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# ISLAMIC LAW AND AMBIVALENT SCHOLARSHIP

*Khaled Abou El Fadl\**

THE JUSTICE OF ISLAM: COMPARATIVE PERSPECTIVES ON ISLAMIC LAW AND SOCIETY. By *Lawrence Rosen*. Oxford: Oxford University Press. 2000. Pp. 248. Cloth, \$80; paper, \$29.95.

This book reminds me of the image of the arrogantly condescending and blustering tourist in Cairo who drifts into a store that has taken the trouble of prominently displaying the price of their commodities in nicely typed tags. Nevertheless, the tourist walks in, reads the price tag, and then proclaims, "Okay, what is the real price?" The poor store employee stares at him with incredulity, and simply repeats the price on the tag, and, in response, the tourist emits this knowing and smug smile as if saying, "I know you guys, you never mean what you say; everything in Arab culture is negotiable, everything is subject to bargaining, and I will not be fooled." Of course, the tourist misses the point. The price on the tag is the real price, and there is no expectation of haggling, bargaining, or any other reconstruction of reality. Before arriving in Cairo, however, the tourist has already received a steady dosage of advice about the Arab bazaar. Everything, the tourist is told, in the Arab market is negotiable; so never take any of the advertised prices at face value, and argue and haggle to your heart's content.

Lawrence Rosen's<sup>1</sup> book is not intended to give advice to tourists about how to get the most for their money; it is nothing short of an attempt to explain the Islamic and Arab conception of justice. The author explicitly adopts the bazaar as the relevant model for understanding Islamic conceptions of justice, whether old or new, rural or urban, social or legal, or Muslim or Arab. But like our haggling tourist, whether intentionally or not, he ends up essentializing and depre-

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cating his subject into a caricature that, although based on some truth, is largely a fictional invention.

Rosen's book is difficult to summarize. It is a collection of previously published articles that were put together in a poorly integrated book. As a result, there are many repetitions and contradictions throughout. In fact, one can trace the development of the author's thought on some issues because it is obvious that the articles were written over a considerable span of time with various temperaments and orientations. Rosen seems to have added a paragraph to the beginning of each chapter in an attempt to draw a common thread between the various sections of the book. But it is clear that these beginnings are forced upon the text in an attempt to convince the reader of a systematic project and a thematic continuity that does not exist. While the reader might possibly accept that eleven of the twelve chapters of the book are reflections on the anthropology of law, the last chapter, which deals with Muslims in American courts, is at best tangential to the narrative of the book.

There are many methodological and factual errors in *The Justice of Islam*, but I will be able to address only some of them. I will also avoid dealing with problems that do not directly pertain to the author's substantive arguments. But, at the outset, I feel compelled to note that Rosen's book does not inspire much confidence. He gets the transliteration of many Arabic words wrong, confuses colloquial with classical Arabic,<sup>2</sup> and fails to consult or cite practically any primary sources on Islamic law. Nearly, all his knowledge of text-based Islamic law is derived from secondary sources. As I demonstrate below, there is no clear research methodology to this book. Rosen is prone to reaching what seem like culturally based conclusions and then, working backwards, he tends to cite anything that he believes supports his arguments. Depending on his conclusions, he cites the Qur'an, secondary sources on classical Islamic law, reports attributed to the Prophet Muhammad, contemporary Middle Eastern law, his own anthropological research, and even anecdotal stories conveyed by friends. There is, however, no clear and systematic methodology in his utilization of these sources. What seems to dictate Rosen's reliance on one source or another is a largely selective — even opportunistic — system of citation in support of his arguments about Muslim and Arab culture.

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2. Among the Arabic words that Rosen transliterates incorrectly are the following: 'udul (p. 8); muhtasib (p. 8); asl (p. 22); shadh; fitna (p. 26); hudud (p. 50); sadaq (p. 15); damin (p. 180); qadhf (p. 191); zulm (p. 156); wasta; and hadana. I suspect that Rosen's Moroccan spoken Arabic is adequate, but, judging from the many mistakes he commits, it is likely that his command of classical Arabic is weak. Importantly, Islamic and Moroccan law texts are written in classical Arabic. It is difficult to imagine that a scholar can speak authoritatively on classical Islamic law or modern Moroccan law without having a firm command of classical Arabic.

The main thesis of Rosen's book is that justice in Islam does not focus on equality, but on equivalence. Islamic law is embedded in a highly negotiable culture in which Muslims bargain for equivalence. In this context, the status or role of persons, much more than facts, plays the pivotal role in law and adjudication. Islamic law is inseparable from its cultural context — a context that is not so much concerned with rules and determinable results, but with conducive obligations, and a dynamic process of social bargaining. Rosen contends that the Arab bazaar offers the best model for understanding Islamic justice and law. The bazaar is an active and dynamic place where there is constant haggling, bargaining, and shifting alliances. While it appears that the bazaar is messy and perhaps chaotic, in fact there is a cultural context that makes the bazaar functional and logical. It is, to use Rosen's expression, "ordered anarchy" (p. 143). If one understands the particularity of culture, the bazaar will cease to be so alien, strange, or irrational. In this context, Rosen makes the important observation that Islamic law is far more flexible and malleable than is commonly assumed. In fact, Rosen argues that Islamic law is similar in some important respects to the common law system, but with some important differences that he sets forth in his book.

In its broadest sense, Rosen's argument is sensible and even convincing: Islamic law has often been stereotyped as a rigid and inflexible system of law that is disembodied from any cultural context, seen primarily as a text-based speculative system of law that has little to do with the sociological practices of its adherents. Rosen, on the other hand, considers Islamic law to be thoroughly context based and culturally bound. Far from being a rigid and nonresponsive system, it engages the cultural paradigms of its adherents in an active and dynamic fashion.

Much of Rosen's conclusions seem to be based on his observations of court proceedings over a number of years in the Moroccan city of Sefrou. Sefrou is an old but small city of about 70,000 people that is to the south of Fez (p. 4). From his fieldwork in this small city, Rosen generalizes about the nature of Islamic and Arab justice throughout the ages and across the Arab world. He realizes, however, that considering the broadness of his claims, this is an inadequate study sample.<sup>3</sup> Therefore, Rosen cites and discusses classical Islamic law doctrines, the Qur'an, traditions attributed to the Prophet, and some contemporary Arab law codes in support of his arguments. Nevertheless, he does not attempt to explain the ways in which it can be said that the text of the Qur'an, for instance, is representative of anything in con-

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3. P. 110. Fairly late in the book, Rosen concedes that in certain respects Morocco might not represent the whole Arab and Muslim world.

temporary Arab culture. He does not explain the relationship between classical Islamic law doctrines and modern cultural practices, or even the ways that the various and divergent existing Arab cultures can be said to be Islamic or not Islamic. Furthermore, he does not seem to distinguish between urban or rural, rich or poor, coastal or inland, secular or temporal cultural contexts. Rather, Rosen is quite prone to lump the complex and diverse realities of Arab and Islamic cultures into one indistinct mass of negotiability, and bazaar-like existence.<sup>4</sup> But using Rosen's own categories, one can say that there is no bazaar rather, there is a *suq* (marketplace), and there is no single type of *suq* in the Islamic or Arab world, but many varied and diverse *suqs*. In Cairo alone, for example, there is the *suq* that one might find next to the Azhar University in Asbakiyyah, which serves the students of the theological seminary; there is also the *suq* that caters primarily to Western tourists in Khan al-Khalili; there is also the *suq* that caters to the middle class in the Tahrir area; and the *suq* in Bulaq that serves a clientele of impoverished communities. Each one of these markets has its own culture and system of conduct that is not generalizable to the other. Most importantly, these various markets are not simply reflective of a broad category that we can call Islamic justice, but are the product of a variety of influences, including some inherited Islamic values, particular localized Egyptian practices, modern commercial regulations, and Western and international commercial influences.

On numerous occasions in his book, Rosen makes remarkably sweeping generalizations about the nature of Arab and Islamic culture, often in a fashion that borders on the incredulous. In many ways, Rosen posits himself as the see-it-all, know-it-all anthropologist who can dive unfettered to the depths of the Arab mind and reality and inform the readers, and probably Arabs themselves, about the true nature and thought of these people that he labels as Arabs. In addition, Rosen assumes that anything Islamic is also Arab, and that anything Arab is also Islamic, so that if he observes what he believes to be a cultural orientation in a particular Arab setting, he is quick to generalize from that specific context to the whole of the Islamic legal tradition. But even more, some of his generalizations are inexplicably offensive and, in fact, his attempt to pretend that these generalizations allow a greater sympathy and understanding of Arab culture is disingenuous, at best. Although he consistently professes deep sympathy with Arabs and Muslims, the ultimate image that he constructs is largely unflattering.

There are so many examples of these generalizations that it is impossible to adequately cite or discuss all or even most of them. There-

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4. Ironically, Rosen criticizes other scholars for indulging in broad generalizations about diverse cultures, but Rosen's own generalizations are equally problematic. Pp. 44-45, 60.

fore, I will survey only some of Rosen's broad generalizations about Moroccans, Arabs, Muslims, and, ultimately, Islamic law. In order to adequately preserve Rosen's style and accurately reflect his claims, I will quote extensively from his book rather than paraphrase his arguments.

Rosen contends that truth in Islamic law is relative and contingent. Truth depends on the context of interpersonal relationships in which people bind each other through a dynamic of reciprocal obligations. According to Rosen, "[f]or Moroccans, no utterance can by itself create a binding obligation" (p. 7). Indeed, mere expressions mean nothing unless "something more has happened," in the sense that people have acted in such a way as to create a sense of obligation (p. 7). Rosen goes on to explain that for Arabs, mere utterances imply nothing about the truth of what is being asserted. Rather, for them truth is constructed within the context of interpersonal obligations (p. 7). Similarly, promises are meaningless unless validated by practice. According to Rosen, "in the Arab world . . . mere utterances, once validated by recognizable means, are taken very seriously, as validated utterances, [and] become vital to a person's reputation and consequences in the world" (p. 149). From this, Rosen pronounces a whole host of generalizations about the nature of truth, trust, and words in the Arab world. "In the Moroccan view," Rosen asserts, "one can identify and assess a person, an utterance, or an act only by their consequences in the world of human relations" (p. 28). "For the Arabs," Rosen adds, "it also follows that what matters in evaluating actions is not their connection to a series of abstract propositions that lie behind them but to the consequences that actions have in the world. . ." (p. 72). Similarly, Rosen elaborates by noting that, "for Arabs it is well understood that an assertion of relationship, standing as a bare utterance, is not necessarily subject to evaluation in truth terms at all" (p. 72). Rosen is then able to identify a major difference between Arabs and Westerners. He proclaims: "Unlike the West, where time reveals the truth of persons, in the Arab world it is rather, nested bonds of obligation — like some elaborate map, or diagram of an electrical system — that shows where another is located in social space and what forces keep a person attached, consequent, identified" (p. 41).

Interestingly, one of the things that Rosen cites in support of his argument is an analysis of the word *haqq* (normally, translated as right or truth) in Arabic. Rosen claims that the word *haqq* has a variety of interconnected meanings — it can mean a right, duty, truth, reality, and obligation. Rosen then comes to the startling conclusion that this word in one context can mean 'you are right' and in another, 'you are wrong' (p. 6). In reality, however, Rosen's claim that, depending on

context, this word can mean the opposite of right, is entirely without foundation. But Rosen wants to prove that for Arabs, all rights and all truth are relative. Hence, Rosen states: "the Arabs operate through a social and contractual system which is radically relativized, one in which permissible relationships are those one can manage to construct within operational parameters that are themselves subject to modification as one marshals one's capabilities to make them hold sway" (p. 143). Arabs, Rosen contends, live in "ordered anarchy" (p. 143). But, according to Rosen, Arabs find a sense of security and comfort in this ordered anarchy. He states: "For Arabs, who believe that it is contexts of relationship, not invariant capabilities, that most fully define a person, actively entangling them in webs of indebtedness constitutes the greatest predictability and security that one can have for their actions towards oneself" (p. 136). Rosen does not hesitate, however, to claim that there is "a sense of ambivalence inherent in virtually any relationship and stance in Arab culture," as the Arabs engage in constant balancing accommodations as to all social or legal realities (p. 158). Rosen deems himself capable to evaluate the subjective convictions that Arabs have about life, and so he asserts: "Arabs believe that social life is a running imbalance of obligations but that it is not the imbalance that applies at any given time that matters but whether the process by which the moving sets of relationships are themselves formed has become unhinged" (p. 172). Arab life consists of ongoing negotiation and balancing, and so there is a persistent state of relativism and ambiguity. For Arabs, truth is in the process, not the facts, but Rosen concludes: "It is here, fraught with all the ambivalences attendant upon it, that the Arabs have made their cultural home" (p. 150).

Rosen does not in any way distinguish between Moroccans, Arabs, Muslims, or Islamic law. The existence of a particular characteristic in one is generalizable to the other — in Rosen's mind, they are all one indistinct mass. Having argued that ambivalence is the cultural home of Arabs, Rosen extends his analysis to an evaluation of the meaning of justice and rights for Muslims and Islamic law. Not surprisingly, Rosen argues that, like their understanding of truth, for Arabs, justice and rights are highly contextual, and relative as well. Arabs try to achieve equivalence by taking into consideration the status of a person in the context of reciprocal obligations and duties. "When Arabs speak about justice," Rosen informs us, "they invariably connect it with the idea of the just person . . ." (p. 155). But the just person is not an abstract idea; he/she is someone who is able to interact with his/her context without disrupting it. In fact, Rosen asserts: "For Arabs justice . . . is not an absolute, a set of propositions to which the insightful must penetrate and give expression in the world" (pp. 170-71). Rather, justice depends on the results of acts, and acts are evaluated in terms of their efficacy for the social order, and not in terms of absolutes (p. 171). Hence, according to Rosen, Arabs either do not understand

or are not interested in abstract principles of justice because they are only interested in the concrete results on the ground. Importantly, however, the results on the ground are not evaluated by reference to some abstract moral standard, but simply by reference to the impact that behavior has on the social order. According to Rosen, “Muslim judges characteristically insist that their goal is to get people back into working relationships — contentious as they may be — rather than to solve matters in a way that ignores future ties” (p. 41). Muslim judges do not uphold the principle, or even the technicalities of law; they uphold the social order. Having set the grounds in such a fashion, Rosen is able to conclude that Arabs have no notion of abstract rights. “To many Muslims,” he states, “courts can no more be expected to preserve individual rights than might be expected in life at large — nor be any less corrupt or any more wise” (pp. 74-75). Rosen then concludes: “One only has rights, the Arabs say, to the extent that one can enforce them” (p. 80).

Rosen’s analysis on justice has some very concrete implications. Not only do Arabs not believe, or even understand absolute notions of truth, justice, or rights, but even corruption and bribery have very different meanings in the Arab context. According to Rosen, bribery is not corruption in Arab and Muslim culture. Corruption for Arabs is the failure to share the benefits with the individuals with whom one has formed bonds of interdependence. Therefore, bribery is corruption only if it results in privileging an elite. As long as government officials are accepting bribes from everyone, and not discriminating against a particular group by refusing to take its money, then bribery is not a problem. Consequently, Rosen asserts that in the Arab world: “It is . . . as a deep expression of the centrality of justice as regulated reciprocity that corruption can be defined as the failure to share with one’s network of co-dependants” (p. 163). Importantly, Rosen believes that he is not only describing the cultural practices of Arabs, but that he is also describing the nature of Islamic law. Islamic law, according to Rosen, is not found in law books, but in the cultural practices of Arabs. As proof of this, Rosen claims that, “Islamic law embraces the culture quite directly.” Rosen explains that this is the case because: “Muslims consistently say that their customs do not stand apart from or alongside Islamic law; rather, they see their customs as Islamic law, provided they do not contravene a clear Quranic precept” (p. 57; emphasis in original). What is most distinctive about Rosen’s discourse is its unrestrained nature. While on several occasions he criticizes other scholars for essentializing and stereotyping Arabs, Muslims, and Islamic law, he himself does not show any restraint in this regard.

Rosen, however, can be a sophisticated researcher who, at times, displays glimpses of real insight. For example, Rosen goes so far as to remind his readers that: "Characterizations of justice in other cultures often reveal more about the analyst than the society under consideration" (p. 153). This serves as a warning to analysts not to project their own subjectivities and biases upon the culture under study. Yet, in practice, this is a warning that Rosen does not heed, and as a result, many of his generalizations are difficult to understand or even excuse. So, for instance, at one point Rosen claims the following: "And everyone in Morocco, however well or poorly educated, has a firm grasp of the essentials of inheritance law, particularly as it relates to women receiving one-half the share granted men of similar genealogical distance from the deceased" (pp. 89-90). I am not sure how Rosen knows this — he does not claim to have interviewed every single Moroccan, educated or not, about the essentials of inheritance law. In fact, he, himself, does not display any particular competence in understanding the essentials of Islamic or Moroccan inheritance law. There is a considerable amount of debate in Islamic law regarding how to assess genealogical distance, and there are a variety of scenarios in which a female inherits the same amount as a male of identical or even greater genealogical distance. For example, according to several schools of thought, the female spouse would inherit a greater share than the surviving male sibling of the deceased.<sup>5</sup> This would be clearly inconsistent with Rosen's characterization regarding the essentials of Islamic inheritance law. On another occasion, in support of his argument that Arabs think of justice only in terms of the just person, Rosen states: "In Morocco, as throughout the Arab world, people will often refer to certain individuals as 'the notables of the area' (*a'yan al-bilad*)" (p. 19). Rosen goes on to explain that such notables have a special status, and perform an important role in the administration of justice. Importantly, however, Rosen's claim is entirely without foundation. The expression *a'yan al-bilad* is most often used in rural areas in which the individual is not anonymous, and in which traditional structures of power continue to exist. For instance, in the large and amorphous halls of justice in Cairo or Damascus, the so-called notables play no role in the administration of justice. If a rich, powerful, or politically connected person exercises undue influence upon a Cairo or Damascus judge, this is called corruption, and is, in fact, prohibited by a host of criminal codes. Similarly, although Rosen insists that bribery is not

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5. See MUHAMMAD ABU ZAHRA, *AHKAM AL-TARIKAT WA AL-MAWARITH* 114-27 (Cairo: Dar al-Fikr al-'Arabi 1987); MUHAMMAD AHMAD IBN RUSHD (A.K.A. AVERROES), *BIDAYAT AL-MUJTAHID WA NIHAYAT AL-MUQTASID* 672-73 (Beirut: Dar Ibn Hazm 1999) [hereinafter *IBN RUSHD, BIDAYAT AL-MUJTAHID*, Dar Ibn Hazm ed.]; MUHAMMAD JAWWAD MUGHNIYYA, *AL-FIQH 'ALA AL-MADHAHIB AL-KHAMSA* 506-12 (Beirut: Dar al-Jawad 1984); DAVID S. POWERS, *STUDIES IN QUR'AN AND HADITH: THE FORMATION OF THE ISLAMIC LAW OF INHERITANCE* 9-10, 43 (1986).

corruption in the Arab world as long as it does not result in privileging an elite, he fails to acknowledge that both in Islamic law and the legislation of most Arab countries, *rishwah* (bribery) is a crime punishable by law.<sup>6</sup> While bribery and corruption are a reality in many underdeveloped countries, the fact remains that they are considered a crime, and that any person who has practiced law in countries such as Morocco, Egypt, Kuwait, Syria, Jordan and others will attest to the fact that prisons are full of people convicted of the crime of giving or receiving a bribe. But my point here is not to quibble with Rosen over the facts. Rather, I am pointing out that Rosen formulates caricatures of Moroccans, Arabs, Muslims, and Islamic law that are offensive, and that ought not to pass for scholarship. As a further example of this caricatured image that Rosen constructs, in describing a fairly chaotic scene of a Moroccan court in Sefrou, he explains that the litigants often shout over each other, and that the court's clerk tries to quiet people down by trying to pin down their hands. Rosen adds that the clerk does so, "in the certain knowledge that no Moroccan can speak if his hands are not free. . ." (p. 11). Perhaps, it is beside the point to note that a court scene in Cairo or Kuwait City would be very different. In urban centers, rules of procedure and the whole decorum of performance would be very different from what Rosen has apparently witnessed in Sefrou. Perhaps, it is also beside the point to note that the type of chaotic proceedings Rosen describes would be similar to what takes place in a small claims court in New York City or Los Angeles. It is more pertinent that one has no idea how Rosen manages to assess the so-called certain knowledge of the court clerk, or how Rosen man-

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6. A report attributed to the Prophet states: "God curses the person who gives a bribe or receives it, or facilitates it." Cited in HILALI 'ABD ALLAH AHMAD, USUL AL-TASHRI' AL-JINA'I AL-ISLAMI 291 (Cairo: Dar al-Nahda al-'Arabiyya 1995). On classical Islamic law and the prohibition against giving or receiving bribes, see ABU BAKR AHMAD B. 'AMRW AL-SHAYBANI AL-KHASSAF, KITAB ADAB AL-QADI 111-18, (Farhat Ziadeh ed., Cairo: American University in Cairo Press 1978) [hereinafter AL-KHASSAF, KITAB ADAB AL-QADI]; 'UMAR B. 'ABD AL-'AZIZ AL-BUKHARI AL-SADR AL-SHAHID, 2 KITAB SHARH ADAB AL-QADI 23-65 (Muhyi Hilal al-Sarhan ed., Baghdad: Matba'at al-Irshad 1977) [hereinafter AL-SADR AL-SHAHID, KITAB SHARH ADAB AL-QADI]. In fact, many classical jurists went one step further, and argued that in order to avoid undue influence, judges should not accept compensation for their job. Ibn Abi al-Damm writes that where someone is obligated to serve in the office of *qadi*, he is not permitted to take any compensation for his services unless he is poor. However, even if he is poor, any and all compensation is to come from the public treasury (*bayt al-mal*) and not the parties to a dispute themselves. If he voluntarily assumes the judgeship, he may receive payment, although this is not to be preferred. Various classical discourses clearly suggest a desire to avoid even the appearance of impropriety. SHIHAB AL-DIN 'ABD ALLAH IBN ABI AL-DAMM, KITAB ADAB AL-QADA' 57-58 (Muhammad 'Abd al-Qadir 'Ata ed., Beirut: Dar al-Kutub al-'Ilmiyya 1987) [hereinafter IBN ABI AL-DAMM, KITAB ADAB AL-QADA']. For an example of modern Arab legislation against bribery, see QANUN AL-'UQUBAT 44-49 (Alexandria, Egypt: Dar Nashr al-Thaqafah 1964); see also MUHAMMAD ABU ZAHRA, AL-JARIMA WA AL-'UQUBA FI AL-FIQH AL-ISLAMI (Cairo: Dar al-Fikr al-'Arabi n.d.) [hereinafter, ABU ZAHRA, AL-JARIMA].

ages to evaluate the expressive abilities of all Moroccans. What is far more pertinent is the fact that what Rosen claims about Moroccans and their inability to express themselves without waving their hands, unfortunately, is quite similar to the type of anti-Semitic caricatures of the mannerisms of Jews that one frequently encounters in European pre-modern literature.<sup>7</sup>

Methodologically, the least one can say is that in constructing the image of the “other,” Rosen is well advised to show restraint, and sensitivity so as to avoid unfortunate stereotypes. But Rosen’s arguments are replete with other inexplicable methodological oversights, and puzzling exaggerations and inaccuracies. After Rosen makes the unfortunate comment about the hand-waving Moroccans, he goes on to explain that in the practice of Arab and Islamic law, the styles of speech by which testimony is shaped, and legal remedies are articulated remain similar to the language people use in everyday life. In other words, according to Rosen, the language used in the practice of law in the Arab world is similar to the language used by lay people in their everyday activities. Rosen states that Arab and Islamic law possess “little of the strange formality or professionalized distortions found in some other systems of law.” Rosen adds: “The result, then, is a legal system that remains relatively close to the terms and perceptions found in a host of other domains of social life” (p. 74). This, however, is a most curious claim. Any person who has read books on Islamic law in their original language is struck by the highly technical jargon that is quite distinct from the everyday language used in societies of the past or present. Furthermore, contrary to Rosen’s claims, courts in urban centers in the Arab world are quite formal, and whether one examines briefs drafted by lawyers or judgments issued by courts, one is struck by the fact that the language used is very technical and generally incomprehensible to the laity. The fact that lawyers use a less technical language to examine or cross-examine witnesses on the stand does not mean that Arab courts lack formality. Good lawyers, whether from the Arab world or the United States, tend to direct questions to witnesses in an accessible language so that they can draw out the facts. But Arab lawyers and judges, like most lawyers and judges in the world, write in a language that is very different from the language used to question a witness, and the law itself, which they implement, is drafted in a language that is highly technical and profes-

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7. This anti-Semitic stereotype is portrayed in the movie *Uprising* (Warner Bros., 2001), a film about the Warsaw Ghetto revolt against the Nazis. Jurgen Stroop, a German propaganda officer, interviews the chief Rabbi of Warsaw in the context of making a movie about Jews. The Rabbi starts speaking on film in a dignified and restrained manner, but the officer tells the Rabbi that something is missing — the Rabbi is not acting sufficiently Jewish. In order to look authentically Jewish, the officer tells the Rabbi that he should wave his hands as he speaks. The Rabbi has no choice but to comply, and he starts speaking while mechanically, and somewhat comically, waving his hands.

sionalized. Rosen, however, is keen on portraying Islamic and Arab law as somehow different from modern legal systems,<sup>8</sup> and although he does not say as much, it is fair to conclude that he tends to perceive Islamic and Arab law as quite primitive.<sup>9</sup> For example, Rosen concludes that Islamic and Arab law do not have appellate levels of review, and even more, they do not need such appellate levels because of the indeterminacy of law and reality among Arabs. Appellate courts are not needed because they would yield definitive results that would tend to ignore a range of localized realities and practices. This is not acceptable, Rosen posits, because Arabs and Muslims wish to live in ambivalence. According to Rosen, appellate courts would not sit well with Arab and Islamic legal cultures (pp. 35, 182). This argument, however, is entirely inaccurate. Apparently, Rosen is not aware of the complex Islamic pre-modern jurisprudence that regulated the jurisdiction of courts, including which issues are susceptible to being overturned by a higher court and which are not.<sup>10</sup> Apparently, Rosen is also not aware that most Arab countries have developed fairly sophisticated rules of procedure that regulate which types of cases can be appealed and where, and most Arab countries have appellate courts including a supreme court.<sup>11</sup> Perhaps, Rosen believes that the appel-

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8. Throughout his book, Rosen uses the expression "Arab law" without explaining what he exactly means by this. It is fair to say that French and Islamic laws, to varying degrees, have influenced most legal systems in Arabic-speaking countries. Furthermore, certain legal scholars, such as Sanhuri, Shehata, and al-'Awa, have influenced a large number of legal systems in the Arab world. However, the expression "Arab law" does not adequately express the tremendous varieties of legal culture and practice in the Arab world. For pedagogical reasons, I am using the expression "Arab law" in this Essay, but I note that it is more accurate to speak in terms of Arab laws and Arab legal systems — in the plural rather than the singular. While I do believe that there are common doctrines and institutions that unify the legal systems of most Arabic speaking countries, one must also be cognizant of the fact that there are many differences as well.

9. Rosen would say that Arab and Islamic legal practices are different, not primitive. This, however, I believe, is disingenuous. The caricature of Arab and Islamic legal systems that Rosen constructs is remarkably similar to the characteristics of primitive legal systems as analyzed by Diamond in his masterful study. See A. S. DIAMOND, *PRIMITIVE LAW* (1935).

10. SHERMAN A. JACKSON, *ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI* 14, 194 (1996); J.S. Nielsen, *Mazalim*, in 6 *THE ENCYCLOPAEDIA OF ISLAM* 933 (H.A.R. Gibb et al., eds., 2d ed. 1960-2001) [hereinafter *ENCYCLOPAEDIA OF ISLAM*]; E. Tyan, *Kadi*, in 4 *ENCYCLOPAEDIA OF ISLAM*, *supra*, at 373. On the historical practice of Chief Judges and their jurisdiction and powers, which included the power of appellate review, in the pre-modern Islamic legal tradition, see 'ABD AL-RAZZAQ 'ALI AL-ANBARI, *MANSIB QADI AL-QUDAT FI AL-DAWLA AL-'ABASIYYA* (Beirut: al-'Arabiyya li'l Mawsu'at 1987); 'ISAM MUHAMMAD SHABARU, *QADI AL-QUDAT FI AL-ISLAM* (Beirut: Dar al-Nahda al-'Arabiyya 1992).

11. For examples of Arab laws concerning courts of appeal (*mahakim al-isti'naf*) and their jurisdiction, see AHMAD ABU AL-WAFA, *QANUN AL-MURAFAT AL-MADANIYYA WA AL-TJARIYYA* 397-98 (Alexandria, Egypt: Dar al-Ma'arif, 7th ed. 1964) ANWAR AL-'AMRUSI, *QAWA'ID WA IJRA'AT IJAR AL-AMAKIN WA TAKHFID AL-UJRA* 326-28 (Alexandria, Egypt: Dar Nashr al-Thaqafa 1966).

late courts that exist in the vast majority of Arab countries today are the product of Western influence, and therefore, are not authentically Islamic. However, Rosen does not explain what criteria would objectively define Islamicity or authenticity in an Islamic context. Most certainly, Rosen does not pretend to be a Muslim cleric who has the authority to differentiate between what is truly Islamic and what can be deemed a corruption of the tradition.

Another matter that raises similar issues as the one dealt with above is Rosen's insistence that Islamic and Arab legal practice relies on direct testimony and oral evidence. Rosen spends a considerable amount of time exaggerating the role oral evidence plays in Islamic and Arab legal systems and, like many Orientalists, he obsesses about the role of written documents in Islamic law, insisting that written documents have an elusive role to play in court adjudications (p. 5). In Rosen's estimation, Arabs consider oral evidence to be more reliable than written evidence, and he implies that circumstantial evidence has a problematic position in Islamic/Arab culture. In evaluating the role of written documents, Rosen heavily relies on an assessment of the function played by public notaries in Morocco. He intimates that reliance on public notaries is an indication that Arabs distrust written documents. Rosen, however, notes that "a great many of the litigants" treated written documents as "near-sacred objects to be protected at all costs" (p. 101). Putting all the pieces together, I am not sure what conclusions Rosen wants to reach. Our own legal system in the United States frequently relies on public notaries, but does this necessarily mean that Americans do not trust written documents? Furthermore, why isn't the fact that some Arabs guard their written documents with their lives an indication of the importance and reliability of written documents in Arab culture? In many ways, the reliance on oral evidence is a common characteristic of a pre-modern legal system, and Rosen does seem keen on giving the impression that Arabs and Muslims live in some bazaar-like pre-modern limbo. But it is strange that Rosen persistently ignores any evidence that disturbs his worldview of Arabs, Muslims, and Islamic law. For example, Rosen states: "it can be argued that a move has begun in Islamic law toward more use of circumstantial evidence, concepts of probability, and the notion that things — and not only sentient beings — can cause things to happen" (p. 43). This statement is startling in its grudging acceptance of the possibility that Arabs and Muslims might actually be employing legal methods that have been known to the common law and civil law systems for at least two hundred years. Furthermore, Rosen's claim is entirely inaccurate because circumstantial evidence and notions of probability have been employed in Islamic law and in Arab legal systems for centuries. In Islamic law and the laws of most Arab countries, a *qarina* (pl. *qara'in*) (legal evidence) could be oral or written, and it could be direct or indirect, and a *qarina* rarely leads to certainty

(*yaqin*), but it does lead to a probability of belief (*ghalabat al-zann*). In Islamic law, the standard of proof varies depending on the legal issue. Murder or adultery, for instance, can be proven only if all doubt is negated (*bi in'idam al-shubha*), while contractual matters require only a preponderance of belief (*bi ghalabat al-zann*). Similarly, circumstantial evidence is admissible in every Arab jurisdiction, including Saudi Arabia, and there are varying standards of proof depending on the legal issue at hand.<sup>12</sup>

The legal world that Rosen describes is odd and unfamiliar for any specialist on Islamic law,<sup>13</sup> or for any person who has practiced law in urban centers in the Arab world. If Rosen accurately understands the legal practices that he documents in his book, all one can say is that his empirical sample, whether it is the town of Sefrou or some other place, is a strange one indeed. But aside from the empirical sample problem, Rosen's knowledge of Islamic law is highly suspect. As part of his argument that, for Arabs and Muslims, truth is highly subjective and constantly shifting, he states: "In Islam, from its earliest times, it is clear that proof depends far more on who it is that says a thing is so than on what may be determined independent of who asserts it."<sup>14</sup>

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12. On the use of circumstantial evidence in Islamic and Arab law, see ABU ZAHRA, AL-JARIMA, *supra* note 6, at 198-240; 'AWAD MUHAMMAD 'AWAD, DIRASAT FI AL-FIQH AL-JINA'I AL-ISLAMI 53-94 (Kuwait: Dar al-Buhuth al-'Ilmiyya 1983); AHMAD FATHI BAHNASI, AL-SIYASA AL-JINA'IYYA FI AL-SHARI'A AL-ISLAMIYYA 367-69, 430-38 (Cairo: Dar al-Shuruq 1983) [hereinafter BAHNASI, AL-SIYASA AL-JINA'IYYA]; AHMAD FATHI BAHNASI, NAZARIYYAT AL-ITHBAT FI AL-FIQH AL-JINA'I AL-ISLAMI 191-204 (Cairo: Dar al-Shuruq 1989).

13. One of the most startling remarks that Rosen makes about Islamic law occurs at the very beginning of his book. Rosen claims that Islamic law is a field where "abstract theological speculations" take place, and that Islamic legal texts address, among other things, questions of theology. P. ix. This claim betrays a basic lack of familiarity with the classical and modern Islamic legal literature. In reality, theology, leave alone the speculative type, is conspicuously absent from Islamic legal treatises. Theological questions are dealt with in a different genre of works dedicated to *'aqa'id* (Islamic beliefs). Unfortunately, one suspects that Rosen has not read primary Islamic legal sources, and that his impressions about Islamic law are based on secondary sources, and on his social encounters in a few courts in a few Arabic-speaking countries.

14. P. 180. Rosen also claims that there is a system of "person classification" in Islamic law. By knowing a person's origins, Muslims believe that they can know a person's characteristic relationships and actions. P. 51. As a matter of socio-cultural practice, this might be true in certain parts of the Arab world. But it is unsupported in Islamic law. Many pre-modern Muslim jurists did accept certain classifications; such as, free, slave, indentured, Muslim, protected non-Muslim, unprotected non-Muslim, man, and woman. These classifications made a difference in identifying appropriate legal remedies, so for example, some jurists argued that personal injury compensation is higher for men than women. But the vast majority of Muslim jurists never claimed that the genealogy, social background, or class has any relevance to ascertaining a person's characteristic relationships or actions. If Rosen's judges are making social and economic origin determinative in their assessment of credibility or in ascertaining the facts of the case, they are acting in clear violation of the rules of evidence in Islamic law.

Rosen does not cite any sources for this rather peculiar claim. At a minimum, his claim flies in the face of the persistent Qur'anic emphasis on truthful testimony, and on speaking the truth even if it be against one's family, clan, or beloved ones.<sup>15</sup> Much of Rosen's arguments seem to rely on the fact that classical Islamic jurists insisted that only the testimony of what they described as '*udul* may be admitted in a court of law. '*Udul* (sing. '*adl*) means just persons or credible witnesses. According to this doctrine, the testimony of a person who has been convicted of a crime of moral turpitude or of a crime involving fraud may not be admitted in a court of law unless such a person has been rehabilitated. The testimony of a just person may be admitted in court, but it is left to the judge to determine the weight to be given to the testimony of such a person. On the other hand, the testimony of unjust individuals is considered inherently unreliable and therefore, it is excluded.<sup>16</sup> This, however, hardly supports Rosen's sweeping claims about the nature of truth in Islamic law.<sup>17</sup> Nonetheless, Rosen's characterizations on this matter are a part of his larger claims about Arabs and their relationship to causation, truth, and intentionality. For Rosen, in the Arab context, all three elements are defined by status and acts. It is the status and actions of a person that define their inten-

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15. QUR'AN 4:135; 5:8; *see also id. at* 2:282, 2:140, 2:283, 5:108.

16. AL-KHASSAF, *KITAB ADAB AL-QADI*, *supra* note 6, at 292-314; AL-SADR AL-SHAHID, *KITAB SHARH ADAB AL-QADI*, *supra* note 6, at 3:3-4:3; IBN ABI AL-DAMM, *KITAB ADAB AL-QADA'*, *supra* note 6, at 302-03; BURHAN AL-DIN ABU AL-HASAN AL-MARGHINANI, 2 AL-HIDAYA SHARH BIDAYAT AL-MUBTADI 404 (Muhammad 'Adnan Darwish ed., Beirut: Dar al-Arqam n.d.) [hereinafter AL-MARGHINANI, AL-HIDAYA]; MUHAMMAD B. JARIR AL-TABARI, AL-AHKAM AL-FIQHIYYA 385-89 (Muhammad Hasan Muhammad Hasan Isma'il ed., Beirut: Dar al-Kutub al-'Ilmiyya 2000) [hereinafter, JARIR AL-TABARI, AL-AHKAM AL-FIQHIYYA]; ABU 'ABD ALLAH MUHAMMAD B. NASR AL-MARWAZI, IKHTILAF AL-FUQAHA' 555 (Muhammad Tahir Hakim, ed., Riyadh, Adwa' al-Salaf 2000); 'ABD AL-QADIR 'AWDAH, 2 AL-TASHRI' AL-JINA'I AL-ISLAMI MUQARANAN BI AL-QANUN AL-WAD'I 401-05 (Beirut, Dar al-Kitab al-'Arabi n.d.) [hereinafter 'ABD AL-QADIR 'AWDAH, AL-TASHRI' AL-JINA'I]; BAHNASI, AL-SIYASA AL-JINA'IYYA, *supra* note 12, at 388-408.

17. Notably, there are similar concerns about the credibility of witnesses with criminal convictions in the common law system. Traditionally, the common law system disqualified witnesses who had been convicted of treason, felony, or a crime involving fraud or deceit. In 1917, the United States Supreme Court abolished the disqualification rule in federal criminal trials. *Rosen v. United States*, 245 U.S. 467 (1917). The Federal Rules of Evidence, rule 601, confirmed that witness disqualification was no longer recognized in federal jurisdictions. However, the witness disqualification rule remained in effect in some state jurisdictions in the United States. Currently, rule 609(a) of the Federal Rules of Evidence provides that, under certain circumstances, prior criminal convictions may be used to impeach the credibility of a witness. In summary, Islamic law credibility and witness disqualification rules are very similar to the old common law approach. The chosen approach of contemporary American federal law is to impeach — not disqualify. But whatever one thinks of the relative merits of the Islamic or old common law approaches compared to the contemporary approach in U.S. federal courts, the basic underlying issue is credibility, and how to assess it. Put simply, contrary to what Rosen incessantly implies, there is nothing particularly exotic or marvelous about the Islamic legal approach, nor does the Islamic approach reveal a truth about Muslim or Arab conceptions of truth, time, social relations, or reality.

tions, and their relationship to causation and truth. Rosen is thus able to proclaim: "Indeed, most Arabs do not recognize the idea of a distinct inner self that could exist apart from action, only a realm of overt expressions that must of necessity conform to what a person must carry inside himself" (p. 72). He then goes on to say: "For the Arabs it also follows that what matters most in evaluating actions is not their connection to a series of abstract propositions that lie behind them but to the consequences that actions have in the world, their impact on those networks of relationships, those webs of obligation, that are constitutive of reality itself" (p. 72). Continuing the same line of reasoning, Rosen asserts: "For it is believed that a man's acts are necessarily connected to his state of mind and that such a set of acts can be deciphered in terms of social background, connections, and modes of negotiating obligations, then it follows that for the Arabs another's intentions are regarded as readily available to discernment and do not constitute a separate domain hidden from human view."<sup>18</sup> From this analysis, Rosen is able to contrast Western and Arab notions of liability, and in that vein, he concludes: "By contrast, for Arabs the extent of actual liability has very little if anything to do with the willfulness of one's acts; fault is largely displaced by repercussion, itself an amalgam of one's own situation and that of the injured party" (p. 79). From these sweeping generalizations about Arabs, Rosen goes on, undaunted, to generalize about many aspects of Islamic law. According to Rosen, "it is generally said of Islamic law that it is a system that pays no attention to an actor's state of mind when a *hadd*-type wrong is involved" (p. 76). *Hadd* offenses are considered major crimes in Islamic law; such crimes include adultery, theft, apostasy, and slander. But Rosen goes beyond generalizing about *hadd*-type crimes. He claims that strict liability applies to major religious infractions, that in cases of murder, the intent of the offender is imputed predominantly from the weapon employed, and that animals, children, and even infants are strictly liable for injuries that they cause (pp. 76-79).

For all this, Rosen does not inform the reader who exactly it is that says that Islamic law is a system that pays no attention to an actor's

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18. P. 77. Throughout his book, Rosen mentions that Arab judges claim that they can tell whether a witness is being truthful by looking into their eyes and at their facial expressions. See, e.g., pp. 13-14, 23, 77, 118. Rosen does not explain whether he considers this to be a unique aspect of Arab legal practices. He does seem to think, however, that this judicial approach to the assessment of credibility somehow supports his claims about contingency and negotiability in Islamic and Arab legal culture, and the ultimate otherness and exoticness of Arabs and Muslims. Interestingly, however, Rosen ignores the fact that common law and civil law judges make the exact same claim about their ability to assess the credibility of witnesses. In my experience, Anglo-American and French judges often claim that they can assess credibility by looking directly into a witness's eyes, and assessing their gestures and facial expressions.

state of mind. He does not cite any original sources, but relies exclusively on a few Orientalist sources written in the first half of the past century. In reality, Rosen is simply wrong. Muslim jurists do not impose strict liability in the case of *hadd* crimes, and the state of mind of the offender is crucial for establishing liability. The majority of jurists hold that a mistaken belief as to facts, for instance, in believing that you are married to someone in a case of adultery, or believing that you have a right to the property in the case of theft, acts as a *shubha* (an element of doubt) that mitigates punishment, or negates liability altogether.<sup>19</sup> Furthermore, in torts, as opposed to crimes, the idea of strict liability is premised on the argument that as between the competing interests, the victim of an injury ought to be compensated. In other words, this is a position of social welfare, not a negation of state of mind analysis. In all cases, Muslim jurists were extremely reluctant to hold a person liable for injuries that resulted from unforeseeable consequences. Compensation was often hinged on foreseeability, which in turn, involved a careful evaluation of the subjective state of mind of the offending party.<sup>20</sup> As to Rosen's odd claim that an infant is to be held personally liable for injuries, this is simply without foundation. No classical jurist held that an infant is personally liable for injury. Furthermore, children are not liable for their intentional criminal acts because children are considered incapable of forming the requisite mental state for the commission of a crime.<sup>21</sup> Even Rosen's claim about whether in a case of murder the weapon used may establish the offender's state of mind is unwarranted. What Rosen ignores is that what Muslim jurists referred to as the "instrument of death (*adat al-qatl*)" position, was fundamentally an argument about foreseeability. The issue was, if a person strikes another with a sword or any other

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19. AL-KHASSAF, *KITAB ADAB AL-QADI*, *supra* note 6, at 731-37; AL-SADR AL-SHAHID, 4 *KITAB SHARH ADAB AL-QADI*, *supra* note 6, at 475-80.

20. For example, the medieval Hanafi jurist al-Marghinani writes of one who digs a hole, sewer, or gutter in a public street, or a street that he knows or should know is utilized by people: if a passerby falls in the hole or sewer, and is hurt, the digger must pay compensation to the injured party if the injury was to be expected. On the other hand, if the hole or sewer was dug in a deserted or private pathway, the digger is not liable if the injury was not expected. In other words, in effect, this means that the actions of the digger are the proximate cause of the injury if it was foreseeable. AL-MARGHINANI, 4 *AL-HIDAYA*, *supra* note 16, at 477. In addition, classical jurists debated at length whether a doctor or other professional is liable for negligence or only recklessness. Some jurists argued that professionals who have obtained the necessary degrees and licenses ought to be held liable under the higher standard of recklessness, not negligence. IBN RUSHD, *BIDAYAT AL-MUJTAHID*, Dar Ibn Hazm ed., *supra* note 5, at 734-35; ABU ZAHRA, *AL-JARIMA*, *supra* note 6, at 423-29.

21. In fact, classical jurists say the exact opposite of what Rosen claims. The requisite mental state is a necessary element in order to hold an offender liable for a crime, including *hudud* crimes. Therefore, the insane cannot be held criminally liable. Legal discourses on children and tort and criminal law is known as *ahkam al-Sighar*. See ABU ZAHRA, *AL-JARIMA*, *supra* note 16, at 407-83; 'ABD AL-QADIR 'AWDAH, 1 *AL-TASHRI' AL-JINA'I*, *supra* note 16, at 600-06.

similar deadly weapon, can such a person claim that the death of the victim was not foreseeable? The Hanafi school of law, in particular, held that the use of some instruments or weapons establish a rebuttable presumption that the injury or death was intentional. The other schools of thought maintained that the use of particular instruments is a factor to be considered, but since the ultimate issue that must be determined is the offender's state of mind, no presumption ought to follow because of the use of a particular instrument by the accused.<sup>22</sup>

Rosen interprets much of Islamic law in a fashion that does not comport with any textual source. For example, one of the main sources of Islamic law is rule by analogy (*qiyas*). According to Rosen, *qiyas* is framed in terms of repercussions instead of antecedent precepts. In using *qiyas*, a judge "will compare outcomes rather than prior rules, results rather than causes" (p. 32). Rather inconsistently, Rosen remarks that judges in the Arab world note that no two cases are exactly the same, and therefore, strict adherence to precedent is inappropriate. Rosen does not ascribe this practice to the influence of the French legal system upon many Arab countries, but implies that this practice is indicative of something traditionally Islamic.<sup>23</sup> Rosen contends that the reason Arab judges do not treat any two cases the same is because judges, in deciding cases, try to validate the present status of people, and maintain people on a course in which they can continue the process of social negotiation without any significant disruption (p. 23). This is why, according to Rosen, rights or justice, as an abstract theory or concept, do not matter in Arab and Islamic law. Rosen, however, misunderstands the role of *qiyas* in Islamic law, and to the extent that he claims that this juristic method influences Muslim judges, his analysis is inaccurate. Contrary to what Rosen claims, *qiyas* does not turn on repercussions, outcomes, or results. In fact, a rule based on *qiyas* or analogy turns solely on what is described as the operative cause of the law (*'illa*). According to the method of *qiyas*, if two cases involve the same material causes or principles, the ruling in a prior case can be extended to a new case. The classic example of this is that if date wine is prohibited because it is an intoxicant, then grape

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22. See JARIR AL-TABARI, AL-AHKAM AL-FIQHIYYA, *supra* note 16, at 340-42; ABU AL-WALID MUHAMMAD B. AHMAD B. MUHAMMAD B. AHMAD IBN RUSHD, 2 BIDAYAT AL-MUJTAHID WA NIHAYAT AL-MUQTASID 580-81 ('Adil Ahmad 'Abd al-Mawjud et al., eds., Beirut: Dar al-Kutub al-'Ilmiyya 1997); AL-MARGHINANI, 4 AL-HIDAYA, *supra* note 16, at 448-49; ABU ZAHRA, AL-JARIMA, *supra* note 6, at 347-53; 'ABD AL-QADIR 'AWDAH, 2 AL-TASHRI' AL-JINA'I, *supra* note 16, at 25-36; AHMAD FATHI BAHNASI, AL-QISAS FI AL-FIQH AL-ISLAMI 73-84 (Cairo: Dar al-Shuruq 1982).

23. The French Civil law system has had a profound influence on many countries in the Arab world, and in this legal system, there is a limited use of *stare decisis*. In this legal system, the facts of each case are considered unique and specific, and so no two cases can be the same.

wine can also be prohibited for the same cause.<sup>24</sup> Rosen seems to have a very poor handle over the whole logic and practice of *qiyas*. At one point, Rosen characterizes sound analogy as *ta'wil* (p. 52 n. 38). This again is one of those inexplicable claims for which Rosen cites no source. *Ta'wil* means interpretations or exegesis — it is the employment of hermeneutic methodologies in an attempt to understand the text. Sound analogy would be described as *qiyas sahih*, not *ta'wil*.

The source of Rosen's understanding of *qiyas* is a mystery, but Rosen does not seem to find any particular need to cite sources for many of his claims about the Islamic tradition. At one point, he claims, without citation, that the Prophet Muhammad stated that there is no distinction among believers except as to knowledge, and he uses this to support his argument that Arabs are preoccupied with knowing the status and relationships of individuals (pp. 70, 143). In twenty years of researching the Islamic tradition, I have never encountered this purported statement that he attributes to the Prophet, and my efforts to locate this report yielded nothing. The closest that is found in the Islamic tradition, is a statement in which the Prophet asserts that the only distinction among the believers is piety (*taqwa*).<sup>25</sup> Furthermore, Rosen is often hesitant and unsure when it comes to Islamic legal history. In one notable example, Rosen repeats the Orientalist fiction regarding the closing of the doors of *ijtihad* in Islamic legal history.<sup>26</sup> Rosen cites Wael Hallaq on this issue, which is rather strange because of all Western scholars, no one has done as much to dispel this fiction as Hallaq.<sup>27</sup> Nevertheless, in one part of his book, consistent with Hallaq's analysis, Rosen argues that the doors of *ijtihad* were never closed at all. Yet, in other parts of the book he contends that the doors of *ijtihad* were left ajar by the incorporation of custom and social practice into Islamic law (pp. 32, 52, 97). In reality, the doors of *ijtihad* were never closed either formally or informally, but the incorporation of social practices and custom into Islamic law has remained a problematic issue. Most of Rosen's research was conducted in Morocco, which follows the Maliki school of law. Of the various Islamic schools,

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24. WAEL HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI *USUL AL-FIQH* 83-95 (1997); MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 197-228 (rev. ed. 1991) [hereinafter KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE]; BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW 67 (1998).

25. Rosen also tends to refer to unidentified Arab poets or acquaintances in support of his arguments without citation or documentation. Pp. 43, 85.

26. According to this fiction, around the tenth century, Muslim jurists decided that all the significant problems in law have been answered and therefore, there was no need for novel or new interpretations or opinions. Consequently, Muslim jurists declared that the doors for independent and novel reasoning (*ijtihad*) have now and forever been closed. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 69-75 (reprint ed., Clarendon Press 1993) (1964).

27. Wael Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT'L J. MIDDLE E. STUD. 3 (1984).

the Malikis were the most accepting of custom as a source of law. Other schools relegated custom to an inferior role or excluded it altogether. Rosen, however, does not acknowledge, or is perhaps unaware, that what he identifies as a general Islamic and Arab characteristic (i.e. the incorporation and reliance on custom) is a distinctly Maliki doctrine.<sup>28</sup> Perhaps Rosen would respond to this criticism by claiming that what the formal expositions regarding custom found in the formal sources of Islamic law are immaterial, whereas what he observes to be the anthropological practice of law is material. Nevertheless, Rosen cannot ignore that most of his empirical data has been collected from Maliki jurisdictions that have been far more tolerant of different customary practices.

Rosen, himself, claims that language and textual sources are important for understanding Islamic and Arab culture. He asserts the following: "To see how some of these elements evince themselves in the Arabo-Islamic worldview it is, as is so often the case when dealing with this part of the world, essential to grasp some of the terms involved in Arabic itself" (p. 134). Rosen analyzes the meaning of several legal terms in Islamic law in order to demonstrate the "Arabo-Islamic worldview." Because of space constraints, it is not possible for me to review all of Rosen's linguistic analysis, but the least one can say about his arguments concerning Arabic terminology is that it is strained. I will focus on two demonstrative examples. Rosen analyzes the meaning of the word *aman*. *Aman* could mean a state of safety or security, or trust, and is often used in Islamic law to mean the granting of assurances of safe conduct to a merchant, traveler, or diplomat.<sup>29</sup> Rosen, however, takes this meaning to a different direction. For him, *aman* tends to convey "a sense of personal attachment between those who trust one another rather than confidence in institutions, officeholders, or even one's own knowledge or abilities" (p. 135). Rosen also analyzes the meaning of the word *wathiqa*, which means to trust and rely on someone. *Wathiqa* is derived from the root word *thiqa*,

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28. YASIN DUTTON, *THE ORIGINS OF ISLAMIC LAW: THE QUR'AN, THE MUWATTA' AND MADINAN 'AMAL* (1999); KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE*, *supra* note 24, at 283-96; SUBHI MAHMASSANI, *FALSAFAT AL-TASHRI' FI AL-ISLAM* 236-45 (Beirut: Dar al-'Ilm li al-Malayin, 3d ed. 1961). On the use of custom in Islamic criminal law, see ABU ZAHRA, *AL-JARIMA*, *supra* note 6, at 214-16.

29. IBN MANZUR, *LISAN AL-'ARAB* 27 (Beirut: Dar Sadir, 6th ed. 1997) [hereinafter *IBN MANZUR, LISAN AL-'ARAB*]. For an introductory treatment of *aman*, see J. Schacht, *Aman*, in 1 *ENCYCLOPAEDIA OF ISLAM*, *supra* note 10, at 429. On the legal doctrine of *aman*, see generally, AL-MARGHINANI, 4 *AL-HIDAYA*, *supra* note 16, at 444-48; SHAMS AL-DIN MUHAMMAD B. MUHAMMAD AL-SHIRBINI, 6 *MUGHNI AL-MUHTAJ ILA MA'RIFAT MA'ANI ALFAZ AL-MINHAJ* 51-68 ('Ali Muhammad Mu'awwad & 'Adil Ahmad 'Abd al-Mawjud eds., Beirut: Dar al-Kutub al-'Ilmiyya 2000).

which means trust.<sup>30</sup> Rosen, however, argues that, since one variant of this word could mean to bind or fetter, terms of trust in the Arab world reveal an important part of the “Arabo-Islamic worldview.” Trust or reliance is a creative act of mutual limitation in which people limit and fetter each other in this constant process of social negotiation (p. 135). The meanings of both these words, however, do not support Rosen’s claims. There is no support for Rosen’s contention that *aman* implies trust in one another that does not include institutions or governments. In fact, in Islamic legal usage, *aman* does connote a state of safety or security that is offered and guaranteed by the government or state. In addition, *wathiqa* is quite different from *awthaqa*. *Wathiqa* means to trust — for instance, to trust in God (*al-thiqa fi’llah*). It does not imply that there is a state of mutual limitation between God and human beings. *Awthaqa* means to tie up or bind, and it does not entail any degree of trust or mutual reliance.

Rosen does not engage in these linguistic speculations for their own sake. He has a much larger point, one that is quite problematic. Rosen argues that Arabs and Muslims have a distinctive sense of time and space. Engaging in various linguistic exercises, Rosen claims that Arabs and Muslims have no concept of public property or space in “either a spatial or metaphoric sense” (pp. 137, 198). All property and space is either privately owned or belongs to God. Even more, Arabs and Muslims do not have a sense of chronological time. Elaborating upon this point, Rosen states:

But Westerners who approach the Quran or listen to Arabs relating popular stories or accounts often find the recitation confusing and disjointed. Instead of moving in a fairly clear chronological order the story often jumps about in time: Instead of a clear picture of events being given by referring to the sequence of their occurrence, central characters are referred to in numerous situations whose precise chronological order is not necessarily given. (p. 71)

This, of course, is consistent with Rosen’s argument that all truth, facts, and rights for Arabs are situational and relative. Nevertheless, Rosen is able to make these claims only by ignoring a substantial amount of contrary evidence. In fact, the idea of public property (*amwal ‘amma*) and public utilities or roads (*turuq ‘amma* and *manafi’ ‘amma*) is found in all classical Islamic law books, in modern Arab legislation, and in all Arab social practices. Rosen’s inaccurate claim is offensive precisely because it ignores the cumulative textual evidence of centuries, and even the contemporary Arab experience with socialism and the nationalization of private properties into publicly owned properties. Both Islamic law and modern Arab law have numerous

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30. IBN MANZUR, 10 LISAN AL-‘ARAB, *supra* note 29, at 371.

discourses on the ownership and regulation of public properties.<sup>31</sup> In addition, Rosen has not read a single pre-modern or modern book of history written in the Arabic speaking world. Pre-modern history books especially were often organized chronologically and not thematically. And, even a book of literature such as *A Thousand and One Nights* proceeds in chronological order as Shehrazade burns the midnight oil one night, and one parable at a time.

The main problem with Rosen's analysis is that it is the quintessential example of result-oriented scholarship. Rosen cites anything that he believes supports his caricatured image of Arabs and Muslims, without bothering with any contrary evidence or even the specifics of the examples he uses. On various occasions, Rosen likens Arab and Muslim culture, and even Islamic jurisprudence to a chess game in which all moves have implications for the overall picture, and in which the possibilities of movement and strategy are endless. He even goes so far as to claim that chess, as opposed to games of chance, became "the consummate Muslim game" (pp. 82, 186). But Rosen does not address the fact that even this part of his worldview of Arabs and Muslims is problematic because many Muslim jurists have prohibited the playing of chess.<sup>32</sup> In addition, the most popular game in the Middle East and the one played most often in coffee houses is backgammon, not chess. Another telling example of Rosen's methodology is a part of his book in which he takes the liberty of contrasting Western and Arab notions of justice. Rosen's point is that while Westerners speak of rights and entitlements, Arabs speak of contexts and relation-

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31. For example, various levies and taxes such as the *khums*, *Kharaj*, and *'ushur* were considered public monies to be spent by the central authority for the welfare of the Muslims (*masalih al-Muslimin*), such as sustaining a military and building fortresses, dams, and public roads. ABU AL-HASAN AL-MAWARDI, *AL-AHKAM AL-SULTANIYYA* 162 (Beirut: Dar al-Kutub al-'Ilmiyya 1985); ABU YA'LA AL-FARRA', *AL-AHKAM AL-SULTANIYYA* 137 (Muhammad Hamid al-Fiqi ed., Beirut: Dar al-Kutub al-'Ilmiyya 1983). For a general history of the Islamic public treasury (*bayt al-mal*), see N.J. Coulson et al., *Bayt al-Mal*, in 1 ENCYCLOPAEDIA OF ISLAM, *supra* note 10, at 1141. On public treasuries and public utilities in Islamic law, see 'ABD AL-HAMID MUHAMMAD AL-QADI, *IQTASADIYYAT AL-MALIYYA AL-'AMMA WA AL-NIZAM AL-MALI FI AL-ISLAM* (Alexandria: Dar al-Jami'at al-Misriyya 1980). On the process of eminent domain procedures for the public welfare (*naz' milkiyyat al-'aqarat li al-manfa'a al-'amma*) in modern Arab law, see AL-QAWANIN AL-MUKAMMILA LI AL-QANUN AL-MADANI 87-109 (n.p.: Dar al-Fikr al-Hadith 1964). On the doctrines of public property, works and utilities, and eminent domain in Islamic and Arab laws, see SA'D MUHAMMAD KHALIL, *NAZ' AL-MILKIYYA LI'L MANFA'A AL-'AMMA BAYN AL-SHARI'A WA AL-QANUN* (Cairo: Dar al-Salam 1993).

32. YUSUF AL-QARADAWI, *THE LAWFUL AND THE PROHIBITED IN ISLAM* 299-300 (*AL-HALAL WAL HARAM FIL ISLAM*) (Kamal El-Helbawy trans., 1994); ABU BAKR JABIR AL-JAZA'IRI, *MINHAJ AL-MUSLIM* 463-64 (Medina: Maktabat al-'Ulum wa al-Hikam 1996); ABU 'ABD AL-ALLAH AL-HAKIM AL-TIRMIDHI, *AL-MANHIYYAT* 69 (Beirut: Dar al-Kutub al-'Ilmiyya 1986). Incidentally, the game of chess is said to have been invented by an Indian Brahmin for his king's pleasure. HERMAN KULKE & DIETMAR ROTHERMUND, *A HISTORY OF INDIA* 8 (3d. ed. 1998).

ships. Rosen then asserts that nothing captures the Islamic notion of justice with greater clarity and poignancy than a tale told by the Berbers of the high Atlas mountains of Morocco about how Justice and Injustice came to be separated for all time (p. 173). Interestingly, however, the Berbers, although Muslim, are not Arab. But this hardly seems to matter because in Rosen's mind Moroccans, Muslims, Berbers, Arabs, Islamic law, and everything in between are all lumped into one indistinct mass. An example derived from one is good enough for the other.

Considering the sweeping and often demeaning generalizations that Rosen makes about Arabs and Muslims, I can only speculate as to how people would react if the same generalizations were made about other people and their legal systems. One can only speculate about Rosen's motivations and purposes. The end result of Rosen's analysis, regardless of how much he tries to escape to abstractions in order to obfuscate his conclusions, Arabs, and indeed Muslims, end up a people without notions of truth, justice, rights, public space, or even time. It is notable that throughout his book, Rosen pleads benevolent understanding. He consistently chides other scholars for being Eurocentric, and insists that Arabs and Muslims must be understood on their own terms. He even defends what he believes to be the Arab and Muslim position on the Salman Rushdie Affair and the *Satanic Verses* — in effect, arguing that their position makes sense within their own cultural paradigms (pp. 189-94). He is also understanding towards what can only be described as the authoritarian practices of some Arab governments. He sees this authoritarianism as consistent with Arab notions of etiquette, treason, and public shame. According to Rosen, in Muslim and Arab culture, criticism of public officials cannot be conducted through public channels or venues because this would violate Arab etiquette.<sup>33</sup> But Rosen ignores that many Arabs and

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33. P. 194. On this point, Rosen cites an incident in which shortly after the Gulf War, a few hundred jurists in Saudi Arabia criticized the King's foreign policies in an open letter published in a newspaper. The Saudi government reprimanded the jurists, reminding them that it is inappropriate to criticize the King publicly, and that proper advice should be given privately and personally. Rosen seems to think that the Saudi government's response represented an authentic Arab norm, and that the jurists who published the open letter acted in a way that is less authentically Arab. In reality, the Saudi government was trying simply to protect itself and perpetuate its infamously despotic rule. For example, there were several reports that the Saudi government did not simply reprimand the jurists, but arrested, tortured, or executed most of them. Interestingly, various rulers in Islamic history have tried to use the same exact argument used by the Saudi government. They tried to censure public criticism by claiming that such criticism is somehow un-Islamic, and demanding that all criticism should be private and personal. Even more interesting, however, is the fact that the majority of Muslim jurists did not accept this self-serving argument. In fact, there is a well-established tradition in Islam of public and visible criticism of rulers. Jurists who do so and, as a result, suffer persecution are remembered as heroes and martyrs. For a study of this tradition, see KHALED ABOU EL FADL, *REBELLION AND VIOLENCE IN ISLAMIC LAW* 68-99 (2001); MICHAEL COOK, *COMMANDING RIGHT AND FORBIDDING WRONG IN ISLAMIC THOUGHT* 46-83 (2000).

Muslims refused to support the death sentence against Rushdie, and even defended Rushdie's right to say whatever he pleased.<sup>34</sup> He also ignores Arab and Muslim aspirations for democracy, and the fact that many would be more than happy to publicly criticize government officials if they did not have to contend with the realities of persecution, imprisonment, and torture.

Considering Rosen's clear tendency to read the evidence selectively, and in effect to affirm the image of the Arab and Muslim as shifty, unprincipled, and simply different, we should ask, once again, what motivates Rosen? Why does Rosen insist on the largely Orientalist paradigm of the exotic bazaar to understand Arabs and Muslims? In perhaps one very telling part of his book, Rosen advises that in attempting to resolve the Arab-Israeli conflict, and making peace, Westerners must understand the Arabs' particular sense of justice. Arabs can only seek to make peace "against [a] tangled, ambivalent, refractory, and transcendent feeling of justice," which shapes their expectations and hopes. Rosen goes on to say: "it behooves us, in our own quest for mutual cooperation and forbearance, to comprehend the Arabs' felt sense of justice and render it the full measure of our sympathy and understanding" (p. 175). In general, this might be good advice. But, an Arab Muslim, like myself, cannot escape the conclusion that Rosen's forbearance and benevolence is condescending. More importantly, it is condescending towards an image of Arabs, Muslims, and their jurisprudence that has much more to do with the state of mind of the author than with anything in reality. Rosen's Arab is a foggy character who is exotic and distant, and who is difficult to understand or predict because he is constantly negotiating, shifting, and forming. Ultimately, Rosen's Arab is difficult to trust or deal with except with condescending forbearance, like the deceiving and coniving merchant in the bazaar who tells you one thing and means another. This, I suspect is Rosen's reality. But, then again, I might be wrong because, according to Rosen's paradigm, as an Arab, I really have no objective sense of reality. My reality is as shifting and changing as the highly situated pieces in a good game of chess.

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34. See FOR RUSHDIE: ESSAYS BY ARAB AND MUSLIM WRITERS IN DEFENSE OF FREE SPEECH (Anouar Abdullah ed., 1994).