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The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law

Haider Ala Hamoudi

University of Pittsburgh School of Law
3900 Forbes Avenue
Pittsburgh, Pennsylvania 15260-6900

www.law.pitt.edu
412.648.1400
E-mail: hamoudi@pitt.edu

HAIDER ALA HAMOUDI*

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The dark haired Christian beauty—
Who permitted her to slay my healthy Muslim self
Unconcerned with her and about her?
I reproach the murder at her hands.

I saw her strike the church bells. . . .
I called to her 'come to me, for you are inspired
by God, and I am enthralled by you' . . . .
Then I said to my soul, 'which causes you more pain,
her distance from you, or the striking of the church bells?'

Nadhim Al-Ghazali (1920-1963)

The central flaw in the current approach to shari'a *in the American legal academy is the reliance on the false assumption that contemporary Islamic rules are derived from classical doctrine. This has led both admirers and detractors of the manner in which* shari'a *is studied to focus their energies on obsolete medieval rules that bear no relationship to the manner in which modern Muslims approach* shari'a. *The reality is that given the structural pluralism of the rules of the classical era, there is no sensible way that modern rules could be derived from classical doctrine, either in letter or in spirit, and all efforts to do so have largely failed. As with all historical approaches to the law, the past becomes no more than an invention of the present, a means to validate an approach rather than any true reflection of the practices and norms of a previous era. Thus, modern Islamic rules are not a resurrection of classical era rules, but rather are largely the product of mediation among competing influences in Muslim society. Within and even beyond Islamic finance, the two major influences are, on the one hand, resistance, clothed in Islamic rhetoric, against the dominant global economic and political order in order to create a separate Muslim sphere within which the Muslim polity may operate,*

* Assistant Professor of Law, University of Pittsburgh School of Law. I would like to thank Vivian Curran, Michael Dorf, Mohammed Fadel, Clark Lombardi, and George Taylor for their thoughts and contributions. Special thanks to Abdullahi An-Naim, Peter Awn, George Fletcher, and Bernard Freamon for their extensive comments. Any errors are my own.

and on the other, the need to engage the broader global order, commercially and politically, in order to restore some level of political and economic power to the Muslim world. A proper study of influences of this sort that have led large numbers of Muslims to adopt particular shari'a *positions on economics, finance, war, and numerous other realms is absolutely vital in the post 9/11 era in order to understand and engage substantial, important segments of the Muslim community in their call for a reinvigoration of the* shari'a.

I. INTRODUCTION

Among critics and sympathizers alike, a deeply flawed and largely formalist paradigm has become commonly accepted in the American legal academy concerning contemporary Islamic law, the abandonment of which will lead to a greater understanding of how the Islamicity of law should be evaluated in our times. The approach the article proposes is one that neither attempts, as sympathizers would have it, to resurrect obsolete medieval doctrine entirely irrelevant to the lives of contemporary Muslims, nor ignores, as critics wish, the clearly pan-national religious revivalist agenda and the Islamic reactions thereto and consequences thereof, all of which will have significant impact on the Muslim world for the foreseeable future.

Rather, using the example of Islamic finance, this article contends that while Islamic law remains an important subject to be studied and taught in American law schools separate from the laws of the Muslim nations, the focus of any inquiry into Islamic law should not be on the classical rules. This is because classical doctrine is not and cannot be the source of modern rules in any meaningful capacity other than the rhetorical.[1] This article therefore develops an alternative paradigm based on the work of the American Legal Realists, and their emphasis on the importance of social, cultural, and economic forces on the development of legal doctrine. I will demonstrate in this

1. There is a crucial difference between the position of this article, that neither the letter nor the spirit of classical doctrine can be the basis of Islamic law in the modern era, and the contention that all of Islamic law, faith, theology, philosophy, and mysticism can be entirely explained by materialist factors such as those identified in this article. This article does not address whether or not some types of particularly authoritative texts (for example, a *Qur'anic* verse) have any value at all in the determination of legal rules, nor does the article discuss the extent to which law is a semi-autonomous institution which not only retains its integrity *in the short term* as political institutions and interest groups within any given society shift, but indeed shapes the "content of the immediate self-interest of social groups." Robert W. Gordon, *Critical Legal Histories,* 36 STAN. L. REV. 57, 101 (1984). Moreover, there is no intent on my part to deal in any capacity with the rich areas of Islamic thought that lie beyond the purview of the law and the influence of material factors on them. The claim is altogether a simpler one, relating purely to the relevance of classical doctrine, developed for the most part more than half a millennium ago, to modern Muslim law.

article that the body of Islamic rules and norms, referred to herein by the Arabic term *shari'a,* can be most accurately understood as a continuing form of mediation between two primary influences within the modern Muslim community, with the classical doctrine at best serving no more than a rhetorical function. These two influences are, on the one hand, a desire to articulate a form of political, economic, and social order that resists the dominant global paradigms and creates a separate, self-defined Islamic identity resting on unique ethical and moral bases, and on the other, the necessity of engaging the global community on a variety of levels in order to restore some level of political and economic power to the Muslim world. Through Islamic finance, the article highlights a central flaw assumed by nearly all scholarly literature concerning modern approaches to the shari'a in the American legal academy; namely, that it ignores such influences and bestows far too much attention upon obsolete classical doctrine at the expense of understanding how contemporary Muslims evaluate and approach questions of Islam and law.

Part II of this article discusses some of the current obsessions with Islamic classical doctrine in U.S. law schools. Turning to Islamic finance as the central example of the thesis of the article, Part III provides an explanation of the structure of classical Islamic law, gives some background on some of the basic commercial prohibitions of the classical era, and demonstrates how none of this could be the basis of any recognizable modern commercial practice. Part IV sets forth the methodologies used in Islamic finance to derive rules from classical prohibitions and shows them to be so selective and opportunistic in application as not to be sensible if understood to be a faithful rendition of classical rules. Part V provides an alternative explanation for the rise of Islamic finance and economics, having more to do with fundamentalist Islamic revivalism as a form of resistance to the broader global order than faithfulness to classical doctrine. Part VI explains how giants in the world of finance, seeking to use the revolutionary fervor gripping the Muslim world to their own financial advantage, influenced the development of Islamic finance in a manner that tamed the more radical impulses of the revivalists to develop a practice that used the rhetoric of resistance and revolution to practice something that looks very much like ordinary finance, though doctrinal fundamentalist influence remains. Part VII discusses the means by which this current paradigm suggests alternative ways to understand and approach shari'a in a broader context, beyond the limits of Islamic finance.

II. On the Formalist Obsessions of Our Times

As the mythology goes, despite the political and cultural influence of revivalist movements from time to time in the modern era,

formal, historic classical rules generally control Islamic doctrine. Under this theory, harmony (of either the textual or purposive sort) with this clearly established and largely immutable set of rules developed centuries ago ultimately determines the legitimacy of any purportedly Islamic approach to any particular issue.[2] Some commentators have moved away from this paradigm slightly and acknowledged that there has been a drift to some extent from reliance on classical doctrine, but nonetheless tend to regard the classical rules as some sort of independent backdrop against which contemporary notions might be measured.[3] Others indicate that there are many disparate approaches to a modern Islamic legal theory, among them attempted recreations of classical doctrine, in either a purposive fashion or through the careful, literal selection of classical rules.[4] Regardless of the approach, rarely[5] is the supposed hold of classical doctrine on at least substantial portions of the modern Muslim imagination seriously questioned.

One thoughtful critic, Lama Abu Odeh, has seized on this assumption in her work decrying the study of Islamic law in U.S. law schools as currently undertaken. She insists, properly, that classical rules are not the law of modern nation states in the Muslim world; rather, in the post colonial era, for the most part, the law is a civil code in all areas but the law of the family, which she describes, somewhat inaccurately, or at least reductively, as a "transplant."[6] Given this, Professor Abu Odeh has called on the academy to acknowledge the obsolescence of some form of pure, generalized Islamic law, and to focus on this reality in teaching and studying Islamic law and its re-

2. Sherman Jackson, *Shari'ah, Democracy and the Modern Nation State, Some Reflections on Islam, Popular Rule and Pluralism,* 27 FORDHAM INT'L L.J. 88, 92 (2003) [hereinafter "Shari'a"] (differentiating between traditional, classical Islamic rules and fundamentalist movements). OLIVIER ROY, THE FAILURE OF POLITICAL ISLAM 35-39 (1992); FRANK E. VOGEL & SAMUEL L. HAYES III, ISLAMIC LAW AND FINANCE: RELIGION, RISK AND RETURN 77 n.2 (1998).

3. *See, e.g.,* Ann Elizabeth Mayer, *War and Peace in the Islamic Tradition and International Law, in* JUST WAR AND JIHAD (John Kelsay & James Turner Johnson eds., 1991) (indicating that "the [Islamic] premodern juristic tradition on war and peace may now be weakening, but its concepts have by no means ceased to influence Muslims' perspectives").

4. *See* CLARK LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT 81, 92-94 (2006) (describing classical doctrine driven techniques ranging from selection of rules from the classical corpus to create a modern legal code, to drafting a legal code from studying and understanding the broad, underlying principles of the classical rules).

5. It is important to note that not every scholar in the legal academy discussing Islamic law is necessarily obsessed with the classical era, though many of the most highly regarded certainly are. For notable exceptions, see note 50 and accompanying text (respecting the work of Professor Abdullahi An-Naim); note 220 and accompanying text (respecting Professor Feldman's approach to modern applications of *shari'a*); and note 223 (respecting Professor Freamon's impressive work on modern Islamic attitudes towards slavery).

6. Lama Abu Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia,* 52 AM. J. COMP. L. 789, 790-93 (2004). Regarding the reductive nature of the term "transplant," see notes 55-57 infra and accompanying text.

lationship to the law of the Muslim world.[7] Professor Abu Odeh does not suggest that Islamic law deserves no study, but that it has been transformed in the post colonial era and that its greatly reduced scope as the law of Muslim nations, complete with the supposed consequent privatization of religious practice, needs to be accepted and incorporated into any proper understanding of "Islamic law."[8]

Professor Abu Odeh's contention that medieval doctrine is obsolete and not relevant to the lives of contemporary Muslims is insightful and has considerable force. Still, in the post 9/11 world it seems quite clear that there is an urgency and importance to understanding shari'a in a manner that transcends the nation state and that is masked by the preoccupation with classical authorities as the expression of contemporary forms of shari'a. The most obvious example might be found in the treatment of the rules of *jihad*,[9] which I touch upon below only briefly, to frame the problem of the manner in which shari'a is approached in the contemporary era.

In explaining *jihad* in the modern world, a premier Islamic law scholar, Professor Sherman Jackson, treats us to an extensive, thoughtful, erudite but ultimately pointless digression into the classical rules, where the paradigm of *jihad* was the division of the world into an Abode of War and an Abode of Islam, presuming some form of eternal hostility on the part of the Muslim world with non-Muslim polities.[10] The *jihad* would then take two forms, aggressive, to expand the Abode of Islam, and defensive, to protect the Abode of Islam from attack.[11] Jackson insists that the juristic classical division was meant more as a description of historical reality, given the nature of the empires of the classical era, Muslim and non-Muslim, than a prescription of the Islamic religion.[12]

But Professor Jackson needs to provide no explanation for how the classical jurists developed the rules that they did in order to enlighten us on contemporary ideas of Islam and war because the vast majority of modern Muslims do not seem particularly preoccupied by

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7. *Id.* at 823-24.

8. *Id.*

9. I have selected *jihad* both because it is an issue of contemporary interest beyond the Muslim world and because, as the text makes clear, scholars of the shari'a in the contemporary era in the realm of *jihad* focus extensively on medieval theories rather than on what the modern Muslim community demands. It should be noted in this light, however, that the term *jihad* has become a loaded one in our era, and that many modern Muslims are quick to point out that the most important form of *jihad* is the personal form, of a struggle for the purification of the soul. *See, e.g.,* KHALED ABOU EL FADL, THE GREAT THEFT 118 (2005). This article focuses on the form of *jihad* that would be of more interest to jurists and legal scholars; namely, as the articulation of the Muslim law of war.

10. Sherman Jackson, *Jihad and the Modern World,* 7 J. ISL. L. & CUL. 1, 10-18 (2002).

11. *Id.*

12. *Id.* at 18.

the classical doctrine. Jackson's misguided focus is best demonstrated by the following statement, in the midst of his section on the classical rules of *jihad*:

> For our purposes of trying to determine the credibility of the claim that Islam is a religion of peace, we may ignore the defensive *jihad*. For no one would accuse Islam, or any other religion for that matter, of not being a peaceful religion simply because it insisted on defending itself.[13]

To ignore defensive *jihad* is to exalt the historical, classical parameters of the practice of *jihad* at the clear expense of current social and political reality. The reality is that acts of Muslim aggression directed at the West, including those of 9/11, are nearly always justified in the form of defense, as protection of Muslim lands (or the Abode of Islam, if we wish to use the classical terminology) from external aggression. If, in assessing whether or not Islam is a religion of peace, we ignore defensive *jihad,* then we ignore the *jihad* of the modern era almost entirely.[14]

Examples are replete in modern history. To select but a few, the Sudanese Mahdi led an early *jihad* in the modern era on a largely anti-colonial ideology.[15] In more contemporary times, Hamas and Hezbollah make frequent reference to "occupation" as the *raison d'etre* for their violent activities.[16] The Afghan[17] and Iraqi[18] *jihads* drew international Muslim support precisely because they were perceived by Muslims to be a form of resistance to foreign occupation and aggression. Even Bin Laden refers to the occupation of American soldiers in Saudi Arabia, the Zionist incursion on Muslim holy lands, and a litany of other activities, all described as acts of unjustifiable aggression against Islam, as the basis for his *jihad*.[19] Despite the ob-

13. *Id.* at 16.

14. To be absolutely clear, my point is not that all violent activities carried on by Muslims are truly acts of self-defense, only that they are justified as such. Of course, one can, and should, decry some of the horrific and patently aggressive uses to which this notion of defensive *jihad* has been put, but in doing so, and in analyzing and understanding *jihad* in the modern era, it is important to bear in mind that the doctrine underlying the activity is one of purported defense, not the expansion of the Abode of Islam.

15. *See generally* P.M. HOLT, THE MAHDIST STATE IN THE SUDAN 1881-1898: A STUDY OF ITS ORIGINS, DEVELOPMENT AND OVERTHROW (1966); FERGUS NICOLL, SWORD OF THE PROPHET, THE MAHDI OF THE SUDAN AND THE DEATH OF GENERAL GORDON (2004).

16. *See* www.moqawama.org (website of Hezbollah, last visited Oct. 30, 2007); http://www.alqassam.ps/arabic/?action=US (website of military wing of Hamas, discussing, among other things, the purpose of its establishment as "building a clear political *jihad* against the occupier") (last visited Oct. 30, 2007).

17. DAVID B. EDWARDS, BEFORE TALIBAN: GENEALOGIES OF THE AFGHAN JIHAD 266-72 (2002).

18. GEORGE PACKER, THE ASSASSIN'S GATE 308-12 (2005).

19. *See, e.g.*, PETER BERGEN, THE OSAMA BIN LADEN I KNOW 164-65 (2005) ("It should not be hidden from you that the people of Islam have suffered from aggression,

vious differences among these various movements,[20] all of them claimed to be acting in defense. If the expansionist paradigm held as much interest among contemporary Muslims as it seems to among scholars of Islam and the polemicists decried by them,[21] then it would have much easier, for example, for Bin Laden to justify his attacks on that basis. The fact that he chooses not to, whether out of conviction or in order to entice Muslims to his side, is extremely telling.

As a result, the broad fabric of activities that are justified under the rubric of *jihad* do not call upon the classical paradigm in any meaningful manner. They are not claimed to be an aggressive attempt to convert the West. Moreover, they look less like even the defensive form of classical *jihad*, of a sudden attack on a unified Muslim polity under the leadership of a caliph that requires an immediate military response,[22] to a gamut of circumstances that are uniquely modern, involving ideas that are rooted in self-determination, regional liberation and anti-colonial fervor.

Professor Jackson defends his project of linking the modern world to the classical rules on the basis of a crucial assumption. This assumption, shared by wide portions of the academy seeking to rescue the classical project as relevant to the modern era, relies on a thoroughly conventional division of modern Islam into two broad categories, that of traditionalism and that of fundamentalism.[23] The former, in the words of two premier Islamic law scholars in the United States, are composed of elements in society that are "socially and politically conservative, seeking individual piety and social mores built around traditional compliance with *fiqh* (traditional classical legal doctrine) and look to social and political improvements mainly as a result of that."[24] The fundamentalists are in theory political in their nature and prefer to develop their ideas through novel interpretations of foundational text; namely, the Qur'an, and Muhammad's statements or utterances, known as the *hadith*.[25] Thus, the traditionalists concern themselves with classical doctrine, and the fundamentalists do not. The traditionalists are not concerned with the exercise of executive authority, and the fundamental-

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iniquity and injustice imposed on them by the Zionist-Crusader alliance and their collaborators to the extent that the Muslims' blood became the cheapest and their wealth as loot in the hands of the enemies.").

20. The use of *jihad* to justify a wide litany of modern activities ranging from national liberation to anti-colonialism to global terrorism is a fascinating one that lies well beyond the purview of this Article. Suffice it to say for purposes of this Article, whatever the underlying premise, those engaging in *jihad* in the modern world nearly always claim to be acting in self-defense.

21. *See* Jackson, *supra* note 10, at 2 (describing such polemics).

22. *See* MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 86, 94 (1955).

23. ROY, *supra* note 2, at 37-39; Jackson, *supra* note 10, at 5-6; Shari'a, *supra* note 2, at 92.

24. VOGEL & HAYES, *supra* note 2, at 77 n.2.

25. ROY, *supra* note 2, at 37-39.

ists are obsessed with controlling the state. The traditionalists, it might be said, represent the law, and the fundamentalists represent politics.

The contention is that the juristic law of the traditionalists has remained for the entire modern era to some extent insulated from the politics of the fundamentalists, as well as, of course, from other political and ideological movements in the nation states of the Muslim world. As stated in a more extreme fashion by Professor Jackson in another work, while fundamentalist movements might have an "enormous impact in social, political, cultural, and other contexts . . . little of this is reflected in the manuals of Islamic law."[26] Thus, Islamic fundamentalists might succeed in upending a regime and replacing it with their own, defined Islamic alternative, or in conducting their own forms of *jihad* divorced from historical rules and based on novel interpretations of foundational text, but the traditionalists' projection of the classical law will remain substantially unaffected by this process. Hence, for example, one leading scholar can admit that there are contemporary political problems with the implementation of democratic rule in Muslim countries, and then propose to ignore those entirely and focus his work instead on "doctrinal" questions relating to democracy, which involve the interpretation of foundational text and centuries old classical exegeses, as if the doctrine developed therefrom remains pristine and unaffected by the political situation that renders democracy so difficult.[27] The law, in other words, is safely separable from the poisonous politics of our era.[28]

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26. Shari'a, *supra* note 2, at 94. *See also* VOGEL & HAYES, *supra* note 2, at 27 n.2 (suggesting marginal influence of fundamentalist trends on Islamic finance outside of Iran).

27. KHALED ABOU EL FADL, ISLAM AND THE CHALLENGE OF DEMOCRACY 4 (2004).

28. It is ironic that Professor Jackson would come to such an odd conclusion, given his admirable efforts at using approaches characteristic of the American Legal Realists in his examination, in the premodern era, of the shari'a. In some of his comparative work, Professor Jackson refers to the work of Professors Roberto Unger and Stanley Fish extensively to suggest that the classical rules are not logical interpretations of foundational text but rather, that classical legal theory was a means by which classical jurists could "authenticate" particular meanings of foundational text that suited them and that they then could defend through accepted rhetorical tools and devices. Sherman A. Jackson, *Fiction and Formalism: Toward a Functional Analysis of* Usul al Fiqh, *in* STUDIES IN ISLAMIC LEGAL THEORY 195-96 (Bernard G. Weiss ed., 2002). Elsewhere Professor Jackson suggests that this quest for validation and authority in legal rulings is in fact the reason for the fabled "closing of the doors" of *ijtihad,* or interpretive effort. Shari'a, *supra* note 2, at 90-93. The closing of the doors did not therefore prevent creative reasoning to legal solutions but merely required jurists to purport to rely on earlier jurists to defend their conclusions on legal questions, often manipulating the positions of the earlier jurists to justify their rulings. Professor Jackson compares this to the work of Alan Watson, and adopts Professor Watson's term "legal scaffolding" to explain it. *Id.* at 91.

It is therefore to Professor Jackson's credit that he has played an early, important role in debunking the notion that classical doctrine is the result of the strict application of interpretive rules to foundational text, divorced from the context in which the process

Professor Abu Odeh mentions the fundamentalist/traditionalist dichotomy almost in passing,[29] but it seems that in some ways her position benefits from its existence because it masks the underlying problem with her position. That is, Professor Abu Odeh's assault on one scholar's argument respecting the possible compatibility of constitutionalism (she could have also added democracy)[30] with classical doctrine is generally sound and correct.[31] Muslims, just like anyone else, invent a past to accord with and validate their own ideological visions, and the idea that events and theorists of the premodern era actually control anything in the contemporary world is an illusory one.

However, Professor Abu Odeh seems to be denying what appears manifest to many of us; namely, that a generalized pan-national notion of shari'a has become deeply relevant in the modern Muslim world. In the context of *jihad*, the notion of Islamically inspired violence perpetrated by non-state actors enjoys widespread support (financial, material, spiritual and otherwise) across the Muslim world, even with respect to conflicts that are confined to nation states.[32] The international dimension of the Iraqi and Afghan *jihads* is one example.[33] As another, the Organization of the Islamic Conference, which is composed of fifty-six majority Muslim states, has sought to define terrorism in a manner that specifically excludes the "resistance" of the openly Islamist militant groups Hamas and Hezbollah.[34] A set of pan-national norms does seem to be developing that both claims its legitimacy at least partially on Islamic grounds and

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unfolds. Nevertheless, because Professor Jackson's focus has largely been in the premodern era, his ideas respecting modern Islamic doctrine and its relationship to the classical law seem contradictory and incomplete. Surely, if the classical theorists simply used earlier jurists to validate their own rulings, developed on the basis of their own ideological and ethical biases, modern jurists could as simply authenticate their own meanings to earlier rulings. These modernists would then suggest that they are remaining faithful to classical principles for the purpose of validation while adopting, modifying and distinguishing them to such a degree over the past several centuries as to render the original opinions, developed by jurists in vastly different social, political and economic circumstances from modern Muslims, entirely irrelevant for all purposes but the rhetorical. It seems that using the techniques Professor Jackson espouses, the conclusion would be that historical classical doctrine is of no moment in approaching contemporary understandings of the shari'a and we in the academy should not be paying as much attention to it as we do.

29. *See* Abu Odeh, *supra* note 6, at 806.

30. *See generally* ABOU EL FADL, *supra* note 27.

31. Abu Odeh, *supra* note 6, at 808-13.

32. This is not to suggest that every contemporary example of *jihad* is necessarily pan-national, only that a significant and arguably growing number of modern *jihads*, including the most widely known and publicized, have an international dimension that can scarcely be gainsaid.

33. *See supra* notes 17 and 18 and accompanying references.

34. Kuala Lumpur Declaration on International Terrorism, arts. 10-12, Apr. 3, 2002, OIC, *available at* http://www.oic-oci.org/english/conf/fm/11_extraordinary/declaration.htm [hereinafter "Kuala Lumpur Declaration"].

that is growing to some extent distinct from the international legal position on the relationship between resistance, *jihad* and terrorism.

The vast popularity of these ideas in the Muslim world can hardly be denied. If Islam has been as privatized and compartmentalized into nation states as Professor Abu Odeh indicates, and the national civil code is the authority to which we must turn in evaluating Islam and law in our times, then the vast and disturbing popularity of Osama Bin Laden in Jordan, where a clear majority of the population as late as 2005 expressed support for him, would be very difficult to rationalize or explain.[35]

It seems that there is a broad, cacophonous, yet ideologically cohesive pan-national movement, or more properly, series of movements, in the Muslim world that has advocated specific ideas of *jihad,* called for an independent form of economics and commerce, sought to redefine the role of women in the social order, and created, or attempted to create, political revolution in the various nation states of the Muslim world that has had drastic legal consequences where successful, all in the name of Islam. In some cases, such as the infusion of notions of social justice into matters of commerce, elements of the various movements may be quite salutary. Other elements have proven much less so. The revival has in its turn spawned a number of pan-national Islamic countercultures, drawing on their own versions of Islam and Islamicity that merit study, from Fatima Mernissi's revolutionary ideas on the potentially expansive rights of women in an Islamic paradigm[36] to Abdullahi An-Naim's notion that the shari'a is not and was never intended to be a legal code.[37]

Inasmuch, however, as the entire pan-national epiphenomenon can be dismissed as fundamentalist and political or a reaction thereto, divorced from "true" shari'a, which is the jurists' law of the medieval era, then it might plausibly be claimed that this is merely politics, bearing no relationship to the shari'a, or the manner in which it should be approached. On the other hand, if the epiphenomenon relates to an understanding of Islam and law in the modern era, in the law of war, in commercial transactions, in defining the role of women, in setting criminal punishment for particular activity, then it seems that nothing could be more important than understanding this Muslim law, or series of legal ideas, teaching it in our law schools and drawing comparisons to other laws and legal systems. Those legal ideas and the reactions they have spawned, entirely divorced from classical doctrine and separate from, although related to, the laws of the Muslim nations, surely deserve our attention.

35. Pew Research Center Poll (July 15, 2003), *available at* http://pewglobal.org/reports/display.php?ReportID=248 (showing popularity ratings for Bin Laden in Jordan and Pakistan at 60% and 51%, respectively, in the summer of 2005).

36. *See generally, e.g.,* FATIMA MERNISSI, BEYOND THE VEIL (2d ed. 1987).

37. *See infra* note 42.

In fact, there is much reason to doubt the reductive division of traditionalism and fundamentalism, Islamic law and Islamic politics, and the dismissal of the latter as not truly legal. While purported adherence to classical rules remains, and Professor Jackson is certainly right that purported reliance on classical authority is an excellent means by which an interpretation might gain legitimacy,[38] the independent revolutionary interpretations of the revivalist movements that Professor Jackson refers to as "fundamentalist" have had a profound impact on how the classical authorities are understood, even by the least revolutionary and most conservative traditionalists. Traditionalism is, as a result, no less modern and no more authentic as an expression of Islamicity than fundamentalism.

The fallacy of the formalist position respecting a division between historical traditionalist Islamic law and modern, fundamentalist Islamic politics is particularly obvious in the context of Islamic finance. Frank Vogel and Samuel Hayes, who have written the authoritative work on the subject in the English language, seem content to accept the practice of Islamic finance on its own terms, as a faithful extension of classical era doctrine. The retort seems to have come from recently from Mahmoud El-Gamal, who has provided us with a case for how Islamic finance currently adheres largely to the "letter" of the classical rules but can violate its "spirit," which Professor El-Gamal seeks to identify through his own analysis of classical authorities.[39] Unfortunately, however, the ascertainment of the spirit of classical law is as vain an enterprise as the ascertainment of its letter.

In addition, in the context of finance, the influence of fundamentalist politics on the core doctrine of the shari'a is clear and obvious. The prominent Islamic revivalists of the last century, who called for economic transformation of Muslim societies in a manner that would both resist dominant conceptions of economic order and supposedly achieve economic and social justice and mutuality in economic transactions, have proven too compelling for Islamic finance to resist in any sort of overt fashion.[40] This conception of Islam in the realm of economics, as consumed with social justice and fairness in contradistinction to the perceived rapacious and exploitative West, has become profoundly popular as a form of protest against the postcolonial economic, social and political order. It is thus a form of economic "resistance," to complement the political form of resistance that manifests itself in the contemporary doctrine of *jihad.*

38. *See supra* note 28 and accompanying references.

39. MAHMOUD EL-GAMAL, ISLAMIC FINANCE: LAW, ECONOMICS AND PRACTICE 52-63 (2006).

40. *See infra* Section IV.

The other influence on contemporary commercial shari'a doctrine is the reality of global economic order, which tends to regard such ideas of confrontation with the West somewhat frightfully if taken seriously. This also has had a significant impact on the development and evolution of shari'a in the modern era. In the commercial and financial context, it is to be expected that large financial institutions like HSBC or Citibank would be perfectly happy to make very limited and modest adjustments to the form of their financial transactions to enter an entirely untapped market, but the idea that they would accept the characterization of loans as exploitative and agree to share in risks and rewards across their portfolio in the manner envisaged by the early Islamic revolutionaries is preposterous. A Muslim society seeking to engage large financial institutions will have to face these realities. Given that any Muslim society, no matter how overtly revolutionary, recognizes the need for some level of global engagement if it wishes to be politically and economically relevant in the modern era, broad interaction with the giants of international finance is inevitable.

The doctrine of Islamic finance thus is entirely contemporary and owes nothing but its terminology to the classical era. It is the manifestation of a continuing mediation of these two broad, opposing influences, of a resistance based desire for "Islamic economic justice" on the one hand and a power based necessary involvement in the global commercial and financial markets on the other.

III. Classical Notions of Commercial Order

A. *Structural Pluralism in the Classical Paradigm*

In order to understand the flaws in the paradigm that connects the rules of Islamic finance to the classical era in some sort of harmonious fashion unaffected by the politics of the day, it is important to review briefly both the structure of classical era doctrine as well as the rules developed to govern various aspects of commerce.

As to structure, any survey of the rich and varied history of classical shari'a will be by necessity narrow and reductive. Not only must such a survey span more than a millennium of legal thought, but the very nature of the classical shari'a defies simple categorization. The means by which the shari'a was developed was largely casuistic, with jurists from primarily four schools of thought[41] working through hypothetical situations on the basis of their interpretations of foundational texts (and the use of other accepted interpretive techniques, most prominently *qiyas,* a form of reasoning largely analogical in na-

41. Other schools existed, among them the literalist Zahiri and the smaller and more marginal Daudi, Thawri and Auzai, but ultimately the four that remained throughout the classical era were the Hanbali, the Hanafi, the Maliki and the Shafi'i. Jackson, *infra* note 212, at xxvi.

ture) and often disagreeing with one another as to outcome.[42] The result is a multiplicity of conclusions among jurists defying easy categorization or analysis, which I refer to herein as "structural pluralism."

This concept of structural pluralism constitutes an essential problem in making faithfulness to classical doctrine the yardstick against which Islamicity is measured. While structural pluralism may have served the shari'a well in the context of empire, quite obviously it is not the manner in which a nation state operates, where there is an expectation of uniformity of result (either throughout the state, or, if a federal state, within each given substate region).

That these notions have been fully incorporated into contemporary Muslim understandings of legal authority is amply demonstrated by the willingness of nearly all Muslim nations, even those purported to be governed by shari'a, to accept the principle of *nullum crimen / nulla poena sine lege*,[43] despite the fact that within the classical paradigm this was a meaningless concept. Structural pluralism obviously precludes the possibility of explicit authoritative texts clearly defining criminal activity in every possible instance. Foundational text provides clarity in some cases, but only for the small number of crimes discussed therein.[44] Therefore, for the wide variety of "discretionary" crimes known as the *ta'zir*, there was no concept of *nullum crimen / nulla poena*.[45]

Contemporary scholars will often point, among other things, to Quranic verse indicating that God has never punished a community prior to sending that community an Apostle to warn them as "proving" that *nulla poena / nullum crimen* are in fact Islamic norms.[46]

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42. Abdullahi An-Naim, *Shari'a and Positive Legislation: Is an Islamic State Possible or Viable?, in* 5 YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW 29-42 (Eugene Cotran & Chibli Mallat eds., 1999).

43. 2 INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, 4153 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (Status of Ratification Chart); Kenneth Gallant, *The Principle of Legality in International and Comparative Criminal Law: A Partial History to World War II (Chapter 2)*, 6 (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=997473 (". . . Islamic countries generally do not object to international obligations concerning non-retroactivity of criminal law.").

44. MATTHEW LIPPMAN ET AL., ISLAMIC CRIMINAL LAW AND PROCEDURE 45-52 (1988) (describing the very limited set of crimes defined explicitly in foundational text).

45. *Id.* at 52-53. *Cf.* Ghaouti Benhelma, Ta'zir *Crimes, in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 213 (M. Cherif Bassiouni ed., 1982) (arguing that the practice of *ta'zir* was consistent with the principle of *nulla poena / nullum crimen*, but acknowledging levels of judicial discretion that are plainly inconsistent with contemporary understandings of *nulla poena / nullum crimen*).

46. THE ISLAMIC CRIMINAL JUSTICE SYSTEM, *supra* note 45, at 25; Taymour Kamel, *The Principle of Legality and Its Application in Islamic Criminal Justice, in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM, *supra* note 45, at 158. *See also* Quran 17:15 (stating that God does not punish "until we have sent a Messenger"), 35:25 (stating that "Every nation has had its Messenger raised up to warn them . . .").

However, this is both ahistorical and largely beside the point, in that it neither reflects classical attitudes towards the *ta'zir,* nor does the verse, which has to do with telling a community that there is a God to whom they owe obedience, relate to what to do with an individual who has violated some sort of community norm but not in a manner that clearly violates a text, for example, an eyewitness who has perjured himself but not in the context of certain proceedings specified in the Qur'an for which there is an established punishment.[47]

The point of this discussion is not to disparage the contemporary interpretations or the largely salutary efforts of quasi-historical story-telling to reach a result with which few in the modern world would take issue. Professor Feldman is right to dismiss this sort of disparagement and focus instead on whether contemporary Muslims accept the doctrinal evolution.[48] However, given the widely held belief that Islam is captive to the rules of the classical world, it is worth pointing out at every possible opportunity that this is hardly true.

This acceptance of the modern paradigm respecting the uniformity and predictability of law despite its considerable variance from the assumptions of the functions of law in the classical era should alone lead to an almost immediate dismissal of all classical doctrine as largely useless to the modern world, too prone to manipulation to be able to be made sense of and therefore not the source of modern rules. A modern legal code cannot truly be made from hundreds of contradictory juristic texts spanning over a thousand years, particularly when, as in matters of commerce and finance, the texts deal largely with material that is either irrelevant or deeply offensive to modern sensibilities, such as debates over whether a stipulation requiring a female slave to be a virgin is permissible because virginity is for the buyer a characteristic of the item sold and not a separate stipulation to the added advantage of the buyer.[49]

Abdullahi An Naim has seized on contradictions and anachronisms of this sort to make the bold and thoughtful claim that the shari'a is not and was never intended to be "law" but rather a set of nonbinding norms.[50] Compelling as I find An Naim's claim, I do not wish to burden this paper with questions of the true nature of the shari'a as legal or moral. Instead, I only point out that, whatever classical doctrine is, it is not anything resembling a modern legal code or even a relatively uniform set of principles to use in a given industry, such as finance, and that any attempt to impose such relative uniformity is one that will be so mired in ideological and ethical choice as not to be taken seriously as a neutral effort to "modernize"

47. *See* Benhelma, *supra* note 45, at 216-17 (using false testimony as an example of a *ta'zir* crime).

48. NOAH FELDMAN, AFTER JIHAD 72 (2003)

49. SANHURI, *infra* note 60, at 102 (quoting Kasani).

50. *See* An-Naim, *supra* note 42.

classical thought. Rather, any such endeavor will be the creation of new rules using old terminology.

Nevertheless, the general belief appears to be that Islamic classical doctrine, disparate and pluralistic as it may be, does have some sort of ascertainable, neutral core, though clearly it could be manipulated by selectively applying the "wrong" rules.[51] If this is so, then there is a correct way of modernizing classical doctrine to remain faithful to the past, and an incorrect way. Indeed, much ink seems to have been spilled in service of finding the correct way. This usually involves locating the "spirit,"[52] "internal logic,"[53] or "underlying principles"[54] of the disparate classical exegeses, and from them developing rules, either through literalist selection of those rules that harmonize with the "internal logic," "spirit" or "underlying principles," as the case may be, or by drafting entirely new legislation in broad harmony therewith.

The great Arab lawyer and Dean of Cairo University Faculty of Law and later Baghdad Law School, Abdul Razzaq al-Sanhuri, claimed to have adopted such an Islamic approach in developing civil codes for Egypt and Iraq that have become the templates for the civil codes of nearly all Arab nations, the "transplant" to which Professor Abu Odeh shows such fealty.[55] In contrast to Professor Abu Odeh, Dean Sanhuri did not describe his own work as a transplant, at least at times. Rather, he was certainly known to have taken the position that his civil code was not an import from abroad, but rather the modernization of the classical shari'a, derived through a process of discovering its principles through extensive comparative study and then using those principles to draft legislation in conformity therewith.[56] The fact that many of provisions were clearly taken from

51. EL-GAMAL, *supra* note 39, at 53; LOMBARDI, *supra* note 4, at 82; VOGEL & HAYES, *supra* note 2, at 37-38.

52. EL-GAMAL, *supra* note 39, at 53.

53. VOGEL & HAYES, *supra* note 2, at 37-38.

54. LOMBARDI, *supra* note 4, at 94-96.

55. *Id.* at 98; ENID HILL, AL-SANHURI AND ISLAMIC LAW 68-70 (1987). Respecting Dean Sanhuri's regional influence, see Abdullah An-Na'im, *The Foundations of Law: Globalization and Jurisprudence, an Islamic Law Perspective*, 54 EMORY L.J. 25, 47 (2005). As any common lawyer in the early 19th century would naturally have a copy of Blackstone's *Commentaries* by his side, so it is inconceivable that an Arab lawyer working in most of the Arab countries of the Middle East would not refer with respect to any legal question concerning interpretation of the civil code to Sanhuri's multivolume AL-WASIT, which functions effectively as his commentaries on the Egyptian Civil Code. *See, e.g.*, W. M. BALLANTYNE, ESSAYS AND ADDRESSES ON ARAB LAWS 79 (2000).

56. HILL, *supra* note 55, at 68-70; LOMBARDI, *supra* note 4, at 98. Even Professor Abu Odeh has noted this point in some of her work. *See, e.g.*, Lama Abu Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANS. L. 1043, 1093-94 (2004).

Western civil codes did not lead Dean Sanhuri to conclude that it lacked Islamicity given the methodology employed to derive it.[57]

By contrast, others in search of the classical spirit have implied that an approach that so closely resembles Western notions of commerce is in fact violative of Islamic law's "internal logic." They suggest that contemporary Islamic finance is more in conformity with that internal logic.[58] One recent scholar argues that neither of these is entirely correct and that, at least with respect to certain classical prohibitions, the purpose and spirit is to preserve Pareto-efficiency.[59] That such great minds can come to such disparate conclusions about the true spirit and logic of the classical law should demonstrate amply that this search for underlying principles and spirit is a hopeless exercise in transcendental nonsense, but nevertheless, the quest appears to continue.

The following sections provide a highly generalized summary of three select prohibitions of the classical era, identified by Dean Sanhuri as particularly problematic in modern times,[60] in order to provide a more concrete and specific demonstration of the considerable distance between classical doctrine and the reality of Islamic finance.

B. Contract and Stipulation

In the classical era, there was no general theory of contract or obligation.[61] Thus, for example, classical jurists discuss specific types of contracts, among them contracts of sale, lease/hire, agency and partnership, without providing a general, underlying theory re-

57. Nevertheless, the resemblance to the European civil codes did provoke a fairly involved scholarly debate on whether or not the civil code was truly Islamic. HILL, *supra* note 55, at 71-83 (describing the scholarly debate at length and taking the position that the civil code was in fact more Islamic than is commonly believed). *Cf.* J. N. D. Anderson, *The Shari'a and the Civil Code*, 1 ISL. L. Q. 29-46 (1954). For a contemporary contribution, see Amr Shalakany, *Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*, ISL. L. & SOC. 201 (2001).

58. VOGEL & HAYES, *supra* note 2, at 38.

59. EL-GAMAL, *supra* note 39, at 53. A Pareto-efficient transaction is one in which at least one of the parties to the transaction is better off, and the other is at least no worse off as a result of the transaction. *See* GEORGE P. FLETCHER & STEVE SHEPPARD, AMERICAN LAW IN A GLOBAL CONTEXT 454 (2005).

60. 3 ABDUL RAZZAQ AL SANHURI, MASADIR AL-HAQQ FI AL-FIQH AL-ISLAMI, DIRASA MUQARINA MA' AL-FIQH AL-GHARBI [The Sources of Authority in Islamic Jurisprudence: A Comparative Study with Western Jurisprudence] 14 (1967).

61. JOSEPH SCHACHT, INTRODUCTION TO ISLAMIC LAW 144 (1979) ("Islamic law does not recognize the liberty of contract, but it provides an appreciable measure of freedom within certain fixed types."); N.J. COULSON, COMMERCIAL LAW IN THE GULF STATES: THE ISLAMIC LEGAL TRADITION 17 (1984). *See also* Hussein Hassan, *Contracts in Islamic Law: The Principles of Commutative Justice and Liberality*, 13:3 J. ISL. STUD. 257, 258-61 (2002) (accepting the conclusions of Schacht and Coulson that Islamic law had no general theory of contract but taking issue with their conclusion that Islamic law recognized no freedom to contract).

specting them.[62] The first significant codification of the shari'a, the Ottoman *Majalla,* repeated this shortcoming, which led Dean Sanhuri to attempt to discover, from his "scientific" perusal of the classical authorities, a series of underlying principles for a more general theory.[63] Quite fortunately, this process led Dean Sanhuri to conclude that the shari'a in fact largely replicates Roman law on the subject, thereby justifying his wholesale adoption of European civil code provisions as concerns much of the law of contract.[64]

Unlike Dean Sanhuri, the classical authorities that he claims to channel in transforming shari'a into something strongly resembling European civil law were not at all concerned with a general theory of obligation. They did debate fiercely, however, in a manner that Western lawyers would no doubt find baffling,[65] the extent to which contracts of the nominate forms could be combined or altered through the use of what are known as stipulations (*shurut),* such as a sale of an animal on condition that it be brought to a particular location.[66] The classical ruminations are far too complex and rich to discuss competently in this Article,[67] but some generalizations can be made. First, it is clear that any stipulations that vary a requirement of the contract (*muqtadha al-aqid*) are void. For example, a contract of sale requires the immediate granting of the item purchased, thus a stipulation that delays the transfer of the item until the death of a particular person cannot be made.[68] On the other hand, stipulations that either reinforce the contract requirements, such as that a buyer own the property she is selling, or harmonize with them, such as that the buyer post security for her purchase, are generally valid.[69]

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62. COULSON, *supra* note 61, at 19; VOGEL & HAYES, *supra* note 2, at 97-98; Sana Habachy, *The System of Nullities in Muslim Law,* 13 AM. J. COMP. L. 61, 63; Hussein, *supra* note 61, at 258 n.6. Numerous classical references make this abundantly clear, as the nominate forms of agreements are discussed therein in vastly different parts of the classical exegeses of most jurists, with seemingly nothing connecting them. *See, e.g.,*IBN QUDAMA, MUGHNI (1986) 6:5 (book of sales), 7:109 (book of partnerships), 8:5(book of leases); KASANI, BADA'I AL-SANA'I (1968) 6:2983 (book of sales), 10:4980 (book of loans), 5:2554 (book of leases); SARAKHSI, MABSUT (1993) 12:108 (book of sales), 22:17 (book of passive partnerships); 15:74 (book of leases).

63. HILL, *supra* note 55, at 45-46.

64. *Id.* at 78-79.

65. The *shurut* have no analogy in Western law, simply because a general theory of obligation, of the sort that most modern legal systems have, makes limitations on the promises one can make through a doctrine of stipulations entirely senseless. That is, once a legal system permits promises to be made and enforced as a general matter, there is no need to restrict stipulations that might condition these promises. In the medieval system, however, where no general theory of obligation exists, a doctrine of stipulations prevents contracts of the acceptable nominate forms from deviating widely from those nominate forms through the inclusion of additional stipulations or conditions.

66. SANHURI, *supra* note 60, at 101-05.

67. For a more complete discussion in Arabic, see *id.* at 101-33.

68. *Id.* at 101-02.

69. *Id.* at 106-08 (quoting a series of classical authorities, among them Sarakhsi, Kasani and Ibn Qudamah). *See also* VOGEL & HAYES, *supra* note 2, at 101.

Most disputes concerned concomitant stipulations that did not derogate from the basic contract requirements or reinforce them, but rather inserted a provision to the favor of one party or the other, such as the seller of a house agreeing to transfer title on condition that he have the right to marry the daughter of the buyer, or the buyer of cloth agreeing to purchase the cloth on condition that the seller sew a shirt from it.[70] There are different degrees of permission granted to these sorts of stipulations depending on the school of thought.[71]

The most liberal school with respect to stipulations is the Hanbali school, which permits them unless they contradict the requirements of the contract or violate a provision of the shari'a, among them, a statement by Muhammad accepted as valid by the Hanbalis that prohibits more than one stipulation in a contract of sale.[72] Hanbali scholars made a point of distinguishing themselves on the basis of the "two stipulations" rule, arguing that a single stipulation in a sale was never intended to be a violation of the shari'a and that, contrary to the position of the other schools, Muhammad never forbade a single stipulation.[73]

Ibn Taymiyya, a late theorist from the Hanbali school, joined in this debate on behalf of his school, arguing, as the Hanbalis before him, that Muhammad never banned a single stipulation in a contract.[74] He further indicated that the true Hanbali position was that any stipulation that was not either a direct violation of a shari'a provision or a strict analogy derived therefrom was permissible.[75] Thus, for example, a seller of a slave could reserve some of the slave's service for himself in the context of a sale.[76]

Ibn Taymiyya is also very clear that stipulations that are made in violation of the shari'a, or as a means to circumvent the shari'a, are invalid, and he absolutely includes within this category the prohibition on two stipulations in a sale or a loan combined with a sale. He indicates as follows:

> And thus has it been proven that the Apostle of God, may peace and blessings be upon him, as reported by Abdullah

70. SANHURI, *supra* note 60, at at 102. *See also* VOGEL & HAYES, *supra* note 2, at 101.

71. SANHURI, *supra* note 60, at 156-72.

72. *Id.* at 163-67.

73. IBN QUDAMA, *supra* note 62, at 2:165-66 ("And as for our view . . . it is not correct that the Prophet forbade a sale with a stipulation, but what is correct is that he forbade two stipulations in a sale . . . . And this leads to the understanding that a single stipulation is permissible. And Ahmed [ibn Hanbal, the eponym of the Hanbali school] has said 'the prohibition is on two stipulations in a sale.'").

74. IBN TAYMIYYA, FATAWA 3:473 (1966).

75. *Id.* at 3:474.

76. *Id.*

> Ibn Omar, has said that a loan with a sale is prohibited and a sale with two stipulations is prohibited . . . .[77]

As is set forth in greater detail in Part IV *infra*, this statement has been conveniently ignored in the modern era, not only by Islamic financiers but also in the first modern codification of the shari'a, the nineteenth century Ottoman *Majalla*.[78]

C. Gharar

The classical doctrine of *gharar* prohibits certain types of speculation and risk in contracts. While contracts, even in the medieval era necessarily involve some level of uncertainty, classical jurists determined that certain levels of uncertainty were of the type that would void a contract, largely on the basis of Prophetic statements forbidding the sale of unripe fruit on a tree, the sperm of a stallion, the fetus of a camel, grapes until they are black, or grain until it is strong.[79] Given the inherent arbitrariness of any line to be drawn between acceptable levels of speculative uncertainty and unacceptable levels, combined with differences among the schools of thought concerning the matter of *gharar*, generalizations are difficult to make without extensive exposition.[80]

Nevertheless, at least two central fundamental principles involving *gharar* can be identified. First, there is a prohibition on the sale of an item not currently in existence.[81] Second, the doctrine bans all significant uncertainties inherent to the performance of a contract by either party, such as any uncertainty over cost or duration.[82] There are disputes within the schools about whether or not these rules would apply to gifts as well as sales, with some Maliki jurists permitting gifts that have large uncertainties in value.[83]

There are two exceptions to these fundamental principles, one developed as a result of a contradictory statement of Muhammad,

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77. *Id.* at 3:419.

78. *See* OUSSSAMA ARABI, STUDIES IN MODERN ISLAMIC LAW AND JURISPRUDENCE 39 (2001).

79. IBN RUSHD, BIDAYAT AL-MUJTAHID 3:1607-08 (1995).

80. *See generally* SANHURI, *supra* note 60, at 13-56 (discussing varying rules of *gharar* among the competing schools of thought).

81. *See* IBN RUSHD, BIDAYAT AL-MUJTAHID 3:1610 (1970) ("thus all of the jurists have agreed on the prohibition of [the sale of fruit prior to its appearance], because it is the sale of an item that has not been created"); SANHURI, *supra* note 60, at 3:31 ("and thus we find that there is a consensus among the schools of thought that if an object is not present at the time of contracting, then the contract is void even if its presence can be established in the future."); VOGEL & HAYES, *supra* note 2, at 91.

82. *See* SANHURI, *supra* note 60, at 3:49. Thus, a price pegged to a varying index or a lease contract that imposes largely unknown liabilities on a lessee fall well within the bounds of prohibited *gharar* in Islamic finance. See VOGEL & HAYES, *supra* note 2, at 93, 144, at least with respect to contracts that are not gratuitous in nature.

83. IBN RUSHD, *supra* note 81, at 2:361 ("all which cannot be sold legitimately from the standpoint of *gharar* [may be gifted]").

and another available in the Hanafi school of thought, which, depending on how seriously they are taken, can do considerable violence to the principles described above. As to the first, advance purchases, known as *salam,* were permitted as established by Prophetic statement of permissibility, so long as they did not pertain to particular objects but rather were generic or abstract sales.[84] The delivery of cash for the purchase had to be immediate. A bilateral executory contract where the seller agreed to purchase at a later date and the buyer agreed to buy at that date was not valid.[85] The second exception related to a concept known as *istisna,* pursuant to which parties contract for the manufacture of particular goods, which obviously would not be in existence at the time that the contract is formed.[86]

D. Riba

The prohibition on *riba* in the classical era had much less to do with interest on loans than with types of prohibited trades, based on the following statement of Muhammad:

> Gold for gold, like for like, hand to hand and any excess is *riba*. Silver for silver, like for like, hand to hand and any excess is riba; grain for grain, like for like, hand to hand and any excess is *riba*; salt for salt, like for like, hand to hand and any excess is riba; barley for barley, like for like, hand to hand, and any excess is *riba,* dates for dates, like for like, hand to hand, and any excess is *riba*. And if the kinds differ, then sell as you wish, so long as it is hand to hand.[87]

This statement creates two categories of *riba*, one in which certain hand to hand (i.e., simultaneous) transactions result in a material gain for one party, and one in which a transaction results in delayed receipt on the part of one party. On its terms, it only applies with respect to six items, and even then, insofar as trades in excess amounts is concerned, only to trade within any particular item. Yet classical jurists, using a form of analogical reasoning known as *qiyas,* expanded this into a bewildering array of prohibitions of trade depending on the nature of the items being traded. Thus, for example, one school of thought created classifications based on the six items above relating to whether or not a particular commodity was weighable or measurable at time of sale, while others created classifica-

84. *See* VOGEL & HAYES, *supra* note 2, at 89. Thus, for example, the purchase at present of a certain number of bushels of wheat was permitted, but not wheat from a particular field. *Id.* Other rules also existed, requiring precise specifications on weight and type, for example. SANHURI, *supra* note 60, at 3:34.

85. VOGEL & HAYES, *supra* note 2, at 89.

86. SANHURI, *supra* note 60, at 3:38; KASANI, BADA'I AL-SANA'I 7:2167-69 (1968).

87. MUHAMMAD IBN IDRIS, Al-Shafi'i, AL-RISALA ¶¶ 43-47 (1940); SARAKHSI, MABSUT 12:110 (1993); SANHURI, *supra* note 60, at 3:177.

tions based on foodstuffs and currency.[88] The differences among the schools are casuistic and complex and hardly worth recounting for purposes of this article.

It should also be noted that forms of artifice (*hiyal*) were readily available according to most jurists of the classical era to the extent that any of these trades (in particular those concerning gold and silver and the items derived by analogy therefrom) proved troublesome. The simplest and most readily available artifice was the *'ina*, which involved the sale and buyback of the same item at a higher price, a practice readily accepted by two of the four classical schools of thought, the Hanafi and the Shafi'i.[89] The Maliki school banned the practice outright,[90] but certain Maliki jurists found their own form of artifice by deeming that *fulus*, or copper coins, were not covered by the *riba* prohibition,[91] a position that the noted Maliki jurist Ibn Rushd, or Averroes, considered unduly narrow.[92]

IV. Contemporary Islamic Finance

A. *Dominant Methodology*

As set forth by two authorities on the subject of modern Islamic finance, Vogel and Hayes, the dominant methodology employed in the contemporary practice of Islamic finance, and the means by which faithfulness to classical rules is supposedly achieved, is dubbed "utilitarian choice," where rules are selected according to their utility.[93] Thus, for example, the Hanafi school permits *istisna*, or manufacture for hire, as described above, in contradistinction to the other schools. Because its rule is more harmonious with contemporary needs, its rules are adopted. Such a choice is not restricted to particular schools, even minority, or individual, opinions of jurists within the schools may be selected over the dominant view of the school. Thus, for example, the Hanafi permission of *istisna* generally permits the buyer of the manufactured product to rescind the contract at any point prior to his inspection of the product. Islamic financiers, however, use a view developed by an early Hanafi jurist Abu Yusuf that binds the buyer at the conclusion of the contract.[94] Indeed, this

88. Nabil A. Saleh, Unlawful Gain and Legitimate Profit in Islamic Law 19-20 (2d. ed. 1992).

89. Nicholas Dylan Ray, Arab Islamic Banking and the Renewal of Islamic Law 55 (1995).

90. *Id.* at 56.

91. Mahmoud El-Gamal, *Islamic Bank Corporate Governance and Regulation: A Call for Mutualization* 12-13 (2005) *available at* http://www.ruf.rice.edu/~elgamal/files/IBCGR.pdf.

92. *See* Ibn Rushd, *supra* note 79, at 3:1568-71 ("and thus we see that the legal cause (*'illa*) is narrow . . . because it does not extend beyond gold and silver"); *see also* El-Gamal, *supra* note 39, at 52.

93. Vogel & Hayes, *supra* note 2, at 37.

94. *Id.* at 146-47; *see also* Kasani, *supra* note 86, at 7:3168-69.

methodology is not only the dominant form used in Islamic finance but has been widely applied in other areas as well. Kristen Stilt ably demonstrates how the Iraqi Personal Status Law has developed from the shari'a using a very similar methodology.[95]

Unfortunately, however, as a means of ensuring harmony with the classical era, "utilitarian choice" is logically fallacious and so patently riddled with ideological bias as to serve little function beyond the rhetorical. Respecting the logic of the method, it is difficult to see how selecting the opinion of a single jurist such as Abu Yusuf or Ibn Taymiyya to the derogation of every other jurist of record in the classical era shows respect or faithfulness to classical rules. Moreover, in determining which rule serves greater "utility," no compass seems to be used other than that the modern scholar prefers one rule to another. "Utilitarian choice," it appears, is little more than application of the opinion that any given authority happens to like for any reason. Using this methodology, virtually anyone from Ronald Reagan to Vladimir Lenin could readily create a commercial system to their liking from the classical corpus.

As noted earlier, commentators are well aware that true unbounded choice provides almost no limits on the type of rules a jurist can create. Vogel and Hayes assure us, therefore, that jurists make it a point to distinguish between legitimate and illegitimate choice. The selection among competing opinions through understanding the context in which they were made and remaining "immensely respectful of the past" in choosing a rule is entirely legitimate.[96] What is unacceptable is irresponsible, decontextualized "patching" (*talfiq*) where rules are merely put together mechanically to meet current commercial demands.[97] Vogel and Hayes note that scholars never admit to "patching" but often accuse others of engaging in it. Vogel and Hayes seem to take rather seriously the difference between the two forms of selection.[98] They note that were "patching" deemed acceptable, then one might readily justify the Western contract system on classical grounds through opportunistic selection of rules, thereby eroding the "internal logic" of the Islamic system.[99]

Thus does it become clear that in order for Islamic finance to retain any semblance of credibility as an extension of classical doctrine, then the life of the law must be based on "internal logic" and the distinction between opportunistic patching and responsible "utilitarian choice" must be meaningful and ascertainable. Neither is true, as the following sections make amply clear.

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95. Kristen Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 721 (2004).
96. VOGEL & HAYES, *supra* note 2, at 37-38.
97. *Id.*
98. *Id.* at 37.
99. *Id.*

B. *The Case of the Disappearing Stipulation Prohibition*

Nothing better demonstrates the entire poverty of the "utilitarian choice" methodology, as juxtaposed against "patching," than the curious disappearance of the classical rules prohibiting stipulations in contract. With the notable exception of the work of Professors Vogel and Hayes, contemporary books on Islamic finance are devoid of any mention of stipulations.[100] Professor El-Gamal refers us to *two* major prohibitions in finance developed by classical jurists,[101] and Dr. Ray tells us that "there are *two* fundamental limiting principles on commercial activity in Islamic law, the prohibitions on *riba* and *gharar*."[102] Professor Warde likewise discusses *two* central prohibitions,[103] and Professor Saleh describes *riba* and *gharar* as the "main prohibitory rules" acknowledged by Muslims.[104]

These statements are at worst demonstrably false and at best woefully incomplete. How can it be that the very elaborately developed set of prohibitions concerning stipulations from the classical era has come to be disregarded in its entirety, without so much as an explanation from the modern experts on the practice? This misconception dates back to the *Majalla*, the Ottoman era codification of shari'a. The drafters of the *Majalla*, along with eminent scholars such as Dr. Arabi, Professors Vogel and Hayes and Dean Sanhuri provide the explanation. It is that Islamic finance, and modern Islamic contract theory generally, has adopted the views of Ibn Taymiyya, who, we are told, permits stipulations that do not either independently violate the shari'a (thereby making a prohibited item into something permissible) or strip the contract of its intended object.[105] On this authority, all other classical references may be discarded.

This is technically true, but not properly understood. As the eminent authorities suggest, Ibn Taymiyya specifically indicates that a stipulation that violates a clearly established provision of foundational text (namely, either a Quranic verse or Prophetic *hadith*) is prohibited.[106] Ibn Taymiyya is a Hanbali, and the long standing Hanbali position has been, based on a Prophetic statement reported by the eponym of the school, and cited elsewhere by Ibn Taymiyya himself, that two stipulations in a contract of sale violates the shari'a on the basis of a Prophetic *hadith*.[107] This means that Ibn

100. *Id.* at 97-107.
101. EL-GAMAL, *supra* note 39, at 10.
102. RAY, *supra* note 89, at 28 (emphasis added).
103. IBRAHIM WARDE, ISLAMIC FINANCE IN THE GLOBAL ECONOMY ch. 3 (2005).
104. SALEH, *supra* note 88, at 3.
105. ARABI, *supra* note 78, at 39 (quoting the Explanatory Memorandum to the *Majalla*); SANHURI, *supra* note 60, at 170; VOGEL & HAYES, *supra* note 2, at 101.
106. IBN TAYMIYYA, *supra* note 74, at 3:474.
107. *See supra* notes 73-74 and accompanying text.

Taymiyya's admittedly more liberal position would still ban two stipulations in a sale of any item. Given the extent to which sales are a fundamentally important part of the Islamic finance paradigm, as demonstrated in Section IV.D *infra*, this is a very serious restriction requiring all contracts of sale to adhere to the nominate form, with one possible stipulated variation. The drafters of the *Majalla*, Dr. Arabi, Dean Sanhuri and Vogel and Hayes wish this away, indicating that Ibn Taymiyya speaks very favorably of permissibility and never mentions the "two stipulations" rule in the context of his discussion on stipulations.[108] In the words of Dean Sanhuri:

> And Ibn Taymiyya did not mention the prohibition on the two stipulations or the prohibition on two sales or the sale and a loan. And as a result, through the hand of Ibn Taymiyya, Islamic law developed permissions on stipulations with the closest possible relationship to the law of the modern West.[109]

The statement is entirely incorrect. It is true that Ibn Taymiyya does not mention the "two stipulations" rule in the context of his discussion on the subject of stipulations, preferring instead merely to indicate that stipulations cannot violate any specific provision in foundational text (*nass*) or an analogy drawn therefrom.[110] However, while discussing illegitimate means used to circumvent the *riba* prohibition, Ibn Taymiyya specifically quotes a provision from foundational text that severely limits stipulations; namely, the prohibition of two of them in a contract of sale.[111]

Nothing would therefore seem to be a more extreme form of decontextualized and highly mechanical and opportunistic "patching" than to adopt Ibn Taymiyya's position on the permissibility of stipulations unless there is clearly established foundational text to the contrary without simultaneously accepting his conclusion that the "two stipulations" prohibition is clearly established by foundational text. Yet this seems to be what Islamic financiers have done in deciding that the classical rules on stipulations no longer present any significant obstacles to developing modern Islamic forms of commerce and finance. So far as it appears to date and certainly to the knowledge of this author, the position taken with respect to stipulations in Islamic finance is more liberal than anything that any classical jurist of record seems to have ever said. Even with the pluralism and the multiplicity of opinions spanning centuries, the modern position on stipulations, dating back to the 19th century *Majalla*, is hardly de-

108. ARABI, *supra* note 78, at 59-60; SANHURI, *supra* note 60, at 172; VOGEL & HAYES, *supra* note 2, at 101 (citing Sanhuri).
109. SANHURI, *supra* note 60, at 172.
110. IBN TAYMIYYA, *supra* note 74, at 474.
111. *Id.* at 418.

fensible on the grounds of "utilitarian choice," or any other choice for that matter.

Thus, concerning this fundamental prohibition of the classical shari'a, the description of modern Muslim scholars interpreting classical doctrine in a manner "immensely respectful of the past,"[112] to create the doctrine that underlines Islamic finance while still remaining faithful to the internal logic of the shari'a, seems more hopeful legend than hard reality.

C. *On the Semantic Nature of the* Gharar *Prohibition*

Although *gharar,* in contradistinction to the rules on stipulations, remains a central prohibition within Islamic finance, more often than not it is conveniently ignored, less through formalist artifice and more through semantic reclassification. The most obvious example of this concerns the prohibition on insurance on the basis of *gharar*, on the theory that the policyholder pays a premium without any knowledge as to the timing or the amount to be received in return, or indeed whether anything at all will be received in return.[113]

Fortunately, however, through the "respectful" selection of classical law rules, we learn that at least among some in the Maliki school of thought, *gharar* does not apply as to gifts, thereby, for example, enabling a father to gift to his son an uncertain amount of money at an uncertain date.[114] Therefore, while insurance is forbidden, gift-based insurance based on notions of solidarity, known as *takaful*, is not. A pious Muslim who wishes to remain faithful to the rules of the classical era must not, the Islamic financier insists, pay premiums to an insurance company, but rather make a donation to a *takaful* company that keeps an account in his name. When there is a need for the *takaful* company to make a payout, it will not be *gharar*, but instead a gift from the participants to their fellow Muslim in need.[115]

So goes the rhetoric. Unfortunately, however, the *takaful* is a for profit company. The donations and payouts are contractually obligatory. There is nothing of substance as opposed to semantics that distinguishes this from a conventional insurance contract. If there is "respect" for the classical era rules in the position of Islamic finance towards *gharar*, it is exceedingly difficult to locate.

D. *On the Centrality of* Riba

Given the foregoing, it would seem puzzling indeed that Islamic finance would take the interest prohibition as seriously as it does. In the first place, the central prohibition of *riba* did not concern interest

112. *See supra* note 96.
113. VOGEL & HAYES, *supra* note 2, at 150.
114. *Id.* at 152.
115. *Id.*; M. MA'SUM BILLAH, PRINCIPLES AND PRACTICES OF TAKAFUL 24-25 (2001).

on loans, but forms of trades. It would be relatively easy for Islamic finance to respect those rules in large part, but simply exempt money from them. For this there is abundant precedent. The Hanafi school of thought limited *riba* to items that can be weighed or measured by volume,[116] and clearly contemporary currency cannot be so weighed or measured, at least from the time that the gold standard was dropped. The Maliki school applied *riba* to currency, but then many of the Maliki jurists exempted copper coins.[117] The Hanafi and Shafi'i schools permitted transparent artifices easy to create, among them the sale and immediate buyback of the same item at a markup.[118] There seems ample basis among the schools of thought to make any concerns of interest based on the *riba* trade ban largely irrelevant.

However, the ban on interest is central to Islamic finance, the one prohibition that is taken the most seriously, and though it is often circumvented, this is done neither through the opportunistic selection of juristic opinions, as per stipulations, nor through semantic reclassification, as per *gharar*, but rather through elaborate, formal artifices such as the *murabaha*, where an item is bought by the bank and sold to the borrower at a mark-up that corresponds to a prevailing interest rate, and often then resold by the borrower to a third party for its cash value.[119] The more transparent artifices accepted by schools of thought in the classical era, such as the sale and immediate buyback, are repudiated by Islamic financiers who, incredibly, make the claim that the shari'a bans artifice with respect to its prohibitions.[120] This is a demonstrably false statement as a historical matter, at least among some schools of thought, and, if taken seriously, would lead to the immediate disintegration of Islamic finance, based as it is upon formalist artifice, albeit of a more elaborate sort, in the best of cases.

Those who develop alternative interpretations of *riba* are dismissed as insufficiently respectful of the Islamic tradition, "defeatists" who are "apologetic about Islam."[121] This is in contradistinction

116. *See supra* notes 88-92 and accompanying text.

117. *See supra* note 91.

118. *See supra* note 89.

119. SALEH, *supra* note 88, at 117.

120. *See, e.g.*, SALEH, *supra* note 88, at 117; VOGEL & HAYES, *supra* note 2, at 22.

121. MUHAMMAD NEJATULLAH SIDDIQI, BANKING WITHOUT INTEREST 7 (1983) (describing the position permitting some forms of interest as "defeatist"); Muhammad Uzair, *The Impact of Interest Free Banking*, 3 J. ISL BANK. & FIN. 39, 40 (1984) ("By this time, there is a complete consensus of all . . . schools . . . and among Islamic economists that interest in all forms, of all kinds, and for all purposes is completely prohibited in Islam. Gone are the days when people were apologetic about Islam and contended that interest for commercial and business purposes, as presently charged by banks, was not prohibited . . . ."). *See also* COUNCIL OF ISLAMIC IDEOLOGY, CONSOLIDATED RECOMMENDATIONS ON THE ISLAMIC ECONOMIC SYSTEM 7 (1983) (indicating the presence of "complete unanimity among all schools of thought in Islam that the term

to their reactions to liberal theories on the other bans, which are often muted or even acquiescent. Therefore, Dean Sanhuri's liberal approach towards stipulations on the basis of a questionable reading of Ibn Taymiyya has been adopted in Islamic finance, but his ingenious reading of Ibn Rushd and Ibn Taymiyya's disciple, Ibn Qayyim Al Jawziyya, to suggest that the *riba* ban need not encompass interest in contemporary circumstances, is rejected soundly.[122] The difference, in tone, in approach, and in outcome, is absolutely striking. In one case, a tangential consequence to the classical ban on trades in precious metals and foodstuffs is made into the centerpiece of modern practice, the essence of Islamicity in commerce. In the other, central classical doctrines are ignored or downplayed in a manner that could readily be described, as they are in the context of the interest ban, as apologetic or defeatist. The "internal logic" of this law is profoundly illogical.

E. On Alternative Approaches to Islamic Finance

The practice of Islamic finance thus cannot be legitimized or supported as some sort of faithful extension of the rules of the classical era. What then, of Professor El-Gamal's "spirit" of the classical rules or Dean Sanhuri's "underlying principles"? Can it be that contemporary Islamic finance practice simply erred in its quest for the "internal logic" of the law, and that another approach more accurately taps the sentiment of the past millennium of legal thought?

Dean Sanhuri's efforts seem particularly difficult to sustain in a post-Realist age. Perusing classical authorities who clearly have not shown the slightest concern for a general theory of contract or obligation, Dean Sanhuri creates one for them through some sort of "scientific" comparative process, finds it to be remarkably similar to Roman law with slight variation, and then begins the process of copying select provisions European civil codes for insertion into the Egyptian civil code on this, purportedly Islamic basis.[123] The point, it should be emphasized again, is not to disparage Dean Sanhuri's remarkable civil code, but only to indicate that this sort of endeavor, discovering legal theories from the ideas of medieval authors who never considered them, reflects the ideological biases of the drafter and the material needs of the times more than the true "spirit" of the classical law.

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riba stands for interest in all its types and forms"); ABDULLAH SAEED, ISLAMIC BANKING AND INTEREST 50 (describing this position as "dominant" and "the basis of Islamic banking theory as well as practice").

122. SANHURI, *supra* note 60, at 234-36, 240-43 (suggesting that the prohibition on loans and exchanges of items of a similar value is only a "prohibition of means," to prevent a separate form of *riba* involving high levels of interest on potentially defaulting loans).

123. HILL, *supra* note 55, at 78-79.

For his part, Professor El-Gamal cannot be faulted for a lack of effort, endeavor as he does mightily to explain the economic bases of the *riba* ban on the basis of Pareto-efficiency, largely through his interpretation of the words of Ibn Rushd.[124] I am deeply skeptical that Ibn Rushd's generalizations, which have to do with achieving "justice" (*'adl*)[125] in transactions through making sure that equal values of goods are exchanged for one another, really relates to a concept such as Pareto-efficiency, which could not have had any real meaning for Ibn Rushd, as opposed to fraud or unfairness in result, particularly for the less knowledgeable party. Dean Sanhuri, for example, quotes precisely the same passage from Ibn Rushd as El-Gamal does, as well as an additional passage from another jurist, to identify three different purposes for the prohibition of *riba*: to prevent hoarding (*ihtikar*), to guard against turning currency into a commodity over which to speculate, and to ban fraud and exploitation over the trade in items of the same genus.[126] It seems once again as if the search for purpose might have more to do with the predispositions of the person performing the searching, with Professor El-Gamal the economist finding Pareto-efficiency and Dean Sanhuri the left-leaning jurist enamored of social justice[127] finding something relating to prevention of monopoly and exploitation.

However, the more central point is that to define Ibn Rushd's position, which appears to be an embrace of the Hanafi position without the artifices,[128] as demonstrating the central purpose of the classical law, is to repeat the mistakes of the Islamic financiers, of selecting the jurist whose views correspond to those of the person performing the selection, to the derogation of all other jurists.[129] Quite clearly, most Hanafis, by accepting such artifice as the sale and immediate buyback of the same item at a higher price, were not terribly concerned about Pareto-efficiency, as Professor El-Gamal would have it, or exploitation, as Dean Sanhuri might have it. The same might be said of the Shafi'is who held a similar position, and even the Malikis beyond Ibn Rushd, who by Ibn Rushd's own explanation create categories governed and not governed by *riba* that often exclude the most fungible good of all, minted copper coins, in a manner disap-

124. EL-GAMAL, *supra* note 39, at 52-53. *See also* El-Gamal, *An Economic Explanation of the Prohibition of Riba in Classical Islamic Jurisprudence* (May 2, 2001), *available at* http://www.ruf.rice.edu/~elgamal/files/riba.pdf.

125. IBN RUSHD, *supra* note 79, at 3:1071-72.

126. SANHURI, *supra* note 60, at 235-36.

127. Shalakany, *supra* note 57, at 204-05.

128. EL-GAMAL, *supra* note 39, at 52-53; IBN RUSHD, *supra* note 79, at 3:1071-72.

129. El-Gamal almost seems to recognize this, describing Ibn Rushd as having provided the "best" analysis for the reasons for the *riba* prohibition, but providing no explanation of precisely how the "best" analysis is to be determined, other than pure ideological preference. EL-GAMAL, *supra* note 91, at 12.

proved of by Ibn Rushd.[130] The elsewhere beloved Ibn Taymiyya's explanation of the *riba* prohibition roots the doctrine in an interest in avoiding the exploitation and oppression of those in desperate circumstances.[131] Neither Dean Sanhuri nor Professor El-Gamal seems to have found a very satisfactory explanation for these permutations of the rules. All searches for a purpose, a spirit or an internal logic seem to have been a failure.

Some commentators, eager in their quest to demonstrate a purpose to the classical law, point out that the renowned medieval jurist Abu Hamid Al-Ghazali indicated that all rules of the shari'a were concerned with the preservation of one of five aspects of human existence and association; namely, religion, life, family, mind and property.[132] Such commentators emphasize that this proved immensely influential in the classical era and that these are therefore the underlying purposes of the shari'a by broad juristic agreement, equally applicable in modern times.[133] This approach has also proved appealing in the modern era; the Egyptian Supreme Court in its derivation of the purposes of the shari'a uses a variant of Ghazali's list to find purposes to the shari'a, though that court seems to have reserved its right to enunciate other purposes as well, without providing much by way of guidelines as to how such additional purposes are to be discovered.[134]

The scholarship that emphasizes these trends is certainly interesting and noteworthy, but ultimately hopeless as an effort to gain clarity on any purposive approach to the shari'a. The purposes as defined by Ghazali are so general and vague as to be effectively meaningless, which probably explains their supposed popularity. It is hard to think of any rule that any rulemaker in any location at any time would ever think of issuing that could not be justified on the basis of preservation of one of the five factors listed above. Something other than purpose, spirit, internal logic or underlying principles must therefore be operating to explain the development of the rules of Islamic finance, a matter to which I turn in the next section.

130. *See supra* note 91.

131. IBN TAYMIYYA, *supra* note 74, at 3:415-16.

132. *See, e.g.*, Asifa Qureishi, *Interpreting the Qur'an and the Constitution: Similarities in Text, Tradition and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67, 101-02 (2007); *see also* LOMBARDI, *supra* note 4, at 32-34; Khaled Abou El Fadl, *Constitutionalism and the Islamic Sunni Legacy*, 1 UCLA J. ISLAMIC & NEAR E. L. 67, 101 (2001).

133. *See supra* note 132.

134. LOMBARDI, *supra* note 4, at 180-81, 188-98 (supplying ideas for general guidelines that the Court appears to be adopting to identify the goals of the shari'a).

V. On Islamic Economics and the Islamic Revolution

In order to understand precisely how Islamic finance developed in the way that it did, it is important to look at the social and historical context in which the Islamic economics movement arose; namely, the Islamic revivalism of the middle of the last century.[135] I focus herein on the three figures described as founders of Islamic economics, the Pakistani Abu A'la Maududi, the Egyptian militant Sayyid Qutb and the Iraqi Shi'i jurist Muhammad Baqir al-Sadr,[136] to show how their ideas gave new meaning to classical prohibitions in commerce and finance, and why these meanings have so much resonance in the modern era. This is the first of the two influences on the practice of Islamic finance, with Part VI providing more detail on the second, the role of the global commercial order.

A. *On the Centrality of Social Justice to the Islamic Economics Paradigm*

As Timur Kuran has properly noted, Islamic economics did not derive out of any desire to improve economic performance in the Muslim world per se, but in a search for a distinctly Islamic identity.[137] To add further specificity to Kuran's claim, Islamic economics, as developed by its founders, sought to project itself as an alternative economic paradigm, a "third way" between the ubiquitous state control implicit in Marxism and what was viewed as the rapacious, exploitative and inhumane forms of capitalism prevalent in the West.[138] It was the economic equivalent to the political resistance so often extolled by militant organizations in the Middle East.[139] Social justice, therefore, was central to the understanding of this framework, a concept that distinguished the Islamic economic system from capitalism, and indeed Qutb's ideas on economics largely appear in a highly influential polemic entitled *Social Justice in Islam*.[140] Sadr also regarded social justice as fundamental, one of the three cornerstones of Islamic economics, along with mixed property ownership (*mulkiyya*

135. Mahmoud El-Gamal, *"Interest" and the Paradox of Contemporary Islamic Law and Finance*, 27 Fordham Int'l L.J. 108, 122 (2003).

136. *Id.* at 115.

137. Timur Kuran, *The Discontents of Islamic Economic Morality*, 86 Am. Econ. Rev. 438, 438-39 (1996) [hereinafter *Discontents*]; Timur Kuran, *The Genesis of Islamic Economics*, 64 Social Research 301, 301-305 (1997) [hereinafter *Genesis*]; Gamal, *supra* note 135, at 122.

138. *See, e.g.*, Muhammad Baqir al-Sadr, Iqitisaduna 270 (3d. ed. 1969) [hereinafter "Iqtisaduna"]; Syed Abul Ala Maudoodi, Economic Problem of Man and The Islamic Solution 27-28 (10th ed. 1992).

139. *See* El-Gamal, *supra* note 135, at 122 (noting influence of Islamic revivalism on Islamic economics); *Discontents, supra* note 137, at 438-39 (providing specific example of Maududi); *Genesis, supra* 137 at 302-05 (also providing specific example of Maududi).

140. Sayyid Qutb, Al-Adala Al-Ijtima'iyyah Fil Islam [Social Justice in Islam] (2d ed. 1953).

muzdawija) and limited economic freedom.[141] Maududi's work is replete with references to rapacious and inequitable forms of capitalism as compared with Islam's concern for social justice.[142]

In this paradigm, it should be apparent that rules concerning the trades of items that can be weighed as against those that can be measured, or restricting the use of stipulations in a sale, serve no purpose. It is not sensible to say that the West is rapacious because it allows sales of items with more than one stipulation attached to them.

However, if the extension of the prohibited *riba* trades into money loans becomes the focus, so that the ban is on interest and not on trades of some commodities for others, a better case of exploitation can be made, at least on a superficial level. Thus did *riba* to the fundamentalists come not to mean the banned trades as set forth in the Prophetic *hadith*, but rather solely interest, and usury.[143] The six items *hadith* dropped from their discourse entirely and was replaced with references to the verses of the Qur'an itself, which never defines *riba* but rather prohibits it and opposes it stridently as the practice of the shameless, who "double and redouble" their profits,[144] who engage in a form of theft[145] that is almost the opposite of charity,[146] and who will find themselves consigned to Hell.[147]

The definition of *riba* as no more nor less than the taking of interest on a loan served the purposes of the fundamentalists nearly perfectly. The West permits institutions to lend money to borrowers in distress, and then to guarantee for themselves a return, with no risk at all, a sure form of oppression.[148] Thus those with money will find their money doubled and redoubled, as per the Quran, and wealth will be perpetuated within the moneyed classes.[149] The idly rich will prosper, drinking the blood and sweat of the poor in their greed, voracious in their appetites, forcing the working class to slave unremittingly to allow the rich to receive their riskless return.[150] Nor, according to Sadr, will such a system be efficient, because the capital class will not necessarily lend their money to the most worthy

141. Iqtisaduna, *supra* note 138, at 357.
142. MAUDOODI, *supra* note 138, at 27-28.
143. QUTB, *supra* note 140, at 150.
144. Quran 3:130 ("O you who believe, devour not *riba*, making it double and redouble. . . .").
145. Quran 2:275, 4:161 (promising a "painful punishment" for those who take *riba* and those who devour the property of others falsely).
146. Quran 30:39 ("And whatever you lay out as *riba*, so that it may increase in the property of men, it shall not increase with Allah; and whatever you give in charity, desiring Allah's pleasure, you shall get manifold.").
147. Quran 2:275 (indicating that those who continue to engage in *riba* following the prohibition will be "companions of the Fire.").
148. QUTB, *supra* note 140, at 151.
149. *Id.* at 150; MAUDOODI, *supra* note 138, at 27-28.
150. QUTB, *supra* note 140, at 149.

projects given that the loans earn a fixed return irrespective of the success of the venture.[151]

In the place of such exploitative debt, the fundamentalists argued, Islam calls for the creation of institutions and instruments that are based on social justice, mutuality and sharing. The shameless lender who offers one dirham and demands two later is destructive of social harmony and the Islamic brotherhood, as he makes an enemy of his borrower.[152] Mutual help, cooperation and support are the basis of the Islamic economic system,[153] so capital and labor should partner together to earn profits, an idea that Sadr takes so seriously as to call for a ban on all hired labor, at least with respect to the exploitation of raw natural wealth, notwithstanding Muhammad's *hadith* clearly in favor of hired labor generally.[154] Sadr, however, is unconcerned with the *hadith,* alternatively describing it as illegitimately derived, or if legitimate taken out of its proper context.[155] It is apparent that Sadr's interest lies not in adherence to foundational text in any formal sense but rather in the creation of a new Muslim order, uniquely Islamic, thoroughly just and contradistinct and separate from that of the broader global community. The creation of an Islamic identity, informed by Islamic ethics and ideological disposition, is what animates Sadr much more than the terms of foundational text.

The prohibition on gambling, supposedly the Quranic basis for the *gharar* doctrine, was justified on the same basis as *riba* by Qutb, as destructive of social harmony and brotherly feeling (*'ikha*) because profits are not based on mutuality or sharing, but the gain of one party at the expense of the other.[156] Later Islamic economists, drawing on this, extended the justification to commercial *gharar* in a more explicit fashion.[157]

This is of course a highly simplistic notion of debt and speculation. Limited liability corporations and bankruptcy laws make the idea of riskless debt preposterous, and debt clearly increases the access of entrepreneurs to capital rather than preserves classes of wealth in their current states. Nevertheless, the discourse, of protest, of revolution, of resistance to an established order, which is colonizing and cruel and rapacious, and its replacement with Islamic social justice, mutuality and brotherhood, proved immensely powerful, in both the economic context and the political. Sadr's ideas were

151. Iqtisaduna, *supra* note 138, at 552.
152. QUTB, *supra* note 140, at 150.
153. *Id.*
154. Iqtisaduna, *supra* note 138, at 360-62.
155. *Id.*
156. QUTB, *supra* note 140, at 143.
157. *See* Timur Kuran, *On the Notion of Economic Justice in Contemporary Islamic Thought*, 21 INT'L J. MIDDLE E. STUD. 171, 175 (1989) (describing the importance of the mutuality principle among Islamic economists in the context of *gharar*).

the most immediately successful, culminating in the establishment of the Islamic Revolution in Iran,[158] though Sadr himself was killed in his native Iraq by Saddam Hussein in 1980.[159] Qutb's notions of militancy and transformation of societies that have so strayed so far from Islam as to be equivalent to those of the pre-Islamic era, the so-called Days of Ignorance,[160] has led to his being dubbed the "father of militant *jihad*."[161] Maududi was the founder of Pakistan's current Islamist political parties, whose influence has affected the structure of Pakistan's political system.[162] The importance of these individuals in political and cultural circles cannot be doubted. Their effect on traditionalist doctrine is demonstrated in the next section.

B. On the Influence of the Fundamentalist Vision

According to the conventional paradigm, all of these ruminations do not add up to a great deal, because they are merely an expression of a political force which has nothing to do with the substance of the classical doctrine on which Islamic finance is supposedly built. As a result, Vogel and Hayes do not cite once Sadr, Qutb or Maududi and instead insist on a traditionalist approach that is supposedly apathetic to politics and seeks instead to remain in quiet harmony with classical doctrine. Vogel and Hayes insist that the radical vision, at least outside of Iran, has had little influence on the form and structure of Islamic finance.[163]

Yet we have seen that the methodologies of Islamic finance are simply indefensible on the basis of a logical, careful and respectful extension of classical rules. By contrast, the fundamentalist claims of economic and social justice and their association with Islamic finance, which Vogel and Hayes attempt to downplay or deny, are absolutely central to the rhetoric of Islamic finance. One of the most prominent and well known proponents of the contemporary practice is Muhammad Taqi Usmani, a former judge on the Shari'a Appellate Bench of the Pakistani Supreme Court,[164] and one of twelve members of the OIC Islamic Fiqh Academy,[165] an organization that Vogel

158. CHIBLI MALLAT, THE RENEWAL OF ISLAMIC LAW 59-78, 142-43; 188-89 (1993) (detailing Sadr's intellectual contributions to the Iranian Constitution and the respect afforded him among Sunni and Shi'i Muslims in the realm of economics). *See also* T.M. Aziz, *The Role of Muhammad Baqir Al-Sadr in Shi'i Political Activism from 1958-1980,* 25 INT'L J. MIDDLE E. STUD. 207, 218 (1993).

159. MUHAMMAD BAQIR AL-SADR, PRINCIPLES OF ISLAMIC JURISPRUDENCE 31 (Arif Abdul Hussain trans., 2d ed. 2005).

160. *See* FELDMAN, *supra* note 48, at 43-44.

161. JOHN L. ESPOSITO, UNHOLY WAR: TERROR IN THE NAME OF ISLAM 8 (2002).

162. *See* FELDMAN, *supra* note 48, at 121-24.

163. *See* VOGEL & HAYES, *supra* note 2, at 27 n.2.

164. MUHAMMAD TAQI USMANI, AN INTRODUCTION TO ISLAMIC FINANCE xi (3d ed. 2002).

165. *See* International Islamic Fiqh Academy, *available* in Arabic *at* http://www.fiqhacademy.org.sa/.

and Hayes cite dozens of times as a source of authority concerning rules of Islamic finance.[166] Judge Usmani also serves on the Global Shari'a Advisory Board of HSBC's Islamic Finance practice and advises a variety of financial institutions on Islamic law.[167] Judge Usmani therefore represents the very essence of the traditionalism and conservatism espoused by Vogel and Hayes as the basis of Islamic finance practice. It is therefore instructive to investigate Judge Usmani's views to see the extent to which the notions of the fundamentalists have played a role in developing the practice. I focus primarily on Judge Usmani's seminal opinion, written in 1999 while he was serving on the Shari'a Bench of the Pakistani Supreme Court, in which the Court instituted a ban on interest in Pakistan on the grounds that it is prohibited *riba*.[168]

First of all, it is instructive to note at the outset that Judge Usmani has clear political links to Maududi,[169] one of the founders of Islamic economics, already suggesting a flow of ideas and concepts from the traditionalist and the fundamentalist and the reverse. This is immediately evident when one reads Judge Usmani's opinion concerning *riba* and interest in Pakistan. Judge Usmani raises the question of whether or not "injustice" might be found in commercial forms of interest.[170] Judge Usmani immediately indicates that although the Qur'an has declared that *riba* is interest and that God is after all the final word on what is and is not just, nevertheless "the evil consequences of interest were never so evident in the past as they are today."[171] Over one hundred pages of text follow to defend this claim.

Judge Usmani indicates that treating money, which is supposed to be a medium of exchange, as a subject of trade leads to calamitous economic results, among them the fact that this drives production to higher than necessary levels and causes inflation.[172] Judge Usmani

166. *See* VOGEL & HAYES, *supra* note 2, at 322.

167. *See* HSBC Amanah, *available at* http://www.hsbcamanah.com/hsbc/amanah.

168. The actual effect of the court's judgment on finance in Pakistan is very much in question. Though Pakistani authorities have pledged to Islamicize the financial system in accordance with various judicial demands, in fact Islamic financial institutions are only a tiny fraction of the financial industry in Pakistan according to IMF Reports. *See* International Monetary Fund, *Pakistan: Selected Issues and Statistical Appendix* at Table IV.1 (Oct. 11, 2005), *available at* http://www.internationalmonetaryfund.org/external/pubs/ft/scr/2005/cr05408.pdf; International Monetary Fund, *Pakistan: Selected Issues and Statistical Appendix* 10 (June 8, 2004) ("[t]hus far, Islamic banks do not constitute a significant part of the banking sector, accounting for 1-2 percent of the total assets of the banking sector"). The impact of the decision, however, is less significant than the reasoning behind it, which demonstrates the extent to which Islamic finance has been deeply affected by the call of the fundamentalists.

169. El-Gamal, *supra* note 135, at 115 n.19 (2003).

170. Shari'ah Appellate Bench, Pakistan Supreme Court, *Opinion Concerning Riba* (J. Usmani section) (Dec. 22, 1999) ¶ 132 [hereinafter "Usmani Opinion"].

171. *Id.* at ¶ 133.

172. *Id.* at ¶¶ 148-52.

then fully adopts the rationale of the fundamentalists respecting economic justice and mutuality. Judge Usmani indicates that it would be a "glaring injustice" if a financier were to be able to earn a profit by extending a loan to an enterprise under circumstances where the enterprise fails, and conversely it would be unjust to limit a financier to his fixed return where the enterprise earns large profits.[173] This is precisely Qutb's point (albeit without Qutb's incendiary rhetoric), that the lending of money creates animosity because it creates situations in which the interests of the parties are not aligned in the manner that they should be.

As for economic justice, Judge Usmani could not be more clear that "[i]nterest based loans have a persistent tendency to favor the rich and against the interest of the common people,"[174] which is Maududi's precise position.[175] Moreover, as Sadr argues, Judge Usmani indicates that because the financier is guaranteed a fixed return, loans will have no "relation with actual production," creating a "mismatch" between the supply of money and the provision of goods and services.

This is not to suggest that Judge Usmani considers classical doctrine irrelevant; quite the contrary, the entire first half of his opinion is based upon the interpretation of foundational text and classical exegesis to develop and explain the ban on *riba*. His later work, while repeating the claims of the fundamentalists concerning economic justice and continuing to insist that interest creates massive disparities in wealth, clearly accepts the dominant practices of Islamic finance.[176] Still Judge Usmani has not, in his derivations of the law, ignored the fundamentalists' call but rather adopted them. The law of the classical doctors, it seems quite clearly, has been affected by the political upheavals of the era.

Were Judge Usmani the only figure who took such a position, perhaps he could be dismissed as an anomaly, but it is abundantly clear that virtually every responsible jurist or Muslim scholar of renown makes similar claims of economic justice and mutuality, based on the fundamentalists' call for revolutionary transformation to achieve something different from both the Marxist East and the capitalist West. Umar Chapra, an economist at the Islamic Development Bank in Jeddah, Saudi Arabia and one of the most well-known and most prolific advocates of Islamic finance in the Muslim world, makes notions of social justice central to his robust defense of Islamic finance.[177] Muhammad Nejatullah Siddiqi, a professor of economics in Saudi Arabia, opens one of his most well known books on Islamic eco-

173. *Id.* at ¶¶ 157-58.
174. *Id.* at ¶ 161.
175. *Id.* at ¶¶ 163-68.
176. *See generally* USMANI, *supra* note 164.
177. *See generally* UMAR CHAPRA, TOWARDS A JUST MONETARY SYSTEM (1985).

nomics with the sentence ". . . the main insight offered by Islamic economics is that ethics matters"[178] and another opens with the sentence "[i]n prohibiting interest Islam has endeavored to do away with a hideous form of tyranny and injustice prevalent in human society."[179] Timur Kuran, an expert on and critic of Islamic economics, describes the prohibition of interest as being "the most celebrated" injunction in Islamic economics among the proponents of the discipline.[180] These proponents ground the injunction, Kuran indicates, on the principle of fairness.[181] Ordinary Muslims are captivated by this perception and are shocked when, in seeking to obtain Islamic financing, they discover the ruse, as it were.[182] The sentiment is nearly universal.

Even the rhetoric of Islamic finance respecting those who proffer alternative understandings of *riba* suggests the type of revolutionary confrontation and resistance to the global commercial order that the fundamentalists first articulated. Siddiqi refers to such approaches as "defeatist" and Uzair as "apologetics."[183] This begs the question, to whom have they conceded this defeat, and to whom are they apologizing? The answer seems clear, it is the rapacious, exploitative West, with its vast disparities of wealth and its economic and social injustices. In place of it, the fundamentalists offer an alternative paradigm, that of resistance to the global order and its replacement with supposedly Muslim ideals and aspirations, that has proved so compelling in the Muslim community that even the staunchest traditionalists have adopted it.

The influence is beyond rhetorical, it extends deep into the doctrine of Islamic finance as well. Islamic finance has adopted the fundamentalist focus on the *riba* prohibition as exploitative and unfair. This makes certain forms of artifice that were acceptable to some classical era jurists unavailable to modern financiers. If, for example, peppercorns were bought and resold in Islamic banking offices under the theory of the *'ina,* or interest was taken on the theory that modern forms of money are not within the purview of the *riba hadith*, the claim that the *riba* prohibition advances social justice would be so

178. MUHAMMAD NEJATULLAH SIDDIQI, ECONOMICS: AN ISLAMIC APPROACH iii (2001). Siddiqi's critique concerns economic affairs generally and not merely finance, but finance does play an important role in his analysis. *See, e.g., id.* at 85-86.

179. SIDDIQI, *supra* note 121, at 11.

180. Kuran, *supra* note 157, at 174.

181. *Id.*

182. *See* VOGEL & HAYES, *supra* note 2, at 26 n.2. For a typical Muslim expression of this perception and frustrations associated with it, see Tarik El-Diwany, *Islamic Banking isn't Islamic,* June 2003, *available at* http://www.islamic-finance.com/item100_f.htm ("[T]he words 'profit-sharing' are to be heard constantly at all of the conferences [on Islamic finance]. Some of the scholars, if pressed, will talk about moving towards more satisfactory products . . . . But then everyone goes home and works on another *murabaha* contract.").

183. *See supra* note 121 and accompanying references.

transparently ridiculous that it could not be credibly made. Islamic financiers as a result eschew such simple devices.

The fundamentalists' lack of concern with stipulations is likewise mirrored in Islamic finance, where the stipulation prohibition has entirely disappeared from the discourse. Finally, Islamic finance, like the fundamentalist call, pays some limited attention to *gharar*, though not nearly as much as *riba*. In sum, the structure of the prohibitions, how seriously they are taken and the means used to avoid them adopt the fundamentalist paradigm almost entirely.

An excellent example of the manner in which the fundamentalist influence can be found in core Islamic finance doctrine is the *takaful*, the supposedly "Islamic" form of insurance. That insurance should be considered *gharar* at all seems at first blush rather startling, given that a policyholder does not pay premiums as a "bet," in the hope of a payout later, but rather is purchasing a specific and easily valued service, avoidance of risk, that he is receiving in exchange for payment of his premiums. It is no more a "bet," after all, then the hiring of a security officer to guard one's goods is a "bet" that someone might try to steal the goods. As Vogel and Hayes note, this argument was raised in 1962 and has never been accepted by the Islamic finance community.[184]

In its place, practitioners have proceeded with the ridiculous semantics of the *takaful,* which creates a fiction whereby a for profit insurance company is in fact organizing some form of charity, and the policy holders are not "buying" anything but rather collecting dues to be paid to their fellow brother should a need arise.[185] The obligations, risk profiles and payments operate exactly in the manner that standard insurance would. At first blush, understanding Islamic finance to be an extension of classical doctrine, it is hard to see why the *takaful* is more sensible than the interpretation of insurance as the purchase of a readily valued service, as described above.

It is the term *"takaful,"* or solidarity, and an understanding of the fundamentalist role in creating the practice that provides the answer. Sales of services to protect goods do nothing to advance the claim that economic justice, fairness or mutuality are integral parts of the practice. By contrast, solidarity, gifting, and charity are central to the vision and far more appealing as a result. Rather than use a more sensible means to permit insurance that could be defended as in harmony with classical theory, the practice prefers the fundamentalist rhetoric, even at the obvious expense of doctrinal incoherence.[186]

184. VOGEL & HAYES, *supra* note 2, at 151 (citing work of Mustafa Al-Zarqa).

185. *See supra* Part IV.C.

186. This is not to suggest that traditionalists are unconcerned with social justice and brotherhood, which are after all central to the idea of Islam, as they are to numer-

The depth of the fundamentalist influence runs to the understanding of the Quran itself. The three most common translations of the Qur'an today define *riba* as "usury" without exception.[187] Supposedly, to a traditionalist, this is at least deeply reductive, at the most usury is one manifestation of a broader ban, the proper translation should be, if the classical doctrine is to be taken seriously, something along the lines proffered by Professor Saleh, "unlawful advantage by way of excess or deferment."[188] This is reflected nowhere in the translations, however.

VI. THE MONEY IN THE GAME

That Islamic finance has almost nothing to do with economic justice, mutuality or social justice, at least as it is currently practiced, is not a matter deeply in dispute.[189] To understand why this is so, notwithstanding the fundamentalist influence, it is important to understand the role of the financial community and global financial institutions in helping mold the practice from its earliest days.

Islamic banking began in earnest in the 1970's[190] and was very much at that time dedicated to the notion of a finance institution that was based on profit sharing and mutuality as per the fundamentalist paradigm.[191] The notion was of a two tiered partnership, where depositors would essentially be investors in the financial institution, and the financial institution would then be an investor in various portfolio investments.[192] This model has broad flexibility and something like it is used in a wide variety of commercial activities, including private equity funds and money market accounts.[193] Unfortunately, however, it is hardly an appropriate structure for a bank. The monitoring costs would be immense, given that investments based on profit-based returns require more careful monitoring

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ous other religions. However, it would seem clear that those interested in maintaining harmony with classical doctrine would not jettison an approach that would permit the practice of insurance on grounds that seem entirely sensible in favor of some form of legal nonsense concerning "solidarity" if not for the fundamentalists' insistence that notions of brotherhood are a central plank of Islamic economics and Islamic commerce.

187. *See, e.g.*, USC-MSA Compendium of Muslim Texts, http://www.usc.edu/dept/MSA/quran/qmtintro.html (containing the three translations of the Quran most cited, those of Yusuf Ali, Marmaduke Mohammad Pickthall and M.H. Shakir).

188. SALEH, *supra* note 88, at 11.

189. VOGEL & HAYES, *supra* note 2, at 26-27; Haider Ala Hamoudi, *Jurisprudential Schizophrenia: On Form and Function in Islamic Finance*, 7 CHI. J. INT'L L. 605, 606-07 (2007).

190. WARDE, *supra* note 103, at 73.

191. VOGEL & HAYES, *supra* note 2, at 130-31; El-Gamal, *supra* note 135, at 124.

192. VOGEL & HAYES, *supra* note 2, at 130-31; El-Gamal, *supra* note 135, at 124.

193. Haider Ala Hamoudi, *Muhammad's Social Justice or Muslim Cant?: Langdellianism and the Failures of Islamic Finance*, 40 CORNELL INT'L L. REV. 89, 116-18 (2007).

than investments based on debt, where the return is fixed.[194] The returns could hardly be guaranteed as they are in a bank if the returns were based on profit; in fact, there could be losses, which could lead to a bank run.[195] Early Islamic banks found their start troublesome for precisely this reason.[196]

Some of the problems above could be avoided with prudent, safe investments in highly liquid equities, but while the depositors might then be satisfied, the bank's potential customers, the borrowers in the conventional paradigm, would find their needs unmet by the money market fund. Some sort of institution, which could bridge the short term liquidity needs of depositors with the long term requirements of borrowers, and which could pool resources and add expertise to develop a balanced and healthy portfolio, would continue to be necessary.

Thus, the profit sharing financial institution, based on the fundamentalist vision of sharing and mutuality had largely failed, at least within the dominant global paradigm of what a bank was and how it was expected to operate. No institution organized on this basis could seem to turn a profit. Moreover, it would seem perfectly obvious that no global financial institution would be very interested in such an approach, either. Financial institutions such as Citibank and HSBC are not, it can be fairly assumed, interested in economic justice, profit sharing, or restructuring themselves to function as equity-based funds. It would also seem perfectly obvious that a financial institution would be happy to employ its own financial model in new countries, even if small form adjustments needed to be made, particularly where, as in states with petroleum reserves, there was potentially a great deal of money to be made.[197]

In addition, it could be fairly presumed that at least some Muslim societies seeking economic and political advancement would look to the global institutions of power, money and influence as potential resources. Clearly Muslim societies found the fundamentalist call for a separate Islamic polity with its unique sense of identity derived from its own notions of ethics and morality appealing, but these same societies also wanted in the process to be important and influential players in the global arena, and fundamentalism alone was not providing the means to achieve this level of relevance, as the failure of the fundamentalist economic paradigm was making clear.

Thus, global financial institutions were seeking new clients, economies in the Muslim world were eager to obtain new sources of

194. *Id.*; *see also* VOGEL & HAYES, *supra* note 2, at 131.
195. VOGEL & HAYES, *supra* note 2, at 131.
196. *Id.*
197. WARDE, *supra* note 103, at 73 (indicating that Islamic banks began in earnest in oil economies).

financing, and the profit sharing bank and economic system had failed. This combination of factors led to the rise of the second influence on Islamic finance, that of meeting global commercial expectations. The practice began to reinvent itself,[198] continuing with the rhetoric of exploitation and economic justice, rhetorically tying *riba* to a large extent and *gharar* to a smaller extent to the achievement of these goals, and paying no heed throughout to the rules of stipulation. But where in the initial model, *riba* encompassed all economic equivalents to interest, the newer model developed highly elaborate artifices to circumvent *riba* while still making claims as to economic justice. The artifices and tricks did not involve exempting currency from the rules of *riba*, or engagement in sale and buyback, the fundamentalists' sway made this type of transparent trick impossible. Instead, the financial institutions relied largely on *murabaha*, which on its face is nothing more than a bank purchasing an item, say jewelry, on behalf of a client, for example, a jeweler, and then selling it to that jeweler at a mark-up to compensate it for its work in the process.[199] However, when the mark-up is tied to a prevailing international interest rate such as the London Interbank Offering Rate (LIBOR), warranties in the jewelry are never held by the bank but transferred to the jeweler, and the jewelry itself is never in the bank's hands for more than a fraction of a second, an interest transaction can be achieved in substance.[200]

The acrobatics can be taken even one step further, if the client is not a jeweler and seeks cash from his bank instead. Using a practice known as *tawarruq,* the bank might purchase the jewelry, transfer it to the client with the LIBOR based markup, and the client might then immediately sell the jewelry back to the original owner of the jewelry for its immediate cash value.[201] The jewelry might not even leave the original owner's physical possession. Some jurists might balk at the latter part of the transaction, fearing it intrudes too far onto the fundamentalist vision of economic justice in finance, but in such a case, that part of the transaction might be hidden from them. The basic *murabaha,* the jewelry at a markup, can receive shari'a approval, and the second part of the transaction, the resale of the jewelry back to the original owner, can be left out of the discussion either because the last part of the transaction is merely the sale of an item for cash, or because it will be performed without the bank's as-

198. VOGEL & HAYES, *supra* note 2, at 135.

199. *Id.*

200. Mahmoud El-Gamal, *Limits and Dangers of Shari'a Arbitrage,* ISLAMIC FINANCE PROJECT 4 (2005) *available at* http://www.ruf.rice.edu/~elgamal/files/Arbitrage.pdf.

201. *Id.* at 9.

sistance or support and therefore does not require the bank's approval.[202]

The practice, and the supposedly classical rules that gird the practice, are thus nothing more than careful mediation, between the necessity of adopting conventional finance models and a desire to retain the appearance of a populist fundamentalist vision of economic justice in finance. This is the case regardless of national boundaries, from Iran, where fundamentalist control was established in 1979, to Saudi Arabia, which professes a more historic connection to the classical doctrine.[203] The fundamentalist vision is central, but so is the need to make and attract money under the rules of a dominant global paradigm. Everybody, it might be said, wants to put pictures of Che Guevara on their T-shirts, but nobody, among the institutions of influence, seems eager to join him in the jungle.

VII. Beyond Islamic Finance

The importance of Realism in understanding Islamic doctrine extends well beyond the commercial realm. In fact, the social and political influences that led to the creation of Islamic finance apply with equal force with respect to nearly all other aspects of modern shari'a. Returning to the subject of *jihad,* it is clear that Maududi, Qutb and Sadr envisioned their form of protest, resistance and revolution against the dominant ideologies of the latter half of the twentieth century to be not only economic, but also political in nature.[204] Sadr clearly articulated a notion of an Islamic state that Khomeini largely appropriated in the Islamic Republic of Iran,[205] and Qutb wrote extensively on the forceful overthrow of Islamic governments that had strayed too far from his vision of true Islam.[206] Maududi was slightly more conservative, but did articulate and seek to bring about some form of shari'a rule in Pakistan.[207]

These fundamentalist visions of *jihad* as protest and revolution against the dominant, established global order are of immense influence among contemporary Islamist movements. Islamic revivalism has in many places added a new word to its lexicon, one undiscussed in the classical texts but near the lips of many living Muslims—

202. *Id.* at 7-8.
203. Roy, *supra* note 2, at 140.
204. Timur Kuran has made this amply clear in his groundbreaking work on the subject of Islamic economics. *See Discontents, supra* note 137, at 438-39; *Genesis, supra* note 137, at 302-05; Timur Kuran, Islam & Mammon 1-38 (2005). In many ways, this Article extends Kuran's ideas on the relationship of Islamic revivalism to Islamic economics, and derivatively, Islamic finance, into the area of legal doctrine, to demonstrate how far contemporary Islamic rules have strayed from their classical forebears, within and beyond Islamic finance.
205. *See supra* note 158.
206. Feldman, *supra* note 48, at 43-44; Roy, *supra* note 2, at 36.
207. Roy, *supra* note 2, at 36.

muqawama, or resistance. The Palestinian Islamic revivalist movement Hamas is in fact an acronym for the Islamic Resistance Movement (*harakat al-maqawama al-islamiyya*).[208] Hizbollah's website is available under the term *muqawama* (www.moqawama.org), and there are repeated references therein to the "resistance" in the "battle" against Israel.[209] The Iraqi insurgency against the United States always refers to itself as the "resistance."[210] The Organization of the Islamic Conference sought to define terrorism in a manner that exempts acts of "*resistance* to foreign aggression" (emphasis added).[211]

The modern forms of *jihad* are defended not only by "fundamentalists" like Sayyid Qutb, but even by authorities like Yusuf Qaradawi, a "traditionalist" attaching himself to classical authority.[212] Qaradawi advises Hamas, the Palestinian "fundamentalist" organization, and legitimates on Islamic grounds its violent activities against civilians in the West Bank. This is in clear contradistinction to a traditionalist paradigm in which social and political improvements are supposedly sought through careful and quiet adherence to the law.[213]

This should be unremarkable. Qaradawi is well aware of the popularity of Hamas in the broader Middle East, and whether he shares their views respecting the Islamicity of their actions or merely cynically adopts them to remain relevant is ultimately beside the point. He must advocate in their favor, and if he did not, whether out of conviction or otherwise, his popularity would wane among the sections of the Muslim community that currently listens to him. In that case, another, more suitable "traditionalist" would take his place. Qaradawi can, and does, decry the activities of September 11 on traditionalist grounds,[214] but Hamas cannot seriously be questioned.

At the same time, however, a clear, separate influence on Islamic doctrine on *jihad* has been the need of Muslim societies to comply with broader global expectations in the political sphere, if Muslim societies are to be relevant, and more importantly, powerful, in the contemporary era, is. Hence, for example, when the Organization of the Islamic Conference justifies its position on the relationship between resistance and terrorism in a document commonly referred to as the Kuala Lumpur Declaration, its principles appear incoherent, because

208. GlobalSecurity.org, Hamas (Islamic Resistance Movement), http://www.globalsecurity.org/military/world/para/hamas.htm (last visited Oct. 30, 2007).

209. *See* www.moqawama.org/israel (last visited May 10, 2007).

210. *See, e.g.,* www.albasrah.net (popular insurgency website, referring to the "resistance" against American instrusion) (last visited May 10, 2007).

211. Kuala Lumpur Declaration, *supra* note 34, at art. 8.

212. SHERMAN JACKSON, ISLAMIC LAW AND THE STATE : THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI xxxii (1996) (describing Qaradawi as being idenitified as an authority "in the tradition of classical Islamic law").

213. FELDMAN, *supra* note 48, at 64.

214. *Id.*

of the need both to meet modern Muslim expectations concerning *jihad* as resistance and to appear not shockingly divergent from global expectations, which could have broad ramifications in the form of diplomatic and economic isolation that Muslim societies seeking advancement would necessarily wish to avoid.

Thus, Article 4 of the Kuala Lumpur Declaration indicates that the true teachings of Islam prohibit the killing of innocent people.[215] However, Article 8 seeks to exempt from any definition of terrorism, on the basis of the UN Charter and international law, "resistance to foreign aggression and the struggle of peoples under colonial or alien domination and foreign occupation for national liberation and self-determination."[216] Articles 10 and 11 then further exempt the Palestinian and Lebanese "resistance" from terrorism, and Article 12 deplores Israeli activities against the Palestinians.[217]

It is hard to make very much sense of this. First of all, no provision of the UN Charter or principle of international law does or could permit activities that otherwise would fall under the rubric of terrorism so long as they can be described as acts of "resistance" undertaken in the course of "struggles by peoples under colonial or alien domination." Secondly, it is unclear why, if Islam deplores the killing of innocent civilians under article 4, there is any need to exempt the resistance of article 8 from the definition of terrorism, particularly in the case of Hamas. In other words, it is not clear what Hamas would seek to do in furtherance of its self-proclaimed resistance that would be prohibited under any reasonable definition of terrorism other than suicide bombing. Finally, it is unclear how the Declaration can exempt, seemingly entirely, the Palestinian resistance, condemn Israel, and deplore the killing of innocent civilians without a mention of suicide attacks undertaken by Hamas against Israeli civilians. Are these then to be condemned as un-Islamic attacks on innocent civilians, or are they legitimate resistance against colonial or alien domination? The Declaration seems designed to avoid answering this question, which, for a document meant to announce the position of the Muslim nations of the world on the subject of terrorism, is quite surprising.

It is only in understanding the tension between the importance of resistance and the necessity of compliance with global expectations that the explanation for the seeming confusion becomes apparent. The impossible references to international law and the UN Charter are obviously meant to assure the broader world of the willingness of Muslim nations to accept international norms, and the references to resistance may as well have been taken directly from spokesmen

215. Kuala Lumpur Declaration, *supra* note 34, at art. 4.
216. *Id.* at art. 8.
217. *Id.* at arts. 10-12.

from any one of the *jihads* currently convulsing the Middle East. They are forced together in a manner that makes almost no sense, justifying modern expressions of *jihad* on the basis of international documents in a manner that few non-Muslim nations would accept. As for the references to "innocent civilians," they provide double assurance. They signal to the international community the Muslim desire for peace and engagement, of course. On the other hand, they are designed to conform to the claims of the resistance, which takes the position that no Israeli adult is an innocent civilian because all participate in the military, at least in reserve status, a position which speaks volumes respecting the extent to which militant Muslims seek to defend their actions on the basis of self-defense.[218] It is only through understanding this very contemporary form of shari'a and the influences that led to its creation that the position of the OIC, and modern Muslims, on the subject of resistance, terrorism, *jihad* and the law of war could possibly be understood.

The same might be said of criminal law within the nation states that seek to apply the harsh criminal sanctions in the shari'a known as the *hudud*, which include the amputation of the hands of thieves and the stoning of adulterers. Professor Feldman, for example, whose work on reconciling Islam and democracy is laudable for its refusal to dwell extensively on classical doctrine and instead focus on what approaches Muslim communities are accepting by way of shari'a,[219] seems to lose his Realist focus in the area of criminal law. In discussing recent attempts to implement the *hudud* in various Islamic countries, Feldman dismisses them as not entirely Islamic because they are the result of political factors, not Islamic doctrine.[220] Feldman informs us that under the classical rules, there is almost always a legal way to avoid enforcement of the *hudud*.[221]

One wonders whether Feldman has fallen into the familiar trap of the political liberal, where innovative, salutary interpretations of text that massage doctrine to conform to contemporary cultural and political realities must be accepted on their terms, but alternative interpretations that are equally creative but lead to less salutary results may be dismissed as a product of "politics." The question is not whether or not there is a way to avoid the *hudud* under the classical rules, presumably those who want to enforce the rules can find classical sources that justify their position as easily as Professor Feldman can find excuses not to enforce. The issue for the modern commentator is why these particular punishments are being grafted onto an

218. *See, e.g.*, Human Rights Watch Report, *Suicide Bombers Commit Crimes Against Humanity*, Nov. 1, 2002, *available at* http://www.hrw.org/press/2002/11/isrl-pa1101.htm.

219. FELDMAN, *supra* note 48, at 54.

220. *Id.* at 72.

221. *Id.*

otherwise modern criminal code now, and what this tells us about the shari'a in the modern era. Again, resistance seems central to the paradigm, a means to demonstrate a moral and social order and a unique Islamic identity in contradistinction to that of the decadent and debauched West. That the principles of *nulla poena/nullum crimen sine legem* have been incorporated, in derogation of the rules of the classical era, only demonstrates the extent to which these same societies understand and incorporate as necessary for advancement the structure of the pervasive and highly regulated nation state of the West, with its detailed codes and extensive administrative regime.

I could continue the discussion for some time on these conflicting tensions, from Al Qaeda's rejection of democratic rule and its embrace of Western technology, to the wide acceptance by modern Muslims, even conservatives, of the prohibition of slavery in the modern world (because, it is said, the shari'a circumscribed and disapproved of the practice, and therefore a ban is entirely logical)[222] and the simultaneous indignation of many Muslims, especially conservatives, at any proposal to prohibit polygamy (because while the shari'a circumscribes and disapproves of polygamy, nowhere is the practice banned).[223] More work is required to expand these ideas further.

It would seem that in this post-Realist age, we in the American legal academy should be well aware that faithful harmony to classical rules that, as Professor Abu Odeh points out, have not been in application for hundreds of years, are not the driving force behind the popularity of particularly and peculiarly pan-national Islamic positions, on commerce, finance, *jihad,* criminal law, family law and numerous

222. Popular Muslim websites, for example, emphasize the fact that foundational text disapproves of slavery and sets the conditions for its ultimate demise, conveniently omitting the fact that centuries of legal rulings enabled a significant expansion of the slave practice in the Muslim world. *See, e.g.,* Understanding Islam Website, http://www.understanding-islam.com/related/text.asp?type=question&qid=652 (last visited Dec. 2, 2007) ("Islam has always been against the very existence of the institution of slavery. Nevertheless, like most of the other social phenomena, slavery too, because of its deep roots in the society, could not have been abolished by a single stroke of the ruler's pen."). *See also* Website of Digital Ahl ul Bayt Islamic Library Project, http://www.al-islam.org/organizations/aalimnetwork/msg00224.html (last visited Dec. 2, 2007). This is not to suggest that all modern Muslim approaches to a slavery ban are equally ahistorical or naïve. My colleague Professor Freamon advocates for an expansive use of the doctrine of consensus, or *ijma*, under the shari'a to give binding effect to the opinion of nearly all contemporary Muslims that slavery should be prohibited. *See generally* Bernard Freamon, *Slavery, Freedom and the Doctrine of Consensus in Islamic Jurisprudence,* 11 HARV. HUM. RTS. J. 1 (1988). In so doing, Professor Freamon stands out as an exception to the rule respecting legal academics in American law schools, one willing to jettison the classical rules in favor of current Muslim positions on Muslim doctrine.

223. Understanding Islam Website, http://www.understanding-islam.com/related/text.asp?type=question&qid=573&sscatid=411 (last visited Dec. 2, 2007) (". . . even though an ideal family setup consists of one husband and one wife, there can be a number of situations where the society demands of a person to compromise the ideal family setup and enter into a second marriage for the general good of the society.").

other subjects relevant today. It is time to abandon the doctrinal obsessions and turn to those social and political factors that drive a substantial portion of the Muslim world to seek a robust new role for the shari'a to control affairs and institutions of human association. This is only the extension of Realist thought to the Islamic arena, a recognition that ultimately any attempted recreation of history in the establishment of legal, political or social order is ultimately an invention of the past, and that contemporary circumstances and social forces more than historic doctrine control the outcome.

An approach of this sort places the shari'a in a new light, with a new means to understand and engage the Muslim world. Quite clearly, for example, though Islamic finance is in many ways a form of protest against the established commercial order, economic "resistance" of a sort, some cooperation in the creation of forms of Islamic commerce can be made. A serious and honest discussion can take place about the means (and the desirability) to achieve Islamicity in finance in a manner both commercially practicable and meeting the demands of modern Muslims respecting social justice and fairness. An altogether different approach might be required with respect to the creeping influence of modern forms of shari'a in matters such as the law of war and criminal law. Nevertheless, if the shari'a is considered in this way, the need to study and teach this pan-national Islamic law, and the fermentation of Islamic thought that has arisen as a reaction and a consequence (some of it modernizing, some less so), seems of paramount importance. Seen in this light, Professor Abu Odeh's thesis that Islam has been largely privatized and that generalized Islamic law is not relevant to understanding Muslim nation states and their citizens is a very difficult proposition to defend.

Perhaps the greatest irony concerning the obsession with formalist adherence to classical doctrine in our academy is that in many ways we lag behind the Islamic scholarly community itself in this respect. Some jurists themselves realized the futility of trying to faithfully replicate classical doctrine, most notably Sadr. Rather than patronize his fellow Muslims or seek to confuse them with lengthy discourses in obscure language, as most jurists of his time did, Sadr's work on economics and commerce, as well as numerous other subjects, is accessible and easy to understand.[224] In his discussions on interpretation and modernization of classical rules, Sadr does not hide from the realities of his interpretive effort and claim to have mastered some sort of neutral process wherein he may understand the purpose or letter of God's Will, or the meaning of the classical doctors, better than others. Rather, he admits quite openly that the interpretive process is deeply influenced by what he calls "subjectivity" (*dhatiyya*) and that any jurist engaging in the process of review-

224. Aziz, *supra* note 158, at 210.

ing classical exegesis is going to find rulings that correspond closely to his vision of legal or economic order, and rulings that seem to deviate considerably from them.[225] In such cases, the jurist has no choice but to select the rules that conform to his own vision.[226] An excellent place to begin the discussion . . . .

VIII. Conclusion

The central flaw in evaluating Islamic law in the American academy is the reliance on the false assumption that contemporary Islamic rules are derived from classical doctrine. This has led both admirers and detractors of the manner in which current Islamic law is currently studied and taught in US law schools to focus their energies on obsolete medieval rules that bear no relationship to the manner in which modern Muslims approach shari'a. The reality is that given the structural pluralism of the rules of the classical era, there is no sensible way that modern rules could be derived from classical doctrine, either in letter or in spirit, and all efforts to do so have largely failed. As with all historical approaches to the law, the past becomes no more than an invention of the present, a means to validate an approach rather than any true reflection of the practices and norms of a previous era. Thus, modern Islamic rules are not a resurrection of classical era rules, but rather are largely the product of mediation among competing influences in Muslim society. Within and even beyond Islamic finance, the two major influences are, on the one hand, resistance against the dominant global economic and political order to create a separate Muslim polity with its own ethical and cultural norms, and on the other, the need to engage the broader world, commercially and politically, in order to develop power and influence. A proper study of influences of this sort that have led large numbers of Muslims to adopt particular pan-national shari'a positions on economics, finance, war and numerous other realms is absolutely vital in the post 9/11 era in order to engage substantial, important segments of the Muslim community.

225. Iqtisaduna, *supra* note 138, at 372-76.
226. *Id.*