

Islamic Intellectual Property

Tabrez Y. Ebrahim*

While intellectual property (IP) law is an established legal framework present in the United States (US) and many Western countries, its contributions in balancing among competing policies often fall short of expectations. Islamic law provides an alternative legal framework to promote balance among private property rights to recognize creative and inventive works and fair distribution in a society to lessen harm with issues concerning access and equity. Islamic law is part of the legal or belief system for nearly one-quarter of the world's population, yet it has not influenced conceptual and normative insights for Western legal systems. Furthermore, even Islamic legal systems have not considered proper theological considerations within their IP laws, which largely are replicas of Western legal systems and not reflective of Islamic principles. By providing a theory of Islamic intellectual property ("Islamic IP"), this Article provides three major contributions: (1) conceptualization of a pluralistic and balanced approach to Islamic IP; (2) demonstration of how Islamic IP embodies value pluralism while recognizing private property and enabling fair distribution through limitation of excesses, consideration of compassion, and promotion of charity; and (3) application of Islamic law to Western IP legal systems pertaining to copyright law's transformative fair use and patent law's patentable subject matter doctrines. As a corollary, this Article shows that there are potential advantages to applying principles of Islamic IP to Western legal systems based on the normative objective of balance in Islamic IP. Drawing on these insights, this Article explores the possible incorporation of Islamic IP to Western IP legal systems to promote reformation. Finally, this Article provides

* Associate Professor of Law, Lewis & Clark Law School; Scholar, George Mason University Center for Intellectual Property x Innovation Policy; Visiting Researcher/Scholar, University of Texas at Austin School of Law & McCombs School of Business; Affiliate Faculty, Data Science Program, Lewis & Clark College; Affiliate, Fariborz Maseeh Department of Mathematics & Statistics, Portland State University; Affiliate, Portland Institute for Computational Science; Registered US Patent Attorney; J.D., Northwestern University Pritzker School of Law; M.B.A., Northwestern University Kellogg School of Management; LL.M., University of Houston Law Center; Graduate Entrepreneurship Certificate, Stanford Graduate School of Business; M.S. Mechanical Engineering (Computational Engineering), Stanford University; B.S. Mechanical Engineering, University of Texas at Austin.

legal and policy decision-makers with a more robust understanding of how Islamic IP can contribute in a myriad of ways to raising the standard of living in a society while promoting innovation.

I. INTRODUCTION	993
II. CHARACTERIZING INTELLECTUAL PROPERTY.....	1002
A. Theories of Intellectual Property: A Brief Overview	1003
B. Religious Perspectives on Intellectual Property	1005
III. ISLAMIC LAW AND INTELLECTUAL PROPERTY.....	1009
A. Tensions and Pluralism	1010
B. How Islamic Intellectual Property Recognizes Private Property	1016
C. How Islamic Intellectual Property Embodies Value Pluralism	1018
D. The Upside of Value Pluralism	1019
E. Towards Balancing Private Property and Fair Distribution...	1021
1. Limitations to Protectable Intellectual Property	1024
2. Compassionate Mindset	1025
3. Charitable Donations	1025
IV. NORMATIVE OBJECTIVES OF ISLAMIC INTELLECTUAL PROPERTY	1027
A. Objectives and Principles of Islamic Intellectual Property....	1028
B. Potential Advantages of Islamic Intellectual Property and Responses to Critique	1030
C. Policy and Theoretical Implications	1031
V. EXPLORING ISLAMIC INTELLECTUAL PROPERTY'S BALANCING: COMPARING WESTERN INTELLECTUAL PROPERTY SYSTEMS.....	1032
A. Implications for Western Intellectual Property Legal Systems.....	1034
B. Implications for Islamic Legal Systems	1039
C. Future Research Directions	1042
VI. CONCLUSION.....	1045

I. INTRODUCTION

“As a student of history, I also know civilization’s debt to Islam. It was Islam . . . that carried the light of learning through so many centuries, paving the way for Europe’s Renaissance and Enlightenment. It was innovation in Muslim communities that developed the order of algebra, our magnetic compass and tools of navigation, our mastery of pens and printing, our understanding of how disease spreads and how it can be healed.”

— President Barack Obama¹

In 2012, an anti-Muslim video stirred controversy in a US courtroom when the film *Innocence of Muslims*, which portrayed a female character debasing Prophet Muhammad, resulted in a copyright claim against Google for its refusal to take down the video.² In 2017, the Trump Organization announced that it would reapply for a trademark for a casino in Jordan, a country where gambling is illegal, in order “to enforce its intellectual property [(IP)] rights.”³ In 2019, King Fahd University of Petroleum & Minerals (“KFUPM”), a university based in the Kingdom of Saudi Arabia, ranked fourth among the top one hundred universities in granting US patents.⁴ In 2022, Saudi Aramco (the state-owned oil and gas company of the Kingdom of Saudi Arabia), a non-US entity, granted the highest number of US patents in the energy industry.⁵ Although these newsworthy examples are not directly about Islamic views of IP, they motivate a discussion about the intersection of IP and Islamic law, which has begun to enter

¹ Remarks in Cairo, Egypt, 2009 DAILY COMP. PRES. DOC. 2 (June 4, 2009).

² Steve Gorman, *U.S. Actress Sues Anti-Islam Filmmaker, YouTube in Federal Court*, REUTERS (Sept. 27, 2012, 4:04 PM), <https://www.reuters.com/article/idUSBRE88Q05N>.

³ See Jon Gambrell, *Trump Has Casino Trademark in Jordan But Gambling Is Illegal*, ASSOCIATED PRESS (Mar. 28, 2017), <https://apnews.com/article/6f10fef37cbf46a9bcc01bcb15a2d735>.

⁴ *KFUPM Ranks Fourth Globally in the Field of Patents*, MINISTRY OF ENERGY (Mar. 6, 2020), <https://www.moenergy.gov.sa/en/MediaCenter/News/Pages/KFUPM-Ranks.aspx>; see also *Saudi Varsity Ranks Global 4th in the Field of Patents*, ARAB NEWS, <https://www.arabnews.com/node/1684566/saudi-arabia> (June 5, 2020).

⁵ Tabrez Y. Ebrahim, *Intellectual Property Through a Non-Western Lens: Patents in Islamic Law*, 37 GA. STATE U. L. REV. 789, 846 n.246 (2021); Michael Davy, *The Story Behind Our Rapid Growth in Patents*, ARAMCO (Mar. 1, 2023), <https://americas.aramco.com/en/magazine/elements/2023/the-story-behind-our-rapid-growth-in-patents>; *10 Most Innovative Companies in Saudi Arabia*, FORBES MIDDLE E. (Mar. 9, 2023), <https://www.forbesmiddleeast.com/lists/10-most-innovative-companies-in-saudi-arabia/saudi-arabian-oil-co-saudi-aramco>.

the scholarly discourse among law professors, religion scholars, and theologians.

IP laws exist, in theory, to promote technological, scientific, creative, and artistic progress of society at large for the benefit of all through utilitarian justifications, but IP laws are implemented in society in ways that reward individual innovators.⁶ Inventors, authors and creators, and marketeers can protect their work when a society has an IP system that provides exclusive legal rights.⁷ As William Landes and Richard Posner have famously noted, because the enjoyment of intellectual products by one person does not prevent enjoyment by others, exclusive rights are necessary to economically recoup the “costs of expression” and “the cost of production.”⁸

The design of utilitarian theory is to benefit society as a first order objective, but rewards individuals as a second order effect.⁹ A common debate arises from IP rights: What level of legal protection should there be for its potentially positive effects for society, and what are its negative impacts on certain individuals in society? This debate pertains to challenging questions in relation to the incentives-versus-access debate in IP law.¹⁰ Since IP law is built around the concept of exclusive legal rights, it struggles to address issues that arise when balancing competing interests.¹¹ For example, a large number of granted US patents belong to the largest companies in the world.¹²

⁶ See William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 168 (Stephen R. Munzer ed., 2001).

⁷ See Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1041 (2005), <https://doi.org/10.2139/ssrn.582602>.

⁸ See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY* 1 (2003).

⁹ Utilitarian theory and reward theory are distinct rationales for IP laws. The utilitarian theory approach promotes the progress of society. The reward theory approach rewards individual innovators. Furthermore, the Lockean theory approach focuses on effort and labor of the individual innovator. While utilitarian theory premises on society, it is noteworthy that the principles of reward theory and Lockean theory also promote innovation.

¹⁰ See Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSPS. 57, 57 (2005), <https://doi.org/10.1257/0895330054048704>; David W. Barnes, *The Incentives/Access Tradeoff*, 9 NW. J. TECH. & INTELL. PROP. 96, 96 (2010).

¹¹ See THE WORLD BANK, *Intellectual Property: Balancing Incentives with Competitive Access*, in GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES 129, 130 (2002).

¹² See James E. Bessen, *The Value of U.S. Patents by Owner and Patent Characteristics* 10 (Bos. Univ. L. Sch., Working Paper No. 06-46, 2006), <https://doi.org/10.2139/ssrn.949778>; *United States: Top Patent Holders (2002-2022)*,

This fact raises challenging questions in relation to small, solo, and startup innovators, as well as social justice issues and marginalized communities.¹³ In the context of the Western IP legal systems¹⁴—particularly those in the United States—two distinct but interrelated limitations exist. First, Western IP laws, while in theory are designed to advance society, their effect advantages certain individuals significantly more than others. Second, Western IP laws do not completely consider the competing interests between large resource-rich companies with resource-poor small, solo, and startup innovators, as well as marginalized communities. The Western IP legal system’s seeming effect is the adoption of the concept of “maximization” for certain individuals to the detriment of other individuals in a society.¹⁵ US IP laws reflect such outcomes, leading to the aggregation of IP rights in a small concentration without considering fair distribution.¹⁶

GLOBALDATA (Nov. 2022), <https://www.globaldata.com/data-insights/macroeconomic/united-states-top-patents-holders-in-the—sector-2137422>.

¹³ See Lateef Mtima & Steven D. Jamar, *Researching Social Justice Aspects of Intellectual Property*, in HANDBOOK OF INTELLECTUAL PROPERTY RESEARCH 671, 671 (Irene Calboli & Maria Lillà Montagnani eds., 2021), <https://doi.org/10.1093/oso/9780198826743.003.0043>.

¹⁴ This Article defines “Western” as encompassing Anglo-American, such as the United States, which is a traditional capitalistic system. In other words, Western is used to distinguish from the Islamic perspective, which is non-Western, for the purposes of this Article. For a discussion on the distinction between the Western and Islamic perspectives, see Azhar Ibrahim, *Islam and the West: Clashes and Cooperation*, in 7 INTERNATIONAL HANDBOOKS OF RELIGION AND EDUCATION 209, 209 (Holger Daun & Reza Arjmand eds., 2018), https://doi.org/10.1007/978-3-319-64683-1_16 (describing that Islamic societies, which includes their legal systems, are confronted with a Western framework and modernity that makes it challenging to separate Islamic and Western concepts); Richard E. Vaughan, *Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say “Property”? A Lockean, Confucian, and Islamic Comparison*, 2 ILSA J. INT’L & COMPAR. L. 307, 309–10 (1996) (distinguishing the Anglo-American concept and definition of property with others such as the Islamic perspective and suggesting that Western perspectives represent a small portion of the collective perspectives because the West is comprised of “a mere 700 million out of a global population that may swell to 9 or 15 billion souls, [such that] [i]gnorance of the beliefs of such a vast number of people can only be a disadvantage to the Western intellectual property rightsholder” (footnote omitted)).

¹⁵ See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 366 (1988).

¹⁶ See Roberto Mazzoleni & Richard R. Nelson, *Economic Theories About the Benefits and Costs of Patents*, 32 J. ECON. ISSUES 1031, 1033, 1042 (1998), <https://doi.org/10.1080/00213624.1998.11506108>; Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 629–30 (2012).

The Intellectual Property Clause of the US Constitution affords Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁷ British and other Anglocentric approaches to IP law similarly grant, under private laws, exclusive rights to individual authors and inventors.¹⁸ These approaches are designed to optimize progress for society at large, but in effect they benefit certain individuals’ effort and labor motivated by the Lockean labor theory of value as a justification for IP rights.¹⁹ Another rationalization for IP emphasizes self-actualization (the Hegelian “personhood theory”) as an alternative justification for IP rights.²⁰ The Lockean approach and Hegelian approach concur on the importance of the individual, and they benefit some individuals relative to others in a society.²¹ In many societies, modern IP law’s effect is equating invention and creation with the individual self.²²

One may wonder whether there are other justifications and approaches to IP law. There has been a recent countercurrent to the utilitarian notion that IP laws are necessary to provide individuals with incentives to protect their investment and the fruits of their labor.²³ Some countering approaches and perspectives to the incentive rationale include a focus on cultural aspects of IP, justice considerations to IP, and the importance of developing countries’ capabilities. Professor Madhavi Sunder’s initial critique of the utilitarian justification of IP proposed that interrelationships between cultures that go well beyond incentives could supply a richer ground

¹⁷ U.S. CONST. art. I, § 8, cl. 8.

¹⁸ See Sean M. O’Connor, *The Overlooked French Influence on the Intellectual Property Clause*, 82 U. CHI. L. REV. 733, 736–37 (2015).

¹⁹ Karen I. Vaughn, *John Locke and the Labor Theory of Value*, 2 J. LIBERTARIAN STUD. 311, 312 (1978).

²⁰ See Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 542 (2005); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330 (1998).

²¹ See Karl Olivecrona, *Locke’s Theory of Appropriation*, 96 PHIL. Q. 220, 220, 225–26 (1974) (suggesting that the Lockean labor theory holds that IP can arise from an individual performing an act of appropriation, thereby motivating individual effort and labor); Alan Patten, *Hegel’s Justification of Private Property*, 16 HIST. POL. THOUGHTS 576, 588 (1995) (suggesting that Hegelian personhood theory prefers individual freedom from interference).

²² See Steven Shavell & Tanguy van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J.L. & ECON. 525, 527–31 (2001), <https://doi.org/10.1086/322811>.

²³ See Lemley, *supra* note 7, at 1075.

to reform IP theory.²⁴ Professor Jessica Silbey's more recent critique of IP questioned the notion of progress promoted by the growth and accumulation of IP.²⁵ There are societal consequences and uneven benefits of IP.²⁶ These ideas extend to various types of religious scholarship, which animate an opposition to the dominance of incentivizing and protecting the efforts of a certain individual who contributes to an innovation, so as to more strongly consider distributional effects.²⁷ In contrast to the dominant utilitarian justification that has shaped IP rights in the United States as well as globally through the World Trade Organization and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, a growing body of literature questions whether the concept of IP could be reformed or modified in new ways to limit excesses in society.²⁸

Religious perspectives, however, have not received nearly as much attention in IP scholarship as critical and progressive perspectives argue that IP does not engender innovation and that society would be better off without IP.²⁹ A handful of faith-based commentary have discussed the purpose, scope, and justifications of IP rights (or lack

²⁴ See Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257, 264, 266 (2006).

²⁵ JESSICA SILBEY, AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE 9 (2022), <https://doi.org/10.1515/9781503631922>; see Jessica Silbey, *Questions of Intellectual Property and Fundamental Values in the Digital Age*, 27 MARQ. INTELL. PROP. & INNOVATION L. REV. 1, 6 (2023), <https://doi.org/10.2139/ssrn.4384583>.

²⁶ See Henning Grosse Ruse-Khan, *Does IP Improve the World? Technology and Its Impact on Our Planet* 1 (Univ. of Cambridge Legal Stud. Rsch. Paper Series, Paper No. 22/2023, 2023), <https://doi.org/10.2139/ssrn.4557026>.

²⁷ See generally Thomas C. Berg, *Intellectual Property and Religious Thought*, 10 U. ST. THOMAS L.J. 579, 581–82 (2013) [hereinafter Berg, *IP and Religious Thought*] (describing how Catholic and Jewish traditions support limiting IP).

²⁸ See Mario Biagioli, *Weight Intellectual Property: Can We Balance the Social Costs and Benefits of Patenting?*, 57 HIST. SCI. 140, 154–57 (2019), <https://doi.org/10.1177/0073275318797787> (discussing a need for a progressive outlook on IP law); see generally OREN BRACHA, *OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790–1909* (2016) (discussing the origins and emergence of IP law in the United States).

²⁹ See Margo A. Bagley, *Exploring Intellectual Property Through the Lens of Religious Thought*, in HANDBOOK OF INTELLECTUAL PROPERTY RESEARCH, *supra* note 13, at 807, 812, 813, 816–17 (describing Catholic, Jewish, Islamic, and Protestant perspectives), <https://doi.org/10.1093/oso/9780198826743.003.0051>; Johnson, *supra* note 16, at, 629–30; Susan K. Sell, *Revenge of the “Nerds”: Collective Action Intellectual Property Maximalism in the Global Information Age*, 15 INT’L STUD. REV. (SPECIAL ISSUE) 67, 70–71 (2013), <https://doi.org/10.1111/misr.12021>.

thereof) in various religious traditions—including Buddhist,³⁰ Protestant³¹ and Catholic,³² Hindu,³³ Jewish,³⁴ and Islamic³⁵ perspectives—but religious engagement with IP has not addressed how

³⁰ See Soraj Hongladarom, *Buddhism and Intellectual Property Rights: The Role of Compassion*, 21 J. BUDDHIST ETHICS 443, 443, 444–45 (2014); Ven. Pandita, *Intellectual Property in Early Buddhism: A Legal and Cultural Perspective*, 19 J. BUDDHIST ETHICS 596, 596–98 (2012); SORAJ HONGLADAROM, *THE ETHICS OF AI AND ROBOTICS: A BUDDHIST VIEWPOINT* 3 (2020).

³¹ Protestantism is part of Christianity.

³² Paul J. Griffiths, *The Natural Right to Property and the Impossibility of Owning the Intangible: A Tension in Catholic Thought*, 10 U. ST. THOMAS L.J. 590, 595 (2013); David W. Opderbeck, *Beyond Bits, Memes and Utility Machines: A Theology of Intellectual Property as Social Relations*, 10 U. ST. THOMAS L.J. 738, 767 (2013); Ruth L. Okediji, *Is the Public Domain Just?: Biblical Stewardship and Legal Protection for Traditional Knowledge Assets*, 45 COLUM. J.L. & ARTS 461, 464 (2022), <https://doi.org/10.52214/jla.v45i4.10076>; Thomas C. Berg & Ruth Okediji, *Intellectual Property Rights and Religious Thought*, U. ST. THOMAS: LUMEN (Winter 2009), <https://news.stthomas.edu/publication-article/intellectual-property-and-religious-thought>.

³³ Shuba Ghosh, *Duty, Consequences & Intellectual Property*, 10 U. ST. THOMAS L.J. 801, 801 (2013).

³⁴ Jeremy Stern, *Spiritual Property, “Intellectual” Property, and a Solution to the Mystery of IP Rights in Jewish Law*, 10 U. ST. THOMAS L.J. 603, 604, 617 (2013) [hereinafter Stern, *Spiritual Property*]; Ayelet Hoffmann Libson & Adi Libson, *Replacing God with Big Data: Personalizing Copyright Law*, 39 B.U. INT’L L.J. 181, 193–94 (2021); Roberta Rosenthal Kwall, *Intellectual Property Law and Jewish Law: A Comparative Perspective on Absolutism*, 22 YALE J.L. & HUMANS. 143, 147 (2010) (reviewing DAVID L. LANGE & H. JEFFERSON POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* (2009)).

³⁵ Ebrahim, *supra* note 5, at 797; Steven D. Jamar, *The Protection of Intellectual Property Under Islamic Law*, 21 CAP. U. L. REV. 1079, 1080 (1992); EZIEDDIN ELMAHJUB, *AN ISLAMIC VISION OF INTELLECTUAL PROPERTY* 1 (2018) [hereinafter ELMAHJUB, *ISLAMIC VISION OF IP*], <https://doi.org/10.1017/9781316863398>; Bashar H. Malkawi, *Intellectual Property Protection from a Sharia Perspective*, 16 S. CROSS U. L. REV. 87, 88 (2013) [hereinafter Malkawi, *IP Protection from a Sharia Perspective*]; Bashar H. Malkawi, *The Alliance Between Islamic Law and Intellectual Property: Structure and Practice*, 10 U. ST. THOMAS L.J. 618, 619 (2013) [hereinafter Malkawi, *Alliance Between Islamic Law and IP*]; Samia Maqbool Niazi, *The Justification of Intellectual Property Rights in Islamic Law*, 4 GLOB. J. ARTS HUMANS. & SOC. SCIS. 62, 63 (2016); Rehana Anjum, *An Introduction to Intellectual Property Rights in Islamic Law* 8–13 (Apr. 18, 2019) (unpublished manuscript), <https://doi.org/10.2139/ssrn.3397868>; Alireza Milani, *The Legitimacy of Intellectual Property Rights the Light of Islamic Law (Sunni and Shia Fiqh)*, 7 WORLD J. ISLAMIC HIST. & CIVILIZATION 37, 39 (2017); Qais Ali Mahafzah et al., *The Perspective of Moral and Financial Rights of Intellectual Property in Islam*, 23 ARAB L.Q. 457, 458–59 (2009), <https://doi.org/10.1163/157302509X467399>.

to handle conflicting concepts and themes.³⁶ No work has answered the fundamental questions raised by the twin notions of recognizing private property rights and allowing access and fair distribution in society, which underlie a balanced approach to an Islamic perspective of IP (what this author coins as “Islamic IP”). Such a balanced approach considers that IP laws themselves should address distributional effects.³⁷ The Islamic IP approach fundamentally differs from Western IP legal systems and raises new questions. What is the justification for IP through Islamic religious thought? How is Islamic IP different from or similar to other faith perspectives, especially Judeo-Christian monotheistic views? After all, a—if not the—fundamental unifying point in Abrahamic faiths is an affirmation of one God; therefore, there should be many similarities among Judaism, Christianity, and Islam. And how can Islamic IP make a case for social and legal change in IP scholarship, and also shape the IP laws of developing countries that follow Islamic law in some form? Since Islam represents a complete way of life among its believers, and scholars have theorized and operationalized IP in ways unaligned with Islamic teachings, then it warrants rethinking what Islamic IP should be and why it should matter for Muslim countries.

In fact, a nascent body of literature has begun to examine IP from an Islamic perspective, and it suggests that a vision of Islamic IP is still being shaped.³⁸ In an initial publication concerning the intersection of Islamic law and one form of IP, patents, “Intellectual Property Through a Non-Western Lens: Patents in Islamic Law,” the author of the article conceptualized and offered justifications that support patents as being permissible in an Islamic legal system, but cautioned that there should be limitations compared to Western IP legal systems.³⁹ The author of the article provided analysis and reasoning to support the conclusion by the Islamic Fiqh Academy of the Organization of Islamic Cooperation (IFA-OIC)—an international

³⁶ See generally Karen Walsh et al., *Intellectual Property Rights and Access in Crisis*, 52 INT’L REV. INTELL. PROP. & COMPETITION L. 379 (2021), <https://doi.org/10.1007/s40319-021-01041-1> (discussing access barriers to IP).

³⁷ The dominant utilitarian rationale in Western IP legal systems (including the United States) considers distributional effects after optimizing innovation. By contrast, the Islamic IP approach considers that the IP legal system itself needs to address distributional effects.

³⁸ Ebrahim, *supra* note 5, at 796–97; ELMAHJUB, ISLAMIC VISION OF IP, *supra* note 35, at 1; Malkawi, *IP Protection from a Sharia Perspective*, *supra* note 35, at 88; Malkawi, *Alliance Between Islamic Law and IP*, *supra* note 35, at 619.

³⁹ Ebrahim, *supra* note 5, at 797–99.

legal council of eminent Muslim jurists, scholars, and intellectuals—that “patent rights are protected by Shari’a,” that is Islamic law.⁴⁰ This Article explores the broader and more challenging question of how to incorporate the twin notions of recognizing private property rights and allowing access and fair distribution in society into IP law doctrine, a question that has long been oriented around polarized debates concerning exclusive rights and access.⁴¹ It may seem that the answer is simply to not recognize IP or end IP in society, as some critics of IP have suggested,⁴² but the Islamic perspective suggests that taking away private property would fail to provide incentives, restrict commercial dealings, and remove a religiously ordained right.⁴³ Another perspective, despite its emphasis on exclusion, recognizes and maximizes IP rights for inventors and creators to create certainty and predictability, but such a perspective limits access and creates excess in society.⁴⁴

The Islamic perspective suggests there should be a balanced approach.⁴⁵ To delineate how IP can be structured to further this aim,

⁴⁰ ISLAMIC FIQH ACAD., *Resolution No. 43 (5/5): Concerning Incorporeal Rights*, in RESOLUTIONS AND RECOMMENDATIONS OF THE COUNCIL OF THE ISLAMIC FIQH ACADEMY 1985–2000 at 89, 89 (2000).

⁴¹ The dominant utilitarian rationale in Western IP legal systems (including the United States) attempts to optimize innovation, and in doing so, avoids some excesses. For example, the US legal system has term limits for copyrights and patents, fair use in copyright law, march-in-rights for patent law, and doctrinal balancing, such as with enablement and obviousness in patent law. But, the Islamic IP approach considers distributional effects as a central feature of an IP legal system.

⁴² See Johnson, *supra* note 16, at 671.

⁴³ See Ebrahim, *supra* note 5, at 866–69, 872, 878–79.

⁴⁴ See Adam Mossoff, *Institutional Design in Patent Law: Private Property Rights or Regulatory Entitlements*, 92 S. CAL. L. REV. 921, 933–34, 940 (2019) [hereinafter Mossoff, *Institutional Design in Patent Law*].

⁴⁵ See discussion *infra* Part III.E. This Article defines “balanced approach” as referring to the Islamic principle of “wasat” (also called “wasatiyyah”), which translates to “moderation” or “balance.” In other words, the Islamic approach promotes a centered, middle way, or moderation as a central characteristic, which this Article argues is distinct from the Western perspective for the purposes of this Article. For a discussion on “wasat,” see Quran 17:110 (“Do not recite your prayers too loudly or silently, but seek a way between.”); Quran 17:29 (“Do not keep your hand gripping at your neck nor stretch it out as far as it will reach, lest you sit back blameworthy, destitute); Quran 25:67 (“They are those who spend neither wastefully nor stingily, but moderately in between.”); Quran 31:19 (“Be moderate in your peace. And lower your voice, for the ugliest of all voices is certainly the braying of donkeys.”); Quran 2:43 (“And establish prayer, pay alms-tax, and bow down with those who bow down [in worship].”).

this Article considers three specific relevant topics—charity, compassion, and limitations—and examines the different enforcement mechanisms that promise to optimize a balance while recognizing private property rights.⁴⁶ This analysis shows how Islamic IP can focus on balancing the perspectives of IP maximalists and IP skeptics (through a value pluralism approach) in a way that increases social well-being while still respecting private property.⁴⁷ In doing so, this Article challenges the normative appeal of a value monism (preserving one value as being superior to all others) that seems to lie in IP scholarship while offering a way forward that preserves, rather than tears down, the notion of private property.⁴⁸ The thesis of this Article echoes what Islamic theory reasoned by intellectuals, jurists, scholars, and theologians suggest: Islamic law recognizes private property but also invites avoiding excess and monopolization in ways that reduce the well-being of innovators and society alike. As such, Islamic IP is not focused on maximizing private rights but takes into consideration fair distribution in ways that raise a greater number of people's standards in a society.⁴⁹

This Article navigates the unexplored territory of balance and value pluralism in Islamic IP law in five parts to point to a new and superior way to understand and govern IP. Part II provides a brief overview of IP theories and explains why religion provides a different basis for making judgments about the optimal scope of IP in a society. Accordingly, it introduces the debates among IP maximalists and IP skeptics.

Part III turns to the Islamic law perspectives about IP, which suggest that recognizing private property rights and allowing access and fair distribution in society underlie a balanced approach for maximizing innovation and social welfare. It introduces Islamic IP as being an alternative and new theory of IP, and in doing so characterizes Islamic IP, provides justifications for IP in Islamic law, and explains how Islamic IP embodies value pluralism. This Part explains how Islamic IP balances recognition of private property and fair distribution in society. It shows how Islamic IP can avoid excesses while recognizing private property in society—through charity, compassion, and limitations—and how these insights serve to develop

⁴⁶ See discussion *infra* Parts III.A, III.E.

⁴⁷ See discussion *infra* Part III.C.

⁴⁸ See discussion *infra* Part III.D.

⁴⁹ See discussion *infra* Part III.A.

an alternative and balanced approach to IP with implications for innovation policy.

Part IV describes the normative objectives of Islamic IP, its potential advantages, and its responses to critiques. It outlines the theoretical and policy implications of such an IP perspective in a society. Part V explains what it would mean to incorporate Islamic IP principles into the edifice of US IP laws as a more balanced ground to aid the system in the United States. While this Article does not suggest altering US IP laws with Islamic law, the Article concludes that an examination of Islamic IP will help reframe US IP policy with new considerations. Additionally, IP laws in Islamic legal systems are essentially replicas of Western IP laws. This Article explains how IP laws in Islamic legal systems can be reformed with consideration of Islamic theoretical concepts and other Islamic religious considerations, including the role of Islamic law, Islamic economics, and Islamic ethics. Finally, and practically speaking for future research, this Article discusses how Islamic IP needs further development and administration to be operative in a society. Part VI concludes.

II. CHARACTERIZING INTELLECTUAL PROPERTY

What does IP mean? What should IP mean for society? One plausible characterization of IP is a legal doctrine that refers to and regulates different sorts of intangibles, or nonphysical assets.⁵⁰ Whether an original form of creative expression (such as a novel, movie, musical composition) or a useful inventive form (such as a process, machine, manufacture, or a composition of matter),⁵¹ legal protection of intangibles is a social value choice for a society.⁵² The distinctive characteristics of intangibles is “that they are easily replicated and that enjoyment of them by one person does not prevent enjoyment of them by other persons” absent allocating exclusive legal rights for limited times.⁵³ IP’s impact matters generally for society, regardless of its exact legal characterization or definition.

⁵⁰ See Fisher, *supra* note 6, at 168.

⁵¹ U.S. CONST. art. I, § 8, cl. 8; 35 U.S.C. § 101. Other intangibles include words and symbols that identify a good or service (that trademark law could protect) and commercially valuable information (such as formulas for soft drinks, confidential marketing strategies, or supplier lists) that are kept reasonably secret (that trade secret law could protect).

⁵² Brian L. Frye, *IP as Metaphor*, 18 CHAP. L. REV. 735, 737–41 (2015).

⁵³ Fisher, *supra* note 6, at 169.

Why does society have IP? One simple answer is that society thinks having IP makes it better off or helps it make progress.⁵⁴ Whether it is technological, scientific, or economic development, or individual creators' and inventors' everyday lives, society prefers development because it believes that a future in which it has advanced will be preferable to one that has not advanced. Indeed, if someone were to tell policymakers in a society that certain laws would make society better off, then they would likely consider their suggestions. But not all development or progress means society will be better off, and not all notions of development or progress are uniform.

This Part elaborates on the theories and debates concerning IP, pointing out that religious perspectives on IP motivate a different evaluation, interpretation, and implementation of IP in society. This Part also outlines the ways that Islamic IP recognizes and operationalizes its view of IP, with a particular emphasis on its different perspectives than Western legal systems. Moreover, in describing the academic study of religion and IP, this Article analyzes the character and definition of Islamic IP as a normative matter and how it may provide different insights for Western legal systems.

A. *Theories of Intellectual Property: A Brief Overview*

A natural place to begin examining religious perspective on IP is understanding Western perspectives on IP itself.⁵⁵ In scholars' classic formulation, the leading theory of IP that dominates Western writing and implementation is based on economic-utilitarian grounds.⁵⁶ For example, absent ex ante incentives of IP rights giving the creator or inventor an exclusive legal right to an innovation, others can copy, share, and use that innovation unless there is a specific property right, thereby legally protecting it.⁵⁷ The economic-utilitarian theory's major insight is that IP is a policy instrument that overcomes free riding and encourages an ex ante investment in research and development for the production of knowledge and innovation.⁵⁸ Such an economic-

⁵⁴ Silbey, *supra* note 25, at 6.

⁵⁵ See generally Hughes, *supra* note 15 (exploring whether IP law reflects traditional Western theories of property law).

⁵⁶ Jeremy N. Sheff, *Philosophical Approaches to Intellectual Property Scholarship*, in HANDBOOK OF INTELLECTUAL PROPERTY RESEARCH, *supra* note 13, at 294, 294; see generally BRACHA, *supra* note 28.

⁵⁷ See generally Sunder, *supra* note 24.

⁵⁸ Ted Sichelman, *Patents as Hedges*, 38 BERKELEY TECH. L.J. 515, 517 (2023); see generally Hughes, *supra* note 15.

utilitarian theory for IP rights, however, includes trade-offs with potential “detrimental effects on market competition, the allocation of resources, the process of cumulative innovation, and the diffusion of knowledge.”⁵⁹ The economic-utilitarian theory of IP has important implications for society and businesses.⁶⁰ The exclusive legal rights IP affords, such as copyrights and patents, are associated with large deadweight losses, such as higher prices of intellectual products and greater administrative costs.⁶¹

The IP theory literature embraces other ideas besides the leading economic-utilitarian theory. Other well-known theories of IP include labor theory, personality or personhood theory, and social planning theory.⁶² The labor theory of IP suggests that an individual may legitimately acquire IP rights when mixing labor with resources that are either without an owner or held in common.⁶³ The personality or personhood theory (or Hegelian justification of private property) of IP provides that IP rights, which are crucial to satisfying fundamental human needs, are worthy enough for legal protection and that considerations such as respect, honor, and admiration should be afforded to creators and inventors.⁶⁴ The social planning theory of IP argues that IP rights should be shaped to help foster a just and attractive culture.⁶⁵ This theory is founded on the principle that IP can shape social, cultural, and economic environments based on interconnectedness.⁶⁶

These IP theories have attracted scholarly commentary and debate on the proper purpose and scope of IP rights. In doing so, IP theory literature has embraced competing definitions of what IP means and tensions IP creates among competing policy trade-offs. Moreover, the evaluation of IP laws has empirically met some

⁵⁹ David Encaoua et al., *The Economics of Patents: From Natural Rights to Policy Instruments* 6 (Apr. 24, 2003) (unpublished manuscript), <https://www.epip.eu/epip2003>. But see Robert G. Bone, *Of Trolls, Orphans, and Abandoned Marks: What's Wrong with Not Using Intellectual Property?*, 42 COLUM. J.L. & ARTS 1, 3 (2018).

⁶⁰ See Petr Hanel, *Intellectual Property Rights Business Management Practices: A Survey of the Literature*, 26 TECHNOVATION 895, 895 (2006), <https://doi.org/10.1016/j.technovation.2005.12.001>.

⁶¹ Encaoua et al., *supra* note 59, at 8.

⁶² See *id.* at 2–5.

⁶³ See Hughes, *supra* note 15, at 297.

⁶⁴ *Id.* at 330; Patten, *supra* note 21, at 577.

⁶⁵ Sunder, *supra* note 24, at 263, 268.

⁶⁶ *Id.* at 268–69.

skepticism. Despite this outsized skepticism, IP law has overcome an inordinate number of proposals for its reformation or elimination.⁶⁷ These proposals have instigated a reevaluation of the interpretation, scope, and justification of IP, prompting this Article's assessment and balance of these competing values from the particular perspective of Islam.

B. *Religious Perspectives on Intellectual Property*

Until recently, the academic study of IP was the province of scholars who debated the nature of the legal protection of intellectual activities and ideas without any religious perspective.⁶⁸ Even though one IP scholar has recognized that adherents of IP systems believe in IP as an end in itself as a sort of religion, only a few recent scholars have begun to study religious perspectives on IP.⁶⁹ The connection between religion and IP does not seem readily apparent, but there are many relevant applications of religious principles to IP doctrine and issues.⁷⁰ These scholars have investigated IP issues gleaned from religious texts and seek to bring rich, new insights to IP scholarship in ways that connect humans to something greater than ourselves, provide a moral context, and appreciate concepts of fairness and justice.⁷¹

While the contemporary study of religion and IP is a relatively recent branch of IP scholarship, it has ancient precursors.⁷² The world's historic religious traditions—Buddhism, Christianity, Hinduism, Islam, Judaism, and others—have only recently entered into the conversation among scholars of law, religion, and IP about how religious themes, practices, and communities can inform IP law and policy.⁷³ Why should one care about religious perspectives of IP?

⁶⁷ See Johnson, *supra* note 16, at 675–78.

⁶⁸ See generally Bagley, *supra* note 29, at 807, 812, 813, 816–17 (describing Catholic, Jewish, Islamic, and Protestant perspectives).

⁶⁹ Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV., 1328, 1336–38 (2015).

⁷⁰ Bagley, *supra* note 29, at 807 (“[Religious scriptures are] a rich source of inspiration . . . and can inform approaches to challenging IP questions. . . . [S]acred texts rarely if ever explicitly deal with IP rights.”).

⁷¹ Berg, *IP and Religious Thought*, *supra* note 27, at 581; Bagley, *supra* note 29, at 807.

⁷² Rémi Brague, *The Concept of the Abrahamic Religions, Problems, and Pitfalls*, in THE OXFORD HANDBOOK OF THE ABRAHAMIC RELIGIONS 88, 88–89 (Adam J. Silverstein & Guy G. Stroumsa eds., 2015).

⁷³ Berg, *IP and Religious Thought*, *supra* note 27, at 580.

One simple answer to this question is that utilitarian- and incentive-driven rationales may be limited in their justification for IP, such that IP can no longer be seen simply through the lens of economics or technology.⁷⁴

The new religious perspective on IP shows that, at times, utilitarian-driven perspectives of IP differ from religious script-based viewpoints on IP.⁷⁵ But this is an optimistic story about Islamic IP, which seeks to provide a new approach to think about IP from a normative perspective that indicates a balanced way to recognize private property and ensure societal well-being.⁷⁶ Recent religion-based IP scholarship includes a number of different perspectives that provide a new theory and approach to IP. These approaches are rooted in the proposition that religion can and should shape IP, and these approaches share a common theme of interactions among others in society.

The Buddhist approach emphasizes the notion of compassion for modifying the concept of IP.⁷⁷ The Buddhist assessment of IP recognizes there should be compassion in the network of interconnection and interdependence that is necessary in modern, globally linked innovators.⁷⁸ This notion of compassion extends to proactively requiring the innovator to seek out who else may have directly aided in the innovation's development and provide fair compensation to them; if such parties cannot be identified, such that they can share benefits of the innovation, then there will be an imbalance in how the world community can benefit from the innovation.⁷⁹ Buddhism, however, provides that understanding the interrelatedness among all things underpins the concept of compassion and does not lead to abandoning private property altogether.⁸⁰ In fact, Buddhist teachings suggest following the IP laws of the lands, but one should be cognizant of and keep one's morality as being superior to IP laws in society when in conflict.⁸¹

⁷⁴ See Sunder, *supra* note 24, at 259.

⁷⁵ See Abdul Karim Aldohni, *Islam and Business Ethics*, in *ENCYCLOPEDIA OF BUSINESS AND PROFESSIONAL ETHICS* 1177, 1777–78 (Deborah C. Poff & Alex C. Michalos eds., 2023).

⁷⁶ See discussion *infra* Part III.E.

⁷⁷ Hongladarom, *supra* note 30, at 449–56.

⁷⁸ See *id.* at 452.

⁷⁹ *Id.* at 454, 457.

⁸⁰ *Id.* at 449–54.

⁸¹ See *id.* at 449; Pandita, *supra* note 30, at 619–20.

The Hindu approach to IP is based on conceptions of justice.⁸² This perspective looks at ancient Indian texts to rethink the concept of ownership and IP.⁸³ Scholarly perspectives on Hinduism IP focus on the importance of sharing IP through licensing.⁸⁴ Hindu perspectives of IP center on consideration of consequences, duties, and obligations.⁸⁵ As such, the Hindu approach to IP considers that the ethics of IP rights necessitate consideration for duties and obligations of others.⁸⁶

Christian perspectives consider the ownership of property as belonging to God. Protestants and Catholics affirm the deity and lordship of Jesus Christ and have some similar beliefs, including the notion of property. But Catholic teachings, including the Catholic Social Teaching, specifically address property in relation to social justice and wealth distribution in society.⁸⁷ As such, the Catholic view considers the importance of renouncing property as well, with importance given to poverty over the propertied life.⁸⁸ The Catholic perspective stresses the link between creative human activity and grace, such that importance is given to the needs of those in poverty.⁸⁹ The Catholic and Protestant viewpoints are similar to the monotheistic faiths' views that IP maximization should not be the goal of a society run under religious guidelines, given that creativity and inventive actions should consciously consider their potential effects on others in society, including long-term socioeconomic development and socio-moral dimensions.⁹⁰ While Protestant and Catholic perspectives do entail less than an IP maximization viewpoint, they also recognize and promote private property as a sacred and honored legal right based on

⁸² See Ghosh, *supra* note 33, at 802.

⁸³ See Prabha Sridevan, *Intellectual Property in the Ancient Indian Texts*, in DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS 232, 233 (Irene Calboli & Srividhya Ragavan eds., 2015); Janani Ganapathi & Venkat Pulla, *Intellectual Property Rights and the Ancient Indian Perspective*, SPACE & CULTURE, INDIA, Nov. 2015, at 15, 16.

⁸⁴ Ganapathi & Pulla, *supra* note 83, at 22.

⁸⁵ Ghosh, *supra* note 33, 818–19.

⁸⁶ *Id.* at 819.

⁸⁷ See PONTIFICAL COUNCIL FOR JUST. & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH §§ 171–84, at 75–80 (2004); H. Justin Pace, *Rogue Corporations: Unlawful Corporate Conduct and Fiduciary Duty*, 85 MO. L. REV. 1, 32, 34–35, 39, 54 (2020).

⁸⁸ Griffiths, *supra* note 32, at 595.

⁸⁹ Opderbeck, *supra* note 32, at 767.

⁹⁰ Okediji, *supra* note 32, at 490.

Biblical teachings. Islamic viewpoints similarly reflect this balanced mindset, which draw upon some Protestant and Catholic teachings in their theological underpinnings. As this Article addresses, however, one distinction between Protestant and Catholic and the Islamic perspective is that the Islamic viewpoint calls for government intervention, whereas Protestant and Catholic perspectives support IP in the marketplace without generally relying on government.⁹¹

Jewish viewpoints on IP parallel Christian perspectives, since both share common monotheistic principles. The Islamic perspective on IP includes similar viewpoints.⁹² Judaism, while acknowledging that there are barriers to recognizing IP, conceives private property so long as God is accepted as the source and human beings as temporal owners.⁹³ While there are debates within Jewish law on whether intangibles are property, the law does not recognize absolute exclusive rights of property but has limitations to vindictive and parsimonious behaviors concerning property.⁹⁴ In other words, Judaism limits absolutists approaches to legal rights with discretionary considerations.⁹⁵

In sum, religious perspectives on IP demonstrate differences and limitations compared to Western IP legal systems. Religious approaches and perspectives to IP—whether Buddhist, Hindu, Christian, or Jewish—recognize private property in some form, but with a different interpretation than Western IP legal systems. Similarly, and distinctly, as this Article points out, Islamic IP provides a different vantage point of IP than in Western IP legal systems.⁹⁶

⁹¹ See Berg & Okediji, *supra* note 32; Ebrahim, *supra* note 5, at 898.

⁹² See discussion *infra* Part IV.

⁹³ Stern, *Spiritual Property*, *supra* note 34, at 605.

⁹⁴ Libson & Lisbon, *supra* note 34, at 194.

⁹⁵ See, e.g., Kwall, *supra* note 34, at 145–46.

⁹⁶ See generally Lena Salaymeh, *Islamic Law*, in 12 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 746, 746 (2d ed. 2015) (describing the ways in which Islamic legal systems abide by the Islamic faith and suggesting a value pluralistic to law in Islam); Nuh Ha Mim Keller, *Why Muslims Follow Madhhabs?*, MASUD.CO.UK (1995), <http://www.masud.co.uk/ISLAM/nuh/madhabstlk.htm> (describing the legal philosophy of Islam as requiring input from religious texts as well as scholarly input).

III. ISLAMIC LAW AND INTELLECTUAL PROPERTY

What does IP provide? In particular, why does society provide exclusive rights to creations of the mind? Scholars have developed a number of different theories to answer these difficult questions, looking to considerations such as incentivizing innovation, recouping expenditures in research and development, prohibiting the free rider problem, permitting clear and predictable private property rights, encouraging follow-on innovation, sparking industry development, coordinating commercialization, limiting duplication, reducing information costs for financing through signaling to investors, and promoting progress.⁹⁷ Other scholars have cautioned about IP's effects on creating supranormal pricing and high entry costs, restricting access to essential medicines, forming inequities in society, producing imbalances among industrialized and developing countries, raising human rights concerns, reducing public health standards, and not achieving progress for society.⁹⁸

Despite the stark differences in viewpoints of IP, these frameworks and implications share two common features. First, they are normative in that they seek to explain what society values and the legal institutions that enable those values; in other words, they are more than just the descriptive discussion of what IP is and may be definitionally. Second, they rely centrally on premises about how exclusive legal rights affect innovators and non-innovators alike, such as how IP can make society better off or worse off.

This Part uses religious perspectives outlined in Part II to make two contributions to the scholarly dialogue about an alternative normative approach to IP: Islamic IP. First, religious scholarship's fraught relationship with minimizing or eliminating private property rights challenges the central, factual premise on which many legal systems rely, seriously complicating the practical applicability and

⁹⁷ See Josh Lerner, *The Empirical Impact of Intellectual Property Rights on Innovation: Puzzles and Clues*, 99 AM. ECON. REV. 343, 343 (2009); Jonathan H. Ashtor, *Does Patented Information Promote the Progress of Technology?*, 113 NW. U. L. REV. 943, 945 (2019); Michele Boldrin & David K. Levine, *What's Intellectual Property Good For?*, 64 REVEUE ÉCONOMIQUE 29, 30 (2013).

⁹⁸ See Subhash C. Jain, *Problems in International Protection of Intellectual Property Rights*, 4 J. INT'L MKTG. 9, 22 (1996); Brian Martin, *Against Intellectual Property*, in INFORMATION LIBERATION: CHALLENGING THE CORRUPTIONS OF INFORMATION POWER 29, 31–33 (1998), <https://doi.org/10.1177/1069031X9600400103>; Johnson, *supra* note 16, at 624–25; Youn Jung & Soonman Kwon, *The Effects of Intellectual Property Rights on Access to Medicines and Catastrophic Expenditure*, 45 INT'L J. HEALTH SERVS. 507, 508 (2015), <https://doi.org/10.1177/00207314155584560>; Silbey, *supra* note 25, at 18.

enforcement of such religious perspectives. Second, Islamic IP provides a framework for thinking about how a more balanced model can recognize private property rights and allow access and fair distribution in society—a critical and novel approach to an alternative theory of IP.

Few would disagree with an IP theory that suggests society should recognize private property while also enabling access and fair distribution. But what does it mean to have a balanced approach to IP?⁹⁹ Islamic IP suggests some surprising new insights in what IP can and should be in society.

A. *Tensions and Pluralism*

Islamic IP is a term that embodies the Islamic vision of IP.¹⁰⁰ The lens of Islamic IP makes a case for the notions of recognizing private property and fair distribution.¹⁰¹ The Islamic IP approach considers that distribution should be a central feature of an IP legal system. As such, this perspective identifies private property and distribution inherent in Islamic IP as a pluralistic account and framework—an alternative conceptual framework for IP. Value pluralism refers to the existence of multiple moral values.¹⁰² As applied in the context of Islamic IP, value pluralism discusses the idea that multiple values in Islam can be honored through a proper, theologically sound system of property.¹⁰³ The twin notions of private property and distribution lie

⁹⁹ See discussion *infra* Part III.E.

¹⁰⁰ “Islamic intellectual property” or “Islamic IP” is based on the author of this Article’s understanding of Islam, literary research (including many of the sources identified in this Article), and qualitative interviews with Islamic law scholars, theologians, and experts. Islamic IP entails interpretation of classical Islamic law, which refers to the body of Islamic rules, principles, and cases compiled by religious scholars during the first two centuries after Prophet Muhammad (peace be upon him). The Leonardo da Vinci Fellowship research grant of the George Mason University Center for Intellectual Property x Innovation Policy supported some of the qualitative interviews by enabling international travel to conduct in-person discussions.

¹⁰¹ See SIRAJ SAIT & HILARY LIM, LAND, LAW & ISLAM: PROPERTY AND HUMAN RIGHTS IN THE MUSLIM WORLD 33 (2006); Engku Rabiah Adawiah Engku Ali, *Re-Defining Property and Property Rights in Islamic Law of Contract*, 11 JURNAL SYARIAH 47, 54 (2003); ELMAHJUB, ISLAMIC VISION OF IP, *supra* note 35, at 1–2, 5.

¹⁰² *Value Pluralism*, STAN. ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/entries/value-pluralism> (June 4, 2023); Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT’L. L. 1, 59–60 (2008).

¹⁰³ Mohammad Hashim Kamali, *Diversity and Pluralism: A Qur’ānic Perspective*, 1 ISLAM & CIVILISATION RENEWAL (SPECIAL ISSUE) 27, 29, 30 (2009),

at the center of understanding Islamic IP. Additionally, a general principle of Islamic IP is to provide “the greatest good for the greatest number of people” in society, and this draws on the concept of public interest in Islamic law.¹⁰⁴

The legal understanding of property in Islamic law centers on private property.¹⁰⁵ Leading Islamic law scholars, jurists, and theologians each locate the notion of private property as central and inextricable to the idea of property within Islam.¹⁰⁶ There is a notion within Islamic law that property within Islam includes IP.¹⁰⁷ If any principle can compete with how Islamic law interprets private property, it is fair distribution in society.¹⁰⁸ The Islamic principle of fair distribution represents a social obligation and duty that has long been part of value pluralism in Islam.¹⁰⁹ One can find particularly symbolic modern expression of value pluralism in the literature on Islamic economics, which while recognizing modern financial

<https://doi.org/10.52282/icr.v1i1.12> (suggesting that pluralism refers to cooperative relations between multiple viewpoints in a society); Shafiq Ahmed Shiekh, *Pluralism in Islam: Nature and Development*, 13 INSIGHT ISLAMICUS 59, 60 (2013) (defining that pluralism means that a society has a variety of religious or cultural groups living together).

¹⁰⁴ Md Abdul Jalil et al., *The Greatest Good for the Greatest Number of People: An Islamic Philosophical Analysis*, 9 J. SOC. SCIS. & HUMANS. 14, 14–15 (2014) (discussing how Western philosophy can be harmonized with Islamic jurisprudence, particularly the theory of *maslaha*); see also Ebrahim, *supra* note 5, at 873 n.342.

¹⁰⁵ Quran 2:188 (“And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people’s property.”); *id.* at 4:21 (“Eat not up your property among yourselves in vanities: But let there be amongst you traffic and trade by mutual goodwill.”).

¹⁰⁶ See Hayatullah Laluddin et al., *Property and Ownership Rights from an Islamic Perspective*, 6 ADVANCES NAT. & APPLIED SCIS. 1125, 1125–26 (2012) (describing that Islamic law, which is based on a divinely ordained system, recognizes property as with a high degree of freedom and entails a special relationship between humans as trustees of the divine).

¹⁰⁷ Ebrahim, *supra* note 5, at 828–29.

¹⁰⁸ See John A. Makdisi, *The Islamic Origins of the Common Law*, 77 N.C. L. REV. 1635, 1650–52, 1658–75 (1999); Alireza Naseri et al., *Restrictions on the Right to Private Property in the Iranian Legal System*, INT’L J. HUMANS. & CULTURAL STUD. (SPECIAL ISSUE) 2155, 2156 (2016) (suggesting that restrictions to private property in Islamic legal systems should include social benefits and public interests).

¹⁰⁹ See D.B. Resnik, *A Pluralistic Account of Intellectual Property*, 46 J. BUS. ETHICS 319, 322 (2003), <https://doi.org/10.1023/A:1025631902384>; Berg, *IP and Religious Thought*, *supra* note 27, at 581.

principles, still calls for official redistribution systems to collect religious tax and disburse the proceeds across society.¹¹⁰

The burgeoning Islamic finance literature provides a balance between commercial interests for individuals and distribution in society in a number of ways and discusses motivations for similar concepts in Islamic IP.¹¹¹ The modern trends in Islamic finance follow norms drawn from the traditional sources of Islam, such as promoting economic activity and trade while avoiding extravagance, discouraging activities that create harmful externalities, simulating generosity, and preventing hoarding.¹¹² In light of this pluralistic view of Islamic principle in a society, it is hardly surprising that Professor Timur Kuran has observed, “the Islamic economy is said to differ from both capitalism and socialism. From the standpoint of Islamic economics, economic freedoms are too broad under capitalism and too narrow under socialism. The Islamic economy constitutes a ‘third way’ that constrains economics liberties optimally.”¹¹³

The notion of value pluralism similarly occupies theorists, theologians, and scholars about IP.¹¹⁴ Value pluralism considers that there are many principles in the interpretation of law, whereas value monism attempts to preserve one particular value as a superior value.¹¹⁵ There is, and long has been, a countercurrent in Islam to the notion that private property is solely about one value—the *sine qua non*

¹¹⁰ Timur Kuran, *Islamic Economics and the Islamic Subeconomy*, 9 J. ECON. PERSPS. 155, 156, 159 (1995) [hereinafter Kuran, *Islamic Economics*], <https://doi.org/10.1257/jep.9.4.155>.

¹¹¹ LARRY BEEFERMAN & ALLAN WAIN, GETTING REAL ABOUT ISLAMIC FINANCE 61–62 (2016) (ebook), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849286; Hans Visser, *The Islamic Economy: Its Origin, Its World View, and Its Claims*, 3 CENT. EUR. REV. ECON. & MGMT. 59–62 (2019), <https://doi.org/10.29015/cerem.765>; Amjid Ali, *Viewpoint: Shariah Law—Bringing a New Ethical Dimension to Banking*, in ISLAMIC FINANCE: INSTRUMENTS AND MARKETS 3, 5 (2010); Alsadek H. Gait & Andrew Worthington, *A Primer on Islamic Finance: Definitions, Sources, Principles and Methods* 2 (Univ. of Wollongong Sch. of Acct. & Fin., Working Paper No. 07/05, 2007), <https://ro.uow.edu.au/cgi/viewcontent.cgi?article=1004&context=accfinwp>.

¹¹² Kuran, *Islamic Economics*, *supra* note 110, at 160.

¹¹³ *Id.* at 159.

¹¹⁴ Tayebah Saheb, *Value Pluralism of Intellectual Property Law*, 7 J. PRIV. L. RSCH. 171, 171 (2019), <https://doi.org/10.22054/jplr.2018.24968.1640>; Justine Pila, *Pluralism, Principles, and Proportionality in Intellectual Property*, 24 OXFORD J. LEGAL STUD. 181, 193–94 (2014); Resnik, *supra* note 109, at 330.

¹¹⁵ Chris Kelly, *Value Monism, Richness, and Environmental Ethics*, 9 ETHICS F. 110, 112 (2014); Saheb, *supra* note 114, at 171.

definitional feature of Western private property.¹¹⁶ Nearly all scholars concede exclusion is central to the very idea of Islamic private property, but they also recognize that there may be multiple values that are equally valid and equally fundamental.¹¹⁷ A question is whether exclusion can be counterbalanced in some form within Islamic principles.¹¹⁸ The idea that private property exists in Islamic law goes back to the primary sources of Islamic law: the Quran and Sunnah.¹¹⁹ Yet the critiques of private property in Islamic law are based on the moral worth and obligation of generosity to others in society and are espoused in the Quran and Sunnah as well.¹²⁰ Furthermore, the analysis of legal issues in the Quran and Sunnah also requires an interpretative methodology for assessing the appropriate legal balance

¹¹⁶ Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730, 752 (1998).

¹¹⁷ Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1020 (2011) [hereinafter Alexander, *Pluralism and Property*].

¹¹⁸ The right to exclude is a conceptual tool that will require assessment of Islamic law doctrine, with private property rights and social obligations as explanatory principles. To date, it appears there has been no comprehensive statement of the constitute feature of the Islamic right to exclude by Islamic scholars, theologians, and jurists. But its theoretical derivation is beneficial across a broad spectrum of areas in real property and IP in both Islamic societies and Western legal systems. The right to exclude has resulted in a great deal of scholarly discussion among Western law professors and is embedded in Western legal systems. Much of the controversy stems from the artificial dichotomy between use, on the one hand, and exclusion, on the other hand. Islamic property law magnifies this dichotomy, for which the acceptable use of a resource is limited in comparison to Western legal systems due to religious restriction and social obligation of *al-mal* (or property, as translated from Arabic). This dichotomy, and the differing assumptions that underlie it in Western legal systems and Islamic law, provides a fresh perspective and important lessons to Western scholarship. Looking through the Islamic mirror could reveal new and important ideas and principles, force a reevaluation that improves social order, and improve the tenets of Western legal systems. Islamic teachings can offer significant points of reference to Western scholarship and Western legal systems because they provide knowledge and a different perspective to be used in the development of property law.

¹¹⁹ Samiul Hasan, *Islamic Jurisprudence: Sources and Traditions Creating Diversity in Human Relationships*, in THE MUSLIM WORLD IN THE 21ST CENTURY: SPACE, POWER, AND HUMAN DEVELOPMENT 23, 24 (Samiul Hasan ed., 2012), https://doi.org/10.1007/978-94-007-2633-8_2 (explaining that the Quran and the Sunnah are the fundamental sources of Islamic principles, with the Quran serving as a “guidance for mankind,” such as economic relationships and laws, and with the Sunnah compiled as Hadith, offering guidance defining human beings’ purpose, objectives, and relationships to one another, to God, and nature (quoting Quran 2:2)).

¹²⁰ Shakeel Ahmad Sofi & Fayaz Ahmad Nika, *Concepts of Social Justice: An Islamic Perspective*, 8 EUR. J. BUS. & MGMT. 19, 22 (2016).

between private property and generosity towards others in society.¹²¹ The notion of pluralism is an essential feature of Islamic IP, and it draws upon the importance of differentiating and integrating two principles in an Islamic context: (1) recognizing private property, and (2) enabling fair distribution in society.

A handful of scholars, shariah boards, and theologians have made assessments of IP in Islamic law that draw heavily on one of these two principles. An evaluation of both private property and fair distribution in a value pluralistic account of IP in Islamic law, however, has not received much attention as one monistic perspective.¹²² The Islamic literature on IP has embraced two competing visions of IP. The first simply accepts IP and equates IP with property.¹²³ Per this characterization, IP is allowed since it is a species of property, which is referenced numerous times in the sources of Islamic law.¹²⁴ This kind of IP—or IP under an Islamic perspective—is justified as being permissible since it has value, which Islamic scholars consider as worthy of ownership.¹²⁵ This perspective recognizes that owning valuable IP can be useful in commercial dealings. Relatedly, this viewpoint considers that humans' ability to create something of value (through creativity or inventive activity) reflects a divine quality.

¹²¹ IMRAN AHSAN KHAN NYAZEE, *THE METHODOLOGY OF IJTIHAD: OLD AND NEW (COMPARATIVE JURISPRUDENCE)* 17–18, 28–31 (2021) (describing the methodology of interpreting the primary sources of law in Islam).

¹²² Valentino Cattelan, *Legal Pluralism, Property Rights and the Paradigm of Islamic Economics*, 30 JKAU 21, 26 (2017), <https://doi.org/10.4197/Islec.30-1.2>.

¹²³ Malkawi, *IP Protection from a Sharia Perspective*, *supra* note 35, at 88; Malkawi, *Alliance Between Islamic Law and IP*, *supra* note 35, at 618–19.

¹²⁴ Frank Snare, *The Concept of Property*, 9 AM. PHIL. Q. 200, 201 (1972); Quran 2:188 (“And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people’s property.”); Quran 4:21 (“Eat not up your property among yourselves in vanities, but let there be amongst you traffic and trade by mutual goodwill.”); Siti Mariam Malinumbay S. Salasal, *The Concept of Land Ownership: Islamic Perspective*, 2 BULETIN GEOINFORMASI 285, 286 (1998) (explaining that Allah refers to the Lord Sovereign of “all that is in the heavens and on the earth,” and that land, water, air, sunshine, and all other everything considered property in the west is meant for the common use and benefit of society); Samia Maqbool Niazi, *The Nature of Property, Its Valuation and Intellectual Property Rights in Islamic Law*, 4 J. ISLAMIC STUD. & CULTURE 69, 70 (2016), <https://doi.org/10.15640/jisc.v4n1a9> (describing that *mal* is anything that can be stored for the time of need and for which commercial and financial value is established by human beings); Quran 3:129 (“To Allah belongeth whatsoever is in the heavens and on earth.”).

¹²⁵ Ebrahim, *supra* note 5, at 797.

The second perspective rejects IP and defines IP as contrary to Islam or against the social vision of Islam. Scholars taking this perspective either point out that Islamic sources of law do not explicitly mention IP or argue that the monopolization potential of IP counters Islamic principles for a society.¹²⁶ The difference between this second perspective and the first perspective is that those who argue against IP are concerned with the potential of aggregating private property in ways that prevent access and create economic imbalances in society.¹²⁷ Those who argue against IP from a theological perspective suggest that the use of human beings' creativity or inventiveness in a way that seems contrary to societal well-being runs afoul of Islamic principles.

Yet no work has answered the fundamental question that should underlie the legal and theoretical integration of both principles: What is the optimal strategy for recognizing private property and enabling fair distribution for IP in an Islamic society? From a pluralism standpoint, integrating private property and fair distribution warrants rethinking whether these principles should be the foundational theme of an alternative theory of IP: Islamic IP.

Thus, the IP inquiry in Islamic law of integrating competing principles is especially rife with tensions because Islam permits private property but also prevents hoarding of wealth and distribution of resources across society.¹²⁸ The notion of IP in Islamic law is met with understandable skepticism, given the counterintuitive notion of allowing private property but restricting excessive wealth accumulation.¹²⁹ But, due to this skepticism, scholars, jurists, and theologians who have studied and commented upon IP in Islamic law have encountered and ultimately overcome new tensions. This Islamic view considers IP as distinct and unique from real property (given IP's intangible nature), and as such, IP should be regulated differently than real property.

¹²⁶ ELMAHJUB, ISLAMIC VISION OF IP, *supra* note 35, at 1.

¹²⁷ A counterargument, however, is that conceptually the value of IP differs from what creates value in real property. The reason for this distinction between IP and real property is that one uses intellectual labor for creative and inventive activity for IP, and as such IP is inherently the product of creative or inventive activity (whereas real property is not, in the sense that human capital does not create real property).

¹²⁸ Paola García, The Concepts of Property and Ownership in the Moral Economy of Islam 2 (2018) (unpublished manuscript), https://www.academia.edu/36714489/The_Concepts_of_Property_and_Ownership_in_the_Moral_Economy_of_Islam.

¹²⁹ ELMAHJUB, ISLAMIC VISION OF IP, *supra* note 35, at 1.

In terms of tensions, the same debates occur in other monotheistic religious traditions with Judaism and Christianity. In fact, both Jewish and Christian perspectives recognize the obligations with and harms of wealth aggregation to the detriment of one's soul and of society.¹³⁰

B. *How Islamic Intellectual Property Recognizes Private Property*

Private property rights play an important role in Islamic IP. This feature reveals a deep parallel with Western IP legal systems, which, as described, allow for private property without any ethical or moral consideration nor any semblance of compassion or charity. Academic study considers IP as a type of private property, and Western IP legal systems retain a private property nature.¹³¹ Islamic IP systems have private property characteristics yet embody more distinctive features than Western legal systems.¹³²

Islamic IP allows creators and inventors the right to own an intangible asset and the right to excludes others.¹³³ But, given that the Islamic view of private property considers the capability of human ownership in an agency conceptualization where The Divine is the absolute owner, The Divine requires societal obligations for the private property right.¹³⁴ Also, because the Islamic view of property concerns a temporary right only in the material world, exploitation of the private property right is also limited since the right must be applied or used (rather than lay dormant for an extended time).¹³⁵ Thus, while Islamic law allows for private property, including recognition of ownership and

¹³⁰ Bagley, *supra* note 29, at 813.

¹³¹ Robert P. Merges, *What Kind of Rights Are Intellectual Property Rights?*, in THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY 57, 58–60 (Rochelle C. Dreyfuss & Justin Pila eds., 2017), <https://doi.org/10.1093/oxfordhb/9780198758457.013.8>.

¹³² Martin Hirschprung, *Ownership Is Nine-Tenths of Possession: How Disparate Concepts of Ownership Influence Possession Doctrines*, 41 VT. L. REV. 143, 145 (2016).

¹³³ 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1979); Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. PA. L. REV. 917, 935 (2017); Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 604 (1998); James Y. Stern, *What Is the Right to Exclude and Why Does It Matter?*, in PROPERTY THEORY: LEGAL AND POLITICAL PERSPECTIVES 48–49 (M.H. Otsuka & J.E. Penner eds., 2018) [hereinafter Stern, *What Is the Right to Exclude*]; Henry E. Smith, *The Thing About Exclusion*, 3 BRIGHMAN-KANNER PROP. RTS. CONF. J. 95, 104–107 (2014); Ebrahim, *supra* note 5, at 837–837.

¹³⁴ SAIT & LIM, *supra* note 101, at 1, 8, 10 (explaining that Islam considers property and land to vest in God but humans temporally enjoy property through a trust where humans are allowed to use the property resources but never own it).

¹³⁵ Salasal, *supra* note 124, at 285–87.

the right to exclude others, there are limitations and societal considerations.¹³⁶

Other monotheistic faith traditions embody a similar conceptualization of private property. For example, in Judaism, private property rights are recognized and are enforced when there is theft of private property.¹³⁷ And as an additional example, Catholicism and Protestantism recognizes private property, but it is not considered as an end in itself; instead, these religions deem private property as a social mortgage of goods that are originally meant for all.¹³⁸ Given the similar conceptualization of private property in Judeo-Christian traditions and Islam, a natural inquiry is why Western IP legal systems, which stem in some way from Judeo-Christian origins, do not embody such balancing stemming from access, distribution, and equity present in religious views.¹³⁹ Here again, private property rights are permissible in all monotheistic faith traditions, and thus allow creators and inventors to reap what they sowed, thereby maintaining incentives. In this respect, Western IP legal systems clearly parallel Islamic IP, which also confers exclusive rights to prevent free riding and maintaining incentives.

¹³⁶ See Abdel Hameed M. Bashir, *Property Rights, Institutions and Economic Development: An Islamic Perspective*, 18 HUMANOMICS 75, 77–78 (2002), <https://doi.org/10.1108/eb018877>; Rose, *supra* note 133, at 604; Stern, *What Is the Right to Exclude*, *supra* note 133, at 59; Klick & Parchomovsky, *supra* note 133, at 919–21, 923; Adam Mossoff, *The False Promise of the Right to Exclude*, 8 ECON. J. WATCH 255, 256 (2011) [hereinafter Mossoff, *False Promise of the Right to Exclude*]; Smith, *supra* note 133, at 95.

¹³⁷ Stern, *Spiritual Property*, *supra* note 34, at 604–06.

¹³⁸ Thomas C. Berg, *Intellectual Property and the Preferential Option for the Poor*, 5 J. CATH. SOC. THOUGHT 193, 200–201 (2008) (quoting Pope John Paul II, *Sollicitudo Rei Socialis* [Encyclical Letter on Social Concern] ¶ 42 (Dec. 30, 1987), http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis_en.html), <https://doi.org/10.5840/jcathsoc20085110>.

¹³⁹ See KODY W. COOPER & JUSTIN BUCKLEY DYER, THE CLASSICAL AND CHRISTIAN ORIGINS OF AMERICAN POLITICS: POLITICAL THEOLOGY, NATURAL LAW, AND THE AMERICAN FOUNDING 18–19, 21–23 (2022); Salasal, *supra* note 124, at 285–87 (providing an ayat from the Quran as support reflecting property ownership: “All that is in the heavens and on the earth belong to Allah s.w.t.’ ‘To him belongs whatever is in the heavens and on earth.’ ‘His is the Kingdom of the heavens and the earth and all that lies between them.’ ‘It is He who has made the earth manageable for you so traverse you through its tracts and enjoy of the sustenance which he furnishes, but unto Him is the resurrection’” (citations omitted) (first quoting Quran 4:126, 134; then quoting Quran 16:52; then quoting Quran 43:85; and then quoting Quran 67:15)).

At a cursory glance, it seems odd that Western IP legal systems with Judeo-Christian underpinnings are critiqued for having issues with access, distribution, and equities. Of course, for a variety of reasons, Western legal systems have deviated from their Judeo-Christian origins, as many scholars note.¹⁴⁰ While Western IP legal systems encourage creativity and inventiveness (thus encouraging attainment of private property rights), Islamic IP provides the traditional notions of access, distribution, and equities that have lessened in Judeo-Christian-based Western IP legal systems. Thus, Islamic IP embodies value pluralism through a balancing approach.

C. *How Islamic Intellectual Property Embodies Value Pluralism*

In addition to recognizing private property, Islamic IP embodies value pluralism in several ways. Value pluralism refers to society not accepting a single comprehensive doctrine, but instead supporting “multiple values that are equally valid and equally fundamental” even if “these values sometimes conflict with each other.”¹⁴¹ In doing so, Islamic IP diverges from Western legal systems, which adopt value monism by considering exclusionary rights superior to all other values.¹⁴²

By contrast, Islamic IP, which embodies ethical values and moral considerations rooted in Islam, requires a pluralistic approach.¹⁴³ The foundational principles of Islamic IP theory entail an appropriate balance “between competing individual and societal interests.”¹⁴⁴ In a sense, Islamic IP allows different aspects of Islamic law to be governed in society by recognizing different values—private property and fair distribution—to serve distinct social functions.¹⁴⁵ As such, Islamic IP occupies an intermediary space between Western IP legal rules and Islamic ethical and moral values.¹⁴⁶ While this space is still yet to be ironed out in Islamic legal systems, the theoretical and normative discourse herein begins theorizing this framework.

¹⁴⁰ See COOPER & DYER, *supra* note 139, at 18–19, 21–23.

¹⁴¹ Alexander, *Pluralism and Property*, *supra* note 117, at 1020.

¹⁴² See Smith, *supra* note 133, at 95; Kelly, *supra* note 115, at 111; Saheb, *supra* note 114, at 171.

¹⁴³ Cattelan, *supra* note 122, at 21.

¹⁴⁴ Pila, *supra* note 114, at 186; Cattelan, *supra* note 122, at 29.

¹⁴⁵ Sulaiman Lebbe Rifai, The Concept of Pluralistic Society in Qur’anic Perspectives 1, 6–8 (Feb. 27, 2021) (unpublished manuscript), <https://ssrn.com/abstract=3794132>.

¹⁴⁶ See Cattelan, *supra* note 122, at 22.

This discussion of value pluralism raises an initial question of whether these principles are born from any current Islamic legal systems. For example, when interpreting and applying Islamic IP, how does an Islamic legal system consider limiting the full scope of exclusive legal rights afforded to inventors? How can fair distribution take place and what sort of valuation is performed of IP assets in such balancing? How can an Islamic IP legal system be administered and what are its limitations? These questions require greater exploration and are the impetus for future research studies.¹⁴⁷

It seems clear from these questions and themes that Islamic IP is premised on limitations to maximization of private property rights, which while still recognized are balanced by other societal considerations.¹⁴⁸ Examples could include mitigating excesses (such as preventing abusive activities and limiting monopolistic behaviors), lowering barriers to access, establishing duties to limit harms, encouraging exploitation of innovations, and promoting societal considerations and societal impact in commercial dealings.¹⁴⁹ Among other things, this discussion draws attention to the way that the theory and implementation of Islamic IP differs from Western legal systems.

D. *The Upside of Value Pluralism*

The area of IP theory from which the new alternative theory of Islamic IP has the most salience is value pluralism. Islamic IP embodies a theory that addresses important concerns about the distribution of the benefits of IP.¹⁵⁰ By contrast, most Western theories, scholarly proposals, and jurisprudential discussions of IP focus on the tensions between individual rights and the public good without acknowledging the balance of economic benefits and social justice.¹⁵¹ Since IP is criticized with contributing to socioeconomic disparities within a

¹⁴⁷ See discussion *infra* Parts IV.B, V.C.

¹⁴⁸ See Omar Farahat, *Moral Value and Commercial Gain: Three Classical Islamic Approaches*, 21 J. ARABIC & ISLAMIC STUD. 209, 212 (2021), <https://doi.org/10.5617/jais.9376>; Russell Powell, *Social Justice and Islamic Jurisprudence*, 17 SEATTLE J. FOR SOC. JUST. 1, 16–17, 23 (2018); Jacqueline Lipton, *Balancing Private Rights and Public Policies: Reconceptualizing Property in Databases*, 18 BERKELEY TECH. L.J. 773, 776, 780 (2003); Michelle K. Walsh, *Achieving the Property Balance Between the Public and Private Property Interests: Closely Tailored Legislation as a Remedy*, 19 WM. & MARY ENV'T L. & POL'Y REV. 317, 329 (1995).

¹⁴⁹ See Susan C. Hascall, *Islamic Commercial Law and Social Justice: Shari'ah Compliant-Companies, Workers' Rights, and the Living Wage*, 88 ST. JOHN'S L. REV. 291, 316–17 (2014).

¹⁵⁰ See Cattelan, *supra* note 122, at 29.

¹⁵¹ See, e.g., Pila, *supra* note 114, at 186.

particular nation and among nations, it is worth considering a theory of IP that attempts to deal with questions of economic justice.

Islamic IP is not concerned with whether IP should be justified. Islamic scholars and an Islamic Shariah council have recognized that IP is a permissible species of private property.¹⁵² Thus, like Western IP theories, Islamic IP assumes that private property is necessary to protect individual interests in a market economy.¹⁵³ In fact, Islamic IP understands that justifying IP is necessary for benefiting the least advantaged members of society in the long run (and that it does not advantage only the most well-to-do people).¹⁵⁴ But, Islamic IP is different than simply being concerned with the distribution of goods, balancing public and private control of property, and preventing exploitation of those who are poor in a society and of poor countries.¹⁵⁵ In essence, the Islamic conception of IP is narrower than the Western conception of IP, and as a result, Islamic IP accepts sharing of economic resources to facilitate more of a sense of socioeconomic equality.¹⁵⁶

The theory of Islamic IP includes a conception of economic justice, such that a well-ordered and fair system of private property alongside distribution exists to give rise to value pluralism principles. Islamic IP embodies value pluralism, which means that society should not accept a single comprehensive value or doctrine but instead should support overlapping principles. In doing so, Islamic IP does not interfere with individual liberties regarding private property rights for creators and inventors and recognizes that the right to private property is a basic principle in Islam, not only justified from a religious principle but also because it provides a sense of a functioning market economy. While Islamic IP identifies that there may be some social and economic inequalities in society, it attempts to forge a compromise between different theories.¹⁵⁷ The chief advantage of an Islamic IP framework is that it responds to concerns about economic justice and imbalances found in Western IP systems.

¹⁵² Ebrahim, *supra* note 5, at 829; Malkawi, *IP Protection from a Sharia Perspective*, *supra* note 35, at 87; Malkawi, *Alliance Between Islamic Law and IP*, *supra* note 35, at 648–49.

¹⁵³ See discussion *supra* Part III.B.

¹⁵⁴ See García, *supra* note 128, at 8.

¹⁵⁵ See Cattelan, *supra* note 122, at 29.

¹⁵⁶ Ebrahim, *supra* note 5, at 872–73.

¹⁵⁷ Muhammad Fuad Zain Ridwan, *Religious-Socialistic Analysis of Land Ownership in Muslim Countries*, 436 ADVANCES SOC. SCI. EDUC. & HUMANS. RSCH. 1180, 1180 (2020).

How can Islamic IP still allow for and enable leveraging of exclusive legal rights while promoting economic justice? How can private property be connected with fair distribution to enable economic justice?

E. *Towards Balancing Private Property and Fair Distribution*

A quick glimpse at IP theories suggests what normatively matters is whether to attain some benefit either for the individual innovator or society. From absolute exclusion to eliminating IP entirely, the debate is polarized on each side of the spectrum.¹⁵⁸ But does this focus on the individual or society need to be one-sided? The Islamic view shows that the answer is no, and that in fact, just the opposite is true—or said in more colloquial terms, “have your cake and eat it too.” That is, a society can allow for protecting private property for the individual and distributing property for society (exclusion and distribution strategies), through balancing strategies such as limitations, compassion, and charity. Here, limitations may refer to restrictions on what may be protectable as IP, which is strongly associated with exceptions to IP protections, but do not include dispossession by state actions through takings.¹⁵⁹ In a different vein, IP can be compassionate in the sense of considering ex ante what to protect with IP rights and ex post how the IP may eventually be used, as well as inviting others to use IP rights. Finally, donating one’s IP can lead to greater balancing in society, and perhaps benefit the individual, even when not immediately apparent to the individual.

The polarization of the debate of maximal exclusive rights and eliminating IP suggests that a simpler path is necessary to balance the

¹⁵⁸ For discussion supporting exclusion, see BLACKSTONE, *supra* note 133, at 2; Rose, *supra* note 133, at 604; Smith, *supra* note 133, at 95; Stern, *What Is the Right to Exclude*, *supra* note 133, at 38; Klick & Parchomovsky, *supra* note 133, at 935; Sean M. O’Connor, The Multiple Levels of “Property” in IP and Why that Matters for the Natural Versus Regulatory IP Debates 1, 4 (Sept. 19, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3252253; Mossoff, *The False Promise of the Right to Exclude*, *supra* note 136, at 257; Larissa Katz, *Exclusion and Exclusivity in Property Law*, U. TORONTO L.J. 275, 275 (2008); Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL’Y 593, 593 (2008). For discussion opposing exclusion, see Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 744 (2009); Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 CAL. L. REV. CIR. 349, 349–350 (2014); Dave Fagundes, *Why Less Property Is More: Inclusion, Dispossession, & Subjective Well-Being*, 103 IOWA L. REV. 1361, 1364 (2018); Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022 (2009).

¹⁵⁹ Naseri et al., *supra* note 108, at 2155.

extremes. In sum, the approach of Islamic IP is simply to prove the old cliché that “life is about balance,” or the more appropriate Islamic quotation that “[l]ife is a balance between holding on and letting go.”¹⁶⁰

The reality of Islamic IP lies in stark tension with the policies of Western IP: maximally protecting and incentivizing innovation.¹⁶¹ So, assuming the familiar premise that IP law seeks to make it easier for those who can aggregate IP rights to prevent access and fair pricing, radical reconceptualization and policies of IP appears in order. But what should be done if private property rights can be recognized but not maximized? One plausible but inadvisable answer is to weaken private property rights, such as not offering enforcement mechanisms against unauthorized uses. But recognizing and enforcing IP as private property serves valuable functions by enhancing incentives and preventing free riding. For one, recognizing and promoting private property rights in Islamic IP is based on Islamic sources of law, while Islamic teachings forbid weakened enforcement against unauthorized use or infringement of IP.¹⁶² Moreover, all the evidence pertaining to the weakening of enforcement of IP suggests that doing so also debilitates commercial transactions.¹⁶³ Islamic IP policies do not entail forced dispossession of IP by the state, as Islamic law is not consistent with the forced dispossession being in tune with private property rights.

This is not to say, though, that Islamic IP is indifferent to the surprising fact that distributing private property tends to increase the innovator’s well-being (in a spiritual sense). The challenge becomes to implement strategies that encourage private property rights, while enabling the kind of distribution that is an essential prerequisite for access and fairness in uses of IP in a society.¹⁶⁴ There are three

¹⁶⁰ See *supra* note 45 and accompanying text; JALAL AL-DIN RUMI, THE ESSENTIAL RUMI (Coleman Barks et al. trans., new expanded ed. 2004).

¹⁶¹ While Western IP has been criticized for being focused on incentives, it should be noted that Western IP is not solely about incentives. There are many exceptions to Western legal systems’ IP laws that limit the opportunity to maximize incentives, particularly with copyright law’s fair use and specific nonprofit uses (as well as to a lesser degree patent law’s patentable subject matter). The point being made here is that Islamic viewpoints on IP are a degree lesser on maximization as compared to Western IP legal systems.

¹⁶² Ebrahim, *supra* note 5, at 852–53, 897.

¹⁶³ See Mossoff, *Institutional Design in Patent Law*, *supra* note 44, at 922–23, 926.

¹⁶⁴ See Daniel Benoliel & Peter K. Yu, *Intellectual Property, Innovation, and Economic Inequality* 1 (Tex. A&M Univ. Sch. of Law Legal Stud. Rsch. Paper Series, Research

different means by which the state in an Islamic IP legal system may do this balancing: (1) clarifying limitations to what may be protectable by IP law and what may be part of the public domain; (2) encouraging individuals and organizations that employ creators and inventors to engage in conduct involving IP compassionately while preserving private property; and (3) enabling mechanisms of charitable donations, including crafting donation incentives for creators and inventors (and the organizations that employ them) to more efficiently distribute IP and facilitate more balanced pricing of IP-protected goods in society. In each of these areas, the Islamic state can nudge creators and inventors towards an approach that honors private property while avoiding excesses and hoarding of IP, thereby increasing overall societal well-being and achieving balance.

IP from various religious perspectives, though, has left aside how to implement and operationalize balancing of private property and fair distribution. Islamic IP provides straightforward recommendations of this balance but will require more details to put into practice. Various religious views of IP implied a recommendation that there should be societal obligations to allow more fair distribution, not ignoring those individuals at a disadvantage. That work, however, has not addressed even harder questions for how innovators and states alike should implement such viewpoints. That is, if religious views towards IP are narrower than Western IP, then how specifically does Islamic IP realize its theory in practice? If maximizing private property is not the objective of Islamic IP, then where does that leave its fair distribution of resources? To the extent that most creators and inventors would want to maximize their private property rights with IP in an Islamic legal system, what should they do with their IP to bring an Islamic society within greater balance? In more formal legal terms, if maximizing private property is not possible within an Islamic legal system, then what mechanisms provide counterbalances that enable more fair distribution?

With these questions in mind, this Part seeks to address what balancing private property and fair distribution in society would look like. To the extent that Islamic IP is a new, alternative theory of IP that makes society better off than say—the utilitarian-focused approach implicit in the standard economic-utilitarian approach to IP—this Article takes the position that this mechanism to balance IP in society is achievable and important for policymaking. With this in mind, what

would balancing private property and fair distribution in Islamic IP look like?

1. Limitations to Protectable Intellectual Property

First, Islamic IP considers limitations to protectable IP. A few aspects of Western IP legal systems restrict protectable IP in some form including fair use in copyright law and method of medical treatment in patent law. Islamic IP suggests that limitations to protectable IP are not fixed to only such aspects.¹⁶⁵ On the contrary, ethical and moral principles suggest broader constraints, both in terms of religious principles to reduce private property protections and to reduce what may be considered harmful to the individual or to society.¹⁶⁶ This result is not limited to Islam but is a broader principle encompassing other faiths.

Religious perspectives on IP show a strong relationship between morality restrictions and a more balanced society. To the extent that policymakers are concerned with crafting IP policies in ways that make innovators and others in society better off, Islamic IP provides some limitations that consider broader societal interests.¹⁶⁷ Some prominent examples of Islamic IP's balancing include constraining the reach of patentable subject matter in patent law and enabling a broader fair use standard in copyright law.¹⁶⁸ Over the past decade or so, patentable subject matter has been rife with indeterminacy in the United States, and Islamic IP can provide a more defined scope, albeit based on Islamic principles, for the limited reach of patentable subject matter.

¹⁶⁵ Mohammed El Said, *Intellectual Property, Islamic Values, and the Patenting of Genes*, in PATENTS ON LIFE 133, 150–51 (Thomas C. Berg et al. eds., 2020), <https://doi.org/10.1017/9781108659802.008>; Thomas C. Berg, *Life Patents, Religion, and Justice: A Summary of Themes*, in PATENTS ON LIFE, *supra*, at 291, 292.

¹⁶⁶ Mahafzah et al., *supra* note 35, at 458–59, 468; USMAN HAYAT & ADEEL MALIK, CFA INST. RSCH. FOUND., ISLAMIC FINANCE: ETHICS, CONCEPTS, PRACTICE 1 (2014); Nari Lee, *Inventor's Moral Right and Morality of Patents*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND MORAL RIGHTS 96, 96 (Ysolde Genreau ed., 2020), <https://doi.org/10.4337/9781789904871.00015>; Ebrahim, *supra* note 5, at 789–90.

¹⁶⁷ Shaikha Al-Muraikhi, *Rethinking Patent Eligibility in Qatar: A Comparative Approach* 16 (unpublished manuscript) (on file with author).

¹⁶⁸ Julie Lowe, *Hanafi Approaches to Copyright*, 30 ISLAMIC L. & SOC'Y 249, 249–52 (2023), <https://doi.org/10.1163/15685195-bja10033>; Ebrahim, *supra* note 5, at 790.

2. Compassionate Mindset

Second, a compassionate mindset would also generate balancing in the Islamic IP system. A compassionate mindset entails thinking compassionately *ex ante* to secure the IP right and *ex post* of the IP right's impact on society.¹⁶⁹ Similar to the environmental, social, and governance (ESG) frameworks and corporate social responsibility (CSR) frameworks of Catholicism, Islamic IP entails similar frameworks that center on considerations for society and not only individual economic interests.¹⁷⁰

Of course, compassion promises significant societal benefits, such as one's own well-being, concern for another human being, and broader improvement in society.¹⁷¹ Prosocial compassion enhances one's well-being and expands society-wide concern and help of others. Integrating compassion to enhance the role of IP in an Islamic society tends to create a mindset in which people are more important than material objects. Religious perspectives on IP have shown a strong relationship between that concern for others, overall societal uplifting, and a rise in the standard of living for the majority.¹⁷²

3. Charitable Donations

Third, a final example of balancing in an Islamic IP system involves charitable giving, which illustrates a societal enhancing strategy. It may seem counterintuitive that getting rid of one's private property would improve one's well-being, given the financial loss of an asset. Not all IP theory perspectives would consider giving of IP to be a financial loss; instead, Islamic IP views such actions as a spiritual cleansing and as a duty in an Islamic society.¹⁷³ That is, a charitable donation of IP is considered a prosocial form of giving.

¹⁶⁹ García, *supra* note 128, at 2.

¹⁷⁰ Visser, *supra* note 111, at 53, 54, 68, 71.

¹⁷¹ HAYAT & MALIK, *supra* note 166, at 14–15.

¹⁷² See Francis-Vincent Anthony & Carl Sterkins, *Religion and Socioeconomic Wellbeing—Empirical Study of the Impact of Religion on Socioeconomic Rights in the Pluralistic and Democratic Context of Tamil Nadu, India*, RELIGIONS, Sept. 5, 2020, at 7, <https://doi.org/10.3390/rel11090454>; Timur Kuran, *Islam and Economic Performance: Historical and Contemporary Links*, 56 J. ECON. LITERATURE 1292, 1313 (2018) [hereinafter Kuran, *Islam and Economic Performance*], <https://doi.org/10.1257/jel.20171243>; Bagley, *supra* note 29, at 819–21.

¹⁷³ SAYYID MUHAMMAD BAQIR AL-SADR, *The Theory of Pre-Production Distribution, Distribution of Public Wealth in Two Stages*, in 2 IQTISADUNA, OUR ECONOMICS (n.d.) (ebook), <https://www.al-islam.org/printpdf/book/export/html/118627> (explaining that an Islamic economic framework for distribution is a preproduction consideration,

The Islamic viewpoint suggests that if a society wants to maximize social welfare, it should give some portion of what they have to further the well-being of others and enable more fair distribution in society.¹⁷⁴ The immediate response to this may be that the Islamic state already requires a 2.5 percent donation of one's wealth each year to individuals in need.¹⁷⁵ Analyzed more closely in light of IP's nature, though, it becomes clear that the mandatory donation of 2.5 percent of one's wealth, which is an individual donation, may not be sufficient for distribution in a society.¹⁷⁶

A society with an Islamic IP legal system demands more attention to the complex dynamic between IP protection and monopolistic type effects. Charitable donations in Islamic IP refer to mandatory IP donations required by the state and voluntary donations offered by the creator or inventor (or the employer of such an innovator). Compulsory licensing, in which the Islamic state pays some sort of adequate remuneration to the holder of the IP right in exchange for the right to use the IP, can facilitate such charitable giving. While such forced dispossession of IP assets in an Islamic society could cause selective choices by creators and inventors of the least worthy IP, there could be ways of mitigating selective effects, such as connecting the donation to a local community or designating it for specific needs. Thus, although not all charitable giving of IP would be considered as being equal, and some innovators could donate their least useful IP,

which differs from a capitalist society economic framework for distribution as a production output consideration, and in doing so, the Islamic economic framework also considers humanity and human issues); Asad Zaman, *Islam's Gift: An Economy of Spiritual Development*, 78 AM. J. ECON. & SOCIO. 443, 475 (2019), <https://doi.org/10.1111/ajes.12272> (specifying the Islamic economic framework emphasizes higher, or spiritual goals, than mere consumption of goods and wealth acquisition).

¹⁷⁴ Zainuddin Rosmini, *Distribution of Zakat for Communities Affected by COVID-19 in the Perspective of Socio-Economic Justice*, 126 J.L. POL'Y & GLOBALIZATION 64, 64 (2022), <https://doi.org/10.2139/ssrn.4306277>.

¹⁷⁵ Zainuddin et al., *Halal Certification as Sharia Legitimacy for Economic Empowerment of Zakat Mustahiq*, 127 J.L. POL'Y & GLOBALIZATION 20, 20 (2002); Zainubahar Poor & Francine Pickup, *Zakat Requires Muslims to Donate 2.5% of Their Wealth: Could this End Poverty?*, THE GUARDIAN (June 22, 2017, 7:17 AM), <https://www.theguardian.com/global-development-professionals-network/2017/jun/22/zakat-requires-muslims-to-donate-25-of-their-wealth-could-this-end-poverty>; I YUSUF AL QARDAWI, *FIQH AL ZAKAH: A COMPARATIVE STUDY OF ZAKAH, REGULATIONS AND PHILOSOPHY IN THE LIGHT OF THE QUR'AN AND SUNNAH* 125 (Monzer Kahf trans., 2011) (2000).

¹⁷⁶ Rosmini, *supra* note 174, at 64; Poor & Pickup, *supra* note 175.

the donation could create more balance of IP from a societal perspective.

Charitable donations represent an area that the Islamic state encourages its citizens to get rid of, rather than hold on to, private property. An alternative mechanism of charitable donation in an Islamic society could be through nonprofits, which compared with commercial uses are especially likely to have charitable elements.¹⁷⁷ Such donating or sharing of IP, whether required or optional, generates more balance in society, as it reduces wealth hoarding and prevents supranormal pricing. One study of Islam found that those who give for the benefit of others tend to have higher emotional and spiritual well-being.¹⁷⁸ Similarly, the Islamic IP view is that creators and inventors who give their IP to the benefit of others in society will become better off themselves emotionally and spiritually, even while giving up an asset that could be a financial loss.¹⁷⁹ Additionally, charitable donations can give individuals lacking resources some IP, whether outright from the government or through a license, thereby achieving a more fair distribution in society.

IV. NORMATIVE OBJECTIVES OF ISLAMIC INTELLECTUAL PROPERTY

While Islamic IP promotes the same objectives of Western IP regimes—from incentivizing innovation, to preventing free riders, to coordinating commercialization, and more—it also helps limit excess and promotes more fair distribution in society than Western IP regimes. Having established the descriptive point that Islamic IP balances exclusive legal rights for intangibles with fair distribution, but not either extreme, this Part turns to a normative assessment of this balance. In doing so, this Part explores the overarching normative objectives of Islamic IP. This Article argues that Islamic IP aims to maximize exclusive legal rights for intangibles with limitations, rather than promote IP at all costs. It rejects the argument that IP is against the social vision of Islamic law or even harmful to society and contends that Islamic IP contributes to a host of benefits for society. In

¹⁷⁷ See Salma Taman, *The Concept of Corporate Social Responsibility in Islamic Law*, 21 IND. INT'L & COMPAR. L. REV. 481, 501 (2011); Rafeel Wasif, *Did 9/11 Affect Donations to Islamic Charities in the United States?*, 52 NONPROFIT & VOLUNTARY SECTOR Q. 1475, 1475 (2022), <https://doi.org/10.1177/08997640221122817>.

¹⁷⁸ Mansoureh Ebrahimi & Kamaruzaman Yusoff, *Islamic Identity, Ethical Principles and Human Values*, 2 EUR. J. MULTIDISCIPLINARY STUD. 325, 334 (2017), <https://doi.org/10.26417/ejms.v6i1.p325-336>.

¹⁷⁹ Visser, *supra* note 111, at 54, 68, 71.

particular, limiting excesses, enabling allocation of resources for innovation, and promoting distributive equity and fairness achieves the balancing of Islamic IP. Islamic IP is based on principles concerning limitations, charity, and compassion.

A. *Objectives and Principles of Islamic Intellectual Property*

To assess Islamic IP's balancing approach, it is useful to clarify the normative objectives of Islamic IP. Islamic law recognizes that clearly defined private property rights are fundamental to Islam, but "the circulation of wealth [is necessary] in an economy to promote and ensure social benefits."¹⁸⁰ As scholars and theologians have long observed, these characteristics of an Islamic economy establish a balanced approach to property rights. Islamic IP exists not only to reward individual creators and inventors but also to advance society-wide economic stability through contributions to the state for fair distribution. With this in mind, several related points are worth exploring in greater detail.

First, it is important to clarify that the overarching aim of Islamic IP is to maximize material and spiritual aims of human well-being. It should also be clear, however, that Islamic IP does not aim to enhance innovation at all costs. After all, an Islamic IP system would not want society's resources devoted to maximizing individual inventors, companies, or universities at the exclusion of the needy, poor, or weak. Rather than aiming to increase innovation at all costs, Islamic IP seeks to promote innovation in a way that maximizes social welfare by considering spiritual and humanitarian needs.¹⁸¹ To achieve this Islamic approach to efficient allocation of material and secular aims, Islamic IP enables integration of a market-based system for private property, where ownership and exclusivity with the right to use the resource are recognized, and limitations to the protection of private property exist "to promote and ensure social benefits."¹⁸²

Islamic economists have argued that unrestrained economic freedom with a *laissez-faire* approach and also communal ownership approach to property are incompatible with Islam.¹⁸³ But it may be

¹⁸⁰ Lutfi Abdul Razak & Muhammad Nabil Saupi, *The Concept and Application of daman al-milkiyyah (Ownership Risk): Islamic Law of Contract Perspective*, 9 ISRAJ. ISLAMIC FIN. 148, 160 (2017), <https://doi.org/10.1108/IJIF-06-2017-0002>.

¹⁸¹ Powell, *supra* note 148, at 17–18.

¹⁸² Razak & Saupi, *supra* note 180, at 160; *see also* discussion *supra* Parts III.B, III.C.

¹⁸³ AL-SADR, *supra* note 173; *see* Raphael Sartorius, *The Notion of "Development" in Ubuntu*, 1 RELIGION & DEV. 96, 109 (2022).

difficult for a government to know the socially optimal ways to intervene on limiting private property at any given time.¹⁸⁴ Nonetheless, Islamic IP highlights an important consideration that Western IP systems overlook—spiritual aims of human well-being in a society, including spiritual purification of one’s self by limitation to excessive hoarding of wealth and moral restraints to what IP may protect.¹⁸⁵ In light of the harms of excesses, what may be considered ethically and morally against being incapable of human ownership, a natural question arises: What are the limitations to what may be protected within Islamic IP?

Second, while recognizing and permitting the full scope of private property rights represents the dominant objective of Islamic IP, other values such as distributive equity and fairness have some normative claim on an IP system in Islamic law.¹⁸⁶ Islamic IP reveals a commitment to distributive values in policies and statutes that widens access to essential medicines, encourages access to IP rights and their benefits by marginalized communities, and broadens participation by underrepresented creators and inventors.¹⁸⁷ Islamic economists and legal commentators have pointed out that justice provides a foundational principle for economics and property systems in Islamic societies, and Islamic IP recognizes those characteristics as well.¹⁸⁸ In a broad sense, Islamic IP, like other Islamic legal regimes and Islamic commercial dealings, is attentive to norms and fairness to maintain some distribution.¹⁸⁹ It is clear that fair distribution in society requires state intervention in order to properly enforce and appropriately regulate. An Islamic IP system allows innovators to secure private property rights but restricts monopolization and allows for voluntary donations.¹⁹⁰ Throughout history, Islamic scholars emphasize the state’s role. But how far is the state expected to go to fulfill its role? What is the state expected to do with an Islamic IP system?

¹⁸⁴ See discussion *supra* Part III.C.

¹⁸⁵ Farahat, *supra* note 148, at 209.

¹⁸⁶ See Asad Zaman, *Islam Versus Economics*, in HANDBOOK ON ISLAM AND ECONOMIC LIFE 45, 56–57 (M. Kabir Hassan & Mervyn K. Lewis eds., 2014), <https://doi.org/10.4337/9781783479825.00008>.

¹⁸⁷ See Powell, *supra* note 148, at 16–17.

¹⁸⁸ See Visser, *supra* note 111, at 76.

¹⁸⁹ See Powell, *supra* note 148, at 17.

¹⁹⁰ AL-SADR, *supra* note 173 (explaining that an Islamic economic system does not permit monopoly style exploitation and, instead, encourages acts of charity).

With these questions and the normative points in mind, it is appropriate to delineate the core principles of Islamic IP that distinguish it from Western IP: (1) limitations, (2) compassion, and (3) charity.¹⁹¹ It is clear that Islamic IP exists to reward individual creators and inventors, but the Islamic IP system, unlike the Western IP systems, does not aim to maximize private gains. A system that allows creators and inventors to seek exclusive legal rights but restricts them from monopolistic behaviors and permits charitable donations of IP seems well designed to maximize social welfare. But this sort of IP system has never been achievable in Western IP systems.

B. *Potential Advantages of Islamic Intellectual Property and Responses to Critique*

Some might argue that the recognition of exclusive legal rights—but not excesses—within Islamic IP, is problematic and unenforceable. They may even go further to argue that this reflects an IP system that is subject to government intervention, which would curb market-driven features and thus represent a cumbersome IP system. After all, incentives to create and invent may seem to be constrained if one purpose of the Islamic IP is to limit excesses. According to this view, forcing inventors to restrict maximization of IP rights would chill creativity and invention and undermine the objectives of exclusive legal rights.

As discussed above,¹⁹² however, this argument misunderstands the goals of Islamic IP. The Islamic IP system seeks not to promote maximizing IP rights at all costs but to efficiently allocate resources for both creators and inventors and those individuals who may be needy, poor, weak, or marginalized in society. Islamic IP contemplates that the efficiency of IP must consider the benefits and costs of incentives and its impact on access as part of the calculus. More broadly, the impetus to encourage seeking incentives for exclusive legal rights at all costs within Western IP systems is considered, in Islamic IP, to be a misguided view that maximization of IP rights is invariably a net social positive, and that more IP is always better for an individual creator or inventor. Islamic IP-enabling limitations, such as charity and compassion, are not easy to administer nor enforce in society, however.¹⁹³ While enabling access and fair distribution may be

¹⁹¹ See discussion *supra* Part III.E.

¹⁹² See discussion *supra* Parts III.A, IV.A.

¹⁹³ See discussion *supra* Part III.E.

laudable and noble goals, the mechanisms and processes that actualize them are not easy, and government decision-making and intervention devoted to them are subject to Islamic law. Furthermore, as this Article has argued, restricting from IP protection what may be considered ethically or morally problematic, promoting an ethos of compassion among innovators, and enabling compulsory charity and voluntary donations of IP for societal use may be challenging to operationalize and enforce in a society, but their benefits wholly outweigh the negative impact of unrestrained economic freedoms.

C. *Policy and Theoretical Implications*

This new and distinct perspective of Islamic IP holds political and theoretical implications, in addition to explaining and providing the objectives of Islamic society. Close observers of IP policy will recognize that Islamic IP represents a similar but subtle variation of what would have been John Rawls's approach to IP: a "reasonable overlapping consensus" approach.¹⁹⁴ In theory, such a pluralism approach acts as a balancing mechanism to excuse maximization of private property rights, even though such a society technically allows and recognizes private property.

Islamic IP as a theory means that members of a society do not all accept a single, comprehensive doctrine to guide their IP system. Such a perspective would support social policies that limit private property rights in some form, provided that these policies do not undermine a person's independence.¹⁹⁵ While under such an IP system, technically, one could still obtain exclusive legal rights to creations, inventions, and sources of identification; equity, however, would weigh against the aggregation of such rights because it would lead to imbalances in society.¹⁹⁶ This may be a conceptual difficulty for those accustomed to Western IP legal systems, where aggregating IP rights rarely justifies government intervention to initiate distribution.¹⁹⁷ The key difference to Islamic IP lies in the extent to which it takes private property for the

¹⁹⁴ Resnik, *supra* note 109, at 329–30.

¹⁹⁵ *Id.* at 330.

¹⁹⁶ Miriam Marcowitz-Bitton & Emily Michiko Morris, *The Distributive Effects of IP Registration*, 23 STAN. TECH. L. REV. 306, 314, 343, 357, 363, 367 (2020).

¹⁹⁷ Corinne Langinier & GianCarlo Moschini, *The Economics of Patents: An Overview* 7–9, 18–19 (Ctr. for Agric. & Rural Dev., Working Paper No. 02-WP 293, 2002), <https://doi.org/10.1079/9780851996417.0031>.

benefit of disadvantaged individuals or for society.¹⁹⁸ Said another way, under Islamic IP, the overall policy objective is raising the standard of living in society, with the aim of driving innovation to improve overall societal well-being.¹⁹⁹

This Article offers policy and theoretical proposals to enhance IP in society; there are also broader implications on the relationship between private property and distributive justice. As noted earlier,²⁰⁰ many scholars have criticized IP rights for limiting access, such as to essential medicines, by highlighting their fundamental ability to create supranormal pricing. Those accounts, however, have ignored central features that are prevalent within Islamic IP—limitations to excesses, charity, and compassion. In the Islamic IP context, IP considers others in society. And these social welfare concerns also render Islamic IP even more amenable to considering underprivileged individuals in society and developing societal living standards. Ultimately, in the Islamic IP context, IP may be even better suited to raise the standard of living for the poor and the marginalized in society than other policy interventions in Western societies.

V. EXPLORING ISLAMIC INTELLECTUAL PROPERTY'S BALANCING: COMPARING WESTERN INTELLECTUAL PROPERTY SYSTEMS

To gain greater insight into how Islamic IP functions in a society, this Part examines a comparative perspective with Western IP legal systems. In particular, comparing US patent law and US copyright law reveals that the US IP legal regimes are quite limited in balancing polarizing policy issues of incentives and access, and have done relatively little to improve shortcomings. Foundational Western IP theories suggest that IP rights are created for the precise purpose of excluding others from copying or replicating activities, absent a license. Like fences, Western IP rights allow their owners to block entrance into their territory, thus encouraging creators and inventors to seek and build more fences to stake out a more dominant position among competitors or in an industry. Such IP rights have few limits in Western societies, in that they can be sought and aggregated in several ways without any duties or obligations on their owners of the IP rights.

¹⁹⁸ Omar Javaid, *Revisiting the Islamic Conception of Economic Justice and Its Implication in Islamic Banking and Finance (2011–2012)* (M.S. dissertation, Karachi Institute of Economics and Technology) (Academia).

¹⁹⁹ Mohd Ma'Sum Billah, *Investment Policies Under Shari'ah Principles*, 33 J. ISLAMIC BANKING & FIN. 11, 12 (2016).

²⁰⁰ See *supra* note 98 and accompanying text.

As this Part will show, however, the different approach within Islamic IP prevents these effects both *ex ante* and *ex post* of the recognition of the IP right. This juxtaposition casts into sharper light the unique incapacities of Western IP systems to create balance between access and incentives.

In comparing Western IP systems to Islamic IP, this Article takes the position that Islamic IP provides a new framework from which Western legal systems can rethink their IP laws. The strong position of IP maximalists in favor of IP owners and the debates over the consequences of IP rights to access, distribution, and equity provides a fruitful domain for understanding the balanced Islamic perspective and its implications for making it a potential model for addressing Western IP policies. On the one hand, Islamic IP confers private property rights. On the other hand, the nature of Islamic IP is based on limitations, compassion, and charity, which clearly differentiate it from the underlying philosophy and motivations of Western IP systems. Furthermore, this Article reveals another overlooked difference: while Western IP rights protect owners, creations and inventions protected by copyrights and patents, respectively, do not need to be put to use, whereas IP rights in Islamic IP systems must be put to some use (or else would be considered as being an impermissible abuse within Islam).

In response to those who would question the value of comparing Islamic IP to Western IP systems, this Article offers three reasons why. First, Islamic IP theories help make the case for social and legal change in Western IP systems. Second, Islamic IP provides clear rules and justifications for private property rights that consider consequences for access, distribution, and equity without sacrificing greatly the rights of creators and inventors—the most intriguing and unique aspect of Islamic IP. Third, even if one believes that seeking guidance from Islam for contemporary Western IP policy (or even for many Muslim countries, which have absorbed Western laws) may seem irrelevant and unlikely to lead to redesigning legal institutions, comparing the perspectives on IP reveals idiosyncratic features of copyrights and patents that legal scholars and policymakers have largely overlooked.

This Article presented a case for balancing private property and distribution in a society drawn from Islamic IP legal theory. Although based on theory and principles in Islamic law and society, the proposed Islamic framework and mechanisms for balancing competing policies have practical implications for both Western IP legal systems and Islamic legal systems. The first implication pertains to potential reform of Western IP legal systems, and the second to IP reform within Islamic

societies—which have mostly embraced Western IP laws—to be within Islamic guidelines.

A. *Implications for Western Intellectual Property Legal Systems*

Can Islamic IP serve as a source for innovation for Western IP legal systems? This Article answers in the affirmative and describes the distinguishing characteristics that can provide innovative solutions to the problems present in Western IP legal systems. Focusing on the unique characteristics and religious guidelines within Islamic law yields surprising results in stimulating potentially innovative solutions to Western IP legal systems. This may at first seem entirely irrelevant to Western IP legal systems. Yet the unique characteristic of Islamic IP can provide a new perspective in Western IP legal systems. In fact, Islamic IP has the potential to rectify deficiencies, thus opening the door to other religious law as a source of inspiration to the largely legal and economic motivation inherent in Western IP legal systems.²⁰¹

One implication to draw from the discussion of Islamic IP is that Western IP legal systems contrast starkly with the balanced approach that underlies the Islamic system.²⁰² Drawing on the theory of Islamic IP, many IP scholars should see balancing private property and fair distribution as a compromise to the polarized debates in Western IP scholarship.²⁰³ A creator or inventor in an Islamic IP system can act upon the material world to attain private property rights, appropriate IP as a form of private property, and gain value from the IP right.²⁰⁴ Under Islamic IP theory, however, one acts not only to seek legal rights and gain value from those rights but also to serve society with a mindset of obligation and stewardship.²⁰⁵ But is this a theory that can serve

²⁰¹ Posner, *supra* note 10, at 57.

²⁰² See Bagley, *supra* note 29, at 817; Sell, *supra* note 29, at 67 (suggesting that IP policymaking in the United States has trended towards maximizing IP rights, particularly with copyrights).

²⁰³ See, e.g., Lisa Larrimore Ouellette & Jonathan Masur, Introduction to Intellectual Property Law 4–5, 13–14 (Nov. 8, 2022) (unpublished manuscript), <https://doi.org/10.2139/ssrn.4271894>.

²⁰⁴ See O'Connor, *supra* note 158, at 1, 3–4.

²⁰⁵ See Emmanuelle Smith, *Islamic Finance: Notion of Stewardship Imbues Business Ethics*, FIN. TIMES (June 17, 2012), <https://www.ft.com/content/8f79c27a-aa59-11e1-899d-00144feabdc0>; Munjed M. Murad, *Islamic Environmental Stewardship: Nature and Science in the Light of Islamic Philosophy*, 63 UNION SEMINARY Q. REV. 145, 145, 147–48 (2010), <https://doi.org/10.7916/D8GQ6X2Z>; William N. R. Lucy & Catherine Mitchell, *Replacing Private Property: The Case for Stewardship*, 55 CAMBRIDGE L.J. 566, 567, 579, 583–86 (1996), <https://doi.org/10.1017/S0008197300100510>; Omar Javaid, *The Principles*

Western IP legal systems, and if so, how? There are two situations in US IP law where the Islamic IP perspective can serve as a useful guidepost. The first regards transformative fair use with photographs in US copyright law, and the second regards patentable subject matter with pharmaceutical research and development in US patent law.

First, Islamic IP can provide new perspectives on copyright law in the United States.²⁰⁶ It can shed new light on transformative fair use in US copyright law.²⁰⁷ Fair use, which provides some flexibility for creators in US copyright law, is considered to provide breathing space for free speech, criticism, innovation, and open exchange of ideas.²⁰⁸ At its core, this doctrine allows for some kinds of uses of creative content that do not require permission or payment.²⁰⁹ As a result, fair use is not infringement if it satisfies four factors: purpose and character of the use, nature of the original work, amount and substantiality of the portion used, and effect of the use on the potential market or the value of the source work.²¹⁰

Transformative fair use, which is another lens of fair use, refers to a new work being based on an old work as transformative if it uses the source in a completely new or unexpected way.²¹¹ In *Google v. Oracle*, the US Supreme Court held that only lines of software code were needed to allow programmers to put their talents to work into a new and transformative program and was a fair use of that material.²¹² With such principles and rulings laying the foundation for US (or Western legal systems in general) IP laws, a question arises as to how Islamic IP would provide potential changes in US (or Western systems in general)

of a Circular Economy in Light of Islamic Values and Beliefs, 12 J. ISLAMIC THOUGHT & CIVILIZATION 215, 215, 225 (2022).

²⁰⁶ Lowe, *supra* note 168, at 252–259.

²⁰⁷ Iqbal Saujan et al., *Shari'ah Compliance of Copyright Act of Sri Lanka*, 3 INT'L J. ARTS HUMANS. & SOC. SCI. 50, 50, 59 (2022).

²⁰⁸ See Abraham Bell & Gideon Parchomovsky, *The Dual-Grant Theory of Fair Use*, 83 U. CHI. L. REV. 1051, 1053, 1069, 1117 (2016).

²⁰⁹ Alin Speriusi-Vlad, *Basic Rules of Protection in the Copyright and Intellectual Property Law. The Nature of the Granted Rights in the Field of Intellectual Property*, 1 DNY PRÁVA [DAYS OF LAW] 473, 473, 483, 490 (2009) (Czech).

²¹⁰ Bryan L. Frye, *Copyright in a Nutshell for Artists & Filmmakers* 14 (Nov. 26, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3737848.

²¹¹ Kevin Madigan, *Significant Second Circuit Fair Use Decision Clarifies Transformative Use Analysis*, COPYRIGHT ALL. (Apr. 1, 2021), <https://copyrightalliance.org/fair-use-decision-transformative-use-analysis>.

²¹² *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1209 (2021).

copyright law. The purpose is not to reform US IP laws based on Islamic principles but to explore the insights and reforms Islamic law could bring to change US IP laws. Islamic IP, which would consider the balance of private property rights and fair distribution for society, would need to consider the legal right of the software code creator (“copyrightability” under Islamic law) and balance it with societal impact—including considerations of limitations against excesses, compassion, and charity.²¹³ While there has been no Islamic ruling on such copyrightability issues, the basis of this Article’s view on balance within Islamic law would likely mean additional factors should be considered besides simply the fair use factors in society.²¹⁴

Second, Islamic IP can shed new light on patentable subject matter in US patent law. The United States, under 35 U.S.C. § 101, defines patentable subject matter, otherwise known as patent eligibility, based on four categories of invention—process, machine, manufacture, and composition of matter.²¹⁵ The US Supreme Court has carved out exceptions to patentable subject matter for abstract ideas, laws of nature, or natural phenomenon, and has established a two-step test to distinguish between eligible and ineligible subject matter that falls within one of the exceptions.²¹⁶ The US patentable subject matter doctrine has been an unclear quagmire since the *Alice Corporation Pty. Ltd. v. CLS Bank International* case in 2014, and in particular, there is much need for clarifying what patentable subject matter should be in the United States.²¹⁷ As emerging technologies proliferate and as patent legal standards evolve, the US Patent and Trademark Office considers various policy aspects of current issues.²¹⁸

²¹³ See discussion *supra* Part III.E.

²¹⁴ See Rafik Beekun, *Islam Forbids the Violation of Copyrights and Laws Regarding Intellectual Property*, ISLAMIC ECON. & FIN. PEDIA (Oct. 25, 2009), <https://www.iefpedia.com/english/?p=2923>; Faisal Daudpota, Fundamentals of Pakistan’s Copyright Law 24–27 (Apr. 24, 2013) (unpublished manuscript), <https://doi.org/10.2139/ssrn.2256161>; Faisal Daudpota, Fundamentals of the UAE Copyright Law 8–12 (Dec. 22, 2022) (unpublished manuscript), <https://doi.org/10.2139/ssrn.4309679>.

²¹⁵ 35 U.S.C. § 101.

²¹⁶ John W. Cox & Joseph L. Vandegrift, *A Brief History of Supreme Court Interest in Patent-Eligible Subject-Matter Under 35 U.S.C. § 101*, 19 J. TECH. L. & POL’Y 181, 183, 210 (2014) (suggesting a lack of clarity on patentable subject matter based on court decisions and the examination process at the US Patent and Trademark Office).

²¹⁷ See *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 219 (2014).

²¹⁸ U.S. PAT. & TRADEMARK OFF., PATENT ELIGIBLE SUBJECT MATTER: PUBLIC VIEWS ON THE CURRENT JURISPRUDENCE IN THE UNITED STATES 11 (2022),

With significant confusion over patentable subject matter in the United States, difficulties in implementing the Supreme Court's precedents in certain technological fields (such as medical diagnostics), and general inconsistency and unpredictability in many scientific and technological fields, another legal conceptualization or normative perspective could provide potential for changes or reinterpretation of patentable subject matter in the United States (or Western legal systems in general).²¹⁹ Once again, the purpose is not to reform US IP laws, such as patentable subject matter, based on Islamic principles, but more so as a thought exercise to see what insights and reforms Islamic law could bring to change US IP laws.

Islamic IP, which considers the balance of private property rights and fair distribution for society, would need to consider the potential for an overbroad patentable subject matter doctrine in creating prospect patents and blocking patents on follow-on innovation. But a patentable subject matter doctrine that is too narrow would negate the recognition of private property rights within Islamic IP.²²⁰ While there has been no Islamic ruling on patentable subject matter (although scholars have recently introduced potential interpretations of it), the basis of this Article's view on balance within Islamic law would likely mean there should be limitations based on ethical and moral principles.²²¹ Furthermore, patentable subject matter in Islamic law should consider how compassion and charity could be implemented as ex ante considerations, and this inquiry requires further analysis.²²² Further research studies on modulating patentable subject matter in Islamic law would limit excesses so as to function within Islamic societal guidelines.²²³

Where excesses in Western IP systems are a problem, balancing can be a solution. Western legal systems have largely focused on private property rights with an emphasis on exclusionary rights, but only recently has scholarship considered ways to balance that approach

<https://www.uspto.gov/sites/default/files/documents/USPTO-SubjectMatterEligibility-PublicViews.pdf>.

²¹⁹ A. Sasha Hoyt, *The Impact of Uncertainty Regarding Patent Eligible Subject Matter for Investment in U.S. Medical Diagnostic Technologies*, 79 WASH. & LEE L. REV. 397, 401, 447 (2022).

²²⁰ Ebrahim, *supra* note 5, at 879–80, 886.

²²¹ Al-Muraikhi, *supra* note 167, at 4, 8, 25.

²²² See discussion *supra* Part II.E.

²²³ See Ebrahim, *supra* note 5, at 886–87.

with considerations of inclusion and progressive viewpoints.²²⁴ Such balancing is a core feature and tenant of Islamic law.²²⁵ Many bodies of Islamic law can be understood as mechanisms to provide such balance in society, including finance, environment, and real property.²²⁶ Islamic finance forces limitations on permissible investment by excluding unethical and immoral wealth assets and hoarding wealth assets.²²⁷ Islamic environmental policy considerations impose social responsibility on actors who damage the environment without any countermeasures.²²⁸ Islamic real property laws provide easements and licenses for those deprived of access to natural resources.²²⁹ Among these Islamic fields, Islamic economics plays a particularly prominent role in providing a basis for guiding and influencing the direction of commercial endeavors, including Islamic IP.²³⁰

Indeed, as influential Islamic economist and scholar Timur Kuran has famously stated in alluding to the balancing approach an Islamic system provides, “[t]he Islamic economy constitutes a ‘third way’ that constrains economic liberties optimally.”²³¹ Drawing upon Professor Kuran and other Islamic economists, Islam, like other monotheistic

²²⁴ See, e.g., Dave Fagundes, *supra* note 158, at 1365–66; Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857, 866–70 (2014) (describing enabling inclusion in property law); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1940–41 (2005) (suggesting property is a source of social bonds and interpersonal connection to foster normative communities); Alexander et al., *supra* note 158, at 744.

²²⁵ See discussion *supra* Parts II.D, II.E.

²²⁶ See Joseph Lowry, *What Is Islamic Law? How Should We Study It?*, 2 J. ISLAMIC L. 236, 238, 242 (2021), <https://doi.org/10.53484/jil.v2.lowry>.

²²⁷ Ali, *supra* note 111, at 3; Abderrazak Belabes, *Variety of Models for Welcoming Islamic Finance into National Law* (Islamic Econ. Inst., Working Paper No. 1431-1432H, 2010), in WEDNESDAY SEMINAR 275, 286 (2010–2011).

²²⁸ See Murad, *supra* note 205, at 147–48, 158–59.

²²⁹ See SAIT & LIM, *supra* note 101, at 27; Ali, *supra* note 101, at 52, 54.

²³⁰ See Visser, *supra* note 111, at 58–59; Andreas Jobst, *The International Role of Islamic Finance*, in ISLAMIC FINANCE: INSTRUMENTS AND MARKETS, *supra* note 111, at 67, 67–70; Samia Maqbool Niazi, *The Nature of Property, Its Valuation and Property Rights in Islamic Law*, 4 J. ISLAMIC STUD. & CULTURE 69, 70 (2016) (describing property in Islamic law as anything with commercial and financial value, which includes IP); NICHOLAS HD FOSTER, ISLAMIC COMMERCIAL LAW: AN OVERVIEW (I) 4–5 (2006) (discussing Islamic law and Islamic economics in the exchange of goods and services with the aim of profit, including those concerning commercial transactions).

²³¹ Kuran, *Islamic Economics*, *supra* note 110, at 159.

faiths, can drive economic behaviors while also placing moral checks and balances in a theory of Islamic IP.²³²

B. *Implications for Islamic Legal Systems*

This theory, and the objectives and applications of Islamic IP, raises several important implications for Islamic legal systems, and additional questions for further study. In Islamic legal systems, IP rights are relatively new and are largely replicative of those in Western legal systems.²³³ As such, IP rights in Muslim countries are still reforming IP rights with Islamic theoretical concepts and religious considerations in mind.²³⁴ Furthermore, scholarly accounts of IP theories for Islamic legal systems are new and still forming, and this Article helps to shape that trajectory with conceptualization, theological underpinnings, and theoretical considerations.

First, this Article sheds a new light on the intersection of IP and Islamic law. Scholarly accounts of IP in Islamic law have highlighted differences with Western legal systems. In various narratives, IP in Islamic law is considered impermissible or harmful against Islamic religious principles for its potential to create monopolistic effects.²³⁵ While these suggestions are largely extreme, they show the negative perceptions of IP from some Islamic perspectives.²³⁶ For instance, some scholars have cautioned that IP is against the social vision of Islam and other jurists have considered IP to be impermissible within

²³² HAYAT & MALIK, *supra* note 166, at 4–5, 7.

²³³ DAVID PRICE, THE DEVELOPMENT OF INTELLECTUAL PROPERTY REGIMES IN THE ARABIAN GULF STATES: INFIDELS AT THE GATES 26–27 (2009) (explaining that the concept of IP and its recognition and acceptability in Islamic law is a subject of an ongoing discussion among scholars and that Muslim scholars and jurists differ on the concept of IP).

²³⁴ DAVID PRICE & ALHANOOF ALDEBASI, PROTECTING INTELLECTUAL PROPERTY IN THE ARABIAN PENINSULA: THE GCC STATES, JORDAN AND YEMEN 31–35 (2018) (introducing debates between scholars, including proponents and critics, concerning the lack of precedent of IP in Islamic sources of law and the challenges of exclusivity in Islamic law, while recognizing its permissibility without an explicit prohibition and with philosophical justifications); *see also* Malkawi, *IP Protection from a Sharia Perspective*, *supra* note 35, at 92–102 (providing arguments and counterarguments for IP protection within Islamic law); Malkawi, *Alliance Between Islamic Law and IP*, *supra* note 35, at 619, 623 (stating that Islamic law does not regulate IP through explicit legal protection which presents challenges for its incorporation within Islam as a religious body of law).

²³⁵ *See* ELMAHJUB, ISLAMIC VISION OF IP, *supra* note 35, at 134–36.

²³⁶ Ezieddin Elmahjub, *An Islamic Perspective on the Theories of Intellectual Property*, in COPYRIGHT PERSPECTIVES: PAST, PRESENT AND PROSPECT 51, 56 (Brian Fitzgerald & John Gilchrist eds., 2015), https://doi.org/10.1007/978-3-319-15913-3_5.

Islamic law and ethics.²³⁷ Of course, it is not surprising that differing viewpoints exist, given that Islamic law recognizes and promotes the sacredness of private property rights based on religious scriptures.²³⁸ It is notable, however, that Islamic legal systems are using IP laws similar to Western legal systems, which are without religious considerations; as such, Islamic legal systems will need modification to fit their IP laws within Islamic guidelines.²³⁹

Second, while this Article has jointly compared Islamic IP with Western notions of IP, it is important to differentiate between their aims. While both types of IP theories—conceptualization of Western IP systems and Islamic IP—entail allowing private property rights and promoting innovation, Islamic IP has considerable differences from Western IP systems in its implementation. Thus, it is far easier for innovators to secure IP rights within Western IP legal systems than in an Islamic IP legal system, wherein there could be uncertainty as to what may be limited from achieving IP protection.²⁴⁰ In addition to limiting protections within Islamic IP legal systems, there could be ex ante compassion and charitable considerations that constrain the scope of IP rights for the innovator or the pursuit of IP altogether in an Islamic legal system. Indeed, while the normative objective of Islamic IP is one of balance, there could be challenges with its encouragement or incentivizing of innovative activity and its administration in society. In addition to its potential limitations, Islamic IP could inhibit the risk-taking and forward-thinking mindset within Western IP legal systems, where maximal economic rights and innovation ideals are overarching goals for many innovators.

Going further, Islamic IP would require significant steps towards its implementation (or potential reformation for any existing IP laws) in a Muslim country that is undergoing economic development or a drive for innovation.²⁴¹ The scope of the IP right would require that it

²³⁷ See ELMAHJUB, *ISLAMIC VISION OF IP*, *supra* note 35, at 1; Ebrahimi & Yusoff, *supra* note 178, at 334–35; Ebrahim, *supra* note 5, at 886. For a discussion of Islamic ethics, see *supra* Part III.E.

²³⁸ SAI & LIM, *supra* note 101, at 33.

²³⁹ See ELMAHJUB, *ISLAMIC VISION OF IP*, *supra* note 35, at ix, 1, 11–12, 59–60, 68–69.

²⁴⁰ See IMRAN AHSAN KHAN NYAZEE, *OUTLINES OF ISLAMIC JURISPRUDENCE* 240–42 (6th ed. 2016).

²⁴¹ See *generally* OMAN OBSERVER, *OMAN VISION 2040, MOVING FORWARD WITH CONFIDENCE: PRELIMINARY VISION DOCUMENT 8* (2020); U.N. Conference on Trade and Development, *Science, Technology & Innovation Policy Review: Oman*, at vii, U.N. Doc. UNCTAD/DTL/STICT/2014/1 (Nov. 3, 2014); Law on Copyright and Neighboring Rights, art. I (promulgated by Royal Decree No. 65/2008, May 17, 2008, effective May

embody some consideration from a religious or theological perspective.²⁴² Furthermore, implementation of Islamic IP would necessitate that there be Shariah compliance or certifications for its realization in an Islamic society (similar to developments in Islamic

18, 2008) WIPO Lex No. OM008 (Oman); Patent Law (promulgated by Royal Decree No. 82/200, Oct. 10, 2000) (Oman); Gen. Secretariat for Dev. Plan., *Qatar National Vision 2030* (July 2008); QATAR FOUND., QATAR NATIONAL RESEARCH STRATEGY 2014, at 4 (2014); Gen. Secretariat for Dev. Plan., *Qatar National Development Strategy 2011–2016*, at 99 (2011); THE KNOWLEDGE FOR DEV. (K4D) PROGRAM WORLD BANK INST., A KNOWLEDGE ECONOMY ASSESSMENT OF QATAR (2006); Ministry of Dev. Plan. & Stat., Realising Qatar National Vision 2030 the Right to Development (June 2015); Patent Law, art. 2 (promulgated by Decree Law No. 30 of 2006, Dec. 12, 2006) WIPO Lex No. QA007 (Qatar); KINGDOM OF SAUDI ARABIA, VISION 2030, at 13 (2017); Hemendra Aran, *Forward to JINAL MEHTA ET AL., ARANCA, SAUDI ARABIA: EMERGENCE OF AN INNOVATION KINGDOM 1* (2014); *Facts and Figures*, KING FAHD UNIV. OF PETROLEUM & MINS., <https://www.kfupm.edu.sa/facts-figures> (last visited Feb. 28, 2024); Aarti Nagraj, *Saudi's SABIC Becomes Largest Patent Developer in the Middle East*, GULF BUS. (June 12, 2014), <https://gulfbusiness.com/saudis-sabic-becomes-largest-patent-developer-middle-east/>; *KSA Ranks 23rd in Number of Patents Granted by the US Patent and Trademark Office*, ARAB NEWS (Apr. 17, 2018, 3:04 AM), <https://www.arabnews.com/node/1286031/saudi-arabia>; Law of Chemicals Import and Management (promulgated by Royal Decree No. M/38 of 16 Jumada II, 1427H, June 12, 2006) (Saudi Arabia); Bashar H. Malkawi, *The Jordanian Intellectual Property Regime: Triangle of Copyright, Trademark, and Patent*, 7 MACQUARIE J. BUS. L. 237, 253, 256 (2010); Bashar H. Malkawi, *Enacting Patent Legislation in Jordan and Its Impact on Innovation*, in FIRST IP & INNOVATION RESEARCHERS OF ASIA CONFERENCE 38, 38 (2019); Ministry of Plan. & Int'l Coop., Project Budgeting and Financing Submission for the Middle East and North Africa Transition Fund (Apr. 14, 2015) (on file with author) (Jordan); JT, *National Centre for Innovation Launched*, JORDAN TIMES (May 10, 2018), <https://jordantimes.com/news/local/national-centre-innovation-launched>; Khaled Elshuraydeh et al., Higher Council for Sci. & Tech., Science & Technology and Innovation Profile of Jordan (2006); Abu-Ghazaleh Intell. Prop., *Jordan: Summary of the Patent Registration System in Jordan*, MONDAQ (Jan. 7, 2000), <https://www.mondaq.com/sales-taxes-vat-gst/3899/summary-of-the-patent-registration-system-in-jordan>; The Patents Rules, No. M-302 of 2003, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Dec. 31, 2003; *Amended Patent Law Comes into Force in Jordan*, ABU-GHAZALEH INTELL. PROP. (June 19, 2017), <https://www.agip.com/news.aspx?id=12916&lang=en>; JANSETTE QUANDOUR, U.S. AGENCY FOR INT'L DEV., JORDAN'S ACCESSION TO THE PATENT COOPERATION TREATY (PCT) (2016). For a discussion of patent-related initiatives adopted by Kuwait, see D&B Bureau, *Kuwait Vision 2035: The Rising of "New Kuwait"*, DIPL. & BEYOND (Apr. 2, 2019), <https://diplomacybeyond.com/kuwait-vision-2035-the-rising-of-a-new-kuwait>; Mishari Alnahedh, *Kuwait's National Innovation Ecosystem*, THE LONDON SCH. ECON. & POL. SCI. (Sept. 27, 2017), <https://blogs.lse.ac.uk/mec/2017/09/27/kuwait-national-innovation-ecosystem>.

²⁴² Al-Hasan al-Aidaros et al., *Ethics and Ethical Theories from an Islamic Perspective*, 4 INT'L J. ISLAMIC THOUGHT 1, 2, 8–9, 10–12 (2013), <https://doi.org/10.24035/ijit.04.2013.001>.

Finance).²⁴³ Alternatively, unlike legislative activity in the United States that seeks to initiate changes to laws, by contrast, ministries or economic development initiatives in Muslim countries could promote their reformation of existing IP laws.²⁴⁴ Or in a young Muslim country, it could be possible to develop and implement Islamic IP theories into practice. This analysis suggests that policymakers in Muslim countries should focus on the implementation of theological considerations into IP systems, which may entail granular modifications to existing IP regimes to explicitly consider the theoretical and normative principles identified in this Article.²⁴⁵

C. *Future Research Directions*

Broadening the perspectives from this Article, the author of this Article suggests that there be greater attention to the role of Islamic law, Islamic economics, and Islamic ethics in shaping the Islamic IP legal systems.²⁴⁶ As noted, Western IP legal systems may be unaligned with Islamic legal viewpoints on IP.²⁴⁷ Thus, a more theoretical and normative assessment of IP within Islamic law and within Islamic legal

²⁴³ MONZER KAHF, *MAQASID AL SHARI'AH OF THE PROHIBITION OF RIBA* (2d ed. 2015); Iqbal Saujan et al., *Shari'ah Compliance of Copyright Act of Sri Lanka*, 3 INT'L J. ARTS HUMAN. & SOC. SCI. 50, 51–52, 55 (2022).

²⁴⁴ Keith E. Maskus, *Intellectual Property Rights and Economic Development*, 32 CASE W. RESRV. J. INT'L L. 471, 471–72 (2000) (suggesting that the question of how IP rights affect economic development is complex and comprises of numerous variables, while explaining that although IP rights can raise the costs of imitation and permit monopolistic behaviors, they can encourage new business development and technology creation); B. ZORINA KHAN, NAT'L BUREAU OF ECON. RSCH., *INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT: LESSONS FROM AMERICAN AND EUROPEAN HISTORY* 8–9 (2002) (describing that significant questions remain unanswered about whether strong IP rights are necessary for economic development, while providing evidence from studies that there exists a “positive relationship between strong [IP] regimes and economic growth”); Albert G.Z. Hu & Adam B. Jaffe, *IPR, Innovation, Economic Growth and Development* 1–2, 17 (2007) (unpublished manuscript), https://policydialogue.org/files/events/Hu_Jaffe_IPR_Innovation_Econ_Growth_and_Dev_Paper.pdf (explaining the unsettled policy debate between the interaction of IP rights, technology transfer, and diffusion; and concluding that empirical evidence of stronger IP rights on encouraging innovation in developing countries is extremely limited); Yee Kyoung Kim et al., *Appropriate Intellectual Property Protection and Economic Growth in Countries at Different Levels of Development*, 41 RSCH. POL'Y 358, 358–59, 360, 368 (2012), <https://doi.org/10.1016/j.respol.2011.09.003> (suggesting that appropriate types of IP rights, rather than strength or weakness of IP rights, are necessary for economic development).

²⁴⁵ See discussion *supra* Parts II.A, II.B.

²⁴⁶ See HAYAT & MALIK, *supra* note 166, at 6–7.

²⁴⁷ Ebrahim, *supra* note 5, at 795.

systems would explore sound Islamic principles as well as the dynamic effects of limitations, compassion, and charity on innovation in an Islamic society.²⁴⁸

As shown in this Article, however, Islamic IP needs further development and administration steps to be operative in a society.²⁴⁹ This Article has relied on qualitative input, religious scriptures, and existing scholarship to argue for more theological and religious considerations into the foundations of an Islamic IP system. Along these lines, the contributions of this Article define a preliminary framework for further examination by jurists, scholars, and theologians on the reach and scope of IP within Islamic law. Additionally, there could be empirical studies that investigate and compare the effects of implementing some Islamic IP legal principles, or alternatively transforming existing IP laws in Muslim countries to embody Islamic IP.²⁵⁰ Such empirical studies could evaluate effects of religious interpretations of IP in a Muslim country on innovation.²⁵¹

Finally, this Article illustrates that IP within Islamic law operates in a different way than in Western societies. In doing so, it has focused on the recent but developing scholarly debate over the scope and fit of exclusive legal rights within an Islamic legal system.²⁵² A host of

²⁴⁸ See discussion *supra* Part III.E.

²⁴⁹ See discussion *supra* Part V.B.

²⁵⁰ See Roland Bénabou et al., *Religion and Innovation* 2–3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 21052, 2015), <https://doi.org/10.3386/w21052>; Kuran, *Islam and Economic Performance*, *supra* note 172, at 1330–32; TIMUR KURAN, *THE LONG DIVERGENCE: HOW ISLAMIC LAW HELD BACK THE MIDDLE EAST*, at ix, 6–7, 9 (2012), <https://doi.org/10.1515/9781400836017>; Timur Kuran, *Why the Middle East Is Economically Underdeveloped: Historical Mechanisms of Institutional Stagnation*, 18 J. ECON. PERSPS. 71, 72, 76 (2004) [hereinafter Kuran, *Economically Underdeveloped*], <https://doi.org/10.1257/0895330042162421>.

²⁵¹ See generally Kuran, *Economically Underdeveloped*, *supra* note 250; Bénabou et al., *supra* note 250; Ani Harutyunyan, *The Cultural Determinants of Patent Rights: Cross-Country Analysis* 8 (July 12, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4501750.

²⁵² See Jamar, *supra* note 35, at 1086 (suggesting that “intangible intellectual property existed in some rudimentary form in ancient Islamic law,” but recognizing that such “could be a significant problem for some Islamic jurists” and the fact that Islamic sources of law are silent on the permissibility of intellectual property “ought not to be too easily ignored or dismissed”); ELMAHJUB, *ISLAMIC VISION OF IP*, *supra* note 35, at 1 (“Intellectual Property . . . is a product of the Western normative environment.”); John Carroll, *Intellectual Property Rights in the Middle East: A Cultural Perspective*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 555, 555–57 (2001) (suggesting that Western countries have dominated international law, including with IP protection and innovation incentives in the Middle East, where Western scholars and

noneconomic factors also determine the conceptualization of Islamic IP. Follow-on work and research into the administration and implementation of such noneconomic factors, which include limitations, compassion, and charity, would provide guidance on reformations to policymakers in Muslim countries.²⁵³

Notably, the Islamic viewpoint of IP tends to focus on balancing seemingly competing principles, particularly recognition and protection of private property, along with dispossession of private property to prevent excesses and be within Islamic principles.²⁵⁴ Such balancing raises normative concerns over IP within Islamic law as to the trade-offs between access and private property, competition and monopolization, and innovation and social justice.²⁵⁵ While it is important for future research studies to investigate these trade-offs as

governments have ignored cultural and religious issues); BERNARD LEWIS, *ISLAM AND THE WEST*, at viii (1993) (explaining that relations between the Western countries and Islamic civilizations were based on encounters, perceptions, and responses); Said Bouheraoua et al., *Shariah Issues in Intangible Assets*, 23 SHARIAH J. 287, 291–92 (2015), <https://doi.org/10.22452/js.vol23no2.5> (summarizing the Hanafi view that requires physical features and physical possession to be classified as permissible property so as to exclude intangible IP from being protected by Islamic law); Elmahjub, *supra* note 236, at 56 (“Islamic Shari’a’s prohibition of the concealment of knowledge and encouragement of its dissemination may raise certain challenges for the current regulation of IP as laid down in its international framework.”); Vaughan, *supra* note 14, at 309–10 (distinguishing the Anglo-American concept and definition of property with others, such as the Islamic perspective, while suggesting that Western perspectives represent a small portion of the collective perspectives because the West is comprised of “a mere 700 million out of a global population that may swell to [nine] or [fifteen] billion souls [such that] [i]gnorance of the beliefs of such a vast number of people can only be a disadvantage to the Western intellectual property rightsholder”); Anjum, *supra* note 35, at 8–13 (refuting arguments that IP and Islamic law are incompatible by addressing any inconsistencies between sources of Islamic law and notions of IP); Javaid Iqbal Khan & Naveed Ahmad Lone, *Intellectual Property Rights in Islam*, 3 INT’L J. RSCH. SOC. SCIS. 153, 159–60 (2013) (presenting arguments that reveal Islamic law is flexible and adaptable to support IP rights); Gizem Orbey, *IP in Islamic Law? Deriving Similar Patent Regimes from John Locke and the Qur’ān*, ISLAMIC L. BLOG (Aug. 25, 2016) (proposing that Islamic contract and property law principles may allow for deriving a viable Islamic patent framework); *see generally* Ibrahim, *supra* note 14 (describing that Islamic societies, which includes their legal systems, are confronted with a Western framework and modernity that makes it challenging to separate Islamic and Western concepts); Ralph Braibanti, *Islam and the West: Common Cause or Clash?*, 16 AM. J. ISLAMIC SOC. SCI. 1 (1999).

²⁵³ See discussion *supra* Part III.E.

²⁵⁴ M. Umer Chapra, *Islamic Economics: What It Is and How It Developed*, ECON. HIST. ASS’N (Mar. 16, 2008), <https://eh.net/encyclopedia/islamic-economics-what-it-is-and-how-it-developed>.

²⁵⁵ See discussion *supra* Parts III.A–B.

considerations for the codification or reformation of IP laws within Islamic legal systems, it is also important to contextualize these effects within the broader economic development, economic justice, and innovation forces that shape Muslim countries.²⁵⁶

VI. CONCLUSION

Islamic IP sheds new light on the debate and tension of private property and economic justice in an Islamic society. Some Islamic law scholarship has held IP within Islamic legal systems as being against the social vision of Islam, whereas other scholars and a fiqh council have recognized that IP is permissible and should be encouraged in an Islamic society. Recent scholarship has debated the permissibility and effect of IP but has not addressed how Islamic IP legal systems may be similar or different from Western IP legal systems. This Article argued that IP within Islamic legal systems entails both Western IP principles and encompasses Islamic principles, notably limitations to excesses, compassion, and charity.

In doing so, this Article introduced the key novel distinction about Islamic IP to clarify its effects—balance. Foremost, the aim of Islamic IP is not maximization of IP rights but instead to balance recognition of IP rights with societal interests. Relatedly, in this Article, this balance emphasizes the importance of value pluralism in an Islamic society. Furthermore, it suggests the calibration of private property rights with access and fair distribution in a society. Additionally, while it is important to consider the needy and poor and the importance of raising the overall standard of living in a society that embodies an Islamic legal system, Islamic IP as a conceptualization also reveals the importance for private property rights and incentives for innovators. This balancing suggests that administration and implementation of Islamic IP in Muslim countries would require

²⁵⁶ See SAUDI AUTH. OF INTELL. PROP., NATIONAL INTELLECTUAL PROPERTY STRATEGY, (2022); Maysan Alobaid, *Intellectual Property: A MENA Blind Spot in a New Economic Age*, UNIV. OF PA. CAREY L. SCH. (Sept. 3, 2021), <https://www.law.upenn.edu/live/blogs/98-intellectual-property-a-mena-blind-spot-in-a-new>; Nagwa Abo-Ellella, Gen. Manager, Egyptian Pat. Off. Libr., *Evolving Role of IP Offices in Policy Formulation, IP Administration, and Coordination with Stakeholders Involved in the Innovation Process*, Presentation at the Global Intellectual Property Infrastructure for Promotion of Innovation, WIPO Doc. WIPO/INN/TYO/10/REF/THEME02/02 (Mar. 1, 2010), https://www.wipo.int/edocs/mdocs/aspac/en/wipo_inn_tyo_10/wipo_inn_tyo_10_ref_theme02_02.pdf; Stanley Kowalski, *Establishing Appropriate Best Practices in Intellectual Property Management and Technology Transfer in the United Arab Emirates: Building Human Capital, Global Networks and Institutional Infrastructure to Drive Sustainable Knowledge-Based Innovation-Driven Development*, 14 INDIAN J.L. & TECH. 77, 77 (2019).

carefully calibrated trade-offs given their potentially opposing effects in Western IP legal systems. Finally, while it is important to understand the implementation of Islamic IP concepts in Muslim countries, it should also be noted that its principles can help provide new considerations to shape or reform Western IP legal systems.