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Examining the Foundations: Comparing Islamic Law and the Common Law of the United States

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ARTICLE

EXAMINING THE FOUNDATIONS: COMPARING ISLAMIC LAW AND THE COMMON LAW OF THE UNITED STATES

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ABSTRACT

This article identifies fundamental differences between the common law legal system of the United States and the Islamic legal system. Although both systems have a religious foundation, this article argues that the religious foundations of the two systems contain different views concerning the jurisdiction of the civil government. The article describes the religious heritage of each system. The article then compares the two systems, viewing them through the lenses of two great principles of the common law: uniformity and equality.[1]

I. THE COMMON LAW HERITAGE

The common law is biblically informed. The English common law, from which the common law of the United States grew, was based on the law of nature, which is a biblically-based view of law.[2]

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1. By uniformity, I refer to the development of the common law as a system in which there is a certain level of internal consistency and in which those under the law have notice of what the law requires because it does not change arbitrarily. This definition of uniformity takes into account, however, the historic ability of the common law to adapt to new circumstances without abandoning its key values and its foundations. By equality, I refer to the commitment within the common law to treating individuals equally under the rules of law without according special privileges to classes of people. The common law has not always practiced these principles perfectly, but it has developed and grown in these principles for centuries. In the discussion of these principles, the article will refer to the Bible and to writings which are biblically informed. In the discussion of Islamic law, the article will refer to the Quran and to writings which are informed by the Quran.

2. The tracing of the biblical influence on the common law has been described in detail by scholars to whom I am indebted. *See, e.g.*, GARY AMOS, DEFENDING THE DECLARATION: HOW THE BIBLE AND CHRISTIANITY INFLUENCED THE WRITING OF THE DECLARATION OF INDEPENDENCE (1989); HAROLD J. BERMAN, LAW AND REVOLUTION I, at 165 (1983) (referring to the "religious dimension" of the Western legal tradition); HERBERT W. TITUS, GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES (1994) [hereinafter GOD, MAN, AND LAW]; JOHN C. H.

The English jurist, Sir Edward Coke, wrote of a biblically-based concept of the law of nature. In *Calvin's Case*, Coke stated that "the law of nature is part of the law of England," and described the law of nature as "that which God at the time of creation of the nature of man infused into his heart for his preservation and direction . . . ."[3] Coke taught that the common law grew out of this law of nature. "For Coke . . . , the law of God, the law of nature or reason, and the law of the land form a continuous series. For him, the common law is a tree rooted firmly in God and nature, and growing into an evergreen."[4] Coke's writings greatly influenced the American lawyers of the colonial era.[5]

A. Foundations of the Common Law in the United States

The teaching found in Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND, first published in 1765, heavily influenced the lawyers and judges of early America. The COMMENTARIES were the "basic text for lawyers and law students" during the first one hundred years of the American republic.[6] Because American lawyers studied Blackstone during this crucial era, they learned Blackstone's philosophy of law. Blackstone's philosophy looked to God as the ultimate source of law and looked to the Bible as the authoritative record of God's commandments to humankind. Specifically, Blackstone spoke of the "law of nature" and "law of revelation" as the "two foundations" upon which "depend all human laws; that is to say, no human laws should be suffered to contradict these."[7]

Blackstone described the "law of nature" as the "will of [the] Maker" as revealed in nature.[8] He understood the nature of man to be that of a created being who is "subject to the laws of his Creator."[9] Blackstone indicated that the law of nature consists of "the eternal, immutable laws of good and evil, to which the Creator himself, in all His dispensations, conforms; *and which He has enabled human reason to discover* . . . ."[10] Blackstone further

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WU, FOUNTAIN OF JUSTICE (1959); Herbert W. Titus, *God's Revelation: The Foundation of the Common Law*, 4 REGENT U. L. REV. 1 (1994).

3. Calvin's Case, 77 Eng. Rep. 377 (KB. 1608).
4. WU, *supra* note 2, at 93.
5. *Id.* at 128.
6. GOD, MAN, AND LAW, *supra* note 2, at 41.
7. 1 WILLIAM BLACKSTONE, COMMENTARIES *43.
8. *Id.* at *39.
9. *Id.*
10. *Id* at *40 (emphasis added).

indicated that human beings can use their human reason "*to discover . . . what the law of nature directs in every circumstance of life . . . .*"[11]

Blackstone described the "law of revelation" as "revealed or divine law," and stated that this law was "found only in the [H]oly [S]criptures."[12] Blackstone indicated that God had provided to humankind this written "law of revelation" because humans are in a state in which their "reason is corrupt" and their "understanding [is] full of ignorance and error" because of the sinful nature of humankind.[13] Thus, Blackstone taught that human beings can use their admittedly flawed reason to discover law, but that they need the guidance of laws given in Scripture to prevent them from misinterpreting the law.

The words of the Declaration of Independence, speaking of "the laws of nature and of nature's God,"[14] correspond to the "law of nature" and the "law of revelation" described in Blackstone's COMMENTARIES. Blackstone's concept of the "law of nature" is expressed in the Declaration as "laws of nature." Blackstone's concept of an explicit "law of revelation" is expressed in the Declaration as "the Laws . . . of Nature's God." These two foundations, the laws of nature and the laws of nature's God, thus took root in America through its founding document.[15]

The "common law," as understood in the early years of the American republic, was based on the same two foundations. One writer during those early years asserted that the common law "was derived from the law of nature and of revelation, those rules and maxims of immutable truth and

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

12. *Id.* at *42.

13. BLACKSTONE, *supra* note 7, at *41. Blackstone explained that the law of revelation was "really a part of the original law of nature," but that it is "expressly declared so to be by God Himself [in the scriptures]." *Id.* at *40, *42. He thus distinguished between "natural law," that is, the "moral system framed by ethical writers" and which is arrived at "by the assistance of human reason," and the "revealed law," which is "the law of nature expressly declared so to be by God Himself." *Id.* at *40, *42.

14. DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776).

15. HERBERT W. TITUS & GERALD R. THOMPSON, AMERICA'S HERITAGE: CONSTITUTIONAL LIBERTY 6 (2006):

> The 'laws of nature's God,' while not the exact term used by Blackstone . . . , parallels what he called the revealed or divine law. God had not only established His laws in the created universe, He had spoken those very laws in the Holy Bible. Therefore, the phrase 'the laws of nature and nature's God' was a most convenient term to refer to the laws of God in the created order and in God's word. Those who claim otherwise must show that the Declaration used the phrase in a novel way, for Jefferson, Adams and other Framers consistently claimed that the Declaration contained no new ideas.

justice, which arise from the eternal fitness of things . . . ."[16] That "law of nature and revelation" was thus understood to consist of God's direction to human beings as to how to conduct themselves. It was understood to be "an objective legal order."[17]

B. Two Jurisdictions in the Common Law of the United States

Importantly, the Framers' reliance on the higher law of God did not mean they contemplated creating a state religion.[18] On the contrary, the Framers explicitly incorporated into their new order a strong commitment to the concept of authority vested in two separate jurisdictions: one for duties to one's divine Creator and one for duties to a civil government.[19] The First Amendment to the United States Constitution expressed this commitment to separate jurisdictions: "Congress shall make no law respecting an establishment of religion . . . ."[20] In other words, the force given to the civil magistrate to carry out its function was not to be used to help the church carry out its function. This commitment to authority vested in two separate jurisdictions of church and state has a biblical foundation: "Render therefore to Caesar the things that are Caesar's, and to God the things that are God's."[21]

This concept of two separate jurisdictions undergirded the development of the western legal tradition long before the birth of the United States. For example, it characterized the legal system of England after the Norman Conquest: "Underlying the competition of ecclesiastical and royal courts from the twelfth to the sixteenth centuries [in England] was the limitation on the jurisdiction of each: neither pope nor king could command the total

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16. JESSE ROOT, THE ORIGIN OF GOVERNMENT AND LAWS IN CONNECTICUT, 1798, *reprinted in* THE LEGAL MIND IN AMERICA 33, cited by GOD, MAN, AND LAW, *supra* note 2, at 41.

17. GOD, MAN, AND LAW, *supra* note 2, at 41.

18. Madison, for example, asserted that "'religion, or the duty we owe to our Creator and the manner of discharging it, can only be directed by reason and conviction, not by force or violence.'" James Madison, Memorial and Remonstrance Against Religious Assessments (1785) (quoting Virginia Declaration of Rights, art. 16).

19. In so doing, the Framers instituted a relationship between church and magistrate contemplated by John Locke. "[T]he instruments of force which belong to another jurisdiction [the state], and do ill become a churchman's hands. Let [the church] not call in the magistrate's authority to the aid of their eloquence, or learning . . . ." John Locke, *Four Letters Concerning Toleration*, 5 THE WORKS 23 (1689), oll.libertyfund.org/quotes/498.

20. U.S. CONST. amend. I.

21. *Luke* 20:25 (New King James). *See also* GOD, MAN, AND LAW, *supra* note 2, at 64.

allegiance of any subject."[22] Concomitant with the recognition of this concept of two jurisdictions in the development of Western theories of state and the law was the concept that a nation could and should be ruled by law and not by fiat of the rulers. "The two powers [of church and state] could only coexist peacefully through a shared recognition of the rule of law, its supremacy over each."[23]

Rather than viewing the higher law of God as a reason to institute a state church, the jurisprudential writers of America understood the higher law of God as a foundation or a root of the principles of the common law. For example, Justice Joseph Story, referring specifically to the Christian heritage of the common law in an address in 1829, stated that "Christianity is a part of the common law.... There never has been a period in which the common law did not recognize Christianity as lying at its foundations."[24] Thus, the common law would reflect Christian precepts, but it would vest only limited authority in the civil government.[25]

C. Legal Reasoning in the Common Law: Role of Analogy

The common law's approach to resolving new questions of law has typically been to reason by analogy to earlier cases in light of established principles. Bracton, the "Father of the Common Law,"[26] is credited with being "the first [in the history of the common law] to hit upon the idea of developing the law by the method of analogy."[27] The compelling principle in this method was a simple one: "[s]imilar facts should lead to similar decisions."[28] In the practice of Bracton's time, judges were not expected to adhere strictly to a single precedent; however, a line of earlier similar cases constituted persuasive authority of the "custom of the judges" and thus affected the outcome of a case being decided.[29] The use of analogy both

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22. BERMAN, *supra* note 2, at 269.

23. *Id.* at 292.

24. GOD, MAN, AND LAW, *supra* note 2, at 38.

25. The absence of any civil penalty for idolatry is one illustration of the limited jurisdiction of the civil government in the common law system. Although the scripture in Deuteronomy 17 gave the Old Testament nation of Israel authority to execute those guilty of idolatry, the biblically based principle of jurisdiction inherent in the common law does not give the civil government of other nations any such authority.

26. WU, *supra* note 2, at 71.

27. *Id.* at 72.

28. *Id.*

29. HAROLD J. BERMAN, LAW AND REVOLUTION II 273 (2003).

supported the development of uniform rules of law and provided for equal treatment of individuals under the law.

II. ISLAMIC LAW HERITAGE

Islamic law derives from the Quran and from the life and sayings of Muhammed. *Sharia* is a term for Islamic law. Islamic writers define "*sharia*" as "[t]he [d]ivine [l]aw of Islam."[30]

"*Sharia*" means in Arabic "'a way to a watering place', and thus a path to be followed."[31] Although the term *sharia* has been used to refer to the Islamic system of jurisprudence as a whole, historically *sharia* has been used to refer specifically to the sources of Islamic law.[32]

A. One Jurisdiction in Islamic Law

Islamic law does not contain a concept of authority vested in two separate jurisdictions, one for duties to one's Creator and one for duties to a civil government. "The Western concept of the 'two kingdoms' of church and state has no counterpart in Islam."[33] Rather, Islam is a "complete code for living, combining the spiritual and the temporal, and seeking to regulate not only the individual's relationship with God, but all human social relationships."[34] As this section describes, Islam contains detailed rules for nearly every aspect of human life. From the time of Muhammed, *sharia* governed all human belief and conduct. "[Muhammed] founded a Moslem state of which he was the head. He administered all religious, political and social affairs. He never showed his companions any sign of separation of church and state."[35]

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30. JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 351 (Mark S. W. Hoyle ed. 2d ed. 1990). Various spellings are seen in the authorities on Islamic law, including *shariah*, *shari'ah*, *sharia*; in this article the spelling "*sharia*" will be used in text; other spellings will be used in quotations, following the spellings used in the original sources.

31. Maria Reiss, *The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions Should Be Non-Binding*, 26 ARIZ. J. INT'L & COMP. L. 739, 742 (2009).

32. *See, e.g.*, Mona Rafeeq, Comment, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice?*, 28 WIS. INT'L L.J. 108, 116-17, n.60, 61 (2010). In this article, the terms "Islamic law" and "*sharia*" will both be used; "*sharia*" will refer to specific rules from the Quran, the original source for Islamic law.

33. Brief for Foundation for Moral Law et al. as Amici Curiae supporting Petitioners, Awad v. Ziriax, 2011 WL 1461738 (C.A.10), at *12 [hereinafter *Awad* Brief].

34. NASIR, *supra* note 30, at 1.

35. IBN MOHAMAD JAWAD CHIRRI, INQUIRIES ABOUT ISLAM 167 (1965).

In the texts of Islam and in the traditional practice of Islam, one finds an all-encompassing religious, political, and social system. Violations of duties to the Creator are also violations of the civil law. For example, apostasy, which the Quran forbids,[36] is punishable civilly as a crime; apostasy is included in the category of *hudud*, which consists of the most serious crimes, for which transgressors face the harshest penalties.[37]

The coverage of *sharia* is minutely detailed, as described by a scholar discussing the British experience with Islamic law:

> Traditionally, sharia law encompasses the full range of human behaviour, from criminal matters (including activities that would not be considered crimes in the modern West, such as adultery, homosexuality, apostasy or wearing the wrong clothes in public); to worship (including prayer, fasting, and pilgrimage); to details of sexual relations between a husband and wife; to business affairs; to family law (such as marriage, divorce, custody of children, and inheritance); to dietary regulations (mainly in determining whether meat is halal or not . . . or in the prohibition of pork and alcohol); to clothing (particularly women's garb); to bodily matters (such as urination and defecation, depilation, the use of the toothbrush, purification after menstruation or sex); to international law (which is based on the law of jihad).[38]

This all-encompassing system of Islam is philosophically motivated by the concept of *tawhid*, or "unity."[39] On an individual level, this concept means that everything in an individual's life is to be part of an integrated whole, without compartmentalization.[40] On a societal level, this concept means that everything in a society is to be integrated.[41] On a political level, it means that the "ultimate unit of the body politic" is to be "the totality of the Islamic

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36. Sura 2:83 (Syed Vickar Ahamed trans., 2007) ("[Y]ou will worship no one but Allah . . . .").

37. Sadiq Reza, *Due Process in Islamic Criminal Law*, 46 GEO. WASH. INT'L L. REV. 1, 5 (2013). The hudud category of crimes includes apostasy, adultery or fornication, theft, and wine drinking; the punishments for hudud crimes may be flogging, amputation, or death. *Id.* at n.11.

38. DENIS MACEOIN, SHARIA LAW OR 'ONE LAW FOR ALL?' 39-40 (David G. Green ed. 2009).

39. SEYYED HOSSEIN NASR, IDEALS AND REALITIES OF ISLAM 16 (2000).

40. *Id.*

41. *Id.* at 17.

community, or the *ummah*."[42] Thus, all Muslims everywhere are considered united. "The political ideal of a single Muslim government . . . is based on the central metaphysical doctrine of unity."[43]

"*Islam*," in Arabic, means "surrender."[44] As interpreted, "*Islam*" means submission to Allah and thus submission to the law of Allah.[45] Thus, the role of an individual in Islam is to do his duty to serve Allah. Since Muhammed contemplated and established an Islamic state, and since there is no separation of jurisdictions in an Islamic state, the role of an individual in Islam would be to submit to and serve that Islamic state.

One modern Islamic scholar, in a chapter explaining "Why Muslims Need a Secular State," has depicted his struggle with the absence of the concept of separate jurisdictions in Islam. He begins his account with this statement: "In order to be a Muslim by conviction and free choice . . . I need a secular state. By a secular state I mean . . . one that does not claim or pretend to enforce Shari'a—the religious law of Islam . . . ."[46] Without a separation of jurisdictions, the outworking of the religious foundations of Islam grants a government unhampered authority to impose rules and exact penalties in every area of human life. "Nothing can escape the narrow meshes of its net."[47]

B. Sources of Islamic Law

There are four commonly accepted sources of Islamic law: (1) the Quran; (2) the Sunna (described below); (3) the consensus of Muslim juristic scholars ("*ijma*"); and (4) reasoning by analogy ("*qiyas*").[48] The first two sources, the Quran and the Sunna, are accepted by all schools of Muslim jurisprudence as texts.[49] The last two of these sources are not accepted in the same degree by all schools.[50] The various schools disagree on the weight of

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42. *Id.*

43. *Id.*

44. NASIR, *supra* note 30, at 1; NASR, *supra* note 39, at 14, 129.

45. *See, e.g.*, *Fatwa 10446 Meaning of the Word Islam*, ISLAMQA (May 1, 2007), https://islamqa.info/en/10446 (indicating that the meaning of "Islam" is "submission, humbling oneself, and obeying commands and heeding prohibitions without objection . . . .").

46. ABDULLAHI AHMED AN-NAIM, ISLAM AND THE SECULAR STATE 1 (2008).

47. DUNCAN B. MACDONALD, DEVELOPMENT OF MUSLIM THEOLOGY, JURISPRUDENCE AND CONSTITUTIONAL THEORY 66-77 (1903).

48. NASIR, *supra* note 30, at 7, 19.

49. *Id.* at 6-7.

50. *Id.*

authority to be given to the sources other than the Quran and the Sunna.[51] The schools' areas of disagreement essentially center around how much credence to give to independent human reasoning on matters as to which the Quran and Sunna are silent.[52]

The Quran is the original source of Islamic law.[53] It is considered by Muslim jurists to be divinely given by Allah to Muhammed.[54] A verse in the Quran that is considered to be the self-identification of the Quran as the source of divine law states: "You judge between them by what Allah has made clear . . . ."[55] The Quran is not primarily a book of law; rather, the Quran provided "general rules and provisions, leaving elucidation and detailed judgments" to Muhammed.[56] A verse in the Quran that is considered a granting of authority and responsibility to Muhammed to interpret the Quran states: "[W]e have sent down to you the Message (the Quran) that you may explain clearly to men what is sent for them . . . ."[57]

The Sunna ("the trodden path") are the traditions attributed to Muhammed.[58] The Sunna are comprised of the verbal utterances of Muhammed (singular "*hadith*," meaning "a saying," plural "*ahadith*"), and the acts of Muhammed (the "*Sira*").[59] A verse in the Quran that is considered the identification of the Sunna as a source of law states: "So take what the Messenger gives to you, and deny yourselves that which he withholds from you."[60] The *ahadith* have been recorded in a number of *hadith* collections, of which six collections are considered the most authoritative.[61] If there are discrepancies between a hadith and the Quran, the Quran prevails.[62] The *Sira* ("journey" through life, or biography) include stories of military expeditions of Muhammed and his companions, political treaties, assignments of officials, letters to foreign rulers, speeches and

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51. *Id.*

52. *Id.* at 6-7, 19-24; *Awad* Brief, *supra* note 33, at *15. This article describes the various schools of Islamic jurisprudence. *Infra* Part IV.

53. NASIR, *supra* note 30, at 20; NASR, *supra* note 39, at 92 ("In essence, all of the *Shariah* is contained in the Quran"); Reiss, *supra* note 31, at 742.

54. NASIR, *supra* note 30, at 19.

55. Sura 5:49 (Syed Vickar Ahamed trans., 2007); NASIR, *supra* note 30, at 19.

56. NASIR, *supra* note 30, at 1-2.

57. Sura 16:44 (Syed Vickar Ahamed trans., 2007); NASIR, *supra* note 30, at 1-2.

58. NASIR, *supra* note 30, at 351.

59. *Id.*

60. Sura 59:7 (Syed Vickar Ahamed trans., 2007); *See* NASIR, *supra* note 30, at 19.

61. Rafeeq, *supra* note 32, at 117.

62. *Id.*

sermons of Muhammed, and verses of poetry commemorating events.[63] Thus, the Sunna constitutes a repository of the sayings attributed to Muhammed and of the life of Muhammed. Some scholars also acknowledge the "tacit assent" of Muhammed as a part of the Sunna.[64] Tacit assent means that a consensus with which Muhammed did not disagree was reached during Muhammed's lifetime.[65]

C. Legal Reasoning in Islamic Law: Role of "Personal Opinion"

The approach to resolving new questions of law in Islamic jurisprudence will vary with different decision-makers. For example, whether a decision-maker will reason by analogy depends upon the approach which that decision-maker adopts in regard to the use of "personal opinion" in interpreting the Quran and the Sunna. A verse in the Quran that has been identified as allowing for the use of personal opinion, at least by Muhammed, in interpreting the Quran states: "We have sent down to you (O Muhammad) the Book in truth that you might judge between men, as guided by Allah . . . ."[66] Muhammed and his "companions" used *ijtihad*, or "independent and informed opinion" on legal or theological issues, to resolve legal questions.[67] *Ijtihad* has been used by other jurists at times.[68]

Just after the death of Muhammed, certain of his "companions" inherited the responsibility for adjudicating legal questions.[69] The tension between those who recognized only the Quran and Sunna as sources and those who saw the need for independent reasoning produced, initially, two approaches, and later, the various schools, of jurisprudence.[70]

One approach to resolving new questions of law, represented by the Traditionalists, considered only the Quran and the Sunna as legitimate textual sources of law and would not consider "personal opinion" or attempt to resolve hypothetical questions. The other approach, represented by the "School of Personal Opinion," permitted interpretation of the Quran

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63. Ahmad S. Moussalli, Gordon D. Newby & Ahmad Moussalli, *Muhammed*, *in* THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD, http://www.oxfordislamicstudies.com/article/opr/t236/e0550 (last visited July 20, 2015).

64. *See, e.g.*, NASIR, *supra* note 30, at 351.

65. *Id.* at 22.

66. Sura 4:105 (Syed Vickar Ahamed trans., 2007); *see also* NASIR, *supra* note 30, at 19.

67. NASIR, *supra* note 30, at 2.

68. *Id.* at 2-4.

69. *Id.* at 6-7.

70. *See id.* at 6-18.

and the Sunna, including the use of analogy from precedents, to resolve legal questions, including hypothetical ones.[71]

Islamic jurisprudence, that is, legal reasoning and the totality of Islamic law together, are generally known as *fiqh* ("understanding").[72] Some scholars define *fiqh* as the body of legal provisions in Islamic jurisprudence.[73] Other scholars report that *fiqh* is both: (1) deducing and applying the principles of *sharia* and (2) the sum of the deductions made by prior jurists.[74] Yet another view is that *fiqh* refers more to a discussion among jurisprudential thinkers than to a consensus. As reported by one scholar, "books of fiqh do not provide firm rules. . . . Instead, they showcase a scholarly discussion of multiple, often contradictory, views."[75] Consensus (*ijma*) and analogy (*qiyas*) are two of the methods of *fiqh*.[76] However, the methods of reasoning in Islamic jurisprudence are not fully known, as one writer observes: "legal logic in Islam has not yet been analyzed, and our knowledge of the methods of legal reasoning subsumed under what is commonly known as *qiyas* [analogy] is still rudimentary . . . ."[77]

In Islamic legal reasoning, interpretation of the Quran ("*tafsir*") ordinarily must be done by a qualified individual.[78] The qualifications for practicing *tafsir* are that the individual must (1) be an accomplished classical Arabic linguist, (2) thoroughly understand Islam's message, (3) have the ability to perceive meanings within the Qur'an, along with general principles, and (4) know and take into consideration the traditions of Muhammad, including the *hadith*.[79] In other words, a judge must be trained in the religion of Islam.

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71. *Id.* at 6-7. However, analogy from precedents in Islamic jurisprudence, where it is permitted, does not involve the use of written reports containing binding precedent, in sharp contrast to the common law system, as is discussed further *infra* Part .

72. BLACK ET AL., MODERN PERSPECTIVES ON ISLAMIC LAW 2-3 (2013).

73. NASIR, *supra* note 30, at 19.

74. HISHAM M. RAMADAN, UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 14 (2006).

75. Rafeeq, *supra* note 32, at 119.

76. RAMADAN, *supra* note 74, at 17-18. A well-known 14th century treatise, Al-Misri's RELIANCE OF THE TRAVELLER AND TOOLS OF THE WORSHIPPER, is a compilation of *fiqh* for the Shafii school. *Awad* Brief, *supra* note 33, at 16.

77. Wael B. Hallaq, *The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and the Common Law*, 34 CLEV. ST. L. REV. 79, 80 (1985-1986). Hallaq attributes this "rudimentary" state of knowledge to the fact that "modern scholars of Islam translate *qiyas* as analogy without realizing the existence of other [types of logical] arguments which are likely included in *qiyas*." *Id.*

78. RAMADAN, *supra* note 74, at 15.

79. *Id.*

D. The Fatwa

In a case in which an issue is not covered by the *fiqh* literature, a *fatwa* may be requested.[80] A *fatwa* is "[a] legal ruling or opinion given by a recognized authority on Islamic law."[81] More specifically a *fatwa* is an "[a]uthoritative legal opinion given by a *mufti* (legal scholar) in response to a question posed by an individual or a court of law."[82] A *fatwa* is "nonbinding."[83] However, it may be morally binding if the recipient agrees with the logic used in the opinion.[84] The reasoning in a *fatwa* is based on the Quran, the Sunna, and *ijtihad* (independent reasoning).[85] Because it has characteristics of both law and theology, a *fatwa* can aptly be described as a "legal/theological opinion[]."[86] *Fatawa* may be published in writing.[87] They appear on various websites, and they are available to *sharia* tribunals.[88]

III. COMMON LAW HERITAGE: PRINCIPLE OF UNIFORMITY

The common law of England, from its earliest stages, was driven by a principle that rules of law should be uniform—that is, consistent across geographic boundaries and cultures, at least within England. Around 893 A.D., Alfred the Great collected the law codes from the three Christian Saxon kingdoms of England, namely Kent, Mercia and Wessex, and

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80. "Fatwa" in AHMAD S. MOUSSALLI, GORDON D. NEWBY & AHMAD MOUSSALLI, THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD, http://www.oxfordislamicstudies.com/article/opr/t236/e0550 (last visited July 20, 2015).

81. *Fatwa*, BLACK'S LAW DICTIONARY (10th ed. 2014).

82. THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD, *supra* note 80.

83. 1 ENCYCLOPEDIA OF ISLAM IN THE UNITED STATES 240 (Jocelyne Cesari ed. 2007) (defining a fatwa as "a nonbinding religious opinion issued by a *mufti*, or legal expert."). *Accord* THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD, *supra* note 80 ("A fatwa . . . is neither binding nor enforceable. Its authority is based on the mufti's education and status within the community. If the inquirer is not persuaded by the fatwa, he is free to go to another mufti and obtain another opinion; but once he finds a convincing opinion, he should obey it.").

84. ENCYCLOPEDIA OF ISLAM IN THE UNITED STATES, *supra* note 83.

85. *Id. Accord* THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD, *supra* note 80 ("Theoretically, muftis should be capable of exercising legal reasoning independently of schools of law (ijtihad), although followers of tradition (muqallids) are also allowed to issue fatwas.").

86. *Awad* Brief, *supra* note 33, at 15.

87. MACEOIN, *supra* note 38, at 27.

88. *Id.* at 27, 41, 62, 68-69.

compiled them into the Doom Book.[89] The Doom Book[90] was "a book or code said to have been compiled under the direction of Alfred, *for the general use of the whole kingdom of England* . . . ."[91]

During the period from the Norman conquest (1066) to the reign of Edward II (1307-1327), "English law for the first time became national—no longer the law of Essex or Mercia or the Danelaw, but the '*law and custom of the realm*' . . . ."[92] Such a change—a movement from the predominance of local law to the predominance of national law—indicates that the law must have developed some measure of uniformity throughout the "realm" of England.

A. Systematic Compilations Under the Common Law

During this period, English law was compiled in a systematic way. The first systematic compilation was the *Treatise on the Laws and Customs of the Kingdom of England* (c. 1188). This treatise, commonly attributed to Glanville,[93] is based on a collection of eighty writs.[94] The fact that the author understood the importance of collecting judicial materials in a single work demonstrates that, in the development of the law of England during this period, there was a drive toward uniform national laws. Furthermore, the

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89. F. N. Lee, *King Alfred the Great and our Common Law* (Jan. 2, 2015), http://www.dr-fnlee.org/king-alfred-the-great-and-our-common-law/ (crediting the Doom Book with formulating customary law which developed into the common law of England).

90. "Doom" or "Dome" comes from the Anglo-Saxon word meaning "judgment." *Doom*, BLACK'S LAW DICTIONARY (10th ed. 2014) (citing W.J.V. Windeyer, LECTURES ON LEGAL HISTORY 1 (2d ed. 1949)).

91. *Doombook*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added). Blackstone addressed the Book of Doom in his COMMENTARIES saying:

> And indeed our antiquarians and first historians do all positively assure us, that our body of laws is of this compounded nature. For they tell us that in the time of Alfred the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile his *Dome-Book* or *Liber Judicialis*, for the general use of the whole kingdom. This book is said to have been extant so late as the reign of King Edward the Fourth, but is now unfortunately lost. It contained, we may probably suppose, the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings. Thus much may at least be collected from that injunction to observe it, which we find in the laws of King Edward the elder, the Son of Alfred.

BLACKSTONE, *supra* note 7, at *65 (letters modernized).

92. WILL DURANT, THE STORY OF CIVILIZATION: THE AGE OF FAITH 678 (1950) (emphasis added). Durant attributes the emphasized phrase to Glanville. *Id.*

93. *Id.*

94. JOHN BEALE, A TRANSLATION OF GLANVILLE x-xi (1900).

fact that the treatise focused on the writs, which defined "particular types of remedies for particular types of wrongs,"[95] also demonstrates a concern with consistency in the application of laws.

In 1215, the English barons compelled King John to sign the Magna Carta, clause 39 of which refers to, and presumes the existence of, a law that is extant uniformly, by requiring that no "free man" could be deprived of liberty or property except by the judgment of his peers or by the "law of the land."[96] Evidently, the phrase "law of the land" contemplated a system of uniform standards by which judgments were to be made—as contrasted to incidental judgments made by individuals without reference to uniform standards. The Magna Carta thus encapsulated a recognition that justice could not be had in an abstract sense, but that it had to be guaranteed by "specific principles and rules."[97] This very concept of the rule of law implicit in the Magna Carta's guarantees of liberty rests on an assumption that a degree of uniformity exists in the legal system, so that the rules can be consistently applied.

By 1256, Henry de Bracton had written his treatise *On the Laws and Customs of England*. In Bracton's treatise, five hundred decided cases are referenced,[98] and these were culled from Bracton's collection of about two thousand cases.[99] Bracton summarized the latter cases in digest form in his Note Book.[100] Bracton did not use the term "precedent," and "did not espouse a doctrine of precedent"[101] in the modern sense of binding precedent. He taught that in deciding individual cases "one must judge not by examples but by reasons."[102] However, the existence of his monumental collection demonstrates a great deal of respect for the value of earlier cases to inform the reasons. Certainly, neither the treatise nor the digests purport to be of mere historical interest; their availability allowed for scholars and practitioners of the law to continue to build a uniform system.

Bracton is famous for his assertion that "the king . . . ought not to be under man but under God and the Law," clarified in the same work by his assertion that, "as a vicar of God [the king] ought to be under the

95. BERMAN, *supra* note 2, at 458.
96. MAGNA CARTA, cl. 39 (1215).
97. BERMAN, *supra* note 2, at 293.
98. BERMAN, *supra* note 29, at 273.
99. WU, *supra* note 2, at 71-72.
100. BERMAN, *supra* note 29, at 273.
101. *Id.*
102. *Id.*

Law . . . ."[103] These statements show a conviction that no human being was above the law; the statements also tend to show a conviction that the law is not to be changed arbitrarily by one person and thus the statements support the understanding that the common law strove for uniformity in the sense of predictability. Furthermore, the fact that Bracton championed the use of analogy to decide new cases supported the development of uniform rules of law.

During the period between 1628 and 1644, Sir Edward Coke published his *Institutes of the Lawes of England*, which, together with his thirteen volumes of *Reports* of cases, "summed up the legal learning of his time."[104] The continued practice of compiling reports of cases showed continued respect for precedent, a practice which permitted uniformity of rules of law, with fairness of application of those uniform rules in individual cases.

After 1689, significant changes in English law which amounted to "transformation" occurred—among others, judges no longer served at the pleasure of the king, but became independent of the monarch and were given life tenure; "the common law became the constitutional law of England;" and a doctrine of binding precedent, in the modern sense of the word, became prevalent.[105] The continued development of the rule of law as opposed to the rule by the ruler, the recognition of a body of law known as the common law, and the strengthening of the respect for precedent, all contributed to a continued drive toward a uniform system of laws.

B. Respect for Precedent Under the Common Law

The common law, in its pursuit of uniformity, developed a system of written reports of decisions. Through these written reports, recorded precedent became and remains the cornerstone of the stability of the common law. Blackstone, in describing the state of the common law in his time, declared that the decisions "of courts were held in the highest regard;"[106] and that the written decisions of courts were preserved in volumes kept at the courts and "handed out to public view in the numerous volumes of *reports* which furnish the lawyer's library."[107] He stated that a report of a decision included the arguments on both sides and "the reasons the court gave for their judgment" taken in notes by "persons present at the

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103. Bracton, De legibus, III, O.2 (fol. 107); *see also* Wu, *supra* note 2, at 73.

104. John M. Gest, *The Writings of Sir Edward Coke*, 18 YALE L.J. 504, 505 (1909).

105. BERMAN, *supra* note 29, at 207-08.

106. BLACKSTONE, *supra* note 7, at *71.

107. *Id.*

determination."[108] He stated that these written opinions were searched by the judges when there were "matters of consequence and nicety" to be decided.[109] In summary, Blackstone described the English reporter system as follows: "[these] decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law."[110]

Blackstone summarized the common law's deep respect for precedent as follows:

> [F]or it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly and declaredly determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule; which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.[111]

Blackstone acknowledged that local customs that varied from the general rule of law were permitted as lawful after those customs were validated by an act of Parliament.[112] However, he pointed out that those customs had to be "reasonable" and "warranted by authority of law,"[113] a standard which acted as a check on local custom so that it did not violate the law of the land.

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108. *Id.* Blackstone indicated that these written notes were taken by scribes of the court from the reign of Edward II to Henry VIII. *Id.* He acknowledged that from Henry VIII to the time of his writing of his Commentaries, this task was delegated to private writers whose recordings of the proceedings contained inaccuracies. *Id.* at *72.

109. *Id.* at *71.

110. *Id.* at *73.

111. *Id.* at *69.

112. *Id.* at *77.

113. *Id.* To show how the common law of England treated variance in local custom, Blackstone pointed out that a widow in certain boroughs was entitled to inherit all of her husband's lands, whereas the law of the land provided she was entitled to inherit one third of his lands. *Id.* at *75. Despite the variance in local custom, the local rules were consistent with the general principle that a widow had substantial rights of inheritance in her husband's estate.

The common law system has long recognized the right to appeal trial court decisions to appellate courts. The very existence of appellate courts in a hierarchy of courts supports the view that the common law has a drive toward uniformity. The appellate courts in the common law system adhere to precedent. Each appellate court has responsibility for hearing appeals from a number of trial courts within its jurisdiction. And each appellate court is responsible for maintaining consistency in the rules of law within its jurisdiction.

IV. ISLAMIC LAW EXAMINED UNDER PRINCIPLE OF UNIFORMITY

Because Islamic scholars agree that the Quran is the original authoritative source for sharia law,[114] one might expect in theory that some degree of uniformity would inhere in decisions under *sharia.* However, the Quran contains general rules that must be interpreted for a Muslim to know what is permitted conduct in a particular instance. The Sunna, although voluminous, do not address every case in which there is a question as to what is permitted.

A. Different Schools of Jurisprudence Within Islamic Law

Islamic law developed through a number of different schools of jurisprudence.[115] The major schools of jurisprudence that survive today are the four Sunni schools of Hanafi, Maliki, Shafii, and Hanbali, and the Shia school of Jafari.[116] The Sunni schools have the reputation for being the "mainstream of Islamic theology and jurisprudence."[117] The differences between the two original approaches—Traditionalist and Personal Opinion—continue to manifest themselves in the juristic schools. Although the Sunni and Shiite schools do not literally line up with the two earlier approaches in every respect, the Shiite branch has tended to adopt the "personal opinion" approach more readily.[118]

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114. *See supra* Part II-B.

115. *See supra* Part II.

116. Rafeeq, *supra* note 32, at 118-19 (citing Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, in UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 1, 3 (Hisham M. Ramadan ed., 2006). *See also* MACEOIN, *supra* note 38, at 29-32 (describing the four Sunni schools of thought); WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI USUL-UL-FIGH (1997) (discussing the four Sunni schools of thought).

117. NASIR, *supra* note 30, at 15.

118. *Id.* at 7. For a detailed history and description of the schools of Islamic jurisprudence and a list of the nations in which each school of thought has been accepted or has a

The various schools of Islamic jurisprudence have differed in "the value they [have] attached to analogy and in their definition of consensus."[119] The consensus of Muslim scholars ("*ijma*") has been particularly well regarded in certain schools of Islamic jurisprudence.[120] Reasoning by analogy ("*qiyas*" or "to judge by comparing with a thing") has been more prevalent in certain other schools.[121] Most Islamic jurists of the Sunni schools acknowledge analogy as a source of law, "the champions being the Hanafis, the least enthusiastic being the Hanbalis, who use it as a last resort, while the Malikis and Shafiis steer a middle course."[122] More specifically, the Hanafi school "emphasizes analytical reasoning in legal interpretation, but stresses that the Quran is the highest legal authority, followed by the Hadith . . . ."[123] The Maliki school agrees "that the Quran is the highest legal authority but argues that the next level of authority is the Sunna, which includes not only the Hadith but also the fatawa[] (legal/theological opinions) of the early Caliphs, and also looks to the practice of the Muslim community of Medina."[124] The Shafii school "agrees that the Quran, the Sunna, and consensus of Muslim scholars, in that order, are the main authorities of law, but in cases in which these authorities are unclear, reasoning by analogy should prevail."[125] The Hanbali school "contends that where the Quran and the Hadith are silent, a consensus of Muslim scholars should govern."[126] The Shiite Jafari school "emphasizes the Quran and the Hadith as the most authoritative sources of law but places greater emphasis on the use of independent reason where the Quran and the Hadith are silent."[127]

Even among schools that recognize consensus as a source of legal authority, Muslim jurists disagree as to what group of people is or was qualified to reach consensus on a question of law. Some jurists accept only the consensus of Imams (community leaders); others accept consensus of their own community, which must reach unanimity; others define

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following, see NASIR, *supra* note 30, at 6-18. For a detailed nation-by-nation compendium of the contemporary Islamic law of personal status in Arab states, with comments on which schools of jurisprudence have flourished or been influential, see NASIR, *supra* note 30, at 29-40.

119. Nasir, *supra* note 30, at 7.

120. *Id.*; *see also* Reiss, *supra* note 31, at 743.

121. NASIR, *supra* note 30, at 7; *see also* Reiss, *supra* note 31, at 743.

122. NASIR, *supra* note 30, at 24.

123. *Awad* Brief, *supra* note 33, at *15.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

consensus as the agreement of the "Companions" of Muhammed or the "Followers" of Muhammed during the two generations after his life.[128] The orthodox view apparently is that consensus is "the general agreement of all scholars of the Islamic community living in a certain period after the era of [Muhammed's lifetime], without the requirement that this agreement is unanimous."[129]

Thus, the various schools of Islamic jurisprudence do not agree on the emphasis that should be given to the four accepted sources of law. There does not appear to be a single method to determine what constitutes reliable precedent. Without a comprehensive method for addressing new cases in the light of established precedent, Islam does not strive toward uniformity in the sense that the common law system does.

At first glance, it might seem that the concepts of *ummah* and *fiqh* would drive Islamic law toward a measure of uniformity. However, the concept of *ummah* does not necessarily lead to uniformity in the application of laws. *Ummah* contemplates an all-encompassing religious, social, and legal system. Such a system need not operate by the rule of law which would tend toward consistency of application. Furthermore, the concept of *fiqh* does not refer to a uniform body of law in the sense of the common law tradition. *Fiqh* tolerates a great deal of variance, depending on the decision-maker's views as to the use of analogy and consensus.

B. Absence of Binding Precedent in Islamic Law

A *fatwa* is not a precedent in the sense that a common law court's opinion is a precedent.[130] It is not binding like a common law court's opinion is binding in its jurisdiction. The Islamic system of law does not have a comprehensive collection of *fatawa* in recorded form comparable to the detailed and reputable reporter system of the common law. Furthermore, the collections of Muhammed's sayings, known as *ahadith*, do not constitute in the sense of the common law collections of legal cases which lawyers and judges can use for analogy.[131] Even if an individual hadith gives some measure of guidance as to how to resolve a problem, it does not typically contain a detailed description of facts, a statement of the issue, and reasoning to a conclusion. Thus, the availability of precedent to all legal scholars—which is essential to the common law's consistency—is missing in Islamic jurisprudence. Therefore, aside from the obligation to

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128. NASIR, *supra* note 30, at 21-22.

129. *Id.* at 22.

130. *See supra* Part II-D.

131. *See supra* Part II-B.

adhere to the Quran and Sunna, consistency of application is evidently not contemplated in Islamic jurisprudence.

The different schools of Islamic jurisprudence acknowledge analogy in varying degrees; some schools find analogy to be highly suspect.[132] This is an indicator that analogy, which tends toward adherence to precedent and uniformity, is not nearly as prevalent or respected in Islamic jurisprudence as it is under the common law jurisprudence. "The 'human component' [of *qiyas* (analogy), *igma* (consensus), and *ijtihad* (independent and informed opinion)] is where much of the varying interpretation and disagreement arises amongst Islamic scholars, and what has caused Shari'a law to vary widely among Islamic communities."[133]

Islamic jurisprudence does not recognize a process for appeal of decisions made by Imams or Islamic tribunals. In sum, "there is no supervisory authority in Islamic law."[134] Without oversight by a court with higher authority, imams or tribunals are not bound to decide cases with similar facts in a similar way. The consistency that derives from a system with appellate review is missing in Islamic jurisprudence.

Some of the procedural rules in the application of Islamic law are not clear. For example, one scholar reports that there is "little clarity and even less uniformity in the 'Islamic' rules of criminal procedure that modern states refer to and apply . . . ."[135] Furthermore, the scholar asserts that "criminal due process from an Islamic perspective" must be "identified and articulated."[136] Without clarity, consistency is not possible.

C. Variance Among Communities in Interpretations of Islamic Law

In practice, interpretations of the principles of Islamic law can vary widely from country to country and from community to community. These differences can be hidden behind the privacy of proceedings in arbitration tribunals. Accordingly, Islamic arbitration tribunals that operate in the United States can produce decisions that differ not only from United States law, but also from the law applied by other Islamic arbitration tribunals. This variance within Islamic jurisprudence could present a virtually insurmountable problem to an American court when a party asks the court to enforce or overrule an Islamic arbitration decision, as is explained below:

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132. *See supra* Part -A.

133. Reiss, *supra* note 31, at 743.

134. Rafeeq, *supra* note 32, at 139.

135. Reza, *supra* note 37, at 4.

136. *Id.*

> Even within Muslim communities in Western nations, the differences between interpretations of Islamic law can be quite vast. Because each community is comprised of diverse groups of people from many different countries and backgrounds, *opinions on each given point of law can vary widely. Individuals can choose between "a healthy diversity of ideological perspectives" when seeking the guidance of imams or other community leaders on family law questions. As a result, private arbitration of similar issues can end up with vastly different results.* Western courts, on the other hand, strive for a certain amount of predictability in the law as it is easier and more efficient to enforce a law that is static than one that can change at a moment's notice. This seeming dichotomy between a community diverse in belief and practice and a legal system seeking consistency in its decision-making leads to constant struggles within U.S. and Canadian courts.[137]

Such differences in interpretation tend to drive Islamic law away from uniformity and predictability. Because of these areas of disagreement, "an internal form of legal pluralism exists within Shari'a law."[138] One observation, made during a discussion about normative authority in Islamic law, is that "[u]ltimately, however, *it is for Muslims to decide*—individually and collectively, according to what they find authoritative—what the religion commands, urges, discourages, or prohibits."[139]

D. Abrogation Doctrine Within Islamic Law

Finally, abrogation, a core doctrine of Islam, guarantees a level of internal inconsistency within Islamic law. The doctrine provides that later verses of the Quran "abrogate" earlier verses where the verses are in conflict.[140] "By these means, jurists were able to solve some of the contradictions in the Quranic precepts, the later revelations abrogating the earlier."[141] For example, the Quran contains contradictory instructions as to how Muslims are to relate to people who do not accept Allah. In one verse, it advises toleration: "And have patience with what they say, and leave them

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137. Emily L. Thompson & F. Soniya Yunus, *Choice of Laws or Choice of Culture: How Western Nations Treat Islamic Marriage Contract in Domestic Courts*, 25 WIS. INT'L L.J. 361, 369-70 (2007) (emphasis added).

138. Reiss, *supra* note 31, at 743.

139. Reza, *supra* note 37, at 16 (emphasis added).

140. NASIR, *supra* note 30, at 20. The passage abrogating an earlier one is called *nasikh*. *Id.*

141. *Id.*

with noble (dignity)."[142] In a later verse, it advises violent acts against them: "I will bring about terror into the hearts of the disbelievers: So you strike above their necks and hit hard over all of their fingertips and toes."[143] The later verses of the Quran, written during the Mecca period of Muhammed's life, tend to be "more legalistic and harsh" than the earlier verses, written during the Medina period.[144]

V. COMMON LAW HERITAGE: PRINCIPLE OF EQUALITY

The common law, from its earliest development, articulated a principle of equality of individuals under the law. For example, Alfred the Great's command, c. 893, that one "Doom [(Judge)] very evenly! Do not doom one doom to the rich; another to the poor! Nor doom one doom to your friend; another to your foe!"[145] demonstrates that Alfred believed in and required equal treatment of individuals in judgment.

The Magna Carta defined and established "liberties," at least as to all "freemen,"[146] stating that "no freeman shall be taken, or imprisoned, or [dispossessed of property], or outlawed, or banished, or in any way destroyed . . . unless by the lawful judgment of his peers, or by the law of the land."[147] The use of the word "peers," although it referred to the freeman's equals in rank, provided at least the seed of equal treatment of individuals under the law. Further, the Magna Carta contained language that spoke generously of guarantees of rights to a broader group of people, stating "we will not deny to *any* man, either justice or right."[148]

The fact that the rights in the Magna Carta were not enforced on behalf of all persons in the English legal system for significant periods of time does not diminish the fact that the Magna Carta had articulated and recognized

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142. Sura 73:10 (Syed Vickar Ahamed trans., 2007)

143. Sura 8:12 (Syed Vickar Ahamed trans., 2007). Sura 8 was written during the Medina period of Muhammed's life, and is later than Sura 73, which was written during the Mecca period of Muhammed's life. The Quran is not arranged in chronological order. *See* MACEOIN, *supra* note 38, at 21-22.

144. MACEOIN, *supra* note 38, at 22.

145. ANCIENT LAWS AND INSTITUTES OF ENGLAND: COMPRISING LAWS ENACTED UNDER THE ANGL-SAXON KINGS FROM ÆTHELBIRHT TO CNUT, WITH AN ENGLISH TRANSLATION OF THE SAXON; THE LAWS CALLED EDWARD THE CONFESSOR'S; THE LAWS OF WILLIAM THE CONQUEROR, AND THOSE ASCRIBED TO HENRY THE FIRST; ALSO, MONUMENTA ECCLESIASTICA ANGLICANA, FROM THE SEVENTH TO THE TENTH CENTURY; AND THE ANCIETY LATIN VERSION OF THE ANGLO-SAXON LAWS (Benjamin Thorpe ed., 1840).

146. MAGNA CARTA, cl. 1-2 (1215).

147. MAGNA CARTA, cl. 39 (1215).

148. MAGNA CARTA, cl. 40 (1215) (emphasis added).

those rights. Once the principle of equality had been recognized, that principle could eventually become the standard for the entire society.

The spirit of equality in the Magna Carta had a profound influence on the history of American law. As one writer noted, "[t]he words of the Magna Carta have inspired democratic movements the world over and formed a basis for countless constitutions – most notably the one crafted by another group of king-defying aristocrats over a long and sweaty Philadelphia summer."[149]

A. Unalienable Rights in American Common Law: Biblical Foundation

In early American jurisprudence, a biblical understanding of human rights undergirded the common law system's commitment to equality of individuals. For example, Jesse Root, writing on "The Common Law of Connecticut," made the following statement:

> [B]y [scripture], we are taught dignity, the character, the rights and duties of man . . . . [The scripture] is the only solid basis of our civil constitutional privileges. . . . [T]he decisions of the courts of justice serve to declare and illustrate the principles of [the law of nature].[150]

Root, in referring to the scriptural basis for "the rights and duties of man," likely was aware of the account of Moses giving instruction to the judges of Israel, and summarizing his instructions with this command: "[y]ou shall not show partiality in judgment; you shall hear the small as well as the great; . . . for the judgment is God's."[151] Root may also have been aware that, in scripture, the principle of no partiality in judgment applied not only to the citizens of Israel but also to the foreigners who were in Israel, as is seen in this command to the nation of Israel: "You shall have the same law for the stranger and for one from your own country . . . ."[152]

As the new nation of the United States of America was birthed, the Declaration of Independence made clear that the equality principle articulated in the Magna Carta on behalf of "freemen" truly applied to "all men." The Declaration made a strong statement of the equality principle:

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149. Griffe Witte, *After 800 Years, Britain Finally Asks: Do We Need a Written Constitution?*, WASH. POST (June 6, 2015), https://www.washingtonpost.com/world/europe/after-800-years-britain-finally-asks-do-we-need-a-written-constitution/2015/06/07/6097b50c-e908-11e4-8581-633c536add4b_story.html?utm_term=.2d2e731350bf.

150. THE LEGAL MIND IN AMERICA 17 (P. Miller ed. 1962) (cited in GOD, MAN, AND LAW, *supra* note 2, at 100).

151. *Deuteronomy* 1:17 (New King James).

152. *Leviticus* 24:22 (New King James).

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator, with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[153] The Declaration was neither a legal decision in the sense of case law, nor a legal enactment in the sense of statutory law. However, its uncompromising mindset of commitment to individual rights was a seed bed for American law.

As with the Magna Carta, the fact that the rights in the Declaration of Independence were not enforced on behalf of all persons in the United States for significant periods of time does not diminish the fact that the Declaration had articulated and recognized those rights. It was the words of the Declaration, along with those of the Constitution, to which the leaders of the American civil rights movement looked, as they held the conscience of the United States to the fire in their quest for equal treatment under the law. Martin Luther King Jr. spoke of the commitment to equality that was made by the writers of America's founding documents: "[w]hen the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which *every* American was to fall heir."[154]

Scholars demonstrated that the concept of individual rights in the Declaration grew out of a biblical understanding of the nature of God and the nature of human beings.[155] The fact that the Declaration states that the rights of individuals are "endowed by their Creator" demonstrates that the drafters of the Declaration believed that the source of those rights was the Creator, and that the Creator valued human beings enough to "endow" human beings with "rights." Moreover, the fact that the Declaration describes these rights as "unalienable" shows that its drafters believed that these rights could not be separated from the person.

These two concepts of "endowment" and "unalienable" combine to produce an understanding of humankind that is consistent with the

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153. DECLARATION OF INDEPENDENCE para. 2.

154. Martin Luther King, "I Have a Dream" Address (Aug. 28, 1963) (emphasis added).

155. *See, e.g.*, Ellis Sandoz, *Religion and the American Founding*, 20 REGENT U. L. REV. 17, 22 (2008) ("Many things, to be sure, not least of all the familiar Creator-creature relationship affirmed in general language in the Declaration of Independence in 1776 and indelibly vesting each human being with inalienable attributes among which were said to be rights to "Life, Liberty, and the Pursuit of Happiness."); Jeffrey C. Tuomala, *Marbury v. Madison and the Foundation of Law*, 4 LIBERTY U. L. REV. 297, 297-98 (2010) ("The Declaration of Independence explains the origin and relationship of the right and will of the people to declare their existence as an independent nation-state and to establish a form of government they believe is best designed to secure their God-given rights."); *see* GOD, MAN, AND LAW, *supra* note 2, at 99-135.

description in Genesis 1 of human beings made in the "image" of God and entrusted with the task of taking "dominion" over the earth.[156] This understanding of human nature is the source of legal equality in American law: "America was founded on 'unalienable rights'—those rights that a man may not unconditionally sell, trade, barter, or transfer without denying the image of God in himself."[157] It follows that "to deny these rights in a man is to deny that he is a human being."[158]

The biblical understanding of the nature of human beings is that *every* human being bears the image of God. "Men share that image [of God] and [God-given] authority [over the earth] in common."[159] Thus, all men are created equal. And it follows that "no man is higher or better than any other man. No man is lord over any other man."[160] Thus, the biblical view of human beings undergirds the principle of equal rights articulated in the Declaration of Independence.

Daniel Webster—a United States congressman, senator, and secretary of state—spoke of the connection between biblical thinking and the understanding of equality of individuals in civil society: "it is not to be doubted, that to free and universal reading of the Bible, [at the time of the founding of the United States] men were much indebted for right views of civil liberty. . . . The Bible is . . . a book, which teaches man his own individual responsibility, his own dignity, and his equality with his fellow man."[161]

The mindset of commitment to individual rights found in the Declaration was ingrained into the American Constitution. The requirement for separation of governmental powers in Articles I, II, and III created a structure that would prevent governmental encroachment on individual rights.[162] James Madison explained that the "separate and distinct exercise of the different powers of government" is "to a certain extent . . . admitted on all hands to be essential to the preservation of liberty . . . ."[163] The amendments to the Constitution delineated specific individual rights that were to be accorded to all "persons" under the law. For example, the

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156. *Genesis* 1:26 (New King James).

157. GARY AMOS, DEFENDING THE DECLARATION: HOW THE BIBLE AND CHRISTIANITY INFLUENCED THE WRITING OF THE DECLARATION OF INDEPENDENCE 104 (1989).

158. *Id.*

159. *Id.* at 107.

160. *Id.*

161. Daniel Webster, Bunker Hill Address (1843).

162. THE FEDERALIST NO. 51 (James Madison).

163. *Id.*

language of the 5th Amendment guarantees that "no person shall be deprived of life, liberty, or property without due process of law;"[164] and the language of the 14th Amendment makes this guarantee applicable to the states: "nor shall any State deprive any person of life, liberty, or property, without due process of law."[165]

B. No Special Privileges under Common Law of United States

In the early development of the legal system of the United States, there was a profound distrust of any aspect of the English common law which accorded rights to some, but denied the same rights to others. "The major vices of the English common law were the concessions that it had made to the privileged classes, such as the royalty and the feudal lords."[166] To make the principle of equality a reality, the American legal system could not allow special privileges to classes of people. Jesse Root "found such special privileges inapplicable in America. . . . [H]e had faith that the common law could be cleansed of [the partiality given to privileged classes] by America's commitment to *its* Magna Carta, the Holy Scriptures."[167]

Root may have had in mind the biblical account of Jehoshaphat's instructions to the judges of the land of Judah: "Take heed to what you are doing, for you do not judge for man but for the Lord, who is with you in the judgment. Now therefore, let the fear of the Lord be upon you: take care and do it, for there is no iniquity with the Lord our God, *no partiality*, nor taking of bribes."[168]

One of the prominent features of American constitutional law was the enactment of clauses forbidding titles of nobility and special privileges.[169] The United States Constitution provides: "no title of nobility shall be granted by the United States."[170] A number of early state constitutions contained similar provisions.[171] The prohibition of such special privileges

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164. U.S. CONST. amend. V.

165. U.S. CONST. amend. XIV.

166. GOD, MAN, AND LAW, *supra* note 2, at 99.

167. *Id.* (emphasis added).

168. *II Chronicles* 19:6-7 (New King James) (emphasis added).

169. U.S. CONST. art. I, §§ 9, 10.

170. U.S. CONST. art. I, §§ 9.

171. GOD, MAN, AND LAW, *supra* note 2, at 104 (describing constitutions of Maryland, Virginia, and Delaware, as examples). Other states, the District of Columbia, and Puerto Rico have prohibited titles of nobility either in their Constitutions or by Statute. *See* ALA. CONST. art. I, § 29; ALASKA CONST. art. I, § 15; DEL. CONST. art. 1, § 19; HAW. CONST. art. 1, § 21; IND. CONST. art. I, § 35; KAN. CONST. B. of R. § 19; KY. CONST. § 23; MASS. CONST. Pt. 1,

has been an essential part of the principle of equality in the American common law system.[172] "The antithesis of equality, or commonality, among the people of *any* nation is the recognition of an elite class of citizens."[173]

The principles of uniformity and equality are intertwined and interdependent in the American legal system. There must be equality of treatment under the law in order for the law to be uniform. And there must be uniformity of rules of law so that there are no privileged classes of people.

VI. ISLAMIC LAW EXAMINED UNDER PRINCIPLE OF EQUALITY

Certain inequalities of individuals are built in to the Islamic system of law. The abhorrence of privileged classes, which was ingrained into the American constitution, is missing in Islamic law. Islamic law historically divided people into classes—Muslims and non-Muslims—and treated the classes differently. It also has traditionally treated men and women differently under the law.

A. Privileged Classes Under Islamic Law

In societies ruled by Islamic law, non-Muslims have been treated as "second-class citizens with few rights."[174] When Muslims conquered a society, they accorded the status of *dhimmi* to non-Muslims who were not killed in the conquest and who did not convert to Islam.[175] *Dhimmi* is defined as a "non-Muslim under protection of Muslim law."[176] The ruling Muslims required adult male dhimmis to pay a tax on their income and

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art. VI; ME. CONST. art. I, § 23; MD. CONST. DECL OF RIGHTS, art. XLII; MO. CONST. art. I, § 13; MONT. CONST. art. II, § 31; OHIO CONST. art. I, § 17; OR. CONST. art. I, § 29; PA. CONST. art. I, § 24; S.C. CONST. art. I, § 4; P.R. CONST. art. II, § 14; D.C. CODE § 1-203.02.

172. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring); Downes v. Bidwell, 182 U.S. 244, 277 (1901); White v. Hart, 80 U.S. 646, 652 (1871); Briscoe v. Bank of Commonwealth of Kentucky, 36 U.S. 257, 350 (1837) (recognizing that titles of nobility "were opposed to the whole spirit of the people, and the constitution . . . annulled all power, state and federal, to do these things; and the prohibition is, in its nature and object, absolute and illimitable."); Ogden v. Saunders, 25 U.S. 213, 334-35 (1827).

173. TITUS & THOMPSON, *supra* note 15, at 22 (emphasis added).

174. ENCOUNTERING THE WORLD OF ISLAM 51 (Keith E. Swartley ed., 2d ed. 2014).

175. *Id.* at 51, 59.

176. "Dhimmi," in THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD, http://www.oxfordislamicstudies.com/article/opr/t236/e0550 (last visited Dec. 1, 2016).

sometimes on their land.[177] Dhimmis often were restricted as to their dress, occupation, and residence.[178]

Christians who were allowed to keep their religious identity were severely restricted in their expression of that identity. For example, in the 7th century Pact of Umar, the Syrian Christians who had been conquered agreed to the following restrictions as their terms of peace with the Caliph Umar:

> We shall not build, in our cities or in their neighborhood, new monasteries, Churches, convents, or monks' cells, nor shall we repair, by day or by night, such of them as fall in ruins or are situated in the quarters of the Muslims . . . . We shall not manifest our religion publicly nor convert anyone to it. We shall not prevent any of our kin from entering Islam if they wish it . . . . We shall not display our crosses or our books in the roads or markets of the Muslims. We shall use only clappers in our churches very softly . . . .[179]

In the same "pact," the Syrian Christians agreed not to ride horses or to bear arms: "We shall not mount on saddles, nor shall we gird swords nor bear any kind of arms nor carry them on our persons."[180] Also, in that pact, the Christians agreed, "We shall show respect toward the Muslims, and we shall rise from our seats when they wish to sit."[181] Thus, in a Muslim society, Muslims were a privileged class and non-Muslims were an underclass.[182]

B. Inequality Between Men and Women in Islamic Law

Under *sharia*, women do not have the same rights as men, particularly in matters pertaining to marriage and family. For example, *sharia* law permits a man to have more than one wife.[183] It does not permit a woman to have more than one husband. In contemporary *fatawa* addressing the question

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177. *Id.*

178. *Id.*

179. Paul Halsall, *Medieval Sourcebook: Pact of Umar, 7th Century? The Status of Non-Muslims Under Muslim Rule*, FORDHAM UNIV. (1996), http://sourcebooks.fordham.edu/halsall/source/pact-umar.asp.

180. *Id.*

181. *Id.*

182. The class system based on dhimmitude eventually "declined in importance" as a result of "formation of nation-states and Western or quasi-Western legal codes." "Dhimmi," *supra* note 176.

183. Sura 4:3 (Syed Vickar Ahamed trans., 2007). *See also* WAEL B. HALLAQ, SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS 277 (2009).

whether such polygamy is legal, some Muslim religious authorities answer that the law of the land does not permit polygamy, but assert that it is lawful under Islam, while other Muslim religious authorities simply assert that polygamy is lawful under Islam.[184]

Within the marriage relationship, *sharia* law sanctions the striking of a married woman by her husband, and, in fact, prescribes such conduct. The Quran instructs husbands as follows:

> Men are the protectors and maintainers of women because Allah has given one more strength than the other and because they support them from their means. Therefore, righteous women are devoutly obedient, and guard in [the husband's] absence what Allah would have them guard. As to those [wives] on whose part you fear arrogance - [first] caution them; [then if they persist], refuse to share their beds; and [finally], beat them.[185]

Nothing in the Quran prescribes such conduct toward men. This difference in status is far from a position of equality under the law.

Furthermore, under *sharia,* women have decidedly weaker rights than do men in regard to divorce. The Quran gives married men a right to divorce their wives.[186] Nothing in the Quran gives married women the same right. In the Islamic law on divorce, in keeping with the Quran's provision, the husband has a unilateral right to obtain a divorce.[187] A man may divorce his wife by a process known as *talaq*, in which the man may simply state three times, either three times in a row or three times over a specified period, that he is divorcing his wife.[188] A woman, in order to obtain a divorce, ordinarily must go through a much more involved process known as *tafriq*, in which she must petition a judge and show grounds for divorce.[189] A wife generally may exercise *talaq* only if her husband has delegated to her the right to do so in their marriage contract.[190]

Sharia law also contains built-in inequality as to the inheritance rights of women. The Quran provides that female children are to inherit only half as much as male children: "Allah commands you regarding (the inheritance

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184. *See, e.g.*, MACEOIN, *supra* note 38, at 84, 102, 111.

185. Sura 4:34 (Syed Vickar Ahamed trans., 2007).

186. Sura 65:1 (Syed Vickar Ahamed trans., 2007).

187. HALLAQ, *supra* note 183, at 280.

188. *Id.*

189. *Id.*

190. *Id.* at 282-83. *See also* David J. Western, *Islamic "Purse Strings": The Key to the Amelioration of Women's Legal Rights in the Middle East*, 61 A.F. L. REV. 79, 121 (2008).

for) your children. To the male, a portion equal to that of two females . . . ."[191] Under Islamic law, a widow's rights to a monetary share of a deceased husband's estate are insubstantial. The set of rules is draconian and complex:

> Islamic law gives widows a slim fraction of the entire estate. Because the Qur'an limits any person from devising more than one-third of his estate, the intestacy distribution scheme affects every estate under Islamic law. Just as critical, Sunni law, which governs ninety percent of the world's Muslims, forbids any named heir, including wives, from taking under a will, leaving only intestate distribution for wives. The Qur'an provides that the wife may never inherit more than one-fourth of the estate. Her small share is slashed in half to one-eighth of the estate if her deceased husband leaves any children, whether in common with the surviving spouse or not. In the event of multiple wives, the wife's share is split evenly among the wives, instead of each receiving her own share as a wife.[192]

In Islamic law, the rules concerning witness testimony discriminate between men and women. For example, a woman's testimony is worth half that of a man's, according to the following instructions from the Quran: "And get two witnesses out of your own men, and if two men are not there then a man and two women . . . so that if one makes a mistake, the other can remind her."[193] Apparently, a man is presumed to be a competent witness, whereas a woman is not.

The British experience with Islamic law has exposed some of the inequalities between men and women which are inherent in the Islamic legal system. This exposure has produced commentary arguing that Islamic law, as to the status of women, cannot be incorporated into British law without denying fundamental rights. For example:

> Since Islamic law—regardless of what its apologists argue—discriminates against women in and out of the married state, it

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191. Sura 4:11 (Syed Vickar Ahamed trans., 2007).

192. Robin Fretwell Wilson, *Privatizing Family Law in the Name of Religion*, 18 WM. & MARY BILL. RTS. J. 925, 942-43 (2010). Wilson contrasts with Islamic law the current law of the United Kingdom and the United States, which provide "significant, concrete protection" for surviving spouses of either sex. *Id.* at 942. Wilson then describes several hypothetical situations showing graphic contrasts between what a widow would inherit under British law and what she would inherit under Islamic law. *Id.* at 943-46.

193. Sura 2:282 (Syed Vickar Ahamed trans., 2007).

> can *never* be in conformity with British legislation. If Muslim women here are British citizens, then they are entitled to exactly the same freedoms and protections as other British women.[194]

This commentary concludes: "There is no reason why religion should trump citizenship in the legal area."[195]

C. Absence of Unalienable Rights Theory in Islamic Law

The concept of humans made in the image of God, which has been seen as the fundamental basis for the recognition of the equality of individuals under the common law system, is not fundamental to Islamic law. The dominant theology of Islam holds to the doctrine that there is a "total and absolute *difference* between the Creator and the creature from any and every point of view."[196] Although one verse of the Quran says that Allah "breathed into" Adam a soul,[197] that concept has not carried over into the Islamic law. Writers who are sympathetic with the Sufi approach of Islam emphasize that a tradition of Muhammed indicates that Allah "created Adam upon His own form."[198] However, the Sufi approach has not developed a school of legal jurisprudence; it likely has not influenced the rules of Islamic law in a significant way.

Coupled with the view of human beings as totally different from their creator is the view that human beings are the slaves of their Creator. Throughout the Quran, Allah refers to various human beings as "my slave."[199]

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194. MACEOIN, *supra* note 38, at 52 (emphasis added).

195. *Id.* at 50.

196. W.H.T. GAIRDNER, THE REBUKE OF ISLAM 116 (1919) (emphasis added).

197. Sura 15:29 (Syed Vickar Ahamed trans., 2007).

198. *See, e.g.*, NASR, *supra* note 39, at 4 (reference to the tradition), 114-140 (argument for a "spiritual way" employing the Sufi approach). Sufism is a mystical, rather than legalistic, approach to Islam; its adherents were influenced by Christian monasticism in the Middle East; Sufis seek to relate to God and receive revelation directly from him. *See* ENCOUNTERING THE WORLD OF ISLAM, *supra* note 174, at 233-235.

199. *See, e.g.*, Sura 37:132 (Syed Vickar Ahamed trans., 2007); Sura 39:16-17 (Syed Vickar Ahamed trans., 2007); Sura 42:47 (Syed Vickar Ahamed trans., 2007); Sura 50:11 (Syed Vickar Ahamed trans., 2007); Sura 66:10 (Syed Vickar Ahamed trans., 2007); Sura 71:27 (Syed Vickar Ahamed trans., 2007); Sura 89:29 (Syed Vickar Ahamed trans., 2007); Sura 97:5 (Syed Vickar Ahamed trans., 2007). There are hundreds of examples. The verses referenced, and many others in the Quran, use the Arabic word "Ibad" or "Ibadi" to describe human beings. This Arabic word derives from a root word, "*ayn ba dal*," sometimes referred to as "A-B-D," which means "a slave." Some English translations, including the Ahamed translation used herein, render the word "servant." Other English translations, including the

The understanding of the relationship between the creator and human beings—as totally different types of beings and as having the relationship of master to slave—lacks an assumption of the inherent value in each human being. Without an assumption as to the value of each human being, there can be no doctrine of unalienable rights. Without a doctrine of unalienable rights, there is no imprimatur for equal treatment of individuals in the Islamic legal system. The government thus is unrestricted in its ability to create different classes of people; it may deny rights to some classes which it affords to other classes, without limitation.

VII. CONCLUSIONS: EFFECTS OF INTRODUCING ISLAMIC LAW INTO AMERICAN COURTS

Both the common law system and the system of Islamic law have strong and significant religious roots. The common law system is characterized by written, binding precedent, which produces a large measure of consistency and predictability. In contrast, the system of Islamic law is characterized by the absence of binding precedent and, therefore, cannot afford consistency and predictability to those under its system. The common law system has been guided by a principle of equality in the sense that it avoids the creation of privileged classes and strives for equal treatment under the law. In contrast, the system of Islamic law has allowed for, and encouraged the creation of, privileged classes, and it defines the rights of those classes in blatantly unequal terms.

Islamic law may enter into the American court system through a number of avenues. Those avenues include: rules of comity recognizing foreign judgments;[200] choice of law rules recognizing foreign law;[201] the application of neutral principles of law;[202] the assertion of a so-called "cultural

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widely-used Pickthall translation, render the word "slave." Based on the root meaning of the word, the rendering of "slave" is more accurate. *See* LANGUAGE RESEARCH GROUP OF UNIVERSITY OF LEEDS, *The Quranic Arabic Corpus*, corpus.quran.com/wordbyword (last visited Feb. 10, 2017) (containing a word-by-word linguistic study of the Quran).

200. *See, e.g.*, Aleem v. Aleem, 947 A.2d 489, 501 (2008) (denying comity to a Pakistani *talaq* divorce); Hosain v. Malik, 671 A.2d 988 (1996) (granting comity to a Pakistani child custody decision where "welfare of child" standard incorporated Islamic rules of family law); Chaudry v. Chaudry, 159 N.J. Super. 566, 571-72 (1978) (granting comity to a Pakistani divorce).

201. *See, e.g.*, Ghassemi v. Ghassemi, 998 So. 2d 731 (La. App. 2008) (recognizing Iranian marriage between first cousins—with no mention of religious affiliation—where Louisiana choice of law rule required recognizing a marriage that was valid where celebrated).

202. *See, e.g.*, Akileh v. Elchahal, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996) (upholding an Islamic ante-nuptial agreement, called a *sadaq*, for husband to pay wife a sum in the event

defense;"[203] decisions of private arbitration tribunals;[204] and free exercise and establishment clause claims.[205] In each of these avenues, there is the potential for United States courts to give way to rules or principles which are contrary to the common law tradition. As the judges of the United States consider claims in which parties seek to have Islamic law applied, they should be aware that stark incongruities will arise, and, in some instances, fundamental rights will be denied, if courts attempt to integrate aspects of the Islamic system of law into the common law system of the United States.

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of divorce, based on court's authority to require a party to fulfill the secular obligations of a religious ante-nuptial agreement).

203. *See, e.g.*, State v. Al-Hussaini, 579 N.W.2d 561, 563 (1998) (denying request for probation in lieu of incarceration to defendant convicted of statutory rape after marrying 13-year-old girl).

204. *See, e.g.*, Jabri v. Qaddura, 108 S.W.3d 404, 410 (Tex. App. 2003) (staying proceedings in state court and sending case to Islamic arbitration tribunal to be decided under Islamic rules of law where arbitration agreement met statutory requirements).

205. *See, e.g.*, Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012) (upholding free exercise challenge to Oklahoma statute which disallowed application of *sharia* law in state courts, where plaintiff claimed the statute would prevent the probate of his will, which apparently referenced sharia law without naming specific beneficiaries).