I have been working this past year on a project that I would describe as applying the ideas of American Legal Realism to contemporary Islamic jurisprudential thought, in particular in the realm of commerce and finance in the Muslim world. In the first part of the project, I dealt at length with one of the founders of the so-called Islamic economics movement, the Iraqi Shi’i jurist Muhammad Baqir al-Sadr, and demonstrated how his ideas of Islamic economics were self-consciously and unabashedly based more on his ideological predispositions of him (and, he hoped, those of his interpretive community) than on any sort of attempt to achieve doctrinal harmony or develop a logic driven hermeneutic from Islamic foundational text. Sadr recognized shari’a interpretation to be a fundamentally creative exercise, bounded by rules set by an interpretive community, and in his creation of an Islamic economic system, this becomes abundantly clear.

The second part of the project is a more frontal assault on the “traditionalist” position that holds sway among Islamic scholars in the American legal academy. These latter, leading scholars argue that Sadr and his “fundamentalist” compatriots can harp on as long as they like about a politically and ideologically driven system of Muslim rules, but the real “law” in the Muslim paradigm is the law of the medieval jurists and that what the more respected and authentic juristic authorities seek to do is replicate, with appropriate modernizations, the logic and purpose of the medieval system in ordering finance, commerce and anything else that is supposed to be Islamic in nature. My paper argues that this is fundamentally nonsense and that the academy needs to pay less attention to what the juristic authorities say they are doing, which is replicating historic rules, and pay more attention to what they are actually doing, which is reinventing a past to conform to contemporary circumstances. It is clear that not only Islamic finance and commerce, but also notions of Muslim criminal law and the law of war use medieval terminology to develop a set of ideas that are undeniably modern, among them anti-colonialism, national and regional self-determination, social justice, and economic and social rights. Sadr is therefore different only in that he is more honest about what he is doing.

The final part deals with the intersection of religious interpretive community and state law as concerns social order in Muslim societies, and in particular in Shi’i dominated Iraq. Again, the general, formalist view is that one looks to medieval doctrine and medieval political structures and systems to understand what modern Muslims want, and I argue that one must look instead to what Muslims are actually calling for and expecting. Clearly modern Muslims have incorporated accepted the modern nation state as the paradigm of political order, but with Shi’is, who also look to an interpretive community to set religious rules, this creates something of a conflict between religious and political in the state. This conflict of laws, and how it is resolved to commercial order in Iraq, is ultimately the third section of this project.

Looking a bit more down the road, and turning back to the second part of the project, where I argue that historical rules and circumstances are reinvented by modern jurists to create positions that meet very modern demands, it seems to me that this is not a statement that could or should be limited to Muslim jurists. US judges who subscribe to something of a traditionalist model (constitutional originalists, basically) also tend to reinvent history to develop opinions that are consonant with their own ideological visions and with modern circumstances. Just as Muslims no longer live in medieval societies, or really want to, so does the United States look fundamentally different than it did in 1789, and without some level of historical reinvention, originalism could not work. I’d love to do a comparative study therefore, on the positions of Justice Scalia and Thomas for example, respecting interstate commerce, and the positions of traditionalist jurists on medieval Islamic rules that couldn’t possibly make sense in the modern world and whose meaning has therefore been radically transformed. This remains somewhat hazy, however.

I hope you find this helpful. Please do not hesitate to contact me with questions or concerns.

H.A.H.