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John Makdisi on The Intercultural Origins of the Common Law

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JOHN MAKDISI ON THE INTERCULTURAL ORIGINS OF THE COMMON LAW

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The origins of the common law are shrouded in mystery.[1]

The Norman Conquest in 1066 determined to a considerable degree the central features of English law, particularly the system of estates. Beginning with William the Conqueror's reign, the English, influenced by Norman, French, and Roman ideas, developed a legal system that spread throughout the English-speaking world, America included.[2]

Introduction

To teach Property Law in the twenty-first century is a lovely challenge, for the supermajority of my 1L students were born just before the latest *fin de siècle*, were infants when the third (Christian) millennium started, and have almost no conscious memory of the

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[1] John A. Makdisi, *The Islamic Origins of the Common Law*, 77 N. C. L. REV. 1636, 1636 (1999).

[2] JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY CONCISE EDITION 181 (2d ed. 2017).

twentieth century. Thus, early on each semester, I expressly sympathize with their possible confusion as to why the first cases that they study are from the nineteenth century,[3] yet I explain that we will go much further into Anglo-American legal history—all the way back to 1066—and that learning Property Law will initiate them into the mysteries of how U.S. society has created and regulated wealth and power over the centuries.

In this Essay, I pay homage to John Makdisi on the occasion of his retirement. Since joining the St. Thomas Law faculty in 2011, I have esteemed him as one of the law school's senior Property Law professors, yet—truth be told—at times also felt intimidated by him for his deep knowledge of the subject, particularly present estates and future interests, coupled with his serious demeanor, penetrating gaze, and cogent arguments at faculty meetings.[4] Especially during tenure-track faculty reviews of my teaching, I worried that my relative inexperience in teaching the subject might cause me to commit an embarrassing error. With time, I learned that my apprehension was unfounded: although he expects excellence of himself, and therefore of others, John Makdisi is generous. As a teacher, he happily and tirelessly engages with his students when they visit his office hours and, as a colleague collaborating on a committee project in the year of his retirement, I found him consistently gracious and myself wishing that I had sought his mentorship earlier.

Beyond such confessions, to contribute substantively to this special issue in honor of John and June Mary Makdisi, I will: (1) review several of John Makdisi's arguments for how Islamic law influenced the creation and early evolution of the English common law; (2) ask why today's Property Law casebooks elide his provocative yet persuasive arguments; and (3) argue that today's Property Law professors should draw upon Makdisi's scholarship on the origins of the common law in order to educate ourselves and highlight for our students the *intercambio de culturas* (intercultural

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[3] *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543 (1823); Pierson v. Post, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805).

[4] *See generally* JOHN MAKDISI, ESTATES IN LAND AND FUTURE INTERESTS: PROBLEMS AND ANSWERS (1991, 7th ed. 2018).

exchange) that generated the English common law. Critically, emphasizing this legal history allows us to counter the "clash of civilizations" argument that has become regnant, ideological, and pernicious in the post-9/11 era of renewed anti-Muslim animus in the United States and abroad.[5]

I. John Makdisi's Arguments for the "Islamic Origins" of the Common Law

Although his research on the origins of the common law both preceded[6] and followed[7] his provocative yet persuasive 1999 article *The Islamic Origins of the Common Law*,[8] I focus on the latter throughout this first Part. Countering the conventional view that the common law evolved predominantly from "[t]he civil law tradition of Roman and canon law[,]"[9] Makdisi explains that his article, "[l]ooks beyond the borders of Europe and proposes that the origins of the common law may be found in Islamic law."[10] He then substantiates his argument with meticulous research regarding three "[i]nstitutions that helped to create the common law in the twelfth century by introducing revolutionary concepts that were totally out of character

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[5] *See generally* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996); Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFFAIRS 22 (1993).

[6] *See, e.g.*, John Makdisi, *Formal Rationality in Islamic and Common Law*, 34 CLEV. ST. L. REV. 97 (1985); John Makdisi, *Islamic Law Bibliography*, 78 LAW. LIBR. J. 103 (1986); John Makdisi, *An Inquiry into Islamic Influences During the Formative Period of the Common Law*, *in* ISLAMIC LAW AND JURISPRUDENCE 135 (Nicholas Heer ed., 1990); John Makdisi & Marianne Makdisi, *Islamic Law Bibliography: Revised and Updated List of Secondary Sources*, 87 LAW. LIBR. J. 69 (1995).

[7] *See, e.g.*, JOHN MAKDISI, ISLAMIC PROPERTY LAW: CASES AND MATERIALS FOR COMPARATIVE ANALYSIS WITH THE COMMON LAW (2005); John Makdisi, *The Kindred Concepts of Seisin and* Hawz *in English and Islamic Law*, *in* THE LAW APPLIED: CONTEXTUALIZING THE ISLAMIC SHARI'A (Wolfhart Heinrichs, Bernard Weiss & Peri Bearman eds., 2008).

[8] Makdisi, *supra* note 1.

[9] *Id.* at 1638.

[10] *Id.*

with existing European legal institutions."[11] In three subparts, he traces the unique characteristics of these legal institutions "[t]o three analogous institutions in Islamic law. The royal English contract protected by the action of debt is identified with the Islamicc *'aqd*, the English assize of novel disseisin is identified with the Islamic *istihqaq*, and the English jury is identified with the Islamic *lafif*."[12] Next, Makdisi compares "[t]he major characteristics of the legal systems of Islamic law, common law, and civil law and demonstrates the remarkable resemblance between the first two in function and structure and their dissimilarity with the civil law."[13] Finally, in what to me is the article's most persuasive part, Makdisi "[t]races a path from the Maliki school of Islamic law in North Africa and Sicily to the Norman law of Sicily and from there to the Norman law of England to demonstrate the social, political, and geographical connections that made transplants from Islam possible."[14] Below, I briefly discuss his comparison between the Islamic law and early common law institutions. For the sake of brevity, I eschew reviewing his analysis of the function and structure of the common law, civil law, and Islamic law. I do, however, discuss, in some detail his explanation for how Henry II of England (born Mar. 5, 1133, coronated Dec. 19, 1154, died Jul. 6, 1189) came to learn about and to oversee the transplantation of three Islamic law institutions that significantly contributed to the origins of the English common law.

A. Three Islamic Law Institutions that Helped Create the English Common Law

Makdisi explains the significance of the three Islamic law institutions that he argues influenced the origin of the common law:

> For the first time in English history, (1) contract law permitted the transfer of property ownership on the sole

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11 *Id.*
12 *Id.* at 1638–39.
13 Makdisi, *supra* note 1, at 1639 (citation omitted).
14 *Id.* (citation omitted).

> basis of offer and acceptance through the action of debt; (2) property law protected possession as a form of property ownership through the assize of novel disseisin; and (3) the royal courts instituted a rational procedure for settling disputes through trial by jury.[15]

Below, I summarize and comment on Makdisi's arguments regarding how Islamic law influenced these three institutions of the nascent English common law.

1. Contract in the Action of Debt

While lawyers may find offer, acceptance, and consideration so elementary as to seem natural, "[t]he writ of debt in the [twelfth century] royal courts [of England] introduced a new concept of obligation by which the contracting parties were bound."[16] In contrast, "[t]he old concept of obligation, as seen in Anglo-Saxon contracts, was that of a promise marked by some formality such as a handshake."[17] After making the promise, the seller had a *moral* obligation to deliver the property that he had promised to transfer to the buyer.[18] In contrast, "[t]he new concept of obligation, embodied in the action of debt, was a *grant* [of property] effectuated by the agreement of the parties."[19] After making the agreement, the seller was obliged to deliver the agreed-property because its ownership had already been transferred, by the agreement, to the buyer.[20]

While some may find this distinction too fine to be noteworthy, Makdisi explains its importance carefully, interpreting *Glanvill*, the first treatise on the common law,[21] and a host of scholarship on the

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[15] *Id.* at 1683 (citations omitted).

[16] *Id.* at 1641 (citation omitted).

[17] *Id.* (citation omitted).

[18] Makdisi, *supra* note 1 at 1641.

[19] *Id.* (citation omitted) (emphasis added).

[20] *See id.*

[21] *Id.* at 1640 (n. 16) (citing THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL (G.D.G. Hall ed. & trans., Nelson 1965) (c. 1187–89)).

subject,[22] before recontexualizing the writ of debt beyond the usual attribution of its derivation from the Roman law "[*e*]*mptio-venditio* (contract of purchase and sale)[.]"[23] As Makdisi notes, "in Roman law a disappointed party had a *personal* right of action, as opposed to the English action of debt in which the disappointed party had a *property* right to the specific thing owned."[24] In other words, "ownership of the goods did not pass until the buyer received the goods and paid the price."[25] Thus, "[c]ontrary to Roman law, consent transferred ownership of the object of sale *before* delivery."[26] This was not an inconsequential difference because the new English contract of sale, protected by the action of debt, transmitted "[t]he buyer/creditor's right to his heir"[27] and the object of sale consequently constituted part of the buyer/creditor's estate. Moreover, Makdisi notes that this new contract of sale placed "[t]he risk of loss on the seller in possession of the object of sale when it was destroyed."[28] In contrast, "Roman law . . . placed the risk of loss on the buyer after the contract was formed and before delivery."[29]

Makdisi then explains that this new English concept of contract (i.e., that ownership of an object of sale passed at the time of agreement instead of upon physical delivery) "[m]ay have been unknown to western legal systems in the twelfth century, but it was known in Islam."[30] He then describes the *'aqd*, the Islamic law of contract, which featured this same concept of the transfer of property ownership upon agreement and not until delivery.[31] To avoid undue detail, I end this subpart by quoting Makdisi's assertion that, "In both Islamic and English law, the source of the contractual obligation was based on commutative justice. Enforcement of the contract was to

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[22] Makdisi, *supra* note 1, at 1640–45.
[23] *Id.* at 1647.
[24] *Id.*
[25] *Id.* (citation omitted).
[26] *Id.* at 1648.
[27] Makdisi, *supra* note 1, at 1649 (citation omitted).
[28] *Id.* at 1650.
[29] *Id.* (citation omitted).
[30] *Id.* at 1651.
[31] *See id.* at 1650–58.

preserve equality between the contracting parties, not to compel the keeping of a promise."[32] Not until "[t]he appearance of the action of debt in the royal courts in twelfth-century England . . . [was] promise as moral justice . . . replaced by equality as commutative justice."[33]

2. *Property in the Assize of Novel Disseisin*

The second innovation of the English common law that Makdisi analyzes is the assize of novel disseisin, which King Henry II of England created "[s]ometime between 1155 and 1166 to restore lands unlawfully seized . . . by providing a speedy means of establishing rightful possession[,]"[34] to provide "landowners with security under the king's law by replacing trial by battle with trial by jury,"[35] and by "shortening the time period for obtaining recovery, and . . . providing easier access to the courts."[36] According to Makdisi, "[t]he assize of novel disseisin remained an extraordinarily vital institution for over two hundred years."[37] Yet, for jurists and scholars, from Henry of Bracton in the thirteenth century to S.F.C. Milsom in the twentieth century, its origins were mysterious and enigmatic.[38]

As with his meticulous analysis of the action of debt, Makdisi carefully reviews the scholarly arguments for the assize of novel disseisin's origins within canon law and Roman law.[39] In the former, the candidates were the *actio spolii* and the older *canon*

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[32] Makdisi, *supra* note 1, at 1653.

[33] *Id.* Makdisi explains further that, "the contribution of the action of debt to the common law has not been widely celebrated because it was not long before the action of covenant, and eventually the action of assumpsit, reintroduced the concept of contract as promise and came to dominate Anglo-American contract law as it is practiced today." *Id.* at 1657 (citation omitted). Nevertheless, "for the span of a few centuries after the writ of debt appeared in the twelfth century, the action of debt in the royal courts provided a remedy that made the common law unique among western legal systems of its time." *Id.* at 1657–58.

[34] *Id.* at 1658 (citation omitted).

[35] *Id.* (citation omitted).

[36] *Id.* (citation omitted).

[37] Makdisi, *supra* note 1, at 1658 (citation omitted).

[38] *See id.* at 1659–60 (nn.122–124) and accompanying text.

[39] *See id.* at 1660–65.

redintegranada.[40] In the latter it was the interdict *unde vi*.[41] Makdisi succinctly and persuasively argues against these origins. The *canon redintegranada* "was only elaborated during the course of the second half of the twelfth century."[42] Thus, "[i]t is unlikely that the *canon redintegranada* influenced the creation of the assize[,]"[43] which, as noted above, King Henry II created between 1155 and 1166. Moreover, "[t]he *canon redintegranada* was directed to an entirely different purpose than that of the assize."[44] As Makdisi explains it, "[w]hile the *canon redintegranada* was designed to protect against breaches of the peace, the assize was designed to protect ownership."[45] For this proposition, Makdisi cites to an early thirteenth century case reported in the *Curia Regis Rolls* of 1199–1230, which demonstrates that the court protected a claimant's ownership "[o]n the basis of prior possession as the best evidence of true ownership."[46] Thus, "[p]ossession stood as a presumption of ownership, and the assize of novel disseisin protected the possession of the one who was first dispossessed . . . unless it could be proved that his dispossessor . . . was the true owner."[47]

As for the Roman interdict *unde vi*, Makdisi argues persuasively that while it "did share some features with the English assize[,]"[48] the "owner under the interdict was not allowed to offer any proof of ownership because ownership was not a defense."[49] Rather, "[t]he interdict protected possession as an end in itself, and a possessor was protected even against repossession by the owner."[50] Thus, Makdisi finds the function of the Roman interdict to mimic that of the *canon redintegranada* (i.e., to protect against breaches of the peace)

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[40] *See id.* at 1661.
[41] *See id.* at 1663–64.
[42] Makdisi, *supra* note 1, at 1661.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 1662.
[47] Makdisi, *supra* note 1, at 1663.
[48] *Id.*
[49] *Id.* at 1664.
[50] *Id.*

rather than to protect the ownership of property rights.[51]

Having questioned canon and Roman origins for the assize, Makdisi then turns to his larger context and argues persuasively that the Islamic *istihqaq*, an action for recovery of land upon usurpation, bears strong similarities to the assize of novel disseisin both in its "[p]resumption of ownership based on possession" and the "[m]ethods by which the actions were brought."[52] As to the latter, he discusses the similarities in greater detail than bears glossing here,[53] but I will note that both the *istihqaq* and the assize relied on a jury of twelve witnesses, which factual findings the judge was bound to accept,[54] and that both actions—in contrast to the Roman law of prescription (*usucapion* or *longissimi temporis praescriptio*)—"[l]imited the time within which an action could be brought to establish one's ownership."[55] For the English assize, "[t]hese limitations were usually pegged to a coronation or to the king's last voyage abroad."[56] For the *istihqaq*, "[p]ossession in Islamic law for the ten-year [period called] *hiyaza* was a way to 'settle the claim and quash the hearing'."[57] (In turn, such limitations presaged the various English Limitation Acts.[58])

3. Trial by Jury

Makdisi then turns to analyze the influence of Islamic law on "[t]he jury . . . one of the most celebrated cornerstones of the common law."[59] Because his analysis is so thorough, it feels inapposite to review it in detail here. Thus, I restrain my discussion to briefly note

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[51] *See id.* at 1664–65.

[52] Makdisi, *supra* note 1, at 1665–66.

[53] *See id.* at 1666–76. In particular, Makdisi demonstrates "that English and Islamic law each had a three-tier theory of possession as the presumption of ownership . . . based on (1) no title; (2) color of title; or (3) title." *Id.* at 1671; *see also id.* at 1671–76 (discussing each condition under English and then Islamic law).

[54] *See id.* at 1666 (n.152) and accompanying text.

[55] *Id.* at 1669.

[56] *Id.* at 1670.

[57] Makdisi, *supra* note 1, at 1670 (citation omitted).

[58] *See, e.g.,* An Act for Limitation of Prescription, 32 Hen. 8, c. 2 (1540); The Limitation Act, 21 Jac. 1, c. 16 (1623).

[59] *See* Makdisi, *supra* note 1, at 1676–96.

the Anglo-Saxon and Norman proofs that preceded the jury, review how Makdisi evaluated them, and then scrutinize his argument that the English jury derived from the Islamic *lafif*.

As Makdisi describes them, "[i]n marked contrast to the jury trial stand the more primitive methods of proof that predominated before its advent. The ordeals by fire and by water were popular methods for determining guilt or innocence on the basis of divine signs."[60] While "[t]he use of ordeals was popular with the English before the arrival of the Normans[,]"[61] their "[u]se declined under the Normans during the twelfth century . . . [until they] were finally outlawed by the decree of the Lateran Council in 1215[.]"[62] After the Conquest of 1066, the Normans introduced methods such as proof by duel, compurgation or wager of law, and trial by party-witnesses.[63] While some of these methods of proof persisted into the thirteenth century, all of them "[w]ere largely displaced by the jury in the middle of the twelfth century[,]"[64] which King Henry II instituted "as the predominant method of proof through his newly created assizes[.]"[65]

After reviewing the Anglo-Saxon and Norman methods of proof that preceded the jury, Makdisi then evaluates the scholarly discourse regarding the methods that evolved into the English trial by jury.[66] He briefly discusses the Anglo-Saxon dooms, the Frankish *inquisitio*, which the Normans had adopted, the Anglo-Saxon tradition of asking a group of neighbors to solve disputes by their sworn verdict, or "recognition," of the facts, and finally the royal inquest.[67] Of them all, he finds "[V]an Caenegem's explanations of the origins of the jury . . . well-conceived if one stays within the confines of western history. If one looks beyond the borders of Europe, however, to analyze possible origins in Islamic law, the Islamic antecedents are found to

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[60] *Id.* at 1677 (citation omitted).
[61] *Id.* (citation omitted).
[62] *Id.* (citation omitted).
[63] *See id.* at 1677–79.
[64] Makdisi, *supra* note 1, at 1679.
[65] *Id.*
[66] *See id.* at 1679–81.
[67] *Id.* at 1679–80.

provide a much closer fit[.]"[68] Makdisi identifies nine basic characteristics of the jury, meticulously compares them to the royal inquest and the popular recognition,[69] and concludes that the royal inquest shares only four of the jury's nine characteristics,[70] whereas the popular recognition shares only three.[71]

Makdisi then turns to the "[*l*]*afif*—the Islamic precursor to the jury."[72] With characteristic rigor, he explains the *lafif* in terms of the nine characteristics of the jury but also in terms of its evolution in Islamic jurisdictions that followed "[t]he Maliki school of law . . . [in which] proof of character was more difficult[.]"[73] According to Makdisi, the "[Q]ur'an directs that one 'get two witnesses, out of your own men, and if there are not two men, then a man and two women.'"[74] To qualify as witnesses, however, these men or women had to be "honorable (*'adl*)."[75] In the absence of an adequate number of such men or women, the Maliki school of law innovated a substitute form of proof in the eleventh century "in the area of North Africa now known as Morocco."[76] In "[t]he exceptional case where proof by *'udul* witnesses was not available[,]"[77] proof by *lafif* witnesses was allowed. "The *lafif* witnesses were considered the community (*jama'a*) of the locality, and the number generally required was twelve."[78] Also, "[i]f they qualified as [*lafif*] witnesses, the judge did not have the discretion to discard their testimony as not credible."[79] Moreover, "[I]slamic law required that the twelve *lafif* witnesses all give identical testimonies."[80] Completing his analysis of the Islamic *lafif*, Makdisi concludes:

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[68] *Id.* at 1681.
[69] Makdisi, *supra* note 1, at 1681–87.
[70] *See id.* at 1685–86.
[71] *See id.* at 1686–87.
[72] *Id.* at 1687.
[73] *Id.* at 1689.
[74] Makdisi, *supra* note 1, at 1688 (citing THE HOLY QUR'AN 2:282).
[75] *Id.* (citation omitted).
[76] *Id.* at 1689.
[77] *Id.*
[78] *Id.* at 1689–90.
[79] Makdisi, *supra* note 1, at 1693.
[80] *Id.*

> The structure of the *lafif* resembles the jury in nearly every detail as it appeared in England in the twelfth century. . . . The only characteristic of the English jury that did not exist in Islam was the judicial writ directing the jury to be summoned and directing the bailiff to hear its recognition. No other institution in any legal system studied to date shares all these characteristics with the English jury.[81]

By the end of his comparison of the characteristics of the Islamic *lafif* and the English jury, I found myself persuaded that the latter derived in substantial part from the former. For me, the burning question then became, how did this intercultural exchange occur? Before explaining it, Makdisi expands his analysis beyond particular legal institutions to compare "[t]he characteristics that distinguish the common law system from the [Islamic law and] civil law system[s]."[82] For brevity I eschew reviewing his application of Mirjan Damaška's conceptualization of "[t]he major characteristics that distinguish the common and civil law systems[.]"[83] Instead, I review Makdisi's discussion of how King Henry II of England learned about and came to adopt the Islamic law institutions of the Maliki school—the *'aqd*, *istihqaq*, and *lafif*.

B. The Sicilian Connection

While some scholars may find Makdisi's earlier arguments too speculative to be persuasive, his article's fifth Part, "The Opportunity for Transplants Through Sicily," persuaded me adequately that I henceforth shall ask my Property Law students to seriously consider the Maliki school of Islamic law as one source of the English common

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[81] *Id.* at 1695.

[82] *Id.* at 1696.

[83] *See id.* at 1696–1717 (applying the functional (activist v. reactive) and structural (hierarchical v. coordinate) analyses developed in MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986) to the common law, civil law, and Islamic law systems).

law. As Makdisi explains, "[t]he study of Sicily and the neighboring tip of North Africa in conjunction with Norman England in the twelfth century reveals a surprisingly interactive relationship between the two areas that made it possible for Maliki legal doctrines and institutions to make their way north to Norman England at that time."[84] Below, I review the parts of his argument that I found most compelling.

1. The Norman Conquest of and Incorporation of Sicily

For historians of the medieval Mediterranean, the twelfth century Norman invasions of the "area of African known as *Ifriqiyya* (now known as Tunisia) and its neighbor Sicily" may be common knowledge.[85] For me, and my 1L students, however, I suspect that this knowledge is esoteric at best. Thus, it feels striking to learn that, "[i]n Sicily, the Norman conquest began in 1061 with the capture of Messina and concluded in 1091 with the capture of Noto"[86] because Property Law typically focuses on a single Norman conquest, of England, in 1066.[87] Moreover, I believe that this history is relevant not only to contextualize the origins of the English common law, such as when introducing present estates and future interests, but also to recontextualize the doctrines of discovery and conquest, which too often focus exclusively on nineteenth century U.S. legal history instead of being explained as an evolution of the medieval canon law that authorized the Crusades, Portuguese incursions into Africa, and Spanish conquest in the Americas.[88]

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[84] Makdisi, *supra* note 1, at 1717.

[85] *Id.* at 1718.

[86] *Id.* at 1719 (citation omitted). Makdisi notes, "Palermo, with its 300 mosques, was captured in 1072." *Id.* at 1719 (n. 546) (citation omitted).

[87] *See, e.g.*, DUKEMINIER ET AL., *supra* note 2, at 181.

[88] *See, e.g.*, ÁNGEL R. OQUENDO, LATIN AMERICAN LAW 96–98 (3d ed. 2017) (citation omitted) (discussing the 1492 Papal Bulls of Alexander VI and the Spanish Council of Castile's *Requerimiento que se ha de leer a los indios* of 1513 (*"El Requerimiento"*), which authorized the Spanish conquest of the Americas). *See also* David P. Waggoner, *The Jurisprudence of White Supremacy:* Inter caetera, Johnson v. M'Intosh, *and* San Antonio Independent School District v. Rodriguez, 44 SW. L. REV. 749, 750, 755–58 (2015) (discussing and critiquing the Papal Bulls *Dum*

Returning to Makdisi's arguments, after establishing that numerous Islamic scholars of the Maliki school "[m]ade Sicily an important center of intellectual activity and, through their travels, a mainstream of Islamic scholarship[,]"[89] he explains how "[w]ith a genius for adaptation, the [conquering] Normans integrated it [the Muslim civilization of Sicily] with their own.[90] For example, the "[M]uslims [of Sicily] continued to practice their religion freely and to be governed by their own judges and laws."[91] Moreover, Sicilian Muslims "[p]rovided a large number of infantry troops as mercenaries" to the new Norman rulers.[92] In Makdisi's judgment, "[t]he genius of Norman administration was to incorporate native elements of government and administration into their own government in order to preserve continuity and identity among the peoples they governed."[93]

But even if the Norman conquest of previously-Muslim Sicily started a process of exchange between the two peoples' cultures, how could this affect Norman England?

2. *The Transplantation of Islamic Law Institutions to England*

According to Makdisi, the answer lies within the court of Roger II, who "[w]as born on December 22, 1095, ruled from 1111 to

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Diversas (1452), *Romanus Pontifex* (1455), and *Inter caetera* (1493), as well as *El Requerimiento* (1513).

[89] Makdisi, *supra* note 1, at 1720 (citation omitted).

[90] *Id.* (citation omitted).

[91] *Id.* at 1720–21 (citation omitted).

[92] *Id.* at 1721 (citation omitted).

[93] *Id.* (citation omitted). *Cf.* Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543, 589 (1823) ("The title by conquest is acquired and maintained by force. . . . Humanity, however, acting on public opinion, has established . . . that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people").

1154, and was crowned king [of the Norman kingdom of Sicily] at Palermo in 1130."[94] Following the paths blazed by his uncle Robert Guiscard, who started the Norman conquest of Sicily,[95] and his father Roger I, who completed it,[96] "Roger II grew up imbued with Muslim culture[,]"[97] and "[m]aintained an intimate relationship with his Muslim subjects, delighting in the company of Muslim poets and scholars."[98] Moreover, "[h]is court resembled that of a Fatimite caliph with its harems and eunuchs."[99] More practically, "the Fatimid coin remained in use and its Norman counterpart was minted with a similar shape and with the same intrinsic value[.]"[100] Similarly, a "branch of the *curia*, known by the Arabic term *diwan*, acted as a central financial body for the kingdom."[101] Also, "[i]n addition to the Islamic influence seen in the financial . . . administrations of Sicily, there is also evidence that the judicial administration of the country was structured along Islamic lines."[102] In particular, "[t]he [Norman] judges decided property cases, witnessed sales and gifts, and disposed of small civil cases among the Christians in the same way as the *qadis* in Sicily continued to do for the Muslims."[103]

But, even if Roger II incorporated many aspects of Muslim culture, including institutions of Islamic law into the Norman kingdom of Sicily, how could this influence the Norman kingdom of England?

Makdisi begins this part of his masterful argument by noting that, "[E]ngland and Sicily were the only two states in the twelfth century that had Norman kings,"[104] and that "the reigns of King Roger II from 1130 to 1154 in Sicily and King Henry II from 1154 to 1189 in England shared many features."[105] Moreover, he argues that Henry

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94 Makdisi, *supra* note 1, at 1721 (n. 564) (citation omitted).
95 *Id.* at 1722 (citation omitted).
96 *Id.* (citation omitted).
97 *Id.* at 1721 (citation omitted).
98 *Id.* at 1723 (citation omitted).
99 Makdisi, *supra* note 1, at 1723 (citation omitted).
100 *Id.* (citation omitted).
101 *Id.* at 1724 (citation omitted).
102 *Id.*
103 *Id.* (citation omitted).
104 Makdisi, *supra* note 1, at 1027 (citation omitted).
105 *Id.*

II "[w]ould have been drawn irresistibly to learn and appropriate the administrative mechanisms by which Roger II achieved his power, wealth, and success,"[106] for Henry II was an ambitious king with a noteworthy interest in law,[107] and the Sicily of Roger II was "[t]he most powerful and wealthy government in Europe[.]"[108]

Again, for some scholars, this may still seem too speculative to be persuasive, but Makdisi does not end his argument prematurely. Rather, he demonstrates that "[t]he road to and from Sicily was well traveled[,] . . . [the] growth of trade was spectacular in the twelfth century, . . . Sicily served as a place of exchange[,]"[109] and also that "many officials made both England and Sicily their homes."[110] Detailing the birthplaces of chancellors and tutors, royal intermarriage (between one of Roger II's successors, William II of Sicily, and Henry II's "youngest daughter Joanna in 1177")[111] goes beyond the scope of this Essay. What bears elaborating, however, is that "[T]homas Brown [who] was born in England around 1120 . . . [and] first appeared in Sicily about 1137[.]"[112] "In 1149, he appeared as Kaid Brun in the diwan, the fiscal department of the Sicilian government, which . . . kept records of boundaries, bought and sold land, recovered the king's property, enforced payments due him, and held court to determine boundaries and decided disputes."[113] Later:

> Brown was forced to flee Sicily for his life when King William I came to power in 1154 . . . [and by] 1158, Brown had arrived in England on the personal invitation of Henry II, [where] he remained until his death in 1180[, having] obtained a position of considerable importance, . . . [including] a seat at the exchequer [where he] kept a third roll as a check on the

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106 *Id.*
107 *Id.* (citation omitted).
108 *Id.* at 1730 (citation omitted).
109 Makdisi, *supra* note 1, at 1728 (citation omitted).
110 *Id.* at 1729 (citation omitted).
111 *Id.*
112 *Id.* (citation omitted).
113 *Id.* at 1729–30 (citation omitted).

rolls of the treasurer and chancellor.[114]

Thus, Makdisi concludes, "[H]enry II had a rare opportunity to learn firsthand about the *istihqaq*, which was the Islamic procedure for recovery of land, and the *lafif*, which was the Islamic jury used to establish evidence in the procedure of the *istihqaq*."[115] Finally, "[w]ithin eight short years after Thomas Brown appeared in England, the English assize of novel disseisin was decreed and the English jury in its modern form made its appearance."[116]

While perhaps a minor point within the standard course on Property Law, I find Makdisi's arguments on the Islamic origins of the common law persuasive and intellectually significant, for they provoke me to wonder why today's Property Law casebooks seem to elide his remarkable arguments regarding the English common law's origins within the intercultural exchange that followed the Norman conquest of Muslim Sicily in the eleventh century and the transplantation of Islamic legal institutions into twelfth century Norman England.

II. Why Do Today's Property Law Casebooks Elide the Islamic Origins of the Common Law?

In this Part, I do not attempt a comprehensive argument regarding why today's Property Law casebooks elide John Makdisi's arguments for the Islamic origins of the common law. Rather, I spotlight this elision and speculate briefly about it based upon my experience of studying and teaching Property Law: I first studied the subject in the fall of 2002 under the tutelage of Professor, now Emerita, Andrea Peterson,[117] began teaching it in the spring of 2011,

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[114] Makdisi, *supra* note 1, at 1730.

[115] *Id.*

[116] *Id.* (citation omitted).

[117] In addition to her own handouts and overhead slide projections, Professor Peterson used JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY (5th ed. 2002). For my earliest published critiques of Property Law, and its pedagogy, *see* Rachel Anderson, Marc-Tizoc González & Stephen Lee, *Toward a New Student Insurgency: A Critical Epistolary*, 94 CALIF. L. REV. 1879, 1900 (n. 88) (2006) and accompanying text.

and have thereafter continuously done so using various editions of casebooks primarily authored by Jesse Dukeminier or Joseph William Singer.[118] In that context, I initially felt astounded by Makdisi's central claim in *The Islamic Origins of the Common Law*. As I remarked to him after reading it, I recall no instance of such a claim in any of the casebooks with which I am familiar, and to the contrary, I recall only the repeated assertions that Roman law, its civil law tradition, and canonical law proffer the common law's sources. This Essay's second epigraph states the conventional claim with a slight addition (specifying Norman and French in addition to Roman influence).[119] While my astonishment may simply derive from ignorance of the discourse on the influence of Islamic law on the origins of the common law, I intuit that something more is at play: Makdisi's claim is controversial, for it threatens the canons of the common law's provenance. Moreover, Makdisi made his claim in the *fin de siècle* period marked by the rise, or renewal, of anti-Muslim animus in the United States, which Samuel P. Huntington's "clash of civilizations" argument arguably emblematizes,[120] two years before the infamous terrorism of September 11, 2001, and hence shortly before the start of the seemingly-endless and global U.S. War on Terror/ism and the proliferation of its accompanying ideologies.[121]

Despite the intellectual significance of Makdisi's claim, the chief article in which he makes it has had only a modest impact on the discourse of U.S. law scholars—according to the admittedly limited

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[118] In the order in which I've taught from them, these casebooks include: JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES POLICIES & PRACTICES (5th ed. 2010); JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, PROPERTY (7th ed. 2010); JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY (8th ed. 2014); JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO MOISES PEÑALVER, PROPERTY LAW: RULES POLICIES & PRACTICES (7th ed. 2017); *and* DUKEMINIER ET AL., *supra* note 2.

[119] *See* the text accompanying, *supra* note 2.

[120] *See* the sources cited, *supra* note 5.

[121] *Cf.* Anderson et al., *supra* note 117, at 1942 (n. 238) (discussing the permutations of how the United States has labeled its War on Terror/ism). *See also id.* at 1895 (n.69) (discussing and citing to sources on the concepts of hegemony and ideology).

metric of law review citations.[122] According to Westlaw's law review database, twenty-nine authors have cited to *The Islamic Origins of the Common Law*.[123] One article cited to it immediately in 1999.[124] Eighteen articles cited to it in the 2000s,[125] and so far ten have cited to it in the 2010s.[126] In contrast, beyond Westlaw and law review scholarship, Google Scholar notes one-hundred-and-thirty four (134) citations to Makdisi's article.[127] How might one respond to this apparent discrepancy? I hypothesize that U.S. law scholars have tended to reject the idea of Islamic law's influence on the origins of the common law.[128] In contrast, scholars of other disciplines have noted and appreciated, or at least not rejected, Makdisi's argument.

To be clear, I do not ascribe the elision of Makdisi's argument from Property Law casebooks to anti-Muslim animus. Although individual authors may harbor such animus, I believe it more likely that the elision derives from the ideological power of Orientalism (i.e., the stereotypical representation of the "Middle East" in "Western" colonialist discourse)[129] as typified by the "clash of civilizations" framing espoused by Huntington. In other words, even without conscious anti-Muslim animus, the notion that the English common law derives from Islamic law may feel counterintuitive, or perhaps even heretical, at this moment in history, to many (most?) U.S. Property Law professors. In contrast, scholars of other countries and disciplines appear more open to acknowledging the centurial

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[122] *See* WESTLAW, LIST OF 29 CITING REFERENCES FOR *THE ISLAMIC ORIGINS OF THE COMMON LAW* (Jan. 31, 2019) (on file with author) (listing twenty-nine citing references from 1999 to 2018).

[123] *Id.*

[124] *Id.* at 1.

[125] *Id.* at 1–4.

[126] *Id.* at 5–7.

[127] *Search*, GOOGLE SCHOLAR, https://scholar.google.com/scholar (search starting point field for "Islamic Origins of the Common Law").

[128] *Accord* Wael B. Hallaq, *The Quest for Origins or Doctrine? Islamic Legal Studies As Colonialist Discourse*, 2 UCLA J. ISLAMIC & NEAR E. L. 1, 5–6 (2003) (discussing the scholarly rejection of arguments by George Makdisi on "the influence of Muslim institutions on medieval European universities and the Inns of Court," and concluding similarly regarding John Makdisi's *Islamic Origins of the Common Law*).

[129] On Orientalism, *see generally* EDWARD SAID, ORIENTALISM (1978).

intercultural exchange between Muslim and European peoples.[130]

III. Teaching about the Common Law as an Example of Interculturalidad *(Intercultural Exchange)*

Even though I hope it remains common knowledge that people in the United States, and elsewhere in the "Western" world, use "Arabic numerals" and the "Roman alphabet," I fear that a substantial portion of today's U.S. law students may have never learned these facts, forgotten them, or not understood their significance. While I am no expert on the history of the *intercambio de culturas* (intercultural exchange) that diffused algebra, Arabic numerals, astronomy, and other knowledge and technology from the "Middle East" to Europe in its late-medieval and early-Renaissance periods, around 1995, I served as an undergraduate research assistant to a Ph.D. candidate in Psychology at the University of California, Davis. Under the supervision of Dean Keith Simonton (now a Distinguished Professor Emeritus), Vincent J. Cassandro, Jr., utilized a quantitative, historiometric, methodology to measure and compare creativity, eminence, and versatility.[131] Counting lines of text within late-nineteenth and early-twentieth century encyclopedia entries, I dutifully recorded how much coverage a given encyclopedia edition afforded to particular individuals whom Cassandro had assigned me to research. In so doing, I learned about a number of Arab and/or Muslim scholars and intellectuals and gleaned a little about how benighted Europe was during its medieval "Dark Ages." A few years later, while pursuing my master's degree in Social Science (Interdisciplinary Studies) at San Francisco State University,[132] I

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[130] See sources available through the process described at *supra* note 127.

[131] *See* VINCENT JAMES CASSANDRO, JR., VERSATILITY, CREATIVE PRODUCTS, AND THE PERSONALITY CORRELATES OF EMINENT CREATORS (unpublished Ph.D. dissertation, Psychology, University of California, Davis 2001) (Order No. 3018983), https://search.proquest.com/docview/304687322.

[132] *See* Marc-Tizoc González, *Critical Ethnic Legal Histories: Unearthing the Interracial Justice of Filipino American Agricultural Labor Organizing*, 3 U.C. IRVINE L. REV. 991, 1009 (n. 52), 1033 (n. 122) (2013) (discussing my studies and

learned about world-systems theory in a Department of Ethnic Studies graduate course on methodology taught by Professor Nancy Raquel Mirabal.[133] I found particularly impactful an essay by liberation philosopher Enrique Dussel, who argued persuasively that Europe prior to 1492 was peripheral to the interregional system that preceded the creation of the "world-system" (i.e., the system that evolved after the Spanish "discovery" of the "New World," European circumnavigation of the planet, and consequent conquest and exploitation of Amerindian peoples and the natural resources that they stewarded in the western hemisphere, which gave rise to "modernity," as enabled by settler colonialism and mercantile capitalism).[134]

Thus, when I regard the elision (and possible rejection) of John Makdisi's arguments regarding the Islamic origins of the common law by the authors of the Property Law casebooks with which I am familiar, I believe that these authors have missed a critical opportunity to help Property Law professors teach in the twenty-first century. I thus exhort Property Law professors to recover and realize the opportunity by educating ourselves in Makdisi's arguments, and the related discourse, and informing our students of the argument for the contribution of Islamic law to the common law's origins. Moreover, until casebook authors begin to include this seemingly minor, yet pedagogically important, argument, I encourage Property Law professors to supplement the casebooks with a reference to Makdisi's article and through greater contextualization of the Norman invasion of England, and elsewhere, and to encourage students to question the origins of the common law—within, and beyond, the twelfth-century

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citing to the masters' thesis that I wrote and brief ethnographic film that I co-produced on the subject of graffiti and its writers).

[133] Professor Mirabal now teaches at the University of Maryland Department of American Studies and directs its U.S. Latina/o Studies Program. *Nancy Raquel Mirabal*, UNIVERSITY OF MARYLAND, https://amst.umd.edu/faculty/nancy-raquel-mirabal/ (last visited March 29, 2019).

[134] Enrique Dussel, *Beyond Eurocentrism: The World-System and the Limits of Modernity*, *in* THE CULTURES OF GLOBALIZATION 3, 5, 7–10 (Fredric Jameson & Masao Miyoshi eds., 1998) (arguing persuasively that prior to 1492, the European kingdoms were at the western periphery of an interregional system that centered on Baghdad until 1258). On world-systems theory in general, *see, e.g.*, IMMANUEL MAURICE WALLERSTEIN, WORLD-SYSTEMS ANALYSIS: AN INTRODUCTION (2004).

reign of Henry II of England.[135]

In the post-9/11 context, and particularly after the current U.S. President expressly attempted to ban asylees, immigrants, and refugees from predominantly Muslim countries,[136] Property Law professors have a critical opportunity to educate our students in the centurial intercultural exchange that originated the English common law and to inspire them to contemplate how such intercultural exchanges may continue to affect the evolution of the Anglo-American common law.

While professors of Property Law do not teach history professionally, our course is arguably the most direct in asking, and teaching, first-year law students how kings, queens, nobles, legislators, judges, other political elites, and eventually, "We the People," through our tripartite republic, have shaped and continue to change "the law" through political struggle and in response to changing social conditions. Beyond engendering agency within history, such pedagogy also cultivates our students' intercultural proficiency so they may better serve diverse clients from around the world. Particularly at this moment in history, I believe that U.S. society needs lawyers who understand our profession and role as officers of the court as part of a centurial, indeed millennial, struggle to establish and protect the rule of law *over authority*.[137] While some

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[135] Makdisi, *supra* note 1, at 1637 (n. 1) (citing numerous sources for this proposition).

[136] *See, e.g.*, Exec. Order No. 13769 832 Fed. Reg. 8977 (Feb. 1, 2017) https://www.govinfo.gov/content/pkg/FR-2017-02-01/pdf/2017-02281.pdf. *See also Timeline of the Muslim Ban*, ACLU OF WASHINGTON, https://www.aclu-wa.org/pages/timeline-muslim-ban (last visited Mar. 12, 2019) (chronicling the sociolegal struggle over the President's attempt to limit claims for asylum or refugee status from seven predominantly Muslim countries from the Executive Order of Jan. 27, 2017 through the Supreme Court's 5–4 opinion upholding the "Muslim Ban 3.0" on June 26, 2018 in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), and featuring links to many of the ban's parallel legal challenges).

[137] On this usage, *see* PETER LINEBAUGH, THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL 17, 212-13 (2008) (discussing the notion of "authority under law," or that "the King is, and shall be, below the law" and critiquing as misusage the incomplete phrase, "rule of law").

may find this aspiration grandiose or immodest, U.S. society, and civilizations around the world, have been reestablishing the gross inequalities in wealth that presaged the twentieth century's global wars.[138] Moreover, signs as obvious as the Russian invasion and annexation of Crimea,[139] and the proxy war in and around Syria,[140] suggest that the détente that followed Perestroika appears to have ended. Similarly, slightly less obvious signs such as the U.S. trade war, by tariff, with China, Canada, and other countries,[141] also suggest

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[138] *See, e.g.*, Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, Working Paper 20625, NAT'L BUREAU ECON. RESEARCH (Oct. 2014), https://www.nber.org/papers/w25462; Gabriel Zucman, *Global Wealth Inequality*, Working Paper 25462, NAT'L BUREAU ECON. RESEARCH (Jan. 2019); Pedro Nicolaci da Costa, *Wealth Inequality Is Way Worse Than You Think, And Tax Havens Play A Big Role*, FORBES (Feb 12, 2019), https://www.forbes.com/sites/pedrodacosta/2019/02/12/wealth-inequality-is-way-worse-than-you-think-and-tax-havens-play-a-big-role/#24143dceac81. *See generally* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014).

[139] *See, e.g.*, Uri Friedman, *Putin's Playbook: The Strategy Behind Russia's Takeover of Crimea*, ATLANTIC (Mar 2, 2014), https://www.theatlantic.com/international/archive/2014/03/putins-playbook-the-strategy-behind-russias-takeover-of-crimea/284154/; Sophie Pinkham, *How Annexing Crimea Allowed Putin to Claim He Had Made Russia Great Again*, GUARDIAN (Mar. 22, 2017), https://www.theguardian.com/commentisfree/2017/mar/22/annexing-crimea-putin-make-russia-great-again; John Simpson, *Russia's Crimea Plan Detailed, Secret and Successful*, BBC NEWS (Mar. 19, 2014), https://www.bbc.com/news/world-europe-26644082.

[140] *See, e.g.*, Ian Bremer, *These 5 Proxy Battles Are Making Syria's Civil War Increasingly Complicated*, TIME (Feb. 16, 2018), http://time.com/5162409/syria-civil-war-proxy-battles/; Krishnadev Calamur, *The Syrian War Is Actually Many Wars*, ATLANTIC (Apr. 13, 2018), https://www.theatlantic.com/international/archive/2018/04/the-syrian-war-is-many-wars/557990/; Tom O'Connor, *What's Happening in Syria? Everything You Need to Know about Proxy War between U.S., Russia, Iran and Turkey*, NEWSWEEK (Mar. 3, 2018), https://www.newsweek.com/whats-happening-syria-everything-you-need-know-proxy-war-us-russia-iran-turkey-829412.

[141] *See, e.g.*, Robin Levinson-King & Daniele Palumbo, *Donald Trump v the World: US Tariffs in Four Charts*, BBC NEWS (Dec. 3, 2018), https://www.bbc.com/news/world-us-canada-45415861; Jacob Pinter, *Trump Leaves G-20 With China Trade Truce, Plans To Cancel NAFTA Ahead Of New Pact*, NPR (Dec. 2, 2018), https://www.npr.org/2018/12/02/672685019/trump-leaves-g-20-with-china-trade-truce-plans-to-cancel-nafta-ahead-of-new-pact; Ken Roberts, *China*

that the world-system is undergoing a paroxysm of social change that shall prove deleterious for vast numbers of people.[142] This is to say nothing of the popular vote for "Brexit,"[143] or the rise of hardcore Right-wing governments such as that of Jair Bolsonaro in Brazil following the impeachment of President Dilma Rouseff, which she has termed a "legislative coup."[144] Further evidence of today's dramatic

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Trade War Update: A Trickle Of Soybean, Oil Exports, FORBES (Feb. 19, 2019), https://www.forbes.com/sites/kenroberts/2019/02/19/china-trade-war-update-a-trickle-of-soybean-oil-exports/#6e2930837050.

[142] *See, e.g.*, FAO, IFAD, UNICEF, WFP & WHO, THE STATE OF FOOD SECURITY AND NUTRITION IN THE WORLD 2018: BUILDING CLIMATE RESILIENCE FOR FOOD SECURITY AND NUTRITION v (2018), http://www.fao.org/3/I9553EN/i9553en.pdf ("In 2017, the number of undernourished people is estimated to have reached 821 million – around one person out of every nine in the world."); *Global Trends: Forced Displacement in 2017*, UNHCR, https://www.unhcr.org/globaltrends2017/ (reporting 68.5 million forcibly misplaced people "worldwide as a result of persecution, conflict, violence, or human rights violations").

[143] *See EU Referendum Results*, BBC NEWS (Jun. 23, 2016), https://www.bbc.com/news/politics/eu_referendum/results.

[144] On the election of President Bolsonaro and his politics, see Tom Phillips & Dom Phillips, *Jair Bolsonaro Declared Brazil's Next President*, GUARDIAN (Oct. 29, 2018), https://www.theguardian.com/world/2018/oct/28/jair-bolsonaro-wins-brazil-presidential-election; *Who is Jair Bolsonaro? Brazil's Far-Right President in His Own Words*, GUARDIAN (Oct. 29, 2018), https://www.theguardian.com/world/2018/sep/06/jair-bolsonaro-brazil-tropical-trump-who-hankers-for-days-of-dictatorship. On the impeachment of former Brazilian President Rouseff in 2016, *see* Jim Naureckas, *Brazil's Neighbors Alarm at Legislative Coup Not of Interest to US Media*, FAIR (Jul. 1, 2016), https://fair.org/home/brazils-neighbors-alarm-at-legislative-coup-not-of-interest-to-us-media/ (critiquing U.S. media coverage of the response of Latin American countries and regional organizations to the impeachment of President Rouseff); Luisa Leme & Pablo Medina Uribe, *Timeline: Brazil's Political Crisis*, AMERICAS SOCIETY / COUNCIL OF THE AMERICAS (Apr. 13, 2016, updated Sept. 1, 2016), https://www.as-coa.org/articles/timeline-brazils-political-crisis. *Cf.* Anderson et al., *supra* note 117, at 1941–46 (characterizing the dawn of the twenty-first century as marked by a revolution between democracy and fascism); Anna Lührmann & Staffan I. Lindberg, *A Third Wave of Autocratization is Here: What is New about It?*, DEMOCRATIZATION 8-9 (2019), https://doi.org/10.1080/13510347.2019.1582029 (demonstrating empirically the rise of a third wave of "autocratization," the decline of democratic regime attributes, beginning in 1994, which ended the post-Cold War third wave of democratization).

social change is replete and includes the unbridled might of U.S. and transnational corporations, their unholy fusion of Big Data with the national security and surveillance state,[145] the accelerating exploitation of natural resources to profit notwithstanding the patently devastating effects on the world's climate, weather, atmosphere, oceans, and indeed entire biosphere.[146]

Conclusion

Incorporating John Makdisi's scholarship on the Islamic origins of the common law may seem like an insufficient way to catalyze the critical thinking that I have evoked above in Part III of this Essay, but I believe that incorporating his arguments into the teaching of Property Law is one small, yet significant, way to inculcate a larger view of the legal profession into our students and to engender their appreciation for the vitality of the centurial intercultural exchange that created, and may yet preserve, the rule of law over authority. In my opinion, competent lawyers of the twenty-first century need to understand, deeply and substantively, how people have evolved their societies' rule of law over authority to adapt to changing circumstances that are always already marked by violence,[147] yet which simultaneously feature social struggles for justice, liberty, and equality. Toward these ends, *The Islamic Origins of the Common Law* provides one significant resource.

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[145] *See, e.g.*, LAURA K. DONOHUE, THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE (2016); DAWN E. HOLMES, BIG DATA: A VERY SHORT INTRODUCTION (2017); FRANK A. PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS BEHIND MONEY AND INFORMATION (2015); Marc-Tizoc González, *Afterword* – Habeas Data*: Comparative Constitutional Interventions from Latin America against Neoliberal States of Insecurity and Surveillance*, 90 CHICAGO KENT L. REV. 641 (2015).

[146] *See, e.g.*, ERLE C. ELLIS, ANTHROPOCENE: A VERY SHORT INTRODUCTION (2018); ELIZABETH KOLBERT, THE SIXTH EXTINCTION: AN UNNATURAL HISTORY (2014).

[147] *Accord* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (arguing famously that "[l]egal interpretation takes place in a field of pain and death").