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October 10, 2008

Mr. Suhail Khan
U.S. Department of Transportation
Office of the Assistant Secretary for Transportation Policy
1200 New Jersey Ave, SE
Washington, D.C. 20590

Re: Your debate with Frank Gaffney, Baltimore, MD

Dear Mr. Khan:

In your debate with Mr. Gaffney in Baltimore on Tuesday evening, October 8, 2008, beyond your ad hominem attacks against Robert Spencer and me, you spent a great deal of time attempting to create the appearance of a moral and logical equivalence between Shariah and Jewish law. This of course follows a long tradition of Muslim Brotherhood agents in the West and other apologists for the brutality of Shariah. For example, just recently, many of the [press reports](#) announcing that England has recently granted Shariah courts on its home soil formal authoritative status as a recognized arbitration panel concluded identically as follows: "Inayat Bunglawala, assistant secretary-general of the Muslim Council of Britain, said: "The MCB supports these tribunals. If the Jewish courts are allowed to flourish, so must the sharia ones.""

Because you attempted to make this equivalency argument during the debate with Mr. Gaffney as if you understood the subject upon which you were opining, please consider this a tutorial on why the active and purposeful pursuit of Shariah in the U.S. has implications for the federal criminal law of sedition (notably Title 18, Section 2385 of the U.S. Code) and why Jewish law and Christian dogma or Catholic canon do not. Specifically, I present here a brief discussion of whether such application of federal criminal law to Shariah would have an impact on the practice of Jews who observe Jewish law

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and the private adjudication of religious and commercial matters before a *bais din* or Jewish court of law (or, for that matter, Christians or Catholics submitting arbitral matters before private ecclesiastical boards or panels).

To begin, by Shariah we mean the authoritative and authoritarian *corpus juris* of Islamic law as it has been articulated by the recognized Shariah authorities over more than a millennium. The term Shariah as used herein, therefore, does not refer to a personal, subjective, pietistic understanding of the word or concept of Shariah. This latter understanding of the word Shariah is closer to its literal meaning in Arabic without any of the legalistic connotations it has developed as an authoritative institution in Islamic history; as it is currently practiced in such countries as Iran, Saudi Arabia, and Sudan; and as it is meant when referred to in the various laws and constitutions of most Muslim countries.

As you know, I have written extensively on the question of the practice or advocacy of Shariah by Shariah authorities as a violation of the primary federal sedition statute (i.e., 18 U.S.C. § 2385) on the grounds that throughout the long 1200-year history of the development of Shariah, and across all five major schools of Shariah jurisprudence, five salient facts are embedded in a deep consensus among all authoritative Shariah authorities:

[1] The *telos* or purpose of Shariah is submission. Shariah seeks to establish that Allah is the divine lawgiver and that no other law may properly exist but Allah's law.

[2] Shariah seeks to achieve this goal through persuasion and other non-violent means. But when necessary and under certain prescribed circumstances the use of force and even full-scale war to achieve the dominance of Shariah worldwide is not only permissible, but obligatory. The use of force or war is termed Jihad.

[3] The goal of Shariah is to achieve submission to Allah's law by converting or conquering the entire world and the methodology to achieve this end (by persuasion, by force and subjugation, or by murder) is extant doctrine and valid law by virtue of a universal consensus among the authoritative Shariah scholars throughout Islamic history.

[4] The doctrine of Jihad is foundational because it is based upon explicit verses in the Qur'an and the most authentic of canonical Sunna and it is considered a cornerstone of justice: until the infidels and polytheists are converted, subjugated, or murdered, their mischief and domination will continue to harm the Muslim nation. And,

[5] Jihad is conducted primarily through kinetic warfare but it includes other modalities such as propaganda and psychological warfare.

Much of my work in this area has drawn upon original Shariah-based works and the academic scholarship relating to that body of work, but also includes the scholarship of others. I especially owe much to Stephen Coughlin (Major U.S. Army Reserves, military intelligence) and his work for the Joint Chiefs while assigned to USCENTCOM.

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Because Jihad necessarily advocates violence and the destruction of our representative, constitution-based government, the advocacy of Jihad by a Shariah authority presents a real and present danger. This is sedition when advocated from within our borders; an act of war when directed at us from foreign soil.

This is especially true because a Shariah authority commands the absolute allegiance of the Shariah faithful Jihadist. As Professors Frank Vogel and Samuel Hayes explain, both distinguished professors at Harvard University and proponents of Shariah-compliant finance, Shariah is not some personalized, subjective, pietistic approach to Islam but an institutionalized legal-political-normative doctrine and system:

Islamic legal rules encompass both ethics and law, this world and the next, church and state. The law does not separate rules enforced by individual conscience from rules enforced by a judge or by the state. **Since scholars alone are capable of knowing the law directly from revelation, laypeople are expected to seek an opinion (fatwa) from a qualified scholar on any point in doubt; if they follow that opinion sincerely, they are blameless even if the opinion is in error.**¹
(Emphasis added.)

Shariah, as it is described on its own terms, is fundamentally and critically unlike Jewish law and any form of Christian canon or ecclesiastical law. Specifically, because neither Jewish law (*halacha*) nor Christian canon or ecclesiastical law obligates the Jew or Christian, respectively, to violently impose theo-political tenets in lieu of the Constitution, there is simply no basis to apply the laws of sedition to the application of Jewish law or Christian dogma within private religious or commercial contexts. While Jews and Christians may advocate and petition their government for laws that reflect their moral and theological worldview (as may Muslims or atheists), neither Jewish law nor Christian dogma permits the forceful imposition of a theocracy in lieu of representative government or the replacement of our constitution with theocratic legislation.

The contrast between Jewish law and Shariah makes this point vividly. After the fall of the Jewish Commonwealth and the dispersion of the Jews into lands ruled by non-Jews following the Roman destruction of the Second Holy Temple (the current Exile, which includes the modern State of Israel), Talmudic and Jewish legal authorities developed several fundamental principles of Jewish law. The first is *dina d'malchuta dina* – or, the law of the land in commercial matters is the law (see, e.g., BABYLONIAN TALMUD, *Baba Kama* 113a, *Baba Basra* 54b, *Gittin* 10b, and *Nedarim* 28a). In other words, the sovereign's secular commercial laws control Jewish law.

The second post-Exilic legal ruling which separates Jewish law from traditional and still quite contemporary Shariah is that Jewish law on its own terms no longer grants jurisdiction over criminal matters or any form of civil or administrative penalty to a Jewish *bais din* or court. At best, a Jewish court established by the community may render decisions about money judgments for actual damages as a kind of private arbitration (see, Rabbi Joseph Caro, SHULCHAN ARUCH, *Choshen Mishpat*, Chapter 1:1-2.) Thus, Jewish law does not allow a *bais din*, even in modern Israel, to issue a ruling that could have any penal or even compensatory function for non-money damages – such as embarrassment or shame.

It is also worth noting that there is no Jewish legal or normative doctrine for taking lives – others' or one's own – as a martyr in fulfilling Jewish law. Specifically, Jewish law requires a Jew to violate Jewish

¹ Frank E. Vogel & Samuel L. Hayes, III, *Islamic Law and Finance: Religion, Risk, and Return* 23 (1998).

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law and to follow the law of the land rather than suffer death except in three cases²: (i) if the local law requires a Jew to murder someone (fighting and killing in a legal war of the nation is of course not murder so Jews have no basis for resisting a military draft); (ii) if the local law requires the Jew to engage in some sexual perversion (incest, rape, or homosexuality); and (iii) if the local law requires the Jew to worship idols. But even in these three cases, a Jew must simply allow himself to be punished or martyred by the authorities for his refusal to violate one of these fundamental sins. That is, Jewish martyrdom is a passive act of resistance. There is no concept of a Jewish martyr who dies murdering his enemy.

Shariah turns the Jewish legal doctrine of martyrdom on its head. As noted above, Shariah demands that its law dominate and it is a fundamental crime under Shariah for a Muslim to adhere to a secular law that does not make clear that Shariah is the “highest law of the land”. If a Muslim adheres to a secular constitution deemed the “highest law of the land”, even if the secular constitution and the laws of the land allow for Shariah adherence, the Muslim is considered a *Mushrik* or polytheist – subject to capital punishment because he has implicitly acknowledged a law giver higher than Allah.³ Moreover, according to Shariah, a Muslim is a martyr when he dies killing/murdering the infidel. There is nothing passive about the act which awards the Jihadist this appellation.

And, returning to the Jewish legal concept of “the law of the land is the law”, this Jewish legal doctrine is true according to most authorities precisely because a legitimate sovereign acting as a representative of its people passing laws for just and peaceful relations is participating itself in the divine plan for human existence. Jewish law recognizes this divinity and does not seek to deligitimatize secular or foreign law by rendering it, as Shariah does, an affront and illegal challenge to supreme divine law and punishable by death.

Further, the only method available to the contemporary *bais din* to enforce its rulings is by the imposition of a kind of communal excommunication (i.e., *herem*, *niddui*, or *nezifah*).⁴ As a practical matter, because the post-Exilic Jewish legal structure is not hierarchical, no *bais din* can force its ruling on any other and this leaves even this enforcement action as little more than local, voluntary censure.

To a Shariah-adherent Muslim, however, contemporary Shariah has lost none of its political clout and continues to have the power of state action. Thus,

Since Islamic law reflects the will of [Allah] rather than the will of a human lawmaker, it covers all areas of life and not simply those which are of interest to a secular state or society. It is not limited to questions of belief and religious practice, but also deals with criminal and constitution (sic) matters, as well as many other fields which in other societies would be regarded as the concern of the secular authorities. In an Islamic context there is no such thing as a separate secular authority and secular law, since religion and state are one. Essentially, the Islamic

² Excepting a case of general oppression of the Jewish people qua Jews or the requirement for a Jew to publicly desecrate Jewish law because he is a Jew. In these two cases, a Jew is also required to passively resist violating Jewish law, even to the point of suffering death. See, generally, Maimonides, MISHNE TORAH, Chapter 5 in the *Laws of the Foundation of the Torah*.

³ See, e.g., the newly minted constitutions of Iraq and Afghanistan. Crafted by U.S. “Islamic law scholars” who insisted on the importance of inserting a Shariah-supremacy clause, these constitutions provide explicitly that no state law may contravene Shariah.

⁴ See, e.g., Maimonides, MISHNE TORAH, Chapter 6 of the *Laws of Talmud Torah*, Halacha 14; Rabbi Joseph Caro, SHULCHAN ARUCH, *Choshen Mishpat*, Chapter 334:43.

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state as conceived by orthodox Muslims is a religious entity established under divine law.⁵

To conclude, it should be clear with but a cursory analysis, because Shariah calls for the destruction of our constitutional republic and for our conversion, subjugation, or murder it is criminal. There simply is no basis to suggest that either Judaism or Christianity, or in fact any other well-known religious dogma or doctrine, falls within the statutory coverage of our extant laws criminalizing sedition.

I hope this letter clarifies the matters you muddled and presented quite falsely in your debate with Frank Gaffney. Should you need any further elaboration, please feel free to contact me.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'David Yerushalmi', with a stylized, overlapping loop at the end.

David Yerushalmi

⁵ Mervyn K. Lewis & Latifa M. Algaoud, *Islamic Banking* 24 (Edward Elgar ed., 2001). The authors of this important text are two prominent advocates of Shariah-compliant finance, one a leading professor of finance in Australia and the other a senior official in the Bahrain Ministry of Finance and National Economy. While the authors attempt to “tone down” this absolute statement of Shariah by suggesting that as a practical matter Shariah has in fact lived side-by-side with secular law and in some cases even incorporated it into Shariah, they honestly but almost unnoticeably add the following to their effort to soften Shariah: “The continuation of a custom of a particular place or community is allowable under Islamic law, and may in fact be assimilated into the law, as were many of the customs of the Arabs. To be permissible a custom must not be contrary to revealed injunctions, and this point remains highly controversial in some areas, for example the treatment of women.” *Id.* at 25 (emphasis added). What the authors mean by “revealed injunctions” are any legal ruling of Shariah authorities where there is consensus among the authorities that the ruling is based on an explicit verse in the Qur’an or Sunna. What is intriguing is that of all of the fixed unalterable laws of Shariah, the authors are concerned about the treatment of women. While many certainly argue that Shariah demeans and subordinates the Muslim woman, one might have thought that the fixed death penalty for an apostate (i.e., a Muslim who wishes to leave Islam) or the infidel (the non-Muslim) would have captured their concern sufficient for articulation. Apparently, it is not, in the authors’ views, “highly controversial” among the Shariah faithful.