“Comparing” Jewish and Islamic Legal Traditions: Between Disciplinarity and Critical Historical Jurisprudence

Lena Salaymeh*

Abstract

Common modes of comparing Jewish and Islamic legal traditions are limited by deep structural assumptions that may be traced to three comparative disciplines that emerged in post-Enlightenment Europe. Comparative philology, comparative religion, and comparative law emphasized linearity and genealogy, with prejudicial and essentializing implications. This article examines how certain disciplinary methods continue to shape the underlying conceptual assumptions of Judeo-Islamic studies through a case study on circumcision, a practice shared by Jews and Muslims. When late antique circumcision is situated within its socio-political, geographic, and intellectual contexts and when it is defined in relation to its correlative terms and concepts, it becomes clear that Jews and Muslims understood and practiced circumcision in distinct ways. These heuristics of critical historical jurisprudence clarify the non-linear and overlapping relationship between Jewish and Islamic legal traditions. The implication of critical historical jurisprudence for contemporary controversies surrounding circumcision is recognizing the inadequacy and limiting consequences of modern categories and concepts.

I. Introducing Disciplinary Impediments

A well-known narrative in the Babylonian Talmud, Eruvin 13b, features a legal dispute between the House of Hillel and the House of Shammai, two rabbinic legal schools of thought that flourished in the first century BCE. The dispute is resolved when a voice from heaven declares, “Both these and those are the words of the living God, but the law (halakhah) is in accordance with the rulings of the House of Hillel.”¹ The phrase “words of the living God” (divrei elohim hayyim) juxtaposed with “law” (halakhah) distinguishes divine law from juristic understandings of divine law. This is reinforced by another prominent Babylonian Talmud passage: Baba Metzia 59b describes God’s legal opinions (Torah) as His domain, whereas law (halakhah) is the domain of the jurists.²

The conceptual distinction between divine laws and their social interpretations in (rabbinic) Jewish legal thought has a parallel in Islamic legal thought. The relationship between “words of the living God” (Torah) and halakhah is similar to that between shari'ah

* Assistant Professor of Law, Faculty of Law, Tel Aviv University. For their valuable feedback, I thank the participants of the Critical Analysis of Law, New Historical Jurisprudence Workshop and the Tel Aviv Law Faculty workshop. I owe special thanks to Rhiannon Graybill and Shai Lavi for their insightful comments on this piece.

¹ Babylonian Talmud Eruvin 13b.
² Id. at Baba Metzia 59b.
(divine law) and fiqh (social understanding of divine law).\textsuperscript{3} This parallel (though not equivalence) is confirmed in the writings of a tenth-century rabbinic figure, Saʿadyah (Ben Joseph) Gaon (d. 942; Iraq). Writing in Judeo-Arabic, he described his work-in-progress as kitāb al-fiqh, suggesting that fiqh means Jewish law (halakhah, rather than divine law).\textsuperscript{4} Several centuries later, Maimonides (d. 1204; Spain/Egypt), in the original Arabic of his Guide for the Perplexed, used the term shariʿ ab to refer to Torah and fiqh to refer to halakhah.\textsuperscript{5} Historically, both Jewish and Muslim jurists recognized and elaborated a distinction between divine law (Torah or shariʿ ab) and societal interpretations of law (halakhah or fiqh).

These terminological distinctions are notable for three reasons. First, the jurisprudential differentiation between divine laws and their social interpretations is often conflated in contemporary discussions.\textsuperscript{6} Second, both Torah and shariʿ ab have similar (and sometimes confusing) idiomatic meanings since they refer both to oral and to written law (i.e., scripture, the Hebrew Bible or Qurʾān). Third, despite referring to distinct concepts, the terms shariʿ ab and halakhah have similar literal meanings—they can both be translated as “a path” or “a way.” (This is one of many reasons why these two terms are often mistakenly equated in contemporary usage.) The semantic correspondence between these terms is misleading because shariʿ ab and halakhah are not counterparts. While the literal definitions of the Arabic and Hebrew terms would suggest that they are equivalent, the relationship these terms have to other legal terminology in Arabic and in Hebrew are not the same. This illustrates why Claude Lévi-Strauss bemoaned that traditional linguistics erred in “consider[ing] the terms, and not the relations between the terms.”\textsuperscript{7} In the case of shariʿ ab and halakhah, defining the terms reifies their similar semantic meanings, rather than the different meanings these terms have within their respective legal discourses. To comprehend the relationship between Islamic and Jewish legal ideas, we must first understand the relationship between terms in Islamic law (shariʿ ab and fiqh) and in Jewish law (Torah and halakhah) respectively.

Lévi-Strauss’s critique also encapsulates a deeper conceptual limitation in how the relationship between Jewish law and Islamic law is commonly conceived and depicted. The misunderstanding caused by defining terms in isolation from their semantic frameworks parallels the misconstruction caused by comparing Jewish and Islamic laws in

\textsuperscript{3} The term shariʿ ab has multiple, historical and genre-specific meanings that are both intersecting and inconsistent. For example, exegetical texts often gloss shariʿ ab as meaning “revelation,” including pre-Islamic revelations (such as the Torah). But, historically, the term was also used to refer to Islam more abstractly and to the pursuit of divine Truth. My differentiation of these terms is based on the identification, in the early eighth century, of a jurist (faqīh) as a scholar specialized in law (fiqh).


\textsuperscript{5} Moses Maimonides (d. 1204), Dalālat al-ḥāʾirīn 3:27 (Salomon Munk ed., 1929-30).


\textsuperscript{7} Claude Lévi-Strauss, Structural Anthropology 46 (Claire Jacobson & Brooke Schoepf trans., 1965).
isolation from their legal frameworks. This methodological limitation misconstrues how the relationship between these legal systems was forged and reshaped historically. As Shai Lavi has elaborated, it is not uncommon for legal scholarship to subordinate law to the logic of modern, non-legal disciplines. In the case of “Judeo-Islamic” studies, the relationship between Jewish and Islamic legal systems is subordinated to the logic of certain nineteenth-century methods from both non-legal and legal disciplines. Many modern disciplinary practices that are taken for granted in the academy coalesced in post-Enlightenment (i.e., seventeenth- and eighteenth-century) Europe and gradually disseminated internationally. But while those initial disciplinary methods have largely been superseded in other fields, Judeo-Islamic legal studies are limited by particular nineteenth-century practices from three interrelated disciplines: comparative philology, comparative religion, and comparative law. Neither the disciplinary practices discussed here nor their associated limitations were invented in the nineteenth century. However, particular nineteenth-century practices have had a long-lasting impact on the fundamental structures of Judeo-Islamic legal studies.

This article presents three abbreviated and partial practices from three disciplines oriented toward “comparison” (comparative philology, comparative religion, and comparative law). Each method imposes, often unintentionally, a linear temporality and a genealogical configuration to the relationship between Islamic and Jewish legal traditions. I illustrate the conceptual problems emanating from these disciplinary methods through a case study on male circumcision. As demonstrated by the aforementioned analysis of Jewish and Islamic legal terms, this article will illustrate that male circumcision in Jewish law does not have the same meaning that it has in Islamic law. Male circumcision is a significant test case because modern discourse imposes a division between religion and the secular that renders circumcision outside the realm of modern/secular law; since both Islamic and Jewish legal traditions predate this modern bifurcation, analysis through the lens of critical historical jurisprudence highlights the potential mistranslation of historical practices.

---

9 I use the term “Judeo-Islamic” for the sake of convenience, but with some hesitation. See Lena Salaymeh, Between Scholarship and Polemic in Judeo-Islamic Studies, 24 Islam & Christian-Muslim Rel. 407 (2013).
12 I use the term genealogy in this article to refer to the study of family histories or of lineages and not to a historiographic approach. (On critical genealogy, or radical historicism, see Mark Bevir, What is Genealogy?, 2 J. Phil. Hist. 263 (2008).)
13 Chapter 4 of my book, The Beginnings of Islamic Law: Late Antique Islambicate Legal Cultures, elaborates late antique circumcision in Islamic traditions more thoroughly (Cambridge University Press, forthcoming 2016).
This article explores why certain disciplinary methods operate on premises that generate misunderstandings about the relationship between the languages and concepts of Islamic and Jewish legal systems. I do not elaborate on why these precise methods reverberate because it is beyond the scope of this article. It is not my objective to attack or discredit traditional methods of comparative philology, comparative religion, or comparative law. Instead, I argue that individual methods from the modern beginnings of these disciplines—now superseded in their contemporary practices—keep Judeo-Islamic legal studies captive to limited ways of thinking and thereby illustrate how “not to compare.” These three disciplinary practices illustrate that comparison without historicism and contextualization is distorting. Nevertheless, historicism and contextualization are only two of many potential starting points for a critical, historical jurisprudential inquiry. Chris Tomlins laments that socio-legal historiography’s concentration on historicism and contextualization produces contingency, indeterminacy, and plurality. By comparison, critical historical jurisprudence discovers open questions that can only be answered with radically distinct language. Examining concepts and practices in their historical, discursive worlds initiates an inquiry that distances us from essentialization and moves us toward immersion within normative spaces that recycle, contest, resist, reshape, and innovate in ways that cannot be easily translated into modern terms.

II. Comparative Philology: Linearity and Prejudice

To narrate Europe’s modern ascendency, some European scholars in the eighteenth and nineteenth centuries became preoccupied with substantiating European scholarship through “scientific” inquiry. Comparative philology was among the disciplines engaged in explaining why Aryans (ancestors of Europeans) were superior. Nineteenth-century European comparative philology sought to identify “original” Indo-European (Aryan) and Semitic languages in order to differentiate between Aryan and Semitic peoples through language. Ernest Renan (d. 1892; France) was well-known as a Semitic philologist whose articulation of the distinctions between Aryans and Semites had a long-lasting influence on Western knowledge production beyond philology or Near Eastern studies. According to Renan, Aryans were the only people who understood liberty and simultaneously believed in a strong state and in individual freedom. By contrast, the political life of Semites was marked by theocracy, anarchy, and despotism. (I hope that my reader hears the echoes of these ideas in contemporary debates.) Involved in the comparative philological studies

---


17 Ernest Renan, De la Part des Peuples Sémitiques dans l'Histoire de la Civilisation: Discours d'Ouverture du Cours de Langues Hébraïque, Chaldäique et Syriaque, au Collège de France 14, 28 (1862).

18 Id. at 16.
of his era, Renan insisted that the linguistic and social dimensions of Semites were intertwined. As Olender has demonstrated, nineteenth-century philological studies shaped later understandings of history in the West, as well as many ideologies (including anti-Semitism). I contend that while the substantive influence may have become minimal, the structural influence remains potent.

Comparative philologists devised a tree model (Stammbaum) to represent language relationships in the form of a family tree. As Image 1 (above) of a proto-Semitic language tree indicates, the comparative philological method involved placing languages in a vertical, hierarchical relationship by comparing their vocabulary and grammar and grouping them based on the extent of their similarities. This method presumes some stasis and conformity within languages, as it neglects vernacular dialects and change over time. I contend that much scholarship, at a deeper conceptual level, continues to perceive the relationships between Islamic and Jewish legal systems as embedded within a linear framework that is structured like a proto-Semitic family tree; consequently, scholars focus on identifying the derivative relationship between “older” Semitic laws and Islamic law. As the comparative philological method is applied in Judeo-Islamic legal studies, it has three notable manifestations: (1) imagining a vertical tree in which Islamic law is derivative of its older Semitic legal sibling, Jewish law; (2) assuming that equivalent trilateral Semitic

---

19 Id. at 15.
20 Olender, supra note 16.
roots produce the same meanings by pointing to similar Jewish and Islamic legal doctrines; (3) presuming that the “grammar” of both legal systems is comparable by pointing to how scriptural texts generate laws.

In terms of the first point, Jewish law has conventionally been viewed as a significant (if not the primary) source of “influence” on Islamic law in modern scholarship. The notion of influence is based on a problematic (if common) evolutionary understanding of Jewish and Islamic legal histories; by imposing a developmental narrative, scholars identify a particular time and place for Jewish legal “influence” on Islamic law. While some scholars recognize “mutual influence,” they have problematically limited it to particular periods, such as Islamic law’s so-called “formative” period. This developmental understanding of legal history is philosophically untenable and fails to account for how socio-historical spaces shape law. The second expression of the comparative philological method in Judeo-Islamic legal studies typically presumes that, just as trilateral Semitic roots produce similar vocabulary, “essential” legal doctrines symbolize the entire legal system; consequently, comparison is isolated to specific areas of law—often family law—and to identifying resemblances in Jewish and Islamic laws. Here, the framing of comparative philology presumes uniformity within legal systems and classifies some legal doctrines (vocabulary) as representative of the entire legal system; this tendency prevents scholars from recognizing how specific areas of law (such as international law) might differ considerably in these two legal systems as a result of the socio-political conditions in which they operated.

The third manifestation of comparative philology in Judeo-Islamic legal studies is associating the generative mechanism of law (i.e., the grammar) with particular scriptural or canonical texts (i.e., “Semitic” texts). For example, a contemporary work asserts that

22 Judith Romney Wegner summarizes this point by stating that “in searching for early influences on Islamic law (beyond pre-Islamic Arabian custom), Jewish law is an obvious starting point. This is so, both because of the shared theocratic orientation and because of the geographic and temporal proximity of the two systems.” Judith Romney Wegner, Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and Their Talmudic Counterparts, 26 Am. J. Legal Hist. 25, 28 (1982).


24 Libson claims that “[a]t the first stage, immediately after the birth of Islam, it was Jewish law that influenced the fledgling Islamic system, but during the geonic period the flow changed direction, with Islamic law putting its imprint on halakhah. Most probably there was a transitional phase, lasting approximately from the mid-7th to the late 8th centuries, during which the flow was two-way, in parallel channels.” Libson, supra note 23, at 175.


“Judaism and Islam share a common approach to their essential structural components. Each considers revelation—in both written and oral form—to be the ultimate source of law.”27 Locating the grammar of law in canonical texts presumes that in both legal systems scriptural texts produce law, as if legal texts are more determinative than hermeneutics. Juxtaposing canonical/scriptural texts, specifically the Torah and the Qurʾān, thereby conceptually limits Jewish and Islamic law to “divine law.”28 This ahistorical assessment discounts the constantly changing interpretations and applications of these texts within diverse communities; it ignores people and their varied readings.

These three manifestations of comparative philology in Judeo-Islamic studies are exemplified in the case of male circumcision, practiced by both Jews and Muslims who lived in the same geographic region for a significant period of time. Islamic circumcision is conventionally understood as: (1) being derivative of its older Semitic legal “forefather,” Jewish circumcision; (2) having the same meaning as Jewish circumcision; (3) being based on equivalent Semitic, canonical ideas (i.e., Abraham’s covenant with God). It is then commonly assumed that Muslims adopted the practice of male circumcision from Jews and, like Jews, understood it as representing Abraham’s covenant with God, as depicted in the Hebrew Bible.29 In contrast to this comparative philological approach, historical evidence indicates that Islamic circumcision was ritualized in late antiquity in ways that are not connected to Jewish practice through linear derivation. Late antique Muslim scholars and jurists drew upon a variety of regional justifications for circumcision and did not perceive it as representing Abraham’s covenant. Muslims practiced circumcision as part of their understanding of ritual purity and in accordance with Abrahamic monotheism (which is not equivalent to rabbinic Judaism). Islamic ritual purity was connected to pre-Islamic, Arabian circumcision practices and to a set of Islamic grooming practices without clear Jewish or Christian equivalents.

Admittedly, one of the ways in which the Abrahamic precedent of circumcision was justified in Islamic literature was through the incorporation of biblical narratives in exegetical works. It was not uncommon for Muslim exegetes to explicate the Qurʾān by referring to the Hebrew Bible. In some cases, the sources of information about biblical narratives were Jewish converts to Islam. While in late antiquity this multilayered, intertextual reading process was normative, it later attracted some scrutiny. Specifically, in the medieval era, Jewish reports came to be identified as “Israelite stories” (isrāʾīlīyāt).30 And eventually, some Muslim scholars would reject these reports because of their content or

28 Case in point: “[W]e focus on what by common agreement of the faithful governs through eternity. For Judaism that is the Torah, and for Islam, the Qurʾān and the Sunna.” Id. at 9.
29 The assumption of adoption from Jews informs both Muslim self-understanding and non-Muslim suppositions. Even when scholars recognize that circumcision had distinct significance in Jewish and Islamic practices, they presume a Jewish source for Islamic circumcision. See, for example, Jacob Lassner, The Covenant of the Prophets: Muslim Texts, Jewish Subtexts, 15 AJS Rev. 207, 229 (1990) (on Muslim borrowing).
30 Roberto Tottoli, Origin and Use of the Term Isrāʾīlīyāt in Muslim Literature, 46 Arabica 193 (1999).
perceived “foreignness.” But Israelite narratives were not removed from Islamic foundational texts and they remained generally accepted; in the specific case of circumcision, there is no evidence of any Muslim figure, prior to the modern era, questioning the legitimacy of circumcision on the basis of its relationship to Jewish practice. Thus, it was common in pre-modern Islamic history for Muslims to justify circumcision based on Abrahamic precedent, but not in a simple, linear relationship to Jewish practice.

III. Comparative Religion: Linearity and Essentialization

It should be clear that the subtle, structural application of the comparative philological method in Judeo-Islamic studies perpetuates the assumptions of both linear and familial Semitic relationships. This, in turn, generates an ethnic stereotype of “Semitic difference” that is not limited to linguistic analyses. After all, Renan claimed that Semites created religions. One of the founders of the modern discipline of comparative religion was Friedrich Max Müller (d. 1900), a philologist and Orientalist who resisted the racism of Renan’s scholarship, but nevertheless perceived the study of language as corresponding to the study of religion. Unsurprisingly, the two disciplines overlapped in their methods, as some basic principles of comparative philology were integrated into comparative religion. For instance, just as comparative philology emphasized non-vernacular languages, comparative religion emphasized scriptural or canonical texts (instead of popular practice). As applied in Judeo-Islamic studies, some modern scholars of religion assumed that by simply reading the Torah or the Qur’ān, they could discover the essential or fundamental aspects of each religion’s legal tradition—a notion that applies the Western Christian (specifically Protestant) idea of “by scripture alone” (sola scriptura). For instance, Neusner and Sonn state, “Why should the two religions concur on so many fundamental propositions concerning the form that religion should take in the here and now of ordinary life? It is because of the character of the revelation—Torah, Qur’an—that each means to realize in the social order.” Similarly, this is why scholarship in Judeo-Islamic studies has traditionally focused on the Babylonian Talmud and specific medieval Islamic legal texts of the surviving, orthodox Sunnī legal schools. Emphasis on canonical (or orthodox) texts elevates a

31 Lowin explains that, in the fourteenth century, isrāʾīliyyāt became “to designate dubious traditions which were to be rejected because of either objectionable content or its non-Muslim origin.” Shari L. Lowin, Abraham in Islamic and Jewish Exegesis, 5 Relig. Compass 224, 225 (2011).
32 “La race sémitique, en particulier, ayant marquée sa trace dans l’histoire par des créations religieuses.” Ernest Renan, Histoire Générale et Système Comparé des Langues Sémitiques 441 (1928).
33 David Moshfegh, Ignaz Goldziher and the Rise of Islamwissenschaft as a “Science of Religion” (2012) (unpublished Ph.D. dissertation, U.C. Berkeley). The discipline of comparative religion is distinct from the specific field of Islamwissenschaft, which is not addressed in this article.
34 See A. Eustace Haydon, From Comparative Religion to History of Religions, 2 J. Relig. 577 (1922); James W. Watts, Ritual Legitimacy and Scriptural Authority, 124 J. Biblical Lit. 401 (2005).
36 By way of example: “Our picture of the two religions therefore conveys the vision of the virtuosi, the ideal of the sages of the Torah and of the scholars who articulated the classical works of Islamic
particular textual tradition above its predecessors or successors; among the many marginalizations are the Palestinian Talmud, the legal practices of non-Rabbinic Jews, and the legal traditions of extinct and minority Islamic legal schools. Comparing scriptures, rather than historically contemporaneous legal texts, results in skewed comparisons.

Canonical approaches promote and legitimate orthodox expressions of a tradition: certain (late antique) rabbis define Jewish law and certain (medieval) Muslim jurists define Islamic law to the exclusion of dissenting or alternative opinions (recorded in non-canonical texts). Consequently, similarities or differences between legal systems are attributed to innate characteristics of these texts or religions, rather than to a social context. This unintentionally propagates the notion of Semitic “religious” difference by neglecting the socio-historical locations of Judaism and Islam. In other words, similarities in Jewish and Islamic legal systems often result from regional customary practices or conditions, rather than scriptural overlap or resemblance.37

Comparative philological language trees were applied to comparative religion. Image 2 (above) captures how religions are compared through linear and familial framings, such as Abrahamic. Implicitly, Abraham is recognized as a proto-religious father of three jurisprudence (fiqh). Anyone who wishes to compare the laws of the two religions will begin exactly where we do, but no one who then proposes to compare the two religions will end there.” Id. at 11.

---

37 I explored geographically-based similarities in Jewish and Islamic legal systems in Lena Salaymeh, Every Law Tells a Story: Orthodox Divorce in Jewish and Islamic Legal Histories, 4 UC Irvine L. Rev. 19 (2014).

monotheistic religions: Judaism, Christianity, and Islam. Just as comparative philology placed Semitic languages in linear, genealogical relationships, comparative religion placed Judaism, Christianity, and Islam in linear and “familial” relationships. But “Abrahamic religions” is a problematic category.

Identifying male circumcision as an Abrahamic practice imposes boundaries on historical inquiry while seemingly engaging historical ideas. Reflecting rabbinic Judaism’s emphasis on ritual circumcision, the Palestinian Talmud indicates that Abraham did not become perfect until after he was circumcised. In comparison, the early Christian apostle Paul (d. ca. 67) asserted that Abraham had achieved perfection prior to circumcision (Rom. 4:9-13). Reflecting a Christian viewpoint of Jewish circumcision as ethnically-based, Origen (d. 253/4; Alexandria/Lebanon) specified that circumcision was incumbent only on the descendants of Abraham and, therefore, not on Christians. As for Islamic texts, there are approximately 70 instances in which the Qurʾān refers to Abraham as an exemplar who should be followed, without specifying circumcision. Within Islamic exegetical literature, there appears to have been a historical shift in the understanding of what constituted Abrahamic practices. Specifically, late antique exegetes—including Ibn ʿAbbās (d. 687; Arabia), Mujāhid ibn Jabr (d. ca. 720), and Muqātil ibn Sulaymān al-Balkhī (d. 767; Iraq)—did not specify Abrahamic practices as necessarily including circumcision. In comparison, the exegete al-Ṭabarī (d. 923; Iraq) defined circumcision as an Abrahamic obligation for Muslims. In doing so, al-Ṭabarī may have been responding to his Jewish, Christian, or other interlocutors; but he did not mention the Abrahamic covenant with God and the blood of circumcision was not endowed with any of the ritual significance it has in Jewish practice. The “Abrahamic” ritual of circumcision is understood distinctly in Jewish, Christian, and Islamic traditions.

Comparative religion’s notion of “Abrahamic” does not account for these distinctions and it imposes an understanding of Abrahamic circumcision that emanates from a genealogical perspective. Because circumcision is misconstrued as an Abrahamic practice in ethnic terms, it is the Jewish and Muslim ethnic groups (sic) who continue to uphold it. Herein lies an additional limitation of this notion of “Abrahamic”: it propagates the idea that Islam is an ethnicity—even though, like Christianity, it is not. A key way in which the overlapping presumptions of traditional comparative philology and comparative religion have misconstrued Judeo-Islamic studies is in incorrectly marking Judaism and Islam as comparable ethnicities.

---


IV. Comparative Law: Linearity and Exclusion

The comparative philological method of organizing language families informed both comparative religion’s method of organizing “religious” families and comparative law’s method of organizing legal families. Some scholars of comparative law sought to pinpoint the legal equivalent of proto-Indo European, the original Aryan law, known as the Ur-Recht.\(^{42}\) In turn, some scholars of legal history identified an original Semitic law as evolving from the Hammurabi Code through biblical, rabbinic Jewish, and Islamic legal systems in a process of linear evolution.\(^{43}\) In 1903, David H. Müller (d. 1912) published his hypothesis about an Ur-Gesetz, from which the Hammurabi Code, the Mosaic Law and the XII Tables are all derived.\(^{44}\) A few years later, Müller published a book, Semitic: language and comparative law, that sought to identify an Ur-Semitic law by connecting Mosaic law to the Hammurabi code.\(^{45}\) While few comparative law scholars identified Aryan and Semitic legal families, many did distinguish between three legal families: common, civil, and religious. In other words, common and civil legal families are secular, as compared to religious legal families.

The differentiation between “secular” and “religious” legal systems parallels the European invention of “Semites” as oppositional figures to “Aryans.” Because nineteenth-century academic discourse identified Semites as having invented religion and religious law, and Aryans as having invented secularism and secular law, Semitic law is, in some ways, coterminous with religious law.\(^{46}\) The construction of Semites in nineteenth-century European scholarship lingers in contemporary constructions of religious legal systems. Unlike Aryan (or secular) legal traditions, Semitic (or religious) legal traditions are perceived as limited by their rigidity and anti-democratic nature. Insofar as religious legal systems are perceived as the antithesis of secular legal systems, this is another manifestation of the Semitic/Aryan dichotomy developed by comparative philology and elaborated by comparative religion. The exclusion of Jewish and Islamic law from the general study of law is a structural reproduction of the religious/secular divide that relegates these legal systems to religious (or area) studies. This division reinforces the notion that secular law is superior to religious law.

This religious/secular legal dichotomy shapes an understanding of law that devalues customary or hybrid legal practices and thereby obfuscates the multilayered legal dimensions of circumcision. While male circumcision is a historical practice understood in modern terms as having both religious (especially Jewish or Islamic) and secular (especial-
ly medical) justifications, female circumcision complicates comparative law’s framing.\footnote{There is no consensus on what constitutes female circumcision. Some practices involve removal of the clitoris; others include the labia minora or labia majora. See Mary Knight, Curing Cut or Ritual Mutilation?: Some Remarks on the Practice of Female and Male Circumcision in Graeco-Roman Egypt, 92 Isis 323 (2001). I use the terms male and female circumcision for the sake of clarity, but I recognize that the practices may not be entirely analogous and could be described differently.} As a regional, customary practice, female circumcision does not correspond either to Abrahamic practices or to secular sensibilities. Female circumcision was an ambiguous issue for medieval Muslim jurists because it was not an Abrahamic practice, nor was it required by any Islamic scriptural text, but could be justified as necessary for ritual purity.\footnote{Kathryn Kueny, Abraham’s Test: Islamic Male Circumcision as Anti/Ante-Covenantal Practice in Bible and Qur’an: Essays in Scriptural Intertextuality 173 (John C. Reeves ed., 2003).} Most medieval Muslim jurists permitted female circumcision and, as Jonathan Berkey has demonstrated, they assumed that male circumcision was obligatory and female circumcision was recommended.\footnote{Jonathan P. Berkey, Circumcision Circumscribed: Female Excision and Cultural Accommodation in the Medieval Near East, 28 Int’l J. Middle E. Stud. 19, 25 (1996).}

A key reason why late antique (and medieval) Muslim jurists did not prohibit female circumcision is that they viewed the practice as a matter of cleanliness, disassociated from the Abrahamic covenant’s relevance to men only. If circumcision was the sign of Abraham’s covenant with God, then women were excluded from it.\footnote{See Ilona N. Rashkow, Taboo or Not Taboo: Sexuality and Family in the Hebrew Bible ch. 4 (2000).} Unlike Abraham’s covenant-based circumcision in Jewish tradition, male and female circumcisions in Islamic traditions are entangled in bodily ritual purity and in local customary practices. Thus, late antique and medieval Islamic legal opinions on female circumcision defy classifications of religious versus secular, by revealing the internal multivocality of Islamic law.

V. A Critical Historical Jurisprudence of Islamic Circumcision

The contemporary discipline of comparative philology has changed significantly since its modern beginnings; the late nineteenth-century wave model (\textit{Wellentheorie}) gradually (though not entirely) replaced the tree model in historical linguistics.\footnote{Daniel Boyarin, Border Lines: The Partition of Judaeo-Christianity 18 (2004) (discussing wave theory in linguistics).} The essentializing methods of comparative religion also fell into disfavor in the early twentieth century, as scholars shifted to a “history of religions” approach.\footnote{See Haydon, supra note 34.} Similarly, comparative law is no longer focused on identifying legal families.\footnote{See H. Patrick Glenn, Legal Traditions of the World: Sustainable Diversity in Law (2007).} The three methods, based on linearity and genealogy, are part of the disciplinary histories of comparative philology, comparative religion, and comparative law. Yet the methodological implications persist at a fundamental structural level because the relationship between Jewish and Islamic legal traditions con-
tinues to be understood in linear verticality and through the limitations of genealogy. In
addition, while comparative philology racialized Semitic languages and comparative reli-
gion canonized Semitic religions, the notion of Semitic identity has largely disappeared.
But the substantive assumptions of those categories persist in the classification of secu-
lar/religious.\footnote{As Gil Anidjar has explained, “religion and race are contemporary, indeed, coextensive and, moreover, co-
concealing categories.” Anidjar, supra note 46, at 28 (emphasis in original).}
Having demonstrated the limitations of these particular disciplinary
methods, I turn now to a critical historical jurisprudence of the relationship between cir-
cumcision in Jewish and in Islamic legal traditions.

The prescribed time for circumcision in Islamic traditions offers an important lens
through which to view the relationship between Islamic and Jewish circumcision. Jewish
circumcision occurred on a clearly stipulated day, in conformity with Leviticus 12:3, which
specifies, “On the eighth day the flesh of his foreskin shall be circumcised” (NRSV).\footnote{Other biblical sources for this prescribed day of circumcision are Gen. 17:12 (circumcision is at eight days
old) and Genesis 21:4 (Isaac was eight days old when Abraham circumcised him).}
By comparison, for pre-Islamic monotheistic Arabs (and possibly for some ancient Israelites),
circumcision may have been a puberty initiation rite.\footnote{Jan Retsö, The Arabs in Antiquity: Their History from the Assyrians to the Umayyads 606 (2005). Some
scholars have suggested that ancient Israelites may have also practiced circumcision as an initiation rite,
pointing to Genesis 17:25 (Ishmael was thirteen when he was circumcised) and Exodus 4:24-26 (Zipporah’s
circumcision of her son).}
Late antique Muslim jurists did not
specify an obligatory date for circumcision—suggesting it may have been of little concern.
Medieval Islamic sources provide multiple opinions on the timing of circumcision, rang-
ing from seven days to puberty; this seemingly corresponds to both Jewish and pre-
Islamic customary practices.\footnote{Najāshī ʿAlī Ibrāhīm, Khiṣāl al-fīṭrāh fī al-fiqh al-islāmī 32-33 (1980).}
(It should be noted that the “eighth day” in Jewish sources
refers to the eighth day of the infant’s life, whereas the “seventh day” in Islamic sources
refers to the seventh day after the infant’s birth. Thus, these units of time are equivalent.)
Some tradition-reports assert that the Prophet’s daughter, Fāṭimah (d. 632; Mecca), cir-
cumcised her sons on the seventh day or that the Prophet had his grandsons circumcised
on the seventh day.\footnote{Muḥammad ibn Abī Bakr Ibn Qayyīm al-Jawzīyah (d. 1350; Syria), Tuḥfat al-mawdūd bi-ābkām al-
mawlūd 144-45 (1977).}
Wahb ibn Munabbih (d. ca. 730; Yemen), possibly of Jewish heri-
tage, reportedly claimed that circumcision on the seventh day is preferable because it
inflicts the least pain on the infant.\footnote{Id. at 144.}
In addition, Imāmī Shiʿī sources report important jurists advising that circumcision be on the seventh day.\footnote{Muḥammad ibn Yaʿqūb Kulaynī (d. 941; Iran), Furūʿ al-Kāfī 6:36-7 (Shams al-Din Muhammad Jaʿfar ed., 1993).}

By contrast, some Muslim scholars disapproved of circumcision on the seventh
day after birth precisely because it was a Jewish practice. The obligation of male circumc-
sion was not in and of itself an excessive emulation of Jewish practices, but some scholars
viewed the issue of *when* to circumcise as coming dangerously close to Jewish tradition. Thus, al-Hasan al-Baṣrī (d. 728; Iraq) discouraged Muslims from circumcising on the seventh day after birth, on the basis of it being a Jewish tradition.\(^{61}\) Makhūl (d. 731; Syria), and other traditionists, reported that Abraham circumcised Ismā’īl when he was 13 years old and Ishāq when he was seven days old.\(^{62}\) This tradition-report suggests an interest in differentiating between Muslim circumcision and Jewish circumcision through the figures of Abraham’s sons. Other late antique jurists recommended circumcision at a variety of times other than the seventh day.\(^{63}\) Some jurists evidently felt it was necessary to distinguish between Jews and Muslims through ritual practices.

Still, many Muslim jurists considered the issue of mistaking Muslims and Jews through circumcision inconsequential. Aḥmad ibn Ḥanbal (d. 855; Iraq) refuted the concern that circumcising on the seventh day would conflate Muslims and Jews.\(^{64}\) The question of when to perform the circumcision ritual seems to have become less pressing in the medieval era. In *Ahkām al-ṣīḫār*, Uṣṣurūshanī (d. 1234/5; Samarqand) identified the maximum age of circumcision as twelve years old and conceded that there was no consensus on the minimum age.\(^{65}\) Ibn Qayyim al-Jawziyyah noted that jurists differed on the legality of circumcising boys on the seventh day after their birth, acknowledging the dispute over Jewish practice and citing al-Hasan al-Baṣrī (d. 728; Iraq) as explicitly rejecting it.\(^{66}\) He concluded that all boys must be circumcised prior to reaching puberty.\(^{67}\) Importantly, none of these Muslim scholars mentioned Abraham’s covenant.

The various tradition-reports cited by medieval jurists reveal a debate in late antique and medieval Muslim societies about when to perform circumcision and a related concern about the dynamics of group identity vis-à-vis Jews. The multiplicity of opinions on the timing of Islamic circumcision demonstrates not simply plurality in the relationship between Jewish and Islamic circumcision, but also differentiation and engagement. Jewish and Islamic circumcision laws simply do not match because, in each tradition, circumcision is embedded within a web of meanings and historical surroundings that fundamentally defy mistranslated and oversimplified comparison. Male circumcision in the Jewish tradition is tied to the blood of Abraham’s covenant, while male circumcision in the Islamic tradition is tied to grooming and an indistinct notion of Abrahamic, monotheistic practices. Critical historical jurisprudence reveals that the relationship between Jewish and Islamic circumcision is a reappearing question in the Islamic tradition, but not

---


\(^{62}\) Ibn Qayyim al-Jawziyyah (d. 1350; Syria), *Tuḥfat al-mawdūd* 121, 144 (1977).

\(^{63}\) al-Layth ibn Sa’d (d. 791; Egypt) recommended circumcision between the ages of seven and ten; Mālik ibn Anas (d. 795; Medina) advised against circumcising on the seventh day. Id. at 144.

\(^{64}\) Id.

\(^{65}\) Muhammad ibn Maḥmūd Uṣṣurūshanī (d. 1234/5; Samarqand), *Aḥkām al-ṣīḫār* 144-45 (1997).

\(^{66}\) Ibn Qayyim al-Jawziyyah (d. 1350; Syria), *Tuḥfat al-mawdūd* 143 (1977).

\(^{67}\) Id. at 142.
within the terms of linear derivation, essentialism, and genealogy embedded in the three
disciplinary practices enumerated above. Instead, this relationship is a changing series of
interplays between customary practices and Islamic notions of monotheism.

VI. Critical Historical Jurisprudence and Modern Debates

The linearity and genealogy of the three disciplinary methods outlined above may inform
not only historiography, but also modern debates. In presenting historical ideas about
both Jewish and Islamic circumcision, I frequently referred to “Abraham,” without ex-
plaining how each tradition deals with him as a historical figure. Just as critical historical
jurisprudence indicates that circumcision has distinct meanings in Islamic and Jewish legal
traditions, so too does “Abraham” have differentiated resonance in these two traditions.
Whereas Abraham embodies the covenant in Jewish traditions, he represents monotheis-
tic practices in Islamic traditions. “Abraham” is articulated distinctly in Jewish and Islamic
traditions despite the genealogical materials in Islamic traditions that posit a familial rela-
tionship between Abraham, Jews, and Muslims.

The inconsistency of Abraham in each tradition contrasts remarkably with the
multiple ways the concept of “Abrahamic traditions” is used in modern discourse to refer
to Jews, Christians, and Muslims. First, there is an internal and positive use of this notion:
Jews, Christians, and Muslims often refer to themselves as Abrahamic, particularly within
settings focused on tolerance and religious plurality. Second, “Abrahamic” sometimes oper-
ates as a code for Semites; this leads to the racialization of Judaism and Islam (an
extension of the association between Semites and religions) in modern debates. Third, the
Abrahamic concept consistently disappears when the Muslim other is the object of cri-
tique. That is, anti-Muslim prejudice conveniently ignores the notion of “Abrahamic
traditions” because it does not suit its objectives. Fourth, there is an instrumental use of
“Abrahamic traditions” that identifies Jewish and Islamic practices that are acceptable be-
cause they conform to majoritarian (i.e., Western Christian) values or to the secular
nation-state’s ordering of society. By way of example, male circumcision is not the subject
of extreme scrutiny or discrediting campaigns because evangelical Christians, a significant
percentage of the U.S. population, endorse it as an Abrahamic practice.68

In comparison, female circumcision—a non-Abrahamic practice—has received
significant criticism from Western scholars and activists. Troubled by a practice that is not
normative either to a Judeo-Christian world-view or to Western liberal feminists, Western
scholars have characterized female circumcision as a morally abhorrent practice, without
recognizing the normative basis for their perspective.69 Admonishments of Muslim jurists
who permitted or encouraged female circumcision reflect an implicit judgment that Abr a-
hamic practice confers legitimacy. While male circumcision (a recognized Abrahamic
practice) has been the subject of scrutiny, it has been in terms of pitting circumcision

---


69 The assumption that female circumcision is more harmful or damaging than male circumcision reflects a
against secular law, rather than against morality. In other words, legal families, a method of categorization in comparative law, constructs the boundaries of modern law in such a way as to accommodate certain aspects of “religious” law and to reject much non-Western customary law.

The term “Abrahamic” represents the utilitarian ways in which Jews and Muslims are adapted within a modern legal system; it does not designate the unification of Christianity, Judaism, and Islam in contemporary U.S. discourse. In recent years, Islam has regularly been invoked to demonstrate religious diversity in the U.S., but often within the boundaries of Abrahamic tradition. Several recent Establishment Clause challenges have been lost because public organizations that display Muslim symbols alongside Christian and Jewish ones are considered to be sufficiently religiously diverse. 70 In other words, Islam has become something of a test case for religious tolerance, such that including Muslims—even if excluding other religious groups—is sufficient to counter an Establishment Clause argument. The notion of an Abrahamic tradition is central to the contemporary project of Muslim assimilation in the U.S.; it is an expansion of a similarly assimilationist project, the notion of Judeo-Christianity. 71 “Abrahamic tradition” is not the shared history of Judaism, Christianity, and Islam; it is, instead, a modern construction of how some Western Christians perceive their relationship to Judaism and to Islam. While “Abrahamic” has distinct and constantly changing meanings in Jewish, Christian, and Islamic literature throughout history, the notion of “Abrahamic religions” collapses these particularities into a simple linear narrative.

While Abrahamic seems inclusive, its genealogical echoes have often unrecognized implications. Abrahamic is sometimes used as a positive alternative to “religious,” but it does not overcome the “Semitic” underpinnings of the category of religion. This is evident in contemporary circumcision debates, where anti-Semitism is both implicit and entangled in facially-neutral objectives. There was a failed attempt to ban male circumcision in the city of San Francisco in 2011. In 2012, Germany also dealt with circumcision-based legal battles. In the U.S. and in Europe, anti-circumcision activists argued that the human rights of a child to bodily autonomy should trump the religious beliefs or practices of a parent. In turn, those who practice circumcision in fulfillment of a religious obligation argued that their right to religious expression (in other words, to practice their religious laws) should not be encumbered by state intervention. On the surface, these arguments are predictable expressions of “secular” versus “religious” ways of thinking that

70 This point is made by Malick Ghachem in an in-progress article, The Search for Abrahamic America (on file with author). Ghachem cites the following cases: Chabad v. City of Poughkeepsie, 76 A.D.3d 693 (N.Y. App. 2010) (finding that including a menorah, Christmas tree, and star and crescent—three assumed symbols of Judaism, Christianity, and Islam—precludes any endorsement concern); Skoros v. City of New York, 437 F.3d 1 (2d Cir. 2006) (holding that a public school holiday display of a menorah and a star and crescent has a secular purpose and is constitutional); and Clever v. Cherry Hill Twp. Bd. of Educ., 838 F. Supp. 929 (D.N.J. 1993) (upholding a school district policy requiring classrooms to display a calendar depicting a diverse range of religious and cultural holidays because it includes a star and crescent).

have come to dominate the contemporary world, generating an assumption that religious law is oppositional to the secular nation-state. But if we recognize the intersection of religion and ethnicity, the circumcision debate looks quite different.

Anti-Semitism motivates some of the individuals who oppose circumcision practices. In the case of San Francisco, for example, one of the materials circulated to garner support for a circumcision ban depicted an anti-Semitic scene of a Jewish circumcision ritual (see Image 3). In a comic designed by an active member of the anti-circumcision movement in San Francisco, the Aryan-looking “Foreskin Man” sought to save Jewish (and in Issue 4 of the same comic, Muslim) children from ritual circumcision. (Of course, this particular comic is not representative of the motivations of all anti-circumcision activists in San Francisco—some of whom based their objections on medical ethics.) Similarly, in Germany, circumcision debates appear motivated, at least in part, by fear of Turkish and Arab immigrants, as well as by a broader anti-religion perspective. Anti-Jewish and anti-Muslim sentiments underlying some anti-circumcision activism are articulated as the necessity of “secular” human rights superseding “religious” law. Using the language of secular law (specifically, human rights)—by claiming that they were advocating for “genital autonomy” and the rights of children to bodily integrity—anti-circumcision activists pitted the secular, modern-nation state against a ritual (religious) law. It is difficult to disentangle opposition to religion from its anti-Semitic associations, even when expressed as a specifically anti-Islam position. There are real-world implications for how “religious law” is constructed and for how it functions as a strategy for demonizing, subjugating or secularizing groups.

Contemporary debates about female and male circumcision reveal some subtle interactions between prejudice and critiques of circumcision practices. This overlap,

---


however, is not isolated to popular debates, but also informs scholarship. As previously noted, Israelite narratives were common sources in late antique Islamic literatures. In the early twentieth century, Israelite narratives became entangled in Western anti-Semitism and a new, modern opposition to these narratives emerged. Circumcision, assumed to be a quintessential “Semitic” practice, became the object of scrutiny. In 1949, Joseph Lewis published *In the Name of Humanity: Speaking Out Against Circumcision.* The book contains many prejudicial images of Jewish circumcision rituals. The anti-Semitic underpinnings of this

Image 4: Arabic translation of Lewis’s book

---

\[74\] Joseph Lewis, *In the Name of Humanity: Speaking Out Against Circumcision* (1949).

above. The author/translator included an extensive foreword arguing that circumcision is a Jewish practice that entered Islamic tradition through what are known as Israelite narratives. He discredited a tradition-report about Muḥammad being born circumcised because it was reported by Kaʻb al-Aḥbār, a Jewish Arab who converted to Islam. This identity-based attack on Israelite narratives is not a continuation of the medieval questioning of “foreign” sources, but rather a modern polemic situated within an equally modern, anti-Semitic discourse. This author/translator accepted the basic premises of the three disciplinary methods by situating Islamic circumcision in a linear, derivative relationship to Jewish circumcision and by assuming that Islamic circumcision has the same social meaning as Jewish circumcision. In so doing, he failed to see the decidedly non-linear ways in which Muslim scholars gave circumcision an Islamic meaning independent of Jewish circumcision.

The relationship between the marking of religion and its racialized implications is not a mere historical connection. There is a documented link between contemporary anti-Semitism and Islamophobia. Similarly, recent campaigns against so-called “shariʿah law” (sic) demonstrate not only deep prejudice against Muslims, but also the intersection of racial and religious discrimination in the contemporary United States. While the terminology used to describe the binary has changed (from Aryan/Semite to secular/religious), the combination of racializing and discriminating against Jews and Muslims continues.

VII. Conclusion

I have suggested that specific (and antiquated) methods from comparative philology, comparative religion, and comparative law continue to shape how the relationship between Jewish and Islamic legal traditions is studied and perceived. The case study on male circumcision emphasized the limitations of traditional “comparative” methods in understanding both historical and contemporary debates. The jurisprudential distinctions with which I began are relevant here again because Jewish and Islamic legal systems are generally known, identified, and understood as “halakhab” and “shariʿah.” And just like these two untranslated and mismatched terms, the legal understandings of Jewish circumcision and Islamic circumcision are both misunderstood and erroneously equated. Circumcision in Islamic legal texts does not have the same meaning or significance that it has in Jewish

76 Id. at 40-56.
77 On anti-Semitism as a modern ideology, see Moishe Postone, Anti-Semitism and National Socialism, in Germans and Jews Since the Holocaust: The Changing Situation in West Germany 302 (Anson Rabinbach & Jack Zipes eds., 1986).
law, even when it engages with the *timing* of Jewish circumcision. Instead of inaccurate and imposed comparisons, critical historical jurisprudence provides an opportunity to recognize the non-linearity of history and the constraints of modern categories. It dismantles how nineteenth-century disciplines constituted the relationships between Jewish and Islamic legal systems, revealing that there are no essences, but rather normative spaces of engagement and reengagement. Studying Islamic law under the shadow of Jewish law can lead to misunderstanding, while studying Islamic law with the light of Jewish law can lead to clarification.

The enduring challenge is how to write about Jewish and Islamic legal traditions from within their own frameworks, without adopting the discursive hegemony of disciplinary methods or the modern religious/secular divide. In current circumcision debates, Islamic and Jewish laws are always and already subordinated to modern law and, therefore, circumcision is dependent on Abrahamic/secular approval. The notion that “religious” legal systems—or, more broadly, religious societies—are fundamentally different from secular ones is embedded within a broader way of thinking that has prejudicial roots and consequences.81 Resistance lies not in merely countering secular arguments, but rather in challenging the premises by which the secular defines (and thereby limits) the religious.

---