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Isis, Boko Haram, and the Human Right to Freedom from Slavery Under Islamic Law

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Abstract

There is now a worldwide consensus on the firm existence of a human right to freedom from slavery. This consensus gives rise to what was thought to be an irrefutable argument that the right to be free from slavery is a jurisprudential universal, with no competent legal system or government able to deny its existence or permit derogation from its tenets. This argument is now being tested by the ideologies, policies, and actions of Muslim insurgencies in Iraq, Syria, and Nigeria, each claiming that the enslavement of non-believing combatants and war captives and slave trading in such persons is permitted under Islamic law. This Article considers the implications of these claims for the future of Islamic law and for its relationship with the world's legal systems, particularly international humanitarian law. It posits that the claims of these insurgencies, while glaringly out of step with modern views of chattel slavery, should be taken seriously and actually have a great deal of support in Islamic legal history. It argues that, despite the long presence of slavery and slave-trading in Islamic legal and imperial history, there is now a firm jurisprudential basis for declaring that slavery in Islam can and should be abolished, even under a government bound by the Shar'ah. It asserts that Muslims and scholars of Islam must engage the Islamic State and Boko Haram in dialogue on this point. It argues that the moral questions raised by the continued specter of slavery in Islamic legal culture are profound and fundamentally more significant than any other questions facing the Muslim community at this time. The Article closes with a pessimistic assessment of the future of Islamic law in its relationship with international humanitarian law and in its ability to improve the lives of its subjects, should Muslims and scholars of Islam fail to achieve a community-wide understanding on the need for de jure abolition.

KEYWORDS: Dabiq; Slavery; Islam; Qur'an; Sunnah; Islamic Juristic Consensus; Moral Progress; Well-Being; Muslim Community; International Law

ARTICLE

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There is now a worldwide consensus on the firm existence of a human right to freedom from slavery. This consensus gives rise to what was thought to be an irrefutable argument that the right to be free from slavery is a jurisprudential universal, with no competent legal system or government able to deny its existence or permit derogation from its tenets.

This argument is now being tested by the ideologies, policies, and actions of Muslim insurgencies in Iraq, Syria, and Nigeria, each claiming that the enslavement of non-believing combatants and war captives and slave trading in such persons is permitted under Islamic law.

This Article considers the implications of these claims for the future of Islamic law and for its relationship with the world's legal systems, particularly international humanitarian law. It posits that the claims of these insurgencies, while glaringly out of step with modern views of chattel slavery, should be taken seriously and actually have a great deal of support in Islamic legal history. It argues that, despite the long presence of slavery and slave-trading in Islamic legal and imperial history, there is now a firm jurisprudential basis for declaring that slavery in Islam can and should be abolished, even

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under a government bound by the Sharī‘ah. It asserts that Muslims and scholars of Islam must engage the Islamic State and Boko Haram in dialogue on this point. It argues that the moral questions raised by the continued specter of slavery in Islamic legal culture are profound and fundamentally more significant than any other questions facing the Muslim community at this time. The Article closes with a pessimistic assessment of the future of Islamic law in its relationship with international humanitarian law and in its ability to improve the lives of its subjects, should Muslims and scholars of Islam fail to achieve a community-wide understanding on the need for de jure abolition.

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INTRODUCTION

The firm existence of a human right to freedom from slavery is now acknowledged by the worldwide community of jurists, by all major international nongovernmental organizations dealing with the

recognition and enforcement of human rights, by organs of the United Nations and regional intergovernmental organizations, and by all the world's national and municipal jurisdictions. These facts give rise to what was thought to be an irrefutable argument that the right to be free from slavery, like the right to be free from genocide, torture, racial discrimination and piracy, is a jurisprudential universal, with no competent legal system or government able to deny its existence or permit derogation from its tenets.¹ To the great surprise and grim consternation of many contemporary scholars, observers and commentators, particularly those who seek a place for the *Shari'ah* among the world's legal systems, this argument is being tested by the ideologies, policies, and actions of Muslim insurgencies in Iraq and Syria and in Nigeria, each claiming that the enslavement of non-believing combatants and war captives and slave trading in such persons is permitted under Islamic law.

This Article considers the implications of these claims for the future of Islamic law and for Islamic law's relationship with the world's international and domestic legal systems, particularly the emerging system of international humanitarian law. It posits that the claims of the Muslim insurgencies in Iraq, Syria, and Nigeria should, from a jurisprudential perspective, be taken seriously and that such claims, while glaringly out of step with modern views of chattel slavery, actually have a great deal of support in Islamic legal history. It argues that, nonetheless, there is now a firm Islamic jurisprudential and legal basis for declaring that slavery in Islam can and should be abolished, even under a government bound by the *Shari'ah*. It asserts that Muslims and scholars of Islam around the world must engage the partisans, jurists, and ideologues of these insurgencies in dialogue on this point, questioning both their view of the historical facts supporting their claims and their understanding of the role of Islamic law in contemporary Muslim communities. The Article closes with a pessimistic assessment of the future of Islamic law in its relationship with international humanitarian law and in its ability to improve the

1. In international law, the right to be free from slavery is part of the cluster of rights arising out of the familiar *jus cogens* set of peremptory norms. LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACTER AND HANS SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 91-93 (3d ed., 1993) (citing, *inter alia*, R. St. J. Macdonald, *Fundamental Norms in Contemporary International Law*, 25 CAN. Y.B. OF INT'L L. 115, 131 (1987)). In many national and municipal systems, the right is enshrined in constitutional and other fundamental organic instruments. Perhaps the most influential national or municipal expression of the right is the Thirteenth Amendment of the United States Constitution.

lives of its subjects, should Muslims and scholars of Islam fail to achieve a community-wide understanding of the need for *de jure* abolition.

I. *BACKGROUND*

The most coherent of the claims asserting a contemporary Muslim right to enslave are those put forward by an organization emerging from the dismantling of Al Qaeda in Iraq and known as *ad-Dawlah al-Islāmiya fi 'l-'Irāq wa -sh-Shām* (“the Islamic State of Iraq and Syria (or the Levant)”—“ISIS” or “ISIL” in English or “DAESH” in Arabic). In 2014, DAESH declared itself to simply be the “Islamic State” and, in a startling and rapid series of military advances, took large swaths of territory in Iraq and Syria. On June 29, 2014, the group proclaimed a worldwide caliphate and its leader, Abu Bakr al-Baghdadi, declared himself to be the caliph, an official who, by some interpretations of classical Islamic political theory and law, must be obeyed by all Muslims.² In accomplishing their conquests, ISIS

2. Understandings of the concept of the Islamic caliphate are contested, wide-ranging and have evolved considerably since the age of the “Rightly-Guided Caliphs,” the seventh-century Muslim political leaders and companions of the Prophet Muhammad who inherited superintendence of the Muslim community immediately after his death. The word “caliph,” or *khalīfa* in Arabic, literally means “successor” and refers to the head of the Muslim community who assumes the temporal functions performed by the Prophet Muhammad when he was alive. These functions include, *inter alia*, the levying of taxes, regulation and supervision of markets, command of the military and the conduct of war, appointment of judges and other governmental officials, formulation of state policy in domestic and foreign affairs, and the like. *See generally Khalīfa*, IV *ENCYCLOPAEDIA OF ISLAM* 937 (E. Van Donzel, B. Lewis, Ch. Pellat, C.E. Bosworth eds., 2d ed. 1978). Professor A.K.S. Lambton observes:

As the temporal head of the community, whose internal organisation was secured by a common acceptance of and submission to the *sharī'a*, the caliph was the symbol of the supremacy of the *sharī'a*. He, like other believers, was subordinate to it and they owed him obedience only as its representative. So far as there was an element of contract in the relations between him and his followers this was to be found in the *bay'a* (a citizen's declaration of allegiance). Termination of the contract was only permitted if a change took place in the status and condition of the caliph such as might cause prejudice to the rights of the community. The weakness of the position was that no tribunal was specified to decide upon his deposition. *Id.* at 948 (definition of *bay'a* inserted by the author).

The caliphal concept gained considerable substantive significance during the halcyon days of the 'Abbasid caliphate, based in Iraq, which functioned, in various incarnations, between 649 C.E. and 1258 C.E. and with great geopolitical impact between 750 C.E. and 950 C.E. It appears that the leaders of ISIS seek to model their “caliphate” on the example of the early 'Abbasid caliphate, which claimed universal authority over all Muslims, *see* HUGH N. KENNEDY, *THE EARLY ABBASID CALIPHATE: A POLITICAL HISTORY* 41-45 (1981). *See also* M.A. SHABAN, *THE 'ABBASID REVOLUTION* (1970); PATRICIA CRONE, *GOD'S CALIPH* 92

partisans have engaged in a variety of attention-grabbing behaviors and many of these behaviors have been condemned as barbaric and not justified by any rational interpretation of Islamic law or jurisprudence.³ Many commentators have further argued that ISIS and its leaders cannot even remotely be described as “Islamic,” opining that it is more likely a cult or an aberrational or “deviant” organization of misfits and criminals. At first blush, there is much that seems to support these views. Traditional and even more extreme interpretations of Islamic law would not, under any circumstances, support the immolation of a prisoner of war or the beheading of an

(1986), or on a model the group claims was announced by the Prophet Muhammad. See Andrew F. March and Mara Revkin, *Caliphate of Law*, FOREIGN AFFAIRS, <https://www.foreignaffairs.com/articles/syria/2015-04-15/caliphate-law>. ISIS also makes a number of additional claims that have recently taken on increased geopolitical significance. These claims include asserting an entitlement to control of territory on the Arabian Peninsula, requiring the overthrow of the Saudi monarchy and other oligarchies in the Persian Gulf and a reorientation of the moral and political landscape in the Middle East. Patrick Cockburn has observed that “[t]he birth of the new state is the most radical change to the political geography of the Middle East since the Sykes-Picot Agreement was implemented in the aftermath of the First World War.” Patrick Cockburn, *ISIS Consolidates*, 36 LONDON REV. OF BOOKS 3, 3-5 (2014).

3. The videotaped immolation of the Jordanian fighter pilot, Moaz al-Kasasbeh, captured and imprisoned by ISIS on December 24, 2014, shocked the world and brought stern condemnation from Muslim jurists, religious leaders and opinion makers around the world. See Damien Gayle, *Even Al-Qaeda Condemn Murder of Jordanian Pilot as ‘Deviant,’* DAILY MAIL.COM (Feb. 4, 2015), <http://www.dailymail.co.uk/news/article-2939536/Even-Al-Qaeda-condemn-murder-Jordanian-pilot-deviant-leading-Muslim-cleric-calls-ISIS-militants-killed-crucified-limbs-chopped.html>; Sami Aboudi & Suleiman Al-Khalidi, *Clerics Denounce Burning Alive of Pilot as un-Islamic*, REUTERS (Feb. 4, 2015), <http://www.reuters.com/article/2015/02/04/mideast-crisis-jordan-clerics-idUSL6N0VE1QO20150204>; Umberto Bacchi, *Jordanian Pilot Burned Alive by Isis: EU Condemns Jordan Over Retaliatory Executions*, INTERNATIONAL BUSINESS TIMES, UK EDITION (Feb. 4, 2015), <http://www.ibtimes.co.uk/jordanian-pilot-burned-alive-by-isis-eu-condemns-jordan-over-retaliatory-executions-1486646>. Prophetic statements are the basis for an Islamic legal prohibition of punishment or execution by fire. The Prophet Muhammed is reported to have said: “Do not punish anybody with Allah’s punishment (fire).” *Translation of Sahih Bukhari Book 84, Vol. 9 Hadith 57*, USC CENTER FOR MUSLIM-JEWISH ENGAGEMENT, <http://www.usc.edu/org/cmje/religious-texts/hadith/bukhari/084-sbt.php> (last visited Nov. 16, 2015) [hereinafter *Bukhari*] (collection of Hadiths maintained by University of Southern California, Center for Muslim-Jewish Engagement). Another account reports that he said: “[b]ut it is only Allah the Master of Honor and Glory who punishes (a guilty person) with burning. So if you find them, behead them (and do not burn them).” IMAM ABU ZAKARIYA YAHYA BIN SHARAF AN-NAWAWI (IMAM NAWAWI), RIYADH-US-SALEHEEN 782 (S.M. Madni Abbasi trans., 1994) (citing *Bukhari*). The ISIS organization has continued to engage in extremely violent treatment of captured combatants and other captives, videotaping these incidents and making sure they are widely disseminated on social media and through news outlets. See, e.g., Ben Hubbard, *Grisly ISIS Video Seems Aimed at Quashing Resistance*, N.Y. TIMES, June 24, 2015, at A6 (reporting that “ISIS carries out brutal executions in a regular way as a constant reminder to local populations and to deter people from cooperating with its enemies.”).

innocent hostage.⁴ On the other hand, Bernard Haykel, Princeton scholar and leading expert on Islamic history and politics, has argued that Muslims who call the Islamic State un-Islamic are typically “‘embarrassed and politically correct, with a cotton-candy view of their own religion’ that neglects ‘what their religion has historically and legally required.’”⁵

Curiously, as we noted above, one of the most shocking aspects of the panoply of ISIS behaviors actually does have an arguable basis in Islamic jurisprudence. This is the behavior by which ISIS partisans and military commanders take combatants and war captives as chattel slaves. Such behavior is the result of their implementation of an ideological policy, based on post-prophetic interpretations of Islamic law and well-recognized views of Islamic legal history, permitting the enslavement of non-Sunni Muslim combatants and war captives. Press reports and United Nations documents indicate that at least 3,000 persons, mostly women and girls, are likely now held in such slavery by ISIS.⁶

4. WAEL B. HALLAQ, *SHARI’A: THEORY, PRACTICE, TRANSFORMATIONS* 330, n.38 (2009) (citing *AL-MAWSU’A AL-FIQHIYYA*, XVI, 151); Muhammad Munir, *Debates on the Rights of Prisoners of War in Islamic Law*, 49 *ISLAMIC STUDIES* 436, 486 (2010) (arguing that Islamic law, based on statements of the Prophet Muhammad, prohibits the execution of prisoners of war and requires fair and humane treatment; also citing the opinions of the jurist Ibn Rushd, who held that the person and honor of the prisoner must be respected and this prohibits torture) (citing ‘Qur’an 76:8-9, which lauds the behavior of Muslim families after the Battle of Badr, who ate only dates so that prisoners they were in charge of could enjoy healthy meals); see also Mohamed El Zeidy, *Prisoners of War: A Comparative Study of the Principles of International Humanitarian Law and the Islamic Law of War*, 9 *INT’L. CRIM. L. REV.* 623 (2009) (arguing that the International Humanitarian Law and the Islamic Law of War are remarkably similar on the question of the treatment of prisoners).

5. See Graeme Wood, *What ISIS Really Wants*, *THE ATLANTIC* (Mar. 2015), <http://www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980/> (arguing that the “Islamic State is Islamic. Very Islamic. Yes, it has attracted psychopaths and adventure seekers, drawn largely from the disaffected populations of the Middle East and Europe. But the religion preached by its most ardent followers derives from coherent and even learned interpretations of Islam.”). Compare Bernard Haykel, *ISIS: A Primer*, *PRINCETON ALUMNI WEEKLY* (June 3, 2015), <https://paw.princeton.edu/issues/2015/06/03/pages/0027/index.xml>, with Kecia Ali, *ISIS and Authority*, *FEMINISM AND RELIGION BLOG* (Feb. 24, 2015, 12:01 AM), <http://feminismandreligion.com/2015/02/24/isis-and-authority-by-kecia-ali/> (stating that “It is not the job of religious studies scholars (or US presidents) to judge which groups are ‘Islamic’ or ‘un-Islamic.’ Rather, we must understand how various actors make claims to represent, understand, or further their tradition.”).

6. Press Release, Security Council, Security Council Urged to ‘Stop the Madness’ as Terrorists Trample Cultural, Religious Diversity of the Middle East, U.N. Press Release SC/11840 (Mar. 27, 2015) (quoting Vian Dakhil, a member of Iraqi Parliament, reporting the enslavement of at least 3,000 persons); Emily Feldman, *ISIS Still Holds Thousands of Slaves, Giving Brisk Business to Human Smugglers*, *MASHABLE* (June 19, 2015), <http://mashable.com>.

The claim that ISIS is nothing more than a cult or “deviant” organization would perhaps have more credence if its claim to an entitlement to enslave its war captives were an isolated one. One should take note that Boko Haram, a West African insurgency growing out of an organization known as *Jamā‘at Ahl as-Sunnah lid-Daw‘wah wa’l-Jihād* (“People Committed to the Propagation of the Prophet’s Teaching and Jihad”) founded in 2003 in northeast Nigeria by the late Mohammed Yusuf and now led by Abubakr Shekau, seeks to advance a similar ideology.⁷ Although Boko Haram has not sought recognition as a State,⁸ it has also taken control of large swaths of territory in northern Nigeria, Cameroon, and Niger and its behaviors have involved widespread pillage and destruction of Muslim and Christian communities in those areas, with indiscriminate killing and kidnapping of large numbers of innocents.⁹ In a widely reported incident in April 2014, the organization kidnapped over 276 schoolgirls from a government-operated girl’s school in the town of Chibok, northern Nigeria. Its leader maintained, in videotaped speeches and Internet feeds, that the girls would be enslaved or

com/2015/06/10/the-vanished-yazidis/ (reporting 1,200 killed, 840 still missing and 4,500 taken as slaves by ISIS and reporting demands of upwards of US\$20,000 from smugglers for the emancipation of Yazidi families).

7. See Human Rights Watch, *World Report 2015: Nigeria* (Jan. 2015), <http://www.hrw.org/world-report/2015/country-chapters/nigeria> (explaining that since 2009, Boko Haram “abducted more than 500 women and girls from the northeast, of which over 100 either escaped, were rescued by security forces, or were released by insurgents. Some abductees suffered other abuses including sexual violence, forced marriage, and force conversion.”); see also *Missing Childhoods: The Impact of Armed Conflict on Children in Nigeria and Beyond*, UNICEF (2015), http://www.unicef.org/media/files/Child_Alert_MISSING_CHILDHOODS_Embargo_00_01_GMT_13_April.pdf (women and girls who escaped describe having “been subjected to forced marriage, forcible religious conversion, physical and psychological abuse, forced labour and rape.” Additionally, “[c]hildren as young as four years old are being used within the ranks of Boko Haram – as cooks, porters and look-outs.”).

8. Cf. *Nigeria and Boko Haram Tracker*, UNIV. OF S. FLORIDA GLOBAL INITIATIVE ANALYSIS (May 4, 2015), <http://www.usfglobalinitiative.org/newsletter/category/security-review/> (reporting that Boko Haram has been re-branded as the “Islamic State’s West African Province” through social media channels, suspected to be controlled by the Islamic State or supporters).

9. Reuters, *Female Suicide Bomber Kills 10 in Nigerian Region Racked by Islamist Violence*, N.Y. TIMES, Feb. 16, 2015, at A6; ‘Thousands displaced’ by Boko Haram Assault, AL-JAZEERA (July 21, 2014, 21:12 GMT), <http://www.aljazeera.com/news/africa/2014/07/displaced-boko-haram-assault-2014721205656363368.html> (recounting massive displacement of over 2,000 residents of the Northern Nigerian village of Damboa by Boko Haram insurgents).

involuntarily married off to Boko Haram fighters.¹⁰ Since then, it has continued to conduct abductions of large numbers of schoolchildren. Its current leader has justified these behaviors using language suggesting that Islamic law permits the enslavement and forced marriage of female captives in a military *jihād*.¹¹

The assertions of these two insurgencies, claiming an entitlement to enslave combatants and war captives based on Islamic law, should not be viewed as idiosyncratic, silly, or cult-based. There are a number of other Muslim insurgencies operating in the world today, some with plausible claims to legitimacy, and many of these insurgencies have been known to take combatants and non-combatants as prisoners in a variety of circumstances.¹² Should the

10. See Lynn, L. Taylor, *Boko Haram Terrorism: Reaching Across International Boundaries to Aid Nigeria in the Humanitarian Crisis*, 21 *ILSA J. INT'L & COMP L.* 1, 7 (2014) (citing *Nigeria: Boko Haram Admits Abducting Schoolgirls*, BBC NEWS (May 5, 2014, 13:17 BST), <http://www.bbc.com/news/world-africa-27284264>) (Boko Haram's leader, Abubakar Shekau, released a video in which he stated, "God instructed me to sell them, they are his properties and I carry out his instructions."); Haruna Umar and Michelle Faul, *Boko Haram Denies Truce, Says Kidnapped Girls Married*, TIMES OF ISRAEL (Nov. 1, 2014, 11:46 AM), <http://www.timesofisrael.com/boko-haram-denies-truce-says-kidnapped-girls-married/> (in a subsequent video, Shekau stated, "The issue of the girls is long forgotten because I have long ago married them off.").

11. See April Nees, *New Development: Boko Haram: A Textbook Case for Designation as a Terrorist Organization and its Terroristic Threat to International Religious Freedom*, 14 *RUTGERS J. L. & RELIG.* 498, 503 (2013) (Boko Haram's current leader, Abubakar Shekau, expressly stated, "[t]his is a war against Muslims and infidels.") (citing to Videotape: Boko Haram: Inciting Messages of Intolerance Against Christians, quoting Imam Abu Muhammad Abubakar Bin in a direct video capturing his preaching); see also Taylor, *supra* note 10, at 8 (stating that Boko Haram justifies its conduct by claiming to strictly adhere to religious ideologies of traditional Islamic Shari'a law. Boko Haram argues that the victims in the Chibok student abduction were captured in a "lawful war").

12. The most prominent of these insurgencies is the Taliban insurgency in Afghanistan, which has fought a war against both the Afghan government and non-Afghan military interlocutors since 1994. See AHMED RASHID, *TALIBAN: MILITANT ISLAM AND FUNDAMENTALISM IN CENTRAL ASIA* 17-30 (2nd ed. 2010). There are a number of other Muslim insurgencies, which, from time to time, also find it useful to take prisoners. Among such insurgencies are those in Syria, the Philippines, Chechnya, Yemen, Kashmir, Somalia, and Palestine. Hamas, which is an Arabic-language acronym translated as "Islamic Resistance Movement," seeks the total liberation of all of historic Palestine, including what is now Israel, and the establishment of an Islamic state in that territory. Hamas claims to derive its guiding principles from the tenets Islamic law. *Hamas Covenant 1988*, THE AVALON PROJECT, YALE LAW SCHOOL (Aug. 18, 1988), http://avalon.law.yale.edu/20th_century/hamas.asp; BEVERLY MILTON, STEPHEN FARRELL, *HAMAS: THE ISLAMIC RESISTANCE MOVEMENT* (2010). Hamas has also, from time to time, taken Israeli soldiers as prisoners but there has never been any suggestion of enslavement of such persons. The most recent Hamas prisoner, Gilad Shalit was released back to Israel in exchange for 1,207 Palestinian prisoners in a prisoner swap deal. Peter Wilkinson, *Why Israelis Believe One Soldier is Worth 1,000 Palestinian Prisoners*, CNN

claims of ISIS and Boko Haram find purchase among some of these other organizations, the world will suddenly find itself grappling with a reemergence of the scourge of de jure chattel slavery, a practice thought to have been abolished in the late nineteenth and early twentieth centuries. Before exploring the implications of this reemergence for Islamic law, this Article will first carefully examine the behaviors of the ISIS and Boko Haram partisans so that we know exactly what we are dealing with.

II. *FACTUAL ACCOUNTS*

Reports of the results of the ISIS and Boko Haram policies effectuating a de jure enslavement of war captives have been horrific. Almost all of the victims of the ISIS policy are members of the Yezidi religious sect, a Kurdish-speaking non-Muslim, non-Christian, non-Jewish ethnic minority inhabiting areas in northern Syria and Iraq and southern Turkey.¹³ Researchers for Amnesty International interviewed a number of victims of the ISIS policy and, in a December 2014 investigative report, offered the following accounts.

Arwa is 15. She was abducted in August in a village south of Mount Sinjar with scores of her relatives and hundreds of neighbours, and was held in IS captivity in various places in Syria and Iraq, where she was raped, before escaping. Sixty-two of her relatives, including her mother and siblings, are still in IS hands. She told Amnesty International:

‘They took us first to Syria, to a place near Hassake. There we were kept in a house with lots of girls. After 10 days a group of us were taken back to Iraq, to Mosul, for two days. Then I was taken to Baiji with one of my sisters and some of my cousins, while four of my sisters and two of my cousins were taken to Syria. In Baiji I was kept in two different places and after about three weeks I was taken to

(Oct. 18, 2011, 10:05 AM), <http://www.cnn.com/2011/10/17/world/meast/israel-prisoner-swap-explainer/>.

13. There are also scattered but persistent reports of the enslavement of Christian women. See JESSICA STERN & J.M. BERGER, *ISIS: THE STATE OF TERROR* 215-17 (2015); *Islamic State's Position on Christians*, BBC NEWS (Feb. 27, 2015), <http://www.bbc.com/news/world-middle-east-31648888> (lasted visited July 27, 2015); see also the very recent account by Rukmini Calamachi of the NEW YORK TIMES describing the enslavement of Yezidi girls and women and the institution of a “theology of rape.” Rukmini Calamachi, *ISIS Enshrines a Theology of Rape*, N.Y. TIMES (Aug. 13, 2015), <http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html>.

Rambussi, near Sinjar, with my 13-year-old cousin, while my sister was taken to my mother who is being held in another village with other relatives.

‘In Rambussi we were held in a house with five other girls. There they did to me what they did to many other girls. I was raped. My cousin was not molested; they wanted to take her to marry her to a man but in the end they left her with us and then we managed to escape. One of the girls said she was not raped but I don’t know if it is true; I hope it is true. Another did not talk about what happened to her. The others were raped. The men were all Iraqis. They said that if we killed ourselves they would kill our relatives.’¹⁴

A 16-year-old girl, Randa, was abducted from her village south of Mount Sinjar with her parents and siblings and scores of other relatives. She was sold or given as a ‘gift’ to a man twice her age who then raped her. Her father was killed along with other male relatives. Her mother, who was heavily pregnant when she was abducted, gave birth in IS captivity and continues to be held with scores of other women and children from the family. Some are being held in Syria, others in Iraq. Randa and two of her aunts and two uncles managed to escape at different times. She told Amnesty International:

‘I was taken to Mosul and kept there all the time. First in a building which they called the maqarr (headquarters). We were about 150 girls and five women. A man called Salwan took me from there to an abandoned house. He also took my cousin, who is 13 years old; we resisted and they beat us. He took me as his wife by force. I told him I did not want to and tried to resist but he beat me. My nose was bleeding, I could not do anything to stop him. I ran away as soon as I could. Luckily they did not do anything to my cousin, did not force her to marry, and she escaped with me. I went to a doctor here, who said that I was not pregnant and didn’t have any disease, but I can’t forget what happened to me. It is so painful what they did to me and to my family. Da’esh (the IS) has ruined our lives. My mum gave birth while being held by Da’esh in Tal ‘Afar; now she is being held in Mosul with my little sister and the

14. *Escape from Hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq*, AMNESTY INTERNATIONAL, 5 (Dec. 23, 2014), http://www.amnesty.org.uk/sites/default/files/escape_from_hell_-_torture_and_sexual_slavery_in_islamic_state_captivity_in_iraq_-_english_2.pdf.

baby. My 10-year-old brother was separated from my mum and is being held in Tal ‘Afar with my aunt. What will happen to them? I don’t know if I will ever see them again.’¹⁵

A third account, perhaps the most horrific in the report, is as follows:

‘I heard that my 19-year-old sister Jilan committed suicide in the place where she was held in Mosul two weeks ago,’ a young man from Sinjar told Amnesty International in early September.’

‘Several girls who later escaped IS captivity confirmed the sad news to Amnesty International in November. One of them, 20-year-old Luna, recounted:

‘We were 21 girls in one room, two of them were very young, 10-12 years. One day we were given clothes that looked like dance costumes and were told to bathe and wear those clothes. Jilan killed herself in the bathroom. She cut her wrists and hanged herself. She was very beautiful. I think she knew that she was going to be taken away by a man and that is why she killed herself.’

Two other girls, aged 17 and 10, who had been held in the same place, confirmed the account of Jilan’s suicide in separate interviews.¹⁶

In a recent account published in the *New York Times*, Rukmini Callimachi reported very similar events, noting that ISIS justifies its enslavement of Yazidi women using a “theology of rape” and that “the trade in Yazidi women and girls has created a persistent infrastructure with a network of warehouses where victims are held, viewing rooms where they are inspected and marketed and a dedicated fleet of buses to transport them.” She further noted that “the practice has become an established recruiting tool to lure men from deeply conservative Muslim societies, where casual sex is taboo and dating is forbidden.”¹⁷

Human Rights Watch recently interviewed 12 young women and girls who escaped from Boko Haram custody after the school attack and, in an October 2014 publication, offered the following accounts.

15. *Id.*

16. *Id.* at 8.

17. Callimachi, *supra* note 13.

A 15-year-old girl who was held in a Boko Haram camp for four weeks in 2013 described being forced to marry a militant more than twice her age:

“After we were declared married I was ordered to live in his cave but I always managed to avoid him. He soon began to threaten me with a knife to have sex with him, and when I still refused he brought out his gun, warning that he would kill me if I shouted. Then he began to rape me every night. He was a huge man in his mid-30s and I had never had sex before. It was very painful and I cried bitterly because I was bleeding afterwards.”¹⁸

One Christian woman described being threatened with death or violence if she refused to convert to Islam:

‘I was dragged to the camp leader who told me the reason I was brought to the camp was because we Christians worship three gods. When I objected to his claim, he tied a rope around my neck and beat me with a plastic cable until I almost passed out. An insurgent who I recognized from my village convinced me to accept Islam lest I should be killed. So I agreed.’¹⁹

A 19-year-old girl who was held in a Boko Haram camp in Gwoza told Human Rights Watch that she was offered thousands of naira as dowry to marry one of the insurgents:

‘I refused the dowry, asking them to go pay to my father if they wanted to marry me. An insurgent who knows my family accepted it on my behalf. He told me he was afraid I would be killed if I continued to refuse. I became confused at the implication of being married to a Boko Haram member, so I pretended to be very ill, and the wedding was postponed until the return of the camp leader, who was travelling to meet the group’s overall leader in the Sambisa camp. He ordered that I should be taken to the hospital [in the local town] for tests before his return. It was the break I’d been praying for. I threatened the woman sent to take me to a hospital in town that I would scream and expose her to Civilian JTF. She quickly walked away as I made my escape.’²⁰

18. Mausi Segun, “*Those Terrible Weeks in Their Camp*” *Boko Haram Violence Against Women and Girls in Northeast Nigeria*, HUMAN RIGHTS WATCH (October 27, 2014), <http://www.hrw.org/node/130172/section/6>.

19. *Id.*

20. *Id.*

III. DABIQ

As noted above, the justification offered by ISIS for the enslavement of female captives is based on interpretations of Islamic law. Since July 2014, ISIS has been publishing a multilingual on-line magazine, called *Dabiq*.²¹ Although the magazine's primary purpose appears to be the recruitment of supporters of ISIS, including jihadist soldiers, its authors also published a theological and legal justification for the reinstatement of slavery and slave trading in territories controlled by ISIS. In an article entitled, *The Revival of Slavery Before the Hour*, the writers assert that "enslaving the families of the kuffar [infidels] and taking their women as concubines is a firmly established aspect of the *Shariah* . . ." or Islamic law and that any Muslim "who were to deny or mock . . . [this assertion] would be denying or mocking the verses of the Qur'an and the narrations of the Prophet," and is therefore an apostate.²²

The article argues, based on a variety of *Shariah* sources, that ISIS partisans have a religious duty to kill or enslave non-believers as part of their struggle [*jihad*] against their enemies.²³ It offers a very brief discussion of Islamic scholarly views of the Yezidi belief system, noting that even Christians regard the Yezidis as "devil worshippers."²⁴ It concludes that members of the Yezidi sect are

21. See *Until it Burns the Crusader Armies in Dabiq*, 1 DABIQ, 4 (Sept. 2014), <http://media.clarionproject.org/files/09-2014/isis-isis-islamic-state-magazine-Issue-1-the-return-of-khilafah.pdf> (explaining that the name of the magazine was "taken from the area called Dabiq in northern countryside of Halab (Aleppo) in Sham. This place was mentioned in a hadith describing some of the events of the Malahim (what is sometimes referred to as an Armageddon in English). One of the greatest battles between the Muslims and the crusaders will take place near Dabiq."). Dabiq is a small village in Syria mentioned in some Islamic apocalyptic literature as the place where the *malāhim* (literally "the battles" or, more figuratively, the "final conflagration" or Armageddon) will occur. *Malahim*, 6 THE ENCYCLOPAEDIA OF ISLAM 216 (C.E. Bosworth et. al, eds., 1991); T. Fahd, *Djafir*, 2 THE ENCYCLOPAEDIA OF ISLAM 375-37 (B. Lewis et. al, eds., 1965) (referring to the *kutub al-hidthan* and references to apocalyptic predictions in the histories of Tabari, Mas'udi and Ibn Khaldun. Such apocalyptic traditions are actually more prevalent among the Shi'a); see also T. Fahd, *Malhama*, 6 THE ENCYCLOPAEDIA OF ISLAM 247 (C.E. Bosworth et. al, eds., 1991). In Islamic history, Dabiq and the nearby plain have been a staging areas for troops and the site of many battles, the most important being the battle occurring on August 24, 1516, when the armies of the Ottoman Sultan Selim I defeated the armies of the Mamluk Sultan Kansuh al-Ghuri, killing him, and paving the way for the Ottoman occupation of Syria and Egypt. See G. Wiet, *Dabik*, in 2 THE ENCYCLOPAEDIA OF ISLAM 72-73 (B. Lewis et. al, eds., 1965).

22. *The Revival of Slavery Before the Hour*, 4 DABIQ 14, 17, <http://media.clarionproject.org/files/islamic-state/islamic-state-isis-magazine-Issue-4-the-failed-crusade.pdf>.

23. *Id.* at 14.

24. *Id.*

therefore eligible to be put to death or enslaved under Islamic law.²⁵ The Dabiq article cites the Islamic battlefield rules permitting distribution of war booty, which would include non-believing women and children captured during the conflict, to be divided among the Muslim soldiers, after the obligatory one-fifth (“*khums*” or “fifth”) is given to the head of state.²⁶ It argues that such captives may be sold in

25. *Id.* at 15. The historical origins of the Yezidi religion and the provenance of many of the beliefs and practices of its adherents are shrouded in exaggeration, misunderstanding, mystery, and an equally profound lack of scholarly consensus. Some scholars trace the origins of the religion to ancient Persian Manicheism, arguing that the Yezidi Kurds gradually abandoned the veneration of the good spirit in Manicheism, preferring to engage in a propitiation of those aspects of life represented by the evil spirit, which they believe has been rehabilitated. Others ascribe its origins to Zoroastrianism, particularly as it was practiced in the ancient city of Yazd, capital of the Iranian province of Yazd and an important center of Zoroastrian religious practice. These practices emphasized the worship of fire. Many Muslims, both Sunni and Shi’a, argue that the Yezidis are followers of a cult that venerates Yezid ibn Mu’awiya, the reviled and corrupt second Umayyad caliph who brought about the martyrdom of Hussain, the Prophet’s grandson, in 680 C.E. and the murder of eighty companions of the Prophet and seven hundred readers of the Qur’an in Medina the following year. The martyrdom of Hussein is recognized every year by the Shi’a in a holiday known as *Ashura* and his memory is venerated by many Sunnis as well. Even if the cult accusation is not true, the Yezidis in the Aleppo and Mount Sinjar areas actually do celebrate the life and exploits of the Caliph Yezid, dedicating a panegyric to his memory and celebrating his birthday. This is an anathema to many Muslims. Other scholars argue that the religion is a syncretistic amalgam of Muslim, Jewish, ancient Christian and Zoroastrian practices and ideas, making it a useless exercise to try to definitively identify its origins.

The Yezidis are in fact monotheistic but they eschew a eucharistic approach to God and, by most accounts, reject the notion that the devil (*Iblis* or *Shaitan* in Arabic) is a fallen angel. They believe that his act of disobedience was forgiven by God and that he is now God’s chief angel (*Melek Taus* or “Peacock Angel” in Kurdish) who can provide human beings with special protections. Yezidis will not utter the word *Shaitan* in speaking of the devil, believing this is a sign of disrespect. This and other beliefs have caused many Muslims and Christians to describe the Yezidis as “devil-worshippers” and there is a well-established body of Islamic scholarly opinion holding that members of the religion should be killed if they do not renounce their beliefs and convert to Islam. Most Yezidis are not Arab but rather are of Kurdish or other Indo-European ethnicity, although some do trace their ethnicity to Arab forbearers. From a Yezidi perspective, the ISIS murder, persecution and enslavement of their members is not a new phenomenon. The Yezidis have been brutally and regularly persecuted by Muslims in the region, both Sunni and Shi’a, for at least the last thousand years. Because of this, they have become quite practiced in clandestinely observing their religious tenets and there are many accounts of false conversions to Islam by Yezidis, who secretly continue to practice their religion despite an outward profession of Islam. Much of this account is taken from R.H.W. EMPSON, *THE CULT OF THE PEACOCK ANGEL: A SHORT ACCOUNT OF THE YEZIDI TRIBES OF KURDISTAN*, 27-48, 70-88 (1928); see JOHN S. GUEST, *THE YEZIDIS: A STUDY IN SURVIVAL* 28-39 (1987).

26. See *The Revival of Slavery Before the Hour*, *supra* note 22, at 15; “*Khums*” is “a one-fifth share of the spoils of war and, according to the majority of Muslim jurists, of other specified forms of income, set aside for variously designated beneficiaries.” A. Zysow & R. Gleave, *Khums*, *THE ENCYCLOPAEDIA OF ISLAM* (P. Bearman et. al eds., 2015),

a market by soldiers, “as *mushrikin* [polytheists] were sold by the Companions (of the Prophet Muhammad).”²⁷ It relies extensively on *ahadith* (narrations of accounts of the life of the Prophet Muhammad) reported by Abu Hurayra.²⁸ It asserts that there has been an “abandonment of slavery” since the rise of *tāghūt* law and the desertion of *jihad*.²⁹ It laments the fact that many Muslim men are engaged in sexual relations with their maids and servants, which is

http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/khums-COM_1417.

“The rules for the *khums* apply in the first instance to moveable property, which includes the captured slaves of the non-Muslim enemy. In the case of combatants taken prisoner and captive women and children, the rule of the *khums* is applied most straightforwardly when these are enslaved and form part of the booty to be divided.” *Id.* The origin of the rule appears to derive from the pre-Islamic practice of setting aside one-fourth or one-fifth of booty captured by Bedouin raiders for the benefit of the commander. *Id.* The *Qur’an* modified this rule by dedicating such portions of war booty to benefit the public interest, specifically the Prophet and the poor, the needy and the disenfranchised in the community. See *The Meaning of the Holy Qur’an*, 8:41 (Abdullah Yusuf Ali trans., new rev. 9th ed. 1997) [hereinafter *Qur’an*]. Verse 8:41 states:

And know that out of all the booty that ye may acquire (in war), a fifth share is assigned to Allah—and to the Messenger, and to near relatives, orphans, the needy, and the wayfarer—if ye do believe in Allah and in the revelation We sent down to Our servant on the Day of Testing—the Day of the meeting of the two forces. For Allah hath power over all things. *Id.*

This verse has been the subject of a variety of interpretations, depending on the school of law, and all emphasize the importance of the public interest in making the division mandated by the verse. The other four-fifths, variously described in the juristic literature as *ghanīma* (“war booty”) or *fay’* (spoils obtained after fighting is concluded) are then divided among the soldiers, with special provisions for the reward of bravery or other extraordinary service. See F. Lokkegaard, *G’hanima*, 2 THE ENCYCLOPAEDIA OF ISLAM 1005-06 (B. Lewis et. al, eds., 1965); *F’ay’*, 2 THE ENCYCLOPAEDIA OF ISLAM 869-70 (B. Lewis et. al, eds., 1965).

27. See *The Revival of Slavery Before the Hour*, *supra* note 22, at 15. This account of the law is also confirmed by Tabari:

[Muslim jurists] agreed unanimously that if women and children are captured and taken to the Territory of Islam, they should be [considered] booty and that if the army [combatants] have enslaved them and faced their [enemy] combatants in a desert land that is not owned by them [the Muslims], the Imam should not honor them [with manumission]. AL-TABARI’S BOOK OF JIHAD 287 (Yasir S. Ibrahim, ed. and trans., 2007).

28. See *The Revival of Slavery Before the Hour*, *supra* note 22, at 15. Abu Hurayra has been the source of an enormous amount of commentary in the religious literature and is still an object of controversy as there no unanimity on his status as a reliable source. FATIMA MERNISSI, *THE VEIL AND THE MALE ELITE: A FEMINIST INTERPRETATION OF WOMEN’S RIGHTS IN ISLAM*, 58 (Mary Jo Lakeland, trans., 1987) (describing Abu Hurayra as a misogynist narrator of hadith).

29. See *The Revival of Slavery Before the Hour*, *supra* note 22, at 16. “*tāghūt*” law refers to law promulgated by a regime that privileges or permits idolatry and sorcery. See *Qur’an*, *supra* note 26, 4:51.

fornication or adultery under Islamic law, and it would be better, so the writers say, if these maids and servants were legally owned concubines, thus relieving the men in these relationships of the moral and legal reprobation associated with fornication and adultery.³⁰

The publication of these purported justifications for the enslavement of the Yezidi women received widespread negative treatment in the Western press³¹ and ISIS then published a second justificatory article, also in *Dabiq*, purportedly authored by a woman.³² The article seeks to meet the criticism and skepticism generated by the first article and provides a much more textually based Islamic legal justification for the enslavement of war captives, citing verses in the *Qur'an* and examples from accounts of the Prophet Muhammad's conduct of war, including a report that he confirmed the ruling of a judge/arbitrator ordering the beheading of the male members of a disloyal Jewish tribe and the enslavement of their women and children.³³ The *Dabiq* article shows a particular

30. See *The Revival of Slavery Before the Hour*, *supra* note 22, at 17.

31. See Terrence McCoy, *The Disturbing Way the Islamic State Justifies Raping and Enslaving Women*, THE WASHINGTON POST, Oct. 13, 2014, <http://www.washingtonpost.com/news/morning-mix/wp/2014/10/13/the-disturbing-way-the-islamic-state-justifies-raping-and-enslaving-women/>; see also Allen McDuffee, *ISIS is Now Bragging About Enslaving Women and Children*, THE ATLANTIC (Oct. 13, 2014), <http://www.theatlantic.com/international/archive/2014/10/isis-confirms-and-justifies-enslaving-yazidis-in-new-magazine-article/381394/>; *ISIS Jihadist Boast of Enslaving Yazidi Women*, AL ARABIYA NEWS (Oct. 13, 2014), <http://english.alarabiya.net/en/perspective/features/2014/10/13/ISIS-declares-return-of-slavery-.html>; Salma Abdelaziz, *ISIS States its Justification for the Enslavement of Women*, CNN (last updated Oct. 13, 2014, 11:16 AM), <http://www.cnn.com/2014/10/12/world/meast/isis-justification-slavery>.

32. Umm Sumayyah al-Muhajirah, *Slave-girls or prostitutes?*, 9 DABIQ 44, <http://www.joshualandis.com/blog/wp-content/uploads/Dabiq-9-They-Plot-and-Allah-Plots-compressed.pdf>

33. *Id.* at 45. In the incident referred to, the Prophet Muhammad, after establishing the new Islamic state in Medina, entered into a treaty with the Jewish tribe, the Banu Quraydhah. Members of the tribe had been duplicitous and were secretly negotiating against the new Muslim entity, siding with non-Muslim tribes that attacked Medina during the Battle of Ahzab. *Imam Muslim*, 3 SAHIH MUSLIM: BEING THE TRADITIONS OF THE SAYINGS AND DOINGS OF THE PROPHET MUHAMAD AS NARRATED BY HIS COMPANIONS AND COMPILED UNDER THE TITLE AL-JAMI'US- SAHIH, No. 4364-70 (Abdul Hamid Siddiqi, trans). The Muslims prevailed and the Prophet laid siege on the Jewish tribe. After enduring much hardship the tribe surrendered and agreed to accept the verdict of an ally, S'ad ibn Mu'adh, as to what should be done with them. *Id.* S'ad decided that the able-bodied men in the tribe should be killed, the women and children "taken prisoner" (enslaved), and their property distributed among the Muslims as war booty. *Id.* The compiler of the hadith notes that S'ad ibn Mu'adh rendered the decision "in light of the teachings of the Torah, which was the Divine Code of conduct for the Jews . . ." citing Deuteronomy 20:10-14, which mandates the killing of male members and the enslavement of the women and children of any city making war against the

concern with the fact that prominent Muslims have criticized the practices of the Islamic State and that many ISIS supporters defensively denied the behavior of the soldiers after being confronted in the Western media.³⁴ It then unabashedly again declares that the enslavement of non-believing female captives (described as the practice of *sabi*)³⁵ is mandated by the religious law, arguing that widespread concubinage is better than prostitution. It asserts that the Islamic State's policies, when looked at in a "true light" rather than the "false light" of the Western press and the arguments of some Muslim scholars, will bring voluntary conversions to Islam to the captives, with the benefits of marriage and kind treatment of the captives in such circumstances. It denies that concubinage is a policy founded on pleasure and it denies that sexual intercourse with female captives in such circumstances is rape.³⁶ It closes with a reference to First Lady of the United States Michelle Obama, speculating that her price "won't exceed even a third of a dinar, and a third of a dinar is too much for her."³⁷

IV. THREE QUESTIONS

The ideological policies and behaviors of these insurgencies, advocating for the reinstatement of slavery and slave-trading as

Jewish state. *Id.* at No. 4364 n.2240. This account shows that the event may not confirm an "Islamic" justification for the treatment of the Jewish captives, as the decision purported to be an application of Jewish law. Other modern accounts of the incident confirm the importance of the execution of the able-bodied men as an application of Jewish law but often omit references to the enslavement of the women and children. *See, e.g.*, AHMED AL-DAWOODY, *THE ISLAMIC LAW OF WAR: JUSTIFICATIONS AND REGULATIONS*, 27 (2011). *Cf.* Munir, *supra* note 4 (pointing out that there is considerable historical criticism questioning the standard account of the incident involving the Banu Quraydhah).

34. al-Muhajirah, *supra* note 32, at 47-49.

35. *Sabi* or *Saby* is the practice of taking prisoners or captives, especially women and girls, during war or hostilities. *See* HANS WEHR, *A DICTIONARY OF MODERN WRITTEN ARABIC (ARABIC – ENGLISH)* 461 (J Milton Cowan ed., 4th ed. 1979).

36. As Mohammad Fadel has observed, there is actually very little discussion of this specific issue in the pre-modern *fiqh* (private conversation). There are, of course, general rules mandating kind and humane treatment of slaves which, by modern sensibilities, would prohibit forcing a captive to engage in sex with her captor. One should remember, however, that, at the time these rules were crafted, even wives could not lawfully refuse to have sex with their husbands. *See* KECIA ALI, *MARRIAGE AND SLAVERY IN EARLY ISLAM* 194 (2010).

37. *See* al-Muhajirah, *supra* note 32, at 49. There is obviously a very sinister reason for this reference. It is quite possible that the remark found its way into the article because Mrs. Michelle Obama is African-American. The history of African-American slavery is well known. Query whether the same remark would have been made about former First Ladies Laura Bush or Hillary Rodham Clinton.

instruments of war, have understandably outraged most people, including diplomats, journalists, government officials, and ordinary observers, Muslim and non-Muslim, around the world. The policies and behaviors also raise troubling philosophical and jurisprudential questions for scholars of Islam, Muslim and non-Muslim, on at least three completely different levels.

First, the use of norms of Islamic jurisprudence and long-standing but also long-moribund, dormant and anachronistic rulings from the Muslim *fiqh*³⁸ to justify the reinstatement of slavery and slave-trading in the name of Islam confronts believing Muslims around the world with a moral issue most have long sought to avoid. The fact that the *Sharī'ah* never formally abolished slavery and that, theoretically, Muslims might therefore continue to capture, own and trade in slaves has been largely ignored by almost all believing Muslims. It seems that Muslims considered the likelihood of such events and participation in such behaviors to be juridical and social impossibilities in the modern world, particularly after the worldwide abolition and effective disappearance of de jure chattel slavery and slave trading in the late nineteenth and early twentieth centuries. Historians have, to some extent, documented this widely acclaimed set of events. They agree that the recognition of a human right to be free from slavery and the widespread development of a consensus of opinion on the issue followed a “sea change” in attitudes on the morality of slavery in nineteenth century Europe and in the Western Hemisphere.³⁹

38. The *fiqh* is the positive law governing Muslims, derived by jurists from the sources of the *Sharī'ah*. Wael B. Hallaq, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI *USUL AL-FIQH*, 153-61 (1997); Irshad Abdal-Haqq, *Islamic Law: An Overview of its Origin and Elements*, 7 *J. OF ISLAMIC LAW AND CULTURE* 27, 50-67 (2002). For a wide-ranging and informative description of *fiqh* and its role in the formulation of Islamic jurisprudence see Asifa Quraishi, *Who Says Shari'a Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism*, 1 *BERK. J. MIDDLE E. & ISLAMIC LAW* 163 (2008).

39. David Brion Davis, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION: 1770-1823*, 41-48 (1975) (“The emergence of an international antislavery opinion represented a momentous turning point in the evolution of man’s moral perception, and thus in man’s image of himself.”). See further discussion in Davis’ other works: *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 25-28 (1966); *SLAVERY AND HUMAN PROGRESS* (1984); see also Robin Blackburn, *THE OVERTHROW OF COLONIAL SLAVERY: 1776-1848*, 61-63 (1988) (“The 1750s and 1760s witnessed open stirrings of colonial revolt as well as the beginnings of the sea-change in educated opinion towards slavery.”); Jenny S. Martinez, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2012) (arguing that the

Historical research also suggests, however, that there was no great “sea change” in attitudes on the morality of slavery in the Muslim world.⁴⁰ Nonetheless, *de jure* chattel slavery and slave trading gradually disappeared or the practices were stamped out in the Muslim world by a combination of firm diplomatic, military and naval pressure from colonial and post-colonial governments, economic incentives designed to encourage entrepreneurs and traders to cease dealing in slaves, and reward schemes visited upon heads of national and local elites in Muslim communities.⁴¹ Muslims therefore generally missed the opportunity to confront, using norms from their own legal system, the profound moral dilemmas presented by the prospect of legal regimes allowing slavery and slave trading, even though the *Sharī‘ah* theoretically continued to permit it.⁴² With the advent of the strident assertions of ISIS and Boko Haram, the era of Muslim ostrich-like avoidance of the issue of the morality and legality of slavery in Islam has now come to an ignominious and very sad and ugly end.⁴³

Secondly, the institution of these policies by ISIS and Boko Haram presents a direct challenge to proponents of the universalist principles that underlie international humanitarian law. This challenge forces scholars to consider the utility and effectiveness of the idea of

international campaign against the slave trade was the engine behind the establishment of international tribunals enforcing human rights norms).

40. WILLIAM GERVAISE CLARENCE-SMITH, *ISLAM AND THE ABOLITION OF SLAVERY* (2006); Ehud R. Toledano, *Enslavement and Abolition in Muslim Societies*, 48 THE JOURNAL OF AFRICAN HISTORY 481, 481-85 (2007) (reviewing WILLIAM GERVAISE CLARENCE-SMITH, *ISLAM AND THE ABOLITION OF SLAVERY* (2006)); Bernard K. Freamon, *Straight, No Chaser: Slavery, Abolition and Modern Islamic Thought*, in *INDIAN OCEAN SLAVERY IN THE AGE OF ABOLITION* (Robert Harms, Bernard K. Freamon & David W. Blight eds., 2013).

41. See generally *ABOLITION AND ITS AFTERMATH IN INDIAN OCEAN AFRICA AND ASIA* (Gwyn Campbell, ed. 2005); EHUD R. TOLEDANO, *SLAVERY AND ABOLITION IN THE OTTOMAN MIDDLE EAST* (1998). It is important to note that the process leading to *de jure* abolition in the Muslim world was certainly not uniform. Abolition was accomplished with comparative ease in Egypt, Tunisia and what would later become the Palestinian Territories and Israel yet, in other locales, like The Sudan, India, and the Arabian Peninsula, *de jure* chattel slavery persisted well into the twentieth century. SUZANNE MIERS, *SLAVERY IN THE TWENTIETH CENTURY: EVOLUTION OF A GLOBAL PROBLEM* (2003); see also ISMAEL M. MONTANA, *THE ABOLITION OF SLAVERY IN OTTOMAN TUNISIA* 74-95 (2013).

42. For a recent forthright attempt to deal with this dilemma, see Sabrina F. Mirza, *The Divine Master-Servant Relationship: Why Islam Cannot Theologically Support the Abolition of Slavery* (unpublished paper on file with the author).

43. See Freamon, *supra* note 40. For a recent example of one important Islamic scholar’s effort to end such avoidance see Khaled Abou El Fadl, UCLA Law Professor, Lecture at the UCLA: *ISIS and the Enslavement and Trafficking of Women* (Apr. 9, 2015).

value monism, championed by a number of contemporary philosophers and legal scholars—most prominently the late Ronald Dworkin.⁴⁴ Even though the universalist assertions of the international humanitarian jurists are sincerely put forward, one should not ignore the fact that there are powerful and deep-rooted reasons why Muslims in Iraq and Syria, and their *salafist* allies in other parts of the Middle East and Europe, have chosen to reestablish an Islamic caliphate in the region. These reasons, rooted in part in a profound sense of cultural, moral, religious, and ethnic loss and emptiness produced by the era of European colonialism, are not remedied by the rise of the enlightenment-centered vision of value monism that drives the imposition of international humanitarian law, no matter how well-intentioned such assertions might be.

Juxtaposed against the assertions of the value monists, whose theories would support the claim that certain principles in international humanitarian law must be applied under all circumstances, are the assertions of the value pluralists, expressed most eloquently by the writings of the late Isaiah Berlin, who maintain that conflicting policies and values advanced by different legal and cultural systems should be recognized as within the human “moral horizon” and, in some cases, allowed to flourish, even though many might disagree with them.⁴⁵ This is not to suggest that Isaiah

44. See generally RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011); see also Jack Donnelly, *The Social Construction of International Human Rights*, in 1 *HUMAN RIGHTS* 76, 99-100 (Richard Falk, Hilal Elver, and Lisa Hajjar, eds.) (recognizing a continuing and deepening commitment to a “basic moral equality of all human beings that provides the core of the vision of human dignity underlying international recognition of human rights”).

45. See Isaiah Berlin, *The Pursuit of an Ideal*, in *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* 1-19 (2nd rev. ed. 2013); Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (1970); Isaiah Berlin, *Giambattista Vico and Cultural History*, in *THE CROOKED TIMBER* 49-67 (1983). The classic formulation of the idea of pluralism in the legal sphere is expressed in Sally Engle Merry, *Legal Pluralism*, 22 *LAW & SOC’Y REV.* 869 (1988); see also Robert D. Sloane, *Human Rights for Hedgehogs?: Value Pluralism, International Law, and Some Reservations of the Fox*, 90 *B.U.L. REV.* 975 (2010). There is a burgeoning discourse on the utility of pluralist ideas in Islamic post-colonial settings, although the discourse has not directly confronted assertions that Muslims should be permitted to enslave others under their “indigenous” law. See, e.g., David Wolitz, *Indeterminacy, Value Pluralism and Tragic Cases*, 62 *BUFF. L. REV.* 592 (2014); Robin Perry, *Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty*, 24 *HARV. HUM. RTS. J.* 71, 104 (2011) (recognizing Part IVA of the UN Declaration on the Rights of Indigenous Peoples as an affirmation of Isaiah Berlin’s ideas); Haider Ala Hamoudi, *Baghdad Booksellers, Basra Carpet Merchants, and the Law of God and Man: Legal Pluralism and Contemporary Muslim Experience*, 1 *BERK. J. MIDDLE E. & ISLAMIC L.* 83 (2008); Thomas

Berlin and the value pluralists would condone the reestablishment of a regime of de jure chattel slavery in the name of a non-Enlightenment legal system. The value pluralists also cling to a core set of morally acceptable principles, even while allowing an alternative moral and political system to flourish.⁴⁶ Yet, the assertions by ISIS are clearly “counter-enlightenment” claims in the tradition of the phrase that Berlin famously coined and driven by an articulate alternative moral vision for achievement of a salient, flourishing life-practice grounded in a particular view of Islamic history. They establish that value pluralism is indeed an “empirical fact” in human societies.⁴⁷ This Article argues that such claims, even though outlandish and off-putting, should be taken in a philosophically serious way and dealt with head-on. This challenge is actually closely related to the jurisprudential problem faced by Muslims alluded to earlier because the value monists will respond to assertions of Islamic permissibility for slavery and slave-trading simply by asserting that the international community of jurists and sovereign States should unequivocally reject the assertion of an Islamic right to own and trade in slaves and take steps, including military steps, to stamp out those practices. To the value monists, it does not matter what Islamic jurisprudence has to say on the issue because slavery and slave trading is such an affront to all commonly held notions of decency that it must not and cannot be tolerated.⁴⁸ If this means that time-honored principles of Islamic jurisprudence must be sacrificed or abrogated by a consensus of the larger human community, then so be it. Value pluralists, and those who recognize the existence of alternative and incommensurate approaches to moral and political life, would not necessarily go that

Kelly, *Unintended Consequences of Legal Westernization in Niger: Harming Contemporary Slaves by Reconceptualizing Property*, 56 AM. J. COMP. L. 99 (2008); Ebrahim Moosa, *The Poetics and Politics of Law after Empire: Reading Women’s Rights in Contestations of Law*, 1 UCLA J. ISLAMIC & NEAR E. L. 1 (2001-2002).

46. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 395-99 (1986). Raz’s conception of value pluralism posits the simultaneous existence of two forms of life, both incommensurate with each other and both asserting a way to achieve a morally acceptable “good life.” One of the main attractions of ISIS among Muslims seems to be its promise to provide adherents with a “good life” in the caliphate. We note that James Madison acknowledged the inevitability of value pluralism in free societies, “which he saw as the natural consequence of man’s self-love, passions, the fallibility of his reason, and consequent ‘zeal for different opinions concerning religion, concerning Government and many other points.’” Sloane, *supra* note 45, at 1001 n.130 (quoting *THE FEDERALIST*, NO. 10, at 58-59 (James Madison)).

47. Sloane, *supra* note 44, at 1005.

48. DWORKIN, *supra* note 44, at 334.

far, but they will be hard-pressed to deny the fact that recognition and continuance of a jurisprudential policy permitting slavery and slave trading is not good for Islam and will not lead to a recognizable “good life” for a Muslim community that seeks a place for the *Shari‘ah* among the world’s legal systems.

Thirdly, the behavior of ISIS and Boko Haram forces thinking Muslims and scholars of Islamic law to ask: What coherency remains of the Islamic legal system? Has the colonialist legacy and the cabining of Islamic law, sets of events to which ISIS and Boko Haram clearly seem to be reacting, in fact worked a destruction of Islamic law, such that it is no longer recognizable as a mature legal system capable of ordering the lives of its subjects and providing them with a “good life?” Although we might disagree with their current on-the-ground policies and styles of governance, are the Muslim insurgencies acting appropriately and in the best interests of Islamic societies when they demand the authority to govern Muslim populations by the tenets of Islamic law, however defined? Answering these questions requires some understanding of the Salafist tradition in Islamic history.⁴⁹

49. A full discussion of the history of salafism is beyond the scope of this Article, although a brief overview will be provided here. The salafist tradition in Islamic discourse is typically described as beginning with arguments for reform and renewal in Islamic thinking that commanded widespread attention in the Muslim world at the outset of the twentieth century. Emad Eldin Shahin, “salafiyah,” in 3 *THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD* 463 (1995). It is said that the origins of this thinking can be found in the writings of Jamal al-Din al-Afghani and the Egyptian reformer Muhammad ‘Abduh, both of whom advanced a “modernist” approach to dilemmas presented by European imperialism and colonial domination of populations in the Muslim world. This “modernist” approach, emulated by many Muslim intellectuals at the time, exhibited a dualistic character. On the one hand it emphasized, in powerful terms, a return to the original sources of the understanding and interpretation of Islamic jurisprudence, the Qur’an and the *Sunnah*, in ordering the everyday lives of Muslims. On the other hand it also sought to combat moral decay, disorientation and lack of confidence among Muslims by championing the compatibility of Islamic thinking with the best examples of reasoning and scientific knowledge and technology coming out of Europe and the West. *Id.* at 465; see also DAVID DEAN COMMINS, *ISLAMIC REFORM: POLITICS AND SOCIAL CHANGE IN LATE OTTOMAN SYRIA* 66-69 (1990).

While all of this is true, one should not overlook the fact that an emphasis on the primacy and importance of original scriptural sources is a persistent theme in Islamic scholarly discourse at least since the time of al-Ghazali. Scholars, jurists and ideologues have consistently placed particular stress on the scriptural sources when they perceive Islam and the Muslim community to be under serious assault. One should recall that, during the early twentieth century rise in Salafist thought, the Ottoman Empire had fallen into its final demise and the European colonial powers began presiding over the redrawing of the map of the Middle East and the installation of compliant rulers and officials. During this time, Muhammad Rashid Rida, a disciple of ‘Abduh, began publishing a magazine, *Al Manar* (“the Beacon”), with a widespread readership in the Muslim world, and other writings that

There are many varieties of Salafism and the Islamic State and Boko Haram are examples of what is called “revolutionary” or “jihadi” Salafism, that is, they seek to make war with the perceived enemies of Islam, establish a caliphate on the model of the ‘Abassid Caliphate of the eighth century, a territory where all Muslims could live if they desired, and impose the Islamic law as it existed during those times on all who reside there.

This Article will explore the questions identified, assessing Islamic law’s standpoint on slavery and the claims of ISIS and Boko Haram against the background of the worldwide consensus we have noted and the relationship between those standpoints and the three troublesome issues we have pinpointed. In conducting this assessment, the Article will evaluate the arguments of ideologues for ISIS and Boko Haram who insist that Islamic law is outside the consensus on slavery and slave trading that now exists. After considering the various definitions of slavery, including Islamic law’s definition, it will critically assess the behaviors of the ISIS and Boko Haram partisans in light of the veritable explosion of human trafficking and “modern day slavery” that now predominates as a result of organized criminal enterprises in many parts of the world today.⁵⁰ It will also consider the Islamic legal system’s relationship to

advocated the restoration of the practices of the “pious ancestors,” the *salaf al-sālih*. DANIEL BROWN, A NEW INTRODUCTION TO ISLAM 214 (2004). This call was also dualistic because it advocated the establishment of an Islamic state that would employ modern methods for the advancement of medical knowledge, religious education, and technological sophistication in an effort to attain progress for the worldwide Muslim community. See COMMINS, *supra* note 49, at 130.

Since that time *salafism* has grown much more complex and varied, with some adherents eschewing politics while others continuing to vigorously advocate the establishment of an Islamic state. For a trenchant summary of the major *salafist* positions, see Bernard Haykel, *On the Nature of Salafi thought and Action*, in GLOBAL SALAFISM: ISLAM’S NEW RELIGIOUS MOVEMENT 33-56 (2014). All *salafists* agree that living life as the *salaf al-sālih* lived their lives is the essence of their approach to achieving a flourishing existence but there is widespread disagreement on how the trappings of modernity should be managed. The relationship between history and progress is also a highly contested issue. The *salafists* who collaborated with and followed Muhammad Rashid Rida placed great emphasis on notions of progress in human affairs but it appears that the contemporary *jihadi-salafists*, those who seek to reestablish the caliphate and their vision of the practices of the *salaf al-salih* by violent means, may not see their vision of history as containing notions of progress. Thus, the reinstitution of *de jure* slavery and slave-trading thus does not present any moral dilemma for them.

50. See UNITED STATES DEPARTMENT OF STATE, *Trafficking in Persons Report* (2015), <http://www.state.gov/documents/organization/245365.pdf>; see also UNODC *Global Report on Trafficking in Persons of 2014*, UNITED NATIONS 5 (2014), <https://www.unodc>.

current juridical efforts to eradicate various forms of slavery and slave-trading that persist, in spite of the universalistic imperatives herein described, asking whether this juxtaposition can shed light on the current coherency and relevance of Islamic law in relation to slavery and human trafficking.

V. *SCHOLARLY DISCOURSE ON SLAVERY AND ISLAM*

Assessing the theoretical relationship between Islamic legal doctrine on slavery and the widely acknowledged consensus condemning slavery and slavery-related practices is a difficult and controversial undertaking. Prior to the recent events in Iraq, Syria, and Nigeria, many scholars took the easy way out and concluded that the Islamic law on slavery, like the law on slavery in many other religious legal traditions, is an anachronism and is best ignored as the world rapidly moves toward a univocal, enlightenment-driven and unabashedly secular approach to the problem of human exploitation.⁵¹ Other scholars have adopted an apologetic stance toward the problem, as many ordinary Muslims have done, celebrating Islam's firm recognition of the humanity of enslaved persons and its strong exhortations of kind, fair and emancipatory treatment of slaves. The apologists conclude that any vestiges of the ancient practices that still exist are benign and should also be ignored.⁵² Such thinking does not

org/documents/data-and-analysis/glotip/GLOTIP_2014_full_report.pdf (reporting that human trafficking affects virtually every country in every region of the world. Between 2010 and 2012, victims with 152 different citizenships were identified in 124 countries across the globe and at least 510 trafficking flows were identified). The current refugee crisis in Europe appears to be greatly exacerbating the problem of trafficking. See, e.g., *Europe's Refugee Crisis Spawns a Billion Dollar Industry*, THE HUFFINGTON POST (Sept. 9, 2015), http://www.huffingtonpost.com/entry/europe-refugees-smuggling-industry_55ef1426e4b093be51bc400f.

51. See, e.g., HALLAQ, *supra* note 4, at 330-31, 335 (arguing that the Islamic law on slavery, like the law on *jihad* and "much else in Islamic legal doctrine," is obsolete and irrelevant in today's world).

52. For examples of typical defenses of slavery from an Islamic standpoint, see ALLAMAH SAYYID SA'EEED AKHTAR RIZVI, *SLAVERY FROM ISLAMIC AND CHRISTIAN PERSPECTIVES* (1987), <http://www.al-islam.org/slavery> (arguing "Islam raised the status of slaves and treated them as human beings instead of brutes of burden (which was their common lot before Islam)"); *The Islamic View on Slaves and Slavery*, KHILAFAH.COM (May 13, 2008), <http://www.khilafah.com/index.php/the-khilafah/foreign-policy/2764-the-islamic-view-on-slaves-and-slavery> (concluding, "it is clear that Islam solved the problem of slavery"); Fadel Abdallah, *Islam, Slavery, and Racism: The Use of Strategy in the Pursuit of Human Rights*, 41 THE AM. J. OF ISLAMIC SOCIAL SCIENCES 31 (1987) ("The aim of this article is to use *ijtihad*, or informed intellectual effort, to show through textual and historical evidence that Islam, in its battle for justice, which is identical to human rights, fought against slavery and initiated a

generate the kind of “rights talk” that would support a regime of abolition but it does lead to the comforting conclusion that the ideal Islamic society, in the view of the apologists, is one that would eventually become slavery-free.

Clearly, neither stance is satisfying. Despite the strong force of the existing secular consensus, modern day slavery, forced labor, and human trafficking remain major problems today, in the Muslim world and elsewhere.⁵³ Muslims around the world still look to their religious traditions and law for useful approaches to these and other human rights problems. Yet, many Muslims are now shocked by the realization that a substantial body of their religious law, law that on its face appears to condone slavery, might actually be of little use to them or, more seriously, plainly condemnable and wrong-headed on the issue. This is a thorny conundrum. On the one hand, concluding that a substantial body of law, important for one-fifth of the world’s population, is anachronistic exhibits a head-in-the-sand approach that is, frankly, counterproductive. On the other hand, concluding that the Islamic law on slavery might be condemnable and wrong-headed is also problematic for many Muslims. It is this conclusion, emphasizing fidelity to religious texts and rules, that is, in part, used by ISIS to justify reviving the practice. In that vein, Muslims should not be deluded into believing that blind and uncritical reliance on the *Shari’ah*’s will always lead to successful results in matters involving human relationships. “Rights talk” is just as important for Muslims as it is for anyone else. Yet, one should also be well-informed about the historical examples that opinion-makers, including *ISIS* opinion-makers, cite in support of their positions. Muslims must therefore courageously engage the *Shari’ah* with critical analysis, thorough and creative approaches to their legal history, and a clear-eyed realism in assessing current issues and attitudes if they are to craft lasting

humane and practical plan for its abolition. Only deviation from Islam prevented elimination of slavery within the first few decades of Islam.”). A similar argument is made by Robert T. Ware III, *Slavery in Islamic Africa, 1400-1800*, in *THE CAMBRIDGE WORLD HISTORY OF SLAVERY: VOLUME 3, AD 1420-AD 1804*, 78 (David Eltis et al. eds., 2011) (“If abolitionists sensationalized the exotic, sexual, and brutal aspects of slavery in the Muslim world, most Islamicists tended to counter the charges by painting slavery in the Muslim world as benign and paternalistic. In short, they reproduced one kind of Muslim apologetic for slavery.”).

53. See, e.g., Mohamed Y. Mattar, *Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 *FORDHAM INT’L L.J.* 721 (2000); see also *UNODC Global Report on Trafficking in Persons of 2014*, *supra* note 50, at 39.

solutions to contemporary problems in their communities. This Article seeks to advance this effort in relation to the problem of slavery in Islamic jurisprudence.

VI. DEFINITIONS

At the outset, it will be useful to define the term “slavery,” as it is used in this Article, since definitional confusion can obscure discernment and application of the law, particularly with respect to the emergence of more recent understandings of what constitutes slavery. The definition of slavery in Islamic law is remarkably similar to that found in applicable international law instruments and much national and municipal law, although the recent recognition of the concept of “human trafficking” has blurred the international definition somewhat by focusing on exploitation rather than the ownership paradigm that characterizes traditional chattel slavery.⁵⁴ The recognition of the new crime of “human trafficking” appears to be a challenge for the Islamic law as well, although there are a number of Islamic jurisprudential principles and maxims that also condemn human exploitation.⁵⁵

Islamic law defines the slave as a human being who is owned by another human being and is subject to all of the disabilities and vicissitudes that might be visited on any item of personal property by its owner or owners.⁵⁶ Thus, a slave can be bought, sold, gifted,

54. For a widely accepted definition of “human trafficking,” see Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 000 [hereinafter Palermo Protocol], defining “trafficking in persons” as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

55. See, e.g., *Qur’an*, *supra* note 26, 4:75 (supporting the weak in their struggle against their oppressors and reprimanding those who do not come to the rescue of those who are being persecuted); see also *id.* at 4:135 (illustrating the Qur’anic message of justice and egalitarianism, protecting the weak and vulnerable from exploitation).

56. R. Brunschvig, ‘*Abd*,’ in I ENCYCLOPAEDIA OF ISLAM 24 (H.A.R. Gibb, J.H. Kramers, E. Levi-Provencal, J. Schacht, eds., 1960); see also Bernard K. Freamon, *Definitions and Conceptions of Slave Ownership in Islamic Law*, in THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 40-60 (Jean Allain ed., 2012). For

mortgaged, leased, loaned, pledged, used or even destroyed, in the same way as any other piece of owned personal property might be.⁵⁷ The slave is therefore subject to the absolute will and total control of the slaveholder. In the classical Islamic legal texts the rules governing the ownership and disposal of slaves made frequent analogy to similar rules governing the ownership and disposal of livestock.⁵⁸ Despite this rather straightforward definition in Islamic law, there were many forms of slavery in Islamic practice that did not neatly fit the strictly “chattel” conception of slavery. The *Qur’an* unequivocally recognizes the humanity of the slave.⁵⁹ Slaves functioned as soldiers and even as military commanders and they performed other important tasks in medieval and early modern Islamic governments—tasks which sometimes gave them extraordinary control over large amounts of public and private wealth as well as other human beings and important decision-making functions of organs of government and the religious establishment.⁶⁰ Given this practice and given the emphasis

the definition as expressed by the jurists in Arabic, *see, e.g.*, 23 AL-MAWSU’AH AL-FIQHIYAH, 11-12 (2nd ed. 1992) (stating that a slave is one who is owned by another).

57. *See ‘Abd, supra* note 56 (“On the juridico-religious level, the slave has a kind of composite quality, partaking of the nature both of thing and of person. Considered as a thing, he is subject to the right of ownership—indeed it is in this that the strict definition of slavery lies—exercised by a man or a woman, and he may be the object of all the legal operations proceeding from this position: sale, gift, hire, inheritance and so on. In this respect he is a ‘mere commodity’ (*sil’ a min al-sila’*).”).

58. IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER, A TRANSLATION OF BIDAYAT AL-MUJTAHID II 208-211 (Imran Ahsan Khan Nyazee trans., 1994); *‘Abd, supra* note 56 (“In the various classes of property distinguished by the fikh, he generally ranks with the animals and his lot is like theirs: the new-born slave, for instance, is the ‘fruit’ (*ghalla*) of his mother, like the young of cattle and belongs to her master. . .”).

59. Perhaps the two best examples of this recognition are the verses mandating equality of punishment for homicide, *Qur’an, supra* note 26, 2:178-9, and the verse exhorting Muslims to marry believing slaves rather than unbelieving free persons. *Id.* at 2:221.

60. *See, e.g.*, ABU’L-HASAN ‘ALI IBN MUHAMMAD IBN HABI AL-BASRI AL-BAGHDADI AL-MAWARDI, AL-AHKAM AS-SULTANIYAH: THE LAWS OF ISLAMIC GOVERNANCE 98-99 (Asadullah Yate trans., 1996) (discussing slaves serving as ‘executive wazirs,’ as well as leading prayer); *see also* IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER: A TRANSLATION OF BIDAYAT AL-MUJTAHID II 13 (Imran Khan Nyazee trans., 1994) (reporting that Abu Hanifa permitted slaves to serve as guardians in marriage); Mohammed Bashir Salau, *Slaves in a Muslim City: A Survey of Slavery in Nineteenth Century Kano*, in SLAVERY, ISLAM AND DIASPORA 99 n.7 (Behnaz A. Mirzai et al. eds., 2009) (citing SEAN STILWELL, THE KANO MAMLUKS: ROYAL SLAVERY IN THE SOKOTO CALIPHATE, 1807-1903, (1999) (Ph.D. dissertation, York University)) (discussing the role of slaves working in the Kano palace in “domestic and emirate administration, army service, and security”); EHUD R. TOLEDANO, SLAVERY AND ABOLITION IN THE OTTOMAN MIDDLE EAST 24-53 (1998) (discussing kul-type, or military-administrative servitude, and harem slavery existing in nineteenth century Ottoman society, as well as the presence of African eunuchs in the nineteenth century); JANE

on the emancipation of the slave in the religious texts, jurists frequently and regularly recognized the humanity of the slave in their opinions and gave it great importance.⁶¹ Yet, despite this strong humanitarian emphasis, the idea of “ownership by another” remained the *sin qua non* of slavery in Islamic law and practice.⁶²

The definition of slavery in international law similarly revolves around the concept of ownership. Although some States in the early twentieth century sought to include “slavery-like practices,” such as *corvee* labor, forced marriages, and disguised child adoptions within the definition of slavery, other States, especially the colonial and former colonial powers, resisted this effort and, in 1926, the international community settled on a widely agreed-upon definition, expressed in the 1926 Slavery Convention of the League of Nations.⁶³ Although the political process that resulted in the Convention was fraught with controversy and contention created by the competing interests previously described, the definition that emerged became a firm international normative standard, defining slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”⁶⁴ All international legal

HATHAWAY, BESHIR AGHA: CHIEF EUNUCH OF THE OTTOMAN IMPERIAL HAREM (2005) (describing the life of a powerful African Ottoman eunuch).

61. MONA SIDDIQI, *THE GOOD MUSLIM: REFLECTIONS ON CLASSICAL ISLAMIC LAW AND THEOLOGY* 36-66 (2012).

62. A commonly heard word in Arabic, used to describe a slave, is ‘*mamlūk*,’ which literally means “one who is owned.” Joel Quirk has pointed out that the purpose of slavery is not always commercial exploitation. Slaves are often held to accomplish other goals, such as “prestige, consumption, warfare, or reproduction” and sometimes for “sadistic” purposes or to psychosocially elevate the status of one population over another, as was the case in Nazi Germany. Joel Quirk, *Defining Slavery in all its Forms: Historical Inquiry as Contemporary Instruction*, in *THE LEGAL UNDERSTANDING OF SLAVERY*, *supra* note 56, at 253-77; *see also* Freamon, *Definitions and Conceptions of Slave Ownership in Islamic Law*, *supra* note 56, at 47 (citing ‘*malaka*,’ in HANNA E. KASSIS, *A CONCORDANCE OF THE QUR’AN 765-67* n.30 (1983)) (noting “that the most common usage of the word *malaka* (in the property sense) in the *Qur’an* is in its discussion of slaves, including concubines, and captives in war, who were often enslaved after hostilities”).

63. International Convention with the Object of Securing the Abolition of Slavery and the Slave Trade, Sept. 25, 1926, 60 L.N.T.S. 253; *see also* Jean Allain, *The Definition of Slavery in International Law*, 52 *HOW. L.J.* 239 (2009) (describing the resistance to a wider definition by the colonial and former colonial powers); JEAN ALLAIN, *THE SLAVERY CONVENTIONS: THE TRAVAUX PREPARATOIRES OF THE 1926 LEAGUE OF NATIONS CONVENTION AND THE 1956 UNITED NATIONS CONVENTION* (2008).

64. International Convention with the Object of Securing the Abolition of Slavery and the Slave Trade, *supra* note 63, art. 1, ¶ 1; *see also* *LEGAL UNDERSTANDING OF SLAVERY*, *supra* note 56, at 207-9 (discussing the legislative history of the 1926 Slavery Convention).

instruments purporting to define slavery promulgated since then have largely clung to the essence of the 1926 definition.⁶⁵

In 1982, the sociologist Orlando Patterson offered an alternative definition of slavery that came to be very influential. In his book, *Slavery and Social Death: A Comparative Study*, Patterson argued that slaves are not always commercial chattel in the capitalist sense and ownership, in the legal sense, may not always be the *sin qua non* of slavery. Consistent with this approach, Patterson has argued that slavery always consists of three distinct markers: (1) personal corporeal domination that is enforced by actual or threatened physical or psychological violence; (2) “natal alienation” of the slave and, in more recent times, profound socio-cultural isolation; and (3) degradation attached to the slave status, which gives expression to the idea that the slave is a person without honor or dignity, with no means of redress for injury to these typically human attributes.⁶⁶

Although legal fictions were sometimes put forward to justify the capture and enslavement of innocents in such circumstances, the commercial practice of trading in slaves, prevalent in the Muslim world, remained largely outside the purview of the Islamic law. Slave trading is not mentioned in the Qur’an and the Prophet Muhammad actually condemned the capture and sale of free persons.⁶⁷ After his death, however, the demands of empire caused jurists to look the other way, ignoring the immorality of what was essentially an illegal

65. See, e.g., Convention on the Abolition of Slavery, the Slave Trade and Institution of Practices Similar to Slavery, Supplementary to the International Convention, Sept. 7, 1956, 266 U.N.T.S. 3 (stating “‘Slavery’ means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and ‘slave’ means a person in such condition or status . . .”); see also Jean Allain & Robin Hickey, *Property and the Definition of Slavery*, 61 INT’L & COMP. L.Q. 915, 915-38 (2012).

66. See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY*, Part I (1982); see also Patterson’s more recent writing: *FREEDOM IN THE MAKING OF WESTERN CULTURE* (later renamed *1 FREEDOM: FREEDOM IN THE MAKING OF WESTERN CULTURE*) (1991); *RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES* (1999); *Helotic Slavery and Freedom*, in NINO LURAGHI & SUSAN E. ALCOCK, *HELOTS AND THEIR MASTERS IN LACONIA AND MESSENIA* (2003); *The Ancient and Medieval Origins of Modern Freedom*, in *THE PROBLEM OF EVIL*, 31-66 (John Stouffer & Steven Mintz eds., 2006); *Freedom, Slavery, and the Modern Construction of Rights*, in *THE CULTURAL VALUES OF EUROPE* 115-51 (Hans Joas & Klaus Wiegandt eds., 2008); Orlando Patterson, *Trafficking, Gender and Slavery: Past and Present*, in ALLAIN, *supra* note 56, at 322-59.

67. *Selected Hadith Regarding [Yawm ul-Qiyamah (The Day of Resurrection), (Day of Judgment)]*, Sahih Bukhari, Vol. 3, Book 34: Sales and Trade, Hadith No. 329, THE MESSAGE CONVEYED, <https://blackbunker9.wordpress.com/2013/03/28/selected-hadith-regarding-yawm-ul-qiyamah-the-day-of-resurrection-day-of-judgment/>.

trade, and permitting their patrons to get rich on the traffic in human beings.⁶⁸ Even after imposition of colonial and post-colonial de jure provisions abolishing slavery and the slave trades in the Muslim world, the trafficking in human beings that originated in the pre-Islamic and Muslim slave trades in the Indian Ocean, across the Sahara, and across Eurasia continued. Colonial governments in these regions and their Muslim-led successors often found the need to import large numbers of persons from poorer regions to satisfy their labor needs.⁶⁹ The legal history of the international antislavery movement tells us that trafficking in human beings in the Middle East and the Indian Ocean worlds never ceased. Eventually, international organizations, and in recent times, national governments sought fresh approaches to this problem, describing the phenomena as “modern day slavery” or “international human trafficking.” It may very well be that the Islamic jurisprudence has not kept pace with this development. A salafist vision of war and slavery and slave trading also may not enable a competent and effective understanding of this history. It is crucial, therefore, that we craft an effective legal history of the practice of slavery in Islam.⁷⁰

68. Research documenting the accumulation of wealth by slave-traders in the Middle East and the Indian Ocean world, particularly for the early period of the slave trades, is still in its infancy but historians have begun to mine the sources documenting the trade in the 19th century and there is significant evidence of great wealth derived from the slave trades, especially in the Persian Gulf and Red Sea economies. See, e.g., Thomas M. Ricks, *Slaves and Slave Trades in the Persian Gulf, 18th and 19th Centuries: An Assessment*, in *THE ECONOMICS OF THE INDIAN OCEAN SLAVE TRADE IN THE NINETEENTH CENTURY* 60, 68 (William Gervase Clarence-Smith, ed. 1989) (noting great wealth generated by the slave trade); Janet J. Ewald, *The Nile Valley System and Red Sea Slave Trade: 1820-1880*, in *id.* at 71, 82; William Gervase Clarence-Smith, *The Economics of the Indian Ocean and Red Sea Slave Trades in the 19th Century: An Overview*, in *id.* at 1, 8 (same); MATTHEW S. HOPPER, *SLAVES OF ONE MASTER: GLOBALIZATION AND SLAVERY IN ARABIA IN THE AGE OF EMPIRE*, 80 (2015) (describing a boom in wealth on the Arabian Peninsula from an explosion in the pearling and date farming industries and the African contribution to this “fantastic wealth”).

69. Jane J. Ewald, *Crossers of the Sea: Slaves, Freedmen, and other Migrants in the Northwestern Indian Ocean, c. 1750-1914*, 105 *THE AM. HIST. REV.* 69, 69-91 (2000); Adam McKeown, *Global Migration 1846-1940*, 15 *J. OF WORLD HIST.* 155, 155-89 (2004); Barry Chiswick & Timothy J. Hatton, *International Migration and the Integration of Labor Markets*, in *GLOBALIZATION IN HISTORICAL PERSPECTIVES* 65-120 (Michael D. Bordo et al. eds., 2003).

70. In the section that follows, I will attempt to employ the concept of an “effective history” developed by the philosopher Hans-Georg Gadamer. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 266 (G. Barden and J. Cummins, trans. and eds., 1975). Gadamer posited that the social sciences, including history, are hampered in achieving an understanding of events because they do not effectively deal with the influence of prejudices and biases inherent in the tradition that produces the social science. The typical approach is to strive for

VII. ISLAMIC LAW AND SLAVERY: CRAFTING AN EFFECTIVE
LEGAL HISTORY

The normative system now commonly referred to as the *Shari'ah* did not develop as rapidly as is sometimes assumed. It took about 400 years for that system to develop into a mature and firm basis of sound juridical policy, legal decision-making and jurisprudential thought.⁷¹ The starting point of the development of this basis was, of course, the *Qur'an*. The text comprises revelations communicated to the Prophet Muhammad in a variety of circumstances and situations over a twenty-three year period, beginning in 610 C.E. and concluding in 632 C.E., shortly before his death. Although the *Qur'an* is much more than a law code or legislative guide, it became the primary source of the *Shari'ah*.⁷² There was acceptance of slavery in the document, but also there were assertions of a new ethic that should govern the relationship of human beings with each other and with the universe around them.⁷³

The *Qur'an* was not the only source of rules for the development of law and ethics among Muslims. During the time the Prophet was alive and within the first few generations after his death, a normative life-practice emerged, based on reports of the perceived behavior of the Prophet and his pronouncements, as interpreted and remembered by his companions. These companions included the first four caliphs,

an “objective” understanding of texts and events when this is practically impossible. He saw the relationship between texts and their interpreters as a dynamic and fluid process. In history, in his view, there is a dialectical relationship between reason and tradition that greatly influences understandings of historical events. He argued that the interpreter should struggle for a “reflective self-awareness” that will lead to an “effective historical consciousness.” This consciousness will greatly assist the interpreter in achieving a usable or “effective” understanding of history. Without reflective and dynamic self-awareness on the part of the interpreter, understanding becomes illusory and often times false. These concepts are explained nicely and I have borrowed some of this account from Wilfred Carr, *Philosophy, Method and Action Research*, 40 J. OF THE PHIL. OF ED. 421, 429-32 (2006). For background on Gadamer’s life and work see William Outhwaite, *Hans-Georg Gadamer*, in THE RETURN OF THE GRAND THEORY IN THE HUMAN SCIENCES (Quentin Skinner, ed., 1985).

71. WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI USUL AL-FIQH 2-3 (1997); WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 122-77 (2005) (describing the development of Islamic legal theories and methodologies of jurisprudence and the formation of the “schools of law”); N.J. COULSON, A HISTORY OF ISLAMIC LAW 36-63 (1994) (similarly describing the development of legal institutions and particularly describing the influence of Imam Muhammad Idris al-Shafi’i).

72. MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 16-57 (3rd rev. and enl. ed., 2003).

73. See generally TOSHIHIKO IZUTSU, ETHICO-RELIGIOUS CONCEPTS IN THE QUR’AN (2002).

who effectively functioned as lawgivers in the new Islamic political and imperial entity that emerged. The new normative life-practice also drew lessons from the behavior and pronouncements of the companions.⁷⁴ There is great controversy over whether this normative life-practice can be traced directly back to the Prophet or whether it was invented by historians, jurists, and political leaders coming after him who had an interest in establishing a normative standard of behavior for denizens in the new empire.⁷⁵ For our purposes, ascertaining the source of this normative standard does not matter because it is undisputed that slavery was an integral part of the new life-practice, no matter who defined it or what its source. Common conceptions of slavery and its place in the new legal culture similarly transcended the Sunni-Shi'a divide that developed soon after the death of Ali, the fourth Caliph and the Prophet's son-in-law, although it has been argued that the Shi'a, beginning with Ali, were more liberal in their treatment of slaves and took the pious obligation of emancipation more seriously.⁷⁶ Nonetheless, both Sunni Muslims and Shi'a Muslims practiced slavery and slave trading in very similar ways, with differences largely confined to details.⁷⁷

When the first revelations of the *Qur'an* came to the Prophet Muhammad in 610 C.E., chattel slavery was an accepted aspect of life and the legal culture in the Middle East and in most of the Eurasian and African world. Given this milieu, it would have been very difficult, socio-legally and economically, for the Prophet Muhammad to have sought the complete abolition of slavery. Indeed the *Qur'an* accepts chattel slavery as a fact of social, economic and juridical life,

74. The accounts of the life-practice we have described are called *ahadith*, which is the plural of the word *hadith*, meaning "story" or "report" or "account." The *hadith* literature is voluminous. Good general descriptions of the literature, its development, and its place as a source of law in the Islamic legal system can be found in HADITH: ORIGINS AND DEVELOPMENTS (Harold Motzki, ed., 2004); JONATHAN A.C. BROWN, HADITH: MUHAMMAD'S LEGACY IN THE MEDIEVAL AND MODERN WORLD (2009); MOHAMMAD HASHIM KAMALI, A TEXTBOOK OF HADITH STUDIES: AUTHENTICITY, COMPILATION, CLASSIFICATION, AND CRITICISM OF HADITH (2006).

75. See JOSEPH SCHACHT, THE ORIGINS OF MUHAMMADAN JURISPRUDENCE, 138-51 (1950). For discussion of Schacht's theses, see N.J. COULSON, A HISTORY OF ISLAMIC LAW (1999); Wael B. Hallaq, *From Fatwa to Furu: Growth and Change in Islamic Substantive Law*, in 1 ISLAMIC LAW AND SOCIETY, 29-65 (1994); THE ORIGINS AND EVOLUTION OF ISLAMIC LAW, *supra* note 71, at 102-9.

76. CLARENCE-SMITH, *supra* note 40, at 55-56 (asserting that Ali's son Husayn and grandson Zayn al-Abidin liberated many slaves and that Ja'far al-Sadiq, the eponym of a major Shi'a school of law, preached against slavery).

77. *Id.* at 56.

although the revelations from God do manifest a great concern for the welfare of slaves—frequently exhorting kind treatment and emancipation and laying down an important analogy comparing the master-slave relationship with the relationship between God and human.⁷⁸ Similarly, the Prophet Muhammad exhibited a great solicitude for the material and spiritual condition of slaves in the society around him. It is said that his example inspired his companions to emancipate thousands of slaves in the early days of the Islamic project.⁷⁹ Yet, the Prophet Muhammad never spoke of abolition and he owned, gave and received slaves throughout his life and even used slavery as an instrument of conquest in war.⁸⁰

As was suggested in the previous section, the Islamic project spawned by the Qur’anic revelations and the example of the Prophet’s life gave rise over the next millennium to a series of powerful empires that extended from Andalusia in Spain and Morocco in the west to India and Southeast Asia in the east and from the Balkans, Turkey, the Caucasus Mountains, the Hindu Kush, and the Asian Steppes in the north and northeast to what is today Nigeria in the southwest and Tanzania, Zanzibar, and the Comoros Islands in the southeast.⁸¹ In all

78. See *Qur’an*, *supra* note 26, 16:71-75; for verses exhorting kind treatment, *see, e.g., id.* 2:221; 4:36; 9:60; 16:71-75; 24:32; for verses encouraging emancipation, *see, e.g., id.* 2:177; 4:25; 4:92; 5:89; 14:31; 24:33; 58:3; 90:1-20. This footnote draws from the author’s earlier research and writing on this issue. See discussion of Qur’anic verses and Hadith in Bernard Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 34-53 (1998); *see also* Mirza, *supra* note 42, at 4-5.

79. ABDUL ALI, *INSIGHTS INTO ISLAMIC HUMANISM: A COMPREHENSIVE APPROACH*, 79 (2007) (noting that Abdullah bin ‘Umar and Abdul Rahman bin ‘Awf freed one thousand and thirty thousand slaves, respectively, and that Hakim bin Hazzam, on the day Mecca was conquered, liberated another one hundred slaves to celebrate his conversion to Islam).

80. See JONATHAN BROCKOPP, *EARLY MALIKI LAW: IBN ‘ABD AL-HAKAM AND HIS MAJOR COMPENDIUM OF JURISPRUDENCE* 140 n.89 (2000) (arguing that the Prophet Muhammad was surrounded by at least 12 slaves during his lifetime, including Bilal ibn Rabah, Zayd ibn Harith, and Salman al-Farisi); ARENT JAN WENSINCK & WOLFGANG H. BEHN, *MUHAMMAD AND THE JEWS OF MEDINA* (1975); W. MONTGOMERY WATT, *MUHAMMAD AT MEDINA* 397 (1994) (Excursus C); *see also supra* note 33 and accompanying text (describing the account of the enslavement of the women and children of the Banu Quraydha).

81. *See generally* 2 MARSHALL G.S. HODGSON, *THE VENTURE OF ISLAM* (1974); IRA M. LAPIDUS, *A HISTORY OF ISLAMIC SOCIETIES* (3rd ed. 2014); HALIL INALCIK, *THE OTTOMAN EMPIRE 1300-1600* (2013); MURRAY LAST, *THE SOKOTO CALIPHATE* (1967); HUGH KENNEDY, *WHEN BAGHDAD RULED THE MUSLIM WORLD: THE RISE AND FALL OF ISLAM’S GREATEST DYNASTY* (2006); RICHARD M. EATON, *THE RISE OF ISLAM AND THE BENGAL FRONTIER: 1204-1760* (1993); JAMES FRANCIS WARREN, *THE SULU ZONE: THE WORLD CAPITALIST ECONOMY AND THE HISTORICAL IMAGINATION* (1998); STEPHEN F. DALE, *THE*

of these empires and in all of the places touched by the Islamic project, slavery remained the norm and large numbers of slaves were supplied to the denizens of those realms, and to Arab and Persian communities in the Islamic heartland, through a robust and commercially successful system of slave trading and transport.⁸² As has been noted, this massive regime of slave trading, often fueled by plunder and conquest, was actually illegal under the *Shari'ah*, but the illegality of the enterprise was largely ignored by its participants, financiers, and the jurists. Slave trading and the trafficking in human beings over the seas and across deserts, with all its horrific cruelty and massive loss of life, continued with impunity for over one thousand years.⁸³

From what source or sources, then, would one draw the conclusion that the religion of Islam and Islamic law stand for the right of freedom from slavery? The reader should now see why finding a right of freedom from slavery in the traditional Islamic sources is a difficult undertaking. There are numerous texts in the

MUSLIM EMPIRES OF THE OTTOMANS, SAFAVIDS AND MUGHALS (2009); J.S. TRIMINGHAM, *ISLAM IN EAST AFRICA* (1964).

82. See generally PAUL E. LOVEJOY, *TRANSFORMATIONS IN SLAVERY: A HISTORY OF SLAVERY IN AFRICA 88-90* (3d ed. 2012) (describing Muslim trading networks for the transportation and distribution of African slaves throughout Arabia, the Ottoman Empire or the Indian Ocean basin); see also *THE SLAVE TRADE INTO ARABIA* (Anita L.P. Burdett, ed. 2006); M. Abir, *The Ethiopian Slave Trade and its Relation to the Islamic World*, in *SLAVES AND SLAVERY IN MUSLIM AFRICA* (J.R. Willis, ed. 1985); *SLAVERY AND SOUTH ASIAN HISTORY* (Richard M. Eaton and Indrani Chatterjee, eds. 2006).

83. See generally REGINALD COUPLAND, *EAST AFRICA AND ITS INVADERS FROM ITS EARLIEST TIMES TO THE DEATH OF SAYYID SAID IN 1856* (1938); REGINALD COUPLAND, *THE EXPLOITATION OF EAST AFRICA 1856-1890: THE SLAVE TRADE AND THE SCRAMBLE* (1939); RONALD SEGAL, *ISLAM'S BLACK SLAVES: THE OTHER BLACK DIASPORA* (2001); JOHN WRIGHT, *THE TRANS-SAHARAN SLAVE TRADE* (2007); BERNARD LEWIS, *RACE AND SLAVERY IN THE MIDDLE EAST: AN HISTORICAL ENQUIRY* (1990); MURRAY GORDON, *SLAVERY IN THE ARAB WORLD* (1989); WARREN, *supra* note 81; LOVEJOY, *supra* note 82. See also Gwyn Campbell, *Slavery and the Trans-Indian Ocean World Slave Trade: A Historical Outline*, in *CROSS CURRENTS AND COMMUNITY NETWORKS: THE HISTORY OF THE INDIAN OCEAN WORLD* 286 (Himanshu Prabha Ray and Edward A. Alpers, eds. 2007); MOHAMMED ENNAJI, *SLAVERY, THE STATE AND ISLAM* (2013); EVE TROUTT-POWELL, *TELL THIS IN MY MEMORY: STORIES OF ENSLAVEMENT FROM EGYPT, SUDAN, AND THE OTTOMAN EMPIRE* (2012); *RACE AND SLAVERY IN THE MIDDLE EAST: HISTORIES OF TRANS-SAHARAN AFRICANS IN NINETEENTH-CENTURY EGYPT, SUDAN AND THE OTTOMAN MEDITERRANEAN* (Terence Walz and Kenneth M. Cuno, eds. 2010); *1 WOMEN AND SLAVERY: AFRICA, THE INDIAN OCEAN AND THE MEDIEVAL NORTH ATLANTIC* (Gwyn Campbell, Suzanne Miers, and Joseph C. Miller eds., 2007); EHUD R. TOLEDANO, *AS IF SILENT BUT ABSENT: BONDS OF ENSLAVEMENT IN THE ISLAMIC MIDDLE EAST* (2007); *THE HUMAN COMMODITY: PERSPECTIVES ON THE TRANS-SAHARAN SLAVE TRADE* (Elizabeth Savage ed., 1992).

Qur'an and *Sunnah*, which unequivocally posit the legality of slavery under certain conditions. There is also a vast corpus of juristic opinion that assumes, without questioning its morality, the legality of slavery in Islamic communities in a great variety of circumstances. Discovering the existence of a right to be free from slavery in what appears to be a pro-slavery textual thicket therefore requires a careful, detailed and critical examination of the sources, the principles of jurisprudence and law that are derived from them, and the legal history of juristic efforts to interpret them. There is an inexplicable tendency, particularly among modernist Muslim thinkers, to uncritically conclude that Islamic law would support an outright abolition of slavery and slave trading.⁸⁴ This is not necessarily so. Tellingly, these thinkers are at a loss to explain why abolition was not readily embraced by Muslim jurists, scholars and government officials when they were confronted with such demands by nineteenth and twentieth century European colonial officials and Christian missionaries. In point of fact, during the heyday of the nineteenth and early twentieth century European-led campaigns against slavery, there was strong resistance to abolition in religious circles and widely held public opinion among Muslims supporting the right to own slaves.⁸⁵ These attitudes eventually changed but, more troubling, recent fairly well-regarded and widely circulated juristic opinions in the contemporary Muslim world, consistent with the foundational texts previously described, still argue that Islamic law permits heads of Muslim governments to authorize the enslavement of prisoners of war captured in a *jihad* against unbelievers.⁸⁶ The ISIS ideologues do not

84. See, e.g., FARHAD MALEKIAN, PRINCIPLES OF ISLAMIC INTERNATIONAL CRIMINAL LAW: A COMPARATIVE SEARCH 229 (2d ed., 2011) (“According to the legal, social, economic and political philosophy of Islamic international criminal law mankind is equal in all social phenomena. Islamic jurisdiction therefore prohibits any type of action degrading a person to the statute of slavery.”).

85. See CLARENCE-SMITH, *supra* note 40, at 140-42; see also Amal Ghazal, *Debating Slavery in the Arab Middle East: Abolition between Muslim Reformers and Conservatives*, in ISLAM, SLAVERY AND DIASPORA 139-153 (Behnaz Mirzai Asl et al. eds. 2009).

86. *The Wisdom behind the Legality of Slavery*, in 5 FATAWA ISLAMİYAH [ISLAMIC VERDICTS], 96-99 (2002) (collecting the opinions of Shaykh ‘Abdul-‘Aziz bin ‘Abdullah bin Baz, Shaykh Muhammad bin Salih Al-‘Uthaimin, and Shaykh ‘Abdullah bin ‘Abdur-Rahman Al-Jibreen). The *fatwa* argues that slavery should remain lawful because its purpose is to “reform those enslaved by removing them from an evil environment, and allowing them to live in a Muslim society [which will] guide them to the path of goodness, save them from the clutches of evil, purify them from the filth of disbelief and misguidance, and make them deserving of a life of freedom. . . .” See also Mufti Muhammad Taqi Usmani, *Hadith Commentary: Slavery in Islam*, DEOBAND (Jan. 26 2013), <http://www.deoband.org/2013/>

rely on these modern opinions but cite instead to verses in the *Qur'an* text in reported *ahadith*, and juristic opinions from early Islam that support the lawfulness of chattel slavery and clearly lay down rules governing relationships with slaves. The ISIS ideologues and their Boko Haram compatriots are particularly fond of citing those provisions of the *Qur'an* and *Hadith* that authorize sexual relations with concubines.⁸⁷ Their outsized fondness for these provisions is an important fact and we shall return to it at the end of this Article.

It may come as some relief to the reader that questions with respect to the legality of involuntary servitude and forced labor in Islamic law are relatively easier to answer. Islamic textual sources and juristic opinions clearly recognize a free person's right to freedom from subjection to involuntary servitude and forced labor.⁸⁸ It is clear, however, that an argument for the assertion of a freedom from slavery based on core Islamic texts and the legal history of their interpretation does not flow as easily using conventional and traditionalist sources. If an Islamic jurist uses conventional and traditionalist sources and methods of analysis, he or she will likely conclude that slavery, under certain conditions, is allowable in a jurisdiction governed by the *Shari'ah* and perhaps even necessary, much like the jurists concluded in the excerpt quoted in footnote 86 above.

This Article does not share this view. In light of events that have occurred in Islamic legal and imperial history, and the evolution in the role of slavery in human history, it will strike a contrary note. Many

01/hadith/hadith-commentary/slavery-in-islam/ ("Thus, the clear manifest truth is that taking slaves is permissible in Islam, with its laws and its limits which have preceded, and nothing has abrogated it, and there are wisdoms in this which we have explained, and the opinion of its abrogation is rejected and is against consensus, and has no proof from the proofs of the Shari'ah.").

87. Concubines are often described by using the Arabic idiomatic expression *ma malakat aymanukum* ("those who your right hands possess"). This phrase is one of several forms used in the *Qur'an* to describe war captives and others who may fall into a state of enslavement as a result of hostilities, negotiations between belligerents, or as tribute or war booty flowing from one group to another. One of the best-known examples of the use of this phrase is found at verse 4:24, where men are permitted to have sexual relations with "those whom their right hands possess. . . ." For a thorough review of the status of concubines in Islamic law see Marion H. Katz, *Concubinage, in Islamic Law*, BRILL ONLINE (Oct. 2, 2015, 7:48 p.m.), http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-3/concubinage-in-islamic-law-COM_25564.

88. The most frequently cited are the *Qur'anic* provisions condemning the imposition of a regime of forced labor on the Jewish people by the Egyptian Pharaoh and a *hadith* reporting that the Prophet Muhammad condemned employers who refused to pay wages to their workers. See *supra* note 67 and accompanying text.

years ago, Abdullahi Ahmed An-Na'im, the widely cited law professor and legal scholar, called for an effort by jurists to show how slavery might be abolished in Islamic law, using an internal point of view.⁸⁹ This Article will explicate how such an abolitionary conclusion can be reached by taking a fresh and dynamic approach to the sources and by examining the legal history through a new lens. This new lens, employing an expansion of the "internal point of view," will view Islamic legal history as a critical part of world history, a history that now recognizes slavery and slave trading as a jurisprudential negative. In the words of Justice Story, it "...stirs up the worst passions of the human soul, darkening the spirit of revenge, sharpening the greediness of avarice, brutalizing the selfish, envenoming the cruel, famishing the weak, and crushing to death the broken-hearted."⁹⁰ Muslim jurists conveniently ignored these negatives, so as to further their patrons' imperialistic ends, even though the sources would authorize the recognition that the negative should not be permitted to exist. The analysis expressed in this Article will also show that the view expressed by the ISIS ideologues and their Boko Haram compatriots is in fact a false and historically inaccurate view, one based on an imperialistic lens that developed on slavery after the death of the Prophet Muhammad. Even if one accepts the literalist view of the sources championed by ISIS and many salafists, it still appears that there is now a jurisprudential basis for the elimination of slavery and slave trading in Muslim communities.

A. Finding a Jurisprudential Basis for the Abolition of Slavery in the Qur'an and Sunnah

There are a considerable number of references in the *Qur'an* directly acknowledging the social and physical presence of chattel slaves in the society and seeking to regulate their condition, their legal status or their relationship to freedom.⁹¹ As noted earlier, there are

89. ABDULLAHI AHMED AN-NA'IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* 175 (1990).

90. *La Jeune Eugenie*, 26 F. Cas. (No. 15,551) 832, 845 (C.C.D. Mass., 1832); *see also* ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 100-16 (1975).

91. By my count there are at least 30 direct references, using various linguistic forms of description. *See, e.g., Qur'an, supra* note 26, 2:177, 2:178, 2:221 (twice), 4:3, 4:24, 4:25, 4:36, 4:92 (three times), 5:89, 9:60, 23:6, 24:31, 24:32, 24:33, 24:58, 30:28, 33:50, 33:52 33:55, 70:30. For a more detailed discussion of the Qur'anic linguistic forms of description of

passages where the concept of chattel slavery and the existence of the master-slave relationship in human affairs are used in the metaphorical sense, illustrating the nature of the relationship between God and humankind, and the abject dependence of the human being on the will of God.⁹² Franz Rosenthal noted that ar-Raghib al-Isfahani (ca. 1100), in his *Qur'an* dictionary, first defined *hurr* [to be free] as the opposite of *'abd* [to be a slave], and then distinguished two forms of *hurriyya* [freedom]: “the one referring to the person who is not subject to any authority, and the other to the person who is not dominated by any ugly qualities as greed and the desire for worldly possessions.”⁹³

To illustrate the first form of *hurriyya*, Al-Isfahani referred to the Qur'an's homicide legislation, at 2:178-9, which abolished the vendetta and blood feud as a remedy for homicide and substituted an egalitarian approach to capital punishment, ordering that punishment should be meted out according to a regime of rough equality, “the free for the free” (*al hurr bi-l-hurr*), “the woman for the woman” and “the slave for the slave” (*al 'abd bi-l-'abd*). He also pointed to the Qur'anic use of the term *thirir*, at, for instance, 4:92/94, which means to “liberate” or “free” the slave from his or her shackles. For the second meaning, he proposed an interpretation of *muḥarrar* at 3:35/31 (“where the mother of Moses is said to have dedicated the child in her womb to God *muḥarraran*”) as meaning “free from worldly desires.”⁹⁴

It is the former use of *hurr* that predominates in the *Qur'an* and the great bulk of the Qur'anic discussion of slavery is, therefore, concerned with practical problems involving the treatment of slaves, their relationships to free persons and circumstances governing their emancipation. Even though there is considerable regulation of the relation between the free and the enslaved, there are no verses suggesting that the practice of slavery ought to continue and there is virtually no discussion of slave trading. Yet, one also looks in vain for an explicit statement mandating the end of the practice.

slavery, see Brockopp, *supra* note 74, at 128-38; see also *Definitions and Conceptions of Slave Ownership in Islamic Law*, *supra* note 56, at 49-52.

92. See, e.g., *Qur'an*, *supra* note 26, 16:71-75.

93. FRANZ ROSENTHAL, THE MUSLIM CONCEPT OF FREEDOM PRIOR TO THE NINETEENTH CENTURY 24 (1960) (citing Ar-Raghib al-Isfahani, *al-Mufradat fi gharib al-Qur'an*, I 109 f., n.54, (1324)).

94. *Id.*

Drawing conclusions concerning a Qur'anic view of abolition, therefore, requires the interpreter to look carefully at the larger social, philosophical and jurisprudential themes expressed in the *Qur'an* to see whether these assertions could support a contemporary regime of abolition that would be consonant and compatible with other provisions of the *Qur'an* and *Sunnah* and the *Sharī'ah* as a whole. The reader should bear in mind that a traditionalist interpretation would conclude that slavery is lawful in Islam simply because there is Qur'anic legislation regulating it, which is an implied permission, and "just as one may not permit what God forbids, so one may not forbid what God permits."⁹⁵ Even the traditionalists must acknowledge, however, that all of the Qur'anic verses on slavery are situated in a context that overwhelmingly encourages emancipation. It must be said, then, that the *Qur'an* seeks to establish an emancipatory ethic on the issue of slavery. The revelations overwhelmingly emphasize *emancipation* of slaves and not the capture of slaves or the continuation of the institutions of slavery and slave trading. For example, verse 2:177 counsels believers to eschew blind adherence to religious ritual and to cleave to moral and pious behaviors, such as the emancipation of slaves, particularly in times of stress and adversity. Verse 4:25 establishes a basic juridical incompatibility between slavery and marriage. In the Islamic era marriage, then, became an important emancipatory vehicle for women living in concubinal circumstances. Verses 4:92, 5:89 and 58:3 mandate the freeing of a slave as expiation for a variety of transgressions including sins, crimes, or other prohibited behaviors, such as the intentional violation of the Ramadan fast. Verse 24:33 orders the owners of slaves to respect requests by slaves to pay for their freedom by contract of manumission. If the slave sought to be emancipated by contract the owner was strongly urged to give his or her consent absent extenuating circumstances. Although the Qur'anic verse appears to impose a mandatory obligation on the owner to allow emancipation by contract, the near unanimous juristic interpretation of the verse held that it was only an optional standard of conduct and the owner could therefore lawfully refuse the request. Nonetheless, the ethical standard encouraging the manumission of a slave as a pious and

95. BERNARD LEWIS, *RACE AND SLAVERY IN THE MIDDLE EAST: AN HISTORICAL ENQUIRY* 78 (1990) (citing commentary on *Qur'an* 5:87 by 12 FAKHAR AL-DIN AL-RAZI, *AL-TAFSIR AL-KABIR* 71, 134 (1938)).

meritorious act of charity undoubtedly gave flower to many such contracts.

Indisputably, the best example of this emancipatory ethic is the language found in chapter 90 of the Qur'an. Addressing the Prophet Muhammad, the Holy Book asserts that there are two roads one can take in life. It is the "high road" that is preferred and following that road leads the righteous human being to free slaves.⁹⁶ The Prophet made sure to live according to this exhortation, showing a great solicitude for the condition of the slaves in the society around him. As we have pointed out, his example inspired his companions to emancipate thousands of slaves.⁹⁷ In an oft-quoted statement, he remarked that he would meet the man who "sells a free man as a slave and devours his price" on Judgment Day.⁹⁸ This is an explicit condemnation of trafficking in free human beings. These facts should lead even the most ardent traditionalist to conclude that the Qur'anic intentment contemplated a gradual disappearance of slavery.⁹⁹

Other juristic interpretations have gone even further. A number of jurists have made the argument that the *Qur'an's* repeated assertions of the oneness of God, known in Arabic as the concept of *tauhid* (or *tawheed*), also impliedly provide a sufficient jurisprudential basis for declaring the abolition of slavery. In the

96. *Qur'an*, *supra* note 26, 90:1-20.

97. *See* ALI, *supra* note 79.

98. BUKHARI, *supra* note 67.

99. This is a modernist argument that was not made by traditionalist jurists until after Enlightenment-centered scholars and abolitionists in the West began to press Muslim scholars in the Islamic world to change their position on slavery. Nonetheless, in recent times many scholars, Muslim and non-Muslim, traditionalist and modernist, have argued that the *Qur'an* contemplates the gradual elimination of slavery. Most prominent is the Qur'anic commentary of Sayyid Qutb, the late Egyptian theologian and Qur'anic scholar. 30 SAYYID QUTB, IN THE SHADE OF THE QUR'AN 176-79 (M. Adil Salahi & Ashur Shamis trans., 1992) (recounting Abu Bakr's constant and frequent emancipation of slaves after his conversion to Islam and arguing that the verses in Surat ul-Balad (Chapter 90 of the Qur'an) require all Muslims to behave in this way); *see also* C.W.W. GREENIDGE, SLAVERY 65 (1958) (citing and quoting Syed Ameer Ali, the Indian Islamic modernist and author of THE SPIRIT OF ISLAM, and Eldon Rutter in saying "the Koran rightly practiced would soon bring about the complete cessation of slavery," and Bertram Thomas, in saying: "In the abatement of slavery Arabia has been false to her Prophet."); MUHAMMAD RASHID RIDA, THE MUHAMMADAN REVELATION (1996). As we noted earlier, *see supra* note 49 and accompanying text, Rida, an early twentieth-century modernist who ultimately came to embrace a salafist philosophy, concluded that the *Qur'an* has ten purposes, and one of is the elimination of slavery. For more discussion of this development *see infra* notes 158-174 and accompanying text. This footnote draws from my earlier research and writing on this issue. *See, e.g., Definitions and Conceptions of Slave Ownership in Islamic Law*, *supra* note 56, at 51 n.55.

recent times, the argument was most eloquently and forcefully put by Shi'a jurists, including Muhammad Baqir al-Sadr, an extraordinarily influential Iraqi jurist who was hanged on the order of Saddam Hussein in 1980, and the Ayatollah Murtaza Mutahhari, a disciple and compatriot of the Ayatollah Khomeini and contemporary of Baqir al-Sadr, who was assassinated in 1979, in the early days of the Iranian Revolution.¹⁰⁰ Baqir al-Sadr argued that “[m]an’s submission to God in Islam . . . is the toll whereby man breaks all other chains of submission or slavery. . . . Therefore no power on earth has the right to fare with his destiny.”¹⁰¹ Thus, according to Baqir al-Sadr, any legal or moral regime permitting slavery is inconsistent with true monotheism. Mutahhari made similar arguments, but they were more specific and he cited the Qur’anic verse 3:64 from Surah Al-’Imran, which supported the notion that recognition of any being with authority over another human being, other than God, was un-Islamic and violated core monotheistic principles announced in the Qur’an. Mutahhari also argued that the idea of an uncompromising submission to God is the ultimate expression of human freedom. Therefore, submission to any being other than God would be a form of *shirk* (association of other beings or things with Allah) and harmful to one’s freedom. Mutahhari distinguished social freedom and spiritual freedom, explaining that they are interdependent, and inextricably bound to each other. If there is true social freedom, in the Islamic sense, there can be no slavery.¹⁰² Mutahhari argued that, in the Holy Qur’an, one of the explicit purposes of the Prophets was to offer mankind social liberty and deliver human beings from mutual enslavement. The Qur’anic call invites mankind to unite on two things, as the idea behind the verse asserts: “[w]e worship none but God and we associate no partner with Him, and none of us must be slaves or masters of one another other than God.”¹⁰³ This means, according to Mutahhari, “the abolition of the order of servitude, the

100. I am indebted to Professor Mohammad Hashim Kamali for introducing me to the arguments of these two jurists and I rely heavily on Professor Kamali’s citations and quotations from their work. A fair amount of their work is now translated into English and I would urge the reader to consult those translations, or their original works, directly.

101. MOHAMMAD HASHIM KAMALI, *FREEDOM, EQUALITY AND JUSTICE IN ISLAM* 10 n.39 (1999) (citing MUHAMMAD BAQIR AL-SADR, *CONTEMPORARY MAN AND THE SOCIAL PROBLEM* 141 (Yasin T.A. al-Jibouri, Tehran, Eng. trans., 1980)).

102. *Id.* (citing AYATULLAH MURTAZA MUTAHHARI, *SPIRITUAL DISCOURSES*, 28 (Alauddin Pazargady, Eng. trans., 1986)).

103. *Id.*

system of exploitation of the exploiter and the exploited, getting rid of inequality and enslavement.”¹⁰⁴ In Mutahhari’s view, social liberty or social freedom is also sacred.¹⁰⁵

Some might argue that Mutahhari’s argument against slavery on the basis of the Qur’anic verse 3:64 is the product of *Shi’a* exegesis, which is rejected by many Sunnis as the product of a hyper-rationalist *Mu’tazila* influence and not representative of mainstream schools of Qur’anic interpretation.¹⁰⁶ With respect to Mutahhari’s arguments against slavery, this is not the case. Sayyid Qutb, the widely cited Sunni theologian and commentator on the *Qur’an*, offered extensive commentary on verse 3:64 in his masterful work, *Fi Zilal al-Qur’an (In the Shade of the Qur’an)*. Qutb’s work preceded Mutahhari’s writings by some 20 years and, although he did not focus his remarks on slavery and its abolition in the same way that Mutahhari later did, it is important to note that he observed:

Corruption does not spread on earth unless Divinity is thus ascribed to beings other than God. It is only when a human being enslaves others, claiming that he himself must be obeyed, or that he has the power to legislate and to set values and standards for human society that corruption becomes rife. Such an assertion is a claim of Godhead, even though the claimant may not state it in as many words as Pharaoh did when he cried: “*I am your lord, most high.*” (al-Nazi’at 79:24). To acknowledge such an

104. *Id.* at 41 (quoting and citing MUTAHHARI, *supra* note 102, at 30).

105. *Id.*

106. The *Mu’tazila* influence is generally defined as “a rationalist-oriented position that emphasized the centrality of reason as an ordering principle in God’s being, of the structure of the universe, and in the governance of human behavior. The rationalist position included, as its corollary, belief in free will and individual responsibility for moral choices.” IRA M. LAPIDUS, *A HISTORY OF ISLAMIC SOCIETIES* 106-07 (1988). The *Mu’tazila* influence was viewed as controversial by many because it “denied that the Muslim ‘logos,’ the Quran, was part of God or divine itself, but asserted that it was a created message inspired by God in Muhammad.” *See also* MAJID FAKHRY, *ISLAMIC PHILOSOPHY, THEOLOGY, AND MYSTICISM: A SHORT INTRODUCTION* 16 (1997). Fakhry characterizes the *Mu’tazila* influence as “the first articulate theological movement in Islam,” and noted that “an early *Mu’tazilite* author, Abu’l-Husayn al-Khayyat (ninth century), lists five fundamental principles (*usul*) on which, despite their divergences, all *Mu’tazilite* factions were in agreement. These are God’s justice and unity, the intermediate position, God’s immutable threats and rewards, His commanding the right and His prohibiting the wrong.” *See also* GEORGE C. ANAWATI, *Philosophy, Theology and Mysticism*, in *THE LEGACY OF ISLAM*, 350, 359-66 (Joseph Schacht and Clifford E. Bosworth, eds., 1974); FAZLUR RAHMAN, *ISLAM*, ch.5 (2d ed. 1966); ABDULLAH SAEED, *ISLAMIC THOUGHT: AN INTRODUCTION* 14 (2006).

assertion by anyone is to be an idolater or to disbelieve in God. It is indeed the worst type of corruption.¹⁰⁷

At several other points in his commentary, Qutb argues that the verse aims to make sure that “none is elevated above another,” that “none enslaves another,” and that human beings “do not enslave one another.” He posits that Islam is “total liberation of man from enslavement by others,” that the Islamic system “is the only one that makes that liberation a reality” and that slavery exists in the “most advanced democracies as well as in the worse types of dictatorship.” Qutb argues that the verse restates the principle that the Prophets were sent to “help liberate people from the injustice inflicted by human beings so that they could enjoy God’s absolute justice.”¹⁰⁸ It is unclear whether Mutahhari was aware of Qutb’s position when he published his arguments against slavery during the Iranian Revolution but their two positions are clearly consonant with each other.

In his discussion of these ideas, Professor Kamali differentiated the Western concept of freedom from that which is contained in Islamic theology, observing that “[h]uman freedom is . . . a necessary concomitant of Divine justice.”¹⁰⁹ While Islamic theological schools largely agree with this premise, they diverge on the extent to which human will and judgment can be exercised with respect to the will of God.¹¹⁰ Kamali adopts the position that the will of God, as expressed in the *Qur’an*, does not command humans “merely to surrender” to these commands, but to first “discover and understand the nature of God’s message.”¹¹¹ The *Qur’an* makes plain that every individual is responsible for determining his or her own destiny.¹¹² With respect to slavery, there is no command in the *Qur’an*, other than arguably the language in verse 47:4, which is concerned with prisoners of war, would authorize Muslims to take slaves.¹¹³ This suggests that the

107. 2 QUTB, *supra* note 99, at 102.

108. *Id.* at 103-04.

109. FREEDOM, EQUALITY AND JUSTICE IS ISLAM, *supra* note 101, at 12-13 (citing Munayminah, *Mushkilat al-Hurriyyah*, 100-01 n.47 (Jamil Munayminah, *Mushkilat al-Hurriyyah fi’l Islam*, ed., 1974)).

110. *Id.* at 13-14 (citing PRINCIPLES OF ISLAMIC JURISPRUDENCE, *supra* note 72, at 342ff).

111. *Id.* at 14.

112. *Id.* at 87 (citing Ismail al-Faruqi, *Islam and Other Faiths*, in THE CHALLENGE OF ISLAM, n.53 (Altaf Gauhar ed., 1978)).

113. *Qur’an*, *supra* note 26, 47:4.

Qur'anic vision only contemplates the taking of slaves in the narrow circumstances presented by the taking of prisoners during war.

In point of fact, Qutb disagreed with the conclusion that verse 47:4 permits the enslavement of prisoners of war. In his commentary on the verse, he argued that the plain text of the verse only contemplates the setting of prisoners free, *gratis*, or for ransom. "The Qur'anic verse does not mention any third option, such as putting idolater captives to death or binding them into slavery."¹¹⁴ Qutb acknowledged that there was a fairly widely held juristic opinion authorizing the enslavement of prisoners, based on interpretations of the verse and the practice of the Prophet Muhammad.¹¹⁵ He argued, however, that the opinions were "in response to prevalent universal situations and common practices in war" and that the Prophet enslaved some prisoners "in order to deal with situations that could not be otherwise be dealt with."¹¹⁶ He concluded that "[p]utting prisoners into slavery is not an Islamic rule; it is a procedure dealing with special circumstances."¹¹⁷ Qutb does not identify the "special circumstances" but he is clear that the text does not authorize enslavement of prisoners of war and that "no human being of good manners would ever say that his view is better than God's ruling."¹¹⁸

Taking into account these diverging theological views, it would seem that the question of whether slavery ought to be permitted to continue would turn on one's view of what is demanded by Islamic notions of justice. Kamali points to numerous Qur'anic verses supporting the proposition that, as a matter of justice, freedom may be sought "through all possible means, as the *Qur'an* directs,"¹¹⁹ that Muslims have an obligation to assist all those who struggle for freedom,¹²⁰ and that freedom is "an inherent attribute of all human beings."¹²¹ On the basis of these verses, Kamali concludes that freedom is "the normative and original state," and the absence or restriction of freedom is, then, the exception to the norm.¹²² To

114. 15 QUTB, *supra* note 99, at 394.

115. *Id.* at 394-99.

116. *Id.* at 400.

117. *Id.*

118. *Id.* at 400-01.

119. FREEDOM, EQUALITY AND JUSTICE IN ISLAM, *supra* note 101, at 15 (citing *Qur'an* 42:41).

120. *Id.* (citing *Qur'an* 22:41) (commanding Muslims to "enjoin good and forbid evil").

121. *Id.* at 16 (referencing *Qur'an* 30:30).

122. *Id.*

illustrate the practical implications of this norm, Kamali refers to the status of the *laqit*, or foundling, whose parents are unknown, and hence whose status as a free person or slave is also unknown. The fiqh on *laqit* recognizes that such infants are presumed free, and that the community is under a duty to safeguard the wellbeing of the *laqit*.¹²³

Kamali points to other verses in the *Qur'an* that discuss slavery in the context of justice. Surah-ul-A'raf, for example, indicates that, of the three most important missions of the Prophet Muhammad, one was to "remove from them the burdens and the shackles which were on them before."¹²⁴ Another example is a dialogue between Moses and Pharaoh, in which Pharaoh accuses Moses of ingratitude, and he responds, "[a]nd is it a favor with which you reproach me that you have enslaved the Children of Israel?"¹²⁵ Kamali similarly argues that forced labor is forbidden because the *Qur'an* declared Pharaoh, who employed forced labor, to be "an agent of corruption."¹²⁶ Moreover, he concludes that "[t]o pay less than what a worker deserves is tantamount to extortion and exploitation of the sort that the *Qur'an* has clearly forbidden."¹²⁷

Examination of the *Sunnah* of the Prophet Muhammad similarly shows the establishment of an emancipatory ethic on the question of slavery. As we have pointed out, there is no question that the Prophet gave, received, and owned slaves and that he used slavery as an instrument of conquest in war. The example of the enslavement of the women and children of the Banu Qurayza tribe is perhaps the most prominent but there are other examples as well. Nonetheless, there is also a surfeit of material demonstrating the Prophet's clear preference for the emancipation of slaves and his constant inducement of similar behavior in those that surrounded him. Like the *Qur'an*, the Prophet's example accepts the existence of slavery as a social, military and political fact but its normative message counsels the implementation of an ethical horizon that would lead to its elimination. Perhaps the best examples of this horizon are the reforms on slavery instituted by

123. *Id.* at 17.

124. *Id.* at 18 (quoting *Qur'an* 7:157).

125. *Id.* (quoting *Qur'an* 26:22).

126. MOHAMMAD HASHIM KAMALI, *RIGHT TO EDUCATION, WORK, AND WELFARE IN ISLAM* 152 (2010) (relying upon *Qur'an* 28:4).

127. *Id.* at 150 (citing *Qur'an* 7:85).

the Caliph ‘Umar ibn Khuttab and his steadfast insistence that the enslavement of captives in war be minimized or eradicated.¹²⁸

What emerges from modern interpretations of the *Qur’an* and *Sunnah* provisions on slavery outlined in this Article is a focus on slavery as a temporary and unnatural human condition, one that is tied to a greater social context that takes contemporary Islamic understandings of justice and morality into account. It is important to note that both Qutb and Mutahhari were writing and thinking about slavery in the context of great social upheaval in their respective societies. They engaged in “rights talk” on slavery. Muslims jurists have thus come to see that slavery is a social evil that must be abolished.¹²⁹ There actually appears to be support for this juristic position in the Qur’anic text and the *Sunnah*.

B. *Is There Now an Ijmā’ (Islamic Juristic Consensus) on Slavery?*

In Sunni Islamic jurisprudence, four sources are available to the jurist who seeks to discover, know, explain, and apply Islamic rules of behavior.¹³⁰ We have examined two of those sources, the *Qur’an* and

128. See SHIBLI NUMANI, *UMAR* 125-27 (2004) (recounting ‘Umar’s emancipation of the Arab prisoners held in slavery after their defeat in the *Ridda* wars against Abu Bakr and his concomitant declaration that “no Arab shall be held in slavery,” as well as his repatriation of Egyptian prisoners sold into slavery after the conquest of Egypt and his orders not to enslave prisoners taken in the conquest of Persia). It should also be noted that ‘Umar established the rule of the *Umm Walad*, which declared that a child of a free man and a concubine was to be considered to be free and that the concubine was entitled to freedom at the death of her owner. The rule also forbid the separation of mother and child in such circumstances. See J. Schacht, ‘*Umm Walad*,’ in *X ENCYCLOPAEDIA OF ISLAM* 857-59 (P.J. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, and W.P. Heinrichs, eds., 2000).

129. The evolution of the position of Muslim jurists on slavery is similar to the evolution of the opinions of American jurists on the wrong-headedness of the decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which held that descendants of African slaves in the United States could never be citizens and that Congress did not have the power to deprive a slave-owner of his property interest in a slave, even if that slave traveled to free territory. Mark A. Graber has argued, with some force, that the *Dred Scott* decision was rightly decided at the time and it is only because of evolving sentiments in American constitutional jurisprudence and sectional politics that the constitutional “evil” of slavery came to be an intolerable concept. This argument is intimately bound up with a notion of progress that has come to dominate American constitutional jurisprudence and politics. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 8-14 (2006). Many of the Muslim jurists and opinion makers who now oppose slavery may be evincing a similar notion of progress. I am indebted to my colleague Alice Ristoph for bringing this comparison to my attention.

130. The Shi’a jurisprudence also relies on four sources but it uses a different approach with respect to the application of the fourth source, *aql* (“thought” or “rationality” or “reasoning”). Application of this source in Shi’a jurisprudence looks to the opinions of the Shi’a imams for guidance. The fourth source in the Sunni jurisprudence, *qiyās* or “analogical

Sunnah, in relationship to the problem of slavery. These two sources are primary and both are to be consulted first in answering any inquiry seeking to discover the divine law, with the *Qur'an* being preeminent. Using these two sources, one might ask whether slavery remains lawful in Islam or, more specifically, whether the sources would permit abolition by lawmakers in a modern-day Islamic state. Both sources obviously establish that slavery was indeed lawful at the time of the revelation but it is contested with respect to whether God intended it to remain a lawful practice and whether it could now be lawfully abolished. Although there are Qur'anic and Sunnaic provisions and a vast corpus of juristic *fiqhī* opinions, clearly announcing rules governing relationships between enslaved and free and acknowledging the lawfulness of the practice of ownership of slaves at the time of the revelation, there are also provisions in the Qur'an, as we have suggested above, which would inferentially support a gradual elimination of slavery and even a concomitant ban. The *Sunnah* is similarly equivocal. While the Prophet Muhammad owned and dealt in slaves, his example was overwhelmingly an emancipatory one, giving rise to the argument that members of Islamic societies emulating his example should strive to achieve a slavery-free society.

The equivocalness of the two primary sources on the question of abolition gives space for jurists interpreting those sources to offer their opinions and craft rules and policies reflecting their understandings of the Divine Will. It is this great pluralism of opinion in Islamic juristic thought that led to the development of the *madhhabs* or 'schools of law' in both the Sunni and Shi'a jurisprudence.¹³¹ A proper *ijmā'* (Islamic juristic consensus) is one reached by all of the *mujtahids*¹³² in a given generation and, once that

reasoning" also allows the seeking of guidance from jurists but this is not necessarily required. PRINCIPLES OF ISLAMIC JURISPRUDENCE, *supra* note 72, 16-116, 228-305; IMRAN AHSAN KHAN NYAZEE, ISLAMIC JURISPRUDENCE 141-231 (2000).

131. For background on the "madhhabs" *see generally* ABU AMEENAH BILAL PHILIPS, THE EVOLUTION OF FIQH: ISLAMIC LAW AND THE MADHHABS (2000); Bernard Weiss, *The Madhhab in Islamic Legal Theory*, in THE ISLAMIC SCHOOL OF LAW: EVOLUTION, DEVOLUTION AND PROGRESS (Peri Bearman et al. eds., 2005); Christopher Melchert, *The Formation of the Sunni Schools of Law*, in THE FORMATION OF ISLAMIC LAW (Wael B. Hallaq ed., 2004); SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI 53-141 (1996).

132. A *mujtahid* is a person who is qualified to engage *ijtihad*, "the effort a jurist makes in order to deduce the law, which is not self-evident, from the sources." PRINCIPLES OF ISLAMIC JURISPRUDENCE, *supra* note 72, 468-99, 523.

happens, Muslims are not free to disobey the rule established. As one might suspect, there are very few matters that have become the subject of an *ijmā'* in Islamic legal history.¹³³ Imam Shafi'i and jurists coming after him have all agreed that there does not need to be an explicit pronouncement of an *ijmā'* by the *mujtahids* in order for us to draw the conclusion that a consensus on a particular question has been reached. If a legal rule or practice is well known to the *mujtahids* and none objects to it, or if a number of jurists announce their opinion on a question of law and none of the qualified *mujtahids* disagrees, it may be concluded that an *ijmā'* on that question exists.¹³⁴

It is arguable that an *ijmā'* or juristic consensus on the abolition of slavery now exists among the Islamic jurists. This is certainly so with respect to any effort by Muslims to enslave other human beings through commercial means or by way of the civil administration of property and inheritance law. There are simply no lawfully owned slaves that could be purchased or obtained in this manner because slavery is illegal in all of the world's jurisdictions, including the world's Islamic jurisdictions. This is a well-known fact among the world's leading Islamic jurists and no self-respecting *mujtahid* would disagree with the conclusion that it is impossible to legally purchase a slave in any open market in the world today and that slavery should remain illegal.¹³⁵

We earlier referred to opinions of jurists that seemed to suggest that the head of an Islamic government could order the enslavement of prisoners of war during the conduct of a lawful *jihad*. Islamic law posits that all other forms of enslavement, including plunder of innocent civilian populations, are unlawful. Whether enslavement resulting from military conquest could actually materialize in modern times depends on whether an Islamic state could actually conduct a lawful *jihad*, particularly a *jihad* defending the citizens of the State. Declaration of a *jihad* is one of the responsibilities vested in the

133. Some commonly cited examples of *ijmā'* are rules resolving questions relating to use of equipment in the army, the organization of mosques, the settings for religious rituals, and questions involving other aspects of worldly affairs such as habitation, agriculture and politics. Questions related to the applicability of certain customs may also be covered by *ijma'*. See AHMAD HASAN, THE DOCTRINE OF IJMĀ' IN ISLAM 105-08 (1976).

134. *Id.* at 111-19.

135. See Open Letter to Dr. Ibrahim Awwad Al-Badri, Alias 'Abu Bakr Al-Baghdadi,' LETTERTOBAGHDADI.COM (Sept. 19, 2014), www.lettertobaghdadi.com [hereinafter Letter to Baghdadi] (asserting that "no scholar of Islam disputes that one of Islam's aims is to abolish slavery" and signed by many prominent Muslim jurists and opinion-makers).

Islamic caliph. Actions taken to defend a Muslim community, attacked because of their religious beliefs, may also qualify as a lawful *jihad*, even without a caliphal declaration.¹³⁶ There have been several military conflagrations in recent times that might qualify as lawful *jihads*, although it is arguable that none could so qualify because there is no lawfully appointed *Caliph* in the world today. Nonetheless, a defensive *jihad* might still qualify as lawful and the military struggle over Palestine, the Bosnia war, the independence struggle in Chechnya, and the military resistance to the Iraq and Afghanistan invasions might, in some minds, qualify as lawful defensive *jihads*. In practical fact, however, in none of these conflagrations have Muslim military commanders enslaved prisoners. Prisoners are either killed or held for ransom or exchange, as is permitted by the *Qur'an*. It seems that no thought has been given to enslaving them. This fact would also give rise to the argument that, even with respect to prisoners of war, there is now an *ijma'* prohibiting their enslavement.

In response to the brutal death and destruction caused by ISIS's effort to establish a transnational Islamic State in Iraq and Syria, hundreds of Muslim political leaders, religious scholars and opinion makers worldwide endorsed an open letter addressed to the "fighters and followers of the self-declared 'Islamic State.'"¹³⁷ The authors collaborated and relied heavily on the *Qur'an* in denouncing ISIS's actions and ideologies as un-Islamic.¹³⁸

Importantly for our purposes, the authors also concluded that there is a now an Islamic juristic consensus banning slavery and slave trading. The letter is very specific. For example, the authors concluded "[t]he re-introduction of slavery is forbidden in Islam. It was abolished by universal consensus."¹³⁹ Further, "[n]o scholar of

136. See generally RICHARD BONNEY, *JIHAD: FROM QUR'AN TO BIN LADEN* 53-90, 111-26 (2007).

137. See Letter to Baghdadi, *supra* note 135.

138. *Id.*

139. *Id.* It should be noted that a well-regarded Syrian Muslim scholar of Islam, Sheikh Muhammad al-Yaqoubi, has recently published, in Arabic and English, a broad rejection of the ISIS ideology, labeling the movement as an example of Khawarijism (following the practice of those who rebelled against orthodox Islam during the time of the Rightly-Guided Caliphs), declaring them to be disbelievers and offering the legal opinion that Muslims have a duty to wage war against them. SHAYKH MUHAMMAD AL-YAQOUBI, *REFUTING ISIS: A REBUTTAL OF ITS RELIGIOUS AND IDEOLOGICAL FOUNDATIONS* (2015). Sheikh Yaqoubi's publication of the book, by his own words, seeks to further a commendable goal, e.g., exposing the infirmities of the ISIS ideology, particularly in the minds of the youth, and condemning the group's horrific

Islam disputes that one of Islam's aims is to abolish slavery."¹⁴⁰ The authors cited *Surat Al-Balad* (chapter 90) which, as we earlier noted, exhorts the Prophet Muhammad to free slaves.¹⁴¹ The letter goes on to cite *Al-Bidayah wal-Nihayah* in which Ibn Kathir says, "The Prophet freed male and female slaves . . . and after the Prophet died, there were absolutely no slaves of his to be inherited."¹⁴² The letter also criticizes partisans of the Islamic State for their treatment of women.¹⁴³ The letter should be read against a background in the Middle East that shows continuing difficult circumstances involving "modern day" slavery and human trafficking. In some locales the practices are particularly virulent and horrific, especially with respect to the treatment of women.¹⁴⁴ Governments in these communities have recently begun to enact legislative measures designed to combat such practices and to alleviate suffering endured by victims.¹⁴⁵ The

record of atrocities and barbaric behaviors. Unfortunately, by declaring members of ISIS to be disbelievers, he may have fallen into the same trap as the enemy he seeks to combat. Interestingly, Sheikh Yaqoubi agrees that there is a consensus against slavery, binding Muslims and making ISIS actions illegal, but he grounds the authority for that consensus in the fact that Muslim nations have all ratified numerous international anti-slavery conventions and therefore, since their military adversaries will not enslave Muslim captives, Muslims should reciprocate by refraining from enslaving prisoners. He suggests that Muslims would be authorized to take slaves if their adversaries resumed the practice. *Id.* at 15-17. Consequently, the book, expected to be widely read in the Muslim world, does not add much to the discourse that Muslims should be having on the moral issues surrounding the question of slavery.

140. See Letter to Baghdadi, *supra* note 135.

141. *Al-Balad*, 90:12-14

142. See Letter to Baghdadi, *supra* note 135.

143. *Id.*

144. See, e.g., Mohammed A. Auwal, *Ending the Exploitation of Migrant Workers in the Gulf*, 34 FLETCHER FORUM OF WORLD AFFAIRS 96 (2010) (describing 430 runaway maids being sheltered in the Indonesian, Filipino, and Sri Lankan embassies in Kuwait at any given moment, with many of the maids complaining of overwork, sexual abuse, beatings and torture inflicted by their "employers").

145. The governments of four predominantly or officially Muslim States—The Gambia, Malaysia, Pakistan, and the United Arab Emirates—have expressly abolished slavery in their constitutions. See CONSTITUTION OF THE REPUBLIC OF THE GAMBIA, 1997, art. 20 (Gam.); FEDERAL CONSTITUTION OF MALAYSIA, Aug. 27, 1957, art. 6 (Malay.); PAKISTAN CONST. Aug. 14, 1973, art. 11 (Pak.); CONSTITUTION OF THE UNITED ARAB EMIRATES, Dec. 2, 1971, art. 34 (U.A.E.). Nine constitutions in Muslim nations have express prohibitions against forced labor. The Constitution of Pakistan, for example, provides that "all forms of forced labour and traffic in human beings are prohibited." PAKISTAN CONST., art. 11; see also CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH, 1972, art. 34 (Bangl.); CONSTITUTION OF THE REPUBLIC OF THE GAMBIA, art. 20; CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, Jan. 1, 1952, art. 13 (Jordan); TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION OF THE REPUBLIC OF TURKEY] Nov. 7, 1982, art. 18 (Turk.). Egypt, Jordan, Djibouti, Syria, Mauritania, Algeria, Bahrain, Oman, Saudi Arabia, Qatar, Lebanon, Malaysia, Nigeria, Indonesia and the United Arab Emirates have all recently enacted anti-trafficking legislation in

struggle against human trafficking in the Middle East continues and, as it does so, the emerging Islamic juristic consensus against chattel slavery becomes clearer and clearer.

C. Isis, Boko Haram, and the Relationship Between the Shari'ah and International Humanitarian Law

We have pointed out that almost all of the verses on slavery in the Qur'an are emancipatory in character. After the completion of the revelation of the Qur'an and after the recognition of the example of the Prophet Muhammad began to take hold, the Islamic jurisprudence developed an overwhelmingly emancipatory ethical approach toward slavery. This took time but eventually resulted in the constant, regular and oftentimes pietistic emancipation of slaves. There was also, in many places, the establishment of governments and military organizations staffed and led by slaves, former slaves, and their progeny.¹⁴⁶ ISIS and Boko Haram seem to be ignoring the emancipatory aspect of the legal history in Islam, focusing instead on Islam's imperial legacy and the role of slavery, and particularly slave-trading and plunder, in furthering that legacy.

various forms and permutations. See Mohamed Y. Mattar, *Human Rights Legislation in the Arab World: The Case of Human Trafficking*, 33 MICH. J. INT'L L. 101, 104 (2011); see also U.N. Office on Drugs and Crime, *Combating Trafficking in Persons in Accordance with the Principles of Islamic Law*, 53-55, http://www.unodc.org/documents/human-trafficking/UNODC_Trafficking_and_Islamic_Law_-_Amended.pdf, (Mohamed Y. Mattar, principal author). Professor Mattar, Research Professor of Law and Executive Director of the Protection Project at Johns Hopkins University is without doubt the leading observer and commentator on efforts to abolish modern day slavery and human trafficking in the Arab world and his scholarly writings have been an invaluable resource in preparing this article. See, e.g., Mattar, *Trafficking in Persons*, *supra* note 53; Mohamed Y. Mattar, *Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings*, 41 VAND. J. TRANSNAT'L L. 1355 (2008).

146. For example, 34 of the 37 'Abbasid caliphs reigning between 750 C.E. and 1258 C.E. had slave origins. See BORGE FREDERICKSEN, *SLAVERY AND ITS ABOLITION IN NINETEENTH CENTURY EGYPT* 78 (1977). At various times dynasties and governments ruled by slaves, emancipated slaves and the progeny of slaves dominated governments in Oman, Iraq, Safavid Iran, Delhi, India, and Egypt. See SUSSAN BABAIE, ET AL., *SLAVES OF THE SHAH: NEW ELITES OF SAFAVID IRAN* (2004); DAVID AYALON, *ISLAM AND THE ABODE OF WAR: MILITARY SLAVES AND ISLAMIC ADVERSARIES* (1994); AHMED HAMOUD AL-MAAMIRY, *OMAN AND EAST AFRICA* (3d rev. ed. 1985); REGINALD COUPLAND, *EAST AFRICA AND ITS INVADERS* (1938); REGINALD COUPLAND, *THE EXPLOITATION OF EAST AFRICA 1856-1890: THE SLAVE TRADE AND THE SCRAMBLE* (1939); PETER A. JACKSON, *THE DELHI SULTANATE: A POLITICAL AND MILITARY HISTORY* (1999); HUGH KENNEDY, *WHEN BAGHDAD RULED THE MUSLIM WORLD: THE RISE AND FALL OF ISLAM'S GREATEST DYNASTY* (2005).

One key aspect of this imperial legacy was the conduct of war. Islam's emancipatory ethic with regard to slavery created a paradox, enabling slaves and former slaves to be integrated into the Muslim societies in the Middle East while at the same time fueling an aggressive and imperialistic effort to capture and enslave more non-Muslims to replace those who were emancipated. The salafist paradigm on slavery focuses on slavery and slave-trading as it was practiced by the companions of the Prophet and their immediate successors, but it seems to have nothing to say about the imperial era that followed over the next thousand years. It should be noted that, in a war conducted under Islamic law rules, in the absence of abolition, soldiers who capture war booty, which would include human beings, are permitted to buy and sell these human beings in an open market. ISIS has in fact established such markets.¹⁴⁷ This is said to be permitted by the Islamic law, viewed through the jihadi-salafist lens. The conduct of war and the enslavement of captives are then easily conflated with the imperialist paradigm that characterizes much of Islamic history after the era of the *salaf al-salih* had past. Jihadi salafism becomes a new form of Muslim imperialism. The conduct of war under these circumstances, without constraint, leads to tragic and horrific results, as we have seen.

The international humanitarian law, as it has been developing, characterizes such conduct as war crimes, with individuals and States to be held accountable for such crimes in a system of international tribunals.¹⁴⁸ Customary international law and the international human rights law also strongly condemn such behaviors, providing

147. *ISIS Sex Slave Market: Syrian Women Sold in Iraq*, ARA NEWS (July 15, 2015), <http://aranews.net/2015/07/isis-sex-slave-market-syrian-women-sold-in-iraq/> (100 Syrian women offered for sale in a market established in Fallujah, Anbar Province); Richard Engel and James Novogrod, *ISIS Terror: Yazidi Woman Recalls Horrors Of Slave Auction*, NBC NEWS (Feb. 13, 2015), <http://www.nbcnews.com/storyline/isis-terror/isis-terror-yazidi-woman-recalls-horrors-slave-auction-n305856>.

148. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES 299-352* (Cambridge University Press 2005) (outlining fundamental guarantees to be accorded to civilians and prisoners in international and non-international armed conflicts, including the right to be free from slavery, rape, mutilation, torture, forced labor, and other arbitrary deprivations of liberty and indignities); DANIEL THURER, *INTERNATIONAL HUMANITARIAN LAW: THEORY, PRACTICE, CONTEXT* 121-84; 231-37 (2011) (providing account of the basic norms, the intersection of international humanitarian law and international human rights law, the emerging system of accountability for individuals and states and the system's encounter with the Islamic law of war).

mechanisms for States and individuals to be called to account.¹⁴⁹ Both systems of international norms and regulations developed in response to the conduct of war, the acquisition of territories and properties, and the treatment of prisoners of war and civilian non-combatants by imperialist entities.¹⁵⁰ The condemnation of the behaviors of the Nazi regime and the punishment of individual Nazi perpetrators after World War II is the prime example of the application these systems, but, as Jenny S. Martinez has shown, the use of international tribunals in such circumstances can actually be traced back to nineteenth century efforts to combat the international slave trade.¹⁵¹

The international humanitarian law and its corollaries in the customary international law and international human rights systems also serve hortatory purposes in that they encourage States and belligerents in armed conflicts to honor and respect norms designed to “restrain the parties to an armed conflict from wanton cruelty and ruthlessness,” and “provide essential protection to those most directly affected by the conflict.”¹⁵² The development of this hortatory function flows, at least in part, from the “value monist” underpinnings of international humanitarian law, that is, underpinnings which seek to advance a universal standard for the conduct of armed conflicts and the treatment of innocent non-combatants and prisoners of war.¹⁵³ A government or an insurgency that does not respect the norms we have

149. M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW (2006); M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and other Serious Violations of Human Rights*, in POST CONFLICT JUSTICE 3 (M. Cherif Bassiouni ed., 2002); ANTONIO CASSESE, GUIDO ACQUAVIVA, MARY FAN AND ALEX WHITING, INTERNATIONAL CRIMINAL LAW: CASES AND COMMENTARY (2011).

150. HENCKAERTS & DOSWALD-BECK, *supra* note 148, at xxv-li. The account of the law provided by jurists advancing a “value monist” approach, like Henckaerts and Doswald-Beck, is indeed the standard account. There is also an argument that international humanitarian law is in fact a continuation of the “civilizing mission” that characterized 19th century Western imperialism. See, e.g., ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005).

151. JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW 160, 164 (2011).

152. FRITS KALSHOVEN AND LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 12 (2001).

153. *The Evolution of International Humanitarian Law and Arms Control Agreements*, in A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS 11-15 (M. Cherif Bassiouni ed., 2000); M. Cherif Bassiouni, *Commemorative Piece: 50th Anniversary Commemorative Essay: Perspectives on International Criminal Justice*, 50 VA. J. INT’L L. 269, 286-287 (2010); see also CHRISTOPHER R. ROSSI, BROKEN CHAIN OF BEING: JAMES BROWN SCOTT AND THE ORIGINS OF MODERN INTERNATIONAL LAW 85, n.65 (1998) (noting that Grotius cited Aristotle at least 143 times in *De Jure Belli ac. Pacis*).

described runs the risk of being treated as a pariah in the community of nations. The Muslim or Islamic insurgencies we have identified earlier, as well as other insurgencies and even many governments, have violated many of the norms of the developing international humanitarian law, sometimes with impunity. Perhaps the most commonly cited examples of such violations have involved suicide attacks on religious institutions and other places where innocent civilians might gather, the taking of hostages for ransom or exchange of prisoners, and bombings and other attacks designed to create terror and widespread panic in the civilian population.¹⁵⁴

Even though these actions of Muslim insurgencies in some cases have been quite ghastly and appalling, drawing condemnation from many quarters, we suggest here that the re-imposition of *de jure* slavery and slave-trading on innocent captives and even prisoners of war is qualitatively different, a form of brutality and injustice that is on a completely different level—the same level as genocide, torture, piracy and racial discrimination—a level that will draw universal condemnation and approbation without dissent or apology, given the worldwide consensus that exists with respect to *de jure* slavery and slave-trading.

Even if we were to grant a caliphal government the right to govern its population by a *salafi* vision of Islamic law, in an effort to bring “the good life” to that population, we think the reinstatement of *de jure* slavery and slave-trading, given its sordid and horrific history, would doom any such a government to a super-pariah status, with grave implications for the future of Islamic law in the international setting and absolutely terrible outcomes for Muslims within the jurisdiction and around the world. Re-imposing the worst aspects of the Islamic imperial legacy, in the name of this *salafi* vision, only compounds this problem. We pose three questions here that we think show the moral bankruptcy and a historical impoverishment of this view of Islamic law.

First, let us imagine entry into the Islamic State by a modern-day human trafficker, say someone trading in non-Muslim women and girls kidnapped from Nepal or lured to the Middle East or West Africa from Ethiopia or Eastern Europe or Southeast Asia. Might that

154. The September 11, 2001 attacks on New York and Washington, DC and the November 13, 2015 attacks in Paris immediately come to mind as preeminent examples of this kind of phenomenon.

trafficker be interested in placing his human commodities for sale in markets created by ISIS or Boko Haram? Would ISIS or Boko Haram allow the trafficker entry? Would citizens of the new Islamic State be allowed to buy such trafficked women? Would the trafficker also be interested in buying captured women and girls in ISIS and Boko Haram markets so that they might be trafficked to locations other than Iraq, Syria or Nigeria? The economic attraction and the relative ease of accomplishment of these tasks, not to mention the fact that the trafficker will argue that he should enjoy a *de jure* immunity for such entrepreneurship while present in the Islamic State, suggest that our hypotheticals may not be implausible or far-fetched. It was noted earlier that news reports indicate that human traffickers are currently making large profits repatriating enslaved Yezidi women. Continuation of these markets in the Islamic State will only fuel such entrepreneurship.

Second, several insurgencies in Africa (in addition to Boko Haram) and in the Sinai have styled themselves as “provinces” of the Islamic State and declared their allegiance to the caliphate. Will these insurgencies also be permitted to establish markets for the buying and selling of chattel slaves? Could they trade in slaves with other “provinces” or with the caliphate itself? Would the slaves be limited to those captured in war? In an era involving an explosion of human trafficking, how would the Islamic State prevent infiltration of such markets by entrepreneurial traffickers seeking to capitalize on the economic opportunity to sell their kidnapped human commodities in a jurisdiction where such transactions are protected by law?

Thirdly, the reader should note that there is a long record of employment of enslaved castrated males, generally called “eunuchs,” in Islamic imperial history.¹⁵⁵ Although the Islamic law technically prohibited the castration of males, the practice was tolerated by many in the early Islamic governments and jurists who advised them. Non-Muslims performed the surgery on captured males and then returned them to their Muslim owners. Eunuchs were often employed in positions of great responsibility and authority and wielded a substantial amount of power even though they were technically

155. The Islamic imperial entities were certainly not the only societies to employ eunuchs. PIOTRA O. SCHOLZ, *EUNUCHS AND CASTRATI: A CULTURAL HISTORY* (2001); WOMEN, MEN, AND EUNUCHS: *GENDER IN BYZANTIUM* (Liz James ed., 1997); TAISUKE MITAMURA, *CHINESE EUNUCHS: THE STRUCTURE OF INTIMATE POLITICS* (1970); SHIH-SHAN HENRY TSAI, *THE EUNUCHS IN THE MING DYNASTY* (1996).

enslaved.¹⁵⁶ Would the partisans of the Islamic State countenance the return of this practice?

The establishment of markets for the buying and selling of human beings captured in armed conflicts and the enslavement of such captives is justified by partisans and ideologues of the Islamic State and Boko Haram on the basis of an atavistic ahistorical interpretation of the *Sharī'ah*. There are two important sets of historical events that this interpretation of the *Sharī'ah* ignores. The first, as we have suggested, is the nearly 1,000 year history of Muslim slave-trading, after the end of the era of the *salaf al-sāliḥ*, that was created by the paradoxical demand for slaves in the Islamic heartland. This demand generated a commercial and imperial practice, illegal under the *Sharī'ah*, that produced widespread death, great and prolonged suffering, the wholesale destruction of many communities and the uprooting of families and social relationships in societies stretching from East and West Africa to India and Southeast Asia. This event might be described as a “holocaust,” in the same way that the trans-Atlantic slave trade and the extermination of the Jews and other minorities in Nazi Germany have similarly been described. Significantly, many Muslims, including many Muslim scholars and historians, are unaware of the details of this history and certainly unaware of its implications for Islamic jurisprudence and Islamic legal history. These grave and weighty implications should be crucial in assessing the jurisprudential and juridical claims of ISIS and Boko Haram. Muslim *Sharī'ah* scholars and other scholars of Islam can no longer ignore the history of slavery, trafficking and slave trading in Muslim communities. A self-reflective historical consciousness on this issue is sorely needed.

The second set of events that is ignored by the partisans of the Islamic State and Boko Haram is the history of the actions of the Nazi regime during World War II, particularly its policies of enslavement and extermination of Jewish and other minorities living under its jurisdiction. Those events were central to the creation of contemporary notions of international humanitarian law. We suggest here that those events also cannot be ignored by those who seek to establish a political entity or government that obeys the *Sharī'ah*. If there is an *ijmā'* on slavery and slave-trading among Islamic jurists,

156. See HATHAWAY, *supra* note 60. For a general discussion of role of eunuchs in Islamic imperial history, see SHAUN ELIZABETH MARMON, *EUNUCHS AND SACRED BOUNDARIES IN ISLAM* (1995).

that *ijmā'* has come about because of the events that occurred in Nazi Germany as well as the events in the Muslim world that led to a region-wide, indeed world-wide, abolition of *de jure* slavery.

The actions of the Islamic State and Boko Haram are therefore not just important for the challenges they present for the success of international humanitarian law and its value-monist, enlightenment-centered underpinnings. They are also important for notions of global Islamic selfhood held by Muslims in their relationship to the non-Muslim world. We argue here that it is incumbent on all thinking and historically aware Muslims and scholars of Islam to engage the partisans, jurists and ideologues of the Islamic State with respect to their vision of Islamic law on the questions of slavery and slave-trading. Consideration of the morality of slavery and slave trading is at the heart of humankind's view of itself. Revulsion at the thought of enslavement or slave trading is a key component in the development of modern notions of human dignity. The issue is therefore an existential one for Muslims and for Islamic law, just as it was for Europeans and Western law.

D. *Slavery, Moral Progress and the Public Interest and Well-Being of the Muslim Community: Examples From History*

This Article's exposition on the need for a critical and self-reflective history of slavery and abolition in the Muslim world could end here. Instead of ending the exposition a short *coda*—as food for thought on the status of slavery as a “good” or “evil” in the Islamic worldview—will be offered.

Muslim jurists have agreed that God acted with a defined purpose in revealing the *Shari'ah*. It is said that this purpose manifested God's intention “to preserve for humankind the five essential elements of their well-being, namely their religion, life, intellect, offspring, and property.”¹⁵⁷ These five elements are described as the penultimate “purposes” or “objectives” (*maqāṣid*) of the *Shari'ah* and are considered to be universals.¹⁵⁸ There are many particular rules of the *fiqh* that have been enacted to further one or

157. Felicitas Opwis, *Maslaha in Contemporary Islamic Legal Theory*, 12 ISLAMIC L. & SOC'Y 182, 188 (2005). “Intellect” is often described as “reason” and “offspring” is often described as “progeny” or “lineage.”

158. MOHAMMAD HASHIM KAMALI, *SHARI'AH LAW: AN INTRODUCTION* 27-37, 123-39 (2008).

more of these universals. The jurists have also designated the five essential universals as *maṣlaḥas*, or elements that further the well-being, welfare or “public interest” of the entire Muslim community.¹⁵⁹ Although a particular rule of *fiqh* may not be mandatorily obligatory or prohibited, in accordance with the Islamic system of *aḥkām al-khamsa*, the universal which it is related to may very well be “legally more important” and receive a “more stringent legal value” than one or more of its corresponding particulars.¹⁶⁰ This might result in a rule of *fiqh* attaining the status of a rule that mandates or prohibits behavior under particular circumstances. “The universals, being certain, are unchangeable whereas the particulars of the law, admitting probability, are susceptible to change.”¹⁶¹ Perhaps the best-

159. The concept of *maṣlaḥa* is the subject of a well-developed discourse in Islamic jurisprudence. Al-Ghazali first tied the concept to understandings of the *Sharī‘ah* by arguing that any measure which secures one of the five values that he identified as the “purposes” of the *Sharī‘ah* is a *maṣlaḥa* (“benefit” or “good”) and anything which violates one of those purposes is a *mafsadah* (“evil” or “harm”). KAMALI, *supra* note 125, at 351. There can be an “attested” *maṣlaḥa*—a *maṣlaḥa* based on an express pronouncement in the text—and an “unattested” *maṣlaḥa*, or one derived from considerations of legal rationality or benefit that are not explicitly dealt with in the text. Most of the discourse has been concerned with the unattested *maṣlaḥa*, as one might imagine, because it is here that the jurists found the means to allow for or prohibit legal change. In these cases it is said that there is “no concrete indication (*dalala*) in the Qur’an, in Sunna, or by consensus (*ijma’*).” Felicitas Opwis, *Islamic Law and Legal Change: The Concept of Maslaha in Classical and Contemporary Islamic Legal Theory in SHARI‘A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT*, 62, 66 (2007). There are four models of the concept that have dominated the jurisprudence. The “Ghazali/Razi” model integrates the unattested *maṣlaḥa* into the procedure normally used to find a *ratio legis* when seeking to analogize the applicability of a text to a new situation. *Id.* at 66-67. This might enable the jurist to reject an existing analogy where considerations of public interest or welfare predominate. The second model, used by the Maliki jurist Shihab al-Din al-Qarafi, extended its use in cases of analogy even further than the Ghazali/Razi approach and he also used the concept to rationalize legal precepts to avoid illegal ends (“blocking the means”) and grant licenses to permit behavior ordinarily prohibited, when a *maṣlaḥa* dictated that result. *Id.* at 68. The third model, crafted by the Hanbali jurist Najm al-Din al-Tufi, was perhaps the most radical. He adopted “almost exclusively a substantive rationality” that eschewed formal procedures and instead depended on an inductive reading of the scriptures, deriving meanings that were independently discernible by the human intellect, even if the text was completely silent on the issue. *Id.* at 68-69. The last model, according to most writers the most comprehensive, was developed by Maliki jurist Abu Ishaq al-Shatibi. He crafted a scheme that “provided jurists with a comprehensive system to extend and adapt the law to new circumstances,” developing a classificatory typology for the universals that lay behind *maslaha*, assigning them utilities as either “necessities,” “needs,” or “improvements” in the law and the purposes of the lawgiver. *Id.* at 69.

160. FELICITAS OPWIS, *MASLAHA AND THE PURPOSE OF THE LAW: ISLAMIC DISCOURSE ON LEGAL CHANGE FROM THE 4TH/10TH TO 8TH/14TH CENTURY* 256 (2010) (paraphrasing an aspect of Al-Shatibi’s theory of *Maslaha*).

161. *Id.* at 257.

known example of the use of the concept of *maṣlaḥa* is the decision by the Caliph Umar ibn al-Khattab to suspend the Qur'anic punishment for theft (amputation of a limb) during the time of a famine, when many people were stealing food out of desperation.¹⁶² In that case the universal concern for life outweighed the particular concern for enforcement of the criminal punishment for theft. The ruling can also be supported by Qur'anic provisions announcing that religion should never be a means of imposing hardship on human beings.¹⁶³

The problems of slavery and slave trading in the jurisprudence and their relationship to the doctrine of *maṣlaḥa* have not received much recent attention from the Islamic jurists and scholars of Islam. This Article posits that the time has come for the dedication of such attention and that the matter is an urgent one. Scholarly examination of the applicability of the Islamic doctrine of *maṣlaḥa* or “public interest” to the problems of slavery and slave trading is likely to be a fruitful field of inquiry. Islamic jurisprudence might now be prepared to see slavery as an “evil” that undermines the Muslim public interest.

As noted earlier, Muhammad Rashid Rida, an early twentieth century salafist, argued that one of the purposes of the Qur'an was the “abolishment” of slavery.¹⁶⁴ He argued that abolition would gradually come about as a result of Quranic emancipatory edicts on slavery, particularly the limitations on the treatment of prisoners of war legislated by Qur'an 47:4, and the example of the Prophet Muhammad.¹⁶⁵ Scholars have maligned his approach, suggesting that it relied on al-Tufi's model of *maṣlaḥa* and betrayed a utilitarian legal philosophy rather than a true fidelity to universalist principles.¹⁶⁶

This may not be so. There are actually several historical examples of the use of *maṣlaḥa* in addressing problems involving slavery and slave-trading in Muslim communities and suggesting that

162. PRINCIPLES OF ISLAMIC LAW, *supra* note 72, at 354.

163. See *Qur'an*, *supra* note 26, 22:78 and 5:6.

164. MUHAMMAD RASHID RIDA, THE MUHAMMADAN REVELATION 142-48 (Yusuf Talal DeLorenzo trans.) (1996).

165. *Id.*

166. See, e.g., HALLAQ, *supra* note 35, at 214-20. Professor Hallaq acknowledges, however, quoting MALCOLM H. KERR, ISLAMIC REFORM; THE POLITICAL AND LEGAL THEORIES OF MUHAMMAD 'ABDUH AND RASHID RIDA 201-02 (1966) that Rida's “equation of interest and necessity, put forth in such a manner as to make formal deductions from the revealed sources only a secondary confirmation of what the law should be, amounts to an affirmation of natural law.”

jurists and opinion-makers viewed such practices as “evils” to be condemned. In 1841 Ahmad Bey, the Ottoman governor-general of the Tunis, issued an edict abolishing the public slave market in Tunis and the public offices associated with the operation of the market.¹⁶⁷ A compiler of the official acts of Ahmad Bey attributed his motives in closing the market to “pure compassion for black slaves, who were often treated with cruelty and sold in the market as beasts, underscoring the Bey’s belief that *al-‘adl* (justice) should be extended to all oppressed subjects” and that “slavery was contradictory to *hurriyat* (freedom), a key element of Islamic civilization and enlightenment.”¹⁶⁸

There is no doubt that Ahmad Bey was under great diplomatic pressure from European governments to halt the slave trade into Tunisia at this time and that he also desired to demonstrate his independence from the Ottoman government in Istanbul.¹⁶⁹ Yet, the evidence suggests that Islamic jurisprudence played an important role in his decision-making. The edict abolishing the Tunisian slave market was just one of several anti-slavery edicts he issued over a five-year period, culminating in an 1846 proclamation mandating the compulsory emancipation of all slaves held by owners in Tunisia. In its text, the Bey justified the issuance of the proclamation on a number of grounds, including the cruel treatment of slaves on what appeared to be racial grounds, the morally reprehensible denial of justice to many of the victims of the slave-trade, and the indiscriminate enslavement of many Muslims who were kidnapped and transported across the Sahara, in violation of very clear Islamic precepts against the enslavement of Muslims.¹⁷⁰ In its last ground, the edict cited the Islamic principle of *maṣlaḥa* as a further reason for the issuance of the edict. This argument was premised on two grounds: (1) that there were “undesirable political implications” created by the specter of runaway slaves seeking assistance from foreign governments as a result of inhumane treatment received within the Bey’s jurisdiction and (2) these events enabled the foreign governments to label the government of the Bey as inhumane, which also damaged its *maṣlaḥa al-siyasiyya* (public and political

167. See MONTANA, *supra* note 41, at 84.

168. *Id.* at 84-85 (citing the compilation of Ahmad Bey’s edicts and L. CARL BROWN, *THE TUNISIA OF AHMAD BEY* 321-22, 1837-55 (1974)).

169. *Id.* at 85.

170. *Id.* 101-02.

interests).¹⁷¹ For all of these reasons, the Bey determined to abolish all aspects of slavery and slave trading within his jurisdiction.

Slavery was not abolished in Saudi Arabia until 1962, over 100 years after the issuance of Ahmad Bey's proclamation. It has also been suggested that *maṣlaḥa* was also the basis for the King of Saudi Arabia's 1962 edict requiring all slave-owners in the Kingdom to sell their slaves to him so that they could be legally emancipated.¹⁷² It is well-known that the Saudi monarchy was coming under increased condemnation because of its recalcitrance in eliminating slavery.

When Muslims engage in a dialogue with the jurists and decision-makers in the Islamic State and Boko Haram, it would seem that the doctrine of *maṣlaḥa* will be useful to them in seeking to convince the ISIS/Boko Haram jurists and decision makers that the public interest and notions of progress demand that those entities take steps to abolish slavery and slave trading.

CONCLUSION

This Article has shown that there is a jurisprudential basis for abolishing slavery in Islamic law. It has also shown that there is a worldwide consensus similarly holding that slavery is illegal under international law and a violation of *jus cogens* principles and that it is in the Muslim public interest to join that consensus. We have further observed that modern-day forms of slavery, described as "human trafficking" by the international authorities and national legislation, continue to be serious problems in Muslim communities. Legislative efforts to stamp out these practices by governments in those communities have not met with much success. We suggest that this is because there is little awareness, among jurists and among ordinary believers, of the legal history of slavery and trafficking in Muslim communities, and still less awareness that Islamic law principles are available to them in crafting an effort to end these practices.¹⁷³ Salafism and its relationship to the colonial legacy in the Muslim world is thus a contributor to this lack of awareness in a way that is extremely destructive. All of the legislation enacted thus far has

171. *Id.* at 103.

172. Aharon Layish, *Saudi Arabian Legal Reform as a Mechanism to Moderate Wahhabi Doctrine*, 107 J. AM. ORIENTAL SOC'Y 279, 285 (1987).

173. For further discussion on this point see Freamon, *Straight, No Chaser*, *supra* note 40, at 62-63.

followed a secular model. We will begin to see an end to slavery in the Muslim world when the Islamic principles we have discussed here begin to be implemented by Muslims in a robust and internally oriented fashion, engaging the arguments of the jihadi-salafists directly, honestly, and with courage. A clear understanding of Islamic legal history demands no less. Muslims should take a lesson from the words of Frederick Douglass:

At a time like this, scorching irony, not convincing argument, is needed. Oh! had I the ability, and could I reach the nation's ear, I would today pour out a fiery stream of biting ridicule, blasting reproach, withering sarcasm, and stern rebuke. For it is not light that is needed, but fire; it is not the gentle shower, but thunder. We need the storm, the whirlwind, and the earthquake. The feeling of the nation must be quickened; the conscience of the nation must be roused; the propriety of the nation must be startled; the hypocrisy of the nation must be exposed; and its crimes against God and man must be denounced.¹⁷⁴

174. Frederick Douglass, Fourth of July Speech at Rochester, New York (Jul. 4, 1852), <http://www.historyplace.com/sps/douglass.htm>.