

The Islamic Secular and the End of History: A Reply to Professor Mohammad Fadel

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In 1989 and again in 1992, Francis Fukuyama famously announced the “End of History.” Modern men and women could finally terminate their search for humanity’s optimal political (and economic) arrangement. The modern West had at long last delivered in the form of liberal democracy (and market capitalism). I was recently reminded of this thesis in reading Professor Mohammad Fadel’s review of *The Islamic Secular*. Alongside his own vision of Islamic law and legal history, Fadel has a clear set of ideological commitments, at the center of which lay the normative status of the modern, secular, democratic state (mediated through the political liberalism of John Rawls) and legal monism as this state’s basic operating structure. These (and other) features of history’s *terminus ad quem* contribute majorly to the interpretive prism through which he reads *The Islamic Secular*, which results in the book’s actual thesis often taking a back seat to Fadel’s preferred narrative.

Fadel begins by flagging *The Islamic Secular*’s “conceptual thickness” which, according to him, “risks rendering it inaccessible to the broad, non-specialist public whom I believe is Jackson’s intended audience” (F, 208). Fair enough. But Fadel is a specialist for whom “conceptual thickness” should be par for the course. Rather than engage with the book’s conceptual richness, however, he explains that it is “difficult to write a concise review of the book’s principal points” and that he will thus limit himself to “certain themes the author pursues in the book in an attempt to describe Jackson’s central point” (F, 207-08). He abandons the standard approach of proceeding chapter by chapter. By contrast, I shall

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try to proceed, as far as is organizationally feasible, page by page, to avoid the appearance of responding only to those aspects of Fadel's argument to which I find it convenient to respond.

Before proceeding, however, allow me to rehearse two points that go to the heart of *The Islamic Secular* and whose failure to appreciate will result in the book's main ideas being overlooked or misinterpreted. First, the book is first and foremost about how Islam-cum-*shari'ah* relates to the term "secular," a foundational descriptor and constituent of modernity's lexicon and mindset. The late Shahab Ahmed eloquently summarized the centrality and function of this term as relates to Islam when he wrote in *What is Islam?*: "Is x religion and therefore Islam, or is x secular and therefore not-Islam?" In other words, can Muslims legitimately pursue God's pleasure through 'secular' thoughts and actions? Or are what might be deemed 'properly religious acts' the only avenues to pleasing the God of Islam? Of course, the answer depends on one's understanding of "secular" and "religious." *The Islamic Secular* assumes the West enjoys no monopoly on the meaning of these terms and puts forth a definition of "secular" that draws on the concept of what scholars of religion refer to as "differentiation." Differentiation is a mode of the secular that neither displaces God nor seeks to obliterate religion but simply circumscribes certain areas of concern (*viz.*, politics, science, the economy) as areas the determination of whose concrete *substance* (as opposed to salvific *status*) revelation is assumed *not* to speak authoritatively.

In their theory of the methodologies undergirding the interpretation and application of *shari'ah*, that is, *uṣūl fiqh*, pre-modern Muslim jurists consistently separate *shar'i* disciplines and metrics of assessment from non-*shar'i* disciplines and metrics of assessment. They identify the determination of the concrete substance of Islam's 'salvific' or 'legal' rules (*aḥkām shar'iyyah*/ sg. *ḥukm shar'i*) as predominantly *shar'i* enterprise, in contradistinction to such non-*shar'i* disciplines as economics, traffic laws or mathematics, whose substance is *not* determined by the revelatory sources of *shari'ah*. In making this distinction, I argue, Muslim jurists were effectively imposing boundaries on *shari'ah* as a *metric of assessment*, which amounts to "differentiation" in the form of limits on what revelation-cum-*shari'ah* can speak to concretely and authoritatively. Mathematics (as a discipline), for example, cannot be known or assessed *qua* mathematics based on *shari'ah*, its metrics or its sources. Rather, to assess a mathematical formula *qua* mathematical formula (beyond the 3 + 7 mentioned in the Qur'an [2:196]), one needs a non-*shar'i*, mathematical metric of assessment. Thus, for example, in his foundational text on algebra, *Kitāb al-Jabr wa al-Muqābalaḥ*, the 3rd/9th century al-Khawārizmī

cites not a single Qur'ānic verse or Prophetic *ḥadīth* to back any formula or explain any diagram.¹ Similarly, one relies upon empirical rather than *shar'ī* sources to determine the position of the sun in sky, despite the importance of this determination to the quintessentially religious act of prayer. In sum, mathematics and determining the sun's position in the sky are differentiated, non-*shar'ī*, 'secular' enterprises. And the 'secular' in Islam, or the "Islamic Secular", simply refers to differentiated, non-*shar'ī* rules or assessments executed in the interest and the name of Islam.

Meanwhile, "religion" (read: Islam) according to the Islamic Secular, is defined not as *shar'ī'ah* but as an orientation towards life lived in conscious awareness of the ubiquitous gaze of the God of Islam, which is boundless and thus inclusive of both *shar'ī'ah* and non-*shar'ī*, differentiated enterprises. Thus, al-Khawārizmī, for example, opens his work on algebra with a benediction to God and prayers upon the Prophet and explains the importance of this enterprise for adjudicating the everyday transactions of Muslims. "Religion," on this understanding, consists of the combined elements of *shar'ī* and non-*shar'ī* modes of thinking and acting, and the Islamic Secular ultimately constitutes a "religious secular." In other words, a human act, can be both 'secular' (i.e., differentiated) and religious / Islamic at the same time. And God's pleasure can be pursued through thoughts and actions that, outside this Islamic framing, might be thought of as "secular" in the reigning Western sense of "non-religious,"

Pursuing God's pleasure begins with adopting Islam-cum-*shar'ī'ah* as one's basic standard of behavior and orientation and proceeds to instantiate-cum-supplement this commitment through the necessary non-*shar'ī* auxiliary deliberations — common sense, mathematics, astronomy, and the like— all of these entailing metrics of execution and assessment *beyond* those of *shar'ī'ah*. In other words, what is needed in the case of mathematics (to calculate *zakāt* (alms) for example) is to know not that a proposed conclusion is "permissible," or *mubāḥ*, but that it is mathematically "correct." "Correct," however, is not (in this context) a *shar'ī* metric: to say that $27 + 37 = 54$ may be "incorrect" but perfectly "permissible," *shar'an* (as a teacher might see fit to include on a multiple-choice math exam). Indeed, one is under no *shar'ī* obligation to know that $27 + 37 = 64$. The argument of *The Islamic Secular* is simply that the metrics for producing and assessing relevant, non-*shar'ī*, auxiliary enterprises

1. Muḥammad b. Mūsā al-Khawārizmī, *Kitāb al-jabr wa al-muqābalah*, ed. 'A. M. Mashrafah - M.M. Aḥmad, Cairo: Paul Barbey Press, 1937. In discussing inheritance, e.g., he does assume the basic Qur'ānic shares as a point of departure, but this is entirely separate from the mathematics that determine the outcome of the cases he discusses. The same applies to his occasional reference to the "position of Abū Ḥanīfa."

are both critical and indigenous to Islam, even though, substantively speaking, they routinely fall *outside* what can be known based on *shari'ah's* *shar'i* dictates or metrics. Of course, a full appreciation of *The Islamic Secular* requires familiarity with more than these two insights. But Fadel's overlooking these two in particular appears to contribute significantly to his reading of the book.

Fadel states early on, that I reject the idea that everything "Islamic" is "determined by a jurisprudential logic impervious to non-jurisprudential, i.e., secular, reason" (F, 207-08). He goes on to state that "most of the debate [with Jackson's interlocutors] takes place on the terrain of this Islamic secular [*sic*] and not, the *Islamic* as such" (F, 2, 208). There are two issues here. First, Fadel seems to equate "Islamic" with "*shar'i*," as a result of which he depicts the Islamic Secular as neither Islamic nor focused on the "Islamic as such" (because the Islamic Secular is not *shar'i*). But this contradicts the fundamental thesis of the book, which is that the "Islamic" is *not* equal to the "*shar'i*," and the "Islamic Secular" can be and is *fully* Islamic, even as a non-*shar'i* enterprise. Second, I never stated or implied that jurisprudential logic is impervious to "non-jurisprudential" or "secular" reason. In fact (and we will see this more concretely below) I state explicitly that the non-*shar'i*, differentiated, Islamic Secular and the *shar'i*, revelatory and jurisprudential *routinely* and *necessarily* interpenetrate (*I.S.*, 236).

On the same page, in explaining my choice of the phrase "Islamic secular" [*sic*], Fadel ignores my explanation (laid out in the Introduction and Ch. 1) and suggests an understanding that is not only external to my vindication but also misleading. According to him, I have "two principal reasons for this neologism" (F, 208). The first is to avoid totalitarian conceptions of *shari'ah*. He claims that I believe that totalitarian understandings of *shari'ah* are the "natural outcome of conflating two distinct notions": 1) that nothing is outside the purview of divine judgment; and 2) that all Muslims, indeed all of humanity, are under an obligation to submit to divine law (*hukm allāh*)" (F, 208). From here he observes that I seek to avoid totalitarian notions of *shari'ah* "by placing strict limits on what ought to be considered a rule of divine law in the *shari'a*, giving careful attention to the formal structure of what constitutes a *hukm*, a 'rule'" (F, 208). On the surface, this is all fine (except his attributing to me the claim about all humanity). But Fadel fails to mention that the "strict limits" placed on the *hukm shar'i* were the work not of Jackson but of classical and post-formative Muslim jurists. This conceals a major aspect of my thesis, namely that, in contradistinction to the situation in the modern West where the whole point of the secular was to impose limits on the authority of revelation-cum-religion *from without*, the Islamic Secular

is founded on the idea that Muslim jurists themselves imposed these limits on *sharī'ah* from within. If Fadel disagrees with my interpretation of juristic discourse here, it would have been useful for him to show why. But he all but ignores the jurists in this regard, which allows him to cast aspersions on the Islamic Secular as an ostensibly Jacksonian invention, without his being seen as questioning the *fuqahā'*.

Meanwhile, I made it clear that the restrictions the jurists imposed on the *ḥukm shar'ī* were not directed exclusively at *sharī'ah*'s rule-making capacity but spoke to the fact that *sharī'ah* routinely does not provide instruction on how to *instantiate* in real space and time many of the rules it does dictate. The limits Muslim jurists imputed to the *ḥukm shar'ī* were of both "horizontal" and "vertical" dimensions. The horizontal dimension spoke to issues on which *sharī'ah* did not propound an explicit rule, e.g., speed limits or zoning regulations. The vertical dimension spoke to the realm 'beneath' the *ḥukm shar'ī* (as I describe it) where the rule is clear but one must dig down beneath it in search of the means to its proper instantiation. In other words, even when *sharī'ah* issues an explicit rule (e.g., that it is obligatory (*wājib*) for a man to support his family financially) it routinely does not indicate *how* this rule is to be satisfied (e.g., how a man is to earn enough money to fulfill this obligation). Rather, for this, one must rely on deliberations 'beyond' or 'beneath' the surface of the rule (e.g., what kind and how much education one should pursue). Again, however, I clarified precisely in this context that "good," "profitable" "sufficient" and the like are not *shar'ī* metrics. Nor is architecture, for example, a *shar'ī* pursuit. Yet Muslims need to know that their structures are structurally sound, and perhaps even profitable, every bit as urgently as they need to know that they are "permissible" to construct and live in. And here, to capture the basic thrust of *The Islamic Secular*, we might return to Shahab Ahmed's insightful query: Is architecture religious and therefore Islam, or is it secular and therefore not-Islam?" How are Muslims to understand, in other words, the relationship between their religiosity and the many pursuits and disciplines that are not dictated by Scripture or its principled extrapolation yet are integral to the instantiation of Islam as praxis?

While Fadel acknowledges much of the foregoing in principle, he appears not to follow through on this understanding in practice. For example, according to him, "The Islamic secular [*sic*] ... is constituted in large part by a vast swathe of human activity for which there are no determinate rules of divine law but is nevertheless morally significant" (F, 209). This is partially true but also misleading. First, the Islamic Secular remains relevant in its vertical dimension even where there is an explicit rule, as we just saw with a man's duty to support his family financially. Second,

both vertically and horizontally speaking, the value or interest to be pursued or instantiated beyond the dictates of *sharī'ah*'s rules (or even within them) is not necessarily "moral." To be sure, a Muslim will ideally pursue only actions that are at least permissible (*mubāḥ*), *shar'an*, and in this sense, one may see all Islamic Secular acts as "morally significant." But the proximate, determinative value of an Islamic Secular act is routinely *not* its "morality" (i.e., permissibility) but the fact that it is "effective," "profitable," "beautiful" or whatever is appropriate to the interest at hand. That these acts remain within the scope of Islam as *dīn* (and even of *sharī'ah*) and are therefore *religious* acts does not alter the legitimacy of this *practical* (as opposed to purely *moral*) calculus. This is all fundamental to the Islamic Secular. And any interpretation of the latter that restricts the "religious" to the "moral" is simply a misinterpretation. So is the view that such constituents of the Islamic Secular as the sciences, arts, literature and the like are "not a part of the Islamic religion" (F, 209) (though Fadel equivocates on this point, depicting the Islamic Secular on the same page as "an essential part of Islam as a religion") (F, 209).

The second reason for my use of the term "Islamic Secular," according to Fadel, is to provide "an intellectual space" where Muslims can defend themselves against the hegemonic encroachments of the Western secular, which positions the religious and secular as binary opposites and promotes the subordination of religion to the secular, in the interest of facilitating for Muslims the pursuit of "worldly happiness" (F, 210). I am in general agreement with Fadel here. One important difference, however, is that, as a differentiated, 'religious secular', the roots of the Islamic Secular revert to the classical and post-formative Islamic juristic tradition, long before the advent of Western modernity. Indeed, my interest in the issue of *sharī'ah*'s boundaries goes back over thirty-five years to my book *Islamic Law and the State*, and even before that to my Ph.D. dissertation. As such, I would characterize the Islamic Secular more as a "corrective," "archeological" or "restorative" gesture than as "a kind of defensive strategy" (F, 210).

From here Fadel points to what he characterizes as the "paradox" represented by the idea of a thing being fully Islamic yet not determined by the normative sources of Islam. (F, 210). He states that he will postpone substantive treatment of this matter to his discussion of the relationship between the *ḥukm shar'ī* and the discretionary, policy-based rules of *siyāsa* (F, 210). In the interim, he treats several other issues, which I shall take in order.

He begins by noting that it is not clear how the Islamic Secular "functions to mediate pluralism in the context of the modern state" (F, 210). He picks up on my discussion of the "empire-state" (what he calls the "imperial state") as

the basic structure that Muslims inherited from Late Antiquity and how this structure and its accompanying logic simply contradict the rules and necessities of modern governance. While empire-states allowed different constituent peoples to be governed by different laws, the legal monism of the modern state summarily preempts this. For Fadel, this inheritance from Islam's pre-modern legacy streams a serious problem into the Islamic Secular. In his view, the modern state's legal monism is both immovable *and* a substantively good feature of modern governance. As such, he sees no point in contemplating any possibilities beyond this arrangement. He writes: "Jackson implies that it would be possible to restore features of imperial rule pursuant to which different communities would have their own legal regimes, but there is no account of how such a regime could effectively govern a diverse population, each with its own legal order, in pursuit of common aims" (F, 210). Oddly, he ignores not only Islam's long history of legal pluralism but also the concrete examples I provide (along with the scholarship back of these) of modern states that retain relevant aspects of empire-state legal pluralism: India, Ghana, Israel, Greece (I.S., 294). Meanwhile, he seems to equate "legislation" with "*shar'i* legislation" (or its functional equivalent in the West), overlooking the status of non-*shar'i* legislation and how it might alter the conversation about legal pluralism, non-*shar'i* legislation *not* being based on 'closed' *shari'ah* commitments and modes of argumentation to which non-Muslims cannot relate. According to him, modern states "coordinate the activities of a broad group of the population and create the conditions that make collective action feasible, be that for reducing pollution, pursuing economic development, building universities or exploring space" (F, 210). And this coordination requires "equality of citizenship" among the various groups in society. The Islamic Secular's tolerance of empire-state-pluralism simply contradicts, according to Fadel, the requisite homogenization implied and purportedly required by modern governance. Moreover, for him, not only must we take "equality of citizenship," seriously (F, 210), but to facilitate this arrangement, we need a concept of the secular that is "not bound to any particular religious conception" (F, 210).

There are several responses to this, all of which suggest that Fadel did not fully appreciate the argument of *The Islamic Secular*. First, he assumes that equality of citizenship is only constituted by *formal equality*, where all citizens are treated equally before a single law regarding whose promulgation all citizens are routinely *not* equal. (Minorities do not have the same impact on democratic lawmaking as majorities.) Fadel assumes not only that formal equality is necessary for modern governance but that everyone is equally served by it. I discuss this matter in the book and suggest that formal equality is but one form of equality, which has its limitations and drawbacks, as demonstrated by an example I borrow from Yale law professor Stephen Carter in his book *God's Name in Vain*.

Carter, a devout Christian, recalls the claim of an American prison warden that Muslim prisoners had no cause to complain because they had all the rights that Christian inmates enjoy. To this Carter replied: “No doubt they do. But they would prefer to have the rights they need as Muslims. The right to do everything that Christians are allowed to do is not the same as the right to follow God in their own way” (I.S., 296). From here I introduce the concept of “equality of respect” (a term I picked up from the legal scholar George Fletcher) as an alternative to formal equality. Fadel, however, either overlooks or ignores all this and then relies on his reader to do the same and conclude from this exclusion that formal equality is “equality,” period, to the exclusion of alternatives such as “equality of respect.” In this way, he is able to plant the idea that only his secular, modern, liberal state offers equality and that this equality is as good and as capacious as it needs to be.

Second, in suggesting the need for “some conception of the secular that is not bound to any particular religious conception,” Fadel appears to overlook the basic meaning of the Islamic Secular. It is true that the Islamic Secular is a “religious secular.” But it is also true that it represents a *differentiated*, ‘secular’ mode of religious thinking and acting. In other words, while Muslims’ non-*sharʿi* deliberations are religious in *orientation*, in actual *substance* they are routinely indistinguishable from those of non-Muslims, as al-Khawārizmī’s algebraic formulae would be from that of any non-Muslim mathematician *qua* mathematician. Both could come to common conclusions on mathematics without relying on or offending *sharīʿah* or religion per se. For, even as products of a religious *orientation*, the concrete dictates of Scripture may be no more determinative of the *substance* of conclusions arrived at in Islam’s differentiated realm than they are of those reached in the differentiated realm of non-Muslims. Precisely for this reason, as I state several times in the book, Islam would be no bar to Muslims and non-Muslims deliberating matters in this differentiated, ‘secular’ realm on an equal footing. Fadel, however, apparently does not appreciate the full implications of this *sharʿi* / non-*sharʿi* (revelatory/non-revelatory) distinction, which blinds him to the fact that the Islamic Secular is not “bound to a particular religious conception” as he understands the latter. Nor, therefore, would Islam as “religion,” necessarily entail the categorical exclusion of non-Muslims from public debate.

This leads to a third observation. In pointing up the importance of social cooperation and making “collective action feasible,” Fadel mentions explicitly “reducing pollution, pursuing economic development, building universities and exploring space.” Closely examined, all these enterprises

reveal themselves to be overwhelmingly non-*shar'i* in substance. I am not sure why *The Islamic Secular* did not suggest to him how cooperation between Muslims and non-Muslims could proceed on these and numerous matters without directly *appealing* to *shari'ah*, on the one hand, and without *offending shari'ah* on the other, in other words, without alienating Muslims *or* non-Muslims.

Fourth and finally, regarding the nexus between equality, societal cooperation and government efficiency, the Islamic Secular builds on the *shar'i* / non-*shar'i* distinction. And it is in the *shar'i* domain that the principle of "equality of respect" rises above that of "formal equality." Here, especially on the logic of what I term the "empire-state," non-Muslims can do many things that *shari'ah* forbids to Muslims, and they are not required to do many things that Islam requires of Muslims. Muslims, on the other hand, *mutatis mutandis*, have no say in determining the substance of non-Muslim's '*shar'i*' (read: scripturally mandated or 'religious') rules; and non-Muslims have no say in the *shar'i* rules of Islam. In the non-*shar'i* domain, by contrast, where we develop traffic laws, environmental regulations, set economic policy (distinct from its legal parameters) build universities and figure out how to explore space, non-Muslims are theoretically both eligible to participate *equally* in public debate and to be held *equally* to the rules and regulations that come of this. In other words, in the non-*shar'i* realm, in contradistinction to the *shar'i* realm, *formal equality* becomes, *mutatis mutandis*, the presumed default. This is what I refer to in the book as a mild paradox (or what many moderns might see as such): "non-Muslims' religion might formally exempt them from various aspects of *shari'ah* but not (certainly not to the same degree) from the 'general Islamic order'," (I.S., 289) consisting of the vast area of discretionary rules and regulations promulgated by the Muslim state-- not the jurists-- on the basis of predominantly non-*shar'i*, discretionary reasoning and intended, *mutatis mutandis*, to apply to everyone equally. Because Fadel overlooks the importance of the *shar'i* / non-*shar'i* distinction, however, he is unable to recognize the possibilities that emerge therefrom.

A similar oversight informs the example he adduces of Mehmet Ali Pasha in 19th century Egypt and his decision to resort to universal conscription. According to Fadel, this first required Mehmet to abandon the traditional Ottoman distinction between "the military class and the cultivators" and reduce them all to "equal citizens of the state" (F, 211). Why this should be a challenge to the Islamic Secular is unclear, as this decision, like the traditional Ottoman distinction it overturned, was clearly if not exclusively non-*shar'i* and discretionary, neither "military class" nor "cultivators" being categories dictated by the *shar'*. This is different, of course, from

the subsequent move to conscript Copts, which challenges the traditional *shar'i* rule barring non-Muslims from military service. But there are two points here. First, rather than as a discretionary response to a particular set of modern circumstances, Fadel sees in this a move towards “equality of citizenship,” as part of an ideological commitment to modern governance. Around the same time, however, America saw itself as perfectly committed to modern governance while explicitly maintaining the *unequal* citizenship of Blacks, as expressed, for example, in Black Codes and the Dred Scott Decision of 1857. Black admission into non-racially segregated combat units did not occur until after WW II, against the broader backdrop of a burgeoning civil rights revolution. Absent these historically contingent developments, the United States might have continued as a perfectly modern state, supremely committed (in its own mind at least) to “good governance,” despite its rejection of “equality of citizenship.”

Second, I am not sure why conscripting Copts necessarily represents “equality of citizenship”? Did Copts qualify for all the ranks and job-descriptions filled by Muslims? Were they promoted with the same speed and frequency? Why would Coptic conscription in Egypt be any more representative of “equality of citizenship” than was Black conscription in the United States? As for the *shar'i* side of the matter, I don't see how a change in *ijtihad* that overturns (or modifies) the traditional rule barring Copts from military service necessarily amounts to “equality of citizenship.” One reads, for example, in the views of such modern jurists as the late Shaykh Yūsuf al-Qarāḍāwī (d. 1444/2022) that it is permissible to set aside the *jizya* in exchange for non-Muslims' military service, without this in any way suggesting that a Copt or Jew could be president of a Muslim state.

Let me be clear. My point here is not to argue against “equality of citizenship” per se. It is to challenge Fadel's attempt to invoke this trope as an indictment of the Islamic Secular and to point out how this obsession drives him to impose meanings on *The Islamic Secular* that lead to (and or reflect) a misreading of the text.

From here, Fadel challenges my assertion that the Islamic Secular does not seek to domesticate religion. I confess that I did not fully understand his charge here. What I did understand led me to suspect that he simply did not take the *shar'i* / non-*shar'i* distinction seriously and instead proceeded to superimpose meanings grounded in presuppositions from without. Fadel writes that “much of the structure of *fiqh*, with its aversion to innovations (*bid'a*) in ritual practice, is itself an institutionalized procedure for disciplining religion... to protect it from superstition and corruption” (F, 211). This was meant to challenge my assertion that the Islamic Secular,

in contradistinction to the Western secular, has no interest in disciplining religion. But Fadel clearly has in mind a notion of “disciplining religion” that bears little resemblance to what I argued in *The Islamic Secular*. My point was simply that the Islamic Secular did not seek to augment the non-*sharʿī* realm at the expense of the *sharʿī* in the same way that the very *raison d’être* of the secular in the West was / is to expand the non-religious realm at the expense of religion. As for *fiqh* as an instrument of discipline, I plainly acknowledged this, referring specifically to *fiqh* as part of Islam’s “technologies of the self.” (I.S., 162). But *fiqh* as a “technology of the self” disciplines *souls* not religion per se, in terms of restricting religion’s relevance, and certainly not in the sense of privileging a non-religious secular over religion. Meanwhile, *fiqh* is a preeminently *sharʿī* enterprise, and it only confuses matters to invoke its disciplinary role against the claim that the non-*sharʿī* Islamic Secular does not aspire to discipline religion. As for superstition, it too would be a preeminently *sharʿī* concern about which the Islamic Secular *qua* Islamic Secular would have little to say, beyond the enterprise of devising discretionary means of standing against it. In other words, it would follow rather than lead *sharīʿah* in seeing superstition as a problem to be addressed. Fadel writes in this context that “Religion must be defended precisely because religious enthusiasm [and here he seems to have Hobbes in mind], that subjective component of religion that Jackson argues is a constitutive element of the Islamic secular [*sic*], is often little more than superstition, even if it is sincere” (F, 211).

Pace Hobbes, however, the Islamic Secular divides religion into *sharʿī* and non-*sharʿī* dimensions. As such, any such “enthusiasm” as might exist would be either *sharʿī* or non-*sharʿī*. If it is *sharʿī*, the *sharʿī* dimension of religion (Fadel’s *fiqh*, etc.) will rightly address it. If it is non-*sharʿī* — and I can only imagine what this might mean— too efficient, too orderly, too lethal? — this hardly amounts to “superstition” or *bidʿa* in any meaningful sense, most scholars restricting *bidʿa* to the *sharʿī* realm. Moreover, *fiqh* does not directly guide one to the appropriate calibration of these clearly non-*sharʿī* commitments (efficiency, orderliness, lethality). Ultimately, such calibration can come only as a product differentiated, Islamic Secular deliberation. None of this, however, amounts to Fadel’s notion of “disciplining religion”, which is clearly directed at the *sharʿī* side of religion.

Fadel also questions “whether the idea of the secular can be rehabilitated for use in describing the internal structure of Islamic thought” (F, 211). I’m not sure what to make of this. I laid out my vindications for my use of the term and tried in good faith to anticipate and respond to possible objections. Fadel only offers, however, a provenance argument against this (“secular” is European) along with the idea that Islam included

“happiness” as an organic part of its teachings, while Christianity, as far as he knows, did not (F, 211-212). As for provenance as an argument, if it excludes anything that was not an original product of Muslims, then, Islamic intellectual and institutional history would be impoverished beyond recognition, a point I raise in my engagement with Hallaq (I.S., 203-04). As for the status of “happiness,” the question the Islamic Secular addresses is not whether Islam sanctions happiness but whether this happiness can be conceived of and pursued as a ‘secular’ enterprise or must necessarily be conceived of and pursued as “religious,” in the sense of “*shar’i*,” if it is to be deemed Islamically legitimate? If happiness is secular (in the Western sense of non-religious) and can be pursued only as a secular pursuit, many Muslims may find no alternative to adopting a secular mode of quotidian existence. Conversely, if happiness can be pursued only through *shar’i* / ‘religious’ activity, or what *shari’ah* directly mandates, this will likely lead, on the one hand, to the over-*shari’atization* of Islam, as Muslims seek to legitimize their pursuit of happiness, and, on the other hand, to a corresponding degree of alienation from the Faith, as *shari’ah* ends up shouldered with tasks and expectations it cannot fulfill. Fadel seems to give short shrift to this problem.

From here Fadel moves to a discussion of “specialization,” by which he apparently means “differentiation,” and marvels that I did not “take advantage of ‘specialization’ within Islamic law to support his [my] arguments in favor of the Islamic Secular” (F, 212). He points to the standard distinction in Islamic law between “ritual” (*‘ibādāt*) and “transactional law” (*mu‘āmalāt*), noting that “*how* God regulated these different domains was fundamentally different” (F, 212, italics original). He references his own work in support of this, alongside Rashid Riḍā’s text on the Caliphate, where the latter is said to divide acts into 1) those whose purpose is to “draw near to God”; 2) those that impact “the moral dimension of social relations”; and 3) those that are “instrumental to the ends of the law,” the latter being “left to human judgment, to be determined in good faith and mutual consultation” (F, 212). Interestingly, rather than cite Riḍā’s Arabic text, so readers could trace this claim for themselves, Fadel cites an English translation (F, 212, nt. 7). At any rate, contrary to his intimation, I did not overlook the *‘ibādāt-mu‘āmalāt* dichotomy; I simply did not see it as a basis for “differentiation” (not “specialization,” as Fadel has it) (I.S., 465, nt. 32). The *‘ibādāt* and *mu‘āmalāt* are *equally shar’i* as salvific rules. Thus, this distinction could not be a template for the *shar’i* / non-*shar’i* division at the heart of the Islamic Secular.² As for Riḍā,

2 I shall ignore Fadel’s intimation that *‘ibādāt* are somehow more religious than *mu‘āmalāt*.

he died in 1354/1935. And I stated explicitly in my Introduction, that I would not even include modern thinkers as early as the Ottomans in the foundational portion of my argument but restrict myself to classical and post-formative jurists in order “to highlight the fact that the Islamic juristic tradition’s recognition of the Islamic Secular is not an early modern, reactionary phenomenon but has deep roots in the pre-modern classical and post-formative tradition” (I.S., 22).

At this point, Fadel returns to the so-called “paradox” represented by the idea that an activity can be simultaneously “subject to the moral principles of Islam, [sic] but is not constituted by the reasoning of the Shari’a” and what he claims to be my way of solving it (F, 212). He claims that I rely on formal developments in *uṣūl al-fiqh* “beginning with Fakhr al-Dīn al-Rāzī (d. 606/1210)” (F, 212-213). In fact, al-Rāzī came almost three-hundred years after the first theorists of *uṣūl al-fiqh* from whom I derive the seminal *shar’i* / non-*shar’i* distinction. And, as I observe, al-Rāzī was only the *systematizer* of this distinction, not its *source* (I.S., 101). At any rate, Fadel rehearses the doctrine that *shari’ah* is constituted by the combination of prescriptive rules (*aḥkām taklīfiyah*) and declarative rules (*aḥkām waḍīyah*), the importance of this being, according to him (or his interpretation of me), that “doctrines lacking these formal qualities were not legal rules, and therefore not part of the shari’a, even if revelation spoke to the issue in a general sense” (F, 213). He objects, however, that “it is not clear why rules that do not satisfy Rāzī’s idealized conception of the legal rule are not rules of the shari’a” (F, 213).

To explicate his point, Fadel turns to the common law distinction between a “rule” and a “standard,” noting that a rule may simply say “drive safely in view of prevailing conditions” and then leave individuals to adjust their actions, accordingly, followed by review of a court or other official regulator. He sees this as analogous to the example I cite involving the *shar’i* requirement for a man to support his family (F, 213). In the same way that a common-law-rule may not prescribe every detail of a driver’s action, while these actions still fall under the common-law-rule in question, *shari’ah* does not have to dictate *how* to instantiate every rule in order for a Muslim’s manner of instantiation to fall under the “rules of the shari’a” (F, 213). This is all relevant and not entirely without merit. But it subtly changes the subject and ultimately distorts the argument of the Islamic Secular.

A rule of *shari’ah* is “instantiated” when its relevant causes (*sabab*), prerequisites (*shart*) and impediments (*māni’*) are concretized (or deemed absent in the case of the latter) as facts on the ground. Obviously, the definition of these causes, prerequisites and impediments is provided by

the sources of *sharī'ah* and are in that capacity "*shar'ī*." The *means and manner* of empirically concretizing or confirming the presence of these constituents, however, is not dictated by the sources of *sharī'ah* and are in this capacity non-*shar'ī*. Now, when a Muslim concretizes the causes, prerequisites and impediments of a *sharī'ah* rule, his efforts fall "under the law," as part of the very instantiation of the rule itself, which remains in its instantiated form a rule of *sharī'ah*, this instantiated act being obligatory (*wājib*), recommended (*mandūb*), forbidden (*ḥarām*), discouraged (*makrūh*) or simply permissible (*mubāḥ*). The Islamic Secular never denies this. What the Islamic Secular asks, rather, is how much concrete instruction regarding the concrete instantiation of a rule does *sharī'ah* provide. And its answer is that *sharī'ah* provides little if any concrete instruction in this regard, which renders knowledge of how to concretize rules a non-*shar'ī* endeavor and *in this sense* 'secular', or outside the dictates or metrics of *sharī'ah*. The fully instantiated rule, however, as the amalgamated result of receiving a *sharī'ah* command and the effort to concretize it as a fact on the ground, is, again, simply a fully instantiated rule of *sharī'ah*, which, *in this sense*, obviously falls *within* *sharī'ah*. This is the perspective of the Islamic Secular.

For his part, however, Fadel seems to equate the *results* of the effort to instantiate the rule with the actual *instructions* on how to do so, seeing the law as equally instructive on each, even as he indirectly acknowledges that the common law — like *sharī'ah* — does not provide this concrete instruction. Ultimately, he restates the workings of the Islamic Secular in terms that, rather than add clarity to the concept, blur it out of focus. Throughout his depiction he never contemplates the central question at the heart of the Islamic Secular: Is the act of instantiation, because it goes beyond the dictates of *sharī'ah*, "secular" and thus not Islam; or is it "religious," as an attempt to respond practically to God's *shar'ī* commands, and thus Islam? Fadel might respond that by rendering this instantiation ultimately part of the common law (and by analogy part of *sharī'ah*) he is effectively declaring it to be religious, not 'secular'. But this too fails to capture the thesis of the Islamic Secular, according to which an act can be both religious *and* secular. This secular-religious nexus is clearly not what Fadel has in mind. And ignoring it clouds rather than clarifies the position of the Islamic Secular. At any rate, I am unable to see the "paradox" to which he refers in all of this.

I am equally unsure about the relevance of Fadel's reference at this stage to "unspecified (*mujmal*)" and "specified (*mufaṣṣal*)" rules, or "customs (*ādāt*)" and their relationship to *ijtihād* or the Prophetic *ḥadīth*, "the claimant must provide proof, and the party denying the claim must swear

an oath (F, 214). In none of this is the *shar'ī* / non-*shar'ī* distinction at the heart of the Islamic Secular assigned any role.

At this point, Fadel returns to his promise to discuss *siyāsa* and its relation to *sharī'ah*. Again, he disagrees with placing limits on *sharī'ah* as I have (according to him, building on al-Rāzī). He sees this not only as “overly formalistic” but as placing us “in a quandary with respect to how we should understand *sharī'a* governance, *siyāsa shar'iyya*, and the continued vitality of the detailed rules of *fiqh* in modernity” (F, 214). He bypasses my argument for why the term “*siyāsah shar'iyyah*” need not imply that *siyāsa* is a part of *sharī'ah* (I.S., 141-43). And he claims that I oscillate between describing *siyāsa* as internal or external to *sharī'ah*. What Fadel may be referring to here is the fact that I acknowledge that, as Frank Vogel (and others) notes, it is not always clear “whether (or when) *siyāsa* should...be understood as part of *sharī'a*” (I.S., 129). I add my own evidence to the controversy and, without declaring those who disagree to be “wrong,” come down on the side of excluding *siyāsa* from *sharī'ah*, on the argument that *siyāsa* operates on a logic and authority palpably distinct from and external to that of *sharī'ah*, further explaining why this is consistent with the thesis of the Islamic Secular. In this light, it is not clear to my mind, why Fadel is so categorical in affirming *siyāsa*'s inclusion in *sharī'ah* as part of his critique of the Islamic Secular.

Fadel recognizes my suggestion that identifying *siyāsa* too closely with *sharī'ah* runs the risk of “equating its [*siyāsa*'s] authority with bona fide, unassailable *shar'ī* authority,” which strengthens the grip of the state over the populace. Surprisingly, however, he dismisses the possibility of such conflation as “remote,” because “the ruler derives *siyāsa* authority from the general principles of the *sharī'a* in situations for which no specific textual evidence can be found” (F, 215). This is a strange argument. For, if the ruler can claim for his *siyāsa* policies the same binding and unassailable authority that backs *fiqh*, though these policies are based on subjective, discretionary insights in contradistinction to the concrete, transcendent, objective sources of *fiqh* (“objective” in the sense of being theoretically accessible to everyone), how is the risk of conflation remote? Stranger still is Fadel's overlooking this liability, despite having translated a seminal work by Shihāb al-Dīn al-Qarāfī (d. 684/1285), a major objective of which was precisely to address this vulnerability. The title of al-Qarāfī's work says it all: *Kitāb al-Ihkām fī Tamyīz al-Fatāwā 'an al-Ahkām wa Taṣarrufāt al-Qāḍī wa al-Imām* (*The Book on Perfecting the Distinction Between Legal Responsa, Judicial Decisions and the Discretionary Actions of Judges and Caliphs*).³

3 Fadel published it under the title *The Criterion for Distinguishing Legal Opinions from Judicial Rulings and the Administrative Acts of Judges and Rulers* in 2017.

Judges and rulers often rely on discretionary authority that should not, according to al-Qarāfi, be treated with the same deference accorded *fiqh* and the non-discretionary elements of judicial rulings, both of which recline on objective, *shar'i* sources. A judge for example —despite the obvious *shar'i* dimension of his authority— cannot claim that the *price* for which he sells an orphan's property is unassailable in the same way that his authority, as defined by *fiqh*, to *sell* this property is. Failure to recognize this distinction was for al-Qarāfi *not* a remote but an imminent possibility, representing precisely the kind of conflation he wanted to avoid. This would apply, of course, no less today than in al-Qarāfi's time.

Fadel continues, however, to argue for “the subordination of *siyāsa* to the *sharī'a*” (F, 215), by invoking the Ḥanafī al-Kāsānī (d. 587/1191) and the Mālikī al-Lakhmī (d. 478/1085) on the obligation to establish a legal system. According to him, their articulations of this obligation “illustrate nicely the ideal relationship between the *sharī'a* and *siyāsa*” (F, 215). *Sharī'ah* provides abstract injunctions, while *siyāsa* represents the authority delegated to the community to determine how to concretize these. A judge can summon defendants and force them to answer to complaints according to the rules of *fiqh*, even if his authority to do so ultimately extends to him purely by virtue of the ruler's *siyāsa*-authority. This is all fine. But the Islamic Secular neither denies nor questions such judicial prerogatives, even as it sees *siyāsa* as operating on an authority distinct from that of *fiqh*. Meanwhile, *pace* Fadel, the Islamic Secular does not assume that “a legal system” can be erected entirely through the *siyāsa*-based concretization of *fiqh* rules. *Maẓālim*, *ḥisbah* and *ta'zīr* clearly go beyond the rules of *fiqh*. In fact, in their works on governance the Shāfi'i al-Māwardī (d. 450/1058) and the Ḥanbalī Abū Ya'lā (d. 458/1065) speak of the necessity of *ijtihād 'urfī* (practical deliberation) in contradistinction to *ijtihād shar'i* (juristic deliberation), by which they refer to the act of deducing policy from the situation on the ground as opposed to simply concretizing or extrapolating from the sources of *fiqh* (I.S., 152). Meanwhile, other jurists note that *ta'zīr*, or discretionary punishments, can be applied even in cases where no *fiqh* rule is violated (I.S., 142). In fact, a ruler's discretionary act or injunction may be perfectly appropriate as a matter of *siyāsa* while plainly contradicting the rules of *fiqh*. We see this in the example of 'Umar I's banishing Naṣr b. al-Ḥajjāj from Medina because his good looks tempted the womenfolk. While approving this move *siyāsatan*, the Ḥanafī Ibn 'Ābidīn (d. 1252/1836) reminds us that, according to the rules of *fiqh*, “a person's good looks do not give rise to any obligation [or right] to banish them” (I.S., 142). All this is laid out in the section of the book on which Fadel focuses his critique of my view of the relationship between *siyāsa* and *sharī'ah* (I.S. 134-44).

Fadel insists further that my argument regarding *siyāsa* is “historically contingent” (F, 216) and “weakened” by the degree to which I rely on “particular pre-modern political institutions” (F, 217). He describes *siyāsa* as “the means by which the Muslim community pursues its *collective* freedom to pursue common aims” (F, 217, italics original). These common aims include, on the one hand, “all the obligations that the Shari’a describes as ‘collective (*furūd kifāya*)’” and, on the other hand, “the cultivation of all ‘important crafts (*al-ḥiraf al-muhimmah*)’” (F, 217). All this approaches the vision of the Islamic Secular. The main differences, however, are 1): whereas Fadel glosses over the question of *how* we come to know that a particular craft is “important,” implying that this falls to the jurists by default, the Islamic Secular explicitly assigns this to the non-*shar’i* jurisdiction of those who have specific knowledge of the crafts (which may include jurists) and how they fit into the overall scheme of Islam as communal praxis; 2) while the Islamic Secular identifies the act of identifying and pursuing “important crafts” as a religious act, even as it is also ‘secular’, we gain no such insight from Fadel; 3) the *shar’i* / non-*shar’i* distinction plays no role in Fadel’s analysis. Of course, Fadel could argue that if he is able to describe the workings of Islam-cum-*shari’ah* without the *shar’i* / non-*shar’i* distinction, then this proves that the latter is superfluous and can be ignored. But that would not explain the consistent practice among Sunnī theoreticians, going back a thousand years of drawing precisely this *shar’i* / non-*shar’i* distinction. Nor could it substitute for a fair and accurate description of the Islamic Secular.

It is not long, however, before we gain clearer insight into Fadel’s underlying commitment and what this contributes to his understanding of the Islamic Secular. He writes: “[T]he legal concept of the collective obligation [*furūd kifāya*] serves as the bridge between *siyāsa* and *fiqh* and places the state at the center of achieving these common aims because, in most circumstances, it is the institution best placed to organize how the community will pursue these collective ends” (F, 217). In other words, the state is the *sine qua non* of communal well-being. And anything that threatens or is insufficiently deferential to this premise must be domesticated, interrogated or possibly destroyed. Crucially, however, “the state” for Fadel, is not just any state. It is ultimately the secular, sovereign, legally monistic, liberal state that catapulted the modern West to achieving humanity’s long-sought ‘well-ordered society’. The only *shar’i* / non-*shar’i* distinction such a state will recognize is one that reduces to a “religious / non-religious” distinction, the former being the presumptive preserve of individuals in the private realm, and only the latter presumptively qualifying for a public role, with the state

deciding how far these presumptions go.⁴ This basic schema informs the remainder of Fadel's review.

Fadel suggests that I am suspicious of the modern state (F, 217) and that my separating *siyāsa* from *sharī'ah* has more to do with my own "political theory regarding the modern state than it does with the nature of the *sharī'a* and its relationship to the Islamic secular [*sic*]" (F, 217). I am not entirely sure what to make of this. I think it is legitimate to ask whether it is the state or the *ummah* that defines the normative relationship between *sharī'ah*, *siyāsa* and the state, modern, "Islamic," or pre-modern empire-state. I am also not sure how Fadel squares this charge with the evidence I marshal regarding pre-modern Muslim jurists' misgivings about this relationship, long before the advent of the modern state (*I.S.* 134-44). He seems to interpret anything that questions the state and the role he assigns it as hostility. But I do not know of any modern theorist— including Rawls! — who has not expressed misgivings about the modern state. To suggest that *The Islamic Secular* reflects the kind of "anti-state neurosis" attributed to Foucault is simply inaccurate. I state explicitly that Muslims may *accept or reject* the modern state -- *as it is* or in some modified form (*I.S.*, 216, 248). And I note the problems that legal monism poses for the *application* of *sharī'ah*, particularly (but not only) regarding non-Muslims, and how these problems might be mitigated or avoided by an arrangement more accommodating of legal pluralism. Such views constitute hostility towards "the state" only if the state is understood to be inherently inalterable and inalterably committed to legal monism. Fadel thinks it is and that this arrangement is the best one for Muslims in the modern world. Of course, he is entitled to his opinion. But it is hardly fair for him to force the square of the Islamic Secular into the circle of the secular, liberal, legally monistic, jurispactic state, lopping off in the process everything that does not fit and then claiming to have 'explained' the Islamic Secular on the latter's own terms.

Contrary to the view of those (especially many lawyers) who begin with the state, grant it ultimate authority and then ask how everything else can be fitted to this, the Islamic Secular does not assume that Muslims' *primary* socio-political relationship is with the state, even if that relationship may be in various instances the most consequential. As John Dewey noted, "the regulations which confront most effectively the lives of men who are not criminals, are not the laws formally declared by the

4 This is different from the role I impute to the Muslim state at *I.S.* 208, which is *not* based on a religious/non-religious distinction.

state in its capacity as government.”⁵ Unions, family, school principals, coaches, church-leaders, and custom may be far more determinative of the quotidian rules that define people’s everyday lives. For Muslims too, the primary relationship (after God) is with each other and the various substate actors, orders and associations that shape and give meaning and value to their daily existence: family, guild, neighborhood, clergy, mosque, workplace, etc. Here, the Islamic Secular brings clarity to the fact that the solution to the everyday challenges confronting Muslims often resides neither in *shari’ah* nor in the instantiation of *shari’ah* rules but in the non-*shar’i* innovations, customs, friendships, everyday relationships and cultural literacy that inform their lives. If a spouse is unhappy because their spouse is not romantic or ‘present’ enough, there is nothing that *shari’ah* can do about this: *shari’ah* does not teach romance or how to be ‘present’, at least not in a concretized, culturally sensitive enough way to make the difference. But communities can, through their collective non-*shar’i* energies, develop socio-cultural *norms* that reflect a healthy and welcome sense of romance and presence, and community-members can acquire a general cultural literacy that includes these, not unlike our assimilation of “manners.” None of this, however, is justiciable by a court, as there is no rule, no *ḥukm shar’i* (beyond *mubāh*, or “permissible”), to be adjudicated. The state, like *shari’ah*, remains marginal at best to the resolution of these issues, which are much closer to everyday life than the abstract *shari’ah*-rules adjudicated by courts. Part of the reason Fadel cannot appreciate the Islamic Secular is that his conceptualization of the state imputes no limits to the latter beyond which something other than its authority can be legitimately brought to bear on problems. Muslims often do the same with *shari’ah*.

Regarding the state and pluralism, Fadel characterizes my view of legal monism “as a negative feature of modern law” (F, 217). Drawing on my discussion of Robert Cover’s concept of “jurispathy,” he notes that I see “the capacity of modern legal institutions such as courts to destroy alternative sites of law... as representing ‘significant challenges to Islam-cum-*shari’a*’ insofar as it contributes to Muslims [*sic*] adopting the form of the modern state, with its tendency to become an ‘autocracy-legitimizing leviathan’” (F, 218). He claims further that I call upon non-Muslims to accept “a certain amount of subordination” as part of the price of being included in the legal pluralism that Islam extends to them (F, 218). Finally, Fadel claims that I impute pluralism to Islam as “an indispensable feature of the *shari’a*” (F, 218), whereas, according to him, this amounts

5 J. Dewey, “Austin’s Theory of Sovereignty,” *Political Science Quarterly*, 9/1 (1894): 31-52 at 48.

to “taking a contingent institutional feature of Islamic legal history and elevating it to a necessary and almost immutable principle of the shari’a” (F, 218). He suggests that I rely too heavily on the institutionalization of legal pluralism by the Mamlūk state, noting, for example, that by contrast “North Africa, Andalusia and West Africa certainly never entertained multiple schools of law” (F, 218).

First, I never said or suggested that “jurispathy” “contributes to Muslims [sic] adopting the form of the modern state.” What I said was that “I am alive to the problem of contemporary Muslim *regimes* taking the modern state-structure as a convenient, autocracy-legitimizing leviathan” (I.S., 197, emphasis added here). This was less a critique of the state *per se* than of the way that modern men and women of power have deployed it as a structure in the interest of consolidating and retaining power, a critique with which I believe many Muslims — and non-Muslims — would agree. Second, I cannot find where I said that legal pluralism *qua* legal pluralism comes with a price of subordination for non-Muslims. That non-Muslims live as socio-political minorities in majority-Muslim lands (not unlike Muslims in the West) means that they live in a socio-political context where the dominant culture *qua* dominant culture produces plausibility structures that may weaken if not overwhelm minorities’ sense that their perspective on life is normative or even normal. But this is hardly a function of legal pluralism. Fadel seems to intimate that the solution to this problem might be for minorities to drop or ‘transcend’ their attachment to *particular* senses of self in exchange for acceptance by the majority as ‘normal’, as simply “human beings.” This too, however, comes with a tradeoff that many minorities, even within the majority, such as Jews or Italians in the US, might deem equally if not more dyspeptic than “subordination.”⁶ As the singer James Brown (d. 2006) famously put it: “I’d rather die on my feet than live on my knees.”

Finally, regarding Fadel’s argument about the historical contingency of Islam’s commitment to legal pluralism, we might note that North Africans, Andalusians and West Africans were overwhelmingly Māliki. Like most groups, they likely sought to preserve the status of their tradition as unquestioned, normative and normalized throughout society (not unlike the reflex we see among traditionally dominant groups in America today). But one would be hard-pressed to find in *any* Māliki manual of *fiqh* a denial of the legitimacy of non-Māliki rules, including non-Māliki judicial decisions, even in a polity dominated by Mālikis. Again, Fadel’s

6 As we have come to hear in the US, “I’m not white; I’m Italian.” See M. F. Jacobson, *Roots Too: White Ethnic Revival in Post-Civil Rights America*, Cambridge, MA: Harvard University Press, 2006, 7.

argument here is particularly odd given his familiarity with the great Egyptian Mālikī jurist Shihāb al-Dīn al-Qarāfī, whose commitment to legal pluralism was so stark that he argued (in the same book that Fadel translated!) that judicial rulings that reflect views that are *disputed* among the schools of law are *more* inviolable than those on which there is unanimous consensus! If al-Qarāfī and the Mālikī school in general explicitly endorsed the principle of legal pluralism, how can what North African, Andalusian or West African Mālikīs did in their specific contexts and for their specific reasons be any less historically contingent than what the Mamlūks (or anybody else) did? This is not to mention the historical contingency that permeates the Islamic juristic tradition as a whole.

From here Fadel returns to Robert Cover and, as he puts it, the state's "need to control the surfeit of law that arises from pluralistic, community-based law-making ([what Cover calls] 'jurisgenesis')" (F, 219). As Fadel describes it, jurisgenesis "creates communities of subjective commitment." Jurispathy, on the other hand, curbs this activity and "attends to the good order of the world based on objective and enforceable rules" (F, 219). In other words, the state intervenes to curtail any plurality of law-making in the interest of producing the requisite uniformity to sustain a cooperative order. According to Fadel, jurispathy in Islam took the form of a "conflict of laws principle," according to which legal judgments could be overturned if they violated certain juristic criteria (F, 219) (not quite jurispathy to my mind). He acknowledges that an excess of jurispathy "results in the destruction of community" (F, 219) by denying groups the collective ability to self-define. And here is where my alleged "suspicion" of the state re-enters the picture: "Jackson clearly fears that if the state is recognized as having an organic relationship with the shari'a through *siyāsa* that it will be able to destroy the Muslim community's ability to generate norms for itself from the ground up" (F, 219).

Fadel intimates that my alleged fears here are unfounded, even as he expresses no reservations about the state's jurispathic powers being mediated through *siyāsa* as a constituent of *shari'ah*, in which capacity it can pretend to the latter's unassailable authority. He suggests that my "anxiety about the state has less to do with the innate features of the shari'a than with doubts about how to draw a principled line between the public— in which the jurispathic efforts of the state are necessary and welcome— and the non-public— in which the state would be exceeding its legitimate role" (F, 220). Fadel is half correct here: my issue is not with the inherent nature of *shari'ah* but with what a state structured on legal monism brings to the *application* of *shari'ah* in a pluralistic society. But he superimposes here his own obsession with the public-private

dichotomy and proceeds to ‘analyze’ the Islamic Secular in that light. This completely throws the Islamic Secular out of focus. For, again, I state clearly that the pre-modern Muslim state embraced *both* legal pluralism and quasi-jurispactic standardization, where certain rules were to be applied uniformly across the board to Muslims and non-Muslims alike (I.S., 289), while other rules were restricted to their respective religious communities. The operative distinction between these rules, however, was *not* that they applied to the public versus the private domain but that they were *shar‘i* (or its functional equivalent in the case of non-Muslims) or non-*shar‘i*. Legal pluralism applied, *mutatis mutandis*, to *shar‘i* rules, while non-*shar‘i* rules were subject to jurispactic standardization. This maps so imperfectly onto Fadel’s public-private dichotomy as to render the latter simply inapplicable. The very existence, for example, of non-Muslim courts that adjudicate *public* rules (e.g., contracts, marriage, divorce, etc.) that contradict the rules of Islam reflects the limits of jurispactic standardization along public-private lines. So does the fact that non-Muslims were held to some public laws (e.g., zoning, currency-exchange rates) but not others (e.g., drinking wine, selling pork).

Pace Fadel, the Islamic Secular takes no interest in the liberal obsession with drawing the line between “the necessarily monistic public domain and the pluralistic domain of private commitment” (F, 220). On the contrary, rather than cede “the public” to the state as some metaphysical entitlement, the Islamic Secular asks *how much* communal norm-setting or rulemaking power is *necessarily* forfeited to the state, and on what grounds. The state is not God (*pace* Hobbes), and its ownership over the public cannot be simply assumed. In fact, pre-modern Muslims explicitly referred to the public as “God’s domain” (*ḥaqq Allāh*), where state-authority was clearly circumscribed in principle, even if not always in practice. Meanwhile, even in polities such as the US, there are communal norm/rule-making entities (churches, guilds, factories, bouncers in nightclubs, families, even gangs⁷) that the state does not seek to take over jurispactically. I spoke directly to this in Ch. 3, where I discuss the concept of *sui juris* and the question of whether state intervention in Islam is the exception that must be explicitly justified or a presumptive state-right that needs no justification (I.S., 272-74). And I made it clear that such deliberations are significantly non-*shar‘i* in substance. The Islamic Secular adds to this by expanding the pool of contributors to these deliberations

7 As a Western trained lawyer, Fadel might deny that such rules are law, the only law being state law, promulgated and backed by sanctions implemented by the state. But see my “Legal Pluralism Between Islam and the Nation State: Romantic Medievalism or Pragmatic Modernity” *Fordham International Law Journal*, 30:2 (2006): 158-76.

to include non-*shar'i* perspectives and expertise that might otherwise be excluded. The problem with viewing *siyāsa* as a part of *shar'i'ah* is that it potentially allows the state both to speak in the name of *shar'i'ah* and its revelatory authority *and* to classify unilaterally issues as *shar'i* (as opposed to non-*shar'i*) and thereby shut down discussion in the name of *shar'i'ah*'s pre-political authority. It makes a difference, in other words, whether lifetime tenure for rulers, for example, is understood as a *shar'i* or as a non-*shar'i* provision. And one need not guess where states (with or without support from the *fuqahā'*) will come down on this issue if they are vested with the absolute right to determine the answer. One wonders if Fadel duly considered this in his opposition to separating *siyāsa* from *shar'i'ah*, as well as in his indictment of the Islamic Secular for doing so.

Meanwhile, blurring the distinction between *siyāsa* and *shar'i'ah* can also blur the distinction between "crime" and "sin." Does a *siyāsa* policy that sets the minimum age of marriage at 18 render marriage at 17 a sin? Is this *zinā*? What are the consequences in the Hereafter? Fadel proceeds on the Hobbesian assumption that jurispathic state intervention (and definition) is the state's inherent, '*shar'i*' right, by virtue of which the state can standardize or demand forfeiture of communal autonomy and discretionary input as it sees fit, in the interest of the "well-ordered society." Identifying *siyāsa* with *shar'i'ah* only adds to the thickness of this presumptive right by equating the authority of the state with the authority of the *shar'*. I'm not sure, however, that we are more justified in superimposing Fadel's Hobbesian presumption onto Islam than we would be in considering the view of al-Qarāfi who insists that state intervention is the exception (that requires justification) rather than the rule (that does not) (*I.S.*, 273).

In its alleged 'failure' to draw the public-private line, however, Fadel suggests that the Islamic Secular insufficiently accounts for how Muslims can reconcile "Islamic commitment, intra-Muslim pluralism and the instrumental rationality of modern capitalism" with the requirements of governance in the modern world (F, 220). This is strange coming from someone who has supported Law and Economics. At any rate, what the Islamic Secular brings to the table on such issues is not concrete solutions but clarity on whether in proffering the solutions proffered the state or community is to proceed on the basis of *shar'i* or non-*shar'i* authority or reasoning, in what proportion, and how this informs the nature, richness and possibilities coming out of such deliberations.

From here Fadel returns to the problem of equality, particularly regarding non-Muslims in a majority-Muslim polity. He intimates that my invocation of the empire-state model is 'pastist' and naïve. He acknowledges the internal logic of the modern example I give of the

Coptic Church in Egypt wanting to preserve the right to deny remarriage to couples who divorce for reasons unrecognized by the Church. But he insists that this “does not speak to why *individual* Egyptian Christians would agree to have their rights to exit an unhappy marriage and then remarry arbitrarily limited by the decisions of their Church, especially when the vast majority of their Muslim neighbors suffer from no similar burden” (F, 220, italics added). This is stunning logic. It assumes that Coptic religiosity counts for little, that it can be overridden by the slightest secular temptation, and that Copts value (or should value) being equal to Muslims over being Copts. Again, Fadel overlooks my discussion of “formal equality” versus “equality of respect,” including the view of the American Christian thinker Stephen Carter: “The right to do everything that Christians [read: here Muslims] are allowed to do is not the same as the right to follow God in their own way.” Should Coptic Christians also reject the Church’s ban on polygyny because “their Muslim neighbors suffer no similar burden”? Should Muslims in America drink alcohol because Christians and Jews are permitted to do so? How could any religion survive this logic?

For Fadel, however, this is of a piece with “the problem of equality and the modern state” (F, 221). According to him, law is the instrument, and the state is the vehicle through which individuals are organized in pursuit of common aims (F, 221). In such light, he insists, “It is difficult to imagine a state that consists of numerous self-governing, insular communities being capable of executing projects that require mutual cooperation on any meaningful scale” (F, 221). Meanwhile, according to Fadel, the modern shift from communal to individual rights was not the result of a crass secularism but of the need to promote social cooperation on an unprecedented modern scale in pursuit of “common projects” (F, 221). Groups had to be disaggregated, in other words, into their constituent parts to render them more governable and to be able to steer them more effectively towards social cooperation. And in pursuit of this, “some kind of patriotic attachment or ‘nationalism’ ...[becomes] a universal phenomenon with the rise of the state” (F, 221). States that are unable to enlist their citizenry in this state-sponsored cohesive sentiment tend to fail. Modern, confessional Lebanon, according to him, is a case in point, demonstrating the dangers and futility of legal pluralism, communal autonomy and any arrangement approaching that of the pre-modern empire-state. And with this, Fadel comes to the most explicit expression of his interpretive point of departure: “I find it exceedingly implausible that Muslims could introduce a form of governance radically different than [*sic*] that of the modern state” (F, 221). According to him, “The only

question the Islamic secular [*sic*] should take on, therefore, is the *kind* of state they will adopt” (F, 221 *italics original*).

Again, I never expressed any categorical opposition to the modern state. Viewed on its own terms, however, Fadel’s is *not* the only question the Islamic Secular should take on. Given the weight of Islam’s transgenerational legacy coupled with the Muslim encounter with modernity, whatever *kind* of state Muslims ultimately settle upon will be accompanied by Shahab’s Ahmed’s question of whether this state is “secular and therefore not Islamic” or “religious and therefore Islamic.” And these questions will engender the further question of what we mean by “secular” and “religious” and how this affects the basic identity and operation of this state. Who will be recognized as rightful contributors to the political philosophy that lays the theoretical foundation of this state? In fact, will it be political *philosophy* or political *theology* that lays these foundations? Stated differently, will this be a *shar’i* discourse, a non-*shar’i* discourse or a combination of the two? And in what proportions?

As for the other details Fadel mentions here (patriotism, nationalism, common projects, cohesive sentiment and the like) space will not accommodate a full response to these. But let me say (again) that the insinuation that the Islamic Secular is inherently opposed to the modern state is simply inaccurate, as I clarify in my critical engagement with Wael Hallaq’s *The Impossible State* in Ch. 4 (*I.S.*, 216). I should also note, contrary to Fadel’s insinuation, that the Islamic Secular is substantively grounded *not* in the logic of the pre-modern empire-state but in that of classical and post-formative tradition of *uṣūl al-fiqh*. *The Islamic Secular* calls out some of the problems with legal monism and questions the heavy-handed homogenization that Fadel seems to see as the normative function of the modern state. In fact, part of the problem with the modern state from the perspective of the Islamic Secular is that its homogenization process not only reduces “the surfeit of lawmaking” to a single expression of law but tends as well, as we see in Fadel, to reduce the *shar’i* / non-*shar’i* distinction to near meaninglessness. Meanwhile, the Islamic Secular is not alone in calling out the problems it sees with the modern state. University of Michigan law professor Don Herzog writes: “How many times must we learn that states don’t always secure social order, that sometimes they undercut and destroy it?”⁸ Hannah Arendt is similarly clear about the dangers of the state’s juripathic tendencies: “in the realm of human affairs [state] sovereignty and tyranny are the

8 D. Herzog, *Sovereignty RIP*, New Haven: Yale University Press, 2020, 259.

same.”⁹ As for Lebanon’s symbolizing the evils of legal pluralism and self-governing communities, why not consider Switzerland? In fact, why not consider the view of Lord Acton (d. 1902) who praised Switzerland and pluralism generally: “The co-existence of several nations under the same State is a test, as well as the best security of its freedom. It is also one of the chief instruments of civilization and, as such, it is in the natural and providential order and indicates a state of greater advancement than the national unity which is the ideal of modern liberalism”?¹⁰

From here to the end of his review, Fadel takes up my engagement with Andrew March in Ch. 6 of the book. It is telling that of all the scholars to which I devote chapters, March is the only one singled out for discussion. Of course, like Fadel, March is a devotee of John Rawls, and it seems that Fadel sees in my critique of March a critique of Rawls. This Rawlsian commitment deeply informs his reading of *The Islamic Secular* to the point that even when his depictions are basically sound, his tendency to force Rawlsian tropes, anxieties and aims upon them results in disfigurement, as his aim is routinely to vindicate Rawls on Rawlsian terms rather than explicate the Islamic Secular on its terms. Interestingly, unlike what we saw in Fadel’s question about whether “secular,” as ostensibly a product of the West, could be repurposed to “describ[e] the internal structure of Islamic thought” (F, 211) the fact that Rawls’s theory is also a product of the West seems to pose no such problem.

Fadel understands my basic criticism of March to be that he takes *fiqh* “too seriously” (F, 222). According to him, I see March as “confusing juristic statements that are part of the Islamic secular [*sic*] with transcendent Islamic ideals” (F, 222). This I allegedly see as blinding March to the fact that Muslims are free to revise rules that fall within the Islamic Secular based on their concrete political interests (F, 222). In fact, however, I do *not* accuse March of taking *fiqh qua fiqh* too seriously but of seeing nothing *beyond fiqh* as a basis for principled Muslim action. *Pace* Fadel, March does *not* confuse the Islamic Secular with transcendent Islamic ideals. March does not recognize the Islamic Secular at all. His entire argument centers around the question of the *permissibility*, *shar’an*, of Muslims’ embracing liberal democracy. And my argument against him is that *shar’i* metrics, including “permissibility,” are not the only metrics that rightfully (read: Islamically) guide Muslim action. Beyond the question of their *shar’i* duties and whether Muslims *can* embrace liberal democracy, I argue that it is equally Islamic from the perspective of the Islamic Secular for Muslims to ask if they *should*

9 Cited in Herzog, *Sovereignty*, 267.

10 Cited in Z. Kurelić, “What Can We Learn from Lord Acton’s Criticism of Mill’s Concept of Nationality?” *Politicka misao*, 43/5 (2006): 19-27 at 22.

embrace liberal democracy, based on non-*shar'ī* practical or prudential assessments of their concrete quotidian *interests*. On this calculus, even if it is permissible, *shar'an*, to embrace liberal democracy, Muslims might elect not to, if doing so threatens or frustrates their interests. I argue that this practical calculus and its Islamic legitimacy escapes March. As a result, he assumes that by 'proving' that it is *permissible* for Muslims to embrace liberal democracy that he has successfully reconciled them with it and in the process solved the 'problem' of "Islam and liberal democracy."

Fadel processes my critique of March through a decidedly Rawlsian lens not every aspect of which space will permit me to address. Perhaps most representative of his critique, however, is his assessment of my perspective on the US Constitution. While I advocate that Muslims embrace the Constitution, I argue that they do so based mainly on non-*shar'ī*, prudential, Islamic Secular grounds. As Fadel puts it, "Jackson is suspicious of any demand that Muslims affirm the constitution [sic] on morally significant deontic grounds that could be taken as compelling them to uphold the constitution as a matter of religious doctrine" (F, 223). Indeed, he notes, Jackson is reticent "to clothe what he sees to be a prudential political judgment with religious sanctity" (F, 223). But Fadel has a serious problem with this. For him, following Rawls, a constitutional arrangement can work only if the majority, "despite their differences, all see profound *moral* reasons to adhere to such a constitution" (F, 224, emphasis added). He tells us nothing about the source or nature of these "moral" reasons, but one senses that they must have a depth approaching that of 'religious conviction', which he sees me rejecting as the basis for recognizing the Constitution. Meanwhile, Fadel seems to think that Muslims can achieve this required depth of conviction only in the form of *shar'ī* (read: theological) beliefs that are grounded in Scripture, in other words, 'religious conviction' "*in the proper, the religious sense*," based perhaps on the (mistaken) notion that Ash'arites (taken as orthodoxy) held revelation to be the sole source of value-judgments. He fails to appreciate that, according to the Islamic Secular, differentiated, 'secular', non-*shar'ī* beliefs can be just as deeply (and legitimately) held as are beliefs that are grounded in revelation. A husband may uncompromisingly hold himself to coming home at a 'decent hour' not because he is compelled to do so *shar'an* but because he believes this is the morally right or matrimonially sound thing to do. And like the conventional "good" or *ma'rūf* of Arabia, non-Muslims may contribute, alongside Muslims, to the instantiation of this belief as a cumulatively established communal norm. In sum, Muslims may hold, as a deep, non-*shar'ī*, moral conviction, that it is good to uphold the Constitution. For, as al-Qarāfī so eloquently put the matter: "Good as a category [and by entailment bad] is broader than

the legal ruling” (*al-ḥasan a’amm min al-ḥukm al-shar’i*) (*I.S.*, 77). This non-*shar’i*, ‘secular’, good, even as it is ultimately ‘religious’, remains far more open to outsiders and to being shared across communal lines. In fact, non-Muslims may be *more* apt to trust this commitment because they can see it as being separate from religious convictions or sources that they as non-Muslims by definition reject.¹¹ In sum, viewed in the full light of the Islamic Secular on the latter’s own terms, it is possible, *pace* Fadel, to sustain a solid commitment to the Constitution on non-*shar’i* grounds in a manner that can be communicated and shared across communal lines.

Fadel also charges that in place of Rawls’s “well-ordered society,” where reasonable individuals “for their own reasons internal to their own comprehensive doctrines, are happy to pursue only a restrained vision of their ideal theory in recognition of the equality of others, Jackson seems to endorse, implicitly at least, a conception of politics for American Muslims that can be described as competitive pluralism” (F, 222). He overlooks my explicit statement that “Muslims may lose some battles...[b]ut this need not result in their abandonment or rejection of the overall political arrangement” (*I.S.*, 364). Meanwhile, he points to my communitarian perspective on American politics and my rejection of Rawls’s attempt to replace the affective bonds of community with public reason, which I see as potentially catalyzing social conflict beneath the surface by forcing people (and not just Muslims) to suppress their pre-rational, deeply held beliefs and treat their inability to *defend* these rationally as if this amounted to their *agreeing* rationally with society’s rejection thereof. As for the impact on Muslims in particular, Fadel downplays liberalism’s demand that citizens be prepared to sacrifice core beliefs at the altar of “public reason” as well as what I identify as liberalism’s latent ambition to re-order the Muslim soul (F, 222-223). Yet Rawls was particularly concerned about religious doctrine, among all other threats, as *the* nemesis of social stability (*I.S.*, 329-30). And March leaves no question about the primacy of the (Western) secular over the religious when he insists that whenever the two collide in public, “public reason trumps religious reason” (*I.S.*, 318, 355).

Again, in none of Fadel’s analysis here does the *shar’i* / non-*shar’i* distinction play a role. And this produces two effects. First, it narrows the area in which ‘public reason’ unencumbered by “comprehensive doctrine” could,

11 I am merely responding to Fadel here. Otherwise, I am not sure what *my* level of commitment to the Constitution contributes to or detracts from the degree of commitment that *others* have to it. Even if they completely trust my commitment, that does not automatically translate into deeper commitment on their part. What is presently unfolding in the US confirms this.

ceteris paribus, produce agreement across communal lines, as it implies that Muslims, acting as believing, practicing adherents of their Faith, will always and only argue on the basis of ‘closed’ *shar’i* reason and never on the basis of ‘open’, non-*shar’i*, ‘secular’ (yet still religious) reason. Second, precisely in this light, it elevates Rawlsian liberalism to the position of being the only solution to societal pluralism.

I could go on in this fashion. But that would only add to the number of instances where Fadel superimposes Rawlsian and other presuppositions onto *The Islamic Secular* instead of reading the latter on its own terms. I could also note how Fadel summarily ignores the reality of race and the entrenched racial hierarchy in the US and how this may call into question public reason’s pretensions to neutrality (*I.S.*, 349-50, 354). Or I could point out how his elevation of individualism assumes, without argument, that communitarian impulses are fatally flawed and can thus be dismissed “with prejudice.” Or I could reiterate the fact that, *pace* Fadel, the aim of entering the public arena is not always for the purpose of “cooperation” or “common projects” but sometimes to disrupt these, on either moral or practical grounds (*I.S.*, 339). These and related issues would take us beyond what space will allow for here.

In his closing paragraph Fadel writes that he wished that I had spent less time justifying the idea of the Islamic Secular and more time showing its usefulness in resolving issues facing contemporary Muslims. It seems, however, that I did not spend quite *enough* time justifying and explaining the Islamic Secular to break through Professor Fadel’s pre-existing interpretive prism. This is not to deny him the right to disagree with or even refute the Islamic Secular. But his review does not present an accurate enough picture of *The Islamic Secular* for him to be able to refute it fairly. As for the Islamic Secular’s utility for addressing modern problems, that depends on what problems we have in mind and how far we expect theory to go in solving them.

In the end, none of this can gainsay the fact that Fadel’s critique was bold, learned, insightful and honest. It left me with much to contemplate. I thank him for taking the time to engage with my work and for allowing me to benefit from his broad, cumulative reservoir of knowledge and insight.