Ibn Rushd, Shaykh 'Uthman, and al-Wansharisi, a world in which Muslims could live under non-Muslim rule and not be subject to official pressure to renounce their faith, or where the cultural affinities between the Muslims and non-Muslims did not threaten to blur the boundary between Islam and non-Islam, or where Muslims would be afforded the means to safeguard and promote the dignity of Islam was unimaginable. Their thinking, however, was consistent with the reality of their time and place.[28] Thus, rather than being criticized or scoffed at for being rigid, reactionary, or conservative, these scholars should be perhaps commended for being the realists that they were. At the same time, however, rather than uncritically accepting and applying their views to present circumstances, these views should be examined in light of the above-cited distinction between law and fact.

The views of these scholars was clearly informed, if not dictated, by what they understood to be the customs and habits obtaining in non-Muslim lands in their time. This, however, is clearly a question of fact, and the only real question confronting contemporary Muslims is whether they should

bind themselves to the factual assessments of these men, even if they themselves believe the facts to be different. The answer to this question is provided, once again, by the aforementioned, al-Qarafi, who was once asked:

> What is the correct view concerning those rulings found in the *madhhab* of al-Shafi'i, Malik, and the rest, which have been deduced on the basis of habits and customs prevailing at the time these scholars reached these conclusions? When these customs change and the practice comes to indicate the opposite of what it used to be, are the fatwas recorded in the manuals of the jurisconsults rendered thereby defunct, it becoming incumbent to issue (new) fatwas based on the new custom? Or is it to be said, "We are *muqallids* (lay followers). Thus, it is not our place to issue new rulings, as we lack the qualifications to perform ijtihad (independent interpretation). We issue, therefore, fatwas according to what we find in the books handed down on the authority of the *mujtahids*."?[29]

Al-Qarafi's response to this query was both clear and unequivocal.

> Holding to rulings that have been deduced on the basis of custom, even after this custom has changed, is a violation of consensus (ijma') and an open display of ignorance of the religion.[30]

To acknowledge, then, that America, or any other country for that matter, is a place where Muslims enjoy constitutionally guaranteed rights to freedom of religion, protection of life and property, the opportunity of promoting the interests of Islam and Muslims, and contributing to the overall shape of the society does not at all involve a challenge to the integrity of these Maliki jurists as jurists. At the same time, once the right—indeed, the duty—of contemporary Muslims to assess their own reality is acknowledged, the blanket application of these premodern Maliki views to the question of Muslims residing in modern America can be seen to be a misappropriation of an otherwise valid tradition.

Turning to the views of the remaining schools, we find a different perspective, which upon close examination appears to reflect the palpable differences in experience between jurists who lived in predominantly Maliki areas and those who lived in other parts of the Muslim world. While Maliki-dominated territories had suffered great losses at the hands of invading Christians (two great Muslim communities, the Spanish and the Sicilian, being irretrievably lost to Christian conquerers), in the East where the Shafi'i and especially the Hanafi schools dominated, the situation was quite different. True, the eastern lands of Islam also suffered losses at the

hands of both the Mongols and the Crusaders, but in both cases these lands were subsequently returned to Islam: in the case of the Mongols, through voluntary conversion; and in the case of the Crusaders, through military reconquest. The return of these lands to Muslim sovereignty did not occur overnight, however, and during the interim between the time they were lost to these non-Muslim conquerors and the time they were returned to Muslim control, Muslims lived, as a simple matter of fact, under non-Muslim rule, including, in fact, a three-year period (656–659/1258–1261) during which there was no caliph! This did not lead, however, to any sustained syncretism, permanent damage to Muslim religious institutions, or to any mass exit from Islam. This almost certainly informed the perspective of the Shafi'i, Hanafi, and even Hanbali jurists, just as the historical reality in the West apparently informed the conclusions of the Malikis.

Generally speaking, for the Shafi'is, Hanafis and Hanbalis, the operative issue is whether Muslims living in a non-Muslim polity are safe and enjoy enough freedom to practice the rudiments of their religion. Such Muslims should seek to conduct their affairs in such a way that they do not contribute to the military strength of their host-country, such that other Muslims would suffer at the latters' hands. But, unlike the Malikis, these three schools do not begin with the premise that it is not permissible under any circumstances for Muslims to reside in non-Muslim territory and that it is incumbent upon those who convert to Islam while in a non-Muslim country to migrate to a Muslim land. Hanafi jurists, for example, appear to be generally unopposed to Muslims residing in non-Muslim lands, assuming that Muslims are able to establish congregational prayers, especially *jumu'ah* and *'Id,* fast in Ramadan, and that they can work to procure the appointment of Muslim governors or arbiters to oversee their affairs.[31] By and large the Hanbalis hold a position similar to that of the Hanafis.[32] Some Shafi'is, meanwhile, take matters a step further. At one point, for example, the great Shams al-Din al-Ramli (d. 1004/1596), also known as "Little al-Shafi'i," is asked about a community of Muslims residing under a Christian king who exacted taxes from them but allowed them to practice their religion, i.e., to build mosques, hold Friday prayer, fast in Ramadan, and generally apply the laws of Islam. Al-Ramli's questioner indicates that, although this was the situation at the time, there were no guarantees that this would last and that the Muslims would not subsequently come under the jurisdiction of Christian laws or pressure to convert. Al-Ramli's response is that not only is it not incumbent upon these Muslims to emi-

grate but, in fact, it is forbidden for them to do so because by their leaving this territory it would be less likely to be guided to Islam.[33]

In sum, the majority (i.e., three of the four schools) hold it to be permissible for Muslims to live in non-Muslim territories. This license was conditioned, however, albeit implicitly, by the assumption that these Muslims would be in a position to promote and protect their basic interests and that they would in fact do just that. Even among the Maliki's there are signs that where this was understood to be the case, the general prohibition might be relaxed.[34] The real issue, then, is and always has been the concrete situation of the Muslims on the ground, a situation for which the Muslims—not the non-Muslims—must assume responsibility. On this understanding, there would seem to be only two tenable positions on the matter of Muslims residing in America:

1. Muslims are obligated to leave America because they cannot protect their basic interests; or
2. because they can protect their basic interests, they may stay provided that they actively pursue the welfare of Muslims and the dignity of Islam.

To remain in a non-Muslim land, however, without actively pursuing legitimate Muslim interests—even if such inaction should hide behind rhetoric or dogmatic and uncritical appropriations of tradition—is not a justifiable choice.

Muslims and the U.S. Constitution

The issue of the active pursuit of Muslim interests brings us finally to the question of Muslims and the U.S. Constitution, since, obviously, the Constitution provides the legal framework within which any such activity will have to be conducted. This is a huge topic to which no single article can hope to do full justice; however, I would like to direct a few remarks toward two aspects of the relationship between Muslims and the Constitution. The first of these is the Muslim attitude toward accepting the provisions and advantages afforded by the Constitution. The second concerns the challenge that operating within this constitutional framework poses for Muslims.

The First Amendment of the U.S. Constitution guarantees freedom of religion. Some Muslims, however, are hesitant, if not hostile, toward accepting or acknowledging the validity of this provision. This is because such acceptance and acknowledgment raises in the minds of many Muslims

the question of sovereignty and authority, what scholars like Abu al-A'la al-Mawdudi and Sayyid Qutb referred to as the *hākimīyah*. If, according to this view, part of the meaning of the *shahadah* is that God and God alone has the authority to confer rights and impose obligations, then certainly a man-made constitution that does not derive its authority from God must be illegitimate as a violation of God's rightful monopoly on authority. By the same token, any Muslim who recognizes the validity of such a constitution is guilty of attributing legal authority and sovereignty to someone other than God, a clear violation of Islamic monotheism (*tawhid*) and an open act of *shirk* (polytheism). To be sure, there is a certain forcefulness to this logic that renders it difficult at times to resist, at least at face-value. Closer examination, however, suggests that while this argument might apply to Muslims who arrogate to themselves the right to rule independent of God, this is by no means the only or even most plausible construction to be put on the relationship between Muslims and the U.S. Constitution.

To begin with, the U.S. Constitution was the result of an agreement among a group of non-Muslims about how to distribute political rights and power within a non-Muslim polity. Not being Muslims, it was only natural that this agreement was not based on Islamic law. To recognize this fact, however, and concomitantly the validity of such an agreement, in no way entails any recognition of the right to ignore or flaunt God's law; rather, this is more akin to the *fuqaha*'s recognition of the validity of a formerly Christian or Jewish couple's Christian or Jewish marriage, even after the couple has embraced Islam.[35] Obviously, this marriage did not take place in accordance with Islamic law; in fact, it may have explicitly violated specific rules of Shari'ah, e.g., by not having witnesses present or including a bride-price consisting of some Islamically banned commodity, such as wine or pork. Still, the marriage of this couple is almost universally recognized by Muslim jurists as a valid marriage, whether the couple remains Jewish or Christian or converts to Islam. No jurist, meanwhile, has ever hinted at this being based on any recognition of anybody's right to violate or flaunt God's law.

In addition, consider the issue of buying from and selling to non-Muslims. Obviously, this entails a recognition of the property rights of these non-Muslims, since both of these transactions assume legal transfer of property. This obtains despite the fact that this right could not have accrued to these non-Muslims on the basis of their recognition of any divine authority. And if they do not recognize God's authority, how is it that

such property rights should accrue to them? Yet, when, shortly following the fall of Makkah, the Prophet asked Safwan b. Umayyah if he could borrow some tools and weapons and Safwan asked the Prophet whether he was borrowing these things or simply taking them, the Prophet responded that he was borrowing them. In other words, the Prophet acknowledged Safwan's rights over his belongings.[36] Some Muslims would argue of course that what is really going on here is that this right is effectively being established by God's commanding the Prophet not to confiscate the Makkans' property. But even if this were the case (which I do not concede) this could hardly be expanded into a general rule that would negate the Qur'an's recognition of all kinds of non-Muslim rights and obligations before the coming of the prophets, both in Arabia and in other communities.[37] In many instances the Qur'an's reference to *al-ma'rūf* clearly points to what is commonly recognized as good and decent even among non-Muslim peoples and even before the coming of revelation. In short, in many instances the Qur'an does not establish but actually confirms preexisting rights among non-Muslim peoples. And this is done without the slightest suggestion that the prior existence of these rights constituted an affront to God's monopoly as Right-Giver.

The Qur'an and Sunnah are also full of exhortations to Muslims to honor treaties and agreements brokered by non-Muslims. Again, however, this implies a tacit acknowledgment of the legitimacy of non-Muslims as bargaining parties. In other words, were it not legitimate for non- Muslims to broker such agreements (agreements that are neither derived from divine authority nor likely to be based on the law of Islam), it would not be legitimate, *a fortiori,* for Muslims to honor these very agreements. Yet, we find that even agreements to which the non-Muslims attached stipulations that appeared to curtail or infringe upon certain rights of the Muslims (i.e., in the Treaty of Hudaybiyyah, where the Quraysh stipulated that Muslims who leave Makkah to join the Prophet at Madinah must be sent back to Makkah) were honored and recognized by the Prophet as legally binding. Clearly, however, none of this in any way implied any acceptance—as a matter of conscience—of the right of non-Muslims to challenge or violate God's rightful monopoly as Law-Giver.

All of this is reminiscent of a very rich discussion in classical jurisprudence over the question of whether non-Muslims are responsible for the concrete rules (*furū'*)—as opposed to the basic principles (*usūl*), such as *tawḥīd,* the prophethood of Muhammad, or belief in the Hereafter—of

Islam.[38] The well-known position of the Hanafi school was that they were not.[39] This was also the view of the Shafi'ī, Fakhr al-Din al-Razi (d. 606/1209)[40] and, with some important qualifications, the Mālikī, Shihab al-Din al-Qarafi (d. 684/1285).[41] On this view, contracts and property rights that non-Muslims enjoyed over each other (or with Muslims in a non-Muslim territory) were accorded full legal validity, even if they had not been carried out in accordance with the stipulations of Islamic law. Yet, again, none of this implied the belief on the part of these jurists that these instruments were religiously valid, and that by recognizing their legal validity, they were somehow attributing to someone other than God the right to confer legal rights in any ultimate sense.

It would seem, then, to be problematic, at the very least, to insist that Muslim recognition of the validity of the U.S. Constitution implies a violation on their part of God's rightful monopoly as Law Giver. How can recognition of a decision among non-Muslims to confer certain advantages upon Muslims (and non-Muslims) be said to amount to an act of *shirk*? Would all U.S. foreign aid to Muslim countries be banned under a similar logic (since such transfers must assume prior property rights)? And would the acceptance by Muslims of all grants of citizenship be equally proscribed? The U.S. Constitution defines the parameters of a non-Muslim state, not a Muslim one. How can Muslims be shouldered with the responsibility for these parameters? If in the future America becomes a predominantly Muslim country (politically or numerically) it might be reasonable to hold Muslims responsible for ensuring that its legal and political order are consistent with the dictates of Islam. In the meantime, such a demand would appear to be naive, escapist, and poorly substantiated. To my mind, the kind of confusion that has been generated over this issue is another example of what happens when Muslims in the West blindly and uncritically import views and ideologies from the modern Muslim world.

A more profitable approach for Muslims in America would be to look at the opportunities the Constitution affords them to promote their interests as Muslims and to take full advantage of them. According to the Constitution, the U.S. government cannot force a Muslim to renounce his or her faith; it cannot deny him or her the right to pray, or fast, or perform the pilgrimage; it cannot force him or her to eat pork, shave his beard or remove her *ḥijāb*; it cannot deny Muslims the right to build mosques or to hold public office; it cannot deny them the right to criticize government officials and policies, including the person and the policies of the president. The U.S. government

cannot even force a Muslim (*qua* Muslim) to pledge allegiance to the United States! Surely it must be worth the Muslims' time and energy to ask if these (and many other) rights and opportunities should be squandered in the name of dogmatic minutae and uncritical readings of Islamic law and history, rather than turned to the benefit and practical welfare of Islam and Muslims in America.

Muslims, Islamic Law and the Separation of Church and State

The U.S. Constitution does pose, however, at least one challenge to Muslims, namely, in its insistence on the separation of religion and state. Many, if not most, Muslims understand this to mean that Islamic law (or Jewish or Christian law for that matter) is, as a permanent constitutional provision, disqualified from becoming the basis of law and or public policy. This, in their view, renders the Constitution unacceptable from their perspective as Muslims.

But this is not really what the so-called separation of church and state means. The doctrine of separation of church and state in American constitutional discourse does not mean that religion can play no role in public policy, or even that religious rules cannot be applied as law. What it means is that religious rules cannot be applied simply because someone's religion says they should. Law, in other words, is conceived of as being both secular (i.e., this-worldly) and a public trust. As such, only those laws that prove serviceable to the public here and now can qualify as law. In other words, the doctrine of separation of church and state might be likened in many ways, to use the language of Muslim jurists, to a ban on treating *'ibadāt* (matters of religious observances) as if they were *mu'amalāt* (matters of public interest and civil transactions). The real challenge for Muslims lies, in short, not in the constitutional ban on admitting religious rules and values into the public domain (since, again, there really is no such ban) but rather in how effectively Muslims can articulate the practical benefit and utility of Islamic law to American society. This enterprise is often stifled by the largely reactionary tendency on the part of Muslims to transcendentalize the whole of the Islamic legal tradition. They treat those aspects of Islamic law that are subject to social and or historical considerations as if history and social reality were completely irrelevant to their interpretation and or application.

In Islamic law, there is a basic distinction between *mu'amalāt* and *'ibadāt*. *'Ibadāt* are generally identified as those rules through whose application the primary benefit (*maṣlaḥah*) accrues to humans in the Hereafter, not in this world. These would include such things as prayer, fasting, pilgrimage, and the like. Because the primary benefit sought from these institutions is the glorification of God and the open acknowledgment of human debt to God, these actions are on the whole not subject to social and historical forces, nor can they be made the basis for any analogy. One cannot say, for example, that there are social or historical circumstances under which the whole purpose of prayer or fasting would be rendered redundant. Nor can one say that where God commands the performance of two units (*rak'ah*) of prayer, the performance of four or seven units would be better, in the same way that it would be better to feed eleven or twenty people in circumstances where God only requires the feeding of ten. *Mu'amalāt,* on the other hand, consist of those rules through whose application humans enjoy some benefit in the here-and-now, in addition to whatever reward they might receive in the Hereafter for complying with God's command. These would include such rules as those governing sales, contracts, theft, drinking, marriage, and divorce. Precisely because the worldly benefits contained in these rules are apprehensible by human reason, the Law can be extended to cover cases not explicitly addressed by scripture. This is done through the use of analogy (*qiyas*), a basic application of which would run something like the following: drinking wine is forbidden; the reason (*'illah*) for this is that drinking wine corrupts one's faculties for reasoning; by extending the prohibition on drinking wine to any substance that contains the *'illah* of corrupting one's mind, a substance like crack-cocaine can be adjudged forbidden, even though it was not around at the time of revelation. Obviously, the key to all of this is the ability to analyze the rules of the Shari'ah to the end of penetrating the reason or *'illah* underlying them. Without this *'illah,* therefore, there can be no analogy, and numerous social and other problems will inevitably go unaddressed.

Now, all of the four Sunni schools of Islamic law recognize analogy as a valid mechanism for deducing the law. In addition, they all recognize that virtually all of the rules of *mu'amalāt* contain *'illah*s that can be known. Moreover, there is a general recognition of the idea that all of the *mu'amalāt* are legislated for the purpose of promoting the worldly welfare and happiness (*maṣlaḥah*) of humanity. Because of this, Muslim jurists are able to debate the application, modification, and even suspension of rules

of *mu'āmalāt,* depending on whether or not the *'illah,* for which they were legislated is likely to be served. On this basis, for example, Ibn Taymiyyah once stopped one of his disciples from interrupting a group of Mongol Muslims who were drinking wine. Ibn Taymiyyah's explanation was that the ban on wine was issued because intoxication turns people away from prayer and the remembrance of God. But when these Mongols drink, it turns them away from looting, rape and murder.[42]

Precisely through this ability to penetrate and articulate the rules of Islamic law in ways that clearly define their benefit and utility to society, Muslims are likely to be able to influence the legal order in America. Once this is done, there are no constitutional impediments to having these laws applied in the public domain. Muslims must be vocal and confident in articulating the social benefits underlying the rules on things like *riba,* adultery, theft, drinking, contracts, premarital sex, child-custody, and even polygyny. This should all be done, however, in the context of an open acceptance of American custom (*urf*) as a legally valid source in areas where the Shari'ah admits the reliance upon custom. In short, Muslims must take non-Muslim Americans just as seriously as they expect non-Muslim Americans to take them. And they should be willing to recognize areas of common interest and concern wherever these are found to exist.

Thus, it would be foolish to deny that the prospects for American acceptance of such institutions as stoning, flogging, or amputation are virtually nill, at least for the foreseeable future. Here, however, two things should be borne in mind. First, the specific punishments for criminal offenses in Islamic law are precisely the *'ibādah* aspects of these rules. In other words, while many other forms of punishment (e.g., jailing, fines, public embarrassment) could have served the purpose of deterring people from these acts, God chose these specific punishments. Since, however, there is no necessary or exclusive relationship between these punishments and deterrence (the real reason behind these sanctions), these punishments are assigned a status akin to that of ritual acts of worship. This "ritualistic" aspect is captured in the jurists' common reference to these punishments as "rights of God" (*ḥuqūq Allah*).[43] Meanwhile, the primary *maṣlaḥah* behind these rules remains avoidance of the harm contained in the forbidden acts. Where there is a conflict between these two aspects of these rules, jurists have differed over whether or not the rights of man (e.g., protection of property) should take precedence over the rights of God (e.g., amputation of the hand). Many, if not most, jurists have given precedence to the rights

of man. Al-Wansharisi, for example, stated openly that if a Muslim has a choice between living in a land where there is justice but the rights of God are violated, or living in a land where there is injustice while the rights of God are observed, the Muslim should choose the land where there is justice.[44] In other words, if it is not possible to ensure the rights of God, this should not lead Muslims to give up on trying to ensure the Islamically sanctioned rights of man.

The second thing to keep in mind is that notions of what is cruel and unusual, of what is barbaric, of what is draconian (which is the real basis upon which America rejects such things as Islamic *hadd*-punishments) are a function of culture, not law. It is only through changes in American culture that American attitudes toward such things are likely to change. Thus, in the end, as in the beginning, we are brought back to the inextricable connection between American culture and Muslim self-determination. The real challenge is not whether Muslims can sustain a position of blind, dogged steadfastness, but whether they can think and act in a manner that promotes the welfare of society, and reduces and ultimately eradicates the threat of Muslim double-consciousness. This will require greater investment in the spirit and logic of the Muslim jurisprudential tradition, a more open, fair-minded, and realistic assessment of American reality and history, and a more critical assessment of the usefulness of the customs, biases, ideologies, and tradition from the modern and premodern Muslim world.

Conclusion

Islam is a way of life. But that way of life is not synonymous with Islamic law. Islamic law may provide the limits or general framework within which Muslims pursue their needs and aspirations, express their cultural genius, and determine the relationship to be established with the cultural and historical legacies of their Muslim and non-Muslim past(s). But it is not the function of Islamic law to determine the substance of these things. Whether Muslims wear black or brown shoes, marry in mosques, hotels or community centers, or understand and appreciate the significance of the civil rights movement is not dictated (certainly not in any direct way) by Islamic law. The propriety and benefit of these things cannot be judged by simply looking at entries (or lacunae) in fiqh manuals. Rather, Muslims must look at and understand the world around them in light of scripture and, where appropriate, the logic underlying fiqh and jurisprudential discourse. Moreover, even the strictest adherence to fiqh will not produce the kind of

cultural vitality and change that is needed in America. Indeed, a major part of the challenge confronting Muslims in the U.S. has to do with the space that falls between what is obligatory (*wājib*) and what is forbidden (*harām*). This is the area where—if it is done at all—Muslims will be able to construct and fortify a genuine (and genuinely felt) American-Muslim identity and contribute to the eradication of double-consciousness. This is above and beyond the issue of Muslim involvement in legislative politics and all the accoutrements thereof (i.e., lobbying, demonstrating, and campaigning).

In the end, however, the real question is whether, given their disparate pasts, Muslims in America will find a way to identify as a single group (without one group dominating the other), or consciously decide to identify as an oligarchy of separate but related groups (e.g., white American, African-American, Arab, Pakistani) with common values but separate, even if related interests, or simply remain an assembly of "crowds" chaotically pushing toward an ever-elusive, undefined end. In the absence of open, informed and honest exchange, the latter of these possibilities is bound to prevail, the threat of double-consciousness will inevitably be confirmed as reality, and the logic of those who affirm the religious obligation (*wujūb*) of mass-migration (*hijrah*) from America will become virtually impossible to resist.

Notes:

1. Perhaps it would be more accurate to say that this search has been in progress (or at least heightened) since the demise of the Nation of Islam in the late seventies. This can be stated because their theological blunders notwithstanding, the Nation of Islam under Elijah Muhammad achieved astounding success at appropriating both African-American and white American culture to the end of fashioning a deeply effective and authentically American "African-American Muslim" culture and identity.
2. See S.P. Huntington, "The Erosion of American Identity," *Foreign Affairs* 76, no. 5 (Sept.-Oct. 1997): 33.
3. See W.E.B. Dubois, *The Souls of Black Folks*, 8th ed. (Greenwich, CT: Fawcett Publications, 1969), 17.
4. Ibid.
5. Ibid.
6. In George Orwell's classic novel, *1984*, there is a scene where the State wants to be assured that the protagonist, Winston, sees reality in whatever way it interprets it. To this end, Winston is placed in a "pain-chair," and an official holds up four fingers. Then, Winston is asked, "How many fingers am I holding up, Winston?" When he responds, "four," the official insists that there are five. He then tweaks up the dial on the pain-chair and asks the question again. This continues until Winston finally exclaims that he is trying to abandon his senses and see five fingers.
7. Back in 1996, Ron Borges, a white writer for the Boston Globe, wrote, "My father, who is eighty years old now, isn't the most liberal person in the world. He was a construction worker for most of his life and never liked people who talked a lot. But when Ali was willing to go to jail for his beliefs, that got my father's attention. He told me, 'You know, I

don't agree with what this guy is doing, but he's alright. You get very few chances to be a man in life, and this guy takes advantage of them.' And I'll tell you something else. My father voted for [the then racist, segregationist] George Wallace in 1968 and for [the social liberal] George McGovern in 1972. That's quite a change, and I have to believe that watching Ali was part of what influenced him." See T. Hauser, *Muhammad Ali in Perspective* (San Francisco: Collins Publishers, 1996), 104.

8. King himself openly acknowledged this. For example, following the failed nonviolent demonstrations in Albany, Georgia in 1962, he stated that the success of nonviolent resistance actually depended on a combination of attacks by whites, full coverage by the media, consequent national outrage, and then government intervention. See J.B White, *Black Leadership in America: 1895-1968* (London and New York: Longman Press, 1985), 134–35.

9. I think it is important to understand that, outside the area of religious observances, the Shari'ah is basically a code of limits beyond which the Muslim should not venture in pursuing his or her worldly ambitions. It is not a "blue-print" that outlines everything the Muslim should (or should not) do. Within those limits, in other words, Muslims should not necessarily be looking to the Shari'ah to tell them what to do. For example, the Shari'ah is not going to inform a man who the woman of his dreams would be or what activities are likely to bring him pleasure in his spare time. This is up to him to figure out. What the Shari'ah will do is let him know if his desires and activities fall within the scope of what God permits. In short, in the same way that it is necessary to understand the limits of legislative politics, Muslims need to understand the limitations of the Shari'ah, as well as those who represent it. While adherence to the Shari'ah may not be inconsistent with the pursuit of happiness, it will not relieve individual Muslims of the responsibility of figuring out where their happiness as individuals lies. If there is going to be an "Islamic culture" in America, it can only be the product of the Muslim cultural imagination that is sanctioned by the Shari'ah. It will not be (nor has it ever been) the result of simple adherence to the Shari'ah, in the sense of Muslims keeping their religious duties.

10. This is a larger point than space permits me to explicate here. Suffice it for now to point to the universally agreed upon rule to the effect that "necessity renders the impermissible, permissible" (*al-ḍarūrāt tubīḥ al-maḥẓūrāt*). Or, outside the area of what may be perceived as necessities, one need only consider how many Muslim merchants and retailers fail to assess annually and pay zakat on their inventory, or how many binding oaths (*aymān*/sg. *yamīn*) are broken daily and not expiated for, or how many divorces fail to conform to the procedures outlined by the Shari'ah, or whether Shari'ah rules governing child custody are actually adhered to.

11. The question of music is, of course, a controversial one, the majority of premodern (and probably modern) jurists holding it to be forbidden. My inclusion of music here is not a veiled attempt to slip it in under the rug. But if the content of American culture is as important for Muslims as I have presented it here, then music can no more be omitted from the purview of matters that require study, than, say, mortgages or inheritance, or, for that matter, participation in politics! As a start, one might consider the fact that Sh. Ahmad al-Sāwī, for example, in his supercommentary on Sh. al-Dardir's standard Mālikī manual, *al-Sharḥ al-ṣaghīr*, notes that singing among men that does not involve instruments or foul themes is perfectly permissible and entails no reprehensibleness (*karāhīyah*). On this interpretation, it would seem that male acappella would be a perfectly acceptable artistic expression that could be developed among Muslims. See *Bulghat al-sālik li aqrab al-masālik ilā madhhab al-imām Mālik*, 2 vols. (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1372/1952), 1:435. As far as the ban on instruments goes, Sh. al-Dardir made exceptions for the drum (*daff*), the woodwind oboe (*zummārah*) and the horn (*būq*) but categorically proscribed stringed instruments.

12. This suggests, again, that the problem is not fashion or literature per se, but involvement with fashion or literature in the West!

13. Blacks suffered also from a phenomenon I call "qārūnism" (*qārūnīyah*), after the Qur'anic figure, Qārūn, who, upon arriving at a position of wealth and power, disassociated himself from the legitimate aspirations of his people. Muslims will have to devise ways of

resisting this temptation, especially since ethnic differences among them tend to blur (or perhaps answer) the question of who one's people are.

14. In this regard, professor Khaled Abou El-Fadl has written an excellent and absolutely indispensable study, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries," *Islamic Law and Society* 1:2 (1994):141–187. This article should serve as the starting point for anyone interested in the topic.

15. Shihāb al-Dīn Abū al-'Abbas Ahmad b. al-'Ala' al-Qarafi, *Kitāb al-iḥkām fi tamyīz al-fatāwā 'an al-aḥkām wa tasarrufāt al-qāḍī wa al-imām*, ed. 'Abd al-Fattah Abū Ghuddah (Aleppo: Maktabat al-Matbu'at al-Islamiyah, 1967), 201.

16. Ibid., 207–08.

17. The Prophet alluded to this reality in a famous hadith: "You people present your disputes before me, and I judge according to what I hear. And some of you may be more eloquent at presenting matters than others. So if I should award to one of you a right that properly belongs to his brother, let him not take it. For in such a case I shall have but cut out for him a piece of the Hellfire!"

18. I have not included the Shi'a contributions because doing justice to that tradition would require a framework much broader than space permits here.

19. Saḥnūn, *Al-Mudawwanat al-kubra*, 4 vols. (Beirut: Dar al-Fikr, 1986), 3:278.

20. *Muqadimmāt Ibn Rushd* (on the margin of *al-Mudawwanah*), 3:345–47.

21. See, e.g., Ahmad b. Yahya al-Wansharisi, *Al-Mi'yār al-mu'rib wa al-jāmi' al-mughrib 'an fatāwā 'ulamā' ifrīqiyah wa al-andalus wa al-maghrib*, 13 vols. (Beirut: Dar al-Gharb al-Islami, 1981), 2:137–41.

22. Uthaman b. Fudi, *Kitāb bayān wujūb al-hijrah 'alā al-'ibād wa bayān wujūb naṣb al-imām wa iqāmat al-jihād*, ed. Fathi Hasan al-Misri (Khartoum: University of Khartoum Press, 1977), 12–17, 100, 112–13.

23. *Muqadimmāt Ibn Rushd*, 4 vols. (on the margin of al-Mudawwanat al-kubrā) (Beirut: Dār al-Fikr, 1986), 3:28–39. Among other things, Ibn Rushd bases his opinion on his interpretation of the Prophet's having allowed his uncle al-'Abbas to deal in *riba* in Makkah prior to Makkah's conversion to Islam. This, Ibn Rushd acknowledges, is based on the view that al-'Abbas was a Muslim who concealed his Islam throughout the time he remained in Makkah, following the Prophet's migration to Madinah. The date of al-'Abbas's Islam is disputed, of course, some holding that he did not become a Muslim until around the conquest of Makkah, i.e., 8 A.H., which would mean that he was never allowed to deal in *riba* as a Muslim, since it was precisely upon the conquest of Makkah that the Prophet overturned all *riba*-based transactions. Here, however, Ibn Rushd points to the hadith of the companion, al-Ḥajjāj b. 'Ilāṭ, which indicates, according to him, that al-'Abbas was a Muslim at the time of the conquest of Khaybar, which was before the conquest of Makkah.

24. Uthman b. Fudi, *Bayān wujūb*, 14–15.

25. Ibid. On the fact of African vernacular culture being thoroughly and inextricably informed by African religious beliefs, see J.S. Mbiti, *African Religions and Philosophy*, 2nd. ed. (Oxford: Heinemann Educational Publishers, 1989), 1–5 and passim.

26. Uthman b. Fudi, *Bayān wujūb*, 13–14. This was clearly related to the fact that the Shaykh was operating in areas that shared a common cultural background, such that the threat of "lapsing" back into pagan ways or conflating the meaning of Islamic with pagan ideas and institutions was a constant threat. This, I submit, is actually similar to the situation of the Prophet in Arabia, which suggests that the exaggerated obsession with *bid'ah* is a later development, i.e., arising after Islam had spread outside of Arabia. Prior to that, the primary concern would almost certainly have to have been with the threat of sliding into already familiar Arab paganism, as opposed to the introduction of new ideas and customs.

27. See al-Wansharisi, *Mi'yār*, 2:138-40.

28. While one could be a Jew in Morocco or a Christian in Cairo, one could not, in the time of these men, be a Muslim in Paris, Manchester, or the Chesapeake Bay.

29. al-Qarafi, *Tamyīz*, 231. See also, for a more detailed explanation of this principle, my *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: E.J. Brill, 1996), 130.
30. Ibid.
31. Abou El-Fadl, *Islamic Law and Muslim Minorities*, 172.
32. Ibid., 157.
33. Ibid., 160.
34. See, e.g., al-Wansharīsī, *Mi'yār*, 2:133–34.
35. See, e.g., Aḥmad al-Dardīr, *al-Sharḥ al-ṣaghīr* (on the margin of al-Ṣāwī's *Bulghat al-sālik*), 2:406–07.
36. See the record of this incident in Malik b. Anas, *Muwaṭṭa'*, ed. Muhammad F. 'Abd al-Bāqī, 2 vols. (Cairo: Dar Iḥyā' al-Kutub al-'Arabīyah, 1336/1918), 2:543–44.
37. I have in mind here such Qur'anic portrayals as that of the Prophet Shu'ayb's criticisms of his peoples' injustices. The Qur'an clearly assumes the rights being denied some Madyanites to be what might amount in modern parlance to "natural rights" whose legitimacy should have been recognized even before the coming of Shu'ayb. See, e.g., Qur'an 11:84–86.
38. In other words, if a non-Muslim refuses to pray or fast, could he or she be punished as could a Muslim?
39. See, e.g., 'Abd al-Raḥmān b. Muhammad Shaykhzadah, *Majma' al-anḥur sharḥ multāqā al-abḥur*, 2 vols. (Istanbul: 'Uthmaniyah Press, 1327/1908), 1:660.
40. See *al-Maḥsūl fī 'ilm usūl al-fiqh*, ed. Ṭaha Jābir Fayyāḍ al-'Alwānī (Beirut: Mu'assasat al-Risālah, 1412/1992), 2:237–42. Al-Shāfi'ī himself, however, and according to al-Rāzī, the majority of Shāfi'īs, strongly disagreed with this position. Even they, however, did not argue that a non-Muslim could be punished, e.g., for not fasting or praying.
41. See *Sharḥ tanqīh al-fuṣūl*, ed. Taha 'Abd al-Ra'uf Sa'd, (Cairo: al-Maktabāt al-Azharīyah, 1393/1973), 162–67.
42. See the discussion by Yusuf al-Qaradāwī, "Fiqh al-ma'rakah ... fiqh al-awrāq," *Majallat al-'amal*, May-June (1991): 63. Ibn Taymīyah's argument is actually based on what jurists commonly refer to as the *ḥikmah*, which is really "the reason behind the reason or *'illah*." In other words, the reason (*'illah*) that wine is forbidden is because it intoxicates. But why is intoxication bad? It is bad because it promotes violence, licentiousness, etc. This is the *hikmah*. Ibn Taymīyah's example, then, actually demonstrates the tendency among jurists to go farther than the *'illah* in considering the application of the law.
43. This is why, for example, once a theft has been reported to the Muslim authorities, the punishment cannot be set aside, even if the victim wishes to pardon the perpetrator. Because this specific punishment is a "right of God" and not a right of man, it cannot be forfeited, unlike the "rights of man," such as a woman's right to maintenance or a creditor's right to be paid a debt.
44. al-Wansharisi, *Mi'yār*, 2:121: "Baladun fihi ma'āṣin fī huqūq Allāh fa huwa awlā min baladin fihi ma'āṣin fī maẓālim al-'ibād."