

Fifty-Seven Tracts:
Shaybānī's (d. 189/805) *Aṣl/Mabsūt*, Twelve Centuries On

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Abstract

In Muḥammad b. al-Ḥasan Shaybānī's (d. 189/805) *al-Mabsūt*, it is taken for granted that different nations (Jews, Zoroastrians, Christians, Muslims) may live inside a single moral-legal structure known as an abode (*dār*, pl. *dūr*). When a community of nations is governed by Islamic moral and legal norms, theirs would be known as the Islam-abode, *Dār al-Islām*. Islamic moral and legal norms have a strong, though not unlimited, presence in this abode. The norms and forms of consent dominant in the Islam-abode are not presumed to be politically and socially respected outside of it. Each one of these 'religious nations' were granted collective rights as 'protected groups.' To bring what I hope will be a helpful comparison, consider the following. In the United States, only in areas where rights can be granted to individuals based on these individual's 'sincerely held beliefs' may an individual receive relief because of their affiliation with a religious group. No rights are afforded to religious 'groups' per se. A class certification (an acknowledgement that an individual Muslim who suffered discrimination did so for belonging to that class) may benefit the individual's cause in a religious freedom case; yet religious groups don't have rights as a group. In contrast, in Shaybānī's world, even if the doctrines and practices of a group are abhorrent to Muslim beliefs (for example, incest, practiced by Shaybānī's eighth-century Zoroastrians), the group's religion is protected, and the individuals belonging to the religious group would be acknowledged in a manner unavailable to today's American Muslim minority. Against that benefit, however, we will see that an individual's freedom to move about from one religious group to another, while not an infrequent occurrence, was not celebrated (to say the least). And the jurist, who held a degree of power in shaping his society's norms, had his limits.

In Muḥammad b. al-Ḥasan Shaybānī's (d. 189/805) aggregated fifty-seven tracts on laws known as *al-Aṣl* and *al-Mabsūṭ*—available now in Muḥammad Boynokalin's clean (if at times inadequate) edition¹—lies the foundation for Ḥanafī law. That corpus was the departure point for over a millennium-long tradition. The texts were mediated, for most readers, by the edits and rearrangements of the martyr of Rayy/Reyy (near Tehran), known as al-Ḥākim al-Marwazī (d. 334/945), in his *Kāfī*. Indeed, it is unnecessary modesty to limit Shaybānī to being a father of only Ḥanafī law. If we take Islamic law writ large to be that intellectual field that required extensive and encyclopedic documents to delineate its borders, then my best evidence tells me that it began with Shaybānī's fifty-seven tracts.

Before proceeding forward, a justification of this backward turn to an eighth-century text is in order. My reader inhabits a world in which Muslim jurists are understood to be responsible for much of what is undesirable in the lives of Muslims, from inept governance to disabled and immoral legal reasoning to social discord, perhaps over a millennium. When will these jurists forfeit their right to be heard?—this reader must be asking. Never mind the fact that those asserting that Muslim jurists are culpable for these historical and current problems have very little patience or appetite for legal texts. I owe this reader my judgment of that old style of law and legal literature. Is it good? Yes, I think it as good as any other. Is it reasonable, suitable even still for borrowing from, after modification? Yes, indeed! Is there anything wrong with it? Sure, it has its issues, but there is no good theory for what is generally wrong with it. And yes, it has a very good and long story to how it arose and how it evolved, again one that is hard to tell briefly. Suffice it here to speak of one element of my story with it: the side of this story that pertains to the Shaybānī of twelve centuries ago.

One thing I can say about Islamic legal literature is that there is a way to see it as operating, for somewhere between six and eight centuries, with a theory of the law that coheres with its ambition to provide answers to practical legal questions. In other words, one can attain a theoretical sense of how its theoretical and practical jurisprudence can be seen as of a piece. You talk about how to characterize human actions and move to the sources of the law, then to contingencies, maxims and exceptions, then back to the facts of the case, and again to doubts in the world of legal and broader epistemology (doubts about social and even natural life), using the same tools that have been briefly, or elaborately (depending on the author), sketched in your *uṣūl al-fiqh* (roughly, theoretical jurisprudence), *qawā'id al-fiqh* (roughly, maxims or canons), *furuq* (juristic distinctions), *alghāz*, *mutārahāt* (riddles), *munāzarāt* (debates), *tarājim* (juristic prosopography, biographies), etc. If these details are hard to wrap one's head around, the reality behind them is possibly as simple as this: A good jurist is thinking about human beings, their actions, the contingencies affecting their

choices, and the irregularities of luck or chance (or God’s invisible hand) befalling their lives, while at the same time reviewing the principles of the law, its generalizations that must meet exceptions, and the distinctions among ostensibly similar cases. Matching the theoretical with the practical, even for the jurist, is not a perfectly drawn mathematical equation. The jurist tries to do their best, conjuring in mind that God will always know best.

These centuries, from the fourth/tenth to about the eleventh/seventeenth or twelfth/eighteenth centuries, are not Islam’s first. What happened before that? In a doctoral dissertation I wrote a decade and a half ago, I said that we couldn’t really know and perhaps it was irrelevant (after all, we wouldn’t be able to tell much about Socrates’ views by learning about his childhood). Let Islamic law’s childhood stay a secret known to its contemporaries. It is not going to open itself anyway. I was not sure then what to do with the early adulthood years of Islamic law, which includes Shaybānī. I was sure his story would not change my general narrative; and I can still say that very few people can tell us much about the centuries preceding Shaybānī. But Shaybānī’s texts clearly tell us that the theory of a coherent theoretical and practical jurisprudence should not be seen as operating prior to the fourth/tenth century. There is a different kind of legal theory operating there. This essay will delineate this theory’s borders, with emphases on questions of how norms and consent interrelate, and how the presence of a religious identity needs to be protected—and not only in reference to an individual with religious beliefs. Rather, Shaybānī acknowledges the existence and importance of religious collectivity, a group which could be harassed and verbally insulted, its doctrines vilified by passersby, among other shameful spectacles, despite the theoretical protection of the members of that group as individuals.

In the essay’s first five sections I introduce Shaybānī and his context, provide a primer on what it means for Islamic law to regulate choices, offer an example of how consent is expressed or presumed in the extreme ends of human relations (partnership and adversity), and speak of limits on consent that a Muslim jurist respects. In the last four sections I focus on the nature of the Islam-abode as a bordered community of nations, and point to how religious considerations sometimes fail the jurist in his search for perfect consistency in his reasoning.

1

When Islamic Law Began

Shaybānī’s (d. 189/805) 57 books on laws ranging from rituals to trade, family, crime, and transabodal (equivalent of ‘international’) activities, which went collectively by the title *al-Aṣl*, open a millennium of Ḥanafī legal reasoning that was closed by Ibn ‘Ābidīn’s *Commentary* or *Ḥāshiya*. (Left partly unedited at Ibn ‘Ābidīn’s death in 1252/1836, his son later completed its editing.) In the intervening millennium, one Muslim government after another instituted

practices that, on the one hand, restricted the jurist and partly took away his freedom to apply his own principles and to apply a good measure of deference to social norms; and, on the other hand, they aided that jurist by offering solutions to problems that seemed unsolvable with the tools of jurisprudence. Not unlike a Roman jurist, the Muslim jurist's main source of authority is persuasion, rather than social consensus or the police. But the jurist does function within limits imposed by society and government.²

In reading *al-Aṣl*, one encounters not only a case history that speaks to archivists but also a compendium of legal and political reasoning that cuts to the basic foundation of Islamic moral-legal structures. For example, it will be apparent after this reading that a concept of political philosophy that is separate from law and legal theory faces challenges. The reading will also throw sufficient doubt on the stability of modern notions of liberty and rights, as it alerts us to what laws are made of (namely, the elements of norms and consent). A pithy biography of Shaybānī follows.

2

Shaybānī, His Laws, and His Surround

Born in 132/749 in Wasit (the Middle City, so-named because it lay midway between Kufa, where he grew up, and Baghdad, where he lived most of his life), Shaybānī's life ended on a trip to Rayy (Iran today) in 189/805. He studied under the two eponymous founders of Ḥanafī and Maliki law for three years each.³ These two schools supposedly offered two models for the creation of law, one from reason and the second from history and tradition. In his late years, the individual who mattered more to Shaybānī was an older student of Abū Ḥanīfa, known as Abū Yūsuf (d. 182/798), whose death preceded Shaybānī by less than a decade.

Abū Yūsuf had become a trusted courtier of the Caliph Rashīd (d. 193/809) and hence was in a position to give Shaybānī advice on court etiquette. When Rashīd became aware of Shaybānī's excellence, he invited him to his court. According to rumor, Abū Yūsuf told Shaybānī to request to leave the room when Abū Yūsuf hinted to him to leave, having told Rashid that Shaybānī suffered from urinary incontinence. Abū Yūsuf then hinted to Shaybānī to leave once Rashid started to enjoy his company, leaving Rashid to think that Shaybānī would have been such a good conversation companion, if it weren't for his medical condition! The false medical condition, in any case, didn't keep Shaybānī from the circles of power or the international scene for long. The second/eighth century's best student of law eventually became one of its best scholars. He eventually became a legal adviser to the same Caliph Rashīd and, having sharpened his teachers' (Abū Ḥanīfa and Abū Yūsuf) views into a school of law, started to become a true professor of laws.

When Shaybānī was born, what we today (following a Eurocentric view) call the Near East or the Middle East had already witnessed imperial

activities by Persia for over a millennium (525 BC-651 CE). And, while the brief Greek imperial adventure (321-146 BC) was well in the past, Rome's imperial republic had incorporated Macedon's eastern territories (and more) for about three quarters of a millennium in 749 CE. Shaybānī's theories about nations within and without the same abode or the same polity are thus informed by a true understanding of the material-historical conditions of empire, even before there was anything to be strictly called a Muslim empire.

Domestic laws in the Roman East had been around for a while in the environs of Damascus, Islam's first global capital, where authorities such as Awzā'ī (d. 157/774) lived and produced their work. Law schools were available not only in Rome and Constantinople but in Berytus (Beirut) and, by the fifth century CE, in Antioch and Alexandria. The Theodosian Code was made into law in the Roman provinces on January 1, 439 CE, and the Justinian code was more than two centuries old (529-749 CE).⁴ Although these were not consistently enforced even inside the Roman Empire, their inconsistent presence affected much in trade and political life. Local (provincial) laws were such that social standards dominated each community, as long as taxes were collected and sent back to the center of the Empire. International relations, especially in the convention of enslavement after war, was an area where the impact of Roman institutions on the nascent Islamic jurisprudence can be most clearly detected.

One must acknowledge that similar institutions can be found in the two types of legal literature, Roman and Islamic, though most solutions for old problems in Roman law are given to us today with new (medieval) authorities as arbiters who ended old disagreement. For example, Muslim jurists speak of contracts of clear nature and details, such as sale and lease, and other contracts, which the parties may invent or design (*'uqūd ghayr musammā*; literally contracts for which there is no name or title). The latter are regulated based on the principle that those who are parties to these contracts must commit to the general standards of what is permitted, avoiding (for example) excessive ambiguity (*gharar*) and uncompensated surplus (*ribā*). Roman law sees contracts as being divided into clear-cut ones, such as sale and lease, where good faith and reasonableness (*bonae fidei*) and principles of equity apply; and innominate contracts (literally, contracts for which there is no name or title), such as barter, which could only be enforced after they are performed.⁵ The division is not a neat one by any stretch. Roman jurists address *laesio enormis*, excessive pricing, which allowed remedies for buyers and sellers but had to wait for Accursius (d. 1263) to be estimated as a deception at the ratio of half the price.⁶ Similarly, Muslim jurists speak of *ghaban fāhish* (excessive gouging in the case of sale), which is assessed at a third or a half of the ratio of reasonable price added to the charged price. Another example of such a relationship between Roman and Islamic law lies in the use of prison (mostly as a measure of detention before trial or punishment).⁷

Romanists simply note an element of control by the imperial center over the provinces. Of cases in the Roman provinces, where the power and prestige of the Empire would resolve conflicts and reduce animosity, for example, John Richardson states:

The context within which such cases were decided was not, juridically speaking, Roman, and the cases themselves might not involve Roman citizens at all, but those to whom it fell to oversee them belonged to the class from which the urban praetors were drawn, and in some cases had themselves held that office earlier in their careers. It was inevitable that when they needed structures and patterns to manage their own jurisdiction they turned to those of the *ius civile*, even though the parties to the cases were not Roman citizens. It is the interplay of Roman procedures and local, non-Roman legal rights and individuals which gives the legal work of the provincial governors its particular flavor and interest, especially in the earlier centuries.⁸

Paramount was the interest in streamlining activities that would otherwise be a headache for the center of the Empire. Intervention by Rome in the provinces needed a justification and a cost-benefit analysis.

Between Carlo Alfonso Nallino (d. 1938)'s lectures on the matter and those of Şūfī Abū Tālib (d. 2008) (whose text that included the lecture was assigned at al-Azhar to the freshman law school class until the 1990s),⁹ ample examples were provided of the structural divergences in legal reasoning between the two systems. Sanhūrī's (d. 1971) lectures in civil law (*Maṣādir al-Itizām*) raised doubts about the thesis that Roman law deeply influenced Islamic law (though this did not prevent Patricia Crone from her 1987 attempt at exaggerating their similarities¹⁰). Ultimately, Roman law in the provinces and Islamic law serve very different goals. The former was a tool of control and streamlining of the population of an empire; the latter had the unusual ambition of covering all aspects of life, personal, social, and transabodal.

Two quick notes before we end this section. First, we need to understand law in Shaybānī's *Aṣl* as inclusive of other elements not normally seen as law in a modern environment. For example, law includes the domain of etiquette, even when the discussion emanates from reflections on the laws of verbal crimes and their punishments:

What of a man accusing a woman of fornicating with an animal, a camel, ox, or donkey? He is not to receive the specified punishment (ḥadd). What if the insinuation was that a camel was the price paid for the sexual act (the same going for a cow, dress, or silver currency (darāhim))? Yes [that would require the specified punishment.]... What if it was said 'you, son of blue-man, red-man, yellow-man, blond-

man, black-man, man-of-Sind, man-of-Ethiopia, while the father is none of that? No specified punishment (*ḥadd*) in any of that. Why? Because the statement did not negate an affiliation with one's true father; rather, it is an erroneous description. *What if someone said 'my son' [to someone who is not his son]?* No specified punishment.... Why; *he attributed the other man to himself [as progeny, which would be a negation of the true father]?* Because this is a word people use. It is not given as a false claim. It is a polite expression of affinity (*kalimat lutf*).¹¹

Second, Shaybānī's laws are not properly Qur'anic or Muḥammadan law. It is true that precise language may be hard to come by to explain what it means that theoretical jurisprudence (*usul al-fiqh*) sources are organized according to the familiar hierarchy—the Qur'an, the Prophet Muḥammad's Sunna, consensus (of all Muslims or of jurists), reasoning from analogy, etc.—yet it remains true that neither the Qur'an nor the Prophet's Sunna could give us a substantial idea about Islamic law as we know it. Indeed, some Qur'anic language is in friction with basic doctrines of Islamic law, such as the stipulations of a minimum value for a property, that it not be the property of a household resident, and that it be kept in a proper depository for the assigned corporeal punishment of theft to be considered.

As the prototypical Muslim jurist, Shaybānī sometimes finds a generalization in the language of the revelation worthy of being restated as a principle. In some cases, this generalization admits of exceptions. Other times, such principles are nowhere to be found in the revelation, and they must be derived from other sources. That is, these sources (reason, social conventions, assumptions about the laws of nature, and of esp. human nature, among others) also lend themselves to the formulation of principles which, in turn, admit exceptions. The life of the law in Islam, to offer an analogy that appeals to Anglo-American audiences, is certainly not the life of the interpretation of revelation in any non-broad and non-trivial sense; while it incorporates logic, it is not limited to it, and it certainly hinges much more clearly on experience.¹²

Shaybānī, however, was not simply a legal professional with no religious character. Take this anecdote, often brought up to prove Shaybānī's honesty and piety, to close this subject of distinguishing Islamic laws from Qur'anic verbiage. 'Abd al-Raḥmān b. Maḥdī (d. 198/814) warned Shaybānī that he had applied analogical reasoning based on a statement from the Prophet's authority, which the former knew was not a sound report. Shaybānī hastened to edit this section out and changed his mind.¹³ This anecdote aligns with a recognition that reports of the Prophet's acts and statements were seen as either affirming a norm capable of expansion and extension, in which case they were cited and elaborated, or causing a reflection toward an exception (sometimes explicable, meaning subject to *qiyās*, and other times purely ritualist, *ta'abbudī*). It is the norms, not the traditions, which constitute the

backbone of the laws. If cancelling a tradition only requires minor corrections, you can tell that the system was much larger than any single report of what the Prophet said, did, or tacitly approved of.

To reiterate, Shaybānī's *Aṣl* starts that magnificent millennium of Ḥanafī legal reasoning that is closed by Ibn 'Ābidīn's *Commentary*. And it also bears repeating that, in addition to differing social standards across broad swathes of Muslim lands in the intervening millennium, one Muslim government after another instituted practices which both restricted the jurist in his deference to social norms and aided that jurist with help he could use addressing intractable issues.

3

Riḍā, Ikhtiyār, & Ḍarar

The Arabic terms *riḍā* (consent) and *ikhtiyār* (freedom of choice) are used in different contexts within contract law (*'aqd*) and the standards of competence and its impediments (*'awārid al-ahliyya*). The subsidiary term *khiyār* addresses exceptions in contracts (options to nullify). The concept of *dīn* applies to choices made by non-Muslims and their residing habits (a Ḥanafī golden rule reads: *natruk ahl al-dhimma wa ma yadīnūn*, i.e., “we let scriptuaries practice what they hold true”—a specific protection for religious groups against whom a powerful community may discriminate). (Were a similar protection available to Muslims in the US after 9/11, it would have been much more valuable than the familiar modern American government's readiness to protect “sincerely-held religious beliefs.”) A choice that may not be tolerated is one that occasions harm and necessitates compensation. *Ḍarar* (harm) and *ḍamān* (liability, compensation) then come in to complete the picture. Let's start with a foundational juristic view of human choices and then hear Shaybānī's voice address some of the details.

When a responsible individual, unaffected by impediments to her or his agency, consents, that is, acts based on a true choice, she or he loses the freedom to make some further choices. Once I freely buy your book for \$20, I don't have a free choice in (what was once) my \$20. After I consent to a marriage that results in children, I don't have a choice not to support my wife and children. (I cease to own my property, in other words, if it is occupied by the rights of the wife and children.) If one were able to claim an intrinsic inability to make that first choice, provide a meaningful first consent, then the consequences of that consent don't follow. Think of a child, or a person under duress. Since such people do not or cannot make a meaningful initial consent, their rights are preserved in subsequent calculations of who owes whom what. But for obvious reasons, attending human nature and the nature of human interaction, the defense that one was coerced fails frequently.

Shaybānī sets the tone for a long tradition of suspicion of claims of coercion. A man claims he was coerced to a divorce-deal (*khul'*) with his wife;

but he is bound to it. “Don’t you realize that if he was forced to have sex with someone, he would [still] be bound to wash up before praying; or if he was forced to eat during a Ramadan day, he would [still] be bound to compensate for that day of fasting?”¹⁴ (The analogy between the two conditions of being forced to make an utterance and being forced to engage in a carnal act is here somewhat strained.) Now add to the list of those seen as incapable of delivering a meaningful consent someone whose religion takes away that first choice (a Muslim cannot elect to drink an intoxicant or consume the flesh and fat of a pig), whose gender takes away that first choice (a woman in her period does not get to be in the mosque, on most views), or whose bondage takes away that first choice (a slave needs a master’s permission to initiate a marriage offer). Moreover, a dominant religion may restrict those who don’t believe in it. While they get to sell pork and wine products, Shaybānī thinks Christians do not get to trade in “carrion and blood.” Finally, a change in the status of a business deal that affects the agency of someone who is involved in it (and his capacity for choice) also changes this person’s choice. Thus a sale of wine on credit between two Christians is valid; but if one of them converts to Islam before the delivery, the buyer does not get to have the merchandise and the disbursed payment must be returned.¹⁵

The idea that consent is one, yet not the sole, basis for norms in society resonates in laws old and new. Consent (verified or presumed) is a basic pillar of legal and moral life. In ancient Egyptian law, as Toby Wilkinson discovered, a will by a woman named Naunakht (twentieth dynasty, twelfth century BC), distributing her inheritance among only five of her eight children and disinheriting the remaining three, needed to be reviewed by the court a year after distribution to ensure the consent of the concerned parties.¹⁶ Centuries later, the Justinian Code (Book 5, Trials, #20) established, on the authority of the jurist Paul (second and third century CE), the idea that “the correct view” of how to understand an obligation is to treat it, before the courts, as an outcome of a contract. The fictional contract here assumes that abiding by a legal order involves consenting to its implicit terms. Consent and contract do interrelate, of course, but consent is broader.

Consent, broadly understood, is the foundation of communal-religious affiliation, which has consequences in rituals, vows, marriages, and the rest, and is the foundation of all social postures—also including marriage and family, market and labor, and the willingness to be subjected to moral censure and criminal and social punishment. As noted earlier, Shaybānī’s laws are not sympathetic to claims that one took a certain course due to coercion. For instance, he insists that divorces under coercion are still effective. Coercion by political power within the same political and moral structures are an interesting claim that needs to be considered soberly and without emotions.¹⁷ These claims are as easy to make as the claim that the government is corrupt and hence rebellion is justified, which jurists are reluctant to grant.

Shaybānī's *Mabsūṭ* was only the start of a long tradition of reasoning and a juristic craft that spread into the corners of the Muslim world. In this tradition, consent—while by no means unlimited—makes, shakes, and breaks. At a crescendo in his treatise on “how one may determine appropriate compensations for assigned payments” (debts, prices, dowries, etc.) under conditions of currency variability, the nineteenth-century Syrian Ḥanafī master of jurisprudence, Ibn ‘Ābidīn, quotes one of his mentors who allows resort to settlements.¹⁸ Even government policy may not be decisive, if the markets see things differently. The views on this matter, before and during Ibn ‘Ābidīn’s time, had varied significantly. In addition to currency counterfeits (using copper in silver currency) and changing government policies in late Ottoman practice, several factors may disadvantage one partner of a transaction or money promise over the other. At the bottom of this reasoning, however, is attention to a basic principle: consent, and the norms it generates, forms legal standing. A breach in the status of the consent of human agents in a society changes our sense of order.

The currency of consent as a generator of norms, with the aid of a legal professional who works to articulate the extent and limits of these norms, is also found in modern national and international law. In international law, “recognition” constitutes the state.¹⁹ Circular or not, the logic goes thus: territory or land recognized as a state, by other states, is a state. The preponderance of “consent” by other political or legal abodes, applied to the status of a given abode as legally and politically independent, makes it as such. The states then treat one another as states, and consent is at least the theoretical foundation of their inter-statal activities.

The reader must bear in mind that norms can be generated out of consent, and that consent can be a source of order, even when norms are soft. And human perceptions and forms of secure knowledge of the natural world, while falling on multiple spectrums or spectra, are a foundation for social and moral and political life—as obscure as the connection between social and natural knowledge may appear to some of us. The legal professional’s work, at times, consists in articulating the limits of consent and necessary coercion. In some cases, this is descriptive; in others, it is prescriptive.

4

Consent in Adversity and in Partnership

When the lifetime of a consent is considered, the jurist finds that it possesses the potential of turning into either settlement and contentment or a sense of buyer’s remorse. These two options need not be restricted to market dealings; one is said to have buyer’s remorse after a marriage decision, a decision to concede the ascension of a given individual to public office, and other decisions weighty or trivial. Consent’s long-term endpoint must be taken into account in

assessing it. In this the role of the legal professional in articulating the limits of communal consent or consent among adversaries or partners is magnified.

Take the opposite ends of relationships, one being adversity and the other being partnership. First is Shaybānī's view on appointing a representative (*wakīl*, someone with power of attorney) over the rejection of an adversary in a case.²⁰ Against Abū Ḥanīfa, Shaybānī holds that one has such power, to appoint an attorney against the will of his adversary. In other words, the adversary's consent is ineffectual; it has no legal consequences. Especially in a case in which the one who appointed a representative is unable to represent himself, for sickness or absence, Shaybānī would ignore the will of his opponent outright. Abū Ḥanīfa's argument also looked at consent but stipulated that it be mutual: the appointer of a representative and her or his adversary has a stake in the case; hence, their consent must be sought before the judge proceeds. The wisdom of Shaybānī's view is apparent to us now when we consider whether one may pick an adversary's lawyer or a debt collector on behalf of a creditor. Today (especially in a system that is labelled adversarial, such as in the United States) we tend not to have a problem with a will's executor who fell into disagreement with one of the inheritors, to stand in opposition to the complaining inheritor, when the original (the deceased who wrote the will) cannot be made available. But the issue here is not necessity. It is whether an adversary's consent ought to be sought and whether it would be meaningful to seek it in this case.

Moreover, in a business partnership, when unjust deals are struck where one side is guaranteed to draw more benefits than the other, the parties' consent is as good as nonexistent. A partnership between two traders that stipulates one distribution of profit and another for losses is one such agreement. Should partners stipulate, for instance, that losses be shared at a ratio of 2:1 while profits be shared evenly, this is not an acceptable partnership.²¹ On occasions, partners do violate the terms of their partnership. What then? Shaybānī addresses a deal where a money-provider (MP) and two partners (P1 and P2) all agree to share profits at a 2:1:1 ratio (MP, P1, P2). In this scenario, one partner commits to the terms of his partnership and another commits only in half the assets or money to the deal. The MP first collects his capital, and if P2's property needs to be taken away for that to be fulfilled, so be it. Once MP gets his capital back, any profit from P1 and the authorized half within P2's investment is divided at the 2:1:1 ratio. Any surplus of profit gained by P2 in the unauthorized half is his to release to charity, because he never properly owned it. Shaybānī labors to explain how the surplus in P2's unauthorized activities must be determined, before anything is released to charity, in order to guarantee a maximum of fairness to MP and P1.²² The fulfillability of the initial agreement here totally hinged on the effort of the legal professional: without his intervention nothing would be accomplished.

5

God, Nature, & Society

Now to ultimate (or metaphysical) sources of restriction on consent. In modern capitalist environments, restrictions on consent are suspicious, unless they are for the valid interests of human beings. For example, person A consenting to buying from Person B what turns out to be the property of a Third Party C cannot be seen as an effectual consent. It is against the valid interest and rights of the real owner. An arbitrary power of the state where A and B live may also impose an invalidation on the sale for weaker reasons.

The consent of two parties—especially when it results in consequences which, in turn, lead to a reconsideration of this very consent—may be ripe for preemption by a higher power. To be sure, this is not unknown in modern laws. Modern courts may agree or disagree as to whether existing laws cover situations that rise to their consideration and adjudication, but they usually agree on the principle that human consent may require some natural restrictions. How they explain that is another issue. *R v. Brown*, a standard case in English law decided by the House of Lords 3:2 in 1993, holds that consent is unavailable in the case of sado-masochist activities.²³ This case also raises the question of whether agreements among parties that are understood as abhorrent to general human reason or instinct are automatically invalid. The question of consent is not as easy as it appears, in light of such extensions of the notion of human freedom in modern jurisprudence.

In any case, Shaybānī accepts in principle that human consent may be reasonably infringed. But for what considerations? First comes God. Shaybānī states that a divorce at the wife’s initiative, involving a stipulation that the wife does not receive any financial support during her waiting period, is acceptable. By contrast, a stipulation that she not be provided housing by the husband does not stand scrutiny, he says, “because it is an act of disobedience that she be asked to live in a house other than her own husband’s—(i.e., while still married to him, which she is until the divorce is final).”²⁴ Mutual consent is unproductive here, since it contradicts God’s will.

In a word, nature can say no to presumed norms and human consent. It is in fact one of medieval Islamic legal reasoning’s secrets hiding in plain sight that it is mostly based on a theory of human nature and a respect for reason and convention. These principles do clash and are not adequate reasons for all the laws, to be sure. There are moments of no explanation—or explanation stopping at the gate of revelation—which have confused and veiled western scholars of Islamic law from good understanding of this type of reasoning.

Nature is certainly one important limit on both the possibility and meaningfulness of consent. Shaybānī teaches us that “sexual intercourse by an underage boy bequeaths neither the normal punishment (*hadd*) nor a payment of dowry (*mahr*), because the boy’s penis is as good as his finger.”²⁵ In a similar vein, al-Badr al-‘Aynī (d. 855/1453) states: “A slave ordered a free, underage

boy to kill, and the boy fulfilled the command: The male agnates of the boy pay the blood money for inadvertent killing (*qatl khata'*), because the boy's intentional and unintentional killing is one and the same."²⁶ For both Shaybānī at the start of the Ḥanafī tradition and 'Aynī at its height, it is obvious that adulthood is a prerequisite for full responsibility. The desires, consents, and aggressions of an underage boy could not be taken the same way as those of an adult. Nature refuses that equation.

Jurists' supervision of the end of marriage gives other examples. A unilateral divorce by the husband is counted as a second divorce even after a previous divorce at the wife's initiative that entails compensation (*khul'* or *mubāra'a*)—even though the previous act is normally seen as a final divorce (upon the end of the waiting period).²⁷ In other words, a husband's violations of the terms of an agreement still bind him to further adverse consequences—in this case, losing one of his three opportunities for terminating a marriage before his wife has to take another partner in valid marriage prior to ever coming back to him. Shaybānī, who presents this view on the authority of Ibrāhīm al-Nakh'ī (d. 96/714) and 'Āmir al-Sha'bī (d. 103/721), also explicitly states that compensated divorces are final.²⁸

Khul' and *mubāra'a* are normal ways to end a marriage. These agreements, in addition to judicial divorces of different type, balance out a man's ability to unilaterally divorce his wife, since he gets to shoulder the bill. They allow a woman to end her marriage, as long as she does not plan to benefit financially from it. That is why they ought to end in a final, rather than a retractable, divorce. When a man enters a divorce on top of a divorce deal with his wife, this is simply a violation of the law. One reaction would be to ignore it. On Shaybānī's doctrine, it is essentially void, but it will, in addition, reduce this man's ability to resume a normal marriage upon a future agreement with his wife. In *khul'* laws, each time a compensation is either vague or unspecified (or if the change of circumstances makes delivering it untenable), a reasonable replacement is due.²⁹

Every system has its excesses when it comes to how nature operates, and Ḥanafī law is not free of these. Sunni jurists think that two babies nursed by the same adult female are siblings and hence unmarriageable to one another. This superstition, if we call it that, is extended even further in Ḥanafī law: so far as to apply in the case of two babies, male and female, nursed by two females who were married (at the time or recently enough) to one and the same man. Even the case of "a man, whose son and daughter nursed on his brother's wife," leaves this son unable to marry any of the daughters of this 'nursing-mother' (the wife of his uncle), whether these girls of the uncle's wife were born before or after the nursing, and whether these females were the daughters of the nursing son's uncle or not.³⁰ Based on these 'milk-bridges', this reasoning creates uncle-niece and aunt-nephew relations that close the doors of marriage.

So far Shaybānī has not given us ambitious notions of eternal (human) rights to be afforded (only) to individuals. That modern language in itself invokes no reproach as a foundation of social, moral, legal, and political life in a community and for the limits and borders of consent within a given societal arrangement. However, it falls short (for a contemporary example) where it allows individuals to enjoy free speech rights that protect their verbal harassment of groups (e.g., Muslims, Blackamericans, and others who are unprotected as groups), on the pretense that the members of these groups, in principle, retain (vague and less clear) rights as individuals. These vague rights won't shield modern Muslims, for example, from vilifications of the symbols of their religion (e.g., that the Prophet Muḥammad is a womanizer and a bloodthirsty individual) and their creeds. Wouldn't it be strange if an eighth-century Zoroastrian Mesopotamian (who would be allowed to marry his sister and stand in a Muslim court as a married man, not an incestuous scum) would be accorded more respect and protections in the Islam-abode than would be a twenty-first century American Muslim? I hope this is not true; I hope I am missing something. (Well, we haven't been to eighth-century Mesopotamia, and we can't tell how this Zoroastrian felt. My best hunch is that modern American Muslims enjoy rights he didn't, and he enjoys rights we don't).

In any case, we ought to now move to the second section of the essay, which reads Shaybānī on legal life and legal death and sketches the mixed courts of eighth-century Iraq (which ruled subjects of mixed religions and used a mix of Islamic and non-Islamic laws, all within the borders of a well-defined abode). We will also have something to say about the limits of the consistency of these legal doctrines and practices.

6

Legal Life and Legal Death

International law today (still) assumes that nation-states are closed off by borders, within which national laws apply, and outside which other nation-states exercise an important aspect of their sovereignty via instituting and enforcing their own laws. To follow what we are looking at here, we need to start by delinking nation and state. One state or abode (e.g., the "Islam-abode") may enclose multiple nations, which in turn may have different laws in certain areas but share public laws with other nations within the same state or abode. Inside the same state, nations don't normally go to war with one another. When this anomalous condition we call civil war occurs, a set of laws governing cessation (*baghy/khurūj*) apply. At the borders of this multi-national state, war or peace with other states is possible. Hence, a shorthand for the abode that is external to one's abode is the war-abode. In practice, the so-called war-abode is nothing but an alternative name for the unbelief-abode, where laws unrecognizable to Muslim jurists are normally and regularly enforced.

Yet, wars happen; and when they happen, laws often change. War is a due process by which rights and responsibilities may be reassigned. Coupled with the counterintuitive delinking of nation and state, one may want to contemplate the idea of legal death, its medieval Islamic version being something of a limited improvement on a similar ancient notion. In Roman law, legal death applies most immediately to slaves, where freedom (in the sense of freedom-to-act), then citizenship, and finally age majority are three yardsticks or building blocks for legal competence, enumerated here in the order of their impact. A slave is deprived of the most basic standard of competence (freedom-to-act); hence, as Ulpian (170-223 CE) put it, he is almost dead.³¹ (Ulpian is the Roman jurist most cited in the Digest of Justinian, which was assembled in 530-533). Not being a citizen also takes away access to legal protection. Being a child, even of a citizen, is another impediment to full legal life.

In Islamic law, or more specifically the Islamic law of the jurists of the early Ḥanafī tradition, living inside the Islam-abode is the starting point for legal protection. There is further legal protection for slaves inside the Islam-abode than for free individuals outside of it. Legal death applies to those who migrate and abandon the Islam-abode. (Incidentally, the notion from Roman law that the slave is part-human, part-object has not gone away in Islamic law.) Inside the Islam-abode, legal death is an essential notion that both solves and creates problems. Never to conflate the two completely, Ḥanafī law does still emphasize their distinction in certain cases. Thus Ḥanafī law allows replacements of flight-risk debtors. In other words, a man may guarantee the return of another with a payment of his debt by accepting to remain in custody until the return of the debtor. If the guarantor converts, then flees and moves outside of the Islam-abode, their flight does not absolve the debtor from providing an alternative—as opposed to the case of an actual death of the guarantor.³² Being of a different nation—religious and ethnic “nations” often overlapping—affects rights and responsibility in a complex way. What was it like?

7

The Mixed Courts of Eight-Century Iraq

Abu Ḥanīfa (d. Kufa, 150/767) is reported to have allowed a Ḥanafī judge to hear a spouse support claim by a mother against her son or a sister against her brother, who is in either case also her former husband, because Zoroastrian laws allow incestuous marriage.³³ This mixed court procedure (where Zoroastrian adversaries stand before a Muslim judge to be governed by Islamic law) was rejected one generation later: Abū Ḥanīfa’s student, our Shaybānī, disagreed with the master, and Shaybānī’s view carried on for the subsequent millennium as the standard Ḥanafī doctrine. The altering of doctrine within one generation could be explained (as later Ḥanafī authorities say) by a shift in the conditions and customs of the times (*urf*).³⁴ There were too many Zoroastrians, who lived

in Kufa and sought judicial protection, who could not be ignored by Muslim judges of the early times; later, this became a false problem not in need of a solution. The distance between Kufa and Medina, briefly the seat of government after Muḥammad's death, was twice the distance between Kufa and Zanjan, for example; Damascus, the Umayyad capital, was equally far from Kufa. Be that as it may, the old view clearly complicated a useful doctrine Ḥanafīs were on the verge of developing: that laws follow geography, and religious minorities must develop their own laws within a Muslim town or city, as long as these do not clash with public laws.

Interestingly, Abū Ḥanīfa would have advised a Muslim judge not to intervene in a case involving two Christians, where one took over another's wife without their marriage being followed by a proper termination and waiting period.³⁵ His argument is that these Christians' laws govern their families, even if they lived under a Muslim government. Shaybānī's view, here in agreement with Abū Ḥanīfa's other (and older) student, Abū Yūsuf (d. 182/798), is that the improper marriage may be repudiated and proper procedure instituted.

The legal terms of art in these discussions are indeed nothing other than the familiar *dhimma* and *dhimmī*. Abū Ḥanīfa's doctrine is often reduced to a dictum: let the people of *dhimma* act as they do or believe they should do! The restriction of the *dhimmīs* to Jews and Christians is also a familiar limit, known in Qur'anic exegeses and law-texts, but the Ḥanafī view of *dhimmīs* or protected populations was broader. The minorities left off from Sassanian times included all those who were subject to persecution in the olden days: Jews (*yhw'd-y*), Buddhists (*šmn-y*), Hindus (*brmn-y*), Nazarenes (*n'cr'-y*), Christians (*krstyd'n*), and Mandaens (*mktk-y*).³⁶ The Manicheans (*zndyk-y*), or *zanādiqa*, who triumphed gradually under Sassanian rule, now Arabic-speaking and in some cases artisans of poetic expression, would become a subject of literary curiosity in the second to third/eighth to ninth centuries, and their treatment (especially for those who professed to be or attempted to pass for Muslims) vacillates between harsh juristic threats of erasure and execution and the reality that deemed them mostly innocuous. The *brahmāniyya* (Hindus) will await another day (when Ḥanafī communities move eastward toward India) and in the meantime seem to not be of concern; the *sumāniyya* (Buddhists) make a showing in *uṣūl al-fiqh*'s epistemic inquiries as interlocutors who deny that physical reality is a decisive indication of what truly is (e.g., in Ibn al-Ḥājjib's (d. 646/1248) text in theoretical jurisprudence, *Muntahā al-Sūl*), but I am not familiar with cases or legal scenarios that bring their peculiar beliefs to a Muslim court in early Muslim Iraq.

Inside the Islam-abode, *al-Aṣl*'s discussion of such people's marriages indicates, on first blush, full abandonment of cases involving non-Muslims. The conversion to Zoroastrianism of a Jew or Christian who is married to a Jew is not contestable in a Muslim court, since marriages between Jews and Zoroastrians do occur.³⁷ This last explanation seems similar to what the teacher

(Abū Ḥanīfa) taught (namely, leaving the people of *dhimma* to act as they deem), but reaches the opposite conclusion. In principle, the divergence between Islamic and non-Islamic family laws means that non-Muslim communities must settle their marital conflicts outside of Muslim courts, which would require developing the requisite legal and judicial practices independently of Islamic law. Yet we will see presently that marriage may be seen as a subject of public law in some cases.

The following scenario will further clarify the disagreement among the school founders. Consider this text:

Inquirer: What if a woman from the war-abode converts to Islam, then migrates to the Islam-abode, leaving her husband behind; could she immediately marry another man in the Islam-abode? Abū Ḥanīfa says: Yes. Inquirer: Without a waiting period? Abū Ḥanīfa says: No waiting period. Wouldn't it be the case that a divorce by her husband, were he to divorce her while living where he lives, be vacuous? Both Abū Yūsuf and Muḥammad [Shaybānī] say: She should observe a waiting period! A concubine who bore her master a child (*umm walad*) should also observe a waiting period. Each must wait a period sufficient for three menstruating instances. If she were to marry before that, the marriage is susceptible to annulment (*fāsīd*). If she was pregnant at the time of the new marriage, the marriage is also susceptible to annulment.³⁸

Land is the limit of laws. The purchase of a slave child while ignoring his brother, also available for purchase, is reprehensible. The general principle is that a slave owner may not separate, via purchase or sale, members of the same family. But, if a resident of the external abode is selling only one of two brothers, a Muslim may buy the one available for purchase. The alternative, Shaybānī says, would be letting both go back to the black hole of the external abode or the unbelief abode. If the same two brothers are offered for sale inside the Islam-abode by an owner who lives in it, they may not be separated.³⁹

Times have changed, or perhaps, geography has changed. In Shaybānī's world, one's prior religious beliefs cease to be a shield from acceptable public norms. Once 'Islam' is combined with 'residence' in the Islam-abode, one's religious history is irrelevant to rights and responsibilities. Abū Ḥanīfa thought the existing ties between new converts and their families who live outside the Islam-abode would end upon emigration. He also thought that any continuity in their previous marriages would be impossible to observe. Shaybānī thought the jurisdiction of the law in the new land may be continuous with one's recent actions—notably, marriages that dissolved very recently. All (newly Muslim) women, free and slave on the verge of freedom (which is what an *umm walad* is), are expected to observe a waiting period sufficient for three menstruating instances.

There are restrictions on consent among non-Muslim nations within the Islam-abode that may require further reflection today. Should scriptuaries' hiring of one another for the purpose of performing a ritual (prayers) be allowed? Shaybānī's answer is no, and that Jews, Christians, Zoroastrians, and "all the people of unbelief" living in the Islam-abode are the same in this. Were they to hire someone to ring a bell for their prayers for a monetary compensation, this is also not allowed, because it is an act of "disobedience."⁴⁰ In other words, this is a question different than performing the prayer itself, without any compensation, which is available to these non-Muslim worshippers. This seems to be an extension of the idea that Muslims are not allowed to charge or compensate for acts of rituals. The language of "disobedience," however, is somewhat puzzling. An Islamic prayer is not an act of disobedience; to the contrary, it is a required ritual. You cannot charge for a religious requirement, nor can you pay for it. The law pertaining to non-Muslims in the Islam-abode is either a limited extension of the logic of laws applying to Muslims, or a subprinciple pertaining to non-Muslim "nations" within the Muslim abode, aiming to limit non-Muslim rituals to their natural, uncompensated performance.

The view that Muslims could not hire Qur'an teachers (because it is a ritual, and one cannot charge for a ritual) was abandoned in due time. It became clear that without professional Qur'an teachers, people would either do a bad job reciting it or abandon learning it altogether. But it is not clear that outlawing the effort of non-Muslim nations to preserve their religious traditions by professionalizing worship was reconsidered. True, a Muslim remains able to rend his house to a non-Muslim, even if the latter drank wine or used it for worship of the cross, as long as the Muslim didn't specifically sell it for that purpose.⁴¹

What are these mysterious borders that create abodes and accounts for the 'trans-' in the transabodal? Everyone knows that they are phantoms: they do not correspond to realities on the ground. (Modern international law texts I read in the 1990s said otherwise: they even told us that physical borders may be indicated by barbed wire—an empirically correct claim as applied to the borders of Egypt and Israel, although I also noted that barbed wire was used around military barracks inside the Egyptian capital.) Like any student of law, I was a good consumer of the notion that the earth may well be imagined to consist of upside cones or pyramids, where the surface is the land of a nation, thinning into a point at the center of the globe (thank Holland's Hugo Grotius (d. 1583-1645); physical borders go even deeper into the ground, and of course, there are also marine borders, the contesting of which led to international law cases, especially in Europe, where land is tight and irregular). Suspending this busy and often confused notion of borders, one must submit that the difference between two societies is clearest and most easily articulated when one identifies

difference in customs, which find their way to laws. In the next section, Bartolus (1313-1357) will be our guest to illustrate this point.

8

Borders

The modern notion of national borders is foreign to superstates, such as the one Shaybānī was attempting to help his governor-advisees rule. There they are, a bit surprisingly, closer to medieval European notions of borders among cities. Bartolus, a man of the law school of Perugia, always taken to be the earliest lawyer to dabble with questions of law's jurisdiction—which modern national laws enshrined as private international law; in other words, laws of a nation's sense of the jurisdiction of its courts when an international element is involved—considered jurisdiction and the defense of “ignorance of the law” on reasonable and pragmatic grounds:

I ask what about delicts. If a foreigner does a wrong here shall he be punished according to the statutes of this city? ... Let us put it broadly: either what he did in this city is wrong by the common law, then he is punished according to the statutes or custom of this city...or it was not a wrong by the common law, and then either the foreigner had lived so long in the city that he really ought to know the statute, and then it is the same case, or he had not lived there long, and then the act was either commonly prohibited by all cities (as, for instance, that he should not carry grain outside the territory without license from the government, which is commonly prohibited throughout all Italy), and in that case he should not allege ignorance as a total excuse..., or it is not so generally prohibited, and then he is not held unless he knew of it. ... There is now a text [he means a legal authority] for this, where an ignorant man is not held unless his ignorance was gross and supine.⁴²

Similar principles on reasonable and unreasonable claims of the ignorance of the law are found in Shaybānī's *Aṣl*. More saliently, Islamic law's main claim is directed at Muslims within an Islam-abode. It is clear, for example, that two diaspora Muslims cannot rely on the protection of Islamic law. This would be true both outside of the borders of lands governed by Muslim governments and if the case was brought back to Muslim lands for consideration by a Muslim judge.

Moreover, a Muslim whose rights were violated outside the Islam-abode is not expected to act as if he were an independent state, fighting back or employing trickery to regain his rights. Shaybānī believed that when a Muslim individual makes a commitment to a non-Muslim state, this commitment could not be breached by the same individual, even if the state itself violates it. A

series of questions goes as follows. ('I' indicates interlocutor and 'MS' Muḥammad al-Shaybānī.)

I: What if a Muslim's concubine is seized by an enemy, while her [Muslim] owner was allowed to visit this land as a merchant or based on some kind of agreement (*aman*), is he allowed to take her away [by force or trick]? MS: I would not recommend that (*akrah^u lah^u dhālik*). I: And you would not allow him to cohabit with her? MS: Yes. I do not recommend it. I: Why? MS: Because they seized her. I: What if she was free, a mother (*umm walad*; who cannot be sold and is automatically freed upon the death of her owner), or stipulated to be freed upon his death (*mudabbara*), or even his wife? ... MS: In all these cases, he is allowed to take the woman (*kull^u shayⁱⁿ min hādha fa lā ba'sa an yasriqah^u*)...don't you notice that if they [those who seized her] were to convert to Islam, they would keep the concubine, with no recourse to her owner, but the free and all those whose freedom is pending upon their owner's death are to be returned to their families?⁴³

Ihrāz is the bottom line, entailing legal control over an object or a human being. Shaybānī allows the soldier to enjoy spoils only after total control over them is attained, when this *ihrāz* is fulfilled after the land of war is left behind, and the property is divided back under the control of a Muslim government (if the land is not annexed).⁴⁴

There are three reasons for Shaybānī's conclusions here. First, in questions dealing with non-Muslims, whether state actors or individuals across borders, Shaybānī always asks himself what would happen if the non-Muslim becomes Muslim, then reasons backward. This is already stated in the quoted text. Second, if Muslims were to seize the non-Muslim land where the purported breach of contract occurred, a blank slate of new rights and responsibilities ensues. We may state this as the principle that "war is due process"—a new legal reign allowing those who won the land to collect all its immovables, large movables, and all adults under the sovereign authority of the vanquished. Land, for example, is redistributed based on the decision of the winners. The third and last reason is that an individual has no sovereignty that parallels the sovereignty of the state that did him injustice. In many legal scenarios that follow this case, individual soldiers are restricted from appropriating anything from lands they conquered in small skirmishes without the permission of an entitled Muslim leader.

The law of the land is a familiar modern expression. In the US, a particular rhetorical value is acquired by pointing to the federal constitution as the law of the land, because it proves a single legal document of jurisdiction across all states in the union, which state law cannot countervail. The law of the land in a given state is what the state's legislative authority imposes and adopts

as law. The modern state also imposes a truncated version of its laws over foreign residents in it.⁴⁵ But the law of the land may also be irrelevant to the case at hand. In a modern context, if an English court has to consider the validity of a contract between two Englishmen living in France to sell goods situated in Paris, they would certainly have to apply French law.⁴⁶ The expectation that the two Englishmen living in France and applying their trade activity to French merchandise will comply by French, as opposed to English, law certainly appeals to a simpler logic, where an economic dealing is expected to be governed by the laws of the land of the economic activity itself. Even in matters of trans-state trade (*buyū* ‘, *sharika*) and trans-state deposits (*wadā’i* ‘), Shaybānī was stricter in stipulating a government authority’s access to enforcement of the law within its land. If he was relaxed about including multiple nations in his private and public laws, Shaybānī was uncompromising about excluding laws of other lands from his legal reasoning.

A now growing area of law, called preventative criminal law, which addresses fears of terrorism in Europe and the US and allows preemptive justice, offers another reference for conceptual clarity. While these new laws have precedents in unexpected areas, such as so-called sexual grooming in UK laws (situations where sexual predators are considered on the verge—but not actually culpable yet—of violations of minors), they signify a turn in the limits of trust in the power of standard national and international legal provisions of protection. The point of these discussions is determining when preempting an illegal activity is justified.⁴⁷

Shaybānī’s legal doctrines in the area of preempting violations of the law are intricate. An individual may preempt an attack on his body or property by either local thieves or invaders of his land:

Should he fear being killed or maimed...he would be permitted to preempt their action This is based on a preponderance of evidence; wouldn’t it be permissible for you, if you found a man drilling a hole in your home from outside, or someone who entered your home with a sword at night or from a hole in your home wall, which he made, and you feared his attack on you by the sword, and that was your best sense of the likely (*akthar ḡannik wa ra’yik*), wouldn’t you be permitted to kill that person...⁴⁸

Yet, the population of a town fully converted (from Islam) and later conquered (by Muslims) could not be captured, as long as safety among the population was dominant before its re-conquest by a Muslim force.⁴⁹ And the same freedom is afforded to a protected (*dhimma*) group that violated the terms of their agreement with a Muslim government, as long as safety dominated in the town after the violation of the terms and before its conquest by Muslim forces.⁵⁰

9

Beyond Legal Death

One Achilles heel in Shaybānī's theorizing was how legal death could be reconciled with actual religious affiliation, which is a matter for the hereafter as well as for social standing within a religious community. A test of Shaybānī's interest in the affairs of non-Muslims is further provided in his discussion of religious conversion within the same family. In the following discussion, inheritance laws are under consideration. These laws have shillyshalled between 'property' and 'personal status' categories. The scenarios also involve apostasy and dietary laws.

Inq.: What if an underage boy, who has not hit puberty, abandons Islam; would you execute him? Ans.: No. Inq.: What if he hits puberty after conversion? Ans.: I would place him in jail but not execute him, because he never embraced Islam as an adult. Inq.: What if this boy abandons Islam after being capable of reasoning but before biological puberty; would you allow his father to inherit from him, and would you allow for him an Islamic funerary prayer? Ans.: According to a standard of consistency (*qiyās*), yes, but I would not do that, because it is too abhorrent (*li-fuḥshih*). I would not allow his slaughtered animal to be consumed by Muslims, nor an Islamic funeral offered, nor his property to be inherited by Muslim relatives. Inq.: What if a Zoroastrian boy who could also reason but has not reached biological puberty converts to Islam; would you consume his slaughtered animal and offer an Islamic funeral for him? Ans.: Yes. Inq.: Would you allow him to inherit his Zoroastrian father or allow his father or mother to inherit from him? Ans.: No. This is what Abū Ḥanīfa and Muḥammad (Shaybānī) hold, and it was Abū Yūsuf's early view. Abū Yūsuf then said: A boy's decision to convert to Islam is acceptable; a boy's decision to abandon Islam is not.⁵¹

In Ḥanafī law, *istiḥsān*, or exception to the standard of consistency, is allowed to operate when an important consideration has to be taken into account. Why was *istiḥsān* allowed to operate in considering the case of a boy suspected of abandoning Islam: ruled not a Muslim as far as the implications of the funeral prayer, the permission of consuming his slaughtered animal, and inheritance laws, but extended to a judgment of apostasy? This is the easy one. Apostasy punishments are not applied because these tend to require a higher standard of evidence and are regularly decided with leniency. The rest is treated with strictness. But the case of a Zoroastrian underage boy is harder to regulate. Both Abū Ḥanīfa and Shaybānī applied leniency in the funeral and dietary laws, but they left inheritance laws aside. The deceased had to be known as Zoroastrian to inherit and be inherited by his Zoroastrian family members.

Shaybānī's invocation of *istiḥsān* in the case of near adulthood children also applies in another area, where the conversion of a near-adult to Islam liberated him from bondage to non-Muslims, as if he was an adult. Shaybānī only stipulates apparent capacity to reason and to understand what it means to be a Muslim.⁵² On his general principle, the sale of a Muslim slave who is owned by a non-Muslim is compulsory, though at market price. Incidentally, non-Muslims buy and sell wine and pig products, from which Muslims are prohibited. Shaybānī prohibits them from trading in usurious transactions⁵³ and even the sale of carrion and blood.⁵⁴

No legal structure is fully free of a slant, and Shaybānī's is no exception. What strikes me as worthy of reflection is the extent to which modern legal cultures continue to be in denial about the need of religious and ethnic groups for protection that is afforded to the group, not only their members as individuals. Muslims would benefit from acknowledgement that they stand as a group, affected by verbal abuses that are hurled regularly on television and in the public sphere, especially but not only after the attacks that are marketed as 'Islamic' terrorism. If their rights as a group were to be taken into account against the rights of Islamophobes to speak their mind, things would have gone in a better direction. It is strange that one could even begin to wonder whether a Christian or a Zoroastrian under Shaybānī's legal regime in eighth-century Iraq might enjoy a liberty that a Muslim in twenty-first century America could not.

Conclusion: Shaybānī Today

Shaybānī is not a new topic. We have heard a lot about him. He is Abū Ḥanīfa's prize student, a student-turned-antagonist of Mālik b. Anas, a confidant of Harun al-Rashid. Some of us may even know that he was heavyset (less politely, fat), that he had fair skin, among other little details of his life and personality. Yet, I doubt that many people who have firm opinions of Shaybānī read much of his *al-Mabsūṭ*. It is long, and its books (tracts) are not of the same quality (they were not edited to the same degree). Scholars of Ḥanafī law who spend a lot of time reading these works complain about uncertainty as to which voice is speaking: whether it is the master, Abū Ḥanīfa; the older student, Abū Yūsuf; or Muḥammad b. al-Ḥasan al-Shaybānī himself.

It is, in any case, a set of fascinating texts, sure to surprise those accustomed to late Ḥanafī legal commentaries. They did surprise me regarding the type of legal theory operating in them. They are free of the presumptions of jurists who speak of rigid principles of "rationale" and the text and subtext of the Qur'an and the Sunna. Their interest in consistency is limited to the immediate needs of legal explanation. Their occasional dialogical form makes a reader participate in imagining solutions to practical problems. A focused reader must stop each few pages, in some cases every other page, to ponder an insight; some pages raise doubts about claims commonly traded as foundations

of the field of Islamic legal history. Finally, Shaybānī's tracts don't exude of casuistry; rather, they demonstrate a degree of liveliness and responsiveness to social reality—perhaps a sensibility needed today as a foundation for any serious conversation about the nature of law and its role in a Muslim society.

A final word. One thing reading Shaybānī teaches me, a fifteenth/twenty-first century reader no less, is that a good jurist never expects an individual or a community to agree to changes in people's minds (based on whatever theory of freedom) that would change legal positions. In other words, I could not agree (today) to a choice C to be made by agent A—whether this choice be one regarding their identity, a contractual or non-contractual commitment, or any other kind of choice—before this choice is made. A social and political contract ought to be made with clear expectations about what communities and their members believe. (Accommodating past and present choices is hard enough; adding rights to be generated based on future choices to the contract goes beyond the human, all too human, capacity of a jurist, and hence ought to be viewed with suspicion.) In this essay I hope I succeeded in making the case that *al-Mabsūṭ* merits a contemporary reading with a view to the tangled relationship between norms and consent.

Appendix: Fifty-Seven Tracts (and their place in the 2013 edition's twelve volumes)

I

kitāb al-ṣalāt—Prayers

II

kitāb al-ḥayḍ—Menses

kitāb al-zakāt—Alms

kitāb al-ṣawm—Fasting

kitāb al-taharrī—Laws of Caution

kitāb al-istiḥsān—Subtle Reasoning

kitāb al-aymān—Oaths

kitāb al-buyū'—Sales

kitāb al-ṣarf—Currency Exchange

III

kitāb al-ṣarf, cont'd—Currency Exchange

kitāb al-rahn—Pawns

kitāb al-qisma—Shares and Divisions

kitāb al-hiba—Gifts

kitāb al-ijārāt—Hires and Rents

IV

kitāb al-ijārāt, cont'd—Hires and Rents

kitāb al-sharika—Partnerships
kitāb al-mudāraba—Money-Effort Partnerships
kitāb al-riqā'—Nursing
kitāb al-ṭalāq—Divorce

V

kitāb al-ṭalāq, cont'd—Divorce
kitāb al-'itq fī al-maraḍ—Manumission in Illness & on Deathbed
kitāb al-'itq—Manumission
kitāb al-ṣayd wa al-dhabā'ih—Hunting and Slaughtering (Dietary Laws)
kitāb al-waṣāyā—Testaments
kitāb al-farā'id—Inheritance

VI

kitāb al-farā'id, cont'd—Inheritance
kitāb al-mukātib—Indentured Slaves
kitāb al-walā'—Freedmen
kitāb al-jināyāt—Crimes against the Body
kitāb al-diyāt—Blood-money

VII

kitāb al-diyāt, cont'd—Blood-money
kitāb al-dūr—Borders and Abodes
kitāb al-ḥudūd—Specified Punishments
kitāb al-sariqa—Theft
kitāb al-ikrāh—Coercion
kitāb al-siyar—War
kitāb al-kharāj—Land Tax I
kitāb al-'ushr—Land Tax II: Tithes
kitāb al-da'wā—Lawsuits & Claims

VIII

kitāb al-da'wā, cont'd—Lawsuits & Claims
kitāb al-shirb—Water Sharing
kitāb al-iqrār—Confessions
kitāb al-wadī'a—Safekeeping Agreements
kitāb al-'āriya—Borrowing
kitāb al-ḥajr—Interdiction
kitāb al-'abd al-ma'dhūn—When a Slave is a Business Deputy

IX

kitāb al-'abd al-ma'dhūn, cont'd—When a Slave is a Business Deputy
kitāb al-shuf'a—Preemptive Actions

kitāb al-khunthā—Gender Ambivalence

kitāb al-mafqūd—The Missing

kitāb ju'l al-ābiq—Runaway Slaves

kitāb al-'aql—Blood-money II

kitāb al-ḥiyal—Stratagems

kitāb al-luqṭa—Missing Objects

kitāb al-muzāra'a—Sharecropping

X

kitāb al-muzāra'a, cont'd—Sharecropping

kitāb al-nikāḥ—Marriage

kitāb al-ḥawāla wa al-kafāla—Money Transfers and Guarantees

kitāb al-ṣulḥ—Settlement

XI

kitāb al-ṣulḥ, cont'd—Settlement

kitāb al-wakāla—Representation, Deputizing, and Power of Attorney

kitāb al-shahādāt—Testimonies

XII

kitāb al-rujū' 'an al-shahādāt—Retracting Testimonies

kitāb al-waqf—Trusts

kitāb al-ṣadaqa al-mawqūfa—Charitable Endowments

kitāb al-ghaṣb—Usurpation

¹ With Boynokalin, during a lengthy Istanbul stay, I discussed the editor's occasional frustration with the uneven quality of the texts of *al-Mabsūṭ*, which led him to start working on an edition of the work of al-Hakim of Marw (who died in Rayy, like Shaybānī before him), beginning by collecting all the work's manuscripts. Scholars of Ḥanafī law believe that the mediation of al-Hakim al-Marwazī was decisive in the reception of Shaybānī's fifty-seven tracts.

² H.F. Jolowics, *The Roman Foundation of Modern Law* (Oxford: Oxford University Press, 1957), 8.

³ Reasonable doubt arises as to whether he drew more on Abu Yusuf than on Abu Hanifa in his years in Kufa, given that Abū Ḥanīfa was in prison during this time. I am indebted to Khalid Blankinship for alerting me to this point.

⁴ Wolfgang Kaiser, "Justinian and the Corpus Iuris Civilis," in *The Cambridge Companion to Roman History* (Cambridge: Cambridge University Press, 2015), 121 (on the Codex Theodosianus); 122 (on law schools).

⁵ James Gordley, *The Jurists: A Critical History* (Oxford: Oxford University Press, 2013), 20.

⁶ *Ibid.*, 56.

⁷ Note, however, that for the Romans, prison was used frequently as punishment. Andrew Lintott, "Crime and Punishment," in *The Cambridge Companion to Roman Law* (Cambridge: Cambridge University Press, 2015), 325.

⁸ John Richardson, “Roman Law in the Provinces,” also in *The Cambridge Companion to Roman Law* (Cambridge: Cambridge University Press, 2015), 45.

⁹ Šūfī Abū Ṭālib’s text makes different appearances, some of which lacks this section. A 1998 edition (Cairo: Dār al-Nahḍa al-‘Arabiyya) titled *Tārīkh al-Qānūn fī Miṣr* (A History of Law in Egypt) covers (at 253-268) mutual influences between Greco-Egyptian and Roman laws in Egypt before Islam and ignores the Sharia-Roman law question.

¹⁰ Patricia Crone, *Roman, Provincial, and Islamic Law: The Origins of the Islamic Patronate* (Cambridge: Cambridge University Press, 1987).

¹¹ *al-Aṣl* (Doha: Ministry of Endowments, 2013), 7:217, 218. All future references are to this edition.

¹² A hint at Justice Holmes’ (d. 1935) dictum, in his Common Law lectures of 1881, that the life of the law has not been logic; it has been experience. Oliver Wendell Holmes, *The Common Law* (Chicago: American Bar Association, 2009), Lecture 1, 1.

¹³ This anecdote, which would demonstrate Shaybānī’s care not to contradict established reports of the prophet Muḥammad’s statements, is used in polemics against him, as Boinokalin indicates. *al-Aṣl* (Doha: Ministry of Endowments, 2013), 1:29.

¹⁴ *al-Aṣl* (Doha: Ministry of Endowments, 2013), 4:552.

¹⁵ *al-Aṣl*, 2:403.

¹⁶ Toby Wilkinson, *Writings from Ancient Egypt* (London: Penguin, 2016), 133-136.

¹⁷ *al-Aṣl*, 7:268-420.

¹⁸ Ibn ‘Ābidīn, *Majmū’ Rasā’il Ibn ‘Ābidīn* (Cairo: Būlāq, 1889?), 2:66.

¹⁹ Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), 492-493.

²⁰ *al-Aṣl*, 7:5.

²¹ *al-Aṣl*, 4:62-63.

²² *al-Aṣl*, 4:159-161.

²³ *R v Brown* (The Crown against Brown) [1993] 2 All ER 75 House of Lords. Note the language of the decision: “Where A wounds or assaults B occasioning him actual bodily harm in the course of a sado-masochistic encounter, does the prosecution have to prove lack of consent on the part of B before they can establish A’s guilt under section 20 and section 47 of the 1861, Offences Against the Person Act?” Lord Templeman also states: “Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised. I would answer the certified question in the negative and dismiss the appeals of the appellants against conviction” (<http://www.e-lawresources.co.uk/cases/R-v-Brown-1993.php>).

²⁴ *al-Aṣl*, 4:550.

²⁵ *al-Aṣl*, 7:222.

²⁶ Badr al-Dīn al ‘Aynī (d. 855/13453), *al-Bināya Sharḥ al-‘Ināya* (Beirut: Dār al-Kutub al-‘Ilmiyya, 2000), 6:368.

²⁷ *al-Aṣl*, 4:551.

²⁸ *al-Aṣl*, 5:549.

²⁹ *al-Aṣl*, 4:549-572.

³⁰ *al-Aṣl*, 4:336.

³¹ Paul de Plessis, *Studying Roman Law* (London: Bloomsbury, 2007), 37. Ulpian’s death date invokes the starting point of what is known in Roman history as the crisis of the third century (235-284) ending with Diocletian’s ascent to the throne. The three centuries separating Ulpian from Justinian’s jurists and collectors of the Digest are those three centuries when the emperors battled to reconsider paganism and Christianity, ending with some modification of their legal system based on the new religion. The Sassanian empire’s birth date was also in Ulpian’s lifetime (224). The empire seems to have ended in an abrupt and strange manner. Its legal legacy remains a matter of speculation. Even if the Sassanians were to have their Justinian (an emperor

to collect some representative views of jurists), we would still debate their impact on Ḥanafī law. For a note on the only surviving book of cases (court cases and hypothetical cases) from Sassanian Persia, see *Encyclopaedia Iranica*, “Judicial and Legal Systems III,” <http://www.iranicaonline.org/articles/judicial-and-legal-systems-iii-sasanian-legal-system>.

³² *al-Aṣl*, 10:370.

³³ Abū Zayd al-Dabbūsī (d. 436/1032), *Ta’sīs al-Nazar*, ed. M. Dimashqī (Beirut: Dār Ibn Zaydūn; Cairo: al-Kulliyat al-Azhariyya, n.d.), 31-32. Sukru Ozen of Istanbul İlahiyat University contests this book’s attribution to Dabbūsī; he remains committed to its Ḥanafī authorship by a fifth/eleventh or early sixth/twelfth century author.

³⁴ Ibn ‘Ābidīn, *Majmu Rasa’il Ibn ‘Abidīn* includes the Treaties on Custom (*Nashr al-‘Arf*). I studied Ibn ‘Abidīn’s doctrine and some of its practices in *Islam, Modernity, Violence, and Everyday Life* (New York: Palgrave, 2009), chap. 4.

³⁵ al-Dabbūsī, *Ta’sīs al-Nazar*, 31.

³⁶ Touraj Daryaei, *Sassanian Persia: The Rise and Fall of an Empire* (London: IB Tauris, 2009), 77.

³⁷ *al-Aṣl*, 4:463.

³⁸ *al-Aṣl*, 7:483.

³⁹ *al-Aṣl*, 2:523.

⁴⁰ *al-Aṣl*, 4:22.

⁴¹ *al-Aṣl*, 4:17.

⁴² Joseph Beale, *Bartolus on the Conflict of Laws* (Cambridge, MA: Harvard University Press, 1914), 23-24. Authorities cited by Bartolus are omitted from this quote; note that ‘common law’ for him is the *lex commune*, made up of both Roman and Canon Law, commonly respected, that is, in European cities.

⁴³ *al-Aṣl*, 7:455-456.

⁴⁴ *al-Aṣl*, 7:437.

⁴⁵ A. John Simmons’s *Boundaries of Authority* (Oxford: Oxford University Press, 2016), 17.

⁴⁶ Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), 2.

⁴⁷ Ali Emrah Bozbiyander, “The Advent of Preventative Criminal Law: An Erosion of the Traditional Criminal Law” in *Criminal Law Forum: The Official Journal of the Society of Reform in Criminal Law* (Springer, 2017).

⁴⁸ *al-Aṣl*, 7:360.

⁴⁹ *al-Aṣl*, 7:504.

⁵⁰ *al-Aṣl*, 7:505.

⁵¹ *al-Aṣl*, 7:510.

⁵² *al-Aṣl*, 2:513.

⁵³ *al-Aṣl*, 2:514.

⁵⁴ Shaybānī’s laws are certainly most vulnerable in regulating the status of children. In *al-Aṣl* (7:457), he considers the case of a man from the unbelief abode who visits the Islam-abode on a valid permission (*aman*); then converts to Islam; and Muslims invaded his homeland. Would his children be considered Muslim? Shaybānī says they ought to be treated as *fay’*, the reason being that the man converted in the Islam-abode. Now, if this man were to convert to Islam in the unbelief abode, then enter the Islam-abode with his children, the family would all be *fay’* excepting the children, who are considered Muslim and should not be subjected to any control (*lā sabīl ‘alayhim*). Somewhat consistently with that ruling, the possessions of those with strong ties with the Islam-abode but who reside outside of it are treated as an extension of the Islam-abode upon their seizure. Any part of this person’s property that is deposited with a resident of the unbelief abode is also *fay’*, unless deposited with a *dhimmī* with relations in the Islam-abode (people or government) or a Muslim, in which case it must be returned. The money is as good as any property in the unbelief abode, when it is controlled by its residents; but of *dhimmīs* with

ties to the Islam-abode or with Muslims, it is as good as belonging to the Islam-abode (and hence it is protected).