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### Islam's Fourth Amendment: Search and Seizure in Islamic Doctrine and Muslim Practice

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## ARTICLES

# ISLAM'S FOURTH AMENDMENT: SEARCH AND SEIZURE IN ISLAMIC DOCTRINE AND MUSLIM PRACTICE

SADIQ REZA\*

*Modern scholars regularly assert that Islamic law contains privacy protections similar to those of the Fourth Amendment to the U.S. Constitution. Two Quranic verses in particular—one that commands Muslims not to enter homes without permission, and one that commands them not to “spy”—are held up, along with reports from the Traditions (Sunna) that repeat and embellish on these commands, as establishing rules that forbid warrantless searches and seizures by state actors and require the exclusion of evidence obtained in violation of these rules. This Article tests these assertions by: (1) presenting rules and doctrines Muslim jurists of premodern and modern times have articulated on the basis of the pertinent texts; (2) discussing the evidence, or the lack thereof, in the historical record that such rules operated in criminal practice in the premodern Arab-Ottoman Muslim world; and (3) comparing the apparent theories and policies of Islam’s pertinent provisions with those of the Fourth Amendment. The Article concludes that authority for Fourth-Amendment-like protections certainly exists in Islamic law, but assertions that such protections do so exist, or have ever been routinely practiced before the modern period, are unsupported by the*

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\* Professor of Law, New York Law School. Research for this study was conducted primarily at Harvard Law School, where the author was a Visiting Researcher at the Islamic Legal Studies Program in 2004–05 and a Visiting Scholar at the Graduate Program in Fall 2007, and was generously funded throughout by New York Law School. The author is indebted to participants in workshop presentations at Harvard’s Islamic Legal Studies Program, New York Law School, and the Boston University School of Law for insightful comments and questions, and to the library staffs at all three law schools for exceptional assistance. Peri Bearman, Ahmed El-Shamsy, Nimrod Hurvitz, Aida Othman, Kevin Reinhardt, Frank Vogel, and Aron Zysow gave essential early guidance, and Robert Blecker, Steve Ellmann, Stan Fisher, and Sherman Jackson generously read and commented on drafts. Thanks are also due a long list of scholars of Islamic law or history who graciously answered queries, sent advance copies of forthcoming work, helped identify and locate sources, or did all of these things: Eli Alshech, Nathalie Bernard-Maugiron, Michael Cook, Bogac Ergene, Eyal Ginio, Louise Halper, Yaron Klein, Clark Lombardi, Abraham Marcus, Hossein Modarressi, Tamir Moustafa, Rudolph Peters, David Powers, Delfina Serrano, and Kristen Stilt. (Of course, all errors and shortcomings are the author’s.) Harvard University PhD candidate Shady Hekmat Nasser assisted ably with Arabic-language research, and at different times Kristen Eaton, Kristina Hilton, Bill Kaleva, Ned Thimmayya, and Dan Vissers provided first-rate administrative support. This Article is dedicated to the Nour women of three generations whose support and forbearance over too many evenings and weekends allowed it to be written: wife Nawal, mother-in-law Jane, and daughter Najma. © 2009, Sadiq Reza.

*doctrinal and historical records. There is, in the end, no obstacle to articulating search and seizure protections in Islamic law that meet modern notions of criminal due process; in this is the possibility of common ground between those who seek a greater role for Islamic law in today's Muslim world and those who seek a lesser one.*

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## ISLAM'S FOURTH AMENDMENT

*Oh you who believe! Enter not houses other than your own, until you have asked permission and saluted those in them . . . . If you find no one in the house, enter not until permission is given to you . . . .*<sup>1</sup>

*[S]py not on each other . . . .*<sup>2</sup>

*The religious law cannot concern itself with suspicions of possible criminal acts . . . [but] only with executing the legal punishments. Political leadership, on the other hand, has to concern itself with the investigating stage, in which is ascertained the commission of crimes necessitating legal punishments.*<sup>3</sup>

### INTRODUCTION

The story is repeated often: how the early Muslim leader Umar ibn al-Khattab ignored the crime of wine-drinking by a group of reveling Muslims because he had discovered that wrongdoing by “spying.”<sup>4</sup> Modern scholars regularly cite this story and others like it, along with Quranic verses including those above, to show that Islam protects personal privacy in its rules of criminal procedure. Implicit in these references, and occasionally explicit, is an analogy to the prohibition of unreasonable searches and seizures in the Fourth Amendment to the U.S. Constitution and the penalty for obtaining evidence by violating it: the exclusion of that evidence from a criminal trial. But how far can this analogy be taken? What precise interpretations did classical Muslim jurists give the relevant texts, and what rules did they derive from them? How have judges and rulers applied those rules over the fourteen centuries of Islam, in the service of what underlying principles, and with what results? What remains of those rules in contemporary criminal doctrine and practice in the Muslim world? And how does all of this truly compare with the history, the principles, and the practice of the Fourth Amendment and its exclusionary rule?

This Article addresses these questions. In doing so, it necessarily addresses broader and deeper questions about how to conceptualize Islamic law. For to identify rules that govern search and seizure in Islamic doctrine and assess the actual practice *vel non* of these rules is to

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1. QURAN, 24:27–28.

2. QURAN, 49:12.

3. IBN KHALDUN, 2 THE MUQADDIMAH 36 (Franz Rosenthal trans., 1980).

4. Actually, there are accounts of at least three such incidents involving Umar. *See infra* Section II.B.

engage in several levels of scrutiny. The relationship between theory and practice in Islamic criminal law and procedure must be clarified. The respective jurisdictions of the scholar-jurists who articulate this theory, the judges who apply it, and the executive authorities who determine its everyday practice must be delineated. The authority of each of these realms of Islamic law—the doctrines of jurists, the rulings of judges, and the practices of rulers and their agents—must be measured and compared. A definition of “Islamic” criminal procedure, indeed of “Islamic law” itself, must be provided. And within all of this, search and seizure doctrines must be identified, evidence of actual practice must be located, and policies underlying both must be unearthed and examined. This Article conducts this scrutiny. The result, I hope, is not only a clarification of Islam’s search and seizure doctrines but also fresh insight into Islamic law itself, indeed a fresh approach to studying it—an approach that considers practice to be at least as important as doctrine, and doctrine itself to be as variable as the circumstances in which it is articulated and the individuals who articulate it.

But why, it might be asked, present this approach through search and seizure? Indeed, why examine “Islam’s” doctrines of search and seizure at all, let alone assess their historical practice, when today most Muslim-majority countries have constitutions and criminal-procedure codes that forbid arbitrary arrests, require warrants to enter homes, limit intrusions on private communications and correspondence—*i.e.*, laws that already contain the search and seizure guarantees that are considered fundamental human rights under contemporary international standards? (This includes the ten or so countries that enforce “Islamic” crimes and punishments.<sup>5</sup>) Most Muslim-majority countries are also parties to international covenants that mandate these guarantees, such as the 1966 International Covenant on Civil and Political Rights and the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment. And Muslim-majority countries have themselves adopted “Islamic” declarations of human rights, specifically a 1981 Universal Islamic Declaration of Human Rights, a 1990 Cairo Declaration on Human Rights in Islam, and a 1994 Arab Charter on Human Rights. These declarations include the litany of modern rules of criminal due process and assert that these rules are compatible

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5. These countries are Saudi Arabia and other states of the Arabian Peninsula, along with Iran, Libya, Pakistan, Sudan, and northern Nigeria. See RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW 142–74 (2005) [hereinafter CRIME AND PUNISHMENT].

with Islamic law; indeed they go so far as to say these rules are grounded in it.<sup>6</sup> The countries of today's Muslim world have, in other words, at least nominally endorsed rules for the criminal process that reflect the norms of international human rights, including rules that pertain to search and seizure; and they have stated that these rules are fully consistent with Islam, indeed are "Islamic." Of what use then is an examination of past doctrines and practices on the topic?

Let me suggest four answers. First, the Islamic pedigree of any law or legal construct is a crucial source and measure of its legitimacy in Muslim eyes.<sup>7</sup> Identifying doctrinal authority and historical precedent for search and seizure protections in Islam can therefore legitimize those protections; it might also increase compliance with them, or at least the political incentives to comply with them.<sup>8</sup> Second, to the extent Islamic rules or principles of search and seizure are compatible with those of modern secular law, points of contention between those who advocate Islamic law as the ultimate constitutional principle and

6. See Sadiq Reza, *Torture and Islamic Law*, 8 CHI. J. INT'L L. 21, 36–37 (2007).

7. This is hardly a novel proposition; indeed others state it more broadly. See Frank Griffel, *Introduction*, in SHARI'A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT 1 (Abbas Amanat and Frank Griffel eds., 2007) ("All normative discussions within Islam, as well as between Muslims and members of other faiths, center on the content of Sharia."); KECIA ALI, *SEXUAL ETHICS IN ISLAM* xii (2006) ("For the vast majority of Muslims world-wide—not only extremists or conservatives, but also those who consider themselves moderate or progressive—determining whether a particular belief or practice is acceptable largely hinges on deciding whether or not it is legitimately 'Islamic'."); FRANK E. VOGEL & SAMUEL HAYES III, *ISLAMIC LAW AND FINANCE: RELIGION, RISK, AND RETURN* 19 (1998) ("Islamic law remains—in faith if not in legal reality—the criterion for right action in Muslim life."); see also ABDULLAHI AHMED AN-NA'IM, *ISLAM AND THE SECULAR STATE* 4, 9–10 (2008) ("[T]he religious beliefs of Muslims, whether as officials of the state or as private citizens, always influence their actions and political behavior," and "[t]he Qur'an and Sunna are . . . where Muslims look for guidance in developing their social and political relations, legal norms, and institutions.").

8. Increased compliance is of course far from guaranteed; as I myself have said, in the context of discussing investigative torture in the modern Muslim world, "[t]he divine provenance of Islamic law does not . . . compel state actors in a Muslim country to comply with the dictates of that law any more than the humanitarian ideals of international law compel state actors in any country to comply with that law." Reza, *supra* note 6, at 40. See also AN-NA'IM, *supra* note 7, at 111 ("Muslims['] . . . motivation to uphold human rights norms is likely to diminish if they perceive those norms to be inconsistent with Islamic precepts . . . [while] their commitment and motivation to protect those rights will increase if they believe them to be at least consistent with, if not required by, their belief in Islam."); MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* 30 (2003) ("[A]ny attempt to enforce international or universal norms within Muslim societies in oblivion of established Islamic law and traditions creates tension and reactions against the secular nature of the international regime no matter how humane or lofty such international norms may be.").

those who oppose that (or any) constitutional role for Islam are minimized. This tension is central to constitution-writing and constitutional interpretation in today's Muslim world; the new constitutions in Afghanistan and Iraq in recent years are but two examples of it.<sup>9</sup> And criminal procedure rules in general—constraints on state powers of investigation, prosecution, and punishment, and corresponding protections for criminal suspects and defendants—are of course core components of modern constitutions; they are also central to human-rights norms that underlie and animate contemporary criticisms of Islamic law. Third, for academic reasons as much as practical ones, identifying the existence and scope of “Islamic” rules or principles of criminal procedure—irrespective of how they compare with their modern (Western) counterparts, and particularly where there is no correlation—itself has value. Even cursory familiarity with pertinent Islamic jurisprudential literature suggests we have much to learn about, and much to learn from, what Islam has had to say about criminal due process over the centuries. Fourth, criminal procedure illustrates better than any other field a central dynamic of Islamic law itself: the relationship between the doctrines jurists have articulated over the fourteen centuries of Islam, which form the corpus of formal Islamic jurisprudence, and the real-world practices of Islam's executive authorities, which have not necessarily followed jurists' doctrines but still depend on them for religious legitimacy. Understanding this dynamic—one of congruence at times, disjuncture at others—is necessary to an accurate conception of Islamic law itself, as I will argue more fully in Part I below. It also helps explain modern-day interpretations and applications of Islamic law and suggests possible directions for future ones.

There are, then, practical reasons as well as academic ones to inquire into search and seizure in Islamic law and Muslim practice.<sup>10</sup> And the

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9. See Ann Elizabeth Mayer, *The Respective Roles of Human Rights and Islam: An Unresolved Conundrum for Middle Eastern Constitutions*, in CONSTITUTIONAL POLITICS IN THE MIDDLE EAST 77, 77–97 (Said Amir Arjomand ed., 2008). See also Barnett R. Rubin, *Crafting a Constitution for Afghanistan*, in CONSTITUTIONAL POLITICS IN THE MIDDLE EAST at 147, 156–58; Ashley S. Deeks & Matthew D. Burton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INT'L L.J. 1, 5–23 (2007); Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N.Y.L. SCH. L. REV. 557, 577–78 (2006–07); Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 864–65, 877–79 (2005).

10. And in future work I will focus on yet another reason to identify Islamic rules or principles of criminal procedure: to correspond with and regulate the enforcement of “Islamic” crimes and punishments in the countries where those are on the books, as well as in others in which their *ad hoc* enforcement is possible. See Sadiq Reza, *Due Process in Islamic Criminal Law: Framing an Inquiry* (in progress).



core conclusions of this inquiry bear mention at the outset. First, textual support for some search and seizure protections do indeed appear in the Quran and the Traditions (Sunna), the sacred texts that are the primary sources of Islamic law. Muslim jurists of both classical and modern times have also articulated rules or doctrines of search or seizure on the basis of these sacred texts. At times these rules resemble those of our Fourth Amendment while at others they do not; when they do not, they may fall short of Fourth Amendment protections or exceed them. The underlying principles of the Islamic doctrines are also familiar at times—similar concerns for privacy, liberty, and property appear, for instance—but principles that are foreign to the land of our Fourth Amendment appear as well. Among these are concerns about reputation, honor, and modesty; a theory of criminal law that distinguishes between public wrongdoing and private wrongdoing; and affirmative injunctions about ordering civil society. But there is little evidence that these search and seizure doctrines were enforced, or even considered in criminal cases, over the lands and centuries of pre-modern Islam, at the least in the Arab-Ottoman regions about which source material is most readily available. Rather, with criminal investigation and adjudication mostly ceded to political authorities (rather than judicial ones) in these regions, the jurists' doctrines of search and seizure apparently saw little application. Matters change in the modern period, though, and developments of the past hundred years provide perhaps the most surprising conclusion of this study. In this period, during which Western constitutions and codes have been adopted in all but a few countries in the Muslim world, search and seizure provisions and practices resembling those of Western countries have been institutionalized throughout the Muslim world.<sup>11</sup> These provisions and practices—of Western, “secular” origin—have arguably brought the lands of Islam closer than they have ever been to implementing the ideals of search and seizure protection that are suggested in the Quran and the Traditions and articulated by classical jurists.

In Part I below, I identify and explain the two halves of Islamic criminal procedure—theory and practice—and in doing so I set out the relative jurisdiction and authority of various actors in defining and enforcing criminal prohibitions in Islamic law: jurists, judges, rulers, police officials, and others. I also provide a working definition of Islamic law, and explain the approach I have taken, and the limitations inherent, in researching criminal procedure doctrine and practice

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11. *See infra* Section III.B.

over fourteen centuries in a wide swath of the world. In Part II, I present pertinent texts of the Quran and Traditions, followed by the rules Muslim jurists have articulated on the basis of these texts. In Part III, I trace evidence of the practice, or the lack thereof, of these rules over the centuries and lands of Islam. In Part IV, I discuss and compare the apparent purposes of Islam's search and seizure rules with those of the Fourth Amendment. In the Conclusion, I offer some observations on what the results of the study suggest for search and seizure, criminal practice, and legal interpretation generally in today's Muslim world. The inquiry is comparative in both directions: examining what Islam has, or does not have, of the Fourth Amendment is but half the task; I also approach the question from the reverse, identifying search and seizure protections and theories that are found in Islam but not in the Fourth Amendment context.

#### I. THEORY, PRACTICE, AND AUTHORITY IN ISLAMIC CRIMINAL PROCEDURE

Islam has no formal constitution or Bill of Rights; nor does its law, in theory at least, consist of a set of rules humans have devised to regulate their affairs. Rather, Islamic law—*sharia* (“path” or “way”)—is God's law, set out by God for humans to acknowledge and obey in all matters and in His service.<sup>12</sup> Some rules of government, civil society, and criminal law and procedure are within that law, but in no assigned place; they must instead be identified and extracted from a vast body of jurisprudence that is built upon the traditional sources, or “roots,” of Islamic law. There are four such roots: the Quran, the Traditions, the

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12. A classic description of the *sharia* is this: “The sacred Law of Islam is an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects; it comprises on equal footing ordinances regarding worship and ritual, as well as political and (in the narrow sense) legal rules.” JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 1 (1964). See also FAZLUR RAHMAN, ISLAM 101 (1979) (“[T]he Sharia . . . is The Way, ordained by God, wherein man is to conduct his life in order to realize the Divine Will.”); BERNARD WEISS, THE SPIRIT OF ISLAMIC LAW 8 (2006) (describing “*sharia*” as what early Muslim scholars called “the totality of norms—legal, moral, and ritual—[they] endeavored to articulate,” and cautioning not to equate *sharia* and law since the former “includes norms beyond those that constitute law in the strict sense”); Griffel, *supra* note 7, at 2–3 (noting the origin and evolution of the term and defining it as “the rules and regulations that govern the lives of Muslims”). But see MOHAMMAD HASHIM KAMALI, SHARI'AH LAW: AN INTRODUCTION 1, 4–5, 14–15 (2008) (noting a “tendency to over-legalize Islam,” arguing that Islam is “a faith and moral code first and foremost,” and rejecting the view that the *sharia* is “the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself” (quoting SCHACHT, *supra*, at 1) (internal quotations omitted)).

consensus of scholars, and reasoning by analogy.<sup>13</sup> The first two of these roots are textual and considered sacred: the Quran, seen as the divinely-revealed word of God, and the Traditions (Sunna), a record of authoritative sayings and actions of the prophet Muhammad. Also in the Traditions, but of lesser authority, are statements and actions of a revered group of Muhammad's contemporaries, the "Companions." The third and fourth sources of Islamic law constitute methods of adopting or articulating rules and norms that ostensibly find authority in the sacred texts; they operate much like precedent in common law, and gave rise in the early centuries of Islam to independent "schools" of law whose use and interpretations of the textual sources regularly differ.<sup>14</sup> The result is a vast body of jurisprudence, articulated by individual scholar-jurists of one or another school of law and generally regarded by all schools as authoritative religious law. This jurisprudence is contained in texts of many kinds: multivolume treatises, collecting the legal rules and norms of a particular jurist or school; monographs that are intended to guide rulers, judges (*qadis*), or others on the proper performance of their duties; and compilations of legal opinions (*fatwas*) issued by individual scholars in response to questions posed by *qadis*, rulers, or individual Muslims—to mention but a few of the pertinent types of texts.<sup>15</sup>

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13. Other sources of law that, for the most part, never attained the status of formal "roots" include custom, public interest, juristic preference, and necessity. See, e.g., M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E.L. 135, 138–42 (2002) (distinguishing and discussing the "principal" and "supplemental" sources of Islamic law).

14. See Farhat J. Ziadeh, *Usul al-Fiqh [The Roots of Jurisprudence]*, in 4 THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD 298, 298 (John L. Esposito ed., 1995) [hereinafter OXFORD ENCYCLOPEDIA] (describing the four sources and early development of Islamic law); Farhat J. Ziadeh, *Sunni Schools of Law*, in 2 OXFORD ENCYCLOPEDIA at 456–62. See generally MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* (2003), for more detailed treatment of the sources of law and the jurisprudential method. The theoretical framework set out here reflects the Sunni (majority) jurisprudential method; the Shi'i (minority) method differs somewhat, particularly in giving enhanced interpretive authority to certain descendants of Muhammad (imams) and allowing a greater role for reason. See Abdulaziz Sachedina, *Shi'i Schools of Law*, in 2 OXFORD ENCYCLOPEDIA at 462–64.

15. See Muhammad Ibrahim H. I. Surty, *The Ethical Code and Organised Procedure of Early Islamic Law Courts*, in CRIMINAL JUSTICE IN ISLAM: JUDICIAL PROCEDURE IN THE SHARIA 149, 150 (Muhammad Abdel Haleem et al. eds., 2003) [hereinafter CRIMINAL JUSTICE IN ISLAM] (referencing al-Khassaf's *Adab al-Qadi [Rules for the Judge]* and citing counts of between 63 and 121 extant judicial manuals); see Muhammad Khalid Masud et al., *Muftis, Fatwas, and Islamic Legal Interpretation*, in ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS 3, 3–32 (Muhammad Khalid Masud et al. eds., 1996) (describing the role of fatwas).

But the law of Muslim lands has always encompassed much more than the treatises of jurists and the *fatwas* of scholars—that is, much more than formal jurisprudence, or “*fiqh*” (literally “understanding”).<sup>16</sup> And the courts of *qadis*, who are presumptively bound by *fiqh* norms and obligated to adjudicate cases according to those norms,<sup>17</sup> have never been the sole arena of legal proceedings and adjudication in Muslim lands. Nowhere has this been more so than in criminal law, the adjudication and enforcement of which has, since the earliest days of Islam, fallen largely to actors and institutions outside of the Islamic-law court, at least in the Arab-Ottoman regions that are the main focus of this study.<sup>18</sup> These other actors and institutions have included police officials, who acquired various names across the lands and centuries of Islam; a quasi-judicial “morals inspector” called the *muhtasib*, whose role and duties we will examine in some detail; courts of grievances (*mazalim*), originally established by the ruler to hear complaints against government officials; and other administrative courts and councils established by executive authorities as adjudicative forums expressly distinct from the courts of *qadis*.<sup>19</sup> Dual jurisdictions have thus existed in criminal-law enforcement in Muslim history, one comprising the *qadis*’ courts and the other comprising the courts and agents of the rulers, with the *muhtasib* somewhere in between (as we will discuss in more detail below). All of these actors and institutions possessed and wielded powers of investigation, adjudication, and punishment of

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16. See, e.g., NOEL COULSON, *A HISTORY OF ISLAMIC LAW* 148 (1964) (“[T]he classical doctrine never formed a complete or exclusively authoritative expression of Islamic law.”).

17. See, e.g., PETERS, *CRIME AND PUNISHMENT*, *supra* note 5, at 8 (*qadi* adjudicates criminal cases “on the basis of the *fiqh* doctrine”); Baber Johansen, *Signs as Evidence: The Doctrine of Ibn Taymiyya (1263–1328) and Ibn Qayyim Al-Jawziyyah (D. 1351) on Proof*, 9 *ISLAMIC L. & SOC’Y* 168, 171 (2002) (*qadi* “applies *fiqh* norms”).

18. See PETERS, *CRIME AND PUNISHMENT*, *supra* note 5, at 8–9; COULSON, *supra* note 16, at 123–34; URIEL HEYD, *STUDIES IN OLD OTTOMAN CRIMINAL LAW I* (1973); SCHACHT, *supra* note 12, at 50, 54–55, 76; HAIM GERBER, *STATE, SOCIETY, AND LAW IN ISLAM: OTTOMAN LAW IN COMPARATIVE PERSPECTIVE* 60–61, 65, 183 (1994) (“[S]o far there is no documentary reason to revise Schacht’s and Coulson’s claims that Islamic law in the pre-Ottoman period had little or nothing to do with the penal law.”); *but see id.* at 16–17, 61–78 (arguing that *qadis*’ role in adjudicating criminal cases and doing so according to Islamic law increased in the Ottoman Empire after the sixteenth century).

19. See Emile Tyan, *Judicial Organization*, in *LAW IN THE MIDDLE EAST* 236, 242–43, 259, 263–69, 274–78 (Majid Khadduri & Herbert J. Liebesny eds., 1955); COULSON, *supra* note 16, at 127–34; HEYD, *supra* note 18, at 211, 228, 229–33; Rudolph Peters, *Islamic and Secular Criminal Law in Nineteenth Century Egypt: The Role and Function of the Qadi*, 4 *ISLAMIC L. & SOC’Y* 70, 75–76 (1997) (tracing rise of administrative courts and councils for criminal adjudication in 19<sup>th</sup>-century Egypt) [hereinafter *Role and Function of the Qadi*].

criminal offenses.<sup>20</sup>

Several reasons are commonly given for why jurisdiction in criminal matters developed thus.<sup>21</sup> First, only a few crimes and accompanying punishments are seen as expressly listed in the Quran and the Traditions—specifically: (1) the handful of “fixed” crimes, or *hudud* (sing., *hadd*), which call for the harsh punishments for which Islamic criminal law is perhaps best known;<sup>22</sup> and (2) crimes of homicide or other bodily injury (*jinayat*), the punishment for which is “just retribution” (*qisas*)—*i.e.*, harm to the defendant of the type inflicted on the victim—or financial compensation (*diyya*) if the victim so chooses.<sup>23</sup> The jurisprudence that binds *qadis* and defines their criminal law jurisdiction focuses mostly on these few crimes. Second, jurists articulated doctrines that made conviction and punishment for crime in *qadis*’ courts extremely difficult, including strict definitions of the elements of the *hudud* crimes, high evidentiary burdens, and elaborate procedural requirements.<sup>24</sup> That law enforcement officials created their own forums for more expeditious and successful criminal prosecutions is therefore not surprising. Third, crimes not listed in the Quran and

20. And the *qadi* himself often operated beyond the formal constraints of the *sharia* in criminal cases, handing over to the ruler cases in which there was insufficient proof according to the *sharia*’s rules, or even punishing “administratively” (*siyasatan*) himself in such cases after requesting and obtaining an order to do so from the ruler. See HEYD, *supra* note 18, at 217, 252, 256; Tyan, *supra* note 19, at 260.

21. See Farhat J. Ziadeh, *Criminal Law*, in 1 OXFORD ENCYCLOPEDIA *supra* note 14, at 329, 330, and HEYD, *supra* note 18, at 1.

22. Scholars count between four and seven of these crimes, with a majority of view of six: theft, brigandage, adultery, false accusation of adultery (slander), wine-drinking, and apostasy. See MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 1–2 (1982); Saeed Hasan Ibrahim, *Judicial Powers in Criminal Cases*, in CRIMINAL JUSTICE IN ISLAM, *supra* note 15, at 19 (adding rebellion, or “insurrection against a lawful Muslim authority”). The punishments for these crimes include flogging, amputation, and death by crucifixion or stoning. See generally EL-AWA, *supra*.

23. See Muhammad Abdel Haleem, *Compensation for Homicide in Islamic Shari’a*, in CRIMINAL JUSTICE IN ISLAM, *supra* note 15, at 98–99, 106. Because the right to punishment in bodily injury crimes belongs to the victim, these crimes straddle the divide between crimes and torts. See Ziadeh, *Criminal Law*, *supra* note 14, at 329, 330.

24. See PETERS, *supra* note 5, at 54. Among these doctrines is the well-known evidentiary requirement, for *hudud* offenses, of oral testimony by two or more eyewitnesses who are adult male Muslims of good character, unless there is an unrevoked confession by the defendant. See, *e.g.*, HEYD, *supra* note 18, at 1, 180; COULSON, *supra* note 16, at 124–27; Mohammed Selim El-Awa, *Confession and Other Methods of Evidence In Islamic Procedural Jurisprudence*, in CRIMINAL JUSTICE IN ISLAM *supra* note 15, at 117–29 (discussing requirements of witness testimony, along with the evidentiary roles of circumstantial evidence and the judge’s personal knowledge). A two-witness rule was also a feature of Roman-canon law. See JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 3–4 (2006).

Traditions—most crimes, in other words—are deemed to fall into a catch-all category of crimes that call for “discretionary” punishment, or *ta’zir* (literally “chastisement”).<sup>25</sup> While jurisdiction over the fixed crimes theoretically belongs to the *qadi*, since punishment for those crimes is a “right of God” (*haqq Allah*), jurisdiction over the discretionary crimes, which are seen as matters of public order, is shared equally by the *qadi* and the ruler.<sup>26</sup> And the vast category of discretionary crimes also includes fixed crimes the proof of which fails to meet one or another evidentiary requirement.<sup>27</sup> Thus, while the *qadi* focused on formalities of proof and procedure in the few crimes over which he had exclusive jurisdiction (again, in theory), political rulers had the power independently to enforce the wide realm of discretionary crimes; they accordingly deputized agents and created institutions to investigate, prosecute and adjudicate what amounted to the bulk of criminal law.<sup>28</sup>

These two jurisdictions—that of the jurists’ *fiqh* and the *qadis* who applied it, on the one hand, and that of the ruler and his agents and institutions on the other—have been characterized by Western scholars as, respectively, one of “religious” authority and the other of “secular” authority.<sup>29</sup> More broadly, an earlier generation of Western scholars characterized the distinction between jurisprudential doctrine and executive practice as a fundamental fault line in Islamic law, an irreconcilable schism between theory and practice.<sup>30</sup> In this view, many

25. See Mohammad Hashim Kamali, *The Right to Personal Safety* (Haqq al-Amn) and the Principle of Legality in Islamic Shari’a, in CRIMINAL JUSTICE IN ISLAM, *supra* note 15, at 70–72; EL-AWA, *supra* note 22, at 96–119.

26. Also shared is jurisdiction over the bodily-injury crimes, which are considered neither rights of God nor public rights but rights of individuals, and as such their prosecution depends on the will of the victim. See PETERS, CRIME AND PUNISHMENT, *supra* note 5, at 39; Peters, *Role and Function of the Qadi*, *supra* note 19, at 71. As we will see, however, such jurisdictional distinctions were not necessarily honored in practice.

27. See, e.g., Kamali, *supra* note 25, at 72; Ziadeh, *Criminal Law*, *supra* note 21, at 329.

28. See Ziadeh, *Criminal Law*, *supra* note 21, at 330; COULSON, *supra* note 16, at 127–128; see also Rudolph Peters, *Who Killed ‘Abd Allah Al-Ghazza? A Murder Trial Before a Nineteenth Century Egyptian Qadi*, in AMSTERDAM MIDDLE EAST STUDIES 86 (Manfred Woidich ed., 1990) (describing state’s intervention in homicide cases in Egypt when victim did not demand retribution and *qadi* did not punish or punished insufficiently severely in its view) [hereinafter *A Murder Trial*].

29. See, e.g., Peters, *Role and Function of the Qadi*, *supra* note 19, at 71, 72, 75, 76 (contrasting *qadis*’ “religious courts” with executive’s “secular councils,” “secular courts” and “secular justice” in 19<sup>th</sup>-century Egypt); COULSON, *supra* note 16, at 128–29 (“[A]lthough all functions in the Islamic state were theoretically religious in nature, the distinction between the [executive] and Shari’a jurisdictions came very close to the notion of a division between secular and religious courts.”).

30. See, e.g., SCHACHT, *supra* note 12, at 2 (in Islamic law “there . . . existed a discordance between the sacred Law and the reality of actual practice . . . , a gap more or less wide according to

practices of criminal-law enforcement by Muslim political authorities constituted departures from the *sharia*, indeed contraventions of it, creating a running contradiction between theory and practice.<sup>31</sup> More recent analysis, however, locates criminal practice by executive authorities soundly within classical doctrines that permit rulers to consider the real-world exigencies of governance in implementing God's law, particularly the doctrine of "governance in accordance with the *sharia*" (*siyasa shar'iyya*), which cedes daily governance to political authorities *as a matter of the sharia*.<sup>32</sup> Seen thus, the criminal-law practice of Islam's political authorities—their "*siyasa*," or governance, in fulfillment of the ruler's duty to uphold God's law—occupies a position alongside that of the jurisprudence of scholars; indeed, the two are arguably interdependent.<sup>33</sup> In this view, both jurisprudential theory and executive practice are essential components of any accurate understanding of Islamic law.

My approach here embraces the latter view; for purposes of this Article, I define "Islamic law" as consisting of both the religious-legal doctrines of Muslim jurists and the practices of Muslim judges and

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place and time, now and then on the point of being closed but continually reasserting itself."); *id.* at 76–85 (chapter entitled "Theory and Practice"); *id.* at 209 ("At the very time that Islamic law came into existence, its perpetual problem, that of the contrast between theory and practice, was already posed."); J.N.D. Anderson, *Law as a Social Force in Islamic Culture and History*, 20 BULL. SCH. ORIENTAL & AFRICAN STUDIES 13, 19–20 (1957) (discussing "a considerable gulf between theory and practice"). Max Weber may have sired this generation in part. Among his observations about Islamic law was this: [I]n practice Muslims often adhered to customary or secular law or they ignored the ideal code of the Shari'a . . . [T]he scholars preserved a legal tradition which was ironically irrelevant to the practical needs of ordinary Muslims. BRYAN S. TURNER, *WEBER AND ISLAM* 115 (1974).

31. See, e.g., HEYD, *supra* note 18, at 1.

32. See F.E. Vogel, *Siyasa: In the sense of siyasa shar'iyya*, in THE ENCYCLOPAEDIA OF ISLAM, NEW EDITION 693, 694–96 (C.E. Bosworth et al. eds., 1997); PETERS, CRIME AND PUNISHMENT, *supra* note 5, at 8, 67–68; Frank E. Vogel, *The Public and Private in Saudi Arabia*, 70 SOC. RES. 749, 750 (2003); FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM 169–74, 197–205, 226–31, 239–40, 249–50 (2000); MOHAMMED FADEL, ADJUDICATION IN THE MALIKI MADHHAB 64–65 (1995) (unpublished Ph.D. dissertation, University of Chicago) (on file with author). Coulson, though firmly a member of the earlier generation, appears torn between the two views. See COULSON, *supra* note 16, at 129–30, 132–34 (discussing evolution of jurisprudential doctrine that legitimized rulers' discretionary practice, but still deeming non-*qadi* jurisdictions "extra-Shari'a"); N. J. Coulson, *Doctrine and Practice in Islamic Law: One Aspect of the Problem*, 18 BULL. SCH. ORIENTAL & AFRICAN STUDIES 211, 222–25 (1956).

33. See VOGEL, ISLAMIC LAW AND LEGAL SYSTEM, *supra* note 32, at 203, 239–40. Schacht, the foremost authority in that earlier generation, was not necessarily against the notion of interdependence; see SCHACHT, *supra* note 12, at 84 ("We must think of the relationship of theory and practice in Islamic law not as a clear division of spheres but as one of interaction and mutual interference.").

political authorities that are ostensibly grounded in those doctrines or sanctioned by them.<sup>34</sup> But the inquiry here sweeps more broadly still, beyond the doctrines of jurists and “ostensibly sanctioned” practices of executive authorities—that is, beyond even my own definition of Islamic law—since in adducing evidence of search-and-seizure practice in Muslim history I do not necessarily pause to consider whether a given practice is indeed “ostensibly sanctioned” by juristic doctrine. Historical and practical considerations compel this approach. Law and

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34. I do not, however, take a position on whether executive practice is part of the *sharia* proper or external to it. Indeed, scholars debate whether jurists’ doctrines themselves—the *fiqh*—should be considered part of the *sharia* or separate from it. Ultimately, the definitions of both *sharia* and “Islamic law” are matters of semantics. On *sharia*, compare, e.g., TARIQ RAMADAN, WESTERN MUSLIMS AND THE FUTURE OF ISLAM 34 (Oxford University Press 2004) (“[T]he *Sharia*, insofar as it is the expression of [] “the way to faithfulness,” deduced and constructed a posteriori, is the work of human intellect.”), *id.* at 37 (“[T]he corpus of the *Sharia* is a human construction, and some aspects of it may evolve just as human thought evolves.”), and KHALED ABOU EL FADL, ISLAM AND THE CHALLENGE OF DEMOCRACY 30–34 (2004) (same), *with id.* at 33 (“[But] I would suggest that Shari’ah ought to stand in an Islamic polity as a symbolic construct for the divine perfection that is unreachable by human effort.”); see also Yvonne Yazbeck Haddad & Barbara Freyer Stowasser, *Introduction*, in ISLAMIC LAW AND THE CHALLENGES OF MODERNITY 5 (Yvonne Yazbeck Haddad & Barbara Freyer Stowasser eds., 2004) (“Especially in the modern period, legal-theological scholarship has defined shari’a as revealed or divine law in order to distinguish it from *fiqh* (jurists’ law) and *qanun* (state law), with the aim to stress the divine origin of the shari’a, whose norms are binding for all times.”); Griffel, *supra* note 7, at 3 (defining *fiqh* as “the academic discipline whereby Muslim scholars describe and explore Shari’a”); KAMALI, SHARI’AH LAW, *supra* note 12, at 16, 41 (distinguishing between the two but defining *fiqh* as a part of *sharia*); AN-NA’IM, *supra* note 7, at 35 (calling *sharia* and *fiqh* “[both] products of human interpretation . . . in a particular historical context”). On “Islamic law,” see, e.g., Frank Vogel, *An Introduction to the Law of the Islamic World*, 31 J. INT’L LEGAL INFO. 353, 356–57, 362–66 (2003) (adding *siyasa*—the state’s application of *fiqh* doctrines—to *sharia* and *fiqh* as necessary to the study of Islamic law); Lama Abu-Odeh, *Commentary of John Makdisi’s “Survey of AALS Law Schools Teaching Islamic Law,”* 55 J. LEGAL ED. 589, 589 (2005) (describing and contrasting two definitions of Islamic law: *fiqh*, and “the law applied to Muslims living in the Islamic world today”); see also Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT’L L. 307, 321 (1994) (distinguishing the terms “Islamic” and “Muslim” and arguing that “Islamic” should designate “matters pertaining to the religion” and “normative religious principles—or [principles] that are presented as being normative,” whereas “Muslim” should designate matters that pertain to the religion’s adherents); Sherman Jackson, *Islam(s) East and West: Pluralism Between No-Frills and Designer Fundamentalism*, in SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? 117, 118 (Mary L. Dudziak ed., 2003) (calling the term “Islamic” a “neologism” and “virtually unknown in premodern times” and decrying its use to connote “a false universal, converting time- and space-bound expressions of Islam into binding and normative models for Muslims everywhere”); Kristen Stilt, *Price Setting and Hoarding in Mamluk Egypt: The Lessons of Legal Realism for Islamic Legal Studies*, in THE LAW APPLIED—CONTEXTUALIZING THE ISLAMIC SHARI’A: A VOLUME IN HONOR OF FRANK E. VOGEL 57, 57–58, 73–74 (Peri Bearman, Wolfhart Heinrichs, & Bernard G. Weiss eds., 2008) (urging a legal-realist approach to studying Islamic law).



legal practice in a given region and period in Muslim history have always included several components in addition to formal jurisprudence—not only the practice of political authorities but also local custom, and, in more recent centuries, state legislation. Jurists of each region and period have not necessarily opined on each of these “extra-doctrinal” sources of everyday law, and whatever opinions they might have voiced are not necessarily available to us today. And the jurisprudential doctrine of a given region and period in Muslim history is itself, like any legal doctrine, context-specific, contestable, and ultimately a product of its human expositors and their predispositions or predilections.<sup>35</sup> In other words, at any moment and place in Muslim history, a given law or legal practice might not have been expressly sanctioned by a jurisprudential doctrine, and any jurisprudential sanction that did exist might not have been universally considered valid then, or be considered valid by anyone today. To demand doctrinal validation for a given search and seizure practice before discussing it here would therefore be to demand too much, and would result in discussing too little.

For these reasons, the inquiry here addresses both the normative question of what Islamic doctrine *says* about search and seizure and the descriptive question of what Muslims have *done* in search and seizure over the years, identifying convergences as well as divergences between the two realms wherever possible. Stated differently, the inquiry here is into the “law of Islam” (*droit d’Islam*) rather than just “Islamic law” (*droit Islamique*), to invoke a distinction recently revived by Khalid Fahmy and Rudolph Peters.<sup>36</sup> Justifying this broader lens is the premise that the practical and academic goals of an inquiry such as this can be advanced as much by studying Muslim legal history—law and legal practice in those regions and periods in which Islam serves as the ultimate organizing principle of state and society—as by studying Islamic legal doc-

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35. See also Sherman Jackson, *Fiction and Formalism: Toward a Functional Analysis of Usul al-Fiqh*, in *STUDIES IN ISLAMIC LEGAL THEORY* 177, 178–79 (Bernard G. Weiss ed., 2002) (arguing against the “fiction” that Islamic legal theory alone determines the content of legal doctrine, and asserting that the function of formal jurisprudence is instead “to establish and maintain the parameters of a discourse via which views can be validated by rendering them identifiably legal, both in the sense of passing muster as acceptable (if not true) embodiments of scriptural intent and in the sense of being rendered distinct from views that are, say, scientific, ideological, or simply pragmatic”) (emphasis omitted); Kristen Stilt, *Recognizing the Individual: The Muhtasibs of Early Mamluk Cairo and Fustat*, 7 *HARV. MIDDLE E. & ISLAMIC R.* 63, 64–66 (2006) (urging studying the biographies of decision-makers in Islamic law in a legal-realist approach to Islamic law).

36. Khalid Fahmy & Rudolph Peters, *Introduction: The Legal History of Ottoman Egypt*, 6 *ISLAMIC L. & SOC’Y* 129, 129 (1999).

trine.<sup>37</sup>

In short, the question of how to characterize the distinction between (or unity of) the spheres of doctrine and practice in Islamic law is not of primary concern in this inquiry. At the same time, both the fact of that distinction and ramifications of it are central and unavoidable themes—indeed they are explicit ones, as the respective titles of Parts II and III of this Article indicate. One ramification is that different rules and practices of criminal investigation and adjudication emerged in the different spheres. Specifically, all evidence indicates that in enforcing criminal law, *qadis* were bound by the strict evidentiary and procedural rules of jurisprudential doctrine—the *fiqh*—but the ruler and his agents were not.<sup>38</sup> There is in fact little indication that any rules at all constrained executive actors in criminal-law enforcement and adjudication. Police officials, for instance, reportedly heard testimony from witnesses who did not meet *fiqh* requirements, beat suspects for confessions, and relied on circumstantial evidence for convictions—all prac-

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37. See also Baudoin Dupret, *What is Islamic Law? A Praxiological Answer and an Egyptian Case Study*, 24 THEORY, CULTURE & SOCIETY 79, 83 (2007) (arguing that the study of Islamic law “needs focusing much more on living phenomena and actual practices,” centered around themes including “the opposition between law in practice and law in books”). I do not mean, by asserting the existence of “regions and periods in which Islam serves as the ultimate organizing principle of state and society,” to invoke the cliché that the institutions of religion and government are inseparable in Islam, doctrinally or historically. Modern scholars, Muslim and non-Muslim, have surpassed that cliché. See, e.g., ASMA ASFARUDDIN, *THE FIRST MUSLIMS: HISTORY AND MEMORY* 187–90 (2008); PATRICIA CRONE, *GOD’S RULE: GOVERNMENT AND ISLAM* 394–95 (2004). I mean instead to refer to the generally-accepted view that in regions where Islam has predominated, the religion has constituted the central normative premise of social and political behavior. See, e.g., ALBERT HOURANI, *A HISTORY OF THE ARAB PEOPLES* 43, 83, 86–87, 147 (1992) (noting the existence of an “Islamic world,” a “common religious culture,” and “cultural unity” in the lands of pre-modern Islam despite differences of geography, ethnicity and language, and ruling powers across these lands); see also *id.* at 113 (“From the time of the Abbasids [8th–13th centuries CE] onwards the *shari’a* was generally accepted by Muslim townspeople, and upheld by Muslim rulers, as giving guidance to the ways in which Muslims should deal with each other.”); *id.* at 161 (noting a “continuing process of mutual adjustment between the *shari’a*, once it took its definitive form [in the early centuries of Islam], and the practices of Muslim societies”); *id.* at 223 (“The most fundamental duty of a Muslim ruler, and that which both expressed and strengthened his alliance with the Muslim population, was to maintain the *shari’a*.”); see also CRONE at 282–84 (arguing that pre-modern Muslim rulers were widely recognized as routine violators of the *sharia*, and that when jurists sought their removal they did not try to depose them but rather leveled against them “the ultimate charge”: apostasy, or “loss of status as a Muslim”).

38. Sources for this proposition are ubiquitous; for just one example, see HEYD, *supra* note 18, at 198–200 (discussing this phenomenon in the context of the Ottoman Empire).

tices forbidden to *qadis* (at least in theory).<sup>39</sup> Magistrates in the courts of grievances (*mazalim*), institutions about which little appears in jurisprudential treatises, apparently held and exercised many of the same powers.<sup>40</sup> The realm of the ruler, which was the realm in which most criminal law enforcement and adjudication took place, was thus one largely unconstrained by the formalities of jurisprudential doctrine. Search and seizure practices, as we will see, were one area in which this divergence between jurisprudential doctrine and executive practice manifested itself.

A second ramification of the duality of spheres in Islamic law relates to the first: in articulating rules of criminal-law enforcement and adjudication, classical jurists themselves often articulated different rules for different actors—typically one set of rules for judicial officers and another for executive officials. In doing this, jurists might simply have been acceding to the reality that rulers' criminal-law practices diverged from jurisprudential norms and there was little they could do about it; they might also have been asserting their own power as arbiters of the religious legitimacy of those practices, and thus of political rule more broadly.<sup>41</sup> Whatever the motivation, the result for our purposes is that a rule or doctrine might differ according to what specific actor is being addressed and which sphere he inhabits, and this difference of spheres and rules is one fulcrum upon which this inquiry necessarily turns.

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Two explanations about methodology are required before plunging in to the substance of this study. The first pertains to the scope of the inquiry. Researching fourteen hundred years of doctrine and practice, in lands stretching east from present-day Morocco to Indonesia, and south from today's Turkey to the Sudan, is more than a lifetime's work. For the doctrinal component, I have focused on texts and treatises that are generally considered by scholars, Muslim and non-Muslim alike, to be the most authoritative articulations of a given time, place, or school of legal thought; still, the sources obtained and reviewed for this article inevitably constitute but a small fraction of the hundreds of volumes

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39. See PETERS, CRIME AND PUNISHMENT, *supra* note 5, at 8–11; COULSON, *supra* note 16, at 127–28; Tyan, *supra* note 19, at 274–78.

40. Tyan, *supra* note 19, at 263–69; COULSON, *supra* note 16, at 128, 130–32; see also JORGEN S. NIELSEN, SECULAR JUSTICE IN AN ISLAMIC STATE: MAZALIM UNDER THE BAHRI MAMLUKS (1985).

41. See Reza, *supra* note 6, at 26–27.

that could contain pertinent information.<sup>42</sup> For the historical-practice component, I have limited my inquiry to the better-studied Arab-Ottoman regions of the Muslim world—*i.e.*, the Arabic-speaking lands of today’s Middle East and North Africa, plus Turkey. This reach covers the areas in which Islamic law emerged and predominated in pre-modern times; these are also the areas about which source materials are most plentiful and readily accessible. But this focus helps only slightly.<sup>43</sup> even for these areas, evidence of legal practice in the pre-modern period exists only in anecdotal form and in miscellaneous sources—in guidance manuals for judges or rulers, collections of rulings by individual jurists, personal chronicles, histories of particular periods, and jurisprudential treatises.<sup>44</sup> Culling all of these volumes, which easily number in the hundreds, for evidence of practice would itself be the work of a half-lifetime. Court records from various places and periods of Islamic history do appear sporadically, and more systematically from the Ottoman Empire beginning in the fifteenth century. These records are far from comprehensive, and formidable barriers to studying them still remain;<sup>45</sup> fortunately, in recent years Western historians have begun to explore and report on these vast archives, and on other primary sources such as the collected rulings of a given jurist whose opinions were influential in a particular region and period. I rely on secondary studies such as these, along with representative primary texts of the types I list above, for evidence of practice. But since I rely of necessity on a limited number of sources for evidence of both doctrine and practice, and since my review of even those sources cannot be considered definitive given their length, my conclusions must be only tentative—preliminary rather than final, suggestive rather than conclusive, based on indicative rather than comprehensive data.

Second, the focus on “classical” jurisprudence must be explained.

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42. *See, e.g.*, CHIBLI MALLAT, *INTRODUCTION TO MIDDLE EASTERN LAW* 15 (Oxford 2007) (“The historical wealth of available legal documents [from the Middle East] is probably unmatched in the rest of the planet, and many lengthy and complex treatises have yet to be uncovered,” and “[t]he span of time covered by [Islamic jurisprudential] literature is unique in the legal history of humanity.”).

43. It also, regrettably, perpetuates the tendency among Muslims and non-Muslims alike to view these areas as both necessary and sufficient representatives of things Islamic.

44. *See also* MALLAT, *supra* note 42, at 61 (“Law reporting as understood nowadays is unknown in a systematic and pervasive Middle Eastern form during the classical age.”).

45. *See, e.g.*, MALLAT, *supra* note 42, at 62 (“Work on court records from classical Islam is notoriously difficult,” including problems of special script, handwriting, and the nature of the archives as “pell-mell collection[s] of various legal records.”); *see also infra* notes 246–47 and accompanying text.

## ISLAM'S FOURTH AMENDMENT

What is seen as the classical period of Islamic law spans roughly the eighth century through the twelfth century CE, a period that stretches from the rise of formal jurisprudence to around the time the Abbasid Muslim empire came to an end in 1258. It is during this period that many of the jurisprudential doctrines that remain authoritative today—again, at least in the Arab-Ottoman lands of Islam—were articulated.<sup>46</sup> As we will see, the influence of these classical doctrines and the jurists who articulated them remains strong, and the role of the doctrines as authoritative articulations of Islamic law is largely unchallenged, at least in the realm of criminal law and procedure.

### II. “SEARCH AND SEIZURE” IN ISLAMIC DOCTRINE

With these explanations of theory and method in mind, we can turn to the rules and doctrines of search and seizure suggested by Islam’s sacred texts and developed by classical Muslim jurists. First, however, we must identify what we seek in that examination—that is, what rules or principles of the Fourth Amendment serve as both the fixed variables for which we seek analogs (or their absence) in Islam and the reference points for identifying aspects of Islamic doctrine that the Fourth Amendment does not share. Part II begins there (II.A); it then presents pertinent material from Islam’s sacred texts, the Quran and Traditions (II.B), followed by juristic elaborations on these texts in the pre-modern period (II.C) and in modern times (II.D).

#### A. *Scope of Inquiry*

The Fourth Amendment contains two commands: first, the government must not conduct “unreasonable searches or seizures” of people, their homes, or their belongings; second, warrants (for search or seizure) must be supported by sworn statements of “probable cause” and must specifically describe the person, place, or things to be searched or seized.<sup>47</sup> Courts and legislatures have, of course, derived a multitude of rules and doctrines from these commands. To guide the inquiry into Islamic law, I identify seven aspects of the jurisprudence

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46. This focus too perpetuates an unfortunate tendency: that of seeing Islamic jurisprudence as having been fully developed and frozen by the end of this period, indeed sooner. *See, e.g.,* SCHACHT, *supra* note 12, at 69–75 (presenting his much-adopted theory of the “closing of the gate” of Islamic legal reasoning). I do not mean to endorse this view, which has been vigorously challenged. *See* MALLAT, *supra* note 42, at 110–11 & 111 nn. 447–49, 117–19, 123–24 (discussing that view, citing some of its sources and opponents, and ultimately rejecting it).

47. U.S. CONST. amend IV.

and legislation that is built on the Fourth Amendment as fundamental. These aspects are: (1) rules that govern investigating individuals through *searches* of them, their homes, their correspondence and their belongings—specifically, the presumptive requirement of a warrant; (2) rules that govern the *seizure* of individuals suspected of crimes—*viz.*, the requirement of probable cause for arrests and pretrial detention, and reasonable suspicion for lesser restraints on liberty, along with similar rules for the seizure of personal property; (3) requirements of *judicial authorization* for searches or seizures, before the action (via a warrant) or afterward (via a judicial hearing); (4) *exceptions* to requirements of prior judicial authorization—plain view, hot pursuit, etc.; (5) limitations on the *manner and scope* of authorized searches or seizures—*i.e.*, reasonableness: excessive force should not be used in seizures, and searches should not extend beyond the area reasonably likely to contain the evidence sought; (6) *remedies or sanctions* for the violation of these rules—evidentiary exclusion, civil damages, disciplinary action, etc.; and (7) the rule that these requirements bind only *state actors* (and others acting on their behalf).<sup>48</sup>

Of course there is much more to the Fourth Amendment than this; and each of these seven aspects is itself riddled with exceptions and qualifications. I will raise further and finer points of Fourth Amendment doctrine as they relate to the comparative analysis. For now, I list only these seven aspects in order to broadly frame the inquiry into the Islamic doctrines. The rest of Part II of this Article, then, is devoted to identifying rules in classical Islamic doctrine that appear to speak to any of these basic aspects of Fourth Amendment doctrine.

## B. *Quran and Traditions*

### 1. Searches: Entering Homes, Suspecting Others, and “Spying”

As for rules in the Quran on investigating individuals through “searches,” two passages stand out. One of them, the first lines of which are the opening quote of this Article, gives believers strict instructions about entering people’s homes:

Oh you who believe! Enter not houses other than your own,  
until you have asked permission and greeted those in them;

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48. The most authoritative and exhaustive reference on the Fourth Amendment is WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (2004 & 2008 supp.) (6 vols.). More succinct but also reliable is JOSHUA DRESSLER & ALAN C. MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE—VOL. 1: INVESTIGATION* (2005 & 2008 supp.).

ISLAM'S FOURTH AMENDMENT

that is best for you, in order that you may heed (what is seemly). If you find no one in the house, enter not until permission is given to you: if you are asked to go back, go back; that makes for greater purity for yourselves, and God knows well all that you do.”<sup>49</sup>

In other words: homes (*buyut*), whether or not occupied at the moment, should not be entered absent the occupants' permission.<sup>50</sup>

Note that the rule is now directed toward all Muslims (“Oh you who believe!”)—*i.e.*, not only state actors. We will elaborate on both of these matters in due course. Let us turn now to the second of the two key Quranic passages on the topic. This verse, which is a fuller version of this Article's second opening quotation, contains a command that ranges well beyond homes:

Oh you who believe! Avoid too much suspicion, for suspicion in some cases is a sin. And spy not on each other, nor speak ill of each other behind [your] backs.<sup>51</sup>

“Suspicion,” in this verse, is discouraged, while “spying” is categorically forbidden, as is what comes to be called “back-biting.” What are “spying” and “back-biting,” and how much “suspicion” is too much? The Quran does not say, but we will see shortly how scholars answered these questions about this verse, which we will call the “spy not” verse. Note too that, as with the permission requirement of the “enter not” verse, the “spy not” command is both unqualified and directed toward all Muslims. Other pertinent Quranic verses will surface in our inquiry. For instance:

It is no virtue if you enter houses from the back; it is virtue if you fear God. Enter houses through the proper doors, and fear God, that you may prosper.<sup>52</sup>

We will see shortly how this verse, which we will call the “proper doors” verse, has been used in the search and seizure context. And in Part IV, we will consider the precise circumstances in response to which each of these verses was reportedly revealed.

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49. QURAN, 24:27–28.

50. QURAN, 24:29.

51. QURAN, 49:12.

52. QURAN, 2:189.

Turning now to the Traditions, several reports that bear on “searching” individuals appear. Regarding requesting permission to enter another’s home, for instance, Muhammad is said to have opined on correct and incorrect methods of making such a request, and to have established at least two exceptions to the requirement—exceptions that remind one of, respectively, the “consent” and “plain view” exceptions to the Fourth Amendment’s warrant requirement.<sup>53</sup> He is also said to have suggested a rather severe penalty for one who even looks into a home without permission: in an oft-cited report, when Muhammad learns a man had peeped into his home through a hole while Muhammad was scratching his head with an iron comb, he tells the man: “Had I known you were looking, I would have pierced your eye with it [*i.e.*, the comb].”<sup>54</sup> In another, the prophet says there is no liability for one who pokes out the eye of someone who is looking into his home without permission.<sup>55</sup>

Statements attributed to Muhammad similarly supplement the Quran’s “spy not” verse. The most relevant (and most cited) of these expands somewhat on the verse’s commands: “Beware of suspicion, for suspicion is the worst of false tales; and do not seek out [others’ faults], and do not spy . . . .”(!)<sup>56</sup> Two others warn of penalties for specific forms of “spying”—namely, eavesdropping and reading the correspondence of others. On eavesdropping: “Whoever listens to others’ conversations against their wishes will have molten lead poured in his ears on

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53. See III SUNAN ABU DA’UD 1429, nos. 5157 & 5158 (Ahmad Hasan trans., Sh. Muhammad Ashraf 1984) (instructing a visitor to request permission by saying, “Peace be upon you. May I enter?”); *id.* at 1431, no. 5168 (disapproving of a visitor’s saying “It is I” after knocking and being asked “Who is there?”); VIII SAHIH BUKHARI 173, no. 262 (Muhammad Muhsin Khan trans., 1981) (instructing that one should leave if permission to enter is not given after three requests); III SUNAN ABU DA’UD, *supra*, at 1429–30, nos. 5161 & 5162 (same); *id.* at 1431, no. 5167 (reporting that the prophet, when requesting permission to enter a home the door to which had no curtains, “did not face [the door] squarely, but faced the right or left corner”); VIII SAHIH BUKHARI, *supra*, at 173–74 (invitation constitutes permission); III SUNAN ABU DA’UD, *supra*, at 1432, nos. 5170 & 5171 (same); *id.* at 1428, no. 5154 (“When one has a look into the house, then there is no (need for) permission.”).

54. VIII SAHIH BUKHARI, *supra* note 53, at 171, no. 258; see also VII SAHIH BUKHARI, *supra* note 53, at 529, no. 807 (same). Another report has the prophet trying to stab with an arrowhead a man who peeped into his quarters. See VIII SAHIH BUKHARI, *supra* note 53, at 171, no. 259; III SUNAN ABU DA’UD, *supra* note 53, at 1428, no. 5152.

55. III SUNAN ABU DA’UD, *supra* note 53, at 1428, no. 5153.

56. VIII SAHIH BUKHARI, *supra* note 53, at 59, no. 92 (author’s translation); see also III SUNAN ABU DA’UD, *supra* note 53, at 1370, no. 4899.



the day of judgment.”<sup>57</sup> On reading others’ correspondence: “He who reads a letter of his brother without his permission will read it in hell.” (!!)<sup>58</sup> And a statement attributed to one of Muhammad’s Companions indicates that what is ultimately forbidden by the “spy not” verse and Tradition is essentially any effort to discover wrongdoing that is not apparent. Ibn Mas‘ud, when told that a certain person’s beard was “dripping with wine,” reportedly said: “We have been prohibited from seeking out [others’ faults]; but if something becomes manifest to us, we can seize it.”<sup>59</sup>

It is not sayings of Muhammad, however, but rather actions of one of his closest companions, Umar ibn al-Khattab (d. 644), that are most often held up as rules set out in the Traditions that relate specifically to investigating wrongdoing and wrongdoers. That Umar should be a leading authority for such rules is natural: in his role as the second successor to Muhammad as leader (caliph) of the new Muslim state, Umar created executive regulations and administrative bodies that spanned the range of government activities, including nighttime police patrols, whose duty was to locate and arrest wrongdoers like drinkers and gamblers.<sup>60</sup> At least four different reports involving Umar in the Traditions are cited as rules that govern searches to detect wrongdoing. We will refer to these reports repeatedly in the pages that follow; for simplicity let us call them *Umar I*, *Umar II*, *Umar III*, and *Umar IV*. The first three reports involve Umar’s refraining from pursuing wrongdoing that he discovered in alleged violation of one or more of the Quranic verses above. *Umar I*, related by one of the prophet’s Companions, reads as follows:

I went out in the city with Umar one night, and while we were walking we saw the light of a lamp. We proceeded toward it, and when we reached it we found a closed door and the sounds of

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57. See ABDUL LATIF AL-HUMAYYIM, IHTIRAM AL-HAYAH AL-KHASSAH (“AL-KHUSUSIYAH”) FI AL-SHARIAH AL-ISLAMIYAH WA AL-QANUN AL-MUQARAN [RESPECT FOR PRIVACY IN ISLAMIC LAW AND COMPARATIVELY] 284–85 (2004).

58. See Osman Abd-el-Malek al-Saleh, *The Right of the Individual to Personal Security in Islam*, in ISLAMIC CRIMINAL JUSTICE SYSTEM 67–70 (M. Cherif Bassiouni ed., 1982) (citing source).

59. III SUNAN ABU DA’UD, *supra* note 53, at 1362, no. 4872. This apparently meant that the drinker and his drink were to be left alone since no one had witnessed the act of drinking. See, e.g., Kamali, *supra* note 25, at 73.

60. See, e.g., FAROUK S. MAJDALAWI, ISLAMIC ADMINISTRATION UNDER OMAR IBN AL-KHATTAB 27, 99–103 (2002). Umar is also credited with establishing the first Islamic judicial code, through a series of letters to judges in which he lays out their duties and obligations as judges under God. See *id.* at 111.

revelry from inside. Umar took my hand and asked me, “Do you know whose home this is?” I said I did not. Umar said, “It is the home of [so-and-so]. They are drinking. What do you think?” I said: “I think we have committed a forbidden act; God said we should not spy.” So Umar left them alone.<sup>61</sup>

In other words, Umar disregarded “evidence” of wrongdoing—drinking wine is one of the fixed criminal prohibitions of Islam—because he had come upon that evidence, *i.e.*, his observations, by spying, at least as he and his night-patrol partner saw it; they had thus violated the “spy not” command. The second report, *Umar II*, reaches the same result but adds both the “enter not” and the “proper doors” verses as authority:

Umar was walking in the city one night when he heard a man singing in his home. He climbed over [the wall of the home] and found the man there with a woman and wine. Umar said: “Oh enemy of God! Did you think God would conceal you while you sinned?” The man responded: “Commander of the Faithful, do not rush to judgment. I have indeed committed a sin, but you have committed three. God said, ‘spy not,’ and you have spied. God said, ‘It is no virtue if you enter houses from the back,’ and you have climbed my wall. And God said, ‘Enter not houses other than your own,’ and you entered my home without my permission and without greeting me.” Umar replied: “Will you do right if I pardon you?” “Yes, Commander of the Faithful,” said the man. “If you pardon me I will never do anything like this again.” So Umar pardoned him and left.<sup>62</sup>

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61. ABD AL-QADIR AWDAH, 1 TASHRI‘ AL-JINA‘I AL-ISLAMI [CRIMINAL LAW OF ISLAM] 220, 503 (1963) (author’s translation). Awda’s version of this story is identical to Ghazzali’s, and is in turn copied by others. See AL-GHAZZALI, 2 IHYA ‘ULUM AL-DIN 271 (1996); al-Saleh, *supra* note 58, at 70 & n.75; SAMI HUSNI AL-HUSAYNI, AL-NADHARIYYA AL-‘AMMA LI AL-TAFTISH [THE GENERAL THEORY OF SEARCHES] 21& n.57 (1972). In Ghazzali’s version, as in my translation of Awda’s and the two others cited *supra*, the door is closed (*mughlaq*) when Umar and the Companion reach it. Three other translated versions of the story have the door open or “ajar”—a difference of no small significance, of course, when it comes to search rules. See NAGATY SANAD, THE THEORY OF CRIME AND CRIMINAL RESPONSIBILITY IN ISLAMIC LAW: SHARI‘A 76–77 (1991); Taha J. al-Alwani, *The Rights of the Accused in Islam*, 10 ARAB L.Q. 3, 14–15 (1995); Awad M. Awad, *The Rights of the Accused Under Islamic Criminal Procedure*, in ISLAMIC CRIMINAL JUSTICE SYSTEM 104 (M. Cherif Bassiouni ed., 1982). But no one in this latter group cites a source for his version.

62. AL-GHAZZALI, *supra* note 61, at 272; see also AWDA, *supra* note 61, at 503; AL-HUSAYNI, *supra* note 61, at 20–21 & 21 n.56; ‘ISAM ‘AFIFI HUSAYN ‘ABD AL-BASIR, TAJZI‘AT AL-QA‘IDAH AL-JINA‘IYAH:

ISLAM'S FOURTH AMENDMENT

Thus, while in *Umar I* the caliph takes it upon himself to disregard the unlawfully-obtained evidence (*sua sponte*, one could say), in *Umar II* the wrongdoers make what amounts to an on-the-spot motion to suppress, and Umar grants it. A similar motion is found in the third report, *Umar III*:

Umar was informed that [a certain man] was drinking wine in his home with some friends. Umar went to [that man's] house and entered it, and found him with only one other man. [The homeowner] said to Umar: "Commander of the Faithful, you are not allowed to do this; God forbade spying." Umar responded: "What are you trying to say?" [The homeowner's guest] replied: "True, Commander of the Faithful. This is spying." So Umar left.<sup>63</sup>

That wrongdoers felt so free to challenge the leader of the Muslim community, even in the midst of their wrongdoing, is a matter we will return to later. For now, note that all three of these reports end in Umar's declining to act on wrongdoing that he learned of by violating God's commands.

A different consequence of the same kind of unlawful behavior appears in the final Umar story we will consider at this point, *Umar IV*:

A woman [of a certain name and clan] used to visit [a certain man] in Basra while she was married to [another man]. Upon learning of this, [four named men] lay in wait for her until she entered the house, and then they surprised the two [inside]. The men's testimony about the matter before Umar is well known. Umar did not reject their testimony; but he punished

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DIRASAH MUQARANAH FI AL-QANUN AL-WAD'I WA-AL-FIQH AL-JINA'I AL-ISLAMI [PRINCIPLES OF CRIMINAL LAW IN POSITIVE LAW AND ISLAMIC JURISPRUDENCE] 314 (2003). Awda's and Husayni's versions of this story are roughly the same as Ghazzali's, but there are very different versions. In perhaps the best-known alternative, the wrongdoers whom Umar surprises are committing different wrongdoing and they list only two sins by Umar, leaving out the "proper doors" reference; Umar replies with something to the effect of "My two sins to your two," and leaves. See, e.g., ABU AL-HASAN AL-MAWARDI, THE ORDINANCES OF GOVERNMENT [AL-AHKAM AL-SULTANNIYA WA AL-WILAYAT AL-DINIYA] 273 (Wafaa H. Wahba trans., 1996) (wrongdoers "drinking and lighting fires in their tents").

63. Again, there are various versions. See, e.g., AL-HUMAYYIM, *supra* note 57, at 167; al-Alwani, *supra* note 61, at 14; Awad, *supra* note 61, at 104.

them for the fixed crime of false accusation of adultery because of its insufficiency.<sup>64</sup>

Presumably—the accounts do not specify—Umar deemed the men's testimony insufficient on the ground that the necessary proof for the fixed crime of adultery is four qualified witnesses to the act of actual intercourse.<sup>65</sup> For our purposes, though, this report supports the proposition that “spying” and entering homes without permission in order to uncover wrongdoing are forbidden, or at least we will see it cited for that proposition shortly. Unlike the first three Umar stories, however, in this case the result was not the suppression of evidence but criminal punishment for the accusation that rested on the spying.

Other pertinent stories about Umar will appear, as will additional sayings of Muhammad and Traditions that involve other individuals. For now, suffice it to say that these Quranic verses, prophetic sayings, and stories about Umar appear to be the authorities most pertinent to rules that govern searches—investigating wrongdoers and wrongdoing—in Islam. They are certainly the authorities that are cited most often in that context. And according to these authorities: a person's home is inviolate; wrongdoing that is not “apparent” cannot be acted upon, nor should wrongdoing be sought out; and even suspecting someone of wrongdoing is disfavored.

## 2. Seizures: Arrest and Pretrial Detention

Nothing in the Quran speaks specifically about arresting or otherwise seizing persons accused or suspected of wrongdoing.<sup>66</sup> The Traditions, however, are replete with relevant reports. These reports reflect discomfort with the pre-adjudication seizure of individuals and indicate the need for limits to its length and its very occurrence, even as they

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64. See AL-HUMAYYIM, *supra* note 57, at 214.

65. See El-Awa, *Confession and Other Methods of Evidence*, *supra* note 24, at 121; EL-AWA, PUNISHMENT IN ISLAMIC LAW, *supra* note 22, at 126. Perhaps for this reason, along with the threat of sanction via the fixed crime of false accusation of adultery, both El-Awa and lore are correct that there has been no conviction of adultery on the basis of witness testimony in all of Islamic history, and convictions have instead rested on confessions. El-Awa, *Confession and Other Methods of Evidence*, *supra* note 24, at 122.

66. What appears to be the closest reference comes in an instruction in one verse to detain (*habasa*) witnesses to a bequest if their testimony is doubtful, in order to have them swear to its truth. QURAN, 5:106; see Irene Schneider, *Imprisonment in Pre-Classical and Classical Islamic Law*, 2 ISLAMIC L. & SOC'Y 157, 166 (1995); FRANZ ROSENTHAL, THE MUSLIM CONCEPT OF FREEDOM 35 (1960).

apparently establish the basic authority to arrest and detain. On the authority to seize alleged wrongdoers, the prophet is said in one report to have “detained a person upon accusation” (*habasa rajulan fi tuhmah*),<sup>67</sup> and in another to have detained an accused wrongdoer “for a day and a night.”<sup>68</sup> (Unfortunately, neither report specifies the nature of the alleged wrongdoing, the basis of the accusation, or the nature of the detention.<sup>69</sup>) Muhammad also reportedly “sent people in pursuit” of members of a visiting clan who had apparently killed his camel-herdsman before they went on their way.<sup>70</sup> And reports abound of individuals whom others “brought to” Muhammad, *i.e.*, having arrested them, for him to adjudicate criminal accusations against them (but again, the grounds for these “citizens’ arrests” are rarely specified<sup>71</sup>). And Muhammad’s Companions too were brought criminal suspects, or they ordered arrests themselves. One report, for instance, has a Companion detaining a group of weavers “for a few days” upon an accusation of theft.<sup>72</sup>

The Traditions on restraint and oversight in pre-adjudication seizures are somewhat more detailed. In one report, after some Companions had some members of a certain tribe arrested, the tribe’s leader stood up during a sermon by Muhammad and demanded to know why. The prophet appeared to ignore the question; the tribal leader repeated it, but Muhammad still did not answer; and the tribal leader then asked a third time, after which Muhammad ordered the release of

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67. III SUNAN ABU DA’UD, *supra* note 53, at 1030, no. 3623. This version translates *tuhmah* as “suspicion” rather than “accusation”; so too does Rosenthal and, apparently following him, Schneider. See ROSENTHAL, *supra* note 66, at 37; Schneider, *supra* note 66, at 161 & n.25 (citing ROSENTHAL). Other modern scholars, however, translate the word as I do. See, *e.g.*, Kamali, *supra* note 25, at 80; al-Saleh, *supra* note 58, at 75 & n.103.

68. Kamali, *supra* note 25, at 76 & 80.

69. And the length of the detention in the second report is debated; see *infra* text at notes 204–210.

70. III SUNAN ABU DA’UD, *supra* note 53, at 1216–17, nos. 4351–57. All the report tells us about what preceded the seizure, and thus what might have underlay the suspicion, is that Muhammad had, upon the visitors’ arrival, sent them to the camels to drink their milk for sustenance.

71. Two exceptions appear at III SUNAN ABU DA’UD, *supra* note 53, at 1220, nos. 4366 & 4367. In the first of these reports, townspeople are said to have seized and brought to Muhammad a man whom a woman identified, on the scene and just after the act, as having raped her. (Just before the prophet sentenced this man, we are told, another man stood up and declared that he, not the detainee, was the guilty party.) In the second of these reports, an accused thief is said to have been brought to Muhammad after having admitted his guilt.

72. III SUNAN ABU DA’UD, *supra* note 53, at 1221, no. 4369; see also Kamali, *supra* note 25, at 80.

the detainees.<sup>73</sup> We are not told why the detainees were arrested, but we do have an explanation for the prophet's handling of the matter: the police officer who had conducted the arrest was in attendance at the sermon, and Muhammad ostensibly concluded from the officer's silence that he had no valid reason for the arrest.<sup>74</sup> In another report, Muhammad asks God's forgiveness for having detained one of two men of a certain tribe whom members of another tribe had brought to him and accused of stealing two of their camels—even though the detention had lasted only as long as it had taken the undetained co-accusee to retrieve, at the prophet's order, the very camels he and his detained companion were accused of stealing.<sup>75</sup> Umar, meanwhile, is reported in one case to have urged a governor to speed up the adjudication of travelers who were being held on criminal charges since they were far from their families,<sup>76</sup> and in another case to have chastised a man who accused another of having stolen his leather bag during a journey with others, because the accuser had no witness. ("I wanted to bring the man to you in chains," the accuser in the latter case reportedly told Umar, to which Umar is said to have responded in anger: "You would bring him here in chains, and yet there was no witness? I will not compensate you for your loss, nor will I investigate it."<sup>77</sup>) And the report about the Companion who detained the weavers "for a few days" goes on to say that he released them without having beaten or even questioned them about their alleged theft. When the accusers challenged him for doing this, the Companion reportedly replied:

What did you want? Had I flogged them and your goods turned up [from their confession], that would have been fine. But if not, I would have had to take [as much skin] off of your backs as I took off theirs.<sup>78</sup>

The Traditions, then, provide authority for seizing alleged wrongdoers while also indicating requirements such as a minimum evidentiary basis for pre-adjudication seizures and limits to their length and nature.

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73. III SUNAN ABU DA'UD, *supra* note 53, at 1030–31, no. 3624; *see also* ABUL A'LA MAWDUDI, HUMAN RIGHTS IN ISLAM 26 (Khurshid Ahmad, Ahmed Said Khan & M. M. Ahsan trans., 1980).

74. MAWDUDI, *supra* note 73, at 26.

75. *See* Taha J. al-Alwani, *Rights of the Accused (Part Two)*, 10 ARAB L.Q. 238, at 242.

76. *See* IBRAHIM ABDULLA AL-MARZOUQI, HUMAN RIGHTS IN ISLAMIC LAW 392 (2000).

77. *See* al-Alwani, *supra* note 75, at 242–43.

78. 6 MUKHTASAR SUNAN ABI DAWUD 218 (Dar al-Ma'rifa 1980) (author's translation); *see also* III SUNAN ABU DA'UD, *supra* note 53, at 1221–22, no. 4369.

C. *Classical Jurisprudence*

Modern writers on “Islamic” criminal procedure routinely rely on some combination of the authorities set out above—typically the “enter not” and “spy not” verses, the prophet’s “spy not” restatement, and one or more of the reports about Umar—to support the proposition that Islam strictly circumscribes criminal investigative powers.<sup>79</sup> Searching homes, conducting surveillance of communications, even arresting without a warrant—all are said to be strictly forbidden.<sup>80</sup> Some say those who violate these rules are subject to punishment.<sup>81</sup> Others say Islamic law forbids considering evidence that is obtained by violating these rules.<sup>82</sup> And some go so far as to credit Umar with having established an exclusionary rule for unlawfully-obtained evidence long before it appeared in Anglo-American law.<sup>83</sup>

The Quranic verses and Traditions cited above certainly provide authority for each of these propositions. But my research uncovers very little to support them in classical Islamic jurisprudence (and even less in historical practice, as discussed in Part III). There are indeed rules or doctrines of search and seizure in the jurisprudence, as we will see: some limits on investigating suspected wrongdoers and intervening in wrongdoing are spelled out, as are criteria for detaining accused wrongdoers. One possible consequence of violating some of these rules is also mentioned, namely compensation for an injured party. But nothing I have found bears out modern assertions of the existence of an exclusionary rule, let alone the application of one, other than the reports we have already seen in which Umar applied such a rule in the earliest years of Islam. Indeed, as I discuss below, the single reference I have found in the classical legal literature to the idea of excluding evidence for search or seizure violations *rejects* that idea—even though

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79. See, e.g., Adel Omar Sherif, *Generalities on Criminal Procedure under Islamic Sharia*, in CRIMINAL JUSTICE IN ISLAM, *supra* note 15, at 8; Gamil Muhammed Hussein, *Basic Guarantees in the Islamic Criminal Justice System*, in CRIMINAL JUSTICE IN ISLAM, *supra* note 15, at 48–49; Kamali, *supra* note 25, at 72–74; al-Alwani, *supra* note 61, at 12; SANAD, *supra* note 61, at 76–77 & n.2; MATTHEW LIPPMAN, SEAN MCCONVILLE & MORDECHAI YERUSHALMI, ISLAMIC CRIMINAL LAW AND PROCEDURE 65–66 (1988); al-Saleh, *supra* note 58, at 67–70; Awad, *supra* note 61, at 104–06;

80. See, e.g., SANAD, *supra* note 61, at 76–79.

81. See, e.g., Hussein, *supra* note 79, at 49; Sherif, *supra* note 79, at 8.

82. See, e.g., Hussein, *supra* note 79, at 49; al-Saleh, *supra* note 58, at 69–70; LIPPMAN ET AL., *supra* note 79, at 66.

83. See, e.g., AL-HUMAYYIM, *supra* note 57, at 167–68; AL-HUSAYNI, *supra* note 61, at 21–22. I myself have said as much, I must confess. Sadiq Reza, *Religion and the Public Defender*, 26 FORD. URB. L.J. 1051, 1052 & n.5 (1999).

that same literature regularly discusses excluding evidence that violates other jurisprudential norms, including the prohibition of coercion during interrogations.<sup>84</sup>

Assertions that Islamic law contains robust search and seizure protections therefore do not appear to be well supported in classical Muslim jurisprudence. The remainder of this section demonstrates this through a survey of what leading jurists of the pre-modern period said about searches (C.1) and seizures (C.2). Regarding searches, we begin with some of the earliest statements on the matter (subsection C.1.a.). Next, we look in turn and in depth at the views of two giants of Islamic jurisprudence from the eleventh and twelfth centuries who are the most-cited authorities on search matters in both classical and modern sources: Ghazzali (subsection C.1.b.) and Mawardi (subsection C.1.c.). We then briefly consider the views of other classical jurists and scholars (C.1.d.). Section C.2 turns to classical doctrines on seizure; these come from a number of jurists, foremost among them another giant of Islamic legal thought, Ibn Taymiyya. Then, in section C.3, we consider the specific question of an exclusionary rule for search violations, including the single reference to such a rule that I found in the classical jurisprudential literature.

Four distinct themes emerge from the search jurisprudence. First, there is indeed a unanimous presumption against efforts to uncover crimes and other bad deeds, reflecting the Quranic verses and Traditions we saw above. This presumption is expressed in a rule of “manifestness” that resembles the “plain view” exception to the Fourth Amendment’s warrant requirement. But second, some jurists suggest that this rule (and other rules of criminal procedure) vary according to the particular state actor at issue. Specifically, executive actors—rulers, police officers, and others—are granted greater investigative leeway than judicial officers (*qadis*), in an exemption that largely swallows the initial rule. Third, even as they exempt executive officials, jurists address *non*-state actors too when articulating search rules, in a leap well beyond the boundaries of our Fourth Amendment. All Muslims, in other words, not just government officials, are subject to God’s investigative limits. But fourth, jurists say little or nothing about consequences for violating these rules, whether the violator is a state official or private citizen.

The seizure jurisprudence also differentiates between judicial and executive officials, but unlike the search jurisprudence it does not also

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84. *See infra* Section II.C.3.



address non-state actors. The central theme of this jurisprudence is a tension between “objective” factors and “reputational” ones as criteria for arrest and pretrial detention. Jurists also consider familiar questions such as what alleged crimes merit pre-adjudication detention and how long that detention can be. But again, as with the search jurisprudence, consequences for violating the rules are almost entirely unaddressed.

Before we begin reviewing this jurisprudence, however, one of the most important actors in Islamic search and seizure theory—the *muhtasib*—must be introduced properly, along with the religious command that lies at the heart of his duties. It is in the context of the *muhtasib* and his duties that doctrines governing search and seizure are most often articulated. *Muhtasib* is translated in various ways—market inspector, ombudsman, religious policeman, morals enforcer—and the responsibilities of one who held the office included all of those duties.<sup>85</sup> The last of these duties is what concerns us here: the *muhtasib*'s role in enforcing laws such as the prohibitions of drinking and gambling. The *muhtasib* essentially walked through the markets and streets of Muslim cities to seek out and deter wrongdoing (apparently much as the *agoranomos* did in the cities of classical Greece<sup>86</sup>), and his mandate lay in a basic and broad-reaching religious command: the duty to “command right and forbid wrong.” This duty originates in the Quran, where at least eight separate verses refer to it.<sup>87</sup> The leading verse appears to impose the duty on all members of the Muslim community; later verses imply that only certain people are enjoined to perform it.<sup>88</sup> The question of who precisely bears the duty to command right and forbid wrong—who can or should be a *muhtasib*—overlaps, as we will see, with the question of which search and seizure rules apply to which actors.

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85. Manuals intended as guides for *muhtasibs* demonstrate the wide range of their duties. See, e.g., ABD AL-RAHMAN B. NASR AL-SHAYZARI, *THE BOOK OF THE ISLAMIC MARKET INSPECTOR* (Ronald P. Buckley trans., 1999); M. IZZI DIEN, *THE THEORY AND THE PRACTICE OF MARKET LAW IN MEDIEVAL ISLAM* (1997); LIAQUAT ALI KHAN NIAZI, *THE INSTITUTION OF MUHTASIB (OMBUDESMAN)* (1994).

86. See ABD AL-RAHMAN, *supra* note 85, at 6.

87. See MICHAEL COOK, *COMMANDING RIGHT AND FORBIDDING WRONG IN ISLAMIC THOUGHT* 13 (2000).

88. “Let there arise out of you a band of people inviting all that is good, enjoining what is right and forbidding what is wrong; they are the ones to attain felicity.” QURAN 3:104; see COOK, *supra* note 87, at 13–14.

1. Searches

a. *Early Jurists: the Rule of “Manifestness”*

Muslim scholars and jurists lost no time in considering precisely what the pertinent Quranic verses meant for investigating wrongdoing. Given the “enter not” verse, for instance, an obvious early question for all four of the Sunni schools of law that survive today—Maliki, Hanafi, Shafi‘i, and Hanbali—was whether state officials could enter a home without permission when there was reliable evidence of wrongdoing inside.<sup>89</sup> No, an early Maliki jurist told the sultan, unless the particular home or its inhabitant were known for prior wrongdoing; and the other schools appeared to agree, though with a different caveat: as long the wrongdoing remained concealed within the home.<sup>90</sup> What, then, if wrongdoing occurring inside a home traveled beyond its four walls, such as when a forbidden musical instrument could be heard from the street? Yes, said a leading Hanafi scholar, entry without permission was permitted in this case; no, indicated Ibn Hanbal himself, instructing his followers not to try to locate a house from which music had been heard, since “what is covered [within the house] one [should] not search.”<sup>91</sup> Two exceptions to the Quran’s categorical “enter not” prohibition thus quickly emerged: entering a home without permission was allowed when wrongdoing inside the home traveled outside it, or there was evidence of prior wrongdoing by the inhabitants. And there were more exceptions: “necessity” (*darura*) was one, such as to put out a fire or to repair a broken water pipe shared by others; arrest was another (along with searching incident to it), if a defendant refused to surrender himself to authorities.<sup>92</sup> Meanwhile, jurists also extrapolated, on the basis of the “enter not” verse, a crime of unlawful entry, specifying its elements and debating its proper punishment, and derived a right of self-defense against unlawful intruders.<sup>93</sup>

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89. Ziadeh, *Sunni Schools of Law*, *supra* note 14, at 456–62.

90. See Eli Alshech, “Do Not Enter Houses Other than your Own”: *The Evolution of the Notion of a Private Domestic Sphere in Early Islamic Thought*, 11 ISLAMIC L. & SOC’Y 291, 298–300 (2004). The three schools also appeared to agree that one need not report wrongdoing he encountered while already lawfully within a home. *Id.*

91. Alshech, *supra* note 90, at 298, 300; see also COOK, *supra* note 87, at 100 n.140.

92. See AL-HUMAYYIM, *supra* note 57, at 210–12 (necessity), 215–17 (arrest).

93. See AL-HUMAYYIM, *supra* note 57, at 223–27 (unlawful entry), 227–34 (self-defense). Nor did the rule-derivation end there. What constituted a “home” for purposes of the verse, and what action by the visitor satisfied the requirement of requesting permission, for instance, were addressed. To the first question, an early answer was that “home” (*bayt*) meant any structure with

Similar attention went to the “spy not” verse. What did God mean by forbidding “spying”? The eminent Quranic scholar and jurist al-Tabari (d. 923) answered: seeking out people’s faults in order to discover their secrets.<sup>94</sup> Other jurists extended the definition to include any attempt to learn about things a person seeks to keep private. Listening to others’ conversations, eavesdropping outside homes (and of course peeking into them), uncovering people’s flasks to determine if they contain wine—all of this was deemed prohibited by the “spy not” command in early legal opinions.<sup>95</sup> A more nuanced view appeared a few centuries later, in the Quranic commentary of the equally eminent exegete and jurist al-Qurtubi (d. 1272). Linking the “spy not” command with the warning against “suspicion” that immediately precedes it in the same verse—“Avoid too much suspicion, for suspicion in some cases is a sin”<sup>96</sup>—al-Qurtubi opined that given the juxtaposition of the two commands, “suspicion” means “accusation,” and together the commands address the concern that “one might be tempted to make an accusation and then seek confirmation of one’s suspicion via spying, inquiry, surveillance, eavesdropping and so on.”<sup>97</sup> What the verse forbids, al-Qurtubi went on to say, is not *all* suspicion—and thus, by inference, not all spying—but rather suspicion “for which no proper proof or apparent reason is known.”<sup>98</sup> There are, in other words, “two kinds of suspicion: that which is brought on and then strengthened by proof that can form the basis for a ruling[,] and . . . that which occurs for no apparent reason and which, when weighed against its opposite, will be equal.”<sup>99</sup> The latter type, al-Qurtubi concludes, is what the verse forbids; the implication is thus that “spying”—conducting searches,

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lawful occupancy, as opposed to only private residences; a merchant’s store thus qualified for the protection while a deserted house along a traveler’s road did not. Alshech, *supra* note 90, at 295; AL-HUMAYYIM, *supra* note 57, at 138–50. On the second question, some scholars said “requesting permission” meant coughing, clearing one’s throat or making some other “gentle sound” to indicate one’s presence and wish to enter, while others set out somewhat more exacting requirements. Alshech, *supra* note 90, at 296–97, 306–08. As one classical scholar explained the injunction to request permission and salute: “The first greeting . . . is for the residents to hear the visitor, the second is for the residents to be cautious [in their behavior], and the third [*i.e.*, the residents’ response to the salutation] is for them to either welcome the visitor or send him away.” *Id.* at 306 n.48.

94. AL-HUMAYYIM, *supra* note 57, at 101 n.5.

95. *See id.* at 152–54, 264–70.

96. QURAN 49:12.

97. *See* al-Alwani, *supra* note 61, at 15.

98. *Id.*

99. *Id.*

surveillance, or other actions early jurists deemed prohibited by the verse—might be permissible upon a sufficient showing of pre-existing suspicion.<sup>100</sup>

But a more absolutist view of the verse appears to have prevailed in the earlier centuries of Islam, particularly in the views of jurists whose work is cited today as most authoritative on the matter. Under this reading, what the “spy not” command came to mean for purposes of law-enforcement was a presumption of unlawfulness in *any* act undertaken to detect wrongdoing that was not apparent—in other words, any truly investigative act. “Do not investigate what is not out in the open (*ma ghaba*),” said Ibn Hanbal, and in responses to questions posed to him he applied this rule to forbid any effort to confirm suspicions of wrongdoing in at least these four instances: when one sees (1) a jar one thinks might contain liquor, (2) a covered (*mughatta*) object one suspects to be a forbidden musical instrument, (3) a chess-board (also forbidden) that players cover or hide, or (4) a man’s co-habiting with his ex-wife.<sup>101</sup> Ibn Hanbal also articulated a corollary to this: one could, indeed should, act on wrongdoing that was “apparent”—*i.e.*, in plain view; thus, one who encounters a musical instrument “in the open” (*makshuf*) should destroy it.<sup>102</sup> And he himself allowed an exception to the rule, given sufficient indicia of wrongdoing: when one sees something concealed, such as a covered musical instrument or liquor container, but it is “clear” (*tabayyanahu*) what lies within, said Ibn Hanbal, he should destroy it.<sup>103</sup>

All three of these principles that early jurists derived from the “enter not” and “spy not” verses—that one is forbidden to seek out wrongdoing or act on it unless it is apparent, or “manifest”; that one *should* act on wrongdoing that is apparent; and that there are exceptions to the rule of manifestness, allowing acting on concealed wrongdoing when there are sufficient indicia of guilt—become embedded principles of investigating wrongdoing and wrongdoers in Islamic jurisprudence. And the two classical jurists who are cited most for these principles are Ghazzali and Mawardi.

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100. *Id.*

101. See COOK, *supra* note 87, at 100 & n.141, 481 n.93.

102. *Id.* at 100.

103. *Id.* at 100; see ABU BAKR AL-KHALLAL, *AL-AMR BI AL-MA'RUF WA AL-NAHY 'AN AL-MUNKAR* 139 (A.A. Ata ed., 1975).

b. *Ghazzali: Manifestness and the Muhtasib*

Seen by many as the greatest religious authority in Islam after the prophet Muhammad, Abu Hamid Muhammad al-Ghazzali (d. 1111) wrote not only on jurisprudence but also theology, logic, ethics and more.<sup>104</sup> Ghazzali's much-cited search rules appear in his most significant work, *Revival of the Religious Sciences*, a multi-volume treatise in which he bridges law and ethics in setting out rules on a wide array of activities to guide Muslims in their daily lives.<sup>105</sup> Four aspects of the guidance Ghazzali presents in this work merit our attention: (1) the rule of manifestness and its exceptions; (2) a list of permissible means of intervening in wrongdoing; (3) who is addressed by these rules; and (4) the consequences of violating them.

Ghazzali's articulation of the rule of manifestness and its exceptions appears in a chapter entitled "Commanding Right and Forbidding Wrong," in which he gives a detailed job description for the person who carries out that divinely-ordered duty: the *muhtasib*.<sup>106</sup> Ghazzali introduces the rule of manifestness in a list of four conditions he says must exist for wrongdoing to fall within the *muhtasib's* jurisdiction. One of these conditions is that the conduct must in fact constitute a wrong.<sup>107</sup> Another is that the wrongfulness of the conduct, legally speaking, must be obvious to the *muhtasib*—*i.e.*, the *muhtasib* must know the conduct to be wrong without having to engage in legal reasoning (*ijtihad*). A third is that the *muhtasib* can act only while the unlawful conduct is under-

104. See, e.g., W. MONTGOMERY WATT, *THE FAITH AND PRACTICE OF AL-GHAZALI* 14–15 (1982); MUHAMMAD ABUL QUASEM, *THE JEWELS OF THE QUR'AN: AL-GHAZALI'S THEORY* 10–11 (1977).

105. AL-GHAZZALI, *supra* note 61; see Roy Mottahedeh & Kristen Stilt, *Public and Private as Viewed Through the Work of the Muhtasib*, 70 SOC. RES. 735, 736 (2003).

106. Unfortunately, a reliable English translation of the Arabic version of this chapter does not appear to be available. A 1982 English version of this chapter and the nine other chapters of the second quarter ("Book II") of the work appears to be more paraphrase than translation. See IMAM GAZZALI'S *IHYA ULUM-ID-DIN* (Fazul-ul-Karim trans., Kitab Bhavan 1982). A 1983 reprint of that version adds the first quarter ("Book I") of the work. *IHYA ULUM-ID-DIN* (Fazal [sic]-ul-Karim trans., Islamic Book Foundation 1983). A 1972 English version of the entire work by a different author omits many chapters, including the "Commanding Right" chapter. Fortunately, Michael Cook gives an excellent and very readable summary of the chapter. See COOK, *supra* note 87, at 427–46; Buckley also provides a "translated abridgement" of the chapter as Appendix I. SHAYZARI, *supra* note 85. Ghazzali himself later wrote a shorter version of *Ihya* in Persian, under the title *Kimīya-yi Sa'adat* (*The Alchemy of Happiness*), and several English translations of that work exist; one recent and readily-available version of the "Commanding Right" chapter is AL-GHAZZALI ON ENJOINING GOOD AND FORBIDDING WRONG (Muhammad Nur Abdus Salam trans., Great Books of the Islamic World 2002). Cook also cites the Persian work in his discussion.

107. Cook lists and discusses these conditions. COOK, *supra* note 87, at 435–37; see also AL-GHAZZALI, *supra* note 61, at 437–38.

way—*i.e.*, neither before it nor after it. And the fourth, the crucial one for our purposes, is that the wrongdoing must be “apparent to the *muhtasib* without spying”—in other words, it must be manifest.

Parallels from the world of our Fourth Amendment immediately suggest themselves, most notably our “plain view” doctrine for seizures of evidence or contraband, and to a lesser extent the rule in many states that a police officer can arrest an individual for a misdemeanor without a warrant only if the crime is committed in the officer’s presence.<sup>108</sup> And Ghazzali’s elaborations and illustrations bring us even closer to the Fourth Amendment. If, Ghazzali says, the *muhtasib* encounters on the street a man he (merely) suspects of carrying a forbidden item in his garments, the *muhtasib* may not search the man.<sup>109</sup> (Nor may he stop him, it would seem, though Ghazzali does not expressly say so.) This rule also applies to homes: if the *muhtasib* suspects that wrongdoing is taking place inside a home, he may not enter to investigate it. (On this point some of Ghazzali’s exact language might strike scholars of American criminal procedure as familiar: “One who conceals his sin in his home and closes his door cannot be spied upon.”<sup>110</sup>) Ghazzali thus embraces the rule of manifestness as the presumptive limit to investigating wrongdoers. And the main authority for this rule Ghazzali cites is *Umar II*, in which Umar was rebuked by the wrongdoers he had come upon by violating the three key Quranic commands: “enter not without permission,” “spy not,” and “enter homes through their proper doors.”<sup>111</sup>

Ghazzali elaborates on the rule when he discusses various means by which a *muhtasib* should (or should not) perform his duty of commanding/forbidding.<sup>112</sup> Ghazzali presents eight such means, in increasing order of severity, beginning with “seeking information” (*ta’arruf*) about ongoing wrongs and ending with “obtaining armed help.” Quite sim-

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108. See, e.g., *Horton v. California*, 496 U.S. 128 (1990) (items found during search of home pursuant to warrant to search for other items are lawfully seized provided their incriminating nature is “readily apparent” and search did not exceed authorized scope); LAFAYE, *supra* note 48, § 5.1(b). The latter rule is not required by the Fourth Amendment, and in any event it does not apply to felony arrests, which states typically permit upon probable cause whenever an officer has that degree of suspicion. See *id.*

109. COOK, *supra* note 87, at 437; see also AL-GHAZZALI, *supra* note 61, at 443.

110. AL-GHAZZALI, *supra* note 61, at 437; see *Katz v. United States*, 389 U.S. 347, 352 (1967) (“One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.”)

111. AL-GHAZZALI, *supra* note 61, at 437–38; see also *supra* text at note 61.

112. Cook lists and discusses these points too. COOK, *supra* note 87, at 438–41.

ply, the first of these means—"seeking information"—is forbidden. As Ghazzali explains: one may not eavesdrop (on a home) for the sound of music; nor may one sniff to detect the aroma of wine; nor feel someone's clothes in search of the shape of a lute; nor even ask the neighbors about a person's possible wrongdoing.<sup>113</sup>

But when the *muhtasib*'s suspicion rests on facts and inferences of a certain quantum and quality, searching is permitted. (And again, seizure too, implicitly.) The *muhtasib* may, for instance, search the suspected wrongdoer he encounters on the street if there is a "particular sign" (*'alamah khassah*) of his wrongdoing.<sup>114</sup> This standard sounds suspiciously like the "reasonable suspicion" standard for *Terry* stops—brief investigative seizures that receive considerable attention in Fourth Amendment jurisprudence<sup>115</sup>—and all the more so in light of the illustrations Ghazzali provides for it.<sup>116</sup> The odor of wine from a person, for instance, allows the *muhtasib* to accost him; detecting that wrongdoing by smelling it is as good as seeing it. Similarly, the *muhtasib* may intervene if he "knows" (*ya'raf*) from the shape of a concealed item, perhaps because the suspect's garment is thin, that it is a forbidden musical instrument. (In which case, as with the open display of such instruments, the *muhtasib* not only can but should seize them and smash them.) This exception—which sounds like a more demanding standard than our probable cause standard for arrests and search warrants—allows the *muhtasib* even to enter private homes to perform his duty to forbid wrong. When wrongdoing that is taking place inside a home becomes apparent from outside it—such as through the smell of wine, or the sounds of drunkards or forbidden musical instruments—the *muhtasib* can, indeed should, enter. So too when two witnesses report, without having been asked about it, such wrongdoing inside a home.<sup>117</sup>

Thus, Ghazzali adopts the rule of manifestness for intervening in wrongdoing, along with an exception or qualification when there are sufficient indicia of guilt. He also establishes, when discussing the eight possible means of commanding/forbidding, rules for *how* the *muhtasib*'s intervention is to take place—in other words, parameters of

113. AL-GHAZZALI, *supra* note 61, at 443.

114. AL-GHAZZALI, *supra* note 61, at 438.

115. *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* itself does not use the term "reasonable suspicion," but in later cases the Court adopted the term as the standard for such investigative seizures. See DRESSLER, *supra* note 48, at 285 n.29.

116. COOK, *supra* note 87, at 438; AL-GHAZZALI, *supra* note 61, at 438.

117. AL-GHAZZALI, *supra* note 61, at 438, 443.

manner and scope.<sup>118</sup> We have already seen that the first possible means, seeking information about wrongdoing, is forbidden. The remaining means, assuming the *muhtasib* has lawfully come upon the wrongdoing are the following, in increasing order of severity: informing a wrongdoer of his wrongdoing; advising and exhorting him to cease it;<sup>119</sup> rebuking him harshly if he still refuses to desist;<sup>120</sup> physical force, such as breaking musical instruments, pouring out wine, or ejecting from a mosque someone who is not in the proper state of purity; threatening violence;<sup>121</sup> employing violence, but without weapons; and finally, soliciting armed assistance, should the *muhtasib* find himself unable to forbid the wrong on his own through any of the foregoing methods. With respect to all of these means, Ghazzali stresses that the governing principles are necessity and restraint.<sup>122</sup> Informing a wrongdoer of his wrong should be done politely, without implying he is ignorant or stupid. Exhortation should be pleasant, sympathetic, and mindful of the danger of appearing superior to the exhorte— a danger that might be a greater wrong than the one the *muhtasib* is intervening to forbid, Ghazzali adds. Harsh language is warranted only when good manners fail and the offender is stubborn and scornful. Physical force should not be used if the *muhtasib* can persuade the offender himself to take the necessary action—for instance, to destroy the musical instrument—and even when employed it should be the minimum necessary: musical instruments should be broken, if that would suffice to make them unusable, rather than ripped to pieces; wine vessels should not be broken if the wine can be poured out simply and safely enough; and a man to be ejected should be grabbed by his arm rather than by his leg or his beard. Violence should be threatened before used, and the threat cannot be of something impermissible, such as kidnapping the offender’s wife. And even when the situation requires the *muhtasib* to act on a threat of death—for instance, if someone on the other side of a river has seized a woman, or is playing a flute (!), and the *muhtasib* has no choice but to lift his bow and threaten to shoot—if the offender does not desist, the *muhtasib* must still not aim to kill.

The manner of intervention by the *muhtasib* is thus subject to limitations of necessity and restraint—or proportionality, we might say.

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118. *Id.* at 443–48; see also COOK, *supra* note 87, at 438–41.

119. By, for instance, citing pertinent reports from the Traditions. See COOK, *supra* note 87, at 439.

120. “You libertine! You fool! Don’t you fear God?!” *Id.* at 439–40.

121. “Stop that, or I’ll break your head!” *Id.* at 440.

122. *Id.* at 439–41.



True, Ghazzali's discussion on this point refers to stopping wrongdoing rather than merely investigating it; his rule of proportionality presupposes the lawful discovery of wrongdoing. But these are also limits on the manner of intervening when wrongdoing is suspected or discovered, as Ghazzali's illustrations amply show. Our Fourth Amendment certainly governs such interventions by law enforcement, and with not terribly dissimilar rules.<sup>123</sup>

To whom, however, are Ghazzali's rules of manifestness and proportionality addressed? It is clear the rules govern the *muhtasib*; but who is the *muhtasib* in Ghazzali's view—who is the person charged with the duty of commanding/forbidding and thus bound by Ghazzali's rules? Nowhere does Ghazzali say that that person is the government agent officially appointed to police markets and morals.<sup>124</sup> In fact, he discusses and rejects the view that a *muhtasib* must be appointed by the ruler.<sup>125</sup> He also rejects the view that the ruler's permission might be necessary for certain actions by a *muhtasib*—specifically, the last three of the eight possible means of forbidding wrong: threatening violence, using it, or obtaining armed assistance.<sup>126</sup> Indeed, Ghazzali notes that one of a *muhtasib*'s duties is to perform his duties *with respect to* the ruler, commanding him to right and forbidding wrongdoing by him.<sup>127</sup> (That, of course, is a message straight from the three Umar stories.) In fact, one reason Ghazzali gives for rejecting the requirement of official permission for the job is the very persistence of early Muslims in performing the duty of commanding/forbidding with respect to rulers,<sup>128</sup> and the final section of his chapter on commanding/forbidding is expressly devoted to the subject of performing the duty in that context. Clearly, Ghazzali's *muhtasib*, and thus the person bound by his

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123. *Terry*, 392 U.S. at 20 (search or seizure must be “reasonably related in scope to the circumstances which justified the interference in the first place”); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (police officer's use of deadly force to prevent escape of felony suspect is unconstitutional absent probable cause that suspect poses threat of serious physical harm to officer or others); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (constitutionality of force used to effect particular seizure depends on balancing nature of intrusion against countervailing governmental interests, considering specific facts and circumstances such as severity of crime at issue, whether suspect poses immediate threat to safety of police officer or others, and whether suspect is actively resisting arrest or attempting to evade arrest by flight).

124. See also COOK, *supra* note 87, at 447–48.

125. *Id.* at 430–31.

126. *Id.* at 440–41.

127. Acknowledging that the ruler might kill someone who dares such impudence, Ghazzali urges courage and promises martyrdom in reward. *Id.* at 446.

128. *Id.* at 431.

search rules, need not be a state actor. Rather, individual subjects—all Muslims—can be *muhtasibs* in Ghazzali’s view, provided they meet the criteria with which he opens the chapter.<sup>129</sup> Ghazzali’s rules therefore bind any and every Muslim who undertakes the duty to command right and forbid wrong. And this, in turn, means every qualified Muslim: relying on pertinent Quranic verses and reports from the Traditions, Ghazzali opines at the outset of the chapter that God has imposed the duty on *all* Muslims.<sup>130</sup>

And there is stronger evidence that Ghazzali’s pertinent rules bind every Muslim. In another chapter of *Revival of the Religious Sciences*, entitled “Love and Brotherhood,” Ghazzali sets out what amounts to a Muslim code of interpersonal conduct.<sup>131</sup> This code appears in various lists of do’s and don’t’s for good Muslims; among the lists are eight “rights” or “duties” (*huquq*) each Muslim owes his close companions, and twenty-six duties a Muslim owes his relatives, neighbors, and slaves.<sup>132</sup> One of these duties is to forgive a fellow Muslim’s “mistakes and failings.”<sup>133</sup> A second is to keep silent about them—and one way to fulfill this duty is to shun “suspicion.”<sup>134</sup> A third is affirmatively to hide the faults of fellow Muslims from others. Indeed: “Conceal the faults [or sins; *awrat*] of all [your fellow] Muslims,” Ghazzali exhorts, and as incentive to heed this rule he appends a string of well-known sayings of Muhammad and others that either urge forgiving wrongdoers or promise the abiding reader salvation for this good deed.<sup>135</sup> Actual crimes are unquestionably among those faults one should conceal: Ghazzali supports the exhortation by citing a well-known Tradition in

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129. See *id.* at 429–32 (legal competence, Muslim faith, moral probity, and ability).

130. *Id.* at 428.

131. There is a good English version of part of this chapter, in identical editions by two different publishers. AL-GHAZZALI, ON THE DUTIES OF BROTHERHOOD (Muhtar Holland trans., Overlook 1976); AL-GHAZZALI, ON THE DUTIES OF BROTHERHOOD (Muhtar Holland trans., Latimer 1975).

132. The reliable English version of this chapter does not reach the latter list. The English “paraphrase” version does, but puts it in what that version numbers as the next chapter of the work. The Arabic edition I have used includes all the material discussed in this paragraph in a single chapter.

133. AL-GHAZZALI, ON THE DUTIES OF BROTHERHOOD, *supra* note 131, at 60; see also *id.* at 67 (“[Y]ou should seek seventy excuses for your brother’s misdeed, and if your heart will accept none of them you should turn the blame upon yourself.”).

134. “[T]he tongue should not mention a brother’s faults in his absence or presence,” and one way to fulfill this duty is to “giv[e] up suspicions,” because “suspicions constitute slander in the heart.” *Id.* at 35, 38.

135. AL-GHAZZALI, *supra* note 61, at 270. For instance, Muhammad reportedly said: “He who conceals a Muslim[’s faults] will have his faults concealed by God, in this world and the next.” *Id.*

which an adulterer, ordered by others to go to Muhammad and confess, did so; the prophet punished the man but advised the others, "It would have been better for you had you concealed him with your garment."<sup>136</sup> But the ultimate authority Ghazzali cites for the command to conceal others' wrongdoing is already familiar to us: he concludes this discussion by citing nothing other than *Umar I*, *Umar II*, and the Quranic verses contained therein—the "enter not," "spy not," and "proper doors" verses.<sup>137</sup>

So there is no doubt Ghazzali believes the rules he derives from the pertinent texts bind every Muslim, state actor and private citizen alike. This takes us to addressing the fourth and final aspect of Ghazzali's treatment that merits attention: the consequences of violating these rules. On this Ghazzali says little directly; he mentions that the *muhtasib* who unnecessarily breaks a wine vessel is liable for compensation, but otherwise suggests no routine consequence, including the exclusion of evidence<sup>138</sup>—even though, as we have just seen, he cites the Umar stories as authority for his rules. But the consequences Ghazzali envisions are apparent in his exhortations to brotherhood. "Concealing faults, feigning ignorance of them and overlooking them—this is the mark of religious people," says Ghazzali,<sup>139</sup> and the theme of incurring God's favor by following the rules Ghazzali enumerates runs throughout *Revival of the Religious Sciences*. Complying with the investigative limits Ghazzali identifies is an act of piety; it incurs God's blessings. And if this is the case, then the inverse must necessarily be true: violating them incurs God's disfavor. The penalty Ghazzali envisions for violating God's search rules is not the exclusion of evidence at a subsequent criminal trial. Nor is the primary deterrent to violating them the possibility of compensation for unnecessary injury to property, or retribution for injury to person, although these remedies might lie. It is, instead, disfavor with God, in this world and the next. Every Muslim who undertakes the duty of commanding/forbidding, which means every Muslim to Ghazzali, is thus bound by the rules and subject to their divine sanction.

Ghazzali does suggest that the powers of a self-appointed *muhtasib*—the everyday Muslim—and one who has the ruler's blessing are not

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136. III SUNAN ABU DA'UD, *supra* note 53, at 1219, no. 4364; *see also* AL-GHAZZALI, *supra* note 61, at 270–71 (relating other reports in which the prophet or a Companion discouraged people from bringing wrongdoing to their attention).

137. AL-GHAZZALI, *supra* note 61, at 271–72.

138. *See* COOK, *supra* note 87, at 440; Mottahedeh & Stilt, *supra* note 105, at 736.

139. AL-GHAZZALI, ON THE DUTIES OF BROTHERHOOD, *supra* note 131, at 39.

identical. For instance, he seems to endorse a view that only the ruler can take action to prevent *future* offenses.<sup>140</sup> Ghazzali does not expand on this notion of different rules for the self-appointed versus the ruler-appointed *muhtasib*, but articulating different rules for different actors is central to the approach of the next giant of Islamic jurisprudence whose search rules we will consider, Mawardi. And Mawardi's doctrinal distinctions perhaps best reflect the actual practice of search and seizure in Muslim history over the centuries, as we will see in Part III.

c. *Mawardi: Rules for the Muhtasib, the Ruler and Police, the Magistrate of Grievances, and the Judge*

No discussion of “Islamic” governance—the rules for rulers and other officials in a Muslim state—is complete without reference to the work of Abu al-Hasan al-Mawardi (d. 1058), particularly his *Ordinances of Government*.<sup>141</sup> If Ghazzali is Islam's greatest ethicist and theologian since the prophet Muhammad, Mawardi is its foremost political theorist. In *Ordinances*, his magnum opus, Mawardi presents his theory of legitimate Muslim leadership and daily governance.<sup>142</sup> Throughout the work are pronouncements relating to search and seizure; these pronouncements are cited about as often as Ghazzali's, and like Ghazzali's they are still considered authoritative today.

Mawardi's pertinent rules appear in several sections of *Ordinances* in which he spells out the law-enforcement powers of one or another state official. The relevant officials for our purposes are the following four: the *muhtasib*, the *qadi*, the magistrate of grievances (*mazalim*), and the ruler (and his agents—governor, police, etc.). As we will see in a moment, Mawardi places the powers of each of these four officials, and limitations on those powers, at different points on a spectrum, authorizing or prohibiting certain actions differently for each actor. Among the actions he discusses are investigating wrongdoing and confronting wrongdoers—*i.e.*, powers of search and seizure.

Let us begin with Mawardi where we left off with Ghazzali: with the *muhtasib*, whom Mawardi addresses in the final chapter of *Ordinances* (fittingly titled “On the Market Supervisor's Office”). Unlike Ghazzali, Mawardi addresses the *muhtasib* as state actor, even though he allows that any Muslim can command right and forbid wrong: he opens his

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140. See COOK, *supra* note 87, at 440.

141. AL-MAWARDI, *supra* note 62.

142. See Wafaa H. Wahba, *Introduction*, in AL-MAWARDI, *supra* note 62, at xiii, xiii–xiv.

discussion of the *muhtasib*'s powers by noting that commanding/forbidding is "expected of all Muslims," but then lists nine differences between the official *muhtasib* and the "volunteer" *muhtasib*,<sup>143</sup> and the chapter goes on to focus on the duties and powers of the official one. But like Ghazzali, Mawardi presents "manifestness" as the presumptive threshold requirement for action by a *muhtasib*.<sup>144</sup> In the very first words of the chapter Mawardi explains that the basic duty of the office is "to promote good if *obviously* forsaken, and [to] prohibit evil if *manifestly* done," and he goes on to say that the *muhtasib* must "investigate *manifest* immoral actions" and "penalize . . . *evident* violation[s]."<sup>145</sup> Later in the chapter Mawardi elaborates: the *muhtasib* "is neither entitled to spy on prohibited acts that are not openly committed, nor to make them public."<sup>146</sup> And in support of this proposition he cites a saying of Muhammad from the Traditions: "Let whoever attempts any of this rubbish [*i.e.*, prohibited acts] hide himself from view as God admonished, for those who reveal themselves to us will have God's penalties enforced against them."<sup>147</sup> Like Ghazzali's *muhtasib*, then, Mawardi's *muhtasib* should intervene only in ongoing wrongdoing that is apparent without investigation; like Ghazzali's good Muslim, he is not to bring to public attention wrongdoing that does not already enjoy that attention.

Of course there is an exception: investigating hidden offenses is called for, says Mawardi, when there is reliable information that one or another of the most serious of crimes—a "grave violation that could not

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143. *Id.* at 260. The differences are mostly in the degree of obligation to perform the duty and do not concern us here. For instance, differences number four and five are that the official *muhtasib* "has to" respond to a complainant while a volunteer need not, and "has to" investigate immoral actions and look for good that has been abandoned in order to reestablish it, while volunteers "neither have to investigate nor look." *Id.* But there are some differences in powers too. The official *muhtasib* can obtain help from others to command/forbid, can penalize offenders, and can exercise independent judgment in "matters of convention" such as the placement of pavilions in the marketplace, Mawardi says, while volunteers can do none of these things. *Id.* But Mawardi's *muhtasib*, like Ghazzali's, still cannot exercise such judgment in matters of law. *Id.*

144. Note, though, that Mawardi's *Ordinances of Government* predates Ghazzali's *Revival of the Religious Sciences* by about a century.

145. AL-MAWARDI, *supra* note 62, at 260 (emphasis added).

146. *Id.* at 273.

147. *Id.* Note that this saying appears to be more of a warning to *wrongdoers* (to keep their wrongdoing hidden) than a constraint on *muhtasibs* or other investigators; nevertheless Mawardi chooses it—rather than, say, the unequivocal "spy not" verse—as his support. Perhaps that is because he proceeds immediately to the rule's extra-Quranic exception.

otherwise be redressed”—is occurring under cover.<sup>148</sup> Mawardi gives two examples of such crimes: when a man meets alone with a woman to commit adultery, or alone with another man in order to kill him.<sup>149</sup> And the “indicative evidence” of such a heinous crime that would suffice to allow investigation is a report from “a trusted informer.”<sup>150</sup> In such a case, the *muhtasib* “is entitled . . . to spy and to explore and search[,] lest the violation of inviolables or the committing of sins goes unchecked.”<sup>151</sup> The *muhtasib* may even enter a home without permission in such a case, it would appear, particularly if the spying confirms the offense; although Mawardi does not expressly say this, he implies it in the story he recounts to illustrate the exception: *Umar IV*, the report in which the four men spied on the married woman who visited the man in Basra and surprised them inside the man’s home.<sup>152</sup>

But such investigation is not permitted for lesser offenses—and here Mawardi parts company with Ghazzali, and other jurists for that matter, who permit intrusions for any type of offense provided there is reliable evidence of it. If, Mawardi says, the *muhtasib* receives information about wrongdoing that “lies outside this limit and falls below this level,” the conduct “should not be spied into or exposed.” In support of this limitation Mawardi cites *Umar II*, in which the man Umar caught drinking pointed out to Umar that to discover his wrongdoing Umar had sinned more than he.<sup>153</sup> On the basis of that story, Mawardi concludes, “Should someone . . . hear unacceptably noisy voices coming from a house whose dwellers engage in shouting, he should remonstrate from outside without forcibly entering it, for the impropriety is manifest and he does not have to uncover anything else within.”<sup>154</sup> Mawardi’s *muhtasib*, then, operates within the limitations of plain view, with an exception only when the suspected crime is serious.

For the *muhtasib*, then, Mawardi’s search rules resemble Ghazzali’s; indeed Mawardi’s rules are stricter, since he permits the plain-view rule

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148. *Id.* At first Mawardi suggests a different exception: when it is “likely[,] on account of indicative evidence and obvious traces[,] that some persons are using cover for suspicious action.” *Id.* But this exception makes little sense, given the repeated theme of jurists, including Mawardi himself, that one *should* hide his wrongdoing, and that wrongdoing that is hidden is not as harmful as wrongdoing that is in the open. Indeed, that is the very import of the prophetic saying Mawardi cites just before, in support of the rule of manifestness.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*; see *supra* text accompanying note 64.

153. AL-MAWARDI, *supra* note 62, at 273.

154. *Id.* at 273–74.

ISLAM'S FOURTH AMENDMENT

to be trumped only by evidence of the most serious crimes, while Ghazzali allows that for any crime. But Mawardi goes on to address actors Ghazzali does not specifically address—namely the *qadi*, the magistrate of grievances (*mazalim*), and the ruler (or governor) and his police officials. Put simply, in Mawardi's view executive officials—magistrates, rulers and governors, police officers—are not constrained by the investigative limitations that bind the *muhtasib*, while the *qadi* is bound by greater ones. This spectrum of constraints emerges in Mawardi's descriptions of the duties of each office, and in a separate series of comparisons he makes of their respective powers—*qadi* vs. magistrate, *qadi* vs. ruler/police, *qadi* vs. *muhtasib*, and *muhtasib* vs. magistrate. As we will see, this spectrum of powers and constraints can be depicted as in this diagram:

→ DECREASING CONSTRAINTS (INCREASING POWERS) →		
<i>qadi</i> →	<i>muhtasib</i> →	magistrate of grievances
		ruler/governor/police

Constraints on powers of search (and seizure) are among those that fall along this spectrum.

Regarding the *qadi*: in a list of ten “areas of judgment” that fall within the *qadi*'s jurisdiction, Mawardi says nothing about powers of search or seizure.<sup>155</sup> But later, contrasting the *qadi*'s powers with those of the magistrate of grievances (also in a list of ten), Mawardi says the magistrate's law-enforcement powers exceed those of the *qadi* in several respects. Among these are that the magistrate of grievances can try to “find out the truth” between quarreling parties by means that include “greater reliance on intimidation” (and on circumstantial and hearsay evidence); he can “order the antagonists to be placed under surveillance” if they “display signs of mutual lies”; and he can “allow [requiring] bail where appropriate.”<sup>156</sup> In other words, the magistrate of grievances can authorize “spying” and has the power to order pre-adjudication detention, or at least to condition release on payment of a surety; the *qadi*, explicitly in this comparison and by omission in the earlier discussion of his duties, can do neither. Why can the magistrate do these things that the *qadi* cannot? The magistrate of grievances has

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155. *Id.* at 79–80. In the closest reference, he says the *qadi* should “look into” certain disputes over real property even if there is no specific complainant. *Id.* at 80.

156. *Id.* at 94.

“wider freedom of action,” Mawardi lists as difference number two, because his assigned task of redressing wrongs “extends beyond the realm of necessity into that of discretion.”<sup>157</sup>

What Mawardi means by this distinction between “necessity” and “discretion”—and how much the distinction portends for rules of search and seizure—becomes clear in his subsequent comparison of the powers of *qadis* with those of governors and police officers. In a chapter called “On Crimes and Punishments,” Mawardi lists nine differences between the criminal investigative and adjudicative powers of *qadis*, on the one hand, and those of executive officials on the other. In short, governors and police officials can “use means of investigation and exoneration . . . that *qadis* and [other] judges do not have”; among these means are “consider[ing] the accusation (*tuhmah*) as evidence of guilt and “jail[ing] the accused for investigation or exoneration.”<sup>158</sup> The governor can also consider hearsay evidence, circumstantial evi-

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157. *Id.*

158. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM, *supra* note 32, at 233. I have already explained my translation of *tuhmah* as “accusation.” See *supra* note 67. Other than that change, in quotations and citations in this paragraph, I use Frank Vogel’s more recent translation of this passage, rather than the 1996 translation by Wafaa Wahba that I have been quoting and citing thus far, because of what appear to be two material errors in Wahba’s version. (VOGEL, ISLAMIC LAW AND LEGAL SYSTEM, *supra* note 32, at 233–35.) First, in the text this footnote appends, in which Mawardi lays out the constraints on the judge before listing the allowances given the political leader, Wahba twice translates the Arabic word Mawardi uses occasionally for judge, *hakim*, as “ruler.” See AL-MAWARDI, *supra* note 62, at 238. Vogel translates it as “judge,” which is not only linguistically correct but also clearly more consistent with the intent of this passage—*viz.*, to distinguish the powers of judges *as against* those of rulers. See VOGEL, ISLAMIC LAW AND LEGAL SYSTEM, *supra* note 32, at 232. Indeed, Wahba’s second use of “ruler” instead of “judge” for *hakim* makes for a sentence that illogically reads, “[the commander or police official] may employ with the accused methods of investigation and establishment of innocence that *judges and rulers* are not entitled to use”—as opposed to Vogel’s “*qadis and [other] judges*,” which is clearly what Mawardi means. See AL-MAWARDI, *supra* note 62, at 238; *cf.* VOGEL, ISLAMIC LAW AND LEGAL SYSTEM, *supra* note 32, at 233. See also AL-AHKAM AS-SULTANIYAH 309 (Asadullah Yate trans., Ta-Ha Publishers 1996) (translating *hakim* as Vogel does in both instances). Wahba’s accurate translation of the concluding sentences of the passage also indicates the error of these earlier portions. See AL-MAWARDI, *supra* note 62, at 240 (explaining that the differences in the powers of “governors” as opposed to “judges” rest in their different mandates—“matters of policy” versus “legal decisions,” respectively). The second error appears to be a result of something Vogel discovered in his research: apparently-erroneous insertions of the word “not” in certain Arabic editions of *Ordinances* during this same listing of the allowances given the ruler but not the judge. See VOGEL, ISLAMIC LAW AND LEGAL SYSTEM, *supra* note 32, at 234 n.37. Wahba’s translation includes the apparently erroneous “not” in one of the instances Vogel found, but not in the second. See AL-MAWARDI, *supra* note 62, at 238 (“First, a governor may *not* [sic] listen to charges proffered by his lieutenants . . .”) (emphasis added); *cf. id.* at 240 (“Eighth, a governor may [] hear testimonies . . .”); VOGEL, ISLAMIC LAW AND LEGAL SYSTEM, *supra* note 32, at 234, 235. Vogel’s corrections are, again, clearly more consistent with the spirit of the passage. See also



dence, and character evidence against the accused, unlike the *qadi*; and if the information “aggravate[s] and strengthen[s]” the ruler’s suspicions, he may proceed to other “means of investigation,” among which is beating the accused to extract a confession.<sup>159</sup> And these distinctions and others between the powers of ruler and *qadi* in criminal law enforcement are, in the end, “because of the specialization of the governor in policy (*siyasa*), and of the judge in the legal rules (*ah-kam*).”<sup>160</sup>

So the ruler and his agents specialize in “policy” while the *qadi* sticks to “legal rules”; the magistrate of grievances enjoys “discretion” while the judge is limited to “necessity.” And that Mawardi means the *qadi* is bound by *religious* legal rules, while the ruler and the magistrate of grievances are not, is clear. In a chapter entitled “On the Appointment of Judges,” Mawardi sets out qualifications a person must meet in order to be a *qadi*. Among these are that the *qadi* “be knowledgeable in religious precepts,” which knowledge requires “a firm command of [the] sources [of Islamic law] and extensive familiarity with its branches.”<sup>161</sup> Mawardi follows this command with a description of the four traditional sources of Islamic law, and says the *qadi* who is proficient in them is “a religious authority.”<sup>162</sup> Indeed, the very purpose of a *qadi* is to “apply[] religious law.”<sup>163</sup> No similar requirement or description appears in Mawardi’s lists of criteria for the governor, nor for any of the other political offices he discusses.<sup>164</sup> The *qadi*, in other words, is bound by procedural rules of formal jurisprudence, including its rules of investigation and detention; political actors are unencumbered by these rules. And if “spying,” not to mention threatening and beating the accused, is among the powers these latter actors have, this must mean that the textual authorities on search and seizure—the lofty principles and prohibitions from the Quran and Traditions we saw at the beginning of this chapter—do not bind political agents.

In other words, the religious law—*sharia*—demands more of state officials who wield explicit religious authority than it demands of state

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AL-AHKAM AS-SULTANIYAH, *supra*, at 309, 311 (Yate’s translation, like Wahba’s, mistakenly inserts the first “not” and correctly omits the second).

159. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM, *supra* note 32, at 233.

160. *Id.* at 235.

161. AL-MAWARDI, *supra* note 62, at 73.

162. *Id.* at 74.

163. *Id.* at 74.

164. *See id.* at 4 (qualifications of sovereign (*imam*)), 23–24 (ministers), 34–35 (provincial governors), 38–59 (war commanders), 60–71 (commanders of expeditions to fight apostates, insurgents or brigands).

officials who do not. Governors, police officers, and magistrates of grievances can employ methods of criminal investigation (and adjudication) that are forbidden to *qadis* by religious doctrine and thus unavailable to those whose duty is to uphold that doctrine. This distinction between jurisprudential authority and political authority must have reflected the reality of criminal practice in Mawardi's time, as was suggested in Part I and will be seen more fully in Part III. What is noteworthy here is how clearly and unequivocally Mawardi draws the line between the two realms of authority, and the doctrinal legitimacy he bestows on the distinction.

Where do these differences in constraints and powers leave the *muhtasib*? According to Mawardi, the (official) *muhtasib* "is intermediate between the decisions of the law courts [i.e., the *qadis*] and those of the court of wrongs [i.e., the magistrates of grievances]."<sup>165</sup> The *muhtasib*, that is, "has more of the ruler's coercive power . . . than judges have in relation to religious infractions," and his office "is created to intimidate" so that "overbearing and harshness in the exercise of it may not be considered to exceed the limits or break the rules."<sup>166</sup> In other words, the *muhtasib* is partially excused from jurisprudential constraints as a matter of policy. The judiciary, on the other hand, "is created for equity"; "restraint and dignity are more appropriate to it, and any departure from [these principles] to the presumption of the *muhtasib* constitutes excess and a violation of duty."<sup>167</sup>

Does this mean the *muhtasib* can do everything the governor and police can do? It would appear not, given the governing rule of manifestness to which Mawardi holds fast for the *muhtasib*, and his locating the *muhtasib*'s powers between those of judges and magistrates of grievances. And what if the *muhtasib* exceeds his mandate, or the *qadi* orders an investigation beyond his authority, or the governor or police or magistrate of grievance oversteps his bounds?—for there must be some constraints on even these executive actors. Like Ghazzali, Mawardi does not say. Mawardi, like Ghazzali, does not set out an exclusionary rule or any other routine consequence for violating his search and seizure rules—even though, like Ghazzali, Mawardi cites *Umar II* in support of his rules.

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165. *Id.* at 261.

166. *Id.* at 262.

167. *Id.*

d. *Other Classical Views*

Other classical scholars weighed in on matters of search and seizure, though not all followed Mawardi's distinctions between religious and political authority and actors. Ibn Taymiyya (d. 1328), for instance, a third giant of classical jurisprudence, rejected these distinctions but provided other guidance. In a treatise devoted entirely to the duty of commanding right and forbidding wrong, translated as *Public Duties in Islam* (*al-Hisbah fi al-Islam*), Ibn Taymiyya asserts that all state officials, including the *muhtasib*, exist for the sole purpose of commanding right and forbidding wrong; all of them are therefore "[*sharia*] authorities and religious offices."<sup>168</sup> To this end, forbidden musical instruments can be destroyed, and wine-casks and idols "smashed up and burned," with no difference in powers according to the identity of the actor.<sup>169</sup> But the power to command/forbid is not unlimited: the means of intervention itself "should not be improper," Ibn Taymiyya quotes from an unspecified saying, and those who command/forbid in an unlawful manner are themselves sinning.<sup>170</sup> Unlike Ghazzali and Marwardi, Ibn Taymiyya does not mention spying or entering houses as examples of such improper commanding or forbidding, nor does he cite the Umar reports. Rather, he enunciates a principle of utility: in another echo of the Fourth Amendment's reasonableness balancing test, Ibn Taymiyya says the benefit of any intervention "should outweigh the cause of [the] corruption," and "a wrong should not be forbidden if to do so entails the loss of a greater right."<sup>171</sup>

Ibn Khaldun (d. 1406), the North African jurist and historian renowned for his sweeping *Introduction to History* (*Muqaddimah*), mentions search and seizure in his detailed descriptions of the evolution and character of various government positions. In doing so, Ibn Khaldun suggests a spectrum much like Mawardi's, though his distinctions between "religious" and "political" authority are not as starkly drawn. The office of the *qadi*, writes Ibn Khaldun, "proceeds . . . along the lines of the religious laws laid down by the Quran and the [Traditions]";<sup>172</sup> the office of the *muhtasib* too is "a religious position,"

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168. IBN TAYMIYAH, PUBLIC DUTIES IN ISLAM 23–25 (Muhtar Holland trans., 1982).

169. *Id.* at 23, 25.

170. *Id.* at 77, 92.

171. *Id.* at 77–78, 80. The Arabic word translated here as "right," *ta'arruf*, means "good," as in the greater good, not a "right" in the sense of a legal entitlement (*haqq*).

172. IBN KHALDUN, 1 THE MUQADDIMAH, *supra* note 3, at 452.

subordinate to that of the *qadi* and originally in his jurisdiction;<sup>173</sup> and the police also fill “a religious function” that is “connected with the religious law.”<sup>174</sup> But of these three officials, only the police can investigate crimes; “[t]he religious law,” Ibn Khaldun states, “cannot concern itself with suspicions of possible criminal acts.”<sup>175</sup> It is the police who bring suspects to court, decide and impose “preventive punishments,” impose punishments specified in the *sharia* as well as others “not provided for,” and in general exercise authority “in the service of the political (establishment) and”—here is the crucial part—“without reference to the religious laws.”<sup>176</sup> This must mean that Ibn Khaldun’s police, like Mawardi’s ruler/police and magistrate of grievances, are not constrained by the jurists’ doctrines of criminal procedure. Indeed, it is the police who, “being in the possession of all the circumstantial evidence, force [ ] (the criminal) to confess, as is required by the general (public) interest.”<sup>177</sup> The magistrate of grievances is similarly unconstrained, says Ibn Khaldun, as that is a position that “combines . . . government power and judicial discretion” to do “what the judges and others are unable to do”—including executing punishments not foreseen by the religious law and considering “indirect and circumstantial evidence” in reaching its judgments.<sup>178</sup> Like Ibn Taymiyya, Ibn Khaldun does not list detailed rules of search and seizure; but like Mawardi, he classifies certain government officials as bound by jurisprudential doctrines of criminal procedure and others as exempt from them. Apparently then for Ibn Khaldun, as for Mawardi, search and seizure constraints are the province of “religious” law and the luxury of those whose duty is not everyday law enforcement.

## 2. Seizures

As they did with searches, classical jurists propounded rules governing the seizure of individuals accused of wrongdoing, on the basis of the Quran, the Traditions, and other sources. The question of who is bound by the rules is not a prominent feature in this jurisprudence; although jurists do address that matter, they focus more on the

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173. *Id.* at 462. But, Ibn Khaldun notes, the *muhtasib* subsequently became an office under the ruler. *Id.* at 463.

174. *Id.* at 457.

175. IBN KHALDUN, 2 THE MUQADDIMAH, *supra* note 3, at 36. This sentence is the third of the quotations that appear at the very beginning of this Article.

176. IBN KHALDUN, 1 THE MUQADDIMAH, *supra* note 3, at 457.

177. IBN KHALDUN, 2 THE MUQADDIMAH, *supra* note 3, at 36.

178. IBN KHALDUN, 1 THE MUQADDIMAH, *supra* note 3, at 455–56.

grounds for seizure and its permissible length. In doing so, they typically use a single word—"detention" (*habs*)—for what we consider five separate acts in American criminal procedure: a brief stop for questioning or other investigation—*i.e.*, a *Terry* stop; a full custodial arrest; detention pending adjudication; imprisonment as punishment; and post-adjudication detention pending other punishment (*e.g.*, lashing, or monetary compensation for bodily harm). Given our focus on pre-adjudication seizures under the Fourth Amendment, we will consider only the rules in the first three categories.<sup>179</sup>

The seizure jurisprudence is less extensive than the search jurisprudence; most classical literature on detention apparently focused on jailing debtors.<sup>180</sup> But detention for criminal adjudication is also addressed. We saw above that the Traditions established precedent for detaining persons accused of crime; in the jurisprudence that built on the pertinent Traditions and other sources, five questions received particular attention: (1) whether detention upon an accusation of wrongdoing was permissible at all; (2) assuming it was permissible, the circumstances that allowed (or required) such "investigative" detention; (3) how long that detention could last; (4) who was authorized to order that detention; and (5) what that detention entailed. As we will see, the resulting rules depend in part, naturally, on the nature of the alleged crime and the quantum and quality of the evidence against the accused. But what factors count in that quantum and quality—what criteria are relevant to determining the propriety of arrest and detention—emerges as a central question. For while jurists do suggest objective indicia of guilt as factors relevant to lawful arrest or detention, the most extensive seizure doctrine, and certainly the most cited one, focuses on a very different factor: the reputation of the accused.

On the first question, whether detention was ever allowed, an early and authoritative view was that arresting someone on the basis of only the accusation of another was impermissible. This view came from Abu Yusuf (d. 798), the chief justice in Baghdad and a key disciple of Abu

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179. Separately, jurists also endorsed an elaborate procedure to arrest court-shy defendants in their homes, a procedure that required a *qadi's* authorization and close supervision and appears to have come from Roman practice. See Farhat Ziadeh, *Compelling Defendant's Appearance at Court in Islamic Law*, 3 ISLAMIC L. & SOC'Y 305 (1995). This procedure, *hujum*, clearly applied in civil claims, but it is not clear it did in criminal cases. See also AHMAD IBN UMAR AL-KHASSAF, *ADAB AL-QADI BI SHARH AL-JASSAS [AL-KHASSAF'S RULES FOR THE JUDGE AS EXPLAINED BY AL-JASSAS]* 245–53 (Farhat Ziadeh ed., Amer. Univ. in Cairo 1978); Surty, *supra* note 15, at 160–61.

180. See, *e.g.*, Schneider, *supra* note 66, at 158–60, 164–65; ROSENTHAL, *supra* note 66, at 39, 46.

Hanifa, the intellectual founder of the Hanafi school of jurisprudence. In a treatise on taxation that includes passages on criminal law and other topics and is addressed to Islam's then-caliph Harun al-Rashid, Abu Yusuf advises:

Instruct your governors not to arrest people upon accusation (*la ya'khudhuna al-nas bi al-tuhmah*). A man comes to [the governor] and says, "This man has accused me of stealing from him," and people arrest him and others upon that. This is an unlawful act . . . . It is [also] unlawful and impermissible to detain (*yahbus*) a man upon another's accusation . . . . [Rather,] the complainant and the defendant should be brought together, and if the complainant has proof (*bayyinah*), then it should be ruled on. If not, a surety (*kafil*) should be taken from the defendant and he should be released . . . . The same goes for all those who are detained (*fi al-habs*) upon accusation.<sup>181</sup>

As support for this position Abu Yusuf asserts that "[t]he Prophet did not arrest people upon accusation,"<sup>182</sup> and he reminds the reader that Muhammad and the Companions strove to avoid inflicting punishments and warned against false accusations.<sup>183</sup> Abu Yusuf's assertion that Muhammad did not arrest upon accusation contradicts the Traditions we have seen, in which the prophet reportedly did just that; other jurists nevertheless shared the position that detention upon accusation was never permissible. Supporting this view was Umar's reported angry retort to the accuser who wanted to bring an accusee to Umar in chains but had no evidence of his guilt.<sup>184</sup>

But the eventual majority view was that arrest and detention for investigation upon an accusation of criminal wrongdoing was generally permissible.<sup>185</sup> The Maliki jurist Ibn Farhun (d. 1397), for instance, listed in his well-known legal treatise ten categories of individuals who

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181. ABU YUSUF, *KITAB AL-KHARAJ* 190 (Cairo, 4th ed. 1973). For others' translations, see *KITAB-UL-KHARAJ (ISLAMIC REVENUE CODE)* 356 (Abid Ahmad Ali trans., Lahore 1979); Kamali, *supra* note 25, at 79. In Kamali's translation, which is not of the entire work but of this passage only (minus the first three sentences of mine), Kamali translates *yahbus* as "imprison," but then *habs* as "detention"; nevertheless, he, like Abu Yusuf, appears in both instances to mean post-accusation, pre-adjudication detention. See Kamali, *supra* note 25, at 79.

182. ABU YUSUF, *supra* note 181, at 190 & n.2. (*la ya'khudhu al-nas fi al-tuhmah*).

183. *Id.* at 190–91.

184. See *supra* text at note 77; see also Kamali, *supra* note 25, at 79; "Habs" [Detention], in *AL-MAWSU'AH AL-FIQHIYAH, ENCYCLOPEDIA OF ISLAMIC JURISPRUDENCE*, 293–94 (3rd ed., 1983).

185. Kamali, *supra* note 25, at 80; "Habs," *supra* note 184, at 286.

can lawfully be detained. The last of these, after categories that include convicted criminals and debtors whose financial status is unknown, is that of people detained “for investigation after being accused of depravity (*fasad*).”<sup>186</sup> Among those Ibn Farhun specifies as belonging in this category are accusees of murder, theft or any of the other fixed crimes.<sup>187</sup> Other scholars were similarly unequivocal about the authority to arrest and detain upon accusation, as long as circumstances warranted it.<sup>188</sup>

On the next question, what circumstances warrant investigative detention, a variety of factors appear. One is the gravity of the alleged crime: apparently the majority of Hanafis, contrary to their predecessor Abu Yusuf, came to allow detention for the most serious transgressions, specifically the fixed crimes (*huddud*) and bodily injury crimes (*qisas*), but not for lesser ones such as non-payment of debts; the rationale was that punishment upon conviction of the serious crimes might be more severe than imprisonment while punishment for the lesser ones could not.<sup>189</sup> Another relevant factor is the quantum and quality of evidence against the accused as measured by the number of witnesses who have come forward and what is known about their integrity. The Hanafi jurist al-Khassaf, for instance, notes conflicting opinions on whether detention is appropriate if only one of the two required witnesses comes forward and swears he will bring the second.<sup>190</sup> At the same time, al-Khassaf appears to endorse detaining an individual accused of at least one particular crime, the fixed crime of false accusation of adultery, if two witnesses the *qadi* does not know—*i.e.*, whose integrity he does not know—come forward, provided the *qadi* then proceeds to inquire about the witnesses.<sup>191</sup>

Other objective criteria are also mentioned. Mawardi weighs in here, at least with respect to lesser seizures that might constitute what we

186. IBN FARHUN, 2 TABSIRAH AL-HUKKAM 240 (Dar al-Maktabah al-‘Ilmiyya 1995) (*man yuhbas ikhtibaran lamma nusiba ilaihi min al-fasad*). This category is one of two Ibn Farhun adds to the list of eight such categories set out by an earlier Maliki jurist, al-Qarafi (d. 1285). See *id.* at 233–34; AHMAD IBN IDRIS AL-QARAFI, 4 KITAB AL-FURUQ 1221–22 (Dar al-Salam 2001).

187. IBN FARHUN, *supra* note 186, at 234, 241.

188. See “Habs,” *supra* note 184, at 286.

189. See Kamali, *supra* note 25, at 79–80; “Habs,” *supra* note 184, at 293. Indeed, this was apparently the position of Abu Hanifa himself. See AL-KHASSAF, *supra* note 179, at 746, no. 874 (“Abu Hanifa . . . did not allow release upon surety for those accused of the fixed or retaliatory crimes.”). Perhaps Abu Yusuf, in deeming detention disallowed upon mere accusation, meant that no one should be detained upon an *unsworn* accusation? (See *supra* 182 and accompanying text).

190. AL-KHASSAF, *supra* note 179, at 746, no. 874.

191. *Id.*

would consider *Terry* stops. In *Ordinances*, after advising the *muhtasib* that fulfilling his duty to forbid wrongdoing requires him to “keep people from dubious situations,” Mawardi cautions restraint by offering up a hypothetical: if the *muhtasib* sees “a man standing with a woman on a busy street with nothing suspicious about them”—*i.e.*, nothing that suggests illicit relations between them—he should neither rebuke them nor object to their conduct, “for people cannot help that sometimes.”<sup>192</sup> He then changes the facts of the hypothetical to suggest something of a reasonable suspicion standard for approaching the same couple: “[i]f they are standing in an empty road, however, the emptiness of the place is suspicious, and [the *muhtasib*] should remonstrate.”<sup>193</sup> But the *muhtasib* should still not rebuke too hastily, lest the man and woman be blood relatives (which would render their being alone together permissible).<sup>194</sup> In other words: “His rebuke should be according to the evidence.”<sup>195</sup> Or, as we might say, the nature of the intervention should be reasonably related in manner and scope to its justification.<sup>196</sup>

But the factor jurists seem to list more often than any other as the key to deciding whether to arrest and detain a criminal accusee is the accusee’s reputation for good deeds or bad ones.<sup>197</sup> The precise formulation differs by jurist; let us consider a version of Ibn Taymiyya’s, from one of his thousands of authoritative *fatwas*, which might have been the first articulation of the doctrine. Accusees of “theft, brigandry and the like” are of three kinds, says Ibn Taymiyya: first, those who are “known by others for their religiosity and piety” and “not the type to be [thus] accused”; second, those whose reputations are unknown, be it for “righteousness” or “immorality” (*la ya’raf bi barr wa la fujur*); and third, those who are immoral (*fajir*), known for prior thefts or the signs of thievery—that is, gambling, or other “loathsome behavior” (*al-fawahish*) that requires money the accusee does not have.<sup>198</sup> Accusees in the first category, Ibn Taymiyya says, are not to be detained; nor, for that matter, are they to be beaten, *i.e.*, to extract a confession; nor are

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192. AL-MAWARDI, *supra* note 62, at 270.

193. *Id.*

194. *Id.* See also *id.* at 268 (*muhtasib* should object to uncleanness of someone in mosque “if certain of it,” and must ask a man he finds eating during Ramadan his reason for doing so, for instance that the man is traveling or elderly, if the man “looks suspicious”) (emphasis added).

195. *Id.* at 270.

196. See *Terry*, *supra* note 115.

197. Indeed, a reputation for bad deeds might even suffice to justify punishment; investigative detention and punitive imprisonment become conflated in this doctrine. See *infra* note 328.

198. 34 MAJMU’AH FATAWA SHAYKH AL-ISLAM AHMAD IBN TAYMIYYA 236–37 (n.d.).



they required to swear an oath of innocence.<sup>199</sup> Indeed, whoever accuses someone in that category should himself be punished.<sup>200</sup> Accusees in the second category, those whose reputations are unknown, should be detained “for investigation of their status,” which apparently means for determination of which of the other two categories they fall into.<sup>201</sup> And accusees in the third category should—“according to some jurists,” Ibn Taymiyya asserts as a qualifier here—be beaten (and presumably detained beforehand, then) until they give up the goods.<sup>202</sup> Later jurists restated and elaborated on this doctrine. Ibn Qayyim (d. 1351), Ibn Taymiyya’s leading disciple, presents it as one that applies to crimes of all types; Ibn Farhun, the Maliki jurist whose categories of lawful detention we mentioned above, more or less copies Ibn Qayyim’s version in doing the same.<sup>203</sup>

As for the third question, how long investigative detention can last, positions again varied. Some jurists set a limit of one month, while others, most prominently Mawardi, preferred leaving the matter to the ruler’s discretion.<sup>204</sup> Views might have varied according to how long a jurist believed the prophet’s reported detention “upon accusation” had lasted: Ibn Qayyim quotes a report that says that detention had lasted “a day and a night” (*yauman wa lailan*), while Ibn Farhun notes a different one that says the prophet had detained someone “for an hour of daytime” (or “one day”) and then released him.<sup>205</sup> Ibn Farhun goes on to say that the maximum term of pretrial detention varies according to the reason for the detention, and then elaborates with a set of rules.<sup>206</sup>

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199. *Id.* at 236.

200. *Id.*

201. *Id.*

202. *Id.* at 237.

203. IBN QAYYIM AL-JAWZIYAH, AL-TURUQ AL-HUKMIYA FI AL-SIYASAH AL-SHAR’IYAH [PROCEDURES OF ADMINISTRATION] 89–92 (Dar al-Hadith 2002); IBN FARHUN, *supra* note 186, at 128–29; *see also* FADEL, *supra* note 32, at 190–92. In both versions, however, the first category changes from those who are “known by others for their religiosity and piety,” as Ibn Taymiyya had it, to those who are “innocent” (*bari’an*). IBN QAYYIM, *supra* note 203, at 89; IBN FARHUN, *supra* note 186, at 128. Modern scholars nevertheless describe the category as Ibn Taymiyya did, even when they cite Ibn Qayyim’s or Ibn Farhun’s version. *See, e.g.*, Kamali, *supra* note 25, at 76–78; FADEL, *supra* note 32, at 190–92; al-Alwani, *supra* note 61, at 10–11; Awad, *supra* note 61, at 100–01.

204. AL-MAWARDI, *supra* note 62, at 239 (noting both positions and deeming the latter “more appropriate”); *see also* IBN QAYYIM, *supra* note 203, at 91 (noting both positions); Kamali, *supra* note 25, at 77; al-Alwani, *supra* note 61, at 11, 13; al-Saleh, *supra* note 58, at 75–76.

205. IBN QAYYIM, *supra* note 203, at 90; IBN FARHUN, *supra* note 186, at 232. In the same discussion, Ibn Farhun also reports a Tradition that the prophet “imprisoned someone upon an accusation of homicide.” *Id.*

206. IBN FARHUN, *supra* note 186, at 240–41.

For the discretionary crimes (*ta'zir*), he opts for the ruler's discretion, but he also notes the one-month opinion, and another that would limit detention for those crimes to a single day.<sup>207</sup> For accusations of homicide or grievous bodily injury, he sets a presumptive limit of one month, allowing for extension should evidence appear during that month to strengthen the accusation.<sup>208</sup> For the fixed crimes (*hudud*), Ibn Farhun leaves it to the ruler's discretion, and adds that this applies even when there is only one of the required two witnesses, or when there are two but their integrity (*'adalatuhuma*) must still be ascertained.<sup>209</sup> And for accusations of theft—one of the fixed crimes, but singled out here by Ibn Farhun—as well as, again, grievous bodily injury, after the accusee is detained the ruler should demand proof from the complainant; if no such proof appears, the accusee should be released, presumably before the one month period is reached.<sup>210</sup>

The fourth question, who can order investigative detention, is where a distinction between *qadis* and executive actors reappears. Some jurists, Mawardi again most prominent among them, deemed detention outside of the *qadi*'s powers while others saw it as falling within them.<sup>211</sup> Ibn Taymiyya believed in no such distinctions, as we have seen,<sup>212</sup> and his disciple Ibn Qayyim quotes him as stating that the matter falls within the jurisdiction of whoever is authorized to rule on people's affairs, be he called judge or governor or magistrate of grievances or something else.<sup>213</sup> And on the fifth and final question, what form detention can take: Ibn Qayyim says detention means restricting or overseeing a person's movement, such as by keeping him in a mosque, requiring a surety for his release, or assigning someone to watch over him<sup>214</sup>—in other words, it need not constitute jailing.

207. *Id.*

208. *Id.* at 241; *see also* al-Saleh, *supra* note 58, at 75 n.104.

209. IBN FARHUN, *supra* note 186, at 241; *see also* al-Saleh, *supra* note 58, at 75 n.105.

210. IBN FARHUN, *supra* note 186, at 241.

211. AL-MAWARDI, *supra* note 62, at 239 (“Judges . . . may not detain people except for [] established guilt.”); IBN QAYYIM, *supra* note 203, at 91 (citing both views and proponents of each); Kamali, *supra* note 25, at 78 & n.92; al-Alwani, *supra* note 61, at 13.

212. *See supra* text accompanying note 168. But he did note the opinion of some jurists that the governor and not the *qadi* should carry out the beating that awaits the accused thief who is known for prior thefts. IBN TAYMIYYA, FATAWA, *supra* note 198, at 237.

213. IBN QAYYIM, *supra* note 203, at 82.

214. *Id.* at 90. In the 2002 edition of this work that I have been citing, the all-important “not” is missing from the key sentence, which should translate as: “[The] lawful [form of] detention is *not* [only] imprisonment in a confined space, but rather [any method of] restraining an individual [and] preventing him from acting on his own, be it in a home or at the mosque . . .” (*fa inna al-habs*

Should jailing be its form, a form of judicial review appears in a quasi-*habeas corpus* doctrine articulated by a number of jurists. According to this doctrine, every newly-appointed *qadi* must, upon taking office, personally inquire of every jailed person the cause of his confinement, and free those with respect to whom proof of wrongdoing is lacking.<sup>215</sup>

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Absent from the seizure jurisprudence, as in the search jurisprudence, are discussions of what consequences follow a violation of the rules jurists articulated. This brings us to a final question of classical doctrine to consider.

### 3. An Exclusionary Rule?

Does Islamic law forbid the use of evidence obtained through a search and seizure violation—one standard consequence of Fourth Amendment violations—as several modern scholars have asserted? What about other possible remedies or responses, all familiar in Fourth Amendment jurisprudence: civil damages, particularly when no evidence is seized or criminal trial results from a search or seizure violation; state disciplinary action against the offending state official; or formal criminal prosecution for especially egregious official misconduct?<sup>216</sup>

We certainly saw in the Traditions, specifically in *Umar I*, *Umar II*, and *Umar III*, that the second caliph Umar indeed foreshadowed the modern American exclusionary rule by declining to act on wrongdoing he uncovered by spying and entering homes without permission.<sup>217</sup> But we did not see that consequence urged or restated by any of the key jurists whose work we have discussed—Ghazzali, Mawardi, Ibn Taymiyya, Ibn Qayyim, Ibn Farhun and others—even when they cited one of the Umar reports in support of the search and seizure rules they set out. Instead other possible consequences appear: Ghazzali said the *muhtasib*

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*al-shar'i la'issa huwa al-sijn fi makanin dayyiqin, wa innama huwa ta'wiq al-shahhs, suwa kana fi bait au masjid . . .*). The “not” clearly belongs. See, e.g., IBN FARHUN, *supra* note 186, at 232 (quoting the passage with the “not”); Kamali, *supra* note 25, at 77 (paraphrasing the passage with the “not”).

215. See AHMAD IBN UMAR AL-KHASSAF, ADAB AL-QADI [RULES FOR THE JUDGE] 129–39 (Munir Ahmad Mughal trans., 1998) (in English); Schneider, *supra* note 66, at 167; al-Alwani, *supra* note 61, at 13.

216. A vast amount of scholarship discusses the exclusionary rule and its alternatives. Some of this literature is cited in Part IV *infra*. See generally LAFAVE, *supra* note 48 (“The Exclusionary Rule and Other Remedies”); DRESSLER, *supra* note 48 (“Fourth Amendment: Exclusionary Rule”).

217. See *supra* text accompanying notes 61–64.

who unnecessarily breaks a wine vessel must financially compensate the injured party;<sup>218</sup> he also implied that the *muhtasib* who exceeds lawful constraints faces punishment, or least disfavor, in the afterlife. Ibn Taymiyya too said excess in commanding/forbidding is a sin.<sup>219</sup>

But apart from the three Umar reports, I have found no support in classical Islamic doctrinal sources for a rule barring evidence obtained from search or seizure violations. And that the jurists whose work we have discussed do not even consider an exclusionary rule, even though they regularly cite the Umar stories that suggest it, is particularly striking, since these same jurists routinely discuss evidentiary exclusion as a possible consequence of violating a different rule of investigative procedure: the prohibition of coercion during interrogations.<sup>220</sup> That they do not address this consequence in the search and seizure context seems to confirm that exclusion has not typically been considered a consequence of violations of those rules.

Affirmative support for this conclusion comes from a look at leading compilations of jurisprudential rules (*fiqh*) of the schools of Islamic law, or so-called “positive law” manuals.<sup>221</sup> I found no reference to the matter in four leading such compilations.<sup>222</sup> There is, however, a direct reference in Marghinani’s *Hidaya*, a twelfth-century Hanafi manual.<sup>223</sup>

218. See *supra* text accompanying note 138.

219. See *supra* text accompanying note 170.

220. Muslim jurists have not all agreed that coerced statements should be excluded; they have not even agreed that coercion in interrogations is impermissible. They have, however, addressed the question of exclusion as a consequence of coercive interrogations. See, e.g., Johansen, *supra* note 17, at 170–71, 175, 177, 191–92; Reza, *supra* note 6, at 24–25.

221. These manuals differ from the treatises we have discussed thus far in that they mostly collect and present rules of law on miscellaneous points, often rules that have simply been passed down by others, instead of presenting doctrines or concepts that result from a jurist’s own engagement with the Quran and the Traditions on each point.

222. MALIK IBN ANAS, *AL-MUWATTA OF IMAM MALIK IBN ANAS: THE FIRST FORMULATION OF ISLAMIC LAW* (Aisha Abdurrahman Bewley trans., 1989); IBN RUSHD, *THE DISTINGUISHED JURIST’S PRIMER: A TRANSLATION OF BIDAYAT AL-MUJTAHID* (Imran Ahsan Khan Nyazee trans., 1996) (2 vols.); AL-NAWAWI, *MINHAJ ET TALIBIN [sic]: A MANUAL OF MUHAMMADAN LAW* (E.C. Howard trans., 2005) (Shafi’i); IBN QUDAMA, *AL-MUGHNI* (Muhammad Sharaf al-Din Khattab, Muhammad al-Sayyid, & Ibrahim Sadiq eds., 1996) (16 vols.) (Hanbali/comparative). Of these, only Ibn Qudama’s is not available in English; given that and its length, the caveat that my findings are but preliminary therefore merits especial emphasis with respect to that work. See *supra* Part I.

223. SHEIKH BURHANUDDIN ABI AL HASAN ALI MARGHINANI, *THE HIDAYA: COMMENTARY ON THE ISLAMIC LAWS* (Charles Hamilton trans., Z. Bainter revised ed. 2005) [hereinafter *HIDAYA*]. There are various editions of this criticized but much-used English translation, which was based not on the original Arabic text but on a Persian translation. See Y. Meron, *Marghinani, His Method and His Legacy*, 9 ISLAMIC L. & SOC’Y 410, 410 (2002). The treatise is the author’s abridged version of an eight-volume commentary he wrote on Hanafi *fiqh* rules that he had compiled in an earlier work.

One entry, in a section on the crime of adultery, states flatly:

If witnesses bear evidence of whoredom [read: adultery (*zina*)] against a man, declaring that “they had come to the knowledge of it by wilfully looking into the person’s private apartment at the time of the fact[,]” yet such evidence is to be credited, nor is it to be rejected on account of the manner in which the knowledge of the witnesses was obtained, as their looking was allowable, in order that they might be enabled to bear evidence; they are therefore the same as physicians or midwives.<sup>224</sup>

This statement is unequivocal: there is no evidentiary exclusion for spying with respect to testimony about adultery.

More support for this position appears in a subsequent chapter of the *Hidaya* on types of evidence. In a section that describes admissible evidence generally, one entry deems inadmissible—indeed, “illegal”—what a witness has heard “from without a door, or from behind a curtain.”<sup>225</sup> But the reason is not that the witness was spying; it is that such evidence is unreliable: “voices are often similar . . . [and] they cannot be distinguished with certainty [in such cases].”<sup>226</sup> Other entries list categories of people whose testimony is generally not admissible because of improper conduct; among these are persons who “[are] continually intoxicated”; who “amuse[] . . . [them]sel[ves] with birds, such as pigeons or hawks”; who “[have] committed a great crime . . . [that] induces punishment”; who “go[] naked into the public bath”; or who “[are] guilty of base and low actions, such as making water or eating . . . victuals on the high road”—as well as, of course, those who have been punished for the *hadd* crime of slander, pursuant to the Quranic verse that orders their testimony rejected.<sup>227</sup> Reasons these actions disqualify a person’s testimony are given too. In the above examples, they are that drunkards and those who go naked into the bath have “commi[tte]d . . . prohibited act[s]”; bird-gaming “engenders forgetfulness”; proven criminals are “unjust”; and as for immodest conduct on high road, “where a man is not restrained . . . by a sense of

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*Id.* at 414; see also W. Heffening, *al-Marghinani*, in VI ENCYCLOPAEDIA OF ISLAM (NEW EDITION) 557–58 (P. BEARMAN et al. eds., 1989).

224. *HIDAYA*, *supra* note 223, at 385.

225. *Id.* at 775.

226. *Id.*

227. *Id.*, at 780, 782–83; QURAN 24:4. The disqualification for slander is also mentioned in the earlier chapter on punishments. *HIDAYA*, *supra* note 223, at 380.

shame . . . from such actions as these, he exposes himself to a suspicion that he will not refrain from falsehood.”<sup>228</sup> In other words, a presumption that a person is unreliable or untrustworthy arises when he commits any of these acts, at least in terms of establishing one of the bedrock requirements of witness competency in Islam: moral probity, or uprightness (*adalah*).<sup>229</sup> But neither spying nor entering a home without permission is listed among the acts that give rise to this presumption.<sup>230</sup>

A possible explanation for this omission is suggested in a later entry that states a general rule of witness competence: “The testimony of him whose virtues exceed his vices and who is not guilty of great crimes, [is] admissible, notwithstanding he may occasionally be guilty of venial crimes.”<sup>231</sup> And this is because: “[I]nnocence with respect to great crimes, and a preponderance of virtue over vice, must necessarily be deemed sufficient, . . . [or] the door of evidence would be shut, whilst the preservation of the rights of mankind requires that it should be kept open.”<sup>232</sup> In other words, the administration of justice depends on witness testimony; testimony should therefore be admitted as long as a witness’s faults or wrongdoing do not outweigh his or her virtues. Spying, then, is apparently not serious enough wrongdoing to outweigh the virtues of an otherwise qualified witness and preclude his testimony—explicitly in the case of adultery, and implicitly in other cases—even when that testimony is possible only because of the witness’s spying.

Why this is the case—even though spying and entering homes without permission are expressly forbidden by the Quran, it bears reminding, unlike the disqualifying acts al-Marghinani lists (except of course the *hudud* crimes of drinking and slander)—is not clear. Nor is it only al-Marghinani and the Hanafis who omit those Quranically-forbidden acts from the list of those that disqualify a witness’s testi-

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228. *Id.* at 782–83.

229. See EL-AWA, *supra* note 22, at 124–25.

230. It is thus not clear what authority supports the statement the *Hidaya*’s original translator added in a footnote to the entry on allowing testimony about adultery that results from spying: “To explain this it may be proper to remark that a person’s looking into the private apartment of another is an unlawful act, which, if it was not justified by the motive, would invalidate his testimony.” ALI IBN ABI BAKR MARGHINANI, *THE HIDAYA: COMMENTARY ON THE ISLAMIC LAWS* 194 (Charles Hamilton trans., Islamic Book Trust 1982); see *supra* text accompanying note 224.

231. *HIDAYA*, *supra* note 223, at 785.

232. *Id.*

mony.<sup>233</sup> But the inference from this routine omission, in the midst of so many other grounds listed for disqualifying witness testimony, is inescapable. Classical Islamic doctrine does indeed call for excluding evidence that is linked to various types of wrongdoing, but spying and entering homes without permission are not typically among those types.

This leads to the conclusion that evidentiary exclusion, if it lies at all, depends on a test that balances the harm of an unlawful intrusion against the harm thereby prevented or detected. This mirrors the rule Mawardi pronounced on a *muhtasib's* spying/entering, drawing a distinction between more serious crimes (permitted) and less serious ones (forbidden).<sup>234</sup> It also arguably best reflects the rule that emerges from the four Umar reports themselves. Recall that in *Umar I* and *Umar III*, it was mere drinking that the caliph declined to act on because he had discovered that wrongdoing by spying or entering without permission, and that in *Umar II* the caliph agreed that he had sinned “more than” the man he found drinking alone with a woman (by spying, entering without permission, and entering from the back); but in *Umar IV* the caliph allowed the testimony of the four men who witnessed the much more serious crime of adultery by spying (though he punished the men for the legal insufficiency of their testimony). In other words, the Umar precedents—the strongest authority in Islam for an exclusionary rule—might be more accurately read as establishing a balancing test for suppressing evidence that results from search and seizure violations, rather than a Fourth-Amendment-like exclusionary rule.<sup>235</sup>

#### D. Modern Views

We have now seen the Quranic verses on search and seizure, consid-

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233. See, e.g., IBN RUSHD, *supra* note 222, at 528–30 (proving adultery), 546 (theft), 556–60 (witness qualifications generally); AL-NAWAWI, *supra* note 222, at 515–17 (stating general rule that witnesses “[must be] of irreproachable and serious character” and “should have abstained entirely from committing capital sins . . . and should not be in the habit of committing sins of a less serious nature,” and listing examples of potentially disqualifying acts or habits under these criteria, among which are playing backgammon or chess, singing without the accompaniment of musical instruments, eating in a public place, embracing one’s wife or slave in the presence of others, and “always telling funny stories”).

234. See *supra* text accompanying notes 148–154. It also, incidentally, foreshadows the approach to exclusion in much of the world today. See generally Craig M. Bradley, *Maple Goes Abroad*, 52 CASE WESTERN L.R. 375 (2001).

235. Coincidentally, the Fourth Amendment rule itself suddenly seems headed in this direction. See *Herring v. United States*, 129 S. Ct. 695 (2009).

ered a number of sacred Traditions that augment those verses, and surveyed the rules and doctrines classical Muslim jurists derived from those sacred texts and other sources. What remains, before we turn to evidence of practice in Part III, is to consider modern views on the topic.

But in fact there is little new in the modern views. Quite simply, modern Muslim scholars consistently cite the same Quranic verses, the same Traditions, and the same classical scholars whose views we have seen above, to make the same points about search and seizure under Islamic law today. A look at almost any of the works by contemporary Muslim scholars that I have cited above would demonstrate this; let us look briefly at the treatment that the most influential modern theorist of criminal law in Islam gives the topic: Abd al-Qadir Awdah (d. 1960).

Awdah, an Egyptian judge who became a leading thinker in the Muslim Brotherhood, is probably the most-cited modern authority on “Islamic” criminal law; his two-volume *Criminal Law of Islam (al-Tashri‘ al-Jina‘i al-Islami)* was first published in 1949 and has been reissued periodically since then.<sup>236</sup> In this work Awdah addresses a wide range of matters, from principles of criminal law and the elements of crime to defenses, punishment, and more. One chapter of the work addresses the duty and practice with which we are now very familiar: commanding right and forbidding wrong. The chapter appears in a section on defenses to criminal liability; Awdah’s theory appears to be that all Muslims bear the duty of carrying out that divine injunction, and therefore one who harms a person or property in the course of discharging that duty, particularly the “forbidding wrong” half, should not be subject to criminal liability.<sup>237</sup> But the requirements Awdah sets out for that defense look very much like an amalgam of Ghazzali’s and Mawardi’s rules for the *muhtasib*. Wrongdoing that is being acted on must be “apparent without spying or investigation”; thus, one may not eavesdrop on someone’s home to try to hear the sounds of singing or musical instruments, or to try to catch a whiff of wine or hashish from within; nor may one search another’s clothes or enter his home to see whether he has something (unlawful) concealed therein; nor may one inquire of another’s neighbors to find out what takes place within his

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236. AWDAH, *supra* note 61. The widely-available English edition of this work, CRIMINAL LAW OF ISLAM (1987) (English, 3 vols.), should be used with care.

237. See 1 AL-TASHRI‘, *supra* note 236, at 493–95; 2 CRIMINAL LAW OF ISLAM, *supra* note 236, at 206–10.



home.<sup>238</sup> Unless, that is, it is “probable” that a person is committing a sin, through “indicative signs” (*amarat dallat ‘ala dhalik*) or “corroborative information” (*khabary yaghlib ‘ala al-dhann sidqihī*), in which case one may spy or otherwise investigate the wrongdoing; and Awdah’s examples of this simply copy and update the classical examples.<sup>239</sup> So too, Awdah says in the same discussion, may one enter a private home without permission if two people volunteer information that the occupant is committing a sin therein, or if wrongdoing inside the home becomes apparent outside such as through the smell of wine or the sounds of drunkards.

Awdah also discusses limits on the manner and scope of approved intervention, which include a list of seven methods of increasing severity (to Ghazzali’s eight), principles of necessity and proportionality, and a rule that one who exceeds these limits is “accountable for the excess” (*mas’ul ‘an al-ziyadah*), by which Awdah apparently means one is subject to criminal or civil liability for unwarranted injury to person or property.<sup>240</sup> Not surprisingly, Awdah supports these positions with citations to the Quranic verses and Traditions we know well. He also cites Ghazzali and Mawardi, and little else, in footnotes to this material. There is, in other words, little more or different about search and seizure, in the most widely-cited modern treatise on Islamic criminal law, from what we find in the classical literature. Awdah also does not discuss the exclusion of evidence as a consequence of a search or seizure that violates the rules he presents; recall, though, that he presents these rules as defenses to criminal liability rather than affirmative constraints on law enforcement.

As we have seen, other modern Muslim scholars add doctrines or rules that do not appear in the classical texts—a warrant requirement for searches and seizures, an exclusionary rule for violations, and more.<sup>241</sup> But these thinkers cite essentially the same classical authorities that Awdah cites, that we know well, and that we know do not call for such rules. The influence of modern notions of criminal due process is obvious in these assertions; in making them Muslim scholars

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238. 1 AL-TASHRI’, *supra* note 236, at 502–04; 2 CRIMINAL LAW OF ISLAM, *supra* note 236, at 219–20.

239. To wit: smelling hashish outside a home, being told by a “reliable person” that a man has secluded himself with a woman in order to commit adultery, or hearing a gunshot. 1 AL-TASHRI’, *supra* note 236, at 504; 2 CRIMINAL LAW OF ISLAM, *supra* note 236, at 220.

240. See 1 AL-TASHRI’, *supra* note 236, at 504–08, 510; 2 CRIMINAL LAW OF ISLAM, *supra* note 236, at 220–29, 237–38.

241. See *supra* text accompanying notes 79–83.

seem genuinely to *want* to find these search and seizure rules in Islam. What to make of this desire—a desire that is both conceptually legitimate and capable of being fulfilled, in my view—is a matter I address in the Conclusion. For now, the important point is that modern discussions of search and seizure doctrine in Islam add little to classical discussions of the matter, beyond assertions of modern-sounding rules that are not clearly grounded in the sacred texts or classical jurisprudence.

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This concludes our survey of Quranic verses, Traditions, and jurisprudence on search and seizure in Islamic law.<sup>242</sup> Let us assess what we have found so far, in light of the scope of inquiry set out in Part II.A above—that is, the seven aspects of Fourth Amendment doctrine that I identified there as fundamental.<sup>243</sup> We have seen much of the first and second aspects—rules that govern investigating individuals through *searches* of them, their homes, their correspondence and their belongings, and rules that govern the *seizure* of individuals and, to some extent, the seizure of property. Specifically, standards for both search and seizure that sound much like the Fourth Amendment’s reasonable suspicion standard appear, as do rules for pretrial detention that mirror the American ones in turning on the nature of the offense and the quantum and quality of evidence against an accused. (Even the focus on an accused’s “reputation”—what is known of his character and prior record—as a criterion for detention is not wholly unfamiliar.<sup>244</sup>) But instead of a presumptive warrant requirement, there is a basic doctrine of “manifestness,” which forbids acting on wrongdoing unless it is apparent without investigation.

As for the third aspect, *judicial authorization* for searches or seizures, we have not seen a requirement of prior judicial authorization—*i.e.*, a warrant—for either act. We have, however, seen the suggestion of at least post-hoc review by a judicial authority, in the instances in which Muhammad or a Companion ordered the release of a detainee, and,

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242. I hasten to note that the presentation above does not include every single report from the Traditions that jurists have cited on the matter, nor of course does it present every statement on the topic by a Muslim jurist or scholar. It does, however, include what appear to be the most representative and commonly-cited selected Traditions and juristic opinions that I have found in the literature.

243. *See supra* text accompanying notes 47–48.

244. The federal preventive detention statute, for instance, lists “the history and characteristics” of a defendant among the factors judges should consider in deciding between detention and release, and specifies that this includes, *inter alia*, the defendant’s “character,” “past conduct,” and “criminal history.” 18 U.S.C. § 3142(g)(3).

### ISLAM'S FOURTH AMENDMENT

regarding searches, in the Umar stories themselves. There are *exceptions* (the fourth aspect) to the manifestness doctrine, when there are sufficient indicia of guilt (Ghazzali) or the suspected crime is especially grave (Mawardi). There are limits on the *manner and scope* of authorized interventions (the fifth aspect), in rules of necessity and proportionality that echo those of our Fourth Amendment. There is some mention of *remedies or sanctions* for rule violations (the sixth aspect), in the threat of civil or criminal sanctions, but no development of the exclusionary rule Umar suggested; indeed that rule is rejected in the one direct mention of it I found in the classical literature. And we have not seen a corollary to the seventh aspect I identified, which might be seen as the defining aspect of the Fourth Amendment: the rule that its requirements and limitations apply only to *state actors*. On the contrary, we have seen the opposite: all Muslims can be bound by the search and seizure rules of Islam.

I will comment on these findings in Part IV and the Conclusion. First, however, we must explore what evidence of these rules and others can be found in Muslim criminal practice, historically and today.

### III. SEARCH AND SEIZURE IN MUSLIM PRACTICE

In this part of the Article, I present the evidence I have found of search and seizure practices, or their absence, in Muslim history. In the Introduction, I explained in general terms the approach I took in researching practice, and the limitations of this research, given the vastness of the inquiry and the relatively small number of sources it has been feasible to consult for the purposes of this study. Some additional explanations and caveats are required. For evidence of practice, my sources are primarily secondary studies by modern historians of various texts that span the centuries of Islam.<sup>245</sup> These texts include court

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245. These sources include, in addition to sources cited elsewhere in this article (and many others I reviewed but in which I did not find relevant material): GABRIEL BAER, *STUDIES IN THE SOCIAL HISTORY OF MODERN EGYPT* (1969); HEYD, *supra* note 18; GALAL H. EL-NAHAL, *THE JUDICIAL ADMINISTRATION OF OTTOMAN EGYPT IN THE SEVENTEENTH CENTURY* (1979); EHUD R. TOLEDANO, *Law, Practice, and Social Reality: A Theft Case in Cairo, 1854*, in *STUDIES IN ISLAMIC SOCIETY: CONTRIBUTIONS IN MEMORY OF GABRIEL BAER* 153, 153 (Gabriel R. Warburg & Gad G. Gilbar eds., 1984); ABRAHAM MARCUS, *Privacy in Eighteenth-Century Aleppo: The Limits of Cultural Ideals*, 18 *INT'L J. MIDDLE EAST STUDIES* 165 (1986) [hereinafter *Privacy in Aleppo*]; ABRAHAM MARCUS, *THE MIDDLE EAST ON THE EVE OF MODERNITY* (1989); PETERS, *A Murder Trial*, *supra* note 28; RUDOLPH PETERS, *Murder on the Nile: Homicide Trials in 19<sup>th</sup>-Century Egyptian Shari'a Courts*, in *XXX DIE WELT DES ISLAMIS* 98 (1990); GERBER, *supra* note 18; PETERS, *Role and Function of the Qadi*, *supra* note 19; EYAL GINIO, *The Administration of Criminal Justice in Ottoman Selanik (Salonica) During the Eighteenth Century*, 30

records, manuals for judges, collections of rulings, chronicles, histories, and jurisprudential treatises. I also reviewed a number of primary texts myself. None of these primary texts or secondary studies are devoted to matters of search and seizure. Some of the studies focus broadly on criminal law or procedure, but they do so as works of history rather than as comparative analyses of legal practice. Indeed, nearly all of the secondary studies are works of history, written from the perspectives of historians rather than of lawyers or legal scholars. And the primary sources themselves pose problems as evidence of practice. *Qadi* court records, for instance, are typically no more than mere case summaries, listing the names of parties and little more, and giving little information about the context of the case, the legal basis of the *qadi*'s decision, or—most important for our purposes—the procedure by which he reached it.<sup>246</sup> How representative or even accurate these records are is also unclear.<sup>247</sup>

With these caveats in mind, and a reminder that my findings are necessarily illustrative and suggestive rather than comprehensive and conclusive, let me present a *précis* of the findings that follow. First, there is historical evidence that at least some constraints on search and seizure have clearly been recognized in practice throughout the centuries and lands of Islam. The primary evidence of this lies in anecdotal accounts of citizens' complaints of relevant illegalities—typically home intrusions, unlawful arrests, or extended detentions without trial—and responses to these complaints by *qadis* or rulers. In other words, that these complaints were recorded and honored, indeed that they were lodged in the first place, indicates that search and seizure constraints

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TURCICA 185 (1998); Khaled Fahmy, *The Police and the People in Nineteenth-Century Egypt*, in XXXIX DIE WELT DES ISLAMIS 340 (1999); COOK, *supra* note 87; Christian Muller, *Judging with God's Law on Earth: Judicial Powers of the Qadi Al-Jama'a of Cordoba in the Fifth/Eleventh Century*, 7 ISLAMIC L. & SOC'Y 159 (2000); Delfina Serrano, *Legal Practice in an Andalusian-Maghribi Source from the Twelfth Century CE*, 7 ISLAMIC L. & SOC'Y 187 (2000); Johansen, *supra* note 17; DAVID POWERS, LAW, SOCIETY, AND CULTURE IN THE MAGHRIB, 1300–1500 (2002); BOGAC ERGENE, LOCAL COURT, PROVINCIAL SOCIETY AND JUSTICE IN THE OTTOMAN EMPIRE [1652–1744] (2003); Delfina Serrano, *Twelve Court Cases on the Application of Penal Law Under the Almoravids*, in DISPENSING JUSTICE IN ISLAM: QADIS AND THEIR JUDGMENTS 473–93 (Muhammad Khalid Masud, Rudolph Peters & David S. Power eds., 2006) [hereinafter *Twelve Court Cases*].

246. See Dror Ze'evi, *The Use of Ottoman Court Records as a Source for Middle Eastern History: A Reappraisal*, 5 ISLAMIC L. & SOC'Y 35, 38, 48 (1998).

247. See *id.* at 39–41, 45–46, 50 (“[W]e may even ask whether the record of a trial in which a person was accused of embezzlement and other crimes and later sentenced to death really took place, or whether it was just a legal fiction intended to justify in retrospect a murder committed by the governor's agents.”).

had some place in everyday legal practice.

At the same time, questions of search or seizure do not appear to have been raised or considered as a routine matter in criminal cases—neither by investigating officials *sua sponte* (as in *Umar I*), nor by affected parties (as in *Umar II*, *Umar III*, and the modern-day American motion to suppress), nor by adjudicating officials (like a trial judge). General descriptions of trial procedure under the *sharia* are devoid of reference to any inquiry or other procedure whereby the propriety of a search or seizure is challenged, or even considered.<sup>248</sup> And while I have found a single account in which a *qadi* is reported to have been advised not to search a possible wrongdoer he encountered on the street (*à la Umar*), I have found no case that discusses search or seizure, let alone the exclusion of evidence for wrongful search or seizure, as a matter of trial procedure, evidence, or any other aspect of criminal investigation and adjudication. And this is true in sources that, as I will illustrate below, take pains not only to describe recorded criminal cases but to analyze them, indeed in some cases to classify them according to defenses raised by the parties. I also contacted authors of detailed secondary studies that described cases in which search or seizure issues seem most likely to have arisen if they were addressed in criminal practice. None of these authors could recall from their research a single instance of a challenge to testimony or other evidence, let alone its suppression, on grounds of unlawful search or seizure.

Moreover, the sources reveal repeated examples of judicial and executive practice in criminal cases that violates *other* jurisprudential norms—particularly the reliance on character evidence to establish guilt, and, more significantly, the use of torture to obtain confessions. The failure to adhere to the religious tenets that forbid these practices can only suggest that search and seizure constraints too were ignored. Indeed, some sources tell us that violations of these rules, particularly those against spying and prying, were *de rigueur* in Ottoman times, at least in part because of an Ottoman law that held communities collectively responsible for the wrongdoing of their neighbors.

In sum, the sources on criminal practice in the pre-modern Arab-Ottoman Muslim lands provides plenty of evidence that jurisprudential norms in general were not followed in criminal practice, and little evidence that search and seizure norms in particular were even consid-

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248. See, e.g., Frank E. Vogel, *The Trial of Terrorists Under Classical Islamic Law*, 43 HARV. INT'L L.J. 53 (2002); Ronald C. Jennings, *Kadi, Court, and Legal Procedure in 17th C. Ottoman Kayseri: The Kadi and the Legal System*, 48 STUDIA ISLAMICA 133 (1978).

ered. Of course, we cannot say definitively on this basis that search and seizure rules were not at all honored in the pre-modern Muslim centuries. The very existence of occasional complaints (outside of formal trial proceedings) and the apparent infrequency of these complaints could combine to mean just the opposite: that compliance with search and seizure rules was overwhelmingly the norm, violations were few, and complaints of violations were duly addressed and recorded. Without much more extensive research into existing primary sources from specific places and periods, we simply cannot say.

Section A below presents the evidence I have found of search and seizure practice in the lands of Islam from the seventh century through the nineteenth—*i.e.*, from the beginning of Islam until the last one hundred years or so, when Western-style legal codes and constitutions were adopted in virtually every country of the Muslim world. In section B, I comment briefly on search and seizure protections in the constitutions and codes in selected countries of the contemporary Muslim world.

A. *The Pre-Modern Era: from 7<sup>th</sup>-century Iraq to 19<sup>th</sup>-century Egypt*

1. Criminal Law Enforcement

To begin with, it appears to have remained the case in every period and place that both the formalities of jurisprudential doctrine and the person of the *qadi* had little role in criminal investigation and adjudication, and that instead the ruler and his agents administered the bulk of criminal law. This suggests that the search and seizure rules promulgated by jurists likely played little role in criminal matters. We have evidence that executive actors dominated criminal adjudication in eleventh-century Cordoba, in a modern study of legal rulings issued then and there.<sup>249</sup> Court records from Ottoman Egypt in the sixteenth and seventeenth centuries paint a similar picture; the leading study of *qadi* court registers from that region and period unearths very few criminal cases, indicating that these cases were adjudicated outside of the courts of *qadis*.<sup>250</sup> The same goes for seventeenth-century Tripoli (Libya), where reportedly only one of some fifty-five judgments in a

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249. See Muller, *supra* note 245, at 161, 175–76.

250. See EL-NAHAL, *supra* note 245. In one register, criminal cases constituted fewer than 3% of five hundred cases recorded in a year. *Id.* at 25.

*qadi* court register from the years 1666–67 is a criminal matter.<sup>251</sup> In eighteenth-century Aleppo (Syria) too, criminal matters were largely the domain of police and governors, we are told from the leading study of the pertinent *qadi* court records;<sup>252</sup> so too in eighteenth-century Salonica, we learn from a study of its *qadi* court records, where the governor had the express power to arrest suspects, investigate crime and adjudicate criminal charges, and very few criminal cases appear in the records.<sup>253</sup>

More broadly, we know this about the Ottoman Empire generally in the fifteenth through the seventeenth centuries, from the classic and still-authoritative study of criminal practice there, Uriel Heyd's *Studies in Old Ottoman Criminal Law*.<sup>254</sup> From his extensive study of Ottoman court records, Heyd tells us that criminal suspects were punished, even executed, without having been tried by a *qadi* or even an agent of the ruler's court.<sup>255</sup> Penal codes promulgated by the Sultan permitted jailing suspects and even torturing them in order to obtain confessions.<sup>256</sup> For convictions, insufficient proof was no hindrance; officials could rely on other evidence forbidden by formal jurisprudence—circumstantial evidence, reputation evidence, the defendant's prior record, and witnesses who did not meet the *sharia's* competency requirements.<sup>257</sup> Similar information comes in Abraham Marcus's portrayal of eighteenth-century life in the Syrian town of Aleppo, as least as he found it reflected in that city's court records. Police had broad powers to search and arrest, Marcus tells us, and any restraints on the use of these powers regularly gave way to concerns of public order.<sup>258</sup>

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251. See MALLAT, *supra* note 42, at 64–66, 79. Later registers from the city appear to have been much the same. See *id.* at 80 & 80 n.288, 81 & 81 n.290 (citing one report of a capital case and reports of only “several instances” of lesser criminal cases in eight subsequent registers).

252. MARCUS, *EVE OF MODERNITY*, *supra* note 245, at 78–79, 104–05, 107–09, 114–15.

253. Ginio, *supra* note 245, at 201. Ginio notes that there were also other institutions that handled criminal matters there, as elsewhere, and suggests that mediation was the most common method of resolving criminal cases, particularly when there was insufficient proof of guilt under *sharia* requirements. *Id.* at 187–88, 192, 206–07. The same study tells us that *qadis* had, in a quasi-appellate role, the power to reverse judgments issued by lower *qadis*, the governor, or other provincial officials. “Illegal methods of investigation” were one ground for reversal, but the only example provided of this is torture. *Id.* at 197–98.

254. HEYD, *supra* note 18.

255. *Id.* at 193.

256. *Id.* at 201–02.

257. *Id.* at 193, 202.

258. MARCUS, *EVE OF MODERNITY*, *supra* note 245, at 78–79, 105, 110, 120.

A similar divide between judicial norm and executive practice in criminal law prevailed in nineteenth century Egypt, we know from Rudolph Peters' many studies. Peters says that the *sharia* was "the law of the land" there and then, applied by *qadis* in criminal matters as well as others; but still, most crime was dealt with by administrative agents and "secular" councils that were not bound by *sharia* rules of evidence.<sup>259</sup> In fact, in many instances *qadis* apparently handed over criminal cases to administrative authorities for adjudication, after having conducted fact-finding hearings or even having fully adjudicated the cases according to the *sharia*; and this occurred even with criminal cases that the penal codes expressly delegated to *qadis*.<sup>260</sup> Among the criminal cases that might never even have reached the *qadis* were those of public drunkenness—one of the fixed religious crimes, as we know; Peters tells us he came across no conviction for that offense in the *qadi* sentences he sampled, leading him to suspect that those cases were dealt with summarily by the police.<sup>261</sup> Meanwhile, in serious crimes, village leaders were responsible for arresting suspects and investigating crimes while awaiting the arrival of a district police officer, according to an 1871 law.<sup>262</sup> The police would then interrogate witnesses and otherwise complete the investigation, and then pass the case on to administrative authorities for trial.<sup>263</sup> That search-and-seizure norms were observed by all of these administrative-executive officials, given the evidence that these officials routinely ignored other jurisprudential norms, seems unlikely. And by 1883, the *qadi*'s competence in criminal matters came to an end, through the judicial reforms that brought French-inspired penal codes to Egypt and signaled the advent of the modern period.<sup>264</sup>

In other words, religious rules and norms do not appear to have been a prominent feature of criminal investigation and adjudication throughout the lands and centuries of Arab-Ottoman Islam. This suggests that the search and seizure rules jurists promulgated likely played little role in criminal matters. Let us turn now to specific evidence of the practice or violation of these rules.

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259. See Peters, *Role and Function of the Qadi*, *supra* note 19, at 70, 72, 75, 79.

260. *Id.* at 72, 78–83.

261. *Id.* at 83.

262. See Peters, *A Murder Trial*, *supra* note 28, at 88 n.16.

263. *Id.* In homicide cases, though, a *qadi* tried the case first, following the *sharia*, in order to satisfy the "private" claim of the next-of-kin, before passing the case on for "secular" adjudication by administrative authorities. See *id.* at 86.

264. *Id.* at 72, 78.



## 2. Entering Homes

We have evidence that the Quran's "enter not" command and Umar's applications of it were not always followed in the early centuries of Islam, as the religion formed a polity centered around what is today Iraq. Michael Cook's exhaustive review of early classical texts in his study of commanding right and forbidding wrong provides anecdotal evidence of this.<sup>265</sup> Cook unearths, for example, a report from Ibn Hanbal that an early Muslim governor, Sufyan al-Thawra (d. 778), noted with "horror" that certain individuals, apparently *muhtasibs*, had taken to raiding homes, climbing walls so as to surprise the occupants in wrongdoing.<sup>266</sup> Some two hundred years later, followers of Ibn Hanbal's own school of law reportedly "went wild" in Baghdad, attempting to enforce their particularly strict brand of commanding and forbidding by, *inter alia*, "plunder[ing] shops" and "raid[ing] the homes of military leaders and others to search for liquor, singing-girls or musical instruments."<sup>267</sup> Another century or so later, according to a Hanbali diarist, some residents of a Baghdad neighborhood complained to the caliph that a prominent local leader (*sharif*) and his associates had raided their homes in search of liquor when they had none; the *sharif* replied that he had found liquor in the homes and poured it out.<sup>268</sup> All, however, agreed that he had also improperly smashed musical instruments he had found in the homes.<sup>269</sup>

Moving a bit to the northwest, and ahead several centuries, Abraham Marcus opens one of his studies of eighteenth-century Aleppo with an account that falls squarely within our sights:

On the night of May 26, 1762, several residents of the Syrian city of Aleppo entered a house in the neighborhood uninvited. The owners were not in, but several unveiled women sitting in male company were there to greet them. If the scene proved less compromising than the intruders expected, it did confirm their suspicion that the house was a meeting place for illicit relations. The following day they turned in the owners, a man and his

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265. COOK, *supra* note 87.

266. *Id.* at 99.

267. *Id.* at 117.

268. *Id.* at 118–19.

269. *Id.* at 119. Compensation was then discussed as a remedy, but it is not clear it was ordered. See also *infra* text at note 301.

mother, to the court and secured the *qadi*'s consent to have them expelled from the neighborhood.<sup>270</sup>

This episode appears more aberrational than representative; Marcus recalls it as “the only such occurrence” in the thousands of court cases he read in his research, and therefore “clearly not part of any common or even infrequent practice in the city.”<sup>271</sup> The same, then, likely applies to Marcus’s mention of the “universal horror” raised when rebels entered harems in search of the male property-owners who declined to join them during a violent uprising in 1769.<sup>272</sup> At the same time, Marcus wonders, as should we, whether executive officers—as opposed to the private-citizen intruders in both tales above—might have violated domestic privacy regularly in their criminal law enforcement.<sup>273</sup> In Marcus’s view, that he found no such complaints could mean that they did not, or that they did, and citizens either accepted the practice as legitimate or did not complain about it for fear of reprisal.<sup>274</sup> Heyd, meanwhile, reports in passing a decree by an Ottoman ruler that apparently forbade entering private homes in search of drunkenness.<sup>275</sup> Presumably, the decree issued because the practice was occurring. And it is clear that police in nineteenth-century Egypt had both the authority and the means to search “private and public grounds” via “detectives” (*bassasin*), and that they used this power “to ascertain the veracity of . . . testimony given during . . . investigation” and “establish or destroy the credibility of witnesses.”<sup>276</sup> What constraints on this power or judicial review of it existed, if any, are not apparent.

### 3. Suspecting Others and Spying

We have more affirmative evidence that the Quran’s “spy not” command was routinely disobeyed. We are told, for instance, that in Egypt under the Mamluks (13<sup>th</sup>–16<sup>th</sup> centuries), both the governor and the *muhtasib* were authorized to look into the behavior of “suspect” people, and the resulting “trials of suspicion” could be heard and

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270. Marcus, *Privacy in Aleppo*, *supra* note 245, at 165. See also MARCUS, *EVE OF MODERNITY*, *supra* note 245, at 117.

271. Email correspondence with author (on file with author).

272. Marcus, *Privacy in Aleppo*, *supra* note 245, at 170 (quoting ALEXANDER RUSSELL, 1 *THE NATURAL HISTORY OF ALEPPO* 295 (1794)).

273. Email correspondence with author (on file with author).

274. *Id.*

275. HEYD, *supra* note 18, at 233.

276. Toledano, *supra* note 245, at 157 n.11, 162–63 n.34.

decided without the witness testimony required by the *sharia*.<sup>277</sup> Heyd tells us that Ottoman police were known to employ spies, and the Sultan himself reportedly walked the streets in disguise in search of wrongdoers.<sup>278</sup> And Marcus paints a vivid picture of “spy not” violations in eighteenth-century Aleppo: given the Ottoman policy of collective punishment for wrongdoing, Marcus reports, neighbors spied on one another constantly, ratting out wrongdoers to authorities if they did not cease unlawful behavior—the drinking or selling of wine, for instance, or the running of a brothel in one’s home, along with illicit affairs and premarital pregnancies.<sup>279</sup> In other words, both government officials and private citizens found cause to disobey this core “search and seizure” rule, indeed core Quranic principle of society, apparently with impunity. Routine surveillance of civilians by police officials and their agents was apparently also a feature of law-enforcement in nineteenth-century Egypt. The search-empowered *bassasin*, whom Toledano called “detectives,” are called “spies” by Khaled Fahmy, who reports from his studies of Cairo police records that these covert informants were among the features of an increasingly powerful and intrusive state apparatus in the period.<sup>280</sup>

#### 4. Arrest and Pretrial Detention

There is some evidence that Ibn Taymiyya’s reputation-based detention doctrine influenced decisions on pretrial jailing. In her recent study of twelve criminal cases from the 11<sup>th</sup>–12<sup>th</sup> century Muslim West (parts of today’s Spain and Morocco), Delfina Serrano reports that accusees of rape, blasphemy, nonviolent theft and murder were jailed if the *qadi* “accepted” the accusation as “valid,”<sup>281</sup> though on what basis the *qadi* so accepted an accusation is not clear. In any case, an accused murderer could avoid jailing upon establishing an alibi and assuring the *qadi* of his good reputation, provided there were no “conclusive

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277. Johansen, *supra* note 17, at 190–91.

278. HEYD, *supra* note 18, at 233.

279. Marcus, *Privacy in Aleppo*, *supra* note 245, at 116–17; *see also* MARCUS, *EVE OF MODERNITY*, *supra* note 245, at 177. Marcus sees the policy of collective punishment as a method of social control that “exploited group familiarity to manufacture, at minimal cost and effort for [the government], a system of indirect policing as well as a lucrative source of revenue” from the criminal fines that resulted. *Id.*

280. Fahmy, *supra* note 245, at 350–51, 353–54, 366, 376; *see also supra* text accompanying note 276.

281. Serrano, *Twelve Court Cases*, *supra* note 245, at 480, 487, 490.

proofs against him”<sup>282</sup> (the meaning of which is also unclear). Once jailed, however, an accusee’s proof of good character apparently did not suffice to release him, at least in one case of murder and another of nonviolent theft.<sup>283</sup>

But in the Ottoman Empire a few centuries later, as in our own common-law history, arrest was as much a duty of private citizens as of police officials, and one can only wonder whether the doctrines of Ibn Taymiyya and others were even known, let alone followed. Heyd tells us Ottoman officials required residents of the neighborhood in which a murder, robbery, theft, assault or arson occurred to locate and produce the offender, and if they failed at that then to pay whatever compensation was due the victim.<sup>284</sup> Family members were responsible for locating an offender who fled.<sup>285</sup> Witnesses to a crime were apparently obliged to seize the offender and bring him to trial, or suffer punishment themselves; and, in an echo of the Anglo-American “hue and cry,” a citizen could apparently have a suspect arrested on the street merely by crying out, “I have a legal claim against him.”<sup>286</sup> When a defendant refused to comply with a plaintiff’s demand that he appear in court, the plaintiff could retain a private agent or a government official to arrest him, and the defendant would then be required to reimburse the plaintiff for the agent’s fee.<sup>287</sup> That in undertaking these arrests private citizens wrestled with the fine points of juristic doctrine seems unlikely.

Nor were government officials necessarily constrained by any arrest rules when they were doing the seizing. In eighteenth-century Aleppo, Marcus tells us, arbitrary arrests were standard practice, as was interrogation by torture.<sup>288</sup> But arrest procedures were apparently not always and everywhere without constraints. An Ottoman document Heyd unearths from the year 1540 requires prior authorization by a *qadi* or his deputy for arrests in serious offenses.<sup>289</sup> The absence of such an official in the neighborhood, combined with a risk of flight, permitted arrest without such authorization, according to the document, but the defendant would then have to be brought before a *qadi*,<sup>290</sup> presumably

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282. *Id.* at 480.

283. *Id.*

284. *See* HEYD, *supra* note 18, at 235.

285. *Id.*

286. *Id.* at 237.

287. *Id.* at 237–38.

288. MARCUS, *EVE OF MODERNITY*, *supra* note 245, at 88, 114–15, 118, 120.

289. HEYD, *supra* note 18, at 238.

290. *Id.* at 238. Heyd does not say how soon after the arrest this had to take place.

for judicial review of the arrest. Bondsmen and others whose task it was to locate and produce defendants who had fled were given letters to present to the *qadis* in whose districts the search would take place, and Heyd surmises these letters stated that their bearers had the right to seize the defendants,<sup>291</sup> like warrants. The bearers could then ask the local officials to arrest and bind the defendant for his return to court.<sup>292</sup> (Heyd also tells us many criminal suspects were released only upon posting bond, particularly those who had criminal records or were “commonly known” as criminals;<sup>293</sup> here is a vestige of Ibn Taymiyya’s reputation-based arrest doctrine.)

Similarly, in Egypt in the seventeenth century, each *qadi*’s court was staffed by a bailiff whose duty it was to “summon” criminal defendants upon the request of a complainant or order of the governor or *qadi*.<sup>294</sup> The court registers indicate that defendants usually responded voluntarily to summons; unwilling defendants were arrested by police or military officials.<sup>295</sup> Also, as Heyd had reported about the central Ottoman lands, in Egypt two neighbors or others in the proximity of a crime were obligated to produce a defendant; but details about who actually effected the arrest and how it was carried out in a given case are not recorded.<sup>296</sup>

The Egyptian court registers El-Nahal studied do indicate that when a complainant brought a complaint against a suspect who had fled, the *qadi* “investigated” it; so too if a crime were reported instead to the governor, who would refer the case to the *qadi* for investigation.<sup>297</sup> The typical investigation consisted of a visit to the crime scene by two court-certified witnesses, occasionally with the complainant, an agent of the governor, or the *qadi* himself in tow.<sup>298</sup> These individuals then examined the corpse of the murder victim or the home of the burglarized plaintiff, questioned neighbors and bystanders, and arrested suspects—but neither procedures nor standards for such searches or seizures are reported.<sup>299</sup> And routinely, the reports from investigations by certified witnesses were recorded in the register “for use when the

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291. *Id.* at 238–39.

292. *Id.* at 240. Again, searchers could be held liable for failing to produce the suspect. *Id.*

293. *Id.*

294. EL-NAHAL, *supra* note 245, at 20.

295. *Id.* at 20–21.

296. *Id.* at 21.

297. *Id.* at 26.

298. *Id.*

299. *Id.* at 26–27.

defendant was arrested”<sup>300</sup>—for use as evidence at trial, apparently. That these reports justified the arrest itself, and thus likely any pretrial detention, seems implicit.

## 5. Complaints and Remedies

There is sporadic evidence of complaints about unlawful searches or seizures; but it is scant, and what results from the complaints is not always clear. We do know that from the earliest centuries of Islam, officials who violated search or seizure norms could be required to compensate the injured parties. In the tale Cook recounts about the prominent local leader in seventh-century Baghdad whom residents complained had raided their homes in search of liquor, debate ensues over whether the man owes the residents compensation for the musical instruments he had destroyed after entering.<sup>301</sup> In the Ottoman Empire, citizens who claimed abuse in the criminal process by governors or their agents could request an investigation from the sultan himself.<sup>302</sup> Penalties for the official found to have acted unjustly included dismissal and transfer; but they were apparently meted out unevenly. In a case heard by a *qadi* in which townspeople accused the governor of Damascus of jailing and fining them without trials or proof, the *qadi* ordered the return of the monies but apparently spared the governor any punishment.<sup>303</sup>

A recent study of Ottoman legal practice in the 17<sup>th</sup> and 18<sup>th</sup> centuries suggests a similar state of affairs, but relies on sources that offer a different window into search and seizure practices. Haim Gerber studied three sources from this period in Istanbul and Bursa: *qadi* registers, *fatwa* collections, and a recently-published “Book of Complaints,” which collects grievances against government officials that were filed by everyday citizens of the region over a nine-month period in the year 1675 and sent to the central Ottoman government.<sup>304</sup> In the *qadi* register of 17<sup>th</sup>-century Bursa, Gerber finds no complaints against the police chief for illegal or despotic behavior; on this ground he exonerates that particular official from any such wrongdoing.<sup>305</sup> From the *fatwa* collections, Gerber reports a *fatwa* holding

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300. *Id.*

301. COOK, *supra* note 87, at 119. Cook does not report the outcome.

302. HEYD, *supra* note 18, at 212.

303. *Id.* at 211–12.

304. GERBER, *supra* note 18, at 15, 22, 87.

305. *Id.* at 137.

that a police chief who beat a non-Muslim villager to death should himself be executed, and another ordering unspecified punishment for police officials who tortured a suspected thief “without real evidence” to the point where he lost an eye.<sup>306</sup> Gerber also reports two cases of alleged unlawful arrests by local officials or villagers, but neither any resolution nor remedy is mentioned.<sup>307</sup>

In the *Book of Complaints*, Gerber finds “several hundred” of the nearly 3,000 grievances to be claims of wrongdoing by governors and police chiefs.<sup>308</sup> Among these are one in which a group of citizens protested that the governor of their province had seized them in a murder case without any suspicion; a *fatwa* supporting their cause apparently accompanied their complaint.<sup>309</sup> But Gerber does not say what remedy, if any, was requested or issued. There are also two successful complaints of detentions without trial for three months,<sup>310</sup> suggesting that period of time as a possible upper limit on pretrial detention. In the first of these cases, a villager protested the three-month “administrative” detention of his slave, whom the governor’s agent had seized when sent to arrest the villager himself. The central government confirmed the illegality of the action, but no remedy is indicated. In the second case, the central government deemed unlawful an individual’s arrest and three-month detention, and the confiscation of his horses and sheep, all on suspicion of banditry.<sup>311</sup> In this case the prompt return of the man’s property was ordered.<sup>312</sup> In both cases, the officials were understood to have been acting to curb crime—*i.e.*, pursuant to their delegated duty to maintain public order—but the acts were found illegal for the explicit reason that the matters had not been referred to the *qadi*’s court for adjudication.<sup>313</sup> This indicates that *qadis* provided some form of judicial review and relief in arrest and detention. And *qadis* themselves generally stayed well within legal limits in the period, Gerber finds, and cases of alleged wrongdoing by them were seriously investigated by state officials.<sup>314</sup>

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306. *Id.* at 111.

307. *Id.* at 161.

308. *Id.* at 70.

309. *Id.* at 87–88.

310. *Id.* at 170.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 159. Financial wrongdoing was apparently the predominant complaint against *qadis*, just as most complaints against local officials were for the extortion of illegal taxes. *Id.* at 159–62.

Gerber concludes from his study that the *Book of Complaints* shows no evidence of large-scale despotic behavior by the central government.<sup>315</sup> Indeed, he considers the volume affirmative evidence of non-despotism in the region and period, especially given its documentation of instances in which the government instructed the *qadi* to look into particular complaints.<sup>316</sup> What does all of this suggest about search and seizure practices? Regarding the *qadi* register, Gerber writes, “A type of grievance not found in the register apparently did not exist in real life, at least not on a massive scale.”<sup>317</sup> The same, it would seem, could be said of the *fatwa* collections and the *Book of Complaints*; as Gerber notes, the very existence of the latter volume shows that citizens had the ability to challenge the conduct of government officials.<sup>318</sup> Does the paucity of complaints about matters of search or seizure mean that wrongdoing in this area was infrequent; or that it was common but expected; or that complaints were unrecorded, or directed elsewhere; or that citizens were simply reluctant to complain about it? Again, we cannot say for sure; but Gerber’s conclusions would seem to rule out the last of these possibilities. Even so, Gerber’s study is silent about whether search and seizure issues were raised in criminal cases themselves.

Such silence continues in Gamal El-Nahal’s short summaries of some fifteen criminal cases from the *qadi* registers of 17<sup>th</sup>-century Egypt, at least regarding search issues, even when the facts of a case might have raised them. In El-Nahal’s summaries, we find defendants who present various defenses to the charges against them—insufficiency of the evidence, witness bias or untruthfulness, duress, character evidence (as proof of innocence), oaths of innocence, and actual evidence of innocence (in the form of witness testimony).<sup>319</sup> Most of these cases are of homicide or assault, but at least two are of thefts in which questions of both search and seizure could presumably have arisen;<sup>320</sup> but there is no mention of such questions. El-Nahal does report a few cases in which citizens accused government officials of unlawful conduct, and among these cases are two accusations of unlawful arrest, followed by an unlawful fine in the first case and a beating and unlawful imprison-

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315. *Id.* at 161.

316. *Id.* at 182.

317. *Id.* at 70.

318. *Id.* at 156.

319. EL-NAHAL, *supra* note 245, at 28–31.

320. *Id.* at 30.



ment in the second.<sup>321</sup> In both cases the *qadi* ordered the imprisonment of the offending official.<sup>322</sup>

That there is some evidence of complaints and remedies in matters of arrest and detention, however, makes the absence of evidence of similar attention to searches all the more telling. Perhaps the most striking examples I found of this are in Bogac Ergene's study of court records from two Ottoman provinces in the 17<sup>th</sup>–18<sup>th</sup> centuries, containing 5,000 individual entries.<sup>323</sup> Among these records Ergene finds a petition to the central government by seven soldiers who requested their immediate release from a detention of over three months, on what they claimed were legally unsubstantiated allegations of corruption.<sup>324</sup> Ergene does not mention any response to the petition. (One does, however, again suspect that three months was something of a detention threshold, given the number of complaints that mention that time period.) Ergene also describes in great detail several criminal cases that clearly involved searches but apparently did not raise questions of their legality. In a case from the year 1736, a husband and wife were accused of stealing money, jewelry and other belongings from the house of another over a year earlier. "[S]ome of these items had been found in the house of the couple," Ergene notes, dropping a footnote to say: "I do not know how."<sup>325</sup> The defendants claimed they had purchased the items elsewhere, but two witnesses testified that the items "that were found" in the couple's house belonged to the complainant; the court ordered the items returned.<sup>326</sup> An agent for another couple then accused the defendants of having stolen property of this second couple; again the record indicates that some the items had been found in the defendants' home; again Ergene laments, "I do not know how, or by whom"; and again the court finds for the complainants and orders the property returned.<sup>327</sup> Several individuals then present unfavorable character evidence about the defendants; the complainants present a *fatwa* that says that when stolen belongings are found in the possession of individuals who cannot be proven to have committed the theft, the defendants should be imprisoned and interrogated; and

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321. *Id.* at 34–35.

322. *Id.*

323. ERGENE, *supra* note 245.

324. *Id.* at 158.

325. *Id.* at 155 & n.25.

326. *Id.* at 156.

327. *Id.* at 156 & n.26. Ergene at least shares our curiosity about the matter.

the court orders that the command of the *fatwa* be implemented.<sup>328</sup> There is, in other words, no apparent inquiry into how the items of either the first complainants or the second were found in the defendants' home, let alone into the legality of those discoveries.

In another case Ergene reports, villagers accused three neighbors of conducting heretical rituals and engaging in wife-swapping in their homes. Four witnesses swore they had actually observed the conduct, which they said included wine-drinking and anal intercourse; Ergene calls the testimony "extremely dubious" given religious practices at the time, concludes that we cannot be sure what if anything the witnesses actually saw, and adds that the record is "suspiciously vague about the conditions in which the witnesses had observed the activities of the defendants."<sup>329</sup> There is, in other words, again no apparent inquiry into how the witnesses came to be inside the defendants' homes to witness the alleged conduct and whether their presence there was lawful. (Nevertheless, the court decides to punish the defendants, though the nature of the punishment is not specified.<sup>330</sup>) And finally, Ergene reports a case in which the evidence against an alleged serial burglar included the testimony of two witnesses who said they had found the defendant "in his bed naked" when they had gone to his home to bring him to court.<sup>331</sup> Additional testimony included character evidence, but apparently no evidence that stolen property was found in the defendant's home (or that his home was even searched). The court sentenced the defendant to death;<sup>332</sup> but we do not know why—or whether, to be fair—the witnesses escaped sanction for entering the defendant's home, surely without the invitation of the naked (and sleeping?) defendant, and seizing him from there without a *qadi*'s prior approval, thus ostensibly violating both an established seizure procedure and the most basic search rule of Islam: enter not without permission.

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328. *Id.* at 156–57. Heyd had noted that the Ottoman criminal code provided for the torture of "suspicious" individuals who could not satisfactorily explain their possession of stolen goods. HEYD, *supra* note 18, at 116; Ergene, *supra* note 245, at 157 n.28. As Ergene notes, the purpose of either interrogation or torture in these circumstances is not clear; Sunni jurists apparently considered both practices methods of investigation, but they could very easily serve as punishments themselves. *Id.* at 158.

329. *Id.* at 165–66; see also *id.* at 166–67 & 167 n.51 ("The fact that [the *qadi*] urged the witnesses to take oaths to demonstrate the trustworthiness of their testimon[y], not a common practice in this period, suggests that he was suspicious of their actions.").

330. *Id.* at 165.

331. *Id.* at 167.

332. *Id.* at 168.

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It thus appears that there is very little in the historical record to suggest the routine practice of search protections in Muslim history, at least in the Arab-Ottoman lands, and little evidence of seizure protections until recent centuries. Nor is there much evidence that the doctrines of Muslim jurists were heeded or even considered in either of these matters. Indeed, in all of my research, I found only one instance in which a government official was reported to have expressly followed the rule of manifestness to refrain from acting on suspected wrongdoing. It is this report, in a footnote in Christian Muller's recent study of *qadi* records from 11<sup>th</sup>-century Cordoba:

A *qadi* of Cordoba met a man in the street who carried a drum in his hand and balanced a vessel on his head. The *qadi* wanted to destroy the illegal drum and search the vessel, presumably for additional illegal items. But a jurist who was in his company told him it was not his business, as a *qadi*, to search other people's household articles. His only task was to prevent what was obviously reprehensible [ . . . ; ] that is, he had to destroy the drum.<sup>333</sup>

No doubt Umar would have approved. But he also likely would have wondered, along with us, why so little other evidence of his laudable example, and the exclusionary rule he is credited with establishing, readily appears in the historical record. Is it because the search and seizure norms of Islam's sacred texts were observed so routinely in practice as not to merit mention? Or because they were ignored, forgotten, or affirmatively rejected as impractical or subordinate to the daily exigencies of criminal law enforcement? We do not know enough to say.

#### B. *Modern Period*

The uncertainty about search and seizure protections in Arab-Ottoman lands ends in the modern period, at least as a textual matter: the past two centuries have seen the adoption of Western-style legal codes and constitutions containing search and seizure protections in virtually every Muslim-majority country in the world.<sup>334</sup> The precise

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333. Muller, *supra* note 245, at 166 n.33.

334. Of the forty-four countries in the world in which Muslims constitute greater than fifty percent of the population, only Somalia has no recognized constitution. See TAD STAHNKE &

wording of the protections varies from country to country, as do the consequences for violating them. What matters for our purposes is that only in this period do rules governing search and seizure appear to have become a regular feature of criminal practice in the Muslim world. For instance, in the constitution of Egypt—the most populous Arab country, the first to adopt Western legal codes, and a model for other countries in the region—some five separate provisions govern matters of search and seizure.<sup>335</sup> Among these is a provision that says homes “shall have their sanctity” and “may not be entered or inspected except by a causal judicial warrant prescribed by the law.”<sup>336</sup> A separate code of criminal procedure elaborates on these protections, and the judiciary enforces them.<sup>337</sup> Violations can result in the exclusion of evidence via the French-inspired doctrine of “nullity,” as well as disciplinary proceedings against offending state actors or other legal remedies.<sup>338</sup> The constitution of British-influenced Pakistan, home of the world’s second-largest Muslim population (after Indonesia), contains a long and detailed provision on arrest and detention, and a separate short provision that declares inviolable the “dignity of man” and “the privacy of home”—the latter “subject to law,” that is.<sup>339</sup> Elaborations again are found in a separate code of criminal procedure, violations of which can, though do not necessarily, result in the reversal of convictions on grounds that the evidence was unlawfully obtained.<sup>340</sup> And Saudi Arabia—one of the few Muslim countries to have avoided Westernization and maintained *sharia* as its nominal state law—mentions search and seizure in the quasi-constitution it issued in 1992, the “Basic Law.” One provision of that law says that arrest and imprisonment are permitted only “under the rules of the system”; another

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ROBERT C. BLITT, THE RELIGION-STATE RELATIONSHIP AND THE RIGHT TO FREEDOM OF BELIEF: A COMPARATIVE TEXTUAL ANALYSIS OF THE CONSTITUTIONS OF PREDOMINANTLY MUSLIM COUNTRIES 6 n.6, 7 (2005), *available at* [www.uscirf.gov](http://www.uscirf.gov).

335. EGYPT CONST. arts. 41–45, *in* VI CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 2007), at 9.

336. EGYPT CONST. art. 44.

337. *See* Sadiq Reza, *Egypt*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 107, 114–24 (Craig M. Bradley ed., 2d ed. 2007), at 108, 114–24.

338. *Id.* at 122–23. On nullities under French law, *see* Richard S. Frase, *France*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 337, at 212–214.

339. PAK. CONST. arts. 33–35, 37, *in* XIV CONSTITUTIONS, *supra* note 335, at 11–13, 15.

340. M. FARANI, THE CRIMINAL PROCEDURE CODE [OF PAKISTAN], 1898 (2004), at 88–139 (listing code provisions and citing cases applying them); *id.* at 139 (citing cases holding that violating code provision requiring two witnesses for searches does not necessarily render search illegal).

follows the Quran in forbidding “enter[ing] houses without the permission of their owners.”<sup>341</sup> A criminal procedure code that became effective in May 2002 adds more detailed protections, but understandably departs from the “enter not” command: homes can be searched with warrants, and “all lawful means” can be used to effect entry should the occupant refuse it.<sup>342</sup> Yet the new code still maintains vestiges of the classical jurisprudence too, for instance in a requirement that state officials visit prisons and detention centers and review defendants’ cases to protect against unlawful detention.<sup>343</sup>

Whether these textual provisions translate into meaningful protections in everyday practice is another matter. In Egypt, a 1958 “emergency law” authorizes the warrantless arrest, detention and search of anyone who is “dangerous to public security and order” when the president declares a state of emergency.<sup>344</sup> Such a declaration was made in 1981 and remains in effect today; not surprisingly, reports of warrantless searches and arbitrary arrests and detentions (and much worse) issue annually.<sup>345</sup> Much the same appears to be the case in Pakistan, where search and seizure powers were expanded under a 1997 anti-terrorism enactment that also remains in force, indeed has been augmented since then.<sup>346</sup> And in Saudi Arabia, despite royal decrees on top of the regulations that limit search and seizure powers,

341. SAU. ARAB. BASIC LAW arts. 36, 37 in XVI CONSTITUTIONS, *supra* note 336, at 51.

342. SAU. ARAB. CODE CRIM. P., art 41 (unofficial translation, courtesy of U.S. Dep’t of State, on file with author).

343. *Id.*, art. 37.

344. See Sadiq Reza, *Endless Emergency: The Case of Egypt*, 10 NEW CRIM. L. REV. 532, 537–38 (2007).

345. See *id.* at 532, 539 n.17; U.S. STATE DEP’T, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EGYPT, at 1, 6–7, 10–11 (2005) *available at* <http://www.state.gov/g/drl/rls/hrrpt/2005/61687.htm>; U.S. STATE DEP’T, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EGYPT, at 1, 6, 9 (2004) *available at* <http://www.state.gov/g/drl/rls/hrrpt/2004/41720.htm>; U.S. STATE DEP’T, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EGYPT, at 1, 5–6, 8–9 (2003) *available at* <http://www.state.gov/g/drl/rls/hrrpt/2003/27926.htm>.

346. See HUMAN RIGHTS WATCH, WORLD REPORT 1998: PAKISTAN, at 2, *available at* [http://www.hrw.org/worldreport/Asia-09.htm#P823\\_214912](http://www.hrw.org/worldreport/Asia-09.htm#P823_214912) (describing the new provisions and noting significant public opposition to them); HUMAN RIGHTS WATCH, WORLD REPORT 1999: PAKISTAN, at 2–3, *available at* <http://www.hrw.org/worldreport99/asia/pakistan.html> (reporting order by Pakistan’s Supreme Court that certain provisions of Anti-Terrorism Act, including provision allowing warrantless home searches, be amended to conform with constitution); U.S. STATE DEP’T, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: PAKISTAN, at 14 (2002), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2002/18314.htm> (reporting promulgation of new anti-terrorist provisions in 1998, 1999, and 2001, expanded search powers under a new Police Ordinance, and warrantless entries by police); U.S. STATE DEP’T, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: PAKISTAN, at 7 (2005) *available at* <http://www.state.gov/g/drl/rls/hrrpt/2005/61710.htm> (report-

violations appear to be routine—particularly by the religious police (*mutawwa'in*), who are modern-day incarnations of none other than our old friends, the *muhtasibs*.<sup>347</sup>

Detailed study is needed of the law and practice of search and seizure—indeed of all aspects of criminal procedure—in countries of the modern Muslim world, country by country. Such study is beyond the scope of this Article. For present purposes, three central points about the modern period emerge. First, search and seizure protections are the law of the land, at least textually, in ways they appear never before to have been over the history of Islam. At the very least, they are recognized more formally, and developed more fully, than ever before. Second, these protections do not rest explicitly on “Islam”—*i.e.*, the *sharia*—even though, as we have seen, *sharia* doctrine supports them, indeed arguably mandates them, at least in some form. Third, without more information about both the modern and pre-modern periods, we cannot say for certain whether search and seizure practice correlates more closely now with the norms of Islam’s sacred texts.

In these three points lie hints of the possibilities and prospects for search and seizure rules in the Muslim world today. We will consider these possibilities and prospects in the Conclusion. First, however, we must complete our comparative analysis by considering the underlying theories and policies of search and seizure protection under the Fourth Amendment and in Islamic doctrine.

#### IV. COMPARATIVE THEORY AND POLICY

Protecting individuals against unjustified government invasions of privacy and deprivations of liberty or property is generally seen as the core set of interests the Fourth Amendment serves.<sup>348</sup> Which of these three values—privacy, liberty, or property—was the predominant moti-

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ing “routine[.]” practice of warrantless searches by ordinary police officers and security forces acting under Anti-Terrorism Act).

347. See U.S. STATE DEP’T, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SAUDI ARABIA, at 3, 4–5 (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61698.htm>. But these modern-day *muhtasibs* are apparently not burdened by the constraints that Mawardi and others placed on their ancestors. See Frank E. Vogel, *The Public and Private in Saudi Arabia*, *supra* note 32, 758–65 (2003) (discussing search and seizure powers and practices of contemporary Saudi *mutawwa'in* and finding them more like those of the classical Islamic model of the police than those of the *muhtasib*).

348. See, e.g., Kathryn R. Urbonya, *Rhetorically Reasonably Police Practices: Viewing the Supreme Court’s Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387 (2003); Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property and Liberty in Constitutional Theory*, 48 STAN. L.

vation for the Fourth Amendment originally is a matter of some debate;<sup>349</sup> there is, however, no doubt that property notions factored prominently in early applications of the amendment and remained its primary focus well into the twentieth century.<sup>350</sup> Nor is there any doubt that today, privacy has replaced property as the focus of the amendment's search protections, while liberty and property are the focus of its seizure protections.<sup>351</sup> Of the many species of privacy in American law, "informational privacy" is the one perhaps most commonly seen as protected by the amendment: information about a private citizen's habits and health, purchases and finances, belongings and beliefs—all this and more about the details of citizens' everyday lives are seen as shielded from unjustified government access by the Fourth Amendment's search requirements.<sup>352</sup> A physical form of privacy too is protected by the amendment: searches that unreasonably invade an individual's bodily integrity are also forbidden, whether or not they would reveal private information.<sup>353</sup> And a dignitary form of privacy too finds

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REV. 555 (1996); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 230 (1993).

349. Compare Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 609–611, 659–660 (1999) (focusing on the Framers' concern about protecting against the seizure of property in customs searches), with William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 393, 397–407 (1995) (focusing on the privacy aspect of three "canonical" cases that predated the amendment); see also Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 309 (1998) ("The Fourth Amendment was a creature of the eighteenth century's strong concern for the protection of real and personal property rights against arbitrary and general searches and seizures."); WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 766 (Oxford 2009) ("Privacy was the bedrock concern of the amendment . . .").

350. See Clancy, *supra* note 349, at 309–27; Cloud, *supra* note 348, at 573–97, 609–29.

351. Since 1967, the very definition of a search for Fourth Amendment purposes has been government action that implicates an individual's "reasonable expectation of privacy." *Katz*, *supra* note 110; *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (finding a search in law-enforcement use of a thermal-imaging device from outside a home to detect excessive heat, associated with marijuana-growing, inside the home). A seizure of a person, meanwhile, is defined as an encounter with government actors that a reasonable person would believe she is not free to terminate. See *Terry*, *supra* note 115; see also *Brendlin v. California*, 551 U.S. 249, 254–55 (2007). And a seizure of property is "some meaningful interference with an individual's possessory interests" in the property by a government actor. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992).

352. See Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, In Need of a Rule*, 64 MD. L. REV. 755, 758–60 & n.19 (2005).

353. See, e.g., *United States v. Blake*, 888 F.2d 795 (11th Cir. 1989) (finding an airport search of suspect's genital area unreasonably beyond the scope of defendant's consent to a search of his "person").

protection, by the amendment's seizure limitations as well as its search limitations: government actions that unnecessarily degrade or embarrass individuals can violate the Fourth Amendment simply for that reason.<sup>354</sup>

In Islam's search and seizure rules, particularly from the numerous reports in the Traditions and the interpretations classical jurists gave those reports and the Quranic verses, it is obvious that some kind of privacy is the key protected interest.<sup>355</sup> There is even evidence that juristic interpretations of the Quran's "enter not" verse evolved similarly to how judicial interpretations of the Fourth Amendment did, shifting their focus from property to privacy. Classical interpretations of that verse, as traced by Eli Alshech, evolved over time from characterizing the residential protection of the verse as a matter of property rights to discussing it as a matter of privacy, aimed at enabling occupants to conceal their conversations, their activities, and "things people typically hide from others" (*ma yukhfihi al-nas 'adatan*).<sup>356</sup> There is therefore good reason to see the search rules that rest on the Quranic verses and Traditions as privacy protections, as many contemporary scholars do.<sup>357</sup>

But in the Islamic context more appears to be at stake than simply protecting rights of privacy, liberty, and property against unjustified intrusion by state officials; and even the privacy concerns are of a different character from those that animate the Fourth Amendment. Rather, in the key Quranic verses and Traditions and the jurisprudence that builds on them, concerns and principles that are foreign to the land of our Fourth Amendment suggest themselves. There are notions of criminal law theory that are unique to the Islamic context. There is also a cluster of privacy concepts that do not find easy analogs in the world of our Fourth Amendment. And there is a set of ideas about ordering civil society itself. I will discuss each of these three sets of notions in turn; then, I will consider the question of what specific

354. See e.g. *Lauro v. Charles*, 219 F.3d 202, 212 (2nd Cir. 2000) (citing the "adverse effects on [arrestee's] dignity and privacy" in finding Fourth Amendment violated by staged "perp-walk" that humiliated arrestee and served no legitimate government objective). See also *Maclin*, *supra* note 348, at 201 n.16, 229 n.111, 240 n.153, 242 (listing dignity as among the interests protected by the Fourth Amendment).

355. See e.g. *COOK*, *supra* note 87, at 80, 82, 99–100, 380–81, 417, 479–82, 556–57, 591–94 (discussing notions of privacy in the context of those verses and the theory and practice of commanding/forbidding).

356. See *Alshech*, *supra* note 90, at 296–97, 304–309 & 306 n.46, 317–20.

357. See e.g. *al-Alwani*, *supra* note 61, at 12; *Awad*, *supra* note 61, at 105–06; *al-Saleh*, *supra* note 58, at 67–69; *SANAD*, *supra* note 61, at 76; *Hussein*, *supra* note 79, at 49.



bearing the Islamic tenets appear to have on regulating the state.

#### A. *Criminal Law Theory*

One apparent explanation for the “enter not” and “spy not” commands is the theory that wrongdoing that is exposed to the public is more harmful than wrongdoing that is kept “private.” Recall the Tradition that Mawardi had cited in support of the “spy not” injunction: “Let whoever attempts any of this rubbish [*i.e.*, prohibited acts] hide himself from view as God admonished, for those who reveal themselves to us will have God’s penalties enforced against them.”<sup>358</sup> Add to it this one: “All the sins of my followers will be forgiven except those of the Muhajirun [those who fled with the prophet from Mecca to Medina] who, having committed their sins at night and been screened by God, come the next morning and say to another, ‘Last night I did this and that . . .’”<sup>359</sup> In other words, disclosing wrongdoing that one commits privately is worse than having committed that wrongdoing in the first place.

Nor is it only the wrongdoer himself who should conceal wrongdoing. “He who sees something that should be kept hidden and conceals it will be like one who has brought to life a girl buried alive,” said Muhammad, and if someone conceals a Muslim’s secrets, “God will conceal [that person’s own] secrets in this world and on the Day of Resurrection.”<sup>360</sup> Recall too the oft-cited Tradition in which Ibn Mas‘ud, a Companion of Muhammad to whom people brought for punishment a man whose beard was said to be “dripping with wine,” said: “We have been prohibited from seeking out [others’ faults]; but if something becomes manifest to us, we can seize it.”<sup>361</sup> Spying and entering homes without permission appear, then, to be forbidden at least in part because they publicize wrongdoing that would otherwise remain hidden.

Indeed, it might even be that the very harm of wrongdoing, or at least certain types of wrongdoing, *is* its exposure to the public. This principle appears to apply at least to the “domestic” crimes of playing music, singing, drinking wine, and engaging in illicit sexual behavior.

358. *See supra* text at note 147.

359. VIII SAHIH BUKHARI, *supra* note 53, at 60–61 (author’s translation).

360. III SUNAN ABU DA‘UD, *supra* note 53, at 1362–63, no. 4873; *id.* at 1376, no. 4928. The first of these Traditions was reportedly relied on as authority to stop a person from turning in his wine-drinking neighbors after they had ignored his request that they desist. *See id.* at 1363 no. 4874.

361. *See supra* text accompanying note 59.

As we have seen, it is typically in the context of these crimes that the *muhtasib* literature articulates the rule forbidding intervention absent “manifestness.” Further supporting this idea is the rule that the fixed crime of adultery is not proven without four witnesses to the act of penetration. As several commentators have observed, this evidentiary burden suggests that the conduct actually forbidden is not so much extramarital sex but its public display.<sup>362</sup> Under this theory, wrongdoing that takes place behind closed doors is between God and the wrongdoer; outside intervention is unnecessary and unwarranted.<sup>363</sup> The prophet in fact explicitly said as much, according to an authoritative Companion: “A hidden wrongdoing will harm only the one committing it. But if it becomes public, and is not changed [read: corrected], it will hurt the community.”<sup>364</sup> Thus, once evidence of wrongdoing reaches the public, it is a matter of public consequence and calls for outside intervention. Until then it harms only the wrongdoer and is a matter best left between the offender and God. Spying and entering homes without permission are forbidden, according to this theory, because the community has no interest in uncovering hidden wrongdoing, indeed has every interest in keeping it hidden.

The notion that only “public” wrongdoing is harmful, or that “private” wrongdoing is less in need of intervention than “public” wrongdo-

362. See, e.g., NOEL COULSON, *CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE* 78 (1969) (“No doubt an act of sexual immorality committed in circumstances where such testimony is forthcoming would amount at least to the criminal offense of public indecency even under English law.”); Asifa Quraishi, *Her Honor: An Islamic Critique of The Rape Laws of Pakistan from A Woman-Sensitive Perspective*, 18 MICH. J. INT’L L. 287, 296 (1997) (citing similar statements); LAWRENCE ROSEN, *THE JUSTICE OF ISLAM* 191–92 (2000). A similar point could be made about the fixed crime of false accusation of adultery (*qadhif*), which by definition is public wrongdoing since the required proof of it is two witnesses to the false accusation, and perhaps even the fixed crime of apostasy, which might not merit intervention and punishment unless one’s disbelief is declared publicly. See ROSEN, *supra*, at 189–93.

363. This principle might apply even when a guest witnesses wrongdoing in the home of another; early Maliki sources and al-Shafi’i himself instruct the guest in such a case to leave the home, but do not go on to instruct him to report the wrongdoing to authorities. See Alshech, *supra* note 90, at 299 n.23.

364. Yaron Klein, *Between Public and Private: An Examination of Hisba Literature*, 7 HARV. MIDDLE E. & ISLAMIC REV 41, 45 (2006) (quoting Abu Hurayra); COOK, *supra* note 87, at 43–44 n.60 (citing the same tradition); see also *id.* at 171–72 & n.42 (noting same public/private distinction made by 19th century Wahhabi writer); *id.* at 381 & n.179 (same distinction in 10th century Maliki *muhtasib* manual); see also IBN TAYMIYYA, *PUBLIC DUTIES IN ISLAM*, *supra* note 168, at 94 (distinguishing three kinds of “sins”—those that injure others, those that injure only the sinner, and those that injure both—and listing as examples of the second kind “wine-drinking and adultery and fornication, if their harmfulness is limited”). But see QURAN 7:33 (“The things that my Lord hath indeed forbidden are shameful deeds, whether open or secret.”).

ing, is foreign to the Fourth Amendment. Indeed, a nearly opposite notion is a well-established principle of Fourth Amendment jurisprudence: searches of private areas or items that uncover *only* wrongdoing are presumptively permissible—or, more accurately, are not even subject to Fourth Amendment scrutiny as “searches”—on the theory that no *non*-criminal activity is being exposed and no privacy interest is therefore implicated.<sup>365</sup> In other words, the Fourth Amendment recognizes no distinction between “private” wrongdoing and “public” wrongdoing. A law-enforcement officer who receives information that a homeowner grows marijuana in his backyard is not discouraged by Fourth Amendment doctrine, let alone prohibited by it, from seeking a warrant to enter the home and search the backyard, even if all indications are that the marijuana is only for the homeowner’s personal use. An officer who receives a reliable tip, or other information amounting to probable cause, that a given pedestrian has drugs in her pocket or purse is not forbidden to stop, arrest, and search that person, with or without a warrant. The Islamic doctrine forbids both of these actions.

One might explain the Islamic position as premised on the fact that the “private” wrongdoing this limitation ultimately protects—drinking, illicit sexual relations, etc.—is conduct that speaks more to (im)morality than criminality. Or it might reflect discomfort with vesting in the *muhtasib* the power to seek out such conduct, given the *muhtasib*’s varied duties and his amorphous identity as part-judge, part-police officer, and possibly little more than an officious private citizen. The limitation might also reflect a recognition that the conduct it ultimately protects is conduct that God, or at least humans, will never successfully prohibit no matter what practical methods are employed. Whatever the Islamic rationale, the Fourth Amendment recognizes no such limitation with respect to investigating wrongdoing that is similarly “private,” such as drug use in one’s apartment, prostitution in one’s home, or the possession of obscene materials on one’s computer. Nor does it recognize any other ground for distinguishing between wrongdoing that merits intervention and wrongdoing that does not.<sup>366</sup>

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365. See *Illinois v. Caballes*, 543 U.S. 405, 408–410 (2005) (canine sniff that reveals only the presence of illegal drugs not a search for Fourth Amendment purposes); *Jacobsen*, 466 U.S. at 122–23 (same with chemical test); *Kyllo*, 533 U.S. at 27, 36–39 (use of thermal-imaging device to detect heat emanating from a home is a search for Fourth Amendment purposes because it reveals non-criminal “intimate” information).

366. Perhaps the closest the amendment has come to such a distinction is two rulings in which the Court deemed the gravity of an offense relevant to determining the constitutionality of

B. *Privacy Theory*

The notion that public wrongdoing is more harmful than private wrongdoing, and thus more deserving of intervention, is entwined with the distinctly “Islamic” notions of privacy that the “enter not” and “spy not” commands appear to reflect and enforce. Three concerns in particular stand out, for both their apparent centrality to these search limitations and their foreignness to Fourth Amendment doctrine: modesty, reputation, and confidentiality. To begin with, modesty, of the physical kind, is indisputably an original concern of the key Quranic verses. Immediately following the “enter not” verses in the Quran are the verses that instruct men and women to “lower their gaze and guard their modesty.”<sup>367</sup> Later in the same chapter, God instructs believers to require those in their household, specifically their slaves and children, to request permission before entering their presence on three occasions—before the morning prayer, during the afternoon rest, and after the late-night prayer—because “these are your three times of undress.”<sup>368</sup> Classical scholarship on the historical circumstances in which Quranic verses were revealed cites concerns of this sort to have been the immediate stimulus for both this latter verse and the “enter not” verse. Among the functions of this scholarship, which is called “occasions of revelation” (*asbab al-nuzul*), is to provide the context of Quranic verses for purposes of legal interpretation,<sup>369</sup> as

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a warrantless search or seizure. In *Welsh v. Wisconsin*, the Court found the Fourth Amendment violated by a warrantless home entry to arrest a suspect for drunk driving since the offense carried only a civil-forfeiture penalty; the offense was insufficiently serious, the Court held, to create exigent circumstances. 466 U.S. 740, 753–55 (1984). In *Illinois v. McArthur*, the Court applied that reasoning against a defendant who challenged his warrantless two-hour seizure and detention outside his home while police obtained a warrant to search it for “some dope,” which the suspect’s wife had told them he had slipped under the couch. 531 U.S. 326, 335–36 (2001). The seizure was reasonable, the Court found, and the drugs and paraphernalia the search turned up were admissible at trial, because the ultimate offenses—misdemeanor possession of drug paraphernalia and less than 2.5 grams of marijuana—were punishable by jail. *Id.*; see also *Dorman v. United States*, 435 F.2d 385, 392 (D.C. Cir. 1970) (en banc) (listing gravity of offense as the first of several factors to consider in exigent-circumstances inquiries). But soon after that second case, a 5–4 Court held that the gravity of an offense is categorically irrelevant to the constitutionality of a warrantless arrest. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Fourth Amendment not violated by custodial arrest for seatbelt offense punishable by only a fine).

367. QURAN, 24:30–31. These are also, incidentally, the verses that instruct Muslim women to conceal their beauty from all but except family members—*i.e.*, the verses that support wearing the hijab.

368. *Id.* at 24:58–59.

369. See Andrew Rippin, *Occasions of Revelation*, in 3 ENCYCLOPEDIA OF THE QUR’AN 569, 571 (Jane Dammen McAuliffe ed., Brill 2003).

such it might be seen as Islam's version of legislative history. Regarding the "enter not" verse, according to the "occasions" literature, a woman complained to the prophet that men of her family had a habit of barging in on her when she was resting at home and in a state of undress, and she asked the prophet what she should do about it; then God revealed the "enter not" verse.<sup>370</sup> The "spy not" verse too is said to have been revealed in response to an episode of personal physical embarrassment, though of a slightly different kind, despite the loftier meanings jurists have found in that injunction.<sup>371</sup>

Equally evident in Islam's search limitations is an interest in preventing public dissemination of unflattering information about individuals, however truthful that information may be—a reputational interest, in other words. This interest appears especially in the Traditions that echo and build on the "spy not" command. "Nor speak ill of each other behind [your] backs," the Quran adds immediately after ordering believers not to spy,<sup>372</sup> and the prophet not only repeated God's command against "back-biting" but defined the term: back-biting is "saying something about your brother that he would dislike," according to a prophetic Tradition, and it is as evil when the information is true as it is when it is false.<sup>373</sup> Reputation, in other words, is one of the interests protected by Islam's search limitations.<sup>374</sup> And this interest is implicated even when the information is about nothing other than a person's wrongdoing. Numerous reports in the Traditions illustrate this principle; perhaps the most vivid example appears in an anecdote that involves a Companion of the prophet, Uqba ibn Amir al-Juhani (d.

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370. ABU AL-HASAN AL-WAHIDI AL-NISABURI, *ASBAB AL-NUZUL* 324–25 (Isam bin Abd al-Muhsin al-Hamidan ed., 1992). See also *id.* at 329 (explaining the "times of undress" verse, Quran 24:58, as being revealed after episodes in which individuals entered upon others when the latter were not dressed). The "proper doors" verse (2:189), however, is explained differently. According to the "occasions" literature, that verse was revealed to end the practice of entering one's home from the rear rather than the front door when in a state of ritual purity, which was presumably being done to maintain that state. See Andrew Rippin, *Asbab Al-Nuzul in Qur'anic Exegesis*, 51 BULL. SCH. ORIENTAL & AFRICAN STUDIES 1, 9–10 (1988).

371. QURAN, 49:12; JALAL AL-DIN AL-SUYUTI, *ASBAB AL-NUZUL* 279 (Muhyi al-Din Muhammad Bi'yun ed., 1st ed. [n.d.]) (explaining the verse as occasioned by a person's telling others how a Companion of the prophet, after eating, lay down to rest and then either burped or passed gas).

372. QURAN 49:12.

373. III SUNAN ABU DA'UD, *supra* note 53, at 1359–60, no. 4862 ("do not back-bite"); *id.* at 1358, no. 4856 (defining back-biting). See also YUSUF AL-QARADAWI, *THE LAWFUL AND THE PROHIBITED IN ISLAM* 316–20 (Kamal El-Helbawy et al. trans., 2006) (1960) (discussing back-biting).

374. See also COOK, *supra* note 87, at 80 (identifying three principles of privacy in classical Islamic doctrine: the prohibition against spying and prying, sanctity of the home, and a duty "not to divulge what would dishonour a Muslim").

677), and his secretary while he was a governor in Egypt:

[The secretary told Uqba] that he had neighbours who drank wine, and proposed to summon the police . . . to arrest them. Uqba told him not to do this, but rather to counsel and threaten them (verbally). [The secretary] did so, but to no effect; so he again proposed to call in the police. Uqba once more told him not to, and quoted a tradition he had heard from the Prophet: “Whoever keeps hidden what would disgrace a believer . . . it is as though he had restored a baby girl . . . to life from her tomb.”<sup>375</sup>

A private reproach for wrongdoing is preferable to a public one; divulging a fellow Muslim’s wrongdoing is thus as wrong as seeking it out. Indeed, according to Ghazzali, one’s duty to conceal wrongdoing permits being dishonest about it with others: “Just as it is permitted to a man to hide his own faults and secrets, even if he needs to lie, so may he do for his brother’s sake,”<sup>376</sup> thus protecting a brother’s reputation, if not more. The importance of reputation is reflected in the seizure rules too: as we saw above, what is known about a suspect’s “character” determines whether or not she should be detained pending adjudication, according to the formulation Ibn Taymiyya suggested and several others copied.

And the linking of faults *and secrets*—two very different things, of course—in the just-cited quote from Ghazzali points to a third privacy interest Islam’s search rules reflect: maintaining confidentiality. “[Do not] divulge[] a brother’s secret which he has entrusted to you,” Ghazzali instructs believers; and the prophet reportedly said: “When a man tells something and then departs, it is a trust.”<sup>377</sup> This injunction is not unqualified; confidences that relate to serious wrongdoing need not be kept: Again from Muhammad: “Meetings are confidential except three; those for the purpose of shedding blood unlawfully, or committing fornication, or acquiring property unjustly.”<sup>378</sup> But information about lesser wrongdoing, and anything else a person might wish to keep confidential—*i.e.*, private—should be so kept. That the same

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375. *Id.* at 80–81. Cook explains that the prophet’s metaphor refers to female infanticide, a pre-Islamic Arabian practice. *Id.* at 81 n.265; see also III SUNAN ABU DA’UD, *supra* note 53, at 1362–63, nos. 4873–74.

376. AL-GHAZALI, *supra* note 131, at 42; see also *supra* note 134.

377. *Id.* at 41; III SUNAN ABU DA’UD, *supra* note 53, at 1357, no. 4850.

378. III SUNAN ABU DA’UD, *supra* note 53, at 1357–58, no. 4851.

Arabic word (*'awrah*) is used interchangeably in these texts for both “faults” and “secrets” confirms this principle.<sup>379</sup>

None of these three principles—physical modesty, reputation, or confidentiality—are a part of Fourth Amendment doctrine. Both reputation and confidentiality have in fact been expressly excluded from the scope of protection under the amendment. Reputation, the Supreme Court held in 1976, is not a protected privacy interest under the Fourth Amendment (or any other amendment); being publicly identified as a criminal accusee before a finding of guilt therefore offends no constitutional value.<sup>380</sup> And confidentiality is far from a guarantee in the land of the Fourth Amendment, as in life generally, and expecting it from a “brother” or a friend is therefore unreasonable, at least as the Court has seen it.<sup>381</sup>

### C. *Civil Society*

But there is even more at stake in Islam’s search and seizure rules than Islamic notions of privacy. Ghazzali states it flatly: “Concealing faults, feigning ignorance of them and overlooking them—*this is the mark of religious people.*”<sup>382</sup> In Ghazzali’s view, which as we have seen is an especially influential one, the Quran’s “enter not” and “spy not” commands and the Traditions that build on them are not just about privacy, regardless of how privacy is defined. Nor are they necessarily, or even primarily, about search or seizure, or criminal procedure at all. They are, instead, ultimately rules of civil society, establishing positive norms of personal conduct and interpersonal relations that Muslims are enjoined to follow. We see this in Ghazzali’s repeated invocations of those commands—not to back-bite, not to spy, not to reveal a fellow

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379. See also E.W. LANE, 2 ARABIC-ENGLISH LEXICON 2193–95 (1984) (giving classical definitions of the word that include “weakness,” “foulness,” and “[a]nything that a man veils, or conceals, by reason of disdainful pride, or of shame or pudency”).

380. *Paul v. Davis*, 424 U.S. 693 (1976); see also Reza, *Privacy and the Criminal Arrestee or Suspect*, *supra* note 352, at 762–63.

381. See, e.g., *Hoffa v. United States*, 385 U.S. 293 (1967) (“Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”) (finding no Fourth Amendment violation in informant’s testifying to incriminating statements defendant made to him in confidence); *White v. United States*, 401 U.S. 745, 751–53 (1971) (same result when informant wears concealed radio device to transmit conversations to law-enforcement officers as they occur; in confiding in others people assume the risk their confidences will be betrayed). The Court’s view is not without its critics. See, e.g., Tracey Maclin, *Informants and the Fourth Amendment: A Reconsideration*, 74 WASH. U.L.Q. 573, 614–35 (1996).

382. See *supra* text accompanying note 139.

Muslim's wrongdoing, not even to suspect one of it—when he discusses the duties a Muslim owes his fellow Muslims.<sup>383</sup> We see it too in the work of the person who is perhaps closest to being Ghazzali's contemporary counterpart, Egyptian scholar Yusuf al-Qaradawi (b. 1926). In his 1960 book *The Lawful and the Prohibited in Islam*, perhaps the best-known of his many books, Qaradawi aspires to do much of what Ghazzali did in his much longer *Revival of the Religious Sciences*: set out the tenets and practices of ideal Muslim life.<sup>384</sup> In a section of the book on "Social Relations," Qaradawi cites the "avoid suspicion" and "spy not" language of the latter verse, along with some of the related Traditions, and explains their meaning as follows:

*Suspicion*

Islam aims at establishing its society on clearness of conscience and mutual trust, not on doubts, suspicions, accusations and mistrust . . . . The kind of suspicion which is [forbidden in the "spy not" verse and] a sin is the ascribing of evil motives, and it is not permissible for a Muslim to impute such motives to his brother without justification and clear evidence. Because the basic assumption concerning people is that they are innocent, a mere suspicion should not be allowed to result in the accusation of an innocent person . . . . Human weakness is such that no one is free of suspicion and wrong thoughts especially concerning those with whom relationships are not good. However, one must not give in to such thoughts nor go beyond thoughts to action . . . .

*Spying*

Inwardly, mistrust of others produces evil thoughts in the mind while outwardly it leads a person toward spying. But Islam establishes its society on the purity of both what is inner and what is outer. Therefore, just as spying follows suspicion, the prohibition of spying comes immediately after that of suspicion [in the Quran].<sup>385</sup>

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383. See *supra* text accompanying notes 131–37.

384. AL-QARADAWI, *supra* note 373.

385. *Id.* at 314.



According to Qaradawi, then, suspicion is discouraged and spying is forbidden because of the attitudes these acts foster in individuals and thereby in society. The commands are, in other words, exhortations to virtue—individual and collective—and prescriptions for it.

Nor is Qaradawi alone among modern Muslim thinkers in seeing such exhortations and prescriptions in the Quranic injunctions that are at the heart of our study. None other than Sayyid Qutb (d. 1966), a leading voice of Egypt's Muslim Brotherhood and arguably the modern thinker who is most influential in contemporary Islamist movements, saw them similarly. "Whoever examines this religion [Islam] equitably and attentively will perceive the vast efforts it deploys to refine the human soul in all its aspects, dimensions, and dealings," he says in his widely-read 1949 book *Social Justice in Islam*, and those efforts "aim at securing the welfare of society by instituting a permanent supremacy of the conscience rooted in awareness of practical, individual obligation."<sup>386</sup> The first example Qutb gives of such an effort is the "spy not" verse; then he explains:

Spying is the worst crime against personal freedom and against the honor and privacy of the individual . . . ; not only does it render a character incapable of praise, but it robs it of all vital and practical courage.<sup>387</sup>

And the second example follows immediately after: the "enter not" verse, after which Sayyid Qutb explains, "[i]ndividual honor must be respected because individual honor is the first requisite of social justice."<sup>388</sup> Neither Sayyid Qutb nor Qaradawi ignores the privacy-protecting aspect of these verses; both in fact mention that aspect explicitly.<sup>389</sup> But clearly for both thinkers, the "enter not" and "spy not" commands aim at much more than protecting the privacy and dignity of others; they aim at promoting individual virtue and a just and moral social order for all.

#### D. *Regulating the State*

The very purpose of the Fourth Amendment is, of course, to regulate the conduct of state actors; that is the seventh and last of the aspects I

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386. SAYYID QUTB, *SOCIAL JUSTICE IN ISLAM* 94 (John B. Hardie & Hamid Algar trans., 2000).

387. *Id.*

388. *Id.*

389. AL-QARADAWI, *supra* note 373, at 314, 315; QUTB, *supra* note 386, at 78–79.

identified in Section II.A as fundamental to it.<sup>390</sup> To what extent Islam's pertinent provisions serve that function must therefore be addressed. Certainly, the rules for *muhtasibs* set forth by Ghazzali, Mawardi and others bind whoever performs that duty, be it state actor or private citizen. (More recently, Qaradawi has said it squarely: "The texts prohibiting spying and searching out people's faults apply equally to the government and to individuals."<sup>391</sup>) It is also clear the seizure jurisprudence directly addresses state officials, beginning with Abu Yusuf's advice to the caliph that governors should not arrest people upon mere accusation and continuing through the *quasi-habeas corpus* doctrine in the classical literature.<sup>392</sup>

It is less clear, however, that the Quranic verses forbidding spying and entering homes without permission were understood or intended to address state actors at the time they were revealed. As we saw just above, concerns about personal privacy, modesty, and dignity vis-à-vis *fellow Muslims* are said to have been the immediate context of the "enter not" and "spy not" verses. And as we have seen throughout this study, jurists of classical and modern times have focused as much on these concerns when discussing the verses as on concerns about intrusiveness by the state.

History and logic explain this focus. Put simply, the mistrust of executive authority that animated the Fourth Amendment, indeed the entire Bill of Rights, was not a feature of Arabian society at the time the verses were revealed. Social and moral decline, not political oppression, is the milieu in which Islam arose and the malaise it directly addressed.<sup>393</sup> And during Muhammad's lifetime, which is when all of the Quran's verses were revealed, executive authority in Islam rested with him, and the standard accounts paint him as a just and compassionate ruler.<sup>394</sup> There was, in other words, no reason for God to have intended the immediate audience of Arab Muslims to see the "enter not" and "spy not" Quranic verses as constraints on state power, nor for that audience to have understood them that way.<sup>395</sup>

Nevertheless, as we have seen, many contemporary Muslim legal

390. See *supra* text accompanying note 48.

391. AL-QARADAWI, *supra* note 373, at 322.

392. See *supra* text accompanying notes 181–215.

393. See, e.g., ASFARUDDIN, *supra* note 37, at 2–3.

394. See, e.g., HOURANI *supra* note 37, at 19–20. Of course he also, it must be said, transmitted all of the Quran's verses himself.

395. Nor should one expect seventh-century Arabs to have seen the statements as pertaining particularly to state actors. Even in the West, of course, notions of individual liberties and

theorists construe the verses and related Traditions not just as exhortations to individual and collective virtue but also as express limitations on state power. Indeed, the very starting-point of this study was the urging of contemporary scholars that the pertinent texts provide Fourth Amendment-like protections, including an exclusionary rule. Let us consider one especially telling example from the modern period: pertinent statements of Sayyid Abul A'la (Mawlana) Mawdudi (d. 1979)—the founder of Pakistan's influential Islamic Society, a leading voice of political Islam, and still one of the most influential thinkers among modern Muslim revivalists.

In his many works, Mawdudi presented his own interpretations of the Quran and Traditions with an agenda of mobilizing Muslims toward political action and, ultimately, the establishment of modern "Islamic states."<sup>396</sup> To this end, in his *Islamic Law and Constitution*, first published in 1955, Mawdudi lists the "Rights of Citizens" (in a chapter called "First Principles of the Islamic State"). The second of these rights is "the protection of personal freedom"; among the authorities Mawdudi cites for this right are a number of statements we saw in the seizure jurisprudence, beginning with the Tradition in which Muhammad released the detainees whose arrest was challenged publicly and not defended by the arresting officer.<sup>397</sup> Mawdudi says much the same in a compilation of two of his talks, published in 1980 as *Human Rights in Islam*, and in this work Mawdudi adds that citizens in an Islamic state have another pertinent right: a right to privacy vis-à-vis the state. Opening a discussion of "The Sanctity and Security of Private Life," Mawdudi says: "Islam recognizes the right of every citizen in an Islamic state to no undue encroachment on the privacy of his life."<sup>398</sup> He then quotes the Quran's "spy not" and "enter not" verses, cites a number of the Traditions in which Muhammad embellished on these verses, explains the privacy rationale of these commands, and then adds his own exegesis, explaining what the texts mean for the ideal Islamic state:

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constraints on government powers—and particularly rules for the criminal process that guarantee such liberties and constraints—are a phenomenon of only recent centuries.

396. See, e.g., Seyyed Vali Reza Nasr, *Mawdudi, Sayyid Abul A'la*, in 4 OXFORD ENCYCLOPEDIA, *supra* note 14, at 71, 74–75.

397. SAYYID ABUL A'LA MAUDUDI [sic], *THE ISLAMIC LAW AND CONSTITUTION* 248–50 (Khurshid Ahmad trans. and ed., 9th ed. 1986); see *supra* text accompanying notes 73–74. The first right Mawdudi lists is the oft-cited right to protection of "life, property, and honour," on the basis of a well-known prophetic Tradition to that effect. *Id.* at 248–49.

398. MAWDUDI, *supra* note 73, at 24. I find no mention of this right or the pertinent Quranic verses and Traditions in the earlier work, *ISLAMIC LAW AND CONSTITUTION*, *supra* note 397.

[P]rying into the life of an individual [by acts such as reading citizens' mail, bugging their homes, etc.] cannot be justified on moral grounds by a government[']s saying that it needs to know the secrets of potentially dangerous persons. The basis of this philosophy is the fear and suspicion with which modern governments look at those of their citizens who are intelligent and dissatisfied with official policies. This is exactly what Islam has called the root cause of mischief in politics.<sup>399</sup>

The “spy not” and “enter not” verses and related Traditions thus directly constrain state actors to prevent this mischief, in Mawdudi’s view. Suspicion by the state, and the government’s spying on citizens or entering their homes because of it, is as undesirable as the same conduct by fellow civilians; Islam forbids both via the pertinent verses and Traditions.

And what precise harm does the state inflict when violating these edicts? Something of a *First-Amendment*-like concern for freedom of thought and political dissent can be detected in the above quote from Mawdudi—“the fear and suspicion with which modern governments look at those of their citizens who are intelligent and dissatisfied with official policies.” Indeed, among the other rights Mawdudi argues citizens in an Islamic state should enjoy are “freedom of expression,” “freedom of association,” “freedom of conscience and conviction,” and “the right to protest against tyranny.”<sup>400</sup> Similar concerns animate Fourth Amendment protections in the American context too. “The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression,” the Supreme Court said in a 1961 case, and the Court has required special scrutiny, even special rules, under the Fourth Amendment when searches implicate First Amendment interests.<sup>401</sup> Not just protecting privacy and promoting civic virtue, then, but also a concern for protecting political dissent(ers) against government surveillance and censorship, and promoting free thought and expression generally, inform Mawdudi’s view that the pertinent Quranic verses and Traditions bind the state. These interests

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399. MAWDUDI, *supra* note 73, at 25.

400. *Id.* at 28–30.

401. *Marcus v. Search Warrants*, 367 U.S. 717, 729 (1961); *see also, e.g., Maryland v. Macon*, 472 U.S. 463, 468 (1986) (citing cases); 2 LAFAYE, *supra* note 48, §§ 4.6(d)–(e); 4.11(b), 4.13(d), 6.7(e); A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L.R. 1461, 1506 (2000) (discussing relationship between First Amendment and “privacy-enhancing rules”).

are also among those served by our Fourth Amendment.

In the end, the two sets of concerns about spying and entering homes—those that pertain to private individuals, on the one hand, and those that pertain to the state on the other—appear to overlap in the Islamic context. Suggesting this are two Traditions with which both Mawdudi and Qaradawi close their discussions of the matter. In one of these Traditions, Muhammad is said to have advised Mu'awiya, the governor of Damascus during the prophet's lifetime and later the fifth caliph of Islam, the following: "If you seek out people's faults, you will corrupt them, or bring them very near to corruption." In the second, Muhammad reportedly said: "The ruler who sows suspicion among the people corrupts them."<sup>402</sup> What do these sayings mean? Mawdudi explains:

["Corrupting"] people is what happens when secret police are spread all around a country looking into their affairs: men begin to look at one another with suspicion, so much so that they are afraid of talking freely in their houses lest some word should escape from the lips of their wives and children which may put them in embarrassing situations. In this manner it becomes difficult for a common citizen to speak freely, even in his own house; society begins to suffer from mutual distrust and suspicion.<sup>403</sup>

The state, in this view, is clearly targeted and bound by Islam's search and seizure rules; but not only in order to protect individuals from unjustified invasions of privacy, unwarranted deprivations of liberty or property, and government censorship or persecution. Rather, the Quranic verses and the Traditions that discourage suspicion, forbid spying, and require permission before entering homes also bind the state for the same reason they bind individuals, though perhaps more compellingly given the state's power over the social order: to maintain the dignity and integrity of civil society.

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402. AL-QARADAWI, *supra* note 373, at 316; MAWDUDI, *supra* note 73, at 25. The translations of these two Traditions are not identical in the two works—for instance, Mawdudi's version says "spoil(s)" and "ruin" in place of Qaradawi's "corrupt(s)" and "corruption"—nor can the versions in the original works be identical, since Mawdudi wrote in Urdu and Qaradawi writes in Arabic. (And even two Arabic originals can word a given Tradition differently from one another.) The Qaradawi version is more consistent with quotations of these sayings I have seen elsewhere.

403. MAWDUDI, *supra* note 73, at 25.

## CONCLUSION

Authority for Fourth-Amendment-like protections thus certainly exists in Islamic legal doctrine. Assertions that such protections are well-established, however, or implications that they have ever been routinely practiced before the modern period, appear to be unsupported by the doctrinal and historical records. These assertions and implications come from varied quarters—not only from scholars of Islamic law but also modern Muslim thinkers who have unabashedly political agendas, such as Mawlana Mawdudi and Sayyid Qutb; and not always distinguishable in these assertions is the line between saying the protections *do* exist and saying that they *should*. In other words, a desire to *find* an exclusionary rule and other Fourth-Amendment-like protections in the Quran, the Traditions, and the jurisprudence that builds on these sacred texts is apparent in the many assertions that Islam *has* such protections.

That Muslim jurists and thinkers seek such protections in Islam is no crime (or sin); adapting to the changing needs of society by reinterpreting the sacred texts has long been a central dynamic of Islamic jurisprudence.<sup>404</sup> But given what we have seen of the doctrinal and historical records on search and seizure, suggestions that such protections already exist in Islamic law are perhaps better recast as exhortations that they *should be* articulated within it—as normative arguments rather than descriptive truths.<sup>405</sup> Nor are those who seek the establishment of “Islamic states,” like Mawdudi and Sayyid Qutb, the only interested party in this effort, of course. Those who seek to establish or advance modern principles and practices of criminal due process, and human rights generally, in the Muslim world have at least an equal

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404. See, e.g., KAMALI, *supra* note 12, at 49–59.

405. Otherwise such assertions appear to be, to quote Ann Mayer, “anachronistic projections of modern principles of criminal justice back into a legal order in which they were unknown.” Ann Elizabeth Mayer, Book Review, 21 AM. J. COMP. L. 361, 363 (1983) (reviewing THE ISLAMIC CRIMINAL JUSTICE SYSTEM (M. Cherif Bassioni ed., 1982)). See also Khaled About El Fadl, *The Human Rights Commitment in Modern Islam*, in HUMAN RIGHTS AND RESPONSIBILITIES IN THE WORLD RELIGIONS 301, 337 (Joseph Runzo, Nancy M. Martin, & Arvind Sharma eds., 2003) (“contemporary discourses [among Muslims] . . . are replete with unjustified assumptions and intellectual shortcuts that have seriously undermined the ability of Muslims to confront such an important topic as human rights,” and “partly affected by Muslim apologists, many Western scholars repeat generalizations about Islamic law that, to say the least, are not based on historical texts generated by Muslim jurists”); Jackson, *supra* note 34, at 124 (“[W]e will search in vain in the manuals of the ancients for answers that satisfy our every sensibility.”).

stake in making this argument; some have already made it.<sup>406</sup> Here, in other words, is possible common ground between those who seek a greater role for Islamic law in today's Muslim world and those who seek a lesser one.

That classical Muslim jurists did not fully articulate Fourth-Amendment-like protections vis-à-vis the state is no barrier to articulating them today. Even contrary principles or precedent from Islamic legal history, such as the facts that executive officials were largely unconstrained by jurisprudential niceties in enforcing criminal law and that jurists such as Mawardi endorsed that arrangement, are no hindrance. Islamic law is—to repeat a contemporary mantra of leading Muslim legal scholars (of various stripes)—ultimately a product of human agency, and thus necessarily subject to both reinterpretation and evolution.<sup>407</sup> Moreover, every interpretation of Islamic law is influenced by the immediate context and circumstances—historical, political, ideological or

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406. See, e.g., ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 124 (1990) (arguing that because early Muslim jurists “were naturally unaware of the currently much-appreciated need to regulate and control the powers of arrest, search and seizure and so forth,” Islamic law “historical[ly] . . . had very little to say on these [and other] vital questions of practical law enforcement,” so “the way [is] open for modern formulation in light of Islamic policy considerations”); BADERIN, *supra* note 8, at 89–90, 114–18; see also MUHAMMAD ASAD, THE PRINCIPLES OF STATE AND GOVERNMENT IN ISLAM 84, 85–86 (1980) (arguing that a true Islamic state must protect, *inter alia*, citizens’ “dignity and honor and the privacy of their homes,” and calling for constitutional enactments that guarantee these protections and prohibit governments from violating them).

407. See, e.g., ABOU EL FADL, *supra* note 34, at 321 (“[T]he *Shari’a* . . . relies on the interpretive act of the human agent for its production and execution.”); AN-NA'IM, *supra* note 7, at 10–11 (“*Shari’a* principles are always derived from human interpretation of the Qur’an and Sunna; they are what human beings can comprehend and seek to obey within their own specific historical context,” and “[h]uman agency is therefore integral to any approach to the Qur’an and Sunna at multiple levels, ranging from centuries of accumulated experience and interpretation to the current context in which an Islamic frame of reference is invoked.”); Sherman Jackson, *Jihad and the Modern World*, in ISLAM IN TRANSITION: MUSLIM PERSPECTIVES 407 (John J. Donohue & John L. Esposito eds., 2d ed. 2007) (“Muslims . . . have to avoid the fallacy of assuming that the realities of yesterday pass automatically into today or that the factual or historical assessments of the Muslims of the past constitute authoritative discourses that are binding on the present.”); RAMADAN, *supra* note 34, at 37 (“[I]t is essential to remember that the corpus of the *Sharia* is a human construction, and some aspects of it may evolve just as human thought evolves.”); SAMI ZUBAIDA, LAW AND POWER IN THE ISLAMIC WORLD 10 (2003) (“The *shari’a* . . . is transmitted and developed through human agency,” and “as it came down to us, [it] is largely man-made, based on exegesis, interpretations, analogies, and extensive borrowing from customary practices . . . and existing local Middle Eastern legal traditions.”); see also OUSSAMA ARABI, STUDIES IN MODERN ISLAMIC LAW AND JURISPRUDENCE 18, 205 (2001) (“[N]ot all sacred rules are definitive in meaning, whether Qur’anic or the Prophet’s, and . . . ambiguity, generality and semantic indeterminacy in the revealed texts were, and still are, put to creative use by Muslim jurists.”).

other—of the jurist who makes it.<sup>408</sup> Mawardi and his doctrines illustrate both of these propositions. There is apparently little doubt that Mawardi wrote his *Ordinances of Government* at the behest of the ruling political powers of his time and place—specifically, the Abbasid caliphs of 10<sup>th</sup>- and 11<sup>th</sup>-century Baghdad, whose rule was then threatened by an ascendant Shia power, the Buwayhids (or Buyids).<sup>409</sup> Mawardi was also a practicing judge (*qadi*) who enjoyed the Sunni caliphs' high esteem and trust, as well as an important political role: he was the caliphs' "emissary and mouthpiece" in negotiations with the Buwayhids.<sup>410</sup> Modern studies uniformly conclude that the commissioning of the work and Mawardi's political status and role influenced the doctrines he articulated in *Ordinances*.<sup>411</sup> In other words, practical political considerations—his patrons' and Mawardi's own—animated and shaped Mawardi's legal doctrines. In fact, scholars see *Ordinances* as largely ratifying existing practices of the time and bestowing religious blessing on them—at once deferring to political realities and incorporating them into an Islamic jurisprudential framework, and thereby exalting them to the status of religio-legal command.<sup>412</sup> Put differently: Mawar-

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408. See Jackson, *supra* note 35; see also ABOU EL FADL, *supra* note 34, at 317 ("The extent to which *Shari'a* law will provide for certain rights . . . to a large extent depends on the subjective determinations of Muslim jurists."); ARABI, *supra* note 407, at 18 ("Modern Islamic law is better viewed as what present-day Muslim jurists, legislators, judges, and theologians take to be Islamic provisions and rulings in the altered, complex world of today, rather than an *a priori*-constituted legal corpus that is conserved, albeit in an astoundingly rich variety, in classical legal manuals," and "*shari'a* is a living law, flexible and responsive to new legal practices, and to the momentous changes in the larger social world that befall human existence."); *id.* at 209 ("[I]n reality, *shari'a* was a multifaceted hermeneutic and interpretive enterprise owing much to the values and norms of the communities in which its various schools took root."); Reza, *supra* note 6, at 38–39 (discussing a possible relationship between context and content of differing juristic opinions on torture).

409. Indeed, Mawardi says as much in the introduction to the work. See Hamilton A.R. Gibb, *Al-Mawardi's Theory of the Caliphate*, in *STUDIES ON THE CIVILIZATION OF ISLAM* 152 (Stanford J. Shaw & William R. Polk eds., 1962); Donald P. Little, *A New Look at Al-Ahkam Al-Sultaniyya*, 64 *MUSLIM WORLD* 1, 2–3 (1974).

410. Gibb, *supra* note 409, at 152.

411. The only debate appears to be whether those doctrines aimed at enhancing the power and prestige of just the Sunni caliphs, or of the Abbasid political system as a whole. See Nimrod Hurvitz, *Competing Texts: The Relationship Between al-Mawardi's and Abu Ya'la's al-Ahkam al-sultaniyya*, *HARV. ISL. LEGAL STUD. PROGRAM OCCASIONAL PUBLICATIONS*, No. 8 (2007), at 38–40.

412. See *id.* at 45 (Mawardi "considered the ruling elite's policies as an important and legitimate source of doctrine" and "inserted the principles of political customs and newly formed institutions into the doctrine of public law," so "large parts of [*Ordinances*] . . . are . . . historical practice or narratives that have undergone transmutations and have been fashioned to fit the mold of legal conceptualization and terminology.").



di's *Ordinances*—the most influential public-law treatise in Islam, it bears emphasizing—was written “by [a] member[] of the establishment[,] for members of the establishment[,] about the roles of the establishment.”<sup>413</sup>

Mawardi's legal doctrines must be viewed in this light, as must those of all Muslim jurists and thinkers. The spectrum of law-enforcement powers Mawardi draws, and especially the distinctions he makes between judicial (religious) restraint and executive (political) power, reflect the reality of criminal-law enforcement in his time (and before it, as we have seen). Whatever Mawardi says about search and seizure—for instance, generally forbidding the *muhtasib* to spy and enter homes and the *qadi* to detain accusees, while authorizing the ruler to do these things and more in fulfilling his duty to maintain order—is not Islamic law because God said so; it is Islamic law because Mawardi said so and Muslims have accepted it as a legitimate articulation of God's law. It makes perfect sense that Mawardi would, at a time of political instability and given his particular position, confirm the authority of the ruling powers by bestowing religious blessing on their law-enforcement practices, while at the same time seeking to maintain the dignity and prestige of the religious establishment—which he represented as a judge and jurist—by deeming that sphere still bound by religious-judicial constraints in law-enforcement. What it does not make is binding precedent for Muslims.

Modern assertions of Fourth-Amendment-like protections in Islam must be viewed in the same light. The modern period has brought modern norms and practices of criminal due process to the Muslim world in constitutions, codes, and treaties; no principle stands in the way of articulating the protections of these norms and others on the basis of the Quran and the Traditions, whether or not similar protections have been articulated or recognized before. Search and seizure protections in particular appear well supported, if not required, by the Quran and Sunna. Indeed, given what we have seen in the sacred texts, the implantation and implementation of search and seizure protections along modern Western lines might itself already have brought the Muslim world closer than it has ever been to practicing the pertinent norms of privacy, dignity, civic virtue, and state regulation that the Quran and Traditions suggest.

In the end, the failure of governments in the modern Muslim world to honor these norms consistently appears central to both the calls for

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413. *Id.* at 41.

greater search and seizure protections and the assertions that Islam mandates them. Mawlana Mawdudi again illustrates. Discussing the right to “the sanctity and security of private life” that he finds in the pertinent Quranic verses and Traditions, he says:

[But] in the so-called modern civilized world we find that not only are the letters of other people read and censored, but even that photostat copies are retained for future use or blackmail. Bugging devices are secretly fixed in houses so that conversations taking place behind closed doors can be taped. In other words, in many spheres of life individuals have no real privacy.<sup>414</sup>

Mawdudi was presumably referring to Pakistan—his home country, and the first nation ever to have been founded as an “Islamic state”—but his complaint might also be directed at other governments in the modern Muslim world today. How valid this complaint is, and how close to Islamic norms or far from them search and seizure practices in the Muslim world are today, are matters we must leave for another day. Surely though, few Muslims or observers would disagree with Mawdudi that protecting privacy, liberty, property, and dignity through robust search and seizure protections is as important in the Muslim world as it is outside of it. We have seen that classical Islamic doctrine contains some pertinent rules and principles, though perhaps not as many modern writers suggest; and we have seen that some of these rules and principles meet or exceed those of Western (non-Muslim) origin while others fall short. But Islamic law and Muslims are not bound by the interpretations of predecessors, or even those of other contemporaries. There is the Quran; there are the Traditions; there is what Muslims have made of these sources in the past; and there is what we make of them today.

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414. MAWDUDI, *supra* note 73, at 25.