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Misinterpreted Justice: Problems with the Use of Islamic Legal Experts in U.S. Trial Courts

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PETER W. BEAUCHAMP

Misinterpreted Justice: Problems with the Use of Islamic Legal Experts in U.S. Trial Courts

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MISINTERPRETED JUSTICE

In search of religious truth, lawyers, judges, and jurors who know almost nothing about Islam must wade through multiple layers of translation—from Arabic to English; from the spiritual to the secular; from the metaphorical to the literal. When most Muslims themselves cannot agree on what so many aspects of their faith mean, how can American jurors?¹

I. INTRODUCTION

The United States is home to an increasingly multicultural legal environment. Indeed, our legal system has, to a certain extent, shown itself willing and capable of understanding and resolving the world's dynamic and multifaceted legal issues.² Accordingly, Islamic legal disputes have not always been as alien or novel to a U.S. court as they may appear to be today.³ Nevertheless, in the wake of the events of September 11, 2001, the current relationship between the U.S. legal system and Islamic law is oftentimes strained, at a moment when that relationship is more important than ever. Among the many issues brought to the fore by the events of 9/11 is the question of how the increasingly diverse cultural, political, and legal U.S. landscapes should interact with the Islamic faith. In the wake of that fateful day, tensions have often run high as the United States has attempted to simultaneously crack down upon and prevent future acts of terror while also seeking to retain the nation's open, diverse, and tolerant ideals.⁴ These tensions are increasingly arising in U.S. courts, where judges have struggled for more than a decade to adjudicate complex issues of Islamic law within the framework of U.S. legal rules and procedures.⁵ Recent controversies have ranged from criminal material support of terrorism cases to civil challenges of policies of motor vehicle departments regarding the wearing of a type of Muslim veil, the *hijab*, in state identification photographs.⁶ Assuredly, blanket

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1. Amy Waldman, *Prophetic Justice*, ATLANTIC MONTHLY, Oct. 2006, at 82, 85.
 2. See, e.g., Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").
 3. See, e.g., Hosain v. Malik, 108 Md. App. 284 (Md. Ct. Spec. App. 1996) (analyzing and granting comity to a Pakistani court's Islamic legal ruling in a child custody dispute); Al-Silham v. Al-Silham, No. 93-A-1770, 1994 Ohio App. LEXIS 1316 (Ohio Ct. App. Mar. 25, 1994) (adjudicating an evidentiary dispute relating to materials on Islamic law in a custody matter).
 4. See, e.g., ACLU, RECLAIMING PATRIOTISM: A CALL TO RECONSIDER THE PATRIOT ACT (2009) (protesting the deprivation of civil rights authorized by the USA Patriot Act, passed in response to the events of 9/11).
 5. See, e.g., Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441 (2008) (offering a detailed survey of U.S. legal controversies and judicial opinions relating to Islamic veiling practices); see also Muhammad v. Paruk, 553 F. Supp. 2d 893 (E.D. Mich. 2008) (analyzing a First Amendment challenge to judge's order that plaintiff remove her veil in court); Khatib v. County of Orange, No. SACV 07-1012 DOC (MLGx), 2008 U.S. Dist. LEXIS 24530 (C.D. Cal. Mar. 26, 2008) (challenge to court officers making plaintiff remove her *hijab* in court).
 6. See, e.g., *infra* Part III.

sentiments about the utter incompatibility of Islamic and U.S. law are intellectually bereft. They are also counterproductive to efforts focused on making the two systems work together, which is important given the irreversibly multicultural world in which we live. Still, there are unquestionable differences between the two systems that necessitate a nuanced and reasoned approach in order for them to remain concurrently legitimate, if not necessarily coexistent, within the U.S. judicial system.⁷ These differences are perhaps never as obvious and problematic as when U.S. courts make legal decisions based in large part on the expert opinion of Islamic legal scholars.

This note argues that the inherently pluralistic nature of Islamic law makes it impossible for U.S. courts to legitimately rely upon the expert opinion of Islamic legal scholars in the same way that expert legal opinion has traditionally been applied in legal proceedings. Generally speaking, the purpose of admitting expert testimony in U.S. courts is to explain and to illuminate for the trier of fact certain theoretically immutable or “true” facts which the fact finder would otherwise fail to comprehend due to a lack of expertise.⁸ This premise does not fit when weighing issues of Islamic law. Islamic law has, since its inception, been a pluralistic field insofar as multiple, differing interpretations of a single legal issue can concurrently be “true,” depending upon the myriad lenses and approaches available for properly engaging with the subject.⁹ However, a U.S. court’s need to concretely establish certain questions of fact and law in order to adjudicate a controversy arising under either U.S. or Islamic law will necessarily mean that one or another Islamic legal expert’s opinion will carry the day.¹⁰ This is problematic because the result of the trial can be either a decision lacking the familiarity and consistency of a traditional U.S. common law legal proceeding, or one which is not a nuanced or legitimate encapsulation of Islamic law (or sometimes both). In either circumstance, U.S. judges are making bad jurisprudence on the basis of benign ignorance. By analogy, one can imagine how woefully inadequate it would be for a foreign court to make a definitive ruling as to what federal law says about an issue on the basis of a single decision by a court in one jurisdiction without acknowledging that a contrary decision from another jurisdiction can also be authoritative.

Accordingly, U.S. courts would do better to treat expert Islamic legal opinion as a mere supplemental aid to the trier of fact, rather than as a firm basis on which to ground legal decisions. U.S. courts should then ultimately decide controversies on the basis of what the fact finder deems to be a just outcome, as colored by their familiarity with the framework of U.S. policy, precedent, and principles. Striving toward a “just outcome” is, after all, essentially what finders of fact are charged with doing in U.S. courtrooms every day.¹¹

7. Petition for Writ of Certiorari at 82, *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 546 U.S. 936 (2005) (No. 05-155).

8. See JACK V. MATSON, SUHA F. DAOU & JEFFREY G. SOPER, *EFFECTIVE EXPERT WITNESSING* 7-8 (4th ed. 2004) [hereinafter *EXPERT WITNESSING*].

9. See *infra* Part II.B.

10. See *infra* Part III.

11. See *infra* note 152.

Part II of this note will first discuss the use of and rationales for admitting expert legal testimony in trials. This Part will then offer a broad illustration of the major historical and functional tenets of Islamic law, underscoring some of the intransigent differences between it and the U.S. common law legal system. Part III of this note will then explore in detail why it is problematic for U.S. courts to attempt to utilize expert Islamic legal testimony in the same way that other expert testimony is traditionally applied in trials. Specifically, this note will analyze three different cases from three different fields of law decided by U.S. courts that illustrate this problem: *United States v. Hayat*,¹² which deals with criminal prosecutions; *Freeman v. Department of Highway Safety & Motor Vehicles*,¹³ which deals with the free exercise of religion; and *Saudi Basic Industries Corp. v. Mobil Yangbu Petrochemical Co.*,¹⁴ which deals with tort law. This note contends that, in each of these cases, decisive expert testimony relating to some facet of Islamic law was improperly applied or precluded. Finally, Part IV of this note will offer a solution to this issue, suggesting that U.S. courts refrain from attempting to make any hard legal or factual determinations of Islamic law based on Islamic legal expert testimony, and instead use such Islamic testimony as a supplemental aid for coming to just outcomes in controversies on the basis of U.S. policies, precedent, and principles.

II. HISTORY

A. The Admission of Expert Testimony in U.S. Trial Practice

Expert testimony has become a ubiquitous component of U.S. civil and criminal trials.¹⁵ An expert witness is very basically understood as “a person who, by reasons of education or special training, possesses knowledge of a particular subject that may be beyond the understanding of the average person.”¹⁶ Unlike lay witness testimony that must be proffered by someone who actually perceived the evidence spoken of, expert witness testimony is premised on reasoned opinion, and the expert need not have actually perceived any of the direct evidence at issue at trial.¹⁷ Experts are also permitted great latitude in what they may testify to, including, in many circumstances, opinions as to ultimate issues to be decided by the trier of fact.¹⁸

Trial judges have the discretion to determine whether someone is qualified as an expert witness and permitted to offer testimony on a case-by-case basis.¹⁹ At the

12. No. 2:05-cr-240-GEB, 2007 U.S. Dist. LEXIS 40157 (E.D. Cal. May 17, 2007).

13. 924 So. 2d 48 (Fla. Dist. Ct. App. 2006).

14. No. 00C-07-161-JRJ, 2003 Del. Super. LEXIS 294 (Del. Super. Ct. Aug. 26, 2003), *aff'd in part and vacated in part on other grounds*, 362 F.3d 102 (3d. Cir. 2004), *rev'd*, 544 U.S. 280 (2005).

15. See EXPERT WITNESSING, *supra* note 8, at 7.

16. *Id.*

17. See MICHAEL H. GRAHAM, FEDERAL RULES OF EVIDENCE IN A NUTSHELL 309 (6th ed. 2003).

18. FED. R. EVID. 704.

19. See, e.g., GRAHAM, *supra* note 17, at 319–31 (discussing Federal Rule of Evidence 702 and its interpretation by the Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)).

federal level, the formal rules of evidence are found in the Federal Rules of Evidence (FRE), which were adopted by Congress in 1975.²⁰ Expert testimony is dictated by FRE 702, which reads, in its entirety, as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.²¹

Commentators have noted that “[t]he use of expert testimony enables the jury to draw the *proper* inferences from the facts introduced at trial.”²² In other words, only “proper” or factually sound evidence should be admitted under the FRE. In practice, this becomes a question of “reliability” to be answered by the trial judge.²³ In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the U.S. Supreme Court articulated what has become known as the “gatekeeping” duty of trial judges to prevent the admission of unreliable expert testimony.²⁴ The immense discretion of trial judges with regard to the admissibility of evidence was reinforced by the Court six years later in *Kuhmo Tire Co. v. Carmichael*, in which it noted that “[t]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”²⁵ Trial judges even have the power to appoint their own expert witness.²⁶ Finally, trial judges’ discretion is afforded substantial deference by reviewing appellate courts.²⁷

It is also important to remember that a trial will rarely, if ever, include the testimony of only one expert witness; the testimony of one expert witness is logically best refuted by an adverse party via countervailing testimony from another expert witness.²⁸ This means that, in addition to the reliability requirements of FRE 702 and its accompanying case law, the veracity of an expert’s testimony will be tested

20. EXPERT WITNESSING, *supra* note 8, at 5. Although the FRE are not technically binding on state courts, the rules adopted by many states closely mirror the language of the FRE. Cornell University Law School, Legal Information Institute, *Federal Rules of Evidence*, <http://www.law.cornell.edu/rules/fre/> (last visited October 28, 2010). Thus, although two of the cases discussed in this note were heard in state courts, for the sake of simplicity and general background, this section only discusses expert testimony in the context of the FRE.

21. FED. R. EVID. 702.

22. GLEN WEISSENER & JAMES J. DUANE, WEISSENER’S FEDERAL EVIDENCE § 702.3 (6th ed. 2009) (emphasis added).

23. GRAHAM, *supra* note 17, at 319, 331–32.

24. *Daubert*, 509 U.S. at 597.

25. *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

26. FED. R. EVID. 706.

27. *See Kuhmo*, 526 U.S. at 152.

28. *See* EXPERT WITNESSING, *supra* note 8, at 7–8; *see also* the cases discussed *infra* Part III.

against that of another expert in their field. Thus, the trier of fact, whether a jury or a judge, will ultimately decide that one or another expert opinion is more authoritative, or at least more “correct,” than the other. Although expert witnesses should be constrained by their oaths to tell the truth and the ethical obligations of their respective professions, the U.S. adversarial system necessarily encourages some degree of partisanship.²⁹ Consequently, a judge or jury will make determinations of fact that decide a case based upon which of the experts’ dueling perspectives most compellingly sells an idea of truth.

B. *The Basic Principles of Islamic Law*

Islamic law, no different from the common law, is a complex mechanism, with a centuries-long history of evolution and application.³⁰ What follows is a brief summary of the field. The bedrock of Islamic law is the *Qur’an*,³¹ the primary source of the direct teachings of God’s law, or *Shari’a*.³² The *Qur’an*, however, is not in itself an exhaustive source of legal rules, and so while any explicit command or teaching found within it is traditionally considered binding law, it is but the top source in a hierarchy of sources in Islamic law.³³ Second in the source hierarchy is the *Sunna*, or the teachings and practices of the Prophet Muhammad, which, through the declaration in the *Qur’an* to “obey God and his Prophet,” stands as the most authoritative source of interpretation and extrapolation of the *Qur’an*.³⁴ Together, the *Qur’an* and the *Sunna* are considered the divine texts of Islamic law.³⁵ The third source is *Ijma*, or consensus, which refers to the shared opinion of Islamic scholars from the Muslim community on a given legal issue.³⁶ Finally, the fourth source is *Qiyas*, or analogy, which permits an individual scholar to use analytical reasoning to deduce a legal rule from all of the guidance provided by the *Qur’an*, *Sunna*, and *Ijma*.³⁷

Only a *mufti* (in the plural *mufteen*), a very learned scholar-jurist of the above sources, is qualified to issue legal opinions about controversies or general questions of law.³⁸ The *mufteen* are not entirely unlike U.S. law professors who write law review articles in the hope of influencing the progression of the law, except that the opinions

29. See EXPERT WITNESSING, *supra* note 8, at 96–97.

30. See generally Sadiq Reza, *Torture and Islamic Law*, 8 CHI. J. INT’L L. 21, 22 (2007) (noting the fourteenth-century history of Islam).

31. See N.J. COULSON, A HISTORY OF ISLAMIC LAW 55–56 (1964).

32. Reza, *supra* note 30, at 26.

33. See COULSON, *supra* note 31, at 55–60.

34. *Id.* at 55–57.

35. Reza, *supra* note 30, at 25.

36. COULSON, *supra* note 31, at 59.

37. See *id.* at 59–60.

38. See KNUT S. VIKØR, BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW 7 (2005).

of the *mufteen* are the primary rather than secondary source of Islamic law.³⁹ The exacting process by which a *mufti* ascertains the law on a particular issue is called *ijtihad*, the “derivation of legal rules through study, research and analysis.”⁴⁰ It is the *mufti* who does the real intellectual heavy lifting in terms of deciding what Islamic law says about an issue, although the *mufti* himself is separate from the court and may lack any particular knowledge about the litigants.⁴¹ Parties to a dispute appear before a *qadi* (in the plural *qada*), the judge in courts of Islamic law,⁴² whose role in formulating binding decisions is minimal. While the *qada* marshal the proceedings of the courtroom and ultimately render decisions, they do not necessarily consult the four sources of Islamic law in order to issue legal judgments; rather, once again, this task is left to the *mufti*. In fact, *mufteen* may, from time to time, issue legal opinions without having been prompted to do so in response to a specific controversy. Thus, the *qada* direct the finding of facts and issue decisions that are binding on litigants, while the *mufteen* remotely synthesize general fact patterns with their special knowledge of the sources to make determinations of law that might or might not be applied to a specific controversy.⁴³

Most importantly, unlike in our own U.S. common law system where judges establish binding precedent, the legal decisions made by the *qada*, pursuant to the expert scholarly opinion of a *mufti*, have no binding precedential value for future cases and are no more authoritative than any other decision.⁴⁴ Thus, as long as the *ijtihad* process is properly derived from the sources of law, any *mufti*'s legal opinion becomes part of the corpus of Islamic jurisprudence.⁴⁵ Islamic law presumes that no human, save the Prophet Muhammad, can know God's law with certainty; therefore, no single scholarly opinion on a legal issue is more authoritative than another.⁴⁶ As Professor Sadiq Reza explains:

[B]ecause every jurist's opinion is by definition a product of human agency, each opinion is considered both (1) a probable rather than a conclusive articulation of the Shari'ah and (2) no more authoritative than the opinions of other jurists, *no matter how much these views might differ from each other*.⁴⁷

39. *See id.*

40. Saudi Basic Indus. Corp. v. Mobil Yangbu Petrochemical Co., No. 00c-07-161-JRJ, 2003 Del. Super. LEXIS 294, at *12 (Del. Super. Ct. Aug. 26, 2003) (quoting expert testimony of Herbert S. Wolfson).

41. *See* VIKØR, *supra* note 38, at 7–8.

42. Reza, *supra* note 30, at 25.

43. *See generally id.* at 25–26 (describing the division of labor between the *mufti* and *qadi*).

44. *Id.* at 26.

45. *See* Reza, *supra* note 30, at 26.

46. *Id.*

47. *Id.* (emphasis added).

Indeed, this pluralistic view of Islamic law is widely acknowledged by contemporary scholars,⁴⁸ and is also reinforced by the existence of seven distinct “schools” of Islamic law between *Sunni* and *Shi’i* Islam, the two dominant but, again, distinct sects of Islam.⁴⁹ Irrespective of debates between these schools and sects, no one scholar or school can claim more authority than any other. As Knut S. Vikør has also explained:

There is no such thing as *a*, that is *one*, Islamic law, a text that clearly and unequivocally establishes all the rules of a Muslim’s behaviour. There is a great divergence of views, not just between opposing currents, but also between individual scholars within the legal currents, of exactly what rules belong to the Islamic law. The jurists have had to learn to live with this disagreement on and variety . . . in the contents of the law.⁵⁰

This principle is especially important for understanding Islamic law, which is the inspiration for the legal systems of many nations,⁵¹ including Iran⁵² and Sudan,⁵³ and remains the sole formal source of law in Saudi Arabia.⁵⁴

One illustration of the difference between the use of expert testimony in U.S. law and the use of a *mufti*’s legal opinion in an Islamic legal setting is a murder trial in which the defendant proffers the mitigating circumstance of mental disease or defect.⁵⁵ In the U.S. legal system, each side will introduce expert witnesses at trial who will compete for credibility as to whether the defendant did or did not have a mental disease or defect.⁵⁶ Although reasonable minds may disagree as to whether or not the defendant was or was not sane, in order for the jury to make a decision or the court to issue a sentence, one or the other expert’s opinion must be discounted as untrue, or at least as less true.⁵⁷ Furthermore, those experts will be testifying only as

48. See, e.g., *id.*; see also WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNĪ USŪL AL-FIQH 1 (1997) (“In its developed form, Islamic legal theory came to recognize a variety of sources and methods from and through which the law might be derived.” However, “sources” in this context should not be understood as something different from the hierarchy spoken of previously, but rather as different schools and scholars.); VIKØR, *supra* note 38, at v (“Both a rule and its exact opposite can simultaneously be said to be ‘what the Sharī’a says’ and what God asks of the believer.”); Saudi Basic Indus. Corp. v. Mobil Yangbu Petrochemical Co., 866 A.2d 1, 33 (Del. 2005) (quoting testimony of Dr. Frank E. Vogel that there is “no single binding definition of usurpation” in Islamic law (internal quotation marks omitted)).

49. Reza, *supra* note 30, at 26.

50. VIKØR, *supra* note 38, at 1. Indeed, the same principle could be said to be a universal tenet of all human spirituality, not just Islam.

51. See *id.* at 254.

52. See *id.* at 269.

53. See *id.* at 273.

54. *Id.* at 264.

55. See, e.g., MODEL PENAL CODE § 210.6(4)(g) (1962).

56. See *supra* Part II.A.

57. See generally WEISSENBERGER & DUANE, *supra* note 22 (noting that expert testimony allows juries to make “proper” inferences about key issues).

to issues of fact (e.g., whether or not the defendant is clinically sane), whereas the judge is responsible for establishing for the jury issues of law (e.g., the legal definition of sanity).⁵⁸ Unlike expert witnesses in a U.S. legal proceeding, the *mufteen* provide the *qada* with determinations of what the applicable law is, and may additionally apply that law to a factual issue at hand.⁵⁹ Thus, in Islamic law, a *qadi* never has to choose one *mufti*'s opinion over that of another in order to dispose of a case; multiple *mufteen* do not compete in the same case over an Islamic legal principle because, as long as the process of *ijtihad* is properly undertaken, no *mufti*'s opinion can be considered more or less true than that of another *mufti*.⁶⁰

Finally, despite the differing characteristics of Islamic and U.S. legal systems, they are really quite similar in function. For instance, that two *mufteen* can provide two *qada* with diametrically opposed opinions about the same controversy is no different than the fact that two U.S. judges sitting in the same courthouse might come to opposite conclusions about a single legal issue. Similarly, a U.S. appellate court reviewing a trial court's decision might have before it a spectrum of legitimate precedent from which to choose when crafting a new decision.⁶¹ Thus, the U.S. adversarial system, in which multiple expert witnesses might vie for perceived preeminence within their field, does not lend itself well to the pluralism inherent in the structure of Islamic law; perhaps as a result, the U.S. legal system has thus far failed to synthesize the two systems effectively.

III. THE PROBLEM ILLUSTRATED: A CASE LAW ANALYSIS

The inherent pluralism of Islamic law makes it impossible to say that one reasoned interpretation of the law is somehow more authoritative or "just" than another interpretation.⁶² When the fact finder in a U.S. legal proceeding chooses between the interpretations of two or more Islamic legal experts, it is, in essence, saying that other experts' interpretations are, at least so far as the facts at issue are concerned, not true.⁶³ This is a problematic aspect of incorporating Islamic law into the U.S. legal system because, unlike the scientific, forensic, technical, or mechanical fields of many other expert witnesses found in U.S. law, Islamic law is not derived from

58. See, e.g., *United States v. Long*, 562 F.3d 325, 334 (5th Cir. 2009) (noting that in the context of severe mental disease or defect, "courts, not mental health experts, define the meaning of 'severe,' and . . . the jury (ordinarily) decides whether the evidence adduced to satisfy that legal definition is clear and convincing").

59. See Reza, *supra* note 30, at 25–26.

60. See *id.* at 26.

61. See William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 250 (1976) (discussing the availability of multiple lower court opinions when an appellate court reviews a decision); see also *United States v. Larson*, 495 F.3d 1094, 1100–02 (9th Cir. 2007) (demonstrating a circuit court's reasoning and decision making when resolving intra-circuit precedential conflicts).

62. See *supra* Part II.B.

63. See WEISSENBERGER & DUANE, *supra* note 22; see also GRAHAM, *supra* note 17 (stating admissibility of expert testimony is to be determined based on assistance to trier of fact).

empirical fact, but rather is a vital component of the legal, governmental, and religious aspects of life for more than one billion people.⁶⁴ The negative ramifications for the overall U.S. legal system are twofold: first, decisions are being made by courts that have little or no experience with the nuanced workings of Islamic law, rather than on the basis of familiar domestic policy, precedent, and procedures; and second, these decisions send an erroneous message that there are objectively more and less authoritative interpretations of an inherently pluralistic legal system. The end result is the same: bad law. The following is an analysis of three cases in which U.S. courts have, despite the best intentions and efforts of the judges presiding over them, illustrated why Islamic law cannot not be dealt with in the same manner as other fields of expertise.

A. *United States v. Hayat*

The Eastern District of California case *United States v. Hayat* exemplifies how misguided reliance by U.S. courts on Islamic legal experts' divergent cultural understandings is creating bad law.⁶⁵ By excluding the potentially exculpatory testimony of one expert and relying entirely on the damning testimony of another expert, the *Hayat* court created a tension with Islamic law where the real issue was about regional social practices.

In the wake of 9/11, the United States has pursued much more aggressive prosecutorial policies to prevent future attacks against civilians.⁶⁶ This approach has necessarily entailed prosecuting individuals on the basis of what they or their support may someday accomplish, rather than for what has already been done.⁶⁷ The increasing use since 9/11 of laws like the federal statute governing material support for terrorism⁶⁸ has come to be known by some as the government's doctrine of "preemptive prosecution."⁶⁹ Legal scholars have strongly criticized such laws as a form of strict

64. Silvia Aloisi, *Muslims More Numerous than Catholics: Vatican*, REUTERS UK, Mar. 30, 2008, available at <http://uk.reuters.com/article/idUKL3068682420080330> (noting that the Muslim population is "generally estimated at around 1.3 billion").

65. No. 2:05-cr-240-GEB, 2007 U.S. Dist. LEXIS 40157 (E.D. Cal. May 17, 2007).

66. Waldman, *supra* note 1, at 83.

67. *See id.*; see also Hina Shamsi, *Let's Reassess Material Support*, HUFFINGTON POST, Oct. 23, 2007, http://www.huffingtonpost.com/hina-shamsi/lets-reassess-material-su_b_69587.html (arguing that material support prosecutions seek to punish more than affirmatively illegal conduct and encourage "guilt by association"). *But see* Juan C. Zarate, *Supreme Court's Hard Line on Supporting Terrorists Is the Right Line*, CHRISTIAN SCI. MONITOR, July 16, 2010, <http://www.csmonitor.com/Commentary/Opinion/2010/0716/Supreme-Court-s-hard-line-on-supporting-terrorists-is-the-right-line> (arguing that "[t]he law does not prohibit individuals from independently advocating a terrorist group's cause nor does it ban mere association or membership in [a foreign terrorist organization]," and that the law is necessary for preventing actual terrorism).

68. 18 U.S.C. § 2339A (2006).

69. Waldman, *supra* note 1, at 83.

liability thought crime.⁷⁰ Oftentimes, expert testimony about a defendant's specific intent is the most important factor in a material support prosecution.⁷¹ The power of expert witnesses is considerable in this context because, rather than mere civil liability, the consequences of a criminal prosecution hang in the balance.

The stakes are particularly high in a case like *Hayat*, where an issue as seemingly simple as the proper meaning of a message scrawled on a piece of paper can be the difference between freedom and a life spent in prison. In 2005, a twenty-two-year-old man of Pakistani decent from Lodi, California, named Hamid Hayat was charged with providing material support to terrorists in violation of 18 U.S.C. § 2339A, the material support statute.⁷² During an hours-long interrogation by the Federal Bureau of Investigation (FBI), Hayat confessed to having attended a terrorist training camp in Pakistan during a recent visit, and confessed that he returned to the United States to wage *jihad*.⁷³ However, other than his videotaped confession, the government had little in the way of direct evidence linking Hayat to a terrorist organization.⁷⁴ The most important piece of evidence in Hayat's prosecution was a scrap of paper found in his wallet on which a single line of Arabic was written.⁷⁵ The interpretation of this single piece of paper became very important because the material support statute requires a showing of intent.⁷⁶ The prosecution sought to establish Hayat's intent through the use of an expert Islamic scholar who would testify to the meaning of the paper's message.⁷⁷ According to the prosecution's theory of the case, what the message meant would allow the fact finder to infer Hayat's personal intent.⁷⁸ In other words, Hayat stood to be convicted on the basis of an expert opinion about his implied opinion. Thus, the exact meaning of a single line of Arabic on that piece of paper would come to be not only the most important part of the ultimately successful

70. See, e.g., David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 723–25 (2009); Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization*, 56 BAYLOR L. REV. 861, 862 (2004).

71. See, e.g., discussion *infra* notes 72–87.

72. Waldman, *supra* note 1, at 82; United States v. Hayat, No. 05-cr-240-GEB, 2007 U.S. Dist. LEXIS 40157, at *2 (E.D. Cal. May 17, 2007).

73. Waldman, *supra* note 1, at 82. Although the word “*jihad*” has no single, universal meaning, in this context it is generally understood as “an armed conflict between the Muslim society and a non-Muslim enemy.” VIKØR, *supra* note 38, at 36 n.15.

74. See Abigail Cutler, *Islam on Trial?: The Author of “Prophetic Justice” Discusses the Murky Business of Prosecuting Would-Be Terrorists on the Basis of Their Beliefs*, ATLANTIC MONTHLY, Sept. 12, 2006, <http://www.theatlantic.com/doc/200609u/waldman-interview>.

75. *Id.* The other more ancillary evidence used against Hayat consisted “of a taped conversation between Hayat and an FBI informant who had posed as an extremist, [some] literature . . . [written] by a powerful Pakistani militant, [and] a scrapbook of clippings praising the Taliban and sectarian violence.” *Id.*

76. 18 U.S.C. § 2339B (2006) (stating that the law applies only to one who “*knowingly* provides material support or resources to a foreign terrorist organization” (emphasis added)).

77. See United States v. Hayat, No. 2:05-cr-240-GEB, 2007 U.S. Dist. LEXIS 40157, at *51–52 (E.D. Cal. May 17, 2007).

78. See *id.* at 34–35.

conviction of Hayat, but also an illustration of how misconceptions about Muslim people and culture can lead to courts focusing on the wrong type of expert opinion.

The prosecution's witness, Dr. Khaleel Mohammed—a Saudi-trained scholar from San Diego State University—first offered to the court a translation of the line as, “Lord, let us be at their throats, and we ask you to give us refuge from their evil.”⁷⁹ The argument by the prosecution was that this was a “jihadist note” that constituted “probative evidence” of Hayat’s “requisite jihadist intent.”⁸⁰ After protests from defense counsel, the court allowed into evidence the following translation of the text: “Oh Allah, we place you at their throats, and we seek refuge in you from their evil.”⁸¹ Following his conviction in 2006 on the material support charge and three counts of making false statements to FBI officials, Hayat filed a motion for a new trial under Federal Rule of Criminal Procedure 33, which allows a criminal judgment to be vacated “if the interest of justice so requires.”⁸² Most important among Hayat’s various arguments for a new trial was that the trial court’s preclusion of Professor Anita Weiss from testifying for the defense about the paper resulted in the opinion testimony of one of the prosecution’s experts being “essentially left rebutted.”⁸³ Professor Weiss, an expert in Pakistani culture and religious practices, would have testified as to her belief that Hayat’s piece of paper was a *tawiz*, a sort of good luck charm commonly carried by travelers and other Muslims in Pakistan to ward off evil; instead, she was limited to testifying about what a *tawiz* is in general.⁸⁴ The district court’s response to this argument erroneously focused on only one type of expert testimony. The court first reiterated the principle of expert testimony that a trial court “has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony.”⁸⁵ The court then affirmed the previously sustained foundation objection that precluded Professor Weiss’s testimony on the ground that, because the line on the paper was written in Arabic, which Weiss did not speak, she was unqualified to say definitively whether or not the piece of paper was in fact a *tawiz*.⁸⁶ Ultimately, the court concluded that, because Hayat’s inability to proffer

79. Waldman, *supra* note 1, at 83, 89.

80. *Id.* at 83.

81. *Id.*

82. *Hayat*, 2007 U.S. Dist. LEXIS 40157, at *2. Under Rule 33, “[u]pon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.” FED. R. CRIM. P. 33(a). This has been interpreted to mean that a new trial can be granted “[i]f the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderated sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred.” *Hayat*, 2007 U.S. Dist. LEXIS 40157, at *2 (quoting *United States v. Alston*, 974 F.2d 1206, 1211–12 (9th Cir. 1992)).

83. *Hayat*, 2007 U.S. Dist. LEXIS 40157, at *56–57.

84. *Id.* at *57; Waldman, *supra* note 1, at 90.

85. *Hayat*, 2007 U.S. Dist. LEXIS 40157, at *55 (quoting *Hamling v. United States*, 418 U.S. 87, 108 (1974)).

86. *Id.* at *57–58.

Professor Weiss's testimony that his piece of paper was a *tawiz* "was not of decisive value," it was not an error to have excluded it from the trial.⁸⁷

By excluding Professor Weiss's more specific expert testimony on the basis of her inability to speak Arabic, the *Hayat* court failed to realize what would have been the most pertinent expert testimony in the case. The court's finding that Professor Weiss's testimony would not have been of decisive value is questionable in light of the very different story about the piece of paper that the prosecution was permitted to tell. Prosecution witness Dr. Mohammed testified that the paper's message was anything but a peaceful traveler's charm, but rather was for use "when one is engaged in war, a holy war, fighting for God, against an enemy that is perceived to be evil."⁸⁸ Dr. Mohammed's explanation of the paper's message may well have been one legitimate scholarly opinion about the text's Arabic translation, but it is noteworthy that no fewer than five other experts in Islamic studies and Pakistani culture have identified the same line of text as being a well-known supplication of travelers asking for protection from God against those who might harm them.⁸⁹ However, no expert testified as to this meaning in Hayat's trial, something some defense lawyers have attributed to a "reluctance on the part of many Muslims to testify for the defense in terrorism cases for fear of opposing the government when they already feel vulnerable."⁹⁰ Thus, the Arabic-to-English translation of the *tawiz* should only have been one part of the analysis; the more important issue was why Hayat carried a *tawiz* at all, and that is the issue Professor Weiss would have testified about. By comparison, someone who wanted to understand why U.S. teenagers wear Che Guevara t-shirts would not turn to an expert on the history of socialism, but rather would seek out an expert on U.S. teenage pop culture or cultural anthropology.⁹¹

The *Hayat* court's unfamiliarity with Islam and Muslim culture led it to treat a single line of Arabic as objective proof of terrorist intent rather than making a more detailed analysis of Hayat's reasons for carrying the message. Accordingly, the *Hayat* case raises questions as to whether the traditional understanding of expert witness testimony in U.S. criminal trials can be routinely applied to interpretive questions of Islam while still ensuring a fair criminal trial. It is not unreasonable to expect a broader and more comprehensive inquiry into the meaning of an Islamic text when that text is a major component of what is essentially a prosecution for having a potentially, but not assuredly, dangerous political proclivity.

87. *Id.* at *56.

88. *See* Waldman, *supra* note 1, at 89.

89. *Id.* at 89–91.

90. Cutler, *supra* note 74.

91. In fact, one version of the iconic Che Guevara t-shirt depicting the revolutionary's image features the line "I don't actually know who this is," underscoring how there can be a huge difference between an object's objective meaning and the reasons why an individual identifies with that object—the t-shirt satirizes the many people who might wear Che Guevara's face for pop culture's sake without having any real understanding of what he stood for. *See* TEET SHIRTS, http://www.teetshirts.com/che-guevara-parody/prod_284.html (last visited Jan. 18, 2011).

B. Freeman v. Department of Highway Safety & Motor Vehicles

Another example of why the meeting of expert testimony and Islamic law in U.S. courts can be problematic is found in the 2006 Florida District Court of Appeal case *Freeman v. Department of Highway Safety & Motor Vehicles*.⁹² Sultanna Lakiana Myke Freeman applied for her driver's license in Winter Park, Florida in February 2001.⁹³ In accordance with her interpretation of the *Qur'an* and *Sunna*, Freeman regularly veiled her face.⁹⁴ Although Freeman had been permitted to wear her veil for her previous Illinois State driver's license photograph,⁹⁵ Florida law mandates that the Department of Motor Vehicles shall issue driver's licenses "bearing a fullface photograph or digital image of the licensee."⁹⁶ By virtue of "mistake," Freeman was permitted to wear her veil in her Florida driver's license photo; however, following the events of 9/11 seven months later, she was sent a letter informing her that she was to present herself for a photograph taken without her veil or have her license cancelled.⁹⁷

Freeman challenged the order to have her photograph retaken in a state court bench trial, asserting that the Department's demand violated Florida's Religious Freedom Restoration Act of 1998 (FRFRA).⁹⁸ Florida passed the FRFRA in response to the U.S. Supreme Court case *Employment Division, Department of Human Resources of Oregon v. Smith*,⁹⁹ which held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest."¹⁰⁰ In essence, the FRFRA codified a compelling interest test into state law.¹⁰¹ Accordingly, if Freeman could show at trial that the Department's photographing requirement constituted a substantial burden on the free exercise of her religion, then the state would have to demonstrate a compelling governmental

92. 924 So. 2d 48 (Fla. Dist. Ct. App. 2006).

93. *Id.* at 51. It is worth noting that the court made explicit reference to the fact that Freeman was an adult convert to Islam, perhaps evidencing the court's desire to minimize the validity of her faith and lawsuit.
Id.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 51–52.

98. *Id.* at 50. The pertinent language of FRFRA provides that:

The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (a) Is in furtherance of a compelling governmental interest; and (b) Is the least restrictive means of furthering that compelling governmental interest.

Id. at 53 (quoting FLA. STAT. § 761.03 (2003)).

99. 494 U.S. 872 (1990).

100. *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) (summarizing the holding of *Smith*, 494 U.S. 872).

101. *See Freeman*, 924 So. 2d at 53.

interest in requiring that her photograph show her full face. Once this has been established, the state would then need to demonstrate that the law was the least restrictive means of furthering that interest.¹⁰² FRFRA defines “exercise of religion” as “an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.”¹⁰³ More importantly, as the appellate court in this case noted, a “substantial burden” is defined as “one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires.”¹⁰⁴

Both sides presented Islamic legal experts as witnesses.¹⁰⁵ Freeman presented, and the trial court qualified as an expert witness, Professor Saif Ul-Islam, a professor at the University of Central Florida who was also a local Imam.¹⁰⁶ He testified that “Muslim women must veil themselves and that numerous passages in the *Qur’an* and the *Sunnah* refer to the veiling of Muslim women and require[] a Muslim woman to veil.”¹⁰⁷ This was consistent with Freeman’s own contention that Islam forbids photographs of the human face and animals.¹⁰⁸ The Department presented, and the trial court qualified as an expert witness, Dr. Khaled Abou El Fadl, a widely published, U.S.-educated law professor who holds a Ph.D. and a Masters degree in Islamic law.¹⁰⁹ He testified that “in Islamic countries there are exceptions to the practice of veiling. Consistent with Islamic law, women are required to unveil for medical needs and for certain photo ID cards,”¹¹⁰ and that “the only qualification is that the taking of the photograph accommodate Freeman’s beliefs,” which would be done by the Department’s existing offer to use a female photographer with no other person present.¹¹¹

Ultimately, the trial court found in favor of the Department, and on appeal the Fifth District Court of Appeal of Florida affirmed that decision.¹¹² Essentially, the appellate court adopted, as a matter of fact, the expert opinion of Dr. El Fadl without making any further comment on the efficacy of Professor Ul-Islam’s contrary

102. *Id.*

103. *Id.* at 54 (quoting FLA. STAT. § 761.02(3) (2003)).

104. *See id.* at 55–56 (quoting *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1032 (Fla. 2004)).

105. *Id.* at 52.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 56–57. Dr. El Fadl received his J.D. from the University of Pennsylvania. *Faculty Biography of Khaled Abou El Fadl*, UCLA L. SCH., <http://www.law.ucla.edu/home/index.asp?page=386> (last visited Jan. 18, 2011).

110. *Freeman*, 924 So. 2d at 56.

111. *Id.*

112. *Id.* at 50–51.

opinion.¹¹³ The appellate court noted that Freeman had indeed established that her wearing of the veil was “a practice motivated by a sincere religious belief,”¹¹⁴ and that the FRFRA “clearly prohibits a reviewing court from conducting a factual inquiry which questions the validity or centrality of a plaintiff’s beliefs.”¹¹⁵ Thus, Freeman had effectively established the free exercise of religion element of her claim. However, in an extremely brief and one-sided fashion, the appellate court found that Florida’s license statute did not constitute a “substantial burden” on Freeman’s right of free exercise.¹¹⁶ The appellate court ruled that Freeman’s practice was “merely inconvenienced” by the photograph requirement, for which it cited only to Dr. El Fadl’s opinion that there are exceptions in Islamic countries to the practice of veiling.¹¹⁷ The court offered no explanation as to why Dr. El Fadl’s expert opinion was taken to be more reliable than that of Professor Ul-Islam. Professor Ul-Islam’s expert opinion was based upon the same two primary sources of Islamic law that Dr. El Fadl’s or any other’s opinion would be: the *Qur’an* and the *Sunna*.¹¹⁸

But what is most perplexing and problematic about *Freeman* is that, under the framework delineated by Florida’s FRFRA, the court could have upheld the state’s photographing requirement without finding as a matter of fact that Islam “does not forbid all photographs.”¹¹⁹ The FRFRA permits the State of Florida to “substantially burden” a person’s free exercise of religion if the reason for doing so is a compelling governmental interest and the burden is the least restrictive means of advancing that interest.¹²⁰ Thus, the court could instead have found that the photographing requirement was indeed a substantial burden on Freeman’s right of free exercise, as supported by her assertion and by Professor Ul-Islam’s expert testimony, but that, in light of the state’s compelling interest in, for example, being able to identify the state’s vast population of drivers, having a single photograph taken by a female photographer is the least restrictive means of furthering that interest. Despite the popular saying that strict scrutiny is “strict in theory, but fatal in fact,” even the Supreme Court has noted that that saying is not particularly accurate and that compelling government interests can fulfill the least restrictive means criterion.¹²¹ Moving to that prong of FRFRA would also have meant that the case was decided

113. *See id.* at 56.

114. *Id.* (quoting *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1032 (Fla. 2004)).

115. *Id.* (quoting *Warner*, 887 So. 2d at 1032).

116. *Id.* at 57.

117. *Id.*

118. *Id.* at 52. Arguably—and this is assuredly debatable—according to the source hierarchy, an expert opinion premised on interpretation of the *Qur’an* and *Sunna*, like that of Dr. Ul-Islam, should trump an expert opinion based solely on the custom and practice of Islamic countries, like that of Dr. El Fadl. *See supra* Part II.B.

119. *Freeman*, 924 So. 2d at 57.

120. *Id.* at 53.

121. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003).

on the basis of Florida's well-established strict scrutiny precedent, and not on the legitimate, though necessarily non-authoritative, opinion of a single Islamic legal scholar. By doing so, Florida could have retained its photographing requirement while avoiding telling Freeman, effectively, that her sincerely held belief that she must never be photographed unveiled is, as a matter of fact, erroneous.

C. Saudi Basic Industry Corp. v. Mobil Yangbu Petrochemical Co.

The 2003 Delaware Superior Court and 2005 Delaware Supreme Court decisions in *Saudi Basic Industry Corp. v. Mobil Yangbu Petrochemical Co.* are perhaps the clearest examples of how U.S. courts' misguided reliance on Islamic legal experts to adjudicate issues involving Islamic law is creating bad law.¹²² This controversy began when Saudi Basic Industries Corporation (SABIC), a Saudi Arabian company, brought an action in the Superior Court of Delaware seeking a declaratory judgment that any payments made to it by Mobil Yanbu Petroleum Co. ("Mobil") and Exxon Chemical Arabia, Inc. ("Exxon"), joint Saudi defendants in the action, were not overcharges in violation of the parties' contract.¹²³ Mobil and Exxon made a tort and breach of contract counterclaim, asserting that SABIC had, for more than twenty years, secretly overcharged the defendants for technology SABIC had licensed from a third-party corporation.¹²⁴ The defendants' tort counterclaim was *ghasb*, the Saudi Arabian tort of usurpation. Because SABIC elected to file its initial claim in a Delaware state court rather than in Saudi Arabia, the state court undertook to adjudicate the *ghasb* claim in the manner of a Saudi judge.¹²⁵ At the conclusion of a two-week jury trial, the jury found in favor of the defendants on both counterclaims and ordered SABIC to pay them more than \$400 million in compensatory damages.¹²⁶

SABIC first filed a motion for judgment as a matter of law and, in the alternative, for a new trial on the defendants' *ghasb* claims.¹²⁷ SABIC's argument was that "the *ghasb* verdict in favor of ExxonMobil is deficient as a matter of law because the Court did not properly instruct the jury on the elements of *ghasb* . . . under Saudi law."¹²⁸ Long before the actual trial, the court undertook to determine the elements of a *ghasb* claim by allowing the expert testimony of both parties.¹²⁹ SABIC proffered

122. See *Saudi Basic Indus. Corp. v. Mobil Yangbu Petrochemical Co. (SABIC I)*, No. 00C-07-161-JRJ, 2003 Del. Super. LEXIS 294 (Del. Super. Ct. Aug. 26, 2003) *aff'd in part and vacated in part on other grounds*, 362 F.3d 102 (3d. Cir. 2004), *rev'd*, 544 U.S. 280 (2005); *Saudi Basic Indus. Corp. v. Mobil Yangbu Petrochemical Co. (SABIC II)*, 866 A.2d 1 (Del. 2005).

123. *SABIC II*, 866 A.2d at 6. It is not clear why exactly SABIC elected to bring suit in Delaware rather than in Saudi Arabia; however, presumably it made the strategic move thinking it would fare better in a U.S. court.

124. *Id.*

125. *SABIC I*, 2003 Del. Super. LEXIS 294, at *1-2.

126. *SABIC II*, 866 A.2d at 6.

127. *SABIC I*, 2003 Del. Super. LEXIS 294, at *1.

128. *Id.* at *3.

129. *Id.* at *5.

the expert opinion of the highly esteemed Islamic legal expert Dr. Frank E. Vogel, while Exxon and Mobil proffered the expert opinion of the equally esteemed Dr. Wael B. Hallaq.¹³⁰ Unsurprisingly, however, the court quickly found that it was unable to reconcile the differing opinions of the parties' experts.¹³¹ Under the authority of Delaware Uniform Rule of Evidence 706, the court appointed its own independent expert, Mr. Herbert Wolfson.¹³² After months of research, the court eventually held a hearing at which all three experts testified and were subject to cross examination.¹³³ The elements of *ghasb* that were eventually decided upon by the trial court and instructed to the jury were: "(a) the exercise of ownership or possessory rights, (b) over the property of another, (c) without consent, (d) wrongfully."¹³⁴ SABIC, however, disagreed with the court's definition of "without consent" and also argued that a necessary element of force was missing from the jury instruction.¹³⁵ In support of its post-trial motion for judgment as a matter of law, Dr. Vogel submitted another affidavit to the court arguing these two points and asserting that the trial court simply got the Saudi law wrong.¹³⁶ Even more fundamental, however, SABIC also argued, with support from the opinion of Dr. Vogel, that it was impossible for a U.S. court and U.S. judge to undertake the process of *ijtihad*, which is explicitly what the trial court claimed to have done in deciding upon the elements of *ghasb*.¹³⁷ In Dr. Vogel's own words, "*ijtihad* requires for its credibility qualifications which, on the very face of things, neither Prof. Hallaq, myself, or, with respect, any [U.S.] court possesses."¹³⁸

130. *Id.* at *7, *9. Dr. Vogel is an independent scholar, legal consultant, frequent expert witness, and recently retired Harvard Law School professor who is highly esteemed for his expertise in Islamic law and other legal systems of the Muslim world, with a particular emphasis on finance and other contemporary applications. See *Frank E. Vogel—Home*, FRANK E. VOGEL, <http://frankevogel.net/home.html> (last visited Nov. 3, 2010). Dr. Hallaq is a scholar of Islamic law and Islamic intellectual history. See *Middle Eastern, South Asian, and African Studies*, COLUMBIA UNIVERSITY, <http://www.columbia.edu/cu/mesaas/faculty/directory/hallaq.html> (last visited Nov. 3, 2010). He is currently working as the Avalon Foundation Professor in the Humanities at Columbia University, with his expertise largely dealing with "the intellectual history of Orientalism and the repercussions of Orientalist paradigms in later scholarship and in Islamic legal studies as a whole." See *id.*

131. See *SABIC I*, 2003 Del. Super. LEXIS 294, at *10 ("It was . . . clear before the Saudi law experts took the stand that all three differed on the proper elements of a *ghasb* claim.").

132. *Id.* at *5–6. Delaware Uniform Rule of Evidence 706 very closely mirrors that of Federal Rule of Evidence 706. Compare DEL. UNIF. R. EVID. 706, with FED. R. EVID. 706. Herbert Wolfson is an experienced legal practitioner in many Middle Eastern countries, including Abu Dhabi, Dubai, and Saudi Arabia. See *Professional Listing, Herbert S. Wolfson—Philadelphia, PA*, MEDLAWPLUS.COM, <http://www.medlawplus.com/professionals/Legal/966439014449788.tpl> (last visited Jan. 27, 2011). His work is mainly concentrated in commercial law, labor and employment dispute resolutions, shareholder agreements, and limited liability companies. *Id.*

133. *SABIC I*, 2003 Del. Super. LEXIS 294, at *6.

134. *Id.* at *4.

135. *Id.* at *5.

136. *Id.* at *7–8.

137. *Id.* at *14–15.

138. *Id.* at *15.

Indeed, the implicit provocative question posed by Dr. Vogel in the *SABIC* cases is whether, irrespective of the number or quality of expert witnesses involved, U.S. courts should be in the business of adjudicating Islamic legal claims at all.

The Delaware Superior Court and, subsequently, the Delaware Supreme Court both acknowledged that a U.S. trial judge attempting to undertake *ijtihad* and adjudicate an Islamic legal claim as if a Saudi judge would face substantial challenges; however, both courts ultimately found that it was possible and entirely appropriate for a trial judge to do so. The superior court began by acknowledging the intellectual challenge involved, noting that “ascertaining the proper elements of the tort of *ghasb* under Saudi law was an extremely challenging and drawn out process,”¹³⁹ especially given the fact that “all three [Saudi law experts] differed on the proper elements of a *ghasb* claim.”¹⁴⁰ The trial court also demonstrated a firm general understanding of Islamic law’s inherent pluralism, taking note of Mr. Wolfson’s opinion that *ijtihad* “may lead to different scholars reaching different results at different times, even on similar questions. Such different results are viewed as acceptable so long as the proper analytical procedures are followed in reaching the results.”¹⁴¹ Accordingly, the trial court rigorously defended its handling of the *ghasb* claim: “The Court employed the *ijtihad* process as best it could under the circumstances and properly ‘navigated within the boundaries of the Hanbali school.’”¹⁴² Finally, the trial court took Dr. Vogel himself to task, noting that “[e]ach time he opined on the subject, [his] definition on *ghasb* seemed to change.” Further, the court stated that it “[was] concerned about Dr. Vogel’s objectivity,”¹⁴³ and ultimately concluded by asking, “[i]f Dr. Vogel is correct in that neither he nor Dr. Hallaq possess the qualifications to engage in the *ijtihad* process, then *what* Saudi law ‘expert’ would be able to assist this United States Court in determining the applicable Saudi law?”¹⁴⁴

On appeal, the Delaware Supreme Court likewise demonstrated a fairly nuanced understanding of Islamic law’s pluralism, noting that “Saudi judges identify a ‘spectrum of possibilities on any given question, rather than a single correct answer.’”¹⁴⁵ The supreme court even acknowledged the proverbial elephant in the courtroom:

[T]he division of labor between judges and juries does not readily lend itself to the *ijtihad* methodology that Saudi Arabian jurists are required to employ. . . .

139. *Id.* at *11.

140. *Id.* at *10.

141. *Id.* at *13.

142. *Id.* at *14 (quoting Transcript of Saudi Law Hearing Morning Session at 127, *SABIC I*, No. 00C-07-161-JRJ, 2003 Del. Super. LEXIS 294 (Del. Super. Ct. Aug. 26, 2003), *aff’d in part and vacated in part on other grounds*, 362 F.3d 102 (3d. Cir. 2004), *rev’d*, 544 U.S. 280 (2005)).

143. *Id.* at *14–15.

144. *Id.* at *16.

145. *SABIC II*, 866 A.2d at 31 (internal quotation marks omitted).

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. . . . Unlike the division of labor inherent in an American jury trial, the Saudi jurist's application of *ijtihad*, and its resulting remedial decision, would not neatly divide between determinations of law and fact.¹⁴⁶

However, the adversarial tradition of expert testimony in U.S. courts was again the justification for the trial court's handling of the *ghasb* elements controversy: "[T]he trial judge had no alternative but to decide which expert's testimony to accept or reject. The trial court determined to accept the opinion testimony of Professor Hallaq and Mr. Wolfson, and to reject that of Dr. Vogel."¹⁴⁷ Additionally, the court spoke of the trial judge's legal rulings being "correct," which further emphasized the incompatibility of the black and white, adversarial U.S. system of expert witnesses with the comparatively harmonious multiplicity of Islamic legal interpretation.¹⁴⁸ In short, despite its astute recognition of the differences between U.S. and Islamic law, the Delaware Supreme Court was destined to fall prey to the same inherent limitations of the U.S. system's ability to accommodate true Islamic law that the trial court did, especially in light of the great deference trial courts are afforded in questions of expert testimony.¹⁴⁹

Undoubtedly, the entire *SABIC* saga was wrought with complications, not the least of which was *SABIC*'s own apparent miscalculated venue strategy. As the trial court noted:

It is remarkable that *SABIC*, having purposely selected this forum instead of a Saudi Court, knowing the United States legal system is dramatically different than the Saudi legal system, comes forward after a verdict against it to claim that *no* American Judge is qualified to interpret and apply Saudi law.¹⁵⁰

The Delaware Supreme Court likewise underscored the consequences of *SABIC* electing to adjudicate its claims within the structurally and philosophically different U.S. legal system: "Having chosen an American forum whose adjudicatory processes *SABIC* knew were different from those of Saudi Arabia, *SABIC* cannot fault the trial court for having followed those procedures."¹⁵¹ Furthermore, the unorthodox way in which *SABIC* submitted the new affidavit from Dr. Vogel post-trial, which only then asserted that U.S. judges cannot legitimately undertake *ijtihad*, certainly did not clarify for the trial court what had already been a complex and several-months-long problem. The fundamental issue remained: a U.S. court's recognition that the legitimacy of a *qadi*'s decision rests not upon *stare decisis*, but upon the *qadi* having followed the proper analytical procedures in reaching a result, does not change

146. *Id.* at 36.

147. *Id.* at 33.

148. *See id.*

149. *See supra* Part II.A–B.

150. *SABIC I*, No. 00C-07-161-JRJ, 2003 Del. Super. LEXIS 294, at *16–17 (Del. Super. Ct. Aug. 26, 2003), *aff'd in part and vacated in part on other grounds*, 362 F.3d 102 (3d. Cir. 2004), *rev'd*, 544 U.S. 280 (2005).

151. *SABIC II*, 866 A.2d at 37.

the fact that U.S. judges are, by simple reality, unqualified to replicate that process.¹⁵² Indeed, this was Dr. Vogel's ultimate contention.¹⁵³ The inability of a U.S. court to adjudicate a case in the same way that a Saudi Islamic judge would adjudicate it is even clearer and more counterproductive to cross-cultural and political relations when that court openly admits to having attempted to perform *ijtihad*. Still, the Delaware courts cannot be said to have done anything wrong, per se, as the solution to the issues raised in these and the preceding cases may well require direction from outside of the courtroom.

IV. A PROPOSED SOLUTION

Because Islamic law is inherently pluralistic, juries should be instructed, and judges sitting as finders of fact should consider, that the expert opinions of Islamic legal scholars are equally valid and authoritative and that it is their job as the finder of fact to decide what the just outcome of a controversy is, but not to decide an issue of Islamic law. Despite the open-endedness of the idea of a "just outcome," this idea is not altogether foreign to U.S. law and finders of fact. For example, while wrestling with the equally ambiguous challenge of ascertaining what constitutes insanity for purposes of criminal liability, Judge Bazelon of the District of Columbia Circuit Court of Appeals suggested the following jury instruction:

Our instruction to the jury should provide that a defendant is not responsible if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot *justly* be held responsible for his act. . . .

The purpose of this proposed instruction is to focus the jury's attention on the legal and *moral* aspects of criminal responsibility, and to make clear why the determination of responsibility is entrusted to the jury *and not the expert witnesses*.¹⁵⁴

When deciding a question of fact or law that hinges upon Islamic law, U.S. law might similarly instruct juries or direct judges that they are neither capable of nor expected to replicate the *ijtihad* process, but rather that they are permitted by the facts of the case before them to rely in part on the testimony of expert *A* instead of expert *B* in coming to a just or moral resolution of the case. Determining what exactly is "just" or "moral" would call upon judges and juries to draw from their own experiences and understanding of U.S. policy, precedent, and principles, precisely as they would in any other case involving only domestic law.¹⁵⁵ Such an analysis would

152. *Id.* at 30–31.

153. *Id.* at 32.

154. *United States v. Brawner*, 471 F.2d 969, 1032 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part) (emphasis added).

155. *See, e.g.*, BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113 (1921) ("If you ask how [a judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection . . .").

be analogous to the broad equitable discretion that many of our nation's family courts already explicitly enjoy; a degree of discretion that should be enjoyed by courts hearing all types of controversies implicating Islamic law.¹⁵⁶ Thus, judges and juries would essentially decide cases in the same way they always have, except they would never be expected to ostensibly ground their decision on the basis of Islamic law.

In practice, this change of approach likely would not have changed the outcome of the three cases analyzed herein. The *Hayat* court could have utilized the existing "miscarriage of justice" language from Federal Rule of Criminal Procedure 33(a) to grant a new trial in which more testimony about the alternate meanings of the *tawiz* would be allowed, or, even better, in which the *tawiz* would not be the primary basis for convicting Hayat of material support of terrorism.¹⁵⁷ Similarly, the *Freeman* court could have elected to uphold the Department's photographing requirement on the basis that it served a compelling state interest and was narrowly tailored to advancing that interest, rather than making the sweeping and dubious pronouncement that Islam does not require Freeman to wear her veil while being photographed.¹⁵⁸ This would have been a just resolution of the issue that avoided direct engagement in the practice of Islamic law. Finally, the *SABIC* case poses a more difficult question: whether U.S. courts should be trying Islamic legal claims at all. Perhaps the answer gleaned from that case is no, and the Delaware trial court instead should have entertained only a claim more analogous to fraud under U.S. law rather than the Saudi tort of *ghashb*.¹⁵⁹ Or, if the *ghashb* claim was still litigated, the trial court should have abstained from ruling on the elements of the tort as a matter of law, and instead should have instructed the jury to weigh the competing expert testimony along with the facts and decide who justly should win without explicit reference to Saudi law. While the courts in these cases may well have come to a "just" final outcome, the processes by which they did so were not as intellectually sound, nor representative of Islamic law, as they could have been. The solution proposed above would have avoided the ambiguity and inaccuracy that plagued these trials while preserving the courts' fundamental justice-ensuring function.

156. See, e.g., Rajni K. Sekhri, Note, *Aleem v. Aleem: A Divorce From the Proper Comity Standard—Lowering the Bar That Courts Must Reach to Deny Recognizing Foreign Judgments*, 68 MD. L. REV. 662, 678 (2009) (criticizing a Maryland Court of Appeals decision that refused to grant comity to a Pakistani Muslim divorce because "the court could have reached the same result under the State's jurisdictional authority to equitably divide marital property upon divorce").

157. See FED. R. CRIM. P. 33(a) ("Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.").

158. See *supra* note 98.

159. Under Delaware law, the elements of common law fraud consist of:

- (1) defendant's false representation, usually of fact, (2) made either with knowledge or belief or with ruthless indifference to its falsity, (3) with an intent to induce the plaintiff to act or refrain from acting, (4) the plaintiff's action or inaction resulted from a reasonable reliance on the representation, and (5) reliance damaged the defendant.

Browne v. Robb, 583 A.2d 949, 955 (Del. 1990) (citations omitted).

V. CONCLUSION

The United States stands to grow more multicultural and diverse. This is assuredly a good thing, but it also means that our legal system needs to be flexible and culturally sensitive. This is not to suggest, however, that our sense of law, order, and justice needs to be abandoned. Rather, our courts need to retain their ultimate duty of ensuring justice without mischaracterizing and misrepresenting Islamic law. As illustrated previously, the purpose of expert testimony in the U.S. adversarial system is to illuminate, for judges and juries, the truth about a complex issue in dispute.¹⁶⁰ This premise is at odds with the inherent pluralism of Islamic law, in which the opinion of one scholar cannot accurately be viewed as any more authoritative or potentially just than that of any other scholar.¹⁶¹ The result of this dichotomy, as illustrated by the *Hayat*, *Freeman*, and *SABIC* cases, are court decisions that put U.S. judges and juries in roles they are ill-equipped to fulfill, and which are inaccurate portrayals of how Islamic law functions.¹⁶² Thus, U.S. courts would do better to treat the testimony of Islamic legal experts as supplemental background information for judges and juries to use when attempting to arrive at a just outcome, thereby retaining the familiar guiding role of U.S. policies, precedent, and principles, while avoiding making erroneous and unqualified determinations of Islamic law. This will protect both the justice-ensuring role of our judicial system and signal our nuanced understanding of a multicultural and dynamic legal world.

160. *See supra* Part II.A.

161. *See supra* Part II.B.

162. *See supra* Part III.