

GETTING REAL ABOUT ISLAMIC FINANCE

GETTING REAL ABOUT ISLAMIC FINANCE

Dr Larry Beeferman

*Director Pensions and Capital Stewardship Project
Labor and Worklife Program, Harvard Law School,
Harvard University*

Dr Allan Wain

*LWP Fellow
Harvard Law School
Harvard University*

*Head of Research and Strategy
CP2*

ABOUT THE CO-AUTHORS



Dr. Larry Beeferman is the Director of the Pensions & Capital Stewardship Project at Harvard Law School's Labor and Worklife Program. The Project addresses key legal, policy, and other practical issues relating to strengthening and extending retirement security for more households and practices, institutions, and systems of pension fund governance, management, and investment that encourage capital markets and corporate policies to work more effectively for workers and the health and well-being of the larger community.

The Project's publications have included ones concerning pension fund investment in infrastructure, the tools for and practice of taking into account social factor risks in investment decision-making, labor and private equity, worker voice and the union role in the management of pension fund assets, the Dodd-Frank financial markets reform legislation, and proposals for automatic enrolment in retirement plans. A publication on rethinking fiduciary duty is part of a collection of essays published by Cambridge University Press.

Larry W. Beeferman received a juris doctorate from Harvard Law School and a doctorate in applied physics from Harvard University. Prior to leading the Project, he was a professor of law at the Massachusetts School of Law and Western New England School of Law, headed up the Asset Development Institute at Brandeis University's Heller School for Social Policy and Management, and served as Associate Counsel to the Massachusetts Special Commission Concerning State and County Buildings.



Dr. Allan Wain is Head of Research and Strategy at CP2 and a LWP Fellow at Harvard Law School.

Prior to joining CP2 in April 2015, Allan was Head of Strategic Development at Hastings. Previously Allan was an economics and strategy adviser to the Office of the President and Cabinet in the Middle East, Managing Director of an infrastructure investment and development company, and Chief Economist at BHP Petroleum.

Allan's research interests include the meaning, relevance, and application of infrastructure to pension funds and to society, incorporating how infrastructure is informed by and is informing of societal values, employment opportunities, government policy, and market behaviour. He has written several essays investigating the social, environmental, and investment value of infrastructure to a transitional economy and is the co-author of *The Valuation of Benefits of Hydrologic Information* (Melbourne University Press).

Allan has studied at the University of Melbourne, Stanford University, Harvard University, and Imperial College (University of London) and has a Master of Business and PhD degrees, together with postdoctoral, postgraduate, and undergraduate qualifications in economics, finance, and engineering.

TABLE OF CONTENTS

INTRODUCTION	1
PART I: THE INTEREST IN INVESTMENT IN “REAL” ASSETS, INFRASTRUCTURE AMONG THEM	3
PART II: CONCERNS ABOUT “FINANCIALIZATION,” THE “REAL ECONOMY” (AND, PERHAPS, “REAL ASSETS”)	6
PART III: CONCERNS AND OBJECTIVES WHICH INFORM ISLAMIC FINANCE AND THE RELEVANCE TO THEM OF NOTIONS OF THE “REAL,” FOR EXAMPLE, “REAL ASSETS” AND THE “REAL ECONOMY”	14
Generic references to the “real”	15
Somewhat more specific recitations of the need for a sufficient enough – direct or indirect - connection of “finance” to the “real economy”	16
Yet more specific arguments about the need for links to the “real”	17
Contracts, the “real”, and the Islamic narrative	34
Ways of “seeing” “objects” in and the legitimacy of transactions: the case of salam	42
PART IV: TAKING STOCK	48
PART V: OPPORTUNITIES AND CHALLENGES FOR INVESTORS	51
A. OPPORTUNITIES	51
The import or significance of the interest in “real assets”	53
The import or significance of the concern about “financialization”	56
B. CHALLENGES	57
What Islamic Finance “is”	58
What are the sources of what Islamic finance is or should be?	58
The legitimacy and authority of pronouncements of institutions and individuals with respect what “Islamic finance” is and what it requires	60
Pressures for standardization/uniformity in the face of the diversity of thought and practice in Islamic finance	61
C. EXPERIENCE WITH <i>SUKUK</i> AS ILLUSTRATIVE OF THE CHALLENGES	63
Concerns about Shariah compliance: “asset-based” as compared to “asset-backed” sukuk and the relevance of “tangibility”/tangible objects.	65
Issues of Shariah compliance framed in terms of a requirement of “ownership”	66
Rationales offered in relevant literature for the “ownership” rule as it relates to ijarah sukuk	67
The relation of an “ownership” rule for the financial lease ijarah/ijarah sukuk to the requirements for the operating lease ijarah	73

The “ownership”/“real asset” rule in relation to requirements for the “silent partnership”/mudarabah and loans.....	76
Some operating lease ijarah rules reconsidered.....	78
An ongoing vs. a “one-off” relationship?	78
Successive transfers of “objects”?	79
Why a contract for sale?	79
Some final thoughts	82
D. RETURNING TO THE MATTER OF MONEY	84
PART VI: RESPONDING TO THE CHALLENGES AND TAKING UP THE OPPORTUNITIES	95
APPENDIX A	98
The “Veil of Money” and the “Veil of Maya”	98
APPENDIX B	99
The Islamic Narrative: Textual and Other Sources	99
APPENDIX C	102
Trade and Exchange in the Islamic Narrative	102

INTRODUCTION

This essay is most immediately about reliance on and the relationship among three discourses framed with reference to that which is deemed or thought to be “real”. One involves arguments within the context of pension-fund decision-making as to the potential importance of investment in “real assets,” among them, infrastructure as a real asset. Another pertains to debates about the role of “finance” in an economy, especially at the extreme insofar as it entails what some have referred to as “financialization” specifically as it is cast in terms of a problematic relationship between the sphere of finance and that of the “real economy.” A third involves discussion about investment decision-making undertaken with a conscious reference to settling upon them in light of an understanding of what Islam requires, permits, or bars – an exercise which falls under the broader rubric of “Islamic finance” – more particularly, the significance of “real assets” to that understanding.

For the most part, the paper is focused on the third topic, the meaning and import of making investments offered within the context of Islamic finance. That meaning and import necessarily varies with the vantage point of those persons or organizations contemplating investments of that sort. They depend upon whether the person considering investment in some way embraces Islam; if so, how he or she accepts it, that is, how it shapes his view of the world and his or her place in it, and what it expects, encourages, or requires of him or her in diverse ways (including making of investments); if not, in what respects, how thinking (and acting) in such terms might, nonetheless be relevant, useful, and perhaps even potentially important. Our discussion is grounded in the latter vantage point though it necessarily entails an alertness to and appreciation of the other.

Most specifically, this paper is concerned with pension funds as investors, the interest that they may have in infrastructure-related enterprises, and whether and how the opportunity for and terms of investments in such enterprises have been or might be, in relevant ways, defined with reference to Islamic finance. In a number of respects, pension funds’ concern may be articulated in terms of conventional and important considerations of financial risk and reward. However, insofar as the concern might have a direct or indirect normative dimension, the fact that, on its face and ostensibly by definition, Islamic finance is intertwined with normative priorities and commitments, it calls for special attention. By direct and indirect we refer, respectively, to investment decisions which include normative criteria for their own sake, and to others which accept conformity with it based on the belief that it has no material effect either on financial outcomes or if it does, the effect is a positive one. Investment in the latter terms often falls under the rubric of being “responsible” or “socially responsible.”

This essay is organized in the following way:

First, we focus on what on its face might be seen as most directly connecting with pension investor goals and needs, that is, the putative character of “real assets” in general and infrastructure-related investments, in particular. The aim is to determine what substance there is to characterizations of the meaning of that phrase and then to look beyond them to assess the concerns which inform or drive the making of such characterizations.

Second, we then turn to an exploration of discourse relating to “finance,” most recently within the context of what has been called “financialization” – a term which has been employed by some in connection with explaining the origins of the recent global financial crisis (GFC) in the world economy – but which more generally highlights a long-running and complex debate as to the relationship between the financial sector and what is termed the “real economy”. That debate has been carried on largely within the frame of Western thought; however, it has, perhaps, given

special impetus for reflection and analysis on the part of those persons who see finance informed by the Islamic narrative as a better alternative to what that thought (and concomitant practice) has produced.

Third, we consider Islamic finance as such but largely only as it concerns the role and significance of the “real” (in certain senses) in determining or influencing how transactions might proceed and on what terms. We write “in certain senses” because the largely contemporary term “real assets” does not capture or reflect notions as to the real as they seem to have played out in the history of Islamic finance. The section is composed of several parts. Initially, we illustrate from selections from a range of essays about Islamic finance on one hand, the prominence of one or another reference to the “real” (in the sense with which we are concerned here); on the other, the use of such references with little or no explication of the meaning of the reference or explanation as to what justifies their prominence. Next, we explore a range of more in-depth characterizations of Islamic finance by others to gain insight into whether and how notions of the “real” come into play. These characterizations are informed by different approaches: one which is largely grounded in primary Islamic texts, and then others which, though they might rely in some measure on the literal language of passages from those texts, are more concerned with normative and instrumental considerations which they as being in some measure linked to those texts. Then, because it is evident from that analysis that those notions are bound up with how parts of the Islamic narrative have been reflected in Islamic contract and property law, we canvas certain aspects of these subjects. In turn, in light of having done so we offer some ideas about the link between the need to “see” and the manner of “seeing” “objects” transactions and the legitimacy of those transactions in Islamic terms. Finally, to illustrate the point, we make a modest case study of *salam* contracts.

The fourth section “takes stock” of what has come before in that we both reprise and in some measure flesh out the key elements of the preceding sections. The thrust of the argument is on one hand to acknowledge or recognize the seeming need for transactions to have a sufficiently “object”-ive character to warrant legitimacy derived from the Islamic narrative while on the other to contend that in many ways that need is largely a surface phenomenon, that is, there are other concerns – normative and instrumental – which give it force and effect.

The fifth section has two parts. First, we explore how contemporary opportunities for and challenges to pension funds considering investments framed in terms of Islamic finance are shaped, among other things, by a diversity of thought and practice, the roles of relevant institutions, and the play of diverse interests. Second, with regard to the contemporary context, we describe the emergence over the past 15 years or so of a cluster of modes of finance ostensibly in accord with Islamic requirements – cast under the rubric *sukuk* – and review and assess certain contentious arguments about such compliance framed in terms of “ownership” but linked to notions of the “real”. Our aim in doing so is not to offer a definitive assessment as to how Shari`ah requirements in such terms might be met – an endeavor which would demand an effort which would extend beyond the reach of this paper – but rather to offer some insights into considerations which may come into play in reaching a conclusion in that respect. In the course of the analysis, we explore the relation of arguments in support of other kinds of investment to those relating to *sukuk*. Because those arguments are, in a number of respects, bound up with the understanding of the nature and role of money, especially in connection with notions of a/the “real economy” we attend to them as well.

We conclude with brief comments and thoughts on taking up the opportunities and meeting the challenges posed by Islamic finance.

PART I: THE INTEREST IN INVESTMENT IN “REAL” ASSETS, INFRASTRUCTURE AMONG THEM

Many pension funds, those persons or organizations who manage assets on their behalf, and investment consultants speak not only of “real assets” but also on occasion of a “real assets” “class”.

However, the definitions of “real assets” they proffer are all over the map, so much so that there seems to be little shared understanding of what they are thought to be. References made in that context have been to commodities, commodity linked investments, real estate (generally), commercial real estate, real estate investment trusts (REITs), farmland, energy, commodities, renewable resources, oil and gas, natural resources, forestland, timber properties, precious metals, gold, royalty trusts, infrastructure, listed infrastructure, inflation-indexed bonds, inflation-linked derivatives, TIPS, and even intellectual property. There are as well generic references to “long life operating assets” and investment strategies whose values are sensitive to inflation.

Some of the brief narratives about real assets in this context go beyond the simple identification of categories or types, but rather focus on the characteristics which bear upon what is deemed to be a real asset.

In certain ways, the most evocative remark in this connection was made by a columnist at a pension and investment trade journal. After offering some thoughts as to a definition, he added: “it’s obvious that all the value in this world resides in real things being used to make real things.”¹ The reference seems most immediately to be concerned with material/tangible things which are sought to meet human needs and wants and then to the material/tangible means by which what is sought is made and provided. The definition seems to be provided based on a recognition or acknowledgement that whatever the relevance, importance, or significance of finance or investment, it is secondary in the sense that it must be understood or assessed in terms of how it ultimately translates into ways of meeting of such needs.²

A good number of the attempts at a definition focus on this materiality/tangibility aspect. That is, they speak of real assets as being

- “usually physical”³
- “‘hard’ or ‘tangible’ assets and provide ownership of stored value”⁴
- “characterized typically by investments in tangible ‘hard’ assets”⁵
- “backed by a hard asset”⁶
- “assets that have physical form”⁷
- “ultimately backed by a tangible, physical asset”⁸
- “anything you can hold, touch or smell”⁹
- “tied to hard assets”¹⁰
- “‘hard’ or ‘tangible’ assets and provid[ing] ownership of stored value”¹¹

or involving

- “tangible underlying assets and [a]...connection to the food and resource-scarcity theme.”¹²
- “tangible assets”¹³

or

- “hav[ing] physical form”¹⁴

As noted, though, the first quoted definition is not only concerned with materiality as such but also with the presence in people's lives in the sense of that which is important to them which often, though hardly always, has a material or tangible character.

Many efforts at the definition place emphasis on that aspect, with a stress on production (for consumption). That is, they state that real assets

- “serve as the foundation for the delivery of goods and services that are necessary to support the global economy”¹⁵
- “are ‘hard’ or ‘tangible’ assets and provide ownership of stored value.”¹⁶
- “[u]sed to produce goods and services: Property, plants and equipment, human capital, etc.”¹⁷
- “used to produce goods and services...Examples: factories, land, human capital, etc.”¹⁸
- “directly create or add to the consumption opportunities available to people.”¹⁹
- are economic resources that directly generate consumption”²⁰
- “constitute our capital wealth—buildings, stocks of commodities, goods in course of manufacture and of transport, and so forth.”²¹
- are “more basically, the inputs to the production of real goods”²²
- “constitute our capital wealth—buildings, stocks of commodities, goods in course of manufacture and of transport, and so forth.”²³

However, the first-quoted passage also focuses on “value,” largely in the sense that people place a value, indeed often a high value, on satisfaction of the cited needs or wants – of *value in use*, as distinguished from value in other senses, for example, *financial value*.

Thus, some of the endeavors at definition assert that real assets

- have “intrinsic value”²⁴
- “hav[e] intrinsic value with the ability to be exchange for other goods or services of value.”²⁵
- “represent investments in items that have intrinsic value because they are consumable or used in production...These types of investments have intrinsic value and are usually physical...”²⁶

We would suggest that all of these aspects of the definitions seek to distinguish – even sharply so – between how they describe real assets from how they characterize other kinds of assets (of a “financial” nature) which might have some direct or indirect bearing upon whether and how the noted needs or wants are satisfied.

Several of the forays into definition evidence this distinction. They say that real assets are

- “physical asset[s] whose substance has value, as opposed to...financial asset[s],... [which involve] contractual claim[s]...on underlying asset[s]”²⁷
- “good[s] that [are] independent from variations in the value of money”²⁸
- assets which “ha[ve] a claim to an underlying physical or tangible asset” as contrasted with “financial assets whose value is derived from a contractual claim.”²⁹

It may, perhaps, be evident from the foregoing that the definitional exercise is a tricky one. The cited narratives in this particular context are informed by concerns which in most circumstances are exclusively financial in nature. So they make an effort to link or relate financial attributes of investments in “real assets” to what are arguably the defining characteristics of those assets on

the assumption that, in turn, the various investments will have distinguishing features. Such an effort is, broadly speaking, no different in kind from others which seek to relate the financial characteristics of investments in other kinds of enterprises based on the ostensibly distinctive character of those enterprises. In many respects that distinctiveness might be associated with the good and/or service and/or the literal process by which an enterprise produces it. However, insofar as the objective is to identify financial outcomes from investment in that enterprise, discussion about the good and/or service and the process is inevitably bound up with economic and, in turn, financial considerations as they bear on that enterprise.

Here, then, it would seem that with respect to a “real asset” there is a sense that the product and/or service – and perhaps the process for producing it – is dramatically different from that associated with other kinds of enterprises. The – what one might term – “intuitions” operating here are ones which somewhat ironically seek to distance the asset from the very financial relationships which are the ultimate focus of the effort. That is, (a) the emphasis is on that which is “physical” or “tangible” in nature as contrasted with that which is not, that is, something which has an intangible, perhaps (human) relational character and (b) the stress is on intrinsic value/value in use as distinguished from value in financial terms. There may also be a sense that “assets” of that sort may be much more likely to be thought of as relatively more important in and of themselves perhaps by virtue of their being likely to pose more issues as a scarce resource. Any such intuition may be implicitly linked with financial considerations insofar as goods or services which are more important as such or by virtue of being scarce might implicate a financial calculus different from others. Moreover, in certain respects, they seem relatively far removed from the kinds of enterprises with which their use might be associated and from the relationships, financial and otherwise, which underpin them. So in these respects, they seem at a distance from “financial assets”. At the same time, it would appear that these very qualities or characteristics – especially their scarcity and importance – are associated with attractive financial attributes which, in turn, warrant investment.

The prominence of real estate (at least in the sense of land) and commodities (at least in the sense of natural resources) seems apt in this regard. They are found, not made. They are physical/tangible in nature. They have uses in themselves which are important if not essential and may be so as well in connection with processes for the production of goods and/or services which are important if not essential. Their importance or essentiality is enhanced insofar as they are non-renewable or non-recyclable or not easily so within relatively short time frames.

At first blush, given the discussion above, the inclusion of infrastructure as a “real asset” seems odd, but on reflection, it may be less so. First, there is a societal imperative to ensure access to sufficient provision of infrastructure-related goods and services on terms or under conditions which pose minimal obstacles to doing so. There is, also, a similar imperative to ensure the existence of enterprises which are capable of providing the goods or services which meet those needs and which actually operate to provide them in a timely and reliable way. Third, infrastructure-related enterprises are often envisioned as (a) being established or created as the result of marshalling of a large amount of materials (and other) resources; (and typically great in relation to the resources required to operate) (b) individual facilities, structures, etc. of large scale in physical terms; and/or (c) networks of individual facilities, structures, etc. which are large scale in physical terms and require/extend over a large land area. In turn, these attributes along with certain other distinctive characteristics arising from infrastructure serve as a basis for the financial characteristics of investments in infrastructure being similar to those of other “real assets” and different from other kinds of assets.³⁰

PART II: CONCERNS ABOUT “FINANCIALIZATION,” THE “REAL ECONOMY” (AND, PERHAPS, “REAL ASSETS”)

There are other narratives which broadly distinguish between what is referred to as the “real economy” and that which is not – especially with an eye to what is juxtaposed as the ostensible financial dimensions of the economy – and may, in that connection, link the “real economy” (which might be connected to “real assets”, depending upon how they are defined.) Narratives of this sort seem to have gained greater prominence in the wake of the recent global financial crisis (GFC). They often are cast generally – in part or whole – in terms of “financialization” and more specifically are often framed in terms of the problematic or even pathological size, nature, and/or role of financial relationships, institutions, and practices in relation to other aspects of the economy.

There is, however, no agreed upon definition of the term “financialization”; the meanings range widely. For example, Epstein writes of “Greta Krippner’s...excellent discussion of the history of the term and the pros and cons of various definitions...As she summarizes the discussion, some writers use the term ‘financialization’ to mean the ascendancy of ‘shareholder value’ as a mode of corporate governance; some use it to refer to the growing dominance of capital market financial systems over bank-based financial systems; some follow Hilferding’s lead and use the term ‘financialization’ to refer to the increasing political and economic power of a particular class grouping: the rentier class; for some financialization represents the explosion of financial trading with a myriad of new financial instruments; finally, for Krippner herself, the term refers to a ‘pattern of accumulation in which profit making occurs increasingly through financial channels rather than through trade and commodity production’...”³¹ Epstein himself “cast[s] the net widely and define[s] financialization quite broadly:...financialization means the increasing role of financial motives, financial markets, financial actors and financial institutions in the operation of the domestic and international economies.”³²

Stockhammer offers an overlapping characterization: “Financialization is the term used to summarize a broad set of changes in the relation between the ‘financial’ and ‘real’ sector which give greater weight than heretofore to financial actors or motives. The term has been used to encompass phenomena as diverse as shareholder value orientation, increasing household debt, changes in attitudes of individuals, increasing incomes from financial activities, increasing frequency of financial crises, and increasing international capital mobility.”³³

To the above, we add a cautionary note. That diversity and the corresponding lack of a clear, coherent, and compelling explanatory narrative grounded in the term led one critic to refer to it as a “spurious theoretical innovation (neologism),” “a form of theorizing in which a school of thought finds the theory that defines that school is inadequate for understanding events in the world.”³⁴ Somewhat similarly, Christophers first refers to the many versions of what financialization is and points to three “[p]articularly influential [ones]...The first (Arrighi/Krippner’s) is concerned with processes of capital accumulation and profit generation, arguing that financial sources and institutions have increased their share vis-a-vis nonfinancial sources and institutions; capitalism, that is to say, has (been) financialized. The second (a` la Froud et al.) is concerned with the realm of corporate motives and governance, arguing that the growing importance of models such as ‘shareholder value’ reflects an attenuation of business objectives, and all that matters, increasingly, is (financial) value. And the third (a` la Martin) is concerned, more obliquely, with expansion in the sphere of finance’s influence. If capitalism and business enterprise have been financialized, so too, it is said, has daily life and its cultures and identities; credit and debt, as Martin emphasizes, are lived realities.”³⁵ But then Christophers argues that “[d]espite – or perhaps because of – increasingly broadly based scholarly scrutiny, it remains

unclear what financialization 'is' and, relatedly, how it can most productively be conceptualized and analyzed."³⁶

That criticism aside, as the above quoted passages suggest, the financialization narrative is typically cast in part with specific reference to the "real economy" and that which stands in juxtaposition to it.

Some of the characterizations take the form of just broad descriptions by which problems of and failure in the financial sector/economy result in difficulties for the real sector:

- "stress"/"distress" in the financial sector can cause distress in the "real economy"³⁷
- bank exposure to "dangerous risks" in the "financial systems" can result in their collapse with "disastrous consequences for the real economy"³⁸
- if finance – as the "engine of the economy" – "flutters," "real output sputters"³⁹
- failure of "financial institutions" can have "substantial negative economic consequences" for the "real economy"⁴⁰
- increasingly leveraged "financial markets" may grow to "unsustainable heights relative to the real economy" (which ranges from "groceries to shoes to doctors' visits to garbage collection.")⁴¹
- "Financialization" is "a distorted financial arrangement based on the creation of artificial financial wealth, that is, financial wealth disconnected from real wealth or from the production of goods and services."⁴²
- "finance-based capitalism or financialized capitalism" involves in part "the decoupling of the real economy and the financial economy with the wild creation of fictitious financial wealth benefiting capitalist rentiers."⁴³
- Distinguish "real wealth, based on production, from fictitious wealth....and associated with financialization: the artificial increase in the price of assets as a consequence of the increase in leverage."⁴⁴
- "the 'real' economy of goods and services and the 'symbol' economy of money, credit and capital are no longer bound tightly to each other; they are, indeed, moving further and further apart."⁴⁵
- Financialization is a "pattern of accumulation in which profit making occurs increasingly through financial channels rather than through trade and commodity production."⁴⁶
- "Financialization" is "the process by which economic activity shifts from 'real' production of goods and services to ever more complex forms of financial transacting."⁴⁷

On their face, these formulations not only seem to start from a financial-real economy dichotomy but also do not offer much insight as to the actual internal dynamics of each – though especially the former – and the relationship between them. For example, with respect to those largely general statements which focus on the *transmission* of problems in one sphere to the other, what is "stress"/"distress"; what are "dangerous risks" (as compared to other kinds) and why? in what ways is there a "failure"?; what are "flutter[s]" of finance? What occasions the occurrence of each? Is the problem to be remedied by reducing the occasions or modifying the mechanisms for transmission? The same questions apply to the somewhat more specific formulations which emphasize "leverage[]" brought to "unsustainable heights" (at least in relation to the "real economy") or the growth of what is termed "fictitious wealth" (here, associated with high prices engendered by the excessive use of leverage). Other portrayals, by contrast, emphasize *disconnection* or *decoupling* of the sectors/their "no longer [being] bound tightly to each other". But then what connections or coupling would be appropriate ones? Still other descriptions highlight the *relative size* of the sectors, that is profits are achieved more in "financial channels"

than in “real channels” (?) or that economic activities occur more through (complex) “forms of financial transacting” than through “real” production.

The above commentary looks at the relationships largely in instrumental terms. That of other observers grounded in religious understandings has, not surprisingly, had a more normative cast:

- “Pope Benedict echoes the criticism of many religious observers by describing the ‘damaging effects on the real economy of badly managed and largely speculative financial dealing.’”⁴⁸
- “One of the primary criticisms of financialization is that it has ‘legitimized the adoption of strict monetary calculation over the many immaterial and social issues implied in economic choices.’”⁴⁹
- “[E]thical alienation’ result[s] from ‘the abandonment or loss of criteria other than those of efficiency,’ and its contribution to a feeling of helplessness among market participants. Financialization is the culmination of this process that has liberated economics and finance from ‘metaphysical, societal and political control.’”⁵⁰
- Among the “social and ethical effects of financialization” are “1) ‘progressive separation of economic activities from social norms’; 2) ‘loosening of moral values in economic decisions’; and 3) ‘dominance of financial gains over other economic considerations, such as meeting basic human material needs.’”⁵¹
- “Financialization sees wealth creation and maximization as the ends of human activity but for the Catholic social tradition, those ends must be balanced with solidarity where ‘the economy displays solidaristic characteristics because institutions relate the individual to the whole community.’”⁵²
- “If money does not so change hands as to express accurately these value relationships [of physical objects], then the relations themselves are altered rather than expressed by the money sums paid for them. When investment is made with funds that have never been income and, before being income, have never been cost, such a derangement is theoretically inevitable.”⁵³

“This statement [by Bernard Dempsey, a Jesuit priest and Harvard trained economist,] describes a primary objection to financialization by Christian critics – that money is made (or lost) with funds that are not generated income by the investor and where there is no sacrifice to the investor. It is also the necessary starting point in defining the real economy: any system of real economic production must provide that monetary exchange represents participants’ actual values. Complex monetary systems often distort values and whirl out of control in their detachment from real production. Real production involves real risk and contribute[s] toward some vision of the good grounded in institutional and individual values; and real exchange ensures that those values are accurately expressed.”⁵⁴

Dempsey “suggests that the process we have described as financialization – where profit increasingly is based on leverage rather than real assets with quantifiable risks, and where returns come more via a lottery-like system than based on tangible production – prevents the development and perfection of human personality.”⁵⁵

- “An immediate need is the reorientation of finance through development of theology centering on real economic activity – not simply calls for the elimination of injustice but constructive theological dialogue on what the financial economy is for. Financialization is more insidious than government corruption or corporate collusion. Its destructive consequences result from natural patterns of economic development and the rational incentives of participants that go beyond even the most devious intentions of any

government, corporation, or social class. Its reversal cannot be accomplished through government regulation or appeals to corporate responsibility. Fundamental transformation of the investment culture is needed.”⁵⁶

Although the first of the above echoes the preceding more instrumental descriptions several are concerned *with giving less priority to or better balancing narrow modes of economic/financial thinking or objectives with non-economic ones*. For example, they insist on the need to look beyond strict monetary calculation/criteria of efficiency and the related pursuit of (perhaps individual) material gain and to consider social norms/moral values/notions of solidarity. Arguably, though, the last two go further. Particularly striking is the formulation by Dempsey which, as we will see, resonates with the Islamic narrative as it relates to finance. Here, the transactions themselves must be an expression of the values of those who participate in them, values which are intimately bound up with the “real” subject matter of the transaction, that is, that which (if anything) identified with the “real economy” is produced in connection with the transaction and the role the participants play in producing it. McDaniel seems to make a somewhat similar point – though more generally – in his reference to the need for a change in the “investment culture,” to look beyond the prevailing (“destructive”) “natural patterns of economic development and the rational incentives of participants.”⁵⁷

These latter formulations are ones which seem to suggest that despite the seeming dichotomy in rhetorical terms of a “financial” and “real” economy that they are at root bound up with one another so that insofar as “financialization” is a serious problem, it must be addressed with that in mind. There are other analyses – though secularly grounded – which simply do not accept the distinction between financial economies and real economies but rather see them as being constituted in tandem, as coming into being as aspects of the same set of actions.

For example, although her focus is most immediately on the operation of stock markets, Hertz takes note of what she views as an underlying dichotomous moral narrative – one which she rejects – about financial markets. It is one which “opposes what is simultaneously real and good – a sane world of investment in which ‘real’ value is produced through markets’ underlying relation with the productive economy – to what is concomitantly unreal and dangerous – the insane world of speculation.”⁵⁸ In keeping with the religion-related subject matter of our essay, she notes that “[i]ntrinsic to shoring up the boundaries of the ‘real’ or ‘healthy’ economy is the condemnation of the figure of the intermediary. In the Bible, the image of the shady intermediary figures prominently in the parable of the cleansing of the temple, in which Jesus accuses money-changers of having turned God’s house into a ‘den of thieves’ (an image that is, by the way, highly popular among Occupy Wall Streeters).”⁵⁹

To Hertz, “investors” and “speculators” each engage in and are aware that the other applies the same “form of calculation”: “[b]oth...enter the stock market in the pursuit of wealth” and “both must constantly compare the profitability of their choices to that of competing opportunities.”⁶⁰ Moreover, “in practice,...speculation...produces...the [same] effects” as investment, that is, “real gains and losses of wealth.”⁶¹ Further, the association of investment and speculation with the long and short term, respectively, is problematic. To be sure, “[t]he ‘reality’ of the real economy is the reality of long term economic prospects, projections and representations formulated to predict market movements over months and years” identified with the former and “not the minutes and days” associated with the latter.⁶² But “there is nothing realer about a month than a minute.”⁶³

Again, according to Hertz, at the level of production/consumption, speculation is seemingly different from investment. The former moves from “the projection of beliefs” (based on perceptions as to “‘market psychology’”) “to the production of wealth to the consumption of material objects

that this wealth permits.”⁶⁴ By contrast, the latter “seems to run...from concrete human needs to the material goods produced by the ‘real economy’, to the creation of wealth that is the moral consequence of the satisfaction of these needs through goods, to the investment in the future satisfaction of those needs that the stock market facilitates.”⁶⁵ But Hertz sees them as convergent when viewed in light of the social conventions which underpin them both. Just as the objects of consumption are produced by virtue of social relations of production and exchange by which their seeming inherent (economic) value – as reflected in their price – is realized, so needs – reflecting the value (in use) of those objects – are not “articulated around the desire or the demand of the [individual],” but rather arise from social relations of consumption, by a process which has been termed “consummative mobilization.”⁶⁶

In sum, “the material objects of the ‘real economy’” cannot break “free of constitutive social relations.”⁶⁷ In turn, “the premise that financial instruments are mere socio-conventional means to material ends, and not social/material ‘things’ in and of themselves...flies in face” of the fact that they themselves are “objects of an in-between, mediated nature, created to measure and facilitate the creation of other objects.”⁶⁸ Moreover, they have a “material form,” at minimum, in the sense of the “buildings to house them,” “the analysts...employed by the thousands to track them,” and the “people who live off them.”⁶⁹

In light of such an understanding, Hertz sees stock markets as the institutionalized practice of (investment/speculation) dealing in “hybrids or ‘quasi-objects’.” Nominally abstract and un-“real” financial instruments are created in connection with that practice. They have a “real”/“objective” character not only because the practice puts them into play as part of the social process of enabling the (very “real”) activities of the production and consumption of material things but also because the activities which constitute the practice are equally as “real”.⁷⁰

A somewhat similar perspective is offered by Bryan and Rafferty based on a critique of arguments made in accord with a “Marxian (but not exclusively Marxian) analysis of finance”.⁷¹ They write:

“The first prevalent argument...is that finance is discrete from the ‘real’ economy. We are told that finance is about speculation, and its growth has become unrelated and disproportional to the world of production of goods and services.”

“This sort of proposition not only has the hallmarks of monetarism (money is a veil); its adoption serves to divert the current debate away from a progressive politics. Once we isolate finance from something called the ‘real’ economy, and identify profound problems within finance, we have constituted an idealised ‘real’ capitalism, somehow devoid of ‘finance’, on which is imposed financial ‘distortion’. The financial crisis is immediately cast as a crisis against the ‘real’ economy. Focus turns to processes within finance that are anathema to the operation of the real economy, and hence to an agenda of re-regulation – of returning finance to its appropriate, subordinate, functional (for production) role.”⁷²

However, in their view, “what is ‘financial’ and what is ‘real’ cannot be disentangled. In one dimension they cannot be disentangled because many corporations undertake both financial and industrial operations; in another dimension because finance itself must be ‘produced’: it cannot be understood simply via a cargo cult of ‘the state’.”⁷³

(In a related essay they write “[f]inance has often been presented as a passive vehicle of capital’s social and economic relations. At the edges, finance is sometimes posed in terms of its potential for crisis and disorder, where ‘real’ productive capital and ‘fictitious’ finance capital often become out of proportion from too much speculation, credit creation, and so on...”⁷⁴ By contrast they argue

that “we leave the world where money is neutral (and when not corrosive and dangerous) and consider that money in capitalism may actually be an integral part of capital’s economic and social relations, then we need to move beyond the notion of finance as a sort of fictitious realm of duplicate capital. Given the weight of moral baggage that such terms have come to carry, it may well be that one exciting prospect of current interest in finance is to contest the notion of finance as a form of fictitious capital.”⁷⁵⁾

“The second, and related, prevalent argument is that finance is driven by speculation. For those drawn to images of ‘casino capitalism’, this is a definitional proposition; and it drips with moralism. But moving beyond such simplistic labelling, there is an identification of finance with speculation when finance is not attached to either ‘real’ processes (buying wheat) or involved in hedging ‘real’ positions (futures contracts on an actual wheat shipment) (eg McNally 2009). The effect of this sort of proposition is to cast the GFC as a speculative crisis... But the criterion of whether there is a ‘real’ position underlying the financial position we believe misses a key dimension of financial evolution.”⁷⁶ In particular, they argue that “[i]n the current world there are no anchors to the money system, either national or global,” that is, there is no “consensual unit of account on a global scale. Nation states may be able to guarantee the value of money within their political borders, but they cannot guarantee ‘their’ money’s value relative to other monies (currencies).”⁷⁷ The response is to diversify into “other asset classes like equities or property” or what may appear more stable. But as many others follow the same course there is a need to diversify further into “weather derivatives of credit derivatives or commodity derivatives, until these too are incorporated into the standard hedging products, and there is a need to further diversify.”⁷⁸

As Bryan and Rafferty see it, “if this trading was motivated simply by taking a gamble on the commodity or weather markets, we might call it ‘speculation’, but if it is driven by the agenda of diversification, it looks rather different. It looks like a never-ending search for safe ways to store value. To attribute the label ‘speculation’ may not be categorically false (and there is no denying a gambling component in these markets) but, in the absence of an anchor, all asset prices are merely relative and so all asset forms are inherently ‘speculative’. So the attribution of ‘speculation’ or, in a similar vein, ‘fictitious capital’, as opposed to ‘real’ capital, fails to recognize the process now at work in financial markets; indeed, in capital itself.”⁷⁹

In sum, “[d]iversification of financial exposures is, at least in part, an organic and integral part of accumulation in which diverse asset forms denominated in diverse currencies and locations become integrated into a single global capital market.”⁸⁰

Thus, for these writers, this narrative about “diversification of asset holdings and management of exposures to financial volatility is all about the management of financial (and other) risk.”⁸¹ Discourse about financial risk and risk management has become pervasive in the current era, and the miscalculations of risk that materialised in the GFC are arguably one of its direct expressions. One ‘fallacy’ inherent in this endeavor “is that risks can be comprehensively measured and priced. Individual positioning in risk markets can never account for the systemic risks: Donald Rumsfeld’s unknown unknowns.”⁸² The reality is that risk “is not simply an actuarial computation,” it “is also a social relation. It is both impacted by social relations and itself transforms social relations.”⁸³

Bryan and Rafferty’s references to “fictitious capital” – also mentioned in one of the other characterizations of “financialization” discussed above – and money as a “veil” have not only relatively deep historical roots but also important connections with aspects of the Islamic narrative with which we are concerned. With respect to “fictitious capital,” as described by Hermele, “[t]o

Marx, in his main work *Capital*, the important point was to distinguish the real economy where the process of accumulation and exploitation took place, from the financial sector, which only operated in a secondary capacity, to service the real accumulation process.”⁸⁴ Hermele adds that “[i]n this Marxist understanding, ‘actual capital’, or ‘real capital’ – consisted of capital applied directly in the production process, while the various variants of ‘money-capital’...only matter in the sphere of circulation” (that is, in exchanges of sale of that which was produced).⁸⁵

As for the “veil of money”, the notion reflects “one of the recurrent themes in the economics debate over the last two-and-a-half centuries,” that is, “[t]he question whether money is ‘neutral’ with respect to the so-called ‘real’ economy, in other words, whether money is a ‘veil.’”⁸⁶ (“The use of the term ‘neutral’, however, is of more recent origin.”⁸⁷) Among other things, it was remarked on by John Maynard Keynes in his assessment of the consequences for the banks of the “collapse of money values” in the context of the depression: He urged that there was a need to “begin at the beginning of the argument. There is a multitude of real assets in the world which constitute our capital wealth – buildings, stocks of commodities, goods in course of manufacture and of transport, and so forth. The nominal owners of these assets, however, have not infrequently borrowed *money* in order to become possessed of them. To a corresponding extent the actual owners of wealth have claims, not on real assets, but on money. A considerable part of this “financing” takes place through the banking system, which interposes its guarantee between its depositors who lend it money, and its borrowing customers to whom it loans money wherewith to finance the purchase of real assets. The interposition of this veil of money between the real asset and the wealth owner is a specially marked characteristic of the modern world.”⁸⁸

However, notwithstanding Keynes’ reference to that phrase it was the occasion for him to move beyond it.⁸⁹ According to Hermele’s portrayal, “[t]owards the end of the 19th and the beginning of the 20th centuries, influential economists ...used the then current metaphor among which claimed that money and finance was a ‘veil’, ‘a cloak’, or ‘garment’, which hid the way the real economy operated. Although finance and money were central aspects of the economy and the way it functioned, a common understanding among economists was that in fact they did add but little, and nothing essential, to the key issue the production as such.”⁹⁰ In certain of respects it is suggested that Marx’s view – consonant with his reference to “fictitious capital” – was similar, though for him “behind money lie...‘real’ economic ‘forces’ and, in turn, behind these lie the ‘real’ *social* relations that again, in turn, appear as monetary relations.”⁹¹ By contrast Keynes “criticized mainstream economist and economics in general for assuming that money was ‘in some sense neutral’, unable to affect the transactions ‘between real things’”⁹² As Hyman Minsky described Keynes’ thought, the point was that “money is connected with financing through time...[T]he flow of money to firms is a response to expectations of future profits, and the flow of money from firms is financed by profits that are realized.”⁹³ Thus, “in a capitalist economy, the past, the present, and the future are linked not only by capital assets and labor force characteristics but also by financial relations. The key financial relationships link the creation and the ownership of capital assets to the structure of financial relations and changes in this structure.”⁹⁴ In turn, Ingham argues that, in contrast to the orthodox view, “Keynes saw clearly the importance of money as a social technology for connecting present and future.”⁹⁵

Although Ingham credits Keynes in that way, he presses the need to move beyond Keynes’ formulation:

“Obviously, money is socially produced in the sense that it does not occur naturally, and it also mediates and symbolizes social relations – for example, capital-wage labor. However, I wish to go further and argue that money itself *is* a social relation. By this I mean that ‘money’ can only be sensibly seen as being constituted by social relations...[T]his claim is most obviously sustained

in the case of credit-money as 'promises' to pay; but...all forms of money are social relations and, for example, the conventional textbook distinction between 'money' and 'credit' is not merely anachronistic, but is based on a conceptual confusion";⁹⁶ "both are promises to pay".⁹⁷

More specifically for Ingham, the critical issue in terms of the nature of money is understanding that it is (a) "a social relationship of credit and debt" and is (b) "denominated in a money of account" ("measure of value"). That is, the specific social relationship he has in mind is one which involves an "issuer" of money. The act of issuing money establishes it as a money of account/measure of value which has import for what Ingham defines in this context as debt and credit. First, debt is implicated in that "[i]n the most basic sense, the possessor [of money] is owed goods". (Again, "[m]oney cannot be said to exist without the simultaneous existence of a debt that it can discharge"; and, yet again, that which is issued is "money" "only...if it is capable of cancelling any debt incurred by the issuer.") Second "credit" is involved in that a possessor's money "represents a claim or credit against the issuer". So, for example, "a state issues money, as payment for goods in services, in the form of a 'promise' to accept it in payment of taxes. A bank issues notes, or allows a cheque to be drawn against it as a claim, which it 'promises' to accept in payment by its debtor." Key, though, insofar as the discussion focuses on money of exchange, is the concern or desire that it serve universally or, if not that, very, very widely as a means for exchange.

This concern, in part, is reflected in Ingham's remark that while "the origin of the power of money is in the promise between the issuer and the user of money," "[t]he 'claim' or 'credit' must also be enforceable." Presumably, this enforceability means that the state not only compels those in the society who provide goods and services to accept in exchange the money the state issues but also "promises" to accept such money in fulfilment of such obligation as those persons in the society might have to pay taxes to the state. At first blush, such action in itself would create great incentives or pressures for parties in the society making (other than barter) exchanges to accept such issued money in exchange. However, it would seem that Ingham, by his use of the word "enforceable," contemplates the state taking the related but arguably distinct step to require parties to such exchanges to accept the money issued in exchange. (He seems to reinforce the point by stressing that "[m]onetary societies are held together by networks of credit/debt relations that are underpinned and constituted by sovereignty...Money is a form of sovereignty and as such it cannot be understood without reference to an authority."⁹⁸)

With that as a basic framework, Ingham specifically focuses on the "development of capitalist money" (in the first instance, capitalism in the West). As Ingham describes it, "capitalism's distinctive structural factor is to be found in the production of credit-money...whereby private debts are 'monetized' in the banking system" whereby "the act of lending creates deposits of money."⁹⁹ The "so-called 'money market' is the 'institutional structure whereby private debts are routinely monetized by the linkages between the state's debt and the banking system, as mediated by the central bank."¹⁰⁰ In other words, "[t]he scarcity of money is socially and politically determined. At the macro level, the supply of money is structured by the rules and norms governing fiscal practice...which are the outcome of a struggle between economic interests...In capitalism, the power struggle between credits and debts is centred on the real rate of interest...that is politically acceptable and economically feasible."¹⁰¹ Broadly stated Ingham points a picture of "two interdependent, but autonomous sides to all money economies," one involving the labor market/capitalist-worker relationship and the process of production and the other, the supply and value of money. The antagonistic interdependence between the two is a major source of capitalism's dynamic character."¹⁰² On that view what is "essentially capitalistic" is not the practice of "buying cheap and selling dear or marking up a sale price in excess of costs" but rather

“the continuous comparison of the rate of interest on money loans with the profitability of enterprise.”¹⁰³

We do not here canvas the precise reach and strength of Ingham's arguments. For our current purposes it is sufficient to remark that they point to the relationships between or among the activities placed under the rubrics of the financial economy and the real economy – however, at the rhetorical level, they might be seen as being distinct – being intimately bound up with different and changing understandings as to the nature and functions of money and the social relationships which underpin or constitute them. Such understandings are almost necessarily assessed in both normative and instrumental terms. We have very briefly canvassed certain of those understandings largely grounded in a Western narrative. Perhaps not surprisingly then, within the framework of the Islamic narrative, there are diverse and evolving understandings which reflect the normative commitments and instrumental concerns which characterize it; ones which we touch on below.

PART III: CONCERNS AND OBJECTIVES WHICH INFORM ISLAMIC FINANCE AND THE RELEVANCE TO THEM OF NOTIONS OF THE “REAL,” FOR EXAMPLE, “REAL ASSETS” AND THE “REAL ECONOMY”

What is termed “Islamic finance” as cast in contemporary terms appears to implicate or involve that which may be termed as “real.” For example, there are often references to “real assets” (and in certain contexts, citations to a/the “real economy”). Insofar as there are, the critical questions are: (1) what, within that context, is meant by “real assets” and why they are so implicated; (2) insofar as they are involved in that manner, how that bears upon the availability and character of means for investment formulated or devised in terms ostensibly consistent with the requirements of Islamic finance; and (3) in what ways (if any), for which (if any) investors, should investments of that sort be of distinct interest or concern.

With regard to the last question, the answer depends upon the relevance of investments with Islamic attributes to investors' own needs and expectations. In the first instance, certain investors might be indifferent to any Islamic attributes of investments. That is, their concern would be only with financial outcomes as such, namely, financial risks and rewards.

However, in reality, they are likely to give at least implicit (and others explicit) attention to the extent to which the calculus of financial risks and rewards is shaped or influenced by (1) how the institutions or organizations through or by which investments within the ambit of Islamic finance operate; (2) how they shape the nature of those investments and the terms upon which they are available; and (3) in turn, how their attributes bear, if it all, upon that calculus.

For other investors, insofar as they look beyond financial rewards and risks as a consideration, the seeming attributes of Islamic investments in those other terms might resonate or appear apposite with their concerns. In some cases, such interests may be strongly normative in character. For example, they may pertain to how those persons who have stakes in an enterprise in which an investment has been made are affected and treated by it. In still other cases, the issue is of a somewhat different nature. That is, it may relate to beliefs about the broadly shared or collective consequences (such as climate change) of enterprises' conduct. For some among all of the foregoing, the supposition may be that if investments are devised in ways appropriately attentive to the Islamic narrative, non-financial concerns can be effectively addressed while at the same time yield outcomes in conventional finance as good as or perhaps better than those which might be achieved without such attention.

Generic references to the “real”

There is, not surprisingly, a vast literature about or with import for Islamic finance as such and its underpinning in the Islamic narrative in particular. We have canvassed a very modest sample of that literature – largely contemporary – to gain some sense of the relevance of the “real” to discourse in those terms. Indeed, in many cases one finds references to “real assets” and related words or phrases. However, they frequently offer relatively little illumination as to what is meant by them or why, at root, they are important. For example, within one lengthy publication which includes many essays about Islamic finance and economic development, a number of articles offer broad gauge references to “real assets,” one to the “real economy” and many other things which are with regard to certain aspects characterized as “real”.

With respect to the first, the editors of the publication remark that that “[t]he organizing principle of Islamic finance in an Islamic economy is transaction based on exchange, where real asset is exchanged for real asset. Hence transactions are based on the real economy.”¹⁰⁴ Several of the papers refer to real assets but in a somewhat generic sense, pointing to certain seeming recent pathologies of “Western” finance (at minimum implicitly suggesting that they might not arise in the context of Islamic finance). So, for example, one suggests that “[a]s the growth of pure financial instruments – those with little connection to real assets – far outpaces the growth of the real sector activities, a phenomenon called decoupling...or financialization...emerges, whereby finance no longer is anchored in the real sector.”¹⁰⁵ Another expresses a concern that “[r]esources that could have been gainfully employed to build real assets get diverted into speculative activity that provides gains to a very small group.”¹⁰⁶ A third observes that “[a]s layer upon layer of securitization decouples the connection between the financial and real sectors, an inverted credit pyramid is created to the extent that the liabilities of the economy becomes a large multiple of real assets needed to validate them (Mirakhor 2011).”¹⁰⁷

Among the other articles there are somewhat similar references to “real goods and services”¹⁰⁸; “real good[s] or object[s]”¹⁰⁹; and “real wealth”.¹¹⁰ As for the second, the authors of one paper remark:

“At a deeper level, the [Modigliani–Miller] theorems suggested a dichotomy between finance and the real economy: corporate growth and investment decisions were dictated completely by “real” variables such as productivity, demand for output, technical progress, and relative factor prices of capital and labor. Finance in this paradigm is always permissive and simply facilitates the investment process.”¹¹¹

Interestingly they take note of changing perspectives within “conventional [Western] economics” (briefly discussed above in the section about financialization) which look beyond notions of the “veil of money” in the sense described above. (Indeed, they characterize the book in which their essay appears as one which “introduces new theoretical ground based on the analysis of John Maynard Keynes on employment, interest, and money, which inadvertently provides the best rationale for some of the basic precepts of Islamic economics.”)¹¹²:

“More complex considerations and theoretical developments involving asymmetric information between insiders (managers) and outsiders (creditors or shareholders), problems of adverse selection, moral hazard, agency costs, signaling, and transaction costs lead to different costs of the various forms of finance, but can be shown to be broadly compatible with the ‘pecking order’-type theory outlined above...In general, this far richer and more complete analysis of the issues points to the significance of the corporate capital structures and the financial decisions for the real economy. At the very least, the new models of the firm suggest that ‘finance’ is not simply a veil,

but that there are very important interactions between corporate finance and the real economy.”¹¹³

By contrast, they seem to turn the “veil” notion on its head, suggesting that, in the “spectrum of ideal Islamic finance instruments...there does not seem to be room provided for making money out of pure finance, where instruments are developed that use real sector activity only as a veil to accommodate what amount to pure financial transactions.”¹¹⁴

Only one step removed are numerous related references to “real activity”¹¹⁵; the “real sector”¹¹⁶; “real sector activity” and transactions¹¹⁷; and the “real sector of the economy”.¹¹⁸

Somewhat more specific recitations of the need for a sufficient enough – direct or indirect - connection of “finance” to the “real economy”

Other writings go beyond formulaic statements which in some measure link the need for “real [x]” to Islamic norms. For example, in the book cited, Iqbal and Mirakhor suggest that “Islamic finance is based on the belief that such a system facilitates real sector activities through risk sharing.” More particularly, they argue that it “has its epistemological roots firmly in the Qur’an – specifically chapter 2, verse 275.”¹¹⁹ That segment, denominated *sūrat l-baqarah* (The Cow), reads in Arabic as follows:

الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي يَتَخَبَّطُهُ الشَّيْطَانُ مِنَ الْمَسِّ
ذَلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا فَمَنْ جَاءَهُ مَوْعِظَةٌ
مِّن رَّبِّهِ فَانْتَهَى فَلَهُ مَا سَلَفَ وَأَمْرُهُ إِلَى اللَّهِ وَمَنْ عَادَ فَأُولَٰئِكَ أَصْحَابُ النَّارِ هُمْ
فِيهَا خَالِدُونَ

One source provides “seven parallel translations in English” of that verse (along with “word by word details of the verse’s morphology”). All such translations state (1) that *riba* – read either as interest or as usury – is barred and (2) although it is said that trade is like *riba*, the former is permitted while the latter is not.¹²⁰

Iqbal and Mirakhor contend that the verse first “ordains that all economic and financial transactions are conducted via contracts of exchange (*al-Bay*)” and second, that the “no *riba* ... [requirement] must be met for a contract to be considered Islamic.”¹²¹ With regard to the former point they argue that “Classical Arabic lexicons of the Qur’an define contracts of exchange (*al-Bay*) as contracts involving exchange of property in which there are expectations of gains and probability of losses...implying that there are risks in the transaction.”¹²² (We return to this point below.) They then offer a rationale for the ostensible literal terms of the prescription, casting it in a way which might be viewed as being evocative of but which makes no specific reference to the “real” as such. That is, they, they assert that “[b]y focusing on trade and exchange in commodities and assets, Islam encourages risk sharing, which promotes social solidarity. The prohibition of interest-based transactions stems from the fact that interest-based debt contracts are instruments of risk shifting. In such a contract, the creditor acquires a claim on the property rights of the debtor without losing the claim on the property rights to the money lent, regardless of the outcome of the

contract.”¹²³ While the word “commodities” is strongly suggestive of that which might be denominated as “real,” the authors offer no suggestion as to what “assets” are and (presumably) why they have a character similar (enough) to commodities in ways which are relevant to the rationale offered. Interestingly, they propose a second rationale, though, in the first instance, by way of what is just a description: “Another important implication of risk sharing is the rate of return to financing is determined ex post (after the investment has been made) by the rate of return on real activity.”¹²⁴ Here we have an explicit reference to something denominated as “real” – though as an “activity,” not a “thing” or “object” – though what precisely it is, is not defined.

In another publication Mirakhor and a different co-author (Askori) appeal to a somewhat different reference to the real. They distinguish “between an underlying real sector contract and the instrument that financially empowers that contract. All contracts (*‘uqud*) that have reached us originate in the real sector and all are permissible risk-sharing contracts.”¹²⁵

In yet another publication, Mirakhor, Iqbal, and another co-author (El-Hawary) offer roughly the same rationale, casting it in terms similar to those described above though with a gloss which implies an association of the “real”. That is, they contend that that “[t]he prohibition of debt and the encouragement of risk sharing suggest a financial system where there is a direct link between the real and the financial sector. As a result, the system introduces a ‘materiality’ aspect that links financing directly with the underlying asset so that the financing activity is clearly and closely identified with the real-sector activity. There is a strong link between the performance of the asset and the return on the capital used to finance it.”¹²⁶ (The word “materiality” is used in the sense of something which reflects a causal link rather than that which is physical. Note, again, the reference is to an “activity”, not a “thing” or “object”).

For our purposes at this point, perhaps the most interesting aspect of the foregoing cited writings is that they highlight the importance to discourse about Islamic finance of the “real,” at least in the sense of “real activities” and the “real economy”; suggest an association of the “real” with “assets”/“underlying assets” which, in turn, might in some measure be identified with “commodities”; and imply that the importance may be linked to and/or grounded in other concerns. Those other concerns are ones posed by the meaning and reach of prohibitions of *riba* and in some measure others concerning the meaning and reach of prescriptions as to the risk borne by parties to financial transactions.

Yet more specific arguments about the need for links to the “real”

While the characterizations outlined above are broadly suggestive of what might be expected of those participants in financial transactions for whom adherence to Islamic norms is important, they are largely descriptive or conclusory in nature. They do not offer much insight as to why, more precisely, Islam norms demand the conduct described. As a result, we turn now to aspects of several relatively coherent and comprehensive efforts to provide some insight in those terms, especially attentive to matters of the “real”. We review them not because we see (or are even in a position to judge) that they are necessarily the predominant, definitive, best, etc. ones in those terms but rather because the analyses are thought provoking and illustrative of how efforts at explication might go beyond largely formulaic statements.

Some lines of argument are essentially textual and linguistic - what one might term “internal” – in nature. That is, they largely focus just on the words of what are thought to be the relevant texts, indeed, perhaps the only or exclusive authoritative texts. Their goal is to determine the meanings

in and of themselves of various portions of the text and in relationship to one another so as to gain an understanding of its overarching conceptual and normative structure and requirements.

Cattelan, in the course of a series of essays, offers an analysis largely of this sort with respect to the “real” which can be summarized in the following terms:

Reality is an artifact/expression/manifestation of God’s will. That reality is synonymous with that which is true/right/just. God allows people to participate in the playing out of God’s will.¹²⁷ That is, Islam, by definition, is the guidance given by God to people as to how they should act – in effect as an agent of God – so as to be in accord with what is real/(the) truth/right/just. More precisely, people have the responsibility to perform Shari’ah because it is (only) in that way that their actions result in that which is in accord with reality (understood as just described). That reality expresses God’s will, among other things, as to people’s proper relationship to the physical/material world and between and among one another, and what they might properly derive or gain from both. It is people’s responsibility to perform Shari’ah because their doing so will enable/lead to/result in the creation/existence of such proper relationships and people’s proper enjoyment of what they might derive from the material world and those relationships. If they fulfill that responsibility, they are rewarded in that immediate/worldly sense as well as in the broader sense of playing the role which is open to them in realizing God’s will.

The reach of this formulation extends to people’s participation in the marketplace; when they are so involved, they act “as an agent of the ‘real’/‘right’ (*haqq*) created by God”.¹²⁸ Moreover, what is appropriate for them to do is assessed in relation to what God deems to be the proper character of the relationships established in the course of that participation. The assessment is grounded not in the individual rights or intentions/will of as such of those persons who engage in a transaction but rather in the “transactional equilibrium” mandated by God with which people’s behavior must be in accord.

Challenging questions are posed in understanding how that transactional equilibrium is characterized and defined and what it entails or requires in general and in particular contexts. It appears to be associated with a cluster of notions which are inclusive of (1) achieving “balance” in the sense of scales being brought into balance, (2) “rights” being ordered or arranged so as to be in their proper place (in relation to one another), (3) and ensuring to a just holder of a right that which is her/his due.¹²⁹

In the economic context, broadly stated, the contention might be that “in the Islamic world the assumption of the centrality of God as the only Creator has directed the notion of property rights towards a conceptual framework based not on dividing separate portions of economic justice, but on participating in the unique divine justice (*‘adl*) by sharing economic resources”¹³⁰ Here, it is not (arguably as in Western thought and Western capitalism) a matter of a “‘right of a person against the ‘right’ of another person..., but the ‘right’ of a person with the corresponding ‘obligation’ of another person, linked together in a constant unity.”¹³¹

Certainly, in that context, the cluster of elements might be seen as having material connotations. That is, in certain respects, they might be seen to evoke equilibrium or balance being achieved with respect or in relation to material objects. And, indeed, Cattelan contends so, though the thrust of his argument in these terms is not clear. For example, he writes that “in the ethical conception of the reality as created by God..., the concept of *haqq* enjoys...a sort of ‘material’ connotation, a ‘tangible’ nature that always denote[s] ‘a legitimate “property right” share in something, such a profit, a bundle of goods, a piece of real estate, an inheritance, or an office’

(Geertz, 1983, p. 189), as expression of the *realism* of God's Will in His absolute sovereignty, as well as the *monism* of His 'rule' (*lā ḥukma illā min Allāh*).¹³²

Returning to the point he states as follows:

"[T]he 'rights' (*ḥuqūq*, pl. of *ḥaqq*) are the means thanks to which God realizes (in the proper sense of 'making real – *ḥaqq* – in the creation') the status of the action (*ḥukm*), as already established by His Will. As already noted, in this constant interdependence *ḥukm/ḥaqq*, giving rise to 'a vision of the reality as being in its essence imperative, a structure not of objects but of wills' (Geertz, 1983, p. 187), the *ḥaqq* enjoys a sort of 'material' connotation (and not by chance 'reality' is one of the various meaning of *ḥaqq*, next to 'Truth' and 'right' [(J)Lane, 1865), as a 'concrete' entity whose 'place' is necessarily compliant with the *ḥukm*.

"A postulate of primacy of real economy over finance is consequently derived in Islamic economic rationality, in close connection with the human performance of God's Will as results of the dyad *ḥukm/ḥaqq* in terms of Actor/agent relationship."¹³³

There are difficulties with this formulation, as suggestive as it might be. First, it relies on several different meanings associated with the word "real". Second, only one related group of elements among them arguably has a connection to the issues with which we are concerned here. Third, there is a lack of clarity and perhaps of consistency across that group, with references to that which is "tangible," "material objects," that which has "a 'material connotation'," that which constitutes "a legitimate 'property right' share in something" which ranges widely from "a profit, a bundle of goods, a piece of real estate, an inheritance, or an office," and what is thought to be "a 'concrete' entity". Lastly, that group is identified more broadly, though without explanation, with what is termed the "real economy".

The above being said in *analytic* terms is not to gainsay what might be a fair portrayal in *descriptive* terms. That is, Cattelan states that in "[a]ccord" with his formulation, "any commercial transaction in [Islamic economics and finance] finds its core element in the tangible object under trading (as previously noted, in Islamic justice 'what is meant is not ensuring the freedom of the subject of rights, but ensuring something real for the person': Smirnov, 1996, p. 344). While the parties are free to determine any setting for the contract ('*ʿaql*) the effect of the transaction (*ḥukm al-ʿaql*) are already established at Law, and linked to the concreteness of the *ḥaqq*. In this way, the validity of the transaction always requires the constant reference to something tangible and existent."¹³⁴

Here, too, one has a sense of what is required but its precise character is not only elusive but also seemingly more narrowly defined than what was described before. That is, the description speaks of "tangible object[s]," that which is "tangible and existent," and that which is "real for the person".

Certainly, an interpretation along these lines – this one largely cast in terms of "object"(s) – is apposite with Cattelan's reprise of what he casts as the dominant way of viewing contractual and property legal relationships (to which we return below), but the description here, as well, is less than satisfactory because of a lack of clarity of the term "object" and its relation to other terminology employed:

"[T]he decisive element of the legal relation lies in the object. The object takes place between the two persons who enter into the relation/ship through it. This relationship, of which the object is the specific term, is constituent of the right. The title that founds the right of the subject is the reason which establishes a link of belonging between him and the object. Once this relationship

has been concretely realised, a state of adjustment and of equilibrium has to rule: everything in its [due] place.

The subject ruled by Law is certainly obliged towards the other party but his obligation has no other object than the thing or the act which are due. He is less tied to the other party than obliged towards an objective performance.”¹³⁵

“The centrality of the object as something real’ (in the sense of ‘tangible’) to be traded (objectivism) represents a core element of Islamic property rights and contract (‘*aqd*) theory.”¹³⁶

Cattelan elaborates on this point in the following terms:

“Different [from] the Western tradition, the ‘*aqd* finds its pivotal element not in the expression of the will..., but in the empirical object as concrete matter to be traded: its fundamental purpose, as voluntary relationship is to maintain the equilibrium of legal titles...as linked to existing/real properties...From a theological/ethical view..., the ‘*aqd* is, in fact, as everything else, a divine creation, not an expression of human freedom...Consequently, even if the parties are free to determine any setting inside the contract, the contractual effect...and the conditions of enforceability are already established at law, and linked to the concreteness of the object as *haqq* (‘truth’, ‘right’).

“In this way, the enforceability of the contract necessarily requires a constant reference to something existent and certain, either as a specific thing...or in the...responsibility of the debtor...The attention always falls on the object.”¹ It is not a question of an “exchange of promises or obligations..., but the exchange of properties as established at Law.”¹³⁷

Other lines of argument look beyond the literal words of ostensibly authoritative texts and their putative meanings and rely in greater or less measure on “external” considerations. These meanings include accounts of the historical context in which the text – in general or particular – was revealed/crafted, the norms or values expressed by it, the economic, social, and other concerns which may have informed those values or norms or their translation into specific requirements, etc.

For example, a paper by Kahf, which speaks to the ostensibly distinctive character of Islamic banking (and its relationship to development), though somewhat loosely structured and conclusory, offers an introduction to or illustration of one such different mode of argument. The analysis might be termed to be of the “second order” because, by contrast with Cattelan, he does not quote primary texts of the Islamic narrative. Rather, he just offers propositions which he implicitly suggests are an accurate gloss or reading of such texts.

As a preface to a review of certain aspects of the paper we identify Kahf’s diverse references to that which is “real” or to related terms such as the “actual” and the “physical”; we note, as well, the different shades of meaning associated with them.

1. “[T]he nature of Islamic financing itself which is intrinsically inter-linked with transactions in the physical goods market and socially and morally committed...Islamic banking has three major intrinsic characteristics that are developmental in their nature. These *three characteristics* are: a direct and un-detachable link to the real economy or physical transactions, integration of ethical and moral values in financing so that financing is directed to useful products only and the reconstruction of relationship with depositors on the basis of sharing instead of lending.”¹³⁸

2. "Real-life exchange and production processes have, as part of their components or forms, the provision of goods to consumers as well as machines and equipment, materials and other input-goods used in production to producers. The essence of Islamic banking practices is the provision of such goods and services while payments for them are delayed to later dates. Islamic banking also provides means of payments in the form of producers' principal in projects on the basis of sharing the actual, real-life outcome of a production process."¹³⁹
3. Islamic finance requires that "both parties [that is, financier and beneficiary,] share the real actual results or net profit/loss of a productive enterprise."¹⁴⁰
4. "The principle of justice and fairness requires that the result or actual outcome or profit of ...cooperation [between the owner of property and the user of that property] should fairly be distributed between the two parties or nothing else."¹⁴¹
5. Both the lender and the debtor "deserve to share the real outcome of that exercise."¹⁴²
6. "The essential characteristic of Islamic modes of financing is their direct and un-detachable link to the real economy or physical transactions. Sharing modes are only possible for productive enterprises that involve real-life businesses that increase quantity or improve quality or enhance usability of real goods and services."¹⁴³
7. "Sharing modes are only possible for productive enterprises that involve real-life businesses that increase quantity or improve quality or enhance usability of real goods and services; and by doing that, such businesses generate a return that can be distributed between the entrepreneur and the financier."¹⁴⁴
8. "Islamic financing is purely a real-life, real-goods/services financing. No financing can find its way to the Islamic system without passing through the production and/or exchange of real goods and services."¹⁴⁵
9. "Islamic financing is intrinsically integrated with the goods and commodities market and is limited to the needed amount of finance that is required by actual transactions that take place in the real market."¹⁴⁶
10. "Islamic financing is bound by the extent of transactions in the real goods and services market."¹⁴⁷
11. "[R]endering the profitability criteria the measure of performance for depositors make them more aware and attached to the real market. This helps creating an entrepreneurial spirit in the depositors because it keeps them alert to profit making."¹⁴⁸
12. "[I]nvolving the masses of depositors [i]n the profitability of banks brings them closer to the real market instead of keeping a firewall between those who save and those who invest. It also changes the nature of financial intermediation of the banking system bringing it to be in more harmony with real market and developmental changes in it."¹⁴⁹

Insofar as Kahf goes beyond broad gauge statements as to what Islamic finance requires and offers arguments as to why, they are largely cast in terms of notions of "property" rather than on those as to that which is "real". Moreover, his arguments are for the most part more concerned with the legitimacy of claims to that which is property rather than on what property "is" (and how it is related to that which is "real".)

Thus, Kahf's starting point appears to be the proposition that the owner of "private property" "has a full right to the increase, growth, benefit and profit that is attributed to [his or her] property" while, at the same time, he or she "carries the liability of any loss or destruction that may happen to [it]."¹⁵⁰ Kahf offers no definition of property as such. Rather, that statement is concerned with normative considerations, that is, who has legitimate claims to what is understood to be "property" and on what basis, though it suggests instrumental ones.:

Kahf's characterization is broadly consistent with what Askari et al describe as four rules "governing property relations" according to the Islamic narrative.¹⁵¹ They are

- First, "everything in creation, including humans, is the property of the Creator. He has created natural resources for the benefit of all of mankind."¹⁵²;
- Second, the all humans have "the right of access to these resources."¹⁵³;
- Third, "once the property is accessed and combined with work by individuals, a full right of possession of the resulting product is established for the individual without either the Creator losing His Original Property Right or the collectivity losing its initial right of possession to these resources."¹⁵⁴ ; and
- Fourth, there are "only two ways in which individuals gain legitimate property rights: (i) through their own creative labor, and/or (ii) through transfers – via exchange, contracts, grants, or inheritance – from others who have gained the property rights title to an asset through their own labor. Fundamentally, therefore, work is the basis of the acquisition of right to property."¹⁵⁵

Kahf's particular point seems to be concerned with a person who *already owns property*, (presumably which was gained through one or both of the two cited permissible means). At first blush, the entitlement of that owner to any "increase, growth, benefit and profit that is *attributed*" to that property does not make sense. That is, the growth, benefit, or profit does not typically result spontaneously/from the mere fact of the existence of property or the additional fact that it is deemed to be "owned" by someone. Rather, each may be the result of someone's use of some preexisting property (or legitimately appropriated natural resource). If the action is solely that of the owner then the attribution to him or her would follow directly from the noted basic premise. Presumably, if the identical action were taken by another person (which arguably could occur only with the agreement of the property owner) that premise would require that he or she would have some right to the increase, growth, or profit. Indeed, this inference is consistent with Kahf's statement that "[i]f a property is entrusted, by its owner, to someone else (through financing), the user's efforts that contribute to growth and profit creating must also be recognized."¹⁵⁶

With an eye to the proscription of *riba*, Kahf addresses "interest-based lending." In his words, "instead of entrusting a productive property to an entrepreneur the lender gives money or real goods (be it life-time savings or any other loanable goods/funds) to the borrower against a notional right, that we call debt."¹⁵⁷ This characterization is not entirely clear, first because the author does not define what "real goods" are (as compared to other kinds of goods or for that matter, money); second, because he does not distinguish "productive" property from other kinds of property. In other parts of the paper he refers to "productive projects" and "productive enterprises."¹⁵⁸ (Arguably he might mean property which if used enables increase, growth, benefit, or profit.) Also, Kahf seems to contrast "entrusting" another person with "productive property" with "lend[ing]" what he terms "money or real goods".¹⁵⁹ However, the comparison does not seem to otherwise rest on *what* is provided. "Real goods" would appear to qualify as "productive property" and Kahf does not seem to distinguish money from it in the context of his discussion of lending.

The issue, then, would be one as to the difference between "entrusting" and "lending," more precisely, the different relationships between "entrusters" and "lenders" and their counterparts. In both cases, the counterparts have been provided with property/productive property/money/real goods by the lenders or entrusters in anticipation of the former making efforts to use the property with the goal of contributing to increase, growth, benefit, and/or profit thereby. In turn, as suggested above, on the basis of the fourth principle of property, the latter are entitled to "recogn[ition]" of that "contribut[ion]". Kahf essentially illustrates this point by means of the

following examples (though they are not entirely on the mark). In particular, contrasting “the same savings and/or real goods...[being] given on sharing bases” rather than on (presumably) “lending bases”, he writes:

“The owner holds on to the right of ownership and the user exerts efforts for making the goods grow and increase, like a peasant who buries seeds in the soil and serves them, or like a trader who buys merchandise and finds a good market for it. Ownership remains in the hands of the finance provider and the work is applied by the finance receiver. Both contributions are recognized as they participate in creating an increment, increase or growth. Therefore, both parties deserve to share the real outcome of that exercise.”¹⁶⁰

Strictly speaking, the foregoing only addresses scenarios in which the outcomes are *positive*, that is, those which are profitable, and not ones in which a loss – perhaps even a total loss – is suffered. Although Kahf speaks to negative outcomes only briefly and cryptically, in broad-gauge terms his argument rests largely on the contribution-profit/benefit nexus of the fourth principle of property:

“Since the Islamic law assigns to private property a corner-stone role, the owner should have a full right to the increase, growth, benefit and profit that is attributed to one’s property. By the same token, the owner carries the liability of any loss or destruction that may happen to its property. This is not only fair and consistent with human nature but it is the only rational thing to be done. The principle of justice and fairness requires that the result or actual outcome or profit of such cooperation should fairly be distributed between the two parties and nothing else. In other words, any distribution that is based on giving either party a pre-determined fixed amount regardless of the actual profit may not be fair or just.”¹⁶¹

The references to fairness and justness reflect the normative thrust of the fourth principle of property which is largely restated in the first sentence. They are different from Kahf’s appeal to beliefs or contentions about what “human nature” entails or requires or as to what rationality demands.

While Kahf does not press the latter two points further he offers the following, somewhat different and curious kind of argument: Because lending, in contrast with “entrusting”, creates “a notional right [for the lender], that we call debt,” it “change[s] the nature of what is owned from real balances that have claims on goods and services in the society to a legal commitment, which is purely an inter-personal abstract concept. A debt is, by definition and by its nature, incapable of growing or increasing because it is purely conceptual; it is a relationship between a person and another person. How can a debt grow? How can it increase?”¹⁶² The argument is odd for several reasons. The initial part of it is concerned only with the fact that the relationship is characterized by what is termed “debt”. Only the latter part refers to debt with interest. But insofar as debt in one case is understood (by Kahf) as “a legal commitment”/as a “purely an inter-personal abstract concept” so it is in the other. To the extent that debt in one case does not involve owning “real balances that have claims on goods and services in the society” so it does not in the other. To the degree that debt in one case represents “a relationship between a person and another person” it represents it in the other.

Holding that matter aside for the moment, there are other problems with the characterization. The contention is that because a debt “is purely conceptual”/is a relationship “between a person and another person,” it cannot “grow” or “increase”. It seems to be placed in contrast with other permissible arrangements in which “real balances that have claims on goods and services” were “owned”. Presumably, the latter claims can “grow” or “increase”. Assuming that Kahf means to use the word “owned,” there seems to be implicated the language of purely personal relationship,

of that which is conceptual or abstract, and that which is incapable of growth or increase which appears to be based on the difference between the nature of the claims which the financier has.¹⁶³ And given the putative logic that the “real balances that have claims on goods and services” are capable of growth or increase, the question is why. For a debt relationship as such, arguably it could be that those claims have no connection to the *results* of the activities in which the person financed sought to engage with the financing, activities whose ostensible object is growth or increase. But if so, then Kahf is merely restating the conclusion, not offering a reason for it.

By contrast, there is no need to make linguistic appeals to notions as to what is abstract/conceptual or not if the argument is traceable to the already cited notions grounded in the fourth principle. That principle (however diffusely) posits that people have certain entitlements – have “property”-like rights – based on the benefits/profits/etc. which are the result of efforts they make in acting on or in relation to pre-existing property or natural resources.

Indeed, Kahf effectively makes that argument: in contrast with relationships based on debt, “the same savings and/or real goods may be given on sharing bases. The owner holds on to the right of ownership and the user exerts efforts for making the goods grow and increase.”¹⁶⁴ Here “o[w]nership remains in the hands of the finance provider and the work is applied by the finance receiver” and both “participate in creating an increment, increase or growth.”¹⁶⁵ Despite the reference to the efforts of the user/debtor, they do not appear to be relevant to the distinction because in both the preceding – debt – case and this one of a person to whom property has been “entrusted”/who has the ability to make use of the property presumably makes efforts geared to producing “growth”/“profits”. Rather it must pertain to the provider of that property. Arguably, because of the purely “personal” nature of the debt relationship, the lender does not make any/has no connection with efforts at generating growth or profits from the property.

Again, note that the foregoing is an endeavor at *description/definition* which is then linked to a *normative* conclusion which hinges on this contention: “Both contributions are recognized as they participate in creating an increment, increase or growth. Therefore, both parties deserve to share the real outcome of that exercise.”¹⁶⁶ In the second example, in what sense do both make “contributions”? Clearly, in the second case (and the first one, for that matter) the recipient of finance is making the remarked upon efforts. In neither situation does the provider of finance engage in such efforts. In what way does he or she “participate” in the manner required? Participation is defined in relation to the connection between what he or she has “entrusted”/allowed the person financed to use and what the financier receives by virtue of the arrangement. If the person financed is unsuccessful, then the financier suffers a loss of some or all of what he “contributed” in that way. That is, the financier cannot avoid the property he or she afforded to the person financed being “put it into play” and, hence, being wasted. The notion could be that if there is no risk of loss then functionally the financier has made no “effort”. That is, the property which in some form has been provided can be viewed in terms of “effort”: the form of goods and services (which are property already in existence, hence the fruit of previous efforts) or money (which is at least property in the sense that it is a claim for property already in or which will come into existence). If the money must under all circumstances be returned, that seems to be the equivalent of allowing the financier to gain something without having made any effort. Permitting such return does not seem to square with the first proposition about property cited above: a person’s right to property depends upon his or her expenditure of effort in creating it.

The flip side of this kind of argument is similar. In the case of financed endeavors which are successful, the contributions of the financier represent a fixed (in advance) “amount” property/effort. According to the noted proposition, the property rightfully claimed by a person is that which is the result of his or her (successful) efforts. When the person financed is successful new “property” is the result and presumably would be shared by him/her and the financier in

relation to their respective efforts. But for a debt with interest arrangement, the financier is assured an amount of property which results regardless of its relationship to the amount of property/efforts he has made available,

If there is merit to the foregoing analysis of the distinctions described, the differences are an artifact of a normative judgment as to those financial relationships which are thought to be in accord with what Islam requires.

Although that judgment on its face seems to hinge on the nominal role or presence of “property” in the arrangement, at a deeper level it is based on a characterization of the parties in terms of the “efforts” as contributors to the endeavor which is enabled by the arrangement of the relationship and that, in turn, finds its ultimate source in a normative judgment as to what gives sanction to a person’s “ownership” of “property,” for example, that it is the result of that person’s efforts in producing it.

The centrality of the efforts-property relationship is consistent with the fact that notwithstanding the references to the “real” there is no suggestion in Kahf’s exposition that “property” has to be tangible in the sense of being that which takes the form of material *object*. Recall that Kahf refers to both goods and services as “property”. Both are tangible in the sense that production almost of necessity involves some tangible objects and of necessity, some activity/efforts by human beings; that which is produced is an artifact of both. What goods and services share in common is being the fruit of “efforts”. The fact that Kahf goes so far as to deem money to be “property” might be thought to be consistent with this conclusion. Within Kahf’s meaning, money is “property” not by reason of such materiality as it may have (as a coin or piece of paper, for example), but rather by virtue of it representing a direct claim on goods and services.

For the purposes of this essay, then, Kahf’s analysis is suggestive though less than satisfying. In descriptive terms, Kahf points to the relevance of the “real” in discourse as to the permissibility of one or another type financial transaction. However, there is no clear or consistent definition as to that which is real or clarity as to precisely the role that being “real” plays in determining permissibility.¹⁶⁷ Again, in descriptive terms notions as to that which is “property” appear to loom large with regard to that question. But there is still little meaningful discussion as to what property “is” (or uniform use of the term) and its relation to and the significance of its association with that which is “real”. Rather, property is important to the discussion of permissibility because in Kahf’s paper, normative judgments as to what is the warrant for a property-like claim are the foundation for his characterization of various financial transactions as being deemed legitimate or not.

There are other discussions of the permissibility of forms of finance which go beyond what Kahf offers in terms of normative or instrumental rationales. Here, too, as suggested above, justifications of these kinds are bound up in some measure with a variety of notions, among others, of “real” assets. Not surprisingly, they typically come up in the context of discussion about the prohibition of *riba*.

Note that such rationales are often supported by citations to the primary text of the Islamic narrative – the revelations reported by the Prophet in the Qur’an. However, “[t]he second most importance [textual] source is found in the *sunna*, that is, the deeds, utterances and tacit approvals of the Prophet, as related in the *hadith* or traditions.”¹⁶⁸ “Muslims use the term *hadith* (literally: ‘report’) to denote, on the one hand, a tradition about the prophet Muhammad or one of his companions..., and on the other, the whole corpus or the genre of such traditions. A complete *hadith* consists of a text...and information about its transmission..., i.e. a chain of transmission through which the report is traced back to an eyewitness or at least to an earlier authority.”¹⁶⁹

“The contents of *hadiths* are diverse. They report historical events in the life of the Prophet, the first caliphs or other Companions; they also provide information about opinions or actions concerning issues of belief, ritual, law, ethics, the Qur’an and its interpretation, and so on. Therefore, *hadiths* are not only found in the so-called *hadith* collections, but also in compilations devoted to the life of the prophet Muhammad..., in accounts of early Islamic history, in works on the exegesis of the Qur’an in juridical treatises and in biographical dictionaries.”¹⁷⁰

(There are, of course, other substantive sources of law found in secondary texts, references to historical practices/local custom at relevant times as well as sources which reflect the interpretive methodologies employed.) As we describe below, although the process of ascertaining what appears to be a high unto universally accepted text for the Qur’an, which, if any, *hadith* are deemed to be authoritative is a rather different matter. (See APPENDIX B.)

In all events, Iqbal and Mirakhor characterize the prohibition of *riba* in a way which is linked to notions of the importance of the “real economy”. Recall the passage quoted above that “[t]he organizing principle of Islamic finance in an Islamic economy is transaction based on exchange, where real asset is exchanged for real asset. Hence transactions are based on the real economy.”¹⁷¹ (For a brief discussion of the more general importance of trade and commerce to the Islam narrative and understanding thereof, see APPENDIX C.) That is, “requiring contracts to be based on exchange constitutes a necessary condition, and ‘no-*riba*’ as the sufficient condition in an Islamic financial system. By focusing on trade and commerce in commodities and assets, Islam encourages risk sharing, which promotes social solidarity.”¹⁷² The authors do not define what they mean by “real assets” or the “real economy” as such. Indeed, it would seem that they equate “commodities and assets” with “real assets” though that introduces some circularity into the analysis.

In another essay Mirakhor (and Bao) start (though do not end with) a textual/linguistic analysis to support their point. That is, they contend that the noted “verse declares contracts of *Al-Bay’* (risk-sharing-based transactions) permissible and contracts of *Al-Riba* (interest rate-based debt contracts) nonpermissible”; that although “[m]ost translations of the Qur’an render *Al-Bay’* and *Al-Tijarah* as ‘commerce’ or ‘trade’,” “various verses of the Qur’an (such as 2:111, 2:254, 35:29–20, 61:10–13)” and “major lexicons of Arabic” suggest that “trade contracts (*Al-Tijarah*) are entered into in the expectation of profit (*riba*)” while *Al-Bay’* contracts “are defined as ‘*Mubadilah Al-Maal Bi Al-Maal*: exchange of property with property.”¹⁷³ Next, though, they appeal to “contemporary economics” to argue that from such a standpoint “this phrase would be rendered as exchange of a property rights claim.”¹⁷⁴ (However they revert to the same textual/linguistic sources to “suggest a further difference in that those who enter into a contract of exchange expect gains but are cognizant of probability of loss (*Khisarah*).”¹⁷⁵ It would seem that it is by way of the reference to “property rights” that the authors might be making the (at least rhetorical) connection to “real assets” and, perhaps, the “real economy” in a way similar to that discussed above with respect to *Kahf*, though they say nothing explicit in those terms.

Rather, Mirakhor and Bao proceed to emphasize more instrumental considerations of an economic character, that is, strengthening the ability of individuals to engage in and benefit from economic activities. More particularly, they opine that the “rules of behavior and compliance” expressed by the bar against *riba* not only “reduce uncertainty,” by “reduc[ing] the burden on human cognitive capacity, particularly in the process of decision making,” but also “promote cooperation and coordination.”¹⁷⁶ In the latter regard through, the prohibition of *riba*, “Islam has provided ways and means by which those who are able to do so mitigate uncertainty by sharing the risks they face by engaging in economic activities with fellow human beings through exchange. Sharing allows risk to be spread and thus lowered for individual participants.”¹⁷⁷ As

such, though, on its face at least, these rationales are not readily linked to framing in “real” terms. (In yet another essay co-authored by Mirakhor, while he reprises in some measure what is described above, he adds arguments justifying his reading of the text in the actual practice of the Prophet in Medina, to the same effect, that “[t]he moral-ethical foundation of market behavior prescribed by the Quran and implemented by the Prophet was designed to minimize the risk for participants and increase the efficiency of exchange.”¹⁷⁸)

Another, though more generic rationale is offered by Hamid, one concerned with the need to spur involvement in “real world” activities/the “real, productive economy”. In this regard, he quotes the following passage from the writings of a famous Muslim thinker and philosopher of the 11th to 12th century in connection with ban on *riba*:

“[W]hen a person having money is allowed to earn more money on the basis of interest, either in spot or in deferred transactions, it becomes easy for him to earn without bothering himself to take pains in real economic activities. This leads to hampering the real interests of humanity, because the interests of the humanity cannot be safeguarded without real trade skills, industry and construction.”¹⁷⁹

The above is, of course, a translation from the Arabic, so we are not in the position to determine, among other things, the precise meaning of the words “real economic activities” and “taking pains” to be “bothering” with them or to understand what exactly are the “real interests of humanity” which “real trade skills, industry and construction” can help safeguard. (Also, we do not know the context in which these words were situated.) On their face (in English), though, the passage would seem to implicate a sense of an overriding concern for provision to meet people’s need/want for goods and services and that those who lend on the basis of interest will not be sufficiently attentive to the everyday effort/activities – through “real trade skills, industry and construction” – required of the borrower to produce them. If so, again, the focus is on the activities as such, not the material objects (whether termed “real asset” or otherwise) which of necessity are a necessary part of the activities.

Warde offers a related argument. He contends that one of “the three ethical/economic justifications for the prohibition of *riba*” is that “it is unproductive”, a criterion grounded in the notion that “[e]arning a profit is legitimate when one is engaged in an economic venture and thereby contributes to the economy.”¹⁸⁰ In this case, Warde derives support for his assertion with reference to historical practice during the period of the revelation of the Qur’an (and matters to which Muhammad otherwise spoke, ostensibly captured in (accepted) *hadith*). That is, Warde remarks that “[b]y certain accounts, Meccan merchants in the days of the Prophet routinely engaged (usually in-between arrivals and departures of caravans) in interest-based lending, speculation and aleatory transactions.” Profit from trade “benefited the community and enhanced welfare” while those other kinds of transactions “diverted resources towards non-productive uses and contributed to illiquidity and scarcity.”¹⁸¹ In this connection, he suggests that “[t]he modern-day equivalent of that debate contrasts the real, productive economy with the financial, speculative one.”¹⁸² (Warde also offers two other, more normative arguments, one of which is arguably relevant here. It concerns avoiding unfairness, though he links it to the just noted economic rationale.¹⁸³ That is, “[u]nder a traditional interest-based relation between borrower and lender, the borrower alone either incurs the losses or reaps disproportionately high benefits. Conversely, the lender makes money irrespective of the outcome of the business venture. Islam prefers that the risk of loss be shared equitably between the two. In other words, rather than collecting a ‘fixed, predetermined’ compensation in the form of interest, lenders should be entitled to a share from any profits from a venture they have helped to finance.”¹⁸⁴)

While, as noted, analyses of the sort described are important insofar as they in one fashion or another look beyond immediate reliance on textual sources for rationales, they do not appear to engage in the exercise in a systematic way and so, in certain ways, what they do borders on the anecdotal.

However, among those efforts of a more methodical nature are those detailed in a book by Mahmoud A. El-Gamal. Although El-Gamal hardly ignores textual references, he puts great emphasis on “the social and economic ends of financial transactions.”¹⁸⁵ He does so as a leading critic of Islamic finance as he sees it currently practiced. He describes it as a “form-driven Shari’a arbitrage” which largely “utiliz[es]...nominate contracts and selective application of their classical conditions” to mimic and justify the use of products characteristic of conventional finance.¹⁸⁶ That is, as discussed below, classic Islamic jurisprudence did not map out the landscape of permissible contracts in broad gauge terms but rather in terms of a number of specifically named and defined contracts/contractual structures and contemporary efforts at determining the legitimacy of ostensibly new contractual arrangements and frequently characterized those arrangements as acceptable because they constituted by nominate contracts used as “building blocks”.

By contrast, El-Gamal’s stated goal is “[i]n part,... [to] reconcile the two views by recognizing classical prohibitions in Islamic jurisprudence as prudential regulatory mechanisms.”¹⁸⁷ From such a perspective, a decision must be made as to “whether to start from contracts that are known to have embodied those mechanisms in premodern times (e.g., nominate contracts such as *murabaha* or *ijara*) or to start from conventional practice and impose restrictions that embody the substance of those classical mechanisms.”¹⁸⁸ For El Gamal, the “resulting choice of one approach or the other should be dictated by economic considerations.”¹⁸⁹ That being said, though, he insists that the task requires a redefinition of Islamic finance “in terms of truly religious social and economic developmental goals” “rather than the mechanics of its operation” and demands “integrat[ing] those social goals with the mechanics of financial innovation.”¹⁹⁰ That, in turn, requires “an understanding of the *economic reasoning* underlying classical jurisprudence, to ensure that developments in the (common-law-like) body of Islamic financial jurisprudence serve substantive ideals, rather than formulaic mechanics.”¹⁹¹

Perhaps because of the above-characterized nature of El-Gamal’s argument, there are very few references in the nearly 200 pages of his book to the “real” in general and just a couple instances in which the “real” is used in ways at all akin to how it has been employed as described in prior pages. Indeed, of the latter there are arguably only two instances and they simply involve a description of certain practices in contemporary Islamic finance.¹⁹² There are, similarly, a few references to “tangible assets.”¹⁹³

Rather, El-Gamal’s focus is informed by his view that classical jurisprudence “aimed mainly to enhance fairness and economic efficiency, subject to the legal and regulatory constraints of premodern societies.”¹⁹⁴ For example, “classical jurists envisioned the two major prohibitions in Islamic jurisprudence of financial transactions – those against *riba* and *gharar* – to be efficiency-enhancing”¹⁹⁵ (though, as discussed below, at other points, he states the concerns or goals more broadly). Especially relevant for this paper is how El-Gamal frames the discussion to follow of the basis for and meaning of that statement. In particular, he asserts that “in finance – the forbidden *riba* is essentially ‘trading in credit,’ and the forbidden *gharar* is ‘trading in risk’ as unbundled commodities.”¹⁹⁶ We return shortly to the important question as to what is unbundled to not. At this point it suffices to remark that although the need for bundling has some link to the “object”-oriented discourse we have described above, the actual focus is on certain kinds of activities which must be rejected. The discourse simply serves to illustrate and evoke images of those unacceptable activities.

For now, we largely consider El-Gamal's discussion about *riba*, though only reprise aspects of his analysis relevant to the issues posed here. (We note that El-Gamal echoes many authors in asserting that the distinction between legitimate and forbidden compensation which *riba* embodies "is the most fundamental distinguishing feature of Islamic finance, as a prohibition-driven industry."¹⁹⁷)

El-Gamal's approach is first, to consider certain canonical Qur'anic verses and then the juristic taxonomy of prohibitions. Based on that he contends that classical jurists had extended a pre-Islamic bar against *riba* to "cover all forms of interest-bearing loans" for reasons that are not "particularly convincing."¹⁹⁸ Hence, he is critical of their having done so. He asserts that *riba* is not the same as interest because, in his view, some prohibitions that fall within it do not involve a time element. On one hand, "even the most contemporary jurists do not consider all forms of what economists and regulators call interest to be forbidden *riba*."¹⁹⁹ On the other hand, "there are forms of forbidden *riba* (illegitimate increase in exchange) that do not include interest."²⁰⁰

El-Gamal's affirmative argument rests on his assessment of the "economic substance" of the prohibition. That appraisal starts from analysis of writings of "the Maliki jurist, judge, and philosopher Ibn Rushd (also known as Averroes, d. 595 A.H./1198 C.E.)" as it related to jurists' generalization to all fungible commodities of a literally narrow prohibition on "trading goods of the same genus and kind in different quantities" (*riba al-fadl*, "the *riba* of increase, also called *riba Al-Sunna*")²⁰¹ – which itself was a generalization of a prohibition concerning exchange involving any among six named commodities.²⁰² According to El-Gamal the latter proscriptions entailed two conditions with respect to exchange, that it be "hand to hand" and "in equal amounts."²⁰³

El-Gamal accepts what he characterizes as Ibn Rushd's understanding of the underlying reasons for these prohibitions: "[W]hat is targeted by the prohibition of *riba* is the excessive inequity it entails. In this regard, equity in certain transactions is achieved through equality. Since the attainment of equality in exchange of items of different kinds is difficult, we use their values in monetary terms."²⁰⁴ In turn, according to El-Gamal, this implies that "the conditions for efficiency in exchange" are "that the ratio of traded quantities should be determined by the ratio of prices, and the latter should be equal to the ratio of [marginal] utilities."²⁰⁵ Thus, those who comply with the prohibition in exchanges of fungible commodities must "collect[]...information about market conditions, and mark[] terms of trade to market prices," thereby "protect[ing] individuals against engaging in disadvantageous trades and enhances overall exchange efficiency."²⁰⁶ Since "trading at any ratio that deviates from that of market prices will – by necessity – be disadvantageous to one party," "justice and efficiency both dictate following this mark-to-market approach to establishing trading ratios."²⁰⁷

El-Gamal then extends the argument to "exchange[s] over time (through credit sales, leases, or other transactions)".²⁰⁸ He does so, as noted above, informed by concern about the propriety and usefulness of formal adherence to classical contract forms as compared with criteria identified with the achievement of justice and efficiency. So, for example, he refers to the contemporary arrangement for the equivalent of a bank loan taking on the classic *murabaha* form of (an accepted) credit sale as the means for ostensible compliance with Islamic norms. In the case of *murabaha*, "an intermediary buys a property with free and clear title to it" and "[t]he intermediary and prospective buyer then agree upon a sale price (including an agreed upon *profit* for the intermediary) that can be made through a series of installments, or as a lump sum payment."²⁰⁹ By contrast, according to El-Gamal, achievement of "ensur[ing] equity in exchange ...dictates that credit ...be extended at" what he terms "the appropriate interest rate".²¹⁰ Although there is reference to "profit", to El-Gamal it might as well be labelled "interest." That is, the buyer is charged

an “implicit interest rate”. To El-Gamal, “benchmarking the implicit interest rate... to conventional interest rates – which are “based on credit worthiness and security of the posted collateral” – is “quite appropriate,”²¹¹ that is, it ensures equity in exchange. But if so, doing so raises the question as to the need for going through the *murahaba* exercise (and bearing its additional costs) in the first place. He sees adherence to this or other such forms as warranted “only if we ensure that the spirit of the Law” which justified those forms in earlier circumstances is “protected” in current ones.²¹²

To further explore this issue El-Gamal turns to mortgage finance in relation to concerns which inform the prohibition of *riba*, namely “to protect individuals from getting excessively indebted, as well as paying or receiving unfair compensation for receipt or extension of credit.”²¹³ He casts such protection as a response to concern with humans’ “irrational behavior,” for example, their “tend[ency] to discount the immediate future” which favors present consumption over future consumption and leads to their taking on more and more debt.²¹⁴

El-Gamal then observes that the non-Islamic mortgage “constitutes an interest-bearing loan of money, which the overwhelming majority of jurists (though not all) consider to be a form of the forbidden *riba*.” Even though such a loan is secured by the house, it is “separat[ed]...from the sale contract for which [the loan] was intended” and is “equally condemn[ed]” according to Islamic norms whether the loan is secured or unsecured.²¹⁵ By contrast, for the typical Islamic mortgage employing a lease arrangement, there is ostensible or formal compliance with classic contractual forms. That is, it involves sale of the house to the bank and the bank’s lease of it to the borrower who makes “rental” payments” which are “benchmarked to market interest rates”²¹⁶

These payments are the equivalent of conventional mortgage payments. The making of the last of such payment entitles the borrower to transfer of ownership of the house to him or her. Although bringing the house into the transaction in the way described ensures accord with the required formalities, for El-Gamal, the issue is again not fundamentally about those formalities, but rather about one of economic substance. Here, while Islamic bank practice is to require its customers to make payments “benchmarked to mortgage market interest rates,” that is inadequate to the task.²¹⁷ (Indeed, per the point above, reliance on such rates undermines the justification for the use of the classical form for the transaction.) Rather, there is a need to compare those payments “to the actual market rent of the property”²¹⁸ because doing so “should prevent the individual from engaging in excessive borrowing to purchase the property” and also “assure[s] that the implicit interest rate he pays is marked to the market-determined time value of the property serving as security for the debt.”²¹⁹

We now return to the question of that which is “unbundled” or not. We do so, not only because of the passage just quoted above but also in light of the subsequent one which closes El Gamal’s discussion about *riba*. He writes: “We have thus seen that the classical prohibition of *riba* in finance refers to the unbundled sale of credit, wherein it is difficult to mark the interest rate to market.”²²⁰ He notes that “[i]n this regard, the simplest form of an included credit sale is an interest-bearing loan” (by which he seems to mean an unsecured interest-bearing loan).²²¹ He concludes his broadly analogous discussion of “[t]he prohibition of *bay’ al-gharar* (the sale of *gharar*)” by stating it “may thus be seen as a prohibition of the unbundled and unnecessary sale of risk. Of course, the most extreme form of unbundled sale of risk is gambling: paying a predetermined price for some unproductive game of chance (e.g., spinning a roulette wheel and winning a larger sum of money if the ball falls on black).”²²²

Shortly thereafter, in a discussion of the “economic substance,” he reprises both references in the following way:

“[W]e have argued that the two main prohibitions in Islamic jurisprudence, those of *riba* and *gharar*, are best characterized as trading in unbundled credit and trading in unbundled risk, respectively. For the case of *riba*, we argued that disallowing unbundled trading of credit can protect individuals who are vulnerable to excessive borrowing from falling into debt cycles and ensured marking interest rates to market. Similarly, it can be seen that the prohibition of trading unbundled risk aims to protect individuals from exposure to excessive financial risk or payment of mispriced premia to eliminate existing risks.”²²³

El-Gamal repeats the point with another example, one involving sale of an extended warranty/“insurance” after the purchase of a computer which comes with a basic warranty/“insurance”. According to him, doing so is not in accord with Islamic norms. It fails because sale of the extended warranty *after* sale of the computer “capitalizes on individuals’ loss aversion”; by contrast, if there is sale before – that is, offer of the insurance “bundled” with the computer “(e.g., if it sold for \$1,000 without warranty, and for \$1,200 with extended warranty), buyers will tend to view safety as an attribute of a computer they do not yet own, and would thus be unwilling to pay a high price for the embedded insurance.”²²⁴

Although El-Gamal appears to see bundling, for the reasons stated, to be a *necessary* condition for compliance with Islamic norms, he makes clear that it is not a sufficient one. That is, “classical contract forms – specific means of bundling credit and/or risk with other economic activities – can be used as apparently legitimate means toward illegitimate ends.”²²⁵ He cites *tawarruq* as a case in point. Here, “[a] customer buys an easily saleable asset from an Islamic bank at a marked up price, to be paid at a later date, and quickly sells the asset to raise cash.”²²⁶ According to El-Gamal, in this case, “the ‘rental’ value on commodities...is precisely the rental value on money: that is, market interest rates that are not linked to the object of sale in any meaningful way. In other words, the ‘bundling of credit’ in this transaction serves no economic purpose.”²²⁷

El-Gamal returns to this line of argument in a later published article though he seems to cast it in somewhat different terms. That is, he remarks that “the prohibitions of *riba* and *gharar* are precisely restrictions on means of trading in risk (the extension of credit exposes the creditor to potential borrower default or bankruptcy). In this regard, the spirit of Islamic jurisprudence allows transfer of credit and risk only if bundled within a financial transaction such as sales, leases, and partnerships.”²²⁸ Here the rationales underpinning the need for bundling appear to be broader than those reasons stated in his book: “Such bundling regulates the level of risk taking in financial transactions, thus allowing for necessary risk taking to encourage investment and economic growth while minimizing individual and systemic risks of bankruptcy and wild fluctuations in economic values.”²²⁹ In all events, with respect to bundling the focus is not on a need for the transaction to be linked to objects as such but rather on certain kinds economic activities (which presumably, in and of themselves, are in accord with Islamic norms). (Interestingly, though, in a much more recent draft paper, although El-Gamal makes similar points, he makes no mention of bundling.²³⁰)

With the above in mind, consider those four of El-Gamal’s references in his book to bundling which offer some specific sense of what it is or entails and another which does not mention bundling but might allude to it.

- (1) “classical contract forms – specific means of bundling credit and/or risk with other economic activities”²³¹;
- (2) “transfer of credit and risk only if bundled within a financial transaction such as sales, leases, and partnerships.”²³²;

- (3) *tarrawuq* is impermissible because “the ‘rental’ value on commodities...is precisely the rental value on money: that is, market interest rates that are not linked to the object of sale in any meaningful way. In other words, the ‘bundling of credit’ in this transaction serves no economic purpose.”²³³ ;
- (4) “the unbundled sale of credit, wherein it is difficult to mark the interest rate to market.”²³⁴, and
- (5) “disallowing unbundled trading of credit can protect individuals who are vulnerable to excessive borrowing from falling into debt cycles and ensure[s] marking interest rates to market.”²³⁵

With regard to (1), El Gamal does not define what he means by economic activities. So this broad and vague reference to “other economic activities” as such is at best only suggestive. His use of the phrase just a few other times in the book confuses the matter. At one point he refers to “[t]he objective of balancing economic freedom (allowing more contracts to enable more economic activities) with risk of abuse (if too much freedom is allowed)...”²³⁶ At another, he cites the efforts of premodern jurists “to restrict *salam* [that is, pre-paid forward sale] contracts to genuinely needed economic activities, such as the original financing of agricultural production.”²³⁷ In his critique of *tawarruq* he speaks of “[e]conomic activities camouflaging the underlying sale of credit (two spot sales and one credit sale of some commodity) do little to protect individuals from borrowing or lending excessively, for the wrong reasons, or at the wrong interest rate.”²³⁸ Statement (1) might imply that “other economic activities” are ones which are not concerned with the provision of credit. But the just-quoted criticism of *tawarruq* seems to deem it to be an economic activity, albeit a problematic one and the comments as to *salam* equate “original financing of agricultural production” as an economic activity. The association of economic freedom with more contracts to enable economic activities does not add to the understanding of what the latter entail.

With regard to (2), the contention is that the permissibility of the transfer of credit (or risk) hinges on bundling and among that with which it might be bundled are “sales, leases, and partnerships.” Presumably implicit in this statement would be that those sales, leases, and partnerships are otherwise permissible, that is, both the activities with which they are concerned and the relationships between the parties with respect to those activities. But if so, in and of itself that is not especially informative. The implication may be that the activities are not ones which would in and of themselves would be characterized as involving the transfer of credit (or risk).

Such an implication (and arguably more) might be inferred from (3). There it is acknowledged that the transfer of credit involves bundling but what is being bundled is not otherwise acceptable. Arguably, the reason is that although the bundling involves a tie to a sale, the link entails no connection with the *object* of that sale, in the sense that there is no intention on the part of either party to make any use of that object, either for consumption or for production. Because there is no such intention, no “economic purpose” is intended or implicated. El-Gamal does not quite say that. Rather his concern is (or is as well) the relationship between the parties with respect to the object of the sale. More particularly, the rate of interest rate or profit (or otherwise) charged is an unidentified, arguably generic market interest charged for use of the money advanced by the lender; and that the rate of interest is not one charged for use of the object. To press this line of argument further, perhaps, given the centrality of “economic substance” in general and “efficiency” or perhaps justice and efficiency, in particular, for El-Gamal’s analysis, charging interest at a rate calculated in a way which has nothing to do with the use of the object which is nominally central to the transaction is neither just nor efficient (with respect to the parties). However, for this scenario the force of that argument is not obvious. Here, the ostensible concern is not for the borrower in that he or she is being charged a rate of interest which is determined on a basis which

has nothing to do with his or use of the object that is the subject of the nominal sale. Why? Because the borrower (just like the lender) has no concern with the object as such? At first blush, the transaction is inefficient from a larger perspective in that the sale and resale involve the application of time, effort, and resources with respect to the object of sale but no use of that object in connection with consumption or production.

Characterizations (4) and (5), particularly the references to marking to market, are only slightly informative and in certain ways problematic. Clearly, they identify pricing based on relevant market transactions with efficiency (and arguably justice as well). But then the question is what market transactions are the significant ones. Arguably they are market transactions which might be associated with the activities for which credit is to be supplied. Of necessity, these activities involve “objects” and they might do so in a way which makes the market for the purchase and sale of them of import. The examples El-Gamal cites in his discussion of fungible commodities come to mind in that regard. But in those cases, they involve benchmarking against their price in the conventional markets where they are traded. This approach would seem to assume that the price generated by the operation of the ideal(ized) market is the touchstone or efficiency (and justice). We return to this point below.

For the time being, though, the question then becomes one of the significance of the benchmark when the relevant market does not operate in the way assumed. It is an issue which is similarly posed when El-Gamal extends the fairness and efficiency/mark to market argument to trading in credit. For example, suppose the operation of the conventional market results in what otherwise might be viewed by some as usurious interest rates or their equivalent?

But other issues are raised as well. Credit involves the provision of resources to enable or facilitate activities. The question then becomes whether and on what terms there should be recompense for such provision. As El-Gamal characterizes it, the recompense must be appropriately linked/“bundled” to those activities. The question is, exactly how.

In this regard, consider his mortgage finance example. El-Gamal is critical of the current mode of Islamic finance which incorporates a nominal leasing arrangement into the terms of the transaction to provide the “cover” of facial compliance with pre-modern jural forms in conjunction with effectively setting the bank’s recompense (the “implicit interest rate”) at conventional mortgage interest rates. In that case, he rejects (at least sole) reliance on conventional interest rates as the benchmark for recompense which is permissible according to Islamic norms.

El-Gamal’s objections are two-fold. First, the transaction results in the same recompense as conventional mortgage finance but at the cost of additional complexity and expense required by use of the noted juristic artifice. Second, the employment of the device in this context does not adequately test the “economic substance” of the transaction for justice and efficiency. Rather, apparently drawing on the very device – the nominal lease arrangement – he insists that the recompense be benchmarked against the actual market rent of the property. But the fact that the artifice happens to involve a lease arrangement does not mean that such a choice is dispositive of that against which the recompense should be benchmarked. For example, might the benchmarking be based on how the borrower uses the property, for example, whether the borrower will live in the house or lease it? Again, with respect to which kinds of rental terms should the recompense be assessed? Thus, in a sense one might say that although the judgment as to the implied interest rate is as a formal matter tied to the *object* involved in or implicated with the *activities* being financed, in fact it is the activities as such on which the judgment is made.²³⁹

Contracts, the “real”, and the Islamic narrative

We have seen in the preceding discussion that, in considerable measure because of the perceived special significance of verse 2:275 of the Qur'an, there has been correspondingly great emphasis or focus on contracts, most particularly contracts for sale. That discussion sought to explore the role, relevance, or import of “objects” in connection with financial transactions viewed as being particular kinds of contracts for sale. However, we took note above of Cattelan's contention that the “object as something ‘real’ (in the sense of ‘tangible’) to be traded” as a “core element” not only of Islamic contract theory but also of Islamic property rights²⁴⁰ Certainly insofar as contract law is concerned with transactions which involve what is understood to be “property” that necessarily implies an appropriate alignment of property law with contract law and hence warrants attention to notions of the real/tangible/objects in that context as well.²⁴¹ Moreover, recall that Kahf's arguments with regard to the ostensibly distinctive character of Islamic finance entail a discussion which blurs the lines of discourse about contract and of property.

We first turn briefly to contracts, particularly contracts of exchange, and most especially contracts for sale. As explained below, for our purposes the key points are that contracts loom large in a variety of ways in the Islamic narrative and are closely linked to that narrative as it pertains to property; that the evolution of Islamic law has been such that there has not been formulation of an overarching theory of contract in the Western sense; and that within the framework developed contracts of sale are highly prominent in serving as a starting or reference point/basis for what might otherwise be viewed as distinctive kinds of contracts.

For example, as Iqbal and Mirakhor characterize it, “[t]he concept of contracts in Islam...is ...a concept upon which the *Shari'ah* is based. The whole fabric of the Divine Law is contractual in its conception, content and application. The foundation of the *Shari'ah* is the covenant between Allah (swt) and man, which imposes on man the duty of being faithful to his word. The *Qur'an* reiterates that ‘Allah (swt) will not fail in His Promise.’”²⁴² Similarly, according to Noor Mohammed, “[t]he initial source of Islamic contract law is apparent through the Quranic revelation in these words:

O ye who believe!
Fulfil (all) obligations”²⁴³

“This Quranic verse is the basis of the sanctity of a wide variety of obligations. The Arabic word '*uqud*' covers the entire field of obligations, including those that are spiritual, social, political, and commercial.”²⁴⁴ Ercanbrack makes a similar point: “The Muslim believer owes his obedience to God. His faithfulness or loyalty (*amanah*) to his pledged word is made in His presence so that god is witness to the conclusion and binding nature of all contracts. Several verses in the Quran highlight the divine importance of keeping one's oaths and agreements...Jurists developed the Islamic law of contract from the primordial covenant. Thus, the sharia, not unlike the Western legal principle of *pacta sunt servanda*[- ‘agreements must be kept’-]underscores the sanctity of contract.”²⁴⁵

Within the immediate context of issues of meeting human needs, notions of property and trade and contract are intertwined. Vogel and Hayes take note that within the context of the Islamic narrative, “one [major] tenet is that property is God-created and God-given”²⁴⁶; second “that contract is a moral and legal means to gain property.”²⁴⁷; and that “[t]rade is given even greater emphasis by being singled out over other means of gain such as gift and inheritance.”²⁴⁸ Iqbal and Mirakhor contend that “[t]hroughout the legal and intellectual history of Islam, a body of rules constituting a general theory of contracts – with explicit emphasis on specific contracts, such as sales, lease, hire, and partnerships – was formulated on the basis of the *Shari'ah*. Contracts are

considered binding, and their terms are protected by the *Shari'ah*, no less securely than the institution of property."²⁴⁹ They add that

"Islam lays great emphasis on promoting trade and gives preference to trading over other forms of business"; again, that "[t]he *Qur'an* acknowledges the need for markets and affirms their existence, placing emphasis on contracts of exchange (*bay'*) and trade (*tijirah*)."²⁵⁰

More specifically, as Iqbal and Mirakhor describe it, "[t]rade incorporates not only the trading of physical assets but also of the rights to use those assets. The basic contracts are therefore the contracts of exchange, sale of an asset or sale of rights to utilize an asset. Whereas contracts of exchange and sale result in the transfer of ownership, contracts for the utilization of assets transfer only the right to use a property from one party to another."²⁵¹ It is intriguing that they remark that "[t]hese two types of contracts" – which they term "transactional contracts" – are those "from which all others derive, lay the foundation of the principal commercial activities in the economy."²⁵² We say intriguing because the authors distinguish between "transactional contracts" – which "deal with real-sector economic transactions that facilitate the exchange, sale and trade of goods and services" and three other kinds of contracts.²⁵³ Of the latter, one is that of "financing contracts" – "which offer ways [other than by way of debt] to create and extend credit, facilitate financing of transactional contacts and provide channels for capital formation and resource mobilization between investors and entrepreneurs"²⁵⁴ another is that of "intermediation contracts" – which "facilitate an efficient and transparent execution of transactional and financial contracts"²⁵⁵ (which include trust, partnership, agency, insurance, and other arrangements).²⁵⁶ These two kinds of contracts are ones closely identified with investing.

Shimizun also stresses the importance of the sale contract in

"hav[ing] taken an important role in the formation of the Islamic law of contract, as well as the concept of *riba*. The various categories of contracts have been evolved into a sale contract. For example, the contract of hire (*ijara*) is also as a sort of sale, because it is an exchange between labor and remuneration. The study of a sale has formed the core of the Islamic law of contract.

"The contract of sale (*ai-bay'*) means the delivery of a definite object which possesses legal value in exchange for something "equivalent" in value. The concept of sale also include[s] barter (i.e. exchange of one thing for the other 'equivalent' value)."²⁵⁷ He cites Coulson to the effect that the early jurists "'saw their basic task to lie in deciding whether any given transaction, actual or proposed, fell into the category of bay', and therefore permissible and valid, or of *riba*, and therefore forbidden and invalid. In essence it was the process of the interpretation of this basic distinction drawn by the *Qur'an* and its application to contemporary commercial practices that governed the formation of Islamic contractual law."²⁵⁸

More broadly Coulson remarks that

"Islamic legal treatises do not first expound general principles and follow them with their detailed applications, but consist of a succession of separate and isolated topics. Such a legal method naturally produced its own legal concepts. There is, for example, no notion of Contract, in the English sense, where general principles governing agreement may assume: instead there is a law of contracts, in which individual types of transactions are governed by their particular rules. In fact, the whole technique of law in Islam was, until modern times, profoundly influenced by the methodology of its originators in the eighth century."²⁵⁹

Again, Schacht states that “the contract of sale forms the core of the Islamic law of obligations, the categories of which have been described in most detail with regard to this contract, and other commutative or synallagmatic contracts, although regarded as legal institutions in their own right, are construed on the model of *bay'* and sometimes even defined as kinds of *bay'*. Sale is an exchange of goods or properties (*mal*); it therefore includes barter and exchange.”²⁶⁰

Similarly, Saleh writes that “[u]ntil the 19th century no definition of a contract as such is to be found in the treatises of Islamic law. Indeed, nominate contracts were depicted in concise terms but the basic concept of contracting remained unspecified. The reason is that Islamic *fiqh* (jurisprudence) is casuistic not dogmatic, it is meant to solve cases which could well be theoretical at times yet *fiqh* has constantly declined to devise theories from the solution given to those cases. That is the reason why, as a substitute for a General Theory of Contract, the overwhelming majority of specialists in Islamic jurisprudence have turned their attention to the contract of sale which they regarded as the model for all sorts of contracts.”²⁶¹

In light of the above if one looks to what would appear to be at least early understandings as to requirements for valid contracts of sale – recognizing, though, that those understandings are in a number of ways preserved at the rhetorical level – one can perhaps see how readily notions of object-“ivity” derived from it and, in turn, spilled over into other contract arrangements. At the same time one can simultaneously get a sense of its normative and instrumental underpinnings.

1. Saleh, for example, argues that “for...early scholars and their followers, a contract was supposed to be completed immediately. Its subject-matter or more commonly the legal status of that subject-matter was supposed to undergo an instantaneous change with no need for the creation of an obligation which would precede such a change.”²⁶² He adds that the reasons for this were “to be found in the Shari'a requisite that transactions should be devoid of *riba* (unlawful advantage by way of excess or deferment) and *gharar* (uncertainty, risk, speculation),” namely it “eliminate[d] any possibility of *riba* and *gharar*.”²⁶³

Hassan argues along similar lines:

“An essential element of the contract of sale in Islamic law is that there be an immediate transfer of ownership from the seller to the buyer. As soon as the contract is validly concluded, the property, whether it is immovable or movable, passes from the seller to the buyer. It is this immediate passing of property that then gives rise to an obligation on the part of the buyer to pay the price to the seller. The concern with preserving equality is clear from the fact that the reason why the buyer is obliged to pay when he is, is that he cannot combine in his hands both the object and its price. Since the price is the equivalent of the object, to retain both the price and the object gives rise to an imbalance. It goes against the demands of commutative justice. As Chehata said: ‘Not to pay the price is to break the equilibrium that each contract must assure.’”

“For the same reason, if the object is destroyed before delivery, the buyer no longer has a duty to pay the price. The equivalent of the price is no longer in existence and, as the buyer does not combine in his possession both the object and the price, there is no imbalance. Similarly, if the buyer has not conveyed the price to the seller, the seller is not under an obligation to deliver the object.”²⁶⁴

“The concern of the jurists to minimize the risk of *riba* and *gharar* led them to focus on the concrete elements of the contract and its immediate implementation rather than on the

obligation, if any, that arises from a contract. They thus focused on the subject matter and its counter-value, where such counter-value was present.”²⁶⁵

2. Paired with the above was the condition that “such countervalue should be in existence, in their essence at least, and known to the contracting parties.”²⁶⁶ According to Saleh, “[t]hat was the ideal, if not idealistic way to secure a just balance between the contracting parties and to prevent exploitation of the weak.”²⁶⁷ (He observes more generally that “[b]y necessity the focal points of a contract in this system are its concrete elements, i.e. its subject-matter and the countervalue for that subject-matter, if any, rather than any obligation arising out of the contract.”²⁶⁸)
3. Fadel observes not only that “[t]he requirement, derived from the law of sales, that property (*ciwa*) be mutually exchanged permeates the Islamic law of exchange” but also that “the sine qua non of a lawful exchange is that both parties receive property whose material characteristics, e.g., price, quality, and quantity, are ascertainable at the time of the contract.”²⁶⁹ He notes that this “‘property’ requirement is much narrower than the common law’s requirement of a ‘consideration,’ defined simply as ‘a performance or a return promise [that] is bargained for.’”²⁷⁰ “Performance” in the latter context “may consist either in ‘an act other than a promise, or a forbearance, or the creation, modification or destruction of a legal relation.’”²⁷¹ He terms the requirement of specificity of this sort as a reflection of “Islamic law[s] refus[al] to enforce contracts that include significant speculative elements because there is no mutual exchange of property.”²⁷² He regards this kind of contingency and that of temporal contingency – “only one side receives property, while the other’s receipt of property is contingent on the occurrence of an event in the future” as being based upon an irrefutable presumption that the absence of an actual exchange of property reduces the welfare of the contracting parties.”²⁷³
4. The preceding required elements very strongly suggest but would not seem in and of themselves to entail what is ostensibly another requirement cited by Hassan that “[t]he merchandise must be possessed and the vendor must be the real owner, with ownership in the sense of full and absolute right, *dominium* or the *statu liber*.”²⁷⁴ He states that “[i]t had been common practice among the pre-Islamic Arabs to sell goods which had not been with the vendor and had not been possessed by him.”²⁷⁵ He suggests that some among the reasons for this practice (and the above-noted requirements) fell within “the prohibition of *bay` al-gharar*” “were related to fraudulence since such a sale amounts to obtaining the property of others by selling unavailable goods and the contract may lead to disputes and disagreements between the parties in the contract?”²⁷⁶

At first blush, the language and formulation of these requirements are especially evocative of physical exchanges involving tangible objects, for example, commodities and goods.²⁷⁷ Notions of ownership and possession are rather straightforward in this context and, correspondingly, the ability to be in a position immediately to transfer or exchange them upon conclusion of an agreement to do so. In the first instance, the capacity to specify, in anticipation of an agreement the (material characteristics), e.g., price, quality, and quantity appears to be unproblematic. Of course, one can readily imagine those circumstances in which the objects (and/or money in the case of a money-for-objects exchange) are literally in-hand and hence available for an immediate, hand-to-hand transactions. While not immediately relevant, even what appear to be the symbols indicative of reaching an agreement bring to mind a physical/here-and-now character.²⁷⁸

Given the above, it is perhaps not surprising that at minimum, thinking in the relatively early years of the Islamic era about the metes and bounds of permissible transactions might have been

dominated by reasoning with respect to contracts of sale as a general matter and very likely, during that formative period, ones involving tangible objects, especially commodities and goods, in particular. However, perhaps also not unexpectedly, given the increasing diversity and shifting character of experience, that contract of sale template or paradigm was simply not adequate to the task; and that even if the ostensible forms for it were maintained the content effectively changed. For example, Saleh remarks that “[i]n practice,...the system did not work the way it was intended for; from the outset numerous exceptions and qualifications were dictated by business exigencies and found accommodation with an evolving legal system. Most of these exceptions and qualifications were the subject of intense studies by scholars and acquired an unqualified legality and respectability.”²⁷⁹ In this connection, he cites three exceptions, *istisna`* - a contract for one person to manufacture for future delivery to another for a price set at the time of making of the contract; *hawalat al-dayn* - the assignment of debt; and *bay` salam* - a sale with advance payment for future delivery. We discuss the last at some length below but in some measure to anticipate, Saleh remarks that “[u]nder the strict *Shari’a* rule this kind of sale would be unlawful, for the vendor deals with an article not in his possession” but that “[n]evertheless...[it] was admitted in the *Shari’a* on the ground of a tradition attributed to the Prophet himself, as well on the ground of consensus (*ijma`*) and public need.”²⁸⁰ As intimated, these developments should come as no great surprise from just the brief characterization above the kinds of concerns - normative and instrumental - which underpinned or grounded the elements of the contract of sale paradigm.

In certain respects, the discussion above with respect to contracts for sale had implicit references to “property”; that is, the permissibility of the transactions was largely focused on the specificity and presence - in various senses - of that which was to the subject of those contracts. But conditions as to specificity and presence were necessarily linked to notions of ownership and possession, notions closely identified with property.²⁸¹ Indeed, Zahraa and Mahmor assert that “[t]he meaning of *bay`* (sale) in the usage of the Arabic language is the exchange of *mal* (property) for *mal* (property). Linguistically the word *bay`* could mean either sale or purchase.”²⁸² However, they add that although [t]he closest English meaning of the word *mal* is property, “the word *mal* has been used to denote a special legal term” and it is in the latter sense upon which they relay in their essay.²⁸³ In so stating, they, at the same time, acknowledge that “[i]t is perhaps no exaggeration to say that no other term in Islamic law has caused such highly controversial views than the concept of *mal*. The main concerns of the controversy over its meaning have been regarding its quantitative and qualitative aspects and the relationship between *mal* and concepts such as ownership, corporeal and usufruct property.”²⁸⁴

An essay by Muhammad Wohid Islam proves a useful perspective on the concept of property in Islamic legal thought. He first analyzes the word “property (*mal*)” in *philological* terms. He suggests that “[*m*]al in the Arabic language signifies whatever in effect a man may acquire and possess; whether that is corporeal (*‘ayn*) or usufruct (*manfa’ah*); such as gold, silver, animal, plant and benefit gained out of things such as the riding of vehicles, the wearing of clothes and the residing in houses etc. On the other hand, whatever a man cannot possess, cannot linguistically be regarded as *mal*. For instance, birds in the sky, fish in the water, trees in the forest, and mines in the secret depth of the earth are not linguistically considered *mal*.”²⁸⁵ Citing famous dictionaries dating back centuries he adds, “[a]ccording to *al-Qamus al-Muhit*, *mal* means all things which are capable of being owned; and according to *Lisan al- ‘Arab*, *mal* is customarily known as all things capable of being owned.”²⁸⁶

Moreover, he cautions that the “*Shari’ah* has not imposed unnecessary limitation on the meaning of *mal* by defining it in a narrow perspective; rather the concept of *mal* is left wide on the basis of peoples’ customs and usages.”²⁸⁷ He remarks that “[t]he term *mal* or its derivatives has been

mentioned in the Qur'an in more than 90 verses and in the Sunnah of the Prophet (*pbuh*) in as many places as uncountable, and thus these two sources have left the understanding of the terminology open according to the customs of the people."²⁸⁸

Perhaps, then, it is not surprising that there has been and there remains contention as to the *juristic* meaning of the word. Wohidul Islam observes that on one hand, "the Hanafi school recognises property only in material things which have tangible substance or corpus. Usufructs (*manaf'i* pl. of *manfa'ah*) and rights (*huquq* pl. of *haqq*) are not therefore, according to Hanafi jurists, property but rather a sort of dominium"; on the other, "[t]he non-Hanafi jurists, on the other hand, hold that usufructs and rights are also property, because by thing they mean the beneficial use and the benefit of it and not the thing itself."²⁸⁹ Wohidul Islam contends that the latter view is "in line with the customary usage of people and therefore accorded wide legal recognition."²⁹⁰

Certainly, what the Hanafi school treats as property is more than plausible. At the level of individuals, questions quite obviously arise with regard to a desire they may have for (personal) appropriation, that is, to identify and "possess" some "thing" for themselves; in the first instance, the latter might well be a physical or tangible object seen as desirable to have "for oneself" (for whatever reason). Arguably, in that instance, the "have" refers to at least that which is capable or amenable of being brought within the individual's physical control. A distinct issue is that of the circumstances under which that object might not only be brought within the individual's physical control but also remain so insofar as the individual wishes it to be the case. That poses questions associated with "ownership," that is the legitimacy of a particular object coming within an individual's control and of remaining in his or her full possession (and correspondingly, the legitimacy of it subsequently being caused or allowed to be in the possession of another individual). The very important body of requirements/rules/standards according to which legitimacy in those terms is determined might be identified as or referred to as "property law". For whatever reasons, it would appear that for Hanafi school jurists, legitimation of that character was warranted only in connection with physical or tangible objects. This is not to say, they were not concerned with legitimation under different circumstances, for example, with regard to usufruct insofar as the latter is understood as the "right of an individual to use something that belongs to someone else."²⁹¹ Rather, it would appear such legitimation was cast not in terms of the body of requirements/rules/standards for "property," but rather, as noted, of those appropriate to an individual having "a sort of dominium."

At first blush, the desire of individuals for physical or tangible objects is not merely or only one of the sheer ability to possess them, but rather often because they want to enjoy or have the benefit of the uses to which those objects might be put. And, in turn, circumstances might allow some form of retention of possession of them by individuals in combination with the enjoyment by others of certain of the uses of the objects. In turn, notions of "ownership" could well be extended to those who seek legitimation for their acquisition and enjoyment of those uses. For some – for example and as noted, certain non-Hanafi jurists – there could be comfort in extended such legitimation under the rubric of "property law", especially in those cases in which the uses are the direct result of physical action on or with respect to the objects.

But, certainly, just as one distinguishes between a material/tangible object and, for example, a right or claims to possession of that object, so one can differentiate between the uses to which it might be put and the right to those uses. If so, then in principle, insofar as a necessary condition for something to qualify as property is its materiality/tangibility, then putting a material/tangible thing to its uses by definition evokes images of action which directly engage with its material/tangible attributes. For example, the object could be consumed in whole or part, changed physically, or could simply be moved from one place to another. Arguably, to the degree that such

images are well enough evoked for someone, the more willing that person might accept usufruct as “property” or, perhaps, insofar as the uses evoked are seen to have a material/tangible nature. We will return shortly to the matter of whether and how images might be evoked in this and broader contexts.²⁹²

For the moment, though, the note that the case of usufruct is illustrative of jurists and others grappling with notions of ownership and property with respect to that which is one or more steps removed – and removed in diverse ways – from those initially associated with just physical or tangible objects.

So, for example, at one point in their seminal book (for certain Western readers at least), Vogel and Hayes acknowledge that “[*mal*] is defined as tangible things to which human nature inclines”²⁹³; and that “the usufruct of property is not something existent and tangible.”²⁹⁴ Nonetheless, they remark that – as of the time of their writing, 1998 – “Islamic law [wa]s increasingly recognizing intangible property as *mal*.”²⁹⁵ For example, they state that while “Islamic law usually ignores intangible values,” the Organization of Islamic Cooperation had in 1988 “broadly endorsed intellectual property rights.”²⁹⁶ However, the issue appears to remain hotly contested to this day.

So, for example, more recently Rasani describes contemporary scholars as being “split into two main groups.”²⁹⁷ The argument of one, “as summarized by Mufti Taki Usmani,...is that: ‘the concept of ownership in Shari’a is confined to tangible objects only.’ These scholars contend that there is no precedent in the Holy Qur’an, in the Sunnah, or in the juristic views of the earlier Muslim jurists that an intangible object was subject to private ownership or to sale and purchase.”²⁹⁸ While this view is of a linguistic/textual nature such scholars also offer ones which have both a normative and instrumental character: “...‘[K]nowledge’ in Islām is not the property of an individual, nor can an individual prevent others from acquiring it, whereas the concept of ‘intellectual property’ leads to the monopoly of some individuals’ knowledge, which can never be accepted by Islām.”²⁹⁹ By contrast, “the majority of Islamic scholars t[ake] the position that there is nothing in Shari’a that enjoins or contravenes protecting and enforcing intellectual property rights and that Muslims should abide by their contracts and the laws applied in their countries.”³⁰⁰

Contentions of this kind are in greater or less measure nested in a field of discourse oriented to or grounded in “objects,” especially physical or tangible ones. The strength of that orientation or grounding is illustrated by Vogel’s and Hayes’ further description of *mal* in the following terms:

“*Mal* is owned (*milk*) as either ‘*ayn* or *dayn*. ‘*Ayn* is a specific existing thing, considered as unique object and not merely as a member of a category...*Dayn* is any property, not an ‘*ayn*, that a debtor owes, either now or in the future; or it can refer to such property only when due in the future...Although *dayn* literally means ‘debt,’ in *fiqh* it refers not to the ‘obligation’ per se, but rather to the property the subject of the obligation, which is considered to be already owned by the creditor.”³⁰¹ They add, further, that Islamic law “imagin[es] *dayn* property as subsisting ‘in the *dhimma*’ of the obligor [seller].”³⁰² The sense of the term *dhimma* seems to be that a specific object of the kind described is imagined as being in the possession of the seller who has title to it and that the obligor/debtor has accepted the duty and obligation to protect it.³⁰³ Accordingly, Vogel and Hayes suggest – consonant with the discussion of contract law above – that “[t]he fictions of *dayn* and *dhimma* indicate that Islamic law understands sale not as one or more obligations, but as the consenting present transfer of property.”³⁰⁴

Cattelan offers a similar view. He argues that “the *dhimma*, as the (fictive) place where *dayn* properties (still intangible at present) are temporarily located, substitutes in Islamic scholarship

the need for a reference to a specific tangible thing (*'ayn*).³⁰⁵ More generally, he refers to “the objectivism of Islamic law, where, `with regard to ownership, it is the thing . . . that takes primacy. [. . .] [T]he thing must have a material, concrete existence.”³⁰⁶ Thus, in Islamic law, “*dayn* is not an ‘obligation’ in the Western legal sense (*i.e.*, a legal duty for the individual), but a kind of property, an asset which is referred to as if it were already owned by the creditor, `in the sense that the debtor owes it to him either now [as generic thing, still to be individualized as *'ayn*] or in the future [either as generic or specific thing]’.”³⁰⁷

Based on their assessment, Vogel and Hayes see the concept of *dayn* and immediate exchange in a literal or fictive sense as looming large for situations relevant to banking and finance. This is because banking and finance pertain to delayed performance or payment of money or property or the purchase, sale, or transfer of the obligation to do so. Insofar as one credits, for the purpose of Shariah compliance, a critical need for an appropriate link of a transaction to a physical or tangible object in the here and now, then banking or financial transactions are arguably at least one step removed or “distant” from that object, in the case in a temporal (as compared to spatial, conceptual or other) terms.

As Vogel and Hayes describe it, the character and extent of temporal distance bear heavily on the legitimacy of transactions in terms of Islamic norms. More particularly, they contrast *'ayn* for *ayn* exchanges (which involve the immediate exchange of one object for another) and *'ayn* for *'dayn* exchanges (which range from an immediate sale for cash to delayed delivery or payment on one side) with *dayn* for *dayn* (*bay' al-dayn bi-al-dayn*) sales. They remark that there is extensive (though not universal support) for the “many restrictions” which apply to the latter.³⁰⁸ Two among the rules bar exchanges involving delay in delivery on both sides (even if it is *'ayn* which is delivered) and “sell[ing] a *dayn*, whether due now or later, for another *dayn* due now or later.”³⁰⁹

Whatever the precise details of or the relative breadth of support for such restrictions, for the purposes of our discussion, their significance derives from the consideration of and judgments as to the permissibility of transactions being anchored in or by evocations of objects – perhaps just tangible objects – being present/being in the “here and now”. That is, the above suggest that an assessment of the permissibility of any transaction requires “seeing” whether and in what way objects are “present” in it. Of necessity, if seeing in such terms is required, then the means for/the machinery of decision-making must incorporate or take into account relevant aspects of what is “seen” in such a way. Now at any given time, such a way of “seeing” and such means for judging the significance for a decision as to what is seen in such terms may be the dominant or exclusive means for doing so. But they need not remain so. For example, it may be that decisions reached in that way are for one reason or another thought to be unsatisfactory. They may be so much so or so consistently so that may spur or require a change in the machinery in general employed – or how it applies – enabling “seeing” in the way described or at the extreme, encourage, demand, or compel a different way of “seeing”.

What might occasion the need to “see” things in a certain way (and a particular method for attributing significance to what is “seen” in that way) and the corresponding need to change it is an extremely complex matter and one of great importance. For the purposes of this particular essay, though, we need attend to it only to a very limited extent. That is, we take some note of it as it concerns “seeing” present objects in the context of Islamic finance and insofar as we do its import for investments made in light of the Islamic narrative.

So, for example, as an historical matter, in the period leading up to and including the founding era trade was a very important part of the economy.³¹⁰ It is also clear as an historical matter that trade

was a prominent aspect of Muhammad's life before and during the founding era not only as an "occupation" but also as it was concerned with the practical terms on which markets operated. It is also evident that the Qur'an contains numerous references to trade not only in literal (and descriptive and normative) terms but also in imagery/linguistically. We were and are not in a position to canvas the many examples of the foregoing.³¹¹ However, at first blush, one might imagine that trade was in many cases face to face and involved the immediate exchange of the goods that were produced and available for sale in that era.³¹² So, certainly, all of this would readily serve as a not insubstantial basis for "seeing"/understanding a range of issues through the lens of trade, and perhaps face-to-face immediate exchanges of goods at that.

Of course, a variety of circumstances were likely to have given rise to exchange with other characteristics. The accumulation of surpluses on the part of some would allow them only to expand their own opportunities for exchange. In addition, though, insofar as that expansion entailed exchanges in distance places and it was not practicable for those with surpluses to engage in them, supplying another with the means to carry them out would involve a different kind of exchange relationship. More generally, there might have been exchanges involving the provision of resources (representing some of that surplus) to others involved in trading (or perhaps other activities) of their own in anticipation of future recompense from the recipient of those resources.³¹³ Insofar as those who engaged in agricultural production in anticipation of sale recognized the need for protection against the uncertainty of the terms of sale at a time far in the future from initial planting, the possibility of a different kind of exchange, one involving on one side of it not present objects/immediate delivery but rather objects to be delivered in the future.

The point is that, in the first instance, such exchanges are not immediately amenable to being "seen" as ones which involve face-to-face, immediate exchange of objects and/or the means of decision-making based on what is "seen" in those terms are not readily applied. If so, "seeing" could be recast so as to view it as encompassing this new kind of exchange and/or the methodology could be adapted to take account of the actual differences between the two. At the extreme, perhaps one or both might need to be abandoned and new ways of "seeing" (and applying what is "seen" in that way) being formulated. Presumably insofar as there a need for change, the nature and character of it would be informed by normative or instrumental considerations.

Ways of "seeing" "objects" in and the legitimacy of transactions: the case of salam

To offer a sense of the dynamics or process of how various considerations might be brought to bear, we consider the practice of *salam* which is "a sale whereby the seller undertakes to supply some specific goods to the buyer at a future date in exchange for an advanced price fully paid on the spot."³¹⁴

On its face the practice appears to violate a seemingly clear proscription found in what is, according to one author, "one of the most important and widely accepted Hadith among Muslims, the Sahih Al-Bukhari, Book 34 (The Book of Sales [Bargains])."³¹⁵ Broadly stated, the requirement is that one cannot sell that which is not in one's own possession.³¹⁶ Among the *hadith* grouped under this requirement, the typical characterization is more specific. For example, one states that "Ibn Abbas (Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying: He who buys foodgrain should not sell it until he has taken possession of it."³¹⁷

Another, however, elaborates a bit further:

“Ibn Abbas (Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying: He who buys foodgrain should not sell it, until he has weighed it (and then taken possession of it).”³¹⁸

Yet another contextualizes it even more:

“Ibn 'Umar (Allah be pleased with them) reported that they were beaten during the lifetime of Allah's Messenger (may peace be upon him) if they had bought foodgrains in bulk and then sold them in the spot without shifting them (to some other place).”³¹⁹

The latter scenarios seem to involve a situation in which someone has bought a large quantity of food grains and sells a portion of them to another person. However, it would seem that although the seller receives recompense at the time that the portion to be transferred, it is only later that the specified food grains are taken from the bulk amount and brought to the agreed upon point of sale for the agreed upon transfer.

Still another *hadith* in the group provides an additional interesting gloss on the foregoing. It states in part:

“Abu Huraira (Allah be pleased with him) is reported to have said to Marwan: Have you made lawful the transactions involving interest? Thereupon Marwan said: I have not done that. Thereupon Abu Huraira (may peace be upon him) said: You have made lawful the transactions with the help of documents only, whereas Allah's Messenger (may peace be upon him) forbade the transaction of foodgrains until full possession is taken of them. Marwan then addressed the people and forbade them to enter into such transactions (as are done with the help of documents).”³²⁰

It would seem that in lieu of actually receiving the agreed upon amount of foodgrains on the spot the purchaser was given documents which reflected claims for that amount of foodgrains. The previously quoted *hadiths* might suggest that the claims were for some portion of a larger bulk of foodgrains located elsewhere. If so, it is not clear that a person holding the documents went to that location and presented it to obtain the specified amount of foodgrains or that the amount was withdrawn from the bulk and delivered to an agreed upon place – that of the transaction or otherwise – and turned over to the purchaser upon the purchaser's tender of the document. In either case, the transfer of the amount of foodgrains necessarily took place sometime after the transaction. While the concern about “documents” seems to be one as to the fact that as they “are” (or embody) *claims* for foodgrains (or arguably tangible goods more generally) and are not the foodgrains themselves. However, the underlying issue might relate to the delay inherent in the use of documents. It is curious, though, that in the sentences preceding discussion along these lines, the reporter in the *hadith* recounts questioning someone as to whether that person had “made lawful the transactions involving interest”. The individual denies that, but then the reporter quotes himself as responding in the way just described concerning the documents. In other words, this sequence seems to imply that the prohibition as to the use of documents in the way detailed is seen as an instance of the use of interest.

The explanation may be that the documents are seen as an expression of a debt relationship. In a detailed contemporary survey of the *salam* contract in Islamic law, Al Zaabi takes note of “[t]he broad agreement among mainstream scholars that the *salam* contract has aspects resembling a debt contract.”³²¹ The use of the word “resembling” reflects the fact that the classification is not a simple matter of “in” or “out” or “yes” or “no”. Rather, Al Zaabi remarks

"As *salam* is a type of exchange or substitution that results in a debt owed by the seller, it acquires the meaning of a transaction that involves both selling and buying *and* borrowing and lending...The balance of scholarly consensus forms the view that *salam* represents a sale contract and is seen as such by the followers of Hanbali, Hanafi, and Maliki schools and by some Shafi'is."³²²

Not surprisingly, then, Al Zaabi adds that "[t]he broad agreement among mainstream scholars that the *salam* contract has *aspects resembling a debt contract* has not prevented differences among them on related issues like transfer and accompanying guarantees."³²³ Over a span of more than 20 pages Al Zaabi describes numerous such differences, some of which are associated with the characterization of *salam* in terms of debt. In all events, insofar as *salam* is viewed through the lens of debt that raises, among other issues, the question of it implicating the prohibition of *riba* (at minimum, insofar as it is thought of in terms of a prohibition of the payment of interest).

Another, somewhat indirect or backhanded, source of support for the permissibility of *salam* has its origin in the following Qur'anic instruction: "When you contract a debt for a fixed period write it down."³²⁴ Al Zaabi embraces the view of others that "debt" encompasses "whatever is owed," not just that which "take[s] the form...of money but any objects like foodstuffs."³²⁵ He then states that "[t]his explains the *tafsir* attributed to Ibn Abbas, that the Qur'anic verse 2:282 was revealed to address *salam* in particular, for in permitting lending, the verse has also permitted *salam* (al-Ashqar, 1995)."³²⁶ More precisely, according to a "narration...reported by Sa'id," "Ibn 'Abbas (Radiyal Lahou 'an-um) said, 'I bear witness that As-Salaf (payment in advance, i.e., As-Salam) that is guaranteed for products to be received later has been made lawful by Allah, the Most High, in His Book and He has allowed it.'" and then immediately thereafter that Ibn 'Abbas recited verse 2:282 from the Qur'an.³²⁷

Even though arguments of the kind described have sustained the general form of the *salam* contract as a permissible one, they are not sufficient to determine whether any particular contract with that form is allowed. In particular, *salam* is permitted only subject to a number of specific conditions. We now look briefly at the bases for those conditions. There appear to be two hadiths which seem to offer the most obvious or direct support for them. What seems to be the most prominent one of the two states as follows:

"The Prophet (ﷺ) came to Medina and the people used to pay in advance the prices of fruits to be delivered within two to three years. The Prophet (ﷺ) said (to them), 'Buy fruits by paying their prices in advance on condition that the fruits are to be delivered to you according to a fixed specified measure within a fixed specified period.' Ibn Najih said, '... by specified measure and specified weight.'"³²⁸

The other recounts relevant events in the following way:

"'Abdullah bin Shaddad and Abu Burda sent me to 'Abdullah bin Abi 'Aufa and told me to ask 'Abdullah whether the people in the lifetime of the Prophet (ﷺ) used to pay in advance for wheat (to be delivered later). 'Abdullah replied, 'We used to pay in advance to the peasants of Sham for wheat, barley and olive oil of a known specified measure to be delivered in a specified period.' I asked (him), 'Was the price paid (in advance) to those who had the things to be delivered later?' 'Abdullah bin 'Aufa replied, 'We did not use to ask them about that.' Then they sent me to 'Abdur Rahman bin Abza and I asked him. He replied, 'The companions of the Prophet (ﷺ) used to

practice Salam in the lifetime of the Prophet; and we did not use to ask them whether they had standing crops or not.”³²⁹

Although it is not entirely clear, the reference to “standing crops” seems to suggest that the payment in advance need not necessarily relate to agricultural produce then in existence.

Consider a line of argument offered by Usmani in this context. He asserts that “one of the basic conditions for the validity of sale in Shariah that the commodity intended to be sold must be in the physical or constructive possession of the seller.”³³⁰ This assertion appears to be directly based on a passage from the Qur`an, rather on the cited group of *hadiths* which focus on a certain kind of transaction involving a particular commodity, foodgrains.³³¹ The stated proposition as such is a generalization of these *hadiths*, extended to any commodity. Note the significance or reach of the condition hinges on what is understood or accepted to be “constructive possession”.

Usmani then refers to there being “only two exceptions to this general principle in Shariah,” one of which is *salam*. In support of the *salam* exception, he makes a textual reference to a hadith for it – and we take note of an additional one along similar lines – which, again, are concerned with a certain kind of transaction involving certain agricultural commodities – wheat and barley – and one agricultural product – olive all. Again, as Usmani casts this exception, it is one framed broadly, ostensibly applicable to all commodities or other objects. Arguably, insofar as an explicit prescription in a hadith is dispositive there might be thought to be no need to say anything further in justification of it.

Usmani argues that “[t]he basic purpose of this sale was to meet the needs of the small farmers who needed money to grow their crops and to feed their family up to the time of their harvest. After the prohibition of *riba* they could not take usurious loans. Therefore, it was allowed for them to sell the agricultural products in advance.

“Similarly, the traders of Arabia used to export goods to other places and to import other goods to their homeland. They needed money to undertake this type of business. They could not borrow from the usurers after the prohibition of *riba*. It was, therefore, allowed for them that they sell the goods in advance. After receiving their cash price, they could easily undertake the aforesaid business.”³³²

So, although Usmani starts from a brief argument linked to a relevant text framed in a way apposite with “seeing” particular kinds of transactions as linked to literal (or notional) physical possession, he goes further. He offers reasons which are largely instrumental and economic in nature. That is, farmers must have money in advance of the sale of their crops to enable them in the interim to have the means to grow them and support their families. Traders require money in advance to purchase the goods which they imported for sale at home or which they exported for sale away from home. (Presumably, they might also require the money to sustain themselves and their families in the intervening time.) Although loans might, in principle be available, there was a likely prospect that they would be able to secure only “usurious” ones, that is, ones which violated the prohibition of *riba*. So advance payment was warranted as affording traders and farmers access to the required resources they would not otherwise be able to obtain. Of course, having available such a way of gaining resources would be less pressing if the proscription against loans with interest were not in place. Certainly, in the absence of the exception, farmers and traders might be less likely to abide by the proscription. Hence, the exception might be viewed as having a two-fold instrumental character: to enable farmers and traders to engage in productive activities and to do so in a way which avoids harm to themselves and their families pending success in

those activities and helps avert non-compliance with the proscription of *riba*. The other argument, this one nominally directed to the purchase of the farmers' crops, is instrumental in economic terms: those who buy through advance payment "normally" enjoy the advantage of purchasing the agricultural products at a price lower than that which they would pay at the time after the fields were reaped and when the products sold. Indirectly, then, that offers encouragement for compliance with the ban on loans with interest.

By contrast, Al Zaabi's lengthy discussion of the conditions for permissible *salam* in large measure seems to involve analogical reasoning, that is, comparison of the similarity of a particular *salam* contract to other kinds of contracts and making inferences as to the permissibility of the former in light of the permissibility (or not) of other kinds. It is an exercise which looks to the relevant texts on their face. However, at one point, Al Zaabi offers a somewhat indirect argument of an instrumental character. When he does so he cites the need to decide in view of the imperative of avoiding *gharar*.

That requirement arises from the fact that the deferment of delivery of an object purchased in advance creates possibilities for uncertainty above and beyond those which arise from a contract which involves delivery at the time of payment. Recall that the cited *hadiths* (nominally just with respect to the objects referred to therein) require that there be a fixed specified period within which they were to be delivered and that the objects to be delivered be specified by measure and weight. But there are issues as to specificity as they relate to the payment. In this connection Al Zaabi writes:

"To avoid any suspicion or uncertainty (*gharar*), the price must be made known in the contract in its kind, amount and description; it is not enough to see the price without knowing it precisely. That is because God has commanded that a debt be recorded in writing, on the grounds that this is fairer, more conducive to testimony, and less likely to engender doubt or suspicion later on. The general aim is to prevent potential disagreement (al-Ashqar, 1995). This becomes all the more important if, in the event it turns out that the seller is unable to deliver the sale object in part or whole at the time the contract matures."³³³

Clearly the passage just quoted above first appeals to a literal text, here the more fundamental one, Qur'anic verse 2:282. But then it goes beyond that to focus on the goals or purposes of the requirement as stated. Relying on people's ability or willingness to recount the terms of an agreement sometime after it has been entered into poses the risk that one or both parties may be unable or unwilling (perhaps for less than honorable reasons) to recall fully and accurately its terms. The prospective uncertainty as to the recall of those terms may give rise to doubts or suspicions as to the unfairness or abuse which might result from it. Such concerns might be greater in the case of a *salam* contract as compared to one for which delivery occurs at the time of payment. In the latter case, the performance of the obligation would ostensibly have already taken place so the need for recollection is concerned with looking back to confirm or deny that in fact the obligations had been fulfilled. In the former case, need for recollection occurs at the ostensible time of performance of the obligation to deliver the object and about whether performance has occurred in the first instance, matters which might be more contentious and otherwise problematic.

So why are these arguments offered? It might be that even though the cited *hadiths* are dispositive, an understanding of their practical import might offer generic legitimation in and of themselves. Perhaps the aim might be to demonstrate the wisdom, judgment, etc. which were entailed in its formulation though it is not clear whose wisdom, judgment, etc., implicit reference

would be made, for example, that of Allah or the Prophet. Alternatively, it could be in recognition of the limits of the literal text, that is, there is a need to understand why the exception was warranted in circumstances not addressed in that text because that would provide guidance in yet other circumstances to which it spoke.³³⁴

For our purposes, the preceding discussion is important insofar as it sheds light on the role and importance of references to “the real” at least in the role played by, say, tangible goods, in transactions in determinations as to their permissibility. Clearly all of the scenarios referred to above involve or envision on a least one side of exchanges, the ultimate provision and corresponding receipt of identified tangible goods. The issue posed is one especially concerned with the timing of their receipt. In the first instance, the requirement is that receipt must occur at the same time as the fulfillment of the other side of the exchange, for example, by the payment of money. Whatever the informing concerns for that requirement, either allowance of the exception is in accord with those concerns or insofar as it not, other considerations warrant the transaction not being so. The latter consideration might simply be textual. That is, there is a basic literal proscription in a relevant text but there is an exception to it also stated in literal terms in another relevant text which has equal or greater weight or significance. If so, then the role of tangible goods in permissible transactions is simply understood to be different from that originally envisioned. Alternatively, if other, for example, instrumental reasons of the sort describe above, offered to justify why the envisioned role of tangible objects may permissibility be different, then the issue is not one of those objects in and of themselves but rather one or more of another kind.

With the above in mind we turn very briefly and in very, very limited way to a recent book concerning Islamic finance and derivative instruments in commodities markets, more particularly, its arguments in favor of forwards, futures and options in that context. One chapter of the book “investigates the concept of *bay‘ al-kāli‘ bi al-kāli‘*, that, of sale of the nonexistent and their relation with the forward contract.”³³⁵ The authors refer to three interpretations of the relevant *hadith*. According to one, “‘Do not sell what is not with you’ means not sell what one does not (*la tabī‘ma laisa ‘indaka*) at the time of sale.”³³⁶ By contrast another – really a related cluster of interpretations – asserts either that it (1) “applies only to the sale of specified objects (*al-‘a‘yān*) and not to fungible goods, as these can be substituted or replaced with ease.” or (2) it “is confined to the sale of objects in rem (*buyu‘ al-‘a‘yān*) and does not apply to the sale of goods by description (*buyū‘ al-ṣifāt*)”³³⁷; or (3) “refers to the sale of specific objects for the Prophet permitted deferred sales of various kinds, in which the seller did not have the object of sale at the time of contract. In essence, this prohibition seeks to prevent *gharar* in sales (e.g., a runaway camel, uncertainty over delivery, and sale of someone’s property without his or her permission).”³³⁸ The view expressed by the third interpretation is that it “means the sale of what is not present and what the seller cannot deliver” with emphasis on the latter, “which entails risk-taking and uncertainty (*mukhāṭa‘ rah wa gharar*).”³³⁹

On their face, these might be thought to be textual arguments. However, the third of the cluster of interpretations is not concerned with the goods as such but rather the implications of the role they play in the transaction in terms of (presumably undesirable) risk-taking and uncertainty. We were not in a position to canvas the underlying arguments which were thought to sustain the first two in the cluster suspect that, again, it is not the goods (“objects”) in themselves but other considerations which yield the conclusions. Interestingly, the authors supplement the foregoing nominally textual arguments with some contemporary instrumental ones. For example, they take note of “changes of the market in the present circumstances compared to the time of the Prophet.”³⁴⁰ That is, at that time “the market was so small that it did not give the assurance of regular supplies at any given time”. Today, “markets are regular and extensive, which means that

the seller can find the goods at almost any time and make delivery as may be required.”³⁴¹ Echoing their prior contentions, they assert that “the possibility of *gharar* or a dispute is not present here.”³⁴²

PART IV: TAKING STOCK

The inquiry upon which this paper is based was occasioned first, by the notion or intuition that what in contemporary terms has been termed or characterized as “Islamic finance” is linked in some not insubstantial measure with notions of that which is “real”; and second, that such notions might be similar to those which might inform two aspects of contemporary discourse pertaining to investment. One relates to rules and standards, practices and behaviors associated with investment in the Western context— not infrequently cast under the pejorative rubric of “financialization” – which some contend reveal a problematic connection (or lack thereof) between the activities of investment finance and the “real” economy. The other, more narrowly, pertains to efforts to promote investment in what are cast as “real assets”.

With regard to Islamic finance we would suggest that the story is a mixed and in certain ways a muddled one. It would seem that at least in contemporary discourse about transactions within the ambit of Islamic finance there is prominent some variant of a contention that one of their distinctive features is that in some relevant ways they must implicate that which is “real”. The challenge in sorting through this discourse is determining what in this context is meant by the “real,” precisely what role it plays, and why. In many respects it seems to be closely identified with one of the English dictionary definitions for the word which refers to that which is “actually existing as a thing or occurring in fact” and, conversely, “not imagined or supposed.”³⁴³

More specifically in this regard, there are clearly evident in literature over the centuries, important arguments as to what Islamic norms require in reference to or by identification with tangible or physical objects. In many ways, at its core – or at the extreme – it appears to involve a need to be able to “see” or “envision” transactions as directly involving tangible or physical objects with respect to which there are required on both sides actions which are “here” and “now”. Insofar as that was and in some measure remains the case that might not be surprising. That is, in prior eras, transactions of that sort might, in fact, have been a common or even predominant mode for dealing so it might come as no surprise that norms defining the legitimacy of transactions might be cast in such terms. However, the physicality and immediacy of such transactions might also afford in at least a couple of ways a sense of security and confidence. They might be thought to offer the immediate and assured availability of that which is needed for personal consumption or perhaps economic activities tightly linked to production to meet those needs.

Of course, for all kinds of reasons, there would likely develop a desire to engage in transactions which in spatial, temporal, or relational (between or among the parties) terms or in level of abstraction are more distant from the prototypical one. That is, it might seem useful to engage in transactions in which that which is provided by one party is not literally at the same place where the other is obliged to supply it in exchange; or that which is provided by one or both parties is supplied at a date sometime in the future from the time of the agreement which sets the terms of the transaction; or that there are relationships with other parties which stand between those who are most immediately involved with the subject matter which is produced, distributed, or received; or that which is to be provided is one or more steps removed from physical or tangible objects. For example, it is one thing to agree to be obliged to deliver certain of them at another place and even at a later time; it is yet another to engage in a transaction in which one agrees to supply the obligation to deliver such objects. As noted above, transactions involving financial investments necessarily entail actions by the parties to their entry into the agreement and such actions as

each performs at that time. In turn, then, that necessarily implies that the transactions do not fit the “here” and “now” model. Again, in the case of what is termed intellectual property the immediate “objects” of the transaction or not physical or tangible as such though ultimately they necessarily have a connection with that which is.³⁴⁴ Moreover, insofar as transactions involve money – however understood – on one or both sides they are necessarily at one or more steps removed from the physical or tangible objects, the potential acquisition or disposition of which is the intended result of the money’s use. In at least that sense, money is an abstraction from those objects.

Almost by definition, all of the possibly desired transactions cannot, in the first instance, be “envisioned” or “seen” in the same way as the prototypical ones. There are at least two possibilities in this regard. One is simply to ignore outright what would otherwise seem to be the need for the relevant “presence” of physical or tangible objects in the transaction. Another is to find warrant or justification for what it is which must be “present” or what constitutes being “present” in a different or perhaps even novel way. The kinds of methodologies applied within the context of explications of the Islamic narrative described above for reaching conclusions in the face of ostensibly new situations, including possible new kinds of transactions, are hardly unique to Islamic jurisprudence. To varying degrees such methodologies go beyond the selection of relevant texts or descriptive records of transactions previously seen as permissible or not and appeal to them “on their face,” so to say. That is, they consist of more than assertions of seeming self-evident conclusions derived directly from the texts or such records. If so, they would look in some measure to other kinds of justifications. These justifications might be normative in character (and seen as expression or manifestation of Islamic values), that is, entail considerations of fairness, justice, etc. They might be instrumental in nature, that is, involve questions of efficiency, the demands of practical action, etc.

Indeed, the Quran itself and the *hadith* in greater measure might be thought to entail exercises of that sort. The revelations said to be embodied in the Quran, whatever their enduring or timeless nature, were in part most immediately concerned (or spoke to) the society in which Muhammad lived and the practices, behaviors, etc. which characterized it. That is, to varying degrees they were directed to those practices, behaviors, etc., and deemed them to be required, permissible, or barred in light of the revelations.³⁴⁵ The ongoing task, of course, is whether and how understandings of that sort might be thought to change or be viewed differently in light of the otherwise inevitable changes in that society driven by internal as well as external forces. As suggested above, the *hadith* in the first instance ostensibly reflect what was attributed directly or indirectly to Muhammad as an articulation of a richer and deeper understanding of the import of the reported revelations, some occasioned in general by the many significant roles he played during his lifetime and others in particular, by the innumerable specific (and often quite practical) decisions he made and the actions he took at his own initiative and in response to those of who were his followers as well as those who were not. Here, too, there was warrant for statements grounded not only in the normative content of the revelations but also in some measure instrumental ones (though these might be cast in or reference to normative considerations).

Note we write “ostensibly reflect what was attributed to Muhammad” cognizant of a contentious and quite obviously, an extremely important debate as to whether the statements in the putative *ahadith* were in fact made by Muhammad.³⁴⁶ While that the debate plays out bears on the interpretive significance and reach of various *ahadith*, broadly speaking that does not affect the line of argument offered here.

With the foregoing in mind and harking back to the reference to a prototypical object-oriented transaction above several things should be clear. First, that within the society of Muhammad’s

time there were already a diverse range of transactions into which people entered, among them, ones of a financial character; second, whatever the strength or prominence of object orientation prior to Muhammad's time we might presuppose that it was adapted to allow the range of such transactions for normative and instrumental reasons; third, that the revelations in general and their translation (directly or indirectly by means of *hadith* or otherwise) into the activities of everyday life – as to the understanding and practice of those who embraced or accepted them – meant both a shift in those reasons and a corresponding change in how transactions were “envisioned” or “seen” transactions in object-oriented ways or otherwise.

Most important, though, for our purposes, is that neither the prototypical object-oriented transactions nor others are reducible to or exhausted by their “object” elements. As suggested above, their ‘objective’-ness was just one – though perhaps a very important one – of a constellation of elements which render(ed) those transactions permissible (and useful or valuable). That is, those aspects of “object”-ivity which signaled or communicated as such acceptability in those terms were intertwined with – supported and were supported by – experience and beliefs and/or expectations as to matters of trust, fairness, efficiency, practicality, etc. (Quite obviously, the constellation of ideas associated with the ostensible prohibitions of *riba* and *gharar* closely inform how they are understood to be intertwined.)

This point was reflected in some of the descriptions of Islamic finance reviewed above but in rather different ways.

So, for example, Cattelan's discussion largely operates in and is perhaps most valuable insofar as it focuses on textual and related linguistic groundings for object-ivity. Certainly, he offers some thought-provoking arguments which distinguish Western and Islamic modes of thought. Among other things, he suggests that with respect to the latter, the appropriateness transactions are not viewed or assessed on the basis of or in relation to parties' “rights” but rather but to what one might term a pre-ordained and absolute ordering which is an expression or manifestation of divine will. Insofar as that distinction is apt, then it is an important one insofar as it points to a need to look beyond individual will and interests to assess the “rightness” of transactions. In this respect Cattelan might not be off the mark as a descriptive matter in identifying ordering with that which is “real” in the sense of that which is “true” (and/or perhaps valid, not fake or illusory, etc.). However, he appears less so in making the leap or transition from the “real” in such terms to it in the sense with which we are primarily concerned, that is in attempting to closely link if not equate the real to “objects,” especially physically tangible ones. That being said, he, at minimum, highlights the prominence of discourse in Islamic property and contract of the “object”.

By contrast with those of Cattelan's papers which we have canvassed, object-ivity often plays a minor or even relatively inconsequential role in explanations as to what Islamic finance requires and why. Perhaps not surprisingly, where it plays a role, it is discussed in conjunction with a characterization of the various elements of the transaction and the transaction as a whole typically cast directly or implicitly in terms of matters of fairness, trust, practicality, efficiency, etc. So, for example, the exposition by Kahf with respect to financial transactions is framed mainly in terms of fairness and justice for the parties, especially as they concern the rewards to which they are entirely and the risks they bear. But it is also informed by the importance of viewing such transactions as being sufficiently tied to something like the “real economy,” at least in the sense of goods and services which are needed (or desired) for consumption (or production).

As we have seen, discussion in these terms echoes aspects of the Islamic narrative in terms of how it defines that which is termed “property” and how it might legitimately be acquired. Beyond the oblique reference to it in speaking of those goods and services, Kahf's reliance on “object”-

vity largely takes the somewhat indirect form of his cautionary tale about money in general amount money and debt in particular. We would suggest that the cautionary character of the story reflects recognition of and in some measure a felt need to grapple with money – arguably by definition, something “abstract” by comparison with goods or services; or maybe better, (at least) one step removed from the “objects”/goods – perhaps only physical or tangible – (and perhaps services with which it may be linked on the basis of various kinds of relationships).³⁴⁷ However, as our discussion of Kahf’s essay suggests that the issue is not money as such – clearly exchanges of money for goods (and services) may be and in innumerable circumstances have been at the core of economic life – but rather the relationships with which may be bound up and values at stake depending upon how those relationships are constituted. So, for example, it is one thing for money to be provided in exchange for a good or a service and another for it to be supplied to an enterprise in exchange for certain kinds of relationships with an enterprise. Insofar as Kahf attends to that situation, on the whole, the logic of his argument seems largely bound up with that aspect of the Islamic narrative which very closely ties warrant for rewards of that (and other) kind(s) from an enterprise to that person’s labor with respect to, that is, from their engagement in the very operation of that enterprise.³⁴⁸ As we have seen, that kind of contention is apposite with aspects of the narrative as it is reference or framed in terms of what seems to be cast as the proscription of *riba* (but certainly does not exhaust its reach or the concerns which arguably justify that reach).

El-Gamal’s rather more broad-ranging and systematic analysis is most striking for two reasons.³⁴⁹ First, on the whole, while the critique is especially focused on the putative (and perhaps cynical) manipulation of classical contract forms to rationalize engagement in financial transactions that might not otherwise as readily be justified on the basis of the Islamic narrative, matters of “objectivity” as such do not for the most part loom large. Second, where they appear they are really assessed in light of other considerations. Most prominently, while El-Gamal in some ways looks to relevant texts as such, the understanding he adopts is one grounded in an approach which is, perhaps not surprisingly, more concerned with their instrumental and normative underpinnings. That is, he views transactions through the lens of efficiency, though in some measure with an eye to other considerations. As such while his critique necessarily entails a reprise of the use (and misuse) of the object-oriented classical contractual forms and in some measure there is a focus on certain *objects* identified with the subject matter of transactions, the ultimate concern is not with *objects* as such but rather with the *economic activities* which involve (or relationships which implicate) those objects and whether the terms for transactions with respect to those activities (and relationships) meet the test of efficiency (and perhaps fairness and other considerations as well).³⁵⁰

PART V: OPPORTUNITIES AND CHALLENGES FOR INVESTORS

A. OPPORTUNITIES

What is the import of the foregoing for fund investors in general and most importantly for our purposes, Western pension fund investors, in particular?³⁵¹

First, as a general matter, there have been increasing opportunities – and with time there will very likely be many more – to choose investments which it is claimed have been formulated consistent with an understanding of what is required by the Islamic narrative and typically cast in terms of being an expression of “Islamic finance”. So that, at least, behooves pension funds to gain an understanding of the nature, scope, and significance of what is claimed to be Islamic finance in general and how it is manifest in the particular investments of that sort which might be available to them.

Second, doing that is not simply a matter of appropriately canvassing the landscape of available investments. Rather, as suggested by the discussion above, there are not insubstantial claims that Islamic finance overall is and specific kinds of investment falling under that rubric are, superior to those formulated in conventional Western terms. At the level of individual investments, there are, as noted, contentions that the latter are better for instrumental and/or normative reasons. As discussed, they may be said to be less risky, to spur various stakeholders to take more account of the interests of others, or to induce or compel fairer or just terms of reward and risk sharing. (As we have seen, at the rhetorical and analytic level, the “story” or narrative which justifies or explains those contentions includes certain elements which place an emphasis on or attributes significance to what we have termed the “object”-ivity.)³⁵²

As a result, there is a need, even a responsibility, for pension funds to be not just alert to what opportunities there might be within the context of Islamic finance but also assess, if not by themselves, to be able to call upon others with the capacity to evaluate, claims of that sort. That would entail gaining a sufficient grasp of what is distinctive (if at all) about any investment cast in those terms and how its features relate to the normative and instrumental concerns which inform pension fund decision-making. That in turn, requires both knowledge about the actual performance or outcomes, in practice, of seemingly similar enough investments as well as an understanding of the criteria or standards which are applied in devising the investments and the processes by which – and by whom – they are used.

Third, as might be evident from issues canvassed in this paper, gaining such knowledge is no mean task. For starters, as we have seen, even the term “Islamic finance” itself is contested.³⁵³ However it is cast, in the first instance, its claims to legitimacy and merit have root in a tradition and practice reaching back some 14 centuries. In the sphere of thought those claims are based in part on diverse textual sources deemed to be authoritative and customs and day-to-day practices prevalent in different communities, countries, and regions; varied standards or criteria for analysis of those texts and assessment of those customs and practices; and diverse institutions (and the people who occupy positions within them) whose analysis and recommendations or decisions are viewed as legitimate and authoritative. Moreover, recent history and contemporary experience are testimony to wide-ranging and intense efforts at reconstituting relationships and redefining interests or priorities from the individual to the societal level in the name of and/or ostensibly informed by the Islamic narrative. Prominent among those efforts are ones to constitute/reconstitute what is termed Islamic finance. We write “in the name of” or “ostensibly” because what are on their face are appeals to that narrative may be thought to be driven by other kinds of interests or agendas, also ranging from the individual to the societal level.

All the above being said, it is not to imply that pension funds need to or even if they might seek to, could readily gain an in-depth understanding of the foregoing. However, it does suggest that they might view “Islamic finance” not simply as a source of yet more opportunities for investment as such but also an expression of a different way or manner of investing; different not only in the very important but limited sense of what it means in terms of prominent but conventional measures of success but also with respect to their import otherwise for parties to the transactions and for those on whom the transaction will have an impact.

Moreover, pension funds have an interest not just in the particular transactions in which they might take part but as well in the larger system which allows and perhaps enables them to occur and which constitutes a calculus of choices and actions which shapes or influences – sometimes profoundly so – what those transactions produce for investors. Indeed, our earlier discussion concerning the discourse about and motivations for transactions involving “real assets” in the context of contemporary critiques of conventional Western finance at the individual transactional

and systemic levels framed in terms of “financialization” – juxtaposed with the perceived need for investment to be better or more appropriately connected to the “real economy” – highlights the potential relevance of discourse about Islamic finance.

The import or significance of the interest in “real assets”

For example, at first blush, rhetoric about “real assets” within the context of how certain investment products are labeled often appears to be empty and not infrequently incoherent and perhaps even opportunistic, that is, as a means for purveying what would be new and attractive opportunities for investment. Nonetheless, whether intentionally or not that rhetoric evokes concerns which echo those posed by efforts at giving appropriate meaning to what is termed Islamic finance. In particular, the linguistic appeal of “real assets” would seem to derive in part from a discomfort or perhaps disquiet with that which they might be implicitly juxtaposed, namely, “financial assets”. This may be because the latter are in their nature one or more steps removed from that which is associated with the former. Recall that such of the described efforts as are made to define real assets typically involve appeal to (1) that which in general terms is cast as “hard”, “tangible,” “physical,” “touch[able],” etc., or in specific terms as “land,” “property” (in the sense of “and?”); “buildings,” “stocks of commodities,” “goods in course of manufacture and of transport,” “factories,” plants and equipment,” etc. or (2) economic activities with which they are closely identified, for example, that which is “used to produce goods and services,” that which “directly creates or adds to the consumption opportunities available to people,” etc. As we have seen, these kinds of appeals are explicit or implicit in many efforts at distinguishing Islamic finance from conventional Western finance; so do attempts to identify real assets with that which has “intrinsic value.” Moreover, the effort to contrast “real assets” involving “claims to physical or tangible assets” with that which implicates mere “contractual claims” and identifying the former with “value” of a different kind – for example, intrinsic value – resonates with the arguments made in the context of Islamic finance as to the necessary and appropriate presence of objects in transactions.³⁵⁴

The above being said, there is a certain irony in the “real assets” narrative. On the one hand, it is articulated in a way aimed at defining a category or class of assets which at its core seeks to sharply distinguish itself from others seen, by contrast, as have a strongly “financial” character. On the other it is an exercise whose very purpose is to view those “real assets” through a financial lens for the purpose of offering an ostensibly “new” kind of investment. As such, in doing so, it in certain ways financializes that which is non-financial, resulting in that which stands at more or less of a remove from the underlying “real assets”. References to “royalty trusts,” “real estate investment trusts,” “listed” stocks (namely stocks in public traded companies) are illustrative in this regard. At the extreme there is no attempt at all to define real assets as such but rather “fast forward” to focus only on characterizations of the putatively distinctive financial characteristics of investments in them.³⁵⁵

The case of infrastructure, not infrequently placed among “real assets,” offers a stark, illustrative example in these terms. One highly experienced, knowledgeable, and insightful researcher on infrastructure investment has remarked in connection with what he describes as

“the gradual emergence and formulation of a narrative about the characteristics of infrastructure investment as a previously unrecognised asset class has caught the attention of investors and academics.

“The proposed investment narrative highlights the opportunity to invest in well-defined tangible assets...”³⁵⁶

This form of narrative he rejects:

“While infrastructure assets are usually understood to be tangible assets – physical structures of steel and concrete – from the point of view of financial economics, infrastructure investment is better defined as a high sunk cost, long-term investment in immobile, relationship-specific assets. In this context, it is contracts, not concrete that matter. In other words, the physical characteristics of tangible infrastructure only determine the need for long-term contracts, which in turn determine the investment profile of infrastructure investments.”³⁵⁷

In his ensuing analysis he reiterates the point:

“In what follows, we review the model or investment narrative implicit in most industry publications and argue that it fails to focus on the most relevant dimension of infrastructure finance – contracts – but instead commits the fallacy of equating the physical characteristics of tangible infrastructure with its expected investment characteristics. This fallacy of composition (‘a toll road is a toll road’) leads to investment products that partly fail to deliver the proposed narrative, as the academic research that we review below tends to confirm.”³⁵⁸

Finally, in a later essay he returns to this line of argument:

“Infrastructure investment is often mistakenly equated with real asset investing. The apparent focus on tangible structures, as well as the emphasis on the construction phase of infrastructure projects both suggest that infrastructure-related assets are first and foremost about steel and concrete.”³⁵⁹

He adds: “But if relationship-specific tangible infrastructure assets have little or no value outside of the contractual relationship that created the opportunity to invest in them in the first place, contractual features explain investment characteristics better than physical features, and infrastructure assets are better described as financial rather than real assets.”³⁶⁰

To be sure, this perspective has merit insofar as is linked to (some of) the kinds of relationships – those with governments – in which investment in infrastructure-related enterprises is embedded. Indeed, in a certain sense it captures one hardly unimportant element of the kind of analysis which could be valuable for making investment decisions with respect to infrastructure. That is, it strives to capture the essence and import of a certain form of critical relationship of people – in this case collectively, through government – to the infrastructure-related enterprises, that is, relationships defined by contract. And, indeed, in many circumstances – which he details – in which the investments involve not ownership of those “tangible assets” but rather contractual rights, for example, to construction and/or operation of them and cash flows therefrom.³⁶¹ (That foregoing being said whether the notion of contract evoked by this characterization is apt is another matter.³⁶²)

However, it falls short by attempting to cast the entire conversation in those terms. In certain ways it is reminiscent of discourse about corporations back a couple of decades which started to frame corporations in terms of their being a *nexus of contracts*. Unfortunately, what might have been a useful abstraction for certain purposes was used as an ideological and other lever by which the reality of the relationships it purported to represent was transformed.³⁶³

In writing the foregoing, there is no intent to be disingenuous. Of necessity, investments are viewed as having a financial character. The issue is rather one of how the “real asset” (or perhaps better the economic activity identified with it) is situated with respect to the transaction which

defines the investment; that is, whether how it is situated diminishes or negates the force or significance of the “real asset” being at the core of the transaction. That issue parallels contentions over the permissibility – in view of the Islamic narrative – of an object being situated unacceptably in the transaction.

The foregoing suggests that the challenge of Islamic finance in this context affords opportunities beyond the obvious and possibly important prospects for new and potentially rewarding investments currently identified with “real assets” as currently characterized in largely linguistic, formulaic, and unreflective terms. Those opportunities arise from “taking a cue” from discourse about Islamic finance to assess the efficacy and propriety of financial transactions in light of (1) the ways in which “objects” – namely those by which sometimes very important human needs are met or which are among the means by which they are produced – are situated in those transactions and (2) how their being so situated bears on the efficacy and propriety of those transactions.

So, for example, in an essay on why and how infrastructure “matters,” we offered a very different definition for infrastructure as a starting point which was not only alert to the broader and evolving history of the term itself but also appropriately sensitive to the issues posed here. While there was recognition of its “object”-ivity, the emphasis was on their relation to the needs which were the reason for its very existence:

“Facilities, structures, equipment, or similar physical assets – and the enterprises that employ them – that are vitally important, if not absolutely essential, to people having the capabilities to thrive as individuals and participate in social, economic, political, civic or communal, household or familial, and other roles in ways critical to their own well-being and that of their society, and the material and other conditions which enable them to exercise those capabilities to the fullest.”³⁶⁴

Moreover, we focused on what we referred to as *infrastructure-related enterprises* because the task of the provision to meet needs is a sustained project or undertaking by an often large group of people organized for that purpose. To be sure that endeavor will of necessity entail the use of facilities, structure, buildings, etc. which may well loom large – literally and figuratively – in its operation and prospects for success. However, its achievements ultimately depend upon the actions of the individuals who constitute the enterprise. Of course, not surprisingly and hardly inappropriately, investors tend to keep the spotlight on financial attributes and characteristics. Yet this emphasis too easily risks losing sight of the real world enterprise which gives rise to those attributes and characteristics. This problem becomes more severe insofar as investments are made through one or another vehicle rather than directly. In those cases, investors are at least one more step removed from the underlying enterprise.

Further, we placed the emphasis on people in two different ways. On one hand, the definition is grounded in “people’s needs – important if not essential – because meeting them is the ultimate end in relation to which finance is a means. In doing so we shift the emphasis away from the popular or conventional focus on (kinds of) facilities, structures, buildings, etc. This is not because they are not unimportant but because they are just one among the (material) means by which those needs are met. Note that the definition does not actually use the word “need” but rather “capabilities”. The latter term is associated with what might well be viewed as a better way to frame discourse about individual well-being.”³⁶⁵

On the other hand in critically evaluating the decision-making process a focus on diverse kinds of people and their relationships *within* and *with* the infrastructure-related enterprise. More particularly, in the first instance we “sought a tool or method which linked infrastructure as defined

in direct and indirect ways to the ultimate concerns of investors,” among which are, of course “many of a financial nature.”³⁶⁶ “However, they extend to other, ostensibly non-financial considerations.”³⁶⁷

The import or significance of the concern about “financialization”

As described above, “financialization” is a term generally used to characterize what may be seen as problematic or even pathological in the role and reach of financial transactions, instruments, and institutions (and the individuals who constitute and/or who have a stake in them) but which appears to have special cogency or force in relation to systemic issues, particularly the occurrence of financial crises.

As the illustrative examples offered earlier suggest there has recently been widely voiced deep concern about “financialization” as a – and arguably the principal – source of the financial crisis of 2008-2009, typically understood to have arisen from and played out most immediately in the context of the Western financial system and economies, though with serious ramifications for the lives and livelihoods of people across the globe. We have, in turn, taken note of a wide-ranging and heavily contested debate ostensibly within the frame of relevant Western narratives as to the causes of that crisis, especially to articulate more clearly what is meant by “financialization” or more precisely to determine which, if any, kind or aspect of it might have occasioned those events. That debate has almost naturally or inevitably extended to the significance of transactions and related activities within the financial sphere for activities and transactions associated with what is often termed as the “real economy,” typically cast as the sphere in which there occurs the production and distribution of goods (and services)/“objects” to meet people’s needs (and of that which is required to produce and distribute those goods (and services)/“objects”). Not surprisingly, the focus of many critiques of financialization is on how the transactions and activities in the financial sphere with which it is identified are of a kind and have a character which ill-serve those identified with the “real economy”. Others, though, as discussed, treat the distinction between the spheres as an artificial or non-existent one; and rather, view them as aspects of underlying social relationships by which both are constituted. In either case, though in different ways, normative considerations are implicated.

At the same time, however, the playing out of the financial crisis has elicited a related and dual discourse within the frame of Islamic narratives. On one hand “financialization” in general and financial crises such as the most recent one, in particular, are viewed as expressions of fundamental weaknesses or failings in the Western narrative especially as it relates to economics and finance. In turn, the Islamic narrative is thought to be the source of rather different standards and practices which, if followed, would not give rise to the kinds of problems which have occurred. For example, according to one commentator, the “root cause behind” the recent financial crisis was the result of “[e]xcessive debt promoted by interest-based and risk-shifting gambling-like instruments.”³⁶⁸ He adds that his view is illustrative of a more broadly held one:

“[A] number of seminars and symposia were held to discuss the causes and remedial measures and how Islamic economy can avoid such happenings. For instance, in such a conference held in Amman, Jordan in 2010, there was consensus among the participants that excessive lending and risk shifting in conventional finance, in addition to interest (*riba*), excessive risk (*gharar*), gambling (*maysir*), speculations (*mujazafah*), were the main reasons behind the financial crisis. The capitalist system was noted to have an inherent tendency of frequent crises. In their opinions, the risk-sharing and Islamic economic system, based on ethical values, presents an alternative to avoid occurrence of such crises...” That recognition, it is suggested, “enhanced the conviction and self confidence of the first generation” of Islamic economists; “opened the eyes of many

second generation Islamic economists who were trying to imitate conventional banking and finance ‘in an Islamic way’; and “alerted the new generation in the offing, and created an urge among them to return to the fundamentals of Islamic economics.”³⁶⁹

Typically, the critical assessments of the sort noted employ references to the “real economy” similar to the ways we have seen from those which start from the Western narrative. For example, the authors of a recent book propose a system which, they contend, “may be deduced from Islamic teaching” and which they assert can “save capitalism” (and avert another financial crisis).³⁷⁰ They write:

“In recent years, it has been widely recognized that debt, loans or borrowing through interest-based contracts and a banking system that creates money through deposits and bank lending invariably promotes a phenomenon that has become coined ‘financialisation,’ resulting in a divergence between the real and financial sectors of the economy, or in other words tethering the linking between the real and financial sectors.”³⁷¹

Although there is no reference to “objects” here (or elsewhere in the book) as noted, notions of them are evoked by a further explication of what might be meant by the “real economy.”³⁷²

On the other hand, reference above to first and second generation Islamic economists derives from a concern about “the issue of ‘financialization’ of Islamic economics and banking that bothers leading scholars of the first generation and most of the writers of the second generation.”³⁷³ Here, by financialization the writer means a shift from “stressing the value-based nature of the industry that would operate under the Islamic spirit” which “would aim at earning a reasonable profit with investment in merit goods and services” and “always [be] characterized...as faith and ethics based.”³⁷⁴ Echoing the critical commentary of El-Gamal and others, he contends that despite the “claim[] that partnership and risk sharing is the core of Islamic banking and finance,” the dominance in practice is for debt-based finance, including *sukuk* based on *ijarah*, *salam* and *istisna*.³⁷⁵

Western pension funds might and should be concerned with the implications of systemic problems – whether cast in terms of “financialization” or otherwise – for their own choices among financial transactions which underpin their investments. In essence, then, there are valuable connections to be made in those terms or, indeed, perhaps how those choices may be indicative of and/or contribute to those problems. In turn, then, funds may have much to learn from the “external” critique of the (Western) system within which they operate, that is a critique which draws upon the Islamic narrative as well as the “internal” self-critique among those committed to that narrative as they grapple with whether and how, in very practical terms, they should seek to distinguish what they do from the prevailing, dominant practice rooted in the Western narrative.

B. CHALLENGES

As suggested above, at the outset there are basic challenges by virtue of a far-ranging diversity in thought and practice as to (1) what “Islamic Finance” “is”; (2) what are the sources which inform or defined what Islamic finance entails; (2) the legitimacy and authority of pronouncements of institutions and individuals with respect to the foregoing; and (3) the extent to which those pronouncements are binding or persuasive.

What Islamic Finance “is”

Literature about what Islamic finance “is” (or should be) has been characterized by Fang as a “large extent polarized between proponents and sceptics..., which makes it quite difficult to produce a ‘nuanced or empirically grounded understanding of Islamic finance’... At one end of the spectrum are contributions that promote Shariah-based finance as desirable and are mainly geared towards discussing the implementation of its moral–religious precepts in the modern economy at the local or international level.”³⁷⁶ By contrast, “[a]t the other end of the spectrum, [Islamic Finance] is examined with the heuristic tools of ‘conventional’ finance and classical economic theory...The religious and normative nature of Islamic economic precepts, however, does not fit well with classical economics’ assumptions of purely profit-maximizing agents. As a result, studies examining whether and how [Islamic Finance] fits into the global financial system are often criticized for prematurely discarding the viability and social desirability of alternative financial instruments based on Islam.”³⁷⁷

Similarly, Cattelan speaks of an Islamic Moral Economy (IME) in which “Shari’ah economics is conceptualized according to a value-oriented proposition, frequently referring to *homo-Islamicus* as an ethical antithesis to *homo-economicus*.” He, in turn, refers to “the current social failure of [Islamic Economics and Finance (IEF) which] is explained in terms of insufficient concretization of IME, due to the ‘mimicking’ tendency by Islamic banking and financial institutions (IBFIs) to replicate conventional structures.”³⁷⁸ He also criticizes “a ‘Shari’ah economics [which] is unconsciously reduced to a sub-category of the loose realm of ethical investments...lacking in autonomous rationality, while conventional economic paradigm, on the background, remained unquestioned: here, Islamic values *rectify*, but do not substitute, conventional rationales; better, the very existence of Shari’ah economics in the IME approach logically depends on the persistence of the conventional paradigm, being the ‘injection’ of Islamic religious values simply conceived as a ‘moral’ constraint to Western individualistic attitude in an *ana*-logical relationship with it.”³⁷⁹ By contrast, he presses for “an independent paradigm for Shari’ah economics can be coherently built on the Qur’an and the Sunna as premise for a *Shari’ah based economy*, and how this paradigm, if properly conceptualized and implemented, can actually lead to the practice of Shari’ah economics *not in opposition, but in a dialogue* with conventional economics.”³⁸⁰

What are the sources of what Islamic finance is or should be?

There are corresponding or parallel issues as to what are the sources for a proper understanding of what Islamic finance entails (and how those sources should be drawn upon.)

For example, as noted, it seems pretty clear that current practice of Islamic finance is heavily influenced by appeal to generally to what El-Gamal refers to as the golden age of classical Islamic jurisprudence” and the nominate contracts (referred to previously) which were a product of that jurisprudence.³⁸¹ We have briefly described El Gamal’s – among others’ – condemnation of contemporary efforts at the “arbitrage” of such jurisprudence. But, not surprisingly, his analysis has its own critics. For example, Hamoudi concurs with El-Gamal’s condemnation.³⁸² However, he does so from a broader and even more sharply critical perspective, in specific and general terms. With respect to the former, he describes himself “deeply skeptical” of El Gamal’s attempt “to explain the economic bases of the *riba* ban on the basis of Pareto-efficiency, largely through his interpretation of the words of Ibn Rushd.”³⁸³ He argues that notions of Pareto-efficiency would have had no meaning for Ibn Rushd in making “his generalizations” as to equal values in connection with achieving ‘justice’ (*‘adl*); while notions of “fraud or unfairness in result, particularly for the less knowledgeable party” would have. Moreover, Hamoudi cites another scholar who, quoting the “precisely the same passage from Ibn Rushd as cited by El-Gamal. as well as an

additional passage from another jurist” who “identif[ies] three different purposes for the prohibition of *riba*: to prevent hoarding (*ihtikar*), to guard against turning currency into a commodity over which to speculate, and to ban fraud and exploitation over the trade in items of the same genus.”³⁸⁴

More generally, Hamoudi refers to what he terms “the futility of trying to faithfully replicate classical doctrine” which in part would seem to rest on an appeal to a consensus that never really existed.³⁸⁵ To him, “[t]he reality is that given the structural pluralism of the rules of the classical era, there is no sensible way that modern rules could be derived from classical doctrine, either in letter or in spirit, and all efforts to do so have largely failed.”³⁸⁶ Even more sharply he contends that the lens through which the classical era is viewed is one which refracts what is seen according to contemporary understandings and interests: “As with all historical approaches to the law, the past becomes no more than an invention of the present, a means to validate an approach rather than any true reflection of the practices and norms of a previous era. Thus, modern Islamic rules are not a resurrection of classical era rules, but rather are largely the product of mediation among competing influences in Muslim society.”³⁸⁷

So, for example, he contrasts such endeavors with the approach of the highly influential Iraqi Shi’ah jurist Muhammad Baqir al-Sadr. As Hamoudi describes him, Sadr did not “patronize his fellow Muslims or seek to confuse them with lengthy discourses in obscure language”; his work “is accessible and easy to understand”; and “[i]n his discussions on interpretation and modernization of classical rules, [he] does not hide from the realities of his interpretive effort and claim to have mastered some sort of neutral process wherein he may understand the purpose or letter of God’s Will, or the meaning of the classical doctors, better than others.” Instead, “he admits quite openly that the interpretive process is deeply influenced by what he calls ‘subjectivity’ (*dhatiyya*) and that any jurist engaging in the process of review classical exegesis is going to find rulings that correspond closely to his vision of legal or economic order, and rulings that seem to deviate considerably from them. In such cases, the jurist has no choice but to select the rules that conform to his own vision.”³⁸⁸

Hamoudi’s views are ones with the ambit of what has been termed “legal realism”. That is, within the context of American legal thought, the legal “Realist movement began as a revolt against the tenets of Classical legal thought, which portrayed judicial decision as the outcome of reasoning from a finite set of determinate principles. In contrast, the Realists stridently insisted on the proposition that legal rules cannot guide courts to definite results in particular cases and demanded that legal scholarship recognize the social forces influencing legal change.”³⁸⁹ Indeed, Hamoudi remarks that some have characterized Sadr’s approach as akin to what for some has appeared to be a view yet more radical than that associated with legal realism – within the context of American legal thought, under the rubric of Critical Legal Theory – one which Sadr “had admitted was necessarily deeply influenced by his own subjective political and ideological presuppositions towards social justice and mutuality.”³⁹⁰ That being said, both currents of legal thought have, themselves, not been uncontested and counter currents which in greater or lesser measure grounded in normative/ostensible morally objective considerations have emerged.³⁹¹

Indeed, according to Hamoudi, Sadr did not in fact embrace a solely subjective view but rather “presupposed the existence of an institution, the *marja’iyya*, which is entrusted with the theological authority to redefine the *shari’a* on ideological and ethical bases, and then subsequently to constrain individual jurists as well as the ordinary lawmaking process with external and objective disciplining rules so as to ensure an objective and neutral role for the *shari’a* in rulemaking.”³⁹² (This illustrates and highlights the point that at the level of practical meaning, modes of thought/thinking have force and effect by and through associated institutions and the people constitute them) Indeed, Hamoudi himself sees Sadr’s ideas about jurisprudence would Sadr’s

from of jurisprudence as having the potential to “play an important role today in rescuing Islamic finance from increasingly silly Langdellianism in order to permit Islamic finance to contribute to developments in global banking in a manner that retains its faithfulness to its populist, mutualist, and deeply Islamic roots.”³⁹³

Again, the preceding few paragraphs are intended just to suggest the wide range of views within the sphere Islamic legal thought, which as we shall discuss below, is important to the practical implications of the issues posed in this paper. In remarking so we caution that the noted comparison has limitations. That is, Cattelan, Kahf, El-Gamal, and even Hamoudi are largely if not exclusively concerned with the ostensible requirements of Islamic finance as they are thought to flow or follow from, in the first instance, those founding Islamic texts which inform what private actors might or should do. What, if anything, a/the state might require in this regard is arguably a distinct matter, but one which may, in fact, bear heavily on what is done. Similarly, by contrast (and perhaps at the other end of the spectrum), the discourse referred to in connection with American legal thought is, in the first instance, concerned with pronouncements of law made by courts which are an arm of the government of a nation, the institutions of which are said to be required to be separate from those of religion. However, that notion, too, is hardly uncontested. So, the issues posed in that case are in some measure not dissimilar to those in the Islamic context, a matter to which we will return briefly below.³⁹⁴

The legitimacy and authority of pronouncements of institutions and individuals with respect what “Islamic finance” is and what it requires

If there are important questions posed by the seeming wide diversity of thought with regard to the essential character and sources of Islamic finance, there are related ones raised by the multiplicity – over time and space – of institutions which render decisions as to legitimacy of financial transactions in Islamic terms and whose judgments are in some measure viewed as authoritative in those terms.

For example, Hamoudi cites the well-known scholar, Joseph Schacht to the effect that “as the *shari’a* developed, its substance was not decided by a political authority, such as a caliph, nor by state officials, such as a judiciary, nor by any other sort of state sanctioned body, but rather by particular schools of thought entirely divorced from state control.”³⁹⁵ From a sociological perspective, the four dominant schools of thought within the Sunni tradition which emerged in the ninth century were “described accurately as guilds by the late Professor George Makdisi because of their institutional similarity to that Western medieval institution.”³⁹⁶ However, “with the advent of the colonial era, the juristic schools lessened in importance and ultimately disappeared in large parts of the Muslim world. To compound the difficulty, with the rise of the nation-state came not only transplanted law, but also transplanted political institutions and bureaucratic and administrative procedures. This process began as late as the end of the eighteenth century, and was therefore long complete by the creation of the first Islamic banks near the end of the twentieth century.”³⁹⁷ Correspondingly, the previous rules were modified or even replaced by virtue of executive or legislative action. In a number of cases, the new rules were imported from those formulated within one or another Western tradition.³⁹⁸

Within the constraints defined by that context, there are varied sources of ostensibly authoritative or persuasive opinions. For example, broadly speaking, Visser remarks that when the requirements of sharia law are not clear “a Muslim, individuals or a court of law can ask a legal opinion or *fatwa* (pl. *fatawa*) ...from a qualified Islamic fiqh scholar, a mufti. *Fiqh* is the science of Islamic law and the general term for a fiqh scholar is *faqih* (pl. *fuqaha*). *Fatawa* may also be

promulgated by *ulama* (religious scholars) or fuqaha, individually or in group deliberations or in group assemblies such as the Indonesian Council of Ulama.”³⁹⁹ “A fatwa issued by a highly-respected mufti is the closest equivalent in the Muslim world to a case precedent in the Anglo-American legal system,” though it is not necessarily binding in the same way or binding at all.⁴⁰⁰

Moreover, Visser suggests that the multiplicity of Sunni schools may be in part an historical artifact of the fact that “the Sunni community, to which between 85 and 90 per cent of Muslims belong, knows no church-like hierarchy and, like Protestantism, no final authority.”⁴⁰¹ By contrast, Shiites “hold[] that the religious and political leader of the Muslim community, the *imam*, is divinely appointed” and whose authority is great. Moreover, “Shiite Islam does have clerical hierarchies, in the case of the Twelvers headed by *ayatollahs* (at *ayatollah* is an honorific title for an outstanding legal scholar)” who “in their turn may accept guidance by grand *ayatollahs*, of which there may be one, as in Iraq, or more than one, as in Iran.”⁴⁰² Note, though, that “Shiites decide for themselves which *ayatollah* to follow as their source of authority.”⁴⁰³

Pressures for standardization/uniformity in the face of the diversity of thought and practice in Islamic finance

The diversity of thought and practices has converged with other considerations to result in considerable pressure to create (sufficiently) standardized forms of Islamic financial transactions (or corresponding contractual expressions thereof). For example, Ercanbrack takes note of the tendency of “[c]ommercial law, in general towards convergence for commercial reasons.”⁴⁰⁴ Thus “[l]egal standardisation is generally important for establishing market transparency, stability and predictability, all of which are essential components of a commercially viable and prosperous financial centre” (and the financial transactions it offers or facilitates).⁴⁰⁵ Moreover, “[t]he globalisation of financial markets [also] generates market pressure to standardize Islamic financial contracts,” establish “clear parameters with respect to...the relative rights and remedies of the parties [and]...the terms of many financial and commercial risk allocations and (3) the legal documentation.” For the financial industry and its clients there are a variety of related reasons for standardization: it would “(1) reduc[e] transactions costs for firms and thereby lower[] prices for consumers”; (2) “reduce[] the time necessary for marketing new products”; (3) “reduc[e] the burden on sharia scholars of whom there is a shortage”; (4) “improv[e] documentation standards and mitigat[e] the risk of legal challenges”; and (5) “improv[e] consumer confidence in the authenticity of Islamic financial products and services.”⁴⁰⁶

The concern noted in the fourth point has been cast by some as one of “Sharia risk,” that is, a fear that a particular “Islamic financing transaction is challenged [as a matter of government law] on grounds that it does not comply with Islamic law.”⁴⁰⁷ More particularly, where there is a contractual obligation for the terms of the transaction to be in conformity with Islamic law and a contractual provision, in the first instance, for a private party to have the authority to determine whether there is conformity and there is a dispute brought before governmental courts as to whether the authority and/or decision of that private party should be honored. As a practical matter that concern may be mooted out by so-called “waiver of Sharia defense” clauses” by which the borrower normally waives the right to bring any defense based on the non-compliance of the transaction with Sharia principles” and even “an explicit statement” by “which the parties agree to follow the interpretation of the bank’s own Sharia board as far as the transaction is concerned.”⁴⁰⁸

Current practice in this connection offers a mixed picture particularly as it relates to the third point, that pertaining to Shari’a scholars. Consonant with those noted aspects of historical practice which have involved appeal to legal scholars, authority to render decisions with regard to the

terms of particular financial transactions being in sufficient accord with those norms has been accorded to Shari'a review boards. More particularly, according to one description,

"[e]ach institution offering Islamic financial services has in-house religious advisers, who are collectively known as the *Shariah* Supervisory Board (SSB). In principle, the role of the SSB covers five main areas: certifying permissible financial instruments through *fatwas* (ex-ante *Shariah* audit), verifying that transactions comply with issued *fatwas* (ex-post *Shariah* audit), calculating and paying *Zakat*, disposing of non-*Shariah* compliant earnings, and advising on the distribution of income or expenses among shareholders and investment account holders. The SSB issues a report to certify that all financial transactions comply with the above-mentioned principles.

"This report is often an integral part of the Annual Report of the Islamic financial institution. In practice an SSB's tasks may vary according to provisions stipulated in the articles of association of the financial institution or those stipulated by national regulators..."⁴⁰⁹

As an institutional matter, members of these boards are chosen by the enterprises whose transactions they review and on which they pass judgment. They are paid by those enterprises for their services. In the first instance, that raises issues of conflicts of interest.⁴¹⁰ It appears that membership on these boards is typically quite concentrated, that is, a relatively small number of people serve on a relatively large number of boards which raises additional concerns about conflicts of interest⁴¹¹; and also questions as to the adequacy of due diligence.⁴¹² The high demand for the relatively few people who serve on the boards has led to perceptions that their remuneration (not a matter of public record) is excessive.⁴¹³ The cost of such services is among those which are said to add not inconsiderably to the expense of the Shari'ah due diligence process.⁴¹⁴ There are also issues as to the quality of education of Shari'ah scholars⁴¹⁵; indeed, even as to whether the term is a misnomer.⁴¹⁶

While such boards serve the immediate function of legitimatizing or validating one or another financial transaction they pose challenges in terms of any perceived need for uniformity. The decisions are generally kept private so there is no opportunity to assess the nature and quality of decision-making in general and how it was applied in any particular case. This is especially true when, as happens, board issue conflicting *fatwas*. In turn, it excludes exchanges between or among board members and others with an interest in that decision-making to engage and learn from one another, a process which might well lead to more broadly shared thinking as to what rendering a decision requires as a general matter as well as in particular kinds of cases.

Arguably standardization might be effected through regulation, either governmental or private, the latter involving organizations of private entities which are stakeholders or players in Islamic finance whose decisions might have force by virtue of example or persuasion. Such regulation might be substantive, that is directly address – and more or less prescriptively – what conformity necessarily requires. For example, the private "[t]he Accounting and Auditing Organisation for Islamic Finance Institutions (AAOIFI) is a non-governmental organisation...active in formulating 'Shari'a standards,' guidelines for Islamic financing transactions."⁴¹⁷ However, they "only set out criteria that must be met by Islamic financing transactions so that they meet Sharia requirements," but "only provide very limited guidance in case an agreement is incomplete and virtually none when things go wrong."⁴¹⁸ In other cases, the regulation may be process oriented. That is, it may prescribe the composition of Shari'ah boards, the qualifications of their members and the terms of their composition, the reach or force of their decisions, etc.

Notwithstanding these, according to one recent assessment, “[a]lthough the industry has made some gains in standardization, particularly in retail products, [Islamic Finance Institutions] have not consistently adopted industry standards, with the result that Islamic finance continues to be practiced differently between jurisdictions and even within the same jurisdiction.”⁴¹⁹ (There are, of course, exceptions.⁴²⁰)

Clearly, aspirations for standardization and such regulations have their upside. However, there may be a downside which involves issues of legitimacy and perhaps what might be termed “situated authenticity”. It should be evident from what we have written above that the field of Islamic finance is in tremendous flux: there is an immense diversity of opinion as to what it is, what it requires, and why. There is also a wide variety among those – at an institutional and individual level, secular and religious – with an interest or stake in how those questions are answered. Private attempts – and perhaps even more so, governmental ones – to prescribe solutions which are literally binding or perhaps functionally so may be viewed as unacceptable at best and even illegitimate at worst. For example, in the former regard, one prominent lawyer and scholar has suggested that “globalized legal practices have secretly hijacked Islamic contract law.”⁴²¹ In this regard, the perspective of an “insider” book by the former head of Islamic finance teams at Barclays and Deutsche Bank is perhaps cogent. As phrased by one reviewer, “most of the[] instruments [fashioned by the banks] were reverse-engineered from their secular counterparts, and so devised to comply more with Shariah’s letter than its spirit” ; “[m]any of the instruments...discusse[d by the author] were sold by major banks that saw them as just another opportunity. This is not surprising: Governments and wealthy individuals wanted financing that complied with their religious requirements, and banks gave it to them.”⁴²²

Moreover, the debate not infrequently touches on issues which are highly sensitive for or important at the level of meaning and practical action for diverse constituencies. In such cases, extensive discussion between and across those constituencies over an extended period of time may be required before a possible consensus – not likely universal but perhaps broadly embraced – might be achieved. In those cases, premature prescriptions of a binding or quasi-binding character may pre-empt that debate in at least the short term though over the long term may fail precisely because that debate almost of necessity reemerges.

C. EXPERIENCE WITH *SUKUK* AS ILLUSTRATIVE OF THE CHALLENGES

As a case in point, we consider an increasingly prominent feature of contemporary Islamic finance, the issuance of *sukuk*. We first briefly canvas its emergence as a vehicle for investment which is putatively *Shariah*-compliant. We then take note of a number of challenges which have been posed in terms of their being taken up by both those concerned with *Shariah*-compliance in and of itself and those who are not. We follow with a focus on one particular kind of *sukuk*, the so-called *ijarah sukuk* – the legitimacy of which is grounded in the nature of and *Shariah* requirements for one among the nominate contracts – *ijarah* contracts – insofar as they relate to leases. We do so in part because the *ijarah sukuk* has been one important means (alone or in connection with others) in the service of project finance. We do so with a special emphasis on the relevance and importance in nominal and practical terms of “real assets”-related notions canvassed in the sections above. In this connection we explore at some length the controversy within this context framed in terms of an “ownership” requirement drawing on or referencing important concepts and rationales which have been or might be employed in analyses geared to assessment of *Shariah*-compliance. For the purposes of this essay we are not in a position to and it is not our intent to offer definitive conclusions or recommendations with regard to the matter of

Shariah-compliance of one or another form of *sukuk* but rather to lay some groundwork for what might be a future endeavor along those lines.

Although the rubric *sukuk* (singular, *sakk*) has deep historical roots, among the characterizations in contemporary terms is one offered by Moody's Investors Service: "Trust Certificates' or 'Participation Securities' that grant the investor a share of an asset along with the cashflows and risk commensurate with such ownership."⁴²³ Somewhat more specifically it describes *sukuk* as "notes or certificates that represent ownership of a pool of underlying assets, hence *Sukuk* holders should be entitled to the ongoing cashflows and proceeds of sales from those assets."⁴²⁴ Note, though, as detailed below, *sukuk* investors "do not hold...rights [to the underlying assets and their cashflows] directly but through a special purpose vehicle (SPV), which is usually set up to issue the *Sukuk* and purchase the assets...from the [borrower, also term the 'originator']".⁴²⁵ *Sukuk* have not infrequently been referred to or characterized as bonds – likely because they have been crafted by some to be and seen by others as being both ostensibly Shariah compliant yet in some measure the functional equivalent of a bond – "they are not. (Recall El-Gamal's caustic comment about the "arbitrage" of such forms in this way.⁴²⁶ That is, an *ijāra sukuk* is structured to include elements which look like those of a historically familiar and common *ijara* transaction for what would be an operational lease but has other elements which make this *sukuk* a means for providing finance. In other words, the *ijara* elements are simply a means to toward that end"⁴²⁷)

The emergence of *sukuk* was an artifact of the absence of Islamic capital markets, debt or equity, for project finance. "Shariah compliant access to the equity capital markets began in approximately 1999. Shariah-compliant access to the debt markets occurred later, commencing in the period of 2001 to 2003 with seminal *sukuk* offerings"⁴²⁸ Activity in this era was spurred by a "fatwa...issued...by the *Shari'ah* board of the [AAOIFI]..., the preeminent accounting and auditing authority for the Islamic finance industry. This *fatwā*, AAOIFI *Shari'ah Standard No. (17), Investment Sukuk* (the "AAOIFI *Sukuk Standard*"), approved standards for *sukuk*, including both bond and securitization structures."⁴²⁹ That standard "provide[d] for 14 eligible asset classes" which included securitizations" of an existing or to be acquired tangible asset (*ijara* (lease))" and "to fund construction (*istisna'a* (construction contract))."⁴³⁰ "The most common transactions using interest-bearing debt" did not involve a simple solely Shariah-compliant element but rather involved structures "built around the use of some variant of an *istisna'a* ... or an *ijāra* (lease) structure or both (most often an *istisna'a-ijāra*) for a portion of the overall project."⁴³¹ (For a greenfield project the transactions often entail incorporation of *istisna'a* elements relating to the construction phase and *ijara* elements for the post-construction phase.⁴³²). Over the long term, notwithstanding some of the challenges discussed below, the market for *sukuk* has grown enormously and is expected to do so in the future.⁴³³

Here, we focus on the *ijarah sukuk* – which may be referred to as a financial lease *ijara* – which generally involves a structure along the following lines:

- (1) A special purpose vehicle (SPV) is established. It issues *sukuk* "which represent a right against the SPV to payment of the Periodic Distribution Amount (i.e. profit) and the Distribution and the Dissolution Amount (i.e. principal) on redemption."
- (2) Investors purchase *sukuk* certificates from the SPV which establishes a trust – with the SPV acting as Trustee on behalf of the certificate holders – for the proceeds and the "assets" it acquires with the monies received from those purchases. Each certificate represents "an undivided beneficial ownership interest in the relevant assets underpinning the trust."⁴³⁴
- (3) A company "enters into a Sale and Purchase agreement with the Trustee" to sell "land or other tangible assets" to the Trustee "for an amount equal to the Principal Amount."⁴³⁵

- (4) The Trustee, in turn, leases the land or other tangible assets pursuant to an *ijara* agreement “for the periodic payment of Rental” by the company, the Rental being “equivalent to the ‘Periodic Distribution Amount’.”⁴³⁶
- (5) The SPV then pays over to *sukuk* certificate holders Periodic Distribution Amounts using the Rental amounts it receives.
- (6) At default or maturity (or on the occurrence of other agreed-upon events) the Trustee sells and the company repurchases the land or other tangible assets “pursuant to the exercise of a Sale Undertaking or Purchase Undertaking” for an amount termed the Exercise Price which is a “sum equal to the Principal Amount plus any accrued and unpaid Periodic Distribution Amounts owing to certificate holders.”
- (7) “The SPV pays the ‘Dissolution Amount’ to the Certificateholders in an amount equal to the Exercise Price.”⁴³⁷

In accord with the Shariah requirements for an operating lease *ijara* (discussed at greater length below) and “unlike in conventional operating leases, the SPV (in its capacity as lessor) is responsible for all major maintenance (typically repair, replacement and maintenance of a capital nature without which the assets could not reasonably be used by the project company). The project company is responsible for all ordinary maintenance (typically repair, replacement and maintenance other than major maintenance). In addition, the SPV [is] responsible for insurance of the assets. To limit the SPV's liability and ensure that third parties do not have any claims on the SPV or its assets, the project company and the SPV enter into a service agency agreement under which the project company is appointed as agent of the SPV for the purpose of carrying out the major maintenance and procuring the insurance. Should the project company fail to effect any repairs or replacements, or obtain the insurance, the SPV may do so and will be indemnified by the project company for all amounts paid or costs incurred by the SPV.”⁴³⁸

Concerns about Shariah compliance: “asset-based” as compared to “asset-backed” *sukuk* and the relevance of “tangibility”/tangible objects.

Important for our discussion, the foregoing characterization, published in 2012, took note of the fact that although *sukuk* “can be structured as secured instruments the vast majority...are structured so as to be ‘asset-based’ rather than ‘asset-backed’ investment.”⁴³⁹ That is, “Certificateholders do not typically have recourse to the assets which underpin the Sukuk structure.” Rather, they have only an unsecured claim against the [project company] obligor for the repurchase price of such assets” (pursuant to the Sale or Purchase Undertaking).⁴⁴⁰

Contention over the permissibility of “asset-based” as compared with “asset-backed” *sukuk* was flagged in a 2006 credit rating report by Moody’s which offered its own characterization of Shariah requirements with an eye to identifying their relationship to the important secular, financial risk-related considerations with which ratings agencies are concerned. Although the description is not cast in terms “of objects” but rather in the contemporary financial language of “assets”, “cash flows,” and the like, there are strong echoes of the former: That is,

“Shari’ah requires that financing should only be raised for trading in, or construction of, specific and identifiable assets. Trading in ‘indebtedness’ is prohibited, so the issuance of conventional bonds would not be compliant as they are usually traded and represent interest based funding for general corporate purposes. A non-interest bearing loan however, could be traded if priced at par value.

“Thus, all Sukuk returns and cashflows should be linked to assets purchased, or (in the case of project finance) those generated from an asset once constructed and not simply be income that

is interest based. This requirement for ‘*tangibility*’ has consequential effects in other areas, such as derivatives.”⁴⁴¹

With specific referenced to *ijara sukuk* the 2006 Moody’s report remarks that “[t]he asset itself can be a plot of land, a building, or anything else *tangible* and lease-able.”⁴⁴²

Elsewhere the report states that “[i]f the Sukuk is a ‘True Sale’ securitisation, then there will be a correspondence of the income streams with the actual rental and market value of the asset(s). If not, then it is an unsecured exposure and the asset only exists in the structure to facilitate its Shari’ah compliance. The payment streams to investors are only nominally linked to the underlying asset cashflows and value. In either case, the Sukuk notes represent an equity share in those assets.”⁴⁴³

Two points with regard to the above are worthy of note. At first blush, the references to “tangibility” and “tangible” seem to be quite clear, that is, they seem to imply that the “assets” in question are particular tangible or physical objects (in the instant case, ones of the kind involved in infrastructure-related enterprises). However, the suggestion is that true (?) Shariah compliance requires that “all Sukuk returns and cashflows” be **linked** to the “assets purchased, or (in the case of project finance) those generated from an asset once constructed”/that “income streams” have a suitable **correspondence** with “the actual rental and market value of the asset(s)” while (only) facial (?) Shariah compliance is achieved where the “payment streams” are **nominally linked** to the “underlying asset cashflows and value.”

Thus, the focus of this particular formulation is (a) not on the “asset” – as tangible/“constructed” – as such, but rather on the “returns” and “cash flows” and “value” of the “asset” and (b) how the latter must be “linked” or “correspond” in some appropriate or sufficient way to *sukuk* returns, cash flows, and value.

In other words, there is an ostensible shift away from “object”-ivity as such – that is whatever particular tangible (or otherwise) objects are involved in or required by the enterprise for which finance is sought – to the financial rewards (and risks) and associated financial “value” – of the enterprise as an ongoing endeavor. It is also interesting to note while the Moody’s report characterizes the above discussion under the rubric of “[t]he importance of assets,” it follows with a separate discussion of concerns about the “prohibition of interest or *riba*” and the “prohibition of uncertainty or *gharar*,” arguably as, seemingly, independent or different principles.⁴⁴⁴ Nonetheless, the report’s explication of the “importance of assets” as such harks back to some of the concerns encompassed by those prohibitions.

Issues of Shariah compliance framed in terms of a requirement of “ownership”

The author of the Moody’s report revisited the subject of *sukuk* again in 2009. He returned, among other things, to the issues just discussed above though arguably with a slightly different emphasis occasioned by the observation (echoed later in the above-cited law firm analysis) that “very few existing *sukuk* have asset ownership or security – the majority are unsecured”.⁴⁴⁵ While there are important implications of this for Moody’s ratings in terms of an assessment of financial risk for investors, our focus here is on Shariah-related requirements.⁴⁴⁶

More particularly, that emphasis reflected two important intervening events. First, in 2007 there was sharp critique of *sukuk* (as they had been crafted up until that time) by Muhammad Taqi Usmani, the prominent Pakistani *Shari’ah* scholar and then Chairman of the *Shari’ah* Board of the AAOIFI described above.⁴⁴⁷ Usmani acknowledged the value of *sukuk* in principle, both as a

means to enable the finance of enterprises and “for the equitable distribution of wealth” by “allow[ing] all investors to benefit from the true profits resulting from the enterprise in equal shares.”⁴⁴⁸ However, Usmani found several major faults with *sukuk* in practice. With respect to the one most relevant here he first stressed that *sukuk* as compared to bonds “[g]enerally...represent ownership shares in assets that bring profits or revenues, like leased assets, or commercial or industrial enterprises, or investment vehicles that may include a number of projects.”⁴⁴⁹ However, he expressed concern that “quite recently, the market has witnessed a number of Sukuk in which there is doubt regarding their representation of ownership. For example, the assets in the Sukuk may be shares of companies that do not confer true ownership but which merely offer Sukuk holders a right to returns. Such Sukuk are no more than the purchase of returns from shares; and this is not lawful from a Shariah perspective.”⁴⁵⁰

In the following year, in response to Usmani’s missive, the AAOIFI issued a “clarification of its] views on Sukuk behavior,” which amended its Shari’ah standards relating to *sukuk*.⁴⁵¹ In part, it asserted the following:

“In line with Shari’ah principles, Sukuk must represent proportionate ownership by the sukuk investors in the relevant underlying assets, projects, rights and/or services. Ownership must entail both the rights and obligations of the investors/owners. In the case of asset-backed Sukuk, there must be a legal transfer of assets to the investors.”⁴⁵² Moreover, “[f]or Sukuk to be tradable, the assets owned by Sukuk holders, reflect all rights and obligations of ownership, in real assets, whether tangible, usufructs or services, which are capable of being owned and legally sold in accordance with Shariah principles. The Manager issuing Sukuk must reflect the transfer of ownership of such assets in its books, and must not report them as its own assets.”⁴⁵³

Note here, on one hand, the generic reference to “real assets” but on the other, inclusion among them of not only tangible ones but also “usufructs or services.” That is, this particular requirement is defined in terms of “ownership” – namely, that which is capable of being “owned” (and sold) – so presumably is associated with that which can be deemed to be “property”. Hence “real assets” – a phrase which the AAOFI does not define – seems to be (implicitly) equated with that which would otherwise qualify as property and the particular understanding in that regard adopted by the AAOFI standard extends well behind *tangible* objects.

Subsequent to Usmani’s critique there was a dramatic drop in the issuance of *sukuk* which was viewed by some as testimony to the effectiveness of his attack on their legitimacy (at least as to how that had been constituted). Indeed, it has been seen by some as more generally illustrative of the potentially great influence of *Shari’ah* scholars’ judgments.⁴⁵⁴ Note, though, that others however, see the drop as simply being a result of the post-Usmani critique GFC.⁴⁵⁵

Rationales offered in relevant literature for the “ownership” rule as it relates to *ijarah* *sukuk*

Whatever the case in that regard, most interesting for our purposes, is Usmani’s statement regarding the requirement of ownership which is essentially declarative in nature. He simply and only illustrates his concern with reference to “assets in the sukuk” which are “of companies that do not confer true ownership but which merely offer Sukuk holders a right to returns” and, in turn the assets (impermissibly) represented “no more than the purchase of returns from shares.”⁴⁵⁶ Although this contention as stated in English is not especially clearly phrased, it does not appear to be focused on or rest on any concern on Usmani’s part about investments taking the form of ownership of corporate shares as such.⁴⁵⁷ Rather, as interpreted by the Moody’s report, the issue pertains to the transfer of ownership of “assets” of the originator – here the project company.⁴⁵⁸

Otherwise, Usmani offers no reasoning in support of that assertion. For that matter, the ostensible AAOIFI response to it offers little more,⁴⁵⁹ a point on which others have commented. For example, one writer has asserted that the AAOIFI ruling, “due to poor drafting, lacks clarity and fails to shed sufficient light on the rationale for the ban. (Usmani n.d).”⁴⁶⁰ Also, the authors of a lengthy book on global *sukuk* and securitization are critical of Usmani’s argument. While they acknowledge that “[p]erhaps the Sheikh is referring to the broader issue of the underlying assets in *sukūk* and the doubt as to whether these assets represent genuine ownership as required under Sharī‘ah,” they remark that Usmani “did not elaborate on the issue or the reason behind this problem and leaves some unanswered questions.”⁴⁶¹ Those questions concern the fact that while the transfer of assets the “SPV as a true sale...is an important Sharī‘ah requirement” and the “financing of the SPV is not treated as debt on the balance sheet of the originator,” “[u]nfortunately, many issued *sukūk* are based on beneficial ownership and did not strictly abide by this requirement.”⁴⁶²

We have sought but found little commentary on the rationale for the asserted position. The assertions may be so obvious or self-evident for so many in view of their understanding of *Shariah* compliance entails that there simply has been no need to explicitly offer it. Setting that possibility aside, a consideration of the matter suggests that the justification is little concerned with *ownership as such* but rather is either only indirectly linked to it or simply based on other considerations.

For example, Alexander contends as follows:

“For the purposes of project finance, the rules that the lender must share in the profit and loss of the transaction and that all transactions must be asset-backed are inherently linked in a manner that highlights the importance of retention of title on the part of the Islamic financiers. Given the view of lending money as a charitable act and the prohibition on the charging of interest as an exploitative activity, the asset underlying the transaction will be the central focus of the transaction, and the Islamic lender will be subject to the risks of the asset through the retention of its title in some form or another. Many Islamic transactions therefore are derived from a basic form in which the lender takes title to or purchases the asset in the transaction, and then leases it back to the purchaser who will acquire title to the asset after a specified number of lease period”⁴⁶³ This makes the project asset-backed from the perspective of the Islamic lenders rather than the SPV. If the SPV does not generate profit for the project sponsors, the Islamic lenders will also not receive lease payments from the lease of the project assets to the SPV. In this way, the transaction forces the Islamic lenders to bear the risk of the project’s failure.”⁴⁶⁴

This argument is less than convincing. The author starts from an asserted “inherent[] link” between the “lender” shar[ing] in the “profit and loss of the transaction” and the “transaction” being “asset-backed”. In what might arguably be a restatement of the point it shifts the ground to the “lender” being “subject to the risk of the asset” through “retention of its title *in some form or another*.” In what one might be seen as a reprise of the point Alexander stresses that the receipt by the “lender” of rent payments from the lease of the project assets is contingent upon the SPV “generating profit for the project sponsors” and, hence, “the transaction forces” the “lender” to “bear the risk of the project’s failure”. The scenario here appears to involve a project company/sponsor/obligor as an ongoing enterprise which uses certain “assets” – here termed the “project assets” – in connection with its operations. As noted, the terms of the *ijara sukuk* entails the sale of those project assets to the SPV, lease of them to the project company in exchange for specified payments of Rent over the period of the lease, the resale of the project assets to the company at the end of the term for the Exercise Price (which we assume here would be the Principal Amount) under the repurchase agreement.

What the writer means by the “transaction” (and the profit or loss which might result from it), is not clear. It would seem most plausible that it refers to the contractual relationship(s) between the SPV “lender” and the project company and the terms thereof. If so, then with respect to the “transaction,” from the standpoint of the “lender,” any profit or loss is the result of whether and the extent to which the “lender” receives the payment of Rent and the Principal Amount. From the perspective of the project company, the “transaction” as such does not pose concerns as to profitability or lack thereof. Rather it is a means by which the project company can have at its disposal resources it needs to engage in a potentially profitable infrastructure-related enterprise. So for the project company there no issue as to sharing in the profit and loss of the transaction.

Certainly, the extent to which the “lender” profits (or suffers losses) from the transaction is linked to the ability of the project company to make the noted payments. That, in turn, and in the first instance depends upon the extent to which the project company makes a profit or suffers losses from the enterprise in which it engages. Only in that (indirect) way might the “lender” be said to “bear the risk of the project’s failure.” (Alexander appears to make this point but his reference to “the SPV...not generat[ing] profit for the project sponsors” seems misplaced. The SPV does not generate any profits for the project sponsors. The money it provides simply affords the project company the opportunity to engage in a potentially profitable enterprise.) However, the “lender” need not have title to – or for that matter even a lesser interest in – the “assets” which are the subject of the lease/which “underly[] the transaction” for it to bear any such risk of the project’s failure. Rather, the manner and extent to which the “lender” holds title has import in what would seem to be two opposite ways.

On one hand, it may be implicit in the author’s contention that the “lender will be subject to the risks of the asset through the retention of its title in some form or another.” Such retention might be associated with the lender’s receipt of payments of Rent – and perhaps as well either the project company’s repurchase of the asset or repurchasing it for the Principal Amount – being conditioned on the lender being responsible for maintaining the asset in a way which assures the project company of its enjoyment of the agreed-upon use of the asset. It might also be associated with a similar condition should there be damage to the asset which results from other than lack of appropriate care by the project company in its use of it. However, neither of these “risks” are ones connected with the success or failure of the project company except in the obvious sense that damage to the asset would make the success of the project company more difficult. (As we discuss below they are conditions for Shariah compliance of an operating lease *ijara*.)

On the other hand, insofar as the transaction entails the “lender” having title to or some other lesser interest – for example, a security interest – in the “assets,” the risk of the lender not receiving some (if not all) of the promised payments of Rental or some or all of the Principal amount is reduced if the lender has the opportunity to recover money from the sale or exercise of its interest to apply against what it has not been paid. As such, if an underlying Shariah compliance concern with the *ijarah sukuk* is that the “lender” bear the risk of the project’s failure, then that burden would be *reduced* the link between project failure and the risk (of an adverse outcome) for the “lender” would be *weakened*.

That is, as noted, how much profit the “lender” gains from the “transaction” – broadly speaking, in the form of the Periodic payments – is not specifically tied to the profit which the project company derives from use of the asset in connection with its enterprise. But this is true for an operating *ijara* lease as well. (The rental payments are not formally linked to the profitability or not of the lessee’s endeavor in which the leased “asset” is used.) So, arguably that should be troublesome in terms of *Shariah* compliance. It is not clear what concern of that sort is posed insofar as the “lender” might face a different and potentially greater loss – depending upon the

title or interest held by the “lender” – as a result of the project company’s failure. As noted, the greater extent to which compliance compels holding of title (or an interest) the lesser the risk for the “lender”.

Note that for the lease aspect of this financial lease *ijara* as compared with that of an operating lease *ijara*, the potential loss which might be suffered by the “lessor” could be greater in the former case precisely because the “lessor” retains title to the “asset”. For the operating lease only the rental payments are at risk; for the financial lease, the “lessor” has not only those rental payments at risk but also the Principal Amount which is provided to the project company.⁴⁶⁵

Arguments by Garner are somewhat differently cast from those of Alexander but no more compelling. He writes that “[t]here are many intricate essential conditions in order for an *ijara* to achieve Shariah compliance.” (Although he broadly refers to *ijara* it would appear he is discussing a financial lease *ijara* not an operating lease *ijara*.) He states as follows:

“First, the bank or ‘leasing agency, must own the leased object for the duration of the lease’. This is important as it means that a leasing arrangement is in place with the customer paying for use of the asset, rather than the bank effectively offering a loan to the customer to purchase the asset, obtain title and then pay the bank back over time with interest added on the loan. This also ensures the object is certain, and therefore there is no *Gharar*. This is a subtle difference that ensures the key principles of Islamic finance are not broken.

“Secondly, as title belongs to the bank, so do the risks and duties associated with owning an asset e.g. maintenance. Thirdly, as Procter notes, ‘payments under an *ijara* can only continue whilst the customer has the use of the asset. Consequently, if the asset is lost, stolen, or destroyed, then the obligation to pay rent must terminate’. This and the second noted condition, similar to a *Murabaha* transaction, justify the profit margin charged by the bank. This is because as previously noted, and highlighted by Procter, ‘the lessor cannot pass the entire risk of the asset to the lessee’ as this would mean money would have been made devoid of risk, as this would be borne by the lessee, therefore the bank in making a profit would be charging *Riba* to make this profit.”⁴⁶⁶

With regard to the first point, the first two sentences merely restate the question as to whether the form of the transaction is a subterfuge for effectively allowing loans with interest. The third and fourth sentences not only just seems to reprise the necessity for clear enough specification of the terms of a transaction viewed as a contract for sale (and arguably otherwise as well) but also justifies it out of a concern about *gharar*. More importantly, the “object”/“asset” can equally as well be specified regardless of the nature and extent of any title or interest the “lender” has in it. The second and third points just restate (the operating lease *ijara*) requirements relating to maintenance of and damage to or loss of the “asset” and deem them to be justified based on a concern about *riba*.

Garner’s reliance on the similarity to a contemporary *murabaha* transaction for justification in the terms described is most interesting. The *murabaha* transaction has been seen as a Shariah-compliant substitute for a typical Western transaction in which a bank lends money to another party for the purchase of a product and takes a security interest in that product. Instead, the bank buys a pre-identified product and then (shortly thereafter) sells it to the other party in exchange for installment payments from that party which equal the bank’s purchase price plus a pre-agreed mark-up. As Garner recounts, Procter’s argument for the Shariah compliance of this kind of transaction, no *riba* is involved because “the bank can justify the profit or mark-up due to the risk it has exposed itself as well as the labour or service it has provided”; that is, “[t]he increase in

price has not been made purely out of the use of money or the finance agreement.”⁴⁶⁷ This argument is a curious one.

What is the “risk” to which the bank exposes itself and what labor or service by it is involved? If it is the risk of failure of the other party to make the specified payments that is no different from the risk a bank would face from a conventional transaction. There is, of course, the risk that the other party will refuse to buy the product from the bank in the first instance (let alone commence making the installment payments). And the additional or distinctive labor or service would be that associated with the bank’s purchase of the product. But both are artifacts of the addition to the Western transaction of the bank purchase and resale step so that the argument would seem to be a boot-trap one. Most interesting, though, Garner also refers to “Procter underlin[ing] that due to the trading relationship rather than the Western structure of a ‘secured lender/borrower relationship’, there are greater risks, again justifying the mark-up by the bank.”⁴⁶⁸ The latter argument is precisely the opposite of that offered in the context of an *ijara sukuk* in which not just a security interest but rather, title is said to be required. Insofar as the two cases might be distinguished, it might in the following terms: as described, for the financial lease *ijara*, the *need* for title reflects the import into the discussion about it of the operating lease *ijara* requirement. That, in turn, has significance because it is closely identified with the “lender”/lessor bearing the risk of non-payment based on the loss or damage to or failure to maintain the “asset”. By contrast, for the *murabaha*, the *lack* of a security interest prevents the bank from reducing the risk of loss from non-payment.

Finally, Dusuki and Mokhtar offer what they deem to be a critical appraisal of Shariah-related ownership issues for *sukuk*.⁴⁶⁹ They, not surprisingly, start with and proceed at some length to discuss the fundamental conditions for sales contracts which we have reprised above, citing the requirement that “the *mal al-aqd* (object of the sale) must exist and be owned by the seller at the time of the contract.”⁴⁷⁰ They write that “[t]his is important because the purpose of a sale contract is to transfer ownership of the object of the sale to the buyer and ownership of the price to the seller.”⁴⁷¹ After taking note of different views as to whether and under what circumstances *qabd* requires taking physical possession and/or accepting just legal possession, they “examine the various schools of thought regarding [the] status [*qabd*] in a sale contract.”⁴⁷² Those opinions range from “not [being] an essential requirement (*rukʿn*) of a sale” for Hanafis to differing perspectives among Malikis especially as they relate to food and to “possession [being]...a condition for all kinds of property” for the Shaf’is, though the authors remark on certain scholars who “departed from the majority position” based on custom rather than just accepted textual sources.⁴⁷³

Interestingly, they suggest that for “the majority of scholars of Islamic jurisprudence” the rationale for a bar against resale before possession is “mainly due” to concern about “the presence of *gharar* (excessive risk and uncertainty) which may lead to dispute among the transacting parties...because of the concern that the goods might not be delivered due to damage or other factors.”⁴⁷⁴ They cast this as an expression of the prohibition in Islam of “any transactions involving *bayʿ maʿdum*, since the delivery of the subject matter cannot be effected, and this brings about the prohibited element of *gharar*.”⁴⁷⁵

It is also striking that although the authors briefly reprise *fatwas* by the International Fiqh Academy and the Islamic Fiqh Academy of the Muslim World League and the AAIOFI standard with regard to the varied requirements of *qabd* in certain circumstances, they do not discuss the rationales for them. It is even more interesting that although they then proceed to describe differences between what are termed asset-backed and asset-based *sukuk* they do not discuss the bearing of the cited diverse positions and rationales on the matter of ownership. Rather, they just proceed

to discuss the kinds of interest which in practice *sukuk*-holders might have. They first note the following:

“[I]n most asset-based *sukuk* structures, the *sukuk*-holders who are supposed to own the underlying assets do not have any interest in the underlying asset. This is particularly true for unsecured asset-based *sukuk*, which form a majority of the *sukuk* market. Even for secured asset-based *sukuk*, the *sukuk*-holders will only have security interest in the asset. This means the *sukuk*-holders are merely creditors and not owners of the asset. Even if they have a charge on the asset, legally, they are not the owners of the asset. Security interest means the *sukuk*-holders can only claim total amount of debt due (capital plus accrued profit).”⁴⁷⁶

By contrast, for asset-backed *sukuk*, “*sukuk*-holders cannot ask for recourse to the originator since the asset is deemed to be owned by them. There is no indebtedness between the originator and the *sukuk*-holders since the former has already sold the asset to the *sukuk*-holders (normally done through a Special Purpose Vehicle). Hence, full ownership is evidenced in asset-backed *sukuk*.”⁴⁷⁷

However, they then offer only an observation – largely a conclusory one – in connection with a discussion of particular *sukuk* for which there was no provision with regard to “due diligence” as to the legal permissibility of the transfer or the perfection of transfer (of the “assets”). That is, it “brings up a pertinent Shari’ah issue: with this approach of no due diligence on the asset, how will one satisfy the very basic requirement in Shari’ah that the seller is able to legally transfer title to the buyer?”⁴⁷⁸

Finally, they provide what might seem to be a reference to Shari’ah compliance, though a murky one at best. That is, they assert that there are “two simple questions” to ask to “identify the true role of the asset (from Shari’ah and legal perspectives)”:

“If there is a default, can the *sukuk*-holders dispose of the asset?

“If something goes wrong with the asset itself, will the investors’ return be interrupted?”⁴⁷⁹

They write that “[i]f the answers to *both* questions above is no, then it is an asset-based *sukuk*.”⁴⁸⁰ Certainly the foregoing might be a tenable basis for distinguishing between what should be termed an asset-based *sukuk* and an asset-backed one but it does not, as such, address the issue of compliance. That matter could entail an assertion that only an asset-backed *sukuk* – defined in that way – can be Shari’ah compliant, and the reasons for that assertion would be offered. That is not the case here. Rather, arguably implicit in the two questions is, on one hand, a blanket assertion of the importance of *sukuk*-holders being “able to deal freely with the asset” and, on the other, the seeming significance of the investor bearing financial risk linked to the success or failure of the enterprise/economic activities in which the asset plays a role. While the latter point is prominent in discussions as to Shari’ah compliance it is not otherwise raised in the authors’ paper. What is perhaps most striking, though, is that only *one* of the two questions needs to be answered in the affirmative to deem the *sukuk* to be an asset-backed one. That is, even if *sukuk*-holders do not have the right to dispose of the asset – because they do not have the requisite ownership interest – the *sukuk* would still be an asset-backed one (and hence presumably seen as being Shari’ah compliant) if returns to those holders depend on things not “going wrong with the asset itself”.

Indeed, the two criteria would seem to be in tension. One – that which is frequently expressed in terms of risk/profit sharing – derives strength from at least that aspect of the Islamic narrative which is captured by some of the concerns associated with *riba*, the prototypical example thereof

being a creditor being assured of a return – in the form of interest – on the loan regardless of the success or failure of the enterprise to which the loan proceeds are applied. The other – which on its face is articulated in terms of the need for the sufficient “presence” of the subject matter of the transaction (tangible object, or otherwise) – derives from or is given greater force by at least that aspect of the Islamic narrative which is captured by some of the concerns associated with *gharar*, that is, the unacceptability of transactions the terms or implementation of which pose serious issues of uncertainty and the (ostensibly unacceptable) risks which might follow upon by such uncertainty.

Consider the case of the *sukuk*-holder having just a security interest in the assets. Although the reach of a security interest varies, at its core is the right of the holder of it to seize and sell the property /asset to discharge the debt that the security interest secures. (The arrangements under which doing so are permitted under typical Western law are different from those pursuant to Shari’ah law, but that is not a matter of concern for us here.) Regardless of whether the monies advanced by the *sukuk*-holders are termed as a “loan” by them (and as resulting in the originator incurring a “debt”), the fact is that, in principle, an exercise of that security interest would potentially provide *sukuk*-holders with the return of all of that advance. Insofar as gaining such a security interest is permissible, that by definition that reduces the risk (of loss of at least the money advanced) for the person advancing the funding. We have not canvassed the matter extensively but it would seem that where the advance funding is seen as taking the form of a loan, there is no obstacle to the lender having a security interest. However, it would appear that if the loan is one which would pay interest, permitting the holding of a security interest with respect to it would be barred by the prohibition of *riba*. Arguably, if a transaction entails the payment of interest, which by definition is barred, then enforcement of any security interest even for the purpose of recovery even of the principal of that loan would be deemed to be impermissible.

However, this type of enforcement does not appear necessarily to be the case. For example, in Saudi Arabia, where appropriately configured security interest provisions are generally enforceable, should they be “determined to secure interest,” they are unenforceable only to the extent that they are.⁴⁸¹ Such an approach seems in certain ways apposite with the Saudi Arabia’s approach (on its face) to the payment of interest under which “[i]nterest-related transactions are not...illegal,” but “[r]ather,...void and unenforceable.”⁴⁸² In effect, the “taint” of *riba* of an agreement which on its face constitutes a loan with interest does not prevent it being treated as one without interest for which security interests are enforceable.

All the foregoing being said, it is not evident that the authors’ broad gauge conclusion “that asset-backed *sukuk* clearly fulfill the Shari’ah requirement and dispel all the contentious fundamental issues above” is quite on the mark.⁴⁸³

The relation of an “ownership” rule for the financial lease *ijarah/ijarah sukuk* to the requirements for the operating lease *ijarah*

As noted, the legitimacy – at least as a formal matter – of the financial lease *ijarah/ijarah sukuk* rests in considerable part on its use of the operating lease *ijarah* nominate contract form. It is an arrangement is illustrative of a broader set of possible ones which arise from “the possibility of combining two or more of the nominate contracts in one deal, whereby the deal becomes a separate obligation consisting of the characteristics of the combined contracts.”⁴⁸⁴ (Although it is not without historical precedent we note that it potentially runs afoul against proscriptions against combinations of contracts though we do not canvas the issue here.⁴⁸⁵) For that reason it is useful to consider the nature and origins of certain requirements for Shariah compliance as they relate to the latter.

We first return to the matter of the responsibility for loss and destruction requirements which apply to the operating *ijarah* lease. A search for such justifications yields a very brief discussion by Vogel and Hayes. They suggest that “[i]n a lease the owner of the property must pay for its upkeep and maintenance, since otherwise the tenant’s obligation becomes indeterminate and the contract void.”⁴⁸⁶ It is not entirely clear what they mean here though the idea might be that because there is uncertainty as to the availability of the agreed upon usufruct – because the property which is the source of the usufruct may not have been properly kept up or maintained – and the lessee’s obligations are conditioned upon such availability, there is uncertainty as to those obligations and, in turn, the uncertainty as such renders the contract void. If so, the rationale would appear to be grounded in concerns about *gharar*. Vogel and Hayes also remark on it being “a fundamental term of all leases that the lessor bears the risk of loss or destruction of the leased object” though they do not offer a reason for that requirement. Arguably the just noted indeterminacy argument would apply here as well. It might be that the requirement is obvious, that is, that which is the source of the usufruct must exist for the usufruct to be enjoyed; if it does not exist, then the lessor does not own the property/usufruct which he or she is obliged to deliver under the contract.

Usmani offers two different, but related rationales: “[T]he basic difference between an interest - based financing and a valid lease does not lie in the amount to be paid to the financier or the lessor. The basic difference is that in the case of lease, the lessor assumes the full risk of the corpus of the leased asset. If the asset is destroyed during the lease period, the lessor will suffer the loss. Similarly, if the leased asset loses [*sic*] its usufruct without any misuse or negligence on the part of the lessee, the lessor cannot claim the rent, while in the case of an interest-based financing, the financier is entitled to receive interest, even if the debtor did not at all benefit from the money borrowed.”⁴⁸⁷

First note that Usmani refers to both the destruction of the “asset” (and the “loss” it engenders) and the “full risk of the corpus of the asset” but does not explain how he distinguishes, if at all, the corpus from the asset. It could be that by the latter he means that which is leased viewed in financial terms and the former in physical terms (or perhaps as otherwise being that which is capable of being owned and being subject to destruction). However, this does not quite line up with the link made in the third sentence between an “asset” being “destroyed” and the lessor suffering “the” (or its?) “loss”. Moreover, Usmani speaks of but does not explain what he means by the “full risk of the corpus.” At first blush, the words suggest that whatever the reason or occasion for the destruction of the asset/corpus, the lessor solely bears the loss of it. Arguably, that is not true. Insofar as there is a parallel here with the prescription in the fourth sentence, if the lessee’s misuse or negligence is so extreme as directly to result in the destruction of the asset/corpus, it would seem that the lessee would bear the loss. Strictly speaking, though, there is not quite a parallel, because the issue is not one of bearing the risk of loss of the corpus/asset but the obligation to pay the rent. But, of course, if the lessee is not culpable for the destruction of the corpus/assets he or she cannot be obliged to pay rent for the agree-upon, but now unavailable, use of the corpus/assets. In other words, and more broadly, if so, the lessee does not assume the full risk of the corpus; rather the lessee assumes certain kinds risks associated with how he or she acts in enjoying the uses to which he is entitled by the lease. Insofar as this is cast in the language of Usmani’s characterization of interest-based financing, the lessor cannot “benefit” (in the form of rent) from the lease if the lessee does not benefit from that which is provided by virtue of the lease, that is, cannot enjoy the agreed-upon use because the corpus/asset has been destroyed or rendered unsuitable (for that use) for reasons solely ascribable to the lessor.

But the parallel to the lending scenario seems to fail. Usmani does not explain in what sense the debtor might “benefit” from the money borrowed. Presumably, though, just as the lessee potentially benefits by earning a profit from the enterprise in which he makes use of the corpus/asset leased, so the debtor potentially gains by earning a profit from the enterprise in which he makes use of the money borrowed. But there is no ready parallel between the destruction or unusability of the corpus/asset leased in the former case and what might be done with the money provided in the latter case. The lender has in fact provided what has been agreed upon, the money. Insofar as the money is “lost” it is not by reason of any conduct of the lender. The borrower has enjoyed the benefit of the money at least in the sense that he has had the untrammelled ability to make use of it in his enterprise. Even if one might accept “benefit” with a different connotation – which we do not believe would be appropriate here – the parallel still fails. That is, if benefit is associated with enjoyment of a profit, the lack of a profit (or at the extreme a partial or total loss of that which was expended in the enterprise) failure or inability of the borrower to earn a profit is solely ascribable to the conduct of the borrower.

The argument for a lack of parallelism is strengthened by the fact that loans without interest are permissible and arguably, according to Islam, even encouraged.⁴⁸⁸ For them – and perhaps even for loans the interest from which is barred from being collected – the obligation to pay back the principal remains regardless of whether the borrower has benefited (in the profit sense) or not from the money borrowed. Indeed, it would appear that at least in this context, action to minimize or perhaps even entirely eliminate the risk of non-repayment of the principal is permitted. That is, in contemporary rhetoric, the lender need not bear any credit risk because he or she is allowed to require collateral for the loan.⁴⁸⁹

Supposing so, then the difference between the lease and the loan with interest scenarios would seem to be that (a) in the latter case, notwithstanding “destruction” of that which is provided (money) – really the failure of the enterprise to produce revenues to cover expenses incurred (and paid for in whole or part with the borrowed money) – the lender is still entitled to the interest while (b) in the former case, if that which is the source of the usufruct is destroyed, the lessor has no entitlement to recompense for it from the lessee. But that analogy and distinction would not seem to hold. In the case of the lease, the underlying point might be that the obligation to pay rent continues only if the lessee would not otherwise be viewed as having any culpability for the occurrence of the destruction of the corpus. (For example, it might have been destroyed by fire but the lessee, insofar as it was accorded control over the corpus/asset for the uses permitted by the lease, did not exercise it in any way which posed the risk – or perhaps better an unwarranted – risk of fire.) If so, then, the lessor as the owner, who retains all other residual control by virtue of ownership, must suffer that loss.

By contrast, in the case of the loan, the “destruction” – the loss of the money borrowed (?) – arises solely from the borrower’s choices and actions in connection with how that money is used. This point would seem to be reinforced by the fact that the loss referred to in the loan with interest scenario is in effect the loss of the loan principal. As noted, not only are loans without interest permissible but also the obligation of the borrower to pay back the principal arguably is recognized irrespective of how or why the borrower “destroys”/suffers the loss of what he or she borrowed. This point would seem to be reinforced by the fact that insofar as the loss referred to in the lending scenarios is in effect the loss of the loan principal

A few additional observations on these arguments are relevant. The references to leases are framed in terms of risk and loss; they do not speak to the profit side of the equation as such. That is, they describe circumstances under which the fact that the lessee suffers a “loss” necessarily requires the lessor to suffer a “loss” (though the nature of the losses they suffer differs not only in

kind but also to the extent of one loss of one sort is at best only loosely connected with the other.) With regard to the profit side, the size of the payments of rent is formally independent of the extent of profit of the lessee's enterprise and that would appear to be unproblematic in terms of Shariah compliance. However, while there is a similar lack of relationship for a loan with interest, that is problematic. The ostensible distinction intimated by Usmani with respect to a loan with interest pertains to the fact that the lender is nominally required to make the interest payments even though the debtor has not "at all benefit[ed] from the money borrowed". Usmani does not detail what he means as a "benefit". However, it would appear it he is referring to a situation in which the enterprise in which the money has been used has not yielded anticipated profits – or worse, for example, completely failed. (That Usmani applies the adjectives "at all" to "benefit" suggests, at minimum, the absence of any profit.) Here, then, the fact that the debtor suffers such a "loss" (of a particular kind) is *not* associated with the lender suffering a loss (though of a related but different kind). Again, the *extent* of the respective losses does not appear to be of significance.

At first blush the loss/risk-side distinction might be viewed as a sensible one. The question, though, is whether the analogy quite holds. In the case of the lease example, the losses suffered by the lessee are not occasioned by an act or failure to act on the lessee's part. Rather, they are the result of the inability or failure of the lessor to provide for use in the enterprise what was promised, namely the specified usufruct (which was, perhaps, a necessary though not sufficient condition for its success). However, it would appear, if the lessee is deemed to be culpable for destruction of or inability to use the "corpus of the asset" presumably the lessee's obligation to pay rent is not abated.⁴⁹⁰

The "ownership"/"real asset" rule in relation to requirements for the "silent partnership"/mudarabah and loans.

Consider, by contrast, the case of a *mudarabah*, a "silent partnership" which has pre-Islamic origins.⁴⁹¹

Among a *mudarabah*'s principal characteristics, as specified by classical Islamic jurisprudence, are "that the entrepreneur...has full discretion over the assets and operation, without bearing the risk of financial loss. Usmani (n.d.) explains:

- (i) in *mudarabah*, investment is the sole responsibility of the *rabb al-mal* [i.e., the financing partner]
- (ii) in the *mudarabah*, the *rabb al-mal* has no right to participate in the management which is carried out by the *mudarib* [i.e. entrepreneur] only.
- (iii) in *mudarabah* the loss, if any, is suffered by the *rabb al-mal* only, because the *mudarib* does not invest anything. His loss is restricted to the fact that his labour has gone in vain and his work has not brought any fruit to him."⁴⁹²

In addition, "[t]he partners are at liberty to determine, with mutual consent, the ratio of profit allocated to each one of them, which may differ from the ratio of investment. However, the partner who has expressly excluded himself from the responsibility of work for the business cannot claim more than the ratio of his investment"⁴⁹³

Here, then, the silent partner provides only money to the enterprise, playing no role in its operation. The arrangement is permissible only if the silent partner places all of that money at risk and can profit only to the extent of "the ratio of his investment."⁴⁹⁴ Although it might well be informative for the current discussion to review the rationales for the need for all of the money to be at risk or the permissible ratios being in a certain range, we do not have occasion to do that here.

Even though the losses experienced by the managing partner/*mudarib* are directly or indirectly attributable only to him or her and not in any way to the silent partner (whose only role is to supply money), the Shariah requirement is that the silent partner must suffer a loss (to the extent of the money invested) when the managing partner suffers a loss (to the extent of the money invested). Consider, by contrast, a loan. The matter of interest aside, it would appear that regardless of how or why the borrower has suffered losses, the lender is entitled to return of the principal. Certainly, in this situation, since the losses occasioned for the borrower are also directly or indirectly attributable to only him or her and not in any way to the lender (whose only role is to supply the money), this circumstance could be the rationale for permitting a promise to repay the principal. But if so, that would seem not to be consistent with the requirement that, in the face of losses, the managing partner/*mudarib* is not obliged to repay the monies advanced by the silent partner in a *mudarabah*. The distinguishing feature would seem to be that for the loan with interest the lender insists on *more* than just return of the principal, namely, interest. That is, in addition, the lender seeks a nominally assured gain in the face of a situation in which the borrower experiences a loss. In that circumstance, it appears to make no difference that the lender has no culpability for the loss being suffered (since the lender has no direct role in the enterprise which bears on its success or failure). Rather, here, it would seem that it could simply be because the provider of money (here a lender) enjoys a profit/gain in a circumstance in which the recipient of funds (here a borrower) does not.

Why? It may derive from a view that while a necessary if not sufficient condition for the operation of an enterprise is that it have access to money to acquire already produced goods or already completed services and/or to secure the labor required for that operation, that, nonetheless, such provision – and the provider – is (at least) one step removed from the actual process of producing new goods or services. (In certain respects this sense of remove is associated with references to money being “abstract” and the notion of making money (just) from money of which loans with interest appear to be especially an evocative example.)⁴⁹⁵ It would seem, though, that the issue is not money as such but the context in which a use of money is made. In the case of a *mudarabah*, the money is specifically dedicated to the enterprise engaged in by the managing partner/*mudarib*. By contrast, discussions about loans with interest in the first instance focus just on the interest and not the intended use of the borrowed funds. Actually, of course, in the commercial context, the proceeds of the loans are dedicated to a particular enterprise and perhaps even a particular kind of activity on the part of the enterprise, so the use of the money in this case might be thought to be essentially no different from its use in a *mudarabah*. Thus, the distinction as to permissibility is based on other considerations. Among them is the matter of the extent to which the lender (as contrast with the silent partner/*rabb al-mal*) shares in the risks and rewards of the enterprise. In turn, perhaps for that reason, such supply of money may be seen as less important to the process and, correspondingly, that might be thought to justify different and in a sense weaker claims to what the process produces as compared to the claims of those who supply needed labor to it. If so, then both the *mudarabah* and the loan with interest, the silent partner and lender, respectively, are seen as being at such a remove.

However, while their standing at such a distance might warrant their having *weaker* claims it does not necessarily justify their having *no* claims. Having *some* claims might be based on the recognition that an enterprise frequently requires such provision to even come into being/exist, let alone succeed. That is, provision of that sort is legitimate, necessary, and potentially important. There is also an awareness that insofar as provision is voluntary then for it to occur it must be induced or incentivized. A key question is the relationship between what is given in exchange to the enterprise in question, something which can take the form of claims with respect to the enterprise and how it is operated – for example, ownership-type claims – and/or claims with

respect to what it produces and its disposition. For a for-profit enterprise, disposition is concerned at least with the application of revenues in general and the allocation of profits in particular. The flip-side of these considerations relates to the inducement or incentives of these and other kinds for those who might be spurred to engage in the enterprise, but only by virtue of their labor. In the context of other kinds of transactions, there are broadly parallel issues as to the extent to which those who supply only money and those who provide only labor to an enterprise share the “benefits” from or bear the consequences of its lack of success or even failure.

In the context of *mudarabah*, then, by virtue of his contribution of money, the supplier of it is recognized as having a right to enjoyment of some of such profits as the enterprise might yield. In the event of lack of success or failure, since his or her only contribution to the enterprise is the amount of money supplied it might be seen as appropriate for the supplier to bear a loss up to that sum. (Note, though, the liability of *rabb-ul-mal* is limited to his investment, unless he has permitted the *mudarib* to incur debts on his behalf.”⁴⁹⁶) Similarly, the supplier of only labor is entitled to enjoyment of some of any profits the enterprise might yield and is normally not responsible for any losses beyond that. However, consistent with notions of contribution discussed above, this limitation applies only if “the *mudarib* has worked with due diligence which is normally required for the business of that type. If he has worked with negligence or has committed dishonesty, he shall be liable for the loss caused by his negligence or misconduct.”⁴⁹⁷

Some operating lease *ijarah* rules reconsidered

An operating lease *ijarah* is curious in relation to the foregoing. Since, in the first instance, it is viewed as a contract for sale, the task is how to ascertain the criteria for Shariah-compliance in this case in view of the formal requirements for the contract for sale and, arguably the values which are thought to inform those requirements.

An ongoing vs. a “one-off” relationship?

One approach focuses on the temporal nature of the relationships involved. The core contract for sale does not involve an ongoing relationship between the parties. Rather, the notion is that one party has “ownership” of some “thing” and the contract for sale results in the transfer of ownership and the “thing” to the another person at a *particular point in time*. By contrast, although an operating lease *ijarah* is also framed in terms of the transfer of “ownership” of some “thing” – in this case, the usufruct derived from some other “thing” – the nature of that which is transferred entails an *ongoing* relationship.⁴⁹⁸ That is, the lessee enjoys the usufruct on an ongoing basis for a specified period of time and the lessor continues to own that of which the lessee makes such use. However, as with the core contract for sale, what the lessor is paid is not linked in a direct way to how successfully or not the lessee makes use of that which the lessee receives in exchange. It is paid regardless of the success or failure of the enterprise in which what has been sold has been used. At least in this respect it is like a loan with interest, which, as we discuss below, some characterize as a “sale” of money in which the seller receives not only the money “sold” but also an additional amount of money regardless of how successfully the borrower might make use of it in an enterprise. As such, the question is why, given this similarity, an operating lease *ijara* is permissible.

The answer would seem to start from the fact that the operating lease is deemed impermissible unless the lessor has the above-described responsibilities with regard to maintenance of and avoidance of destruction of the corpus. What is the significance of those responsibilities? They would seem to derive at least in part from the necessary relationship over time between the lessor and lessee. The lessee’s uninterrupted enjoyment of the usufruct is contingent upon the lessor’s

making available on an ongoing basis to the lessee that which is the source of the usufruct, namely, the corpus. Insofar as the transaction is viewed through the lens of the formal requirements for a contract of sale – most especially in terms of the present ownership of some “thing” and present delivery of it – the less the lessor does with respect to ensuring availability of the corpus for use the closer and closer the scenario looks like one in which the lessor provides nothing in exchange. By contrast, the responsibilities for lessors discussed above are ones which appear through the lens of sustained relationship in general; in turn, the sharing of certain risks and rewards which arise or result from that relationship. In the context of the core contract of sale, there are defined duties for the parties associated with its performance but its execution is a one-off event; closure is reached with the specified delivery at the specified time. There is, correspondingly, no concern with the connection between what the seller receives and how or the extent to which the buyer might later use in an enterprise and benefit/profit from that use.

Successive transfers of “objects”?

The argument can in some measure be recast in terms of the “object” rhetoric associated with contracts for sale. In the case of an operating lease, one might speak of there being (sort of) successive (agreed upon) “deliveries” of usufruct matched by successive payments for it, or at least insofar as the noted conceptualization or categorization is required.⁴⁹⁹ (Note, it would appear that whatever concerns as there might otherwise be about a contract for sale involving future deliveries they are not viewed as coming into play here or are ignored.⁵⁰⁰) However, arguably the lessor is not in a position to make such “deliveries” unless he or she has ongoing ownership (and control) of that from which the usufruct is derived. That is (at least) a necessary condition for the performance of the contract (as is required in Shari`ah terms).⁵⁰¹ Clearly, though, insofar as the lessee is thought to become the “owner” of some “thing” – which the lessor necessarily previously “owned” by virtue of the ownership requirements of the contract for sale – what remains of the lessor’s ownership must be understood as something different (and “less”) than what the lessor had owned prior to the lease arrangement.

However, if the issue is cast in such terms it poses from the outset the question as to when and why something less or other than an entire ownership interest is permissible. Certainly, the foregoing discussion suggests that in such circumstances what is sold must be capable of being conceptualized as or deemed to be property and, correspondingly, that which the seller retains must be such as to, at minimum, not interfere with and perhaps, more strongly, enable the seller to in fact transfer/deliver that which the buyer acquires by virtue of the sale. However, that discussion offers little insight into how other such transactions – and ultimately a financial lease *ijarah* – might be assessed. This is, in part, because the first step seems to simply take the form of a declaratory conclusion, that the transaction should be seen as a contract for sale.⁵⁰²

Why a contract for sale?

According to Kamali, “[s]cholars of the four schools of Islamic law have differed somewhat on the precise definition of *ijarah*. All the *madhahib* [that is, schools of thought] are in agreement however, that *ijarah* is a contract of the sale of known and specified benefits or services in return for compensation.”⁵⁰³ We have canvassed only some of the specific requirements for a Shariah compliant *ijarah*. For example, Kamali asserts, consonant with the criteria for contracts of sale, that “[s]ince *ijarah* transfers the ownership of usufruct from the lessor to the lessee, the former must not only own the assets involved but also be able to transfer the ownership of its benefits to the lessee.”⁵⁰⁴ Such an argument is predicated on the willingness to “see” that which is transferred or exchanged as being that which is capable of being owned/property/*mal*.

Of course, such a transaction might otherwise be deemed to be impermissible notwithstanding it not being seen otherwise as a contract for sale. For example, Vogel and Hayes remark that although, “[f]or Hanafis, whose definition of property or mal does not include usufructs, *ijara* is an exception to a general legal principle, permitted only because of the people’s need and the Prophet’s example.”⁵⁰⁵ (That is, the validity of the *ijarah* as it concerns other than an employment relationship might rest just on the practice of the Companions of the Muhammad.⁵⁰⁶) Based on Wohidul Islam’s description it would appear that the difference hinges in part on the nature and significance of “possession”.⁵⁰⁷ As he describes it, the Hanafis sharply distinguish between tangible objects and their use (or rights with respect to those objects). As such, uses (or rights) are not “tangible” and hence cannot qualify as “property”. Also, the idea seems as well to be that while tangible objects exhibit a certain kind of permanence, uses (and presumably rights as well) are time delimited and in that sense are consumed over time. By contrast, it would appear that the non-Hanafi schools treat usufruct as property (at least) because they see it capable of being possessed by virtue of that which is their source – the corpus which gives rise to the usufruct – being so capable of being possessed.⁵⁰⁸ (An additional argument seems to rest on the fact that property is by definition understood as being that which is of use (in certain ways) to human beings, and usufruct is the expression or manifestation of that vital feature.)⁵⁰⁹

While the Hanafi approach appears to simply by-pass the need for application of certain formal requirements for the contract of sale and the non-Hanafi one just chooses to “see” usufruct as or “assimilate” it to that which is termed “property”, it would appear that for both there still remain questions as to what animates a concern about that which is being leased not being subject to diminishment or consumption: For example, Barrett writes that for the *ijarah*, the usufruct from a “thing” must be such that it can be enjoyed “without altering the substance of the thing.”⁵¹⁰ Barrett asserts so without explication and on the whole, contemporary discussions in this regard do not appear especially illuminating. For example, Kamali refers to “a requirement of a valid *ijarah* that the capital asset survives and does not perish with the *ijarah*. This would preclude items such as food, fuel and money which cannot be used unless they are consumed altogether.”⁵¹¹ Usmani contends that “[i]t is necessary for a valid contract of lease that the corpus of the leased property remains in the ownership of the seller, and only its usufruct is transferred to the lessee. Thus, anything which cannot be used without consuming cannot be leased out. Therefore, the lease cannot be effected in respect of money, eatables, fuel and ammunition etc. because their use is not possible unless they are consumed.”⁵¹² Mughal proffers a similar statement of the requirement, though elaborates a bit further to suggest the basis for it as follows:

“It is necessary for a valid contract of lease that the corpus of the leased property remains the ownership of the seller, and only its usufruct is transferred to the lessee. Therefore, the lease cannot be affected in respect of money, eatable, fuel and ammunition, because their use is not possible unless they are consumed. If any thing of this nature is leased out it will be deemed to be a loan and all the rules concerning the transaction of loan shall accordingly apply. Any rent charged on such lease shall be treated as an interest charged on a loan which is unlawful (حرام)”⁵¹³

The reference to a loan is suggestive and in a sense brings us full circle back to considerations spoken to in the first two sections of this essay and to which many authors cited in this section refer. Although the subject requires extensive treatment one interesting line of argument is illustrative enough for our purposes here.

That line of argument relates to the basis for historical and the long-term (though no longer extant) prohibition of interest in the Western context, articulated by the “scholastics” (or “schoolmen”) of medieval universities in Europe from about 1100 to 1700 AD, which mirrors similar contentions by Islamic scholars.⁵¹⁴

A cogent illustration of the perceived relationship between loans with interest and the permissibility of the operating lease was detailed by one among the most prominent (and revered) scholastics, St. Thomas Aquinas.⁵¹⁵ He wrote:

“To take usury for money lent is unjust in itself, because this is to sell what does not exist, and this evidently leads to inequality which is contrary to justice. On order to make this evident, we must observe that there are certain things the use of which consists in their consumption: thus we consume wine when we use it for drink and we consume wheat when we use it for food. Wherefore in such like things the use of the thing must not be reckoned apart from the thing itself, and whoever is granted the use of the thing, is granted the thing itself and for this reason, to lend things of this kind is to transfer the ownership. Accordingly if a man wanted to sell wine separately from the use of the wine, he would be selling the same thing twice, or he would be selling what does not exist, wherefore he would evidently commit a sin of injustice. On like manner he commits an injustice who lends wine or wheat, and asks for double payment, viz. one, the return of the thing in equal measure, the other, the price of the use, which is called usury.

...

Now money, according to the Philosopher [that is, Aristotle,] (Ethic. v, 5; Polit. i, 3) was invented chiefly for the purpose of exchange: and consequently the proper and principal use of money is its consumption or alienation whereby it is sunk in exchange. Hence it is by its very nature unlawful to take payment for the use of money lent, which payment is known as usury: and just as a man is bound to restore other ill-gotten goods, so is he bound to restore the money which he has taken in usury.”⁵¹⁶

By contrast, according to Aquinas,

“there are things the use of which does not consist in their consumption: thus to use a house is to dwell in it, not to destroy it. Wherefore in such things both may be granted: for instance, one man may hand over to another the ownership of his house while reserving to himself the use of it for a time, or vice versa, he may grant the use of the house, while retaining the ownership. For this reason a man may lawfully make a charge for the use of his house, and, besides this, revendicate the house from the person to whom he has granted its use, as happens in renting and letting a house.”⁵¹⁷

Arguments along these lines are offered today.⁵¹⁸

As Munro summarizes the view of Aquinas, “[t]he distinction between licit rents and profits and mortally sinful usury was based upon ownership. Anyone who owned or invested in land, or other forms of real estate or physical property, and who leased the use of the property to others was entitled to receive a rental income on what remained his own property, even though the return was predetermined.”⁵¹⁹ Indeed, “anyone who invested money in a standard partnership contract (*societas*) or a commenda contract, drawn up for a single seafaring venture, was entitled to receive a share of the profits, or dividends, according to the amount of his investment of equity capital; for he, too, retained ownership.”⁵²⁰ The reference, among others, to the commenda contract is most intriguing given the suggestion that “[d]uring the late 12th century...the Islamic Law of Partnerships, as well as the Admiralty law...[was] incorporated into...the medieval European law of commerce” and that “[d]uring this incorporation, Islamic *mudaraba* was called *commenda* by the Europeans.”⁵²¹

While the reference to “ownership” is evocative, what meaning or understanding of it supported the argument by Aquinas (and presumably others) is not clear. The contention clearly contemplated silent partnerships.⁵²² At first blush for them, within the context of Islamic finance, since the *rabb-ul-ma* provides only money to the *mudarib* who might then acquire “property” to be used in the enterprise, it would seem that the former would have no “ownership” interest that property. However, that would not appear to be the case though the precise nature of the interest is not entirely clear. For example, Usmani remarks that “all the goods purchased by the *mudarib* are solely owned by the *rabb-ul-mal*, and the *mudarib* can earn his share in the profit only in case he sells the goods profitably. Therefore, he is not entitled to claim his share in the assets themselves, even if their value has increased.”⁵²³ By contrast, Saleem writes that [*rabb-ul-mal*]...is not a lender, as the ownership of the invested money remains with him. Similarly, a *mudarib* is not a borrower. He is an agent of the [*rabb-ul-mal*] and a trustee of the *mudarabah* assets.”⁵²⁴ Certainly, insofar as the ascription of (some form of) “ownership” interest to the silent partner was a way to distinguish the *mudarabah* from a loan with interest insofar as they might otherwise seem similar in that they both involved solely the provision of money in exchange for a financial reward. However, that problem might be thought to be addressed by the requirement that the silent partner’s financial reward is not guaranteed, but that of the lender ostensibly is; that is, the requirement of risk-sharing is not sufficient for permissibility. In this connection it would seem that as an historical matter with respect to the operating lease for land, ownership of the land was a necessary but not sufficient condition for permissibility.⁵²⁵

In all events, Munro adds that for those not convinced by Aquinas’s ownership argument as such, the scholar distinguished between “fungible commodities” “such as sheaves of wheat, flagons of wine, jars of olive oil, and coined money,” the use of which “meant their transfer, consumption and thus either their complete destruction or disappearance, repayment had to be made with other, but identical units...or coins of equivalent value.”⁵²⁶ By contrast, “a non-fungible” was “a commodity with individual distinguishing characteristic that is not consumed by its use: such as land, a house, a barn, or horse.” In that case, one could “licitly earn a rental income from the use of such property, while retaining ownership and subsequently regaining possession.”⁵²⁷

It is largely such a distinction which, as noted, is the basis for one of the conditions of permissibility for the operating lease *ijarah*. On its face, the matter of “coins” (“money”?) aside, the distinction/condition would seem to speak for itself: if use of that which would otherwise be “leased” (for a particular sum of money, the rent) entails its “complete destruction or disappearance” then by definition there is nothing left of it for the “lessor” to “own”. In that sense the transaction would look like the stereotypical, one-off/one-time transaction except that the transfer of ownership would entail the immediate “destruction” by the buyer of that which was transferred. It would appear problematic only insofar what the “lessee” would otherwise pay as “rent” for it would be different from – perhaps more precisely, greater than – what the “lessee” would otherwise pay for it in a transaction in which the “lessee” would not immediately use and “destroy” it. In that case, it would seem that the “lease” transaction would be inherently unfair/fraudulent/etc.: the “lesser” would be receiving in exchange more than that to which he or she is entitled. The argument “works” for coins (money?) because of the particular view of money embraced, namely, that is, “in its nature” its only “use” is for exchange.

Some final thoughts

As remarked at the outset of this section, the analyses in the preceding paragraphs were not written with the expectation that they as such would constitute or yield a definitive assessment of what might constitute Shariah-compliance for one or another form of *sukuk* (or perhaps other transactional forms responsive to the diverse concerns which have occasioned the fashioning of

sukuk). Rather, the limited but hopefully meaningfully objective was to look at – and more importantly, in some measure look behind – notions of “real assets” especially as they might be associated with notions and requirements for “ownership” with an eye to laying some groundwork for what might be a future endeavor at the larger and far more ambitious project.

We believe that the analyses illustrate and confirm several points made in preceding parts of this paper. First, use of the phrase “real assets” is highly suggestive in relation to certain concerns about and requirements for Shariah compliance of various kinds of financial transactions. Second, however, it is anachronistic in that it uses largely contemporary language to capture or offer a gloss on matters of importance which have deep and complex historical roots and which were addressed in different terms. Third, those terms are ones which seem to reflect a need for the presence or role of “objects” – most immediately that which is tangible – both in a physical and temporal sense. Fourth, that need appears to have both provided an important underpinning for how what has been an important form of transaction – the contract for sale – has been viewed. Fifth, in turn, given the great historical and practical importance of that form of transaction, the particular understanding which was taken up to legitimate it was extended to other kinds of transactions. Sixth, that understanding was framed in terms of closely related notions of “property” and “ownership”. That is, the most basic contract for sale necessarily entailed the transfer here and how of that which each party “owned” and that which was amenable to or capable of being “owned” was “property”. In turn, in the first instance, “property” was limited to certain things which were tangible. Seventh and especially important for our purposes, while on their face decisions as to the Shariah compliance of any particular kind of transaction might appear to hinge on identifying/“seeing” the “presence” in it a certain kind and/or sufficiency of “ownership” of that which is sufficiently “property”-like, those decisions (among others) ultimately rest on other kinds judgments, some of an ostensibly factual nature and others of a normative one. Although matters of Shariah compliance would certainly be expected be normative in nature they might well be seen or thought to incorporate judgments with a factual character. In all events, they are at least judgments as to how people might, do, and should conduct themselves in relation to others. In those terms, matters of “ownership”/“property”/etc., however important they may be as a matter of practice, are in many respects derivative or secondary.

In this regard, consider our effort to trace back the “real asset”/“ownership” within the context of the terms of the relatively newly formulated kind of financial transaction labeled “*sukuk*,” more particularly the *ijara sukuk*. In that particular context, because it was crafted as combination – more precisely the succession – of kinds or forms of transaction each of which is ostensibly permissible then a simple-minded “logic” might yield the conclusion that their being combined in the way described is sufficient to render the overall transaction permissible. But, of course, as we have sought to briefly illustrate, that ignores the interplay of the normative (and perhaps factual) considerations which underpinned prior and accepted/respected conclusions as to whether each of them was allowed. That the interplay of those considerations renders each acceptable separately does not mean that those same considerations work in combination in the different context of a combined transaction to yield a similar conclusion. (Indeed, that new context might entail other or additional considerations.) Of course, recognition that the task is of such at nature does not mean it is a simple or easy one. As we have seen from the examples we have given, it necessarily entails, at minimum, a reprise of “debates” as to the legitimacy, nature, force, and effect of previously posed considerations, individually and in combination, and potentially new or additional ones.

D. RETURNING TO THE MATTER OF MONEY

Although our citation of arguments in the next to preceding subsection with regard to money were in the service of sorting through what might ground certain of the *Shariah*-related requirements for the operating lease *ijarah* – especially as they relate to the matter of “ownership” – it is interesting and important for two other purposes. First, it highlights what is but one of the array of confirmed or suggested links between concepts and historical practices identified with Western narratives and Islamic ones.⁵²⁸ Second, it in some measure bring us back to the earlier discussion about financialization in general; more specifically, as to the nature and role of “money” in the/an economy, and yet more specifically, with respect to the import of the understanding in those terms to phenomena identified with financialization. We have taken brief note of some features of what has been and continues to be a complex and heavily contested debate as to that understanding in Western terms. We have also cited some of those who have sought new, legitimate, cogent ways of drawing upon the Islamic narrative to more meaningfully and effectively grapple with the kinds of issues canvassed here, often critics who see the occurrence of the GFC and activities which engendered it as evidence of a failure – lesser or greater – of Western paradigms. As the quotations we offered above illustrate, their critiques not infrequently identify the scale and prevalence of debt – more particularly lending with interest – as a key factor in the events leading up to the GFC.

Here, as in the Western context, critical analyses have hinged in part on contentions or beliefs with regard to money and, not surprisingly, here too, there are disparate perspectives and contentious disputes as to which have merit. While the topic is both extremely important, the literature is extensive so there is no opportunity here to canvas it in the way which the subject matter requires. Thus, we can only hazard some remarks or observations about a few features of the debate which bear upon the issues with which we are concerned in this paper (though clearly there are implications for other matters). Moreover, to illustrate the importance of the required caution we take note of two kinds of issues relevant to any investigation of the subject.

First, as background for these brief comments about money we looked for textual sources. A search of an online version of the Quran for the word “money” yields only three passages, none of which (in English) refer to money, but rather to “compensation,” two in connection with the payment of “blood money” and the other, “bridal money.”⁵²⁹ We then looked for the word “gold” and found ten verses which mention it. However, for only three is there a meaningful link to the notion of money; even then, for two the only connotation is that of accumulated wealth and for the third, gold as a source of ransom. The fourth seems to just reference gold in the context of offering a gift.⁵³⁰ The other six are concerned only with gold in the form of bracelets, vessels, or plates.⁵³¹ We then sought references to “coins”; there were ostensibly three but relate in no meaningful way to transactions.⁵³² We were not in a position to engage in a definitive inquiry in this regard but we have found no papers which cite any passages from the Quran which concern money in a relatively specific and meaningful way as it concerns the issues canvassed here.

It would appear that the (or a) primary textual source is found in closely related reported *hadith* which are variously phrased, two of version of which read as follows:

“I heard Allah's Messenger (may peace be upon him) forbidding the sale of gold by gold, and silver by silver, and wheat by wheat, and barley by barley, and dates by dates, and salt by salt, except like for like and equal for equal. So he who made an addition or who accepted an addition (committed the sin of taking) interest.”

“Ubida b. al-Simit (Allah be pleased with him) reported Allah's Messenger (may peace be upon him) as saying: Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, and salt by salt, like for like and equal for equal, payment being made hand to hand. If these classes differ, then sell as you wish if payment is made hand to hand.”⁵³³

The references to gold and silver, almost certainly only in relation to a money-like role in transactions of exchange are made in a context which highlights clear concerns about the permissibility of exchanges which occur simultaneously (“hand to hand”) and, by implication those which do not (that is, involve a time delay). The matter of permissibility is, of course, linked to the reference to the taking of interest though it would be better to speak of the term *riba* with its arguably broader connotations.

While there are no doubt other *hadith* which in one or another way offer an additional gloss on insight as to the meaning and import of this one, it would seem clear that insofar as any inquiry must look first to authoritative texts there is not much to draw upon. The reality, then, is that the pursuit of meaning and its implications for contemporary action must rely on centuries of both exegesis and analysis and practical experience to guide or to inform the effort.

This combination of requirements brings us to the second background point which illustrates the importance of both in how the matter of money was grappled with in the early years of Islam. For this discussion we draw on one scholar's characterization of it. Siegfried first speaks to money in Muhammad's time in terms of practical activity. According to him Muslims used raw metal or Byzantine coins as money “Three sorts of metal were used for economic transactions: gold (Dinar), silver (Dirham), and copper (*fals*, pl.: *fulus*).”⁵³⁴ It was only some decades before Muslim governments first struck silver coins and then gold coins. Siegfried remarks that “[i]nitially the quality of coin striking was poor, and weight varied,” in the latter case in part because of “wear and tear”, so “coins were treated like raw metal: people continued to weigh rather than count them.”⁵³⁵ Moreover, even then the official weight of the Dirham varied.”⁵³⁶ “However, silver and copper coins were frequently exchanged in counting because they were less valuable,” “indicating that the idea of money as a numeraire - [as a unit of account by which other goods are valued and priced -]was already present.”⁵³⁷ Interestingly, by contrast, Siegfried suggests that use of “gold and silver as media for exchange with a conventional value stems for the fourth century AH.”⁵³⁸

Siegfried then turns to money as thought of in classical texts, most particularly as they sought to construe the significance of the second of the *hadith* cited just above.⁵³⁹ He details the rather disparate readings of the different schools as they pertain to the different types of goods mentioned in it. For example, Hanafis distinguished among goods measured in weight and those measured in volume; money, “similar to raw metal,” was in the latter category.”⁵⁴⁰ While the Hanbalis concurred this view they deemed “currencies [to] occupy a special position.”⁵⁴¹ For Shafi'i and Malikis, gold and silver [related] to representations of price...Hence, very sale of goods for money is legally sound.”⁵⁴² For the Shafi'i matters of weight or volume were not relevant, and, “[h]ence every sale of goods for money is legally sound.”⁵⁴³ Moreover, for Al-Shafi, “[m]oney itself is not a good any more. As opposed to raw gold, money is not acquired for the sake of its usability. Instead, people hold cash because it is easily convertible into the goods that they ultimately want to buy. The face value is something agreed on rather than a label for the intrinsic value of the metal content. In contrast, the other schools remain in the realm of barter regarding money as a weighable good.”⁵⁴⁴ However, because of the “pervasive” “tradition of weighing money,” “he permit[ted] a difference in number during an exchange of money if this helps to establish equal measure in weight.”⁵⁴⁵ In any case imbalance in weight [wa]s not permitted at all.” By contrast, Malik went “one step further,” “permit[ting] even imbalance in weight.”⁵⁴⁶

Clearly, in the preceding, we can see the importance of then contemporary and evolving practice to relatively early efforts to understand the meaning and implications of such texts as were available and seen as authoritative. We also can see that common endeavor yielded different concepts of the nature of “money” and divergent conclusions as to its import – in light of those texts – for what followers of Islam should (or should not) or might (or might not) do.

Perhaps not surprisingly, then, contemporary discourse as to the nature, role, and significance of money in light of the Islamic narrative evidences many different voices and perspectives. They appear typically to give emphasis on one hand, to money being a medium of exchange and, on the other, that it is not an “asset”, is “not productive,” has “no intrinsic utility” (and sometimes that it correspondingly is not a store of a value), etc. Such framing is not infrequently bound up an emphasis on the primacy of a/the “real economy” and, correspondingly, on the secondary character of money (and arguably more broadly, finance) in a way which is apposite with notions of money discussed which describe it a “veil,” as being “‘neutral’ with respect to the so-called ‘real’ economy.”⁵⁴⁷

For example, Toutounchian recently echoed that view in remarking that “the prohibition of all types of interest emanates from the peculiar concept of money in Islam, where money is only a medium of exchange and a unit of measurement not a store of value. Money is not an asset and any return for the use of money is not justified.”⁵⁴⁸ He fleshes out this perspective as follows:

“Abolition of interest and of its derivative, speculation, closes the gap between money as potential capital and actual capital. It also provides a simple way of defining money exclusively as the medium of exchange with the potentiality of becoming actual capital.”⁵⁴⁹

“Interest and money are artificial social conventions. Most schools of economic thought recognize money as a necessity and one of many highly valued human inventions. The necessity, even usefulness, of interest has, on the other hand, always been questionable. Now interest is a form of return on money: taking that for granted, a familiar analysis introduces three factors of production, puts them together, and shows how they turn a profit/determine interest. In this analysis, capital has been willfully misplaced in order to show the necessity and realness of interest. In fact the analysis only shows that *capital* is productive of profit — money, *qua* money, is not productive.”⁵⁵⁰

Along somewhat similar lines, Asutay asserts that “[m]oney does not have any inherent value in itself and therefor money cannot be created through the credit system.”⁵⁵¹ Gimigliano claims that “[b]oth conventional and Islamic banking regard money as ‘the monetized claim of its owner to property rights’...However at the root of Islamic banking lies the idea of money being neither a commodity nor a capital per se, but a potential capital that, through the productive activity of the entrepreneur, becomes productive.”⁵⁵² Kamali argues that “[t]he economic implications of the prohibition of interest (*ribā*) is to prevent unfair exploitation among the transaction parties, and also to ensure that money is a medium of exchange to be sought not in itself but as a unit of value for other commodities” and citing relevant *hadith* for “[t]he economic implication is that money is a medium of exchange to be sought not in itself but as a unit of value for other commodities.”⁵⁵³ Cattelan contends that “‘money’ has no value per se, but only in its functional destination to trade and business activities, and in the same way ‘risk’ has no value as unbundled commodity, but it is always conceived as something related to the ownership/possession of a commodity or the participation in an undertaking.”⁵⁵⁴

Again, Omar describes relevant literature in the following terms: “Islam perceives money as a medium of exchange and unit of measure (al-Ghazali, d. 505 AH) (Ismail, 2010). Money is a means to achieve certain objectives; it is not the objective itself, and money in itself has no intrinsic utility...Therefore, money cannot be considered as capital ($M \neq K$); which is occasionally associated with the risk-sharing element in an exchange. Money also cannot be considered as a commodity (or asset) ($M \neq C$) to enable tradability as it is just a consideration in the transaction. If profit making is the motive of an exchange, money needs to be integrated into capital by legal combination (*and assume the risk which is associated with the project/property*)..., or be interchanged to a commodity/asset (*to assume the intrinsic utility transformation function*).”⁵⁵⁵

As Karim would have it, “[t]he Islamic concept of money is limited to a mode of exchange and a temporary implicit store of value.”⁵⁵⁶

Mirakhor and Iqbal remark in a recent book that “[e]arly Muslim scholars considered money to be a medium of exchange, a standard of value and a unit of account, but rejected its function as a store of value. Lending on interest was prohibited because this was an act of ingratitude and considered to be unjust, since money was not created to be sought for its own sake, but for other objectives.”⁵⁵⁷ In another book published about the same time, they, along with two other authors, they elaborate further but with an eye to what they see as the larger, systemic implications of this view and corresponding practice:

“Two different strands of thought have dominated the definition of capital: capital as physical goods or real assets; and capital as a pool, or fund, of money or financial assets. Both concepts are intimately related and are essential to capital theory and financial stability. A pool of money is the money counterpart of physical commodities, and vice - versa. In a barter economy, capital is a set of commodities. In a money economy, money serves as a medium of exchange and a store of value.”⁵⁵⁸

A somewhat more esoteric formulation is given by Choudhury:

“The nature of money now turns out to be endogenous. Endogenous money is a systemic instrument that establishes complementarities between socioeconomic, financial, social and institutional possibilities towards sustaining circular causation between money, finance, spending on the good things of life and the real economy. Money in such a systemic sense of complementary linkages between itself, financial instruments and the real economic and social needs according to the *shari’a* assumes the properties of a ‘quantity of money’ (Friedman, 1989) as in the monetary equation of exchange. In the endogenous interrelationships between money and the real economy, the quantity of money is determined and valued in terms of the value of spending in *shari’a* goods and services in exchange. Money cannot have an exchange value of its own, which otherwise would result in a price for money as the rate of interest. Money does not have a market and hence no conceptions of demand and supply linked to such endogenous money in Islam. The *shari’a riba* rule forbids interest transactions. Thus, instead of a market for money and the corresponding supporting financial instruments, there are now simply markets of exchangeables in the light of the *shari’a*. In this sense, the quantity of endogenous money and the returns on it are determined by the real economic value of the exchange between *shari’a* goods and services in demand and supply.”⁵⁵⁹

Lastly, according to Khan in an essay many years ago, “[i]n the capitalist world money is treated as a commodity besides being a medium of exchange and measure of value. Like other commodities, it has a price.”⁵⁶⁰ “As compared to capitalism, Islam treats money as a medium of exchange and a store of value but not as a commodity, since money by itself cannot perform any

function. It becomes useful only when it is exchanged into a real asset or when it is used to buy a service. Therefore, it cannot be sold or bought on credit.”⁵⁶¹

However, in a recent book, Khan seems to offer a sharply different view, set within the context of a critical review of the grounding for the bar to interest on loans. For example, he terms Toutounchian’s “argument of declaring money as not being a store of value” as “misplaced” and one which “lead[s] from one baseless assertion to the next and ending in a quagmire of fuzzy thoughts...Money is an asset (or a store of value) and a unit of measurement, and its primary function is also to serve as a medium of exchange.”⁵⁶² Perhaps most strongly he contends that “[t]o establish that interest on loans is prohibited we need not get into the definition and functions of money. Interest on loans is prohibited for ethical reasons and not because money has a different function in the Islamic economy as against the capitalist economy.”⁵⁶³ He rejects the view that money is “sterile and unproductive” as having (the noted) “roots in Christian Catholic thinking” as having “no basis in *Shari’ah*.”⁵⁶⁴ He disputes what he terms the “oft-quoted argument of orthodox scholars” (taken up by Toutounchian and others) “that money lent on interest is only potentially productive” noting that businesses seek finance for the very purpose of engaging in productive endeavors, though with the recognition that they do so aware that they may, in fact, risk not making a profit.⁵⁶⁵ Lastly he terms as “shallow” “[a]n oft-repeated argument against interest that by its very nature the debt cannot grow.”⁵⁶⁶ For Kahn, the matter of the ability to “grow” is not relevant. Rather, the issue is one as to interest “flout[ing] the Islamic spirit of brotherhood and social harmony.”⁵⁶⁷ However, we note that notwithstanding the (self-) characterization of the “issue” by Khan, a review of his book would seem to suggest that behind it is an analysis grounded in diverse sources and based on a variety of rationales, normative and instrumental and more and less (or not directly tied) to relevant textual sources.

At first blush these last points by Kahn would seem to be most cogent. Insofar as the exercise is to understand money in terms of roles then the most relevant reference point is practice, what people have done and do in fact. First, with regard to matter of a “medium of exchange,” there is little doubt that are societies – ones with which we are concerned here – in which people of engage on a society-wide basis in exchanges which on one side involve proffering and on the other accepting a particular token (which has taken a variety of forms). Insofar as it is important (for a variety of reasons) to characterize or view the exchange as reflecting some notion of “equality” of exchange (in turn, often link to that which is termed “value”), the token serves as an abstract, quantitative way to give meaning to that notion; that is, the token is identified by or with a particular number. Second, the assignment of the number – associated with “money of account”/ money as a “unit of account” – is a predicate or condition for the foregoing to occur. Third, acceptance of the token presupposes an expectation that in the future should the individual who has received it proffer it to another in a subsequent exchange and that the other will accept such a token. It would seem that none of the commentators cited would dispute the foregoing. Insofar as they differ it is with respect to the third point but only in as matter of terminology and attribution. That is, some cast the ability to engage in subsequent transactions in the way described in terms of the token “being” a “store of value”; others would note. But the argument is not about that ability but what that ability is seen to represent, arguably in and of itself, but more importantly in terms of what are its implications in normative or instrumental terms. Some are unwilling to accept identification of the token as a “store of value” because of what they understand “value” to be and what they view as acceptable means by which values are “equated” in practice in exchanges, e.g., those exchanges which involve lending with interest. That being said, how the possibly diverse ways in which the second point is understood needs to be explored, a matter to which we attend to below.

At first blush the preceding discussion would seem to be at quite a remove from perspectives like those of Hertz, Bryan and Rafferty, and Ingham. However, within the broader discourse informed by the Islamic narrative, that would appear not necessarily to be the case.

Some suggestive insights in this regard are found in a three-fold contrast by Sauer of his reading of such discourse with that which might be identified with a Western (especially a Christian) narrative. First, with regard to the latter he considers the understanding of “the real nature of things”.⁵⁶⁸ Sauer contends that it has roots in thinking of each “thing” as having its own unchanging and distinctive essence or “self-contained” structure” with links between events viewed from “thing to thing.”⁵⁶⁹ By contrast, for the former “the nature of a thing is determined by its relationship and actions – that is, by its place in a process...[A] ‘thing’ is its place within a process of interactive relations.”⁵⁷⁰ Second, Sauer focuses on human-ness for which a similar contrast appears: Western notions are of human beings who have an essential nature or form – for example, they are “rational” or “political” beings – and “excellence (virtue)” rests on “conformity to the form”. However, he argues that from an Islamic perspective, “a human being is one who stands ordered to God’s divine command” and gains “identity in relation”; that is, the “self” is “expand[ed] and develop[ed]...in family, the immediate community, the extended community and finally the solidarity of all the faithful.”⁵⁷¹ Third, in economic terms, a Western view might see an “[e]xchange” as “a simple transaction of thing to thing” and “[t]he value the thing (money)...merely [with respect to [its] utility”⁵⁷² whereas an Islamic account sees an exchange in general in terms of how it “enters into the process of economy itself” and, in particular, the use of money on the basis of “effects...on individuals, communities, and social systems.”⁵⁷³ Thus, transactions involving interest – among others – “are forms of relationships, not transactions of ‘things’ in service of preferences.”⁵⁷⁴ Moreover, evaluation of actions, including transactions – and among them ones involving lending money with interest – “is not in terms of beneficial outcomes however measured, but in terms of the soundness and sustainability of the community delivering the outcomes.”⁵⁷⁵ The foregoing characterization is one which, though framed differently, is apposite explicitly with what of Cattelan – as a short overview of which we have provided above – and to varying degrees, implicitly with formulations by other of authors cited above who draw upon the Islamic narrative.

From a descriptive and aspirational perspective, what Cattelan writes and what Sauer alludes to may be an accurate or apt portrayal. But assuming so, it raises very important practical issues in two-fold way – as to the nature and substance – of Islamic law with regard to the matter of people’s proper relationship to between and among one another. That is, it presupposes appeal to an all-encompassing (ultimately divinely inspired or ordained) order with respect to those relationships between and among people are to be judged or guided. The critical question is what more precisely is that order, how one knows that it is “the” order, and how one makes judgments consonant with or guided by that order. Not surprisingly, the answers to those questions might be found in some measure – perhaps significant measure – in relations rooted in the relevant community’s customs, practices, and history; but the challenge is to which among them, in any given contemporary period, appeal might or should be made, and why.⁵⁷⁶

Sauer, though only very schematically, speaks in the following way to another aspect of the Islamic account in a way familiar from discussion earlier in this paper: While, as a general matter it sees “money [as] only a medium of exchange within a set of social relations,” more specifically, it treats money as “not in itself hav[ing] in itself any productive capacity” but rather such capacity (and value) “in relation to human action whose labor is the origin of productivity.”⁵⁷⁷ Sauer’s reference to labor as the source of productivity is made only in passing but arguably it is an allusion to certain aspects of ostensibly Islamic principles of property discussed above, namely

those which directly link labor not just to the creation of wealth but also (and perhaps more importantly) to cognizable claims to the wealth that is created.⁵⁷⁸

Sauer does not pursue this point much further because his focus is primarily on Western (and more specifically, Christian) understandings and especially on the shift in views with respect to money, interest, and usury from the Scholastic to the post-Scholastic period. In that regard he relates that change to the historical shift from economies in which “there are no differentiated economic circuits” – “[t]hat is, production and consumption form a single circuit in which what is produced is consumed immediately or in the relatively short term” and “[w]ealth-producing economies...which create surplus of production over consumption, which permit a differentiation of the two functions as circuits.”⁵⁷⁹ (The reference here is the transition from pre-capitalist to capitalist economies.) Interestingly he does so through a review of “[t]he [post-Scholastic] argument for the moral acceptability of interest based on the analogy of money and rents in a market economy.”⁵⁸⁰

While arguments of that kind are ones which he deems to be “sound,” critical for Sauer is that they “affirm that the intelligibility of the transaction is not in its terms (money or [rent from lease of a] house) but the operations and use, i.e. in relation”; again, it is a matter of “processes”, not “things,” that “relations not things are determinative.”⁵⁸¹ For him the historical problem (and failure) in the Western context was the inability to sustain the distinction in the face of thought and practice which blurred it in a way such that “the essential question bec[a]me not the moral question of when lending is morally acceptable but whether the rate of interest should be regulated in relation to some notion of fairness to individuals based on criteria set by economic utility.”⁵⁸² It is at this point in his analysis that he returns to the Islamic narrative and its ostensible emphasis on the “intrinsic value of certain forms of relationship.”⁵⁸³ With that in mind he touches, in a broad brushstroke way upon matters of capital, wealth, labor and workers, etc. in general, and questions of power, equity, social consequences and like in the context what he refers to as “a modern interest-based economy.”⁵⁸⁴ One need not embrace his particular argument in this regard to recognize a framing which echoes (though very softly) that of financialization, the relation between the “real” and “financial” economy, etc.

Sauer’s consideration of money and interest, and views as to an ostensibly distinctive Islamic understanding of them brings us back in some important ways to issues canvassed by Hertz, Rafferty and Bryan, and Ingham. So, for example, according to Hertz insofar as we are concerned with a “real economy” in or by which “objects” (material/tangible or arguably otherwise) are created (and ostensibly made available) to meet human needs and wants, we cannot assess or judge it other than in light of the “constitutive” “social relations of production and exchange”. That there are such underlying social relations is not necessarily recognized as such; indeed, their existence or presence may be obscured by an understanding which is framed in terms of “things”. So, for example, Hertz (and for that matter, Rafferty and Bryan and Ingham as well) would take note of narratives which uncritically (or perhaps unreflectively) speak of “capital” in and of itself as the source of produced wealth (and attendant claims to it). Moreover, with regard to the role of finance in whether and how the “real economy” functions in the terms described, all would seem to concur not only that financial instruments are “socio-conventional means” for its operation doing so but also that those means are bound up with how “capital” is seen on its face and in its underlying operation.

Further, and for at least these reasons, all would appear to concur that the activities associated with finance are no less “real” than those conventionally associated with the real sector. Recall, in this connection, Hertz’s observations that financial instruments are in and of themselves objects “created to measure and facilitate the creation of other objects” and that they have a “material

form”, at minimum, in the sense of the “buildings to house them,” “the analysts...employed by the thousands to track them,” and the “people who live off them.”⁵⁸⁵ In perhaps an indirect way Martin, Rafferty, and Bryan broadly allude to the same point: “[I]f we leave the world where money is neutral...and consider that money in capitalism may actually be an integral part of capital’s economic and social relations, then we need to move beyond the notion as a sort of fictitious realm of duplicate capital.”⁵⁸⁶ In this regard, they add: “It is surely a paradox that we have learned to live with the notion of the limited liability corporation as a fictitious legal person with real economic effects, but still have such difficulty in accepting finance as anything more than fictitious.”⁵⁸⁷ Similarly, the necessary import (as he fleshes it out) of Ingham’s contention that “‘money’ can only be sensibly seen as being constituted by social relations” is that it is associated with activities no less “real” and in certain ways no less import than those identified with the “real economy”.⁵⁸⁸

In light of the above, it might not be overreaching to suggest that these cited accounts are not unlike the Islamic narrative as characterized by Sauer, Cattelan, and others insofar as they question the apparent “thing”-ness of certain aspects of human experience and seek answers in or from relationships which lie behind or beneath those appearances. To illustrate the point, there might be in some measure be a shared view that transactions involving interest – among others – “are forms of relationships, not transactions of ‘things’ in service of preferences.”⁵⁸⁹ And perhaps there might some agreement that the evaluation of actions, including those which manifest themselves in financial transactions – and among them ones involving lending money with interest – “is not in terms of beneficial outcomes however measured, but in terms of the soundness and sustainability of the community delivering the outcomes.”⁵⁹⁰

At the same time, there are likely to be disparate – maybe even sharply different – perspectives as to the relevant “community” and the bases upon which “soundness” and “sustainability” might be evaluated. That is, Rafferty, Bryan, Hertz, Ingham and others, necessarily appeal to particular constellations of beliefs, contentions, claims, etc., by which those actions are assessed. Moreover, in a number of – and likely many – important respects those constellations might be rather different ones from those which might be of interest to people who identify with the Islamic narrative. So, for example, each involves an assessment of relationships of exchange and production not only in terms an understanding of the nature and significance of human needs and wants for material well-being in and of themselves (but arguably within a hierarchy of other needs) but also with respect to the legitimate, accepted terms on or conditions under which people create or produce such material wealth and the basis for claims to that wealth in light of their respective roles (if any) in its creation. Such an evaluation would appear necessarily to attend not only to instrumental considerations – for example, the constraints and opportunities afforded by various technical and organizational means by which to produce that which is needed – but also normative ones, namely matters of power and dependency, exploitation and fairness, etc.

In this connection, we briefly return to our discussion of the Islamic narrative both as it relates to “money” and, in some measure, to labor. For example, Rafferty and Bryan discuss “money” and “labor” within the context of a Marxist narrative upon which they might draw: for Marx himself, “money” and “labor” “are the two measures of value” which “run in parallel” in three ways all of which are informed by “the conception and measurement of surplus value”.⁵⁹¹ First, “money” is “a produced commodity (gold) with its own costs of production measured in socially necessary labor time” and that cost “is defined with reference to ‘subsistence’ wages of the gold mining industry and hence the economy at large.”⁵⁹² Second, it is “a form of capital for the purchase of commodity labor power” which is associated with “the conception of equivalence in the valuation of different forms of capital, such that the conversion of M to M’ in the circuit of industrial capital reveals the value creation of production.”⁵⁹³ Third, it is expressed a “transformative process” entailing “the

conversion of socially necessary labor time as a unit of account into money as a unit of account” and the process by which “surplus value” is “realiz[ed] as the rate of profit measured in terms of money.”⁵⁹⁴ While they appeal to that narrative they seek to build on it though doing so rooted in “an analysis” which seeks to tie what they term the “fluid identifies of money (or finance) and labor together, to reveal how they are mutually reinforcing anchors of value in financially distinct ways.”⁵⁹⁵ In doing so, they frame the exercise in a way similar to the characterization discussed previously: that is they reject the approach of “those who wish to treat finance as ‘merely’ speculative and unproductive and to focus instead on money as a unit of account and a means to circulate ‘real’ capital.”⁵⁹⁶

At first blush one might consider such a perspective as rather removed from one associated with the Islamic narrative, but that is not necessarily the case, at least in broad gauge terms. For example, “value” as characterized in the preceding paragraph has normative aspects and instrumental associations and implications. That is, on one hand, “value” is identified with the fruits of the productive labor of workers – the “wealth” which is created – which is appropriated by those who employ them; on the other, the mechanism of appropriation involves valuation through the means of money, namely the assignment in money terms of a value to the labor applied (through the exchange of money wages for labor to be exerted), of a value of that which is produced in money terms insofar as it is sold, the difference being “profit,” here, surplus value characterized and measured in terms of money.

While an Islamic narrative might well not embrace the particular notion(s) of value suggested by the foregoing, the discussion of it in the preceding pages suggests that they would appear to share several elements: first, a (strong) appeal to productive “labor” as the source, in fact, of wealth and as a matter of legitimacy, claims to it; second, “money” deriving its significance not from any putative intrinsic characteristics attributed to it – what it “is” – but its role or function in the context of or with respect to relationships by or through which “labor” produces wealth and has rights to it; and third, by extension, the same being true of finance, that is, the import of and legitimacy of financial transactions, most particularly as they involve the (the actual or implicit) provision of and claims to money.

There are, of course, differences and arguably major ones. Certainly, for Rafferty and Bryan and others with a similar perspective, they focus on “labor” in the sense of people who engage in work as “employees,” that is, in a broad sense, “sell” to an “employer” their future labor –, the provision of which occurs largely under the control and direction of an “employer” in the context of an enterprise owned by that employer. Here, the relationship is cast in terms which might be used in the Western context and in the first instance, associated with exchanges involved the sale of commodities and not ones identified with finance. This position is the case even though, unlike stereotypical exchanges of that sort, they involve an ongoing relationship, that is, a sustained relationship between “employer” and “employee” over some period of time. In this connection, recall that encompassed by the term *ijarah* are not only what are seen as *rental* relationships but also *employment* relationships. There would appear to be several possible reasons for their being grouped together in that way. First, as noted, both involve exchanges which implicate relationships over a period of time rather than one-off, point-in-time transfers. Second, they can be seen as involving one person making available for use by another for a period of time that which is owned by the former. (In the case of “employment” it is the very person of the latter insofar as use means the capacity of him or her to engage in work; in rhetorical terms for some it is “labor power”.) Third, and especially important, both raise issues as to the legitimacy of the exchange in terms of the rewards and risks for those on either side of the exchange which may result from the enterprise, assessed at least in part in terms of the roles of each. Of course, especially with regard to these considerations, there is a question as to whether the grouping is

the appropriate one. For example, El-Gamal, in raising questions as to whether *mudaraba* or *musharaka* relationships comport with norms which might associate with *riba* – for him, associated a concern about “the potential for extreme injustice,” compares such relationships with employment ones in such terms. More particularly he compares “hiring the worker at the market wage [at]...\$100 per day with engaging that person as a *mudarib*, investing \$1,000 in capital which it is expected to produce a profit of \$200 plus or minus \$10, depending on market conditions.” If such a person were offered “a 50% share of the profit” “he would earn \$100 plus or minus \$5.”⁵⁹⁷ However, according to El-Gamal, apart from concerns about “the relative risk tolerances of the capitalist and the worker/entrepreneur,” it is troubling that “nothing in the Islamic rules of *mudaraba*... prevents the capitalist from offering the worker a 25% share of profits, which is grossly unfair relative to his market wage.”⁵⁹⁸ How these very important and related concerns play it out are not ones we can canvas here.⁵⁹⁹

Rather, we focus for a moment on the kinds of issues raised insofar as money is seen to be a “social relation” itself, a view which Ingham, Rafferty and Bryan, and others explore in overlapping though sometimes divergent ways. Insofar as we have been in a position to canvas relevant literature which draws upon the Islamic narrative, in many ways that kind of understanding seems to be absent. That is, there are not infrequently references simply to what money “is” (or can permissibly “be”) in terms of its role(s) or to textual or historical references to the token which served (and perhaps may serve) as money whether in specific terms – for example, gold or silver – or more general terms that is not (and perhaps cannot be) a “commodity” or that it can (or cannot) take form of paper money etc. In a number of respects, such characterizations are not unimportant, but if the notion of money as a “social relation” is significant, then these characterizations must be contextualized with reference to that notion. Of course, something akin to that contextualization – even if not quite framed in that way – is not absent from the noted literature.

Striking illustrations of that are, as suggested earlier, found in essays which sharply criticize the financial system associated with contemporary capitalism in ways quite similar to those Western commentators who find fault with it, typically under the rubric of “financialization”⁶⁰⁰ A key reference point for such criticism is *riba* as it entails a bar against lending with interest. To varying degrees such references are made by particular passages in relevant fundamental texts and include a sense of the normative underpinnings of the restriction. But typically the critique is made on instrumental terms, that is, it is argued reliance on a finance by means of lending with interest creates a range of problems which are important but are generally writ small, but at the extreme are write large, most particularly engender financial instability/financial panics and recessions. Here the analysis is macroeconomic in nature, focusing on the financial system as a whole and the institutions with it, especially as they are linked to the origins and role of money. So, for example, in the view of Askari and Mirakhor in a book impressively entitled *The Next Financial Crisis and How to Save Capitalism*, the analysis of which is anchored in the fact, nature, and implications of “financialization”.⁶⁰¹ Interestingly that analysis cites authors to which writers such as Rafferty and Bryan, Ingham, and others might appeal. It offers a characterization not unlike what they might proffer, though as the title suggests in fundamental ways draws different conclusions. Also, interestingly, although other writings by Askari and Mirakhor – some of which we have cited at a number of points in this paper – clearly draw upon the Islamic narrative neither the *Qur'an* nor the *Sunnah* are mentioned in the book. There is only a remark that “[t]he system that is closest to our recommended financial system is that which may be deduced from Islamic teachings – something that has been developed since the mid-1970s and coined as Islamic finance.”⁶⁰²

In the text, Askari and Mirakhor refer broadly to financialization as "a process whereby financial markets, financial institutions and financial elites gain greater influence over economic policy and economic outcomes," one important effect of which is to "elevate the significance of the financial sector relative to the real sector."⁶⁰³ However, their specific critique gives special place to or emphasis on financialization as it is bound up with interest-bearing debt. So, for example, they remark that "when a financial sector is dominated by interest-rate based debt contracts, the financialization process creates more and more debt as it expands throughout the economy, converting equity in real assets into debt" which is even more problematic.⁶⁰⁴ That is, "[b]y emphasizing debt multiplication and relaxing credit standards, financialization has led to rapidly growing corporate debt-to-equity ratios and household debt-to-income ratios; acceleration of dominance of the financial sector relative to the real sector; income transfer from the real sector to the financial sector; deterioration of income distribution and increased income inequality; and changes in the orientation of the economy from saving-investment-production-export orientation to one of borrowing-debt-consumption-import orientation."⁶⁰⁵ In the recent context it resulted in "an increase in the volume of debt through proliferation of unregulated intermediaries and rapid expansion in the trading of derivatives."⁶⁰⁶ Moreover, it had "[a]nother inherent feature," namely "speculation and ensuing [destructive] bubbles, both supported by a loose monetary policy."⁶⁰⁷ Further they opine, though somewhat in passing, that "[t]he process of financialization may have also in part been facilitated by the demise of gold standard with fixed exchange rates between currencies and the adoption of flexible exchange rates."⁶⁰⁸

After a critical reprise of the most recent and past financial crises they argue for alternative system a central element of which is eschewing of interest-based debt. That is "debt, that is, the transfer (and shifting) of risk and fixed rate of interest, has been at the foundation of financial crises and will likely continue to be so in the future unless radical change in financial structure is introduced."⁶⁰⁹ More specifically, "the present financial system is inherently unstable, often shaken by periodic crises and requiring massive bailouts, for essentially two reasons: (i) it is a debt-interest-based system and (ii) creates excessive (mispriced) debt with leveraging through the credit multiplier of the fractional reserve banking system and through other channels associated with financial innovations."⁶¹⁰ By contrast, they point to "the attraction of a financial system that relies more heavily on risk-sharing contracts and equity finance coupled with a banking system that is closer to 100 percent reserve banking, as opposed to risk shifting and interest based debt and highly leveraged (fractional) reserve banking."⁶¹¹ So, for example, "the universal application of risk-sharing contracts and the prohibition of interest-rate-bearing debt in the context of 100 percent reserve commercial banking (banks that provide safekeeping deposit services) and investment banks that invest investor funds on a pass-through basis, as a mutual fund, essentially eliminates the possibility of default and thus reduces the likelihood of severe financial crises."⁶¹² We note that in one passage they allude to issues of power and struggle over credit and the creation of credit money in a way not unlike that of Ingham.⁶¹³

In this regard, there is no occasion to frame the discussion in terms of an understanding of and an interpretation in terms of money as such. As indicated, in effect central to their analysis is the matter of credit money (at minimum in the form it has typically taken within the context of Western capitalism). But the authors, in this publication do not appear to address the matter of the issuance of money by the state apart from issues they explore in connection with government debt. However, in conjunction with an additional author, in another book, they do speak to the question of a central bank issuing paper money. In that book, while they acknowledge that "money and value cannot be created out of `thin air,' in Islam," they argue that there is nothing in the *Qur`an* or the *Sunnah* "that recommends or prohibits the state from creating money," including paper money, insofar as it is not done "to benefit particular members of the community." For example, "if the state prints money to facilitate business transactions and enhance prosperity for the benefit

of the community because the economy's output is below its potential" – that is where there is unused capacity or expected additions to capacity – "it should be permissible." That being said, they emphasize that "the state cannot issue interest bearing bonds and paper money that earns interest." However, a central bank might be a lender of last resort "so long as it does not charge interest in order to sustain economic growth." The charge for such loan would be "consistent with the rate of return of the real sector of the economy *ex post* (thus an actual real rate of return)." Or it could "purchase assets from the investment bank."⁶¹⁴

Not surprisingly, this critique is one among not greatly dissimilar contemporary ones informed by the Islamic narrative, ones which may more directly and/or differently frame the analysis in terms of "money" as such and, correspondingly, suggest different solutions. However, with respect to the creation of money (as a manifestation of the social relations constitutive of money) it is not at all clear that other critics would dismiss out of hand creation of it in connection with a fractional reserve system involving banks which lend without interest or financial institutions (whether labelled banks or otherwise) which provide money in the context of a profit- and risk-sharing relationship.⁶¹⁵ Similarly, others are more focused on government debt, more particularly the direct monetization of government interest-bearing debt, that is, the issuance of (token) money by the government to pay back money it has borrowed.⁶¹⁶

Yet others argue for a system along the lines described by Askari and Mirakhor but go further. Indeed, Askari, himself, as a co-author of another book has strongly rejected the issuance of paper money. Rather, he argues for one based on gold, though the nature and strength of the links of that argument to the Islamic narrative, however suggestive, are not entirely clear.⁶¹⁷ At one point he and his co-authors assert that "[m]oney in the *Qur'an* and the *Sunnah* was gold and silver. Many verses referred to these two monies. The use of the right measures and the interdiction of cheating and diminishing the measure have been stressed repeatedly in the *Qur'an* and the *Sunnah*. Moreover these two commodities obey the laws of value and are determined neither /by the central bank nor by the deficit of the state."⁶¹⁸ With respect to the latter point, the authors do not dwell at length on the "laws of value". At one point they refer to the "principles" of proponents of the "sound money school", one of which is that "[m]oney is a commodity that obeys the law of value, namely, cost in labor and other resources for producers and utility for the users."⁶¹⁹ (By contrast, they remark, "paper money is, by definition, a piece of paper that is not convertible into any commodity by its issuer. It is a thing in itself."⁶²⁰) They then add, that "Islamic finance fully concurs with these principles, except that it strictly forbids any form of interest-based debt."⁶²¹

PART VI: RESPONDING TO THE CHALLENGES AND TAKING UP THE OPPORTUNITIES

The key question is, in face of the above-described diversity and contention across multiple dimensions – for example, as to the accepted textual sources by which the Islamic narrative is expressed in the first instance, the legitimacy and authority of those who might play a role in the interpretation and application of those texts, the legitimacy and authority of methodologies used in interpretation and application, etc. – what should be done? The answer depends upon the somewhat interdependent choices made by those with different roles with respect to and/or stakes in investment being in some relevant or appropriate way in accord with the Islamic narrative.

From the perspective of a U.S. pension fund, in the first instance, the concerns are ones of financial risk and reward primarily as they are informed by the particular current and future circumstances of the fund and the requirements of fiduciary duty in light of them. As such, the fact that a particular investment, if it were fashioned in a certain way, would be deemed by some to

be in accord with the Islamic narrative would be a matter of indifference. Rather, it being so would be of significance for the fund only insofar as efforts at ensuring that the investment is in such accord – or the success of such efforts in ensuring such accord – have a bearing on the fund's projected calculus of financial risk and reward and/or the prospects for that being the calculus in fact. That is, it would seem that the focus would be just such instrumental, rather than normative, rationales for the sought-for accord.

In turn, whether there would be such significance would require the pension fund to have a sufficient understanding of (a) the principal features of the investment which distinguish it from a conventional one (and correspondingly warrant it being deemed to be in such accord with the Islamic narrative as is claimed for it) and (b) the materiality of those features to that calculus. We refer to a “sufficient” understanding because it would not be realistic to expect pension funds to have the required knowledge and expertise to achieve the needed understanding. They will necessarily have to rely on and have confidence in the knowledge of an investment advisor and/or intermediary and be informed enough to make a considered judgment as to what they are told.

Per the preceding discussion, that understanding must include an adequate enough sense of the role and importance of the appeal to the “real” – or as we have preferred to cast it, to object-“ivity” – in the formulation of the terms of proposed financial transactions so as to conform with what the Islamic narrative ostensibly demands. To say that there is a need for such a sense is not to suggest that those terms will necessarily be acceptable to Western pension fund investors. Rather, it will, at minimum, enable them to gauge the nature and significance of any gap or conflict between and among what they required, what those proffering the investment assert purport to do, what those for whom conformity is critical ostensibly require.

However, as should be clear from the preceding pages, while “object”-ivity has clearly been important to framing and anchoring discourse about the permissibility of transactions within the context of Islamic finance, in any particular circumstance it is but one element in that discussion. That is, the conversation at the formal doctrinal and linguistic levels is bound up as well with those aspects of the Islamic narrative which are cast in terms of the ostensible broad gauge prohibitions such as those against *riba*, *gharar*, etc. or ones evident at some level of specificity in the Quran, the *ahadith*, or derivatively in earlier texts explicating them. And, in turn, these prohibitions are linked at the analytic and practical level to a host or individual – or a constellation of instrumental and normative – considerations to which more or less cognizance and play are given. Among those matters are ones as to the feasibility and/or efficiency of transactions, the extent to which they entail or engender the sharing of the risks (and rewards) to which those transactions give rise, whether they constitute at best unfairness and at worst oppression or exploitation of one or another party them, etc.

It should be noted that the very important concerns which we have canvassed here are ones largely related to how financial transactions are structured. However, it should be clear from the discussion above that an enormous range of others which fall within the compass of the Islamic narrative are bound up with the purposes of financing and their impacts – both positive and negative – at the individual and collective level (and in the natural and physical world which individuals and communities inhabit). In this regard there are potentially a broader and valuable set of potential connections between discourse about finance informed by that narrative and other, contemporary, and often Western which are framed in terms of “sustainable” or “responsible” investing or related notions, for example, taking proper account of environmental, social, and governance (ESG) issues or achievement of ethical and social objectives. It would appear that as of this time that those connections remain very, very far from realized and that even just within

the context of the practice of Islamic financial institutions very, very little attention has been given to them.

For example, according to Hayat and Malik, although “[k]ey references on Islam and ecology seek inspiration from the Prophet Mohammad’s tradition, which reportedly accords great respect to the maintenance of plants and trees, land cultivation and irrigation, crops, livestock, grazing, water distribution, water sources, wells and rivers, and water rights,” ecology is a “peripheral area for Islamic finance.”⁶²² They suggest that “[r]ecent environmental concerns, such as carbon emissions, have not, however, attracted specific rulings from contemporary scholars.”⁶²³ They remark that “[t]he AAOIFI standard on [Corporate Social Responsibility (CSR)]...also relegates environmental issues (e.g., reduction of an adverse impact on the environment) into voluntary conduct, whereas issues directly related to society (e.g., employee welfare) are part of mandatory conduct. Practices, however, seems to lag even the CSR standard suggested by the AAOIFI” and that “none of the Islamic banks from the Gulf Cooperation Council countries have adopted the Equator Principles for managing environmental and social issues in development project finance.”⁶²⁴ Finally, while they take note of relevant literature which “makes a direct connection between lending money at interest and ecological degradation” and sees “usury and credit creation as forces inimical to sustainable development” they observe that the ostensible emphasis on profit sharing modes may not be “sufficient to avoid harm and do good.”⁶²⁵ That is, “one can establish a legitimate equity-financed business, but much depends on how the business deals with ESG issues – air and water pollution, managing relationships with the labor force and communities, or ensuring independence and diversity on the board. So far, the focus in determining what is licit in Islamic finance has been on certain prohibited activities and legal contracts rather than possible impact on society and the environment.”⁶²⁶

Such matters of purpose and impact are ones with which pension funds currently must contend in a very serious-minded way under the rubric of fiduciary duty or related standards for decision-making: to what extent are they permitted or perhaps even required to attend to those matters and insofar as they must or choose to do so, *what* should or might they do? Of necessity a host of instrumental and normative issues are raised by these efforts,

It is in terms of those issues that pension fund investors might best be able to grapple with the challenges and opportunities of Islamic finance. They are matters with which pension funds are in fact engaged on an everyday basis within the calculus of their particular decision-making process. The task then is for pension funds to determine in the ways in which Islamic finance in general and particular transactions ostensibly fashioned accord with its requirements offer new ways of thinking about, understanding, and making investments.

APPENDIX A

The “Veil of Money” and the “Veil of Maya”

As intimated in the main text, the phrase, the phrase “the veil of money” was not one which Keynes had coined. Two scholars have argued that “the earliest use of this term...in the English literature” was found in a book on money penned by the English economist Sir Dennis Holme Robertson in 1922.⁶²⁷ He “wrote that ‘it is necessary for the economic student to try from the start to pierce the monetary veil in which most business transactions are shrouded’”⁶²⁸ However they conceded that a German term for it, “Geldschleier” appeared in 1917 in a book on inflation during World War I written by the German economist Robert Liefman who wrote: “For a long time, it has been known that monetary facts and happenings obscure a correct understanding of economic events and, therefore, innumerable political economists have used the metaphor ‘veil of money’, the ‘veil of the Maya’....which was supposed to hang in front of the economic facts and happenings and which one had to brush aside to exhibit the real face of the economy.”⁶²⁹ With regard to Liefman’s parallel or accompanying reference to the veil of Maya, the authors suggest that “[i]n all probability...Liefman...derived the phrase ‘Schleier der Maja’ (directly or indirectly) from [the German philosopher Arthur] Schopenhauer’s *Die Welt als Wille und Vortellung* (1818)” in which he used the phrase many times.⁶³⁰ It “denoted [Schopenhauer’s] basic view that what appears as the real world is actually an illusion.”⁶³¹ The authors note that Maya, “[i]n its earliest usage in the Veda”⁶³² – [t]he most ancient Hindu scriptures, written in early Sanskrit and containing hymns, philosophy, and guidance on ritual for the priests of Vedic religion”⁶³³ which dated from roughly 1500 B.C. – “denoted the beguiling nature of reality” and subsequently (around 700 B.C.) “came to refer to the deceptive and error-ridden elements of reality and its perception.”⁶³⁴

In this connection it is intriguing that one Islamic scholar whose work we discuss further below offers a gloss on the reference to the “veil of Maya” and, arguably, by indirection the “veil of money” and, in turn, a link to the diverse views as to the nature and import of “financialization” briefly canvassed above. More particularly, in framing his essay that scholar argues that the way to think of the “veil of Maya” is “not as a negative view of perceived reality, but as the acknowledgment of the intrinsic nature of the reality as multiplicity.”⁶³⁵ More particularly, he explores the “secular truths of Islamic finance in dealing with property rights in the light of their spiritual truths”⁶³⁶ That is, he speaks of “interpreting the truths about the ethics and religion of Islamic finance as complementary to the truths about its legal and economic rationales”.⁶³⁷ (In so doing he offers “some comparative reflections using social constructs...as products of the Western or European-Christian society.”⁶³⁸) Though phrased in very different terms and focused on arguably a distinctive subject matter, his suggested manner of thinking at minimum echoes that of Hertz and Bryan and Rafferty and in some measure those of the (Western) religion-ground commentators: what who see the real and financial economies (or sectors) as necessarily of a piece, ultimately grounded in and/or constituted by social relationships which embody a particular constellation of both normative/religious/spiritual and secular/instrumental understandings.

APPENDIX B

The Islamic Narrative: Textual and Other Sources

The first and primary source for the Islamic narrative is the Qur'an. Broadly speaking the following as to the origins of the text seems to be accepted: It was believed have been "revealed to the Prophet Muhammad, also called the Messenger of God (Rasulullah), by the archangel Jibril (Gabriel)" over a period of twenty-three years.⁶³⁹ They were orally repeated by and memorized by him. At diverse times, various Muhammad recited portions of the revelations to others who also have memorized them. The Qur'an as a whole or single document was not put in written form during Muhammad's lifetime. However, those to whom Muhammad recited passages wrote down what they heard. After Muhammad's death there were several systemic efforts to collect what had putatively been written down by many different individuals over those many years and authenticate what was submitted. What might be termed the "standard" version of the Qur'an is "called 'Utmānic in accordance with the traditional account of its origin, which traces it to the recension promulgated by 'Utmān b. 'Affān, the Companion of the Prophet Muhammad who ruled the Muslim empire as the third caliph during 23-35/644-56."⁶⁴⁰ The standard text is divided into 114 chapters, termed *sūras/surahs*, each of which is divided into verses. It would appear that Muhammad did not mandate the order of the text which was composed.⁶⁴¹ And, in fact, the standard text is not set according to the times at which various revelations occurred. Rather, it is organized according to the lengths of the revelations, from the longest to the shortest.⁶⁴²

The above being said, there is an extensive and sharply disputed debate among scholars not only as to the nature and origins of the Quran but even as to the existence of the historical figure Muhammad. It would appear that the more critical assessments have come from Western scholars (though not exclusively so) and been sharply contested by others, some of whom view the certain Western analyses as bearing the imprint of a legacy of colonialism.⁶⁴³

In all events, according to Kamali, "[t]he Qur'an calls itself by such alternative names as *huda* (guidance), *kitab* (book), and *dhiḥkr* (remembrance), but not a code of law. By far the greater part of its 6235 verses are concerned with moral and religious themes, devotional matters, man and the universe, the hereafter and even the history of the bygone events and parables. The legal or practical contents of the Qur'an..., constitute the basis of what is known as the jurisprudence of the Qur'an (*fiqh al Qur'an*). There are about 350 legal verses in the Qur'an, most of which were revealed in responses to problems that were actually encountered.

"...Rules concerning commercial transactions, such as sale, loan and mortgage constitute the subject of...seventy verses."⁶⁴⁴

The second most importance source is found "in the *sunna*, that is, the deeds, utterances and tacit approvals of the Prophet, as related in the *hadith* or traditions."⁶⁴⁵ "Muslims use the term *hadith* (literally: 'report') to denote, on the one hand, a tradition about the prophet Muhammad or one of his companions..., and on the other, the whole corpus or the genre of such traditions. A complete *hadith* consists of a text...and information about its transmission..., i.e. a chain of transmission through which the report is traced back to an eyewitness or at least to an earlier authority."⁶⁴⁶

"The contents of *hadiths* are diverse. They report historical events in the life of the Prophet, the first caliphs or other Companions; they also provide information about opinions or actions concerning issues of belief, ritual, law, ethics, the Qur'an and its interpretation, and so on. Therefore, *hadiths* are not only found in the so-called *hadith* collections, but also in compilations

devoted to the life of the prophet Muhammad..., in accounts of early Islamic history, in works on the exegesis of the Qur'an in juridical treatises and in biographical dictionaries."⁶⁴⁷

Here, the matter of the authoritativeness of (the) text(s) is arguably even more complicated and contested than for that of the Qur'an.⁶⁴⁸ It has been suggested that systemic efforts to record in writing the *hadith* commenced only "[a]t the end of the seventh century" which would be roughly half a century after Muhammad's death.⁶⁴⁹ As noted, authentication of the words was based on a process which sought to establish what was thought to be a dependable chain of transmitters, starting with those who reported what they heard directly from Muhammad himself, those who, in turn, heard from those reporters, etc. It is clear that "Muslims do not universally agree on these chains."⁶⁵⁰ Indeed, it has been suggested that "[i]t was not until the fourteenth century that they were accepted by all four main Sunni law schools as being to a large degree authentic, and even then they were not, and are not seen as infallible."⁶⁵¹ At the extreme, some Islamic legal scholars have "argued that the sunna is in reality the practice of the Umayyad rules of Damascus (661-750), only supported by ahadith of dubious authenticity."⁶⁵² Although "[m]ore recent scholarship....tends to concentrate on the authenticity of individual ahadith, rejecting wholesale branding of the ahadith as forgeries."⁶⁵³ In all events, "Shiites...have their own ahadith, though they also accept part of the Sunni Hadith."⁶⁵⁴ Moreover, another source, though only for Shiites, are "the sayings and deeds of the infallible imams that succeed the prophet Muhammad as spiritual and worldly leaders."⁶⁵⁵

There are thousands upon thousands of putative *ahadith* with the number of them which seem to be broadly accepted still numbering in the thousands.⁶⁵⁶ Although that might not be surprising by virtue of their sources and the manner in which they were collected (and assessed) it may also be seen as an artifact of their being associated with activities of Muhammad spanning over two decades in which he played roles apart from that of receiving and communicating the revelations embodied the Qur'an. The roles included that of a military leader, a political leader, a person to whom communities looked to for direction with regard to economic and social life, etc. The number and diversity of the subjects addressed in the *hadith* are in themselves a reflection of those varied roles. In addition, a number of Muhammad's statements would appear to not be ones he initiated himself, but rather were in response to questions members of those communities posed to him about innumerable practical issues or problems (or even disputes) – some perhaps very important and some perhaps relatively minor – for which they needed an authoritative decision, guidance, or understanding. Nominally, what Muhammad is believed to have said in that context is distinct from that which he reports as revelations. However, there would appear to be the quite strong (and perhaps definitive) sense (among some) that he was not merely or not only a conduit for the revelations but also that his very conduct was an embodiment that reflected what the Qur'an required and that he was, as well, exceptionally equipped to understand and communicate how the Qur'an shaped or determined the answers to the practical questions posed to him.⁶⁵⁷

All the foregoing being said, of course, the *ahadith* could speak to only a modest number of the panoply of problems which were or might have been faced in Muhammad's lifetime and, of course, on their face at least, innumerable ones in subsequent eras, including our own.⁶⁵⁸

Apart from the matter of the body of words – especially as written – accepted as authentic there are a host of issues as to how to interpret what those particular words mean and require, most particularly insofar as one moves beyond contentions or beliefs that the meaning is self-evident – that the words speak for themselves – and seeks to ascertain what they mean or require. That raises many questions including ones as to what an/the accepted process for interpretation should be and what, if anything other than the literal words appeal might be made in that process.⁶⁵⁹ .

So, for example, according to the Shafii school of law (which emerged early in the ninth century), appeal might be made to *ijama* (consensus) and *qiyas* (analogy).⁶⁶⁰ *Ijama* The former appears to be identified with some sense/shared sense of the community (of Muslim believers), though precisely what that community is remains in question.⁶⁶¹ *Qiyas* other would entail looking for situations covered in the Quran or the sunna which are similar enough to the one in question but not covered to allow application of the requirement specified for the former. However, some Sunni scholars look, instead to *ijtihad*, “independent reasoning by a qualified jurist” instead.⁶⁶² Even then, among them, there has been a perhaps striking view, originating in the tenth century, “that all important questions had been settled” and hence, use of *ijtihad* was no longer warranted.⁶⁶³ it is far from clear that such use was abandoned. Moreover, certain Shia scholars reject use of *qiyas* but instead look to “*aql* or human reason as...[a] source of sharia.”⁶⁶⁴

Rulings have in some measure been based on other considerations. One is *istihsan* which is applied when “qiyas, or any other method, does not provide a definite answer, or when a rule based on qiyas would put unreasonable burdens on the believers” and involves “exceptions that a jurist can make to strict or literal legal interpretations.”⁶⁶⁵ Another is *istislah* which means “seeking the good”...or taking the public interest, *maslaha*, into account,” though there appear to be differences as to when appeal to might be made.⁶⁶⁶ A third is *urf*, custom, “which can be an argument behind *istihsan* and *istislah* or as a supplementary source of for contract law...in cases where no conditions have been stipulated.”⁶⁶⁷ Lastly, there is *darura* (necessity) which allows not “follow[ing a law] in cases where it would be unreasonable to demand strict obedience,” for example, permitting those who are ill or on a journey to fast even though they might otherwise be required to do so.⁶⁶⁸

APPENDIX C

Trade and Exchange in the Islamic Narrative

Almost by definition, religious texts are meant to be timeless/not to be time bound in the sense that the prescriptions, epistles, prophecies, etc. are understood to have significance/force for all time. In many cases, the actors of whom the text speaks and their actions are in greater or lesser measure set in historical time because the texts are intended to speak to human beings at least contemporaneously and may refer to them in times past. For these reasons alone the texts bear the imprint of the period in which they are (in that sense) embedded, that is the prescriptions, epistles, prophecies, etc. and examples of their application or their immediate relevance to human beings who look to it, make direct or indirect reference to their experience or that of their forbears who lived during the referenced era. The challenge going forward from the ostensible time of “acceptance” of the text is on one hand to draw on that historical experience to better grasp the meaning and import of the text to then contemporary life while on the other to transcend the specifics of that experience to better comprehend their eternal/enduring significance.⁶⁶⁹

So the Qur`an is hardly unique in this regard, though, these considerations might have a bit more force insofar as Mohammad is accepted as an historical figure and the relatively proximity of the years of his life to current times. Moreover, for the topic at hand, that lifetime may have more cogency than otherwise because notwithstanding his preeminent role as the Prophet both prior to and during the period in which he gave voice to the revelations he received from Allah, he was quite active in commercial matters (and subsequently, tribal and larger community, political, military and other matters.) Moreover, in certain ways the language of the revelations which he expressed was that characteristic of such activities. Not surprisingly, there were references to commercial practices (and more broadly, economic life) of the time. Per the point above, this means, on one hand, insight as to the meaning and import of certain revelations might be derived from familiarity with commercial practice (and economic life, more generally) at the time; on the other, because the context for commercial practice and the nature of economic life is in a great many respects vastly different today from what it was during his lifetime, there is, for many, a pressing need to ascertain the extent to which that meaning and import is bound the specifics of commercial practice and economic life in that era. We return to this point below. For the moment, though, we offer some characterizations of Islam in view of the relevance of historical practice.

For example, Çizakça refers to “Islam, [as] a religion born in the Arabian Desert, where trade constituted the most important, perhaps even the sole economic activity...The Prophet himself has informed us that trade constituted nine-tenths of the livelihood of Muslims.”⁶⁷⁰ He adds:

“The immense importance of trade for Muslims is also demonstrated by the transfer of mercantile concepts into the religious sphere: the good and bad deeds of each person are *registered* in a *personal account book*. The Muslim will be judged according to these deeds recorded and will be rewarded with paradise if his good deeds exceed his sins. Having faith is like a *profitable transaction*: participating in the struggle of the Prophet is like *giving a loan* to God; and each Muslim has a *covenant (contract)* with God. It is believed that *Allah* buys Muslims’ lives and properties and sells them, in return, the paradise. This means that if a Muslim spends his/her life and property in the cause of *Allah*, he/she would be rewarded with entry to the paradise. But to be able to spend one’s property in this way, property needs to be earned first. Therefore, it is believed that an honest merchant struggling to earn and enlarge his assets legitimately will be exalted and shall join the ranks of the martyrs.”⁶⁷¹

In contending that Quranic norms aimed to minimize the risk for participants and increase the efficiency of exchange, Askari et al remark that “[f]rom the earliest period of operation of the Medina market, the Prophet appointed market supervisors, whose assignment was to ensure rule-compliance. He ranked honest market participants with prophets, martyrs, and *awlia*’ (plural for a *waliyy*) of Allah, because like prophets, they follow the path of justice, like martyrs they fight against heavy odds (satisfy their own greed), and like the truthful Lovers of Allah they are steadfast in their path to perfection. The Prophet would advise the participants to go beyond mere rule-compliance and to treat their fellow humans with beneficence. While justice in the market would be served by rule compliance, which limits and controls selfish behavior, beneficence rises higher by actually sacrificing one’s self-interest for the interests of others.”⁶⁷²

Iqbal et al stress that “[t]he Quran fully acknowledges the important contribution of markets and places great emphasis on contracts of exchange (*bay*) and trade (*tijarah*),” remarking that “[t]he Prophet implemented a number of policies to enhance the market mechanism and to encourage the expansion of trade.”⁶⁷³ They suggest that “[t]he moral-ethical foundation of market behavior prescribed by the Quran and implemented by the Prophet was designed to minimize the risk for participants and increase the efficiency of exchange,” citing specific examples to that effect.⁶⁷⁴ For example, they remark on the “number of ways in which buyers and sellers are permitted to annul a transaction if they are unhappy, even if the transaction was devoid of all elements— such as cheating, deceiving, over praising or disparaging an item subject of the transaction, not giving full weights and measure—that would automatically render a transaction null and void. Moreover, a corollary of this rule is expressed in the Prophet’s words: ‘Allah (Blessed and Glorified) loves his servants to be easy sellers and easy buyers . . . may Allah bless the person who eases selling and buying.’”⁶⁷⁵ Along related lines, Rohe remarks that “Islamic contract law and commercial law evolved in an environment that was comparatively advanced. Like many of the people around him, Muhammad was a merchant. Sura 4:29 contains the central basis: ‘O believers, consume not your goods between you in an unlawful fashion, unless you are trading, [agreeing together].’ Occupation and economic success are not merely accepted, they are praised.”⁶⁷⁶

El-Hawary argues that “[i]n Islam, the whole fabric of Divine Law is contractual in its conceptualization, content, and application. Islam forcefully places all economic relations on the firm footing of “contractus”. Islamic economics is based on a set of contracts and instruments which form the backbone and building blocks for more complex and elaborate frameworks.”⁶⁷⁷

Warde contends that “[c]ommerce is central to the Islamic tradition. The Prophet Mohammed was himself a merchant. Born in the Banu (sons of) Hashim clan of the Quaraysh tribe, Mecca’s leading traders, he was orphaned in childhood and raised by his uncle, Abut Talib, who taught him the caravan trade. In his twenties, he became the commercial agent of a rich widow whom he later married. It should therefore come as no surprise that in the early Islamic literature, merchants were glorified, or that commercial profit is sometimes referred to as ‘Gods’ bounty’. Whereas it took Christianity centuries before it stopped regarding business as a degrading occupation, Islam from its inception explicitly legitimized private property, business enterprise, and profit.”⁶⁷⁸ In his discussion of *riba* he cites experience in the Prophet’s time for the notion that “[e]arning a profit is legitimate when one is engaged in an economic venture and thereby contributes to the economy.” That is, “[b]y certain accounts, Meccan merchants in the days of the Prophet routinely engaged (usually in-between arrivals and departures of caravans) in interest-based lending, speculation and aleatory transactions. This would account for the sharp distinction drawn in the Koran between profit from trade and profit from *riba*. While the former benefited the community, the latter diverted resources towards non-productive uses and contributed to illiquidity and scarcity. The modern-day equivalent of that debate contrasts the real, productive economy with the financial, speculative one.”⁶⁷⁹

As Askari et al characterize it, “[t]he Quran fully acknowledges the important contribution of markets and places great emphasis on contracts of exchange (*bay’*) and trade (*tijarah*). The Prophet implemented a number of policies to enhance the market mechanism and to encourage the expansion of trade. While Medina had its own existing market, the Prophet, with the advice of the leading merchants, selected a location for a new market for Muslims. Unlike in the existing market in Medina, the Prophet prohibited the imposition of taxes on transactions and individual merchants. He also implemented policies to encourage trade among Muslims and non-Muslims by creating incentives for non-Muslim merchants in and outside of Medina.”⁶⁸⁰ They emphasize both normative and instrumental considerations informed what the Quran requires: “The moral-ethical foundation of market behavior prescribed by the Quran and implemented by the Prophet was designed to minimize the risk for participants and increase the efficiency of exchange. Moreover, rules specified in the Quran regarding faith to the terms of contracts and the knowledge of their enforcement increased certainty and reduced the cost of contracts. From the earliest period of operation of the Medina market, the Prophet appointed market supervisors, whose assignment was to ensure rule-compliance.”⁶⁸¹ However, “[t]he Prophet would advise the participants to go beyond mere rule-compliance and to treat their fellow humans with beneficence. While justice in the market would be served by rule compliance, which limits and controls selfish behavior, beneficence rises higher by actually sacrificing one’s self-interest for the interests of others.”⁶⁸²

- ¹ "Real Assets: The real risk from real assets," by Martin Steward, Investment & Pensions Europe Magazine, October 2013. <http://www.ipe.com/real-assets-the-real-risk-from-real-assets/10000151.fullarticle>
- ² The author does not elaborate on what he means by "real things".
- ³ "A New View on Managing the Risks of Inflation and Diversification," by Kristi Mitchem and Trevor Oliver, State Street Global Advisors, 2014, p. 5 https://www.ssga.com/definedcontribution/us/docs/SSgADC_Inflation%20White%20Paper.pdf
- ⁴ "Building a Real Asset Portfolio," Mercer View, November/December 2014, p.2. <http://www.mercer.com/content/dam/mercer/attachments/global/View/Building-a-Real-Asset-Portfolio.pdf>
- ⁵ "The Realization, A new world. A new normal. A tectonic shift." J.P. Morgan Asset Management, April 2012, p. 2. <https://am.ipmorgman.com/gi/getdoc/1378404661598>
- ⁶ Letter from Townsend Group to Chicago Teachers' Pension Fund, October 15, 2013 in "Chicago Teachers' Pension Fund, 118th Comprehensive Annual Financial Report, For the year ended June 30, 2013," p. 49. <http://www.ctpf.org/annualreports/cafr2013.pdf>
- ⁷ "Illinois State Board of Investment Policy," As amended March 20, 2015, p. 52. <http://www.illinois.gov/isbi/documents/investment-policy.pdf>
- ⁸ "Investment Policy," Mo DOT & Patrol Employees' Retirement System, Revised September 25, 2014, p. 30. [http://www.mpers.org/files/MIDLPDF%5CInvestment%20Policy%20\(Final\)%209-25-14.pdf](http://www.mpers.org/files/MIDLPDF%5CInvestment%20Policy%20(Final)%209-25-14.pdf)
- ⁹ "Real assets for the defined contribution menu," by Mark Teborek and Josh Cohen, Russell Investments, April 2012, p. 1. <https://www.russell.com/documents/institutional-investors/research/real-assets-for-the-dc-menu.pdf>
- ¹⁰ Id. at 1-2.
- ¹¹ "Building a Real Asset Portfolio," Mercer View, November/December 2014, p.2. <http://www.mercer.com/content/dam/mercer/attachments/global/View/Building-a-Real-Asset-Portfolio.pdf>
- ¹² "Alternative Assets Continue Their Inexorable Rise," Towers Watson, July 14, 2014. <http://www.towerswatson.com/en-US/Press/2014/07/Alternative-assets-continue-their-inexorable-rise>
- ¹³ "Annual Investment Plan FY2015," School Employees Retirement System of Ohio, June 2014 p.22. "Investment staff gave the Board an overview of SERS' global real assets portfolio. In June 2013, the portfolio underwent several changes as a result of the asset allocation study: the name was changed from real estate to global real assets to allow for infrastructure investments, the target was increased from 13% to 15% of the Total Fund, and construction of the portfolio was changed to include more income producing investments." "School Employees Retirement System of Ohio Board, Meeting Highlights," November 2014, p.1.
- ¹⁴ "Illinois State Board of Investment Policy," As amended March 20, 2015, p. 52. <http://www.illinois.gov/isbi/documents/investment-policy.pdf>
- ¹⁵ "Real Assets – The New Mainstream, Part I: Real Assets – From Niche to Core," Aquila Capital, 2015, p. 9. http://www.aquila-capital.de/sites/51bb1bb94603d65165000005/content_entry51dc08dc4603d6340000007d/54e1c3e9b58f6b67de00143a/files/Real-Assets_WhitePaper_english_final.pdf
- ¹⁶ "Building a Real Asset Portfolio," Mercer View, November/December 2014, p. 2. <http://www.mercer.com/content/dam/mercer/attachments/global/View/Building-a-Real-Asset-Portfolio.pdf>
- ¹⁷ *Essentials of Investments, 9th Edition* by Zvi Bodie, Alex Kane, and Marcus, McGraw Hill/Irwin, 2013, p. 3. www.pitt.edu/~czutter/Chap001.pptx "In contrast to such real assets are financial assets such as stocks and bonds. Such securities are no more than sheets of paper or, more likely, computer entries and do not directly contribute to the productive capacity of the economy. Instead, these assets are the means by which individuals in well-developed economies hold their claims on real assets. Financial assets are claims to the income generated by real assets (or claims on income from the government)." Id.
- ¹⁸ "Financial Instruments" by Lasse H. Pedersen. <http://people.stern.nyu.edu/lpederse/courses/c150002/02instruments.pdf>
- ¹⁹ "Land, Infrastructure, and Intangible Real Assets," Chapter 8 in "CAIA Level I: An Introduction to Core Topics in Alternative Investments," CAIA Association, Mark J. P. Anson, Donald R. Chambers, Keith H. Black, Hossein Kazemi, p. 220. <https://www.caia.org/sites/default/files/curriculum-download/11ch8andlearningobjectives.pdf>
- ²⁰ Id. at 303.
- ²¹ "The Consequences to the Banks of the Collapse of Money Values," Chapter 7 in *Essays in Persuasion*, by John Maynard Keynes, Macmillan, 1931 (first edition). <http://www.gutenberg.ca/ebooks/keynes-essaysinpersuasion/keynes-essaysinpersuasion-00-h.html>
- ²² "Real assets for the defined contribution menu," by Mark Teborek and Josh Cohen, Russell Investments, April 2012, p. 1. <https://www.russell.com/documents/institutional-investors/research/real-assets-for-the-dc-menu.pdf>
- ²³ "The Consequences to the Banks of the Collapse of Money Values," Chapter 7 in *Essays in Persuasion*, by John Maynard Keynes, Macmillan, 1931 (first edition). <http://www.gutenberg.ca/ebooks/keynes-essaysinpersuasion/keynes-essaysinpersuasion-00-h.html>
- ²⁴ "Real Assets – The New Mainstream, Part I: Real Assets – From Niche to Core," Aquila Capital, 2015, p. 9. http://www.aquila-capital.de/sites/51bb1bb94603d65165000005/content_entry51dc08dc4603d6340000007d/54e1c3e9b58f6b67de00143a/files/Real-Assets_WhitePaper_english_final.pdf
- ²⁵ "Real assets for the defined contribution menu," by Mark Teborek and Josh Cohen, Russell Investments, April 2012, pp. 2-3. <https://www.russell.com/documents/institutional-investors/research/real-assets-for-the-dc-menu.pdf>
- ²⁶ "A New View on Managing the Risks of Inflation and Diversification," by Kristi Mitchem and Trevor Oliver, State Street Global Advisors, 2014, p. 5 https://www.ssga.com/definedcontribution/us/docs/SSgADC_Inflation%20White%20Paper.pdf
- ²⁷ "Real Assets: The real risk from real assets," by Martin Steward, Investment & Pensions Europe Magazine, October 2013. <http://www.ipe.com/real-assets-the-real-risk-from-real-assets/10000151.fullarticle>
- ²⁸ "Real Assets, a sought-after investment class in times of crisis," Deutsche Bank, DB Research, p. 2, June 6, 2012. https://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD000000000289108/Real+assets%3A+A+sought-after+investment+class+in+ti.pdf
- ²⁹ "Building a Better Inflation Hedge: *The Case for Real Assets*," Rocaon Investment Advisors LLC, March, 2014, p. 2. <http://www.rocaon.com/files/InflationHedge.pdf>
- ³⁰ That is, infrastructure-related enterprises are frequently also thought "in their nature" to be ones

- Which require long periods over which they are expected to operate and perhaps over which they are planned and/or established
- For which it is expected that the general character of the operations required to produce/afford the good or service which satisfies the need will not change much over extended periods of time
- Which require institutions, practices, etc. which are capable of marshalling resources at a scale, over a time, and in a way commensurate with what is required to establish the enterprise
- Which entail decision-making about the means and manner of establishment and the nature and terms of operation of enterprises which has a more collective/social/"public" e.g., governmental, character as compared to an individual/"private" one

See "Infrastructure: What 'Is' It? In What Ways Does or Should It Matter for Pension Funds ... and Others?" by Larry W. Beeferman, Director, Pensions and Capital Stewardship Project, Harvard Law School, Twelfth Annual Pensions and Capital Stewardship Project Conference, May 8, 2014, p. 7.

[http://www.law.harvard.edu/programs/lwp/pensions/conferences/pension5_14/INFRASTRUCTURE%20\(BEEFERMAN\)%20FINAL.pdf](http://www.law.harvard.edu/programs/lwp/pensions/conferences/pension5_14/INFRASTRUCTURE%20(BEEFERMAN)%20FINAL.pdf)

³¹ "Introduction: Financialization and the World Economy," by Gerald A. Epstein, Chapter 1 in *Financialization and the World Economy*, Edited by Gerald A. Epstein, Edward Elgar Press, 2004, p. 3.

<http://www.peri.umass.edu/fileadmin/pdf/programs/globalization/financialization/chapter1.pdf>

³² Id.

³³ Financialization and the Global Economy," by Engelbert Stockhammer, Working Paper Series No. 240, Political Economy Research Institute, University of Massachusetts at Amherst, November 2010, p. 2 (published as a Chapter 25 in *The Political Economy of Financial Crises*, Edited by Gerald Epstein and Martin H. Wolfson, Oxford University Press, 2013).

http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_201-250/WP240.pdf "Most authors regard financialization as one of the key components of a broader societal shift in social and economic relations from a Fordist accumulation regime to a new 'neoliberal' regime (e.g. Glyn 2006, Harvey 2005)." Id.

³⁴ "Neologism as Theoretical Innovation in Economics: The case of 'Financialisation'," by Jan Toporowski, Working Paper Series, No. 171, Department of Economics, School of Oriental and African Studies, London, March 2012, p. 1.

<https://www.soas.ac.uk/economics/research/workingpapers/file74889.pdf> Toporowski remarks that while "[t]here is a reality behind the rise of finance," "[w]hat is needed is a proper analysis of how modern finance and capitalism function, identifying endogenous factors and the key determining variables in the system, rather than speculatively linking up of incidents in how business is done today." Id. at 10.

³⁵ "The limits of financialization," by Brett Christophers, *Dialogues in Human Geography*, Volume. 5, Number 2, 2015, 183-200, 185-186.

³⁶ Id. at 196.

³⁷ "The inherent tensions in the financial sector mean that episodes of extreme stress are inevitable, if unpredictable. This is so even if the regulatory and supervisory regimes are in many respects effective. The capacity of government to intervene may determine whether the distress is confined to the financial sector or breaks out into the real economy." "Avoiding Eight-Alarm Fires in the Political Economy of Systemic Risk Management," by Jeffrey M. Gordon and Christopher Muller, Columbia Law and Economics Research Paper No. 369; ECGI - Finance Working Paper No. 277/2010, March 26, 2010. <http://ssrn.com/abstract=1553880> or <http://dx.doi.org/10.2139/ssrn.1553880>

³⁸ When bank exposure "to potentially dangerous market, credit and liquidity risk...materialized with a vengeance, it was thought to have contaminated the entire US financial system by triggering the collapse of banks nationwide, which in turn had disastrous consequences for the real economy." "The New Case for Functional Separation in Wholesale Financial Services," by Ingo Walter, July 30, 2009, p. 4. https://www.stern.nyu.edu/sites/default/files/assets/documents/con_039542.pdf "[B]ecause the services provided by banks and other financial intermediaries as allocators of capital affect nearly everything else in the economy, regulatory failure quickly becomes a traumatic event with important consequences for the real sector." Id. at 21.

³⁹ "Finance is often viewed as a veil on the engine of the real economy, but as has been observed, 'when the veil flutters, the engine sputters.'" "The Financial Crisis, Trade Finance and the Collapse of World Trade," by Mark Wayne, Globalization and Monetary Policy Institute 2009 Annual Report, Federal Reserve Bank of Dallas, p. 13.

<https://www.dallasfed.org/assets/documents/institute/annual/2009/annual09b.pdf> What is quoted in the main text appears to be an incorrect quote of what was actually written by John G. Gurley. See. Review of *A Program for Monetary Stability* by Milton Friedman, by John G. Gurely, *The Review of Economics and Statistics*, Volume 43, Number 2, August 1961, 307-308, 308.

⁴⁰ "[T]he failure of a large financial institution can adversely affect financial institutions and the financial system in developing countries. It can also mean that small and medium size enterprises and households in these countries have difficulty accessing finance. This, in turn, can have substantial negative economic consequences for both the global real economy and the international financial system." "The Financial Stability Board: The New Face of International Financial Regulation," by Narissa Lyngen and Clayton Simmons, Harvard International Law Journal, Special Report Online, Volume 54, June 2012, p. vii.

<http://www.harvardilj.org/wp-content/uploads/2013/08/Lyngen-Simmons-to-publish1.pdf>

⁴¹ "The GFC was characterized by 'financialized capitalism' which involves a 'staggering increase in the amount of money being invested' with 'most of it' is 'put into highly speculative markets in the financial rather than the 'real' economy. 'In recent years there has been a staggering increase in the amount of money being invested by investors worldwide – and most of it has been put in highly speculative markets in the financial, rather than the 'real,' economy. What does this distinction mean? To oversimplify, the 'real economy' is the part of the economy that involves making, selling, and buying goods and services, from groceries to shoes to doctors' visits to garbage collection. The financial sector, in contrast, involves the buying and selling of money as a product in its own right." "A Paper God: How Out-Of-Control Buying and Selling of Money Led to Our Current Crisis," by Bob Goudzwaard, *Sojourners*, Volume 38, Number 6, June 2009, 22-26.

⁴² "Financialization will be understood here as a distorted financial arrangement based on the creation of artificial financial wealth, that is, financial wealth disconnected from real wealth or from the production of goods and services."⁴² One of "three central characteristics of 'finance-based capitalism or financialized capitalism'" is "the decoupling of the real economy and the financial economy with the wild creation of fictitious financial wealth benefiting capitalist rentiers." "The Global Financial Crisis and a New

Capitalism?" by Luiz Carlos Bresser-Pereira* Getúlio Vargas Foundation, Levy Economics Institute of Bard College Working Paper 592, May 2010, pp. 8-9. http://www.levyinstitute.org/pubs/wp_592.pdf

⁴³ Id. at 9.

⁴⁴ "Adam Smith's major contribution of economics was in distinguishing real wealth, based on production, from fictitious wealth. Marx, in Volume III of *Capital*, emphasized this distinction with his concept of 'fictitious capital,' which broadly corresponds to what I call the creation of fictitious wealth and associated with financialization: the artificial increase in the price of assets as a consequence of the increase in leverage. Marx referred to the increase in credit that, even in his time, made capital seem to duplicate or even triplicate." "The Global Financial Crisis and a New Capitalism?" by Luiz Carlos Bresser-Pereira* Getúlio Vargas Foundation, Levy Economics Institute of Bard College Working Paper 592, May 2010, p. 14. http://www.levyinstitute.org/pubs/wp_592.pdf

⁴⁵ "In the process of capital accumulation, the relationship between the real and financial economy has always been marked by the duality of interdependence and separation." "Global Finance in the New Century: Deregulation and Beyond," by Libby Assassi, Duncan Wigan and Anastasia Nesvetailova, Chapter 1 in *Global Finance in the New Century: Beyond Deregulation*, Edited by Libby Assassi, Anastasia Nesvetailova, and Duncan Wigan p. 4. http://www.palgrave.com/resources/sample-chapters/9780230006874_sample.pdf The authors cite Peter Drucker to the effect that "...in the world economy of today, the 'real' economy of goods and services and the 'symbol' economy of money, credit and capital are no longer bound tightly to each other; they are, indeed, moving further and further apart." Id. at 5.

⁴⁶ "The financialization of the American economy," by Greta R. Krippner, *Socio-Economic Review*, Volume 3, Number 2, May 2005, 173–208.

⁴⁷ "Theology of the 'Real Economy': Christian Economic Ethics in an Age of Financialization," Charles A. McDaniel, Jr., *Journal of Religion and Business Ethics*: Volume. 2, Issue 2, 2011, p. 1. <http://via.library.depaul.edu/jrbe/vol2/iss2/1>

⁴⁸ Id. at 2. "What should be avoided is a speculative use of financial resources that yields to the temptation of seeking only short-term profit, without regard for the long-term sustainability of the enterprise, its benefit to the real economy and attention to the advancement, in suitable and appropriate ways, of further economic initiatives in countries in need of development." *Caritas in Veritate*, Benedict XVI, 2009, no. 40. http://w2.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate.html

⁴⁹ "Theology of the 'Real Economy': Christian Economic Ethics in an Age of Financialization," by Charles A. McDaniel, Jr., *Journal of Religion and Business Ethics*, Volume 2, Issue 2, 2011 (quoting from Gian Demetrio Matrangoni and Stefano Solari, "The 'Good Company' and Financialization: Corporate Choices, Institutional Environment, and Catholic Social Thought"), p. 2. <http://via.library.depaul.edu/jrbe/vol2/iss2/1>

⁵⁰ Id. (quoting from Paul H. Dembinski, "Financial Ethics Trapped by Financialization," *ethikundgesellschaft* 2 (2009): 14) at 8.

⁵¹ Id. (quoting from Edward J. O'Boyle, Stefano Solari, and Gian Demetrio Marangoni, "Financialization: Critical Assessment Based on Catholic Social Teaching," *International Journal of Social Economics* 37, no. 1 (2010): 7), at 10-11.

⁵² Id. at 15.

⁵³ Id. at 19-20.

⁵⁴ Id. at 21-22.

⁵⁵ Id. at 20-21.

⁵⁶ Id. at 27.

⁵⁷ Id.

⁵⁸ "Stock Markets as 'Simulacra'," by Ellen Hertz, *Tsantsa*, 2000, Volume. 5, Société Suisse Suisse d'Ethnologie (citing Galbraith for his characterization of speculation as "mass escape from reality [that] excludes any serious contemplation of the true nature of what is taking place"). *A Short History of Financial Euphoria*, by John Kenneth Galbraith, Whittle Books (Viking Penguin), New York, 1993, p. 12), 40-50, 41. <http://doc.rero.ch/record/19936>

⁵⁹ "The 'Real Economy' and its Pariahs: Questioning Moral Dichotomies in Contemporary Capitalism," by Ellen Hertz and Stefan Leins. *Fieldsights - Theorizing the Contemporary*, Cultural Anthropology Online, May 15, 2012. <http://www.culanth.org/fieldsights/339-the-real-economy-and-its-pariahs-questioning-moral-dichotomies-in-contemporary-capitalism> Indeed, she sees this as an expression of a prominent mode of thinking ("ideology") of broad reach which "fundamentally structures the field that is romantically referred to as the 'real economy'." Id

⁶⁰ "Stock Markets as 'Simulacra'," by Ellen Hertz, *Tsantsa*, Volume 5, 2000, 40-50, 45. <http://doc.rero.ch/record/19936> "It is the changes in intention over time, and in reaction to market movements over time, that make investment and speculation blend together in a single form of calculation." Id.

⁶¹ Id. <http://doc.rero.ch/record/19936>

⁶² Id. at 46. <http://doc.rero.ch/record/19936>

⁶³ Id. "What 'really' happens in a month that cannot happen in a minute?" Id. "[O]ne can regret the ways in which short-term investment destabilizes financial markets and creates 'noise' that gets in the way of wealth being invested in productive endeavors (allocative efficiency), but one cannot call it 'unreal'." E-mail from Ellen Hertz to author, June 16, 2015

⁶⁴ "Stock Markets as 'Simulacra'," by Ellen Hertz, *Tsantsa*, Volume 5, 2000, 40-50, 46. <http://doc.rero.ch/record/19936>

⁶⁵ Id.

⁶⁶ Id. (citing "Beyond Use Value," in *For a Critique of the Political Economy of the Sign*, 1981, pp 130-142, 135, Telos Press (Ch. Levin translator)).

⁶⁷ Id. at 47.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ "I believe we are jousting at windmills when we accuse financial markets of being 'unreal'. They are totally real, and it's precisely their reality – the specific forms it takes and the specific forms of wealth they produce – that we should be questioning. Mystifying their existence with discussions of something called the "real economy" – which incidentally represents less than 10% of the wealth circulating in the world at this point – is distracting and misleading, even de-politicizing, in my view." E-mail from Ellen Hertz to author, June 16, 2015.

⁷¹ "The Global Financial Crisis: Where does labour fit?" by Dick Bryan and Mike Rafferty, p. 3. <http://awgf.econ.usyd.edu.au/workshops/A%20Crisis%20Like%20No%20Other/Bryan%20Rafferty%20-%20July%20AWGF%20paper.pdf>

⁷² Id.

⁷³ Id. A "cargo cult" is one "of various Melanesian religious groups characterized by the belief that material wealth (as money or manufactured goods) can be obtained through ritual worship." Definition of "cargo cult," Merriam-Webster. <http://www.merriam-webster.com/dictionary/cargo%20cult>

⁷⁴ "Financialization, Risk and Labour," by Randy Martin, Michael Rafferty and Dick Bryan, *Competition & Exchange*, Volume. 122, Number. 2, June 2008, 120-132, 124. <http://www.maneyonline.com/doi/pdfplus/10.1179/102452908X314849>

⁷⁵ Id. at 124-125.

⁷⁶ "The Global Financial Crisis: Where does labour fit?" by Dick Bryan and Mike Rafferty, p. 4. <http://awgf.econ.usyd.edu.au/workshops/A%20Crisis%20Like%20No%20Other/Bryan%20Rafferty%20-%20July%20AWGF%20paper.pdf>

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id. at 5.

⁸⁰ Id.

⁸¹ Id.

⁸² Id. at 6.

⁸³ Id.

⁸⁴ "How economists understand (or not) the relationship between the real and the financial economy," by Kenneth Hermele, FESSUD Working Paper Series No. 82, 2015, p. 11. <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=5147125&fileId=5147137> More specifically

In Part V ("Division of Profit into Interest and Profit of Enterprise. Interest-Bearing Capital"), Chapter 29 ("Component Parts of Bank Capital") of *Capital* Vol. 3, Marx first refers to state promissory notes as "fictitious capital." Then he states that "[t]he formation of a fictitious capital is called capitalisation. Every periodic income is capitalised by calculating it on the basis of the average rate of interest, as an income which would be realised by a capital loaned at this rate of interest." He adds: "Even when the promissory note – the security – does not represent a purely fictitious capital, as it does in the case of state debts, the capital-value of such paper is nevertheless wholly illusory. We have previously seen in what manner the credit system creates associated capital. The paper serves as title of ownership which represents this capital. The stocks of railways, mines, navigation companies, and the like, represent actual capital, namely, the capital invested and functioning in such enterprises, or the amount of money advanced by the stockholders for the purpose of being used as capital in such enterprises." Further, "[t]he independent movement of the value of these titles of ownership, not only of government bonds but also of stocks, adds weight to the illusion that they constitute real capital alongside of the capital or claim to which they may have title." <https://www.marxists.org/archive/marx/works/1894-c3/ch29.htm>

⁸⁵ "How economists understand (or not) the relationship between the real and the financial economy," by Kenneth Hermele, FESSUD Working Paper Series No. 82, 2015, p. 11. <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=5147125&fileId=5147137> Interestingly Hermele argues that such characterization "is similar to the way Adam Smith more than a hundred years earlier had framed the distinction between real capital – money. To Smith 'capital', which 'the owner does not care to be at the trouble of employing himself' is only 'monied interest'. This kind of capital, Smith said:

'is distinct, not only from the landed, but from the trading and manufacturing interests, as in these last the owners themselves employ their own capitals.'

Id. at 11-12 (quoting from *An Inquiry into the Nature and Causes of the Wealth of Nations*, by Adam Smith, Chicago: Chicago University Press, 1976, Book II, Chapter IV).

⁸⁶ *An Encyclopedia of Macroeconomics*, Edited by Brian Snowdon and Howard R. Vane, Edward Elgar, 2002, pp. 526-527. Note also the following:

"This leads us into that great debate of classical macroeconomics: the veil of money. Has the financial sector evolved to serve only a monetary economy and disconnected itself from the real economy of concrete production and consumption of commodities, services, and activities? If so, it begs the question whether the financial sector is a smoke screen that distorts the real economy, in which case, case macroeconomic policy should seek to dispel the smoke screen in order to reveal the true workings of the real economy.

"Another perspective to evaluate is whether or not we might consider the financial sector as an integral part of the real economy, producing real products and services to facilitate trade, and therefore just one sector among many others." "From Hubris to Disgrace: The End of Finance as we Know it..." by Mark Esposito and Terence Tse, *The World Financial Review*, March-April 2015, March 26, 2015, 4-9, 7. <http://www.worldfinancialreview.com/?p=3612>

⁸⁷ *An Encyclopedia of Macroeconomics*, Edited by Brian Snowdon and Howard R. Vane, Edward Elgar, 2002, pp. 526-527. According to the notion of the "neutrality of money," "[i]t is neutral because...variation in its quantity can affect only the level of prices and not output and growth in the economy." *The Nature of Money*, by Geoffrey Ingham, Polity Press Ltd, 2004, p. 72.

⁸⁸ "The Consequences to the Banks of the Collapse of Money Values," by John Maynard Keynes, August 1931, Chapter 7 in *Essays in Persuasion*, by John Maynard Keynes, W.W. Norton & Co., 1963, p. 169. <http://www.gutenberg.ca/ebooks/keynes-essaysinpersuasion/keynes-essaysinpersuasion-00-h.html> Keynes later remarks: "To sum up, there is scarcely any class of property, except real estate, however useful and important to the welfare of the community, the current money value of which has not suffered an enormous and scarcely unprecedented decline. This has happened in a community which is so organised that a veil of money is, as I have said, interposed over a wide field between the actual asset and the wealth owner." Id. at 175.

⁸⁹ For a brief discussion of the history of the phrase "veil of money" see APPENDIX A.

- ⁹⁰ "How economists understand (or not) the relationship between the real and the financial economy," by Kenneth Hermele, FESSUD Working Paper Series No. 82, 2015, p. 7
<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=5147125&fileId=5147137>
- ⁹¹ "Money is a Social Relation," by Geoffrey Ingham, *Review of Social Economy*, Volume. 54, Number 4, 1996, 507-529, 510, note 2. "Although Marx stressed the fundamental monetary structure of capitalism (M-C-M'), he was primarily concerned with showing that money was a 'mask' (or 'veil') over the underlying 'real' social relations of the production of commodities. Institutions for the social-production of money, such as banks, are not seen as the essence of capitalism; this is sought in the reality of the capital-labour relations of production expressed in an alienated monetary form." Id.
- ⁹² "How economists understand (or not) the relationship between the real and the financial economy," by Kenneth Hermele, FESSUD Working Paper Series No. 82, 2015 (quoting from Keynes' text *A Monetary Theory of Production*), p. 23
<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=5147125&fileId=5147137>
- ⁹³ "The Financial Instability Hypothesis," by Hyman P. Minsky, The Jerome Levy Economics Institute Working Paper No. 74, May 1992, p.4. <http://ssrn.com/abstract=161024> or <http://dx.doi.org/10.2139>
- ⁹⁴ Id. at 4-5.
- ⁹⁵ *The Nature of Money*, by Geoffrey Ingham, Polity, 2004, p. 72.
- ⁹⁶ "Money is a Social Relation," by Geoffrey Ingham, *Review of Social Economy*, Volume 54, Number 4, 1996, 507-529, 510.
- ⁹⁷ Id. at 526.
- ⁹⁸ "The Nature of Money," by Geoffrey Ingham, "Economic Sociology," European Electronic Newsletter, Volume 5, Number 2, January 2004, 18-31,35. <http://econsoc.mpifg.de/archive/esjan04.pdf>
- ⁹⁹ *The Nature of Money*, by Geoffrey Ingham, Polity Press Ltd, 2004, p. 13
- ¹⁰⁰ Id. at 202.
- ¹⁰¹ Id. at 199.
- ¹⁰² Id. at 201. "[T]he actual process of the production of money in its different forms is inherently a source of power." Id. at 4. Ingham contrasts this image of duality is that off "the mythical barter of the 'real' economy" "in which commodities are able to exchange at their real values". Id.
- ¹⁰³ *The Nature of Money*, by Geoffrey Ingham, Polity Press Ltd, 2004, p. 201. "[T]he actual process of the production of money in its different forms is inherently a source of power." Id. at 4. Ingham contrasts this image of duality with that of "the mythical barter of the 'real' economy" "in which commodities are able to exchange at their real values". Id.
- ¹⁰⁴ "Overview," in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p. 9.
http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf They add that "[b]y focusing on trade and exchange in commodities and assets, Islam encourages risk sharing, which promotes social solidarity." Id. at 10.
- ¹⁰⁵ "Epistemological Foundation of Finance: Islamic and Conventional," by Abbas Mirakhor and Wang Yong Bao, Chapter 1 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p. 46.
http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf
- ¹⁰⁶ "Islamic Capital Markets and Development," by Obiyathulla Ismath Bacha and Abbas Mirakhor, Chapter 9 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p.262.
http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf
- ¹⁰⁷ "Islam and Development: Policy Challenges," by Azura Othman and Abbas Mirakhor, Chapter 12 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p. 328-329.
http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf
- ¹⁰⁸ "The relative advantage of the parsimonious simplicity of Islamic risk-sharing contracts becomes clearer when they are juxtaposed against derivatives. A simple contract predicated on direct claims on real goods and services is less ambiguous for both the lender and the borrower because the parties know first-hand who owes what to whom and how claims and obligations will be adjusted to realized outcomes according to the rules. Islamic rules prohibit derivatives because they are not predicated on direct claims on real goods and services. If further risk sharing is desired, more parties may be involved directly in the contract subject to the same rules, and each party knows the claims and obligations of other parties. The clearinghouse is the contract." "Islamic Finance Revisited: Conceptual and Analytical Issues from the Perspective of Conventional Economics," by Andrew Sheng and Ajit Singhin, Chapter 2 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p.108.
http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf
- ¹⁰⁹ "The stock market is an example. While large and impersonal, the stock market pools adequate information about the distribution of direct claims on assets representing real goods and services." Id.
- ¹⁰⁹ "The social role of the Islamic financial sector can be best exemplified by providing financial services to the poor so as to increase their income and wealth.⁹ Specialized poverty-focused Islamic FIs provide services to the poor using Shari'ah-compliant modes and instruments. Thus the assets and liabilities of the Islamic FIs will differ from their conventional counterparts. Important aspects of Islamic modes of finance are that financial capital cannot claim a return on itself and that the transaction must involve a real good or object." "Financial Inclusion and Islamic Finance: Organizational Formats, Products, Outreach, and Sustainability," by Habib Ahmed, Chapter 7 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p. 209.
http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf

¹¹⁰ "Creation of credits not backed by real economy diverts real savings from productive activities to nonproductive activities that in turn weaken the process of real wealth expansion." "Islam and Development: Policy Challenges," by Azura Othman and Abbas Mirakhor, Chapter 12 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p. 330.

[http://www-](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

[wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

¹¹¹ "Islamic Finance Revisited: Conceptual and Analytical Issues from the Perspective of Conventional Economics," by Andrew Sheng and Ajit Singhin, Chapter 2 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, p. 79.

[http://www-](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

[wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

"Modigliani ... explains the Theorem as follows:

... with well-functioning markets (and neutral taxes) and rational investors, who can 'undo' the corporate financial structure by holding positive or negative amounts of debt, the market value of the firm – debt plus equity – depends *only* on the income stream generated by its assets. It follows, in particular, that the value of the firm should not be affected by the share of debt in its financial structure or by what will be done with the returns – paid out as dividends or reinvested (profitably)."

"The Modigliani-Miller Theorem," by Anne P. Villamil, *The New Palgrave Dictionary of Economics* (citing "Introduction," by Franco Modigliani in *The Collected Papers of Franco Modigliani, Volume 3*, Andrew Abel (ed.), MIT Press, 1980, pp. xi-xix), p.1.

<http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=EFA8FFF6D8B4B1071B127C2B82FD961F?doi=10.1.1.362.5287&rep=rep1&type=pdf> This discourse echoes those aspects of the discussion in the main text about financialization and the ostensible primary character of the "real economy".

¹¹² "Foreword" by Dr. Mahmoud Mohieldin in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p. xi.

[http://www-](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

[wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

¹¹³ "Islamic Finance Revisited: Conceptual and Analytical Issues from the Perspective of Conventional Economics," by Andrew Sheng and Ajit Singhin, Chapter 2 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p.80.

[http://www-](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

[wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

¹¹⁴ "Epistemological Foundation of Finance: Islamic and Conventional," by Abbas Mirakhor and Wang Yong Bao, Chapter 1 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p. 32. http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf "When risk is spread among a large number of participants through an efficient stock market, closer coordination between the financial and *real sectors* is promoted, and the benefits of economic growth and financial system stability are better shared." Id. at 46 (italics added). "Risk transfer through debt instruments, in contrast, along with high leverage, weakens the link between the financial and *real sectors*, thus posing a threat to the stability of the financial sector." Id. "The economy-finance nexus defined by Arrow-Debreu-Hahn GE models were risk-sharing conceptualizations in which securities represented contingent financial claims on the *real sector*." Id. at 54 (italics added) "While the market should have instruments to meet the demand for short-term, low risk, and liquid trade financing, it would be unfortunate if the future evolution of Islamic finance focuses only on short-termism at the cost of neglecting the longer-term investment needs of *the real sector*." Id. at 55. (italics added) "Thus, intrinsic values of derivatives become ambiguous, or at least hard to price. In the process – borrowing the term from Karl Marx – "*fictitious capital*" is created, representing only putative property claims far removed from the original direct claims on *real goods and services*. This results in a decoupling of the financial and *real sectors* and increases ambiguity of risk exposure. The chain reaction resulting from diminished trust in one link quickly cascades into financial panic and abruptly deflates derivative asset values." "Islamic Finance Revisited: Conceptual and Analytical Issues from the Perspective of Conventional Economics," by Andrew Sheng and Ajit Singhin, Chapter 2 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013 (italics added), pp.107-108.

[http://www-](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

[wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

"By entering into contracts of exchange, parties improve their welfare by exchanging the risks of economic activities, thus allowing division of labor and specialization. Conceptually, there is a difference between risk taking and risk sharing. The former is antecedent to the latter. An entrepreneur must first decide to undertake the risk associated with a *real sector project* before seeking financing. In nonbarter exchange, it is at the point of financing where risk sharing materializes or fails to do so. The risk of the project does not change as it enters the financial sector seeking financing." "Islam's Perspective on Financial Inclusion," by Zamir Iqbal and Abbas Mirakhor, Chapter 6 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013 (italics added), p.187.

[http://www-](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

[wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

"When an entrepreneur decides to undertake a project in the *real sector*, he or she considers all the risks to the project. These risks do not increase when the project is being considered for financing in the capital/financial markets. However, the method of financing can differ. The project can be financed via risk transfer, risk shifting, or risk sharing. Risk transfer is what financial intermediation has long been expected to do: to transfer risk from the depositor to the

borrower." "Islamic Capital Markets and Development" by Obiyathulla Ismath Bacha and Abbas Mirakhor, Chapter 9 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank (italics added), p.209.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf "The next key advantage of risk-sharing finance to the overall economy is the avoidance of "financialization" (see Mirakhor 2010), and by extension, the creation of asset bubbles. Financialization refers to the growth of pure financial instruments, totally detached from the *real* sector and having a life of their own. Other than the private gains of the few who design and trade these instruments, society benefits little if at all. Worse, such instruments typically divert funds into sectors of the economy that are most malleable to speculative play: usually commodities, real estate, stock, and the like. The result is the creation of asset bubbles, leading to overall economic vulnerability. The fact that in many developing countries asset bubbles can coexist with productive sectors that are starved for funds is the irony of financialization." "Islamic Capital Markets and Development" by Obiyathulla Ismath Bacha and Abbas Mirakhor, Chapter 9 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, p.263.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf "It is easy to see the beneficial impact of risk sharing on the residual risk of fully diversified asset portfolios. For the same portfolios, beta will be lower in the absence of leverage. Since riskiness is lower, risk premiums and therefore required returns for stocks would also be lower. The reduced riskiness of stocks should also make it better suited for lower rungs of society to participate in equity markets. Currently, equity investment is unsuited to most ordinary folk given the volatility of equity markets. Yet to keep things in perspective, there is no reason why equity markets should be much more volatile than the underlying *real* sectors that they represent. If real sector returns are fairly stable, the volatility in stock returns is not attributable to changes in the real sector, but to external factors like leverage, investor psychology, herding, and the like." Id. at p.264. "How can we induce the financial system to serve the *real* sector? The answer is that if the financial system makes money, while the real sector is losing money, finance is not symbiotic or aligned with the real sector. Finance as a service industry can prosper only when its principal, the *real* sector, prospers. Therefore, the incentives that drive finance must be aligned with the real sector, not just in the short term, but in the long term as well. To do so, the marginal revenue from serving the *real* sector must be equal to the marginal cost of doing so. In other words, profits from toxic excessive leverage should be taxed or regulated—and if need be, incentives should be provided for lending to the real sector. The current global regulatory reforms do not address this basic distortion in incentives." "Islamic Stock Markets in a Global Context" by Andrew Sheng and Ajit Singh, Chapter 10 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, p. 290

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf "The absence of short-sale and margin financing could dampen liquidity at times, but once again there is no reason why there should be a systematic reduction in liquidity over time. The potential negative impact of reduced liquidity, however, must be balanced against the positive benefit of reduced volatility and "forced" overshooting of markets and asset prices. In the absence of such overshooting, price discovery should be more attuned to changes in the real sector, and therefore more reflective of *real* values—not artificially induced changes to value." "Islamic Capital Markets and Development" by Obiyathulla Ismath Bacha and Abbas Mirakhor, Chapter 9 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank (italics added), p.265

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf

¹¹⁵ "The prohibition of interest-based transactions stems from the fact that interest-based debt contracts are instruments of risk shifting. In such a contract, the creditor acquires a claim on the property rights of the debtor without losing the claim on the property rights to the money lent, regardless of the outcome of the contract. Another important implication of risk sharing is the rate of return to financing is determined ex post (after the investment has been made) by the rate of return on real activity." "Overview" in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013 p.10.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf

¹¹⁶ "The spectrum of ideal Islamic finance instruments would run the gamut between short-term liquid, low-risk financing of trade contracts to long-term financing of real sector investment. The essence of the spectrum is risk sharing." "Epistemological Foundation of Finance: Islamic and Conventional," by Abbas Mirakhor and Wang Yong Bao, Chapter 1 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p. 32. http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf "When risk is spread among a large number of participants through an efficient stock market, closer coordination between the financial and real sectors is promoted, and the benefits of economic growth and financial system stability are better shared." Id. at 46. "Risk transfer through debt instruments, in contrast, along with high leverage, weakens the link between the financial and real sectors, thus posing a threat to the stability of the financial sector." Id. "The economy-finance nexus defined by Arrow-Debreu-Hahn GE models were risk-sharing conceptualizations in which securities representing only putative financial claims on the real sector." Id. at 54. "While the market should have instruments to meet the demand for short-term, low risk, and liquid trade financing, it would be unfortunate if the future evolution of Islamic finance focuses only on short-termism at the cost of neglecting the longer-term investment needs of the real sector." Id. at 55. "Thus, intrinsic values of derivatives become ambiguous, or at least hard to price. In the process – borrowing the term from Karl Marx – "*fictitious capital*" is created, representing only putative property claims far removed from the original direct claims on real goods and services. This results in a decoupling of the financial and real sectors and increases ambiguity of risk exposure. The chain reaction resulting from diminished trust in one link quickly cascades into financial panic and abruptly deflates derivative asset values." "Islamic Finance Revisited: Conceptual and Analytical Issues from the Perspective of Conventional Economics," by Andrew Sheng and Ajit Singh, Chapter 2 in Chapter 1 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, pp.107-108.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf "By entering into contracts of exchange, parties improve their welfare by exchanging the risks of economic activities, thus allowing division of labor and specialization. Conceptually, there is a difference between risk taking and risk sharing. The former is antecedent to the latter. An entrepreneur must first decide to undertake the risk associated with a real sector project before seeking financing. In nonbarter exchange, it is at the point of financing where risk sharing materializes or fails to do so. The risk of the project does not change as it enters the financial sector seeking financing." Islam's Perspective on Financial Inclusion." by Zamir Iqbal and Abbas Mirakhor, Chapter 6 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, p.187.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf "When an entrepreneur decides to undertake a project in the real sector, he or she considers all the risks to the project. These risks do not increase when the project is being considered for financing in the capital/financial markets. However, the method of financing can differ. The project can be financed via risk transfer, risk shifting, or risk sharing. Risk transfer is what financial intermediation has long been expected to do: to transfer risk from the depositor to the borrower." "Islamic Capital Markets and Development" by Obiyathulla Ismath Bacha and Abbas Mirakhor, Chapter 9 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, p.209.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf "The next key advantage of risk-sharing finance to the overall economy is the avoidance of "financialization" (see Mirakhor 2010), and by extension, the creation of asset bubbles. Financialization refers to the growth of pure financial instruments, totally detached from the real sector and having a life of their own. Other than the private gains of the few who design and trade these instruments, society benefits little if at all. Worse, such instruments typically divert funds into sectors of the economy that are most malleable to speculative play: usually commodities, real estate, stock, and the like. The result is the creation of asset bubbles, leading to overall economic vulnerability. The fact that in many developing countries asset bubbles can coexist with productive sectors that are starved for funds is the irony of financialization." "Islamic Capital Markets and Development" by Obiyathulla Ismath Bacha and Abbas Mirakhor, Chapter 9 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, p. 263.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf "It is easy to see the beneficial impact of risk sharing on the residual risk of fully diversified asset portfolios. For the same portfolios, beta will be lower in the absence of leverage. Since riskiness is lower, risk premiums and therefore required returns for stocks would also be lower. The reduced riskiness of stocks should also make it better suited for lower rungs of society to participate in equity markets. Currently, equity investment is unsuited to most ordinary folk given the volatility of equity markets. Yet to keep things in perspective, there is no reason why equity markets should be much more volatile than the underlying real sectors that they represent. If real sector returns are fairly stable, the volatility in stock returns is not attributable to changes in the real sector, but to external factors like leverage, investor psychology, herding, and the like." Id. at p. 264. "How can we induce the financial system to serve the real sector? The answer is that if the financial system makes money, while the real sector is losing money, finance is not symbiotic or aligned with the real sector. Finance as a service industry can prosper only when its principal, the real sector, prospers. Therefore, the incentives that drive finance must be aligned with the real sector, not just in the short term, but in the long term as well. To do so, the marginal revenue from serving the real sector must be equal to the marginal cost of doing so. In other words, profits from toxic excessive leverage should be taxed or regulated—and if need be, incentives should be provided for lending to the real sector. The current global regulatory reforms do not address this basic distortion in incentives." "Islamic Stock Markets in a Global Context" by Andrew Sheng and Ajit Singhr, Chapter 10 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, p. 290.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf "The absence of short-sale and margin financing could dampen liquidity at times, but once again there is no reason why there should be a systematic reduction in liquidity over time. The potential negative impact of reduced liquidity, however, must be balanced against the positive benefit of reduced volatility and "forced" overshooting of markets and asset prices. In the absence of such overshooting, price discovery should be more attuned to changes in the real sector, and therefore more reflective of real values—not artificially induced changes to value." "Islamic Capital Markets and Development" by Obiyathulla Ismath Bacha and Abbas Mirakhor, Chapter 9 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p.265.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf

¹¹⁷ "At the other end, it provides financing for what is intended or planned to be produced. In this spectrum, there does not seem to be room provided for making money out of pure finance, where instruments are developed that use real sector activity only as a veil to accommodate what amount to pure financial transactions. There are *dayn* (debt) and *Qard-al-hassan* (no-interest-based loan) used to facilitate real sector transactions in terms of consumption smoothing for those who have experienced liquidity shock." "Epistemological Foundation of Finance: Islamic and Conventional," by Abbas Mirakhor and Wang Yong Bao, Chapter 1 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p. 32.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf

¹¹⁸ "The weaknesses in the current system can be pinned down to policies and practices that encourage excessive creation of debt and pay little attention to income disparity and the social and ethical aspects of market practices. The existence of "rentiers," which thrive on such policies, widens the divergence between the financial and real sectors of the economy." "Overview" in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, pp. 21-22.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf "For all practical purposes, the assumption of a risk-free rate introduced an artificial floor into the pricing structure of the real sector of the economy, and into all financial decisions." "Epistemological Foundation of Finance: Islamic and Conventional," by Abbas Mirakhor and Wang Yong Bao, Chapter 1 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, pp. 30-31.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf "It is worth noting that transaction contracts permissible in Islam and the financial instruments intended to facilitate them are not the same thing. Islamic real sector transactions contracts (*Uqud*) that have reached us historically are all permissible. However, it is possible that a financial instrument designed to facilitate a given permissible contract may itself be judged nonpermissible." Id. at 32.

¹¹⁹ "Islam's Perspective on Financial Inclusion." by Zamir Iqbal and Abbas Mirakhor, Chapter 6 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p.187.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf

¹²⁰ "Quran, Verse (2:275) - English Translation". <http://corpus.quran.com/translation.jsp?chapter=2&verse=275>

¹²¹ "Islam's Perspective on Financial Inclusion." by Zamir Iqbal and Abbas Mirakhor, Chapter 6 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p.187.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf

¹²² "Islam's Perspective on Financial Inclusion." by Zamir Iqbal and Abbas Mirakhor, Chapter 6 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p.187.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf

¹²³ "Overview" in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, pp. 9-10.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf

¹²⁴ "Overview" in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, pp. 9-10.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf

¹²⁵ "Risk sharing, public policy and the contribution of Islamic finance" by Hossein Askari and Abbas Mirakhor, *PSL Quarterly Review*, Volume 67, Number 271, 2014, 345-379, 364-365. They add, "[h]owever, a given instrument designed to finance any one of these contracts may be permissible [because it involves no *riba*] but fails to meet the necessary condition of risk sharing." Id. at 365.

¹²⁶ *An Introduction to Islamic Finance, Theory and Practice, Second Edition*, by Zamir Iqbal and Abbas Mirakhor, John Wiley & Sons (Asia) Pte. Ltd., 2011, p. 10.

¹²⁷ "EVERY thing (physical or spiritual, so also ideas, emotions, feelings...) in Islam is what God wants. This has nothing to do with some sort of human predestination or theological materialism ('the reality is God'), but a theological concept of 'unity' (tawhid), to which the human being participates as 'agent' of the 'only Actor'. In this sense al-Ghazali remarks that 'not even the casual glance of a spectator nor the stray thought in the mind come to be outside the sphere of God's will'. Will is also expressed by the term *mashi'ah* – volition – and so it is that the word *shay'* – thing – deriving from the same Arabic linguistic root, is sometimes glossed as 'what has been willed [by God] to exist.'" E-mail from Valentino Cattelan to author, April 21, 2015.

¹²⁸ "In the Name of God: Managing Risk in Islamic Finance," by Valentino Cattelan, EABH Papers, No.14-07, July 2014, p. 10. <http://ssrn.com/abstract=2477584> or <http://dx.doi.org/10.2139/ssrn.2477584>

¹²⁹ See "From the concept of *haqq* to the prohibitions of *riba*, *gharar* and *maysir* in Islamic finance," by Valentino Cattelan, *International Journal of Monetary Economics and Finance*, Volume 2, Numbers 3/4, 200, 384-397, 387.

¹³⁰ "Introduction. Babel, Islamic finance and Europe: preliminary notes on property rights pluralism," by Valentino Cattelan, *Islamic Finance in Europe*, Edited by Valentino Cattelan, Edward Elgar, 2013, p. 7.

¹³¹ Id.

¹³² "Justice as Truth: from the dyad *hukm/haqq* to Islamic economics and finance," by Valentino Cattelan, Ninth International Conference on Islamic Economics and Finance (ICIEF) (citing Geertz, C. (1983) *Local Knowledge. Further Essays in Interpretive Anthropology*. New York: Basic Books), p. 20.

¹³³ Id. at 23.

¹³⁴ "Justice as Truth: from the dyad *hukm/haqq* to Islamic economics and finance," by Valentino Cattelan, Ninth International Conference on Islamic Economics and Finance (ICIEF) (citing Smirnov, A. (1996) Understanding justice in an Islamic context: some points of contrast with Western Theories. *Philosophy East and West*, 46 (3), 337-350), p. 23.

¹³⁵ "From the concept of *haqq* to the prohibitions of *riba*, *gharar* and *maysir* in Islamic finance," by Valentino Cattelan, *International Journal of Monetary Economics and Finance*, Volume 2, Numbers 3/4, 200, 384-397, 388 (quoting from Chehata, C. (1968) 'Le concept de contrat en droit musulman', *Archives de Philosophie du Droit*, Vol. 13, p.141). Again, "[t]he presence of an object between the contracting parties is the feature of the contractual relationship. It gives to the contract its objective nature: through it the concrete realisation of the effects of the contract establishes not only an equilibrium among the persons, but it creates a 'state of things' [settlement of entitlement], a social state properly said." Id.

¹³⁶ "A glimpse through the veil of Maya: Islamic finance and its truths on property rights," by Valentino Cattelan, Chapter 3 in *Islamic Finance in Europe, Towards a Plural Financial System*, ed. Valentino Cattelan, Edward Elgar, 2013, p. 41.

¹³⁷ Id. at 41-42.

Giving practical meaning in any given set of circumstances to issues as they might be framed in ways discussed in the main text necessarily entails a choice as to the processes by which judgments in that regard might be made. As might well be imagined, those which be thought to be appropriate or necessary in the context of the Islamic narrative might be seen otherwise in a different one. For example, Cattelan offers a complex and intricate discussion of ostensible differences between Islamic and Western legal reasoning and logic as they bear upon the connection between “fact” and “law” and that which is “real” and that which is “right”. “Alice’s Adventures, Abductive Reasoning and the Logic of Islamic Law,” by Valentino Cattelan, *International Journal for the Semiotics of Law*, Published online February 4, 2016. <http://link.springer.com/article/10.1007/s11196-016-9459-8/fulltext.html> The approach is one which appears similar to that suggested by Wallaq discussed below at footnote 576.

¹³⁸ “Islamic Banking and Development: An Alternative Banking Concept?” by Monzer Kahf, March 2005, p.1.

http://monzer.kahf.com/papers/english/ISLAMIC_BANKING_AND_DEVELOPMENT_March_2005_IN_HASSAN_AND_LEWIS_HAN_DBOOK.pdf

¹³⁹ Id. at 2.

¹⁴⁰ Id. at 3.

¹⁴¹ Id.

¹⁴² Id. at 5.

¹⁴³ Id. at 8.

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ Id.

¹⁴⁷ Id. at 9.

¹⁴⁸ Id. at 12.

¹⁴⁹ Id.

¹⁵⁰ Id. at 4-5.

¹⁵¹ In book recently co-authored by Askari, Iqbal, and Mirakhor, they refer to “eight key principles of Islamic property rights.” The additional principles in this longer list appear to include “[a]cknowledg[ing] the duty of sharing the product or the income and wealth proceeding from its sale, which relates to property ownership rights as a trust” – “made operational through the ordained duties imposed on income and wealth, which must be paid to cleanse income and wealth from the rights of others” – and “[a]cknowledg[ing] the limitations on the right of disposing of property” – namely “individuals have an obligation not to waste, squander, or destroy property, or to use property for opulence or unlawful purposes.” *Introduction to Islamic Economics, Theory and Application*, by Hossein Askari, Zamir Iqbal, and Abbas Mirakhor, John Wiley & Sons Singapore Pte, Ltd., 2015, pp. 56 and 57.

¹⁵² “Understanding Islam: Development, Economics and Finance,” by Hossein Askari, Zamir Iqbal, Nouredine Krichene, Abbas Mirakhor, 2013, p. 12. <http://ssrn.com/abstract=2358945> or <http://dx.doi.org/10.2139/ssrn.2358945>

¹⁵³ Id.

¹⁵⁴ Id.

¹⁵⁵ Id. According to Vogel and Hayes, in Islam, “[p]roperty rights are sacred.” *Islamic Law and Finance: Religion, Risk, and Return*, by Frank E. Vogel and Samuel L. Hayes, III, Kluwer Law International, 1998, p. 56. “Many Qur’anic verses condemn the wrongful taking (lit., eating or consuming) of property.” Id. So, for example, the phrase “wrongfully devouring property” is “associated with taking property by legal artifice, consuming property of orphans entrusted to one’s care, usury, and trade without ready consent.” Id. “For contract law, the most significant condemnation of wrongful taking of property is the verse excepting ‘trade based on mutual consent [ila. an takuna tijaratan ‘an taradinmikum].’” Id. at 59. Note also Kamali who remarks that “on the subject of contract, the Qur’an proclaims a general principle that contractual agreements must be fulfilled (5:1), and in the area of civil transactions and property the believers are enjoined to:

devour not the properties of one another unlawfully, but let there be lawful trade by mutual consent (4:29) ...

“Elsewhere it is declared that:

God has permitted sale and prohibited usury. (2:275).

“The detailed varieties of contracts and lawful trades, the forms of unlawful interferences with the property of others, and the varieties of usurious transactions are matters which the Qur’an has not elaborated.” *Shari’ah Law: An Introduction*, by Mohammad Hashim Kamali, Oneword Publications, 2008, p. 21.

¹⁵⁶ “Islamic Banking and Development: An Alternative Banking Concept?” by Monzer Kahf, March 2005, pp. 4-5.

http://monzer.kahf.com/papers/english/ISLAMIC_BANKING_AND_DEVELOPMENT_March_2005_IN_HASSAN_AND_LEWIS_HAN_DBOOK.pdf

“That is also humanly natural and the rational thing that should be done. The principle of justice and fairness requires that the result or actual outcome or profit of such cooperation should fairly be distributed between the two parties and nothing else. In other words, any distribution that is based on giving either party a pre-determined fixed amount regardless of the actual profit may not be fair or just.” Id.

¹⁵⁷ “Islamic Banking and Development: An Alternative Banking Concept?” by Monzer Kahf, March 2005, pp. 4-5.

http://monzer.kahf.com/papers/english/ISLAMIC_BANKING_AND_DEVELOPMENT_March_2005_IN_HASSAN_AND_LEWIS_HAN_DBOOK.pdf

¹⁵⁸ Id. at 3 and 8.

¹⁵⁹ Id. at 4.

¹⁶⁰ Id. at 4-5. The seed example seems to be one in which the “financier”, while retaining ownership, permits use of his or her land by the peasant. The trader example does not make any reference to what for finance takes place and does not on its face appear to involve retention of ownership of the merchandise sold. Perhaps Kahf assumes either that the merchandise is acquired by the trader on consignment or has received money to enable him or her to engage in trading. Note Kahf’s reference to “same savings and/or real goods.” That must be read as not distinguishing the situation based on what the financier provides.

¹⁶¹ Id. at 4.

¹⁶² Id.

¹⁶³ As Kahf describes debt, he is focusing on what might equally be cast in terms of what claims against the person financed are held or owned by the financier or what the person financed owes the financier.

¹⁶⁴ Id. at 4.

¹⁶⁵ Id. at 4-5. "Islamic Banking and Development: An Alternative Banking Concept?" by Monzer Kahf, March 2005, pp. 4-5. http://monzer.kahf.com/papers/english/ISLAMIC_BANKING_AND_DEVELOPMENT_March_2005_IN_HASSAN_AND_LEWIS_HAN_DBOOK.pdf

¹⁶⁶ Id. at 5.

¹⁶⁷ In another paper, Kahf offers an equally murky discourse as to the real:

"[T]he shariah recognizes real things and real growth or increment that comes about from the nature of real assets or by the effect of real market forces (that are founded on intrinsic value rather than assumptive speculation) on real assets, goods, or services.

"Additionally, all real assets that may grow may also lo[se] value, thus exposing owners to losses created by the same factors that create the growth; that is, real assets give their owner entitlement rights to any growth that they may create and at the same time expose her to losses that result from physical deterioration or from the demand and supply forces. But a debt, among all assets, is not liable to decrease and does not expose its owner to such kind of losses." "Islamic Finance: Business as Usual," by Monzer Kahf, 2006, p. 4. http://monzer.kahf.com/papers/english/ISLAMIC_FINANCE_BUSINESS_AS_USUAL_Clean_revised_CJIL-2006-09-25-Kahf.pdf

¹⁶⁸ *Islamic Finance, Principles and Practice, 2nd Edition*, by Hans Visser, Edward Elgar, 2013, p. 12.

¹⁶⁹ "Introduction" by Harald Motzki in *Hadith, Origins and Developments*, Edited by Harald Motzki, Volume 28 of the Formation of the Classic Islamic World, Lawrence J. Conrad (General Ed.), Ashgate Publishing Limited, 2004, p. xiii.

¹⁷⁰ Id.

¹⁷¹ "Overview" in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p. 9.

[http://www-](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

[wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

¹⁷² Id. at 9-10. More particularly they contend that the verse first "ordains that all economic and financial transactions are conducted via contracts of exchange (*al-Bay'*)" and second, that the "no *riba*...[requirement] must be met for a contract to be considered Islamic." In turn, they suggest that "[c]lassical Arabic lexicons of the Qur'an define contracts of exchange (*al-Bay'*) as contracts involving exchange of property in which there are expectations of gains and probability of losses..., implying that there are risks in the transaction." Islam's Perspective on Financial Inclusion." by Zamir Iqbal and Abbas Mirakhor, Chapter 6 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p. 187.

[http://www-](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

[wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf) In a different essay, Mirakhor and his co-authors largely restate the point the view that "[t]he objective of Islamic finance is to support real economic activities through risk sharing – producing real goods and services and prohibiting the financing of purely financial, speculative and other prohibited activities." "Understanding Development in an Islamic Framework," by Hossein Askari, Zamir Iqbal, Nouredine Krichene, and Abbas Mirakhor, *Islamic Economic Studies*, Volume 22, Number 1, May, 2014, 1-36, 17. <http://www.irti.org/English/Research/Documents/IES/001.pdf>

¹⁷³ "Epistemological Foundation of Finance: Islamic and Conventional," by Abbas Mirakhor and Wang Yong Bao, Chapter 1 in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p. 34.

[http://www-](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

[wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf)

¹⁷⁴ Id. at 34.

¹⁷⁵ Id.

¹⁷⁶ Id. at 43

¹⁷⁷ Id.

¹⁷⁸ "The Quran fully acknowledges the important contribution of markets and places great emphasis on contracts of exchange (*bay'*) and trade (*tijarah*). The Prophet implemented a number of policies to enhance the market mechanism and to encourage the expansion of trade. "Understanding Islam: Development, Economics and Finance," by Hossein Askari, Zamir Iqbal, Nouredine Krichene, Abbas Mirakhor, 2013, pp. 12-14. <http://ssrn.com/abstract=2358945> or <http://dx.doi.org/10.2139/ssrn.2358945>. A lengthy paragraph follows detailing those policies. Moreover, rules specified in the Quran regarding faith to the terms of contracts and the knowledge of their enforcement increased certainty and reduced the cost of contracts." Id.

¹⁷⁹ "Philosophy and Practice of Islamic Economics and Finance," by Shaikh A. Hamid, Southern New Hampshire University, Working Paper No. 2006-01, p. 19 (quotation from Imam Al-Ghazzali).

<http://academicarchive.snhu.edu/bitstream/handle/10474/1663/cfs2006-01.pdf?sequence=1>

¹⁸⁰ *Islamic Finance in the Global Economy*, by Ibrahim Warde, Edinburgh University Press, 2000, p. 63.

¹⁸¹ Id. at 64. The modern-day equivalent of that debate contrasts the real, productive economy with the financial, speculative one. Some Islamic economists have also argued that an interest-based economy was inherently inflationary and caused unemployment and poverty because the creation of money was not linked to productive investment. Id.

¹⁸² Id. at 63.

¹⁸³ The other argument concerns *avoiding exploitation*: according to Warde, as in other religions, "riba was also seen as exploitative, since it tended to favour the rich, who were guaranteed a return, at the expense of the vulnerable who assumed all the risk." Id.

¹⁸⁴ Id.

¹⁸⁵ *Islamic Finance: Law, Economics and Practice*, by Mahmoud A. El-Gamal, Cambridge University Press, 2006, p. 47.

[http://iugc.yolasite.com/resources/Reference%20Book%2004%20-](http://iugc.yolasite.com/resources/Reference%20Book%2004%20-%20Islamic%20finance,%20law%20economics%20and%20practice,%20M.%20El%20Gamal.pdf)

[%20Islamic%20finance,%20law%20economics%20and%20practice,%20M.%20El%20Gamal.pdf](http://iugc.yolasite.com/resources/Reference%20Book%2004%20-%20Islamic%20finance,%20law%20economics%20and%20practice,%20M.%20El%20Gamal.pdf) "The practice of Shari'a arbitrage proceeds in three steps:

1. Identification of a financial product that is generally deemed contrary to the percepts of Islamic Law (Shari'a).

2. Construction of an “Islamic analog” to that financial product...In fact, an important step in executing Shari’a arbitrage is finding an appropriate Arabic name for the Islamic analog product, preferably one that was extensively used in classical Islamic legal texts. Differences in contract forms and language thus justify and lend credibility to the ‘Islamic’ brand name.

3. In the meantime, an Islamic financial structure marketed under an Arabic name must be sufficiently similar to the conventional structure that it aims to replace. Sufficient similarity would ensure that the Islamic structure is consistent with secular legal and regulatory frameworks in target and origin countries.” Id. at 20-21

¹⁸⁶ Id. at 45.

¹⁸⁷ Id. at 153.

¹⁸⁸ Id.

¹⁸⁹ Id.

¹⁹⁰ Id. at 190 and 191.

¹⁹¹ Id. at 191 (italics added).

¹⁹² Id. at 76. “Most jurists continue to argue that an index is merely a number, which does not represent any real underlying assets.” Id. at 125.

¹⁹³ See id. at 36, 106, and 107.

¹⁹⁴ Id. at 49.

¹⁹⁵ Id. at 10. He adds that this “is not to say that the manner in which injunctions against riba and gharar have been obeyed in Islamic financial practice necessarily achieved such increases in efficiency,” Id.

¹⁹⁶ Id. at 47 (underlining added).

¹⁹⁷ Id. at 49.

¹⁹⁸ Id. at 50. They were (1) concern about the exploitation of poor borrowers of money or commodities; (2) trading money could “lead to fluctuation in currency values and monetary uncertainty”; (2) trading of foodstuffs for future foodstuffs could “lead to shortages in sport markets” for them. Id.

¹⁹⁹ Id. at 51.

²⁰⁰ Id. at 52.

²⁰¹ Id. at 50. The basis for the prohibition is found in Sahih Muslim hadith # 1570 which concerns exchanges involving silver, gold, salt, barley, dates, and wheat. See Riba *al-Fadlin* “Riba in Hadith”

<http://www.ibrahimm.com/Islamic%20Banking/RIBA%20IN%20HADITH.htm>

²⁰² *Islamic Finance: Law, Economics and Practice*, by Mahmoud A. El-Gamal, Cambridge University Press, 2006, p. 52.

<http://iugc.yolasite.com/resources/Reference%20Book%2004%20-%20Islamic%20finance,%20law%20economics%20and%20practice,%20M.%20El%20Gamal.pdf>

²⁰³ Id.

²⁰⁴ Id.

²⁰⁵ Id. at 53

²⁰⁶ Id.

²⁰⁷ Id.

²⁰⁸ Id. at 53.

²⁰⁹ “Definition of ‘Murahaba’,” Investopedia. <http://www.investopedia.com/terms/m/murabaha.asp>

²¹⁰ Id. at 54.

²¹¹ Id.

²¹² Id.

²¹³ Id.

²¹⁴ Id. at 56

²¹⁵ Id. at 4

²¹⁶ Id. at 56.

²¹⁷ Id. at 54.

²¹⁸ Id. at 57.

²¹⁹ Id.

²²⁰ Id.

²²¹ Id.

²²² Id. at 60.

²²³ Id.

²²⁴ Id. at 61.

²²⁵ Id. at 62.

²²⁶ Id. “Thus, if a customer wishes to borrow \$10,000 and pay 5 percent interest, and the bank wishes to lend him the money at that rate, the bank needs only to buy \$10,000 worth of platinum from a dealer, sell to the customer on a credit basis for \$10,500 to be paid later, and then sell the platinum on behalf of the customer back to the dealer, thus generating the desired result.” Id. at 68.

²²⁷ Id. at 62.

²²⁸ “Mutuality as an Antidote to Rent-Seeking *Shariah* Arbitrage in Islamic Finance,” by Mahmoud A. El-Gamal, *Thunderbird International Business Review*, Volume 49, Number 2, March-April 2007, 187-202, 197.

²²⁹ Id. “In other words, the prohibitions of riba and gharar, and associated conditions imposed by classical jurists on contracts that allow transfer of credit and risk without violating those prohibitions, are in essence forms of prudential regulation and risk management.” Id.

²³⁰ At the outset El-Gamal argues that “[t]he essence of Islamic jurisprudence of financial transactions is to approach the ideal of justice in exchange (as argued by Ibn Rushd)” and that “[t]he regulatory substance of classical Islamic law, seeking justice, cannot be enforced through contract and corporate forms, mutual or otherwise” He later adds – presumably with regard to the matter of “substance,” that “[w]hat justice demands is the use of all credible information on the risks in debt, equity, derivative, insurance, or other contracts, in order properly to price these risks. In most cases, one party will have more information about certain risks (e.g. of own likelihood of default, fraud, etc.) than the other.” “Mutuality, Reciprocity, and Justice Within the Context of A Unified Theory of *Riba* and *Gharar*,” by Mahmoud A. El Gamal, First and Incomplete Draft, January 2014, p. 1.

<http://www.ruf.rice.edu/~elgamal/files/Mutuality-14.pdf> In support of this he first quotes the following words from Ibn Rushd:

"It appears in the Law (*Shar'*) that what is intended in the prohibition of *riba* is the potential (*li---makan*) for excessive injustice (*al---ghabn al---kathir*) therein. In this regard, justice in exchange is the attempt to balance the two sides of the exchange." Id. at 2.

He then notes that "Ibn Rushd proceeded to explain the use of monetary prices to determine justice (or lack thereof) in exchange." Id.

²³¹ *Islamic Finance: Law, Economics and Practice*, by Mahmoud A. El-Gamal, Cambridge University Press, 2006, p. 62.

<http://iugc.yolasite.com/resources/Reference%20Book%2004%20-%20Islamic%20finance.%20law%20economics%20and%20practice.%20M.%20El%20Gamal.pdf>

²³² "Mutuality as an Antidote to Rent-Seeking *Shariah* Arbitrage in Islamic Finance," by Mahmoud A. El-Gamal, *Thunderbird International Business Review*, Volume. 49, Number. 2, March-April 2007, 187-202, 197.

²³³ *Islamic Finance: Law, Economics and Practice*, by Mahmoud A. El-Gamal, Cambridge University Press, 2006, p. 62.

<http://iugc.yolasite.com/resources/Reference%20Book%2004%20-%20Islamic%20finance.%20law%20economics%20and%20practice.%20M.%20El%20Gamal.pdf>

²³⁴ Id. at 57. <http://iugc.yolasite.com/resources/Reference%20Book%2004%20-%20Islamic%20finance.%20law%20economics%20and%20practice.%20M.%20El%20Gamal.pdf>

²³⁵ Id. at 60.

²³⁶ Id. at 48.

²³⁷ Id. at 82. The *salam* contract is briefly discussed below at pp. 45-49.

²³⁸ Id. at 62

²³⁹ This understanding seems consistent with an earlier paper by El-Gamal in which argues (in certain ways perhaps differently how he does it in his book) for an economic explanation for the prohibition against *riba*. There he remarks that "[t]he implicit 'interest' rates on short and long term *murabaha* or lease are not simply a function of time and aggregate anticipated market conditions. Instead, such implicit rates (which Islamic banks operating in the U.S. are legally forced to disclose to their clients) will be linked to the specific physical object being financed, used as a collateral." "An Economic Explication of the Prohibition of *Rib'a* in Classical Islamic Jurisprudence," by Mahmoud A. El-Gamal, May 2, 2001, p. 16. <http://www.ruf.rice.edu/~elgamal/files/riba.pdf> By contrast, he states that "[l]onger-term financing will typically be associated with more valuable assets with lower depreciation rates (e.g. buildings, machinery, etc.). Thus, it is quite conceivable that the implicit 'long-term interest rate' facing our agent can be lower than its short term alternatives generated by financing smaller and more perishable items." Id. (El Gamal published at the same time an analogous paper about *gharar*: "An Economic Explication of the Prohibition of *Gh'arar* in Classical Islamic Jurisprudence," by Mahmoud A. El-Gamal, May 2, 2001. <http://www.ruf.rice.edu/~elgamal/files/gharar.pdf>)

²⁴⁰ "A glimpse through the veil of Maya: Islamic finance and its truths on property rights," by Valentino Cattelan, Chapter 3 in *Islamic Finance in Europe, Towards a Plural Financial System*, ed. Valentino Cattelan, Edward Elgar, 2013, p. 41.

"[I]n Islamic law the term '*aqd*...refers not only to bilateral contracts, but is loosely employed to describe all manifestations of the will which tie the author to the obligations arising therefrom'

"Different [from] the Western tradition, the '*aqd* finds its pivotal element not in the expression of the will..., but in the empirical object as concrete matter to be traded: its fundamental purpose, as voluntary relationship is to maintain the equilibrium of legal titles...as linked to existing/real properties...From a theological/ethical view..., the *aqd* is, in fact, as everything else, a divine creation, not an expression of human freedom...Consequently, even if the parties are free to determine any setting inside the contract, the contractual effect...and the conditions of enforceability are already established at law, and linked to the concreteness of the object as *haqq* ('truth', 'right').

"In this way, the enforceability of the contract necessarily requires a constant reference to something existent and certain, either as a specific thing...or in the ('*ayn*)...or in the *dhimma* (...responsibility) of the debtor...The attention always falls on the object..."²⁴⁰ Id. At 41-42. It is not a question of an "exchange of promises or obligations..., but the exchange of properties as established at Law." Id. at 42.

²⁴¹ That is, assessment of the (Islamic) lawfulness of financial transactions depends, in the first instance, on determining which parts of that law are applicable to them. In the first instance, there is a tendency to apply the law of contracts of sale, but that is not unproblematic. According to Zahraa and Mahmor, "[t]he meaning of *bay'* (sale) in the usage of the Arabic language is the exchange of *māl* (property) for *māl* (property)." Definition and Scope of the Islamic Concept of Sale of Goods," by Mahdi Zahraa and Shafaai M. Mahmor, *Arab Law Quarterly*, Volume 16, Number 3, 2001, 215-238, 216. <http://www.jstor.org/stable/3382> They note that "most classical scholars have reproduced the literal meaning of sale in their definition, whereby *bay'* is defined as the "exchange of *māl* for *māl* in a distinctive way". Id. at 216. However, they take note of the tensions implicit in such a definition. Depending upon what might otherwise be understood to be *māl*, reliance on the law of sales involving such property might entail inappropriate extension of that law to transactions which might be governed by law in a different manner.

For example, they take note of the great (though hardly universal) support for "the general concept of *mal*/includ[ing] corporeal, usufruct and special rights" and remark that "application of the law of sale to it" so understood would, for example, result in an extension of it to "the contract of hire and *Sarf* (money exchange)" which was "not intention of the classical scholars." "Definition and Scope of the Islamic Concept of Sale of Goods," by Mahdi Zahraa and Shafaai M. Mahmor, *Arab Law Quarterly*, Volume 16, Number 3, 2001, 215-238, 216 and 220-221. <http://www.jstor.org/stable/3382> Id. "[T]he principal difference between them is that, whereas the contract of hire is concerned with the usufruct of a particular property that the hirer is entitled to enjoy for a limited period of time, the contract of sale denotes a total and permanent transfer of ownership of the property to the purchaser." Id. note 27.

²⁴² *An Introduction to Islamic Finance: Theory and Practice, Second Edition* by Zamir Iqbal and Abbas Mirakhor, John Wiley & Sons (Asia) Pte. Ltd., 2011, 35-36.

²⁴³ "Principles of Islamic Contract Law," by Noor Mohammed, *Journal of Law and Religion*, Volume 6, Number 1, 1988, pp. 115-130, 116 (citing Al-Quran, SV.1.).

²⁴⁴ Id.

²⁴⁵ *The Transformation of Islamic Law in Global Financial Markets*, by Jonathan Ercanbrack, Cambridge University Press, 2015, p. 51.

²⁴⁶ *Islamic Law and Finance, Religion, Risk, and Return*, by Frank E. Vogel and Samuel L. Hayes III, Kluwer Law International, 1998, p. 68.

²⁴⁷ *Id.* at 69.

²⁴⁸ *Id.* at 60.

²⁴⁹ *An Introduction to Islamic Finance: Theory and Practice, Second Edition* by Zamir Iqbal and Abbas Mirakhor, John Wiley & Sons (Asia) Pte. Ltd., 2011, 35-36. The assertion that a general theory of contracts was formulated appears to be contested. See the discussion below at footnote 261.

²⁵⁰ *Id.* at 39.

²⁵¹ *Id.* at 77-78.

²⁵² *Id.* at 78.

²⁵³ *Id.* at 77.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ The third kind of contract is the "social welfare contract." *Id.* at 77.

²⁵⁷ "The Philosophy of the Islamic Law of Contract, A Comparative Study of Contractual Justice," by Hideyuki Shimizu, The Institute of Middle Eastern Studies, International University of Japans, IMES Working Papers Series No. 15, p.55. http://nirr.lib.niigata-u.ac.jp/bitstream/10623/38149/1/2012_1_iuj1_9.pdf

²⁵⁸ *Id.* at 54 (citing Coulson, p. 12).

²⁵⁹ *A History of Islamic Law*, by N.J. Coulson, Edinburgh at the University Press, 1964, p. 47. Those individual types of contracts are what were referred to above as "nominate contracts."

²⁶⁰ *An Introduction to Islamic Law*, by Joseph Schacht, Oxford University Press, 1964, pp 152-153. A commutative contract is one "where each party will receive an equivalent or mutual benefit and obligation." Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. <http://thelawdictionary.org/commutative-contract/> A synallagmatic contract is '[a] bilateral or reciprocal contract, in which the parties expressly enter into mutual engagements, each binding himself to the other.' Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. <http://thelawdictionary.org/synallagmatic-contract/>

²⁶¹ "Definition and Formation of Contract under Islamic and Arab Laws," by Nabil Saleh, *Arab Law Quarterly*, Volume 5, Number 2, May, 1990, 101-116, 100. <http://www.jstor.org/stable/3381366> According to Johanssen, "[t]he principle of the just exchange is strictly upheld by the law of transactions. The jurists try to prevent speculation and unjustified enrichment by various means. It has been said about the Roman law that it does not have a general concept of contract, but rather a list of contracts, and that it does not regard an informal agreement as a contract if it does not satisfy the requirements of one of the listed contracts. This holds true for the Hanafite law...Hanafite and Islamic law do not acknowledge the liberty of contract, they therefore have no general concept of contract. The agreement of individual volitions does not determine form and content of the contract. These are defined by the law and by common usage." *Contingency in Sacred Law, Legal and Ethical Norms in the Muslim Fiqh*, by Baber Johanssen (Studies in Islamic Society, (Ed.) by Ruud Peters and Bernard Weiss, Volume 7), Brill, 1999, p. 201.

Hassan argues along similar lines,

- "1. The classical jurists, though well capable of abstraction and generalization, did not attempt an explicit definition of contract, nor an explicit formulation of a theory of contract.
2. The scheme of nominate contracts in Islamic law drew upon pre-Islamic customs and practice, rigorously scrutinized and amended to conform to Islamic norms of what is lawful and what is prohibited.
3. Mechanisms were developed to validate and legally enable agreements that fell outside the scope of the nominate contracts.
4. Nevertheless, the Law (of course) did not expressly recognize unlimited freedom of contract, since violation of the Islamic prohibitions could never be valid. And:
5. The centre and focus of a contractual agreement was the object of obligation, the subject matter of the particular agreement, the action to be performed, not obligation itself."

"Contracts in Islamic Law: The Principles of Commutative Justice and Liberality," by Hussein Hassan, *Journal of Islamic Studies* Volume 3, Number 3, 2002, 257-297, 261.

²⁶² "Definition and Formation of Contract under Islamic and Arab Laws," by Nabil Saleh Source: *Arab Law Quarterly*, Volume 5, Number 2, May, 1990, 101-116, 101. <http://www.jstor.org/stable/3381366>

²⁶³ *Id.*

²⁶⁴ "Contracts in Islamic Law: The Principles of Commutative Justice and Liberality," by Hussein Hassan, *Journal of Islamic Studies*, Volume 13, Number 3, 257-297, 285-286. <http://jis.oxfordjournals.org/content/13/3/257.full.pdf>

²⁶⁵ *Id.* at 260-261.

²⁶⁶ "Definition and Formation of Contract under Islamic and Arab Laws," by Nabil Saleh Source: *Arab Law Quarterly*, Volume 5, Number 2, May, 1990, pp. 101-116, 101. <http://www.jstor.org/stable/3381366>

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 101-102. "That was the theory of the system which strongly appealed to scholars and learned jurists who overlooked the concept of obligation arising out of contract, and focused their attention, instead, on its immediate implementation." *Id.* at 102.

²⁶⁹ "The Regulation of Risk in Islamic Law, the Common Law, and Federal Regulatory Law," by Mohammad Fadel, *Proceedings of the Fourth Harvard University Forum on Islamic Finance: The Task Ahead*, Cambridge, Massachusetts, Center for Middle Eastern Studies, Harvard University, 2000, pp. 81-88.

²⁷⁰ *Id.* at 84. Thus, "Islamic law's requirement that property exchange hands, when applied rigorously, renders invalid numerous contracts deemed valid at common law." *Id.* The common law is that "body of law and juristic theory which was originated, developed, and formulated and is administered in England, and has obtained among most of the states and peoples of Anglo-Saxon stock." "What is COMMON Law?" The Law Dictionary, <http://thelawdictionary.org/common-law/>

Note that according to Coulson, "[a] contract in Islamic law is simply a legally recognized undertaking. The Arabic word for this is *'aqd* (pl. *'uqud*), with the literal meaning of 'tie' or 'bond'. This is in no sense the precise equivalent of the technical term 'contract' in Western jurisprudence, which involved, certainly at Common Law, the two basic essentials of agreement and consideration. In Islamic law an *'aqd* does not necessarily involve an agreement because the term is used to describe a unilateral juridical act which is binding and effective without the consent of any other party – for example, the repudiation of a marriage by the husband... Nor does an *'aqd* necessarily involve consideration," for example, "a gratuitous loan, a gift or a bequest". Accordingly, while *'uqud* may be translated as 'contracts', because the term normally refers to legal transactions which are concluded by an offer from one party and acceptance from the other, it must be emphasized that an *'aqd* or 'contract' in Islamic jurisprudence means no more and no less than a legal undertaking, the essentials of which are very different from the 'binding promise' which constitutes a contract in Western law." *Commercial Law in the Gulf States, The Islamic Legal Tradition*, by Noel J. Coulson, Graham and Trotman, 1984, p. 18.

²⁷¹ "The Regulation of Risk in Islamic Law, the Common Law, and Federal Regulatory Law," by Mohammad Fadel, *Proceedings of the Fourth Harvard University Forum on Islamic Finance: Islamic Finance: The Task Ahead*, Cambridge, Massachusetts, Center for Middle Eastern Studies, Harvard University, 2000 (citing *Restatement (Second) of Contracts*, § 71), pp.81-88, 84. Thus, "Islamic law's requirement that property exchange hands, when applied rigorously, renders invalid numerous contracts deemed valid at common law." *Id.*

²⁷² "The Regulation of Risk in Islamic Law, the Common Law, and Federal Regulatory Law," by Mohammad Fadel, *Proceedings of the Fourth Harvard University Forum on Islamic Finance: Islamic Finance: The Task Ahead*, Cambridge, Massachusetts, Center for Middle Eastern Studies, Harvard University, 2000 (offering a contrast with the *Restatement (Second) of Contracts*, § 71), pp. 81-88, 84.

http://www.ifpprogram.com/login/view_pdf/?file=The%20Regulation%20of%20Risk%20in%20Islamic%20Law,%20the%20Common%20Law,%20and%20Federal%20Regulatory%20Law.pdf&type=Project_Publication

²⁷³ *Id.*

²⁷⁴ *Sales and Contracts in Early Islamic Commercial Law*, by Abudllah Alwi Haji Hassan, The Other Press, Kuala Lumpur, 2007, p. 31. *Dominium* is "[s]overeignty; control]." Oxford Dictionaries

http://www.oxforddictionaries.com/us/definition/american_english/dominion *Statu liber* in Roman law is referred to as "[o]ne who is made free by will under a condition; one who has his liberty fixed and appointed at a certain time or on a certain condition." Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. <http://thelawdictionary.org/statu-liber/>

²⁷⁵ *Sales and Contracts in Early Islamic Commercial Law*, by Abudllah Alwi Haji Hassan, The Other Press, Kuala Lumpur, 2007, p. 31. Hassan adds that "[t]he transactions of goods which are not known and are of undetermined quantity (*bay' al-juzaf*) was not uncommon in pre-Islamic times" *Id.* at 69.

²⁷⁶ *Sales and Contracts in Early Islamic Commercial Law*, by Abudllah Alwi Haji Hassan, The Other Press, Kuala Lumpur, 2007, p. 66.

²⁷⁷ "At the heart of early *fiqh* doctrine stood the contract of sale wherein individual persons exchanged concrete and defined objects; only clearly defined objects could legally be bought or sold... With the contract of sale at its core, the *fiqh* tradition was thus at the outset hostile to contracts explicitly exchanging potentialities be they of use-value or produce, that could not be precisely evaluated at the time of the contract." *Law, Anthropology, and the Constitution of the Social: Making Persons and Things*, Edited by Alain Pottage, Martha Mundy, Cambridge University Press, 2004, pp.148-149

²⁷⁸ For commercial transactions under the rubric of *bay'* "according to original legal procedure, an element of contract or agreement... is assumed when the purchaser strikes his hand on that of the seller to signify acceptance..., of the offer, which is made usually in the same session. Sale is a bilateral transaction. The most ordinary foundation for an obligation occurring is the contract (*'aqd*). The conclusion of the contract is basically informal; only the literal meanings of technical terms, such as *saqah*, striking hand upon hand, for concluding a sale or contract, reflect former symbolic acts." *Sales and Contracts in Early Islamic Commercial Law*, by Abudllah Alwi Haji Hassan, The Other Press, Kuala Lumpur, 2007, p. xv. Note, one of the authors suggests that "[i]n Arabic we have the verbal noun *bay'ah* 'a striking together of hands to two contracting parties in token of the ratification of a sale'. *Contributions Toward a History of Arabico-Gothic Culture, Volume 1*, by Leo Wiener, The Neal Publishing Company, 1917. According to another source, "[b]ay', the Arabic word used for business transactions, comes from the Arabic word for an outstretched arm (*al-baa'u*), since each of the participants in the sale extends his hand to give and take." <http://www.bakkah.net/articles/fiqh-business-transactions.htm> Note also, that according to another source "[t]he triliteral root *bā yā 'ayn* (ب ي ع) occurs 15 times in the Quran" ("in four derived forms") eight of which appear to have been associated with trade. Qur'an Dictionary. <http://corpus.quran.com/qurandictionary.jsp?q=byE>

²⁷⁹ "Definition and Formation of Contract under Islamic and Arab Laws," by Nabil Saleh, *Arab Law Quarterly*, Volume 5, Number 2, May, 1990, 101-116, 102 <http://www.jstor.org/stable/3381366>

²⁸⁰ *Id.*

²⁸¹ "According to the norms which govern the contract of sale, a just exchange can only occur between owners of property." *Contingency in Sacred Law, Legal and Ethical Norms in the Muslim Fiqh*, by Baber Johansen (Studies in Islamic Society, (Ed.) by Ruud Peters and Bernard Weiss, Volume 7), Brill., 1999, p. 202. "Hanafite law has established two forms of equality among the subjects of an Islamic government. One is the equality of proprietors which governs the law of transactions. The other is the equality of the members of the political community..." With respect to "the 'private claims of men',...the prototype of the legal person is an owner of property. The relationships between these proprietors are supposed to be governed by the principle of just exchange – even if the realization of this principle is sometimes extremely limited." *Id.* at 208-209

²⁸² "Definition and Scope of the Islamic Concept of Sale of Goods," by Mahdi Zahraa and Shafaa M. Mahmood, *Arab Law Quarterly*, Volume 16, Number. 3, 2001, 215-238, 216. <http://www.jstor.org/stable/3382171>

²⁸³ *Id.* at 216, note 7. That being said, their characterization of *mal* appears to differ little, if at all, from that of Wohidul Islam, whose analysis is canvassed in the main text and who readily identifies "property" with *mal*.

²⁸⁴ *Id.* at 217-218.

²⁸⁵ "Al-Mal: The Concept of Property in Islamic Legal Thought," by Muhammad Wohidul Islam, *Arab Law Quarterly*, Volume 14, Number 4, 1999, pp. 361-368, 361.

²⁸⁶ *Id.* "The *Lisān al-Arab* (*ar*) (لسان العرب)" was completed by Ibn Manzur in 1290. Occupying 20 printed book volumes (in the most frequently cited edition), it is the most well-known dictionary of the Arabic language, as well as one of the most comprehensive." https://en.wikipedia.org/wiki/Lisan_al-Arab#Lis.C4.81n_al-CA.BFArab

Fairuzabadi, also known as El-Firuz Abadi or al-Fīrūzābādī (1329–1414) was an Arabic lexicographer and was the compiler of a comprehensive Arabic dictionary. The dictionary, called *al-Qamous*, was one of the most widely used in Arabic for nearly five centuries." <https://en.wikipedia.org/wiki/Fairuzabadi>

²⁸⁷ "Al-Mal: The Concept of Property in Islamic Legal Thought," by Muhammad Wohidul Islam, *Arab Law Quarterly*, Volume 14, Number 4, 1999, pp. 361-368, 362.

²⁸⁸ Id. Also, the passages seem to be largely concerned with those who already have property, not with how they legitimately came to have it in the first instance though there are warning/prescriptions/etc. with regard to how others might legitimately gain property from those who already have it.

²⁸⁹ Id. at 366. There are four Sunni schools of legal thought. (See footnote 385 for a description of others.) Very briefly, here is one characterization of the history of their origins:

Early in the eighth century "[p]ious scholars," who had concluded that "the practices of the Umayyad courts had failed properly to implement the spirit of the original laws of Islam propounded in the Qur'an... began to give voice to their ideas of standards of conduct which would represent the fulfillment of the true Islamic religious ethic. Grouped together for this purpose in loose fraternities they formed, in the last decades of the Umayyad rule, the early schools of law." These "first scholar-jurists were men of religion rather than men of law, concerned, almost exclusively, with the elaboration of the system of ritual practices." It was only subsequently that they developed an "interest in the field of legal relationships." *A History of Islamic Law*, by N.J. Coulson, Edinburgh University Press, 1964, p. 37. While there were "many schools of law which flourished in the different provinces of Islam at this time those of Medina and Kufa were to prove the most important and enduring." Id. at 38. While those schools were originally grounded in "[n]otion of local allegiance," this was ultimately "superseded by the personal authority of the authors of the first legal treatises. The Medinan school became the Maliki school, and the school of Kufa, the Hanafi school." Id. at 51. Subsequently, "two more schools formed under the disciples of Shafi'i and Hanbal." "Islamic Law: The Impact of Joseph Schacht," by David F. Forte, *Loyola of Los Angeles International and Comparative Law Review*, Volume 1, 1978, 1-36, 8.

<http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1014&context=ilr> Note, the first successors of Muhammad, who died in 632 A.D., were the caliphs of Medina – Abu Bakr, then 'Umar, followed by 'Uthman and then Ali, whose rule was supplanted by that of the Umayyads in 661 A.D. who were overthrown by the 'Abbasids in 750 A.D.

For further details on this history see, for example, "Law and Justice", by Joseph Schacht in *Cambridge Encyclopedia of Islam*, vol. II, pt. VIII, chapter. 4. <https://legacy.fordham.edu/halsall/med/schacht.asp>

²⁹⁰ "Al-Mal: The Concept of Property in Islamic Legal Thought," by Muhammad Wohidul Islam, *Arab Law Quarterly*, Volume 14, Number, 1999, 361-368, 366.

²⁹¹ "Manfa'ah," <http://www.investment-and-finance.net/islamic-finance/m/manfaah.html>

²⁹² We address further below the matter of "property" as it relates to "usufruct" below in the context of a discussion of *ijarah* (operating lease) transactions. See infra, pp. 76-79.

²⁹³ *Islamic Law and Finance: Religion, Risk, and Return*, by Frank E. Vogel and Samuel L. Hayes, III, Kluwer Law International, 1998, p. 94.

²⁹⁴ Id. at 144.

²⁹⁵ Id. at 176, note 90.

²⁹⁶ Id. The Organisation of Islamic Cooperation (OIC) describes itself as being the "formerly Organization of the Islamic Conference)," as "the second largest inter-governmental organization after the United Nations which has membership of 57 states spread over four continents," and as the "collective voice of the Muslim world and ensuring to safeguard and protect the interests of the Muslim world in the spirit of promoting international peace and harmony among various people of the world." "History," Organisation of Islamic Cooperation. http://www.oic-pci.org/oicv2/page/?p_id=52&p_ref=26&lan=en

²⁹⁷ "Shari'a and the Protection of Intellectual Property – The Example of Egypt," by Heba A. Raslan, *IDEA – The Intellectual Property Law Review*, Volume 47, Number.4, 497-555, 502. http://ipmall.info/hosted_resources/IDEA/idea-vol47-no4-raslan.pdf

²⁹⁸ Id.

²⁹⁹ Id.

³⁰⁰ Id.

³⁰¹ *Islamic Law and Finance: Religion, Risk, and Return*, by Frank E. Vogel and Samuel L. Hayes, III, Kluwer Law International, 1998, p. 94. Note, though, by contrast, Zahmaa and Mahmood contend that "[i]n Islamic legal terminology, the term *dayn* is used to denote debt. Although *dayn* in some sense is defined as *mal* (property) that someone owes to another it is sometimes used in a much wider sense as a reference to an abstract or religious liability that is established against a person." "Definition and Scope of the Islamic Concept of Sale of Goods," by Mahdi Zahraa and Shafaai M. Mahmood, *Arab Law Quarterly*, Volume 16, Number 3, 2001, 215-238, 217. They add: "Taking into account that the key term in defining the term *dayn* is *mal*, and also taking into account the wide meaning of *mal*..., it is clear that debt may be transacted in the form of money as well as non-money property." Id. at 234.

Cattelan offers a more detailed discussion of *ayn* (and *dayn*). For example, he argues that "[t]he first literal meaning of 'ayn (pl. *a'yān*) is 'eye', the organ of sight; but the term also describes the functional result of the ability to see, the object that is seen, the concrete thing *hic-et-nunc* (here-and-now): thus, it embodies the ideas of individuality, identity, specificity, present existence. Accordingly, in Islamic law 'ayn can be defined as the *property-hic-et-nunc*, the specific tangible thing considered as unique object and not as a member of a category ('this BMW car, in front of the building' and not 'any BMW car'): "'ayn . . . naturally [connotes] the individualised object on which the ownership is exercised; and, in the field of legal obligations, it corresponds to what we name '*corps certain*' [specific thing]". At the same time, the term 'ayn can be used to distinguish the substance (*raqaba*) from the benefits (*manāfi*) of the thing, or to specify the money as 'cash', 'money available *hic-et-nunc*' (money individualised thanks to the transfer of possession)." "Property (*Māl*) and Credit Relations in Islamic Law: An Explanation of *Dayn* and the Function of Legal Personality (*Dhimma*)," by Valentino Cattelan, *Arab Law Quarterly*, Volume 27, 2013, 189-202, 191-192. <http://ssrn.com/abstract=2533021>

³⁰² *Islamic Law and Finance: Religion, Risk, and Return*, by Frank E. Vogel and Samuel L. Hayes, III, Kluwer Law International, 1998, p. 95.

³⁰³ Vogel and Hayes state that "[p]roperty owned as *dayn* is usually a fungible, such as gold or wheat," though "[s]ometimes non-fungible manufactured goods defined by specification are treated as *dayn*." Id. at 94. They add that "if one buys property generically

or abstractly, such as so many bushels of a particular quality of wheat, one is said to have title to that wheat as a described thing in the *dhimma* of the seller.” Id. at 95. However, they take note of the work of Robert Brunschvig which suggests that “the distinction between *‘ayn* and *dayn* may be more accurately not whether goods are generic or specific, but between the object which for now is present and the subject which endures.” Id. at 95, note 49 (citing “Corps certaine et chose to genre dans l’obligation en droit musulman,” in *Études d’Islamologie*, Vol. 2 (Paris: G.-P. Maisonneuve et Larose, 1976), 303-322, 322”). This, they suggest “shows the law’s emphasis on an existing, present substratum for contractual rights in both cases.” Id. at 95, note 49 (underlining added)

³⁰³ *Risk Management in Islamic Finance*, by Muhammad al-Bashir and Muhammad al-Amine, Brill, Leiden and Boston, 2008, p. 68. http://www.iefpedia.com/english/wp-content/uploads/2013/06/Muhammad_Al-Bashir_Muhammad_Al-Amine_Risk_ManagBookos.org_1.pdf The possible sources, some more squarely on the specific point than others, appear to be as follows

³⁰⁴ *Islamic Law and Finance: Religion, Risk, and Return*, by Frank E. Vogel and Samuel L. Hayes, III, Kluwer Law International, 1998, p. 95.

³⁰⁵ “Property (*Māl*) and Credit Relations in Islamic Law: An Explanation of *Dayn* and the Function of Legal Personality (*Dhimma*),” by Valentino Cattelan, *Arab Law Quarterly*, Volume 27, 2013, 189-202, 195. <http://ssrn.com/abstract=2533021>

³⁰⁶ Id. at 200. Correspondingly, there is “ [n]o trace exists of what has been called: *res incorporales*”. (Definition of *res incorporales*: “Intangible property; things imperceptible by the tactile and visual senses.” *Guide to Latin in International Law*, by Aaron X. Fellmeth and Maurice Horowitz, Oxford University Press, 2009.

<http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1829>)

³⁰⁷ “Property (*Māl*) and Credit Relations in Islamic Law: An Explanation of *Dayn* and the Function of Legal Personality (*Dhimma*),” by Valentino Cattelan, *Arab Law Quarterly*, Volume 27, 2013, 189-202, 193. <http://ssrn.com/abstract=2533021> “More precisely, the notion of *dayn* intrinsically embodies an idea of temporality as a credit relation (an exchange postponed in the future for its full realization) where the debt/credit is not primarily conceived as a burden for the subject, but as a property (intangible at present) *already owed* by the creditor, but *not yet received* in concrete form (and for this reason, *still* in the *dhimma* of the debtor).” Id.

³⁰⁸ *Islamic Law and Finance: Religion, Risk, and Return*, by Frank E. Vogel and Samuel L. Hayes, III, Kluwer Law International, 1998, p. 115.

³⁰⁹ Id. at 116. The first case would, for example, involve the exchange of a promise to deliver an object for a promise to deliver a sum of money. The second could concern the sale of an obligation to deliver a particular object.

While Zahra and Mahmor describe *dayn* for *dayn* transactions where performance is delayed is “categorically prohibited by all schools of laws based on a Prophetic *hadith* which prohibits this sale,” they (and others) take note of those who view the *hadith* as a “weak one” “Definition and Scope of the Islamic Concept of Sale of Goods,” by Mahdi Zahraa and Shafaai M. Mahmor, *Arab Law Quarterly*, Volume 16, Number 3, 2001, 215-238, 225, note 65. Moreover, they briefly characterize disparate views as to the permissibility of instant sale of *dayn*.

³¹⁰ See, for example, the brief discussion related to trade in Appendix B.

³¹¹ For one attempt to assess the extent and manner of use in the Qur’an of words “which are primarily used to express some commercial relation,” see “The Commercial-Theological Terms in the Koran,” by Charles C. Torrey, Dissertation for the degree of Doctor of Philosophy at the University of Strasbourg, E.J. Brill, May 7, 1892.

http://archive.org/stream/commercialtheolo00torr/commercialtheolo00torr_djvu.txt In this connection see the discussion in APPENDIX C.

³¹² This characterization must be made with some care. What seems to be widely held view is that in the years extending from the pre-Islamic era there was an extensive international trade located in the Arabian Peninsula. Hasan describes it in some detail remarking for example, that “Mekkah was a busy and prosperous city...almost monopolizing the entrepôt trade between the Indian Ocean and the Mediterranean.” *Sales and Contracts in Early Islamic Commercial Law* by Abdullah Alwi Haji Hasan, Islamic Research Institute, Islamabad, Pakistan, 2007, p. 2. See id. more generally at pp. 1-9. Clearly, while in those circumstances the ultimate trade involved face to face immediate transactions those who had a role effecting the trade may have been removed in time, space, and relationship to the parties who actually engaged in the transaction.

Nonetheless, we take note of – though we do not have the knowledge or expertise to critically evaluate – a sharply contrasting view. See, for example, “Studies on Muhammad and the Rise of Islam, A Critical Survey,” by Ibn Warraq Chapter 1 in *The Quest for the Historical Muhammad*, Edited and Translated by Ibn Warraq, Prometheus Books, 2000 (arguing, for example, that “it is simply not true that Mecca, that is Mecca in the location that we know today, was situated at the crossroads of major Arabian trade routes. Neither was it a natural stopping-place on the so-called incense route from south Arabia to Syria” and more generally that “Mecca does not make sense as a trading center, for spices, incense, or any other conceivable commodity: that prior to the rise of Islam it was not a place for pilgrimage”), p.101.

³¹³ For example, contra the characterization offered by Peters in the previous footnote, consider the following description of Mecca in 610 AD: It “was set amidst a barren rocky valley, where ‘no agriculture at all was possible’. The economy of the people was therefore predominantly dependent on stockbreeding and commerce. As the town stood at the crossroads of routes stretching from the Yemen to Syria, and from Abyssinia to Iraq, Mecca became the most important commercial centre in the region...It was the centre of trade where goods from the north, south and various parts of the Peninsula were brought to be traded and then dispatched to all corners of the Arab world...

“The growth of large markets and flourish of commercial activities witnessed the need for some form of financial organization to facilitate the business activities of traders and merchants. Historically, and before the advent of modern banking, landlords and wealthy merchants assumed the role of financier or moneylender. These were people who had sufficient surplus cash, precious metals, or whatever the monetary instruments might be, to advance credit and finance for traders and merchants. These were the people who assumed the role of a financial institution, granting credits for business purposes. Prophet Muhammad (SAW) himself is said to have accepted some form of credit from his wife Khadijah (RA), a wealthy merchant in Mecca, as capital for his business ventures in both Syria and the Yemen.

"The importance of credit and finance was therefore pivotal during the era of Prophet Muhammad (SAW). Indeed, the success of a merchant, trader, business or even a government was said to be very much dependent upon the availability of credit and finance. Therefore, the expanding growth in business and trade, as a consequence of widely available credit and finance, witnessed a surge in prosperity in Mecca. However, at that time, the practice of providing finance and accepting credit according to the ancient traditions was modified along the lines of the cardinal principles of Islamic law." "Guarantees in Early Islamic Financial System," by Suhaimi Ab Rahman, *Arab Law Quarterly*, Volume 29, Issue 3, 274 – 284, 275-277.

³¹⁴ "Forward Sales and Manufacturing Contracts: Salam and Istisna," by Mufti Taqi Usani.

http://www.albalagh.net/Islamic_economics/salam_istisna.shtml

³¹⁵ "The Hadith's ban on forward contracts," April 25, 2012. <https://moneyijihad.wordpress.com/2012/04/25/the-hadith-prohibit-forward-contracts/>

³¹⁶ "The following comes from one of the most important and widely accepted Hadith among Muslims, the Sahih Al-Bukhari, Book 34 (The Book of Sales [Bargains]):

"Chap. 33. Al-Gharar (the sale of what is not present) and Habal-il-Habala (i.e. the sale of what is in the womb of an animal.) 1022. Narrated 'Abdullah bin'Umar: Allah's Messenger forbade the sale called 'Habal-il-Habala' which was a kind of sale practiced in the Pre-Islamic Period of Ignorance. One would pay the price of a she-camel which was not born yet and would be borne by the immediate offspring of an extant she-camel.

Similar language appears in Book 10 (The Book of Transactions), Chap. 8, of the Sahih Muslim, another widely agreed upon Hadith, which states that "it is invalid to sell the commodity before taking possession of it" in reference to grain." "The Hadith's ban on forward contracts," April 25, 2012. <https://moneyijihad.wordpress.com/2012/04/25/the-hadith-prohibit-forward-contracts/>

"Chapter 8: IT IS INVALID TO SELL THE COMMODITY BEFORE TAKING POSSESSION OF IT

Book 010, Number 3640:

Ibn Abbas (Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying: He who buys foodgrain should not sell it until he has taken possession of it.

Book 010, Number 3641:

A hadith like this has been narrated through the same chain of transmitters.

Book 010, Number 3642:

Ibn Abbas (Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying: He who buys foodgrain should not sell it until he has taken possession of it. Ibn Abbas (Allah be pleased with them) said: I regard everything like food (so far as this principle is concerned).

Book 010, Number 3643:

Ibn Abbas (Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying: He who buys foodgrain should not sell it, until he has weighed it (and then taken possession of it). I (Tawus) said to Ibn Abbas (Allah be pleased with them): Why is it so? Thereupon he said: Don't you see that they (the people) sell foodgrains against gold for the stipulated time. Abu Kuraib did not make any mention of the stipulated time.

Book 010, Number 3644:

Ibn 'Umar (Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying: He who buys foodgrain should not sell it until he has taken full possession of it.

Book 010, Number 3645:

Ibn Umar (Allah be pleased with them) reported: We used to buy foodgrains during the lifetime of Allah's Messenger (may peace be upon him). He (the Holy Prophet) would then send to us one who commanded us to take them (the foodgrains) to a place other than the one where we had bought them before we sold it.

Book 010, Number 3646:

Ibn Umar (Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying: He who buys foodgrain should not sell that before taking possession of it. He (the narrator) said: We used to buy foodgrain from the caravans in bulk, but Allah's Messenger (may peace be upon him) forbade us to re-sell that until we had shifted it to some other place.

Book 010, Number 3647:

Ibn 'Umar (Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying: He who bought foodgrain should not sell it until he had taken full possession of it (after measuring it).

Book 010, Number 3648:

Ibn 'Umar (Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying: He who bought foodgrain should not sell it until he had taken possession of it.

Book 010, Number 3649:

Ibn 'Umar (Allah be pleased with them) reported that they were beaten during the lifetime of Allah's Messenger (may peace be upon him) if they had bought foodgrains in bulk and then sold them in the spot without shifting them (to some other place).

Book 010, Number 3650:

Salim b. 'Abdullah (Allah be pleased with them) reported his father having said this: I saw people being beaten during the lifetime of Allah's Messenger (may peace be upon him) in case they bought the foodgrain in bulk, and then sold them at that spot before taking

it to their places. This hadith is narrated on the authority of 'Ubaidullah b. Abdullah b. 'Umar through another chain of transmitters (and the words are):" His father (Ibn 'Umar) used to buy foodgrains in bulk and then carried them to his people."

Book 010, Number 3651:

Abu Huraira (Allah be pleased with him) reported Allah's Messenger (may peace be upon him) as saying: He who bought foodgrain should not sell it until he had measured it. In the narration of Abu Bakr there the word is Ibtā' instead of Ishtara.

Book 010, Number 3652:

Abu Huraira (Allah be please with him) is reported to have said to Marwan: Have you made lawful the transactions involving interest? Thereupon Marwan said: I have not done that. Thereupon Abu Huraira (may peace be upon him) said: You have made lawful the transactions with the help of documents only, whereas Allah's Messenger (may peace be upon him) forbade the transaction of foodgrains until full possession is taken of them. Marwan then addressed the people and forbade them to enter into such transactions (as are done with the help of documents). Sulaiman said: I saw the sentinels snatching (these documents) from the people.

Book 010, Number 3653:

Jabir b. Abdullah (Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying: When you purchase foodgrains, do not sell them until you have taken possession of them." "The Book of Transactions (Kitab Al-Buyu'), Translation of Sahih Muslim, Book 10" <http://www.iupui.edu/~msaiupui/010.smt.html>

³¹⁷ "The Book of Transactions (Kitab Al-Buyu'), Translation of Sahih Muslim, Book 10, Chapter 8: IT IS INVALID TO SELL THE COMMODITY BEFORE TAKING POSSESSION OF IT," Number 3640. <http://www.iupui.edu/~msaiupui/010.smt.html>

³¹⁸ Id.

³¹⁹ Id.

³²⁰ Id.

³²¹ "Salam Contract in Islamic Law: A Survey," by Obaid Saif Al Zaaabi, *Review of Islamic Economics*, Volume 14, Number. 2, 2010 (underlining added), 91-122, 94. <http://www.iefpedia.com/english/wp-content/uploads/2011/11/RIE-2010-14-2-AL-ZAABI-SALAM-CONTRACT-IN-ISLAMIC-LAW.pdf> "The salam contract is among the kinds of sale that is exempted from the prohibition on selling something that is non-existent or that the seller does not hold in his position use of the word *salam* (or *sala*) seals the contract as the post-dated sale of something specified and characterized as owed (a debt) in exchange for another thing (the price) which is different from it in kind." Id. at 92-93.

³²² Id. at 94.

³²³ Id.

³²⁴ The full text of 2:282 reads in Arabic and in an English translation, as follows:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَى أَجَلٍ مُّسَمًّى
فَاكْتُبُوهُ وَلْيَكْتُب بَيْنَكُمْ كَاتِبٌ بِالْعَدْلِ وَلَا يَأْبَ كَاتِبٌ أَنْ
يَكْتُبَ كَمَا عَلَّمَهُ اللَّهُ فَلْيَكْتُبْ وَلْيُمْلِلِ الَّذِي عَلَيْهِ الْحَقُّ
وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا يَبْخَسَ مِنْهُ شَيْئًا فَإِنْ كَانَ الَّذِي عَلَيْهِ الْحَقُّ
سَفِيهًا أَوْ ضَعِيفًا أَوْ لَا يَسْطِيعُ أَنْ يُمِلَّ هُوَ فَلْيُمْلِلْ وَلِيُّهُ بِالْعَدْلِ
وَأَسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ فَإِنْ لَمْ يَكُونَا رَجُلَيْنِ
فَرَجُلٌ وَامْرَأَتَانِ مِمَّنْ رَضَوْنَ مِنَ الشَّهَادَةِ أَنْ تَفِضَلَ إِحْدَاهُمَا
فَتُذَكَّرَ إِحْدَاهُمَا الْأُخْرَىٰ وَلَا يَأْبَ الشَّهَادَةُ إِذَا مَا دُعُوا وَلَا
تَسْمَعُوا أَنْ تَكْتُبُوهُ صَغِيرًا أَوْ كَبِيرًا إِلَىٰ أَجَلٍ ذَٰلِكُمْ أَقْسَطُ
عِنْدَ اللَّهِ وَأَقْوَمُ لِلشَّهَادَةِ وَأَدْنَىٰ أَلَّا تَرْتَابُوا إِلَّا أَنْ تَكُونَ تِجَارَةً
حَاضِرَةً تُدِيرُونَهَا بَيْنَكُمْ فَلَيْسَ عَلَيْكُمْ جُنَاحٌ أَلَّا تَكْتُبُوهَا
وَأَشْهِدُوا إِذَا تَبَايَعْتُمْ وَلَا يُضَارَ كَاتِبٌ وَلَا شَهِيدٌ وَإِنْ
تَفَعَّلُوا فَإِنَّهُ فُسُوقٌ بِكُمْ وَاتَّقُوا اللَّهَ وَيُعَلِّمُكُمُ اللَّهُ
وَاللَّهُ يَكُلِّ شَيْءٌ عَلَيْهِ

"O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice. Let no scribe refuse to write as Allah has taught him. So let him write and let the one who has the obligation dictate. And let him fear Allah, his Lord, and not leave anything out of it. But if the one who has the obligation is of limited understanding or weak or unable to dictate himself, then let his guardian dictate in justice. And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses - so that if one of the women errs, then the other can remind her. And let not the witnesses refuse when they are called upon. And do not be [too] weary to write it, whether it is small or large, for its [specified] term. That is more just in the sight of Allah and stronger as evidence and

more likely to prevent doubt between you, except when it is an immediate transaction which you conduct among yourselves. For [then] there is no blame upon you if you do not write it. And take witnesses when you conclude a contract. Let no scribe be harmed or any witness. For if you do so, indeed, it is [grave] disobedience in you. And fear Allah. And Allah teaches you. And Allah is Knowing of all things.” <http://quran.com/2/282>

³²⁵ “Salam Contract in Islamic Law: A Survey,” by Obaid SaifAl Zaaabi, *Review of Islamic Economics*, Volume 14, Number. 2, 2010 (underlining added), 91-122, 95. <http://www.iefpedia.com/english/wp-content/uploads/2011/11/RIE-2010-14-2-AL-ZAABI-SALAM-CONTRACT-IN-ISLAMIC-LAW.pdf>

³²⁶ Id. at 94 (underlining added).

³²⁷ “Islamic Verdicts - Volume IV, The Book of Sales Transactions,”

<http://alfatihoun.edaama.org/Fatawas/English/Fatawas/IV4/4thirtytwoq.htm>

³²⁸ Narrated Ibn `Abbas, Sahih Bukhair – Book 35, Hadith, 14 (455). <http://quranx.com/hadith/bukhari/Book-35/Hadith-14/>

³²⁹ Narrated Muhammad bin Al-Mujalid, Sahih Bukhari – Book 35, Hadith 7 (456). <http://quranx.com/Hadith/bukhari/Book-35/Hadith-7/>

³³⁰ “Forward Sales and Manufacturing Contracts: Salam and Istisna,” by Mufti Taqi Usmani.

http://www.albalagh.net/Islamic_economics/salam_istisna.shtml

³³¹ That being said, we have not been able to ascertain what passage from the Qur`an might be referenced here.

³³² “Forward Sales and Manufacturing Contracts: Salam and Istisna,” by Mufti Taqi Usmani.

http://www.albalagh.net/Islamic_economics/salam_istisna.shtml

³³³ “Salam Contract in Islamic Law: A Survey,” by Obaid SaifAl Zaaabi, *Review of Islamic Economics*, Volume 14, Number. 2, 2010 (underlining added), 91-122, 98. <http://www.iefpedia.com/english/wp-content/uploads/2011/11/RIE-2010-14-2-AL-ZAABI-SALAM-CONTRACT-IN-ISLAMIC-LAW.pdf>

³³⁴ Note that Usmani stresses that because “[t]he permissibility of Salam was an exception to the general rule that prohibits the forward sales,” “it was subjected to some strict conditions.” “Forward Sales and Manufacturing Contracts: Salam and Istisna,” by Mufti Taqi Usmani. http://www.albalagh.net/Islamic_economics/salam_istisna.shtml He refers to six as ones which “[a]ll the Muslim jurists are unanimous” though he does not remark on the hadiths or other sources upon which they are based. The exceptions are that (1) “the buyer pays the price in full to the seller at the time of effecting the sale”; (2) “[s]alam can be effected in those commodities only whose quality and quantity can be specified exactly”; (3) “[s]alam cannot be effected on a particular commodity or on a product of a particular field or farm” and “every [other] commodity whose supply is not certain”; (4) “the quantity of the commodity be agreed upon in unequivocal terms”; (5) “[t]he exact date and place of delivery must be specified in the contract”; and (6) “[s]alam cannot be effected in respect of those things that must be delivered at the spot.” Id. Some, though not all of these seem to be based on the hadith just cited above. Usmani also mentions two of the other conditions as ones “which have been a point of difference between the different schools of the Islamic jurisprudence,” though again, without citation of any particular hadiths. Id.

³³⁵ *Risk Management in Islamic Finance*, by Muhammad al-Bashir and Muhammad al-Amine, Brill, Leiden and Boston, 2008, p.12.

[http://www.iefpedia.com/english/wp-content/uploads/2013/06/Muhammad_Al-Bashir_Muhammad_Al-](http://www.iefpedia.com/english/wp-content/uploads/2013/06/Muhammad_Al-Bashir_Muhammad_Al-Amine_Risk_ManagBookos.org_1.pdf)

[Amine_Risk_ManagBookos.org_1.pdf](http://www.iefpedia.com/english/wp-content/uploads/2013/06/Muhammad_Al-Bashir_Muhammad_Al-Amine_Risk_ManagBookos.org_1.pdf)

³³⁶ Id. at 68. The possible sources, some more squarely on the specific point than others, appear to be as follows:

“Hadith no: 2187

Narrated / Authority of: Hakim bin Hizam

I said: ‘O Messenger of Allah, a man is asking me to sell him something that I do not possess; Shall I sell it to him?’ He said: ‘Do not sell what is not with you.’

Hadith no: 2188

Narrated / Authority of: Amr bin Shuaib

from his father, that his grandfather said: ‘The Messenger of Allah (saw) said: ‘It is not permissible to sell something that is not with you, nor to profit from what you do not possess.’

Hadith no: 2189

Narrated / Authority of: Ata

that Attab bin Asid said: when the Messenger of Allah (saw) sent him to Makkah, he forbade him from profiting off of what he did not possess.

Hadith no: 2190

Narrated / Authority of: Uqbah bin Amir or Samurah bin Jundab

that the Messenger of Allah (saw) said: ‘Any man who sells to two men, it is for the one who was first.’

Hadith no: 2191

Narrated / Authority of: Samurah

that the Messenger of Allah (saw), said: ‘If two (separate) authorized persons make a sale (of the same thing), then the first transaction is the one that is valid.’

Hadith no: 2192

Narrated / Authority of: Amr bin Shuaib

from his father, from his grandfather that: the Prophet (saw) forbade the deal involving earnest money.

Hadith no: 2193

Narrated / Authority of: Amr bin Shuaib

from his father, from his grandfather that: the Prophet (saw) forbade the deal involving earnest money. (Hasan) Abu Abdullah said: Earnest money refers to when a man buys an animal for one hundred Dinar, then he gives the seller two Dinar in advance and says: 'If I do not buy the animal, then the two Dinar are yours. And it was said that it refers, and Allah knows best, to when a man buys something, and gives the seller a Dirham or less or more, and says: "If I take it (all well and good), and if I do not, then the Dirham is yours.'

Hadith no: 2194

Narrated / Authority of: Abu Hurairah

"The Messenger of Allah (saw) forbade Gharar transactions and Hasah transactions. "

Hadith no: 2195

Narrated / Authority of: Ibn Abbas

'The Messenger of Allah (saw) forbade Gharar transactions.'

Hadith no: 2196

Narrated / Authority of: Abu Said Al-Khudri

'The Messenger of Allah (saw) forbade selling what is in the wombs of cattle until they give birth, and selling what is in their udders unless it is measured out, and selling a slave who has fled, and selling spoils of war until it has been distributed, and selling Sadaqah until it has been received, and what a diver is going to bring up.'

"Chapter No. 14, Book of The Chapters on Business Transactions," <http://ahadith.co.uk/chapter.php?cid=170&page=6>

³³⁷ *Risk Management in Islamic Finance*, by Muhammad al-Bashir and Muhammad al-Amine, Brill, Leiden and Boston, 2008, p. 68.

http://www.iefpedia.com/english/wp-content/uploads/2013/06/Muhammad-Al-Bashir-Muhammad-Al-Amine-Risk-ManagBookos.org_1.pdf

³³⁸ Id. at 69.

³³⁹ Id.

³⁴⁰ Id.

³⁴¹ Id. at 69-70.

³⁴² Id. at 70.

³⁴³ "real," Oxford Dictionaries. <http://www.oxforddictionaries.com/definition/english/real>

³⁴⁴ For example, consider a patent which accords an inventor the exclusive right to manufacture, use, or sell an invention for a certain number of years. That right might be the subject of a transaction, for example a sale. The immediate object of the transaction would not be physical or tangible. But its acquisition through that transaction would be made in anticipation of activities in the physical world, for example, manufacturing something according to the patented process. That there is such an ultimate connection does not afford an answer to questions as to whether such a right or claim might properly be accorded and even if accorded how it might be characterized, e.g., as "property" or something else. The brief discussion in the main text with regard "property" points to a different though perhaps shifting approach to those issues within the context of Islamic law as contrasted with, say, Western law.

³⁴⁵ Peters remarks that among the "literary forms employed in the [Quran]" were "a large and generally unconnected body of halakic dicta that obviously date from the Medina Period of the prophet's life and prescribe norms of action and behavior for a community-in being" "The Quest of the Historical Muhammad," by F.E. Peters, Chapter 13 in *The Quest for the Historical Muhammad*, Edited and Translated by Ibn Warraq, Prometheus Books, 2000, 444-473, 451.

³⁴⁶ The debate – exemplified by exchanges between two Western scholars of Islamic law – has been characterized in the following terms: One of the scholars, Joseph Schacht "h[eld] that first, during the period of the Caliphate and in the early Umayyad empire, pre-Islamic custom formed the bulk of the legal rules in Arabia. This was the traditional 'sunna' that the Arabs had lived under for centuries. At the same time, local custom and the administrative rules of the Umayyads were the law in the newly conquered provinces, creating a second, parallel sunna. The law in Arabia and he provinces was structured and developed by the newly forming schools of law, first through *ra'y*, but mostly by consensus. The doctrines arising from the schools formed a sunna, called the living tradition of the schools.

"Soon thereafter, the schools began restructuring much of the law by reference to the Qur'an. Finally, beginning around 100 A.H., the Traditions of the Prophet began to be fabricated. Eventually, the tradition as formed a new and final Sunna, which replaced [the others]." "Islamic Law: The Impact of Joseph Schacht," by David F. Forte, *Loyola of Los Angeles International and Comparative Law Review*, Volume 1, 1978, 1-36, 9. <http://digitalcommons.lmu.edu/ilr/vol1/iss1/1> (Note "[t]he Muslim era is computed from the starting point of the year of the emigration (Hijrah [Hegira]); that is, from the year in which Muhammad, the Prophet of Islam, emigrated from Mecca to Medina, 622 [A.D.]", so 100 A.H. was 722 A.D. "Calendar," Britannica Academic. <http://academic.eb.com/EBchecked/topic/89368/calendar/60219/The-Muslim-calendar>)

In sum, "Schacht's unsettling conclusion [wa]s that the Traditions of the Prophet were late invention and that few, if any are authentic." Id. While, according to Forte, "[n]early all Western Islamic scholars agree[d] that Schacht's evidence against the authenticity of the traditions is virtually unassailable," the traces intense exchanges between Schacht and another scholar, Noel Coulson, who "admit[ted] at the outset that 'the thesis of Joseph Schacht is irrefutable in its broad essentials and that the vast majority of the legal dicta attributed to the Prophet are apocryphal and the result of the process of 'back-projection' of legal doctrine....'" However, Coulson, nonetheless "suggest[ed] that the admittedly fabricated traditions may have represented in substance the rules of law the Prophet actually promulgated while at Medina." Id. at 18. For Forte's assessment of the reaction of Muslim scholars to the foregoing, see id. at 26-31.

³⁴⁷ The reference to abstract-ness relates to the role that money plays not the particular form it might take. Clearly, that which has served as money has taken the form of physical objects, some of which are seen to have significant value in use in and of themselves (such as gold), and others little (such as paper money).

³⁴⁸ For further discussion related to the point, see *infra*, pp. 95-96.

³⁴⁹ For a brief, but informative discussion of El-Gamal's work – cast as Qur'an as Precommitment Mechanism," see *Mutual Life, Limited: Islamic Banking, Alternative Currencies, Lateral Reason*, by Bill Mauer, Princeton University Press, 2011, pp. 80-83. See also in this regard, id. at 57-59.

³⁵⁰ Subhani offers an intriguing, though perhaps opaquely articulated perspective which in certain ways echoes points raised here. The core of his analysis is rooted in what he sees as a fundamental misreading of the Qur'an (2:275). "Structural compliance of Islamic finance with Qur'anic exegesis," by Azeemuddin Subhani, Chapter 8 in *Handbook of Islam and economic life*, Edited by M. Kabir Hassan and Mervyn K. Lewis, Edward Elgar Publishing Limited, 2014. That is, he contends that the word *bay'* has been misread as "trade". He asserts that the word *tijara* is the term for trade – buying and selling – is only one aspect of *bay'*, which is much broader: it "means any exchange – financial, economic, social or political." Id. at 156. He argues, on linguistic, scriptural, theological and philosophical analysis that grounds that the operative principle is the distinction between "co-generation and certain generation...[and] "self-generation and...*ex nihilo* generation" of financial return from, and instantaneous settlement of, the transaction." Id. at 170. (Again, "the operative principles of Islamic finance require that the internal process of the transaction,...and not the external effect of the transaction must constitute the basis of structural compliance of the Islamic finance industry with Qur'anic exegesis." Id. at 161.) What exactly he means by co-generation is not particularly clear. Somewhat cryptically he states that "[t]he common element in all bay' contracts is the interaction of two different and oppose counterparties in the deal...This interaction of opposites is a process of co-generation, commensurate with the creating of everything in pairs...The defining characteristic of bay', then, is not-risk taking, as generally held, but co-generation." Id. at 158. While "self-generation occurs in an exchange of homogeneity is acting on itself to grow (e.g. money on money directly)," "...[c]o-generation occurs in an exchange of heterogeneity where one transacting agent is acting on a different agent in order to grow (money on goods and goods on money)." Id. at 159. (So for example, *musharaka* and *mudharabaha* and *ijara* (as well as *ujr* (service) contracts) "have their place in Islamic jurisprudence for their co-generating feature.") Id. at 161. Further, from this perspective he rejects as wrong the conception of Islamic finance as "solely asset-based," whether it refers to tangible assets or equity. Id. He goes so far as to dispute as a rationale for the ban on lending with interest, "the fixity, certainty and predeterminability of interest,...because these very features....are also their main distinguishing features of the contract of *ijara* (renting or leasing) and *Ujr* (fee or salary-based service), and the essential feature of the contract of *Murabaha* (fixed, certain, predetermined mark-up sale) all of which are, indisputably Islamically permitted contracts." Id. at 157. A very much more detailed exploration of these ideas is found in "Divine law of *riba* and bay': New critical theory," by Azeemuddin Subhani, A thesis submitted to the Faculty of Arts in partial fulfillment of the requirements of the degree of Doctor of Philosophy, Institute of Islamic Studies, McGill University, Montreal, Canada, November 2006.

http://digitool.library.mcgill.ca/webclient/StreamGate?folder_id=0&dvs=1458137476409~609&usePid1=true&usePid2=true

³⁵¹ Although we refer to Western pension funds, more broadly there is a focus on thus funds whose decisions, for whatever reasons, are, in the first instance, not *informed* by a commitment to the Islamic narrative.

³⁵² Of course, given that the Quran as the text at the core of the narrative ostensibly reflects a comprehensive understanding of the world/universe (viewed in both physical and other terms), speaks to the full breadth of the human experience in relation to it, and in turn, what human beings might or should (or should) do in view of it, it necessary attends to those matters which might be cast under the rubric of "ESG".

³⁵³ See, for example, "Shari'ah Economics as Autonomous Paradigm: Theoretical Approach and Operative Outcomes," by Valentino Cattelan, *Journal of Islamic Perspective on Science, Technology and Society*, Volume 1, Number 1, 2013, 3-11. <http://www.iistecs.org/sites/default/files/pdf/513102.pdf>

³⁵⁴ There is a faint echo of the Islamic narrative as it concerns "money" in "real assets" being characterized as being "independent from variations in the value of money."

³⁵⁵ "Real asset investments are defined as investments designed to benefit from and provided a hedge against rising and high inflation. Further, they are also designed to yield an inflation adjusted "real" return. In addition, due to their counter cyclical nature and relatively low correlation to traditional broad markets, real assets also provide significant diversification to the entire portfolio." "Investment Objectives & Guidelines, Manchester Employees' Contributory Retirement System, Version 2014-2," Updated June 27, 2014, p. 6. https://www.manchesterretirement.org/maxdocs/Investment_Guidelines.pdf "The exposure may include the following:

- Inflation Linked Bonds – Must follow investment guidelines for fixed income investments. Inflation linked bonds are described as bonds whose principal is adjusted for inflation such that income payments are inflation adjusted, such as TIPS. Both domestic and global securities may be utilized.
- Commodities – Exposure to energy, agriculture, livestock and precious metals is permitted through the use of derivatives, subject to guidelines in Appendix II. Receipt of physical commodities is prohibited.
- Global Equities – Must follow investment guidelines set for equity investments. The following publically traded equities may be utilized:

1. Energy
2. Farmland/Agribusiness
3. Global Climate Change
4. Metals and Mining
5. Global Natural Resource" Id. at 7.

³⁵⁶ "Towards Efficient Benchmarks for Infrastructure Equity Investments, A review of the literature on infrastructure equity investment and directions for future research," by Frédéric Blanc-Brude, January 2013, p. 36. http://www.edhec-risk.com/edhec_publications/all_publications/RISKReview.2013-01-15.4142/attachments/EDHEC_Publication_Towards_Efficient_Benchmarks.pdf

³⁵⁷ Id. at 19.

³⁵⁸ Id. at 36.

³⁵⁹ "Who is Afraid of Construction Risk? Infrastructure Debt Portfolio Construction," by Frédéric Blanc-Brude and Omneia R. H. Ismail, EDHEC Risk Institute, July, 2013, p. 21. http://www.edhec-risk.com/edhec_publications/all_publications/RISKReview.2013-03-28.1327/attachments/EDHEC_Publication_Who_is_Afraid_of_Construction_Risk_F.pdf

³⁶⁰ Id. at 21-22. The writer restates the argument in the following somewhat similar way: "[T]he infrastructure asset class narrative is about financial economics (long term contracts for investing in relationship specific assets) not real assets." That is, "[t]he focus should be on regulatory regimes, especially contracts, and financial structure, not physical characteristics: "investing in mature toll

roads" is a meaningless proposition until tariff setting mechanisms and financial arrangements have been considered. Conversely, an Australian coal terminal with a take or pay throughput contract and 90% leverage, may have a very similar equity return profile than a PFI school in Scotland. Likewise, classifying infrastructure investments by regulatory regimes should clarify the role of infrastructure assets in the LHP. For example, PFI contracts mostly have built in inflation pass through clauses, as such they can constitute an explicit UK inflation hedge, different from an RPIX regulatory regime." Infrastructure portfolio construction: in search of an asset class" by Frédéric Blanc-Brude, EDHEC Risk Institute, August, 2012, p. 4. <http://jensenblancbrude.com/wp-content/uploads/2012/11/Infrastructure-Journal-Fourth-Plinth-Infrastructure-portfolio-construction-in-search-of-an-asset-class.pdf>

³⁶¹ See for example, "Towards Efficient Benchmarks for Infrastructure Equity Investments, A review of the literature on infrastructure equity investment and directions for future research," by Frédéric Blanc-Brude, January 2013, pp. 6-7 and 19-20. http://www.edhec-risk.com/edhec_publications/all_publications/RISKReview.2013-01-15.4142/attachments/EDHEC_Publication_Towards_Efficient_Benchmarks.pdf

³⁶² The contracts in question are not the "run-of-the-mill contract". They may entail quite detailed and perhaps complex prescriptions for the conduct of the parties and the outcomes of their actions. They are concerned with behavior over extended periods of time. The parties to them literally or practically may well change, perhaps many times over life of the contract. Those parties may have different time horizons. There are more prominent concerns about overreaching here than in other concerns. There are also more concerns about the about authority of the (government as a) contracting party. The implications of contract "failure" to perform may be profound. There is a greater likelihood of occurrence of *force majeure* or its equivalent than in other circumstances.

³⁶³ See, for example, "The Uncorporation and the Unraveling of 'Nexus of Contracts' Theory," by Grant M. Hayden and Matthew T. Bodie, *Michigan Law Review*, Volume 109, Issue 6, 2011, 1127- 1144.

<http://www.law.northwestern.edu/faculty/fulltime/butler/papers/ContractualTheoryoftheCorporation.pdf> and http://www.michiganlawreview.org/assets/pdfs/109/6/hayden_bodie.pdf

³⁶⁴ Infrastructure: Defining Matters," by Larry Beeferman and Allan Wain, Pensions and Capital Stewardship Project, Labor and Worklife Program, Harvard Law School, December 2012, p. 15.

<http://www.law.harvard.edu/programs/lwp/pensions/publications/INFRASTRUCTURE%20DEFINING%20MATTERS%20FINAL.pdf>

³⁶⁵ "Infrastructure: Deciding Matters," by Larry Beeferman and Allan Wain, Pensions and Capital Stewardship Project, Labor and Worklife Program, Harvard Law School, August, 2013, p. 7.

<http://www.law.harvard.edu/programs/lwp/pensions/publications/INFRASTRUCTURE%20DEFINING%20MATTERS%20FINAL.pdf>

³⁶⁶ Id. at 7.

³⁶⁷ Id. at 7. "In some cases, that is a matter of necessity, insofar as attending to those concerns is imposed on particular kinds of investors (such as pension funds) as a matter of law, policy, or practice. In other cases it is a question of the investor's (typically institutional) understanding of the relationships within which it is embedded, its role in those relationships, and how they might bear on what the investors' responsibilities are with respect to those with whom they are in such relationships." Id.

Based on that approach we fashioned what we termed "a series of links/categories. These connect at one end with infrastructure-related provision as we characterize it. They then move through a series of what are largely (though not exclusively) categories identified with different kinds of people, on an individual or organized basis, whose expectations and behaviors bear upon the success of the enterprise (in an operational, financial or other sense). Such an analysis, as it shifts across those categories readily reveals or illustrates the kind of blurring and spill-over effects referred to above. In principle, this formulation, one geared most immediately to the concerns of investors – or more aptly in this context, the strategic objectives of pension fund investors – allows one to trace or track the interplay of the various factors or considerations relating to a particular infrastructure-related enterprise which bear upon the possible achievement (or not) of those objectives." Id.

³⁶⁸ "First vs. second generation Islamic economists: Deviations and differences in thoughts." by Abdul Azim Islahi, *Islamic Economics: Theory, Policy and Social Justice*, Volume 2, Eds. Hatem A. El-Karanshaw et al. p. 17.

http://www.kantakji.com/media/175779/islamic-finance-book_volume_2_web.pdf

³⁶⁹ "First vs. second generation Islamic economists: Deviations and differences in thoughts." by Abdul Azim Islahi, *Islamic Economics: Theory, Policy and Social Justice*, Volume 2, Eds. Hatem A. El-Karanshaw et al. p. 17.

http://www.kantakji.com/media/175779/islamic-finance-book_volume_2_web.pdf

³⁷⁰ *The Next Financial Crisis and How to Save Capitalism*, by Hossein Askari and Abbas Mirakhor, Palgrave Macmillan, 2015, p. 48. Among what seem to be many books and publications along these lines is another with more modest ambitions:

"Islamic finance might seem like an odd place to look for ideas for a new global financial system, but, as we shall see, many of its key elements are based on sound economic principles. Global leaders may not know that they are adopting Islamic financial principles when designing the new system, because they will be looking to build a system that what will help protect us from the ills of the current one. Islamic finance has some of the answers to this problem." *Islamic Finance and the New Financial System, An Ethical Approach to Preventing Future Financial Crises*, by Tariq Alrifai, John Wiley & Sons Singapore Pte, Ltd, 2015, p. 4

³⁷¹ *The Next Financial Crisis and How to Save Capitalism*, by Hossein Askari and Abbas Mirakhor, Palgrave Macmillan, 2015, p. 6.

³⁷² Recall again the remarks by one of the two authors in another essay that "[t]he organizing principle of Islamic finance in an Islamic economy is transaction based on exchange, where real asset is exchanged for real asset. Hence, transactions are based on the real economy." "Overview," in *Economic Development and Islamic Finance*, Zamir Iqbal and Abbas Mirakhor, Editors, World Bank, 2013, p. 9.

http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/27/000442464_20130827112728/Rendered/PDF/798910PUB0Econ00Box377374B00PUBLIC0.pdf

³⁷³ "First vs. second generation Islamic economists: Deviations and differences in thoughts." by Abdul Azim Islahi, *Islamic Economics: Theory, Policy and Social Justice*, Volume 2, Eds. Hatem A. El-Karanshaw et al, p. 16.

http://www.kantakji.com/media/175779/islamic-finance-book_volume_2_web.pdf

³⁷⁴ Id.

³⁷⁵ Id.

³⁷⁶ "Islamic finance in global markets: Materialism, ideas and the construction of financial knowledge," by Eddy S. Fang, *Review of International Political Economy*, Volume 21, Issue 6, 2014, 1170-1202, 1171. "With the advent of the subprime financial crisis in

2007, this trend became even more obvious as the socially conscious aspect of IF was increasingly put forward as a desirable normative basis for change in the global financial system... Since the re-emergence of Islamic banking in the 1960s, this strand of the literature has been dominant in terms of volume. Indeed, as Shariah-based economic practices started to become visible, there was a growing need to support them with research so as to anchor their legitimacy among 'conventional' bankers and academics."

Id.

³⁷⁷ Id. at 172. "On the one hand, [Islamic Finance] builds directly on guiding principles and rules from the Shariah, which is in itself based on different religious sources, such as the Qur'an, the Sunnah, and Ijtihad, the process of making legal decisions through an independent interpretation of the former two sources. The values and rules emanating from these sources are hence grounded in a faith/belief system and are normative in nature due to the transcendental aspect of religious commands/teachings. On the other hand, as academic fields traditionally concerned with financial practices (that is, business, economics and finance) have mainly been built on the epistemological and ontological basis of modern economic theory... rationalism remains the predominant approach to such research, and positivism the only legitimate source for the production of new knowledge (Arthur, 2000). As a consequence, economic and financial inquiry has come to be considered as ideologically neutral by market participants and scholars, as the field 'present[s] itself as an objective science... insist[ing] that it offers no normative prescriptions'..." Id. at 1174-1175.

³⁷⁸ "Shari'ah Economics as Autonomous Paradigm: Theoretical Approach and Operative Outcomes," by Valentino Cattelan, *Journal of Islamic Perspective on Science, Technology and Society*, Volume 1, Number 1, 2013, 3-11, 5. <http://ssrn.com/abstract=2495831>

³⁷⁹ Id.

³⁸⁰ Id. at 3.

³⁸¹ During that period "[t]he eight most significant schools of Sunni and Shi'i jurisprudence emerged" (from the early 8th century to the mid-tenth century). *Islamic Finance: Law, Economics and Practice*, by Mahmoud A. El-Gamal, Cambridge University Press, 2006, p. 31. <http://iugc.yolasite.com/resources/Reference%20Book%2004%20-%20Islamic%20finance.%20law%20economics%20and%20practice.%20M.%20El%20Gamal.pdf> This era followed upon that of the revelations to Muhammad and the subsequent one of "personal interpretations of the canon by the Prophet's companions" (from which had emerged between 661 and the early 8th century "a tension between a traditionalist approach to jurisprudence in western Arabia and a rationalist approach in to the Iraq"). Id. at 31. Subsequent periods were characterized by "elaborations within the main juristic schools"; a dark age following the fall of Baghdad to the Tatars in the mid-seventh century A.H. (thirteenth C.E.); a "[r]ebirth of jurisprudence occurred in 1293 A.H./1876 C.E., when the Ottomans codified Hanafi jurisprudence in the *Majalla*"; the beginning of "a number of juristic revival movements began, following exposure to Western legal and technological progress"; and the current "episode of Islamic revival, which began in the mid-twentieth century C.E." Id.

³⁸² "The practice, and the supposedly classical rules that gird the practice, are... nothing more than careful mediation, between the necessity of adopting conventional finance models and a desire to retain the appearance of a populist fundamentalist vision of economic justice in finance." "The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law." by Haider Ala Hamoudi, *American Journal of Comparative Law*, Volume 56, Number 2, 2008, 423-469, 463. <http://ssrn.com/abstract=1014670>.

³⁸³ Id. at 450.

³⁸⁴ Id.

³⁸⁵ Id. at 469-469. Visser offers a brief characterization of the four leading Sunni schools of law (*madhahib*) having their origin in the 8th and 9th centuries: the Hanafi, Maliki, Shafii, and Hanbali schools, with the first apparently being the "most flexible" in drawing on the broadest range of sources/methodologies (and perhaps, for that reason, may be seen as most amenable to meeting the needs of trade). See *Islamic Finance, Principles and Practice, 2nd Edition*, by Hans Visser, Edward Elgar, 2013, pp. 18-20. Another Sunni one, the Zahiri, is reported to be "very strict in the sense that it did not want to leave any room for human reason." Id. at 20. Somewhat similarly, the law system associated with the Ibadi sect, "which belongs neither to Sunni nor to Shia Islam," "follow[s] a literal interpretation of the Quran." Id. That they are such schools does not necessarily mean that in any particular country it is the only such school followed there. Shiites have ostensibly different rules, with the Jafari school – embraced by the "Twelvers (Ithna Asharis) – being the dominant one. Id. at 20. From an institutional and individual perspective this school of thought is interesting in that it "accepts ijma provided it includes the opinion of Muhammad himself or an infallible Shia imam" and ijtihad "by selected scholars, predominantly those living in the holy cities of Shia Islam such as Qum." Id.

³⁸⁶ "The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law." by Haider Ala Hamoudi, *American Journal of Comparative Law*, Volume 56, Number 2, 2008, 423-469, 469. <http://ssrn.com/abstract=1014670>

³⁸⁷ Id.

³⁸⁸ Id. at 468-469

³⁸⁹ "Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship." *Harvard Law Review*, Volume. 95, Number 7, May, 1982, 1669-1690, 1670.

³⁹⁰ "You Say You Want a Revolution: Interpretive Communities and the Origins of Islamic Finance," by Haider Ala Hamoudi, *Virginia Journal of International Law*, Volume 48, Issue 2, 249-306, 253. http://www.vjil.org/assets/pdfs/vol48/issue2/48_249-306.pdf

³⁹¹ See, for example, "The Forgotten Jurisprudential Debate: Catholic Legal Thought's Response to Legal Realism," by John M. Breen and Lee J. Strang, 98 *Marquette Law Review*, 2015, 1203-1311. <http://scholarship.law.marquette.edu/mulr/vol98/iss3/5> and "Theistic Legal Realism and Normative Principles of Law," by Michel V. Hernandez, *Liberty University Law Review*, Volume 2, Issue 3, 703-723, 2008.

³⁹² "You Say You Want a Revolution: Interpretive Communities and the Origins of Islamic Finance," by Haider Ala Hamoudi, *Virginia Journal of International Law*, Volume 48, Issue 2, 249-306, 306. http://www.vjil.org/assets/pdfs/vol48/issue2/48_249-306.pdf "Sadr was groomed almost from birth to become a member of the loose network of Shi'i jurists, largely based in Najaf, Iraq, known as the *marja'yya*. Pursuant to the doctrine of Usuli Shi'ism, which is the dominant form of Twelver Shi'ism with which this Article is concerned, the *marja'yya* is the sole institution with the authority to determine the content of the *shari'a*." Id. at 254.

³⁹³ Id. at 306. "The basic thesis of Langdellianism is that law is a science, akin to the natural sciences, and that the relevant data set for the science of law is that of decisions in cases. From proper selection of the specimen cases, the legal scientist could derive the few, general fundamental legal principles that exist through inductive reasoning.") "Muhammad's Social Justice or Muslim Cant: Langdellianism and the Failures of Islamic Finance," Haider Ala Hamoudi, *Cornell International Law Journal*, Volume 40, Issue. 1, 2007, 89-133. 98. <http://scholarship.law.cornell.edu/cilj/vol40/iss1/2> Again, "[t]he dominant interpretive approach within contemporary Islamic jurisprudence, and Islamic finance in particular, shares many common features with the jurisprudential

theories of Christopher Columbus Langdell. Both approaches are excessively rigid and dependent on formal exercises of logic, allowing the jurist or judge comparatively little interpretive control over the development of legal rules." Id. at 95-96. Langdell was Dean of the Harvard Law School from 1870 to 1890 and famous for his promotion of the so-called "case method" for pedagogy in legal education.

³⁹⁴ For some thoughtful perspectives on the issues posed see, for example, "Shari'a as Law and Legal System: Changing Perceptions," Frank E. Vogel, The Sixth Farhat J. Ziadeh Distinguished Lecture in Arab and Islamic Studies, May 6, 2008. http://depts.washington.edu/nelc/pdf/event_files/ziadeh_series/2008shari'a-frankvogel.pdf; "The Death of Islamic Law" by Haider Ala Hamoudi, *Georgia Journal of International & Comparative Law*, Volume 38, Number 2, 2010, 293-337. <http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1123&context=gjicl>; and "Shari'a in the Secular State, A Paradox of Separation and Conflation," by Abdullah Ahmed An-Na'im, Chapter 16 in *The Law Applied, Contextualizing the Islamic Shari'a*, Edited by Peri Bearman, Wolfhart Neirichs, and Bernard G. Weiss, I.B. Tauris & Co. Ltd, 2008, pp. 321-341.

³⁹⁵ "Present at the Resurrection: Islamic Finance and Islamic Law," by Haider Ala Hamoudi, *American University International Law Review*, Volume 26, Number 4, 2011, 1107-1123, 1115. <http://digitalcommons.wcl.american.edu/auilr/vol26/iss4/8/> Schacht's views as to the authenticity of the *ahadith* were briefly discussed in note... *supra*.

³⁹⁶ Id. at 1114. "Individual jurists within each guild developed vast compendia of rules derived within their respective schools, and it is the sum corpus of these contradictory, varying, and immense compendia that form the substance of the rules from which Islamic law is derived." Id.

³⁹⁷ Id. "Individual jurists within each guild developed vast compendia of rules derived within their respective schools, and it is the sum corpus of these contradictory, varying, and immense compendia that form the substance of the rules from which Islamic law is derived." Id.

³⁹⁸ Id.

³⁹⁹ *Islamic Finance, Principles and Practice, 2nd Edition*, by Hans Visser, Edward Elgar, 2013, p.17.

⁴⁰⁰ Id. Note, though, that "[i]n Sunni Islam a fatwah is not binding, but in Shia Islam a fatwa is binding for those who requested it." Id.

⁴⁰¹ Id. at xiii.

⁴⁰² Id. "Ithnā 'Ashariyyah, also called Imāmīs, English Twelvers, a sect of the Shi'ite Islam, believing in a succession of 12 imams, leaders of the faith after the death of the Prophet Muhammad, beginning with 'Alī ibn Abī Tālib, fourth caliph and the Prophet's son-in-law. "Each of the imams—'Alī, his sons Ḥasan and Ḥusayn, 'Alī Zayn al-'Ābidīn, Muḥammad al-Bāqir, Ja'far aṣ-Ṣādiq, Mūsā al-Kāzim, 'Alī ar-Riḍā, Muḥammad al-Jawād, 'Alī al-Hādī, Ḥasan al-'Askarī, and Muḥammad al-Mahdī al-Hujjah – was chosen from the family of his predecessor, not necessarily the eldest son but a descendant deemed spiritually pure. The last imam recognized by the Ithnā 'Ashariyyah disappeared in 873 and is thought to be alive and in hiding, ready to return at the Last Judgment." "Ithnā 'Ashariyyah," Britannica Academic. <http://academic.eb.com/EBchecked/topic/297983/Ithna-Ashariyyah>

⁴⁰³ *Islamic Finance, Principles and Practice, 2nd Edition*, by Hans Visser, Edward Elgar, 2013, p. xiii. For an illustrative discussion of diversity sources for authoritative decisions in contemporary context as they relate to Twelver Shi'ism – as evidenced by "the rise and continuing importance of 'manuals of practice' by the 'most learned' of the Shi'i's," see "The Quandaries of Emulation: The Theory and Politics of Shi'i Manuals of Practice," by Roy Mattahedeh, The Farah J. Ziadeh Distinguished Lecture in Arab and Islamic Studies, May 2, 2011, p. 6. <http://depts.washington.edu/nelc/ziadehseries.html>

⁴⁰⁴ *The Transformation of Islamic Law in Global Financial Markets*, by Johnathan G. Ercanbrack, Cambridge University Press, 2015, p. 107.

⁴⁰⁵ Id.

⁴⁰⁶ Id.

⁴⁰⁷ "Sharia Risk? How Islamic Finance Has Transformed Islamic Contract Law," by Kilian Balz, Islamic Legal Studies Program, Harvard Law School, Occasional Publications 9, September 8, 2008 ("[c]omplaints about scholars in the industry" include that "they are too expensive"), p.15.

⁴⁰⁸ Id. at 23-24. See also. "Present at the Resurrection: Islamic Finance and Islamic Law," by Haider Ala Hamoudi, *American University International Law Review*, Volume 26, Number 4 (citing similar views expressed several years later in Kilian Bälz, Partner, Amereller Legal Consultants, Remarks at the Islamic Finance Plenary Session of the XVIIIth Proceedings of the International Academy of Comparative Law (July 27, 2010)), 2011, 1107-1123, 1117. <http://digitalcommons.wcl.american.edu/auilr/vol26/iss4/8/>

⁴⁰⁹ "Corporate Governance and Shariah Compliance in Institutions Offering Islamic Financial Services," by Wafik Grais and Matteo Pellegrini, World Bank Policy Research Working Paper 4054, November 2006, p. 7, note 11.

<https://openknowledge.worldbank.org/bitstream/handle/10986/8901/wps4054.pdf?sequence=1> "Shari'ah boards are usually comprised of a panel of *Shari'ah* scholars acting as special advisers to the institutions, and may alternatively be called a *Shari'ah* Committee or *Shari'ah* Supervisory Board (SSB). However, in recent years there has been an increasing trend towards the formation of *Shari'ah* advisory firms, which offer services such as *Shari'ah* audit/review, although they cannot be considered as an alternative to a proper full-panel *Shari'ah* board." "Guiding Principles on Shari'ah Governance Systems for Institutions Offering Islamic Financial Service," Islamic Services Board, 2009, p.1, note 2. <http://www.ifsb.org/standard/IFSB-10%20Shariah%20Governance.pdf> Note, "zakat, Arabic zakat...[is] an obligatory tax required of Muslims, one of the five Pillars of Islam. The zakat is levied on five categories of property – food grains; fruit; camels, cattle, sheep, and goats; gold and silver; and movable goods – and is payable each year after one year's possession." "zakat," Britannica Academic.

<http://academic.eb.com/EBchecked/topic/655448/zakat>

⁴¹⁰ See "Shariah Governance, Expertise and Profession: Educational Challenges in Islamic Finance," by Sayd Farook and Mohammad Omar Farooq, *ISRA International Journal of Islamic Finance*, Volume 5, Number 1, June, 2014, 137-160, 140-141. <http://ssrn.com/abstract=1813483> or <http://dx.doi.org/10.2139/ssrn.1813483>. "Add to this this fact that some scholars now get paid in terms of basis points per managed fund (albeit to assist smaller managers)." Id. at 140-141.

⁴¹¹ "[I]t is highly unlikely that such thinly stretched Shari'ah scholars are able to provide the appropriate level of Shari'ah diligence to every piece of documentation. Rather, they will look at the structure outline and leave the thorough due diligence to their deputies. It is difficult to assume that all points of Shari'ah compliance would be covered in depth for a *sukuk*-offering memorandum (they average around 150 pages). This becomes even more difficult when it comes to funds and structured products. Some may argue that, like lawyers and custodians, Shari'ah scholars also get accustomed to the standard terms and conditions and this may result in quicker processing time. Nevertheless, it does not necessarily imply that there is an appropriate standard of due diligence on each piece of relevant documentation." "Shariah Governance, Expertise and Profession: Educational Challenges in Islamic Finance," by

Sayd Farook and Mohammad Omar Farooq, *ISRA International Journal of Islamic Finance*, Volume 5, Number 1 (asserting that “the top 40 scholars [are]...involved in the boards of more than 73 [Islamic finance institutions] (holding 834 positions)),” June, 2014, 137-160, 143-144. <http://ssrn.com/abstract=1813483> or <http://dx.doi.org/10.2139/ssrn.1813483> For a “geographic analysis of Shari’ah board membership, nationality and educational background,” see “Gatekeepers’ of Islamic financial circuits: Analysing urban geographies of the global Shari’ah elite,” by David Bassens, Ben Derudder & Frank Witlox, *Entrepreneurship & Regional Development*, Volume 24, Numbers 5-6, June 2012, 337-455.

⁴¹² “Shariah Governance, Expertise and Profession: Educational Challenges in Islamic Finance,” by Sayd Farook and Mohammad Omar Farooq, *ISRA International Journal of Islamic Finance*, Volume 5, Number 1, June, 2014, 137-160, 139. <http://ssrn.com/abstract=1813483> or <http://dx.doi.org/10.2139/ssrn.1813483>

⁴¹³ “Sharia Risk? How Islamic Finance Has Transformed Islamic Contract Law,” by Kilian Balz, Islamic Legal Studies Program, Harvard Law School, Occasional Publications 9, September 8, 2008, p. 23.

⁴¹⁴ With respect to *sukuk* it has been suggested that “[t]he additional cost for the issuer ranges anywhere between a quarter of a million to a million US dollars. This includes the costs for the Shari’ah advisory, structuring and the additional legal documentation cycles. Documentation alone generally can cost in six figures regardless of the size of the issuance...” “Shariah Governance, Expertise and Profession: Educational Challenges in Islamic Finance,” by Sayd Farook and Mohammad Omar Farooq, *ISRA International Journal of Islamic Finance*, Volume 5, No. 1, June, 2014, pp. 137-160. <http://ssrn.com/abstract=1813483> or <http://dx.doi.org/10.2139/ssrn.1813483>

⁴¹⁵ See “Shariah Governance, Expertise and Profession: Educational Challenges in Islamic Finance,” by Sayd Farook and Mohammad Omar Farooq, *ISRA International Journal of Islamic Finance*, Volume 5, Number 1, June, 2014, 137-160, 144-151. <http://ssrn.com/abstract=1813483> or <http://dx.doi.org/10.2139/ssrn.1813483>

⁴¹⁶ “It is important to clarify at the outset that the term ‘Shari’ah scholars’ can be a misnomer, as it relates to a niche field of specialized professional expertise, rather than the general sense of ‘*alim* (scholar and expert).” “Shariah Governance, Expertise and Profession: Educational Challenges in Islamic Finance,” by Sayd Farook and Mohammad Omar Farooq, *ISRA International Journal of Islamic Finance*, Volume 5, Number 1, June, 2014, 137-160, 141. <http://ssrn.com/abstract=1813483> or <http://dx.doi.org/10.2139/ssrn.1813483> In this regard the authors take note of the following commentary:

“While the word ‘scholar’ has been preferred as a direct translation for ‘*alim*, (plural: *ulama*), which connotes a person who is learned and expert, in the context of the IFSI we are actually referring to a more specialised level within *Fiqh al-Muamalat* (Islamic commercial laws) rather than *Shari’ah* more widely or other areas of Islamic studies. Furthermore, that specialisation is dedicated towards providing expert opinions in the form of *Shari’ah* pronouncements/resolutions related specifically to Islamic financial services and usually not directly to the general public or businesses more widely. Therefore, again in the interests of clarity, it is important to stress the ‘professional’ (as opposed to an ‘academic’) connotation associated with this role. Hence, this document adopts the term ‘members of the *Shari’ah* board’, rather than ‘*Shari’ah* scholars’, to refer to *ulama* or others who provide their professional services specifically within the IFSI.” “Guiding Principles on Shari’ah Governance Systems for Institutions Offering Islamic Financial Service,” Islamic Services Board 2009, p. 4. <http://www.ifs.org/standard/IFSB-10%20Shariah%20Governance.pdf>

Other questions have been raised with regard to the nature and locus of the institutions which frame discourse about Islamic finance. For example, Mauer, writing in 2011, remarked that “[t]he main nodes” “of a loosely interconnected international network of Muslim members of the business community...were in the financial and innovation centers of Europe and the United States, and not the Middle East or South Asian...” “[T]he main sites for intellectual production in Islamic economic places are places like the Islamic Foundation in Leicester, England; the Institute of Islamic Banking and Insurance in London; and the Harvard Islamic Finance Information Program in Cambridge, Massachusetts.” *Mutual Life, Limited: Islamic Banking, Alternative Currencies, Lateral Reason*, by Bill Maurer, Princeton University Press, 2011, p. 28. He remarks on the importance of the use of English, rather than Arabic, in discourse about Islamic finance:

“For Islamic banking, names are a central preoccupation. Although most in the business use Arabic terms for the various contractual forms they employ, some see these terms as obfuscation, or worry that they provide an Islamic veneer over practices whose status in *shari’ah*, or Islamic law, is uncertain. At worst, some maintain, the use of such terms is merely a marketing ploy. For the most part, the lingua franca of Islamic finance is English; Arabic terms supplement it, and most if not all of those supplementary terms are nouns naming contracts or concepts.” Id. at 25.

In 1998 Mauer enrolled in one of what were at the time the two International banking certification programs. In that context he observes that “[d]ebates were always conducted wholly in English, with a smattering of Arabic terms from *fiqh* and Islamic banking. Indeed, the specific status afforded English in Islamic banking, and the dissemination of ideas through the medium of English, has produced a distinct language ideology in Islamic banking and finance that resonates with debates over interpretation and the putative universality of neoclassical economics. English is the presumed universal standard. It brings more people together in Islamic than any other tongue, even (or especially) Arabic. It also provides an important bridge between centers of intellectual production and implementation in the United States, the United Kingdom, and India and Pakistan, on the one hand, with those in Malaysia and Indonesia, on the other.” Id. at 32-33

⁴¹⁷ “Sharia Risk? How Islamic Finance Has Transformed Islamic Contract Law,” by Kilian Bälz, Islamic Legal Studies Program, Harvard Law School, Occasional Publications 9, September 8, 2008, p. 14.

⁴¹⁸ Id.

⁴¹⁹ “*The Transformation of Islamic Law in Global Financial Markets*,” by Jonathan Ercanbrack, Cambridge University Press, 2015, p. 109.

⁴²⁰ “Malaysia and Bahrain are notable exceptions in that these states have created the institutional frameworks for Islamic finance to flourish.” “*The Transformation of Islamic Law in Global Financial Markets*, by Jonathan Ercanbrack, Cambridge University Press, 2015, p. 109, note 121. For example, “While [Malaysia] continues to be governed by the common law, it has constructed an Islamic legal and financial sphere that permits the industry to develop – more or less on its own terms...Malaysia houses centralised sharia boards within its central bank and securities commission.” Id.

⁴²¹ "Sharia Risk? How Islamic Finance Has Transformed Islamic Contract Law," by Kilian Bälz, Islamic Legal Studies Program, Harvard Law School, Occasional Publications 9, September 8, 2008, p. 24. More particularly, "Islamic financing transactions are no longer governed by Islamic law and Islamic law is no longer applied by Islamic jurists." Id. Bälz goes so far as to express his expectation "[i]n the medium term," that "the law of Islamic finance [will]...develop into a semi-autonomous field of Islamic law such as the Anglo-Muhammadan law, which is based on certain Sharia concepts, but was transformed through its application by English-trained judges." Id. at 24-25. Hamoudi cites Bälz, speaking at a symposium several years later, as offering broadly the same perspective: "In other words, Dr. Bälz does offer us a solution to the conundrum of how to adopt medieval rules into a modern practice, largely by leapfrogging over matters of *responsible* methodology and arriving at the more fundamental question of locating a legitimate authority to undertake it. To Dr. Bälz, the truly fascinating and innovative aspect of Islamic finance is that the authority in question is in fact private and more intimately tied to the modalities of operation of international finance than any court." "Present at the Resurrection: Islamic Finance and Islamic Law," by Haider Ala Hamoudi, *American University International Law Review*, Volume 26, Number 4 (citing Kilian Bälz, Partner, Amereller Legal Consultants, Remarks at the Islamic Finance Plenary Session of the XVIIIth Proceedings of the International Academy of Comparative Law (July 27, 2010)), 2011, 1107-1123, 1119. <http://digitalcommons.wcl.american.edu/auilr/vol26/iss4/8/>

⁴²² "Heaven's Bankers," by Harris Irfan," by Jon Fasman (reviewing *Heaven's Bankers*, by Harris Irfan, Constable & Robin Ltd, 2014), March 20, 2015. http://www.nytimes.com/2015/03/22/books/review/heavens-bankers-by-harris-irfan.html?_r=0 (Per the point raised about the wide ranging debate and diverse aspirations of participants in it, the reviewer notes that the author, by contrast, longs for an Islamic finance industry that caters to "small and medium-sized enterprises, retail customers, the man in the street" and offers something "beneficial to everyone, irrespective of creed." Id.)

Similarly, one experienced practitioner and scholar recently offered a sobering characterization of the landscape in the following terms: Islamic banks eschewed "participatory" (or profit-and risk-sharing) modes of finance because of "the lack of reliable accounting procedures of their customers"; "the threat of adverse selection in PLS offers to unknown customers" and to "maturity mismatches between short-term funds and medium to long-term employments." Moreover, they "considered their PLS accounts as equivalents to conventional deposits and expected not only a factual (albeit not contractual) guarantee of their funds and a predetermined rate of return (close to the conventional rate of interest for savings and term deposits)." In sum "a large variety of functional equivalents of conventional banking techniques and products, including all types of non-PLS debt-creating modes of financing." Moreover, "prominent Shari'ah scholars have certified the Shari'ah compliance of toolboxes that can be used to structure products for the leveraged (and speculative) trading of financial assets within the financial sector with no apparent or at best very weak links to the real economy... This is not to say that the Islamic financial system has already become as detached from the real economy as large parts of the conventional banking system have been, but it could happen. The differences between Islamic banks and conventional banks are reduced mainly to the form and hardly to the substance of their activities. They provide financing to the same groups of customers and for the same kind of projects at roughly the same commercial term." "Islamic Economics and Financial Sector Reform," by Volker Nienhaus, Proceedings of Sharia Economics Conference- Hannover, February 9, 2013, p. 2.

<http://www.iistecs.org/?q=content/islamic-economics-and-financial-sector-reform>

⁴²³ "Shari'ah and Sukuk: A Moody's Primer," by Kahlid Howladar, Moody's Investor's Service, May 31, 2006, p. 1. There are varied reports as to origin and meaning of the term and the practices with which it was associated.

Perhaps the most ironic report states that, "[o]ne of the methods of paying the troops adopted by the Umayyad administration was by a kind of cheque which entitled the holder to draw a specified amount of grain from the Government granaries after the harvest. Speculation as to the fluctuating price of grain gave rise to considerable buying and selling of these Army pay cheques. They were known as *sukuk* (s. *sikka*), and trading in *sukuk* was roundly condemned by the scholars on the ground that it was *riba*." *Commercial Law in the Gulf States*, by Noel J Coulson, Graham & Trotman Limited, 1984, p. 12.

According to another source, "[t]he Arabic word *sukuk* is the plural of the word *sakk*, meaning 'certificate' or 'order of payment'." Documentary evidence confirms the use of the word '*sakk*' in the early Islamic caliphates. The Muslim societies of the pre-modern period used *sukuk* as forms of papers representing financial obligations originating from trade and other commercial activities. In the earlier theoretical legal works, written instruments of credit were present. Such written instruments are encountered frequently in *genizah* documents. *Genizah* documents are documents that were stored in the Middle Eastern mosques and synagogues, because the word 'God' was written either in Arabic or Hebrew and, therefore, the merchants were reluctant to destroy such documents. The Cairo *genizah* documents contain fragments that indicate the existence of *sakk* in the 12th century CE and these money orders are remarkably similar in form to modern cheques. They stated the sum to be paid, the order, the date, and the name of the issuer.

"During the Middle Ages, a *sakk* was a written vow to pay for goods when they were delivered and it was used to avoid money having to be transported across dangerous terrain. As a result, these *sukuk* were transported across several countries and spread throughout the world. The Jewish merchants from the Muslim world transmitted the concept and the term *sakk* to Europe. An interesting outcome of the trade and transport of these *sukuk*, is that it functioned as a source of inspiration for the modern day cheque. Although the cheque has a British background, the modern Western word "cheque" appears to have been derived from the Arabic word '*sak*' " "Development of Sukuk: Pragmatic and Idealist Approaches to Sukuk Structures," by A. Saeed and O. Salah, *Journal of International Banking Law and Regulation*, Issue 1, 2013, 41-52, 45-46. <http://www.debrauw.com/wp-content/uploads/NEWS%20-%20PUBLICATIONS/Development-Sukuk-Pragmatic-and-Idealist-Approaches-to-20-Sukuk-20Structures.pdf>

Al-Aashker and Wilson offer what seems to be an overlapping characterization. They state that among the "political and economic consequences" of "monetary change, or reform, at the time of Abd-al-Malik" was the spread of financial instruments such as the '*ruq'a*', an order of payment, the '*sakk*', drawn on the banker with whom the drawer had an account; hence the word cheque in the European language, and the '*hawalah*', a form of a bill-of-exchange by which the debtor would transfer the debt to his own debtor, or to another person able to pay the debt to the original creditor." *Islamic Economics: A Short History*, by Ahmed El-Ashker and Rodney Wilson, Themes in Islamic Economics, Volume 3, Brill, 2006, pp. 134 and 135. <http://www.kantakji.com/media/4510/c116.pdf>

⁴²⁴ "Shari'ah and Sukuk: A Moody's Primer," by Kahlid Howladar, Moody's Investor's Service, May 31, 2006, p. 5. As McMillen has phrased it, they are "either asset securitisations or whole business securitisations, in each case akin to their conventional counterparts in that they are structured with asset isolation and servicing of the securitisation instrument (the *sukuk*) from cash flows from those assets. They resemble pass-through certificates of the early 1980s: fractional undivided ownership interests, albeit with cash flow restructuring." "Islamic Capital Markets: A Selective Introduction," by Michael McMillen, July 2013, <http://whoswholegal.com/news/features/article/30640/islamic-capital-markets-selective-introduction/>

⁴²⁵ "Shari'ah and Sukuk: A Moody's Primer," by Kahlid Howladar, Moody's Investor's Service, May 31, 2006, p. 6.

⁴²⁶ *Islamic Finance: Law, Economics and Practice*, by Mahmoud A. El-Gamal, Cambridge University Press, 2006, p. 47.

<http://iugc.yolasite.com/resources/Reference%20Book%2004%20-%20Islamic%20finance.%20law%20economics%20and%20practice.%20M.%20El%20Gamal.pdf>

⁴²⁷ That is, "[t]he *fiqh* discourse does not envisage *ijarah* as a mode of financing, but a transaction for the transfer of usufruct from person to person for an agreed consideration and period" "A *Shari'ah* Analysis of Issues in Islamic Leasing," by Mohammad Hashim Kamali, *Islamic Economic*, Volume 20, Number 1, 2007, 3-22, 7. <http://www.kantakji.com/media/5625/1233.pdf> "It is also a requirement of a valid *ijarah* that the capital asset survives and does not perish with the *ijarah*. This would preclude items such as food, fuel and money which cannot be used unless they are consumed altogether." *Id.* at 5-6. (See discussion of the latter point in the main text at p. 85)

⁴²⁸ "Shariah-Compliant Project Finance An Overview, Including Structures," by Michael J.T. McMillen, *Journal of Islamic Economics, Banking and Finance*, Volume 3, Number 1, June, 2007, p. 13. http://ibtra.com/pdf/journal/v3_n1_article2.pdf

⁴²⁹ *Id.* at 14. See AAOFI *Sukuk Standard – Shari'ah Standard No. (17), Investment Sukuk*, Shari'a Standards 1425-6 H /2004-5 (Accounting and Auditing Organization for Islamic Financial Institutions 2004). "Realizing the potential for *sukuk* as a backbone element of an Islamic capital market, the Islamic Financial Services Board ("IFSB") began to focus on capital markets and the legal infrastructure issues. In 2006 (with initial reports made later, in 2007), the IFSB focused on the development of an effective legal framework for Islamic finance, with special emphasis on those elements of the legal infrastructure that relate to *sukuk* issuances." *Id.*

⁴³⁰ "Shariah-Compliant Project Finance An Overview, Including Structures," by Michael J.T. McMillen, *Journal of Islamic Economics, Banking and Finance*, Volume 3, Number 1, June, 2007, p. 14, note 30. http://ibtra.com/pdf/journal/v3_n1_article2.pdf

⁴³¹ *Id.* at 16. That is, they involved either "a single *Shariah*-compliant tranche in an otherwise conventional financing" or one "in which conventional debt is provided to a separate special purpose entity that is related to the *Shariah*-compliant investors solely through *Shariah* compliant contractual arrangements. Each of these involves a 'bifurcated' structure, although the nature of the bifurcation is a bit different for each of these structures." *Id.*

⁴³² For the construction phase, there is a "procurement agreement (or *Istisna'a*) between a special purpose vehicle (SPV)(owned by the Islamic financiers), as the purchaser, and the project company (the borrower), as the procurer." "Islamic Project Finance," by Christopher G. Gross, Craig R. Nethercott, Harjaskaran Rai and Mohammed A. Al-Sheikh, Latham & Watkins LLP, 2012. "The SPV structure has perceived benefits for both the Islamic financiers and the project company. In the case of the financiers, they are protected from the risks associated with the ownership of the assets, for example, environmental liability. In the case of the project company, because the assets are not held by the Islamic financiers directly, the project company and the assets are isolated from the risk of insolvency of an Islamic financier." "Under the procurement agreement, the project company agrees to procure assets on behalf of the SPV by a certain date. On delivery of the assets, title to and possession of the assets passes to the SPV." The SPV "act[s] (on behalf of the Islamic financiers) as the purchaser under the procurement agreement." "The SPV structure has perceived benefits for both the Islamic financiers and the project company. In the case of the financiers, they are protected from the risks associated with the ownership of the assets, for example, environmental liability. In the case of the project company, because the assets are not held by the Islamic financiers directly, the project company and the assets are isolated from the risk of insolvency of an Islamic financier." *Id.* "The project company, as lessee, and the SPV, as lessor, will also enter into a forward lease agreement to lease the assets on delivery. The forward lease agreement operates during the operational phase of the project (the period following delivery of the assets to the SPV according to the procurement agreement until a date equivalent to the final maturity date under the conventional facilities)." *Id.*

⁴³³ For a recent overview of the *sukuk* market see "A Comprehensive study of the Global Sukuk Market, 4th Edition," International Islamic Financial Market, November 2014. http://www.iifm.net/system/files/private/en/IIFM%20Sukuk%20Report%20%284th%20Edition%29%20A%20Comprehensive%20study%20of%20the%20Global%20Sukuk%20Market_0.pdf

⁴³⁴ "Shari'a-compliant Securities (*Sukuk*)," Linklaters LLP, September 2012. p. 6.

http://www.linklaters.com/pdfs/mkt/london/161211_Sharia_Compliant_Securities_Sukuk_Flyer.pdf

⁴³⁵ "Shari'a-compliant Securities (*Sukuk*)," Linklaters LLP, September 2012. p. 6.

http://www.linklaters.com/pdfs/mkt/london/161211_Sharia_Compliant_Securities_Sukuk_Flyer.pdf

⁴³⁶ *Id.*

⁴³⁷ *Id.* at 6-7.

⁴³⁸ "Islamic Project Finance," by Christopher G. Gross, Craig R. Nethercott, Harjaskaran Rai and Mohammed A. Al-Sheikh, Latham & Watkins LLP, 2012. "In some transactions, it may also be a requirement of the financiers that the insurance is also placed with *Sharia*-compliant insurers on a *takaful* (cooperative) basis. If the project company is negligent in the use of, maintenance of, or in procuring insurance or performing its obligations, it assumes principal liability for and will be required to indemnify the Islamic financiers for any related losses." *Id.*

⁴³⁹ *Shari'a-compliant Securities (Sukuk)*, Linklaters LLP, September 2012. p. 13.

http://www.linklaters.com/pdfs/mkt/london/161211_Sharia_Compliant_Securities_Sukuk_Flyer.pdf

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 3.

⁴⁴² *Id.* at 6 (italics added),

⁴⁴³ *Id.* at 6. Later the report revisits the subject with a prefatory reference to a broader group of "financial engineering techniques to create [the above-noted] asset-backed' or securitisation structures" – an echo of El-Gamal's reference to "arbitrage" – observing though that "[w]hile it may initially appear that many *Sukuk* have assets at their core, a detailed analysis of the commercial terms and legal structure shows that, for some, *Sukuk* performance is not governed by these assets – indeed, the credit risk is really that

of the sponsor or originator." Id. at 5. And still later Howladar returns to the points cited in the text: That is, he distinguishes between "a 'True Sale' securitization" for which there is "a correspondence of the income streams with the actual rental and market value of the asset(s)" and "an unsecured exposure" one for which "[t]he payment streams to investors are only nominally linked to the underlying asset cashflows and value." In the latter case, "the asset only exists in the structure to facilitate its Shar'iah compliance." Id. at 8.

⁴⁴⁴ "Shar'iah and Sukuk: A Moody's Primer," by Khalid Howladar, Moody's Investor's Service, May 31, 2006, p. 3.

⁴⁴⁵ "The Future of Sukuk: Substance Over Form?" by Khalid Howladar, Moody's Investor's Service, May 6, 2009, 1.

<http://www.kantakji.com/media/8014/m170.pdf> More particularly, he remarked that "[w]hile there are many sukuk structures (14 described by AAOIFI), the majority of those applied (be they *ijarah*, *musharakah* or *mudarabah*) effectively 'reduce' to a form that is an Islamic equivalent of a conventional secured bond." Id. at 4.

⁴⁴⁶ For example, the author remarks that "[f]rom a risk perspective, it is critical for investors to note that, currently, upon the insolvency of a sukuk originator, the assets 'involved' would be clawed back into the bankruptcy estates. The sukuk investors would have no first-lien or prior ranking or security above any other unsecured credit. It is this aspect that drives the rating of corporate and bank sukuk. If the likelihood of a loss on the sukuk is based not on the assets but on the performance of the originating company – then the rating will be the same as the company's unsecured rating." Id. at 6.

The above being said, that does not necessarily imply that from the perspective of certain investors and originators the above that "asset-based" sukuk are necessarily undesirable. For example, it has been suggested that "[t]he structural 'substance' of many existing unsecured *sukūk* is a deliberate construction; many companies do not want to 'sell' their quality assets to investors, at the same time, many investors do not actually want to take asset risk, but want the equivalent of conventional bonds which is driven by originator risk. Widespread structuring approaches mean that they get the desired debt funding in *sukūk* form and investors are happy with this for the most part." *Global Sukūk and Islamic Securitization Market, Financial Engineering and Product Innovation*, by Muhammad al-Bashir Muhammad al-Amine, Brill, 2012, 131.

Similarly, others have remarked that "most issuers opt for asset-based *sukuk* structures as opposed to the more *Shariah* preferred" because "obligors can access unsecured funding. They do not have to part with their asset to raise the capital needed for their business or ventures. Furthermore, there are few or no costly disclosure obligations on the assets. Investors have sought to be treated simply like that of conventional bondholders. They do not want to take on additional risk, only the credit risk. Any additional risk also affects the pricing of the *sukuk*. Furthermore, it will be difficult to find any investors with such a risk appetite unless the rewards are proportional to the risk." "Religion and the Clash of 'Ideals' and 'Realities' in Business: The Case of Islamic Bonds (*Sukuk*)," by Rafisah Mat Radzi and Mervin K. Lewis, *Thunderbird International Business Review*, Volume 57, Number 4, July/August 2015, (quoting "Sukuk report: A comprehensive study of the global sukuk market (2nd ed.)", International Islamic Financial Market, 2011, p.31), p. 303. <http://onlinelibrary.wiley.com/doi/10.1002/tie.21706/pdf> Moreover, "[t]he pressure to mimic conventional bonds in order to maximize the scope (and cash flow) of potential investors has been tremendous. It will be difficult to find any investors with such a risk appetite unless the rewards are proportional to the risk." Id. (referring to argument by Malim cited in "Asset-backed sukuk: Islamic finance going its own way," by P. Wouters, *Islamic Finance News*, 8(12), 22-24, 22) In other words, "key participants in the *sukuk* market prefer asset-based sukuk" because "they are more averse to market risk than credit risk." Id.

⁴⁴⁷ "Sukuk and their Contemporary Applications," by Muhammad Taqi Usmani, November 2007.

<http://www.kantakji.com/media/7747/f148.pdf>

⁴⁴⁸ Id. at 3.

⁴⁴⁹ Id. at 2. Two other major concerns were that "the *sukūk* generated regular payments determined as a percentage of capital rather than as a percentage of profit" and that "through various mechanisms, the *sukūk* essentially guaranteed a return of the principal at maturity." "Islamic Capital Markets: Market Developments and Conceptual Evolution in the First Thirteen Years," by Michael J.T. McMillen, 2011, p. 26. <http://ssrn.com/abstract=1781112> or <http://dx.doi.org/10.2139/ssrn.1781112>

⁴⁵⁰ "Sukuk and their Contemporary Applications," by Muhammad Taqi Usmani, November 2007, p. 3.

<http://www.kantakji.com/media/7747/f148.pdf>

⁴⁵¹ "Addendum to the AAOIFI Shar'iah Standard No. 17," AAOIFI, February, 2008, p 1.

[http://www.cimaglobal.com/Documents/ImportedDocuments/Sukuk_Pronouncement_V4_\(2\).pdf](http://www.cimaglobal.com/Documents/ImportedDocuments/Sukuk_Pronouncement_V4_(2).pdf)

⁴⁵² Id.

⁴⁵³ Id.

⁴⁵⁴ "Sheikh Usmani's intervention was undoubtedly a turning point in the evolution of modern IF. The debate he opened was not only about what is and is not considered Shariah-compliant, but also signalled the ability of Shariah boards to influence capital flows in an increasingly hybridized Islamic financial system. It is, therefore, unsurprising that this episode was characterized as a 'debate over the soul of Islamic finance' in media accounts, since it was effectively a standoff between Shariah scholars and leading conventional banks over the direction of the industry... The reaction from the market at that time appears to have been in favour of the more conservative view of Sheikh Usmani, as illustrated by the reversal of the trend in the sukuk market." "Islamic finance in global markets: Materialism, ideas and the construction of financial knowledge," by Eddy S. Fang, *Islamic finance in global markets: Materialism, ideas and the construction of financial knowledge*, *Review of International Political Economy*, Volume 21, Number 6, 1170-1202, 1191.

⁴⁵⁵ "[T]he release of the AAOIFI Statement coincided with the onset of the global credit crunch and a rapid fall in the number of sukuk issuances. Consequently, the issuance of corporate sukuk in the GCC countries declined from US\$13.5 billion in 2007 to US\$5.5 billion in 2008." "The Sukuk Handbook: A Guide to Structuring Sukuk," Latham & Watkins LLP, 2015, p..2.

<https://www.lw.com/search?searchText=sukuk>

⁴⁵⁶ "Sukuk and their Contemporary Applications," by Muhammad Taqi Usmani, p. 3. <http://www.kantakji.com/media/7747/f148.pdf>

⁴⁵⁷ See "Principles of Shariah Governing Islamic Investment Funds," by Mufti Taqi Usmani.

http://www.albalagh.net/Islamic_economics/finance.shtml This is consistent with the AAOIFI position which states that "[w]here the underlying assets are investments in equities, the investors must have the right to dividends, if any. Any clause stating that such dividends, if any, are to be retained by the issuer, would go against this feature of ownership." Addendum to the AAOIFI Shar'iah Standard No. 17," AAOIFI, February, 2008, p 1.

[http://www.cimaglobal.com/Documents/ImportedDocuments/Sukuk_Pronouncement_V4_\(2\).pdf](http://www.cimaglobal.com/Documents/ImportedDocuments/Sukuk_Pronouncement_V4_(2).pdf)

⁴⁵⁸ According to the writer of the Moody's reports, "[t]he first point highlighted by AAOFI relates to assets. It proposes that sukuk investors should have rights over the sukuk assets, that they should be sold 'legally' and that the originating company should 'transfer' the asset." "The Future of Sukuk: Substance over Form", by Khalid Howlader, Moody's Investor's Service, May 6, 2009, p. 4. <http://www.kantakji.com/media/8014/m170.pdf>. Note that the text of the AAOFI standards makes no reference to an "originating company".

⁴⁵⁹ The opening sentence of this portion of the standards merely states that it is "primarily concerned with the real or genuine transfer of assets to the investors." Addendum to the AAOFI Shari'ah Standard No. 17, AAOFI, February, 2008, p. 1.

[http://www.cimaglobal.com/Documents/ImportedDocuments/Sukuk_Pronouncement_V4_\(2\).pdf](http://www.cimaglobal.com/Documents/ImportedDocuments/Sukuk_Pronouncement_V4_(2).pdf)

⁴⁶⁰ "From 'Asset-backed' to 'Asset-light' Structures: The Intricate History of Sukuk," by Rafe Haneef, *ISRA International Journal of Islamic Finance*, Volume 1, Issue 1, 2009, 103-126, 124

<http://new.mbri.ac.ir/userfiles/file/Islamic%20Banking%D8%A8%D8%A7%D9%86%DA%A9%20%D9%85%D9%82%D8%A7%D9%84%D8%A7%D8%AA/sukuk/From%20Asset-backed%20to%20asset-light%20structures%20the%20intricate%20history%20of%20sukuk.PDF>

This argument does not appear to rest on any concern – broadly speaking – on Usmani's part with regard to investments taking the form of ownership of corporate shares as such. See "Principles of Shariah Governing Islamic Investment Funds," by Mufti Taqi Usmani.

http://www.albalagh.net/Islamic_economics/finance.shtml

⁴⁶¹ *Global Sukuk and Islamic Securitization Market, Financial Engineering and Product Innovation*, by Muhammad al-Bashir Muhammad al-Amine, Brill, 2012, 119-120. They state also that while "Sheikh Taqi refer[red] to *shukūk* with shares in companies as the underlying assets...in reality there are very few *shukūk* with this kind of structure." Id. at 119. As suggested in the main text, we believe that Usmani was not referring to shares in that sense. Note that Saeed and Salah argue that "[t]his point is relevant in regard to the sukuk *al-ijara* structure." "History of sukuk: pragmatic and idealist approaches to structuring sukuk," by Abudllah Saeed and Omar Salah, Chapter 3 in *The Islamic Debt Market for Sukuk Securities*, Edited by Mohamed Ariff, Munawar Iqbal, Shamsher Mohammad, Edward Elgar, 2012, p. 59. In a later essay they suggest that "[t]he main target of [Usmani]'s criticism was the equity-based sukuk structures – the sukuk issues based on *musharaka*, *mudaraba*, and *wakala*. He, nevertheless, also addressed some elements of sukuk issuances that were relevant in regard to the sukuk *al-ijara* structure and the hybrid sukuk structure.

"Development of Sukuk: Pragmatic and Idealist Approaches to Sukuk Structures," by A. Saeed and O. Salah, *Journal of International Banking Law and Regulation*, Issue 1, 2013, 41-52, 50. <http://www.debrauw.com/wp-content/uploads/NEWS%20-%20PUBLICATIONS/Development-Sukuk-Pragmatic-and-Idealist-Approaches-to-20-Sukuk-20Structures.pdf>

They suggest that "the prevailing sukuk structures were the equity-based sukuk structures in 2007," but that "[f]rom 2008 onwards, the sukuk *al-ijara* started to dominate the sukuk market due to a drop in equity-based sukuk structures as a result of [the AAOFI's 2008 resolution."

"Development of Sukuk: Pragmatic and Idealist Approaches to Sukuk Structures," by A. Saeed and O. Salah, *Journal of International Banking and Regulation*, Issue 1, 2013, 41-52, 47, note 54. <http://www.debrauw.com/wp-content/uploads/NEWS%20-%20PUBLICATIONS/Development-Sukuk-Pragmatic-and-Idealist-Approaches-to-20-Sukuk-20Structures.pdf>

McMillen remarks that the Usmani's reference to an ownership requirement "seems to be directed to assets involved in partnership and similar arrangements. Presumably, as applied to *ijāra* transactions, the requirement would mean ownership of the usufruct that is the subject of the *ijāra*." "Islamic Capital Markets: Market Developments and Conceptual Evolution in the First Thirteen Years," by Michael J.T. McMillen, 2011, p. 27, note 57. <http://ssrn.com/abstract=1781112> or <http://dx.doi.org/10.2139/ssrn.1781112> He also states that "[a]mong the concerns relating to failure to represent ownership were the fact that many contemporary sukuk were structured as entitlements to returns from entities rather than ownership of entities and others included *murābaha* debt where there was no tangible asset to be owned." Id. at 26

⁴⁶² *Global Sukuk and Islamic Securitization Market, Financial Engineering and Product Innovation*, by Muhammad al-Bashir Muhammad al-Amine, Brill, 2012, pp. 97-98. They term the later, ostensibly problematic sukuk as being "asset-based" as contrasted with being "asset-backed." Id. at 121 The following characterization of some of the origins of the ownership issue is enlightening:

"The Malaysian government issued a "global *shukūk* which was backed by USD600 million worth of sovereign tangible assets." The problem was that the government had previously issued other international bonds – which were and remained unredeemed and these bonds had "a standard negative pledge which restrains the bond issuers from issuing any bond that is not in *pari passu* with the existing unredeemed unsecured bonds." Thus, issuance of the "proposed asset-backed *shukūk*... structured as asset backed securities" – "effectively a secured bond" – "his would constitute a direct breach of the negative pledge clause." The solution was for the *shukūk* holders to have only "beneficial ownership of the assets held through the *shukūk* trustee during the life of the *shukūk*." In the case of a default, "the *shukūk* trustee's sole recourse to the assets would be to dispose of the assets only to the Federation of Malaysia and seek payment." Once having done so "the *shukūk* holders would in law be treated as unsecured creditors." The authors remark that the structure "was replicated and now many *shukūk* offerings are structured as asset-based securities and not asset backed." Id. at 121.

⁴⁶³ "Shifting Title and Risk: Islamic Project Finance with Western Partners," by Alan J. Alexander, *Michigan Journal of International Law*, Volume 32, Issue 3, 2011, 571-612, 583. <http://repository.law.umich.edu/mjil/vol32/iss3/5>

⁴⁶⁴ Id.

⁴⁶⁵ Barrett suggests another "risk" related rationale: "Leasing has been justified on the grounds that by retaining ownership the bank runs the risk of premature obsolescence. The rental equipment is often used in a transient manner and the lessor is charged with the responsibility for maintenance. In the case of rental the lessor is also charged with the responsibility for coping with the product's obsolescence, so that it may be regarded as a service-oriented business. This element of risk is a key component in making *ijara* acceptable within the *Sharia*." *Introduction to Islamic Banking and Finance* by Brian Kettell, John Wiley & Sons, Inc., 2011, p. 90.

⁴⁶⁶ "A Critical Perspective on the Principles of Islamic Finance Focusing on Sharia Compliance and Arbitrage," by James M Garner, *Leeds Journal of Law & Criminology*, Volume 1 Number 1, pp. 82-83. http://criminology.leeds.ac.uk/files/2013/09/Islamic-Finance-Principles_Garner.pdf

More specifically, Proctor writes that "[a]n *ijara* contract must terminate on destruction of the subject matter, and the contract may not validly stipulate that the rental payments must continue under such circumstances." *The Law and Practice of International Banking*, by Charles Proctor, Oxford University Press, 2010, p. 778, (This is in contrast with "a conventional lease" for which "the risk in the asset is passed to the customer by means of 'hell and high water' clauses, which require the customer to continue paying

the rent even though the asset may have become a total loss – at least until the insurance proceeds are settled and the transaction can be fully closed out of the proceeds.” Id., note 62.) According to Proctor, such termination “follows from the fact that the lessor cannot pass the entire risk of the asset to the lessee. The financier may thus have to rely on receipt of insurance proceeds in this type of situation, but that is perhaps consistent with the requirement that the financier must take a broader asset-based risk than may be the case in conventional forms of finance.” Id. at 778. Note the use of the suggestive but yet broadly phrased reference to “asset-based” risk.

⁴⁶⁷ “A Critical Perspective on the Principles of Islamic Finance Focusing on Sharia Compliance and Arbitrage,” by James M Garner, *Leeds Journal of Law & Criminology*, Volume 1, Number 1, 2013, p. 76. http://criminology.leeds.ac.uk/files/2013/09/Islamic-Finance-Principles_Garner.pdf Garner’s references are to *The Law and Practice of International Banking*, 1st Edition, by Charles Proctor, Oxford University Press, 2010. Saleem broadly claims that “[t]he profit is made for the expertise and efforts that the seller provides.” *Islamic Commercial Law*, by Muhammad Yusuf Saleem, John Wiley & Sons, Singapore Pte. Ltd., 2013, p. 35

⁴⁶⁸ “A Critical Perspective on the Principles of Islamic Finance Focusing on Sharia Compliance and Arbitrage,” by James M Garner, *Leeds Journal of Law & Criminology*, Volume 1, Number 1, 2013, p. 76. http://criminology.leeds.ac.uk/files/2013/09/Islamic-Finance-Principles_Garner.pdf

⁴⁶⁹ “Critical Appraisal of Shariah Issues on Ownership in Asset-Based Sukuk as Implemented in the Islamic Debt Market,” by Asyraf Wajdi Dusuki and Shabnam Mokhtar, International Shari’ah Research Academy for Islamic Finance, Research Paper No. 8, 2010. <http://www.iefpedia.com/english/wp-content/uploads/2011/02/B108.pdf>

⁴⁷⁰ Id. at 12.

⁴⁷¹ Id.

⁴⁷² Id. at 15.

⁴⁷³ Id. at 15, 16, and 17.

⁴⁷⁴ Id. at 17.

⁴⁷⁵ Id.

⁴⁷⁶ Id. at 19-20. “In case of foreclosure, *sukuk*-holders enjoy only what is due to them, and any surplus out of the asset disposal must be returned to the obligor. If the amount is still insufficient after the asset disposal, the *sukuk*-holders shall wait in line with other unsecured creditor to get back any balance due.” Id. at 20.

⁴⁷⁷ Id.

⁴⁷⁸ Id. at 21.

⁴⁷⁹ Id. at 14.

⁴⁸⁰ Id. at 21.

⁴⁸¹ “The *rahn* agreement must also identify the debt being secured thereby. There does appear to be agreement that a reference to the loan agreement pursuant to which the secured debt is incurred is necessary and that the exact amount of the debt is required to be specified in the agreement. There should be separate detailed specifications of amounts constituting each element of indebtedness-i.e., principal, interest, and other amounts. In the event that the *rahn* agreements are reviewed for compliance with the *Shari’ah* and are determined to secure interest, the practice in Saudi Arabia is that such agreements would be unenforceable only as and to the extent that they secure interest.” “Islamic Shari’ah -Compliant Project Finance: Collateral Security and Financing Structure Case Studies,” by Michael J.T. McMillen, *Fordham International Law Journal*, Volume 24, Issue 4, 2000, 1184, 1225. <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1762&context=ilj>

⁴⁸² “Notwithstanding the invalidity of agreements for the receipt or payment of interest under Saudi Arabian law, and that such agreements are unenforceable through the Saudi Arabian courts, Saudi Arabian banks pay and charge interest. Usually, in such transactions interest is referred to as ‘commission’, ‘service charge’ or another synonym, even though it is obvious that interest is meant by such terms. All Saudi Arabian banks are subject to strict supervision of the Saudi Arabian Monetary Agency, and there cannot be any suggestion that such interest-related transactions are conducted clandestinely. Interest-related transactions are not, therefore, illegal in Saudi Arabia. Rather, they are void and unenforceable. The Saudi Arabian courts and judicial tribunals, including the Board of Grievances, do not award interest in any manner or form. However, interest provisions in an agreement are severable, and a contract will not, therefore, be ruled invalid solely because it includes interest related provisions.” “Saudi Arabian Law Overview, 2. Islamic Contract Law,” Hatem Abbas Ghazzawi & Co. http://www.saudilegal.com/saudilaw/02_law.html

⁴⁸³ “Critical Appraisal of Shariah Issues on Ownership in Asset-Based Sukuk as Implemented in the Islamic Debt Market,” by Asyraf Wajdi Dusuki and Shabnam Mokhtar, International Shari’ah Research Academy for Islamic Finance, Research Paper No. 8, 2010, p. 29. <http://www.iefpedia.com/english/wp-content/uploads/2011/02/B108.pdf>

⁴⁸⁴ To the point, it has been remarked that “*fiqh* literature sees no wrong in combining binding or nonbinding contracts and charitable contracts or combining a sale contract and *ijarah* or a sale contract and currency exchange contract (*sarf*). The majority of jurists permitted combination of sale and *ijarah*. After systematic explanation of the subdivisions of various forms of *ijarah* that may be combined with sale in one deal, al-Hattab, a *Maliki* jurist, concluded that “all these elaborations had proven that the prevalent view of the *Maliki* school is the permissibility of the combination of *ijara* and sale in one deal” (see Al-Hattab, 1398 AH, Vol. 5, p. 397).” “The Combination of Contracts in Shariah: A Possible Mechanism for Product Development in Islamic Banking and Finance,” by Mohammed Burhan Arbuna, *Thunderbird International Business Review*, Volume 49, Number 3, May-June 2007, 341-369, 328.

⁴⁸⁵ For example, Arbuna assesses what he sees as relevant literature to assess “the validity of combining two or more contracts to structure *Shari’ah*-compliant products” “The Combination of Contracts in Shariah: A Possible Mechanism for Product Development in Islamic Banking and Finance,” by Mohammed Burhan Arbuna, *Thunderbird International Business Review*, Volume 49, Number 3, May-June 2007, 341-369, 324. He suggests that there is arguably a problem with this from the outset because “of the traditions that prohibit ‘two contracts in one transaction’ (*itjima al-uqud*). However, he argues that these ahadith are concerned with the issue appropriately or inappropriately [t]ying a contract with a condition,” id. at 345, in ways which reflect concern about *riba*, *gharar* or “injustice, exploitation, and taking advantage of people’s need”. Id. 346 “For example, the rationale for prohibiting combination of a loan contract and sale or leasing is the fear of favoritism or partiality. This is because the seller or lessor may consider discounting the price in favor of the lender due to the loan facility, leading to a contract of loan that extracts profit. By these, there is no justice and freedom of contract without any external influence and this leads to inequality and injustice.” Id. Most generally he contends that their “legality is circumscribed with certain parameters and conditions that are derived from general principles of the Islamic law of contracts” Id. at 354, namely (a) “it is necessary that the structure is not fashioned in a way that would place it in conflict with an

explicit source" Id. at 354; (2) the product "must not be intended to circumvent impermissible transactions, such as *riba*" Id. at 355; (3) "that the principal objectives of the contracts combined do not contradict each other, either customarily or legally". Id. at 355.

⁴⁸⁶ *Islamic Law and Finance: Religion, Risk, and Return*, by Frank E. Vogel and Samuel L. Hayes, III, Kluwer Law International, 1998, p.104.

⁴⁸⁷ "Ijarah," by Maulana Taqi Usmani. Accountacy.co .pk, p. 15. http://www.cba.edu.kw/elsakka/islam_ijarah.pdf "So far as this basic difference is maintained, (i.e. the lessor assumes the risk of the leased asset) the transaction cannot be categorised as an interest-bearing transaction, even though the amount of rent claimed from the lessee is equal to the rate of interest." Id.

Note, in a response to an inquiry about this difference which observed that both the lessor and lender received a fixed return, Usmani offered the following response which seems to add another rationale in the next to last sentence:

"There are several differences between interest and rent. The basic principle of Shariah is that profit is justified where a person has undertaken the risk of the thing given to another person. In a transaction of loan, after advancing money, the creditor does not take any risk of the money because if the money is lost in the hands of the debtor after he has taken delivery thereof the debtor is bound to repay the loan. As the creditor did not take any risk of it, therefore he cannot charge additional profit thereon. While, in the case of a property leased out to the Lessee, the Lessor has taken the risk of the property. If the property is destroyed, he will bear the loss, therefore, it is justified for him to charge rent from the Lessee. Another difference is that the property is always subject to depreciation while money does not depreciate. Therefore, charging of rent in the first case is justifiable while it is not so in the latter case." "Riba, Its Meaning and Application," Maulana Taqi Usmani. <http://muftitaqiusmani.com/en/?p=11075> It is not clear how aligned that additional argument is with debates over that which can be rented.

⁴⁸⁸ Ab Rahman writes as follows:

"In Islam credit and finance are considered important means to elevate the economic status of a Muslim. Several prophetic traditions or Hadith show the importance of credit as a tool to help one's fellowman. The Hadiths of Ibn Hishām and Ibn Mājah report that the Prophet said: 'In the night of the journey, I saw on the gate of heaven written reward for giving alms (*ṣadaqah*) is 10 times and reward for benevolent credit (*qard al-ḥasan*) is 18 times'. Similarly, it is also reported that the Prophet said: 'Whoever extends a loan to a Muslim twice, its reward is similar to that of a single alms'. A Hadith of Abū Hurairah reports that the Prophet said: 'Whoever relieves a believer from a difficulty in this world, Allah will relieve him from his difficulty and Allah will facilitate him in this world and the world hereafter'. The Hadiths show the importance of credit and finance by which Muslims are generally encouraged to help others to elevate their economic status." "Guarantees in Early Islamic Financial System," by Suhaimi Ab Rahman, *Arab Law Quarterly*, Volume 28, Issue 3, 2015, 274-284, 277.

<http://booksandjournals.brillonline.com/content/journals/10.1163/15730255-12341304>

⁴⁸⁹ "Narrated Al-Amash:

When we were with Ibrahim, we talked about mortgaging in deals of Salam. Ibrahim narrated from Aswad that 'Aisha had said, "The Prophet bought some foodstuff on credit from a Jew and mortgaged an iron armor to him." "The Hadith of Muhammad, Volume 3, Book 41, Number 571," by Sahih Bukhari. <http://www.balaams-ass.com/alhai/bukhar41.htm>

⁴⁹⁰ It is interesting to note that the lessee's relationship to the corpus/"asset" has been likened to that of a trust. For example, Kamali, an Islamic scholar remarks that "[t]he lessee's control over the leased article is in the nature of a trust (*amanah*) which means he is not liable for loss and damage that occurs through normal use of the leased object." "A Shari'ah Analysis of Issues in Islamic Leasing," by Mohammad Hashim Kamali, *Islamic Economics*, Volume 20, Number 1, 2007, 3-22, 9.

<http://www.kantakji.com/media/5625/1233.pdf> (Arguably, in this connection, Kamali earlier states that "[s]ince *ijarah* is a variety of sale, it is lawful in everything that can lawfully be bought and sold, and the rules of Shari'ah pertaining to sale are also generally applicable to *ijarah*. The *fuqaha* have, however, singled out basically two things, namely the human being, and the *waqf* property which cannot be sold but can be made the valid subject matter of *ijarah*." Id. at 5. (The term *waqf* relates to certain trust-like arrangements. See, for example, "Waqf: A Quick Overview," by Monzer Kahf.)

http://monzer.kahf.com/papers/english/WAQF_A_QUICK_OVERVIEW.pdf Similarly, according to an Islamic bank, "[t]he leased asset in the lessee's actual or constructive possession shall be a form of trust (*amanah*)." "Draft of Shariah Parameter reference 2: Ijarah Contract (SPR2)," Bank Negara Malaysia 2009, p. 10.

<http://www.bnm.gov.my/documents/conceptpaper/ijarahCP.pdf>

⁴⁹¹ Ebrahim and Sheikh remark that "[m]uḍāraba is a derivative of the Arabic infinitive, *ḍarb* (travel), as in the expression *ḍarb fi l-arḍ*, 'to travel the land'. It is called *muḍāraba* because the agent earns his percentage of a venture's profits as a consequence of the effort and labour he expends. The term *muḍāraba* is of Iraqi origin, and was the preferred term of Ḥanafī jurists to describe this particular form of arrangement because of its close semantic connection with the Qur'ānic verse, "... And others travelling (*yaḍribūna*) through the land (for the purposes of trade)". Jurists of the Mālikī and Shāfi'ī Schools of Law refer to this contract as *muqāraḍa* (lit. 'to surrender the profits'). They state that "[a]ccording to the 11th century Ḥanafī jurist, al-Sarakhsī for 'the legality of this form of contract is known via the normative practice of the Prophet (*sunna*) and the consensus of the early Muslims (*ijmā'*)", but remark that "in common with other jurists of the classical period, al-Sarakhsī made no attempt to provide a rational justification for this form of contract." They suggest that *muḍāraba* "was probably employed because it (i) circumvented the problem of *riba* and (ii) allowed the investor to overcome the problem of having to precisely fix a wage in an arrangement which was essentially the provision of capital in exchange for labour. These advantages would have been factors which led the Prophet Muhammad (PBUH) himself and his eminent companions to employ this facility in trade, either as a *muḍārib* or as a *rabb al-māl*." "The *Muḍāraba* Facility: Evolution, Stasis and Contemporary Revival," by Muhammed-Shahid Ebrahim and Mustapha Sheikh, *Arab Law Quarterly*, Volume 29, Issue 3, 2015 246-260, 254.

They remark that "the Muslim schools of law generally endorsed the application of *muḍāraba* in commerce, with Ḥanafī jurists taking a more liberal stance in contrast to the more conservative Shāfi'ī, Mālikī and Ḥanbalī jurists, who advocated its employment only in trade, where hired labour was not feasible. For the latter schools, as explained by Hasanuz-Zaman, *muḍāraba* defied both the general law of hire as well as ran afoul of several Ḥadīths – 'Profit goes with liability' (*al-kharāj bi-d-ḍamān*) and '... (no) profits

without liability' (. . . *lā ribh mā lā yuḍman*) both of which form the basis of the well-known legal maxim 'profits are concomitant to risk' (*al-ghunum bil-ghurum*) – since the working partner is entitled to profits without having to bear any risk." Id. at 255.

"Commenda contracts, *mudharabah*, which were used in pre-Islamic trade were accepted and declared legitimate under Islam." *Islamic Economics: A Short History*, by Ahmed El-Ashker and Rodney Wilson, Themes in Islamic Economics, Volume 3, Brill, 2006, p.36. <http://www.kantakji.com/media/4510/c116.pdf> Again, they remark that "[t]he commenda, which existed in Arabia before Islam, is referred to in Arabic by three different terms: *Mudārabah*, *Qirād* and *Muqāradah*. The three terms, however, mean the same thing; the difference is semantic and is related to linguistic derivation influenced by geographical locations. The pre-Islamic commenda was approved by the Prophet and became an Islamically acceptable form of business." Id. at 143- 144. The authors do not cite what form "approv[al] by the Prophet" took. (Their use of the word "commenda" is curious since it has origins in Latin and Italian and was a term used for a contract form used in medieval times. Moreover, there appears to be contentious debate as to the origins of the commenda in the *chreokoinonia* in Byzantium, the Jewish *ʾisqa* contract, and the Muslim *qirad* contract (with pre-Islamic origins) which one suggested "displayed certain characteristics which strikingly paralleled those of the commenda and which strongly suggest influence." "The Origins of the Commenda Contract," by John H. Pryor, *Speculum*, Volume 52, Number 1, January, 1977, 5-37, 36.)

According to another writer, "[r]egarding the evidence for the permissibility of Mudaraba, there is no clear proof from Quran. But in hadeeth it's narrated:

'There are blessings in three transactions: credit sales, silent partnership and mixing wheat and barley for home not for trading.'" "The Principles of Islamic Finance, Its Challenges and Policy Suggestions for Azerbaijan," by Savalan Ismayilov Ismayil, Submitted to the Institute of Graduate Studies and Research in partial fulfillment of the requirements for the Degree of Master of Science in Banking and Finance, Eastern Mediterranean University, September 2012 (citing Sunan ibn Majah, Chapters on Sales, Bab: "Partnership and Mudarabah", p 263 (*Ibn al-Qayyim*, 1977, Vol. 4, p. 373)), p. 18, note 1. <http://i-rep.emu.edu.tr:8080/jspui/bitstream/11129/347/1/Ismayil.pdf>

Saleem remarks that "[t]he practice of *mudharabah* was common among the per-Islamic Arabs. The Prophet (pbA-huh) himself entered into a *mudharabah* contract with Khadijah (ambpwh)." though Saleem does not cite a source for this statement. *Islamic Commercial Law*, by Muhammad Yusuf Saleem, John Wiley & Sons Singapore, Ltd., 2013, p. 112.

⁴⁹² "Partnership, Equity-Financing and Islamic Finance: Whither Profit-Loss Sharing?" by Mohammad Omar Farooq, *Review of Islamic Economics*, Volume 11, Special Issue (citing Usmani, Muhammad Taqi., *Musharakah & Mudarabah*) 2007, 67-89, 80-81. <http://www.darululoomkhi.edu.pk/fiqh/islamicfinance/mudarabah.html>.

⁴⁹³ "Partnership, Equity-Financing and Islamic Finance: Whither Profit-Loss Sharing?" by Mohammad Omar Farooq, *Review of Islamic Economics*, Volume 11, Special Issue, 2007, 67-68, 78. www.darululoomkhi.edu.pk/fiqh/islamicfinance/mudarabah.html). See also Iqbal's and Mirakhor's discussion of *mudharabah* in which they emphasize that "the division of profits between the investor and *mudarib* must be in the form of proportions and ratios, rather than in absolute numbers," they simply state that "[t]he profit distribution ratio may differ from that of capital contribution." *An Introduction to Islamic Finance: Theory and Practice, Second Edition*, by Zamir Iqbal and Abbas Mirakhor, John Wiley & Sons (Asia) Pte. Ltd., 2011, p. 91.

http://iaie.net/Common/Controls/DImage/DImage.aspx?imagePath=UploadFolder1%5CJournal%5C11-SI/11-SI-Farooq_4.pdf

⁴⁹⁴ "Partnership, Equity-Financing and Islamic Finance: Whither Profit-Loss Sharing?" by Mohammad Omar Farooq, *Review of Islamic Economics*, Volume 11, Special Issue, 2007, 67-89, 79.

<http://www.darululoomkhi.edu.pk/fiqh/islamicfinance/mudarabah.html>

http://iaie.net/Common/Controls/DImage/DImage.aspx?imagePath=UploadFolder1%5CJournal%5C11-SI/11-SI-Farooq_4.pdf

⁴⁹⁵ See the discussion of Kahf's work see the main text at p. 25.

⁴⁹⁶ "The Principles of Islamic Finance, Its Challenges and Policy Suggestions for Azerbaijan," by Savalan Ismayilov Ismayil, Submitted to the Institute of Graduate Studies and Research in partial fulfillment of the requirements for the Degree of Master of Science in Banking and Finance, Eastern Mediterranean University, September 2012, pp. 19-20. <http://i-rep.emu.edu.tr:8080/jspui/bitstream/11129/347/1/Ismayil.pdf>

⁴⁹⁷ "The Principles of Islamic Finance, Its Challenges and Policy Suggestions for Azerbaijan," by Savalan Ismayilov Ismayil, Submitted to the Institute of Graduate Studies and Research in partial fulfillment of the requirements for the Degree of Master of Science in Banking and Finance, Eastern Mediterranean University, September 2012, p. 19. <http://i-rep.emu.edu.tr:8080/jspui/bitstream/11129/347/1/Ismayil.pdf>

⁴⁹⁸ Note, any situation which involves a time interval between the performance of some of one or both parties' obligations under the contract might be seen to pose new and challenging issues, some of which we have canvassed here, e.g., the *salam* contract. See *supra*, pp. 45-49. Also, recall the discussion above in the main text about finance, by definition implicating one or more time intervals. See the main text at p.43. However, in the former case it is simply a matter of "unpacking" a distinctive and interrelated cluster or constellation of obligations and shifting some of them in time. By, contrast in the latter case, the nature of the financial relationship requires performance at different times; moreover, there is an explicit or implicit focus on the conduct of at least one of the parties on an ongoing basis, namely on the ongoing operation of the enterprise which is financed (whatever the precise sharing of financial risk and reward from that enterprise embodied in the financial transaction).

⁴⁹⁹ At first blush, the argument in the main text might rest on the willingness to assimilate any particular increment of usufruct to a piece or amount of what would be thought to be property (*mal*).

⁵⁰⁰ For example, Mughal states that “[a]ccording to a general rule of Islamic Law of contract, an object which does not exist at the time of contract, may not be sold. However, Ijarah/ اجارة is permissible and valid despite its being sale of the usufructs, which are non-existent at the time of the contract. Analogy will thus invalidate Ijarah/ اجارة, but Istihsan/ استحسان exceptionally validates it on the authority of Sunnah and Ijma’” “What is Ijarah (اجارة),” by Justice R Dr. Munir Ahmad Mughal, March 6, 2012, p. 19.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017140 “Classical jurists discussed both leasing of assets as well as hiring of workers under the common heading of *ijar* or *ijara*. The object of a lease contract was viewed by the vast majority of classical jurists as a “desirable, known permissible and accessible usufruct,” and rent was thus viewed as the price or compensation for that usufruct. However, one major and significant difference between leases and sales is that the majority of classical jurists allowed suspension and deferment of leasing.” *Islamic Finance: Law, Economics and Practice*, by Mahmoud A. El-Gamal, Cambridge University Press, 2006, p. 98.

<http://iugc.volasite.com/resources/Reference%20Book%2004%20-%20Islamic%20finance.%20law%20economics%20and%20practice.%20M.%20El%20Gamal.pdf> “In this regard, while Shafi’i jurists strictly applied the rules against sale of nonexistent items in the case of leasing nonfungible properties, non-Shafi’i jurists allowed future leasing (suspended for commencement at a later date) based on the view that the purchase of usufruct is in fact always a gradual process, wherein future usufruct does not exist at time of contract.” Id, note 3. “Another stipulation of the Hanbali definition [of *ijarah*] is that the benefit or service materializes in the future. For if it existed at the time of contract, it would resemble sale, whereas *ijarah* only yields its benefits over a specified period in the future.” “A *Shari’ah* Analysis of Issues in Islamic Leasing,” by Mohammad Hashim Kamali, *Islamic Economics*, Volume 20, Number 1, 2007, 3-22, 4-55.

⁵⁰¹ We write, arguably, because it is possible that the ostensible lessor might not have such ownership but rather the right – and the right to transfer such – usufruct based on a contract with the owner of that which is the source of it. Here we have no occasion to explore any possibility along these lines.

⁵⁰² In this respect, it has the flavor of an *ipse dixit* statement (which in Latin means “he himself said it” and refers to “a bare assertion resting on the authority of an individual.” Black’s Law Dictionary. <http://thelawdictionary.org/ipse-dixit/>)

⁵⁰³ “A *Shari’ah* Analysis of Issues in Islamic Leasing,” by Mohammad Hashim Kamali, *Islamic Economics*, Volume 20, Number 1, 2007, 3-22, 4. <http://www.kantakji.com/media/5625/1233.pdf> Note the curious reference to it being “benefits and services” which are sold. Interestingly, Abdulla and Al-Mubarak, in describing the textual grounding for *ijarah* cite cases of contracts for human services rather than for use of land or a physical object:

“*Ijarah* is established from the Qur’anic narrative of Prophet Shu’aib and his two daughters (28:26-27), in which the prophet was advised by one of his daughters to hire prophet Musa on wages. In another verse, prophet Musa told Khidr that he could have demanded recompense for setting up the wall straight (18:77). These verses imply that *ijarah* was already in practice during the time of prophets Shu’aib and Musa. Similarly, the verses on hiring wet nurses on wages for their services (2:233, and 65:6-7) further substantiate the legality of *ijarah*. The report (*hadith*) narrated by ‘A’isha, may Allah be pleased with her, about the Prophet, pbuh, and Abu Bakr engaging an expert guide to usher them to Madinah during their migration, is an authentic (*sahih*) report which proves the practice of *ijarah* by the Prophet himself. The Prophet also commanded the believers to pay the wages of the employee (*ajār*) before his sweat dries up, with no delay. This is in fact a confirmation of permission for the *ijarah* contract.” “Maqasid in Risk Management: An Analysis of Ijarah Contract with Special Reference to Malaysia,” by Ahmad Badri Abdullah and Tawfique Al-Mubarak in *Islam and Civilisational Renewal*, IAIIS Malaysia, Volume 6, Number 1, January 2015, pp. 77-78. <http://www.iais.org.my/icr/index.php/icr/article/view/464>

However, another source cites a hadith related to land:

“12. Unlike the Quranic verses, the Sunnah of the Prophet Muhammad (SAW) refers to both lease and hire contracts as follows:

- i. The Prophet (SAW) said: “Pay the hired worker his wages before his sweat dries off”. (Sunan Ibn Majah)
- ii. The Prophet (SAW) is reported to have said: ‘He who hires a person should inform him of his fee.’ (Al-Sunan Al-Kubra li Al-Baihaqi)
- iii. Abdullah ibn Umar narrates, ‘Allah’s Apostle gave the land of Khaibar to the Jews to work on and cultivate and take half of its yield.’ Ibn ‘Umar added, ‘The land was used to be rented for a certain portion (of its yield).’ (Sahih Al-Bukhari) “Draft of Shariah Parameter Reference 2: Ijarah contract,” Bank Negara Malaysia 2009, p. 3.

http://www.bnm.gov.my/documents/conceptpaper/ijarah_contract_20090715.pdf

⁵⁰⁴ “A *Shari’ah* Analysis of Issues in Islamic Leasing,” by Mohammad Hashim Kamali, *Islamic Economic*., Volume 20, Number 1, 2007, 3-22, 5-6. <http://www.kantakji.com/media/5625/1233.pdf> It is also a requirement of a valid *ijarah* that the capital asset survives and does not perish with the *ijarah*. This would preclude items such as food, fuel and money which cannot be used unless they are consumed altogether.” Id. at 6.

Note also El-Ashker’s and Wilson’s discussion of the writings of “Abu-Yusuf Ya’qub ibn Ibrahim al-Ansari (113/731–182/798), a student and a friend of Abu-Hanifah the founder of the Hanafi school of thought.” who was “commissioned by the caliph Harun al-Rashid (786–809), to prepare an extensive report” with which they associate with “Islamic economics [being] born.” *Islamic Economics: A Short History*, by Ahmed El-Ashker and Rodney Wilson, Themes in Islamic Economics, Volume 3, Brill, 2006, pp. 173 and 174, respectively. <http://www.kantakji.com/media/4510/c116.pdf> They write that “[o]n leasing, Abu-Yusuf focused on leasing of fields and palm orchards, with a particular reference to the cultivation of barren land on a lease basis” and described the different views as to the permissibility of leasing barren land and orchards and other gardens on a sharing basis. Apparently, “[t]hose jurists who did not allow the transaction relied on the juridical argument against uncertainty; the yield from the lease of the barren land was uncertain and any involvement in such a transaction could be harmful to either partner. On the other hand, those who allowed leasing depended strictly on the practice of the Prophet when he let the lands of Khyber to the inhabitants of Khyber on a yield sharing basis.” p. 194 They remark that “Abu-Yusuf’s view was that all such leases were allowed and valid. He regarded them as sharing in partnership contracts in which one partner participates in the partnership with his capital and the other with his labour and expertise. The profit, even if it was still unknown to them, were [sic] divided on the basis of profit-and-loss-sharing.” Id. at 195. They add that “[t]his form of partnership is unanimously acceptable by jurists. In Abu-Yusuf’s view, leasing of barren land, orchards and

other trees was like a partnership: the land was similar to the capital in the partnership contract. To enforce his view, Abu-Yusuf relied on the precedent of the Prophet in the lands of Khyber.” Id. at 195.

⁵⁰⁵ *Islamic Law and Finance: Religion, Risk, and Return*, by Frank E. Vogel and Samuel L. Hayes, III, Kluwer Law International, 1998, pp. 103-104.

⁵⁰⁶ “*Ijarah* is validated by the Qur’an, Sunnah, and general consensus (*ijma*). Several verses are found in the Qur’an (al-Kahf, 77: al-Qasas, 26: al-Talaq, 65-6) on the worker’s entitlement to a wage where references are also made to the practices of previous Prophets on *ijarah*, thus indicating that *ijarah* represents an instance of continuity in the Qur’an of the laws of previous nations. References also occur in *hadith* to *ijarah* and the employer-employee relations, including, for example, the instruction, in symbolic terms, to the employer to “pay the employee his wages before the sweat of his brow dries up”. Whereas the Qur’an and Sunnah only refer to *ijarah* as an employment contract, the companions of the Prophet practiced *ijarah*, in the sense of employment as well as rental of real property. The validity of *ijarah* is thus upheld by conclusive *ijma* of the companions, as well as general custom (*‘urf*) among Muslims that prevails to this day.” “A Shari’ah Analysis of Issues in Islamic Leasing,” by Mohammad Hashim Kamali, *Islamic Economics*, Volume 20, Number 1, 2007, 2. <http://www.kantakji.com/media/5625/1233.pdf> Saleem cites verses of the Qur’an contracts – The Qur’an 43:32, 2:233, 65:6, 28:25, and 28:26 – and one Hadith with reference to *ijarah*, all of which refer only to employment contracts. *Islamic Commercial Law*, by Muhammad Yusuf Saleem, John Wiley & Sons, Singapore Pte. Ltd., 2013, pp. 52-53.

⁵⁰⁷ See *supra*, p. 39.

⁵⁰⁸ According to Wohidul Islam, the Hanafi school “recognises property only in material things which are tangible substance or corpus. Usufructs (*manafi* pl. of *manfa’ah*) and rights (*huquq* pl. of *haqq*) are not therefore according to Hanaf jurists property but rather a sort of dominium.” “Al-Mal: The Concept of Property in Islamic Legal Thought,” by Muhammad Wohidul Islam, *Arab Law Quarterly*, Volume 14, Number 4, 1999, pp. 361-368, 366. <http://www.jstor.org/stable/3382152> This recognition arises because “*manafi*” (usufructs) and *huquq* (rights whether property rights or mere rights) are not property, because, these by their nature are not capable of being possessed and, even though they come into existence for some time they do not have subsistence and continuity; rather they cease to exist gradually following their gradual consumption and enjoyment.” By contrast, “[t]he majority jurists (non-Hanafi) hold the view that *manafi*’ and *huquq* qualify as property (*mal*) because they are regarded as capable of being possessed by virtue of the capability of their sources and bases to be possessed even though not by virtue of their own nature.” Id. at 367.

⁵⁰⁹ “[T]hese *manafi*’ and *huquq* are the desired outcome of the material things, and in the absence of such outcome the material things would fall short of human demand and inclination.” Id.

⁵¹⁰ *Introduction to Islamic Banking and Finance* by Brian Kettell, John Wiley & Sons, Inc., 2011, p. 90.

⁵¹¹ “A Shari’ah Analysis of Issues in Islamic Leasing,” by Mohammad Hashim Kamali, *Islamic Economics*, Volume 20, Number 1, 2007, 3-22, 9. <http://www.kantakji.com/media/5625/1233.pdf>

⁵¹² *An Introduction to Islamic Finance*, by Maulana Taqi Usmani, 1998, p. 111. <http://www.kantakji.com/media/8531/ijarah.htm> e

⁵¹³ “What is *Ijarah* (إجارة),” by Justice R Dr. Munir Ahmad Mughal, March 6, 2012, pp. 21-22. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017140

Matters would seem to get a bit more complicated in light of the fact that in the many cases in which use of the corpus/“asset” necessarily leads to its depreciation so that by virtue of extended use, in the absence of other action, no further use can be made of it. According to Saleem, “[t]he leasing company bears the risk of depreciation of the asset or diminishing demand for these assets.” *Islamic Commercial Law*, by Muhammad Yusuf Saleem, John Wiley & Sons, Singapore Pte. Ltd., 2013, p. 58. It is not entirely clear what he means by “bear the risk of depreciation.” If “depreciation” is equated with “consumption” then the just cited rule would in the abstract mean that charging rent to cover it would be impermissible. Arguably, such a conclusion would also be consistent with the requirement that the lessor bear the risk of damage to or loss of the corpus/“asset”. However, the depreciation scenario is different in that the diminishment is a necessary concomitant of the lessee’s normal use of the corpus/“asset”. In any event, as a practical matter, it is hard to imagine that in agreeing to a level of rent the lessor would not take into account the anticipated depreciation of the corpus/“asset”. Moreover, it seems highly unlikely that there would be a separate specification for rent for “use” and for “depreciation”.

⁵¹⁴ “Money is a means for conducting transactions and not a commodity to be traded is another important principle in Islamic finance. Islam recognizes money as a medium of exchange and prohibits the sale of money as a commodity. The Islamic concept of money is such that the value of money is the reflection of the value of the commodity and has no value of its own. Therefore, it is not to be traded but to be used as a medium of exchange in order to facilitate the transactions undertaken by the society.” “The Relevance of Islamic Finance Principles in Economic Growth,” by Mosab I. Tabash, *International Journal of Emerging Research in Management & Technology*, Volume 3, Issue 2, February 2014, 49-54, 52.

http://www.ermr.net/docs/papers/Volume_3/2_February2014/V3N2-107.pdf See discussion *infra* at pp.

⁵¹⁵ For a detailed review of Christian and Islamic views on and practices with respect to interest/usury see “Comparing Islamic and Christian attitudes to usury,” by Mervyn K. Lewis, Chapter 5 in *Handbook of Islamic Banking*, M. Kabir Hassan and Mervyn K. Lewis (Eds.), Edward Elgar, 2007, 64-81. For a comparison from a broader perspective, see “Metaphysics and economy – the problem of interest, A comparison of the practice and ethics of interest in Islamic and Christian cultures,” by James B. Sauer, *Journal of Social Economics*, Volume 29, Number 1/2, 2002, 97-117.

⁵¹⁶ *Summa Theologica*, by Saint Thomas Aquinas (Article 1. Whether it is a sin to take usury for money lent?), Christian Classics Ethereal Library, pp. 3447-3448. <http://www.ccel.org/ccel/aquinas/summa.pdf> As Sauer summarizes the argument, money’s usefulness is to enable exchanges (of things which have equivalent value). That usefulness is exhausted when money is used in an exchange. Insofar a loan with interest is framed as the sale of the services of money, then it is “fraudulent” “because the transaction involve[s] selling something – [the right to use or to possess the services of money] – as indistinguishable from the money itself.” “Metaphysics and economy – the problem of interest,” by James B. Sauer, *International Journal of Social Economics*, Volume 29, Issue 1/2, 2002, 97-118, 105.

⁵¹⁷ *Summa Theologica*, by Saint Thomas Aquinas (Article 1. Whether it is a sin to take usury for money lent?), Christian Classics Ethereal Library, pp. 3447-3448. <http://www.ccel.org/ccel/aquinas/summa.pdf>

⁵¹⁸ For example, Shaik asserts that “[t]hose things on which rent is charged are used and given back in the same existing condition like homes, cars etc. while money and other consumption goods are consumed. When we borrow money, we consume it and

regenerate it. When the money is consumed, the borrower has to regenerate it and the lender without taking any risk is entitled to receive the consumed money with the interest. Can we borrow apples or mangoes on rent? We can borrow hammer but not the nails based on the above classification." "Proposal for a New Economic Framework Based On Islamic Principles," by Salman Ahmed Shaik, April 17, 2010, p. 44. https://mpa.ub.uni-muenchen.de/23000/1/MPRA_paper_23000.pdf

⁵¹⁹ "The Medieval Origins of the Financial Revolution: Usury, Rentes, and Negotiability," by: John H. Munro, *The International History Review*, Volume 25, Number 3, September, 2003, 505-562, 510. <http://www.jstor.org/stable/40109398>

⁵²⁰ Id.

⁵²¹ "Risk sharing and risk shifting: An historical perspective," by Murat Cizakca, *Borsa Istanbul Review*, Volume 14, Number 4, 2014, 191-195, 191-192.

⁵²² With respect to commenda, "If an investor provided all the capital, but did not otherwise participate in the venture, his liability was limited to his capital investment, which entitled him to receive 75 per cent of any profits." "The Medieval Origins of the Financial evolution: Usury, Rentes, and Negotiability," by John H. Munro, *The International History Review*, Volume 25, Number 3, September, 2003, 505-562, 510, note 3. <http://www.jstor.org/stable/40109398>

⁵²³ "An Introduction to Islamic Finance," by Mufti Muhammad Taqi Usmani (underlining added), p.32. <http://apsk.kz/en/images/economics/An%20Introduction%20to%20Islamic%20Finance.pdf> However, Usmani adds that "some jurists have opined that any natural increase in the capital may be taken as a profit distributable between the rabbul-mal and mudarib." Id, note 1.

⁵²⁴ *Islamic Commercial Law*, by Muhammad Yusuf Saleem, John Wiley & Sons Singapore, Ltd., 2013 (underlining added), p. 114. Note that Saleem uses the term *sahib al-mal* rather than *rabb-ul-ma* for the silent partner.

⁵²⁵ For example, in paper discussing, among other things, the legitimacy of *ijarah*, one Islamic bank makes reference to a hadith remarking on relevant practice by Muhammad:

"Abdullah ibn Umar narrates, 'Allah's Apostle gave the land of Khaibar to the Jews to work on and cultivate and take half of its yield.' Ibn 'Umar added, 'The land was used to be rented for a certain portion (of its yield).' (Sahih Al-Bukhari)." "Draft of Shariah Parameter Reference 2: *Ijarah Contract (SPR2)*," Bank Negara Malaysia, 2009 p. 3. <http://www.bnm.gov.my/documents/conceptpaper/ijarahCP.pdf>

(Abdullah ibn Umar – c. 614 – 693 CE – has been described as the son of the second Caliph Umar ibn al-Khattab" and "a prominent authority in hadith and law." https://en.wikipedia.org/wiki/Abdullah_ibn_Umar)

Note that this was a profit-sharing arrangement in which the lessee paid rent in the form of a portion of the agricultural yield of land that was leased. It would appear from one scholarly source that payment of rent in the form of money was necessarily permissible.

"The majority of Islamic scholars such as Malik (1999), al-Syafi'i (2001) and Ibn Qudamah (1997) opined that renting land using gold and silver as payments is permissible. They are of the opinion that leasing land by paying in the form of money is based on several *hadiths* from the Rasulullah SAW (words from the Prophet) which means (Malik, 1999):

i Hanzalah bin Qais reported that Rafic ibn Khadij related that the Prophet forbids leasing agricultural land.

Hanzalah said "I proceeded to ask Rafic ibn Khadij how about gold and silver? Rafic ibn Khadij then said it is alright with gold and silver;

ii. Ibn Syihab said that he asked Sa'id bin Musayyab about leasing land with gold and silver and Sa'id bin Musayyab then said this type of rent can be done; and iii. Ibn Syihab had asked Salim bin 'Abd Allah bin 'Umar about leasing agricultural land. He then said "it can be rented using/with gold and silver." Ibn Syihab then asked, 'What do you think of the *hadith* mentioned by Rafi'ibn Khadij?' He said 'Many are confused, if I have many agricultural lands, I would lease them with gold and silver'.

"According to Al-Syafi'i (2001), besides land lease payment using money, farmers can also pay land rent with other valuables like food. For example, the payment of land lease with dates and other fruits that could be traded. However, Malik (1999) thought that leasing land using food as payment such as dates or the agricultural produce from that land or other goods not produced from that land cannot be done." "The agricultural land tenancy contract from the Islamic perspective and its practice among farmers: A study in Selangor, Malaysia," by Asmak Ab. Rahman and Pazim Fadzim Othman, *African Journal of Agricultural Research*, Volume 7, Number 10, 2012, 1584-1594, 1586. <http://repository.um.edu.my/6655/1/Rahman%20and%20Othman%202012.pdf>

For some historical perspective on (and the considerations at play in) debates over the legitimacy of tenancy relationships, note the following:

"Various forms of tenancy...existed in the Sasanian period. [The Sasanian dynasty was from 224 to 651 AD]... At that time, the main – and for the tenant most desirable – form of tenancy was permanent share-cropping for one-quarter to one-third of the crop...The sharecropper held permanent rights to the land and could sublet it if he wished. Compared to the permanent sharecropper, the contractual tenant (*hoker*, *akkār*) was in a less favourable position: he paid a fixed annual sum in cash or crops but had no permanent rights to the land....

"After the Arabic conquests, these forms of tenancy were fitted into the emerging framework of Islamic law. A distinction was made, in legal terms, between the rent of land for a fixed sum in cash or kind (a contract of lease or hire of usufruct, or *ijāra*) and sharecropping. Islamic jurists were opposed, in principle, to sharecropping, because this system could be interpreted as a type of *ribā al-faql*, or undeserved income from unequal exchange of land, leading to the exploitation of the weaker groups in society. In the course of the eighth century, however, more jurists in Iraq attempted to legitimize its use...There are sharecropping contracts described by Abū Yūsuf (d. 798), as, for instance, in a system in which the land tax is *muqāsama*, a tax assessed on the basis of a share of the crops...It is striking that the initial resistance of Islamic jurists to sharecropping, and the attention to its exploitative nature, had already weakened during the eighth century, probably precisely because of the dominance of sharecropping in Iraq and

the impossibility of banning it." "Factor Markets in Early Islamic Iraq, c. 600-1100 AD," by Bas van Bavel, Michele Campopiano, and Jessica Dijkman. *Journal of the Economic and Social History of the Orient*, Volume 57, 2014, 262-289, 269.

See "The financial system of the early Abbasid caliphate," Chapter 5 in *Premodern financial systems, a historical comparative study*, by Raymond W. Goldsmith, Cambridge University Press, pp 61-80. See also, "Late Antique Legacies and Muslim Economic Expansion," by Jairus Banaji, Chapter 8 in *Money Power and Policies in Early Islamic Syria*, John Haldon (Ed.), Ashgate Publishing Limited, 2010, pp. 165-179.

⁵²⁶ "The Medieval Origins of the Financial Revolution: Usury, Rentes, and Negotiability," by John H. Munro, *The International History Review*, Volume 25, Number 3, September, 2003, 505-562, 510-511. <http://www.jstor.org/stable/40109398>

⁵²⁷ Id. at 511. The ostensibly fleshed out argument by Aquinas reads as follows:

"To take usury for money lent is unjust in itself, because this is to sell what does not exist, and this evidently leads to inequality which is contrary to justice. On order to make this evident, we must observe that there are certain things the use of which consists in their consumption: thus we consume wine when we use it for drink and we consume wheat when we use it for food. Wherefore in such like things the use of the thing must not be reckoned apart from the thing itself, and whoever is granted the use of the thing, is granted the thing itself and for this reason, to lend things of this kind is to transfer the ownership. Accordingly if a man wanted to sell wine separately from the use of the wine, he would be selling the same thing twice, or he would be selling what does not exist, wherefore he would evidently commit a sin of injustice. On like manner he commits an injustice who lends wine or wheat, and asks for double payment, viz. one, the return of the thing in equal measure, the other, the price of the use, which is called usury.

"On the other hand, there are things the use of which does not consist in their consumption: thus to use a house is to dwell in it, not to destroy it. Wherefore in such things both may be granted: for instance, one man may hand over to another the ownership of his house while reserving to himself the use of it for a time, or vice versa, he may grant the use of the house, while retaining the ownership. For this reason a man may lawfully make a charge for the use of his house, and, besides this, revendicate the house from the person to whom he has granted its use, as happens in renting and letting a house.

"Now money, according to the Philosopher [that is, Aristotle,] (Ethic. v, 5; Polit. i, 3) was invented chiefly for the purpose of exchange: and consequently the proper and principal use of money is its consumption or alienation whereby it is sunk in exchange. Hence it is by its very nature unlawful to take payment for the use of money lent, which payment is known as usury: and just as a man is bound to restore other ill-gotten goods, so is he bound to restore the money which he has taken in usury." *Summa Theologica*, by Saint Thomas Aquinas (Article 1. Whether it is a sin to take usury for money lent?), Christian Classics Ethereal Library, pp. 3447-3448. <http://www.ccel.org/ccel/aquinas/summa.pdf>

⁵²⁸ For one survey of perceived connections see *The Role of the Arab-Islamic World in the Rise of the West*, Edited by Nayef R.F. Al-Rodham, Palgrave Macmillan, 2013 and especially in the context of this paper, Chapter 5, "Islamic Commerce and Finance in the Rise of the West," by John M. Hobson, pp. 84-114.

⁵²⁹ "Verse (4:92:16) Sahih International: And never is it for a believer to kill a believer except by mistake. And whoever kills a believer by mistake - then the freeing of a believing slave and a compensation payment presented to the deceased's family [is required] unless they give [up their right as] charity. But if the deceased was from a people at war with you and he was a believer - then [only] the freeing of a believing slave; and if he was from a people with whom you have a treaty - then a compensation payment presented to his family and the freeing of a believing slave. And whoever does not find [one or cannot afford to buy one] - then [instead], a fast for two months consecutively, [seeking] acceptance of repentance from Allah. And Allah is ever Knowing and Wise."

Verse (4:92:41) Sahih International: And never is it for a believer to kill a believer except by mistake. And whoever kills a believer by mistake - then the freeing of a believing slave and a compensation payment presented to the deceased's family [is required] unless they give [up their right as] charity. But if the deceased was from a people at war with you and he was a believer - then [only] the freeing of a believing slave; and if he was from a people with whom you have a treaty - then a compensation payment presented to his family and the freeing of a believing slave. And whoever does not find [one or cannot afford to buy one] - then [instead], a fast for two months consecutively, [seeking] acceptance of repentance from Allah. And Allah is ever Knowing and Wise."

Verse 33:50 "Sahih International: O Prophet, indeed We have made lawful to you your wives to whom you have given their due compensation and those your right hand possesses from what Allah has returned to you [of captives] and the daughters of your paternal uncles and the daughters of your paternal aunts and the daughters of your maternal uncles and the daughters of your maternal aunts who emigrated with you and a believing woman if she gives herself to the Prophet [and] if the Prophet wishes to marry her, [this is] only for you, excluding the [other] believers. We certainly know what We have made obligatory upon them concerning their wives and those their right hands possess, [but this is for you] in order that there will be upon you no discomfort. And ever is Allah Forgiving and Merciful." <http://corpus.quran.com/search.jsp?t=4&q=money>

⁵³⁰ "Verse (3:14) Sahih International: Beautified for people is the love of that which they desire - of women and sons, heaped-up sums of gold and silver, fine branded horses, and cattle and tilled land. That is the enjoyment of worldly life, but Allah has with Him the best return. ...

Verse (9:34) Sahih International: O you who have believed, indeed many of the scholars and the monks devour the wealth of people unjustly and avert [them] from the way of Allah. And those who hoard gold and silver and spend it not in the way of Allah - give them tidings of a painful punishment. ...

Verse (3:91) Sahih International: Indeed, those who disbelieve and die while they are disbelievers - never would the [whole] capacity of the earth in gold be accepted from one of them if he would [seek to] ransom himself with it. For those there will be a painful punishment, and they will have no helpers. ...

Verse (4:20) Sahih International: But if you want to replace one wife with another and you have given one of them a great amount [in gifts], do not take [back] from it anything. Would you take it in injustice and manifest sin?"
<http://corpus.quran.com/search.jsp?t=4&q=gold>

⁵³¹ Verse (18:31) Sahih International: Those will have gardens of perpetual residence; beneath them rivers will flow. They will be adorned therein with bracelets of gold and will wear green garments of fine silk and brocade, reclining therein on adorned couches. Excellent is the reward, and good is the resting place

Verse (22:23) Sahih International: Indeed, Allah will admit those who believe and do righteous deeds to gardens beneath which rivers flow. They will be adorned therein with bracelets of gold and pearl, and their garments therein will be silk.

Verse (43:35) Sahih International: And gold ornament. But all that is not but the enjoyment of worldly life. And the Hereafter with your Lord is for the righteous.

Verse (43:53) Sahih International: Then why have there not been placed upon him bracelets of gold or come with him the angels in conjunction?

Verse (43:71) Sahih International: Circulated among them will be plates and vessels of gold. And therein is whatever the souls desire and [what] delights the eyes, *and you will abide therein eternally.* " <http://corpus.quran.com/search.jsp?t=4&q=gold>

⁵³² Verse (3:75) Sahih International: And among the People of the Scripture is he who, if you entrust him with a great amount [of wealth], he will return it to you. And among them is he who, if you entrust him with a [single] silver coin, he will not return it to you unless you are constantly standing over him [demanding it]. That is because they say, 'There is no blame upon us concerning the unlearned.' And they speak untruth about Allah while they know [it].

[http://corpus.quran.com/wordmorphology.jsp?location=\(3:75:14\)](http://corpus.quran.com/wordmorphology.jsp?location=(3:75:14))

Verse (18:19) Sahih International: And similarly, We awakened them that they might question one another. Said a speaker from among them, 'How long have you remained [here]?' They said, 'We have remained a day or part of a day.' They said, 'Your Lord is most knowing of how long you remained. So send one of you with this silver coin of yours to the city and let him look to which is the best of food and bring you provision from it and let him be cautious. And let no one be aware of you.'

[http://corpus.quran.com/wordmorphology.jsp?location=\(18:19:23\)](http://corpus.quran.com/wordmorphology.jsp?location=(18:19:23))

533

3851	This hadith has been narrated on the authority of Zuhri with the same chain of transmitters.
3852	Abil Qiliba reported: I was in Syria (having) a circle (of friends). in which was Muslim b. Yasir. There came Abu'l-Ash'ath. He (the narrator) said that they (the friends) called him: Abu'l-Ash'ath, Abu'l-Ash'ath, and he sat down. I said to him: Narrate to our brother the hadith of Ubada b. Samit. He said: Yes. We went out on an expedition, Mu'awiya being the leader of the people, and we gained a lot of spoils of war. And there was one silver utensil in what we took as spoils. Mu'awiya ordered a person to sell it for payment to the people (soldiers). The people made haste in getting that. The news of (this state of affairs) reached 'Ubada b. Samit, and he stood up and said: I heard Allah's Messenger (may peace be upon him) forbidding the sale of gold by gold, and silver by silver, and wheat by wheat, and barley by barley, and dates by dates, and salt by salt, except like for like and equal for equal. So he who made an addition or who accepted an addition (committed the sin of taking) interest. So the people returned what they had got. This reached Mu'awiya. and he stood up to deliver an address. He said: What is the matter with people that they narrate from the Messenger (may peace be upon him) such tradition which we did not hear though we saw him (the Holy Prophet) and lived in his company? Thereupon, Ubida b. Samit stood up and repeated that narration, and then said: We will definitely narrate what we heard from Allah's Messenger (may peace be upon him) though it may be unpleasant to Mu'awiya (or he said: Even if it is against his will). I do not mind if I do not remain in his troop in the dark night. Hammad said this or something like this.
3853	Ubida b. al-Simit (Allah be pleased with him) reported Allah's Messenger (may peace be upon him) as saying: Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, and salt by salt, like for like and equal for equal, payment being made hand to hand. If these classes differ, then sell as you wish if payment is made hand to hand.
3854	Abu Sa'id al-Khudri (Allah be pleased with him) reported Allah's Messenger (may peace be upon him) as saying: Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, salt by salt, like by like, payment being made hand to hand. He who made an addition to it, or asked for an addition, in fact dealt in usury. The receiver and the giver are equally guilty.
3855	This hadith has been narrated on the authority of Abu Sa'id al-Khudri (Allah be pleased with him) through another chain of transmitters.
3856	Abu Huraira (Allah be pleased with him) reported Allah's Messenger (may peace be upon him) as saying: Dates are to be paid for by dates, wheat by wheat, barley by barley, salt by salt, like for like, payment being made on the spot. He who made an addition or demanded an addition, in fact, dealt in usury except in case where their classes differ. This hadith has been narrated on the authority of Fudail b. Ghazwan with the same chain of transmitters, but he made no mention of (payment being) made on the spot.
3857	Abu Huraira (Allah be pleased with him) reported Allah's Messenger (may peace be upon him) as saying: Gold is to be paid for by gold with equal weight, like for like, and silver is to be paid for by silver with equal weight, like for like. He who made an addition to it or demanded an addition dealt in usury.

3858	Abu Huraira (Allah be pleased with him) reported Allah's Messenger (may peace be upon him) as saying: Let dinar be exchanged for dinar, with no addition on either side and dirham be exchanged for dirham with no addition on either side. This hadith has been narrated on the authority of Musa b. Abu Tamim with the same chain of transmitters.
3859	Abu Minhal reported: My partner sold silver to be paid in the (Hajj) season or (in the days of) Hajj. He (my partner) came to me and informed me, and I said to him: Such transaction is not desirable. He said: I sold it in the market (on loan) but nobody objected to this. I went to al-Bara' b. 'Azib and asked him, and he said: Allah's Apostle (may peace be upon him) came to Medina and we made such transaction, whereupon he said: In case the payment is made on the spot, there is no harm in it, and in case (it is 'sold) on loan, it is usury. You better go to Zaid b. Arqam, for he is a greater trader than I; so I went to him and asked him, and he said like it.
3860	Habib reported that he heard Abu Minhal as saying: I asked al-Bara' b. Azib about the exchange of (gold for silver or vice versa), whereupon he said: you better ask Zaid b. Arqam for he knows more than I. So I asked Zaid but he said: You better ask al-Bara' for he knows more than I. Then both of them said: Allah's Messenger (may peace be upon him) forbade the sale of silver for gold when payment is to be made in future.

⁵³⁴ "Concepts of Paper Money in Islamic Thought," by Nikolaus A. Siegfried, *Arab Law Quarterly*, Volume 16, Number 4, 2001, 319-332, 320.

⁵³⁵ Id.

⁵³⁶ Id.

⁵³⁷ Id.

⁵³⁸ Id. at 321.

⁵³⁹ "Money in the classical texts of *fiqh* refers to coins." Id. at 323.

⁵⁴⁰ Id.

⁵⁴¹ Id.

⁵⁴² Id.

⁵⁴³ Id.

⁵⁴⁴ Id. at 324.

⁵⁴⁵ Id.

⁵⁴⁶ Id.

⁵⁴⁷ For example, Witbrodt and Shapiee remark that "[t]he *Shariah* approach to commutative transactions reflects secular economic thought concerning exchanges, which recognize that no essential theoretical difference exists between a system of direct exchanges (i.e., barter) and indirect exchanges (i.e., exchanges involving the use of a medium of exchange) (Schumpeter 1994)." "Financial Crisis, Fiqh Muamalat and International Commutative Transactions: An Empirical Assessment of the Value of Contemporary Currency in Light of the Prohibition against *Gharar*," by Matthew Witbrodt and Rohimi Shapiee, *Journal Pengurusan*, Volume 3, 2013, 15-29, 19. <http://ejournals.ukm.my/pengurusan/article/view/4978/2690>

Also, Farooq states the matter in the following terms:

"[T]he view that money is only a medium of exchange...corresponds with the 'Classical dichotomy,' a corollary of which is 'neutrality of money.' According to this view of early Classical economics, the total production of the economy is independent of the monetary factors based on a clear distinction between the 'real sector of the economy' and the 'monetary sector'...

'With clear distinction between the monetary/financial and the real sector, the Classical economists wanted to ensure that the monetary sector or money does not become a distraction from the pursuit of the growth and transformation in the real sector. However, while the view of most Islamic economists echoes the Classical Dichotomy, the [Islamic banking and finance] IBF industry seems to have preoccupied itself with the monetary/financial sector, and thus one hears so much about Islamic finance and so little about Islamic economy. For example, let's note the term 'value addition' in the following statement by a prominent Islamic economist. 'The prohibition of a risk-free return and permission to trade, as enshrined in verse 2: 275 of the Holy Qur'an, makes the financial activities in an Islamic set-up real asset-backed with the ability to cause 'value addition'.

"An important nuance of the quoted verse widely being missed in the discourse about Islamic economics and finance and in the praxis of IBF industry is that before something can be traded, there must be something to trade from some prior real sector activity. Moreover, one single product or object of value can be traded million times, without any 'value addition' in the real sector. For the desired growth and transformation of our economies, we must move beyond the realm of asset-backed transactions to asset creating enterprises in the real sector." "Global Financial Crisis and the Link Between the Monetary and Real Sector: Moving Beyond the Asset-Backed Islamic Finance," by Mohammad Omar Farooq, Mohammad Omar, Proceedings of the 20th Annual Islamic Banking Seminar, Edited by: Dr. Morteza Allahdad, Iran Banking Institute, (citing Ayub, M. (2007). Understanding Islamic Finance, Wiley, 479.), September 2009, p. 5. <http://ssrn.com/abstract=1513488>

⁵⁴⁸ *Islamic Money and Banking: Integrating Money in Capital Theory*, by Iraj Toutounchian, Wiley, 2009, p. 75.

⁵⁴⁹ "Integrating Money in Capital Theory: A Legal Perspective Towards Islamic Finance," by Iraj Toutounchian, *Review of Islamic Economics*, Volume 10, Number 2, 2006, 75-113, 97-98.

⁵⁵⁰ Id. at 76. Although Toutounchian never quite offers an explicit definition of "capital," he refers to "money" as "potential capital," distinguishing it from "actual capital." Id. He remarks that "as soon as a sum of money (potential capital, *M*) is legally combined with a factor of production most likely labour (*L*), it changes its legal aspect to actual capital." Id. at 84. In turn, "money, in [an Islamic banking] system, accrued in the past, does not deserve any reward if regarded merely as potential capital. However, as soon as it changes its legal nature and is released/risked to become actual capital it does deserve its own proper reward." Id. at 88. ("[I]t is the 'institution' of the firm that is able to transform money (potential capital) into actual capital." Id. at 98.) At another point he seems to make the same point but drops use of the terminology: "Nowhere in economic theory can one find any legitimate justification for

considering money as capital. The proper distinction between money and capital is central to any economic system; it is real and determinant in that the development of an economy is geared to the quantity as well as the quality of *capital*, not money." Id. at 83.

⁵⁵¹ "Islamic moral economy as the foundation of Islamic finance," by Mehmet Asutay, Chapter 4 in *Islamic Finance in Europe, Towards a Plural Financial System*, Edited by Valentino Cattelan, Edward Elgar, 2013, p. 65.

⁵⁵² "Islamic Banking in the European Legal Framework," by Gabriella Gimigliano, Chapter 10 in *Islamic Finance in Europe: Towards a Plural Financial System*, Edited by Valentino Cattelan, Edward Elgar, 2013, p. 146.

⁵⁵³ "Ethics and Finance: Perspectives of the Shari'ah and Its Higher Objectives (Maqasid)," by Mohammad Hasim Kamali, *Islam and Civilisational Renewal*, Volume 3, Number 4, July 2012, 620-636, 619 and 626. For a brief reprise of the economic thought in general and views on money along the lines described in the main text articulated by famous eleventh-century Arab scholar, Abu Hamid Ibn al-Ghazal, see "Economic Thought of an Arab Scholastic," by S.M Ghazanfar and A. Azim Islahi, Chapter 2 in *Medieval Islamic Economic Thought*, S.M.N. Ghazanfar (Ed.), Rutledge Curzon ("When someone is training in dirhams and dinars themselves, he is making them as his goal, which is contrary to their functions. Money is not created to earn money and doing so is a transgression. The two kinds of money are means to acquire other things, they are not meant for themselves"), 2003, 23-44, 37. For a related discuss of the relationship between Al-Ghazali's thought and that of St. Thomas Aquinas see "The Economic Thought of Abut Hamid Al-Ghazali and St. Thomas Aquinas, Some comparative parallels and links," by S.M. Ghazanfar, Chapter 12 in *Medieval Islamic Economic Thought*, S.M.N. Ghazanfar (Ed.), Rutledge Curzon (2003), 184-208.

For an extensive discussion of the concepts of money in classical Islamic law and contemporary approaches to paper money (and in some measure related concerns about inflation) in light of that classical thought, see "Concepts of Paper Money in Islamic Thought," by Nikolaus A. Siegried, *Arab Law Quarterly*, Volume 16, Number 4, 2001, 319-332.

⁵⁵⁴ "Justice as Truth: from the dyad *ḥukm/haqq* to Islamic economics and finance," by Valentino Cattelan, p. 26. Note the reference to "unbundled" risk and reward discussed in the main text in the review of El-Gamal's work. See main text at pp. 33-36.

⁵⁵⁵ "The Islamic View on Money and Its Implication for Financial Instrument," by Mohd Noor Omar. *ISRA International Journal of Islamic Finance*, Volume 3, Issue 1, 2011, 161-167, 161. <https://www.bibd.com.bn/pdf/articles/ivomiiffi.pdf>

⁵⁵⁶ *The Islamic Moral Economy: A Study of Islamic Money and Financial Instruments*, by Shafiel A. Karim, Brown Walker Press, 2010, p. 29. "[M]oney is not an equivalent of wealth; it is an abstract representation of wealth." "Wealth is limited to real assets which have a productive purpose." Id.

⁵⁵⁷ *An Introduction to Islamic Finance: Theory and Practice, Second Edition*, by Zamir Iqbal, Abbas Mirakhor, John Wiley & Sons (Asia) Pte. Ltd, 2011, p.58.

⁵⁵⁸ *The Stability of Islamic Finance Creating a Resilient Financial Environment for a Secure Future*, by Hossein Askari, Zamir Iqbal, Noureddine Krichene, and Abbas Mirakhor, John Wiley & Sons (Asia) Pte. Ltd., 2010, p. 11. See also *The Stability of Islamic Finance Creating a Resilient Financial Environment for a Secure Future*, by Hossein Askari, Zamir Iqbal, Noureddine Krichene, and Abbas Mirakhor, John Wiley & Sons (Asia) Pte. Ltd., 2010 ("Capital is also a pool of money or, in other words, financial assets. Financial intermediation and banking use the notion of capital as a pool of money and not as a set of physical goods or objects. Money can be in gold, any other commodity that is accepted as a medium of exchange, or fiat money. It serves as a medium of exchange and a store of value."), p. 12.

⁵⁵⁹ "Development of Islamic economic and social thought," by Masudal Alam Choudhury, Chapter 2 in *Handbook of Islamic Banking*, by M. Kabir Hassan and Mervyn K. Lewis, Edward Elgar, 2007, pp. 34-35. Visser has remarked that "[a]part from the fact that interest is not the price of money but the price of credit, that is, for borrowing money, it looks like Choudhury only wants to accept money as a means of exchange and a numéraire [that is, a unit of account], not as an asset in its own right. This is a view generally adopted by Muslim scholars." *Islamic Finance: Principles and Practice, Second Edition*, by Hans Visser, Edward Elgar, 2013, pp. 29-30.

⁵⁶⁰ "An Introduction to Islamic Economics," by Muhammad Akram Khan, The International Institute of Islamic Thought and Institute of Policy Studies, 1981, p. 11. http://www.muslim-library.com/dl/books/English_An_Introduction_to_Islamic_Economics_.pdf

⁵⁶¹ "An Introduction to Islamic Economics," by Muhammad Akram Khan, The International Institute of Islamic Thought and Institute of Policy Studies, 1981, p. 13. http://www.muslim-library.com/dl/books/English_An_Introduction_to_Islamic_Economics_.pdf

⁵⁶² *What is Wrong with Islamic Economics?* by Muhammad Akram Khan, Edward Elgar Publishing Limited, 2013 pp. 155-157.

⁵⁶³ Id. at 157.

⁵⁶⁴ Id.

⁵⁶⁵ Id. at 157-158. For a reason articulation of the non-productivity argument see "Islamic Banking in the European Legal Framework," by Gabriella Gimigliano, Chapter 10 in *Islamic Finance in Europe: Towards a Plural Financial System*, Edited by Valentino Cattelan, Edward Elgar Publishing Limited ("Both conventional and Islamic banking regard money as 'the monetized claim of its owner to property rights'...However at the root of Islamic banking lies the idea of money being neither a commodity nor a capital per se, but a potential capital that, through the productive activity of the entrepreneur, becomes productive."), 2013, p. 146.

⁵⁶⁶ *What is Wrong with Islamic Economics?* by Muhammad Akram Khan, Edward Elgar Publishing Limited, 2013, p. 158. Here he specifically cites the argument as made by Kahf which we have quoted in the main text. Id.

⁵⁶⁷ *What is Wrong with Islamic Economics?* by Muhammad Akram Khan, Edward Elgar Publishing Limited, 2013, p. 158.

⁵⁶⁸ "Metaphysics and economy – the problem of interest," by James B. Sauer, *International Journal of Social Economics*, Volume 29, Issue 1/2, 2002, 97-118, 99.

⁵⁶⁹ Id. at 100. "[T]he man is the 'cause' of a child. An acorn is the 'cause' of an oak." Id.

⁵⁷⁰ Id.

⁵⁷¹ Id. "In all actions – personal, economic, social and political – the individual must be guided by rights and duties to God and others in interpersonal relations. Sharing, reciprocity, and charity are essential requirement in demonstrating excellence (virtue) in this life as a preparation for the next..." Id. at 100-101.

⁵⁷² Id. at 101.

⁵⁷³ Id.

⁵⁷⁴ Id. at 113

⁵⁷⁵ Id. at 112.

⁵⁷⁶ issues of this sort are squarely posed by Wallaq, who writes in ways apposite with that of Cattelan, though he would seem range far beyond Cattelan in seeing the state as a primary cause of Islamic law having taken a profoundly wrong turn. More particularly,

Wallaq argues that Shari'a law was in practical terms and in contrast with Western law, had its origins in the hands of respected, erudite, moral, and religious jurists who were private individuals, not state officials, and was based on principles derived from cognate context-dependent cases applied in a context- and fact-dependent way rather than as a body of binding rules mandated by the state for action or conduct equally uniformly applicable to all. Thus, for Wallaqa, "Islamic law was not fully revealed unto society until the principles meshed with social reality and until the interaction of countless social, moral, material and other types of human relations involved in a particular case was made to come full circle"; it was "not that found in the books of the jurists, but rather the outcome of a malleable and sensitive application of rules in a complex social setting."⁵⁷⁶ So, for example, "[t]he Muslim adjudicator process was never removed from the social world of the disputants"; was concerned with "a moral logic of distributive justice rather than a logic of winner-takes-all"; was concerned with [p]reserving social order" and "acutely attuned to the system of social and economic cleavages." *An Introduction to Islamic Law*, by Wael B. Hallaq, Cambridge University Press, 2008, p. 165. By contrast Wallaqa sees the "state" as a defining feature of "modernity" – a top down, "all-powerful agent exercising the option of reengineering the social order" which "preempted any vision of governance outside of its parameters – one which displaced and dismantled Sharia's institutional structures – embodied in "a non-state, community-based, bottom-up jural system". Id. at 169. Whatever the merits of Hallaq's critique otherwise, it would, at first blush seem to be a wistful one, that is, he seems to acknowledge that the social order which sustain the understanding and practice he describes is gone and that one which might have that character is not in prospect: "At the end of the day, the Shari'a has ceased to be even an approximate reincarnation of its historical self. That it would be impossible to recreate it along with the kind of social order it presupposed and by which it was sustained is self-evident." Id. at 170. It should be noted that it is not clear what Wallaqa sees as the/a "state". For example, insofar as Wallaqa is referring to the early years of Islam, Essid explores at great length and in great depth, the extensive literature (and corresponding practice) on "the governing of the state" which appears to have its origin in the era of the coming to power of the Abbasids in the eighth century and highlight be the very important "manuals of edification and political and administrative ethics called 'Mirrors for Princes' during late eighth and early ninth centuries." *A Critique of the Origins of Islamic Economic Thought*, by Yassine Essid, E.J. Brill, 1995, pp. 17 and 19. For a contemporary view of the state sharply differing from that of Hallaq see *Challenges in Economic and Policy Formulation, An Islamic Perspective*, by Hossein Askari, Zamir Iqbal, and Abbas Mirakhor, Palgrave Macmillan, 2014, pp. 2-10.

⁵⁷⁷ "Metaphysics and economy – the problem of interest," by James B. Sauer, *International Journal of Social Economics*, Volume 29, Issue 1/2, 2002, 97-118, 99.

⁵⁷⁸ See discussion supra at pp. 21-22. Of course, given the Sauer's characterization of the Islamic narrative, evaluation of how wealth is created and claims to it would be nested in discourse concerned about relationships. Indeed, Sauer remarks that "[w]hile increasing wealth-producing capacity is a good, how that wealth is produced is also a good that is integrally, not incidentally, bound to the meaning and so the reality of the economy itself. In the Islamic view, the relationships that make wealth-production possible are the condition of the possibility of wealth as a good." Metaphysics and economy – the problem of interest," by James B. Sauer, *International Journal of Social Economics*, Volume 29, Issue 1/2, 2002, 97-118, 113.

⁵⁷⁹ Id. at 202.

⁵⁸⁰ Id. at 110.

⁵⁸¹ Id.

⁵⁸² Id. at 112.

⁵⁸³ Id. at 113. So, for example, "[i]nterest transactions, as well as whole host of other economic operations, form consumer purchase transactions to community economic development, are forms of relationships, not transactions of 'things' in service of preferences...[T]he process of acting within certain forms of relationships is valuable in itself not instrumental to some higher or supervening value." Id.

⁵⁸⁴ Id. at 115. In such an economy "capital owners hold wealth. Workers, on the other hand, have wages. Wealth and wages are not analogous economic relations even though each produces an income. Interest income on wealth has always been a more powerful factor in an interest-based economy than the wages of workers or labor." Id. at 115.

⁵⁸⁵ "Stock Markets as 'Simulacra'," by Ellen Hertz, *Tsantsa*, Volume 5, 2000, 40-50, 47. <http://doc.rero.ch/record/19936>

⁵⁸⁶ "Financialization Risk and Labour," by Randy Martin, Michael Rafferty, and Dick Bryan, *Competition & Change*, Volume 12, Number 2, June 2008, 120-132, 125.

⁵⁸⁷ Id. at 125, note 1.

⁵⁸⁸ "Money is a Social Relation," by Geoffrey Ingham, *Review of Social Economy*, Vol. 54, No. 4, 1996, 507-529, 510. Note in this regard, that while Ingham's analysis has ostensibly broad application to other economic systems (which for the purposes of his analysis he canvases in some measure as an historical matter), his particular focus is on "modern capitalism" and "its particular relations for the production of money," namely "a hybridization of state currency and credit-money created by private agencies, mediated by a public/central bank." Moreover, his primary concern is with the concomitant questions in that context "of who controls the creation of money and for what purpose" which are "the source of unresolved struggles" among them, so Ingham has less occasion to attend to the constellation of financial instruments and financial institutions other than banks.⁵⁸⁸ But clearly implicit in both is the "real" character of those instruments and people who leader and serve those institutions – with the same needs and wants for "real" things as others – who engage in no less "real activities" in pursuit of the production (and sale or use) of such instruments.

⁵⁸⁹ "Metaphysics and economy – the problem of interest," by James B. Sauer, *International Journal of Social Economics*, Volume 29, Issue 1/2, 2002, 97-118, 113.

⁵⁹⁰ Id. at 112.

⁵⁹¹ "Risk and Value: Finance, Labor, and Production," by Dick Bryan, Michael Rafferty, and Chris Jefferis, *The South Atlantic Quarterly*, Volume 114, Number 2, April 2015, 307-329, 307.

⁵⁹² Id.

⁵⁹³ Id.

⁵⁹⁴ Id.

⁵⁹⁵ Id. at 308.

⁵⁹⁶ Id.

⁵⁹⁷ "Exploitative Profit Sharing: On the incoherence of all contract-based approaches to 'Islamic finance,'" by Mahmoud El-Gamal, January 31, 2014. [HTTP://ELGAMAL.BLOGSPOT.COM/2014_01_01_ARCHIVE.HTM](http://ELGAMAL.BLOGSPOT.COM/2014_01_01_ARCHIVE.HTM)

⁵⁹⁸ Id. He adds: "If the worker has no access to other work, severe exploitation is thus allowed by this ostensibly "Islamic" partnership model, whereby the worker is forced to earn half his market wage on average, with unwanted risk to boot! That is the very same extreme injustice (*ghubn fahish*) for which *riba* is but one vehicle." Id.

⁵⁹⁹ For some discussion of "work" and "labor" with an eye to the employment relationship see "Islam and Labor Law: Some Precepts and Examples" by Kaen Pfeifer, Chapter 5 in *Islam and Every Day Life, Public Policy Dilemmas*, Routledge Curzon Press, 2006, 113-140; "The Concept and Nature of Labour in Islam: A Survey" by Toseef Azid, *Review of Islamic Economics*, Volume 9, Number 2, 2005, 93-124; "Bringing Work Back in Islamic Ethics," by Bayu Taufiq Possumah, Abdul Ghafar Ismail, and Shahida Shahimi, *Journal of Business Ethics*, 2012; "Religion and Labor: Perspective in Islam," by Iftikhar Ahmad, *The Journal of Labor and Society*, Volume 14, December, 2011, 589-620; and "Corporate Social Responsibility to Employees: Considering Common Law Vis-à-vis Islamic Law Principles," by Md. Anowar Zahid and Kamal Halili Hassan, *Journal of the Social Sciences and Humanities*, Volume 20, Number 8, 2012, 87-100.

⁶⁰⁰ See for example, *The Stability of Islamic Finance: Creating a Resilient Financial Environment for a Secure Future*, by Hossein Askari, Zamir Iqbal, Nouredine Krichene and Abbas Mirakhor, John Wiley & Sons (Asia) Pte. Ltd. (reviewing the work of Hyman Minsky who they refer to as having "considered financial instability to be endogenous to a conventional financial system"), p. 27.

⁶⁰¹ *The Next Financial Crisis and How to Save Capitalism*, by Hossein Askari and Abbas Mirakhor, Palgrave Macmillan, 2015.

⁶⁰² Id. at 48.

⁶⁰³ Id. at 7.

⁶⁰⁴ Id. at 8.

⁶⁰⁵ Id.

⁶⁰⁶ Id. at 11.

⁶⁰⁷ Id.

⁶⁰⁸ Id. at 13.

⁶⁰⁹ Id. at 49.

⁶¹⁰ Id.

⁶¹¹ Id. at 48.

⁶¹² Id. at 56. "The losses on any contract are shared between the parties to the contract; creditors (investors) are not simultaneously debtors (borrowers); the failure of an investment project for an investor does not in turn adversely impact a lender; and as a result, financial losses of one entity do not ripple through the financial system as they would do in a system that is predominantly interest-rate-debt based with a high degree of leverage (with a chain of loans in the economy). Debt fueled asset bubbles and banking crises are almost eliminated as banks can invest their clients' money only in projects on a pass-through basis, akin to a mutual fund. Banks cannot take risk with deposits, leverage, and then become insolvent when loans sour, affecting in turn the overall financial system." Id. at 56-57.

⁶¹³ "Still, even anything approaching 100 percent reserve banking and eliminating the tax subsidies for debt to encourage risk-sharing contracts are unlikely to be broadly embraced anytime soon in the United States. A powerful special interest group, the financial industry, benefits from debt contracts, fractional reserve banking, and their implicit subsidies and preferential treatment. The financial industry is happy with the way things are. It will fight tooth and nail to maintain the status quo. So the only practical approach may be reforms in baby steps but with a clear utopia as the target." Id. at 66.

⁶¹⁴ *Challenges in Economic and Financial Policy Formulation: An Islamic Perspective*, by Hossein Askari, Zamir Iqbal, and Abbas Mirakhor, Palgrave Macmillan, 2014, pp. 130-131. <http://download.springer.com/static/pdf/198/bok%253A978-1-137-38199-6.pdf?originUrl=http%3A%2F%2Flink.springer.com%2Fbook%2F10.1057%2F9781137381996&token2=exp=1459435785~acl=%2Fstatic%2Fpdf%2F198%2Fbok%25253A978-1-137-38199-6.pdf%3ForiginUrl%3Dhttp%253A%252F%252Flink.springer.com%252Fbook%252F10.1057%252F9781137381996~-hmac=5500a8af8a4b20a9ef459ea0080dfc47fc88453c67af8ffdeb19a98810acb2e0>.

⁶¹⁵ See, for example, "Ownership Effects of Fractional Reserve Banking: An Islamic Perspective," by Ahamed Kameel, Mydin Meer and Moussa Larbani, *Humanomics*, Volume 25, Number 2, 2009, 101-116.

⁶¹⁶ For example, Papazian proposes "Islamic money creation as an alternative methodology to the current mainstream and orthodox methodology of linking creation of money with issuance of debt." It "would use an equity-like product to back currency issuance, instead of a debt security." More particularly, "public capitalisation notes" (PCNs) would "be issued by the government treasury, and offered for sale to the country's Central Bank which would be "used for money creation and issuance" and to "capitalise the government." Such "an equity like monetisation tool" would "not promise a fixed interest"; rather it would "promise[] a return ... paid out in the form of a dividend sharing surpluses and profits where they are earned." "The underlying real assets/activities that support these Islamic instruments would be the tangible and intangible resources of the state and their productive management in the pursuit of economic growth." "Islamic Money Creation," by Dr. Armen V. Papazian, *Islamic Banking & Finance*, Volume 8, Issue 3, Number 28, 2011, 19-20. <http://www.iefpedia.com/english/wp-content/uploads/2011/11/IBF28ArmenPapazian.pdf> See also Papazian, Armen, "A Product that Can Save a System: Public Capitalization Notes," by Armen Papazian, October 5, 2011. <http://ssrn.com/abstract=2388043> or <http://dx.doi.org/10.2139/ssrn.2388043>

There have been, as discussed, sharp critiques by Western academics and practitioners regarding the causes of the GFC, whether cast under the rubric of financialization or otherwise. In turn, there have been numerous proposals (and actions taken) for reform. Given the overlap of such critiques and those associated with an Islamic narrative, it might not be unexpected that such proposals might have a character not unlike that of ones from critics informed by that narrative. One such proposal has the following elements: The monetary authority would create "new money" which would be used in "joint venture agreements with private managers that have expertise in credit investing." Such managers, subject to their putting up some of their own resources – "a first loss equity position" – would "acquire credit assets on behalf of the state." "Money and (Shadow) Banking: A Thought Experiment," by Morgan Ricks, *Review of Banking & Financial Law*, Volume 31, Issue II, Spring 2012, 731-748, 738. <http://www.bu.edu/rbfl/files/2013/09/MoneyAndShadowBanking.pdf> The returns from the investments would be shared. More particularly, the manager would pay a risk-based fee and "retain any investment returns on its portfolio in excess of its fee." 739 The government and the manager would own senior and residual equity claims to the credit portfolio. 739. The government would "delineate the universe of credit assets in which the managers may invest" and "establish[] capital requirements." Id. at 741 The author describes how, through this mechanism, the money supplied might be expanded and contracted.

⁶¹⁷ See *The Gold Standard Anchored in Islamic Finance* by Hossein Askari and Nouredine Krichene, Palgrave Macmillan, 2014. The authors assert that “the Islamic financial system affords the best financial setting for one or more countries to establish a link to gold.” Id. at 11. For them the “essential features” of that system are “(i) a banking system that embraces two distinct categories of banks – depository banks that are based on 100% reserve banking, and investment banks that essentially act as pass-through institutions channeling investor funds to desired projects – that prevent banks from taking risks with, and leveraging, their clients’ deposits; (ii) prohibition of interest-bearing debt and encouragement of risk sharing through equity participation and Islamic bonds, whereby the bond holder has direct access to the underlying asset, and is thus sharing the risk.” Id. at 11-12.

was gold and silver. Many verses referred to these two monies. The use of the right measure

⁶¹⁸ *The Gold Standard Anchored in Islamic Finance* by Hossein Askari and Nouredine Krichene, Palgrave Macmillan, 2014, p.2.

⁶¹⁹ Id.

⁶²⁰ Id. at 3. For a sharply different view, see, for example, “The case against the Islamic gold dinar,” by Murat Cizakca, November 2012. https://mpira.ub.uni-muenchen.de/26645/1/THE_CASE_AGAINST_THE_ISLAMIC_GOLD_DINAR.pdf For example, he poses the question as to whether “there is any fiqh objection to the use of paper money.” He contends that “[s]ome of the most respected classical Muslim scholars, particularly Mohammad al-Shaybani, Ibn Kayyim and Ibn Taymiyah did not limit currency to gold and silver coinage only. Ahmad Ibn Hanbal ruled that there was no harm in adopting as currency anything that is generally accepted by the people. Thus, these scholars, among themselves, wide opened the way for Muslims of future centuries to utilize paper money. Leading contemporary scholars like Yusuf al-Qaradawi and Muhammad Taqi Usmani are also of the same opinion.” Id. at 5. In this connection he draws on the following line of argument “The Qur’an does not ordain Muslims to use this or that currency but does provide a powerful clue: the prohibition of the rate of interest. Obviously, it is based upon this clue that [the Prophet] would have tried to reach a decision.” Id. at 4.

⁶²¹ *The Gold Standard Anchored in Islamic Finance* by Hossein Askari and Nouredine Krichene, Palgrave Macmillan, 2014, p.2.

⁶²² “Islamic Finance: Ethics, Concepts, Practice,” by Usman Hayat and Adeel Malik, CFA Institute Research Foundation, 2014, pp. 57-58. <http://www.cfapubs.org/doi/pdf/10.2470/rflr.v9.n3.1> “Some topics in the literature have been written about extensively (e.g., the prohibition of *riba*); others have received far less attention (e.g., ecology as it relates to Islamic finance).” Id. at 2.

⁶²³ Id. at 57-58.

⁶²⁴ Id. at 59.

⁶²⁵ Id.

⁶²⁶ Id.

⁶²⁷ “In Search of the ‘Veil of money’ and the ‘Neutrality of Money’: A Note on the Origin of Terms,” by Don Patinkin and Otto Sieger, *The Scandinavian Journal of Economics*, Volume 91, Number 1, March, 1989, 131-146, 138.

⁶²⁸ Id.

⁶²⁹ Id. at 139-140.

⁶³⁰ Id. at 142.

⁶³¹ Id. As it turns out, another researcher determined that the economist Joseph Schumpeter “used the term [in German] consistently in most of his early works [- dating back to 1908] – on monetary matters” According to that researcher, the term, in Schumpeter’s words, “proceed[ed] from ‘the principle that all the essential phenomena of economic life are capable of being described in terms of goods and services, of decisions about them, and of relations between them. Money, so long as it functions normally,...does not affect the economic process, which behaves in the same way as it would in a barter economy: this is essentially what the concept of Neutral Money implies. Thus, money has been called a ‘garb’ or ‘veil’ of the things that really matter.’” The Early Use of the Term ‘Veil of Money’ in Schumpeter’s Monetary Writings – A Comment on Patinkin and Steiger,” by Hansjörg Klausinger, *The Scandinavian Journal of Economics*, Volume 92, Number 4, December, 1990, 617-621, 619. That being said, the author suggests that while “Schumpeter played an important role in popularizing the notion of the ‘veil of money’ among German-speaking economists,” Schumpeter’s “characterization of the term ‘veil of money’ as ‘usual’ or as a ‘customary expression’ seems to indicate that he was not the first to coin it.” Id. at 620.

Another scholar suggests that phrase in English was used by the British economists Philip Henry Wicksteed, in 1910 and Arthur Cecil Pigou in 1912 with references to “the distorting veil of money” and the “all covering cloak of money payments for services and commodities, and sales of instruments and supports for life for money payments,” respectively. “Money as a Metaphorical Garment Before the Great War – A Comment on Patinkin and Steiger,” by David Laidler, *The Scandinavian Journal of Economics*, Volume 92, Number 4, December, 1990, 613-615, 614,

Still another has contended that “[t]he use of the term ‘Schleier’ (veil) in connection with monetary phenomena appears” in a book by the Austrian economist Eugen von Böhm-Bawerk in 1889 and “veil of money” can be found in” a book by the American economist, Irving Fisher, in 1898. Böhm-Bawerk, Irving Fisher, and the Term ‘Veil of Money’: Note,” by Mauro Boianovsky, *History of Political Economy*, Volume 25, Number 4, 1993, 725-738, 725.

⁶³² “In Search of the ‘Veil of money’ and the ‘Neutrality of Money’: A Note on the Origin of Terms,” by Don Patinkin and Otto Sieger, *The Scandinavian Journal of Economics*, Vol. 91, Number 1, March, 1989, 131-146, 142.

⁶³³ Definition of “Veda,” Oxford Dictionaries. http://www.oxforddictionaries.com/us/definition/american_english/Veda

⁶³⁴ “In Search of the ‘Veil of money’ and the ‘Neutrality of Money’: A Note on the Origin of Terms,” by Don Patinkin and Otto Sieger, *The Scandinavian Journal of Economics*, Volume 91, Number 1, March, 1989, 131-146, 143.

⁶³⁵ “A glimpse through the veil of Maya: Islamic finance and its trusts on property rights,” by Valentino Cattelan, Chapter 3 in *Islamic Finance in Europe: Towards a Plural Financial System*. Edited by Valentino Cattelan, Edward Elgar, 2013, p. 34.

⁶³⁶ Id. By “secular truths” he means “the ‘just’ organization of worldly relationships” of the “‘justice’ of human organizations” Id. at 39; “spiritual truths” are associated with “the dimension of human life that necessarily involves a transcendent experience as well as the idea of...‘justice’ (divine or worldly) for mankind to prosper.” Id. at 46.

⁶³⁷ “A glimpse through the veil of Maya: Islamic finance and its trusts on property rights,” by Valentino Cattelan, Chapter 3 in *Islamic Finance in Europe: Towards a Plural Financial System*. Edited by Valentino Cattelan, Edward Elgar, 2013, pp. 34-35.

⁶³⁸ Id. at 37.

⁶³⁹ *Islamic Finance, Principles and Practice, 2nd Edition*, by Hans Visser, Edward Elgar, 2013, p. 12.

⁶⁴⁰ "The Codex of a Companion of the Prophet and the Qur'ān of the Prophet," by Behnam Sadeghi and Uwe Bergmann, *Arabica*, Volume 57, 2010, 343-436, 364. Sometime around AD 650, 'Utmān is said to have sent copies of the Qur'ān to Kūfa, Basra, and Syria and to have kept a copy with him in Medina." Id. According to the authors, "[e]arly Muslim reports assert that different Companions of the Prophet had different versions of the Qur'ān, and some reports give the purported variants of their codices. The differences among these codices appear to have motivated an attempt at standardization. According to the collective memory of early Muslims, the Companion 'Utmān, after becoming caliph, disseminated a version of the holy book, declaring it the standard. The date of this event is uncertain, but it appears to have taken place sometime during AH 24-30, i.e. AD 644-650.2 It is to the textual tradition identified with this version that almost all extant Qur'ānic manuscripts belong." Id. at 344. A variant of that issue is one of the internal consistency of the otherwise authoritative text. For example, Visser remarks that "there are different versions in the Quran of some of the directions transmitted by [Gabriel] to Muhammad...The version that is held to be the most recent is taken as the version to be followed." *Islamic Finance, Principles and Practice, 2nd Edition*, by Hans Visser, Edward Elgar, 2013, p. 27, note 3.

⁶⁴¹ "Muhammad dictated the revelations, and scribes wrote them down. This gave rise to a number of Companion codices. As the Prophet had not fully determined the order of the *sūras* relative to one another, these codices had different *sūra* orders. However, he had fixed the contents of the *sūras*, including the distribution of verses within them and even the verse divisions. On these elements, and especially where the actual text is concerned, the codices showed great agreement." "The Codex of a Companion of the Prophet and the Qur'ān of the Prophet," by Behnam Sadeghi and Uwe Bergmann, *Arabica*, Volume 57, 2010, 343-436, 413.

⁶⁴² Peters contends that "we [not] know who arranged the suras in their present order, which is roughly (the first sura apart), from the longest to the shortest. They are not, in any event, placed in the order of their revelation as everyone agrees" "The Quest of the Historical Muhammad," by F.E. Peters, Chapter 13 in *The Quest for the Historical Muhammad*, Edited and Translated by Ibn Warraq, Prometheus Books, 2000, 444-473, 452.

⁶⁴³ For an extensive and critical review of the scholarly literature concerning the foundations of Islam, especially the life of Mohammad and the nature and origins of the Quran (in general and in related to Mohammad), see *The Quest for the Historical Muhammad*, Edited and translated by Ibn Warraq, Prometheus Books, 2000. For a sharply critical view of the scholarship, especially as it relates to law, see, for example, "On Orientalism, Self-Consciousness and History," by Wael B. Hallaq, *Islamic Law and Society*, Volume 18, 2011, 387-439 and "Groundwork of the Moral Law: A New Look at the Qur'ān and the Genesis of Sharī'a," by Wael B. Hallaq, *Islamic Law and Society*, Volume 16, 2009, 239-279.

⁶⁴⁴ *Sharī'ah Law: An Introduction*, by Mohammad Hashim Kamali, Oneword Publications, 2008, p. 19.

⁶⁴⁵ *Islamic Finance, Principles and Practice, 2nd Edition*, by Hans Visser, Edward Elgar, 2013, p. 12.

⁶⁴⁶ See "Introduction, Hadith, Origins and Development," Introduction" by Harald Motzki in Hadith, *Origins and Developments*, Edited by Harald Motzki, Volume 28 of the Formation of the Classic Islamic World, Lawrence J. Conrad (General Ed.), Ashgate Publishing Limited, 2004, p. xiii.

⁶⁴⁷ "Introduction" by Wael B. Hallaq, to *The Formation of Islamic Law*, Wael B. Hallaq (Ed.), Volume 28 of the Formation of the Classic Islamic World, Lawrence J. Conrad (General Ed.), Ashgate Publishing Limited, 2004, p. xiii.

⁶⁴⁸ For a detailed and critical review of scholarly literature regarding the "form, origins, transmission, preservation, and authenticity" of *hadith*, see "Introduction, Hadith, Origins and Development," by Harald Motzki, Volume 28 of the Formation of the Classic Islamic World, Lawrence J. Conrad (General Ed.), Ashgate Publishing Limited, 2004, pp. xiii-iii.

⁶⁴⁹ According to Motzki, the content of early efforts to collect hadiths "was mostly preserved by memory and transmitted early and included those of '[s]emi-professional story tellers' which 'were already circulating in the first Islamic century'. (He suggests that in their endeavor to gain information, 'where required' precedents were 'invented...and ascribed them to him.') However, during Muhammad's lifetime a few persons attempted to write them down "[a]lthough there was a marked opposition to the practice" and the more systematic effort by "professional transmitters" to collect and write them down was the result of "initiatives of the caliph and personal motives." Students took notes from lectures by the professional transmitters/scholars "and passed them on to their own students." He remarks that "no remains of the actual collections made before the middle of the eighth century [-- about a century after the death of Muhammad --] have survived to the present day." Introduction, Hadith, Origins and Development," by Harald Motzki, Volume 28 of the Formation of the Classic Islamic World, Lawrence J. Conrad (General Ed.), Ashgate Publishing Limited, 2004, p. xvi.

⁶⁵⁰ *Islamic Finance, Principles and Practice, 2nd Edition*, by Hans Visser, Edward Elgar, 2013, p. 12

⁶⁵¹ Id. at 27, note 1. In this regard, Visser takes note of the view of Islamic scholar Joseph Schacht who contended to the effect that "the sunna is in reality the practice of the Umayyad rulers of Damascus (661-750), only supported by ahadith of dubious authenticity." Id. at 12.

⁶⁵² Id. For a detailed and critical review of scholarly literature regarding the "form, origins, transmission, preservation, and authenticity" of *hadith*, see "Hadith: Origins and Development," by Harald Motzki, "Introduction" to *Hadith*, Harald Motzki (Ed.), by Wael B. Hallaq, "Introduction" to *The Formation of Islamic Law*, Wael B. Hallaq (Ed.), Volume 28 of the Formation of the Classic Islamic World, Lawrence J. Conrad (General Ed.), Ashgate Publishing Limited, 2004, pp. xiii-iii.

⁶⁵³ *Islamic Finance, Principles and Practice, 2nd Edition*, by Hans Visser, Edward Elgar, 2013, p. 13.

⁶⁵⁴ Id. at 27, note 1.

⁶⁵⁵ Id. at 12

⁶⁵⁶ "One of the concerns of legal theory was to provide criteria by which the subject matter of the hadiths (which, in their entirety, exceeded half a million) might be transmitted from one generation to the next in a reliable manner. The application of these criteria finally resulted in the acceptance of only about 5,000 sound hadiths." *An Introduction to Islamic Law*, by Wael B. Hallaq, Cambridge University Press, 2009, p. 16. <https://iuristebi.files.wordpress.com/2011/07/an-introduction-to-islamic-law.pdf>

⁶⁵⁷ "Though not, according to Muslim tradition, endowed with divine qualities (as Jesus Christ is said to have been by Christians), Muhammad was God's chosen messenger; he understood God's intentions better than anyone else, and acted upon them in his daily life." *An Introduction to Islamic Law*, by Wael B. Hallaq, Cambridge University Press, 2009, p. 16. <https://iuristebi.files.wordpress.com/2011/07/an-introduction-to-islamic-law.pdf> Note that it would seem to be acknowledged (or at least by some), that Muhammad in his role as military leader or otherwise made what could be termed "errors" or "mistakes," though they may have been recognized and corrected; or, if not that, at least changed what he deemed to be the answers to certain questions. That raises some potentially interesting issues as to exactly how the hadith should be treated, but ones which are best addressed by those with the relevant extensive knowledge and expertise.

⁶⁵⁸ "The Hadith dwells at length on such subjects as 'the sale of a gold necklace studded with pearls' ... and 'the selling of the camel and stipulation of riding on it' ..., but contains precious little on, say, corporate government, public utilities or intellectual property, let alone complex financial products." *Islamic Finance, Principles and Practice, 2nd Edition*, by Hans Visser, Edward Elgar, 2013, p. 13.

⁶⁵⁹ For a detailed and critical review of scholarly literature on the origins of Islamic law, especially the role of the Qur'an in relation to legal authority in practice and its relation to pre-Islamic law and "foreign law," see "The Formation of Islamic Law," by Wael B. Hallaq, "Introduction" to *The Formation of Islamic Law*, Wael B. Hallaq (Ed.), Volume 27 of the Formation of the Classic Islamic World, Lawrence J. Conrad (General Ed.), Ashgate Publishing Limited, 2004, pp. xiii-xl.

⁶⁶⁰ *Islamic Finance, Principles and Practice, 2nd Edition*, by Hans Visser, Edward Elgar, 2013, p. 13.

⁶⁶¹ Views on the subject range from "agreement of the entire community of believers" to "agreement among scholars"; for some, it is identified with an expression of democracy, for example, one having its source in a parliamentary body. *Islamic Finance, Principles and Practice, 2nd Edition*, by Hans Visser, Edward Elgar, 2013, p. 13.

⁶⁶² Id. at 24.

⁶⁶³ Id. Apparently during early Islam prior to the existence of rules for which the use of *qiyas* was seen as relevant, a special form of *ijtihad*, *ray*, was employed, which was "expert private interpretation or personal reasoning". Id. at 15.

⁶⁶⁴ Id. at 14.

⁶⁶⁵ Id. at 15. In part of whole at least the latter seems to parallel decisions by courts in the Anglo-American legal tradition which are 'at law' and "in equity".

⁶⁶⁶ Id. at 16.

⁶⁶⁷ Id. Certainly in the latter case there are parallels in Anglo-American law in appeals to business practice to fill in gaps in contractual and other arrangements.

⁶⁶⁸ Id.

⁶⁶⁹ For one thoughtful exploration of the nature and demands of the interpretive endeavor, see "Text and Application, Hermeneutical Reflections on Islamic Legal Interpretation," by Bernard G. Weiss, Chapter 19 in *The Law Applied, Contextualizing the Islamic Shari'a*, Edited by Peri Bearman, Wolfhart Neirichs, and Bernard G. Weiss, I.B. Tauris & Co. Ltd, 2008 374-396.

⁶⁷⁰ *Islamic Capitalism and Finance Origin, Evolution and the Future*, by Murat Çizakça, Edward Elgar, 2011, p. xv.

⁶⁷¹ <http://iugc.yolasite.com/resources/Reference%20Book%2004%20-%20Islamic%20finance.%20law%20economics%20and%20practice.%20M.%20EI%20Gamal.pdf>

⁶⁷² Id.

⁶⁷³ "Understanding Islam: Development, Economics and Finance," by Hossein Askari, Zamir Iqbal, Nouredine Krichene, Abbas Mirakhor, 2013, pp. 12-14. <http://ssrn.com/abstract=2358945> or <http://dx.doi.org/10.2139/ssrn.2358945>

⁶⁷⁴ "While Medina had its own existing market, the Prophet, with the advice of the leading merchants, selected a location for a new market for Muslims. Unlike in the existing market in Medina, the Prophet prohibited the imposition of taxes on transactions and individual merchants. He also implemented policies to encourage trade among Muslims and non-Muslims by creating incentives for non-Muslim merchants in and outside of Medina. The rules included, inter alia, and in addition to those mentioned above, no restrictions on international or interregional trade (including no taxation of imports and exports); the free spatial movement of resources, goods, and services from one market to another; no barriers to market entry and exit; free and transparent information regarding the price, quality, and quantity of goods, particularly in the case of spot trade; the specification of the exact date for the completion of trade where trade was to take place over time; the specification of the property and other rights of all participants in every contract; guaranteed contract enforcement by the state and its legal apparatus; the prohibition of the hoarding of commodities and of productive resources for the purpose of pushing up their price; the prohibition of price controls; a ban on sellers or buyers harming the interests of other market participants, for example, by allowing a third party to interrupt negotiations between two parties in order to influence the negotiations to the benefit of one of the parties; and a ban on the shortchanging of buyers, for example, by not giving full weight and measure." "Understanding Islam: Development, Economics and Finance," by Hossein Askari, Zamir Iqbal, Nouredine Krichene, Abbas Mirakhor, 2013, pp. 13-14. <http://ssrn.com/abstract=2358945> or <http://dx.doi.org/10.2139/ssrn.2358945>

⁶⁷⁵ Id. at 14 They add: "Moreover, rules specified in the Quran regarding faith to the terms of contracts and the knowledge of their enforcement increased certainty and reduced the cost of contracts. From the earliest period of operation of the Medina market, the Prophet appointed market supervisors, whose assignment was to ensure rule-compliance. He ranked honest market participants with prophets, martyrs and *awlia*' (plural for a *waliyy*) of Allah, because like prophets, they follow the path of justice, like martyrs they fight against heavy odds (satisfy their own greed), and like the truthful Lovers of Allah they are steadfast in their path to perfection. The Prophet would advise the participants to go beyond mere rule-compliance and to treat their fellow humans with beneficence. While justice in the market would be served by rule compliance, which limits and controls selfish behavior, beneficence rises higher by actually sacrificing one's self-interest for the interests of others." Id.

⁶⁷⁶ Id. at 17-18.

⁶⁷⁷ *Islamic Law in Past and Present*, by Mathias Rohe (Translated by Gwendolin Goldbloom), Brill, 2014, p. 135.

⁶⁷⁸ "Regulating Islamic Financial Institutions: The Nature of the Regulated," by Dahlia El-Hawary, Wafik Grais, and Zamir Iqbal, World Bank Policy Research Working Paper 3227, March 2004, pp. 5-6.

World Bank <https://openknowledge.worldbank.org/bitstream/handle/10986/14732/wps3227islamic.pdf?sequence=1>

⁶⁷⁹ *Islamic Finance in the Global Economy*, by Ibrahim Warde, Edinburgh University Press, 2000, p. 38. Turner describes Islam as having been "primarily urban, commercial and literate. Mecca was strategically placed on the trader routes between the Mediterranean and the Indian Ocean; Muhammad's own tribe, the Quraysh, had achieved a dominant political position based on their commercial strength in the region. The Prophet himself had been employed on the caravans which brought Byzantine commodities to the Meccan market. The Qur'an itself is steeped in a commercial terminology. There has been a continuous conflict in Islam between the dominant urban piety and the values of the desert, but this conflict was also economic. Desert tribes threatened the trade routes and extracted taxation from merchants. Islam provided a culture which was capable of uniting Bedouins and urban merchants within a single community. Islam was thus as much a triumph of town over desert as Arab over Persian and Christian." "Islam, Capitalism and the Weber Theses," by Bryan S. Turner, *The British Journal of Sociology*, Volume 25, Number 2, June, 1974, 230-243, 238.

http://www2.warwick.ac.uk/fac/arts/english/research/currentprojects/coral/trg/theologyreadinggroup/b_turner_islam_capitalism_and_the_weber_theses.pdf

⁶⁷⁹ *Islamic Finance in the Global Economy*, by Ibrahim Warde, Edinburgh University Press, 2000, p. 63.

⁶⁸⁰ "Understanding Islam: Development, Economics and Finance," by Hossein Askari, Zamir Iqbal, Nouredine Krichene, Abbas Mirakhor, 2013, pp. 13-14. <http://ssrn.com/abstract=2358945> or <http://dx.doi.org/10.2139/ssrn.2358945>

"The rules included, inter alia, and in addition to those mentioned above, no restrictions on international or interregional trade (including no taxation of imports and exports); the free spatial movement of resources, goods, and services from one market to another; no barriers to market entry and exit; free and transparent information regarding the price, quality, and quantity of goods, particularly in the case of spot trade; the specification of the exact date for the completion of trade [\\]where trade was to take place over time; the specification of the property and other rights of all participants in every contract; guaranteed contract enforcement by the state and its legal apparatus; the prohibition of the hoarding of commodities and of productive resources for the purpose of pushing up their price; the prohibition of price controls; a ban on sellers or buyers harming the interests of other market participants, for example, by allowing a third party to interrupt negotiations between two parties in order to influence the negotiations to the benefit of one of the parties; and a ban on the shortchanging of buyers, for example, by not giving full weight and measure. Moreover, sellers and buyers were given the right of annulment of a deal: (i) before leaving the location in which it was taking place; (ii) in the case of a buyer who had not seen the commodity and after seeing it found it unacceptable; (iii) if either the seller or the buyer discovered that the product had either been sold for less than, or bought for higher than, it was worth; (iv) if the buyer discovered that the quality of the product was not as expected; (v) if side conditions were specified during the negotiations which were unfulfilled; (vi) if a delivery period was specified but the product was not delivered on time; and (vii) when the subject of the negotiations were pack animals, the buyer had the right to return the animal up to three days after the deal was finalized. These rights of annulment ensured that market participants were protected against a lack of, or faulty, information." Id. at 14.

⁶⁸¹ Id.

⁶⁸² Id.