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Intellectual History of Euro-American Jurisprudence and the Islamic Alternative

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ABSTRACT

*The legal systems that presently prevail in Europe, the Americas, and in polities colonized and formerly colonized by Europe evolved in specific historical contexts and cultural milieus. Nevertheless, they share certain common presumptions that are rarely articulated or exposed to critical scrutiny. It is the task of this chapter to begin to articulate these common presumptions and to attempt to engage them constructively by a comparative study of a rival legal system, such as may be found in accepted principles of Islamic Shari*ᶜ*ah.*

> In the American context, the notion is widespread that research on a familiar subject [by virtue of the subject's very familiarity] ought to be easily accessible. But much Continental work in social science challenges this idea at a fundamental level. It asserts that the mysteries of social existence are densest, not in the behavior of far-off exotic peoples, but in our own everyday usages. Here, familiarity has bred an ignorance which arises not from the strangeness of the object of investigation, but from its very transparency. Living within it, so thoroughly suffused with its assumptions that it is even hard to recall just when we adopted them, we tend to lose the critical perspective which makes 'social science' more than simply a recital of what everyone already knows. The common sense of things, the knowledge everyone is sure to have, is precisely the starting point for the investigations of such a social science.[1]

A MOST DIFFICULT intellectual task that we routinely face is to identify what is always before us; our familiarity with a thing is often precisely what conceals it from us. Sometimes it is even easier to consider first what something familiar is not, before we can begin to say adequately just what it is. This is the approach taken by the French thinker, Tzvetan Todorov, in a remarkable "essay in general anthropology," *Life In Common,* originally published in 1995 and then translated into English in 2001. I prefer to open these "preliminary remarks" with reference to Todorov's essay because I am about to attempt an explication of the familiar. I do not trust myself to give an adequate account of the obvious – or what seems to me *should* be obvious – without assistance.

Todorov's essay begins with a chapter entitled "A Brief Look at the History of Thought." Now this characterization offers an object lesson in the very problem that I have just identified and on account of which I have turned to Todorov for aid. Despite Todorov's inclusive title, the "history of thought," he does not mean the history of all thought, but the history of European and Euro-American thought exclusively. This assertion is obvious from Todorov's opening sentence ("As one studies the broad currents of European philosophical thought …"), although he omits any such qualification in his chapter heading.[2] A most difficult intellectual task that we routinely face is to identify what is always before us. Even the best among us fail to meet the challenge.

I am willing to forgive Todorov this initial blind spot because he manages to move beyond it and expose to view what I find to be a fascinating, if "invisible," familiar. He states that "As one studies the broad currents of European philosophical thought …" one discovers (although few seem to have noticed) that a "definition of man" – of the human being – begins to emerge. It is a definition that presents human beings as essentially "solitary" and "nonsocial" creatures. Todorov goes so far as to characterize all of the "broad currents of European philosophical thought" as "antisocial traditions." He then proceeds by way of example to offer evidence in support of this astonishingly sweeping assertion.[3]

Before we allow ourselves to be carried away with the tide of Todorov's argument, we must make a threshold observation. Even if we grant Todorov his characterization of "the broad currents of European philosophical thought" as essentially antisocial, philosophy is one thing, law

another. Todorov, a literary critic by training, develops his thesis from readings of the relevant philosophical literature. However, what place does a book such as Todorov's rightfully occupy in a discussion of European and/or Euro-American legal systems?

None, I would suggest, unless a link can be established between the intellectual traditions that Todorov identifies and the social institutions that we wish to consider. To find such a link, it may prove helpful to move beyond Todorov's book – or perhaps behind it – and review the work of yet another French intellectual, Pierre Bourdieu.

Reading Bourdieu is never easy. He favors complex sentences composed of strings of subordinate clauses separated by commas. He has also developed a unique vocabulary – his own conceptual apparatus – though one that has not gained wide currency on this side of the Atlantic. Consequently, I introduce Bourdieu's work into this discussion at the risk of trying the reader's patience. I would not do so if I knew a better alternative.

Bourdieu turned his attention to European and Euro-American legal systems in an article which he published in volume 38 of *The Hastings Law Journal*. In this article, Bourdieu outlined what he called a "rigorous science of law," which he identified with his own enterprise as a social scientist, and distinguished this science from "what is normally called jurisprudence in that the former takes the latter as its object of study."[4]

From this vantage point, Bourdieu hopes to avoid entanglement in the debate about law that preoccupies European legal scholars: whether the law develops in "absolute autonomy … to the social world" (a position Bourdieu identifies as "Formalist") or whether law is merely a "reflection, or a tool in the service of dominant social groups" (a school of thought Bourdieu identifies as "Instrumentalist"). Bourdieu charts a third way that contains elements reminiscent of the other two, but which is not identical with either and which possesses unique properties of its own.[5]

In charting this third way, Bourdieu makes use of his own conceptual apparatus – most importantly, for our purposes, the notion of *habitus*. As summarized by the translator of this article, Richard Terdiman, *habitus* indicates "habitual, patterned ways of understanding, judging, and acting" which arise from one's "particular position" as a member of a given social structure. Terdiman writes: "The notion asserts that different conditions of existence – different educational backgrounds, social statuses,

professions, and regions – all give rise to forms of habitus characterized by internal resemblance within the group …"[6] This concept seems to me to owe much to the sociology of knowledge: one's understanding of the world is preconditioned and mediated by one's membership in society. As Bourdieu himself puts it:

> Shaped through legal studies and the practice of the legal profession on the basis of a kind of common familial experience, the prevalent dispositions of the legal habitus operate like categories of perception and judgment that structure the perception and judgment [of legal practitioners.]
>
> There is no doubt that the practice of those responsible for "producing" or applying the law owes a great deal to the similarities which link the holders of this quintessential form of symbolic power to the holders of worldly power in general, whether political or economic. This is so despite the jurisdictional conflicts which may set such holders of power in opposition to each other. The closeness of interests, and, above all, the parallelism of habitus, arising from similar family and educational backgrounds, fosters kindred world-views. Consequently, the choices which those in the legal realm must constantly make between differing or antagonistic interests, values, and world-views are unlikely to disadvantage the dominant forces. For the ethos of legal practitioners, which is at the origin of these choices, and the immanent logic of the legal texts, which are called upon to justify as well as to determine them, are strongly in harmony with the interests, values, and world-views of these dominant forces.[7]

Bourdieu places the "interests, values, and world-views" of those who hold and wield what he characterizes as "this quintessential form of symbolic power," the power to make and apply law, in an institutional context. Those who populate legal institutions share not only their membership in their common "field" (another word that occupies an important place in Bourdieu's conceptual apparatus), but also a common habitus, a way of being-in-the-world fostered by "similar family and educational backgrounds." It is here, I suggest, that one may entertain a link between Todorov's "broad currents of European philosophical thought" and the law. These intellectual traditions are not so much consciously appropriated by lawyers and judges as they are simply imbibed by them throughout the processes of socialization that precede their formal legal training. They do not typically take the form of well-wrought

ideological positions but as inchoate assumptions, presumptions, and prejudices. They are the spectacles through which any decently educated and socialized individual in the West will view the world.

One need not be a French intellectual to appreciate the significance of the social phenomena Bourdieu describes. John Simmons's 1992 study of Locke's theory of rights opens with a series of observations that are consonant with the notion of habitus – without recourse to Bourdieu's social scientific jargon:

> Most people in the English-speaking world [and many outside it] have a practical, nonacademic acquaintance with the Lockean theory of rights. A commitment to [parts of] that theory grounds many of their social and political practices and institutions, and, as a result, guides many of their commonsense judgments about right and wrong, just and unjust. It provides prominent and comforting landmarks in their moral world. American school children learn by rote [or, at least, used to learn] some of the content of the Lockean theory: "that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness."[8]

I would hasten to add that they learn as well what Locke conceived to be the seat or location of the Divine endowment – the individual self or soul – with the concomitant belief that every individual self or soul has the prerogative to assert his or her rights as against every other individual and/or against society itself.

Todorov argues his thesis that the predominant intellectual traditions of the West are, at bottom, anti-social traditions, in two distinct ways. The first way consists of a review of the major proponents of these traditions. Here we find a roll call of the usual suspects: Hobbes, Kant, the French materialists-encyclopedists – in short, the names which we often associate with that period of history known to Europeans as their "Enlightenment" and the thoughts which we associate with those names. The second way in which Todorov chooses to argue this thesis is in contrast: he juxtaposes those currents of European thought which he has identified as predominant with an exception to those very currents taken, in the eighteenth century (as Europeans traditionally reckon time), by the Swiss philosopher, Jean-Jacques Rousseau. Todorov suggests that Rousseau's understanding of the human being is not only an exception to the

rule of European and Euro-American thinking on the subject, but also represents "a real revolution" in thought. According to Todorov, Rousseau "became the first to formulate a new conception of man as a being who *needs others*."[9] Without belaboring the point, I feel obliged again to expose the Eurocentrism in Todorov's statement of his case: Rousseau may well be the first European to formulate a new conception of man as a being who needs others, yet, as we shall see, Rousseau's European exception is an Islamic commonplace. In any event, the "assumptions" which Todorov characterized as latent in European philosophical thought are "antisocial" in the sense that they portray human beings as creatures who are so constituted that they do not need one another in Rousseau's sense of human necessity. And what sense is that? According to Todorov (and I concur with his reading), Rousseau insisted that "man brings to existence an innate insufficiency and that, therefore, each of us has a real need of others, a need to be *considered,* a 'need to attach his heart.'"[10]

Todorov asserts that the broad currents of European thought deny to human beings this "insufficiency." In European tradition, men and women are innately self-sufficient – particularly where the moral sense is concerned. European moral reflection has therefore focused upon the individual in isolation from others. According to Todorov, "The different versions of this asocial vision are easy to identify." Beginning with "the great moralists of the classical period", that is, the Stoics, "… [d]ealing with others is a burden to be discharged …" – something one would do best to avoid, where possible. This tradition translated neatly into its successor, the Christianity of St. Augustine, whose *Confessions* exemplifies the intensely personal nature of the Augustinian encounter with God. In the waning days of the Medieval period, thinkers emerged who understood "[s]ociety and morality [to] conflict with human nature [by] …impos[ing] rules of communal life on an essentially solitary being. It is this conception of man," writes Todorov, that "the concept (is) found in the most influential political and psychological theories of today."[11] It is also, I would add, the unspoken anthropological presumption that pervades the European and Euro-American legal habitus. In the (North) American version, self-sufficiency is not merely a fact of being human; it is seen as a *desideratum,* a goal one should strive to realize in one's daily life. The implication is that, in order to be *fully* human, we must each learn to

make our own way independent of the claims that others, our society, make upon us.

Rousseau's position, on the other hand, represents for Todorov the Great Road Not Taken: Western civilization's missed opportunity. Reading Todorov and Bourdieu together, we may begin to formulate an approach to the study of Euro-American legal institutions that reflects an appreciation for the following paradox: that the actors who populate and determine the tone and policy of these social institutions uncritically share certain anti-social presumptions.

This is Todorov's interpretation and it is one that I find compelling enough to take as a point of departure and examine, in its light, those legal institutions that have evolved under the aegis of European intellectual history. Such an undertaking is, admittedly, a monumental task; it is not one that I can hope to encompass in an essay which I have styled as "preliminary remarks." Be that as it may, I believe, as a scholar, I dare not avoid Malinowski's admonition that one "cannot study separately the institutions and mentality of a people. Only by investigating them side by side, by seeing how certain ideas correspond to certain social arrangements, can both aspects become intelligible."[12] Accordingly, I turn to yet another French intellectual, Michel Foucault, whose landmark study of Western penal institutions, *Discipline & Punish*, offers an original reading of the history of Western theory and practice of judicially authorized punishment.

Reading Foucault is no less challenging than reading Bourdieu. His analyses are sophisticated and nuanced. I do not pretend here to treat of Foucault's book with any critical depth. I wish only to suggest that Foucault's study of social institutions supports Todorov's thesis concerning European intellectual history in telling respects. Foucault situates Western penal institutions alongside other social institutions (for example, schools, hospitals etc.) as foci of social control. Each of these institutions individually and, increasingly, in concert with others, exercises subtle – and not so subtle – degrees of coercive influence over the individuals subject to its jurisdiction. Beneath the rhetoric of reform that often is invoked to characterize the evolution of the Western penal institution, Foucault finds a progressive movement toward more sophisticated forms of bureaucratic dominance over the human personality. For Foucault, the predominance of the prison over other forms of discipline and punish-

ment in Western society must not be understood as a movement from barbarism to humanism; rather, it is a change – or, possibly, a refinement – of focus: from the exercise of coercion over human bodies to the exercise of coercion over the human soul.[13]

What Foucault intends by the word "soul" is not what that word has signified to Western ears over the course of Christendom's sway; neither is Foucault's intention completely incompatible with traditional understandings. For our purposes, it will suffice to take Foucault's use of the word "soul" as a marker for those aspects of human personality that have, heretofore, escaped bureaucratic interference: that small space left open to each one of us concerning which government has yet to express an interest – or found a means to subject to surveillance.

The prison's rise to predominance in Western societies represents for Foucault the latest effort on the part of the powerful in those societies to perfect the techniques of coercion and control that such groups have been honing since the advent of the Modern state:

> In several respects, the prison must be an exhaustive disciplinary apparatus: it must assume responsibility for all aspects of the individual, his physical training, his aptitude to work, his everyday conduct, his moral attitude, his state of mind; the prison, much more than the school, the workshop or the army, which always involved a certain specialization, is 'omni-disciplinary' … Not only must the penalty be individual … it must also be individualizing … 'Alone in his cell, the convict is handed over to himself; in the silence of his passions and of the world that surrounds him, he descends into his conscience, he questions it and feels awakening within him the moral feeling that never entirely perishes in the heart of man' … [T]his [is the] primary objective of carceral action: coercive individualization, by the termination of any relation that is not supervised by authority or arranged according to hierarchy.[14]

Foucault's prisons are "reformatories" in the sense that they are designed to impress permanently upon their inmates those asocial attributes which are expected of members of Western societies. When one leaves such a reformatory, one is expected to exemplify the socially acceptable antisocial attributes cultivated therein. The process of individualization that takes place in Foucault's prisons is one that attempts to reconcile individuals to a life of isolation from other individuals – for the sake, ostensibly, of their moral (and, therefore, civic) improvement. This process, by which

individuals learn to accept their essential alienation from their neighbors, is one by which they are rendered sufficiently docile to be socially useful.[15]

The success of prisons as factories of individualization is demonstrated for Foucault by the fact that they are documented failures as factories of moral and/or civic improvement. "Detention," Foucault argues, "causes recidivism; those leaving prison have more chance than before of going back to it; convicts are, in a very high proportion, former inmates …"[16] The conclusions drawn by Foucault regarding Western penal institutions appears to be quite compatible with Todorov's reading of European intellectual history, *vis.*, that Rousseau was right about human beings needing one another. And if Rousseau was right, Western social institutions have congealed around an anthropology that is, at best, self-defeating. Or at least Western penal institutions have done so.

Although I would gladly linger with this tantalizing possibility, I think it may be more productive to move on to a discussion of a different set of "philosophical currents" that flow through a different model for juridical institutions. Let us put aside, for the moment, Europe and the West and consider the anthropology at the heart of Islamic Shariᶜah.

Before doing so, it is necessary to be clear from the outset what meaning Muslim scholars of Shariᶜah intend by that Arabic term. Perhaps it may be useful to begin with what they generally do *not* intend. As I read the literature, Shariᶜah does not have the meaning that most treatments in English assign to it, for example, "the body of Islamic sacred laws derived from the Qur'an, the Sunnah (q.v.) and the *aḥadīth* (q.v.)."[17] The laws themselves are the product of fiqh, or Islamic jurisprudence. Shariᶜah is something else – something more primitive, in a way, something that must be in place *before* the field of jurisprudence may be entered. Here, again, I find recourse to Bourdieu's conceptual apparatus most helpful. Because if Shariᶜah is ever to be distinguished from the legacy of misunderstanding that has accumulated around it in the West, we, in the West, will need to learn a new vocabulary; we will need to develop a conceptual apparatus that is capable of bearing the polysemous freight that native speakers of Arabic take for granted when they use their words. To develop an appropriate sense of the meaning of Shariᶜah, it is useful to think in terms of *habitus* – those "habitual, patterned ways of understanding, judging, and acting" which arise from one's "particular position" as a member of a given social structure.

With this meaning – or approximation of the meaning – of Shariʿah in hand, it is arguable that Shariʿah belongs to a distant – though by no means forgotten – past. Because Shariʿah does not reside in the body of laws developed over the centuries by Muslim jurists, one cannot simply return to those laws, or attempt to implement them, in the hope that, in the process, Shariʿah will be revived. The role of Shariʿah is to animate fiqh – not *vice versa*; it must therefore first reside in the Muslim jurists themselves – in their "habitual, patterned ways of understanding, judging, and acting" as these are determined by a given jurist's "particular position" as a member of an Islamic social structure.

The most interesting questions one can ask today about Islamic sacred law are these: what is the prevailing social structure in those places where Muslim jurists presently practice and how does it compare with the social structure that prevailed when the body of fiqh that those jurists have inherited was developed? These questions open the door to an even more momentous question of philosophical import: in what sense may one speak of Shariʿah as a present reality?

These are not questions to which I intend to essay an answer – at least not within the confines of the present chapter. Fortunately, I have smaller fish to fry. There is no question that Muslim jurists developed a body of sacred law over a period of several centuries, and that they did so within a particular *habitus*. A description of this habitus may afford us some insight into what Shariʿah once was – and we shall leave aside for the present those questions which would lead us to speculate what, if anything, Shariʿah now is or may some day prove to be.

Few scholars writing in English have offered any satisfactory account of the *habitus* from which emerged the great schools of thought responsible for the past production of Islamic sacred law. Karen Armstrong, however, is a recent exception that proves the rule. In the Preface to her *Islam: A Short History,* Armstrong offers a succinct description of a distinctively Islamic way of inhabiting space and time:

> In Islam, Muslims have looked for God in history. Their sacred scripture, the Qur'an, gave them a historical mission. Their chief duty was to create a just community in which all members, even the most weak and vulnerable, were treated with absolute respect. The experience of building such a society and living in it would give them intimations of the divine, because they would be living in accordance with God's will. A Muslim had to re-

> deem history, and that meant that state affairs were not a distraction from spirituality but the stuff of religion itself. The political well-being of the Muslim community was a matter of supreme importance. Like any religious ideal, it was almost impossibly difficult to implement in the flawed and tragic conditions of history, but after each failure Muslims had to get up and begin again.[18]

One cannot help but recognize in this passage a counter-tradition to that which Todorov discovered in the "broad currents of European philosophical thought on the definition of what is human." Dealing with others is not a burden best avoided; in fact, the notion that it is even possible to engage in such avoidance is not within the purview of Islamic thought. One's duty to God demands that one *consider* the Other – and not merely as a given part of the landscape, as so much furniture – but also as an essential aspect of one's own moral, spiritual, civic, well-being. Isolation is not an option.

Armstrong bases her interpretation of the mission of Islam upon her study of the history of Islam and Muslims; however, the impetus of this mission originates in an anthropology contained in the Qur'an–indeed, in its very language. Although the Arabic root *Hamzah-Nūn-Sīn* appears throughout the Qur'an as a general term for humankind, it is also used to signify persons who seek after familiarity, intimacy. The implication of this etymological exercise (which, traditionally, occupies an honored place in Qur'anic exegesis) is that Islamic tradition includes the belief that human beings need one another – an anthropology not unlike that which Todorov attributes to Rousseau.

As with Western individualism, Islamic sociality presents juridical entailments: "The central notion of Justice in the Shari'ah is based on mutual respect of one human being by another," writes A. R. Doi:

> The just Society in Islam means the society that secures and maintains respect for persons through various social arrangements that are in the common interests of all members. A man as *Khalīfat-Allah* (viceregent [sic] of Allah) on earth must be treated as an end in himself and never merely as a means since he is the cream of Creation and hence the central theme of the Qur'an. What is required is the equal integrity of each person in the society and his loyalty to the country concerned which in turn will make it the duty of the society to provide equally for each person's pursuit of happiness .[19]

General statements of principle such as the foregoing abound in treatises written by Muslim scholars on the meaning of Shariᶜah. To the Western ear, such pronouncements are likely to be dismissed as vague, platitudinous, or utopian fluff; yet Shariᶜah, as habitus, is not reducible to a set of rules – much less to what common law lawyers like myself refer to, in our own legal tradition, as "black letter law." Notice Doi's reference to "social arrangements," as opposed to, say, the "legal system" or "penal institutions." This is not a question of idiosyncratic word choice. Islamic sacred law is predicated not upon the establishment of certain juridical institutions, but rather, upon the creation of a certain kind of community. Such a community, according to Doi, is socially egalitarian: "The treatment accorded by the Shariᶜah made the aristocracies of birth, race, wealth, language, the features which vary from person to person, all suspect as disrespectful of persons." Such a community is also economically equitable:

> The Shariᶜah, it should be noted, gives priority to human welfare over human liberty. Muslims as well as non-Muslims living in a Muslim state are duty bound not to exploit common resources to their own advantage, destroy good producing land, and ruin the potential harvest or encroach upon a neighbor's land. Since a man in Islam is not merely an economic animal, each person's equal right to life, to a decent level of living, has priority over the so called economic liberty.[20]

It bears remarking that such issues are the subject of continuing legislation and litigation in modern Western societies; Doi's point is that Shariᶜah assumes the resolution of such issues – or, at the very least, that the resolution of such issues should not be left to the pendulum swings of party politics or judicial gerrymandering. He asserts:

> Behind every legal, social or political institution of Islam, there is a divine sanction which every believer is expected to reverence no matter where he lives. He cannot change his own whims into laws. There are the limits of Allah [*Ḥudūd-Allah*] which are imposed in order to curtail man's ambitions and devices.

The limits of Allah, Doi continues, are the two poles of "*ḥalāl*" (permissible) and "*ḥarām*" (prohibited) that are contained in the Qur'anic Revelation and are elaborated by Prophetic pronouncement and example

in the hadith literature. These poles set the boundaries within which the Islamic community is free to define itself as a polity with distinctive faith and moral commitments.[21]

To this point, I have made no mention of specific juridical institutions contemplated by Shariʿah or instantiated in the history of Islamic societies. This is because, in the former case, it is difficult to say what specific juridical institutions, if any, *are* contemplated by Shariʿah; and the latter case is itself rendered problematic by the difficulties raised in the former. I do not wish to deny the rich history of fiqh (attempts to apply Shariʿah), its elaboration by the ʿalims (the learned) and *Fuqahā'* (those who are particularly learned in matters of fiqh), or even the reality of decisions rendered in particular cases by, say, a village *qāḍī* (judge). I wish only to affirm Armstrong's observation regarding the Muslim commitment to the creation of a just community (as expressed in the broad outlines of Shariʿah): "Like any religious ideal, it was almost impossibly difficult to implement in the flawed and tragic conditions of history…" Consequently, the extent to which any particular juridical decision conforms to the requirements of Shariʿah is always a matter of debate among Muslims – because the ideal rarely finds adequate expression in the messy circumstances of daily life.

This is not to suggest that societies with majority Muslim populations have failed, throughout the world and history, to create viable juridical institutions. However, majority Muslim societies function with a set of juridical instincts that are distinguishable from those that prevail in the non-Muslim West. One evidence of this difference may be inferred from the types of sanctions traditionally made available to the Muslim community under Shariʿah, compared with those utilized in Western societies. If we accept the verdict of Foucault, Western individualism finds juridical expression in the prison system. Individualism is privileged at the expense of the community – as expressed by the familiar adage that it is sometimes necessary "to destroy the village in order to save it." Muslim communitarianism, whether in its ideal (Shariʿah) or applied (fiqh) expression, is unwilling to take such a risk. As a result, incarceration – though not unknown under Shariʿah-based systems – has never been regarded by majority Muslim societies as a great civilizing or humanizing advance over other forms of sanction.

Be that as it may, I would be remiss if I failed to acknowledge what I

take to be a corollary anthropological intuition common to Muslims: an intuition that the form of understanding which Bourdieu termed *habitus* is embodied, if at all, in individuals and not – for lack of a better term – corporations. Islamic emphasis upon the collective never rules out the indispensable role of the individual in creating the just community.[22]

Such considerations suggest a paradox that appears to me to afflict both Muslim communitarianism and Western individualism – a paradox recently articulated by the American philosopher Richard Eldridge in an insightful study of Wittgenstein's later work. Eldridge asks: Which is to be changed first, human character or sociopolitical institutions? Change in human character and change in sociopolitical institutions presuppose one another with no evident way to break into this circle of presuppositions. One will fail in trying directly to educate and elevate the human beings who are formed under sociopolitical institutions, and one will fail in trying directly to change the sociopolitical institutions that express human character. "All improvement in the political sphere is to proceed from the ennobling of character – but how under the influence of a barbarous constitution is character ever to become ennobled?"[23]

As a general proposition, I would suggest that thoughtful Muslims and non-Muslims could be expected to agree as to the validity of this conundrum. Where the two would potentially part company is in the response to the problem. In so far as the Muslim understands his/her role in history as one of refashioning sociopolitical institutions in conformity with Shari^{c}ah – as the Divinely ordained "way to break into this circle of presuppositions" – one could expect sociopolitical activism. The response of non-Muslims in the West would be, predictably, more varied, more individualized. It could be anticipated to run the gamut from sociopolitical activism (such as we find today with the so-called "Christian right") to resigned quietism. This is not to suggest, however, that the latter course is not open to Muslims. L. C. Brown has recently argued that political quietism has a long and distinguished career among Muslims living in majority Muslim polities.[24] Shari^{c}ah may be argued to authorize the same varied and individualized responses among Muslims that one would anticipate finding among non-Muslims in the West, given the appropriate circumstances. The essentializing tendencies of a legal scholar such as Doi – or of an historian such as Armstrong, or our French intellectuals – should spur the reader on to more thorough investigation and greater

efforts to articulate the sociopolitical and historical contexts, inculcating the *habitus*, by and through which laws are promulgated, interpreted, applied, and enforced.