THE HUMAN DIMENSION OF *SHARI'A* LAW

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I. INTRODUCTION

In his celebrated memoir, *Voice of an Exile*, Nasr Abu Zayd describes opening his local Egyptian newspaper to find a harrowing caricature of himself looking back from the pages. The illustration depicts Abu Zayd—once a prominent professor in Cairo University's Arabic department—as "the 'devil' [having] just stabbed the Qur'an."[1] He recalls that in the picture "[b]lood gushed copiously from the sacred text."[2] Despite this unsettling cartoon, Abu Zayd also recounts feeling "very, very Egyptian" and describes a lifetime of immersion in the religious rituals and culture of Islam—as many young Muslims do, he had memorized the Qur'an by age eight.[3] What can account for this apparent dissonance between the way that Abu Zayd viewed himself and the way that he was depicted in the media?

The ire towards Abu Zayd emanated chiefly from orthodox students and scholars perturbed by Abu Zayd's theories on the Qur'an. By way of summary, as one commentator noted, "Abu Zayd disagrees with interpreters who place excessive reliance upon 'the divine dimension of the Qur'an at the

* J.D., New York University School of Law, 2018. The author would like to thank his wife, parents, teachers, and professors (especially dr. T), who showed him that, in the immortal words of Emil Faber, "Knowledge is Good."

1. NASR ABU ZAYD WITH ESTHER R. NELSON, VOICE OF AN EXILE: REFLECTIONS ON ISLAM 64 (2004).

2. *Id.*

3. *Id.* at 66.

expense of acknowledging its human characteristic.'"[4] Abu Zayd angered his detractors by positing that Muslims could regard the Qur'an—and other sacred texts—as products of a unique historical context, and that certain Qur'anic references could be understood as "literary figures of speech" and not construed literally.[5] For some, these theories undermined an image of the Qur'an as exclusively divine and inherently flawless.[6]

This Note will shine a light on the characteristically human elements throughout Islamic jurisprudence, and in doing so, attempt to make Abu Zayd's theories more palatable to those who have recoiled from them. If couched in an understanding of Islamic Law that openly incorporates both divine *and* human aspects, I submit, a newfound conception of the Qur'an itself may emerge.

Like any rich jurisprudential tradition, there are many Islamic legal techniques. Among them are *ijma* (consensus), *urf* (custom), *qiyas* (analogy), *maslaha* and *istislah* (consideration of the public good), *istihsan* (the best outcome in a given case), and *darura* (necessity). Parts II through IV of this Note analyze some of these techniques to illustrate how Islamic jurisprudential devices create space for modern theories of the Qur'an. Specifically, I analyze the use of legal fictions, or *hiyal*; the practice of legislating in the public interest known as *maslaha*; the *qiyas* analogical method; and the idea of *isnad* (chain of transmission) as it relates to the authority of a given *hadith*.[7] Part V looks to responses to modern theories of biblical criticism in Judaism and Christianity as a potential analogue for how Islamic thinkers might react to a position like Abu Zayd's.

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4. Sukidi, *Nasr Hamid Abu Zayd and the Quest for a Humanistic Hermeneutics of the Qur'an,* 49 Die Welt Des Islams 181, 186 (2009) (quoting NASR ABU ZAYD WITH ESTHER R. NELSON, VOICE OF AN EXILE: REFLECTIONS ON ISLAM 57 (2004)).

5. Nasr Abu Zayd, *The Dilemma of the Literary Approach to the Qur'an*, 23 J. COMP. POETICS 8, 20 (2003).

6. *See* Sukidi, *supra* note 4, at 186 (discussing the humanistic approach to the Qur'an and how it clashes with the "divine dimension").

7. The *Hadith* (capital H) is the collected reports of the Prophet Muhammad's "actions, statements, and practices that received his tacit approval. Each individual *hadith* consists of the text of a report . . . and the names of the succession of individuals . . . who transmitted the report." Scott C. Lucas, *Hadith and Sunna*, *in* ISLAM: A SHORT GUIDE TO THE FAITH 38, 38 (Roger Allen & Shawkat M. Toorawa eds., 2011).

In all, this Note strives to create a climate wherein Abu Zayd's theories on the Qur'an (i.e., viewing the text as a pseudo-human product, rather than an inflexibly divine book containing purely divine law)[8] become less problematic.

Abu Zayd is not alone in expressing progressive views about the Qur'an or indicating a level of discomfort with the Qur'an's literal meaning. Early interpreters such as Muhammad ibn Jarir al-Tabari (d. 923) and Isma'il ibn Kathir (d. 1373) expressed similar sentiments even before the modern period.[9] In recent years, and in the context of conceptually imagining Islamic statehood, Abdullahi Ahmed An-Na'im notes that

> whenever someone mentions verses of the Qur'an, he or she is providing a personal understanding, not the totality of all possible meanings or the only and exclusively valid meaning . . . .
>
> [A]ny attempt to identify and describe to other human beings the Islamic ideal is inherently constrained by all the limitations and fallibilities of the human beings who are making the claim.[10]

These theories are extremely unpopular amongst traditional Muslims for whom the Qur'an's divinity is a central tenet of their faith. This guarded attitude appears to leave very little space for even the most modest liberal theories on the Qur'an. Some scholars have even rejected—or, at least, evinced skepticism about—theories that ascribe only minor involvement in the construction of the Qur'anic text to the Prophet Muhammad:

> [T]he standard Muslim view of the Revelation does not allow any role for the Prophet Muhammad in the genesis of the Qur'an, the total composition which Islam attributes to God alone, fiercely rejecting any

8. *See* NASR ABU ZAYD, AL-TAFKIR FI ZAMAN AL TAKFIR 200 (2d ed. 2003) (describing the Qur'an as God's word created in the human world, rather than purely the word of God).

9. Shannon Dunn & Rosemary B. Kellison, *At the Intersection of Scripture and Law: Qur'an 4:34 and Violence Against Women*, 26 J. FEMINIST STUD. RELIGION 11, 13 (2010) (discussing how early "interpreters . . . explained the text in ways that indicate some level of discomfort with its literal meaning").

10. ABDULLAHI AHMED AN-NA'IM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A, 46–47 (2008).

> idea that supports human involvement. God is the sole 'author' of the Qur'an and Muhammad's role is reduced to that of a recipient of the sacred text and transmitter of it to his people. In its reception and transmission, then, Muhammad faithfully provides a 'carbon copy' of what has been dictated to him in the Arabic language, without addition or alteration. No credit is given to Muhammad; it all accrues to God.[11]

The fact that even the Prophet Muhammad is cordoned off illustrates that the orthodox perspective allows infinitesimal wiggle room for progressive theories about Qur'anic authorship or for historical contextualization. Moreover, conservative Muslims hold that translations of the Qur'an are mere simulacra. In their view, any human attempt to re-constitute the Qur'an in non-Arabic form denudes it of its holy status.[12]

With all of this as background, one can easily see why a theory like Abu Zayd's, which suggests that the text—all of which allegedly "accrues to God"[13]—has an important human characteristic, would not be received lightly.

Seizing upon an unlikely governmental institution, Abu Zayd's adversaries availed themselves of the Egyptian family court in order to give practical impact to what would otherwise have been mere polemics. In the summer of 1993, a group of "guardians of religious orthodoxy" filed a suit accusing Abu Zayd of holding aberrant and atheistic beliefs and apostasy.[14] Moreover, they argued that his marriage was void under Egyptian law because his wife, a believing Muslim, could not validly marry an apostate.[15] Although the trial court dismissed the suit, the appellate court reversed and, based on Abu Zayd's academic writings, concluded that he indeed was an apostate and therefore could not legally be married to his Muslim

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11. Abdullah Saeed, *Rethinking 'Revelation' as a Precondition for Reinterpreting the Qur'an: A Qur'anic Perspective*, 1 J. QUR'ANIC STUD. 93, 93 (1999).

12. HELMUT GÄTJE, THE QUR'AN AND ITS EXEGESIS: SELECTED TEXTS WITH CLASSICAL AND MODERN MUSLIM INTERPRETATIONS 31 (1976) ("According to the Muslim view, the Qur'an, as God's speech cannot be translated but, rather, must be studied in its original Arabic form.").

13. Saeed, *supra* note 11, at 93.

14. Judith Miller, *New Tack for Egypt's Islamic Militants: Imposing Divorce*, N.Y. TIMES, Dec. 28, 1996, at 22.

15. *See id.*

wife.[16] To make matters worse, extremist groups in Egypt such as the Muslim Brotherhood, emboldened by the court decision, began calling for Abu Zayd's death.[17] Fearing for their lives, Abu Zayd and his wife fled to the Netherlands before the Court of Cassation (Egypt's highest court of appellate review) upheld the appellate court's ruling, officially labeling him an apostate and effectively abrogating his marriage.[18]

In *Voice of an Exile*, published nearly a decade after the Egyptian high court's ruling, Abu Zayd echoes his argument that "we overemphasize the divine dimension of the Qur'an at the expense of acknowledging its human characteristics . . . [and] in order to make Islamic thought relevant, the human dimension of the Qur'an needs to be reconsidered."[19] To be clear, Abu Zayd does not hold that the Qur'an was written by men. Instead, he maintains that "placing the Qur'an firmly within history does not imply that the origins of the Qur'an are human."[20] Nevertheless, he insists that any understanding of the Revelation is inextricably tied to the social realities of the seventh century, such as the Revelation's relationship to the Arabic language, which, itself, is "rooted in a historical context."[21] In another work, Abu Zayd suggests that

> texts are "humanized" as soon as they are incarnated in history and language and as soon as they convey their content and their meaning to human beings in particular historical contexts. They are governed by the dialectic of permanence and change, in that the texts are invariable in their content but fluid and variable in how they are understood. Against the texts stands the reading, which is also governed by the dialectic of concealment and exposure.[22]

Muslim legal scholars around the world regard the Qur'an as one of the most—if not the most—critical primary sources of

16. *Id.*

17. *See id.*

18. *See id.*

19. ABU ZAYD, *supra* note 1, at 57.

20. *Id.*

21. *Id.*

22. NASR HAMID ABU ZAYD, CRITIQUE OF RELIGIOUS DISCOURSE (NAQD AL-KHITAB AL-DINI) 109 (Jonathan Wright trans., Yale Univ. Press 2018) (1990).

Islamic legal rulings, or *fiqh*. Alongside the *Sunna*,[23] the *Hadith*, and *ijma* (consensus), the Qur'an is a fixture of Islamic legal justification and reasoning. In any juridical system, justification is "central to the legal enterprise."[24] Therefore, the way in which jurists and scholars view the Qur'an is extremely significant, and a humanizing of the Qur'an—to borrow from Abu Zayd's language—poses distinct theological issues.

With all of this in mind, it might surprise some to learn that "[t]he legal parameters which the Qur'an actually lays down are remarkably few [when compared to the complexity of contemporary Muslim practice]: only 70 injunctions regarding family affairs, 70 on civil matters, 30 on penal law, 13 on jurisdiction and procedure, 10 on constitutional law, 25 on international relations, and 10 on economic and financial matters."[25] Nevertheless, the Egyptian judges who formally labeled Abu Zayd an apostate likely believed that Abu Zayd's theories threatened the divinity of the Qur'an and the exclusivity of that holiness by violating one of the fundamental pillars of Islam,[26] namely that *Shari'a* is "revealed [Islamic] religious law."[27]

A corollary of Abu Zayd's thoughts on the Qur'an is his philosophy that *Shari'a* law is purely human law, that "[t]here is nothing divine about it."[28] This is, perhaps, a more incendiary claim, but not one that is too radical to defy justification. Even Justices of the U.S. Supreme Court have exhibited some awareness that Islamic jurisprudence incorporates decidedly

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23. The *Sunna* is a "normative concept" of living, recorded in the *Hadith*. Lucas, *supra* note 7, at 38. The term refers "to the example or exemplary practice of the Prophet Muhammad." *Id.*

24. Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 389 (2004).

25. ZIAUDDIN SARDAR, ISLAMIC FUTURES: THE SHAPE OF IDEAS TO COME (1985), *reprinted in* ISLAM, POSTMODERNISM AND OTHER FUTURES: A ZIAUDDIN SARDAR READER 70 (Sohail Inayatullah & Gail Boxwell, eds., 2003).

26. Toby Lester, *What is the Koran?*, THEATLANTIC.COM, Jan. 1999 ("[F]or challenging the idea that the Koran must be read literally as the absolute and unchanging Word of God—Abu Zaid was in 1995 officially branded an apostate, a ruling that in 1996 was upheld by Egypt's highest court."), *available at* https://www.theatlantic.com/magazine/archive/1999/01/what-is-the-koran/304024/.

27. Aron Zysow, *Shari'a*, *in* ISLAM: A SHORT GUIDE TO THE FAITH 43, 43 (Roger Allen & Shawkat M. Toorawa eds., 2011).

28. ABU ZAYD, *supra* note 1, at 89.

human elements. For example, Justice Frankfurter compared U.S. Supreme Court Justices to *kadis*, or Muslim judges, saying, "This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."[29] Despite this description, Islamic scholars such as Intisar Rabb have vigorously rejected this characterization of *kadis* as free-wheeling, self-interested, "unbounded" jurists.[30]

Still, modern American judges have echoed Justice Frankfurter's sentiments about the quality and legitimacy of what Intisar Rabb refers to as "*kadijustiz*."[31] These modern courts, however, have expanded the meaning of the term, employing it to describe jurisprudential stances other than the one with which Justice Frankfurter originally disagreed. According to Rabb, Justice Frankfurter intended to "condemn the Court for privileging a constitutional right to free speech over a constitutional procedure requiring litigants to raise a case or controversy to trigger the Court's jurisdiction."[32] Contrast, for example, Judge Diarmuid O'Scannlain of the Ninth Circuit Court of Appeals invoking the "kadi under a tree" language to decry what he perceived to be an anti-textualist preference amongst his colleagues to decide cases based on equities and not the law.[33]

Whatever their intent may be, these American judges latch onto an important aspect of Islamic jurisprudence, which is that the jurisprudential system is not wholly dependent on strict interpretation or application of canonical texts. Indeed, the Qur'an itself appears to invite this type of interpretation and legislation, as it tends to set "down some commands in the form of general principles," which "serve as bases for further

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29. Terminiello v. City of Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting).

30. Intisar Rabb, *Against Kadijustiz: On the Negative Citation of Foreign Law* 48 SUFFOLK UNIV. L. REV. 343, 356 (2015) (arguing that the "*qadi*'s process of adjudication [is] at odds with the fictitious *kadijustiz* account" espoused by Justice Frankfurter).

31. *Id.* at 349 (defining *kadijustiz* as "arbitrary, irrational, and expedient decisions without respect for general principles of law").

32. *Id.* at 360.

33. Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143, 1164 (9th Cir. 2000) ("We must decide cases based on the law, not on our subjective view of the equities.").

legislation by jurists and scholars."[34] These principles include justice (e.g., "Allah enjoins the doing of justice and the doing of good"),[35] punishment that fits the crime (e.g., "And the recompense of evil is punishment like it"),[36] avoidance of hardship (e.g., "He has chosen you and has not laid upon you any hardship in religion"),[37] and necessity as exception (e.g., "whoever is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him").[38]

As a newcomer to the field of Islamic jurisprudence—and an observant Jew—I do not presume that this paper will induce any seismic shifts in the landscape of Islamic legal thought or religious practice. I also share the same reservations as Islamic legal scholars before me who have noted that any investigation of Islamic legal history and theory constitutes an "undertaking [that] is necessarily fraught with the risk of over-simplification of what is an enormous reservoir of legal and historical knowledge."[39] Nonetheless, I humbly hope that I might illuminate a possible path to accepting the Qur'an's human features through examining the form and function of Islamic legal jurisprudence.

II. Legal Fictions

This section examines the use of *hiyal*, or legal fictions, throughout Islamic jurisprudence and discusses how the concept of legal fictions influences a view of human involvement in the creation of legitimate religious law.

Traditionally, the very first case that law students study in Civil Procedure is the infamous *Pennoyer v. Neff*.[40] The case is used, among other pedagogical objectives, to teach the theory

34. Ahmed Hasan, *The Quran: The Primary Source of Fiqh,* 38 Islamic Stud. 475, 496 (1999).

35. Qur'an *The Bee* 16:90 (M.H. Shakir trans., Tahrike Tarsile Qur'an, Inc. 1983).

36. Qur'an *The Counsel* 42:40 (M.H. Shakir trans., Tahrike Tarsile Qur'an, Inc. 1983).

37. Qur'an *The Pilgrimage* 22:78 (M.H. Shakir trans., Tahrike Tarsile Qur'an, Inc. 1983).

38. Qur'an *The Cow* 2:173 (M.H. Shakir trans., Tahrike Tarsile Qur'an, Inc. 1983).

39. M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making,* 1 UCLA J. Islamic & Near E. L. 135, 138 (2002).

40. Pennoyer v. Neff, 95 U.S. 714 (1877).

of territoriality in personal jurisdiction doctrine. *Pennoyer*'s upshot is that for a court to exercise power over an individual, that individual must be present—in one way or another—in the forum.[41] The case came to the Supreme Court on review from the highest court of Oregon, whose law allowed for an action to be "brought against a non-resident and *absent* defendant, who has *property* within the State."[42] In addition, the case introduces many law students to the concept of "constructive notice," which is the process by which a litigant may serve process to the adverse party by posting notice in a newspaper for a period of time specified by state law.[43]

While most students spend hours (foolishly) attempting to master all the facts of their very first case, fearing that they may be called upon by their professor to recount them in front of dozens of their peers, many overlook a critical lesson about the nexus between law and fiction. Both the notion that a person is deemed present in a state based on the existence of property and the suggestion that a litigant has been properly served if notice were posted in a newspaper teach us that legal fictions—or "lies that are not intended to deceive"[44]—are readily deployed by legislatures and judges in the pursuit of justice. *Pennoyer*'s progeny, especially cases such as *International Shoe Co. v. Washington*[45] and *Asahi Metal Industry Co. v. Superior Court*,[46] carried the mantle of legal fictions for the purposes of *in personam* jurisdiction into the modern era, where "the extensive use of legal fictions [helped] to fit modern circumstances into the theoretical mold of *Pennoyer*."[47]

Whereas in secular, American law, deploying legal fictions to achieve worthy legislative or judicial goals may seem generally unproblematic, the use of legal fictions (*hiyal*) in Islamic law for teleological purposes could pose serious theological is-

41. *See id.* at 724 ("Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him.").

42. *Id.* at 720 (emphasis added).

43. *Id.* at 742.

44. Kenneth Campbell, *Fuller on Legal Fictions*, 2 L. & PHIL. 339, 364 (1983) (characterizing Lon Fuller's attempt to "distinguish fictions from lies").

45. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

46. Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987).

47. Campbell, *supra* note 44, at 444.

sues, because, unlike American law, Islamic law is founded on scriptural bedrock. As Raj Bhala has observed, "It is unanimously agreed that the Qur'an is the primary source of *Fiqh* [or jurisprudence] . . . [and that] *Qiyas* [or analogical reasoning], not being an independent source, derives its authority from the *Qur'an* or *Sunnah*."[48] From this vantage point, *hiyal* could be seen as excessive human intervention in the divine principles and laws set down by the *Qur'an* and *Sunna*.

According to Bhala, *hiyal* were invented by opportunistic, Islamic merchants in the Middle Ages.[49] These industrious Muslims developed legal fictions and formalisms "not for their own sake (i.e., not for the mere purpose of having a formalism),"[50] but for a secondary purpose: the underlying objective was to avoid adverse *kadi* judgments, rulings that would deem their financial transactions contrary to the *Shari'a*.[51] These legal fictions "arose outside of, and alongside" the body of Islamic law, a corpus that was itself "in the process of development."[52] In time, these legal fictions were subsumed into Islamic Law, becoming "essentially part of the body of the *Shari'a*."[53] Not surprisingly, however, *hiyal* were not universally accepted by the classical Muslim jurists and their *madhab*s, or legal schools.[54] The Hanafi school is the most supportive of *hiyal*, the Maliki school has evinced either indifference or a stance that *hiyal* are not forbidden, the Shafi'i school began from a position of finding *hiyal* reprehensible but has since migrated towards accepting at least some forms of *hiyal*, and

48. RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHARI'A) 705 (2011).

49. *See id.* at 704–05.

50. *Id.*

51. *See id.* ("Commercial parties to a transaction were keen to minimize the risk an Islamic judge . . . might rule their deal was contrary to the *Shari'a*.").

52. *Id.*

53. *Id.*

54. Scholars recognize four prominent legal schools, or groups of "jurists and legists who are loyal to a distinct, integral and, most importantly, *collective* legal doctrine attributed to an eponym . . . from whom the school is known to have acquired particular, distinctive characteristics." WAEL B. HALLAQ, SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS 62 (2009). These schools, named after their "master-jurist" forbears, are the Hanafi school, the Maliki school, the Shafi'i school, and the Hanbali school. *Id.* Each school has a vision of how to follow the *Shari'a* and how to approach novel legal questions through particular interpretive methods.

lastly the Hanbali scholars like Ibn Tamiyyah have rejected *hiyal*.[55]

Today, one of the most cognizable instances of *hiyal* can be found in the world of Islamic finance, specifically the issues of usury, or *riba*, and commercial risk, or *gharar*. The interdiction against *riba* can be found in a Qur'anic verse that sets up an instructive dichotomy, permitting sales or trading (*al-bay'*) but prohibiting usury (*al-riba*).[56] Ahmed Affi and Hassan Affi note that this verse explicitly outlaws the type of usurious lending that enabled "pre-Islamic Arabs to exploit others by doubling and redoubling their fortunes, thus, eating away at other people's possessions."[57] Similarly, Abu Zayd suggests that the prohibition against usury arose out of a Meccan society which, "like any society, had people who preyed upon the poor and powerless . . . . [and that the] Qur'anic injunction against usury serve[d] a specific purpose: to protect Mecca's poorer citizens from the wealthy elite taking advantage of them."[58] The *gharar* prohibition, which proscribes engaging in risky commercial activities, stems "from a vague Qur'anic principle banning games of chance and from a series of Prophetic *hadith* forbidding speculative activities such as the sale of fish in the sea."[59]

A prime example of *hiyal* is the *murabaha* mark-up scheme, which makes up the bulk of all investments by modern Islamic financial institutions.[60] In this scheme, to skirt the prohibition against usury, Islamic financiers purchase goods requested by the customer and then sell them to the customer at an agreed upon mark-up rate.[61] Over time, Islamic financial institutions have devised nearly "infinite variations on the basic idea of tacking on some form of remuneration in the form of a

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55. BHALA, *supra* note 48, at 706–08.

56. QUR'AN *The Cow* 2:275 (M.H. Shakir trans., Tahrike Tarsile Qur'an, Inc. 1983) ("Allah has allowed trading and forbidden usury.").

57. AHMED AFFI & HASSAN AFFI, CONTEMPORARY INTERPRETATION OF ISLAMIC LAW 200 (2014).

58. ABU ZAYD, *supra* note 1, at 109–110.

59. Haider Ala Hamoudi, *Jurisprudential Schizophrenia: On Form and Function in Islamic Finance*, 7 CHI. J. INT'L. L. 605, 611 (2007).

60. IBRAHIM WARDE, ISLAMIC FINANCE IN THE GLOBAL ECONOMY 133 (2000) ("Mark-up transactions account for 80 to 95 percent of all investments by Islamic financial institutions.").

61. *See id.* (describing the *murabaha* process).

profit mark-up, or service management fees."[62] This practice allows the modern financial institution to gain a profit on what appears, from the outside, to merely be a sale. However, this practice permits the banks to effectively "disguise the interest" by means of a legal fiction—a "ruse" that casts the transaction as nothing more than a sale that operates well within the accepted *Shari'a* parameters.[63] While most Islamic jurists and legal scholars do not consider the surcharge to constitute *riba*, some view it is as "essentially equivalent to a fixed interest loan."[64] Haider Ala Hamoudi even claims that the markups routinely reflect national market interest rates, such as the London Inter-Bank Offered Rate (LIBOR).[65] In light of financial arrangements like the *murabaha*, one might wonder why skeptical Islamic jurists and legal scholars would stomach such a device if its central purpose is essentially to sidestep the *Shari'a*.

Hamoudi believes that this willingness to accept *hiyal* grows out of a general principle in Islamic law wherein the "outward aspect" of a transaction matters more than any intrinsic truth.[66] Hamoudi describes this as "something akin to schizophrenia" because the people who have set up these financial institutions use "formalist means" in order to achieve "formalist ends" while simultaneously calling them functional.[67] As an alternative, Hamoudi advocates a pseudo-restructuring of Islamic financial instructions based on a full-throated articulation of functionalist goals (e.g., social justice, public welfare, etc.), rather than a focus on maintaining the formalist trappings that ultimately allow Muslims to functionally engage in *riba*, albeit in good conscience.[68]

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62. *Id.*

63. WARDE, *supra* note 60, at 134.

64. BHALA, *supra* note 48, at 730.

65. Hamoudi, *supra* note 59, at 618 ("Islamic banks . . . routinely hide the prevailing market interest rates, such as LIBOR, that they use in their internal calculations in the context of *murabaha* and other Islamically-acceptable transactions.").

66. *Id.* at 707.

67. Hamoudi, *supra* note 59, at 606.

68. *See id.* at 619–621 (discussing what a "functional Islamic financial institution" would look like and outlining three primary components: recognition of commercial necessity, a focus on fairness and social justice, and avoidance of highly speculative financial products).

We may also see this type of gilded formalism in the sphere of insurance policies, where Islamic jurists encounter the aforementioned issue of *gharar*. From a conventional standpoint, an insurance policy is a transaction that deals explicitly with uncertainty. Thus, without the smoke and mirrors that *hiyal* provides, it would be difficult for orthodox Muslims to participate in any insurance scheme. However, the Islamic insurance system has over time developed the *takaful* (personal insurance) system, a process by which the insured "transfers a portion of his insurance installments as a conditional "donation" to a "special participant account" which the company uses to pay out compensation to the insured."[69] From a formalist perspective, this is nothing more than gift giving (*tabarru'*), and is therefore both in line with general *Shari'a* principles (e.g. fair compensation, mutual assistance and cooperation, and anti-materialism) and—most importantly—distinct from *gharar*.[70] According to Hamoudi, however, "Aside from its creative labels, there is little that distinguishes *takaful* from more conventional forms of insurance."[71]

Hamoudi's cynicism is not universally shared.[72] Regardless of whether *takaful* is just an exercise in creative labeling, Muslim societies around the world have, over the past three decades, exhibited a trend of openly validating *takaful* and even, in some instances, have institutionalized the system on a national scale. For example, in 1995 Qatar established the Qatar Islamic Insurance Company; in 2005 Saudi Arabia issued the Saudi Arabian Monetary Agency (SAMA) Regulations for cooperative insurance and Bahrain enacted its Monetary Authority Rules, which included rules for *takaful* companies; and in 2010 Bahrain issued AAOIFI (Accounting and Auditing Standards for Islamic Financial Institution) Islamic Insurance Standard No. 26.[73] These examples indicate that the legal fictions inherent in the *takaful* scheme are sufficient in the eyes

69. Renat I. Bekkin, *Islamic Insurance: National Features and Legal Regulation*, 21 ARAB L.Q. 109, 113–14 (2007) (footnotes omitted).

70. *Id.* at 113–14 (discussing how the Islamic insurance system relies on the concept of gift-giving to avoid *gharar*).

71. Hamoudi, *supra* note 59, at 613.

72. *See* Atiquzzafar Khan, *Islamic Insurance: Evolution, Models and Issues*, 13 POL'Y. PERSP., no. 2, 2016, at 29, 30–32 (describing the development of *takaful* systems within various countries).

73. *See id.*

of modern jurists and scholars to extricate them from any potential *gharar* thickets.

Even though *takaful* and *murabaha* are both used to achieve formal religious aims—or, at the very least, to stay in bounds of the *Shari'a*'s contours—they are nothing more than human legal inventions driven by functionalism. Even if one begins from a starting point where the Qur'an is undeniably divine, it is difficult to ignore the patently human aspects of these *hiyal*. Functionalism—because it emphasizes "practical utility"[74]—allows for the irruption of humanity's subjective value judgments into a space where divine or rigid rules would (or should) otherwise apply. It is thus difficult to harmonize functionalism with a vision of Islamic jurisprudence that requires top-down legislation and adjudication guided by the original Qur'anic source-text. One way to reconcile this dissonance, however, is to operate through the prism of Abu Zayd's theory on the true word of God (i.e., that it is necessarily unknowable and merely *signified* by the text of the Qur'an).[75] As Abu Zayd describes, "God's actual words . . . exist in a sphere beyond human knowledge—a metaphysical space that we can know nothing about except that which the text itself mentions."[76] It could follow, then, that if there is brooding, omnipresent, and true *Shari'a* law out in the ether, then the process of Islamic lawmaking is the profoundly *human* act of distilling it down to a cognizable form. In other words, Abu Zayd's approach to the Qur'an elevates function over form—the purpose of the commandment or prohibition becomes more important than the modes and forms of the actual doing or the actual withholding.

For example, with respect to verses that address polygamy,[77] Zayd indicates that the Qur'an's "focus is on doing justice for orphans" and that permitting multiple marriages is a

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74. MERRIAM-WEBSTER, *available at* https://www.merriam-webster.com/dictionary/functionalism.

75. ABU ZAYD, *supra* note 1, at 98–99 (discussing the relationship between the signifier, i.e., the language, and the signified, i.e., reality, and arguing that "the Qur'an is a cultural product").

76. *Id.*

77. QUR'AN *The Women* 4:3 (M.H. Shakir trans., Tahrike Tarsile Qur'an, Inc. 1983) ("And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two and three and four . . . .").

solution drawn from practices that pre-date the advent of Islam.[78] He notes,

> The solution established by the Qur'an is not the same thing as establishing polygamy. It is using polygamy as a solution to a real problem in the seventh century, the problem of orphans. Polygamy was widely practiced already. So we cannot say that polygamy is Qur'anic law. It is not a law. It is a practical solution to a pressing, historical problem. *Justice is the broader issue.*[79]

Under Abu Zayd's approach, a literalist reading of the prohibition against *riba* should give way to a reading that prioritizes the purpose of the Quran'ic prohibition (i.e., "the promotion of trade, charity and social well-being"[80]). Carried to a logical conclusion, Abu Zayd's theory might ultimately allow for blatant charging of interest—traditionally understood to be the quintessential *riba* act—so long as it still achieved the latent purposes of bringing about healthy trade, charity, and social cohesion. However, the prevailing understanding of *riba*-as-interest[81] makes such a dramatic departure difficult from both a theological and political point of view. Nevertheless, a hermeneutical approach to the Qur'an that prioritizes functional goals and accepts the human element can provide a possible avenue for those wishing to simultaneously adhere to the *Shari'a* and charge interest.

III. Legislating in the Public Interest

"*Salus populi suprema lex esto*"
– Marcus Tullius Cicero[82]

78. Abu Zayd, *supra* note 1, at 173.

79. *Id.* (emphasis added).

80. Masudul Alam Choudhury, *Usury*, *in* Encyclopaedia of the Qur'an (Jane Dammen McAuliffe ed.), http://dx.doi.org/10.1163/1875-3922_q3_EQSIM_00438 (last visited Mar. 6, 2018).

81. *See* Muhammad Samiullah, *Prohibition of Riba (Interest) & Insurance In the Light of Islam*, 20 Islamic Stud., no. 2, 1982, at 53 ("Riba is prohibited in Islam in all its forms whatever its rate may be. It should be remembered that the word *riba*, which means an excess or addition over and above the principal, covers both usury and interest.")

82. Marcus Tullius Cicero, De Legibus [On the Laws] bk. 3, pt. 3, subdiv. 8 (Clinton Walker Keyes trans., Harvard Univ. Press 1943) (c. 53 B.C.E.) ("let the welfare of the people be the supreme law").

One method of legislation that leaves ample room for both the modern and the human aspects of Abu Zayd's theories is *maslaha*, meaning "a cause or source of something good and beneficial" or "public interest."[83] *Maslaha* exemplifies how Islamic jurisprudence tolerates, or even encourages, the inclusion of distinctly human factors. In this way, it might ameliorate the difficulties of accepting an anthropocentric understanding of the Qur'an. In their taxonomies, scholars have identified at least three types of *maslaha* rulings: *maslaha mu'tabarah* (i.e., legislation in the public interest that is explicitly upheld by the Qur'an or the Sunnah), *maslaha mulgha* (i.e., legislation explicitly *invalidated* by the canonical texts), and *maslaha mursalah* (i.e., where no text validates or invalidates the legislation).[84] For the purposes of this discussion, I will focus on the version of *maslaha* that allows for the greatest amount of human participation in the lawmaking process, *maslaha mursalah*.[85]

According to Felicitas Opwis, *maslaha* is an Islamic legislative stratagem that "bestows legitimacy to new rulings and enables jurists to address situations that are not mentioned in the scriptural sources of law."[86] The fear is that an ossification of *Shari'a* law development would fail to take account of real and constant social change. To that end, rulings decided pursuant to *maslaha* are based chiefly on notions of the public interest, or what is best for the "needs of Muslim societies."[87] The fact that *maslaha* addresses issues that (necessarily) have been left out of the canonical texts, suggests that in Islamic jurisprudential terms, silence is not pregnant and the *expressio unius est exclusio alterius* interpretive canon does not govern.[88] While the laws generated in the public interest via *maslaha* cannot transgress established *Shari'a* principles, the process of creating

83. Felicitas Opwis, *Maslaha in Contemporary Islamic Legal Theory*, 12 ISLAMIC L. & SOC'Y 182, 182-83 (2005).

84. Elvan Syaputra et al., *Maslahah as an Islamic Source and Its Application in Financial Transactions*, 2 J. RES. HUMAN. & SOC. SCI., May 2014, at 66, 67.

85. From this point forward (unless otherwise indicated), when this Note refers to *maslaha*, it is speaking of *maslaha mursalah*.

86. Opwis, *supra* note 83, at 183.

87. *Id.* at 184.

88. *See id.* ("[*Maslaha*] thus bestows legitimacy to new rulings and enables jurists to address situations that are not mentioned in the scriptural sources of the law.").

new laws notably and *necessarily* does not rely on Qur'anic texts.[89] As Mohammad Hashim Kamali has noted, "The *masalih* (pl. of *maslaha*), in other words, can neither be enumerated nor predicted in advance as they change according to time and circumstance. To enact a law may be beneficial at one time and harmful at another."[90] The eventual compilation of the Qur'an into written format by Uthman ibn 'Affan, the third caliph after the Prophet and one of the Prophet's Companions, exemplifies the use of *maslaha* as the basis for a critical decision—a decision unguided by Qur'anic or Sunnaic text.[91]

As the Uthmanic collection suggests, *maslaha* is a practice as old as the Companions. For example, sensing a need among the people, those closest to the Prophet "decided to issue currency, to establish prisons, and to impose tax[es]."[92] These are regarded as *maslaha* for two reasons: first, no Qur'anic text specifically prescribes or proscribes these actions; second, these systems would ultimately benefit the *umma*, or broader Muslim community. While most proponents of relying on *maslaha* as a basis for legislation would require both of the aforementioned conditions, some Islamic legal scholars have exhibited a preference for *maslaha* over the direct rules of the Qur'an itself.[93] Nonetheless, and despite *maslaha*'s well-founded history, there exists some anxiety about *maslaha* rulings operating as an "instrument of arbitrary desire."[94] To allay this concern—and adding to the anthropocentric characterization of *maslaha*—Islamic legislators tend to seize upon *mas-*

89. MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 352 (3d ed. 2003) (discussing the use of *maslaha* when "an explicit ruling" cannot be found).

90. *Id.*

91. Yasir S. Ibrahim, *Rashid Rida and* Maqasid al-Shari'a, 102/103 STUDIA ISLAMICA 157, 160 n.6 (2006) ("[T]he collection for the Qur'an by . . . Uthman b. 'Affan," . . . [was] not mentioned in the Qur'an or instituted by the Prophet, and therefore the utilities or benefits gained from them were not considered in the sacred texts . . . .").

92. KAMALI, *supra* note 89, at 351.

93. Opwis, *supra* note 83, at 203 (discussing Subhi Rajab Mahmajani's (d. 1986) "theory of Islamic legislation [built] on the premise that *maslaha* and the purposes . . . of the law were the *rationes legis* for all rulings").

94. KAMALI, *supra* note 89, at 358.

laha only when it benefits a vast group of people.[95] In other words, jurists announcing a *hukm* (i.e., judgment) on the basis of public welfare seem to think in grand numbers rather than focusing on the interests of the few.[96]

Maslaha has also been used as way to respond to the secularization of legal codes in Muslim countries. For example, the turn of the twentieth century saw Islamic law becoming "increasingly marginalized in the Egyptian judiciary."[97] Fauzi M. Najjar notes that "from 639 A.D., when Egypt became an Islamic country, until the beginning of the nineteenth century, it was governed by the *Shari'a*. Between 1830 and 1930, Western-type codes were introduced, replacing the religious law in all matters of personal status."[98] By 1955 the *Shari'a* courts were abolished altogether in Egypt.[99] In response, the Egyptian scholar 'Abd al-Wahhab Khallaf, looked to the concept of *mashlaha* as a way to "achieve unity—and thus strength—in Islamic legislation."[100] Critically, Khallaf "envisioned *maslaha* to function as a method to extend the law to new situations to which no text or consensus applied."[101]

Similarly, Muhammad Rashid Rida, the twentieth century Salafi political philosopher, looked to *maslaha* to counteract the difficulties created by Islamic jurists. Rida believed these jurists to have placed "an unnecessarily heavy burden on [the] shoulders" of young Muslims by constantly increasing the number of legal injunctions—a problem compounded by the fact that these young men and women were already drawn to "the West and its decadent ways."[102] David Johnston proposes that Rida believed this confluence created "an even greater incentive for the younger generation to abandon Islam."[103] Rida took the position that *maslaha*, as the "strongest and most pre-

95. *See id.* at 359 ("[T]he *maslahah* must be general . . . in that it secures benefit, or prevents harm, to the people as a whole and not to a particular person of group or persons.").

96. *Id.*

97. Opwis, *supra* note 83, at 209.

98. Fauzi M. Najjar, *Egypt's Laws of Personal Status*, 10 ARAB STUD. Q., no. 3, 1988 at 320.

99. Opwis, *supra* note 83, at 201.

100. *Id.* at 209.

101. *Id.* at 211.

102. David Johnston, *A Turn in the Epistemology and Hermeneutics of Twentieth Century* Usul al-Fiqh, 11 ISLAMIC L. & SOC'Y 233, 261 (2004).

103. *Id.*

cise basis" of Islamic law, could be seized upon to legislate in a way that would accommodate the younger generations.[104] As a result, Rida advocated gravitating towards ethical principles rather than explicit textual rules.[105] While this indicates somewhat of a willingness to elevate human welfare over textual fidelity, Rida never went so far as to say that *maslaha* is lexically superior to explicit Qur'anic or Sunnaic injunctions.

Nevertheless, Wael Hallaq sees the opinions of these modern legal reformers as elevating unabashedly human concepts of public interest utilitarianism over the canonical, revealed texts:

> [M]odern religious reformers' understanding and interpretation of Islamic law, according to Hallaq, are completely based on the notions of utility, public interest, and necessity, a utilitarian approach that runs against the classical understanding of Islamic law. Moreover, in order to achieve this utilitarian interpretation, religious reformers reshaped and molded classical Islamic legal theory to support their view, making the law "nominally Islamic and dominantly utilitarian." In addition, "religious utilitarianists—Rida, Khallaf and others—" insists Hallaq, "pay no more than lip service to Islamic legal values; for their ultimate frame of reference remains confined to the concepts of interest, need and necessity. The revealed texts become, in the final analysis, subservient to the imperatives of these concepts."[106]

It is no surprise, then, that the use of *maslaha* as a basis for legislation has, for centuries, stoked scholarly disagreements. On a basic level, the Qur'an itself presents a complication: "We have not neglected anything in the Book."[107] If the Qur'an announces its own comprehensiveness—or, alternatively the Transmitters' complete transmission—then the occurrence of modern problems without *direct* answers in the

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104. *See id.* at 264 (quoting a 1984 Cairo edition of Rida's 1928 booklet, *Yusr al-Islam*).

105. *See id.* at 265 (suggesting that, "in the legal methodology of . . . Rida, *maslaha* now surpasses" other sources of law, namely analogical reasoning and consensus).

106. WARDE, *supra* note 60, at 166 (footnotes omitted).

107. QUR'AN 6:38. *The Cattle* (M.H. Shakir trans., Tahrike Tarsile Qur'an, Inc. 1983).

Qur'an presents a potential difficulty. How can the Book simultaneously neglect nothing and fail to foresee modern problems?

Some who have opposed *maslaha* legislation have done so fearing that it would lead to "disparity, even chaos."[108] Factions of the Shafi'i school, faithful to the textual bases of Islamic law, could not tolerate how *maslaha* rulings were "unattached to a text"; they believed that this made the rulings devoid of any justification and, therefore, invalid.[109] By comparison, other Shafi'is and many Hanafis stomached *maslaha* rulings so long as they there were either based upon "an analogy in the text or . . . the consensus of other jurists."[110] Although al-Ghazili, an Iranian jurist who lived at the turn of the twelfth century, came close to "making *maslaha* an independent variable and pivotal juridical tool," he was ultimately theologically unwilling "to concede that humans, by virtue of their intellectual endowment by the Creator, can discern what is good and bad, what benefits humanity (*maslaha*), or what detracts from that benefit."[111]

Despite the tension that *maslaha* creates in the world of Islamic jurisprudence, the goal of this Note is not to evaluate *maslaha*'s validity, but rather to analyze what its use implies. In the modern era, *maslaha* has been used as a "guiding principle of law-making" in Muslim communities around the world.[112] This means that human interests have been central to legal decisions. As Islamic jurists and legislators face a changing world where technological advances, environmental concerns, and issues related to population growth signify uncharted waters, thinking deeply about the role of public welfare in the legislative process will become increasingly important. If the use of *maslaha* becomes more commonplace, and if human elements are viewed more often as worthy sources of Islamic legislation, then the way the Qur'an itself is interpreted could

108. KAMALI, *supra* note 89, at 363.
109. JOHNSTON, *supra* note 102, at 245.
110. *Id.*
111. *Id.* at 247.
112. SARDAR, *supra* note 25, at 70. The author also notes that "Muslim scholars are moving away from the confining limitations of the classical texts and are beginning to focus on the general principles of the Shari'ah, as is evident from the 'Model Islamic Constitution' produced by the Islamic Council of Europe." *Id.* at 79.

evolve. Through *maslaha*, Islamic jurisprudence provides a possible starting point for approaching the Qur'an in a new light—one that illuminates and celebrates the text's human aspects.

IV. Human Judgment

> When the Messenger of Allah sent Mu'adh ibn Jabal to Yemen, he asked: "What will you do if a matter is referred to you for judgment?" Mu'adh said: "I will judge according to the Book of Allah." The Prophet asked: "What if you find no solution in the Book of Allah?" Mu'adh said: "Then I will judge by the Sunnah of the Prophet." The prophet asked: "And what if you do not find it in the Sunnah of the Prophet?" Mu'adh said: "Then I will make *ijtihad* to formulate my own judgment." The Prophet patted Mu'adh's chest and said "Praise be to Allah who has guided the messenger of His Prophet to that which pleases Him and His Prophet."[113]

This section looks to the various ways in which human actors inject their judgment into the Islamic legal process, in both adjudicative and legislative settings. Specifically, this section discusses the concepts of *isnad* (i.e., the chain of transmission of a *hadith* from an original witness) and *qiyas* (or analogical reasoning).

The *hadith* above, recounting an interaction between the Prophet Muhammad and Mu'adh ibn Jabal, illustrates several crucial points. First, it highlights the lexical primacy of the Qur'an in the process of making an Islamic ruling and, in doing so, further clarifies why Abu Zayd's critics reacted as vociferously as they did. Second, it illuminates the juristic nature of Islamic legal work. Islamic law remained non-codified for centuries,[114] and, as a result, ad hoc judgments—like the one envisaged by the Prophet in this *hadith*—would become the *sine*

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113. Imam al-Juwayni & al-Jalal al-Ma?alli, Shar? al-Waraqat: Al-Mahalli's Notes on Imam al-Juwayni's Islamic Jurisprudence Pamphlet, ix (Musa Furber trans. 2014) [hereinafter Islamic Jurisprudence Pamphlet] (quoting 13 Jami'at-Tirmidhi Hadith 1327).

114. The first widely successful attempt at codification comes from the Ottoman Empire during the 1870s. Known as the *Mecelle*, the code transposed "Islamic law from the fairly independent and informal terrain of the jurists

qua non of Islamic lawmaking.[115] Third, it exhibits how the human element is not merely tolerated but wholly necessary in Islamic legal discourse. Even though the Qur'an is the first place that Mu'adh looks to should a legal issue arise, the fact that the Prophet is pleased by the notion of Mu'adh formulating his *own* judgment—as opposed to identifying an objectively correct judgment—speaks volumes about how important *people* are to *usul al fiqh* (i.e., Islamic legal theory, or literally "the roots of understanding"). To this end, Hallaq notes that the *kadi* courts were firmly "embedded in both society and social morality," which meant "the *kadi* himself was typically a creature of the very culture in which he adjudicated disputes."[116]

This human ingredient tends, among other things, to produce heterogeneity across the range of *fiqh* rulings on a single subject. The issue of women's dress serves as a prime example:

> It should be said that there is no one single Muslim woman's experience in regards to dress, and it needs to be acknowledged that there is a great deal of diversity of forms that the dress can take, depending on culture and location, yet all are based on principles found within the *Shari'a*.[117]

In this quote, Helen McCue and Ghena Kreyam identify the importance of the specific society within which the Islamic jurist functions. In other words, and as Hallaq has put it, "The pulsing heart of the legal system lay in the midst of the social order."[118] While the "diversity" to which McCue and Krayem refer is certainly extant today—as evidenced by the variety of rulings and practices regarding women's dress, for example—

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to that of the highly formalized and centralized agency of the state." HALLAQ, *supra* note 54, at 411.

115. Wael Hallaq, Usul al-Fiqh: *Beyond Tradition*, 3 J. ISLAMIC LEGAL STUD., no. 2, July 1992 at 173, 197 (discussing how the "theory of an individual jurist" challenges the "myth of a monolithic Islamic legal theory").

116. Wael B. Hallaq, *What is Shari'a?*, 12 Y.B. ISLAMIC & MIDDLE E. L. 151, 164 (2005).

117. Helen McCue & Ghena Krayem, *Shari'a and Muslim Women's Agency in a Multicultural Context: Recent Changes in Sports Culture, in* THE SOCIOLOGY OF SHARI'A: CASE STUDIES FROM AROUND THE WORLD 103, 109 (Adam Possamai, James T. Richardson & Bryan S. Turner eds. 2015).

118. Hallaq, *supra* note 116, at 170.

it does not mean the Islam of old was marked with homogeneity—to the contrary.

A simple but particularly illustrative example comes to us from Ibn Rushd's *The Distinguished Jurist's Primer*. In the section that deals with rulings on food and beverages, Ibn Rushd (also known as Averroes), an influential twelfth century jurist and renowned Platonic and Aristotelian philosopher of Muslim Spain and North Africa, discusses a disagreement amongst legal schools about the permissibility of eating carrion that is found in the sea. The ruling, Ibn Rushd reports, splinters into three different opinions: the first, that it is "permitted absolutely;" the second, that it is "prohibited absolutely;" and a third that prohibits "what floats on the sea," but permits "what is left (on the coast) by the tide."[119] If *Shari'a* law were simply a pure Qur'anic law system (i.e., one that took a literalist approach to the Qur'an's words and sought to legislate and adjudicate in strict alignment), the two opinions that ultimately permit the consumption of carrion of sea animals would find no support. The Qur'an addresses this question in unequivocal terms: "Forbidden to you is that which dies of itself, and blood, and flesh of swine, ..."[120] This means that the jurists who were willing to permit eating carrion under *any* circumstances must have done one of two things: either they were willing to simply ignore the Qur'an's interdiction against eating animals not properly slaughtered (which is not very likely); or they had external reasons for reading the Qur'anic verse narrowly.

Ibn Rushd outlines the extra-Qur'anic sources upon which the jurists permitted eating carrion—two prophetic *hadiths* (traditions) that indicate, despite the seemingly clear language of the Qur'an, that there is room for interpretation. The first is undisputed, originates from Jabir ibn Abd Allah, and permits the eating of sea carrion in all circumstances:

> The companions of the messenger of Allah (God's peace and blessings be upon him) found a whale known as *'anbar*, or some animal, that had been brought in by the tide. They ate from it for about

119. IBN RUSHD, 1 THE DISTINGUISHED JURIST'S PRIMER: A TRANSLATION OF BIDAYAT AL-MUJTAHID 563 (Imran Ahsan Khan Nyazee trans. 1994).

120. QUR'AN 5:3. *The Dinner Table* (M.H. Shakir trans., Tahrike Tarsile Qur'an, Inc. 1983).

> twenty days of a month, and then came up to the messenger of Allah (God's peace and blessing be upon him) and informed him about it and he said, "Do you have some of its meat with you?" They sent him some meat and he ate of it.[121]

The second *hadith*, related by Malik from Abu Hurayra, is (by contrast) disputed; nevertheless, it carries a similar message: "he (the Prophet) was asked about the water of the sea and he said, 'Its water is pure and its carrion is permissible.'"[122] A third *hadith*, which is also traced back to Jabir, conditionally permits the eating of sea-borne carrion only if it washes ashore:

> The tradition that partially conforms with the general implication (of the verse) is what is related by Isma'il ibn Umayya from Abu al-Zubayr from Jabir from the Prophet (God's peace and blessings be upon him), who said, 'Eat what is thrown out by the sea or is left by the tide, but do not eat what floats on it.[123]

As a result, scholars are left with a variety of rulings on the same matter. Because the *Shari'a* is a jurists' law, rulings based on *Shari'a* principles have foreseeably produced varying results throughout the ages. This also meant that judicial discretion—to give credence to one *hadith* over another, to arrive at a ruling based on custom (*urf*) or personal opinion (*ra'y*), or to rely on analogical reasoning (*qiyas*)—was and is a pillar of Islamic jurisprudence that could produce a wide variety of outcomes. At times, competing parties attempted to restrain this discretionary power. For example, when the Sultan issued a decree in 1544 defining the contours of a valid marriage, this had the correlative effect of restricting the discretion of judges, who had been interpreting the law in their own individualistic ways.[124] Ultimately, the decree compelled the judges to enforce the requirement of a guardian's consent in the marital law context.[125]

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121. IBN RUSHD, *supra* note 119, at 564 (quoting 21 Sahih Muslim Hadith 4756).

122. *Id.* (quoting 1 Sunan Abudawud Hadith 83).

123. *Id.* (quoting 27 Sunan Abudawud Hadith 3806).

124. COLIN IMBER, EBU'S-SU'UD: THE ISLAMIC LEGAL TRADITION 168 (1997).

125. *See id.*

One can imagine, then, that general practice among Muslims varies as well. While disagreements crop up in many other areas of Islamic law (e.g., sales, marriage and divorce, prayer and religious practice, inheritance, etc.), a disagreement in the area of dietary law is uniquely appropriate for the purposes of this paper if we ask ourselves the following: what are the purposes of Islamic dietary restrictions? On the one hand, adherence to dietary restrictions serves what appears to be a theological or religious goal—pleasing God, who has commanded that it be so. On the other hand, these types of rules and regulations serve "to help define communities," and thus aim towards establishing some sort of political identity for the Muslim people.[126] One could argue that *all* Islamic laws have the indirect effect of binding Muslims together. If that is so, it only strengthens the argument that *Shari'a* law has important human qualities. Yes, *Shari'a* may be animated by lofty, religious ideals; but at the end of the day, it has implications for the everyday life of everyday people.

On a separate note, unpacking the dichotomy of disputed *hadiths* versus undisputed *hadiths*, uncovers yet another instance in which the human aspect of *Shari'a* law has an aperture to shine through. Imam al-Juwayni's[127] educational jurisprudence pamphlet, *Sharh al-Waraqat*, categorizes these reports of the Prophet's words and actions into two groupings: expedient and grounded. *Waraqat*—"[o]ne of the first books of jurisprudence taught to students"[128]—explains that grounded reports "are those possessing a continuously connected chain (*isnad*) of transmitters," while expedient reports "are those lacking a continuously connected chain through some of its transmitters being omitted."[129] Here, al-Juwayni, suggest that *hadiths* gain currency on account of people, the cohesive *isnad*. In other words, if the tradition has been transmitted from one person to another, it becomes allegedly verifiable and ripe for usage in a juristic context. But if there is a

126. H.E. Chehabi, *How Caviar Turned Out to Be Halal*, GASTRONOMICS, Spring 2007, at 17, 22.

127. Imam al-Juwayni (d. 1085) was a Shafi'i jurist "credited with an extensive knowledge in several fields, particularly law, theology, and belles-lettres." Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT'L J. MIDDLE E. STUD. 3, 15 (1984).

128. ISLAMIC JURISPRUDENCE PAMPHLET, *supra* note 113, at xi.

129. *Id.* at 53.

gap in the transmission, that is, if just one singular link in the human chain is unaccounted for, then there is "[d]istortion in the text," and the legal power and juristic value of the prophetic tradition weakens.[130] Whatever rulings flow from the application of a *hadith* to a modern legal issue will necessarily owe their status to an unbroken human chain. While the succession's ultimate goal is to arrive at a verifiable account of the Prophet's divinely inspired words and actions, one cannot ignore that the entire process relies on the work of men.

In all, *hadiths* manage, on the one hand, to elucidate potential legal questions by providing foundational proof for *fiqh* rulings. On the other hand, and as has been shown above, they can also produce disagreement among the jurists as to the proper outcome of a given legal conflict.

Usul al fiqh has another double-edged sword in its arsenal, namely analogical reasoning (*qiyas*). Like the reliance on transmission in the *hadith* context, the use of analogy by the classical jurists further serves as evidence of human involvement in the Islamic legal process. According to Phillip K. Hitti, the use of analogy to generate judicial decisions was a product of the Hanafi legal school conceived in the eighth century: "By leaning more on juridical opinion and less on tradition the Hanafi school instituted new methods of legal reasoning involving analogy (*qiyas*)."[131] In contrast, "the Hanbali . . . reserved qiyas for rare cases of sheer necessity."[132] Al-Juwayni describes analogical reasoning as "returning a derived case back to the original case due to an apparent cause that joins them in the ruling," and the editor of his pamphlet adds as an example "rice being analogous to wheat with regards to interest, as they are linked in that they are both edible."[133]

Some have found justification for the use of analogies in the text of the Qur'an itself, "where many verses call for logical thinking in matters relating to the existence of God and to the creation of the universe."[134] *Qiyas*, in other terms, is the use of a syllogistic form of reasoning to arrive at a conclusion about a novel or difficult question. To be sure, there is nothing inher-

130. KAMALI, *supra* note 89, at 100.
131. PHILLIP K. HITTI, ISLAM: A WAY OF LIFE 43 (1970).
132. *Id.* at 46.
133. ISLAMIC JURISPRUDENCE PAMPHLET, *supra* note 113, at 56.
134. Bassiouni & Badr, *supra* note 39, at 155.

ently Islamic about the use of syllogisms. As a mode of reasoning it is quintessentially Aristotelian, and therefore patently human. Nonetheless, it has served as the backbone for many Islamic legal rulings, for example:

> When narcotic drugs came to be known in the Islamic world, the question arose as to whether they too were prohibited. By use of the analogical method, the jurists reached the conclusion that they were also prohibited, thus extending the application of the existing rule to a new situation and formulating a new rule by analogy. The argument they used was as follows: Alcohol is prohibited because it is intoxicating (major premise); narcotic drugs are intoxicating (minor premise); narcotic drugs are prohibited (conclusion).[135]

The foundation on which this analogy is built, the major premise, is sourced directly from the Qur'an; nevertheless, the analogical moves that follow are a purely human experiment based on the human experience of intoxication. Furthermore, if Allah's omniscience is a central tenet of Islam, then the fact that narcotics were left off the list could mean that they are permitted to Muslims. It is only through the reasoning done by jurists that the Islamic law prohibits drug use.

Overtime, the results of these analogical inquiries became the major premises for newer questions. For example, Ibn Marzuq, a prominent North African jurist, issued a *fatwa* in the fifteenth century in response to questions concerning whether Muslims could use paper produced by Christians.[136] The solicitor of the *fatwa* likely feared that exposure to such paper would compromise a Muslim's purity, thus making him or her unable to perform ritual duties or acts of worship.[137] Leor Halevi suggests that the solicitor might have been worried about the paper potentially containing undetectable traces of pork or wine and that, by touching these illicit substances, Muslims would compromise their purity or, worse, allow these substances to find their way into mosques.[138] Ibn Marzuq was

135. *Id.* at 156.

136. Leor Halevi, *Christian Impurity Versus Economic Necessity: A Fifteenth-Century Fatwa on European Paper*, 83 Speculum 917, 923–24 (2008).

137. *Id.* at 924.

138. *Id.* at 923–24.

far-reaching in his consideration of the potential problems of using this paper:

> In the course of his inquiry, Ibn Marzuq considered further arguments against Rumi paper. Muslim scholars had written and copied religious texts, including the Qur'an, on this paper. If it contained impurities, then they might well have committed a sacrilege, even if unintentionally or unknowingly, by desecrating scripture and debasing God's name. In addition to handling defiling substances, such as pork fat, Christian papermakers often branded their paper as a Christian product, for in the thirteenth century they began to impress their paper with watermarks representing Christian symbols as well as secular motifs.[139]

Ibn Marzuq turned to prior *fiqh* rulings by the Maliki school on clothing woven or worn by Christians for guidance on whether their paper products also represented purity concerns. According to Halevi, it "is unclear" what the conclusions of the Maliki response are based upon.[140] Despite this lack of clarity, Ibn Marzuq proceeded undaunted, wholly willing to issue an opinion addressing a modern Islamic problem based entirely on (somewhat opaque) evidence that is decidedly *human*. Whatever divine spirit resides in a formalistic Islamic legal methodology enacted by human jurists must have been enough for Ibn Marziuq.

By taking a step back and placing *hadith* and *qiyas* side by side, an apparent affinity in Islamic law for the idea of association comes into focus. With respect to *qiyas*, the jurists associate modern or novel questions with prior, established rulings and, in doing so, construct a viable chain of reasoning. By comparison, in the transmission of *hadiths*, the connective tissue gains its adhesive qualities based on consistent, oral transmission, as opposed to something more cerebral (i.e. the act of analogizing). While they may be similar in some respects, at times, *hadith* and *qiyas* have been pitted against one another. Ahmad Hasan notes that Iraqi legal scholars tended to exhibit a critical attitude toward *hadith* in favor of *qiyas*. He cites a dis-

139. *Id.* at 924 (footnotes omitted).

140. *Id.* at 931.

cussion of the implications of laughter during prayer as an example:

> An 'Iraqi opponent of *al-Shafi'i* says that no *Qiyas* is valid against a binding tradition (*khabar lazim*). A burst of laughter (*qahqahah*) in prayer causes the break of both the ablution and the prayer according to the 'Iraqis. The Medinese hold that only prayer breaks and not the ablution. *Al-Shaybani* in this connection remarks that if there were no traditions (*athar*) on the point in question, *Qiyas* required what the Medinese held. But he adds, there is no extension of analogy in the presence of a tradition (*athar*) and adherence must be shown to the traditions.[141]

In a similar vein, Colin Imber suggests that "the sources of revelation," such as *hadiths*, "rarely override the results of analogical reasoning."[142] Ibn Rushd also highlights a conflict between *qiyas* and *hadith* in the section of his treatise discussing offences.[143] Members of the classical legal schools disagreed about the annual amount due as poll tax, and Ibn Rushd explained that the "reason for the disagreement springs from the variation in the traditions on the topic."[144]

How to choose between a conflicting tradition and the result of analogical reasoning may be animated by a desire to achieve religious ends, but it is ultimately nothing more than a personal choice. As there are no Qur'anic verses elevating *qiyas* over *hadith* or vice versa, the human characteristic of the Islamic adjudicatory process rears its head yet again.

V. What Judaism Can Teach Us

> The eighth fundamental principle faith: That the Torah is from Heaven and that is that we believe that this Torah that is given to us through Moshe, our teacher—peace be upon him—is completely from the mouth of the Almighty. . . The ninth principle: Faithful transmission; and that is that this Torah has

141. Ahmad Hasan, *Early Modes of Ijtihad: Ra'y, Qiyas and Istihsan*, 6 Islamic Stud. 47, 69 (1967).

142. Imber, *supra* note 124, at 36.

143. Ibn Rushd, *supra* note 119, at 484.

144. *Id.*

> faithfully been transmitted from the Creator, God—may He be blessed—and not from anyone else.
>
> – Maimonides[145]

This section tracks the parallelisms and divergences between jurisprudence in Islam and Judaism with an eye towards the ways in which some modern Jewish scholars have adopted views of the Torah (or Pentateuch) as incorporating explicitly human elements.

The anxiety exhibited by Abu Zayd's detractors is not a phenomenon unique to Islam. Traditional Judaism, for example, depends upon a notion of unimpeachably divine Revelation as well—especially vis-à-vis its system of laws. As Steven Shaw noted, "[T]he traditional Jewish attitude toward the Bible sees an intimate connection between a sacred text and a holy law."[146] Yet, this traditional perspective has been called into question in the modern period with the rise of biblical criticism, a historical and literary approach to the Torah, which urges considering its human elements. While "viewing the Pentateuch as a patchwork of independent and often contradictory sources may be an academic commonplace, . . . it flies directly in the face of Orthodox belief in the Mosaic origins of the Torah."[147] Here, David Singer refers to a scholastic approach to the Torah that appears to share certain critical qualities with Abu Zayd's attitude towards the Qur'an. The nineteenth-century Documentary Hypothesis, a term coined by Julius Wellhausen, suggests that the Pentateuch is composed of at least four different sources, written at different times and by different authors.[148] For those who maintain that Moses was the sole author of the Pentateuch, this presents obvious theological difficulties. To be clear, Abu Zayd did not go so far as to suggest that different authors wrote the Qur'an.

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145. Maimonides on Mishnah Sanhedrin 10:1, SEFARIA, *available at* https://www.sefaria.org/Rambam_on_Mishnah_Sanhedrin.10.1.1?lang=bi&vside=sefaria_Community_Translation&with=version%20Open&lang2=EN.

146. Steven Shaw, *Orthodox Reactions to the Challenge of Biblical Criticism*, TRADITION: J. ORTHODOX JEWISH THOUGHT, Spring 1969, at 61, 67.

147. David Singer, *Emanuel Rackman: Gadfly of Modern Orthodoxy*, 28 MOD. JUDAISM: J. JEWISH IDEAS & EXPERIENCES 134, 144 (2008).

148. *See* JULIS WELLHAUSEN, PROLEGOMENA TO THE HISTORY OF ANCIENT ISRAEL 20–28 (J. Sutherland Black & Allan Menzies trans., BiblioBazaar 2008) (1885) (generally discussing the four source documents: the Jehovistic text, the Elohistic text, the Priestly Code, and Deuteronomy).

Nevertheless, he still posed quite a threat to those who insisted on a purely divine, utterly non-human vision of the text.

A striking parallel to Abu Zayd's misfortune can be found in the tale of Charles Briggs, who was Wellhausen's contemporary and a Christian student at the Union Theological Seminary at the end of the nineteenth century. For a time, he and Wellhausen both studied in Germany, and it was then that Briggs woke to a "new light" in his conception of the Bible.[149] Soon, he came back to the United States and began to proselytize this new method of biblical scholarship. His opponents, much like Abu Zayd's, were "Dogmaticians" who were generally "in the habit of using the Bible to support their own dogmatic views."[150] They too ultimately subjected Briggs to a trial of sorts wherein they voted to suspend Briggs from the office of minister in the Presbyterian Church because he had "uttered, taught, and propagated views, doctrines and teachings . . . contrary to the essential doctrine of the Holy Scripture."[151]

Despite these somewhat rocky beginnings, this critical and historical approach to the Bible has become commonplace in academia, and "the majority of biblical scholars in American and European universities are convinced by the idea of the Pentateuch's multiple authorship."[152]

On a very basic level, this perspective threatens the viability of Jewish law, or *halakhah*, which for centuries relied on the text of the Torah as its source:

> Our changed concept of revelation, induced by our acceptance of modern biblical scholarship, alters the sacred character of the Bible and necessitates a new way of viewing the Halakhah. The authority of halakhah stems from its intimate connection with the Bible . . . . Ultimately, in the self-understanding of the tradition, Jewish law is meaningful because God commanded it. Thus the Halakhah is a system of mitzvoth: revealed commandments. Take away the

149. JAMES KUGEL, HOW TO READ THE BIBLE: A GUIDE TO SCRIPTURE, THEN AND NOW 43 (2007).

150. *Id.*

151. *Id.*

152. *Id.* at 42.

> notion of revelation, and halakhah floats like a castle built on air.[153]

With a newfound conception of the source text, rabbis and other Jewish thinkers would need to re-establish and re-justify the tomes of *halakhic* rules, which used the Torah as their foundation.

> Yet we have been nurtured on an understanding of revelation that stems from a critical analysis of the Biblical text, different from and more complex than the traditional understanding of revelation. For instance, we do not believe that the contradictions in the text of the Torah were put there to teach us a new halakhah; instead, we know that they are there because the Torah was written over a rather lengthy period of time. Thus, the very basis of talmudic exegesis is undercut. We may then relate to halakhah as tradition, but not as revelation, not as [commandment].[154]

Here, Rabbi Elliot Dorff suggests looking at *halakha* as tradition—not as commandment.[155] In this way, he elevates the importance of the communal element of Jewish law, defined by people's practice as opposed to an underlying divine text. For those who disagreed with Abu Zayd's approach to the Qur'an, I propose a similar reframing of perspective. If one looks at the *Shari'a* enterprise as being defined by both its human and divine qualities, it might restructure how one thinks about the Qur'an.

Another area of common ground shared by *Shari'a* law development and the establishment of *halakhic* rules relates to how single verses of narrowly-focused, holy text are used by jurists to create laws with far greater reach. With a singular Qur'anic verse as its seed, the Islamic jurisprudential process caused the Qur'anic *gharar* proscription to blossom into a "prohibition of astonishing breadth that basically invalidated any contract with a fundamentally high level of uncertainty, including uncertainties over price and duration."[156] This sort

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153. ELLIOT DORFF, THE UNFOLDING TRADITION: JEWISH LAW AFTER SINAI 207 (2005).

154. *Id.* at 208.

155. *Id.*

156. Hamoudi, *supra* note 59, at 606.

of religious legal germination also appears in Jewish law where, for example, dietary rules concerning the mixing of milk and meat have come to look very different today as compared to what the Torah commands.

Exodus 23:19,[157] Exodus 34:26,[158] and Deuteronomy 14:21[159] proscribe the boiling of a kid in its mother's milk. Traditional Jewish law, however, outlaws much more than merely cooking a young goat in its mother's milk. It is important to note that the verse from Deuteronomy begins with a prohibition against eating dead animals—one which the Qur'an would echo as well, as discussed above. Taken in context, the rule against boiling a goat in its mother's milk could be taken literally—just as the interdiction against eating carrion. But during the Talmudic period, rabbis incorporated their own interpretation, announcing that the restriction extended beyond this specific situation. In Tractate *Khullin*, page 115b of the Babylonian Talmud, the rabbis announce that this biblical restriction also outlaws cooking with any combination of milk and meat, and deriving any benefit from milk or meat that was cooked together.[160] Like the *qiyas* that Islamic jurists undertook for the centuries following the transmission of the Qur'an, the rabbis of the Talmud injected human interpretation to develop updated Jewish law.

This human element is perhaps tolerated in Judaism because there is—at the very least—a tacit notion of "revelation through the experiences of the people,"[161] rather than through the revealed text itself. In the Islamic tradition, the initial revelation is a private experience, the archangel Gabriel

157. *Exodus* 23:19 ("Bring the best of the firstfruits of your soil to the house of the Lord your God. Do not cook a young goat in its mother's milk.").

158. *Exodus* 34:26 ("Bring the best of the firstfruits of your soil to the house of the Lord your God. Do not cook a young goat in its mother's milk.").

159. *Deuteronomy* 14:21 ("Do not eat anything you find already dead. You may give it to the foreigner residing in any of your towns, and they may eat it, or you may sell it to any other foreigner. But you are a people holy to the Lord your God. Do not cook a young goat in its mother's milk.).

160. Babylonian Talmud, *Khullin* 115b, SEFARIA, *available at* https://www.sefaria.org/Chullin.115b.3?lang=BI&with=all&lang2=EN.

161. DORFF, *supra* note 153, at 284.

visiting the Prophet Muhammad secluded in a cave.[162] By contrast, Judaism's revelation myth is defined by the public and the communal:

> And the Lord said unto Moses: Go unto the people, and sanctify them today and tomorrow, and let them wash their garments, and be ready against the third day; for the third day the Lord will come down in the sight of all the people upon mount Sinai . . . . And it came to pass on the third day, when it was morning, that there were thunders and lightning and a thick cloud upon the mount, and the voice of a horn exceeding loud; and all the people that were in the camp trembled. And Moses brought forth the people out of the camp to meet God; and they stood at the nether part of the mount.[163]

Furthermore, whereas earlier rabbinic writings posit that God transmitted everything that the Jewish people needed to know at Sinai,[164] some modern Jewish scholars have reframed the notion of revelation to allow for human participation. From the perspective of Rabbi Professor Louis Jacobs, "[t]he Torah is still God-given if the 'giving' is seen to take place through the historical experiences of the Jewish people in its long quest for God."[165] And in Brian Klug's words, "To say that Torah is from Heaven is to say that God reveals himself through the labours of the prophets, the rabbis and the Jewish people as a whole."[166]

Nonetheless, this anthropocentric ideal stands in conflict with the transitive Maimonidean view that "all rabbinic law is

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162. *See* MUHAMMAD MUSTAFA AL-A'ZAMI, THE HISTORY OF THE QUR'ANIC TEXT: FROM REVELATION TO COMPILATION 47 (2003) (discussing the revelation of the Qur'an and its transmission to the Prophet Muhammad).

163. *Exodus* 19:10–11, 17–18.

164. *See, e.g.*, SALOMON BUBER, 2 MIDRASH TANHUMA, Ki Tisa, Siman 17 (John T. Townsend trans., Ktav Pub. House 1989) (1885) ("When the Holy One came to give the Torah, he spoke it to Moses in (this) order: the Scripture, the Mishnah, the Aggadah, and the Talmud . . . . At that time the Holy One told Moses even what an advanced student (one day) would ask his teacher. . . .").

165. LOUIS JACOBS, WE HAVE REASON TO BELIEVE 15 (4th ed. 1995).

166. Brian Klug, Grammar from Heaven: The Language of Revelation in Light of Wittgenstein (2013) (unpublished manuscript), https://kavvanah.wordpress.com/2013/06/18/prof-brian-klug-on-revelation-and-torah-from-heaven.

ultimately biblical law."[167] Ultimately, I would like to suggest, modern strains of Judaism cope with critical biblical theories by coming to terms with the fact that, as discussed above, "Judaism is seen as having evolved through human co-operation with the divine."[168] I contend that, by dint of its jurisprudential tradition, Islam is ripe for such a characterization too.

VI. Conclusion

This Note argues that an image of the Qur'an, like the one espoused by Abu Zayd, which embraces the text's human characteristics does not necessarily offend the central ideologies of Islam. This is so because Islamic law has openly incorporated similar human elements for centuries. While Muslims—including Abu Zayd—agree that the Qur'an is the word of God, treating it as a "simple rule book negates a historical tradition of interpretation in which the Qur'an constitutes one source."[169] That historical tradition includes devices such as *hiyal*, theories of legislation such as *maslaha*, the *qiyas* analogical method, and the theory of *isnad* with respect to *hadith*. Taken as a composite, these aspects of the Islamic legal tradition lay the groundwork for a conception of the Qur'an (in specific) and Islam (in general) that proudly announces its human qualities. Moreover, as a sister religion with a similarly central, holy text, Judaism provides an illustrative example for how to accommodate critical historical theories of such a text. The notion that Judaism itself is a cooperative creation is a lesson we might be able to carry over into Islamic studies.

In many ways, this project is just a beginning of a process for which there is no end. In the future, Islamic legal scholars and jurists will inevitably face new problems and new realities. How they respond will add new dimensions to Islamic law and, therefore, to Islam itself. So long as the world continues to evolve and Islam responds to find its place within it, the human roots of Islam will persistently grow deeper.

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167. Dorff, *supra* note 153, at 285.
168. *Id.* at 290.
169. Dunn & Kellison, *supra* note 9, at 13.