

UC Berkeley

Berkeley Journal of Middle Eastern & Islamic Law

Title

Persuasion and Authority in Islamic Law

Permalink

<https://escholarship.org/uc/item/8jp7b4z0>

Journal

Berkeley Journal of Middle Eastern & Islamic Law, 3(1)

Author

Tomeh, Mamoud Munes

Publication Date

2010-04-01

DOI

10.15779/Z38K019

Peer reviewed

Persuasion and Authority in Islamic Law

Mahmoud Munes Tomeh*

“Whatever is considered good by the Muslims is good in the eyes of God”¹ —The Prophet Muhammad

INTRODUCTION

Conventional wisdom holds that Islamic law derives its authority from divine sources:² the Qur’an and the Prophetic *praxis*, or Sunnah. But are the Qur’an and the Sunnah really the only sources of authority in Islamic law?

Qur’an 2:283, for example, states, “If you are on a journey and cannot find a scribe [to record a debt], then let pledges be taken.”³

* Associate, Knobbe, Martens, Olson & Bear LLP. B.A., University of California, Berkeley (1995); M.S., Arizona State University (1997); J.D., University of California, Berkeley, School of Law (2007). I would like to express my gratitude and appreciation to the editors of JMEIL for their helpful feedback.

1. Miriam Hoexter, *Qadi, Mufti and Ruler: Their Roles in the Development of Islamic Law*, in *LAW, CUSTOM, AND STATUTE IN THE MUSLIM WORLD* 67, 71 (Ron Shaham ed., 2007) (noting use of this hadith by the jurists al-Sarakhsi and al-Haskafi in justifying reliance on custom).

2. According to Islamic teaching, the Qur’an is the word of God and is divine in nature. See MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 16 (3d ed. 2003); see also MAHMOUD M. AYOUB, *THE QUR’AN AND ITS INTERPRETERS* 1 (1984). In contrast, the Sunnah, or practice of Prophet Muhammad, is considered divine insofar as it is inspired by God, although not in the same sense that the Qur’an is divine. See QUR’AN 53:2-5 (Thomas F. Cleary trans., 2004) (“[Y]our companion has not erred and has not gone astray; nor does he speak from desire. It is just an inspiration with which he is inspired: one strong in power taught him[.]”). Kamali defines the Sunnah as “all that is narrated from the Prophet, his acts, his sayings and whatever he has tacitly approved, plus all the reports which describe his physical attributes and character.” KAMALI, *supra* note 2, at 58. Although Sunnah and hadith are similar in meaning, hadith is specifically a narration, while Sunnah is the law that is deduced from it. *Id.* at 61.

3. See QUR’AN, *supra* note 2, at 2:283. The last clause of the verse (*fa rihanun*

Apparently, this verse is concerned with the evidentiary problem posed by a commercial contract undertaken in circumstances in which it would be difficult to later prove that a debt existed. In an ancient world, this was likely to occur far away from a major city or town, where no scribe was available to produce a formal, notarized contract. If the creditor can have in her possession property (collateral) that identifiably belongs to the debtor, such possession could serve as evidence to bolster the existence of the debt. She might be able to say in court, “Don’t you remember, I sold you X bushels of wheat for Y dirhams, and as you did not have the money with you at the time, you gave me your ring. *See, here it is!*” While this form of evidence tells us nothing of the terms of the alleged contract, it does provide (a) circumstantial evidence that a contract in fact did exist, and (b) property upon which a creditor could rely in fulfilling the debtor’s obligation in the event of default.

While this verse contemplates an evidentiary concern, numerous rulings have been derived from it—rulings that extend beyond the verse’s specific teachings. For example, in the Maliki school, the “pledge contract” takes on a life of its own, becoming a valid contract in its own right and distinct from the contract for which it is intended to serve as only an evidentiary purpose.⁴ Although the pledge contract is valid regardless of actual possession, it becomes void if the creditor does not take possession prior to the death, mortal illness, or bankruptcy of the debtor.⁵ Moreover, in the bankruptcy context, if a creditor fails to take possession of the collateral before the bankruptcy of the debtor, her only recourse is a claim based on the original debt, and all of the debtor’s creditors will have an equal claim over the collateral.⁶ On the other hand, if she had taken possession prior to the bankruptcy of the debtor, her claim over the collateral takes priority over the claims of other creditors.⁷

Questions of validity and priority of claims do not appear directly within the contemplation of the above-quoted verse, which is concerned with establishing an evidentiary basis for debt when a document cannot easily be written to record it. From where did the rest of these rulings

maqbudah) literally means, “then held collaterals,” i.e., then take hold of a physical object that may serve as collateral. *Id.*

4. Mohammad Fadel, “*Istihsan is Nine-tenths of the Law*”: *The Puzzling Relationship of Usul to Furu’ in the Maliki Madhhab*, in *STUDIES IN ISLAMIC LEGAL THEORY* 161, 166 (Bernard G. Weiss ed., 2002).

5. *Id.*

6. *Id.* at 166-67.

7. *Id.*

come? Certainly, Islamic law entails more than a delineation of the direct legal consequences of divine text. Indeed, Imam Malik reportedly said, “*istihsan* [juristic preference] is nine-tenths of the law.”⁸

The important point is that although most Islamic law retains a connection to the Qur’an and Sunnah, its legitimacy—or *authority*—cannot be derived solely from there because only a small fraction (or precisely one-tenth, taking Imam Malik literally) of the holdings of Islamic law are extrapolated from these divine sources. Indeed, Islamic law explicitly recognizes this fact, as I discuss below.⁹

This essay posits that Islamic law gains its legitimacy and authority from its *persuasiveness*. Islamic law is not unique in this regard. Indeed, every system of law gains its legitimacy from the persuasive force it possesses within a community, society, or polity.¹⁰ There are, however, Islamic aspects to what it means to be persuasive, just as one can posit uniquely Western, Buddhist, or Confucian notions of persuasion.

I analyze the question of persuasion in Islamic law from an Aristotelian rhetorical perspective.¹¹ Accordingly, for the purposes of

8. *Id.* at 176. As translated by Fadel, the quote is “*Istihsan* is nine-tenths of [legal] knowledge” (*al-istihsanu tis’atu a’shari al-’ilmi*). *Id.* Although Fadel’s translation is perfectly correct, it is overly literal because the Arabic word for knowledge (*’ilm*) can refer to knowledge in general, or, in this context, sacred knowledge and specifically Islamic law. I prefer to translate knowledge as “the law,” given that Malik was commenting on a doctrine of Islamic law (*istihsan*). *Istihsan* is variously translated as juristic preference, equity, a discretionary opinion in breach of strict analogy, or seeking the most equitable solution. KAMALI, *supra* note 2, at 2; JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 299 (1964); NOEL J. COULSON, CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE 7 (1969); Umar Faruq Abd-Allah, Malik’s Concept of ‘Amal in the Light of Maliki Legal Theory 21-22 (June 27, 1978) (unpublished Ph.D. dissertation, University of Chicago) (on file with author). It is especially difficult to find an equivalent translation for *istihsan* because the four Sunni legal schools have varied their use of the term and often apply it as a catch-all for multiple and distinct legal principles. For a comparison of *istihsan* in the Maliki and Hanafi schools, see *id.* at 245-61.

9. For all of the dogmatism often associated with Islamic law, it is a legal system profoundly aware of its own tenuous relationship with its foundational legal texts. See *infra* pp. 163-64 for a discussion of *qat’i* and *zhanni* textual implications (*dalalat*).

10. For a general discussion of law as rhetoric, see James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985). White does not approach rhetoric as persuasion, but rather as an art by which community and culture is preserved. See *id.* I focus on rhetoric as persuasion precisely because it involves authority. Nevertheless, rhetoric as it relates to the creation and transformation of culture is relevant to authority.

11. A natural extension of this Article is to explore how Islamic thinkers discuss persuasion. For an overview of Islamic rhetoric, see Phillip Halldén, *What is Arab*

this Article, I analyze persuasion in Islamic law from the perspective of *ethos*, *pathos*, and *logos*.¹² Jurists formulating, stating, codifying, or asserting Islamic law must have an ethical appeal. That is, they, as individuals or as a collective body, must be seen in the relevant community as an acceptable authority (*ethos*).¹³ The assertion must stir the passions or awake the emotions of the audience (*pathos*).¹⁴ Adapting the idea of *pathos* to the present context, an assertion regarding Islamic law must speak to the concerns of its audience to be persuasive. In this context, the audience is the Muslim community at large, or at least a significant segment of it. Finally, an assertion must be demonstrated by logical argument to be persuasive (*logos*).¹⁵ A logical argument means the ruling itself must have some basis in the larger body of the Islamic legal tradition and at least reasonably engage with the sources of Islamic law, both textual and otherwise.

It is not my intention to outline a checklist of what makes an assertion legitimate or authoritative within Islamic legal discourse. Indeed, Aristotle envisioned *ethos*, *pathos*, and *logos* as modes or means of persuasion. Rather, I intend to explore aspects of persuasiveness in Islamic law—and therefore authority and legitimacy—through the lens of Aristotle’s *ethos*, *pathos*, and *logos* paradigm.

I. ETHOS

[I]t is often not at all the actual substance of an interpretation that gains it acceptance but rather something additional that comes to it from without.¹⁶

—Sherman Jackson

Ethos in Islamic law can be thought of as two conflicting modes or expressions: the charismatic and the institutional.¹⁷ By charismatic, I

Islamic Rhetoric? Rethinking the History of Muslim Oratory Art and Homiletics, 37 INT’L J. MIDDLE E. STUD. 19 (2005).

12. ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE x (George Alexander Kennedy trans., 2007).

13. *See id.* at 15 (defining *ethos* as “the projection of the character of the speaker as trustworthy”).

14. *Id.* (defining *pathos* as “consideration of the emotions of people in the audience”).

15. *Id.* (defining *logos* as “inductive and deductive logical argument”).

16. SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI xxv (Ruud Peters & Bernard Weiss eds., 1996).

17. One obvious conflict concerns *ijtihad* and *taqlid*. Briefly, *taqlid* refers to the

mean an authority resulting from the knowledge, reputation, or character of a single person. In contrast, the institutional refers to an authority that emerges from some body greater than just one individual. This institution need not be a formal one, but it must be the result of collective effort. While I posit them as different here, I also discuss how they relate to each other, as institutional authority often receives some measure of authority from the charismatic authority of a single person or collection of persons.

A. Charismatic Authority

Islamic law has been described as a “jurists’ law.”¹⁸ Although this quaint trope might oversimplify things, it certainly speaks to the notion that Islamic law developed not as a body of law emanating from a political authority, but rather as a body of law emanating from charismatics who held some form of moral authority—who possessed *ethos*—within the Muslim community.

Charismatic authority in Islam, as in any scientific field, requires possession of some level of qualification in terms of knowledge,

acceptance of the authority of qualified scholarship, whereas *ijtihad* concerns the issuing of an expert legal opinion. NUH HA MIM KELLER, *RELIANCE OF THE TRAVELLER: A CLASSIC MANUAL OF ISLAMIC SACRED LAW* 16 (1999) [hereinafter KELLER, *RELIANCE*]. The idea behind *taqlid* is that one who is not capable of issuing an expert legal opinion must follow (*yuqalidu*) one who is. *Id.* Alternatively, Schacht defines *ijtihad* as the “use of individual reasoning” and *taqlid* as “reliance on the teaching of a master” or “adopt[ion of] the doctrine of a school of law for a particular transaction.” SCHACHT, *supra* note 8, at 299, 303.

I do not intend to revisit the controversy over the fabled “closing of the gates of *ijtihad*.” For a discussion of this topic, see generally Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT’L. J. MIDDLE E. STUD. 3 (1984). Rather, I simply note that charismatic authority relates to *ijtihad*, whereas institutional authority relates to *taqlid*. For example, the schools of Islamic law concern *taqlid* in the sense that the authoritative positions of a school are seen as authoritative and hence to be followed. Historically, institutions rarely performed *ijtihad*; it has commonly been called a “jurists’ law” for this very reason. See COULSON, *supra* note 8, at 3. However, this has begun to change with the emergence of *fiqh* councils, which are assemblies of Muslim jurists that give advisory opinions on various matters. See, e.g., The International Fiqh Academy, Main Page, <http://www.fiqhacademy.org.sa> (last visited April 20, 2010).

18. See COULSON, *supra* note 8, at 3.

education, and experience.¹⁹ Jurists earned the respect of society because of the confidence in their expertise, which resulted from years of professional training.²⁰ The nature of the training varied and evolved over time. In earlier times, it entailed keeping the company of a recognized master for a significant period of time. For example, we know that Malik—eponym of the Maliki legal school—was initially tutored by the well-known scholar Ibn Hurmuz as a youth on an informal basis.²¹ Malik undertook his formal education under the tutelage of prominent Successors to the Companions of Prophet Muhammad, including al-Zuhri, Rabi‘a, and Yahya ibn Sa‘id.²² Indeed, these illustrious Successors were among the “Seven Jurists” (*al-fuqaha’ al-sab‘a*), a counsel of older Successors in Medina that dealt with legal questions.²³ This semi-formal counsel included sons and grandsons of prominent Companions of the Prophet.²⁴ There can be little doubt that this intellectual lineage contributed considerably to Malik’s own prominence and to the authority of his legal opinions. His intellectual connection to Prophet Muhammad is unquestionably close, and this lends him significant *ethos* to this very day.²⁵

In later times, formal academies, colleges, and seminaries were founded, and authority was vested in those graduating from one of these institutions. These included the Sunni university al-Azhar or the Shiite theological seminaries in Qom, which are still held in esteem.²⁶ Today,

19. The term “scientific” used here refers to science in its most general sense as a systematic knowledge or practice. Muslims often refer to Islamic knowledge as “sciences,” perhaps evoking the Latin word *scientia*, which aptly correlates with the Islamic use of the Arabic noun *‘ilm*. See KELLER, RELIANCE, *supra* note 17, at 13 (translating the Arabic phrase *‘ulum shar‘iyya* as “sacred sciences”).

20. BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW 115 (1998).

21. Abd-Allah, *supra* note 8, at 64.

22. *Id.* at 66-67.

23. *Id.*

24. *See id.* at 67-68.

25. For example, Medina, the city in which Prophet Muhammad lived and was buried, is also where Imam Malik lived and taught. This connection bolstered Malik’s *ethos*. See QADI ‘AYAD, FOUNDATIONS OF ISLAM I (1982).

26. *See* THE ROYAL ISLAMIC STRATEGIC STUDIES CENTRE, THE 500 MOST INFLUENTIAL MUSLIMS 36 (2009), [http://www.rissc.jo/docs/IN-WithCovers\(lowres\).pdf](http://www.rissc.jo/docs/IN-WithCovers(lowres).pdf) (calling al-Azhar University “the premier institution for Sunni Islamic scholarship”); Donald Malcolm Reid, *Al-Azhar*, in 1 THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD 168-171 (John L. Esposito ed., 1995). Regarding Qom’s importance, see Michael M. J. Fischer, *Qom*, in 3 THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD 381-385 (John L. Esposito ed., 1995). For a historical overview of the

even with the founding of formal colleges, the charismatic side of religious authority is not entirely absent. It is clear that the prestige of a college is entwined with the prestige of its faculty. Many in American academic circles are aware of the intense competition among universities to secure acclaimed faculty. The Ph.D.-granting university is noted just as often in the biography of professors today as the name of the mentor or committee chair under whose tutelage the professor once studied. It is doubtless the same in Islamic academic circles.²⁷

But there is more to authority in Islam than technical knowledge. Charismatic authority can be understood through the Prophetic saying, “The ‘*ulama*’ are the inheritors of the Prophets.”²⁸ From this perspective, charismatic authority in Islamic law vests primarily in God and His Messenger. God possesses the ultimate ethical appeal, and the prophets, in particular Prophet Muhammad as the last prophet, receive their ethical appeal from God.²⁹ As inheritors of the prophets, the ‘*ulama*’ assume charismatic authority (*ethos*) derivative of that of the Prophet. The ‘*ulama*’ thus have an ethical authority traced to God Himself, through the intermediary of the Prophet.

It is not my intention to overstate the relationship between the temporal, fallible, and contingent charismatic authority of the ‘*ulama*’ and the absolute authority of God. To be sure, it is a postulate of Islamic orthodoxy that there is no prophet—and hence no revelation—after the death of Prophet Muhammad. Inheritors neither receive direct divine guidance nor do they benefit from the divine grace of infallibility.³⁰

development of Islamic educational institutions, see GEORGE MAKDISI, *THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST* (1981).

27. THE ROYAL ISLAMIC STRATEGIC STUDIES CENTRE, *supra* note 26, at 34 (noting that Grand Ayatollah Sayyid Ali Hussein Sistani studied under Grand Ayatollah Abu al-Qasim al-Khoei).

28. ABU ZAKARIYA YAHYA BIN SHARAF AN-NAWAWI, *RIYADH-US-SALEHEEN* 658 (S.M. Madni Abbasi trans., 1984). I leave the word ‘*ulama*’ untranslated to avoid the anachronism that Prophet Muhammad was referring to a specific class of scholars that arose later.

29. See NUH HA MIM KELLER: *AL-MAQASID: NAWAWI’S MANUAL OF ISLAM* 6 (2002) (describing Prophet Muhammad as “the final seal of prophethood”).

30. Muhammad’s infallibility is a standard tenet of Sunni faith. *Id.* (“[God] sent the prophets out of His generosity, protecting them from everything unbecoming of them, guarding them from both lesser sins and enormities both before their prophethood and thereafter”). Prophetic infallibility is a God-given grace, not something inherent in a person. In other words, Prophet Muhammad was not infallible due to something inherent in his ontological reality, but rather because God chose, moment by moment, to divinely protect him from error. The ‘*ulama*’, by contrast, are deficient in this regard. *See id.*

Because of these shortcomings, no potential inheritor can, from the perspective of *ethos*, assert anything with the same authority as that of the Prophet or God.

Nor do I wish to understate the relationship between the fallible charismatic authority of the '*ulama*' and the infallible authority of Prophet Muhammad, and hence, indirectly, the authority of God. From the perspective of *ethos*, being the intellectual-spiritual inheritor of an individual requires the same genuine engagement as the original individual. The endeavor of Prophet Muhammad—his Sunnah or Way—has been traditionally understood to comprise legal (*islam*), doctrinal (*iman*), and spiritual (*ihsan*) aspects.³¹ The inheritor must be recognized as engaging with, and excelling in, these three aspects. He must embody, in his life and thought, the Sunnah of Prophet Muhammad (as opposed to the Way of someone else).

Indeed, piety does just as much to bolster the authority of an opinion or *fatwa* of a jurist as superior technical knowledge in Islamic foundational texts. A concern with piety, not just knowledge, is evident in the rich tradition of Islamic hagiography, particularly in respect of the founders of the famed schools. Biographers often note, for example, that Imam Abu Hanifah would stand in prayer at night reciting the Qur'an in its entirety.³² Rarely does an account of Imam Malik fail to note his humility and the willingness with which he would answer "I do not know (*la adri*)."³³ This anecdote also reflects a self-consciousness of the tenuousness of the inheritor's claim to authority (e.g., how could a mere mortal ever speak on behalf of God?). Unless the matter was fairly clear, Imam Malik preferred to admit ignorance.

As noted by Sherman Jackson, the substance (*logos*) of an interpretation alone is insufficient, as is mere knowledge.³⁴ Ethical appeal has additional charismatic qualifications. Imam Malik states:

31. For an exposition of this tripartite division, see KELLER, *RELIANCE*, *supra* note 17, at 807-15. A tradition narrated by the traditionalist Muslim speaks of the archangel Gabriel asking Prophet Muhammad before his Companions about *islam*, *iman*, and *ihsan*. *Id.*

32. *See id.* at 1028. The argument that such accounts are stories created posthumously to bolster the status of a legal school further proves my point about *ethos*. It is not important that these stories be true; their existence proves the point.

33. *See id.* at 1069; Abd-Allah, *supra* note 8, at 90.

34. *See JACKSON*, *supra* note 16, at xxv. Viewed in context, Jackson's point probably refers to political disparities as influencing the authority or enforceability of an interpretation, not its *ethos* as I discuss it here.

This affair, that is *hadith* and the giving of *fatwas*, requires men characterized by fear of God [*taqi*], piety [*wara*], cautiousness [*siyanah*], perfectionism [*'itqan*], knowledge, and understanding [*fahm*], in order that they perceive what is coming out of their heads and what the results of it will be tomorrow. But as for those who lack this perfectionism [*'itqan*] and awareness [*ma'rifa*], no benefit can be derived from them. They are not authoritative sources of knowledge [*hujjah*], and one should not take knowledge from them.³⁵

In mentioning qualitative attributes such as piety, cautiousness, and perfectionism, Imam Malik's lack of precision should not be attributed to a lack of any standards for determining who has *ethos* in Islamic law. Indeed, he said of himself that he did not take to giving legal opinions (*fatwas*) until "seventy [jurists] testified that [he] was qualified to do so."³⁶ This suggests that a system for evaluating and determining a person's qualifications existed by the first century of Islam. Presumably, these seventy jurists considered things like the number of prophetic traditions he narrated as well as piety and moral rectitude.³⁷ In the words of Timothy Winter,

Great religious figures transform society as much by *who they are* as by what they say. And it would be idle to attribute [a great religious figure's] influence simply to the brilliance and clarity of the books that he left behind him. He was revered, it is very clear, as somebody *who lived the reality of Islam*, as somebody who was well on his way to being a saint.³⁸

B. Institutional Authority

Ijma', or consensus, is one of the jurisprudential bases of Islamic law.³⁹ Because of the role of *ijma'* as a source of Islamic law, it relates to *logos*, as I discuss below. It also relates to *ethos* in a sense distinct from the technical or jurisprudential nature of *ijma'*.⁴⁰ When a legal

35. Abd-Allah, *supra* note 8, at 75.

36. ABU NU'AYM AL-ASBAHANI, *HILYAT AL-AWLIYA' WA TABAQAT AL-ASFIYA'* [The Adornment of the Friends of God and the Biography-Layers of the Pure Ones] p. 316.

37. Imam Malik's statement did not provide any list of qualifications used by the seventy jurists. *See id.*

38. AL-GHAZALI: *THE ALCHEMIST OF HAPPINESS* (Matmedia Productions 2004), *relevant clip available at* <http://www.matmedia.org/films.html> (emphasis added).

39. KAMALI, *supra* note 2, at 228. For an argument that *ijma'* is the most fundamental authority upon which Islamic law is based, see COULSON, *supra* note 8, at 22-23.

40. Indeed, this non-technical notion of consensus is precisely what gives rise to the

proposition is reasonably supported by a group of scholars—a loose (non-technical) consensus—its authority is bolstered precisely because it is not the opinion of a single person but of many people.⁴¹ The *ethos* of many is stronger than the *ethos* of one.

In his *Fall and Rise of the Islamic State*, Noah Feldman reformulates a body of academic work related to the role of the ‘*ulama*’ in Islamic history.⁴² Feldman argues that in pre-modern Islamic civilization, the ‘*ulama*’ played a constitutional role by checking executive power, thereby reducing the risk or threat of authoritarianism and government-backed oppression.⁴³ The ‘*ulama*’, as an unincorporated body and community, possessed enough authority to deny or grant political authority to a ruler.⁴⁴

The recognition of an individual as an ‘*alim* (jurist)—a learned scholar who can speak authoritatively about religion—comes from consensus formed by the laity, other members of the ‘*ulama*’, or both. Once consensus gives a person the privilege of membership in the ‘*ulama*’ class, that person retains a level of authority by virtue of others in the ‘*ulama*’ class even when he disagrees with them. For example, Ibn Taymiyya was a pariah on certain divorce issues and remains

technical jurisprudential definition of *ijma*’ as a source of law. The rhetorical force and authority of consensus or *ijma*’ are so powerful as to make it a source of law that fills in *lacunae* in the scriptural sources. This is further strengthened by the classical definition of *ijma*’, which required that “nothing less than a universal consensus of the scholars of the Muslim community as a whole can be regarded as conclusive *ijma*’.” KAMALI, *supra* note 2, at 228. If all authorities (i.e., charismatics) held a particular legal position, even if not derived from the Qur’an or Sunnah, how could it be wrong? The only way the Qur’an and Sunnah are known is through consensus (universal in the case of the text of the Qur’an or by preponderance in the case of the Sunnah). Hence, while *ijma*’ does not directly partake of a divine origin, *ijma*’ on a particular question becomes on par epistemologically with the mechanism through which the actual words (text) of the scriptural sources are known.

41. Because the technical definition of *ijma*’ in Islamic jurisprudence is tricky, consensus for the purpose of *ethos* is a looser sense of agreement among a particular community (even if that agreement does not meet the strictures of a formal *ijma*’ from the point of view of jurisprudence.)

42. See NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* 30 (2008).

43. *Id.* at 30-33.

44. See *id.* at 30-33, 49-51.

controversial in matters of theology.⁴⁵ But he retains authority even when he challenges widely accepted legal doctrine because his opponents must admit that he earned his status as a jurist and membership into the '*ulama*' class.⁴⁶ Given that even an individual member of the '*ulama*' possesses authority, the authority of the '*ulama*' as a body is clearly stronger. The informal consensus of the '*ulama*' class is one manifestation of *ethos* in Islamic law.

There are other forms of institutional, consensus-derived authority, such as the *madhhab*, or legal school.⁴⁷ The institutional authority of the *madhhab*, however, is related in important ways to other notions of authority, such as charismatic authority. This can be gleaned from debates surrounding what constitutes the official position of the Maliki school. One way of categorizing the authority of a legal position within the *madhhab* is either as *rajih* or *mashhur*.⁴⁸ While interchangeable use of these two terms is common, many jurists employ them in subtly different ways. Most jurists agree that whenever a view is known to have been Malik's final word, it is the *rajih* position.⁴⁹ This notion of *rajih* is clearly connected to Malik's charismatic authority. However, if no final word from Malik is discernable, the meaning of the term *rajih* is unclear. According to some jurists, if a certain position has become practically established (*'amal*) in a particular locality, then that view is *rajih* for that locality but not necessarily elsewhere.⁵⁰ Such a notion of *rajih* is tied to a narrower consensus marked by geographical boundaries. When referring to an opinion not directly attributable to Malik, other jurists use *rajih* when it accords best with Malik's methodology (*usul*) or finds strong

45. JACKSON, *supra* note 16, at 76 n.24; FELDMAN *supra* note 42, at 32. Ibn Taymiyya's opponents schemed to have him jailed for much of his life, particularly for his theological beliefs, such as his literal interpretation of Qur'anic verses that refer to God's "hand" or "face," i.e., asserting that God literally has a hand. For a brief sketch, see, KELLER, RELIANCE, *supra* note 17, at 1059-60.

46. Ibn Taymiyya is particularly influential among many modern Islamist thinkers as well as followers of the so-called Wahhabi sect. See Ronald L. Nettler, *Ibn Taymiyah, Taqi al-Din Ahmad*, in 2 THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD 165-66 (John L. Esposito ed., 1995). However, he also has a wider appeal in the Muslim community and is often lauded with the title "Shaykh al-Islam," meaning "The Sheikh (i.e., authority) of Islam." See SAYYED ABUL HASAN 'ALI NADWI, SHAIKH-UL-ISLAM IBN TAIMIYAH (2005).

47. JACKSON, *supra* note 16, at 79-83.

48. *Id.* at 83.

49. *Id.* at 85.

50. *Id.*

scriptural support.⁵¹ This notion is decidedly charismatic, since it requires the juristic exertion of a particular jurist in whose estimation a particular view accords best with Malik's methodology or scripture. Given that few of these conclusions are self-evident, the persuasiveness of these conclusions necessarily rests upon charismatic authority.

The authority of a *madhhab* as a corporate body is also evident in the concept of the *mashhur*. Like *rajih*, the term *mashhur* has varied meanings depending on whether it refers to a view of Malik or whether it addresses a novel issue of law. Consequently, many jurists, but not all, hold that an opinion of Malik is *mashhur* only if it is narrated by Ibn al-Qasim.⁵² When *mashhur* describes the authority of a position not attributed to Malik, some jurists, but again not all, hold it refers to the opinion favored by the greatest number of jurists (*ma kathura qa'iluh*).⁵³ Under this view, if no answer to a legal question can be found among the *responsa (fatawa)* of Malik himself, the position held by most Maliki jurists is the *mashhur* position. This interesting majority-of-jurists rule is precisely the sort of informal consensus I suggest is the kernel of institutional authority.

II. PATHOS

Pathos is probably the least developed mode of persuasion in scholarly treatments of Islamic law. This is because Islamic law is generally conceived as deriving its authority from God as conveyed in the sacred texts of the Qur'an and Sunnah—what could mere mortals have to do with legal authority? After all, “[i]n accordance with the real nature of things it is the human that must conform to the Divine and not the Divine to the human.”⁵⁴ Nevertheless, recognizing *pathos* as a mode of authority simply acknowledges a tension that already exists in Islamic law—the tension between revelation and interpretation. Interpretation is clearly a human project. In attempting to conform to the Divine, the faithful bring to the table their beliefs, thoughts, emotions, and moral values—all of which entail *pathos*. And while the idea of conforming to the Divine suggests that preconceived notions and beliefs should be rejected, *pathos* recognizes that this is rarely realized because of the imperfections of all that is human. Hence, human perceptions and

51. *Id.*

52. *Id.* at 86.

53. *Id.* at 87.

54. SEYYED HOSSEIN NASR, IDEALS AND REALITIES OF ISLAM 96 (1993).

concerns will affect the propositions that the audience finds persuasive. But *pathos* can also be understood to entail the spiritual struggle of the individual in sincerely asking himself or herself, “What does God want from me?” This question is a profoundly personal one, and is ultimately left to the moral conscious of the individual. Hence, *pathos* can be understood to include both worldly and spiritual aspects.

For Aristotle, the emotions stirred in an audience—along with the authority created thereby—facilitate some desired outcome such as a favored legal judgment.⁵⁵ The recent development of the “Islamic” finance industry illustrates both this interplay as well as the tensions posed by *ethos* and *logos*, especially as regards the debates centered on interest-based loans. This is most clearly evident in the emotions of fear, shame, and emulation that *pathos* elicits. Before considering these emotions, however, it is useful to first discuss the Islamic legal doctrines surrounding the prohibition of interest or *riba*.

Although Islamic law prohibits *riba*, the topic generates much debate. For example, the Egyptian jurist Yusuf Qaradawi has argued that borrowers are not sinful for taking an interest-bearing loan in cases of pressing financial need.⁵⁶ A more cynical view adopted by economist Mahmoud El-Gamal holds that much of what is claimed to be “Islamic” finance essentially repackages conventional financing with an Islamic veneer and simply adds transaction costs without promoting the social justice concerns that ostensibly underlie the appeal of Islamic finance.⁵⁷ Nevertheless, the Islamic finance industry continues to grow and flourish. One answer to this puzzle, I suggest, is *pathos*.

Indeed, although no precise figures are available, the Islamic finance industry is estimated to be valued at \$1 trillion and projected to grow up

55. ARISTOTLE, *supra* note 12, at 112-14. Although *pathos* can be used by Muslim scholars and institutions to gain acceptance of their legal positions, I use *pathos* to refer to the influence that communal concerns wield in determining what is authoritative. A case in point is the tension experienced by a Muslim institutional authority such as al-Azhar, which must walk a tight rope between provoking state onslaught and discrediting itself in popular eyes through subservience to the state. Reid, *supra* note 26, at 171.

56. See YUSUF AL-QARADAWI, *THE LAWFUL AND THE PROHIBITED IN ISLAM* 267 (Kamal El-Helbawy, M. Moinuddin Siddiqui, & Syed Shukry trans.) (stating that a pressing need is something basic for life, like food, clothing, and medical treatment).

57. See, e.g., Mahmoud El-Gamal, *Contemporary Islamic Law and Finance: The Tradeoff Between Brand-Name Distinctiveness and Convergence*, 1 BERKELEY J. MIDDLE E. & ISLAMIC L. 193, 194 (2008).

to \$2.8 trillion by 2015.⁵⁸ A more humble assessment by Oliver Agha places Shari'a-compliant assets at \$500 billion in 2007, representing a 30% growth from 2006.⁵⁹ Assuming the Qur'anic term *riba* does not easily equate with interest, as El-Gamal has argued,⁶⁰ and "Islamic" financial vehicles are essentially equivalent to conventional financial transactions, why does the industry continue to grow? Why does this industry strike a chord with the Muslim community? Why does it tap into Muslim *pathos*?

In answering these questions, it is useful to understand the prohibition of *riba*, of which there are two kinds: *riba* prohibited in the Qur'an and *riba* prohibited based on numerous reports from Prophet Muhammad. The "*riba* of the Qur'an" derives its prohibition from multiple verses in the Qur'an that condemn those who practice *riba*.⁶¹ However, there is significant exegetical support that this refers to an *ex-post* practice where, upon the maturity of a debt, the creditor asks his debtor "Shall you pay me or shall you 'increase' (i.e., pay *riba*)." If the debtor is unable to pay immediately, the creditor defers the maturity date and increases the debt.⁶² This practice is related to both debts from loans as well as goods sold on credit.⁶³ In contrast, the Qur'an counsels generosity and the deferral of debts *gratis* until the debtor becomes

58. Mohammad H. Fadel, *Riba, Efficiency, and Prudential Regulation: Preliminary Thoughts*, 25 WIS. INT'L L.J. 655, 655 n.1 (2007-2008).

59. Oliver Agha, *Islamic Finance in the Gulf: A Practitioner's Perspective*, 1 BERKELEY J. MIDDLE E. & ISLAMIC L. 179, 179 (2008).

60. See El-Gamal, *supra* note 57, at 198-99.

61. For prohibitions on *riba* in the Qur'an, see QUR'AN, *supra* note 2, at 2:275-278, 3:130, 30:39. Note that Cleary's translation of 30:39 does not give the impression that it relates to interest. Indeed, it is arguable that this verse should not be interpreted as a prohibition of *riba* (as other verses sufficiently establish that), but that the word *riba* is used in its purely literal meaning—"increase" or profit. See also ABDULLAH YUSUF ALI, THE MEANING OF THE HOLY QURAN: COMPLETE TRANSLATION WITH SELECTED NOTES 339 (2002) (translating 30:39 as "That which ye lay out for increase through the property of (other) people, will have no increase with Allah. But that which ye lay out for charity, seeking the Countenance of Allah, (will increase): it is these who will get a recompense multiplied."). For the view that 30:39 suggests prohibition of *riba* because it will have no increase with God, see Fadel, *supra* note 58, at 658. In any case, it is hard to imagine the verse refers to anything other than the idea that worldly profits do not matter in the sight of God, but charity does.

62. Fadel, *supra* note 58, at 658.

63. Wahba Al Zuhayli, *The Juridical Meaning of Riba* (Iman Abdul Rahim & Abdulkader Thomas trans.), in INTEREST IN ISLAMIC ECONOMICS: UNDERSTANDING RIBA 26, 27 (Abdulkader Thomas ed., 2006).

solvent or forgiveness of the debt.⁶⁴ It seems, then, that what is so wrong with this practice is that the increase in the amount comes *after* the maturity date, which tends to put the debtor in a weaker bargaining position. Now, if a rate for the value of the credit is priced *ex-ante*, presumably both the debtor and creditor are on an equal footing, and therefore *ex-ante* agreements are presumptively permissible. Indeed, one giant of early authority in Islamic law, Ibn ‘Abbas, the cousin of Prophet Muhammad, held this view.⁶⁵

However, this position was overwhelmed by the opposing opinion adopted by an informal consensus (*ethos*) of ‘*ulama*’ from the early days of Islam. To fully understand why invites an examination of the second type of *riba*—*riba* prohibited based on Prophetic reports. This second type can be further divided into spot and credit forms of *riba*. For example, regarding spot sales, it is reported that Prophet Muhammad

prohibit[ed] the sale of gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, unless it is the same [quantity] for the same [quantity] or the thing [itself] for the thing [itself], and that whosoever gives an increase or receives an increase, has committed *riba*.⁶⁶

Spot *riba* in Islamic law is called the “*riba* of excess” (in Arabic, *riba al-fadl*).⁶⁷ The idea is that one pound of dates, *when monetized in terms of dates*, has a legally, not contractually, set price of one pound of dates. This is so even if the quality of the dates differs. Indeed, the Prophet is reported to have instructed his companion Bilal to enter into two trades in order to acquire a smaller quantity of high-quality dates in exchange for a larger quantity of low-quality dates. The Prophet instructed Bilal to sell the low-quality dates for something else and then use the proceeds to buy the higher-quality dates.⁶⁸ This is akin to a regulation requiring a bank to exchange a tattered dollar bill for a new one. A dollar bill is worth one dollar, no matter its condition, just as a pound of dates is worth a pound of dates, no matter the quality. One interesting interpretation of this injunction is that it is a mechanism of “mark to market,” that is, a mechanism for discovering a fair market

64. Fadel, *supra* note 58, at 658-59.

65. *See id.* at 683 (noting that Ibn ‘Abbas believed that the only prohibited *riba* was the *riba* of pre-Islamic days prohibited in the Qur’an).

66. *Id.* at 661.

67. *Id.*

68. Abdulkader Thomas, *What is Riba?*, in INTEREST IN ISLAMIC ECONOMICS: UNDERSTANDING *RIBA* 125, 129 (Abdulkader Thomas ed., 2006).

value for the dates.⁶⁹ In any case, it is important to note that, in spot transactions, sales across genera do not have a legally set price, and so these prices are set contractually.⁷⁰ One may, therefore, sell one pound of dates for ten pounds of wheat or for a few grams of silver if the sale is immediate.

The other type of *riba* that emerges from prophetic reports is credit-based, or the “*riba* of delay” (in Arabic, *riba al-nasa'*). As narrated in one hadith, “[trading] gold for gold is *riba* unless [delivery is] hand-to-hand; [trading] wheat for wheat is *riba* unless [delivery is] hand-to-hand; [trading] dates for dates is *riba* unless [delivery is] hand-to-hand; [trading] barley for barley is *riba* unless [delivery is] hand-to-hand.”⁷¹

This has been understood to mean that the doctrine of credit *riba* prohibits credit (versus immediate) sales within genera altogether, even if the counter-value is equivalent.⁷² The schools differ greatly regarding the expansion of prophetically enumerated genera in both spot and credit *riba*.⁷³ For example, in the Maliki school, all deferred trades involving counter-values that were of the same genera (such as foodstuffs, e.g., wheat-for-wheat) are prohibited by the doctrine of credit *riba*.⁷⁴ Similarly, regarding the genera of gold and silver, the Maliki and the Shafi'i schools agree that the reason (*'illa* in the language of *qiyas*) for prohibition is that gold and silver serve as prices for private contracting (*al-thamaniyya*).⁷⁵ Although this reasoning could be expanded to prohibit similar exchanges of other commodities that serve as “prices for private contracting” (e.g., fiat currency), a strict, formalistic reading of the prophetically defined genera of gold and silver might arguably not apply to fiat currency.

But while *riba* of the Qur'an is a prohibition designed to protect debtors from *ex-post* changes to contractual obligations, even classical Islamic jurists had difficulty rationalizing both spot and credit-based *riba* prohibitions. Indeed, the influential (*ethos*) 'Izz ibn 'Abd al-Salam reportedly discerned no purpose justifying the rules of spot and credit-

69. Mahmoud A. El-Gamal, *An Attempt to Understand the Economic Wisdom (hikma) in the Prohibition of Riba*, in INTEREST IN ISLAMIC ECONOMICS: UNDERSTANDING RIBA 112, 118 (Abdulkader Thomas ed., 2006).

70. Fadel, *supra* note 58, at 662.

71. *Id.* at 663.

72. *Id.* at 664.

73. *See id.* at 660-67.

74. *Id.* at 663.

75. *Id.* at 663-64.

based *riba* as they historically evolved.⁷⁶ This makes it all the more difficult to apply these prohibitions to modern financial dealings.

To further complicate matters, one irony of Islamic law is that, given the rules on *riba* discussed above, a simple non-interest bearing loan, a *qard*—I give you ten units of gold today, and you return ten units of gold tomorrow—would presumptively be prohibited as the credit *riba* condemned by the Prophet in the tradition quoted above (i.e., a “sale” of gold for gold that is *not* delivered “hand-to-hand”).⁷⁷ However, *qard* was excluded from the rules of *riba* because of its explicitly charitable nature.⁷⁸ Under both Hanafi and Shafi‘i doctrine, no date for repayment is enforceable, which partly explains the difference between a prohibited deferred sale and a legal charitable loan.⁷⁹ But Malikis enforce repayment terms where specified, and so,⁸⁰ for Malikis, it is unclear what makes a loan charitable and a deferred sale uncharitable because the counter-values would have to be equal in value due to the doctrine of *riba* of excess.⁸¹

These doctrines suggest that conventional interest-based finance is problematic. One Maliki authority notes that *qard* loans must be solely for the benefit of the debtor, not the creditor, because otherwise “it would be considered *riba* which all agree is prohibited.”⁸² Indeed, contemporary Islamic scholars broadly believe that lending money on interest is prohibited.⁸³ But many modern financial transactions are not purely the lending of money for money, as would be the case in a cash advance through a credit card. In the case of a cash advance, one receives cash, spends or otherwise uses it, and then owes the creditor that same amount plus interest. It is probably uncontroversial—putting aside the complication of fiat currency—to assert that this would fall under both

76. *Id.* at 660 n.25.

77. *Id.* at 666.

78. *Id.* at 666-67.

79. *Id.*

80. *See id.*

81. *See id.*

82. AHMAD AL-SAWI, 2 BULGHATU AL-SALIK LI AQRAB AL-MASALIK ILA MADHHAB AL-IMAM MALIK 97 (n.d.).

83. *See Fadel, supra* note 58, at 679 n.124 (quoting Wahba Al Zuhayli, a modern jurist, as forcefully asserting that modern monies, including paper currency, are subject to the rules of *riba*); Haider Ala Hamoudi, *Baghdad Booksellers, Basra Carpet Merchants, and the Law of God and Man: Legal Pluralism and the Contemporary Muslim Experience*, 1 BERKELEY J. MIDDLE E. & ISLAMIC L. 83, 95 (2008).

riba of excess and delay because the excess interest imposed removes this financial transaction from the charitable *qard* exception. But many modern financial transactions do not work this way.

In a conventional mortgage,⁸⁴ for example, the borrower typically never sees the money used to purchase the house. Rather, the lender pays the purchase price to the title company which then transfers the money to the seller (or lender).⁸⁵ The loan is tied to some tangible asset, such as a home or a car. From the perspective of the mortgagor, he never sees the money he “borrowed.”⁸⁶ The mortgagor gets a house (not cash), for which he pays a monthly payment and, at the end of a term, owns the house outright—much like the mortgages many scholars have deemed “Islamic.” Critics like El-Gamal note that since the mortgagor never actually sees the money used to buy the house in a conventional mortgage, the distinctions between a conventional mortgage and many ostensibly “Islamic” finance solutions are illusory.⁸⁷

Moreover, other contemporary scholars have raised questions about whether interest-bearing loans are accurately characterized as entailing *riba*. For starters, there is an argument, even if only a purely formal one, that the prohibitions of *riba* do not apply to fiat currency. Recall that the Prophet’s utterances discussed above listed specific genera—wheat, dates, barley, gold, and so on. While the various schools differed on how they expanded upon the prophetically enumerated genera, they recognized some goods for which the rules of *riba* do not apply.⁸⁸ The enumerated genera of gold and silver easily could be expanded to include fiat currency because the *ratio legis* for prohibitions to gold—that they serve as prices for private contracting⁸⁹—applies to fiat currency as well. Indeed, that appears to be the dominant position of most modern Muslim jurists.⁹⁰ However, strictly speaking, the classical positions of both the Shafi’i and Maliki schools support a formalistic argument excluding fiat currency, rendering the rules of *riba* inapplicable.⁹¹ In fact, one respected

84. For the purposes of the argument here, I refer only to a conventional, fixed-rate mortgage, and not other kinds such as adjustable rate or negative amortization mortgages.

85. See El-Gamal, *supra* note 57, at 194.

86. See *id.* at 195.

87. See *id.* at 194-96.

88. See Fadel, *supra* note 58, at 663-64 (noting the position of the Maliki, Shafi’i and Hanafi schools in relation to deferred trades).

89. *Id.* at 664.

90. *Id.* at 679 n.124.

91. See *id.* at 664 n.42, 679 n.124.

modern authority, Shaykh ‘Ali Goma‘a, the official mufti of Egypt, recently opined that bank interest is permissible, in part because Egyptian currency has no relationship to gold or silver, and because banks and their depositors do not engage in lending as understood by Islamic law.⁹²

Another difficulty in the question of interest-bearing loans is the rich precedents in classical Islamic law that allowed devices designed to avoid the rules against *riba*. For example, in Ottoman times, a creditor would lend a sum to a borrower (e.g., \$900) and then sell the borrower a handkerchief (or any other low-priced good) on credit at a price that was well in excess of its market value (e.g., \$100), thereby giving the creditor the desired return on the loan.⁹³ These were viewed as two separate sales, and it is possible that nothing legally prevented the borrower from taking the loan and then refusing to later buy the handkerchief, effectively locking in a 0% interest rate. But there is evidence to the contrary. Ottoman court records suggest that interest on loans may have been enforceable in an Ottoman court.⁹⁴ Instead of banning the practice, Ottoman practice limited the chargeable interest rate,⁹⁵ although this may have varied from time to time and city to city.⁹⁶

Be that as it may, why has the Islamic finance industry been so successful, to the tune of \$0.5 to 1 trillion a year? Why is it that, according to El-Gamal, essentially conventional financial products gain the sanction of Muslim jurists simply by relabeling the transaction in terms of ancient Islamic contracts?

The answer, in part, lies in *pathos*, as the emotions of fear, shame, and emulation reveal. In the context of Islamic finance, fear of God and God’s displeasure is closely linked with the prohibition of *riba* in scripture. The Qur’an, for instance, states that God wages war upon those

92. *Id.* at 679 n.124. For a brief biography of ‘Ali Goma‘a, see THE ROYAL ISLAMIC STRATEGIC STUDIES CENTRE, *supra* note 26, at 40 (listing Ali Goma‘a as the tenth most influential Muslim in 2009).

93. Fadel, *supra* note 58, at 680.

94. Timur Kuran, *The Logic of Financial Westernization in the Middle East*, 56 J. ECON. BEHAV. & ORG. 593, 598 (2005) [hereinafter Kuran, *Logic*]. It is unclear, however, whether these “loans” were directly loans based on interest, or made through legal stratagems.

95. Fadel, *supra* note 58, at 681. In the sixteenth century, the Ottomans limited the interest rate to 11.5%, although only transactions using stratagems (thus satisfying the letter of the ban on *riba*) were legal. Kuran, *Logic*, *supra* note 94, at 598.

96. Kuran, *Logic*, *supra* note 94, at 598 (citing studies that show a customary annual interest rate of 20% in Kayseri and 10% in Bursa).

who engage in *riba*.⁹⁷ Although, as noted, there are arguments allowing some forms of interest, the strength and unequivocal nature of the Qur'an's condemnation of *riba* gives many Muslims pause and counsels a conservative approach. Accordingly, despite criticism that modern "Islamic" financial transactions are virtually identical in all material respects to conventional financing, the pronouncements of scholars validating the practices of Islamic finance serve to assure conservative Muslims that they are not practicing the *riba* condemned in the Qur'an or prohibited by the Prophet.

Fear of God's displeasure is a deeply personal and spiritual aspect of *pathos*. As narrated in one hadith, "Consult your heart. Righteousness is that about which the soul feels tranquil and the heart feels tranquil, and wrongdoing is that which wavers in the soul and moves to and fro in the breast even though people again and again have given you their legal opinion [in its favour]."⁹⁸ Ultimately, what beliefs and legal propositions a believer will accept as authoritative are left to the ethical and moral conscious of the individual. The hearts of many in the Muslim community are simply not at ease with interest-based transactions.

In light of the Islamic world's colonial history, shame can also motivate Muslims to favor Islamic finance. For example, Fazlur Rahman has criticized as intellectually defeatist those Muslim states that have replaced Islamic law with purely secular and western-inspired codes.⁹⁹ Rahman's sentiment, shared by many within circles of Islamic learning, can be summed up as "we too have an intellectual tradition." It is a feeling that perhaps stems from a sense that there is a certain shame in failing to recognize one's own indigenous Islamic tradition and blindly turning to outside western alternatives.

Relatedly, the rise of Islamic finance can be viewed as a manifestation in the business and finance worlds of the very same impulse within the Islamic world that has led to the rise of "Islamist" political parties.¹⁰⁰ In other words, the same social forces that result in

97. QUR'AN, *supra* note 2, at 2:278-79 ("O you who believe, be conscious of God, and disperse what remains of usurious interest, if you are believers. And if you do not, then take heed of war from God and God's messenger. But if you repent, you may have your capital; do not be unfair, and you will not be treated unfairly.").

98. IMAM AN-NAWAWI, AN-NAWAWI'S FORTY HADITH 90 (Ezzeddin Ibrahim & Denys Jonson-Davies trans., 1981).

99. FAZLUR RAHMAN, ISLAM AND MODERNITY: TRANSFORMATION OF AN INTELLECTUAL TRADITION 29 (1982).

100. OLIVIER ROY, THE FAILURE OF POLITICAL ISLAM 36 (Carol Volk trans., 1994)

the call for an “Islamic” solution to legal and political problems are behind the call for an “Islamic” solution to business problems. It would be ludicrous—perhaps even scandalous—for someone in the recently postcolonial Muslim world to seriously assert that the “Islamic” solution to raising the capital needed to fund a major real estate development deal in Dubai would be to simply plug into Western financial institutions operating under rules outside of Islamic law.

To be sure, I do not intend to reduce the debates about *riba* in the Muslim world to a blind anti-western sentiment arising out of shame. That would be far too simplistic. For one thing, many western institutions have begun offering Shari‘a-compliant financing.¹⁰¹ Ironically, this has not resulted in any palpable outcry from Muslim scholars. Indeed, western institutions have hired some of these same scholars to supervise their financial products.¹⁰² Emotions such as shame can be incredibly complex, especially in a postcolonial context rife with competing claims to identity and the “Islamic” solutions such claims put forth.

A final emotion to consider, rooted in admiration, is emulation.¹⁰³ This has a clear link to *ethos*, as a person with ethical appeal inspires or instills in others a desire to emulate or follow. Indeed, emulation has a scriptural basis. The Qur’an admonishes believers to “obey God, and obey the messenger, and those with authority among you. And if you dispute over anything, refer it to God and the messenger, if you believe in God and the last day.”¹⁰⁴

Prophetic traditions contain similar admonitions. For example, one narration states, “You are to follow my *Sunnah* and the *Sunnah* of the Rightly-Guided Caliphs.”¹⁰⁵ Another narration relays a similar meaning: “I left two things among you. You shall not go astray so long as you hold

(stating that one principle of “Islamism” is society must be Islamic in its foundation and structure). While many “Islamists” advocate violent revolutions, *see id.*, I do not intend to suggest that advocates of Islamic finance share this view.

101. *See, e.g., Barclays Fund Arm Launches Shariah-Compliant ETFs*, REUTERS, Dec. 10, 2007, <http://uk.reuters.com/article/idUKNOA05218920071210> (announcing launch of a new *Shari‘a*-compliant exchange-traded funds by Barclays).

102. *Id.* (stating that Barclays’s panel comprises such scholars as Dr. Mohammed Elgari, Sheikh Nizam Yacuby, and Dr. Abu Ghuddah).

103. ARISTOTLE, *supra* note 12, at 147.

104. QUR’AN, *supra* note 2, at 4:59.

105. KAMALI, *supra* note 2, at 60.

on to them: the Book of God and my *Sunnah*.”¹⁰⁶ In addition to referring to the “Way” of the Prophet, the term *Sunnah* can also include both the practice of the community and precedent of the Companions.¹⁰⁷ Thus, the *pathos* of emulation is not restricted to the actions of the Prophet but can be expanded to include Muslim practices. Indeed, the Prophet reportedly said, “Whatever is considered good by the Muslims is good in the eyes of God.”¹⁰⁸

Although various legal devices historically have been used to permit interest-like transactions, one essential difference between such practices and the workings of a modern bank is that the former have been viewed as *Muslim* practices. In contrast, interest has been decried as a western institution and tool of exploitation and imperialism.¹⁰⁹ Again, these perceptions are extremely powerful in a postcolonial context.¹¹⁰ Together with shame, the *pathos* of emulation asks, “which way do we follow, our own tradition or that of others?”

Pathos, as a mode of persuasion (and therefore authority) in Islamic law refers to an audience. *Pathos* implies an audience with both worldly and spiritual aspirations, hopes, and values. On a spiritual level, *pathos* asserts the existence of a community striving to conform to principles derived from divine scripture. To many, interest-based lending simply does not conform to the tenets of revelation. On a more mundane level, *pathos* asserts the existence of a context, a set of common experiences and perceptions. When Muslim jurists speak, they speak to each other, to other Muslims, and, ultimately, to the world. Simply accepting a global financial system that in the perception of these jurists contravenes Islamic law is akin to saying that Islamic teachings no longer matter. It would be to say that Islam has no vision for social relations and economic justice other than the one that historically played out among Christians in Europe.

106. *Id.*

107. *Id.*

108. See Hoexter, *supra* note 1, at 71.

109. See Timur Kuran, *Interest*, in 2 THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD 205, 206 (John L. Esposito ed., 1995) (noting that Sayyid Abu al-A‘la Mawdudi, a modern Muslim thinker of the Indian subcontinent, depicted interest as a tool of Western dominance and a source of Muslim decadence). See also Kuran, *Logic*, *supra* note 94, at 594.

110. According to Aristotle, hatred (enmity) is directed toward types of people, for “everyone hates the thief and the sycophant.” ARISTOTLE, *supra* note 12, at 127. In view of the colonial experiences of many Muslim peoples, the equation of interest with Western imperialism resonates well in some circles.

Muslim jurists generally assert that loaning with interest is unjust and a form of exploitation of the poor by the rich.¹¹¹ In contrast to interest-based lending, most Muslim jurists propose profit-loss sharing modes of finance.¹¹² While the preferred mode of financing put forth by most Muslim jurists, *mudaraba*, could be criticized for failing to be a truly profit-loss sharing contract, their perception remains that interest-based lending is unfair, exploitative, and, thus for good reason, illegal.¹¹³ Many Muslims today feel that interest-based transactions benefit some at the expense of others and that economic activity should benefit all. For many, Islamic finance provides a more equitable alternative.

III. LOGOS

Most of the literature on Islamic law engages its *logos*. Typically conceived, Islamic law is a doctrine of textual interpretation and the application of this doctrine to legal questions (resulting in positive rules). In speaking of *logos* in the context of *authority* in Islamic law, however, it makes sense to ask what distinguishes *any* reasoned argument from an *Islamic* reasoned argument.

One answer is that an Islamic reasoned argument is an argument derived from the sacred texts, the Qur'an and the Sunnah.¹¹⁴ But for all the dogmatism associated with Islamic law, it is a scholarly enterprise profoundly aware of its own tenuous relationship with its foundational texts. Indeed, the doctrine of *qat'i* (definitive) and *zhanni* (often translated as "speculative," but I prefer "probable") textual implications (*dalalat*) clearly point to this awareness.¹¹⁵

Islamic law recognizes that some Qur'anic rulings are definitive and, therefore, not open to multiple meanings.¹¹⁶ Qur'anic verses that fall under the definitive textual implication include the verses on inheritance, where various relatives are given specific shares (one-half, one-fourth,

111. See Fadel, *supra* note 58, at 691 n.181.

112. *Id.* at 691.

113. In a *mudaraba*, the entrepreneur is not entitled to any returns until all the investor's capital has been returned, and so, in the event of a loss of capital, the entrepreneur's labor is valued at zero. See *id.* at 691-92.

114. See KAMALI, *supra* note 2, at 117 (discussing the rules of interpretation of the Qur'an and Sunnah).

115. See *id.* at 27.

116. *Id.* at 27-28.

and so on).¹¹⁷ The argument goes like this: one-half means one-half; not 0.501, but 0.50. There is no imprecision in the amount of the share. One-half is not open to multiple meanings. However, Islamic law is also aware that the vast majority of Qur'anic verses and precedents in the Sunnah comprise only probable textual implications.¹¹⁸ This is because speech is, for the most part, susceptible to multiple meanings, indications, and interpretations. Divine speech is no different. Indeed, a single verse may be definitive in relation to one implication but probable regarding another. For example, 2:228 states, "And divorced women shall wait on their own account for three menstrual periods [*quru*']."¹¹⁹ This verse is definitive in that the waiting period (*'iddah*) is three *quru*', not two or four. However, this verse alone is not definitive on the meaning of the word *quru*', and the diversity of opinion on the matter clearly suggests that the word allows multiple linguistic possibilities. The Shafi'i school holds that the waiting period is three non-bleeding cycles between menstrual cycles.¹²⁰ The Hanafi school, on the other hand, holds that the word refers to three menstrual cycles.¹²¹

Since definitive texts even within the Qur'an and Sunnah are few, what are the limits of Islamic *logos*? Because any legal argument must have certain characteristics in order to constitute a legal argument, I focus on the minimum characteristics of an Islamic legal argument. In other words, what principles determine a legal argument to be Islamic as opposed to, say, a Western legal argument?

A fairly minimal standard for trying to understand divine command is that the argument cannot contradict a divine injunction that is directly on point. Only 350 Qur'anic verses relate to legal injunctions, many of which refer to issues of ritual worship, so this leaves a fairly broad range for interpretation.¹²² As the Qur'an is not the only textual basis for Islamic law, the minimum standard should also include not contradicting Prophetic traditions that are directly on point. Because Prophetic traditions include injunctions not found in the text of the Qur'an,¹²³ their inclusion would narrow the field of possible interpretation considerably.

117. *Id.* at 28.

118. *See id.* at 27-31.

119. *See* QUR'AN, *supra* note 2, at 2:228.

120. *See* LALEH BAKHTIAR, ENCYCLOPEDIA OF ISLAMIC LAW: A COMPENDIUM OF THE MAJOR SCHOOLS 520 (1997).

121. *Id.*

122. KAMALI, *supra* note 2, at 26.

123. *Id.* at 69.

However, most jurists generally agree that the only narrations from Prophet Muhammad that have the same level of authority as the Qur'an are those that are "continuous" (*mutawatir*).¹²⁴ Continuous narrations are validated by multiple independent narrators in such a way as to preclude the possibility that the narrators would conspire to perpetuate a lie.¹²⁵ This body of narrations is relatively small and many address issues of ritual and worship.¹²⁶ Narrations that do not rise to this level of authenticity could always be argued as not having been accurately narrated from the Prophet himself, even if orthodoxy accepts such narrations as authentic. However, orthodoxy also accepts *in principle* that a tradition may be incorrectly attributed to the Prophet unless it is one of these "continuous" narrations.¹²⁷

The issue is, of course, more complicated. Continuous narrations are divided into two kinds: that which is continuous in its meaning (*ma'na*) and that which is continuous in its precise text (*lafzh*).¹²⁸ There are only ten traditions that are continuous in their precise text.¹²⁹ In other words, only ten narrations where the Prophet reportedly said *X* have come down through so many channels simultaneously that it is inconceivable that the narrators could all have conspired to fabricate the identical text *X*.

But the continuous narrations that are continuous in meaning are far more numerous. These are narrations that, although not identical as to their precise text, are similar in meaning, and the number of simultaneous, corroborated reports leads Islamic scholars to conclude that these narrations are authentically attributed to the Prophet.¹³⁰ They generally relate to uncontested issues, such as the five daily prayers, pilgrimage to Mecca, obligation to pay alms (*zakah*), and the like, and establish broad principles against which few would argue, even today.¹³¹

124. *Id.* at 94.

125. *Id.* at 93-94.

126. One wrinkle is that there are two types of continuous narrations: (1) those that are identical in wording and (2) those that are not (i.e., concurring in their purport, but differing in wording). Continuous narrations that are identical in wording are on the order of ten or so. *See id.* at 95. While the number of traditions that are not identical in wording is much greater than those that are, these traditions are but a subset of all narrations. *See id.* (comparing continuous narrations with well-known narrations).

127. *See id.* (according to the majority of scholars, "well-known" narrations—as distinguished from continuous narrations—engender speculative knowledge only).

128. *Id.*

129. *Id.*

130. *Id.* at 94-95.

131. *Id.*

“Did the Prophet really say this?” Unless it is continuous, as discussed above, one could always answer in the negative. At a minimum, therefore, *logos* in Islamic law requires that a position not contradict a legal injunction of the Qur’an or the most rigorously authenticated narrations of Prophet Muhammad. The most rigorously authenticated narrations, in this context, should be limited to the continuous narrations, both continuous in text and in meaning. This definition of a minimally Islamic legal argument probably would not be very controversial. What is more controversial is whether further constraints are necessary.

In addition to the Qur’an and Sunnah, Islamic law is derived from consensus (*ijma’*) and analogy (*qiyas*).¹³² In defining a minimally Islamic legal argument, it is imprudent to ignore the role of these two other sources. This is particularly true of consensus because, as discussed above, it is through consensus that the actual texts of the Qur’an and “rigorously authenticated” Sunnah are known. Hence, if one accepts the consensus regarding the actual text of the Qur’an, on what basis would one reject consensus on other questions?

The term “consensus” is sometimes used informally in Islamic law, but the consensus that is technically binding as a source requires complete agreement—a single dissenting voice is sufficient to dethrone it.¹³³ If technical consensus on a matter was established in the past, future generations are bound by it.¹³⁴ However, only a limited number of legal questions have reached consensus. As the discussion on *riba* above suggests, no consensus exists concerning the doctrines of *riba* derived from prophetic narrations because Ibn ‘Abbas has held the only prohibited *riba* is the one condemned in the Qur’an, i.e., the *ex post* increase for deferment of a payment.¹³⁵ All other legal pronouncements regarding *riba* of excess or delay are not governed by technical consensus, although perhaps there is an informal, non-technical consensus in the sense that a large majority of scholars deem these sorts of *riba* prohibited. Setting aside the admittedly difficult issue of whose consensus should matter, *logos* in Islamic law imposes the limitation that a position cannot be considered “Islamic” if a narrated, technical consensus directly contradicts it.

132. SCHACHT, *supra* note 8, at 60.

133. KAMALI, *supra* note 2, at 228.

134. *See id.* at 232 (stating that *ijma’* is decisive and infallible).

135. *See* Fadel, *supra* note 58, at 683.

Although consensus is in no way understood to be divine, it is essentially a rational proof.¹³⁶ Its logical strength (*logos*) comes from the ethical appeal (*ethos*) of the agreement of many individuals on a single position. More problematic, however, especially from the perspective of defining a minimally Islamic argument, is analogy (*qiyas*).

As traditionally understood, analogy requires some similarity (*'illa*) between the fact pattern of a known ruling (the “original ruling”) and the fact pattern of a novel question that justifies application of the original ruling.¹³⁷ Where one sees similarity, however, another might see difference. *Qiyas* introduces subjectivity, and might even open a Pandora’s Box of sorts.

Qiyas, however, is critical because it provides a text with relevance. For example, it is well-known that the Qur’an forbids the drinking of wine (*khamr*).¹³⁸ However, from a purely linguistic point of view, the Arabic term *khamr* could be held to refer only to the wine of dates and grapes.¹³⁹ Those seeking a limited role for *qiyas* can argue that alcoholic drinks brewed from grains, not grapes and dates, are permissible, even if such drinks result in inebriation. Similarly, with *riba*, one could argue it is limited to peculiar pre-Islamic transactions and is therefore inapplicable as a doctrine today.¹⁴⁰ Any underlying social and economic interests *riba* was intended to protect would simply be lost.

The workings of *qiyas* and *qiyas*-like arguments are akin to the expansion of the U.S. constitutional protections represented in the “penumbras” of the Bill of Rights in *Griswold v. Connecticut*.¹⁴¹ Although the penumbra-based analysis in *Griswold* is not identical to *qiyas*—for example, it does not use the same analytical categories of origin (*asl*), branch (*far'*), effective cause (*'illa*), and rationale (*hukm*)—the doctrines of *qiyas* and penumbras share a concern that literalist

136. KAMALI, *supra* note 2, at 228.

137. *Id.* at 265.

138. Regarding the Qur’anic prohibition of wine, see *id.* at 20-21.

139. AL-RAGHIB AL-ASFHANI, MUFRADAT ALFAZH AL-QURAN 299 (Safwan Adnan Dawudi, ed. 2002). Al-Asfahani even cites a Prophetic saying that “*khamr* is from these two trees: the date palm and the grape.” *Id.*

140. See Fadel, *supra* note 58, at 683. However, this assertion is significantly limited by Sunnah-derived *riba* doctrine.

141. It is certainly debatable that decisions like *Griswold* represent expansions. In any case, I use the word “expansion” because I think all would agree that the Constitution is not explicit on such issues as freedom of association, the right to educate a child in a school of the parents’ choice, or the right to study a foreign language. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

renderings might leave the text a dead letter.¹⁴² Beyond the textually delineated guarantees of the Constitution are “emanations from those guarantees that help give them *life and substance*.”¹⁴³ *Qiyas* is Islamic law’s functional equivalent.

However, unbridled subjective extensions of the Qur’an and the Sunnah pose a serious threat to the objective basis of the law. This problem of subjectivity can be tamed, to a degree, by the distinction Islamic law draws between compelling and non-compelling *qiyas*.¹⁴⁴ A compelling *qiyas* recognizes that in many situations there will be considerable agreement (an informal consensus) as to whether an analogy is compelling, narrowing the multitude of possible analogies that may arise from the textual implications of the Qur’an or Sunnah. Such a confluence of subjectivities can transform a subjective analogy to something more objective.

For example, the Qur’an proclaims that “[f]or those who unjustly consume the property of orphans only ingest fire; and they will be exposed to a blaze.”¹⁴⁵ While the outward purport of this verse is a warning against those who misappropriate the property of an orphan, a compelling analogy (*qiyas jali*) extends this prohibition to the waste and destruction of an orphan’s property.¹⁴⁶ Few would argue against the proposition that if it is wrong to steal the property of an orphan, then it is equally wrong to culpably let it go to waste. This is because the effective cause (*‘illa*), or *ratio legis*, of the prohibition of theft of an orphan’s property is the protection and preservation of property.¹⁴⁷ This reasoning clearly extends to waste as well.¹⁴⁸ As can be seen from this example, triaging analogies into those that are compelling and non-compelling serves to set a more objective standard for defining the minimally

142. See *id.* at 483-84. See also KAMALI, *supra* note 2, at 268. However, one could easily adjust the penumbra argument to fit these elements.

143. *Griswold*, 381 U.S. at 484 (emphasis added).

144. “Compelling” *qiyas*, as I use the term, refers to what Muslim jurists call *qiyas jali*. Kamali distinguishes between *qiyas jali* and *qiyas khafi*, or a hidden analogy, stating that *qiyas jali* is a straightforward *qiyas* that is easily intelligible to the mind. KAMALI, *supra* note 2, at 333.

145. QUR’AN, *supra* note 2, at 4:10; KAMALI, *supra* note 2, at 171-72.

146. KAMALI, *supra* note 2, at 171-72.

147. *Id.*

148. *Id.* One issue Kamali does not address is what level of culpability would be required for the prohibited “waste.”

Islamic legal argument than the wholesale inclusion of *qiyas* otherwise would.

At minimum, therefore, an Islamic legal argument does not contradict (a) a clear text of the Qur'an or the continuous Prophetic narrations, whether continuous in text or meaning, (b) a narrated, technical consensus, or (c) a compelling *qiyas* or analogy to the Qur'an or the continuous Prophetic narrations. It is controversial whether *ijma'* can form a valid basis for *qiyas*.¹⁴⁹ In view of my attempt to define a de minimus standard for Islamic *logos*, the minimally Islamic legal argument should *not* be bound to extensions of *ijma'* because the extension of *ijma'* is reasonably controversial.

In classical Islamic jurisprudential doctrines related to judgments there is support for a definition of a minimally Islamic legal argument. In the Maliki school, for instance, the judgment or ruling of a capable and morally upright judge cannot be overturned or reversed unless it "contradicts a definitive [proof] (*qat'i*) or a compelling *qiyas* (*jaliyyu qiyas*)."¹⁵⁰ The medieval jurist al-Dardir comments that "definitive proof" refers to "the clear text of the [Quran] or of the Sunnah or a consensus."¹⁵¹ One example of a reversible ruling Dardir gives is a judge who denies an intestate successor his fair share of the inheritance by ruling that all the proceeds must go to the brother of the deceased and none to the grandfather.¹⁵² This violates technical consensus and is therefore reversible.¹⁵³

However, my expansive definition of a minimally Islamic argument differs from the above in one key respect. According to the Maliki view,

149. *Id.* at 268.

150. SHAMS AL-DIN MUHAMMAD ARAFAH AL-DUSUQI, 4 HASHIYAT AL-DUSUQI 'ALA AL-SHARH AL-KABIR 153 (Muhammad 'Ulaysh ed., n.d.) (quoting MUKHTASAR KHALIL). Dusuqi's work is a multilayered commentary (*hashiya*) that elucidates another commentary by Ahmad Dardir as well as the underlying work, MUKHTASAR KHALIL, which both commentaries discuss. MUKHTASAR KHALIL is a famous medieval abridgement of Islamic law. See Mohammad Fadel, *The Social Logic of Taqlid and the Rise of the Mukhtasar*, 3 ISLAMIC L. & SOC. 193, 225 (1996).

151. AL-DUSUQI, *supra* note 150, at 153. Dardir's commentary continues on to say "or [basic] legal principles." Hence, in addition to the Qur'an, the Sunnah, and *ijma'*, a ruling must not contradict known legal principles to be legitimate and nonreversible. Dardir provides the example of the Islamic legal principle of giving precedence to evidence tending to negate a fact over evidence tending to establish it, such as preferring evidence negating, as opposed to proving, the existence of a contract. *Id.* Dardir appears to presume that the two kinds of evidence are equally credible.

152. *Id.*

153. *Id.*

a judgment should be reversed if it contradicts the clear text of a Prophetic narration, even where the narration is not continuous.¹⁵⁴ This difference can be understood by considering the enterprise in which jurists see themselves engaged, which, as opposed to setting out a minimally Islamic argument, is striving to reach what they truly believe is the correct or best interpretation of the Qur'an and Sunnah.¹⁵⁵ Islamic jurists are engaged in an exercise in probabilities.¹⁵⁶ However, in trying to define an Islamic *logos* as expansively as possible, I restrict myself to matters on which consensus exists, rather than probabilities.

In sum, a legal position in Islamic law has a minimal amount of persuasiveness, and therefore authority, provided it does not violate the principles outlined above. Although these limitations set boundaries, the *logos* of Islamic law can engage the sources and legal tradition in different, creative ways within these boundaries.

CONCLUSION

The maxim that Islamic law derives its authority from the Qur'an and Sunnah, while true, is incomplete. Islamic law is a human project, although it maintains a relationship with God and is aimed at striving to discover and implement God's command. Viewed through the lenses of *ethos*, *pathos*, and *logos*, authority in Islamic law varies in its relation to God. From the perspective of *ethos*, the speaker must be in a position with respect to God for the speaker's pronouncements to have ethical appeal. The audience, presumably the Muslim community, must be moved to adopt the speaker's view. To do so, the view must speak to the audience. Inasmuch as Islamic values inform the audience's passions and moral conscious, *pathos* suggests a relationship between the audience and God. Finally, from the perspective of *logos*, an Islamic legal position cannot be authoritative if it directly violates an explicit scriptural text, a technical scholarly consensus, or a compelling analogy. *Logos*, as explicated here, thus imposes some limits on the substance of Islamic law, and these limits are related to scripture, its interpretive extension, or

154. *Id.* This is the Maliki position despite Dusuqi's observation that the phrase "definitive proof" suggests that a judge's ruling that contradicts a non-continuous prophetic narration is valid (i.e., should not be reversed).

155. See KAMALI, *supra* note 2, at 469.

156. *Id.* (defining *ijtihad* as "the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of the Shari'ah from their detailed evidence in the sources").

the consensus of the Muslim community. The stronger the relationship that *ethos*, *pathos*, and *logos* respectively have with God, the more persuasive the argument, and the more authority the argument can claim.

