IsHistoricismaviableStrategyfor
IslamicLawReform?
TheCaseof‘NeverShallaFolkProsperWhoHave
AppointedaWomantoRuleThem’*

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Abstract
ThereareatleasttwokindsofhistoricismthatarerelativetoIslamiclegalreform,
one rooted in a progressive theory of history, the other rooted in history as a source
fortextualinterpretation. Thelatterhasthepotentialtogarnergreatersupportfor
progressivelegalchangeinsofarastifallssquarelywithinthewell-knownjurisprudential
conceptknownastakhṣīṣal-ʿāmm(specificationofthegeneralterm). Inthisarticle,
Iexplorethisreformstrategybyanalyzingawell-knownProphetichadīththatistraditionallyunderstoodasexcludingwomenfromholdingpoliticaloffice. Byexploring
literaryhistory, Islamiclegalhermeneutics, andsubstantiveIslamiclaw, Idemonstrate
that, in this particular case, substantial egalitarian reform can be justified without
fundamental changes to traditional Islamic theological doctrines. While no one
rhetoricalstrategyoffersama“magicbullet”forcreatingamoregender-egalitarianversion
ofIslamiclaw, progressive Muslim reformers in my view should first exhaust possibili-
ties for reform implicit in traditional methods before introducing arguments outside
of that tradition—arguments which, by their nature, raise controversial theological
questions that may be more intractable than the legal rules that are the object of the
desiredreform.

Keywords
egalitarianism,historicism,reform,progressiveIslam,takhṣīṣal-ʿāmm, women rulers,
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1. Introduction: Islam, Gender and Islamic Reform

Issues of gender equality have been contentious in the Muslim world since the 19th century; they have also served as a flashpoint in an assumed clash of civilizations. The combination of Orientalism and colonialism, with the former often giving the latter normative justification for intervention in, and conquest and transformation of, the Islamic world in the name of defending oppressed Muslim women, moreover, has complicated internal Muslim debates on normative questions related to issues of gender equality. As a result, Muslims with commitments to gender equality (“progressive Muslims”) often find themselves fighting a two-front war: one against Orientalist and colonialist discourses that seek to justify western domination of Muslim societies using a trope grounded in Islam’s oppression of woman, and the other against hierarchical, and even misogynistic, interpretations of gender relations in historically Muslim societies.

One self-identified progressive Muslim, Ebrahim Moosa, identifies “text fundamentalism”—the belief in the absolute sovereignty of the revealed text, to the exclusion of history and the experience of the Muslim community—as an important obstacle facing Muslim reformers in their struggle to promote progressive Islamic conceptions. Ironically, “text fundamentalism,” according to Moosa, tempts even progressive Muslims. One way they are tempted is to argue that the Qur’an plainly advocates a norm of gender egalitarianism without giving a satisfactory account of those revelatory texts that are inconsis-
tent with their view. Moosa instead advocates a historicist approach to Islamic religious texts, including those aspects of scripture that deal with legal matters. Conversely, progressive Muslims can sometimes find themselves paralyzed when confronted with certain texts that apparently teach that women are inferior to men, at least in certain contexts. This article will analyze one such text, the *ḥadīth* stating that “No folk who has entrusted their affairs to a woman shall prosper,” with the express goal of demonstrating that it is possible for progressive Muslims, at least in certain cases, to engage such texts without either succumbing to paralysis or engaging in “hermeneutical acrobatics” by exploiting the historical and interpretive resources of the Islamic legal tradition.

Although Moosa expressed the view that historicism was an antidote to the text fundamentalism described above, he did not provide a clear sense of what he meant by historicism. It may very well be that a certain kind of historicism—one that pays greater attention to the historical context of revelatory texts, a method which I will call “hermeneutical historicism”—has an important role to play in progressive Muslims’ call for Islamic legal reform. It could potentially play this positive role by destabilizing common sense, univocal interpretations of a text in favor of a more open-ended method of reading which discloses the multivalent possibilities of the text, some of which may be consistent with a progressive political agenda, in this case, gender egalitarianism.

Such a method may even find some resonance within traditionalist Muslim circles, especially when compared to attempts by progressive Muslims (including Muslim feminists) to argue that Islamic revelatory texts, *properly read*, express an unequivocal commitment to gender

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egalitarianism. An important reason why traditionalist religious scholars have been generally dismissive of feminist interpretations of the Qur’an is the implication that the tradition has, with respect to women, acted in bad faith, even consciously suppressing true Islamic teachings on gender. Hermeneutical historicism, then, is responsive to what Andrew March has called the “Reformer’s Dilemma”: because it is discursively less “costly” in terms of moral capital to make revisions to applied doctrine than to methodological or foundational doctrines, an effective reformer is likely to exhaust the former before repairing to the ground of the latter. Given that progressive Islam is an explicitly political project, it would seem appropriate for progressive Muslims to heed the Reformer’s Dilemma, and to that extent, hermeneutical historicism would appear to be a valuable tool in their rhetorical strategies. Such a method could justify departures from the plain sense of a revealed text while avoiding “hermeneutical acrobatics.” Progressive Muslims should pay special attention to what I am calling “hermeneutical historicism” given its affinity to discussions within traditional jurisprudence (usūl al-fiqh) regarding the circumstances in which it is appropriate for an interpreter to assume that a general term was intended to apply more restrictively than its literal sense would suggest. These discussions are treated under the rubric of takhṣīṣ al-ʿāmm (specification of the general term). As Moosa shows, even traditionalist scholars took historical circumstances into account in interpreting the legal consequences of revelation. Indeed, the use of extrinsic evidence to interpret legal texts is a well-established, albeit controversial interpretive technique, in non-Islamic legal systems such as that of the United States.

8) Ali, supra n. 5 at 132 (criticizing a Muslim feminist for failing to “acknowledge the possibility that a reading of the Qur’an that arrives at different conclusions [than those of feminists] could be a legitimate reading or a faithful explication of the Qur’an’s teachings.”).
9) Moosa, Poetics at 44.
11) Moosa, Debts, at 126.
Hermeneutical historicism should be contrasted to what would be, from the perspective of historical orthodox Sunni Islam, a more controversial version of historicism, one, for example, which assumes that history moves progressively toward a specific telos, whether the classless society posited by Karl Marx, or perhaps liberal democracy in the eyes of Francis Fukuyama. I refer broadly to this class of historicist arguments as “progressive historicism.” Progressive historicism uses history to relativize the moral significance of a particular legal text found in the Islamic revelatory sources. A progressive Muslim reformer applying progressive historicism might argue, for example, that although revelation communicates a clear rule without expressly including any kind of temporal restriction, Muslims today are nevertheless justified in restricting it to a distant (or perhaps not so distant) past on the grounds that its moral significance is rightly constrained by what were the inherent practical limitations on achieving perfect justice (typically understood as consistent with the particular conception of justice adhered to by the interpreter) prevailing at the time of the Islamic dispensation in early seventh century Arabia. Progressive historicism might be used to generate readings of revelation that render rules reinforcing a system of gender subordination obsolete by, for example, limiting their application to the unique circumstances of pre-modern societies on the ground that they lacked the economic and institutional means to support a system of gender egalitarianism. Progressive historicist readings might also claim that revelation’s universal and abstract texts point to an ideal transcending the practical limitations that inevitably arose out of the fact that revelation also addressed the very particular problems of seventh century Arabia. This is essentially the approach to the Qur’an taken by the modernist Pakistani-American theologian Fazlur Rahman.13

That progressive historicism is not altogether alien even to traditionalist religious scholars is evidenced in the justification given for the abolition of slavery.14 Traditionalist religious scholars often make the argument that the Qur’an aimed, first of all, to restrict the scope of slavery and raise the status of slaves in society, with the aim of its complete abolition. On this account, the fact that the Qur’an did not itself demand absolute abolition is not an obstacle to Islamic support for abolition. Progressive historicism, however, remains controversial in traditionalist and fundamentalist circles as a general interpretive strategy, probably because its theory that moral progress is a reason to suspend the effectiveness of various Qur’anic legal provisions may suggest that revelation is imperfect.

Hermeneutical historicism, on the other hand, is only an additional interpretive tool in the hands of a jurist that allows her to use history to arrive at a better understanding of the Lawgiver’s admittedly indeterminate intent by investigating the circumstances of the text. Hermeneutical historicism also has the advantage of historical Islamic legitimacy: Islamic scholarship of the Qur’an generally,15 and Islamic jurisprudence, through the concept of takhṣīṣ al-ʿāmm (specification of the general term) specifically,16 both attempted to account for the unique circumstances in which religious or legal texts were communicated, and the relationship of those circumstances to a proper understanding of the text. Hermeneutical historicism, because of the potential it has for excavating alternative readings of the text, may have the potential of generating new (and relatively more progressive) interpretations while avoiding potentially controversial (and usually irrelevant) theological controversy. Progressive Muslim reformers should of course not abandon progressive historicism entirely; rather, it would


15) A sub-field of Qur’anic exegesis is known as asbāb al-nuzūl or “the occasions of revelation.” Because the Qur’an was revealed gradually over twenty-three years, this science seeks to document the particular historical circumstances in which the constituent texts of the Qur’an were believed to have been revealed.

appear that the more politically prudent course for reformers would be first to exhaust the progressive possibilities inherent in conventional methods of interpretation, including hermeneutical historicism, before adverting to more controversial justifications, such as progressive historicism.

The concern with historical context in Islamic hermeneutics manifests itself in connection with Muslim jurists’ discussion of the semantics of the “general term” (al-lafẓ al-ʿāmm). While the formalist bent of traditional Muslim jurisprudence certainly might be an ally of text fundamentalism, traditional Muslim legal interpretation also recognized the importance of context to interpretation. To that extent, jurisprudential controversies regarding how to interpret the general term, as well as the larger question of the role of context in determining meaning, might play an important role in subverting unexamined, univocal readings of texts supporting various kinds of social hierarchies. Such a strategy might be particularly worthy for Muslim reformers to consider because it is peculiarly responsive to the difficult political circumstances facing them. These circumstances, as Sa’diyya Shaikh emphasized, require progressive Muslims, simultaneously, to defend the Islamic tradition against hostile hegemonic western discourses while at the same time maintaining a posture of internal criticism in order to achieve the political goal of a more just and egalitarian society.

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20) Shaikh, supra n. 2 at 155 (“Muslim women and men with feminist commitments need to navigate the terrain between being critical of sexist interpretations of Islam and patriarchy in their religious communities while simultaneously criticizing neo-colonial feminist discourses on Islam.”).
In this article I take up Moosa’s invitation to apply a historicist method to revelatory texts as a reform strategy but from the perspective of hermeneutical historicism rather than progressive historicism. There may very well be instances where an advocate of legal reform concludes that the traditional reading of a text *is* the correct reading, with the result that he will have to apply a theologically controversial method of interpretation, e.g., progressive historicism, in order to carry her argument. As I will show, however, the issue of female political participation appears amenable to resolution in a manner broadly consistent with progressive politics without resorting to the Islamically more controversial method of progressive historicism.

I will test the practicability of this strategy by analyzing the *ḥadīth* “Never shall a folk prosper who appoint a woman to rule them,” or in a different version, “No people has prospered who has appointed a woman to lead them.” Many pre-modern Sunni Muslims invoked this

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21) See, for example, Amina Wadud, *Inside the Gender Jihad: Women’s Reform in Islam* (Oxford: Oneworld, 2006), 192 (describing circumstances in the Qur’anic text where reinterpretation is insufficient and she must instead say “no” to the text based on some other value).

22) It goes without saying that the interpretive strategy proposed here (use of the concept of *takhṣīṣ al-āmm* or specification of the general term) does not provide a magical solution to all questions of gender hierarchy in the Islamic legal tradition. Nor am I suggesting that the exclusion of women from the public sphere in contemporary Muslim societies can be remedied simply by re-reading the *ḥadīth* in question in a manner acceptable to both progressives and traditionalists. Nevertheless, the *ḥadīth* in question plays an important symbolic role in legitimating the exclusion of women from political life, something that justifies the greater attention Muslim progressives have given to this *ḥadīth* relative to the more technical rules of substantive law (*fiqh*), e.g., the obligation of women to stay at home, even though such rules also pose substantial practical problems for female participation in the public sphere, and even though it is sometimes claimed that such rules are the subject of consensus (*ijmāʿ*). Because these technical rules are generally understood to be the product of juridical reflection rather than the words of God or the Prophet Muḥammad, they have less “sanctity” and thus reduced symbolic power in justifying relations of gender subordination in the modern world. For a detailed discussion of some pre-modern substantive rules in the Shāfiʿī school that justified gender subordination, see Scott Lucas, “Justifying Gender Inequality in the Shāfiʿī School,” *Journal of the American Oriental Society* 129:2 (2009): 237-258. For a more comprehensive defense of the right of women to participate in the public affairs of the Muslim community that includes a revisionist interpretation of this *ḥadīth* but goes well beyond it, see Yusuf al-Qaraḍāwī, *Min Fiqh al-Dawla fī al-Islām* (Cairo: Dar al-Shuruq, 1997), 161-176, and ‘Abd al-Ḥalīm Maḥmūd Abū Shuqqa, *Tāhřīr al-Marʾa fī ʿAṣr al-Risāla*, 4 vols. (Dār al-Qalam: Kuwait, 1990).
text to justify the complete exclusion of women from various public offices. It also appears that, at least in certain contemporary Muslims societies, this hadith continues to be commonly used to justify exclusion of women from public office.\textsuperscript{23} Given the general desire of even Muslim traditionalists in the modern period to exonerate the Islamic tradition of openly misogynistic views, however, contemporary Muslim understanding of this Prophetic report, as well as the question of female participation in public affairs, has undergone substantial revision.\textsuperscript{24}

Unsurprisingly, this hadith has earned the particular scorn of Muslim feminists, at least one of whom has written an extensive refutation of its normative status.\textsuperscript{25} Another well-known progressive Muslim author, Khaled Abou el Fadl, has also challenged the normativity of this report.\textsuperscript{26} Unlike many misogynistic reports attributed to the Prophet Muhammad that are universally deemed to be of dubious historical authenticity, the report at issue here is included in sources that Muslims deem to represent the most historically authoritative collections of the Prophet’s words. Accordingly, denial of the text’s authenticity is not a readily available option, at least without raising the kinds of foundational questions that the Reformer’s Dilemma suggests should be avoided unless necessary.\textsuperscript{27}

Accordingly, the analysis of this text could serve as a test case of whether hermeneutical historicism can offer results that are both substantively satisfactory from a progressive perspective and politically

\textsuperscript{23} Mernissi, \textit{supra} note 7, 112-113 (describing the use of this hadith in Moroccan culture to exclude women from political life).

\textsuperscript{24} Conservative scholars such as Yūsuf al-Qaraḍāwī have attempted to reinterpret the meaning of this report. See, for example, \textit{al-Mar’a wa-l-ʿAmal al-Siyāsī} (Part IV) [“Women and Political Activism”], Ana TV Channel, available at http://www.youtube.com/watch?v=ei9LVMaEaBY (last visited September 19, 2009) (Qaraḍāwī explaining that the Prophetic report at issue must be read in light of the Qur'an's story of Bilqīs, the Queen of Sheba, whom the Qur'an depicts as a wise and upright ruler). More generally, scholars such as al-Qaraḍāwī have advocated positions in support of women’s political participation that are substantially at odds with the ethos of the pre-modern tradition. See al-Qaraḍāwī, \textit{supra} n. 22, 161-176.

\textsuperscript{25} See, for example, Mernissi, \textit{supra} n. 7, 113-120.

\textsuperscript{26} Khaled Abou el Fadl, \textit{Speaking in God’s Name: Islamic Law, Authority and Women} (Oxford: Oneworld Publications, 2001), 111-114.

\textsuperscript{27} Mernissi, however, has challenged its authenticity. Ibid. See also, Shaikh, \textit{supra} n. 2 at 158.
superior to other progressive methods of reinterpretation because of the potential it offers in winning the support of a broader Muslim public. Finally, because this hadith uses a general expression—the negation of an indefinite noun—a historical analysis of this text might also serve as a test case for determining the extent to which progressive interpretations of revelatory texts can emerge through a more critical use of traditional hermeneutical tools such as takhşiş al-ʿâmm (specification of the general term) which allows an interpreter, in theory, at least, to take into account particular historical circumstances in an effort to establish the intended meaning of a particular legal text.

2. The Hadith Sources

Versions of this hadith appear in four major Sunni collections from the 9th and 10th centuries: the Musnad of Aḥmad b. Ḥanbal (d. 855/240); the Šaḥiḥ of al-Bukhārī (d. 869/255); the Sunan of al-Tirmidhī (d. 892/279); and the Sunan of al-Nasāʿī (d. 915/302). It also appears in the Muṣannaf of Ibn Abī Shayba (d. 849/234). It subsequently appears in various (and substantially truncated) forms in late medieval/
early modern hadith encyclopedias such as Majmaʿ al-Zawāʾid of Nūr al-Dīn ‘Alī b. Abī Bakr (d. 1405/807),35 al-Jāmiʿ al-Ṣaghīr of Jalāl al-Dīn al-Suyūṭī (d. 1567/974),36 Kanz al-ʿUmmāl of ‘Alī b. ‘Abd al-Malik al-Muttaqī (d. 1748/1161).38 All sources trace this report to one contemporary of the Prophet Muḥammad: Abū Bakra Nufayʿ b. al-Ḥārith (d. 671 or 672/51 or 52).39 Likewise, all historical sources agree that this tradition was narrated exclusively by Baṣrans. This fact is especially significant because many Baṣrans fought on the losing side of the first civil war in Islamic history, a memory which was to provide a significant frame for some of this hadīth’s subsequent narrations.

The Muṣannaf includes one version of this hadīth in its lengthy chapter on the first civil war. There, Ibn Abī Shayba quoted Abū Bakra as saying “Never shall a folk prosper who delegate their affairs to a woman.”40 The Musnad includes eight versions of this hadīth. One states that the Prophet said “Never shall a folk prosper who have entrusted their affairs to a woman.”41 Another states: “A Persian came to the Prophet and [the Prophet] said [to the Persian]: ‘My Lord has killed your lord.’ i.e. Chosroe, and it was said to him, i.e. the Prophet, ‘He appointed his daughter to succeed him.’ He said, ‘No folk who is ruled by a woman shall prosper.’”42 Yet another version states that “Abū Bakra witnessed a messenger come to the Prophet while he was reclining in ʿĀʾisha’s [bt.

39) Ḥishāq Ṭibī, ed. Kanz al-ʿUmmāl fī Sunan al-Aqwāl wa-l-Afʿāl, 2nd ed. (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 1968), 4:392 (reporting his death date as either 51 or 52 AH).
40) Ibn Abī Shayba, supra n. 34.
41) The Musnad includes five versions of this hadīth that are substantially similar to this version. Aḥmad b. Ḥanbal, supra n. 30, 34:43, 120, 121-122, 149.
42) Ibid., at 85-86.
Abū Bakr al-Ṣiddīq (d. 677 or 694/57 or 75) lap and reported to him that they had been victorious over their enemy, so he stood and prostrated in thanks. Then, he began to ask the messenger various questions, and the messenger answered them. Among the things he told the Prophet was that a woman now ruled them. The Prophet then said, ‘Now, the men have perished when they obey women,’ three times.”

The last version quotes Abū Bakra as stating “The Prophet said, ‘Who governs Persia?’ They replied ‘A woman.’ He said, ‘No folk that a woman governs has prospered.’”

Al-Bukhārī included two versions of this ḥadīth. The first appears in Kitāb al-Maghāzī, Bāb Kitāb al-Nabī ilā Kīsrā wa Qayṣar (The Book of Campaigns, Chapter: The Prophet’s Diplomatic Correspondence with Chosroe and Caesar). In this version Abū Bakra states, “God permitted me to benefit on the Day of the Camel from some words of the Prophet that I had heard, after I had almost joined the forces of the Camel to fight with them.” He said, “When the Prophet was told that the Persians had appointed Chosroe’s daughter as their ruler, he said, ‘Never shall a folk prosper who have appointed a woman to rule them.’”

Al-Bukhārī also included another version in Kitāb al-Fitan (The Book of Civil Strife). In this version, Abū Bakra states, “God permitted me to benefit from some words on the Day of the Camel. When the Prophet was told that the Persians had made Chosroe’s daughter their ruler, he said, ‘Never shall a folk prosper who have appointed a woman to rule them.’”

Al-Tirmidhī included only one version of the ḥadīth in Kitāb al-Fitan. In that version Abū Bakra said, “God protected me with something that I had heard from the Messenger of God: When Chosroe died, he said ‘Whom have they appointed as his successor?’ They replied, ‘His daughter,’ upon which the Prophet commented, ‘Never shall a folk prosper who have appointed a woman to rule them.’”

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43) Ibid., at 106-108.
44) Ibid., at 144.
47) Al-Tirmidhī, supra n. 32, at 3:360.
when ‘Ā’isha came, [i.e. to Baṣra,] I remembered the Prophet’s statement. Thus, God protected me through it.’”

Al-Nasāʾī included this hadīth in Kitāb Ādāb al-Qudāt (The Chapter of the Rules [Applicable to] Judges) in a form that is virtually the same as that included in Tirmidhī’s collection, except that al-Nasāʾī omitted Abū Bakra’s concluding comment in which he stated that he remembered this statement at the time of ‘Ā’isha’s arrival in Baṣra. Part 4 will explain in greater detail the interpretive significance of these different framings.

3. The Hermeneutics of the General Term in Islamic Jurisprudence (uṣūl al-fiqh)

The linguistic category of the “general term” (al-lafẓ al-ʿāmm), and exceptions thereto or specifications thereof (al-takhṣīṣ), were important and controversial topics in Islamic jurisprudence (uṣūl al-fiqh) during the fifth-eighth/eleventh-fourteenth centuries. It is unremarkable that the scope of the general term would be contentious in jurisprudential theory given the fact “that the range of application of the law is determined by general terms.” Moreover, the very fact of a term’s generality means that it can come into conflict with other provisions of the law, a problem that justifies the hermeneutical preoccupation with setting out intelligible standards for its interpretation.

One of the linguistic guises in which the general term appears is the negation of an indefinite noun; therefore, Abū Bakra’s hadīth—in its various versions—clearly engages jurisprudential debates on the

48) Al-Nasāʾī, supra n. 33, at 8:200.
51) Ibid.
semantic scope of the general term. Before considering Muslim jurists’ theory of the general term, however, a brief introduction to their theory of language is first needed.

a. An Overview of Pre-Modern Islamic Legal Hermeneutics

For most Muslim scholars of jurisprudence of this era, a speaker conveyed meaning through the deliberate use of specific utterances (alfāẓ). At some primordial moment, meaning was assigned by convention (waḍʿ) to all the words in a language. Because this primordial assignment was intended to further the interests of the speech-community using that language, Muslim jurists argued that a word’s original, primordial meaning also constitutes that word’s proper or literal usage, a sense they referred to as its ḥaqīqa. Speakers, however, frequently use words in a non-literal or figurative sense. Such usage is called majāz, an Arabic noun indicating that the speaker literally “crosses” the proper boundaries of the word’s original meaning.

Muslim jurists assume that speakers know both the primordial meanings of the words constituting their language and the relevant linguistic conventions of their language. They also assume that speakers, above all the Lawgiver (whether God directly in the Quran or indirectly through the Prophet Muhammad’s sunna), choose their words rationally to express their intended meanings. Muslim jurists therefore begin with the presumption that speakers ordinarily intend the plain or literal sense of the words they use. Only if there is evidence to the contrary, for example some extrinsic circumstance (qarīna) suggesting that the speaker intends a non-literal sense, would the listener be justified in interpreting the utterance figuratively. Because the listener may fail to take into account relevant circumstantial evidence, however, the literal sense of an utterance, taken by itself, is only presumptive (zāhir) but not dispositive (qatʿī) evidence of the speaker’s intent. Legal conclusions derived from the plain sense of revelatory texts, therefore, generally yield only probable judgment (ẓann) rather than certain knowledge.

Mainstream Sunni jurisprudence, therefore, may be characterized as having adopted what the American legal scholar William Eskridge calls a “soft plain meaning rule,” meaning that the object of jurisprudential inquiry into the words of the Lawgiver is to discover the Lawgiver’s intent, and that plain meaning is an important, but not dispositive, means for discovering that intent.

b. The Controversial Hermeneutics of the General Term

When faced with linguistic forms that suggest generality (ṣiyagh al-ʿumūm), Muslim jurists must determine whether the literal sense of such forms applies to all instances of the relevant concept. The majority of Muslim scholars of jurisprudence concluded that the literal sense of such terms is indeed general. They also conclude that one of the means by which a speaker communicates generality is to negate an indefinite singular noun, as in the sentence “layṣa fī al-dār rajul” (“There is not a man in the house.”). This majority, the so-called arbāb al-ʿumūm (“the partisans of general expression”), construe general terms as providing presumptive evidence that the Lawgiver intends their application to all instances of the relevant class. This presumption could, and was, regularly defeated by other evidence suggesting that the Lawgiver intended a more specific meaning, a phenomenon known as takhṣīṣ al-ʿāmm (specification of the general term).

A not insubstantial minority, the so-called arbāb al-khuṣūṣ (“the partisans of specific reference”), rejected this analysis. Relying on the frequency with which speakers use general terms while intending a more specific meaning, they argued that, when faced with a general term, a

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53) The primary dissenters with respect to this view, at least as applied to the semantics of the general term, were the Ḥanafīs. Zysow, supra n. 50 at 129. The most important dissenter from this formalist theory of language was the Andalusian jurist Abū Ishāq al-Shāṭibī who instead proposed a pragmatic theory of language grounded in the universal ends of religion (al-maqāṣid al-kulliyāt). Ibrāhīm b. Mūsā al-Shāṭibī, al-Muwāfaqāt, 4 vols. (al-Khubar: Dār Ibn ’Affān, 1997), 4:7-49.
54) Eskridge et al., supra n. 49 at 224-225.
55) Weiss, supra n. 17 at 404-5.
56) The frequency by which general terms were in fact subject to specification by jurists gave rise to common juristic saying that “There is no general term that has not been subject to specification (mā min ʿāmm illā khuṣṣa).” Zysow, supra n. 50 at 129.
jurist is only entitled to presume that the rule applied to some, but not all, of the members of the relevant class. The third (and smallest) group of jurists (al-wāqifiyya) held that it is impossible to justify any kind of presumption as to the scope of a general term in the absence of additional evidence of the Lawgiver’s intent.

Each of the three positions, then, is open to further interpretation of a general term; indeed, even the majority believed that a jurist, before applying a general term, is under an obligation to search for circumstantial evidence that may clarify whether the Lawgiver had used the general term in a non-literal fashion. As a practical matter the real issue separating Muslim jurists was the scope of rules communicated using general terms for which the Lawgiver did not provide any circumstantial evidence relevant to determining the Lawgiver’s intent. For the majority, the Lawgiver’s use of a general term justifies the conclusion that the rule should be applied generally; the minority, meanwhile, hold that the rule may be applied only to the particular members of the class to which it is known to apply, a position that is practically indistinguishable from those jurists who view general texts as inherently ambiguous and thus are in need of clarification before any legal rule may be derived from them. Applying these principles to Abū Bakr’s ḥadīth, the majority of Muslim jurists would conclude, in the absence of any other evidence, that its literal sense establishes that women are not fit to rule.

c. Specification of the General Term

Evidence that the Lawgiver used a general term while intending a more specific meaning may come from multiple sources. In some non-controversial cases, the evidence is explicit and part of the same utterance (al-dalīl al-muttaṣil), an express exception to the general term being the most obvious, as in the Islamic declaration of faith, “lā ilāha illā allah” (There is no god except for God). It is the so-called “disconnected

58) Weiss, supra n. 17 at 405.
indicant of specification” (al-dalīl al-munfaṣil), however, that generates the greatest controversy.

Jurists identify three kinds of disconnected indicants of specification: rational, empirical and textual. The first two are narrow and generally understood to be implicated only when the plain sense of general term would render the statement logically or empirically absurd. Accordingly, rational considerations lead to specification of phrases in the Qur’ān like “God is the creator of all things” so as to exclude God from membership in the class of “things.” Similarly, empirical considerations require specification of the Qur’ānic verse in which God describes a wind as “destroying everything,” because empirically we know that it did not destroy the heavens or the earth. Finally, other texts of revelation can specify general terms. For example, the ḥadīth attributed to the Prophet Muḥammad in which he was reported to have said that “There is no amputation for a thief who steals property having value of less than one-fourth of a gold dinar,” was taken to limit the seemingly general Qur’ānic verse whose terms impose amputation of the thief’s hand.59

A minority of scholars of jurisprudence held that the specific circumstances surrounding the communication of a legal text may serve as circumstantial evidence of the Lawgiver’s intent that the text’s scope is specific rather than general.60 The majority instead affirmed the principle that “consideration is given to the generality of the words, not the specificity of their occasion” (al-ʿibra fī ʿumūm al-lafẓ lā khuṣūṣ al-sabab). As will be shown in greater detail below, whether the particular circumstances surrounding the communication of a legal text are relevant to the proper interpretation of the text is an important consideration in interpreting Abū Bakra’s ḥadīth. Accordingly, I will conclude this section with a brief discussion of this issue.

59) Ibid., at 424.
60) Hallaq, supra n. 52 at 475 (noting the importance of circumstantial evidence to determinations of whether the scope of a text should be narrowed). This intra-Muslim debate regarding the relevance of non-verbal circumstances in construing the words of the Lawgiver is in important respects analogous to the debate in American jurisprudence regarding the legitimacy of using extrinsic evidence, such as legislative history, to interpret a statute. Eskridge et al., supra n. 49 at 223-236.
**d. Can the Specific Circumstances of a Legal Text Specify the Scope of a General Term?**

Abū Ḥāmid al-Ghazālī (d. 1111/505) displays the ambivalence characteristic of Muslim jurisprudence with respect to the tension between its commitment to objectivism in hermeneutics and the inescapable need to give effect to context, even non-linguistic context. Thus, al-Ghazālī affirmed the majority’s position that the circumstances of a text’s communication are generally ineffective to specify the general term while at the same time admitting that such extra-textual circumstances may make it more likely that a more specific intent was intended, thus permitting specification with even a relatively weak indicator (*dalīl akhaff wa aḍʿaf*).61 Indeed, in some cases, despite the general rule, it is simply impossible to resist the conclusion that the relevant circumstances require specification of the general term, as in the case in which one man tells another, “Speak with so-and-so about such-and-such,” and the other man then swears an oath, saying, “By God, I shall never talk to him.” Here, al-Ghazālī said, the oath is understood to apply only to conversations with that third person regarding that particular event, not absolutely.62

Al-Āmidī (d. 1233/630) related that whether or not the circumstances of a legal text are taken into account depends both on the specific circumstances that prompted the communication and the nature of the legal text. Accordingly, if the Lawgiver is asked about a specific act, but provides a response broader than the question asked, many jurists who otherwise affirm the general expression would, in this circumstance, restrict that text’s application to the circumstances of the question.63 On the other hand, if the Lawgiver is asked a question, and

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62) Ibid.

63) Sayf al-Dīn Al-Āmidī, *al-Iḥkām fi uṣūl al-aḥkām*, 4 vols. (Beiruit: Dar al-Kutub al-ʿIlmiyya, 1983), 2:346-347. A standard example involves the case of a well and whether its water was ritually pure. The Prophet Muḥammad was asked about the water of a particular well and was told that wild animals drink from it as do humans. His reply was that “Water has been created pure; nothing pollutes it unless its taste, odor or color is changed.” Most jurists took this report, despite its general language, as applying specifically to that particular well, given what was known about the vastness of its water supply.
the answer is broader than the specific circumstances that gave rise to the question, and the answer is logically independent of the question, then the partisans of the general expression unanimously apply the text generally.\textsuperscript{64} \textit{A fortiori}, for partisans of the general expression, if the Law-giver uses a general term without prompting by the questioner, the general term applies generally according to its presumptive sense.\textsuperscript{65}

It was reported, however, that foundational figures in Islamic jurisprudence accepted the minority position, including Mālik b. Anas (d. 796/179), Abū Thawr (d. 742 or 757/124 or 140), al-Muzanī (d. 877/263) and al-Shāfiʿī (d. 820/204), at least in some of the views attributed to him.\textsuperscript{66} This controversy, moreover, generated differences in legal rules. For example, Shāfiʿī’s disagreed regarding the scope of the dispensation (\textit{rukhṣa}) concerning the ‘\textit{ʿarāyā}’ sale. The ‘\textit{ʿarāyā}’ is a transaction pursuant to which a person uses dried dates to purchase fresh dates in an apparent violation of the Islamic doctrine of \textit{ribā} (usury).\textsuperscript{67} The disagreement is whether this dispensation is available to all persons without regard to their personal wealth, or is limited to needy persons on the grounds that the text giving this permission was prompted by questions from the poor. The majority of Shāfiʿī jurists concluded that the dispensation is universal while a minority limit it to the needy.\textsuperscript{68}

Another example involves interpretation of the Qur’anic verse which states, “Say (O Muḥammad)! I find nothing in that which has been revealed to me proscribing what one may eat other than [the flesh of] carrion or the blood [of slaughtered animals].” Al-Shāfiʿī, who took this

\textsuperscript{64} Ibid. The example used to illustrate this principle involved a group of people who asked the Prophet whether they could perform ritual ablution using sea water while they are out at sea. The Prophet Muḥammad replied saying, “Its water is purifying, and its dead [creatures] are lawful to eat.” Because the question did not raise the issue of whether such animals could be eaten, Muslim jurists concluded that this general expression was intended to communicate a general rule that eating such animals was permissible.

\textsuperscript{65} Ibid.


\textsuperscript{68} Al-Subkī, \textit{supra} n. 66 at 1004-1005.
verse as arising out of a polemic against pre-Islamic Arab pagans rather than a text setting out dietary rules for Muslims, ignored it when he formulated Islamic dietary restrictions. Mālik, however, applied the text generally with the result that, for him, other texts, e.g. Prophetic hadīths, the plain meaning of which appear to prohibit eating the flesh of carnivorous animals, were taken to signify disapproval (karāha), not prohibition (taḥrīm). Al-Zarkashī (d. 1392/794) provided another example of al-Shāfiʿī using circumstances to circumscribe a text’s applicability: contrary to the Ḥanafīs, who held that female apostates may not be executed, al-Shāfiʿī held that their treatment was no different from male apostates, despite the Prophet’s prohibition against killing women. Al-Shāfiʿī, however, argued that the hadīth prohibiting the killing of women refers to the women of hostile non-Muslim tribes, not Muslim women who apostatized. This dispute was also characterized by at least some Muslim jurisprudents as part of a larger problem: does a rule that no longer serves its original purpose continue to apply by its terms or does it lapse by virtue of the legal cause’s disappearance (ʿilla)?

As these examples make clear, even among the partisans of the general term, willingness existed to take into account substantive context in an attempt to produce an interpretation of the Lawgiver’s intent that appeared sensible to the interpreter. This general sensitivity to context, however, did not seem to play a role in jurists’ understanding of Abū Bakra’s hadīth, even though, as Part 4 will show, it would not have been difficult to argue that a more specific meaning was in fact intended. Part Six will make the case that Muslim jurists did not attempt to justify a more narrow reading of the hadīth for the simple reason that, because of a generally prevailing andocentric (if not misogynistic) culture, they were insufficiently motivated to apply the critical tools

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71) Al-Zarkashi, supra n. 69 at 60-61.
72) Ibid., 363, 385.
otherwise available to them in interpreting this *ḥadīth*, something that would change in the modern era.

4. Hadith Genre, Interpretation and Narrative Frame

For Sunni Muslims, the scholar-compilers active in the ninth and tenth centuries of what would later become the “canonical” collections of Prophetic *ḥadīths* are generally most esteemed for their attempts to authenticate the historical material attributed to the Prophet Muḥammad.73 Rigorous historical authentication of the Prophet Muḥammad’s teachings was not, however, their exclusive goal. The generic structure of *ḥadīth* works, the scholar-compiler’s decision where to place a *ḥadīth* within his compilation, and sometimes subtle editorial comments or changes (e.g., with respect to the omission or inclusion of certain background facts) combine to provide evidence that some compiler-scholars were also engaged in their own interpretive projects and wanted their texts to be read in a particular way.

To appreciate how literary context can shape perceptions of a *ḥadīth*’s meaning, a brief introduction to the various genres of *ḥadīth* collections is helpful. The collections which record various original versions of this incident fall into three different genres. The first genre, known as *muṣannaf*, of which Ibn Abī Shayba’s *Muṣannaf* is an outstanding example, emerged in the second half of the eighth century. This work includes material on theology, history of the early Muslim community and law. Ibn Abī Shayba arranged his material topically. Unlike later *ḥadīth* works, Prophetic *ḥadīth* s are only a small part of its materials. Moreover, the concern to include only historically sound material, as evidenced by a reliable chain of transmitters (*ḥadīth*), is absent.74 The second genre, known as the *musnad*, emerged in the late eighth and early ninth centuries and was responsive to the perceived need to authenticate more rigorously the material attributed to the Prophet

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74 Ibid., 25-28.
Muḥammad. Unlike muṣannaf, material in a musnad was arranged alphabetically by the name of the report’s first transmitter. This genre was especially popular with ḥadīth critics, for whom study of the chain of transmitters was a critical tool in assessing the authenticity of a historical text. The Musnad stands as an exemplar of this genre. The third genre of early ḥadīth scholarship can be described as the ṣaḥīḥ/sunan genre. This type of ḥadīth scholarship represented a synthesis of the older muṣannaf genre with the rigorous historical standards of the ḥadīth critics to produce works organized by topic but restricted largely to Prophetic ḥadīths that were deemed to be reliable based on the historical-critical methods of the ḥadīth scholars. The collections of al-Bukhārī, al-Tirmidhī and al-Nasāʾī are exemplars of this genre. Finally, encyclopedic collections of ḥadīth whose primary function appears to have been as reference books for non-specialists, were produced between the fifteenth and eighteenth centuries. Works such as Kanz al-ʿUmmāl, Majmaʿ al-Zawāʾid, Kashf al-Khafāʾ and al-Jāmiʿ al-Ṣaghīr are representative of this genre.

When close attention is paid to the narrative context in which this incident appears, one can speak meaningfully of the reports having materially different implications. As will be shown below, only one of these early ḥadīth collections, that of al-Nasāʾī, made an explicit connection between Abū Bakr’s ḥadīth and qualifications for political office. Al-Bukhārī’s placements of the ḥadīth, however, suggests a reading of the text that functions more to vindicate the Prophet Muḥammad’s claims of prophecy and the need to remain neutral in times of civil war, while al-Tirmidhī’s report suggests that the text’s main lesson is to maintain neutrality in the context of civil war. Ibn Abī Shayba’s version, meanwhile, parallels the prophetic dimension al-Bukhārī gave to the text, but in a substantially different manner: while al-Bukhārī’s

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75) Ibid., 28-31.  
76) Ibid., 31-34.  
77) Ibid., 59.  
78) See al-Nasāʾī, supra n. 33.  
79) See Ibn Ḥajar, supra n. 45.  
80) See Ibn Ḥajar, supra n. 46.  
81) See al-Tirmidhī, supra n. 32.  
82) See Ibn Abī Shayba, supra n. 34.
placement points to a specific incident in Persia as the referent of the Prophet’s statement, Ibn Abī Shayba’s placement suggests that it was a prophecy of the doomed intervention of ‘Ā’isha on the losing side of the first Muslim civil war.\(^{83}\)

To make this point clear, I now turn to the various versions of this incident as reported in the collections cited in Part 2 above. The *musnad* s and the *ḥadīth* encyclopedias are superficially similar in that both minimize authorial voice in interpretation of the text, and in so doing, may have the effect of reinforcing a formalist approach to their interpretation. This feature, while apparently intentional in the *ḥadīth* encyclopedias (their compilers stripped out background facts so as to include only what was deemed to be normatively relevant, i.e., the Prophet’s words, acts or omissions), is only incidental in *musnads* like that of Ibn Ḥanbal, which preserve the contextual integrity of each report, at least to the extent that the original narrators of the reports thought relevant. This feature of the *ḥadīth* encyclopedias is consistent both with the formalism of post-formative Islamic jurisprudence and with the practice of jurists to cite Prophetic *ḥadīths* that were reported in connection with specific events in the form of legal maxims that ignore the specificity of the Prophet’s statement, e.g. “the child belongs to the marriage-bed (*al-walad li'l-firāsh*),”\(^{84}\) and “profit follows risk of loss (*al-kharāj bi'l-ḍamān*).”\(^{85}\)

The *ḥadīth* encyclopedias were compiled specifically to make the work of jurists easier by compiling all legally relevant *ḥadīths* in one convenient source. And while these encyclopedias then provided relevant citation information for the reader which would permit him, if he so desired, to read the full version of the reports in the original collections, he certainly did not need to do so, especially since this abbreviated

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83) In his discussion of this *ḥadīth*, Abou el Fadl argues that it is necessary to raise the question of Abū Bakra’s “authorial voice” relative to the “authorial voice” of the Prophet Muḥammad. Unlike Abou el Fadl, I draw attention to the “authorial voice” of the compilers of *ḥadīth* works who included this text in their compilations, a task which, in my opinion, is far more achievable than recovering the “authorial voice” of either Abū Bakra or the Prophet Muḥammad.

84) See Ibn Ḥajar, supra n. 45, 12:36.

method of citing hadiths was consistent with the legal formalism that dominated Islamic jurisprudence in the post-formative period.

The ṣaḥīḥ/sunan works of al-Bukhārī, al-Tirmidhī and al-Nasāʾī, by contrast, are arranged topically. The author’s placement of a hadith in these works reveals how the author wanted his readers to understand the text. This aspect of al-Bukhārī’s collection is especially complex and has been the subject of a tradition of learned commentary by Muslim scholarship. Unlike the compilers of the musnad, al-Bukhārī’s interpretive voice stands at the center of his work: he included his materials under various chapter headings that in many cases take explicitly normative positions, virtually instructing the reader as to the conclusion that should be drawn from the material he transmits.86

Tirmidhī’s and Nasāʾī’s collections in contrast occupy an intermediate position between the two extremes of the Musnad, which disclaims any interpretive stance with respect to its material, and al-Bukhārī’s, which takes interpretive questions as central to its structure. While al-Tirmidhī and al-Nasāʾī both organize their materials thematically, they are not engaged in (overt) polemical argumentation in the fashion of al-Bukhārī. At the same time, the manner by which they organize their materials reveals their subjective understanding of the material presented. When al-Bukhārī’s placement of this text is compared with that of al-Tirmidhī and al-Nasāʾī, important differences emerge. Al-Bukhārī included it in two different chapters of his book, “The Chapter of [Military] Campaigns, Section: The Prophet’s Diplomatic Correspondence with Chosroe and Caesar,” and “The Chapter of Civil Strife.” Al-Tirmidhī, however, included it solely in his “Chapter of Civil Strife,” and al-Nasāʾī included it solely in “The Chapter of the Rules [Applicable to] Judges.”

Based on al-Bukhārī’s placement of this text, it appears that he viewed it primarily in the context of the Prophet’s diplomatic contacts with the neighboring powers of Byzantium and Persia, and secondarily as a guide to how one should conduct one’s self at a time of civil strife. The hadith that precedes Abū Bakra’s report in al-Bukhārī’s collection is

consistent with this reading. That report tells us that the Prophet Muḥammad had sent a diplomatic letter to the ruler of Persia who, after reading it, tore it up dismissively. Al-Bukhārī reported that when the Prophet learned what happened to his diplomatic initiative, he called on God to destroy the Persian state (fa daʾāʿ alayhim rasūl allahu an yumazzaqū kullā mumazzaq). This would suggest that the report at issue, at least in Bukhārī’s view, functions to vindicate the Prophet’s claim of prophecy insofar as it represents a prophecy that the Persian state would soon collapse, something that would take place shortly after the Prophet died.

Two fifteenth-century hadith commentators, Ibn Ḥajar al-ʿAsqalānī (d. 1449/853) and Badr al-Dīn al-ʿAynī (d. 1451/855), emphasized the Persian context of this text in their respective commentaries on this text in Bukhārī’s saḥīḥ. Ibn Ḥajar explained that al-Bukhārī included Abū Bakra’s hadith in the section dealing with the Prophet’s diplomatic activities, because “it is the conclusion of the story of Chosroe who had ripped up the Prophet’s letter. As a result, God set Chosroe’s son against his father, murdering him. He [i.e. the son] then killed his brothers, with the result that they were forced to appoint a woman as their ruler. That led to the destruction of their dynasty, and they were destroyed, just as the Prophet had asked God to do.”

Ibn Ḥajar provides a detailed account of the internal strife that brought down the Persian state: Shīrawayhi, the son who had murdered his father Pervez in order to become king, died within six months of his parricide and regicide, ironically, at the hands of his father. In Ibn Ḥajar’s account of the incident, after discovering that his son was

87) Ibn Ḥajar, supra n. 45, at 8:161.
88) Al-Bukhārī, unlike either al-Tirmidhī or al-Nasāʾī, frequently repeated hadiths in various chapters of his work in order to draw out what he believed were the full normative implications of the report. Fadel, supra n. 86 at 183. Because he included in his work a lengthy chapter devoted exclusively to issues of governance, Kitāb al-Aḥkām (“The Book of Legal Judgments”), Ibn Ḥajar, supra n. 45, at 13:139-268, his failure to include Abū Bakra’s hadith in that chapter provides a reasonable basis for concluding that he did not believe it had political significance. The same conclusion cannot be as confidently asserted with respect to al-Tirmidhī given the fact that he did not generally repeat the same hadith in his book.
responsible for taking his life, Pervez plotted revenge against his son. To that end Pervez, presumably as he lay dying, prepared a poison which he placed in a jar in the royal treasury, labeling it an aphrodisiac, confident that his son would consume it. Sure enough, Shīrawayhi subsequently discovered the jar, drank its contents, and died. Prior to his consumption of the poison, however, Shīrawayhi had killed all his brothers in an attempt to secure his own rule, but because of his father’s actions, he did not live long enough to produce a male heir. As a result, the Persians were forced to appoint Būrān, Shīrawayhi’s daughter, as their new ruler.  

90) Ibn Ḥajar, supra n. 45 at 162.
91) Al-ʿAynī, supra n. 89 at 18:58.
92) “The Chapter of Civil Strife [fitan]” deals with civil war and events said to occur during “the last days.” For this reason, one might take the view that the inclusion of this hadith under this heading by both al-Bukhārī and al-Tirmidhī implies their position that one of the signs of “the last days” is the assumption of positions of political leadership by women. While this possibility cannot be excluded, the subtlety of the implication was lost on Ibn Ḥajar, who makes no connection between the report and “the last days.” In his commentary on this hadith in the Chapter of Civil Strife, he notes that while Abū Bakra agreed with ʿĀʾisha’s substantive position during the first civil war, i.e., the need to avenge the killers
Like al-Bukhārī, Ibn Abī Shayba also placed this *ḥadīth* in a prophetic context, but one related to ʿĀʾishah’s ill-fated role in the first Muslim civil war. He included this report in his chapter dealing with the events of the first civil war (*Kitāb al-Jamal*), where it is immediately preceded by two reports that attribute to the Prophet Muḥammad foreknowledge of the civil war. Ibn Abī Shayba quoted the Prophet Muḥammad as saying, presumably to his wives, “Oh, which of you shall be the master of the camel … around whom shall be great slaughter but she shall survive?” Ibn Abī Shayba also quotes Abū Bakr as saying that, when asked why he did not join the Baṣrān forces at the time of the civil war, he had heard the Prophet Muḥammad say, “A group shall rebel, and they will perish and shall not succeed. Their leader will be a woman, but they are people of Paradise.” Ibn Abī Shayba, immediately after these two reports, then includes Abū Bakr’s *ḥadīth*. He quotes Abū Bakr as saying that he had heard the Prophet Muḥammad say, “No folk who has entrusted their affairs to a woman shall prosper.” In Ibn Abī Shayba’s narrative, the *ḥadīth* is the climax to the Prophet’s prediction of ʿĀʾishah’s crushing defeat. Ibn Abī Shayba thus explains to his readers why Abū Bakr felt fortunate: he escaped the fate of his Baṣrān comrades who joined ʿĀʾishah’s army solely because he had heard from the Prophet Muḥammad himself prophecies that led him to conclude that ʿĀʾishah’s campaign would end up disastrously.

Finally, al-Nasāʾī, uniquely among the compilers of the *ṣaḥīḥ/sunan* genre, includes Abū Bakr’s *ḥadīth* in a chapter titled “The Book of the Rules [Applicable to] Judges.” The report itself is prefaced with the short statement, “Section: The Prohibition Against Appointing Women to Rule (*bāb al-nahy ‘an istiʿmāl al-nisāʾ fī,l ḥukm*).” This suggests that al-Nasāʾī viewed the *ḥadīth* as establishing maleness as one of the conditions necessary to serve in public office. This may explain why al-Nasāʾī omits Abū Bakr’s statement “When ʿĀʾishah came to Baṣra, I remembered the Prophet’s statement,” even though al-Tirmidhī’s version includes it and al-Nasāʾī’s informants are the same as al-Tirmidhī’s.

While each of these authors—Ibn Abī Shayba, al-Bukhārī, al-Tirmidhī and al-Nasāʾī—narrate substantially the same text from substantially

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of ʿUthmān, he held a pacifist position with respect to intra-Muslim warfare. Ibn Hajar, *supra* n. 46, at 70-71.
the same sources, their placement of the text within their broader works differs in important respects, each one suggesting a different interpretation of the text. The interpretive challenges posed by the placement of this *hadith* in the *ṣaḥīḥ/sunan* genre, however, was largely dissolved by the compilers of the *hadith* encyclopedias between the 15th and 18th centuries. Those works, apparently influenced by the formalist doctrines of jurisprudence, limited themselves to the formally dispositive elements of the Prophet’s teachings—his words, his acts and his omissions. The result was to make the contextual frames of the authors of the *ṣaḥīḥ/sunan* genre irrelevant.

5. Abū Bakra’s *Hadith* in Substantive Law

Part 4 demonstrated how the same *hadith* could be, and in fact was, understood differently depending on the narrative context in which it appears. This Part will further explore the relationship of text, context and interpreter by looking at how this *hadith* was used in substantive law by considering how jurists interpreted this text in connection with their rules governing qualifications for public office.

Islamic substantive law generally requires the holders of public offices to be male. Accordingly, only men may serve as the head of the Islamic state (*imām* or *khalīfa*). The same requirement applies to judges of Islamic courts as well, with only a minority of Muslim jurists permitting the appointment of female judges.93 Discrimination against women is not unique to the pre-19th century Islamic legal system, and to that extent is unexceptional.94 A more complex question is determining the


94 See, for example, Rachel Dulitz, “A King … and Not a Queen,” *JOFA* (Jewish Orthodox Feminist Alliance) *Journal* (2004), at 7-9 (describing pre-modern Jewish prohibitions against women exercising leadership positions over men, whether in the capacity of a ruler,
precise role played by this hadith in producing these discriminatory doctrines, or justifying them once they were in place. Surviving works of substantive law from the first 300 years of Islamic history, for example, do not appear to have cited it to justify the exclusion of women from public offices, a fact that suggests that this hadith played only an ex post justificatory role rather than a “but for” cause of the discrimination evidenced in the legal rules.95

It is almost certainly the case that the increasing formalization of legal education, along with the incorporation of legal debate (munāẓara) and the formal study of legal controversy (ikhtilāf or khilāf), was the catalyst for the ever-increasing reference to this hadith in legal treatises. Al-Māwardī (d. 1058/450), a prominent Shāfiʿī jurist, cited it to justify the Shāfiʿī rule that only men may serve as judges,96 explicitly refuting the views of dissenters such as Muḥammad b. Jarīr al-Ṭabarī (d. 923/310), who permitted women to serve as judges in all types of cases, and the Ḥanafīs, who permitted women to serve as judges, but only in non-capital cases.97 The 12th century Andalusian Mālikī jurist and Ashʿarī theologian al-Qāḍī Abū Bakr Ibn al-ʿArabī (d. 1148/543) took up this issue in connection with his comments on the Qurʾānic story of Bilqīs. There, he relied on the hadith as conclusive evidence that women not only cannot serve as head of the Islamic state (caliph), but also for the proposition that women cannot be judges. Indeed, Ibn al-ʿArabī went so far as to deny that al-Ṭabarī, whom he describes as “the Imam of religion,” could ever have held the view ascribed to him regarding women judges, a position that Ibn al-ʿArabī obviously

95) In reaching this conclusion, I searched using the phrase “lan yufliḥ” and “mā aflaḥ” on the electronic collection of Arabic texts called al-Maktaba al-Shamila which includes among its sources major early works such as the Mudawwana al-Kubra, Kitāb al-Umm, and al-Mabsūṭ. For a survey of later jurists’ use of this hadith to justify the exclusion of women from political office, see Bauer, supra n. 93.


97) Ibid., 156.
considered scandalous. He also expressed doubts that Abū Ḥanīfa had actually permitted women to serve as judges, even in non-capital cases. He instead interprets Abū Ḥanīfa’s view as permitting women to serve only as arbitrators in private cases in which female testimony is admissible, e.g., contract disputes or cases involving a claim for monetary compensation, or perhaps that women may be appointed for specific cases, but not that they may exercise general jurisdiction. He also dismissed historical reports stating that ‘Umar b. al-Khaṭṭāb, the second caliph, had appointed a woman as a market inspector in Madina as the work of “deviant forgers” (min dasa‘is al-mubtadi‘a).98 Certainly by the 13th century, references to this hadith had already become common in Mālikī and Ḥanbali legal treatises.99 It became a regular feature of post-13th century legal treatises in all the schools of Islamic law, but especially of the Shāfiʿīs.100

If Ibn al-ʿArabī is to be believed, the controversy over women’s capacity for political office was so heated that it became the subject of a formal public debate in the court of the Buwayhid amir of Baghdad, ʿAḍud al-Dawla (d. 982), in which Abū al-Faraj b. Ṭarāʾī (d. 1000/390)—leader of Baghdad’s Shāfiʿī jurists at the time according to Ibn

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ʿArabi—debated this question with the famous Māliki jurist and Ashʿarī theologian Abū Bakr al-Bāqillānī (d. 1013/403). Al-Ṭarār, who as a Shāfiʿī rejected al-Ṭabarī’s reasoning (at least according to Ibn ʿArabī),\(^{101}\) was nevertheless charged with defending al-Ṭabarī’s view while al-Bāqillānī defended the majority view.

Al-Ṭarār made the following points in support of the validity of a woman’s appointment as a judge: the goal of law is to have the judge enforce the rules, to hear evidence relevant to those rules, and to resolve the disputes of litigants, and a woman is as capable as a man in the performance of these things (wa dhālika yumkin min al-mar’a ka-imkānihi min al-rajul). Al-Bāqillānī’s response appears to have been based on the consensus (ijmāʿ) that women may not be caliph, despite the fact that a woman is capable of fulfilling all the ends for which the caliphate was established (inna al-gharaḍ minhā [al-imāma al-kubrā] hifz al-thughūr wa tadbīr al-umūr wa ḥimāyat al-bayda wa qabḍ al-kharāj wa radduhu ʿalā mustaḥqiqihi wa dhālika yataʾattā min al-mar’a ka-taʾattihi min al-rajul). Ibn al-ʿArabī dismissed the arguments of both, saying that a woman may not be either a judge or a caliph because, among other things, she is not permitted to mix with men.\(^{102}\)

The debate between al-Ṭarār and al-Bāqillānī foreshadows the modern dilemma of Islamic law: how to resolve a commitment to law as a rational system that is functionally related to the realization of substantive ends, such as those set out in the law of the caliphate, but that are justified by an appeal to historical texts whose plain meaning may contradict the rationality for which the law strives, such as the consensus prohibiting women from serving as caliph? Significantly, while both al-Ṭarār and al-Bāqillānī concede that, as a rational matter, females may

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\(^{101}\) Ibn Khallikān reported his name as Ṭarārā, or Ṭarāra, not Ṭarār, and he reports his full name as al-Muʿāfā b. Zakariyyā al-Nahrawānī. He also described him as a follower of al-Ṭabarī, not a Shāfiʿī jurist. Ibn Khallikān, Wafāyāt al-Aʿyān, ed. Iḥsān ʿAbbās, 8 vols. (Beirut: Dar Sadir, 1973-74), 5:221-224.

\(^{102}\) Ibn al-ʿArabī, supra n. 98, 3:457. Modern democratic sensibilities are, surprisingly, not so far removed from Ibn ʿArabī’s reasoning. For example, Thomas Jefferson himself is reported to have stated that “Were our state a pure democracy, there would still be excluded from our deliberations … women, who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men.” Ruth Bader Ginsburg, “Sexual Equality Under the Fourteenth and Equal Rights Amendments,” Washington University Law Quarterly (Winter 1979): 161-178, at 172.
be as qualified as men for all public offices, including that of caliph, al-Bāqillānī’s argument implies that the existence of a consensus prohibiting the appointment of a woman as caliph proves conclusively that rational possibility, by itself, is insufficient to resolve the debate.

In the pre-modern period, when there was probably a dearth of women trained in the law and thus capable of serving as judges, it would have been relatively costless for al-Bāqillānī and other jurists to invoke a notion of substantive irrationality in the context of a debate which, in 10th century Baghdad, was almost certainly only of theoretical interest. In the modern age, however, because capable women are found in substantial numbers, and many of these capable women are part of a religious scholar’s constituency, it becomes quite costly, perhaps prohibitively so, for a religious scholar to adopt Baqillani’s line of reasoning. It is therefore not surprising to see that at least some modern Muslim jurists have abandoned this view altogether, a topic which Parts 6 and 7 of this Article will take up in greater detail.

By the 14th century at the latest, the Sunni law schools, with the exception of the Ḥanafīs, had come to justify their exclusion of women from political offices on the basis of revelatory grounds in general, and Abū Bakra’s hadīth in particular. This in turn generated a Ḥanafī response, one that was predicated on distinguishing between the moral and the legal, and making an appeal to the purposes of the law along the lines suggested by al-Ṭarār. The earliest Hanafi authority I found making these arguments is Kamāl al-Dīn Muḥammad Ibn al-Humām (d. 1457/861). Relying on what by now had become a standard Ḥanafī argument, Ibn al-Humām explained that judgeship, like giving testimony before a judge, is a manifestation of public power (min bāb al-wilāya). Because the law grants women the capacity to testify in court, she has the analogous capacity to act as a judge in all cases which admit female testimony. Abū Bakra’s hadīth does not invalidate this

103) Cf. Al-Qaraḍāwī, supra n. 24 at 169 (attributing the paucity of women in positions of authority historically to their relative lack of education, a fact that no longer holds true in the modern age where there are “millions of educated women” with capabilities similar, equal or surpassing that of men).
104) Fadel, supra n. 93 at 196.
principle because, according to Ibn al-Humām, its prohibition is addressed only to appointing powers, not the women who are appointed judges. Nothing in the hadīth suggests that the rulings of a woman who has been appointed judge and whose judgments are otherwise in conformity with the law are invalid simply because she is a woman.\footnote{Ibid.} Zayn al-Dīn Ibn Nujaym (d. 1562/969), who quotes Ibn al-Humām, develops this line of argument further.\footnote{ʿAbd Allāh b. Ahmad al-Nasafī, al-Baḥr al-Rāʾiq, Sharḥ Kanz al-Daqāʾiq, 9 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997). 7:8-9.} He argues that although a woman has the capacity to serve as a judge, “the party appointing a woman incurs a sin because of the hadīth, ʿNever shall a folk prosper who have appointed a woman to rule them.’” Even though he affirms sin on the part of the appointing party, Ibn Nujaym goes further than Ibn al-Humām in recognizing the legitimacy of women as political actors, stating, “as for a woman acting as ruler (ṣāliḥ b. Ayyūb (d. 1249/647), served as ruler of Egypt.\footnote{See, for example, Muḥammad Amin b. ʿUmar Ibn ʿAbidīn, Radd al-Muḥtār ʿalā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār, ed. ʿĀdil Ahmad ʿAbd al-Mawjūd and ʿAli Muhammad Muʿawwad, 14 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1994), 8:142-143, and ‘Abd al-Rahmān b. Muhammad Shaykh Zādah, Majmaʿ al-Anhur fī Sharḥ Multaqa al-Abṣār, 2 vols. (Istanbul: Būsnawī al-Hājj Muharram Afandī, 1310), 2:168.} Thereafter, Ḥanafi jurists interpreted this hadīth as creating a moral prohibition against the appointment of women to public offices, but not as creating a legal bar to the validity of a woman’s legal judgments.\footnote{Ibid.}

Ibn al-Humām laid the groundwork for this arguably counterintuitive result. He argued that revelation provides no basis for concluding that a substantively correct legal decision by a woman should be denied enforcement, nor is there anything in revelation that implies that qualified women lack capacity to serve in political office. Although revelation does affirm that women are deficient in comparison to men, that deficiency is not so grave as to strip women of political capacity entirely. Thus, women have the capacity to serve as a witness in a court of law, to administer a trust, and to serve as a guardian of an orphan. Whatever deficiency women suffer from, it is relative, not absolute, and more importantly, it is attributed to women as a class, not as individuals.
Accordingly, some women may be more capable than some or even many men. Therefore, when it comes to assessing the capacity of a woman to be a judge, the only issue is whether her decisions are in accordance with the law, not whether she is disqualified on account of her gender. Ibn al-Humām, in effect, turns the rules of formalism on itself: if Abū Bakra’s hadīth is general with respect to all women, then it is the case that it applies to all women only in a presumptive sense (al-ẓāhir), with the consequence that it does not apply to women who are in fact capable of discharging the offices to which they were appointed.

In the modern period this commitment to the functional rationality of the law, combined with new social experiences, led reformist Muslim jurists to argue for substantial revisions to historical Islamic legal doctrines restricting the capacities of women. In order to appreciate these developments, however, one must first appreciate the depth (and breadth) of the view prevailing prior to the 20th century that women lack these capacities.

6. Muslim Androgyny, the Normative Exclusion of Women from Political Life and Modern Revisionism

Both hadīth scholarship of the ninth and tenth centuries, and subsequent scholarly commentary on that literature as evidenced by Ibn Ḥajar and Badr al-Dīn al-ʿAynī in the 15th century, as well as some versions of Islamic substantive law during this period, suggested greater possibilities for the inclusion of women in the exercise of political power than was effectively realized in Muslim societies prior to the 20th century. Given the existence of a robust minoritarian opinion that was relatively open to the possibility of female participation in the public political life of the Muslim community, it becomes less plausible to attribute the de jure and de facto marginalization of women from the public political life of the Muslim community to Islamic legal theory.110

110) In the Arab Middle East (with the exclusion of Morocco), Central Asia and the Indian subcontinent, the Hanafis, while only one of the four Sunni schools of law, became, in the late medieval and early modern periods, the dominant school of law, both in terms of the numbers of its followers as well as effective political power.

111) See Part 3, supra.
Why, then, did no Muslim jurist (Ḥanafī or non-Ḥanafī) argue, contrary to the hegemonic position apparently introduced around the time of al-Māwardi, that the circumstances of Abū Bakra’s hadith permit the inference that a more specific meaning was intended? Al-Bukhārī himself placed this report in the context of the Prophet’s diplomatic correspondence with Persia, not in The Chapter of Judgments. Even Abū Bakra’s statement that he benefited (or in the variant transmission “was protected”) by his recollection of this hadith is ambiguous: after all, if he realized that the party of ʿĀʾisha was bound to lose because a female (ʿĀʾisha) led them, it would seem that the reasonable course of action would have been to join the forces of ʿAlī, rather than remaining neutral. Moreover, if Abū Bakra had really believed that this hadith prohibits delegation of political power to a woman, one would have expected him to have reprimanded ʿĀʾisha and her allies, rather than maintaining a posture of neutrality.112 According to Ibn Abī Shayba, moreover, ʿAlī never criticized ʿĀʾisha’s allies for forming an alliance with a woman against him; instead, he criticized them for breaking their previously given pledge of loyalty (bay’a).113

As Sherman Jackson has noted, however, Islamic jurisprudence provides no guidance as to how hard (or even where) an interpreter might look for circumstantial evidence that evinces an intent to specify the range of the general term, or even how to determine whether that obligation had been satisfactorily discharged.114 Instead, he suggested that it is impossible to understand juristic attempts to limit the scope of a revelatory text, or conversely, their failure to do so, without taking into account their subjective motivations and concerns.115

Jackson’s hypothesis regarding the importance of subjective motivations is confirmed by modern Muslim jurists’ revisionist treatment of this hadith. The well-known contemporary Egyptian-Qatari jurist, Yūsuf al-Qaraḍāwī, for example, takes the Qur’ānic story of Bilqīs as a textual indicant qualifying Abū Bakra’s hadith, effectively inverting the

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112) See Abou el Fadl, supra n. 26 at 112-114 (discussing the interpretive difficulties relating to Abū Bakra’s hadith).
113) Ibn Abī Shayba, supra n. 34 at 7:536-537.
114) Jackson, supra n. 19 at 193.
115) Ibid., at 194.
traditional understanding of the relationship of these two texts.\textsuperscript{116} For al-Qaraḍāwī, Bilqīs is a model ruler who relies on deliberation and reason (\textit{imraʾa shūrawiyya}) and justice (\textit{ḥākima ʿādila}) in her political decision-making, not arbitrary and autocratic opinion, therefore weakening—even if not eliminating entirely—the force of this \textit{ḥadīth} as justification for the exclusion of women from public office.\textsuperscript{117} Another modern Egyptian scholar, Muḥammad al-Ghazālī, dismisses the relevance of Abū Bakra’s \textit{ḥadīth}, stating that it applies exclusively to the internal turmoil then prevailing in the Persian state, and that the Prophet had meant only that the Persian state was doomed to fall, not that Muslim woman were unfit for political office.\textsuperscript{118}

Modern conservative scholars have managed to put forth revisionist interpretations of this \textit{ḥadīth} despite the fact that the weight of the tradition is against them. Why then did Muslim jurists prior to the 20\textsuperscript{th} century not produce similar accounts of this \textit{ḥadīth}? The simple answer appears to be the question of motive: because of a normalized ideology of gender hierarchy that sometimes degenerated into misogyny, they simply lacked sufficient motivation to challenge the prevailing formalist reading of the \textit{ḥadīth}, especially when nothing practical seemed to turn on that interpretation, and in circumstances in which the formalist reading confirmed all their social and cultural biases against women. Despite the fact that it is impossible to make categorical characterizations about Islamic law and gender equality prior to the 20\textsuperscript{th} century, jurists’ accounts “of male authority, women’s deficiencies, and gendered public space represent a coherent picture of a ‘natural’ social hierarchy and gender roles”\textsuperscript{119} which privileged men; and, that this cultural and social reality substantially explains why, prior to the 20\textsuperscript{th} century, jurists failed to deploy the critical resources of the legal tradition in an effort to understand this \textit{ḥadīth}.

\textsuperscript{116} See \textit{infra} n. 129.
\textsuperscript{117} Al-Qaraḍāwī thus concludes that while women remain ineligible to be the leaders of the entire Muslim community, they can serve as presidents of Islamic states, with the qualification that it would be preferable for men to fill this position. See http://www.youtube.com/watch?v=ei9LVMaEaBY. See also, al-Qaraḍāwī, \textit{infra} n. 24 at 176.
\textsuperscript{118} Brown, \textit{infra} n. 73 at 163. See also al-Qaraḍāwī, \textit{infra} n. 24 at 174-175.
\textsuperscript{119} Bauer, \textit{infra} n. 93 at 1-2.
While assumptions that misogyny was a universal Islamic norm are clearly erroneous,\(^{120}\) evidence of an entrenched androgyny that at times bordered on misogyny was certainly a part of the general cultural and social ambience of the religious intellectuals whose writings are surveyed here.\(^{121}\) Indeed, openly andocentric and misogynistic statements were tolerated within public discourse, as evidenced by various Muslim authors’ use of demeaning language to describe women and their capabilities. The late thirteenth-century Egyptian theologian and Mālikī jurist Shihāb al-Dīn al-Qarāfī (d. 1285/684), for example, described women as having intellectual powers not far above animals,\(^{122}\) notwithstanding his position that as a general rule, women are equally subject to the rules of Islamic morality as men.\(^{123}\) It is unsurprising that this background culture, combined with the social reality of female dependency on men, affected the interpretation of revelation. A few examples should make this clear.

Fakhr al-Dīn al-Rāzī (d. 1210/606), a Transoxanian theologian and Shāfiʿī jurist, who wrote a celebrated theological-cum-philosophical commentary on the Qurʾan called *Mafāṭih al-Ghayb* [“The Keys to the Unseen”] is a good example of how cultural and social androgyny/
misogyny influenced interpretation of the Qurʾan. In commenting on the verse which states, “And among His signs is that He created for you mates from yourselves that you may find tranquility in them and He formed love and mercy between you [as a result],”\(^{124}\) al-Rāzī argued not only that the phrase, “He created for you,” is proof that God created women for the convenience of men (a not uncommon position at that time), but he also went so far as to argue that women, unlike men, were not the intended subjects of the law’s moral commands (\textit{taklīf}). For al-Rāzī, God subjected women to the law’s discipline only for the convenience of men.\(^{125}\)

His introduction of gender hierarchy into a verse that is facially gender neutral stands in stark contrast to his erasure of the female entirely when faced with the express use of gendered language in a context suggesting that both men and women have independently valuable moral lives in the sight of God.\(^{126}\) While it would have been possible for him to affirm the spiritual equality of men and women while also affirming a gender-based social hierarchy, al-Rāzī appears oblivious to the contradiction that arises out his claim that women were not given moral obligation for any reason other than the benefit of men, on the one hand, and the language of these and other verses that suggest women have a moral life equal in dignity to that of men, on the other.

When one looks at verse 34 of \textit{al-Nisāʾ} (4:34) or verse 228 of \textit{al-Baqara} (2:228), both of which seem to endorse (or at least take for granted a gender hierarchy), however, many pre-19\textsuperscript{th} century Muslim exegetes simply affirmed the superiority of men to women as though nothing could be more obvious. In his commentary on 2:228, for example, Abū Bakr b. al-ʿArabī, stated with complete self-assurance that “the superiority of men to women is not something that is hidden to

\(^{124}\) \textit{Al-Rūm}, 30:21.
\(^{126}\) See, for example, his commentary on \textit{al-Tawba}, 9:71-72, ibid., at 3:486-488, whose plain language affirms that “the believing men” (\textit{al-muʾminūn}) and “the believing women” (\textit{al-muʾmināt}) are, using gender-neutral language, “guardians of one another” (\textit{baḍūhum awliyāʾ baḍ}); that they (both believing men and women) “command the good and forbid the evil”; establish prayer; give alms; are obedient to God and His messenger; that God will show “them” mercy; and that God promised both “the believing men” and “the believing women” eternal bliss in Paradise.
[anyone with] good sense” (wa lā yakḥfā ‘alā labīb faḍl al-rijāl ‘alā al-nisā’). Similarly, Ibn al-Kathīr (d. 1373/774), in explaining why Q. 4:34 gives men power over women, states simply that “men are more virtuous than women and a man is better than a woman” (al-rijāl afḍal min al-nisā’ wāl-rajul khayrun min al-mará’).

Given a broad cultural understanding of men’s obvious natural superiority, it is not surprising that the story of Bilqīs was viewed as anomalous and had to be neutralized by references to male superiority. Abū Bakrā’s hadith was especially useful in achieving this goal. Abū Ḥayyān Muḥammad b. Yūsuf al-Andalusī (d. 1344/745), author of the Qur’an commentary al-Baḥr al-Muḥīṭ, recognized the subversive implications of Bilqīs’ story, and therefore explicitly dismissed the notion that it has any normative significance for Muslims. He states: “[Making Bilqīs ruler] was the action of her people, and they were non-believers so it cannot serve as a proof” (dhālika min fiʿl qawm bilqīs wa hum kuffār fa-lā ḥujjata fī dhālika). The normative Islamic rule, according to Abū Ḥayyān, is supplied by Abū Bakrā’s hadith.

Given this cultural and social background, the extent to which Muslim jurists within the domain of substantive law were willing to contemplate the possibility that women could serve in public offices at all, despite both normative and cultural opposition to such an idea, is in itself surprising. Substantive law’s ability to generate the idea that women were equally capable as men to serve in public office (as articulated in the public debate between al-Ṭarār and al-Bāqillānī) is, in some

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127) Ibn al-ʿArabī, supra n. 98, 1:230.
130) Abū Ḥayyān at 7:87.
ways, even more surprising given the historical fact that no woman had been appointed a judge of a Muslim city. Indeed, for some jurists who denied women's capacity to serve in public office, the historical practice of the Muslim community on this score was dispositive.  

Moreover, when the extent of the pre-19th century tradition's androgyny (as well as its occasional misogyny) is taken into account, modern views of scholars such as Muḥammad al-Ghazālī and Yūṣuf al-Qaraḍāwī can be better appreciated for their relatively egalitarian positions: while pre-19th century Muslim jurists understood the exclusion of women from political office to be an obvious consequence of their natural deficiencies in terms of judgment, reasoning and virtue, al-Qaraḍāwī, for example, does not attribute any political limitations placed on women to their nature. Instead, to the extent that he contemplates limitations on women's participation in the political sphere, it is on account of conflicting moral obligations that individual women might have rather than any inherent natural or moral deficiency.  

7. Conclusion

In this article, we have seen how a text that was traditionally deployed to reinforce a prevailing culture of androgyny may very well be read differently, even according to the canons of interpretation developed by the historical tradition itself. Equally important, this study shows how a particularly formalist method of reading legal texts can reinforce already dominant andocentric attitudes by clothing bias in the garb of objective interpretation. On the other hand, the very same hermeneutical theory that reinforced, and gave legitimacy to, a misogynistic reading of Abū Bakra’s ḥadīth can also undermine that reading: by taking seriously the principle that general terms must not be applied generally until care has been taken to exclude the possibility that circumstantial evidence indicates a more specific intent, it would be entirely credible for a contemporary reader of this ḥadīth to follow al-Bukhārī’s or Ibn Abī Shayba’s lead to conclude that this ḥadīth is irrelevant to the question of whether women have the capacity to govern. Indeed, that is

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131) Ibn Qudāma, supra n. 99.
132) Al-Qaraḍāwī, supra n. 24 at 170.
precisely what two modern 20th century reform-minded jurists, Yusuf al-Qaradawi and Muhammad al-Ghazali, have done.

At the same time, the Hanafi reaction to the growing appeal to this hadith to refute their doctrine, which permits women to serve as judges in non-capital cases, shows that the commitment to the rational ideals of the law can also lead to conceptual legal change, which, even if it did not result in any legal change prior to the 20th century, suggests possibilities for modern Muslims. For the Hanafis, the relevant question (at least in the context of whether women can be judges), is whether anything in Islamic law precludes the enforcement of otherwise valid judgments simply because of the judge’s gender, and here the answer to that question is no. Note that the reasoning of this argument can easily be extended to the office of caliph: given the willingness of jurists, dating at least to the time of al-Ghazali, to accept the notion that the caliph can discharge all the office’s legal obligations through the appointment of competent delegates, it seems that a female caliph might remedy whatever natural “deficiencies” she might have, i.e. a physical inability to participate in combat directly, through appointment of competent generals, provided, of course, that she has the capacity to make wise political decisions.

A careful study of androgyny, as well as misogyny, along with the texts and assumptions used to justify them within the Islamic tradition, is a critical step in understanding how such biases have conditioned the interpretive activities of various Muslim intellectuals throughout history, and undertaking such studies along the lines outlined here can serve a useful function in subverting the “text fundamentalism” of which Moosa complains. Abu Bakra’s hadith is a good example of how the framing of a text can play an important, even if subtle, role in determining how it is read and understood. Al-Bukhari’s decision to include this hadith in the chapter of the Prophet’s diplomatic correspondence, for example, or Ibn Abi Shayba’s inclusion of it as part of the events of the first civil war, casts the hadith in a substantially different light than al-Nasawi’s decision to include it in the materials dealing with judges, to say nothing of the later hadith encyclopedias in which all (or most) contextual facts were edited out entirely.

To be clear, the method of hermeneutical historicism deployed here does not claim to establish a “correct” frame for the text; its goal is
simply to subvert the common sense reception of a text that has been used to justify exclusion of women from the Muslim public by demonstrating the historically multivalent nature of that text. The efficacy of this strategy thus depends on the assumption that once a hierarchical reading of an exclusionary text is exposed as a choice rather than a necessity, substantively egalitarian positions will find a more receptive audience. What I am calling “hermeneutical historicism” is a particularly useful interpretive strategy in this regard, given its close affinity to the traditional jurisprudential concept of ṭakhsīṣ al-ʿāmm, specification of the general term.

Reform-minded Muslim intellectuals may therefore find that laying out a detailed genealogy of the particulars of historical instances of Muslim patriarchy, androgyny and misogyny—along the lines suggested in this article—is a more effective strategy for realizing effective reform in the area of gender than, for example, the strategy adopted by either Fatima Mernissi or Khaled Abou el Fadl. Both Abou el Fadl and Mernissi attack the historical reliability of this ḥadīth on the grounds that Abū Bakra, for many reasons, had various incentives to forge it, including perhaps a deep hatred for women; his conviction for slander (qadhf) should have stripped him of the requisite moral integrity (ʿadāla) to be an accepted narrator of Prophetic ḥadīth; and, in any case, he was too marginal a figure in the early Islamic community to be relied upon for such an important teaching.

If the purpose of reformist criticism is to generate a new Islamic position (rather than a post-Islamic position), however, it is important to use arguments that are capable of winning over a critical mass of Muslim support. From this perspective, it is unlikely that the arguments advanced by Abou El Fadl and Mernissi—to the extent they challenge the integrity of Abū Bakra—can succeed. The integrity of the Prophet Muḥammad’s Companions (Abū Bakra being a companion)—at least with respect to the question of their reports of what the Prophet said, did or permitted—is one of the theological foundations of Sunni Islam, in contrast to Shi‘ism and the Khawārij, both of which, to different extents, rejected this proposition.133 The integrity of the Companions

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133See, e.g., Abū Ja‘far Aḥmad b. Muḥammad al-Ṭaḥāwī, The Creed of Imam al-Ṭaḥāwī, trans. Hamza Yusuf (n.p.: Zaytuna Institute, 2007), 76 § 118 (stating that love of the Companions is part of true faith, and to speak ill of any of them is sinful); al-Āmidī, supra
for Sunnis, however, does not entail their infallibility, and thus, it would be perfectly unexceptional if they had criticized Abū Bakra for his interpretation of the ḥadīth, assuming that he understood it in the same manner as later generations of Muslims.134 By attacking Abū Bakra’s credibility, however, Mernissi transforms what is essentially a legal question, i.e. whether women, from an Islamic perspective, have legal capacity to participate in the political domain and hold public office, into a theological one (and one that is, to that extent, ultimately irresolvable) in which she inadvertently appears to take the side of sectarians (at least from the Sunni perspective).135 By questioning the authenticity of the text rather than its historical interpretation, Mernissi further reinforces, even if inadvertently, the role that univocal understandings of texts play in constructing modern conceptions of Islamic normativity.

The attack on Abū Bakra and the implication that this ḥadīth is inauthentic also obscures the depth of the historical conviction that women’s natural deficiencies require that they play a minimal role in public affairs. Given the depth (and breadth) of the historical tradition’s opposition to women in public roles, it is remarkable that otherwise conservative jurists such as al-Qaraḍāwī have openly endorsed the right, and perhaps even the obligation, of Muslim women to participate in political affairs. While al-Qaraḍāwī can in no way be confused for a principled gender egalitarian,136 his views on the capacity of women to

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134) Abou el Fadl raises the possibility that Abū Bakra may have made a mistake in reporting the Prophet’s words. He postulates that the Prophet may have said something along the lines that “This people [i.e., the Persians] will not succeed under the leadership of this woman [i.e., Būrām],” but that Abū Bakra mistakenly reported it using general language, perhaps as a result of his bias against women. Abou el Fadl, supra n. 26 at 113.

135) G.F. Haddad, in his criticism of Muslim feminists’ attacks on Abu Bakra, limited his analysis to the defense of Abu Bakra’s moral integrity and did not even address the substantive issue of women’s capacity to hold political office. Abū Bakrah and the Feminists, G.F. Haddad (Jan. 14, 2005) http://www.abc.se/~m9783/o/abfm_e.html (last visited October 9, 2009).

136) See, for example, al-Qaraḍāwī’s defense of traditional Islamic rules of evidence which discriminate against the admissibility of female testimony, available at http://www.
engage meaningfully in politics can rightfully be characterized, from the perspective of the Islamic tradition, as revolutionary. Gone are any arguments about natural deficiencies in women that render them incapable of playing a positive role in politics or dooming them to the cunning use of guile that is the contrary of political wisdom. Al-Qaraḍāwī simply takes for granted the fact that women have the same capacity as men to exercise good and bad political judgment. Accordingly, the only limitations on the participation of Muslim women in politics are that of conflicting moral obligation rather than capacity, an issue that is to be resolved on individual grounds not generic ones.137 In the case of female political participation, at least, the experience of seeing women engage successfully in public life, along with the perceived Islamic need to respond positively to critics of Islam, has generated the desire to rethink commitments that one might reasonably have believed to be unshakeable, based on the nearly universal agreement among Muslim jurists prior to the 20th century that women not only have nothing positive to contribute to the public life of their communities, but also that their participation in governance is usually destructive.

This shift in juristic opinion points to a broader observation about the relationship of Islamic law as a historical tradition to developments in modern Islamic law: what may appear from the perspective of the historical tradition to be an absolute commitment often takes on the appearance of a contingent rule based only superficially, if at all, on Islamic revealed sources from the perspective of modern Muslims who have had the benefit of experiences that materially differ from their predecessors. Hermeneutical historicism fits quite comfortably within even a conservative reformist trend because it uses historical experience to propose interpretations of revelatory sources that appear to the modern reader as having greater hermeneutical integrity than historically-entrenched readings. In the case of Abū Bakra’s hadīth, the revisionist reading appears to explain more convincingly both the data of revelation and the data of historical experience and can thus displace the

islamonline.net/servlet/Satellite?cid=1119503544348&pagename=IslamOnline-English-Ask_Scholar/FatwaE/FatwaEAskTheScholar (last visited September 12, 2010).

137 Al-Qaraḍāwī, supra n. 24 at 164, 170.
pre-modern reading without substantial resistance. It should not be particularly surprising, moreover, that the discourse of Islamic law is particularly amenable, perhaps more so than Qur’anic exegesis, to this kind of doctrinal change: Islamic jurisprudence, despite its textual grounding, is also committed to a functional rationality that is supposed to make sense of the empirical world in light of the universal goals of Islamic law.138 This gives rise to a dialectic between doctrine and experience that continually results in slow, but very real, doctrinal change.

On the other hand, there persist legal commitments that seem to survive the social changes wrought by modernity. Such commitments are not amenable to revisionist interpretation using the methods of hermeneutical historicism. A case in point is the continued salience of the ḥudūd penalties, or in the context of Islamic family law, the continued centrality of 4:34 (al-Nisā’).139 To go beyond the rules of these verses, a more radical historicism, perhaps along the lines of what I have called progressive historicism, is required. Such an approach must be willing to go beyond specific textual commands by saying in effect that we do not deny the moral integrity of the traditional interpretations of the ḥudūd verses or that of Q. 4:34; rather, we instead deny their moral relevance to us at this time.140

It is not quite clear what kind of historicism Moosa had in mind in his article “The Debts and Burdens of Critical Islam.”141 In this article, I have explored the possibilities of hermeneutical historicism rather than progressive historicism. Because invocation of progressive historicism


139) Qur’an 4:34 vests men with moral authority husbands over wives, requiring wives to be obedient to their husbands and authorizing husbands to discipline rebellious views using admonition (waʿẓ), by temporarily abandoning the marriage bed (hajr), and finally, by physical discipline (ḍarb).

140) For an example of a theologically sophisticated reading of 4:34 by a Muslim feminist, see Laury Silvers, “In the Book We Have Left Out Nothing: The Ethical Problem of the Existence of 4:34 in the Qur’an,” Comparative Islamic Studies 2:2 (2006): 171-180. See also Wadud, supra n. 21, 192, for an example of an approach to understanding the Qur’an that goes beyond textual interpretation.

141) Debts, supra n. 4 at 122.
to justify legal reform requires the introduction of theologically controversial propositions, I have argued that it is wiser to make use of less controversial strategies when they are reasonably available. In the case of the hadith discussed here, the traditional jurisprudential concept of takhṣīṣ al-ʿāmm, specification of the general term, has proven to be a useful tool for subverting historically entrenched readings of this text. This concept could be successfully deployed because of the rich historical detail preserved by the tradition itself regarding this report. These historical details provide a reasonable basis for an interpreter to argue that a non-literal meaning was in fact originally intended. The traditional hermeneutic methods of Muslim jurists, which include but are not limited to, takhṣīṣ al-ʿāmm, remain a flexible yet principled method of interpreting textual meaning that has the potential to be deployed for progressive change. Before attempting to effect theological revolutions by implication, then, progressive Muslims ought first to take more seriously the recognized interpretive tools within the tradition of substantive law.142

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142) See, for example, Ali, supra n. 5 at xx.