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CODES AND HYPERTEXT: THE INTERTEXTUALITY OF INTERNATIONAL AND COMPARATIVE LAW

Marylin J. Raisch*

ABSTRACT

The field of information studies reveals gaps in the literature of international and comparative law as part of interdisciplinary and textual studies. To illustrate the kind of theoretical and text-based work that could be done, this essay provides an example of such a study. Religious law texts, civil law codes, treaties and constitutional texts may provide a means to reveal the nature of hypertext as the new format for commentary. Margins used to be used for commentary, and now this can be done with hypertext and links in footnotes. Scholarly communication in general is now intertextual, and texts derive value and meaning from being related to other texts.

This paper draws upon examples chosen after observing relationships between text presentation and hypertext as well as detailing similar observations by scholars to date. However, this essay attempts to go beyond a descriptive level to argue that this intertextuality, and the hypertext nature of the web, bring together texts and traditions in a manner conducive to the study of legal systems and their points of convergence.

INTRODUCTION

Recent discussion of scholarly communication in the emerging internet landscape of hypertext has brought the study of law into an interdisciplinary,¹ intertextual framework.² International and

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1. Jack M. Balkin and Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 19 YALE J. L. & HUMAN. 155, 157 (on the continuous but changing interdisciplinary study of the law in its shift from humanities and "great books" perspectives to statistical data and economics; compares different perspectives of Learned Hand versus Oliver Wendall Holmes, but raises queries what about nature of evidence drawn from texts); See also, Interview, *Balkin Talks Blogs*, YALE L. REPORT 44, 46-47 (Winter 2007),

comparative legal research, as a major area of special inquiry for practice and scholarship, must bridge the interdisciplinary gap and be brought into this discussion along with the texts - primarily codes and treaties as well as constitutions and judicial opinions - which form its body of meaning. The language of its norms, whether they be of private law, contract, human rights, or religious law, resonate across cultural contexts, making comparative law and transnational understanding twin means to important ends such as peace and trade. Critical to this discussion and necessary to close this gap in international and comparative law in the global information society are aspects of communication theory and the philosophy of technology.

Initially the very nature of international and comparative law (ICL), both inside and outside the academy, appeared less sharply distinct in its boundaries from other disciplines, at least regarding the historical and social sciences. "International law is not really law" was an assertion by logical positivists that held some sway until certain treaty regimes and international arrangements gained ground after the Second World War.³ Comparative law in particular has also had a long

<http://www.law.yale.edu/ylr> (last visited Jan. 31, 2008) ("Just as the internet collapses the news cycle, it also collapses the publication and discussion cycle."). *Id.*

2. The definition of intertextuality I will use in this essay is the fairly simple one used by others in this regard. See Alani Golanski, *Nascent Modernity in the Case of Sherwood v. Walker- An Intertextual Proposition*, 35 WILLAMETTE L. REV. 315, 316 (1999) ("Although the term 'intertextual' may be used in referring to a court's reliance on prior legal opinions, here the term connotes atypical use of texts across disciplines."). Other definitions of intertextuality in its linguistic and literary context have been popularized in the work of Julia Kristeva; See JULIA KRISTEVA, *DESIRE IN LANGUAGE: A SEMIOTIC APPROACH TO LITERATURE* 66 (1980) (quoting M.M. Bakhtin, "...any text is constructed as a mosaic of quotations; any text is the absorption and transformation of another. The notion of *intertextuality* replaces that of intersubjectivity, and poetic language is read as at least *double*."). See also for selected further discussions of the definition and origins of intertextuality, GRAHAM ALLEN, *INTERTEXTUALITY* 10 (2000) ("The life of signs within society is semiology and structuralism seeks to describe human culture in terms of a sign system."; Allen argues that it may have been part of the origin of the theory of intertextuality or it may have arisen from the work of Russian literary theorist Mikhail M. Bakhtin); MARY ORR, *INTERTEXTUALITY: DEBATES AND CONTEXTS* 20, 22 (2003) (agrees that the term originated with Kristeva and specifically her 1973 work *Encyclopédie universalis* but notes that attribution to her of this term may have been overlooked, stating that her idea was elided with Barthes' "death of the author" and Derridean "deferral of text" referring to ROLAND BARTHE, *THE DEATH OF THE AUTHOR* (1969) and perhaps her terms for an oft-quoted and much-interpreted statement by Jacques Derrida, "there is nothing outside the text." JACQUES DERRIDA, *OF GRAMMATOLOGY* 158, (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press First Am. ed. 1974, 1967).

3. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 164-293 (Wilfred E. Rumble ed., Cambridge Univ. Press 1995) (1832) (suggesting that international law is not really law because there exists no sovereign to enforce it); H.L.A. HART, *THE CONCEPT OF LAW* 214 (2d ed. 1994) [hereinafter *CONCEPT*] (suggesting that international law is not really

and still lingering struggle for legitimacy alongside common law case law and statutory law study via the Socratic method in American legal education.⁴ Materials were harder to locate and often in languages other than English; the civil law systems of Romano-Germanic origin had until the mid- 20th century less urgency for American legal research. Students of other legal systems viewed common law in that manner as well.⁵ However, in a world now global in both trade and terror, encountering and understanding the legal Other is of crucial importance.

The rise of internet-based legal research has made the retrieval of the texts and sources of ICL easier to perform, but this paper will argue that there is another less obvious outcome: hypertext and its instantaneous cross references bring to those legal texts an ancient methodology, made new again and crucial to modern legal analysis. That methodology is one of *simultaneous commentary*, which brings associations, sources, and suggested interpretations into the present moment all at once. The hypertext experience is similar to medieval marginalia and commentaries, both for civil codes in the Roman law tradition⁶ and for religious texts such as the Bible, and for religious legal texts. This is not a new or entirely non-obvious observation; it has even been argued that commentary arrayed around the main text as a core visually centered on a printed page takes control of the text⁷. The

law because it lacks “secondary rules of change and adjudication which provide for legislature and courts” and “a unifying rule of recognition, specifying ‘sources’ of law and providing general criteria for the identification of its rules.”). *But see* John Mikhail, *Plucking The Mask Of Mystery From Its Face”: Jurisprudence and H.L.A. Hart*, 19 GEO. L. J. 733 (2007) (reviewing NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* (2004)) (*citing* CONCEPT, *supra* note 3, at 208–31 as “affirming the obligatory character of international law”).

4. David S. Clark, *Development of Comparative Law in the United States*, in MATHIAS RIEMANN & REINHARD ZIMMERMAN, *OXFORD HANDBOOK OF COMPARATIVE LAW* 204–05 (2006); Catherine Valcke, *Global Teaching Law* 54 J. LEGAL EDUC. 160, 162, nn.6–8 (2004).

5. *See, e.g.*, J. PAUL LOMIO & HENRIK SPANG-HANSEN, *LEGAL RESEARCH METHODS IN THE U.S. & EUROPE* (2007).

6. Large numbers of examples abound; for an image from the manuscript tradition in the middle ages for the *Corpus Iuris Civilis* of Justinian *see*, from the Digital Scriptorium, *Corpus Iuris Civilis* with gloss, *available at* http://app.cul.columbia.edu:8080/exist/SCRIPTORIUM/individual/CU-BANC-157.xml?showLightbox=yes&text_num=1 (last visited April 7, 2008); pure hypertext versions and portions of Justinian’s text as *Annotated Justinian Code* by Fred H. Blume, ed. Timothy Kearley (2007), *available at* <http://uwacadweb.uwyo.edu/blume&justinian/default.asp> (last visited Jan. 31, 2007) and Roman Law Library by Y. Lassard and A. Koptev, sponsored by the Université Pierre-Mendès-France in Grenoble, *available at* <http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/> (last visited Jan. 31, 2007).

7. Christopher Burdon, *The Margin is the Message: Commentary’s Displacement of Canon*, 13 LITERATURE & THEOLOGY 222, 226 (1999).

Glossa Ordinaria of canon law (to be examined further on in this essay) may be seen as equal to its base text, by analogy, just as Biblical commentary may “displace” and draw the reader away and into an ever-expanding web of connections that dilute the meaning and substance of the original text.⁸ An additional negative view of hypertextuality (and the argument that it is entirely distinct from intertextuality) similarly sees it going so far beyond the text, that in the literary context it moves away from textuality into non-literary social, cultural and historical materials; unlike intertextuality, it does not guide the reader through its literary lineage to illuminate the “linguistic network connecting the existing text with other preexisting or future, potential texts.”⁹

This essay will argue, however, that texts of religious law bring both intertextuality (reference to other linguistically or traditionally texts) and hypertextuality (references to wider background materials and explanations) under the one umbrella of *simultaneous commentary* and thus into sharp focus; far from distracting from or diffusing the text, this uniting phenomenon of *simultaneous commentary* responds to the lawyer’s need for an interpretive immediacy different from the more general role of footnotes and the case precedents of the common law system. In this sense, the demands on a text by readers, believers, and lawyers differ. Simultaneity of association transcends the limits of validation by authorities prior in time, although historical precedents are crucial to a great deal of both civil law and common law research. Rather, the hypertext experience is positive, and is one of a particular type of intertextuality that provides a marginal gloss to legal texts in their earlier medieval and modern-day electronic formats. Its current template is the wiki and its most familiar modern print predecessor (and partial current equivalent) is the glossed poem in another language or dialect¹⁰.

This paper further will examine instances of major ICL texts that manifest their meaning, internal coherence, and related documents

8. *Id.* at 231.

9. Michael Riffaterre, *Intertextuality v. Hypertextuality*, 25 NEW LITERARY HISTORY 779, 786 (1994).

10. *See, e.g.*, the teaching text with gloss on page or interlinear for editions of Chaucer’s works, such as GEOFFREY CHAUCER, *THE CANTERBURY TALES* (original spelling, Jill Mann, ed., Penguin Classics, 2005); gloss on page footnotes, GEOFFREY CHAUCER, *THE CANTERBURY TALES* (A.C. Cawley, 1996) (1958) (gloss interlinear); reader comments to authoritative Riverside Chaucer include footnotes and gloss not on the same page and less convenient, GEOFFREY CHAUCER, *THE RIVERSIDE CHAUCER* (Larry Benson, Robert Pratt, & F.N. Robinson eds. 1987) (an edition including more texts than merely *THE CANTERBURY TALES*; layout and dispersed glosses criticized by contemporary reviews, e.g., Betsy Bowden, *Glossing Chaucer*, *ESSAYS IN CRITICISM* XXXVIII (1): 75, 77 (1988).

particularly well in the hypertextual universe, and indeed, have done so throughout history, using print and analog technologies. These text types are treaties, constitutions, and codes. Detailed examples will be drawn from codes in the religious legal tradition in order to show, first, how marginal commentary in canon law, Islamic law and Talmudic law texts has been a precursor to modern intertextual and hypertextual research; second, how this marginal commentary has migrated to the electronic text; and third, what implications this phenomenon may have for new interpretive models that are emerging independently in the interdisciplinary approaches of Anglo-American scholarship. Finally, comparative study of textual structures for codes may be ultimately the most valuable bridge between common and civil law methodologies. It may narrow the gap between the codex as a physical form, the hallmark of religious and civil law systems, and the internet code that is hypertext and which has transformed case law interlinkages through Westlaw and Lexis.

I. THE NATURE OF RELIGIOUS LEGAL TEXTS

A. *Oral and Written Transmissions, Tradition, and Commentary*

In law, as in poetry and history, there is a common assumption that communication of information and content appropriate to the form of expression - rules, principles, and sanctions for law; heroic deeds or lyric moments for poetry; chronicles of great events for history - was oral before it was written.¹¹ Oral and written forms of transmitting

11. DONALD M. ANDERSON, *THE ART OF WRITTEN FORMS: THE THEORY AND PRACTICE OF CALLIGRAPHY* 3 (1969) (noting that “we human creatures managed to live without a form of writing for many thousands of years.”). *See also* MARSHALL MCLUHAN, *THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN* 45–46 (1962) [hereinafter MCLUHAN, *GUTENBERG GALAXY*] and WALTER ONG, *ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD* (1982) (on the implications of the shift from orality to text very gradually). *See also*, Twyla Gibson, *Milman Parry: The Oral-Formulaic Style of the Homeric Tradition*, The McLuhan Program in Culture and Technology, available at http://www.utoronto.ca/mcluhan/tsc_parry_homeric_tradition.htm (last visited Feb. 2, 2008); Twyla Gibson, *Eric Havelock: Plato and the Transition From Orality to Literacy*, The McLuhan Program in Culture and Technology available at http://www.utoronto.ca/mcluhan/tsc_havelock_orality_literacy.htm (last visited Feb. 2, 2008); exemplified by Marshall McLuhan, as cited above, and the implications of a shift from an organic and multi-sensual speech culture to technological and linear one with the invention of the alphabet. *But see, e.g.*, JOSEPH A. DANE, *THE MYTH OF PRINT CULTURE: ESSAYS ON EVIDENCE, TEXTUALITY, AND BIBLIOGRAPHIC METHOD* 20–23 (2003) (disputing the thesis of Ong and others that there is sufficient evidence of print and scribal cultures, especially based on type versus script), and note: disputing the distinctions and implications of the visual versus the oral (and later, the aural in communications theory and intellectual

information also co-existed in Greek society and philosophical discourse (as reflected in Plato's dialogues, where orality and textuality are in frequent tension).¹² Legal anthropologists, students of media and communications, and historians of the ancient world have suggested that in the development of human culture, committing to memory extensive amounts of material from an oral tradition remained common and necessary until the technology of writing and preserving records took hold among the early elites who had access to it.¹³

Oral law has a narrower frame of reference and a more distinctive history.¹⁴ Beyond the world of poetic repetition and the mnemonic devices of early cultures to preserve narratives and myth, there have emerged and persist today vestiges of oral law in three areas: in customary laws and traditions among indigenous peoples, in the very tradition of the early common and civil law in the West,¹⁵ and in the practice of states in some very narrow areas of international law.¹⁶ Much of what we know about the western medieval world and the ancient Vedic world of India points to the movement of oral information into scribal documents of some kind, that is, the movement of spoken (or even sung) text becoming recorded (or to paraphrase the United States federal legislation on copyright, "fixed in a tangible medium of expression").¹⁷ However, there is little information on which a scholarly argument can be based, or a history of law substantiated, until the appearance of texts such as the Code of Hammurabi or the Twelve

approaches to the history of the book) McLuhan himself reminds readers that early manuscript reading was oral, that is, a guide to reading out loud for a monastic audience in McLuhan, GUTENBERG GALAXY at 87–89).

12. JAMES J. O'DONNELL, AVATARS OF THE WORD: FROM PAPYRUS TO CYBERSPACE 25–26 (1998) (referring to Plato's *Phaedrus* and the skepticism about writing which he attributes to Socrates, and also commenting on the work of Rosalind Thomas about the borderline in Greek literary culture between the written and the spoken word: no bright line existed between orality and textuality; they co-existed even as "Socratic skepticism of the written word virtually disappeared." *Id.* at 26).

13. *Id.* at 5.

14. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 6, 61 n.9 (3d ed. 2007) (stating that the earliest traditions of law were oral and "the most evident feature of a chthonic legal tradition has been its orality" and citing N. OSLER, EMPIRES OF THE WORD: A LANGUAGE HISTORY OF THE WORLD 183 (2005) on eastern Vedic as well as European resistance to written writing).

15. *Id.* at 61–63, 128–29.

16. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5–10 (5th ed. 1998) (regarding customary international law and occasional difficulties of written proof, such as "ceremonial salutes at sea" and acquiescence in certain practices of a state, interpreting UN STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, para.1.b.).

17. Copyright Act, 17 U.S.C. § 102 (1976).

Tables of early Roman law.¹⁸

This “visuality” of text and the use of pictographic characters or symbols followed by syllabic alphabetic writing became the focus of the work of literary scholars such as McLuhan and Walter Ong, S.J. in propounding a theory of a cultural transition from a multisensory oral and “audile-tactile” world of experience to one of alphabetic, linear expression and experience.¹⁹ McLuhan in particular went on to argue that this medium of communication did not merely express ideas. Indeed, alphabetic writing, and especially its explosion into the dominant medium of western, and eventually world, culture with the invention of movable type and the printing press, came to affect culture by exerting pressure towards rationality and the linear, sequential presentation of ideas.²⁰ The human imagination and its expression in the literary forms of print culture draw in the reader and become part of a collaborative experience involving cross-references within a reader’s prior experience of other texts, his or her personal experience, and other kinds of memories or images. This engaging alphabetic or print medium is, in McLuhan’s particular (and somewhat counter-intuitive) definition “hot” or filled with data for the reader and thus requiring less to be filled in; McLuhan also contrasts this experience with the return of the aural, speech-based and potentially “tribal” world of television in which the viewer must complete the visual picture of the cartoon or cathode tube and literally “connect the dots” to remain engaged with the information being imparted.²¹ McLuhan’s theories and those of his student Ong have been debated and contested for several decades since the appearance of their work,²² but I assert here only that their general notion of some effects being generated by media of expression through the ages and on into the current phenomenon of the internet and its

18. RUSS VERSTEEG, *LAW IN THE ANCIENT WORLD* 6 (2002); JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION*, 2 (3d ed. 2007); Jan M. Smits, *Comparative Law and Its Influence on National Legal Systems*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 515 (Mathias Reimann & Reinhard Zimmerman eds., 2006).

19. See MCLUHAN, *GUTENBERG GALAXY*, *supra* note 11, at 43, 48–50; see also ONG, *supra* note 11, at 157–58 (on the analogous point that an oral culture transmits tradition and lore and is not text-bound, as literary Formalists and New Critics would have it in the study of poetry post-Gutenberg).

20. MCLUHAN, *GUTENBERG GALAXY*, *supra* note 11, at 110–11.

21. MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 24–25 (Routledge ed. 2001) (1964).

22. See, e.g., discussion of critical reaction to the theory of print/oral cultures *supra*, note 11; PAUL LEVINSON, *DIGITAL MCLUHAN: A GUIDE TO THE INFORMATION MILLENNIUM* 3 (1999) (summarizing reactions to the unscientific and metaphorical nature of McLuhan’s theories).

hypertextual world has become an accepted principle in discussions of scholarly communication and the world of electronic code.²³ What may not be so widely agreed upon is precisely what those effects are, and equally controversial, how they can be measured or verified empirically, given McLuhan's originally *negative* coinage for the media-altered world as "the global village" and Charles Reich's description of it as a place filled with tension and terror, where TV is a "riot box" for the underprivileged.²⁴ Thus, normative as well as descriptive perspectives enter this discussion of media fairly early on. On the other hand, recent events, and several since McLuhan's death in 1980, may give us pause to consider the negative effects of media. However, the purpose of this paper is to build upon the principle of the visual in the arrangement of text on the pages of what we now have in print and on computer screens and to explore the points of convergence among text, tradition, and interpretation in documents that form our codes of law. To further this exploration, we must next look at some of the original connections and convergences between law and the sacred, especially as written law collections emerged in early cultural history.

B. Law and the Sacred

A connection between law and the divine or the sacred text is a long-established principle, albeit open to different interpretations; Hammurabi's Laws in their most complete version were found and carved on a stela in Susa, an ancient city in Mesopotamia, and at the top of the conical object is an image believed to be Shamash, the god of justice, handing down the laws to the king.²⁵ The tradition of the Law as the Word of God handed down from Mount Sinai to Moses as Torah (the written Torah being the Pentateuch or first five books of the Hebrew Bible) is another divine source familiar to anyone culturally rooted in the Judaeo-Christian tradition (and leaving aside questions of

23. See, e.g., RONALD J. DEIBERT, PARCHMENT, PRINTING, AND HYPERMEDIA: COMMUNICATION IN WORLD ORDER TRANSFORMATION (1997) cited in Ronald J. Deibert, *Harold Innis and the Empire of Speed*, 25 REVIEW OF INT'L STUDIES 273-74 (1999).

24. MCLUHAN, *supra* note 21, at 37; CHARLES REICH, THE GREENING OF AMERICA 199 (1970).

25. VERSTEEG, *supra* note 18, at 13; Martha T. Roth, *Mesopotamian Legal Traditions and the Laws of Hammurabi*, 71 CHI-KENT L. REV. 13, 21-23 (1995). See also, for a visual representation of the stela, LIBRARY OF CONGRESS, LAW LIBRARY: AN ILLUSTRATED GUIDE 36 (2005) (showing "Plate I, from a set of eighty-two plates, of the *Code of Hammurabi, King of Babylon: about 2250 B.C.: autographed text, transliteration, glossary index of subjects* . . . (edited by Robert Francis Harper 1864-1914) (Chicago 1904). The text of the eighty-two plates has been reconstructed and edited by Harper from the photographs published by Vincent Scheil (*Law Library Rare Book Collection*, ICCN 99023953)").

archaeology and origins for this and the other traditions under discussion).²⁶ Finally, the Qur’an (a source of law through elaboration of the legally relevant verses therein) was revealed to Muhammad through his hearing Allah and receiving the verses gradually.²⁷

Elaborations and interpretations of the law, and particularly of religious law, arose as religious law and its texts developed alongside secular laws which were the edicts of rulers, however divinely-sanctioned the rules might be. Human interpretation of divine law was distinguished in the Jewish, Islamic and Christian canon law traditions; as a result, one finds even today that in searching for scholarly articles and monographs on hermeneutics and the law, the greater number retrieved in a query of electronic databases concern issues arising out of the interpretation of religious scriptures.²⁸ Therefore, hermeneutical concerns and the need for commentary accounting for disparate meanings in the text or the reconciliation of contradictions, the correction of possible errors in transmission, and other concerns make the comparative study of visual texts and transmissions an especially important part of comparative law in general and religious law as the exemplar of the most deeply held convictions about law.

For example, the oral Torah or Mishnah and the Talmud or commentary on it, continuing on through rabbinic decisions or *responsa*, and including some partial codifications, trace a path similar to secular developments. Ordinances and codifications reveal a concern for continuity and fidelity to truth in interpretation on the part of a human legal community that is responding to texts of deep significance to their lives and beliefs. A recent consideration of the Talmud and the Maimonidean, code-like commentary on it²⁹ addresses concerns about this very progress of religious law toward a model of human application

26. 3 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 1020 (Bernard Auerback and Melvin J. Sykes trans., 1994).

27. M.H. KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE, 16–17 (3d ed. 2003).

28. A query on the database *Academic Search Premier*, for example, using the Boolean search “hypertext and law” yielded 37 results on 10/30/07. Of these, 17, or just under half, were articles primarily or exclusively on theology and texts; if Jewish law is more broadly conceived to include ritual law, then two to three more could be added to result in 20 items, or just over half. Given that the research for this essay was limited to materials in English and European languages, most of the scholarly commentary dealt with scriptures and texts of the Abrahamic tradition, hence the limitation of the sample texts examined herein to that tradition.

29. See, e.g., ELON, *supra* note 26, (regarding the codified character of Maimonides’ work, 12th century CE, the *Mishneh Torah* and Joseph Caro’s 16th c. CE *Shulhan Arukh*); JACOB NEUSNER, THE TALMUD: WHAT IT IS AND WHAT IT SAYS 30 (2006) (placing the codification of Maimonides in the context of introductory material on the Mishnah and contrasting both with sources from Scripture and the Qumran library).

very like what we see in the most important texts of secular law; in this case the status of the Talmud becomes both divine law and “law-to-be-applied.”³⁰ The author’s concern is to account for discrepancies between the *responsa* of Maimonides and his Mishneh Torah; the suggested path to an explanation centers on the Talmud as a whole becoming law to be applied.³¹ I would suggest that the intertextual references to individual decisions is giving way, in considering the medieval text, to a preference for simultaneity of understanding; this is the kind of interpretation that a code and commentary approach creates. Even in the realm of these older texts, then, one sees the need to pull multiple texts together as we do today with case links in Westlaw and experiments in online presentations of important legal and religious texts, to be examined further on in this essay.

To cite another example from the Islamic textual and interpretive tradition, similar comparisons to secular law arise in an effort to bring interpretive commentary into a unified framework for elucidation of a text. Text and commentary must be brought into one place, either through intertextual references to other authorities or to the construction of modes of interpretation which allow interpreters to continue to focus on the single source or text, albeit enhanced by individual rulings or applications. The distinction between *Shari’a* as the ultimate law of God and *fiqh*, the human attempts at understanding and applying it through struggle with the text and sources (*ijtihad*) is important not only for understanding the many schools of law and interpretation which arose over the course of the history of Islamic legal interpretation and teachings,³² but also for understanding the relationship between text and interpretation in any contemporaneous historical setting.³³ In Islam as in the Talmudic tradition and even in the case of a secular document like the U.S. Constitution, many documents and vestiges of the oral or unwritten sources lie behind a text that, however incomplete it may seem in its application to specific situations, stands literally or figuratively in the role of a sacred text and final authority.³⁴ An

30. Hanina Ben-Menahem, *The Second Canonization of the Talmud*, 29 CARDOZO L. REV. 37, 37–38 (2006).

31. *Id.* at 47.

32. Asifa Quraishi, *Interpreting the Qur’an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67, 69–70 (2006).

33. *Id.* at 93.

34. The *sunna* or “his life example” from the Prophet’s life are also part of the source material for Islamic law and practice but were not compiled in written form as *hadith* until long after his death; questions of sifting the tradition and possible inauthenticity arise here

examination of the nature of these texts, the role of the physical text in these important tasks of interpretation, and the comparative perspective can now be undertaken in the world of manuscript and early print to see if there are continuities between these presentations and modern electronic ones and to assess what these presentations might suggest for interpretive models.

In the Christian interpretive tradition there is also the notion that revealed or divine law may *appear* to change because of new interpretations made possible through the role of human commentators as part of a larger religious legal system; this was true for Jewish and Islamic law. The Christian law, it has been suggested, added to this phenomenon the “logic of incarnation” (in reference to Jesus as God become human) giving rise to a “distinction between an immutable content and a changeable formulation of divine law.”³⁵ Changes in the rules regarding the death penalty in Jewish law and the charging of interest on loans in the Christian canon law are two examples of changed applications of divine laws or principles.³⁶ The role of the commentator is therefore crucial to the very meaning of the law and must be present intertextually in order for the law to be applied correctly in its current “incarnation.”

II. RESEARCH AND INTERPRETATION *IN* RELIGIOUS LEGAL TEXTS

As argued in the section above, religious law provides a case study of texts, like the U.S. Constitution, in which a community of citizens or believers has an enormous stake; some theoretical consistency in interpretation and the survival of norms is crucial. Despite controversy over fundamentalism or “originalism” versus a “living constitution,” as analogs to similar approaches to texts and their meanings,³⁷ religious

as in the suggestion by Ben-Menahem cited above that some *responsa* of Maimonides may not be authentic (or at least this was an alternative way to explain inconsistencies between his code and his *responsa* positions.). *Id.* at 69; Ben-Menahem, *supra* note 30, at 41.

35. Silvio Ferrari, *Adapting Divine Law to Change: The Experience of the Roman Catholic Church (with some reference to Jewish and Islamic law)*, 28 CARDOZO L. REV. 53, 56 (2006).

36. *Id.* at 54–55.

37. See generally Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L. J. 1085 (1989); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the “Living Constitution” in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191 (1997); G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463 (2003); Vicki C. Jackson, *Constitutions as “Living Trees”? Comparative Constitutional Law And Interpretive Metaphors*, 75 FORDHAM L. REV. 921 (2006) [hereinafter Jackson, Living Tree]

teachings must find ways to address new cases or situations under some theory of continued vitality, be it the aim of preserving a posited original meaning or extending the reach of a universe of meanings to cover situations unanticipated by the text. And even the latter stance is open to variant theories: development of rules and doctrine can be carried out in the “discovery” of older meanings or, alternatively, in the spirit of the original text: new rules are needed to preserve the core values and meanings. The role of simultaneous commentary and intertextual linkages may now be explored in detail to illustrate the role of hypertext through the ages in ancient manuscript, as well as modern electronic hypertext, formats.

A. Canon Law

The primary example offered for this essay will be in the area of Christian canon law through a “research encounter” as I will call it, with a medieval manuscript I viewed in late July 2007, with the gracious permission of the librarians and curators of the Rare Books and Manuscript Library of the University of Pennsylvania: *MS. Codex 1059, or the Decretalis Gregorii IX, with gloss of Bernardo da Botone of Parma (d. 1266), in Latin, decorated manuscript on vellum, France, c. 1280-1300*. While the physical characteristics of this example are important, its role in canon law must first be made clear, along with some understanding of the gloss or commentary which came to surround it and other canon law texts, literally on each page, responding to a format that became well known in medieval texts across traditions.

1. Some Background in Canon Law in the Context of Medieval Law³⁸

As Christianity emerged as a powerful governmental and

(referring to “living tree” as imperfect but preferred term over “living Constitution” as metaphor for a U.S. Constitution rooted in past decisions and understandings, the same tree but growing); RICHARD A. POSNER, *LAW AND LITERATURE*, 212 (Harvard Univ. Press 1998) (1988) (discussing interpretation of constitutions and other legal documents from the perspectives of postmodernists, New Critics, and proponents of determining authorial intention). On expansion into comparative constitutionalism and other legal systems beyond the U.S., see generally Jackson, *Living Tree*, *supra* note 37, at 927–28 (citing Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225, 1285–1301 (1999)); MERRYMAN & PEREZ-PERDOMO, *supra* note 18, at 134 (discussing the “flexible constitution” in civil law systems and the role of judicial review).

38. Throughout this discussion of canon law text presentations, the form of citation in use by modern scholars will be adapted for references to printed works, again of the modern period, and as outlined in one of the recent editions of part of a canon law text. See, e.g., GRATIAN, *THE TREATISE ON LAWS (DECRETUM DD. 1–20 WITH THE ORDINARY GLOSS)* (James Gordley, trans., 1993). The style presented by J. Gordley is as follows: Canon Law: *Decretum*: Distinctiones: D.1 c.1.; Causae: C.1.q.1 c.1 *Liber Extra*: X 1.1.1

ideological force in the fourth century through its acquisition of imperial toleration and eventual establishment, conciliar and Papal authority over doctrine and church governance took the form of law. And that law took the form known to ancient Roman administration, namely the individual decree or decretal letter addressed to a particular controversial point of faith, morals, or liturgy, much as an individual administrative decision might be issued today.³⁹

From the fourth century on, these decretals accumulated even as they gained authority, but there was no collection of these texts into one source. Charlemagne corresponded with the papacy in the eighth century CE and gathered them in a *Codex Carolinus*, but this took place alongside the increasing tension in a dialogue between secular rulers and the papacy for the control of land and which authority might appoint the cleric in charge of a church built on a secular lord's property.⁴⁰ Opposing this trend prompted a major medieval project of forgery, the fabricated decretals known as the Pseudo-Isidorian collection; it incorporated the forged “donation” by Constantine of a grant of power to the successor of St. Peter (the Pope) over the lands of the West. Until the middle of the twelfth century the partial collections of decretals⁴¹ did not achieve the goal that was attempted in a watershed moment by the scholar Graziano or Gratian, who was probably a teacher at Bologna in the late twelfth century and possibly a monk.⁴²

In her introduction to the partial printed text of Gratian's *Decretum*, Katherine Christensen presents the work of this first systematic canonist by emphasizing this point: many scholars believe that the twelfth century was a time of partial renaissance. That is, in pastoral life and in the monastic communities there were reformers who wanted to bring (or, they may have argued, return to) a more genuine spirituality and integrity into the church in addressing the issues of secular versus ecclesiastical realms of authority.⁴³ Also, a revival of

39. See generally WALTER ULLMANN, *LAW AND POLITICS IN THE MIDDLE AGES: AN INTRODUCTION TO THE SOURCES OF MEDIEVAL POLITICAL IDEAS* 119–22 (1975).

40. *Id.* at 127. For a discussion regarding the Investiture Controversy, see generally WALTER ULLMANN, *A SHORT HISTORY OF THE PAPACY IN THE MIDDLE AGES* 154 (Methuen & Co. Ltd. 2004) (1972); Charles Duggan, *St. Thomas of Canterbury and Aspects of the Becket Dispute in the Decretal Collections*, in *DECRETALS AND THE CREATION OF ‘NEW LAW’ IN THE TWELFTH CENTURY* ch. II (1998).

41. Other pre-Gratian collections include those of Anselm of Lucca, Burchard of Worms, the Polycarpus, Ivo's *Decretum*, *Tripartita*, and the *Panormia*. *Translators' Preface* in GRATIAN, *supra* note 38, at vii. See also ULLMANN, *supra* note 39 at 134–36.

42. Katherine Christensen, *Introduction*, in GRATIAN, *supra* note 38, at ix, x.

43. *Id.* at xi.

interest in the secular Roman law as compiled by the emperor Justinian in the rather loosely arranged *Corpus Iuris Civilis* of the sixth century CE began in earnest (apparently also in Bologna) with lectures by one Irnerius.⁴⁴ In this favorable climate, one of an interest in law and in reform, Gratian began his task of sifting through contradictory decretals (including the fraudulent ones) to create the collection under its original title, *Concordia Discordantium Canonum*, that is, the concordance or harmonization of discordant canons, appearing circa 1140.⁴⁵

a. *The Glossa Ordinaria*

The gloss arose as medieval scholars responded to the text as they had to texts of Roman law and the Bible: some sought to suggest a superior arrangement of materials and some corrected his definitions or took issue with Gratian or earlier commentators. The gloss grew in a manner similar to marginalia, and then, as Katherine Christensen describes it:

In time, the accumulated material was organized into a running commentary, more like a series of footnotes than a continuous text, which was conventionally copied around the edges of the manuscript page while the text of the *Decretum* occupied the center block.⁴⁶

Christensen points out that the names of only some commentators (reserving here the term “Glossators” for special usage in connection with the commentators on the secular Roman law, which are beyond the scope of this essay) are known; some are indicated by initials. The

44. *Id.* But see ULLMANN, *supra* note 39, at 68–69, 78 (indicating that the first law school was situated in Ravenna and for transmission of parts of Justinian’s code through manuscript transmissions via Pisa, Florence, and Verona).

45. After the invention of the printing press, Gratian’s *Decretum* (c. 1140), the *Liber Extra* (1234), the *Liber Sextus* (collection of Boniface VIII, 1298), the *Constitutiones Clementineae* (1317) and the *Extravagantes* of John XXII (1325) began to be issued as a set of the “Body of Canon Law” to parallel Justinian’s codification and became known as *Corpus Iuris Canonici*; the *Liber Extra* or Gregorian Decretals “remained officially in force among Roman Catholics until 1918.” JAMES A. BRUNDAGE, *MEDIEVAL CANNON LAW* 55–56 (1995). But see ANDERS WINROTH, *THE MAKING OF GRATIAN’S DECRETUM* 2, 9 (2000) (identifying the effective date for use of the entire Corpus, including Gratian, and not just *Liber Extra*, in the Roman Catholic ecclesiastical courts, was 1917, and stating that much of Gratian survives even in the modern *Codex Iuris Canonici* of 1983; it was revised and “corrected” after the Council of Trent by a commissions or *Correctores Romani*, which resulted in *editia Romana* of 1582). For an overview of some canonical collections, see generally DOROTHY M. OWEN, *THE MEDIEVAL CANON LAW: TEACHING, LITERATURE AND TRANSMISSION* 2–42 (1990); STEPHAN KUTTNER, *MEDIEVAL COUNCILS, DECRETALS, AND COLLECTIONS OF CANON LAW: SELECTED ESSAYS* (Variorum 1992) (1980).

46. Christensen, *supra* note 42, at xvii. See also the printed illustration of this format beginning with the main text in GRATIAN, *supra* note 38, at 3.

partial translation she introduces and the gloss translated by J. Gordley provide a list of the names of the known commentators.⁴⁷ Note that this translation includes only the *Distinctiones*.

b. *The Gregorian Decretals: Correcting and Gathering the Corpus*

Decretals continued to be issued after the watershed collection put together by Gratian. While Pope Innocent III saw to publication of some of the “new law” that was “outside” of the Gratian compilation (hence called *extravagantes* or “walking outside”)⁴⁸ in 1209/10, it was not until 1234 under Pope Gregory IX that the manuscript appeared, to be examined here briefly, and was produced circa 1280–1300.⁴⁹ This work was also, in itself, intended to supersede all previous compilations, and it was called (and is still cited as) the *Liber Extra* (“book outside”).⁵⁰ Its subdivisions became a model for all future collections.⁵¹

2. *Notes on the Manuscript I Viewed*

The notes accompanying *MS Codex 1050* of these Gregorian Decretals (again, also known as *Liber Extra*) may have been used in France until at least the 16th century although some annotations are in a 14th century English hand. It appears to have been a working copy into the 16th century.

X.1.1.1 D.1 (or the first “distinction” or canon (rule)) at glosses c and d (marked in script as ways to mark off the glosses) speaks of natural law as divine law versus usages or customary law, that is, written and unwritten human law. Gloss c (it might be e but appears c as clarified by an early printed text, to be discussed below) contains a reference to the phrase “Love and do what you will.” While difficult to discern in this manuscript, further support that my seeing this note in the gloss comes from a detailed examination of the phrase and its meanings, beginning with its true origination in the sermon of St. Augustine on Galatians 6.1 in 410 C.E..⁵² In the *Glossa ordinaria*, and Ivo of

47. See *Jurists in the Gloss*, in GRATIAN, *supra* note 38, at 122, 122–23.

48. ULLMANN, *supra* note 39, at 142. See generally KENNETH PENNINGTON, POPES, CANONISTS AND TEXTS, 1150–1550 (1993) (discussing the role of the papacy in decretal collections in general and textual histories of compilations and commentaries such as the *Compilatio tertia* and lectures on the Decretals of Gregory IX).

49. See *infra* Part II.A.2.

50. See *supra* note 45.

51. ULLMANN, *supra* note 39, at 142.

52. GILES CONSTABLE, “LOVE AND DO WHAT YOU WILL”: THE MEDIEVAL HISTORY OF AN AUGUSTINIAN PRECEPT 1, 29 n.1 (Medieval Inst. Publ’n 1999) (citing ST. AUGUSTINE, SERMONES POST MAURINOS REPERTI, MISCELLANEA AGOSTINIANA, 1 (Germain Morin ed.

Chartes' prologue to the *Decretum* (this case, Gratian's and not Gregory's later text considered here) the phrase echoes "We ought to love one another" from 1 John 4.11; the context may have been one of ecclesiastical discipline.⁵³ The intertextual life of the phrase goes on and appears, in modified form just simply translated as "do what you will" centuries later in Rabelais' *Gargantua and Pantagruel*, in the sign over the gate of the fantasy monastery (*Fay ce que voudras*).⁵⁴ This phrase remains cryptic, and Rabelais may have intended a more libertine interpretation, but in a contemporary law review one author, critiquing some versions of positivism, suggests that if one has Love and conforms one's will to it then it follows that one can indeed do as one wills.⁵⁵ Otherwise, we can will disordered things, including ill things toward ourselves or others. The Gloss for the modern reader brings intertextual reference to this puzzle of Love and the Will into focus across many texts using the "hypertextual" (that is, marginal) reference.

Comparing the manuscript, for clarity, with incunable printed versions of the text helps to clarify the effect of the presentation. First, I compared this point in the text X 1.4.11 as between MS Codex 1059 and the following, also in the collection of the Rare Books and Manuscript Library of the University of Pennsylvania: *Gregorius Pap IX Decretales [bound with Liber sextus decretalium dne [tilda over the ne] Bonifacii pape VIII and Constitutiones Clementis pape V] [printed by or for Anthony Koberger in 1482 in Nuremberg]*.

Here and in the MS the gloss c, beginning *cum tanto*, falls just below the block of text with the statutory preamble. In a study of the decretals and constitutions of Gregory IX, canon law scholar Stephen Kuttner observes that X 1.4.11 is one of four constitutions in Book I that have "at least short introductory clauses or sentences indicating the motive of legislating."⁵⁶ The gloss sits to the side in a simultaneous intertextual reference.

In another printed version, *Decretalis Gregori Noni Pontificis* of

1930).

53. *Id.* at 8–10.

54. FRANÇOIS RABELAIS, *GARGANTUA AND PANTAGRUEL* 159 (J.M. Cohen Trans., Penguin Books 1970)(n.d.).

55. John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768, 1774–75 (1998).

56. Stephen Kuttner, *Raymond of Peñafort as Editor: The 'Decretals' and 'Constitutiones' of Gregory IX*, 12 BERKELEY BULL. OF MEDIEVAL AND CANON L. 65, 72 (1982). He transcribes X 1.4.11 as "cum tanto sint grauiora peccata quanto diutius infelicem animam detinent alligatam. . . ." *Id.*

1558, the books, titles, and chapters are more clearly indicated and include references to *iuri naturali*.⁵⁷

This enrichment of text is experienced much like a wiki or the hypertext links to cases and law review references in Westlaw. The cross-reference, for enhanced meaning, can be checked immediately. While the means to evaluate all glosses would not have been available to a scholar in any one library in the era of medieval law, the precedent is set for immediate interpretation as inextricably bound up with other texts.

3. Other Images Available Electronically

For purposes of this essay, some images from the Digital Scriptorium (as well as the Library of Congress publications) via links (with notification and attribution) are used as illustrations of the hypertextual nature of text surrounded by commentary, especially as scanning and photography are damaging to manuscript pages. For reasons of age and the need for presentation, it was not possible to copy MS Codex 1059. See, for example:

57. Gregorian Decretals, *supra* note 45. “Recitatur per questionem de quo iure naturali loquitur litera, respondet quod de ill quod consistit in praeceptis.” *Id.*

Image 1



Image 2



Images 1 and 2 are the recto and verso, respectively, of another manuscript of the Gregorian Decretals, digitized by the Digital Scriptorium at Columbia University Rare Book and Manuscript Library.⁵⁸

For additional descriptions of marginalia you can refer to Cardinal Albinus of Alvano and the *Digesta Pauperis Scolari Albinus*, MS. OTTOB. LAT. 3057:

Marginal notes are found throughout the codex, ranging from entries by the text-hand or contemporary scribes to nineteenth-century annotations. The most frequent entries are cross-references to similar texts found in the first eight books of the compilation. . . . The red marginalia of books 10 and 11 often are brief regesta of the documents in the text.⁵⁹

In addition to this “textual hypertext” in the medieval tradition, more formal study needs to be made of simple marginalia in evaluating the canon law world of intertextuality.⁶⁰

B. Talmudic Law

1. General Background on the Talmud and Other Text Sources of Jewish Law

To effect a brief comparison and to enlarge the argument around intertextual and hypertextual effects of traditional (originally medieval) text presentation for these religious legal sources, some basic details of the sources may be reviewed.

As noted above in the section on “Law and the Sacred,” there are sources of Jewish law which are applied more like secular civil law and “rules for societal interactions”; this *halakah* (as opposed to the *haggadah* (also *aggadah*) or narrative of God’s story of acts in the world) may still deal with ritual matters, but of interest to many researchers and law students is this area of application—so much so that the Library of Congress makes this distinction in the classification and

58. New York, Columbia University, Rare Book and Manuscript Library, Plimpton MS 88. Online images may be seen on the Digital Scriptorium website, <http://www.scriptorium.edu>, using as shelfmark the format: Plimpton MS 088.

59. UTA-RENAE BLUMENTHAL, *Cardinal Albinus of Alvano and the Digesta Pauperis Scolari Albinus*, MS. OTTOB. Lat. 3057, in PAPAL REFORM AND CANON LAW IN THE 11TH AND 12TH CENTURIES XVII 40 (1998).

60. See generally Roger E. Reynolds, *Marginalia on a Tenth-Century Text on the Ecclesiastical Officers*, in LAW, CHURCH, AND SOCIETY: ESSAYS IN HONOR OF STEPHEN KUTTNER 115–29 (K. Pennington and R. Somerville, eds., 1977).

description of rare manuscripts and editions in its collections.⁶¹ The Jerusalem Talmud of the fifth century CE and the later (by approximately two centuries) Babylonian Talmud represent an extraordinary tradition of interpretation. As I do not know Hebrew or Aramaic, the references here are to the text images and to the observation of the Library of Congress curators, as a seemingly basic and uncontested fact arising from within the description of the side-by-side texts of the commentary tradition, that “unlike the immutable law that makes up the *Torah*, the *Talmud* represents a collection of previously unwritten oral laws and traditions of the Jewish people that were modified to reflect societal needs as they historically evolved.”⁶²

To appreciate the hypertext of the older manuscript and print technologies, images of the printed arrangements in the *Talmud Bavli* (Babylonian *Talmud*) may be found in the Library of Congress (and reproduced in its publication)⁶³ and in the Schottenstein editions (including paperbound travel editions, currently published) of the Talmud and its sub-parts, Mishnah and Gemara.⁶⁴

2. Images Available Electronically

One of the most exciting points of convergence for the arguments of this essay, namely, 1) that hypertext pre-existed the Internet, 2) is reborn within it, and 3) as a medium is affecting the meaning and reasoning processes of language (especially legal language), is the appearance of pre- and post-electronic hypertext at once. An example of this experiment (and perhaps a focus for pondering its potential for text-based forms of scholarship) is a presentation of the Babylonian Talmud by Professor Eliezer Segal at his web pages; a page is shown at <http://www.acs.ucalgary.ca/~elsegal/TalmudPage.html>. This interactive image enables a beginning student to click into related information on the traditions electronic “hypertext” page to link to more information about each marginal or central section.⁶⁵ See for example:

61. LIBRARY OF CONGRESS, LAW LIBRARY, *supra* note 25, at 36.

62. *Id.*

63. *Id.* at 37.

64. HERSH GOLDWURM ET AL, TALMUD BAVLI: THE CLASSIC VILNA EDITION, WITH AN ANNOTATED, INTERPRETIVE ELUCIDATION, AS AN AID TO TALMUD STUDY (1st ed., Mesorah Publ'n 1990).

65. Professor, Department of Religious Studies, University of Calgary, Alberta, Canada. Home page and publications, courses in Jewish studies, *available at* <http://www.acs.ucalgary.ca/~elsegal/TalmudPage.html#Page> (last visited Mar. 5, 2008) (note: the page does not view equally well in all browsers).

Image 3⁶⁶

The image shows a digital representation of a Talmudic text, specifically Megillah 24a. The text is presented in a traditional layout with a central column and side columns. A red box highlights a specific passage, and a red arrow points to it. A red box with white text reads: "Click here to read about the Tosafot commentary to the Talmud". The interface includes a search bar at the top and a list of topics on the left.

Finally, the “surrounded text” presentation has moved into popular and non-legal texts as well, with modern commentators presented; this immediacy of reference creates a valuable aid to study and appreciation in both print and online formats.⁶⁷

66. Sample text: Megillah 24a. Talmud (Gemara).

“And if he was a minor, then his father or his teacher passes in his stead.

What is the reason?

Rav Pappa says: On account of the honour.

Rabbah ben Shimi says: Because it might lead to a quarrel.

What is the practical difference?

The practical difference would be in a case where he did it gratis.”

Gemara (Babylonian Talmud). Original material in this module is copyrighted by Eliezer Segal ©.

67. See, e.g., MY PEOPLE’S PRAYER BOOK: TRADITIONAL PRAYERS, MODERN COMMENTARIES “THE SH’MA AND ITS BLESSINGS”, (Rabbi Lawrence A. Hoffman ed., Jewish

C. *Islamic Law*1. *General Background re the Texts*

While it is beyond the scope of this essay to examine the details of the many controversies surrounding the authenticity and transmission of the sources of Islamic law beyond the brief description above (under “Law and the Sacred”), certain characteristics of “medium and message” (to return allusively to McLuhan and the Toronto School, also mentioned above) in these studies contribute additional issues of significance to the question of intertextuality and religious law. Scholars argue that the value placed upon orality and the difficulty in deciphering all of the aspects of written Arabic may point to the unique role of oral transmission in this tradition.⁶⁸ However, Islamic law scholars also make use of textual criticism to support arguments for certain authorities within the tradition. There is its use in pointing out the traditionalist Islam’s rejection of speculative theology, or *kalam* and the work of al Ash’ari and the Ash’arites, for example.⁶⁹ Despite increased interest in Islam, detailed current scholarship in English is not well developed.⁷⁰

2. *A Standard Print Text*

The Holy Qur’an text, translation and commentary. Translated by Abdullah Yusuf Ali, Elmhurst, N.Y.: Tahrike Tarsile Qur’an, 2001.⁷¹

3. *Electronic Images and Databases (Images not Available)*

From the Digital Scriptorium (with link notification): Oxford Islamic Studies Online, Oxford University Press, 2007. John Exposito, ed. <http://0-www.oxfordislamicstudies.com.gull.georgetown.edu/> [NOTE: subscription based and not available on the free web]

Lights Publ’g 1997).

68. Ahmed Souaiaia, *On the Sources of Islamic Law and Practices*, 20. J.L. & RELIGION 123, 124–25 (citing YASIN DUTTON, *THE ORIGINS OF ISLAMIC LAW* 13–14, 164–65, 173–77 (1999)).

69. George Makdisi, *Ash’ari and the Ash’arites in Islamic Religious History*, reprinted in *RELIGION, LAW AND LEARNING IN CLASSICAL ISLAM* 127–31 (1991) (Ashgate Variorum) (originally published in *STUDIA ISLAMICA* XVII and XVIII 1962–1963).

70. See generally HUNT JANIN & ANDRÉ KAHLMEYER, *ISLAMIC LAW: THE SHARIA FROM MUHAMMAD’S TIME TO THE PRESENT* (2007) (overview with emphasis on finance and jihad); *ENCYCLOPEDIA OF ISLAMIC LAW* (Arif Ali Khan, Tauqir Mohammad Khan, eds. 2006); IMAM MUHAMMAD SHIRAZI, *THE QUR’AN: WHEN WAS IT COMPILED?* (Ali ibn Adam trans., 2001).

71. There is an edition of this title with a 2006 imprint that is not yet available to the author.

Some of these pages are “shaped” and some have marginal commentary. Most calligraphic presentations of the Qu’ran are illuminated rather than annotated, and this makes for a less “hypertextual” visual experience in print.

This online presentation of text is hypertextual but not with surrounded text; however links at the left for navigation through the text constitutes one aid; some commentary is indeed linked and there is an option for side-by-side comparison between the Arberry and Haleem translations. It is “. . .linked to the first online version of A Concordance of the Qur’an by Hanna Kassis. Primary source documents with editorial introductions. Timelines covering major events in the Islamic world and corresponding events in general world history for context.”⁷² Again, there are not many clear and objective online sources despite the growing presence of sites.⁷³

Finally, as was the case for Jewish law commentary, but here with a focus on the aural or hearing side of the “medium as message” effect, one may note a popular text introducing the Qur’an through an abridged and partial text but with an accompanying CD of recitations.⁷⁴ This addition of the aural to the hypertextual and intertextual world brings in new perceptions if not new information.⁷⁵

D. Application of Commentary in Hypertext for Treaties and Constitutions: The Global Research Process Made Intertextual

In the final empirical explorations of some effects of hypertextual/intertextual experiences of texts (and their commentaries or related texts operating as instant footnotes and marginalia), I hope to bring the implications of this scholarly communication context into final view. This experience of text creates a new framework for understanding the language of comparative law. The location of meanings and references through a hot-linked word makes the experience of researching international and comparative law more

72. Oxford Islamic Studies Online, *available at* <http://gull.georgetown.edu/record=b488035#> (click on the “Contents” tab) (last visited Mar. 31, 2008).

73. For an older print description of this online environment, see GARY BUNT, *VIRTUALLY ISLAMIC: COMPUTER-MEDIATED COMMUNICATION & CYBER ISLAMIC ENVIRONMENTS* (2000).

74. MICHAEL SELLS, *APPROACHING THE QUR’AN: THE EARLY REVELATIONS* (2006).

75. Aurality may also have effects over time in the non-religious legal system, as Professor Hibbitts suggested earlier on in the development of the study of legal language. See Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 *CARDOZO L. REV.* 229 (1994).

similar to the revolution in researching common law through Lexis and Westlaw, or perhaps more like a grand wiki for the topics of law. Nowhere is the need for deeper understanding greater, however, than in the case of international agreements and other legal systems.

1. *WTO Agreement*

A commonly researched but complex agreement (and one of a set of agreements) on harmonizing and facilitating world trade, the World Trade Organization Agreement (successor to the General Agreement on Tariffs and Trade, which still forms its core) is elucidated through a large portal presenting arbitral-type decisions by a panel, with appeal to an Appellate Body as well as founding documents and reports at <http://www.wto.org/>. For the purpose of this essay the focus will be on one small part, a hypertext document which has a print equivalent (not as frequently updated), namely the *WTO Analytical Index: Guide to WTO Law and Practice* at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm.⁷⁶

While the index covers the related agreements, such as the General Agreement on Trade in Services (GATS) and Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS), this brief examination will focus on the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement).

Under each hot link for the Preamble, Articles, and Declarations, explanatory commentary is included, and footnote number links bring the decisions of the panel and appellate body under that link as an annotation. One can receive an interpretation of the sub-paragraphs under each article. Then in turn the researcher can link to the entire decision in full text. When the case and commentary portions are in other volumes as is the case with print, the result is a less integrated sense of the meaning of the text. All that remains is for the updating of the information to remain robust.⁷⁷

2. *Geneva Conventions*

The International Committee of the Red Cross,

76. WORLD TRADE ORGANIZATION, *WTO ANALYTICAL INDEX: GUIDE TO WTO LAW AND PRACTICE* (Cambridge Univ. Press 2007) (2003), available at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm (last visited Mar. 5, 2008).

77. There are some indications that additional decisions appear more quickly in the subscription databases. See e.g. the Online Source for World Trade Law, available at www.worldtradelaw.net (last visited Mar. 5, 2008). This also permits collection of cases by article and/or topic.

<http://www.icrc.org/eng>, has created a portal for international humanitarian law to create a linked environment for the major treaties and commentary as well as national implementation of the treaties. With regard to the latter, <http://www.icrc.org/ihl-nat> involves straight links to statutes by country, as texts not readily available elsewhere, the hypertextual nature of the treaty database illustrates more clearly the deeper contextualization of text and commentary when given a unified presentation.

The treaty database, <http://www.icrc.org/ihl>, includes many treaties in international humanitarian law, but the focus here is on the four oldest treaties; these have a standard print commentary.⁷⁸ The treaties database allows for the display of article with commentary sequentially but rapidly for the 1949 conventions and additional protocols, some articles of which are currently the focus of debate on the treatment of combatants under common article 3. The database shows a date of 2005 and may be less up to date than current jurisprudence would warrant, but what is important to note is that there is access to commentary immediately and as part of the fabric of the treaty language.

3. *South African Constitution and International Constitutional Law*

Attempts have been made to annotate constitutions across topical areas, such as the efforts of the International Constitutional Law site at http://www.servat.unibe.ch/law/icl/xr__indx.html and tie these categories into the South African Constitutional article topics at <http://www.hrcr.org/safrica/index.html>. While neither project is complete or updated, the aim is to integrate topics such as “liberty” and “equality” with actual articles of constitutions from many jurisdictions. This would become a hypertextual global analysis of these rights.⁷⁹

4. *The U.S. Constitution and Concepts in Religious Legal Systems: What are the Similar Hermeneutical Tasks?*

Can a new intertextual relationship be created between a secular legal text, indeed one which, within its own terms, insists upon a separation of the religious sphere from the legal and governmental?

78. See generally THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY. [published under the general editorship of Jean S. Pictet] 4 vols. Geneva: International Committee of the Red Cross, 1994–1995.

79. The CODICES database of the Venice Commission of the Council of Europe has a similar aim and links some case law to constitutional topics, but this is not a hyperlinked environment but rather a document retrieval system. See Venice Commission, Codices Database, available at http://www.venice.coe.int/site/main/CODICES_E.asp (last visited Mar. 5, 2008).

This question is raised by Biblical scholar Jaroslav Pelikan⁸⁰ in ways that may reflect upon the visual and interpretive character of what has been termed the Great Code.⁸¹ Pelikan points out that a work such as Albert P. Blaustein’s *The Bicentennial Concordance* “bear[s] a strong family resemblance to the basic reference works of biblical scholarship.”⁸² Pelikan goes on to tackle some of the most provocative hermeneutical questions common to legal and religious doctrinal interpretation, despite the fact that one might question whether, apart from the Ten Commandments, the Bible is *per se* a legal instrument, as opposed to the canon law developments treated in the section above, where commentary is paramount and tied directly and *visually* to the text to be interpreted.⁸³ He brings an intertextual approach to the interpretive dilemma through allusion to John Henry [Cardinal] Newman’s 1845 *Essay on the Development of Christian Doctrine* and suggests that “healthy” versus “corrupt” developments, whether in constitutional interpretation or in religious law and doctrine, may be revealed in the “tests” Newman devised.⁸⁴ This interweaving of the

80. JAROSLAV PELIKAN, *INTERPRETING THE BIBLE AND THE CONSTITUTION* (Yale Univ. Press 2004).

81. NORTHROP FRYE, *THE GREAT CODE: THE BIBLE AND LITERATURE* (Harvest ed. 1983). This classic work looks at the collection of texts which became the Bible in a manner that works through myth and typology to explore the allusive and intertextual nature of the entire corpus. Its linguistic and literary character trumps religious meaning for Frye.

82. PELIKAN, *supra* note 80, at 7; *THE BICENTENNIAL CONCORDANCE: INDEXES TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA* (Albert P. Blaustein ed., Fred B. Rothman & Co. 1992).

83. *Id.* “Yet Christian scripture is not only the supreme epic and the inexhaustible source of poetic figures or literary allusions and the most fruitful of all texts for thousands of musical compositions (all of which it is) but the Great Code [note: the above-cited work by Northrop Frye is not mentioned by Pelikan]. This designation involves code as codification, code as supreme law, code as guide for conduct, code as cryptogram, code as genetic code, code as *codex*, “codes and codas.” To that extent it shares with any other code, whether it be the Code of Hammurabi or the Code of Justinian or the Code of Napoleon or the Code of Canon law (or the Constitution) the need to be interpreted in a manner that those outside the charmed circle of interpreters will not find arbitrary, even if they disagree with it or cannot always follow its reasoning.” *Id.* at 30.

84. *Id.* at 124 (citing John Henry Newman, *Essay on the Development of Christian Doctrine* (1845); see also Francis U. Mootz III, *Review Essay, Belief and Interpretation: Meditations on Pelikan’s “Interpreting the Bible and the Constitution,”* 21 J. L. & RELIGION 385, 387–91 (2005–2006) (reviews and enlarges Pelikan’s reference to Newman’s tests, effective for believers, as against Gadamer’s hermeneutical theory of a “fusion of horizons” whereby the reader sees subjective meaning in a text and the text adjusts the reader’s prejudices, suggesting this may be the interpretive model for the non-believer). But see Steven D. Smith, *What Doth It Profit? Pelikan’s Parallels*, 90 MINN. L. REV. 727, 743–744 (2006) (critical of Pelikan’s failure to bridge the gap between religious and secular hermeneutical methods and his opting for being merely descriptive of the methods rather than accounting for the convergences and differences in Biblical versus constitutional

complex text, its meaning for law and doctrine, and the nature of sourcing the universe of meanings has both intertextual and visual implications in the rise of the codex itself;⁸⁵ this is part of the textual history of the Bible and a phenomenon of its early Christian study.⁸⁶

E. Comparative Law, Intertextuality, Code and Codex

In their essay on law and the humanities, Professors Balkin and Levinson pause rhetorically to ask precisely in what discipline are lawyers, and in particular academic lawyers, working- is it more similar to a divinity school or a university department of religion?⁸⁷ The distinction, they point out, would turn on seeing the former as a place to refine the norms and values of a faith to which one is committed as opposed to the latter, where, in a position of greater “externality” one may be observing and analyzing belief systems to which one may not have any allegiance.⁸⁸ The analogy I would draw in working through the possible effects of visual and physical characteristics of texts would be built upon (though to be clear and fair to those authors, in no way suggested by them) that observation. That is, comparative law and some aspects of transnational law are analogous to comparative religion and take an outsider’s viewpoint even though I would argue that the study may advance deeper understanding of the intertextual meanings of legal texts within one’s own legal system. We are living and studying law at a time of cultural change similar to that of the change from the scroll to the codex, and in that connection, scholar Anthony Grafton has described a library in the third century CE at Caesarea and its new type of information system: the visually-ordered codex and its pages.⁸⁹ He points out that the codes “changed assumptions about the relation

interpretive strategies).

85. *See generally* JAROSLAV PELIKAN WITH VALERIE R. HOTCHKISS & DAVID PRICE, THE REFORMATION OF THE BIBLE, THE BIBLE OF THE REFORMATION (1996) (also served as “catalog of a major exhibition of early Bibles and Reformation texts at Bridwell Library, Perkins School of Theology, Southern Methodist University, “. . . and according to the book jacket notes, other venues for exhibition that were done at Yale, Harvard, and Columbia universities); JAROSLAV PELIKAN, WHOSE BIBLE IS IT? A HISTORY OF THE SCRIPTURES THROUGH THE AGES (2005) (also reviews collected Biblical texts and their variations).

86. *See generally*, ANTHONY GRAFTON, CHRISTIANITY AND THE TRANSFORMATION OF THE BOOK 6 (2006) (discussing the creation of an early library at Caesarea Maritima in Palestine and the visual presentation of information in the transition from scroll to the codex format).

87. Balkin and Levinson, *supra* note 1, at 162.

88. *Id.* at 163.

89. GRAFTON, *supra* note 86, at 17–18.

between a book as a material object and as a unit of meaning.”⁹⁰ The phenomenon of the codex and the complexity of Biblical and historical study and documentation were met by such devices as the chronological tables of the early church historian Eusebius and the *Hexapla* of Origen.⁹¹ The latter was a layout of columns on a page which compared the Greek Septuagint and Hebrew texts and well as at least three other versions; Grafton surmises that it must have occupied several codices.⁹² In sum, Grafton, like O’Donnell, concludes that these Canon Tables “were extraordinarily original and effective information retrieval devices—the world’s first hot links. They would have enabled readers not simply to rely on memory. . . but to turn the four Gospels into a single web of cross-commentary—to move from text to text. . . .”⁹³

The hermeneutically focused thought of Jürgen Habermas recognized that, like Grafton’s Caesarea (after 70 CE, when Jewish, Christian, and pagan cultures mixed there),⁹⁴ Europe itself eventually created a culture where plurality and universality co-existed; for our purposes the significance of this dual nature as applied to a legal culture is that it may bring human rights into tension with multicultural societies.⁹⁵ Moving away from Habermas’ emphasis on critical theory and on the need to be aware of biases in encountering a text, Hans-Georg Gadamer counters that bias alone may have to be accepted as part of the way we encounter texts (or even history).⁹⁶ An interpreter, who for the purposes of this essay will be regarded as also a commentator and perhaps even an ordinary reader, may need to “bring the text into an intelligible relation with his own cultural milieu” and this is one way that Gadamer’s approach has been described.⁹⁷ Something “*distant* has to be brought close” in a relationship with past texts and the Other of

90. *Id.* at 12 (also stating here that the codex was a little anthology of texts and became functionally a small library in itself).

91. *Id.* at 97 *et seq.*

92. *Id.* at 97, 99 (showing photo of a fragment); *see also id.* at 91, 104 (regarding evidence of its form and content from Jerome and the format of “Bibles” as a series of codices, in any case, until the collections were stabilized in the High Middle Ages).

93. *Id.* at 199.

94. *Id.* at 19.

95. JURGEN HABERMAS, *Israel or Athens: Where does Anamnestic Reason Belong? Johannes Baptist Metz on Unity amidst Multicultural Plurality* (trans. Peter Dews), in RELIGION AND RATIONALITY: ESSAYS ON REASON, GOD, AND MODERNITY 129, 136 (Eduardo Mendieta, ed., 2002).

96. HANS-GEORG GADAMER, *TRUTH AND METHOD* 237 (1975).

97. Jack Mendelson, *The Habermas-Gadamer Debate*, 18 NEW GERMAN CRITIQUE 44, 56 (Autumn 1979).

some different world, be it of a legal system or a religion.⁹⁸ It is in this sense, I would argue that intertextuality and the hypertextual experience of the internet seem more fruitful than narrative analogies in describing the situation of postmodern critical perspectives on legal developments in internet law or in the complex environment of international and comparative law.⁹⁹ Even when the “story” of the text follows many avenues, commentary may guide or limit interpretation by creating a record of at least one particular dialogue.

CONCLUSION

Hypertext mark-up language and the associations it creates seem limitless, and in one sense they are, but in another sense they continue specific interlinkages among texts and may make us aware of new ones. Religious and legal codes were at one time linked in a pattern of intertextual references, and this affects patterns of association whether in cyberspace (rather like Lessig’s serious play on the work “code”)¹⁰⁰ or among codices on a shelf in a physical library. The effect of this type of intertextuality is not to form a new methodology in law, although Westlaw/Lexis and their hypertextual digest of interlinked cases may have done so. Rather, in the case of constitutions, codes and treaties, texts linked hypertextually may start to look not so different from this common law hypertextuality and close the gap between civil law approaches to language and meaning and those of common law. One example of this point of convergence is still within the ambit of my

98. Hans-Georg Gadamer, *On the Scope and Function of Hermeneutical Reflection*, in *PHILOSOPHICAL HERMENEUTICS* 22–23 (David E. Linge, ed. and trans., 1976, 2004).

99. *But see* Barbara Stark, *After/Words: ‘Violations of Human Dignity’ and Postmodern International Law*, 27 *YALE J. INT’L L.* 315 (2002) (describing the fragmentation of multiple outcomes and the ambiguity of human rights “violators” and “victims” using the multiple outcomes presented in narrative versions by the film *Run Lola Run* (Sony Pictures Classics 1999); Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martii Koskenniemi, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martii Koskenniemi) (describes multiple regimes and norm-creating institutions with rule systems that may result in complex conflicts in norms); Michael J. Madison, *The Narratives of Cyberspace Law (or, Learning from Casablanca)*, 27 *COLUM. J.L. & ARTS* 249 (2004) (overlapping themes and plots are in fact a good description of cyberspace).

100. LAWRENCE LESSIG, *CODE VERSION 2.0* 5 (2006) (“In real space we recognize how laws regulate—through constitutions, statutes, and other legal codes. In cyberspace we must understand how a different “code” regulates—how the software and hardware (i.e., the “code” of cyberspace) that make cyberspace what it is also regulate cyberspace as it is. As William Mitchell puts it, this code is cyberspace’s “law.” “Lex Informatica,” as Joel Reidenberg first put it, or better, “code is law.”)

argument for the visual and the marginal or annotated page: the phenomenon of legal common-placing in common law legal history.¹⁰¹ It may move us to see comparative law even more strongly as a sub-species of legal philosophy¹⁰² in an increasingly interdisciplinary world of legal study and research. Intertextuality has the potential to show a more positive outlook beyond fragmentation or commodification.¹⁰³ The continuing life of the codex is in its new connectedness; the value of a creative work may “radiate potential connections” through blogs and hypertextual references and “sewn together into the universal library” in a manner that may make an e-book or one printed on demand far from obsolete (if publishers agree).¹⁰⁴

Closing the gap in textual and language-based study for international and comparative law will require further study of the implications of intertextuality and its effects, perhaps on a more empirical basis. Mapping out connectivity between scholarly communication and code commentary rests on continuity between marginal commentary and hot-linked references or annotations. Further contributions to textual and literary theory in the area of international and comparative law would fill an important gap indeed. What this essay argues is that in international and comparative law, and law generally (as in other disciplines), the dialogue between text and interpretation has an enriched life both in the code of cyberspace and in the codex on the shelf.

101. See generally M. N. Hoeflich, *The Lawyer as Pragmatic Reader: The History of Legal Common-Placing*, 55 ARK. L. REV. 87, 89–91 (2002) (emphasizing the interpretive community of early civil and canon law and going on to describe the many methods and complex cross-referential glosses that early civil and common law lawyers used). Many thanks to the librarians of the Folger Shakespeare Library, Washington, DC, for their private tour of their collection of wide margin book. E.g., THOMAS LITTLETON, *LES TENURES*, 1604. The librarians annotate it thus: “This famous law book was written in legal French by Littleton for his son, Richard, as a ‘clear account of the several estates and tenures then known to English law.’ Printed with interleaved blank pages and wide margins, it provided plenty of room for annotations by future lawyers. STC 15754. But see IAN MACLEAN, *INTERPRETATION AND MEANING IN THE RENAISSANCE: THE CASE OF LAW* 88–89 (1992) (indicating that the authority to interpret, back in an earlier era, was prohibited to jurists); I would argue that history has already seen a shift from authority to “do it yourself” in the field of annotation, noting, and hence, interpretation.

102. Catherine Valcke, *Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems*, 52 AM. J. COMP. L. 713, 739–40 (2004).

103. LESSIG, *supra* note 100, at 61, 127.

104. Kevin Kelly, *Scan This Book!*, N.Y. TIMES MAG., May 14, 2006, at 71.