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The Role of Culture in the Creation of Islamic Law

JOHN HURSH*

INTRODUCTION

How does culture reflect the creation, interpretation, and application of Islamic law? In turn, how does Islamic law reflect and influence culture? This Note will explore the cyclical relationship between culture and Islamic law during the formation of Islamic society. In addition, this Note will demonstrate that this cyclical relationship creates meaning both in law and in culture by examining instances of cultural influence within the Islamic tradition. Within this context, this Note examines non-Islamic claims of cultural influence in the formation of Islamic law and the refutation of these claims by Islamic scholars inside the tradition. This is an old debate, but this Note will add new perspective through a somewhat novel law and culture analysis.

Muslims believe that the Qur'an is the ahistorical and infallible revealed word of God.¹ The Qur'an establishes the principles for Islamic law, or Shari'a, which at least in principle are "static and immutable."² Islamic law thus challenges a fundamental assumption of most Western³ legal theorists by insisting that the foundation of Islamic law is not a culturally created or even a culturally influenced event. Within Islamic law, scholars debate the degree and the manner in which cultural influence and contradictory meaning is eliminated or explained. More broadly, this debate features Islamic scholars within the tradition responding to critics outside the tradition. As with any contestation of identity and authority, it is important to recall that moral and political consequences result.⁴ For example, although intellectually flawed, contradictory, and overly broad, Samuel Huntington's retreaded clash of civilizations thesis advanced a political agenda that helped influence both domestic and foreign policy within the United States.⁵

This cultural and legal debate largely remains the non-Muslim outsider claiming that culture influenced the formation of Islamic law and the Muslim insider replying that the Qur'an contains the word of God and that cultural influence simply does not

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1. See N.J. COULSON, A HISTORY OF ISLAMIC LAW 9–11 (1964).

2. *Id.* at 2.

3. This Note uses the word Western for lack of a better term, but a more suitable or accurate descriptive adjective might be Euro-Anglo.

4. See Robert Post, *Introduction: The Relatively Autonomous Discourse of Law, in LAW AND THE ORDER OF CULTURE*, at vii–viii (Robert Post ed., 1991).

5. MARWAN M. KRAIDY, HYBRIDITY, OR THE CULTURAL LOGIC OF GLOBALIZATION 19–20 (2005).

apply. To this conclusion—that the principles of Islamic law are God’s infallible word—the outsider critic has no response because he or she is arguing against an article of faith. This conclusion does not, however, resolve the debate. The outsider may grant this assumption, but still maintain that culture influenced the formation of Islamic law. To do so, the outsider simply argues that while the Qur’an is the infallible word of God, the transmission of these words into law was a cultural enterprise. Although subtle, this argument allows for both an infallible source of law and a culturally influenced development and practice of law.

A similar argument applies to the *sunna*. The *sunna* is the collection of Muhammad’s statements and actions. Muslims consider the *sunna* the second-most important source of Islamic law. Given the widely accepted historical account of Arabia when Muhammad founded Islam, and the demonstration of a substantial interplay between pre-Islamic culture and Islamic law, specifically within the Qur’an and the recorded activities of the Prophet, an argument allowing for an infallible legal source and a culturally influenced jurisprudence becomes much harder to refute. Much more importantly, taking this “infallible source, fallible jurist” position allows for a less restrictive interpretation of Islamic law, which allows Islamic scholars to adopt liberal legal principles while maintaining an Islamic identity and a faithful adherence to the Qur’an and to the *sunna*.

This Note examines the influence culture had on the creation of Islamic law as well as the inferred and direct questioning of the legitimacy of Islamic law due to cultural influence. Part I briefly discusses how law and culture create meaning. Part II discusses the transition from pre-Islamic to Islamic law and the role culture played in this transition. Part III examines contemporary legal and cultural debates over the reinterpretation of the origins of Islamic law. Part IV offers strategies for implementing liberal reform to Islamic law without disputing the divine authority of the sources or denying the influence of culture on Islamic law.

I. LAW AND CULTURE: THE CREATION OF MEANING

Law and culture are inextricably related concepts that require a social and cultural backdrop for meaning. Robert Cover states, “the creation of legal meaning,” which he defines as “jurisgenesis,” “takes place always through an essentially cultural medium.”⁶ Similarly, Lawrence Rosen argues, “law is so deeply embedded in the particularities of each culture that carving it out as a separate domain and only later making note of its cultural connections distorts the nature of both law and culture.”⁷ Rosen further argues that isolating the law from culture does not make sense, because legal officials make decisions by relying on cultural assumptions.⁸ It is in this sense that culture and the law are inseparable.

Pierre Bourdieu makes a similar argument. Bourdieu states, “The law is the quintessential form of ‘active’ discourse, able by its own operation to produce its effects. It would not be excessive to say that it *creates* the social world, but only if we remember that it is this world which first creates the law.”⁹ Despite similarities to

6. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983).

7. LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION*, at xii (2006).

8. *Id.* at 6–7.

9. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38

Cover and Rosen, Bourdieu's argument is more extensive. Bourdieu's broader point is that while law and culture are not only inseparable as Rosen argues, or that legal meaning requires a cultural medium as Cover argues, but that law and culture are inseparable *because* they create meaning in one another. Thus, law creates culture, while culture simultaneously creates law.

Robert Post describes this reciprocal creation of meaning as a "ceaseless dialect."¹⁰ Recognizing the dialectical creation of social and legal meaning is relatively new within academic legal discourse. Post addresses this issue by discussing how law has remained a relatively autonomous cultural discourse.¹¹ Post argues that while legal theorists have "tended to look outward" by using general hermeneutic theory, this has produced a tension as a more general cultural methodology threatens to subsume the more specialized legal thought.¹² This tension is not surprising. Given the relative autonomy that legal discourse enjoys within culture and society, it is understandable that legal practitioners are reluctant to admit that the law fits neatly under a larger methodological rubric. By doing so, lawyers and legal scholars would relinquish claims of relative exclusivity on the production of meaning within the legal system.

At least in principle, this is not an issue in Islamic law, as the goal of Islamic jurists is to discern the meaning of the divine word of God. Society and culture cannot influence this divine and immutable source of law; at best they can conform to these principles.¹³ The following examples question whether Islamic law succeeds in meeting this criteria and even if so, whether culture affects Islamic law by other means.

II. EXAMINING THE FOUNDATION: THE TRANSITION FROM PRE-ISLAMIC TO ISLAMIC LAW

A. Historical Background

Muhammad received his first revelation from Allah in 610.¹⁴ Twelve years later, after fleeing his birthplace of Mecca due to harassment and persecution largely by his own tribe, Muhammad successfully united the three ruling tribes of Medina under Islam.¹⁵ Although Muhammad would die only ten years later,¹⁶ Muslims would already control the Arabian Peninsula. Muslim forces expelled the Byzantines from Egypt and Syria, while overrunning the Persians only nine years after Muhammad's death.¹⁷ Amazingly, within less than a century Islam became the dominant religious, political, and military force in the Middle East and North Africa.¹⁸ By 750, Muslim forces

HASTINGS L.J. 805, 839 (1987) (translated with an introduction by Richard Terdiman) (emphasis in original).

10. Post, *supra* note 4, at xiii.

11. *Id.* at viii.

12. *Id.* at ix.

13. See COULSON, *supra* note 1, at 85.

14. YASIN ISTANBULI, *DIPLOMACY AND DIPLOMATIC PRACTICE IN THE EARLY ISLAMIC ERA* 9 (2001). In addition, when referring to a year, this Note uses the Common Era designation, not the Islamic calendar.

15. See COULSON, *supra* note 1, at 10–11.

16. *Id.* at 22–23.

17. ISTANBULI, *supra* note 14, at 57–61.

18. See COULSON, *supra* note 1, at 23.

bordered the Franks in present-day France, the Byzantine Empire in present-day Armenia, and Hindustan in the Indian subcontinent.¹⁹

The rapid growth of Islamic society required an effective legal system to govern its expansive population.²⁰ While the Qur'an provided Muslims with numerous rules regarding ethical personal conduct, it was relatively silent on the role of government, as only about eighty verses of the Qur'an are legal in nature and most of these appear as ad hoc decisions.²¹ Islamic scholars regard this vacuum as problematic because it allows for the possibility of pre-Islamic culture to shape what is regarded as the golden age of Islam.²² The intrusion of pre-Islamic culture into the Islamic tradition raises questions of authenticity and homogeneity within Islam. Here, this intrusion presents two important questions regarding the role of culture. One, did pre-Islamic culture influence the formation of Islamic law? Specifically, did pre-Islamic Arab tribal custom simply become absorbed and made Islamic? Two, if pre-Islamic culture influenced the formation of Islamic law, does this influence undermine the claim that Islamic law is based on divine sources?

The Western or non-Islamic narrative of Islamic legal history states that Islam engulfed the legal and social customs of pre-Islamic Arab tribes as Islam spread across the Arabian Peninsula.²³ For example, Coulson cites the shift from the social focal point of tribal allegiance in pre-Islamic communities to the family unit in broader Islamic society as the definitive example of Islamic law overtaking tribal custom.²⁴ Accordingly, as Islam transformed from a small religious community contained in the Arabian Peninsula to a military empire stretching from the Pyrenees to the Indian subcontinent,²⁵ multitudes of non-Islamic people with diverse social, religious, and legal practices were now ruled by an emergent religion and an evolving legal system. As stated previously, this development called for a swift implementation of a pragmatic administrative code.²⁶ The tension produced by the strict adherence to the Qur'an and the pragmatic concerns to govern a large and diverse group of conquered people is revealed by disputes and compromise played out at the local level. This is perhaps predictable, as absorbing local customs is a pragmatic solution for administrative governance and seemingly does not threaten the larger cultural enterprise of Islam. The decisive oath offers such an example.

19. *See id.* at 21.

20. *See id.* at 23.

21. *Id.* at 12–13 (“[Regulations] often have the appearance of *ad hoc* solutions for particular problems rather than attempts to deal with any general topic comprehensively.” (emphasis in original)).

22. FRED M. DONNER, NARRATIVES OF ISLAMIC ORIGINS: THE BEGINNINGS OF ISLAMIC HISTORICAL WRITING 1–3 (1998).

23. *See* COULSON, *supra* note 1, at 21.

24. *Id.* at 34.

25. *Id.* at 30.

26. *See id.* at 23.

B. The Example of the Decisive Oath

The decisive oath is the affirmation of evidence while in court. Decisive oaths date back at least to ancient Mesopotamia in the second century B.C.E.²⁷ In pre-Islamic Arabia, this oath was called the *qasama*.²⁸ An individual and usually fifty *compurgators* (oath helpers) not having witnessed the event, but testifying to the character of the individual, would take the oath.²⁹ Under Islamic law, oaths requiring *compurgators* applied only to cases of murder. This oath still was called *qasama*, while the word *yamin* referred to other oaths including the decisive oath.³⁰

A *hadith* is a verbal expression or statement made by Muhammad.³¹ Pious Muslims attempt to follow Muhammad's example by emulating his thoughts and actions. A particular *hadith* states that the plaintiff must prove his case through two witnesses or that the defendant must take the oath.³² Joseph Schacht, however, demonstrates that this practice did not become a formal tradition in Islamic law until the time of the Muslim jurist Muhammad ibn Idris ash-Shafi'i (767–820), well after Muhammad's death (632).³³ This conflicting account leads Herbert Liebesny to conclude that "[t]he *qasama* thus appears to be an institution quite different in origin and application from the decisive oath referred to in the *hadith* and developed in classical Islamic law."³⁴

A skeptic could then argue that this example demonstrates how an important principle of Islamic law is not attributable to Muhammad, but to the reformation of a legal principle already thousands of years old. Even more troubling, a variant of this legal principle remains in practice in contemporary Egypt³⁵ and the principle is supported by a strong *hadith*. While this appears to be a damaging example, Islamic scholars likely disregard what skeptics consider highly problematic examples such as the decisive oath. *Fiqh* reasoning—which establishes legal principles from the Qur'an and the *sunna*—made allowances for *urf* (local custom) provided these local cultural practices did not violate Islamic law.³⁶ Thus, a local practice could remain in use if Islamic officials, after considering the purposes and consequences of a local custom, found that it did not violate the Qur'an or the *sunna*.³⁷ Indeed, this tradition traces back to Muhammad, whose silence on many Arabic tribal customs was interpreted as his assent.³⁸

27. Herbert J. Liebesny, *Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions*, 20 AM. J. COMP. L. 38, 46 (1972).

28. *Id.* at 49.

29. *Id.*

30. *Id.*

31. *See infra* Part III.B.

32. Liebesny, *supra* note 27, at 49.

33. *Id.* at 48 (citing JOSEPH SCHACHT, THE ORIGINS OF MUHAMMADAN JURISPRUDENCE 187–88 (1950)).

34. *Id.* at 49.

35. *Id.* at 50.

36. Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origins and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 58 (2002). Regarding *fiqh*, see *infra* notes 74 and 99.

37. *See* Abdal-Haqq, *supra* note 36, at 58.

38. *Id.* at 58.

Of course, this argument quickly becomes a circular debate, as the skeptic may then counter that *fiqh* reasoning strains credibility. Is it not more reasonable to assume that Muhammad did not attempt to impose Islamic law directly on Arabic tribes in an effort to avoid war or lose allegiance? Moreover, does the practice of *urf* not demonstrate the ability of Islamic scholars to explain away acceptance or denial of local custom on an ad hoc and ultimately uncontested basis? There are various reasons to assume that this was or was not the case. The more important point here is that this argument quickly becomes an irresolvable circular dispute between the outsider/skeptic and the insider/believer.

C. The Example of the Ka'ba in Mecca

Prior to Islam, different Arab tribes ruled various parts of Arabia as independent states.³⁹ Most tribes consisted of stationary people living in villages or cities, who depended on farming for survival, and Bedouins, who travelled throughout the desert herding livestock, searching for water and pasture.⁴⁰ Pre-Islamic tribes were often pagan and typically polytheistic.⁴¹ Many worshipped the Ka'ba in Mecca.⁴² The Ka'ba is a stone structure over 2000 years old and now considered the most sacred site in Islam. Meccans believed that Abraham built the Ka'ba.⁴³

Interestingly, Arabic tribes worshipped Allah before Muhammad's birth. In fact, Abdul-Muttaleb, Muhammad's grandfather, stated that Allah (the god of the Ka'ba) would protect Mecca from the Abyssinian attack in 570.⁴⁴ Pre-Islamic Arabic tribes considered Allah the supreme God among many lesser gods.⁴⁵ The pre-Islamic Allah (*al-ilah* – the god) was the dispenser of rain.⁴⁶ As such, this version of Allah was likely a Bedouin god, because while rain was vital for nomadic and sedentary people alike, sedentary people were somewhat less dependent on rainfall due to irrigation.⁴⁷ Pre-Islamic tribes also made pilgrimages to Mecca completing certain rites, such as circumventing the Ka'ba.⁴⁸ Muhammad likely allowed for the continuation of these practices because they created a unifying theme among Arabs.⁴⁹

39. See *ISTANBUL*, *supra* note 14, at 4.

40. *See id.*

41. *Id.*

42. *Id.*

43. *Id.* at 4–5. Muslims consider Judeo-Christian prophets such as Abraham, Moses, and Jesus to be authentic prophets. In contrast to Jews and Christians, Muslims also believe that Muhammad was the final and conclusive prophet.

44. *Id.* at 4–5.

45. Joseph Henninger, *Pre-Islamic Bedouin Religion*, in *STUDIES ON ISLAM* 3, 12 (Merlin S. Swartz ed. & trans., 1981).

46. *Id.*

47. *Id.*

48. Ismail K. Poonawala, *Muhammad 'Izzat Darwaza's Principles of Modern Exegesis: A Contribution Toward Quranic Hermeneutics*, in *APPROACHES TO THE QUR'AN* 225, 229 (G.R. Hawting & Abdul-Kader Shareef eds., 1993) (suggesting that Muhammad principally addressed the pre-Islamic Arab tribes through the Qur'an, stating, "The quranic message, therefore, is primarily addressed to the pre-Islamic Arabs with regard to their beliefs, customs, and practices.").

49. *Id.* at 230.

The accepted Islamic narrative is that Muhammad selected Mecca as a religious center, after he initially considered Jerusalem.⁵⁰ The transition to an Islamic religious center from a pre-Islamic holy site was continuous, with the only major change being the destruction of the idols in the Ka'ba.⁵¹ The Islamic ceremonies used at Mecca existed as pre-Islamic pagan rituals, but Abraham initiated these ceremonies, thus they were acceptable.⁵² This example demonstrates not only that Biblical and Bedouin aspects of pre-Islamic culture influenced the founding of Islam,⁵³ but also that these two cultural influences intertwined to influence this founding. Whether this example represents a selective incorporation of past religious custom for political gain or the necessary religious purification of a holy site depends on one's view. What is not contestable is that this example demonstrates a complex interplay between older pagan and Biblical cultures and emerging Islamic culture.

D. Lex Talionis

Before Muslims controlled the Arabian Peninsula, there was a seesawing power struggle between the nomadic tribes of the central and northern regions of Arabia and the settled states of the south.⁵⁴ Although pre-Islamic law in the Arabian Peninsula varied depending on location, certain legal customs were present throughout the Peninsula. One example is the use of *hakams* (nonbinding arbiters) to settle *lex talionis* (blood feuds).⁵⁵ Although *hakams* often were called to settle disputes, tribal leaders were not bound by their decisions and they often exacted vengeance rather than reaching peaceful resolution.⁵⁶ Although the Qur'an condoned retaliation, it also imposed strict regulations on Muslims such as single retaliation and the preference to accept blood money as a peaceful settlement.⁵⁷ While these regulations did little to affect tribal practice, the social values associated with retaliation underwent a dramatic shift.⁵⁸ Rather than a reassertion of tribal strength, retaliation became the punishment of the wicked as God intended.⁵⁹

This example demonstrates Muhammad's ability to use a pre-Islamic law to his advantage when the practice did not violate Islamic law. Muhammad also successfully used pre-Islamic customs such as poetry and oratory to further the influence of Islam.⁶⁰

50. G.R. Hawting, *The Origins of the Muslim Sanctuary at Mecca*, in *STUDIES ON THE FIRST CENTURY OF ISLAMIC SOCIETY* 23, 23 (G.H.A. Juynboll ed., 1982) (suggesting that Muhammad ultimately chose Mecca given its familiarity as his birthplace).

51. *Id.* (stating that the destruction of the idols served to reestablish monotheism in Mecca).

52. *Id.* (arguing that this was a reclamation project, re-edifying an originally monotheistic cultural practice).

53. Henninger, *supra* note 45, at 15 ("Islam which followed this religion did not grow out of a void, nor was it of purely foreign origin. It was not a Bedouin religion, for its principal roots are to be found in the biblical religions; however, in Arabia it found not only human values but also religious values it could and did incorporate.").

54. FRED MCGRAW DONNER, *THE EARLY ISLAMIC CONQUESTS* 48-49 (1981).

55. *Id.* at 40-41.

56. *Id.*

57. QUR'AN II:174, XVII:35, IV:94-95 (Arthur J. Arberry trans., 1955).

58. DONNER, *supra* note 54, at 59.

59. *Id.*

60. *Id.* at 64-65.

Thus, while restricted from violating Islamic legal principles set forth in the Qur'an, Muhammad retained pre-Islamic legal practices that did not violate the Qur'an. He also reinterpreted the social meaning of these practices to influence Arabic tribal people to convert to Islam. This strategy matches the characterization of most Islamic and non-Islamic scholars of Muhammad as a master strategist and deft political figure.⁶¹

While Muhammad appropriated specific pre-Islamic laws and customs, there is no doubt that he also implemented a different legal system than that of pre-Islamic Arabia. The largest contrast to the pre-Islamic tribal legal system, which consisted of temporary and instable treaties, was a centralized Islamic legal system and accompanying administrative apparatus.⁶² For example, while requiring taxation for protection was not a new practice in Arabia, Muhammad's administrators (and the subsequent expansion of administrators by the Umayyads—the first Muslim dynasty) marked a transition from collecting taxes on behalf of a tribal or blood-lineage affiliation to collecting taxes for the Islamic state.⁶³ While perhaps viewed only as a military or political triumph, this is a legal victory as well, which helped to shape the region as never before. It is thus imperative to recognize the importance that a broader centralized concept of law played in the establishment of the Islamic state and the transformation of the region.

The prevalence of an overriding concept of law, the focusing of political authority on God, the *umma*, and Muhammad, the systemization of taxation and justice, the establishment of a network of administrative agents to supervise member groups – all these helped lend the new Islamic state a durability and a degree of centralized control over its subjects hitherto unknown to the area.⁶⁴

E. The Qur'an: What It Says and What It Does

Muhammad received the revelations that formed the Qur'an throughout his life, from the age of forty until his death.⁶⁵ Muhammad received these revelations piecemeal, and they were not collected immediately after his death.⁶⁶ Although Muhammad was born in Mecca and lived there from 570 to 622, he emigrated to Medina in 622, living there until his death in 632. *Suras* (verses in the Qur'an) can be classified as either Medinan or Meccan, revealing the location and hence the corresponding range of years that Muhammad received the verse. The Meccan *suras* largely discuss past communities and abstract ethical maxims.⁶⁷ These *suras* have a poetic tone and were written before Muhammad gained significant political authority.⁶⁸ The Medinan *suras*, by contrast, largely discuss the duties and tasks expected of a pious Muslim.⁶⁹ These *suras* have a prosaic tone and were written after Muhammad

61. *See id.* at 68–69.

62. *See id.* at 71–75.

63. *Id.* at 75.

64. *Id.* (emphasis in original).

65. *See* ISTANBULI, *supra* note 14, at 12.

66. COULSON, *supra* note 1, at 13.

67. MICHAEL COOK, *THE KORAN: A VERY SHORT INTRODUCTION* 138–42 (2000).

68. *Id.*

69. *Id.*

controlled Medina.⁷⁰ The distinctive characteristics of Meccan and Medinan *suras* suggest the influence of culture on the formation of the Qur'an.

The skeptic could claim that the shift from abstract ethical maxims to completing expected religious duties is not surprising, given Muhammad's rise to power in Medina. The striking change in *sura* topic and tone surely demonstrates a reaction to Muhammad's rise to power within a particular sociohistorical moment. Moreover, the rise of Islamic society corresponds to the shift in tone and content of the *suras*. Of course, the believing Muslim can ignore this claim by simply asserting that the Qur'an is the word of God, the intent of which men and women cannot know. To the skeptic, this answer remains illusive and unverifiable.

There is a third possibility that mediates between the incredulous skeptic and the believing Muslim unwilling to consider claims of cultural corruption. A mediating position asserts that even assuming the Qur'an is the absolute word of God, it is still interpreted by fallible humans. This raises the question of how *suras* are interpreted and applied, which is the starting point for Islamic law. This also raises the related question of how culture influences this interpretation and application.

Mohammed Bamyeh considers these questions by claiming that it is not enough to interpret what the Qur'an says, but that one must also consider how the Qur'an says it.⁷¹ Bamyeh argues that there is a widespread effort to reduce the historical narrative of Islam to a general, social, or ideological meaning whether by traditional schools of Islam, later by orientalist, or later still by anthropologists and sociologists.⁷² He also suggests that this reduction is not a significant explanation of Islam by asking, if modern criticism of Islam's foundational authenticity is accepted, then what explains the textual coherence and the continued functionality of Islam.⁷³ A mediating position attempts to avoid the problem of reductionism as expressed by Bamyeh, and the problem of circularity between the outsider/critic and insider/believer as discussed above.

F. *Sulh al-Hudaybiyyah* (The Peace Treaty of the Hudaybiyyah)

Even assuming that the Qur'an is the infallible word of God, difficulties persist. Not only were the Qur'anic words Allah gave to Muhammad of fundamental importance, but since Allah revealed his word to Muhammad, his words and actions were and are considered the best example for following Allah's commandments.⁷⁴ Thus,

70. *Id.*

71. MOHAMMED A. BAMYEH, *THE SOCIAL ORIGINS OF ISLAM: MIND, ECONOMY, DISCOURSE*, at xii (1999).

72. *Id.* at 258.

73. *Id.* ("[H]ow, if at all, can one account for the apparent coherence of the text, or for its apparent ability to systematize the reflections and reference points of those who believe in it?").

74. FAROOQ A. HASSAN, *The Sources of Islamic Law*, 76 AM. SOC'Y INT'L L. PROC. 65, 66 (1982).

This independent science of identifying the "jurisprudential" part of the shariah came to be called "fiqh," the normative methodology of Islamic learning that can be conveniently called Islamic jurisprudence. Since the word of God was revealed to the Prophet Muhammad, his actions and sayings were and are believed to have been the best possible interpretation of God's commandments contained in the

Muhammad's words and actions received great attention through the science of *fiqh* (jurisprudence).⁷⁵ Muhammad's actions, however, sometimes appear to conflict not only with the expectation of modern scholars, but also with Muhammad's contemporaries, the original Believers. The Treaty of the Hudaibiyyah offers such an example.

One year after successfully defending Medina from the Meccans in the Battle of the Trench, Muhammad took approximately 1500 Muslims on a pilgrimage to Mecca.⁷⁶ The group brought around seventy head of cattle for religious sacrifice, suggesting that Muhammad intended to make a peaceful religious pilgrimage, not to challenge the Meccans' authority. Learning that the Quraysh, the most powerful and wealthy tribe in Mecca, intended to block his entrance to the city, Muhammad decided to take a less traveled route.⁷⁷ At Hudaibiyyah, approximately nine miles from the city, Muhammad received a diplomatic envoy from Mecca.⁷⁸ Over the course of several diplomatic exchanges, Muhammad reached an agreement with the Quraysh.⁷⁹ Among the terms of the treaty, Muhammad agreed to release Quraysh prisoners to Mecca, but he did not receive the same considerations for Muslim prisoners in Mecca.⁸⁰ He also agreed not to enter Mecca, but to return a year later to perform the pilgrimage, where his stay would last only three days under strict supervision.⁸¹ Scholars consider the treaty an unlikely success because Muhammad gained control of Mecca only two years later without waging war.⁸² At the time of the treaty, however, Muslims considered the terms humiliating.⁸³ The most problematic aspect of this agreement is the manner in which Muhammad agreed to the treaty and his explanation to the Muslims for doing so.

When Muhammad signed the treaty he agreed to change the Islamic heading "In the name of Allah, the Compassionate, the Merciful" to the Quraysh heading "In Your Name, *our* Allah," which attributes Allah to the Quraysh and not Islam.⁸⁴ In addition, Muhammad agreed to replace a reference to himself as the Prophet, signing the treaty with the more traditional Arabic designation of his father's name.⁸⁵ Here, a skeptic would claim that Muhammad's decision to acquiesce to Quraysh designations demonstrates subservience to the dominant group's cultural practices. This decision seems even more likely given the critical importance of the cultural customs in

Quran. The science of *fiqh*, therefore, was directed no less toward understanding and analyzing the deeds and sayings of the Prophet, as much as toward the written word of God's mandates, as it was to find and collect the different norms of Islamic law.

Id.

75. *See id.*

76. ISTANBULI, *supra* note 14, at 39.

77. *Id.* at 40.

78. *Id.*

79. *Id.* at 40–43.

80. *Id.* at 42.

81. BAMYEH, *supra* note 71, at 223.

82. *Id.* at 228.

83. *See* ISTANBULI, *supra* note 14, at 43–44 (suggesting that this treaty was better than typically regarded because it forced the Quraysh to recognize Muhammad as an equal and to recognize the existence of an Islamic state, and arguing that Muhammad became a legitimate leader and not a rebel through this treaty).

84. BAMYEH, *supra* note 71, at 223 (emphasis added).

85. *Id.* (stating that Muhammad agreed to change "Muhammad, the messenger of Allah" to Muhammad, followed by his father's name).

dispute—the right to claim Allah as an Islamic or Quraysh God and acknowledging Muhammad as the messenger of Allah. Moreover, Muhammad’s explanation for deciding not to challenge the Quraysh for entrance into Mecca was that his she-camel lowered herself to the ground in the valley of Hudaibiyyah.⁸⁶ Muhammad believed that this was a sign from God, halting him on his camel, just as Allah halted the Abyssinians riding on elephants from entering Mecca and destroying Abraham’s Ka’ba.⁸⁷ The skeptic would claim that this explanation is simply not persuasive given the overwhelming evidence that Muhammad acted as he did because of the military and political reality of the situation.⁸⁸ While the Muslim believer does not need to accept this argument, the likelihood or persuasiveness of the skeptic’s explanation compared to the believer’s unquestioning acceptance does seem problematic.

More importantly, these examples demonstrate that the circularity between the non-Muslim outsider and Muslim insider is irresolvable in this context. The influence of culture is demonstrable, but the extent that culture influenced the foundation of Islamic law remains an issue or a non-issue depending on one’s viewpoint.

III. LOOKING BACKWARD: A CULTURAL REINTERPRETATION OF ISLAMIC LAW

A. Questions of Legitimacy

Non-Islamic scholars question the legitimacy of Islamic law through inference as well as direct examples. Scholars have long argued that Islamic culture did not arise as a homogenous enterprise, but rather as a mixed borrowing of the social customs belonging to tribal Arabs, Jews, Christians, and other religious and ethnic groups.⁸⁹ Scholars then infer that the influence or adoption of pre-Islamic custom and law undermines the legitimacy of Islamic law.

This is hardly a new argument. For example, Angelika Neuwirth notes that the early Meccan *suras* closely resemble pre-Islamic *kuhhan* (a literary utterance made by an oracle).⁹⁰ Neuwirth’s argument suggests that at minimum, a pre-Islamic cultural practice influenced the creation of sacred Muslim verse within the Qur’an. Predictably, Islamic scholars refute non-Islamic claims of illegitimacy regarding the Qur’an. M.A.S. Abdel Haleem argues that the key to understanding the Qur’an is through context and internal relationships.⁹¹ He refutes “Western” claims of illegitimacy,⁹² arguing that

86. *Id.* at 224.

87. *Id.*

88. *Id.* at 293–94 n.105 (noting that in all likelihood, Muhammad could not have entered Mecca by force as there were an estimated 10,000 combatants in Mecca at this time, while Muhammad had at most 1500 sedentary religious pilgrims and perhaps as few as 700).

89. *See, e.g.,* Henninger, *supra* note 45, at 15 (discussing the pre-Islamic Bedouins use of the word Allah before the founding of Islam).

90. Angelika Neuwirth, *Images and Metaphors in the Introductory Sections of the Makkan Suras*, in *APPROACHES TO THE QUR’AN*, *supra* note 48, at 3, 3; *see also* Michael Zwettler, *A Mantic Manifesto: The Sura of ‘the Poets’ and the Qur’anic Foundations of Prophetic Authority*, in *POETRY AND PROPHECY: THE BEGINNINGS OF A LITERARY TRADITION* 75, 77–78 (James L. Kugel ed., 1990) (describing *kuhhan* as pre-Islamic oracles or seers that made rhymed pronouncements of the same name regarding future events).

91. M.A.S. Abdel Haleem, *Context and Internal Relationships: Keys to Quranic Exegesis*,

doctrinal and external considerations are not fruitful considerations of the Qur'an.⁹³ Moreover, a closer look reveals that another scholar made the same argument that Neuwirth did sixty-six years earlier.⁹⁴ Neuwirth's restatement of a previous argument reinforces the circularity of this debate, as non-Islamic scholars make the same claims of illegitimacy due to cultural influence while Islamic scholars predictably refute or ignore these criticisms. In sum, Muslims regard non-Islamic critiques demonstrating how external factors such as culture might have influenced the Qur'an or the *sunna*⁹⁵ as simply the wrong way to interpret the Qur'an and Islamic law.

A second variation of how culture undermines Islamic claims of legitimacy involves a more direct questioning of the legitimacy of Islamic law. Rather than using historical or cultural examples to infer that Islamic law lacks a legitimate foundation, critics attempt to demonstrate cultural corruption within the divine sources. A typical version of this argument is to claim that Islamic law actually borrows heavily or even depends on non-Islamic legal systems. Earlier orientalist scholars, such as Ignaz Goldziher and Joseph Schacht, argued that Islamic law was dependent on Roman law.⁹⁶ Contemporary scholars such as Patricia Crone have harshly criticized this view.⁹⁷ Crone, however, then argues that Shari'a closely resembles Jewish law, not Roman law,⁹⁸ and that provincial law provided the most formative legal aspect to the development of *fiqh*.⁹⁹ Crone finds that an attempt to characterize Islamic law simply as adopting Roman legal principles and applying Islamic terminology is incorrect. However, she then makes virtually the same argument, simply replacing Roman legal principles with provincial and Jewish law.¹⁰⁰ In essence, Crone faults her predecessors only for mistaking the legal system on which Islamic law depends. Thus, the result is the same, namely that Islamic law depends on a non-Islamic legal system and thereby cannot support claims that it comes from a divine source.

B. The Sunna and the Hadith in Early Islam

The debate over the legitimacy of the *sunna* is perhaps the most contested argument between non-Islamic commentators and traditional Islamic scholars. The *sunna* is the collection of the traditions or the precedent set by the Prophet.¹⁰¹ Muslims consider the

in APPROACHES TO THE QUR'AN, *supra* note 48, at 71, 71.

92. *Id.*

93. *Id.*

94. *See id.* at 32 n.5.

95. *See infra* Part III.B ("The *sunna* is the collection of the traditions or the precedent set by the Prophet.").

96. PATRICIA CRONE, ROMAN, PROVINCIAL, AND ISLAMIC LAW: THE ORIGINS OF THE ISLAMIC PATRONATE 3 (1987) (noting that Goldziher and Schacht are among the first scholars who attempt to demonstrate, rather than merely suggest, that Islamic law developed from Roman law).

97. *See id.* at 12 (arguing that Goldziher and Schacht are wrong on several accounts and never demonstrably correct on any account).

98. *Id.* at 2.

99. *Id.* at 99. *Fiqh* is the science of jurisprudence or "understanding." Since Muslims believe Islamic law is infallible, it can only be understood. *See* COULSON, *supra* note 1, at 75.

100. *See* CRONE, *supra* note 96, at 99.

101. COULSON, *supra* note 1, at 56.

sunna a source of divine law.¹⁰² Although often used interchangeably, the *sunna* and the *hadith* are different terms.¹⁰³ *Hadith* refers to an actual verbal expression the Prophet made, while the *sunna* refers to the broader mode in which he lived, or the example that he set.¹⁰⁴ Non-Islamic scholars often conflate the two terms.¹⁰⁵ Further complicating the matter, commentators sometimes refer to collections of *hadith* as the *Hadith*. The *Hadith* is actually the collection of all *hadiths*, which is all of the recorded statements and actions of the Prophet, which in turn make up the *sunna*. The *sunna* serves as a complementary source for legal interpretation to be used alongside the Qur'an.¹⁰⁶ If a clear legal pronouncement is not available in the Qur'an, the next place to look is the *sunna*.¹⁰⁷

Iganz Goldziher was the first non-Islamic scholar to offer an influential critique of the historical accuracy and therefore the legitimacy of the *sunna*.¹⁰⁸ Goldziher questioned the validity of the *sunna* by arguing that many *hadiths* were fabrications inserted into the *sunna* after Muhammad's death. Islamic scholars, long aware of this possibility, had already developed a method for discovering fabrications by evaluating *isnads*, which are the chains of informants that relate the statement or practice back to Muhammad.¹⁰⁹ *Hadiths* with verified *isnads* are deemed authentic sayings or actions of the Prophet and are considered strong. *Hadiths* with questionable, falsified, or fabricated *isnads* are considered weak.¹¹⁰ This evaluative practice continues today. For example, contemporary Islamic scholars still debate the soundness of the *isnad* regarding whether one should fast on Arafa.¹¹¹ Arafa is the day Muhammad perfected his religion. It is one of the ten holiest days of the Islamic year. This debate began with the second Caliph¹¹² in the seventh century and remains unresolved today. The great longevity of this debate demonstrates the diligence of Islamic traditionalists toward resolving contradictions between *hadiths*.

The particularly damaging aspect of Goldziher's critique, however, is that he found many fabrications among strong *hadiths*. In fact, Goldziher used only strong *hadiths* for his research.¹¹³ Thus, the concern for Islamic scholars is not an unawareness of the problem, but a critique that demonstrates the failure of the method designed to catch these flaws. If correct, this critique severely undermines the legitimacy of Islamic law,

102. *Id.*

103. Abdal-Haqq, *supra* note 36, at 46.

104. *Id.*

105. *Id.*

106. COULSON, *supra* note 1, at 56.

107. *See id.* at 57 (suggesting that under Shafi'i the *sunna* actually became the primary source of Islamic law because the Qur'an was interpreted through the *sunna*, thus the *sunna* developed an "overriding role").

108. DONNER, *supra* note 22, at 13.

109. *Id.*

110. *See, e.g., id.* at 14.

111. M.J. Kister, *On 'Concessions' and Conduct: A Study in Early Hadith*, in *STUDIES ON THE FIRST CENTURY OF ISLAMIC SOCIETY*, *supra* note 50, at 89, 106.

112. The *caliph* (leader, successor) heads the *Umma* (the Muslim community). MALISE RUTHVEN, *ISLAM IN THE WORLD* 69 (2006).

113. DONNER, *supra* note 22, at 14.

because the second, or arguably functionally primary,¹¹⁴ source of Islamic law is shown not to be divine, but merely a collection of fabrications.

The collection of *hadiths* offers an example of how culture intrudes into Islamic law. Basing legal principles on the actions and sayings of Muhammad carrying forth his daily activities in the sociohistorical context of seventh-century Arabia surely allows prevalent social norms to enter the discussion. While an obvious stalemate exists between the non-Islamic critic claiming that the *sunna* consists of fabricated *hadiths* and the Islamic traditionalist replying that the *sunna* is a divine source with appropriate safeguards, a more subtle and useful analysis exists.

M.J. Kister discusses how *rukhas* (concessions) were an efficient tool to adapt to changing social circumstances in the early Islamic state by studying divergences in the early *hadiths*.¹¹⁵ *Rukhas* are a social practice which ease Islamic obligations in order to lessen hardships, such as permitting the sick to avoid otherwise obligatory fasts.¹¹⁶ Since Islamic law attempts to regulate all aspects of the believer's behavior, concessions function as legal loopholes. Kister demonstrates how concessions varied in application, as some concessions applied only to specific times,¹¹⁷ while other concessions left the choice to practice a concession to the believer,¹¹⁸ reversed prohibitions,¹¹⁹ or allowed for compromise, such as allowing the individual Muslim to decide whether after kissing his wife, he must perform the *ablution* (ritual cleansing) before prayer.¹²⁰

Kister also demonstrates that Muslims tolerated and preferred contradictory *hadiths* from the early companions of the Prophet,¹²¹ rather than practicing *naskh* (abrogation), which is the complete change or even removal of the *hadith*. Obviously, abrogation is a more radical measure than allowing contradictory *hadiths* within the legal system.¹²² While accepting aspects of Goldziher's analysis, Kister arrives at a markedly different conclusion, stating, "[t]he few traditions reviewed . . . clearly demonstrate the fluidity of certain religious and sociopolitical ideas reflected in the early compilations of *hadith*, as already proved by I. Goldziher,"¹²³ but adding, "[t]his activity reflects a sincere effort to establish the true path of the Prophet, the *Sunna*, which the believer should follow."¹²⁴ Thus, while circularity remains a problem, at least some scholars accept that allowing contradictory *hadiths* is an imperfect practice but that it does not undermine this source of Islamic law.

114. See COULSON, *supra* note 1, at 57.

115. Kister, *supra* note 111, at 89.

116. Mohammed Hashim Kamali, *Al-Maqasid Al-Shari'ah: The Objective of Islamic Law*, MUSLIM LAW., Apr.–June 1998, at 1, 2, available at <http://www.aml.org.uk/journal/3.1/Kamali%20-%20Maqasid.pdf>.

117. Kister, *supra* note 111, at 91.

118. *Id.* at 92.

119. *Id.*

120. *Id.* at 93.

121. See *id.* at 95.

122. See *id.*

123. *Id.* at 107.

124. *Id.* (emphasis added).

C. Cultural Variation Within the Formation of Islamic Law

Islamic law offers a distinctive characteristic not found in other legal systems. While the sources of the law are considered divine and infallible, and therefore impervious to the influences of culture, the application of the law creates diversity in locality not present in other legal systems. For example, the role culture should play in the administration of Islamic law is an old debate.

After the Prophet's death, four main schools of Sunni Islamic law emerged: the Hanafi, the Maliki, the Shafi'i, and the Hanbali. The schools quickly divided over what role culture should play in administering the law. In particular, the Hanifi school emphasized the need to use *ra'y* (human reasoning) to resolve legal questions without a corresponding example in the Qur'an or *sunna*. The Maliki school rejected this practice as impermissibly equating human law with divine law.¹²⁵ Later, the Shafi'i school resolved this conflict by allowing *ra'y*, which developed into *qiyas* (analogical reasoning), to remain a legitimate source of Islamic law.¹²⁶ Before employing the practice of *qiyas*, an Islamic jurist would first need to attempt to resolve the legal question through the Qur'an or the *sunna*. If neither source provided explicit direction, a jurist could then analogize a parallel example based on the underlying principles within the Qur'an and the *sunna*.¹²⁷ The location of the Hanifi school in Kufa, present-day Iraq, and the Maliki school in Medina may account for this disagreement. Kufa was a cosmopolitan city influenced by Persian law and culture, whereas Medina was the Prophet's home and the origin of the Islamic state.¹²⁸ The location of the Hanifi school suggests that the influence of a different legal system and legal culture, as well as a more diverse urban setting, allowed the Hanifi school to practice less rigid law than the Maliki school.

It is important to recall that early Islam is not the same cultural and religious enterprise as Islam practiced today. As with any cultural and religious movement spanning numerous centuries, distinct periods emerge. Islam, at the time of the Prophet, is much different from Islam during the founding of the Islamic state, the initial expansion of the Umayyad Dynasty, or as practiced today. The development of Islamic law and culture reflects the various versions of Islam attached to a particular historical moment.

125. See MANSOUR H. MANSOUR, *THE MALIKI SCHOOL OF LAW: SPREAD AND DOMINATION IN NORTH AND WEST AFRICA, 8TH–14TH CENTURIES C.E.* 2–3 (1994).

The use of human reason, *ra'y*, in formulating and elaborating Islamic law was tolerated by the Kufans or Hanafis as a legitimate and necessary, as well as a suitable and flexible instrument, for coping with new milieu and circumstances.

The Madinans or Malikis, on the other hand, rejected human reason and believed that every law must be derived from the Qur'an or the Prophet's *Sunna* as recorded in the Hadith.

Id. (emphasis in original). Mansour also notes the division that these two positions created in early Islamic law, stating, "the fledgling Islamic jurisprudence was faced for the first time with a rift between the Malikis who supported revelation and the Hanafis who emphasized reason." *Id.* at 3.

126. See *id.* at 3–4 (stating that *qiyas* became the third source of Islamic law).

127. *Id.* at 3.

128. *Id.* at 2.

One should not imagine that Islam as we know it came fully formed out of Arabia with the Arabs at the time of their conquest of the Middle East and was then accepted or rejected as the case may be, by the non-Arab peoples. Although many of the details are obscure and often controversial, it seems clear that Islam as we know it is largely a result of the interaction between the Arabs and the peoples they conquered during the first two centuries or so of the Islamic era which began in AD 622.¹²⁹

This point was particularly important during the Umayyad period, which was a crucial time for fledgling Islam. The Umayyads not only successfully expanded the Islamic world to reach three continents, but they also formulated the most cohesive vision of Islam after Muhammad's death.¹³⁰ Moreover, under the Umayyads, Islamic jurisprudence began to develop as a system, rather than a set of loosely connected laws.

Interestingly, the initial approach of the Umayyads was to exclude conquered people from accepting Islam.¹³¹ This approach was largely due to taxation. The Umayyads required non-Muslims to pay significant taxes to support the conquering Muslims.¹³² At least in principle, by accepting Islam conquered peoples would then be exempt from providing this support. Despite initial attempts to keep non-Muslim people socially and religiously separate from Islam, by the end of the Umayyad Dynasty in 750 most of these conquered people considered themselves Muslims.¹³³ Culturally this is important, as significant non-Islamic practices likely influenced the formation of classical Islam after the Prophet's death. The Umayyads' inability to keep non-Muslims from assimilating into Islam suggests a further inability to keep local customs separate from Islamic culture and law. Despite a concerted effort made by the conquering Umayyads, separating Muslim from non-Muslim proved impossible.

D. The Locality of Islamic Law

Lawrence Rosen stresses the importance of locality in Islamic law, stating, "Islamic law, deferring to the local version of what facts mean to people's relationships, allows facts to speak to their consequences through local custom, personnel, and standards."¹³⁴ At first, this deference to locality seems incompatible with divine sources, which presumably would replicate the same result regardless of location. But, perhaps this apparent contradiction is not so surprising. Cultural theorists have argued persuasively that social meaning is not possible without the application of a principle. Hans-Georg Gadamer makes this point bluntly by finding that all interpretation rests on application.¹³⁵ Gadamer's argument is pragmatic. For example, while there are social

129. G.R. HAWTING, *THE FIRST DYNASTY OF ISLAM: THE Umayyad Caliphate A.D. 661–750*, at 1–2 (1987).

130. *Id.*

131. *Id.* at 4.

132. *Id.*

133. *Id.* at 8.

134. ROSEN, *supra* note 7, at 176.

135. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 271–77 (Joel Weinsheimer & Donald G. Marshall trans., Crossroad Publ'g Co. 2d ed. 1989) (1975). For example, Gadamer discusses how interpreting the Bible as a historical document leads to a much different meaning than interpreting the Bible through the lens of Enlightenment rationality. *Id.* at 272.

norms and legal rules that inform a reviewing court when a judge violates judicial discretion, judicial discretion does not actually occur until the ruling court makes this finding. In other words, a judge's violation of judicial discretion—a social norm—is not made “real” until a reviewing court applies this norm. Gadamer's argument applies to locality within Islamic law as well, where a strong reliance on locality might be viewed as the practical result of what Islamic law requires: an interpretation of divine sources, no official legislative body, and the necessity of regulating numerous people with widely disparate backgrounds.

James Feibleman argues that a successful system of law must provide two oppositional goals simultaneously: one, a legal system must be stable enough to provide continuity; and two, be flexible enough to provide for change.¹³⁶ Likewise, Feibleman argues that “[t]he origins of law can be explained in two ways: by reference to individual needs and by reference to social exigencies.”¹³⁷ If a successful legal system requires continuity and flexibility, it is reasonable to assume that the origins of the same legal system provided the stability for transforming one sociocultural arrangement into another (a reference to social exigencies) and that the legal system provided the flexibility to accommodate local culture and social customs (a reference to individual needs). This model certainly applies to the formation of Islamic law. Initially, Islamic law was successful in adopting the social customs of pre-Islamic tribes.¹³⁸ Later, Islamic law allowed for the successful conversion of Arabic tribes into a relatively coherent religious community and eventually a state and then an empire.¹³⁹

E. Contemporary Example: Moroccan Qadi Courts

Rosen recently spent a year observing a *Qadi*¹⁴⁰ court in Sefrou, Morocco. The *qadi* (special judge) negotiates a bargain between the two parties without necessarily ruling against either party.¹⁴¹ Rosen explains:

[R]ather than being aimed simply at the invocation of state and religious power, rather than being devoted mainly to the creation of a logically consistent body of legal doctrine, the aim of the *qadi* is to put people back in the position of being able to negotiate their own permissible relationships without predetermining what the outcomes of those negotiations ought to be.¹⁴²

This legal practice demonstrates the immensely successful continuity Islamic law maintains. Admittedly, simply because a legal practice remains in use does not mean

136. JAMES K. FEIBLEMAN, *JUSTICE, LAW, AND CULTURE* 64 (1985).

137. *Id.* at 49.

138. *See, e.g.*, DONNER, *supra* note 54, at 59.

139. *See* COULSON, *supra* note 1, at 21.

140. *See id.* at 28 (discussing the creation of *qadis* (special judges) by the ruling class in the Umayyad Dynasty to settle local disputes for the governor of a particular region, and stating that *qadis* arose from an administrative necessity because as the Umayyads successfully expanded the Islamic empire it was no longer feasible to solve disputes on an *ad hoc* basis).

141. LAWRENCE ROSEN, *THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY* 17 (1989).

142. *Id.* (emphasis added).

that it is successful; however, the fact that *Qadi* courts remain in use after thirteen centuries is remarkable and does not seem possible without at least a significant degree of support by Muslims.

The longevity of *Qadi* courts demonstrates the importance of negotiation within Islamic law, while also offering broader insight into Islamic legal culture. Rosen argues that the key metaphor to understanding Morocco and the Middle East is the concept of contract and negotiation.¹⁴³ He finds the image of the bazaar or marketplace to be “writ large in social relations, of negotiated agreements extending from the realm of the public forum into those domains—of family, history, and cosmology—where they might not most immediately be expected to reside.”¹⁴⁴ Istanbuli makes a similar point by demonstrating that Muhammad adopted Arabic arbitration, especially when negotiating with Jewish tribes.¹⁴⁵ While the Middle Eastern bazaar and Arabic arbitration preceded Islam, perhaps by millennia, these practices, equal parts law and culture, remain important to the practice of Islamic law.

The examples above demonstrate a further circularity. While the interpretation and application of Islamic law allows for the intrusion of cultural practice, interpretation and application still do not address the extent that culture influences Islamic law or brings the skeptic and believer closer to a resolution.

IV. STRATEGIES FOR LIBERAL REFORM

A. Example Specific Strategy

Given the problem of circularity that this Note demonstrates, non-Islamic commentators should adopt a different tactic if they want to influence Islamic scholars to make liberal reforms to Islamic law. Dismissing secular criticism questioning the legitimacy of the Qur’an and the *sunna* is easy for Muslims because such criticism is perceived as uninformed Western opinion or inapplicable non-Islamic arguments. In addition, such criticism often claims a cultural superiority—whether stated directly or indirectly—that Muslims are likely to reject.¹⁴⁶ Instead, non-Islamic commentators should proceed by accepting these sources as immutable, while circumventing their authority. Such tactics are much likelier to succeed in providing liberal reform.

John Burton posits such an example when discussing the stoning penalty for adultery. Burton notes that the stoning penalty for adultery is not found within the Qur’an.¹⁴⁷ Moreover, he argues that Muslims adopted the stoning penalty even though historically it had nothing to do with Islam.¹⁴⁸ Stoning was in fact the Jewish penalty

143. *Id.* at 11.

144. *Id.*

145. ISTANBULI, *supra* note 14, at 52.

146. See DOUGLAS LITTLE, AMERICAN ORIENTALISM: THE UNITED STATES AND THE MIDDLE EAST SINCE 1945, at 35 (2002). See generally EDWARD W. SAID, CULTURE AND IMPERIALISM (1994); EDWARD W. SAID, ORIENTALISM (1979).

147. John Burton, *Law and Exegesis: The Penalty for Adultery in Islam*, in APPROACHES TO THE QUR’AN, *supra* note 48, at 269, 269.

148. *Id.* (stating that the stoning penalty was the “adoption by the Muslims of an item of legal material that historically had nothing whatever to do with Islam”).

for adultery.¹⁴⁹ The penalty became part of the *sunna* because Muhammad ordered the stoning of a man and woman found guilty of committing adultery.¹⁵⁰ This is not, however, the entire story.

Muhammad ordered the stoning of this couple because they were Jewish and brought before Muhammad. Acting as an arbitrator, Muhammad asked what the penalty for adultery was in the Torah.¹⁵¹ The guilty couple told Muhammad that the penalty was humiliation and flogging,¹⁵² but a recent Jewish convert to Islam informed Muhammad of the much harsher penalty and showed Muhammad the penalty written in the Torah and obscured by the couple.¹⁵³ Muhammad then ordered the stoning, reasoning that the Jews, being people of a different book, must follow the legal principles of that book.¹⁵⁴

The result is that the stoning penalty moved from *tasfir* (interpretation) to the *sunna* by the time of Shafi'i (767–820), as this interpretation graduated into *fiqh*.¹⁵⁵ Burton demonstrates how a contemporary, although rarely used, Islamic legal penalty deemed reprehensible and cruel by virtually all non-Islamic commentators is not in fact Islamic—but Jewish in origin. He also illustrates how this custom moved backward from interpretation to an attribution of the Prophet's actions, thus legitimating the legal penalty.

While Burton makes an argument that undermines the legitimacy of a particular legal penalty, this is not a strategy likely to apply to numerous situations. Although this is a powerful critique, its application is limited due its specificity.

B. Broad Strategy

In addition to the limited examples applicable to a strategy such as Burton's, other difficulties remain. The most obvious difficulty to creating liberal reform is that since Muslims consider the Qur'an both the source of Islamic law and a preexisting, eternal, and absolute good,¹⁵⁶ truly amending the law is unthinkable.

This difficulty can be conceptualized as an either/or binary relationship. Scholars often characterize Islamic law this way. For instance, Ann Lambton finds that Islamic law can only be known or unknown, obeyed or disobeyed.¹⁵⁷ While this is a stopping point for many scholars, Lambton makes an interesting observation stating that

149. *See id.* at 272.

150. *See id.*

151. *Id.* at 271.

152. *Id.*

153. *Id.* at 271–72.

154. *Id.* at 272. Historically, Muslims have treated Jews and Christians with tolerance because they are considered “people of the book,” meaning that they share a common religious and cultural background and therefore receive certain social and legal rights. JOHN L. ESPOSITO, WHAT EVERYONE NEEDS TO KNOW ABOUT ISLAM 75–76 (2002). Moreover, people of the book—Muslims, Jews, and Christians—are mentioned specifically in the Qur'an as children of the prophet Abraham. *Id.* (stating and discussing *sura* 3:84).

155. Burton, *supra* note 147, at 282.

156. ANN K.S. LAMBTON, STATE AND GOVERNMENT IN MEDIEVAL ISLAM: AN INTRODUCTION TO THE STUDY OF ISLAMIC POLITICAL THEORY: THE JURISTS, at xiv (1981).

157. *Id.* at 1.

Muhammad was not responsible for the formation of Islamic law.¹⁵⁸ Historically this is true, as Shari'a was formed after Muhammad's death. Lambton then creates a tension by quoting an Islamic source that states, "Certainly you have in the Messenger of Allah a good example."¹⁵⁹ Of course, Muhammad is the ultimate example for Muslims to emulate. If Islamic law developed in a manner inconsistent with Muhammad's example, a troublesome problem seemingly arises. After all, if the sometimes harsh standards of Shari'a are not supported by the Qur'an or the example of Muhammad, what justification could arise for the continued rigidity of this law?

Unfortunately, rather than push this thought, Lambton exhibits the standard non-Islamic dismissive attitude toward the *sunna*. She resorts to claiming that the *sunna* was a collection of pre-Islamic rituals, or even worse, at least from a Muslim's perspective, falsified accounts of Muhammad's actions reset into the *sunna* to serve a particular goal. Lambton states:

In them were included not only many elements from non-Islamic sources, which were thus absorbed into and assimilated to Islam, but also many traditions which were in fact spurious or falsified to meet some particular need. Once accepted into the corpus of traditions, however, all these various elements were given sanctity and immutability and their origins were either forgotten or never realized.¹⁶⁰

Despite her dismissive approach, Lambton does make a very important point. It was not until Shafi'i that Islamic law took on a conservative reluctance toward change.¹⁶¹ Lambton argues that neither the Qur'an nor Muhammad exhibited the degree or rigidity that Shafi'i successfully imposed on Islamic law through *ijma* (consensus).¹⁶² Further, she contends that while Shafi'i attempted to exclude change and growth from Islamic law through *ijma*, the first two centuries of Islamic legal practice were much less restrictive. "Recent research has shown that Islamic law in its formative period down to the middle of the second century was by no means immutable in theory let alone in practice. The persistent refusal to admit to the possibility of change dates only from the time of Shafi'i."¹⁶³ Accepting Lambton's position seemingly would open Islamic law to the possibility of much more liberal reform.

C. Reconsidering Muhammad

Muhammad separates himself from the earlier prophets of the book because he demonstrates no miracles and makes no supernatural claim, such as Jesus turning water into wine. Rather, Muhammad's great strength is generally considered his reasoning. While Islam eventually spread across three continents through military might, it is

158. *Id.* at 2.

159. *Id.* at 6 (quoting Zafar Ishaq Ansari, *Islamic Juristic Terminology Before Safi'i: A Semantic Analysis with Special Reference to Kufa*, 19 ARABICA 259 (1972)).

160. *Id.* at 6-7.

161. *Id.* at 12.

162. *Id.* ("In the Qur'an there is no categorical or systematic political structure, and there is no indication that Muhammad intended his actions to be regarded as laying down immutable standards to be followed and observed in perpetuity.").

163. *Id.*

important to remember that Muhammad's initial conversions came through diplomacy, persuasion, and logical argument, not violence.¹⁶⁴

Muhammad was very much a man of his times. He was able to persuade a multitude of diverse peoples within the Arabian Peninsula to adopt Islam. Muhammad succeeded because he embraced local practices and customs advantageous to his cause.¹⁶⁵ Why should contemporary Islamic leaders not practice the same savvy in response to cultural norms and social values much different today than those of seventh-century Arabia? Admittedly, this question can become a request for Muslims to adapt values of a secularized culture sometimes greatly at odds with the values of Islamic states. Further, it is a legitimate criticism to ask why Islamic leaders even need to reply to Western or non-Islamic criticism. If Islamic leaders and Muslims following these leaders believe that they are living according to God's divine law, other criticism seems moot.

As a pragmatic consideration, however, Islamic leaders would be wise to engage in cultural criticism from the non-Islamic world rather than merely to ignore or dismiss these criticisms. If nothing else, engaging with another culture demonstrates a confidence in one's own cultural practices. Moreover, this is the outreaching model that Muhammad adopted when developing the Islamic state. Through persistence, diplomacy, and good governance—and only after these practices, military power—Muhammad forged a religious and cultural ideology strong enough to maintain control of a diverse group of peoples with various religious and cultural practices of their own. At the same time, the Islamic legal system provided the flexibility to engage and ultimately absorb non-Islamic practices that were beneficial to Islam.

D. The Role and Limitations of Shari'a

Commentators wishing to produce liberal reform within Islamic law should emphasize that while the Qur'an and the *sunna* are divine sources, the interpretation of these sources is not a divine practice, but a production of social meaning limited to a particular sociohistorical moment. Professor Abdullahi Ahmed An-Na'im makes this point strongly, stressing the need to recognize that Shari'a is a culturally produced derivative of Islamic law's divine sources.

Although derived from the fundamental divine sources of Islam, the Qur'an and Sunna, Shari'a is not divine because it is the product of *human interpretation* of those sources. Moreover, this process of construction through human interpretation took place within a *specific historical context* which is drastically different from our own. It should therefore be possible for contemporary Muslims to undertake a similar process of interpretation and application of the Qur'an and Sunna in the present historical context to develop an alternative public law of Islam which is appropriate for implementation today.¹⁶⁶

164. See BAMYEH, *supra* note 71, at 223.

165. See *supra* Part II.D.

166. ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 185–86 (1990) (second emphasis added).

Admitting a particular sociohistorical context influenced Islam does not question the legitimacy of the two divine sources of Islamic law; it only asks that contemporary Muslims receive the same opportunity to interpret these sources within their sociohistorical and cultural moment.

Allowing for an infallible source of law while insisting on fallible human interpretation satisfies both Islamic tradition and non-Islamic critiques. The Qur'an and the *sunna* remain divine and immutable, which satisfies Muslim scholars, while admitting sociohistorical and cultural practices influenced the formation of Islamic law satisfies non-Muslim scholars. In addition, while Islamic leaders and scholars can easily ignore or deflect criticism that simply questions the legitimacy of the Qur'an or *sunna*, ignoring criticism that accepts the legitimacy of these sources proves much more difficult.

Even if adopted wholeheartedly, however, this position will fall short of the demands of all non-Islamic critiques. There are examples of Muhammad's actions, such as giving instructions to kill people on sight, which would be irreconcilable with non-Islamic critiques even if considered within a historical context.¹⁶⁷ Furthermore, there are clearly stated passages in the Qur'an that even liberal-minded contemporary Muslims might have difficulty reinterpreting contrary to their current meaning. *Sura* IV:34, which allows a husband to beat a disobedient wife is one such example.¹⁶⁸

Despite some limitations, adopting the above position will allow Islamic leaders and scholars sympathetic to liberal social values the flexibility to reform Islamic law. Given current examples of international outrage, such as the international reaction to a Saudi Arabian woman receiving a penalty of ninety lashes for being alone with a man whom she had not married, after being gang raped by seven men over the course of several hours,¹⁶⁹ or the use of stoning—while extremely rare—to kill people convicted of adultery,¹⁷⁰ a flexibility for at least basic liberal reform is necessary.

In addition, not only are non-Islamic commentators calling for these reforms, but Muslims within Islamic states are also calling for compromise. Kano is a Nigerian state that adopted Shari'a in 1999.¹⁷¹ Bala Abdullahi, a civil servant in Kano, stated, "Shariah needs to be practical. We are a developing country, so there is a kind of moderation between the ideas of the West and traditional Islamic values. We try to weigh it so there is no contradiction."¹⁷² Although not a complete overhaul, this

167. *Id.* at 184.

168. QUR'AN, *supra* note 57, at IV:34.

Men are the managers of the affairs of women for that God has preferred in bounty one of them over another, and for that they have expended of their property. Righteous women are therefore obedient, guarding the secret for God's guarding. And those you fear may be rebellious admonish; banish them to their couches, and beat them. If they then obey you, look not for any way against them; God is All-high, All-great.

Id.

169. Rasheed Abou-Alsamh, *Saudi Gang-Rape Case Provokes a Rare Debate*, N.Y. TIMES, Dec. 1, 2007, at A9.

170. MISSION FOR ESTABLISHMENT OF HUMAN RIGHTS IN IRAN, ISLAMIC PENAL CODE OF IRAN 4, available at http://mehr.org/Islamic_Penal_Code_of_Iran.pdf.

171. Lydia Polgreen, *Nigeria Turns from Harsher Side of Islamic Law*, N.Y. TIMES, Dec. 1, 2007, at A1.

172. *Id.*

position is practical and respectful to the Islamic tradition, as it does not question the legitimacy of the Qur'an or the *sunna*, or demand that Islamic leaders adopt non-Islamic changes because they are somehow simply superior.

CONCLUSION

Culture reflected the sociohistorical and cultural moment of the creation of Islam. Culture also influenced the foundation of Islamic society and Islamic law. Muhammad allowed for the practice or adoption of various pre-Islamic Arabic, Jewish, and Christian cultural and legal practices, as long as these practices did not contradict the Qur'an. This pattern of selective adoption continued during the spread of the Islamic empire after Muhammad's death. The integration of numerous peoples with non-Islamic cultural and legal customs required the assimilation of non-Islamic customs for the empire to spread.

Of contemporary importance is the debate over the *extent* that culture influenced the formation of Islamic law. Non-Islamic critics outside the Islamic tradition claim that culture influenced the formation of the Qur'an and the *sunna*, thus undermining the legitimacy of Islamic law. Muslim scholars inside the Islamic tradition counter that the Qur'an contains the divine word of God and that the *sunna* is the divinely inspired example of the Prophet, thus, claims of cultural influence simply do not apply. As demonstrated, this disagreement reduces to an irresolvable circularity. A mediating position is the outsider allowing that while the Qur'an is the infallible word of God and the *sunna* is the legitimate collection of the Prophet's example, the transmission of these words into law was a cultural enterprise. This mediating position allows for liberal reform inside the Islamic tradition without questioning the legitimacy of the divine sources of Islamic law. This solution will not satisfy all critics, but it does offer a legitimate start.

