Historical, Religious and Scholastic Prohibition of Usury: The Common Origins of Western and Islamic Financial Practices

Joshua Vincent

Follow this and additional works at: http://scholarship.shu.edu/student_scholarship

Recommended Citation
http://scholarship.shu.edu/student_scholarship/600
Few practices have been so universally abhorred as usury. Through the ages, usury has been condemned by prophets, priests, philosophers, and poets of all nations. It has often been regarded as one of the vilest of crimes. The Hebrew prophet Ezekiel included usury with rape, murder, robbery, and idolatry in a list of "abominable things" that would receive the punishment of God. In the Middle Ages, Christian scholars debated whether usury should be considered extortion, a form of robbery, or a sin against charity and the Holy Spirit.

The origins and evolution of usury are extremely interesting from the perspective of many disciplines—economics, religion, law, etc. Usury is derived from the Medieval Latin term "usuria," which means "interest" or "excessive interest," and originally meant charging a fee for the use of money. It was actively banned and shunned well before the emergence of the Abrahamic religions of Judaism, Christianity, and Islam, all of which

2 Ezekiel 18:10-13 (Revised Standard Version).
3 ACKERMAN, supra note 1, at 61.
5 THE TORAH AND LATER SECTIONS OF THE HEBREW BIBLE CRITICIZE INTEREST-TAKING, BUT INTERPRETATIONS OF THE BIBLICAL PROHIBITION VARY. ONE COMMON UNDERSTANDING IS THAT JEWS ARE FORBIDDEN TO CHARGE INTEREST UPON LOANS MADE
prohibited usury as well. The legal origins on the prohibition of usury can be traced back to the Code of Hammurabi in 1760 BC. It is also frowned upon in Hindu law which predates 400 BC, even Plato spoke out against usury. This tradition carried into the Judeo-Christian-Islamic prohibition.

The definitional approach to prohibiting usury centers on distinguishing which transactions constitute the lending of money for a profit. The best known example in the ancient world of this approach is Israel, which outlawed usury among Israelites but permitted it if the borrowers were foreigners. The scholastic theory, which dominated European thought on usury from the fourth century until the sixteenth century, was a

---

7 THE CODE OF HAMMURABI (also known as HAMMURABI'S CODE OR CODEX HAMMURABI), was written ca. 1760 BC in ancient Mesopotamia. See, MARC VAN DE MIEROOP, KING HAMMURABI OF BABYLON: A BIOGRAPHY 99-111 (2005). The new code was not only Babylonian law, but also one of the first written codes of law in recorded history. The Code was created by Prince Hammurabi (ca. 1810 BCE - 1750 BCE), a first dynasty king of the city-state of Babylon who inherited the throne from his father, Sîn-muballit, in 1792 BC. Hammurabi believed himself to be specially chosen by the gods (i.e. the sun god Shamash) to convey the law to his people. The Code contained 275-300 laws written on 12 tablets. It is often cited as the first example of the legal concept that there are some basic laws that no one can change, not even a king. It is also very specifically structured so that each crime is given a specific punishment. These punishments were the bases of the modern day “eye for eye, tooth for tooth” philosophy. The code also serves as one of the earliest examples of the ideas of “presumption of innocence,” and that evidence must be presented against an accused. The fact that the law was written was important in itself because it implied that they were indisputable.  
9 Usury (in the original sense of any interest) was denounced by a number of spiritual leaders and philosophers of ancient times, including Plato, Aristotle, Cato, Cicero, Seneca, Plutarch, Aquinas, Muhammad, Moses, Philo and Gautama Buddha. Id.  
more nuanced version of the ancient Israeli approach. Contemporary to the scholastic theory, Islam developed a very similar theory of usury which survives into the modern age.

The Islamic approach begins with severe condemnations in religious texts of taking *riba* in connection with a loan. Scholars debate the correct translation of *riba* as either usury or interest, which may be due to the historical change in meaning of these terms in the West. Yet, the Islamic condemnations do not condemn business and commerce (or trading), which is distinguished from taking *riba*.

Over the centuries Islamic jurisprudence has developed forms of investment in businesses, such as joint ventures, limited partnerships, insurance arrangements, sale-leaseback transactions, and higher purchase prices on credit sales, which comply with the prohibition of *riba*. These transactions are often distinguished from *riba* by Islamic jurists on the basis of changes in risk sharing (compared to a loan), profit to the financier being based on the productivity

---

12 The exact dates are obviously not fixed. I am constructing a border around the period of the scholastic theory beginning with the condemnation of usury by the Council of Nicaea in 325 and ending with the passage of the *ACTE AGAINST USURYE*, 1545, 37 HENRY VIII c. 9 (ENG.), which allowed loans charging up to 10 percent. See JOHN T. NOONAN, JR., *THE SCHOLASTIC ANALYSIS OF USURY* 15 (HARVARD U. PRESS 1957); NORMAN JONES, *GOD AND THE MONEYLENDERS* 48 (1989). The scholastic theory is described in detail in Part II, infra.


14 There are a total of eight verses in the Qur'an which condemn taking *riba*. See id. at 536-37. Mohammed is reported as having compared taking *riba* to committing adultery 36 times and committing incest with one's mother, which demonstrates the intensity and seriousness of the issue in Islamic thought. See id. at 537.


17 See KLEIN, *supra note* 13, at 536.

of the business financed (rather than a fixed percentage of the amount of money provided), and fees for other services (such as purchasing the item sold on credit). 19

In the United States, the tradition of statutory limitation of interest rates dates back to Colonial times. 20 Forty-six states still retain rate ceilings. 21 American usury laws were modeled on the Statute of Anne (1713), 22 itself derived from still earlier legislation and debate. Thus, American usury law represents a venerable body of legal, ethical, religious, and (sometimes) economic thought, reaching back through the Middle Ages to the foundations of western civilization. 23 The social goals, economic consequences, criticisms, and proposals for change cannot be fully understood without some acquaintance with their context: the legal and economic developments that produced them. 24

This paper examines the implications and historical developments of usury based upon the “scholastic theory of usury,” the jurisprudential approach that dominated Western law and ethics for over a millennium. 25 The scholastic theory was rooted in ancient religious texts, Aristotelian philosophy, and Roman law contract theory. 26 It argued, under natural law principles, there is fundamental distinction between investing capital in a business or wealth-producing assets and lending money to fund consumption,

19 See id.
20 McCALL, supra note 10, at 557-58.
21 Id.
22 ACT TO REDUCE RATE OF INTEREST, 12 ANNE, c. 16 (1713); FRANK E. HORACK, A SURVEY OF GENERAL USURY LAWS, 8 LAW & CONTEMP. PROB. 36, 36-37 (1941).
23 ACKERMAN, supra note 1, at 63.
24 ACKERMAN, supra note 1, at 63.
25 McCALL, supra note 10, at 555.
26 Id.
the latter was considered violative of commutative justice.\footnote{Two quotations from St. Thomas Aquinas can serve as a definition of commutative justice. “In the first place there is the order of one part to another, to which corresponds the order of one private individual to another. This order is directed by commutative justice, which is concerned about the mutual dealings between two persons.” 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA, PT. II-II, Q. 61, ART. 1 (FATHERS OF THE ENGLISH DOMINICAN PROVINCE TRANS., BENZIGER BROS. 1947). “[I]n commutations something is paid to an individual on account of something of his that has been received, as may be seen chiefly in selling and buying, where the notion of commutation is found primarily. Hence it is necessary to equalize thing with thing, so that the one person should pay back to the other just so much as he has become richer out of that which belonged to the other.” Id. at pt II-II, q. 61, art. 2. See JACQUES MELITZ, SOME FURTHER REASSESSMENT OF THE SCHOLASTIC DOCTRINE OF USURY, IN 24 KYKLOS: INTERNATIONAL REVIEW FOR SOCIAL SERVICES 476 N. 3 (1971) (“The usury doctrine, dating mainly from 1150 to 1350, appeals not to authority and charity, but to ‘natural law’, therefore to reason and commutative justice.”).} The scholastic theory also noted that the persistence of usury systemically leads to undesirable wealth transfers inconsistent with distributive justice.\footnote{Again Aquinas can provide a definition of distributive justice: “[T]here is the order of the whole towards the parts, to which corresponds the order of that which belongs to the community in relation to each single person. This order is directed by distributive justice, which distributes common goods proportionately.” AQUINAS, supra note 12, at pt. II-II, q. 61, art. 1.}

I. Pre-Scholastic Approach to Usury

A. Ancient Societies

Lending at interest pre-dates writing and the coining of money by thousands of years.\footnote{Id.} The earliest recorded loans date from about 3000 B.C., but the practice appears to have been ancient by then.\footnote{Id.} Interest probably originated during the beginnings of agriculture, about 8000 B.C.\footnote{Id.} Farming provided people with early forms of lendable
capital: live-stock, grain, and tools. Loans of seed-grain or breeding stock, in particular, produce their own increase and may have suggested the idea of interest.  

It was only later, after 8000 B.C., during the Mesolithic Age, and especially after 5000 B.C., during the Neolithic Age (the dates, of course, are conjectural and differ widely for different locations), that capital and credit became important and provided a main impetus toward human progress. Mesolithic man went out to find his food. Neolithic man produced his own food through agriculture and animal culture. His capital took the form of seeds, improved tools, and especially herds of animals. Capital accumulation led to a great increase in population and the opening up of vast new areas in Asia and Europe. Such capital permitted the further accumulation of possessions, the support of chieftains, and the building of cities.

Cattle probably comprised the first true productive assets or capital of tribes or individuals. Cattle breeding supplied many financial terms used in later money economies. For example, there is our own word capital and our term pecuniary, from "pecus," meaning a "flock" in Latin. As cattle and grain became available and in demand in quantities above consumption requirements, they provided a form of primitive money; that is to say, they became commodities of sufficient value and uniformity that they could conveniently be used as a standard medium of exchange for other

32 HOMER AND SYLLA, supra note 11, at 19.
33 Id. at 20
34 Id.
35 Id.
36 ACKERMAN, supra note 1, at 63.
37 Id.
38 Id.
39 HOMER AND SYLLA, supra note 11, at 20.
40 Id.
41 Id
commodities. Not only could they be loaned out at interest, they also provided a standard of valuation.

B. Early Commercial Societies

The first written laws come from the Sumerians, a culture already advanced commercially. On the banks of the Tigris and Euphrates rivers, the Sumerians built the world's first urban civilization in the fourth millennium B.C. Living in large cities such as Ur, they pioneered irrigated farming, architecture, and commerce. About 3000 B.C., Sumerian priests invented cuneiform writing-perhaps in order to keep track of temple accounts and commercial transactions. Of surviving Sumerian writings, 90% are commercial accounts and contracts that contain some of the earliest recordings of loans repayable with interest.

In about 2350 B.C., Urukagina, a king of the Sumerian city of Lagash, had his scribes record for posterity his exploits and legal reforms (he freed persons imprisoned for debt), thus producing the earliest legal code. Other rulers adopted the practice, recording changes in a body of unwritten, customary law administered by Sumerian judges. In about 1750 B.C., the Babylonian king Hammurabi compiled, systematized,

---

42 ACKERMAN, supra note 1, at 66.
43 HOMER AND SYLLA, supra note 11, at 20.
44 Id.
45 Id. at 21.
46 Id.
47 ACKERMAN, supra note 1, at 66.
48 JAMES PRITCHARD, ED, ANCIENT NEAR EASTERN TEXTS RELATING TO THE OLD TESTAMENT 163 (PRINCETON UNIV. PRESS, 3D ED. 1969).
49 Id.
and expanded upon the earlier systems, creating his famous legal code.51 Like the Sumerian codes, Hammurabi's was probably a set of changes and additions to an unwritten "common law," rather than an attempt to set forth all of the laws of the land.52 Hammurabi's Code contains the earliest surviving usury law:

[§ L] If a merchant has given corn on loan, he may take 100 sila of corn as interest on 1 gur; if he has given silver on loan he may take 1/6 shekel 6 grains as interest on 1 shekel of silver.

[§ M] If a man who has raised a loan has no silver to repay it but has corn, [the merchant] may then take corn for his interest (at a rate) in accordance with the ordinances of the king; but, if the merchant has increased his interest above [100 sila of corn] on 1 gur [or] over 1/6 shekel 6 grains [on 1 shekel of silver] and has taken (it), he forfeits whatever he has given (on loan).53

These measures amount to 20% on loans of silver and 33% on loans of grain.54 The rates were apparently customary in the area, dating back for centuries.55

Since the Code required contracts to be written, much evidence of Babylonian lending practice remains today.56 Competition was apparently keen, for many loans were

---

52 Id.
53 G. Driver & J. Miles, *The Babylonian Laws* 39 (1952). The Code also deals with other lending abuses such as wrongful retention of security or use of force in collection. One section excuses the debtor from payment for a year in case of drought.
54 Id.
55 Id.
transacted at well below the legal rate. As trade became more widespread, the rates set by Hammurabi were adopted generally throughout the Middle East. These basic rates remained fairly constant for about 1200 years. After the Persian conquest of 539 B.C., Babylon declined as a commercial center. Normal rates rose towards 40%, and the old legal or traditional limits were ignored.

1. Greece

The Greeks of the seventh century B.C. developed an economic system that was commercial, urban, and monetary. Credit facilitated trade. The necessities of trade led to the Greeks adoption of standardized Babylonian weights and measures, a sort of legal tender for the payment of debts and taxes. Credit forms were exploited by the Greeks in an atmosphere of freedom and laissez faire very different from that of Babylonia.

There was extensive borrowing at interest. The Greeks apparently never prohibited interest entirely. In the earliest times, custom and kinship ties served to moderate the interest charge. Later, the customary rates were established as maximum legal limits, usually between 16% and 18%.

64 ACKERMAN, supra note 1, at 67; HOMER AND SYLLA, supra note 11, at 26.
65 Id.
66 Id.
B.C., the Greek economy underwent great changes. Spurred by the recent invention of coined money and improved navigation, the importance of trade grew rapidly. The economic changes caused great distress to the existing subsistence farming economy. Fluctuating prices, inflation, and competition from slave labor made small farming only a marginal living.

By 594 B.C., a large portion of the Athenian population was deeply in debt. Many citizens lost their land and were sold into slavery to pay their creditors. The city was threatened with revolt. In this crisis, the poet-orator Solon was called upon to restore the situation and given extraordinary powers. Solon cancelled existing land debt, prohibited the practice of debt slavery, used state funds to redeem Athenians already enslaved, and abolished the legal limits on interest rates.

For several centuries, interest rates in Athens were set solely by the market. Trade prospered. Whether attributable to the free interest or to other factors, Athens rapidly outstripped the other commercial cities of Greece. Although beneficial to commerce, the uncontrolled interest rates were a hardship on consumer debtors.

Greek philosophers also considered the question of usury—though more

67 Id. See ACKERMAN, supra note 1, at 68.
68 HOMER AND SYLLA, supra note 11, at 34.
69 Id. See ACKERMAN, supra note 1, at 68.
70 Id. See HOMER AND SYLLA, supra note 11, at 34.
71 Id.
72 Id.
73 Id. See T. DIVINE, INTEREST 11 (1959).
74 ACKERMAN, supra note 1, at 68.
75 Id. See T. DIVINE, INTEREST 11 (1959).
76 ACKERMAN, supra note 1, at 68.
77 Id.
from a moral than economic perspective.\textsuperscript{78} Plato felt that the role of the State was to instill virtue into its citizens; he thought wealth interfered with the attainment of such goodness.\textsuperscript{79} To encourage virtue, none should possess more than they need; none less.\textsuperscript{80} Plato condemned usurers for not only ignoring the poor, but for "planting their own stings into any fresh victim who offers them an opening to inject the poison of their money; and while they multiply their capital by usury, they are also multiplying... the paupers."\textsuperscript{81} Thus, according to Plato, lending at interest increases the gap between the rich and the poor, breeds disharmony and turmoil in the citizenry, and should therefore be prohibited by law.\textsuperscript{82}

Aristotle agreed with his teacher's appraisal of the bad moral effects of usury.\textsuperscript{83} In addition, he believed that interest was inherently unnatural and unjust.\textsuperscript{84} This conclusion was based upon Aristotle's analysis of economics. Aristotle stated that the goal of economic activity was to satisfy physical requirements such as food and clothing.\textsuperscript{85} The production of goods to fill these needs is the commendable, "natural" form of money-making.\textsuperscript{86} Farming, stock raising, and manufacturing fall into this category. They produce

\begin{itemize}
\item \textsuperscript{78} ACKERMAN, \textit{supra} note 1, at 69.
\item \textsuperscript{79} PLATO, \textit{THE REPUBLIC} 280 (F. CORNFORD TRANS. 1945).
\item \textsuperscript{80} Id. at 281
\item \textsuperscript{81} Id. at 280-81. Although disapproving of interest on commercial loans, Plato believed that men should pay their debts. He prescribed penalties for default of 200\% annually.
\item \textsuperscript{83} Id. at 217.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} ARISTOTLE, \textit{POLITICS} 23-24 (B. JOWETT TRANS. 1964). This is what is referred to as the "natural law theory of usury". ("The most hated sort, and with the greatest reason, is usury, which makes a gain out of money itself, and not from the natural use of it. For money was intended to be used in exchange, but not to increase at interest. And this term usury (\textit{tokos, i.e.,} offspring, produce) which means the birth of money from money, is
their own "increase" in a natural and beneficial way. Money functions properly as a medium of exchange to facilitate the transfer of goods.\textsuperscript{87} Commerce, hire, and usury, on the other hand, produce nothing that helps satisfy these wants.\textsuperscript{88}

\textbf{2. Rome}

The practical Romans refused to let such philosophizing interfere with the conduct of business.\textsuperscript{89} They generally steered a middle course, neither forbidding interest entirely nor letting the rate go unrestricted.\textsuperscript{90} The earliest written Roman laws, the Twelve Tables of 443 B.C., reduced the previous rate of interest by setting legal limits.\textsuperscript{91} The Tables provided for a rate of $8 \frac{1}{3}\%$, and a penalty of fourfold damages for violation thereof.\textsuperscript{92}

A nation of citizen-farmers, the Romans became suspicious of clever notions like interest.\textsuperscript{93} Several attempts were made to abolish it.\textsuperscript{94} In 342 B.C., a new law was passed which forbade the taking of interest by Roman citizens.\textsuperscript{95} The law was easily evaded, however, by the use of foreign agents, and was soon repealed.\textsuperscript{96} After the defeat of

\textsuperscript{87} A\textsc{cker}man, \textit{supra} note 1, at 69.
\textsuperscript{88} Id.
\textsuperscript{89} D\textsc{ivine}, \textit{supra} note 75, at 20; Hom\textsc{er} and Sylla, \textit{supra} note 11, at 43.
\textsuperscript{90} Hom\textsc{er} and Sylla, \textit{supra} note 11, at 44.
\textsuperscript{91} Hom\textsc{er} and Sylla, \textit{supra} note 11, at 44 (4th ed. 2005); A\textsc{cker}man, \textit{supra} note 1, at 70.
\textsuperscript{92} Hom\textsc{er} and Sylla, \textit{supra} note 11, at 44 (4th ed. 2005); A\textsc{cker}man, \textit{supra} note 1, at 70.
\textsuperscript{93} A\textsc{cker}man, \textit{supra} note 1, at 70.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
Hannibal in 202 B.C., Rome rapidly became the dominant power in the Mediterranean. Commerce, especially sea-trade, became an important and lucrative activity. In 88 B.C., the dictator Sulla raised the usury limit to 12%, an official rate that endured for over 500 years. The efficacy of the interest ceiling, however, seems to have been slight.

The final expression of Roman usury law was the Code of Justinian (533 A.D.) issued from Constantinople after the fall of the Roman Empire in the West. It set a graduated scale of maximum rates ranging from 8% on loans made by banks, to 6% on loans made by ordinary citizens, to 12% on maritime loans. This scheme represented a considerable advance in the economic sophistication of the law, for it recognized the fundamental difference between commercial and consumer loans, at least to the extent of permitting banks to lend at higher rates than ordinary citizens, who would presumably make mainly personal loans.

The Code also made explicit allowance for risk, another element that is ignored by any unified rate ceiling. In any era or commercial setting, a few loans will inevitably prove to be uncollectable. This is a normal expense of the lender's business; it must be considered in computing his overall profit. If Roman lenders were to be

---

97 HOMER AND SYLLA, supra note 11, at 47 (4th ed. 2005);
98 Id.
99 ACKERMAN, supra note 1, at 71.
100 Id.
101 HOMER AND SYLLA, supra note 11, at 44 (4th ed. 2005); ACKERMAN, supra note 1, at 70.
102 ACKERMAN, supra note 1, at 71.
103 ACKERMAN, supra note 1, at 71 (1981) (Part of the charge made on each collectable loan goes merely to compensate for lost principal. If a $100 loan had a 1% chance of loss, then about $1 of the interest charge must be allotted to cover this risk. When $100 is uncollectable by debtor default, the loss is balanced by the risk-charge of the many loans that are repaid. As the risk increases, an increasingly greater portion of the loan-charge
motivated to make more hazardous loans, the rate limit had to be correspondingly higher.\textsuperscript{104} As long as the rewards for success remained high, as in sea-trade, then the merchant whose ship came in would be able to profit despite a high interest rate; the lender could receive a fair return and also be covered for his risk of loss.\textsuperscript{105} 

As trade develops in any given society, merchants begin to seek loans to finance their ventures.\textsuperscript{106} These new borrowers differ substantially from consumers. For the commercial borrower, repayment is not so arduous a task. He does not consume the loan, but invests it to produce gain.\textsuperscript{107} Since the principal retains value in the form of merchandise or capital goods, the debtor need earn only enough to pay the interest. From expected profits, he has a natural source for repayment.\textsuperscript{108} In addition, the commercial borrower occupies a better bargaining position than the consumer.\textsuperscript{109} His needs are not so desperate; if the rate is too high, he can choose not to borrow.\textsuperscript{110} For these reasons, the commercial borrower does not seem to need the same kind of protection as the consumer.

The benefits of trade are quickly apparent: it provides revenue for the state and profitable investments for the influential classes. These advantages create a strong incentive for permitting the interest charges that stimulate commercial activity. Attitudes in commercially active societies reflect these factors.

\textsuperscript{104} Id.
\textsuperscript{105} Ackerman, supra note 1, at 71 (1981)
\textsuperscript{106} Id. at 65.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
II. The Scholastic Theory of Usury: the Fourth to the Sixteenth Century

With the context of the varying alternatives to regulating credit proposed by the ancient world established, this Part traces the history of the scholastic theory of usury from its beginnings in ancient biblical texts through its developments in the Middle Ages. The scholastic thinkers translated the simple biblical prohibitions into the language of the Roman law and natural law philosophy. Part A summarizes the ancient foundation on which the scholastics worked. Part B analyzes the scholastics' philosophical, juridical and theological defenses of these foundations. Part C presents the scholastics' application of the scholastic theory to actual economic situations.

A. Ancient Foundations: Biblical Text and Roman Law and Aristotelian Philosophy

The scholastic theory established principles for identifying transactions that constituted usury. It then prohibited them on terms originating in the ancient Jewish approach. The Jewish scriptures contained several texts concerning usury that became the starting point of analysis for the scholastics:

"If thou lend money to any of my people that is poor that dwelleth with thee: thou shalt not be hard upon them as an extortioner, nor oppress them with usuries."  

111 MCCALL, supra note 10, at 558.
112 Id.
113 EXODUS 22:25 (King James Version)
"If thy brother be impoverished, and weak of hand, and thou receive him as a stranger and sojourner, and he live with thee, take not usury of him nor more than thou gavest: fear thy God, that thy brother may live with thee."\textsuperscript{114}

Interest was entirely forbidden on loans to others within the community. These commands contemplate "consumer" loans to meet immediate wants.\textsuperscript{115} To exact interest from the needy is extortion.\textsuperscript{116} Among tribal "brothers" mercy and charity are the ideal.\textsuperscript{117}

Foreigners did not receive this protection. Deuteronomy 23:20-21 provides: "To a foreigner you may lend upon interest, but to your brother you shall not..."\textsuperscript{118} In charging interest to foreigners, the Hebrews were only following local custom.\textsuperscript{119} The special solicitude for tribal brothers did not extend to foreign idolators.\textsuperscript{120} As long as charity prevailed among Hebrews, the law was satisfied.\textsuperscript{121}

The early Christian church also vigorously condemned usury.\textsuperscript{122} Nevertheless, the New Testament was equivocal on interest. It required charity toward the poor: "Give to him who begs from you, and do not refuse him who would borrow from you,"\textsuperscript{123} and "if you lend to those from whom you hope to receive, what credit is that to you? For even sinners lend to sinners, to receive as much again. . . . Lend, expecting nothing in

\textsuperscript{114}LEVITICUS 25:35-37 (King James Version)
\textsuperscript{115}ACKERMAN, supra note 1, at 64.
\textsuperscript{116}Id.
\textsuperscript{117}Id.
\textsuperscript{118}DEUTERONOMY 23:20-21 (KING JAMES VERSION).\textsuperscript{119}ACKERMAN, supra note 1, at 64 (1981)
\textsuperscript{120}Id.
\textsuperscript{121}Id.
\textsuperscript{122}Matthew 5:42 (Revised Standard Version).
\textsuperscript{123}LUKE 6:33-35 (REVISED STANDARD VERSION).
Yet, in parable, the "slothful servant" is chastised for permitting his master's money to lie idle, rather than putting it out at interest to produce gain. The early church fathers condemned interest taking as a sin against Christian charity. The Old Testament prohibitions, however, remained solid scriptural foundations for condemning usury.

These biblical texts and references provided the underlying principles of usury analysis in the West for approximately 1,200 years. The Church greatly influenced the emerging legal order, directly through canon law and ecclesiastical courts, and indirectly through canon law's impact on secular legal regimes and theologically-informed legal teaching at Church-dominated universities. The Church's influence would be of purely historical interest were it exclusively procedural in character. Not surprisingly, however, the emerging law had a powerful normative basis, a moral framework that in many situations impeded the growth of commerce.

In the medieval period, to be European was nearly synonymous with being a Christian. The Church "wielded a real authority over the faithful," and the pope, as the head of its hierarchy, was charged with no less a duty than "to lead men to eternal

---

125 ACKERMAN, supra note 1, at 72.
126 See notes 113-119 supra and accompanying text.
129 Id.
130 DAVID J. GERBER, PROMETHEUS BORN: THE HIGH MIDDLE AGES AND THE RELATIONSHIP BETWEEN LAW AND ECONOMIC CONDUCT, 38 ST. LOUIS U. L.J. 673, 683 (1994) ("Europe during this period was a Christian civilization, organized and dominated by Christian symbols, ideas and institutions."). Ecclesiastical courts even had jurisdiction over Jews in cases brought against Christians, or where the "secular authorities did not offer adequate protection to them." HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 222 (1983).
life.” Throughout the period “the canonists were constantly endeavoring to make their system correspond as closely as possible with the ideal of Christian conduct, and to reduce to a minimum the divergence between law and morals.” Moral norms were reinforced both publicly, through canon law enforced in ecclesiastical courts, and privately, in the confessional, creating a mutually reinforcing system of norm standardization and enforcement.

Grounded in community values, Church norms were often inimical to commerce and wealth creation. Viewed as pitting believers against each other, mercantile profit endangered the Church’s conception of society as a communal endeavor, and was closely circumscribed. In the canonists’ zero-sum view of the nascent marketplace, “commercial activity [was] incompatible with religious salvation,” so the emerging...

---

131 Theodore F. T. Plucknett, *A Concise History of the Common Law* 278-79 (2d ed. 1936) (examining how customary law spread through its application in mercantile courts at fairs and eventually entered the common law); William F. Walsh, *Outlines of the History of American and English Law* 81 (1924); (declaring that “customary law must be regarded as the common law in the making, ready to be put in final form as a coordinated, rationalized system of national law”); see William W. Bassett, *Canon Law and the Common Law*, 29 Hastings L. J. 1383, 1418 (1978) (“No matter what be our religious beliefs, since the canonists struck the spark to push back the night of the dark ages, we have believed and continued to hold firm the conviction, against waves of discouragement from almost overwhelming odds, that law is good and that good laws and good lawyers can make people whole and set them free.”).

132 Dennis J. Callahan, *Medieval Church Norms and Fiduciary Duties in Partnership*, 26 Cardozo L. Rev. 215, 224-26 (2004); Plucknett, *supra* note 131, at 269; see Bassett, *supra* note 131, at 1387 (“The canon law carried a detailed ideal of life and practical adjudication of life’s affairs, deliberately intended to be an example to secular jurists, both to civilists of the Roman-law tradition and the common-law practitioners, of how law should relate to justice from the ideal vantage point of a Christian perspective.”).

133 Id. at 226.


135 Id.
merchant class was seen as especially vulnerable to market temptations. While profits taken from agricultural or textile production were viewed positively, the Church "regarded as suspect profits of speculation, banking, and finance." Moreover, the Church declared the principles of supply and demand unjust. Instead of allowing market forces to drive wages and prices, the Church created a regulatory regime which fixed standards of value.

By linking commercial activity to temptation, and by framing mercantile profit making and financing activity as contrary to communal values, the Church was able to establish pervasive control over economic matters. For instance, the Church adjudicated contract disputes, exerting jurisdiction over oath-based promises, and in the process shaped the long-established values of the Christian community into a "good faith contracting" norm which displaced the formalism of the Roman law. Similarly, the Church injected its notions of fairness and justice into the marketplace by reawakening

---

136 David J. Gerber, *Prometheus Born: The High Middle Ages and the Relationship Between Law and Economic Conduct*, 38 St. Louis U. L.J. 673, 697 (1994); see id. at 696 ("The church's dominant role in society meant that its values would be the starting-point for responding to the market, and the church's tradition was filled with antipathy to commerce.").

137 Patrick Cleary, The Church and Usury: An Essay on Some Historical and Theological Aspects of Money Lending 82 (1972)

138 PLUCKNETT, supra note 131, at 270

139 James A. Brundage, *Medieval Canon Law* 175 (1995) ("Canonical rules...reached...into virtually every nook and cranny of human conduct, both public and private."); Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply Side Analysis*, 97 NW. U. L. Rev. 1551,1591 ("The assertion of authority over all 'spiritual matters' meant in practice that the church was able to create a sort of 'shadow claim' for almost every claim recognized in other legal jurisdictions, from contract, to debt, to criminal law, to testamentary succession.");

the "just price" theory of the Justinian Code, thereby encouraging "the regulation of prices . . . on the grounds that it protected the common welfare."\textsuperscript{141}

Similar to the Christian principles endorsed by the Church during this time, Islam also governs life based on moral obedience and compliance. However, Muslim compliance is based upon the Qur'an, as well as the words and actions of the Prophet Muhammad, known as the Sunnah.\textsuperscript{142} Through centuries of careful interpretation and exegesis, the scholarly tradition of Islam has derived legal principles from these primary sources\textsuperscript{143} to create a body of law known as the Shari'ah, which literally means "The Way."\textsuperscript{144} Since the vast majority of Muslims are not scholars, the Shari'ah represents a vital connection to authentic sources of Muslim faith and practice.\textsuperscript{145} The scholars who

\textsuperscript{141} Gerber, supra note 130, at 699, 714-20; see Berman, supra note 130, at 21 (commenting that the Church promoted a "realization of justice...proclaimed as a messianic ideal of the law itself," associated in the Middle Ages "with the Last Judgment and the Kingdom of God" and later "with public spirit, fairness, and the traditions of the past"); Bassett, supra note 131, at 1417-18 (noting that ecclesiastical chancellors and canon lawyers developed the "notions of good faith, fairness, [and] balancing of hardships").


\textsuperscript{143} Bhatti, supra note 137, at 208 (The primary sources of Islamic Law are, in order of authority, from greatest to least: the Qur'an, the Sunnah, ijma (consensus of the scholars), and qiyas (analogical reasoning). The Qur'an is believed to be the literal word of God conveyed to the Prophet Muhammad. Chris Roederer & Darrel Moellendorf, \textit{Jurisprudence} 465-66 (2004)).

\textsuperscript{144} Id. (The development of the Shari'ah is akin in both purpose and method to the codification of the Civil Law in modern European countries. The aim was to compile the principles of Islam from the authentic sources of the religion, which were the Qur'an and the Sunnah. In the European case, these authentic sources were either the Roman commentaries of Justinian, or the natural law tradition. See, e.g., Rene David & John E.C. Brierley, \textit{Major Legal Systems in the World Today} 22-27 (3d ed. 1985).

\textsuperscript{145} Bhatti, supra note 137, at 208.
exposit the Shari'ah are individuals who have, inter alia, years of formal legal training in the science of “fiqh,” or the fundamental principles of Islamic jurisprudence.\textsuperscript{146}

Using well-settled methods of derivation,\textsuperscript{147} these scholar-jurists have steadily developed a corpus of legal opinions that is intended to meet the unique needs of Muslims in various times and places.\textsuperscript{148} Muslims are free to consult jurists sua sponte and examine various legal opinions on a given issue that concerns them.\textsuperscript{149} Indeed, with the exception of the immutable principles contained within the Qur'an, a Muslim is never bound to accept any legal opinion or new juristic rule that he or she does not agree with.\textsuperscript{150} By the same token, since the tradition is self-referencing and cumulative, a consensus by a majority of jurists on an issue constitutes a type of legal proof in and of itself, which can carry a significant amount of spiritual weight.\textsuperscript{151} Hence, to the extent that the Shari'ah can be followed,\textsuperscript{152} observing it is just one step in the process of living a "god conscious" life,\textsuperscript{153} or in a manner that is consistent with the Qur'an and the Sunnah.

One of the central features of Islamic transactional law is that it completely prohibits interest, or “riba.”\textsuperscript{154} Several verses in the Qur'an denounce interest as

\begin{footnotesize}
\begin{enumerate}
\item Id. at 208. This is the foundation of Islamic jurisprudence. (See Wael B. Hallaq, \textit{A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI USUL AL-FIQH} I (1999).)
\item Based on its reliance on precedent and analogy, some have noted that Islamic jurisprudence is a common law tradition. Id. at 208-209.
\item Bhatti, \textit{supra} note 137, at 208.
\item Id. at 209
\item Id.
\item Bhatti, \textit{supra} note 137, at 209.
\item Bhatti, \textit{supra} note 137, at 209-210.
\item Bhatti, \textit{supra} note 137, at 211. Although the term riba is used in the Qur'an, it is never precisely defined in relation to finance. The word riba is derived from the Arabic
\end{enumerate}
\end{footnotesize}
contravening God's design for humanity: "Those who devour interest (riba) will rise up on the day of Resurrection as those tormented by Satan's touch. That is because they say that 'Trade and usury' are the same. However, God permits trade, and prohibits usury ... ." 155 Elsewhere, the Qur'an states: "God condemns usury (riba), and blesses charities ... O you who believe, be mindful of God and refrain from all kinds of interest, if you are truly believers ... " 156 Apart from economic reasons, Islam also prohibits the charging of interest out of a concern for social justice. One of the five pillars of the Islamic faith is the annual payment of a certain percentage of one's disposable income as "zakaat" or "alms for the poor." 157 Even beyond zakaat, individuals are commanded to give charitably at regular intervals to over five distinct classes of individuals.
within society including relatives, beggars, orphans, and the destitute.\textsuperscript{158} In light of these positive duties to actively disseminate wealth throughout society, prohibiting interest preempts its use as an exploitative and oppressive tool throughout the course of executing one's moral and social obligations.\textsuperscript{159} Hence, Islam's preoccupation with interest ultimately reflects both economic and social concerns,\textsuperscript{160} and careful observance of the prohibition is an essential part of Muslim spiritual and economic life.


B. Scholastics' Philosophical, Juridical And Theological Defenses Of These Foundations.

The scholastics developed a definition of usury in light of two sources from the ancient world: Roman Law and Aristotelian philosophy. An early scholastic analysis of usury rested on the legal definition in Roman law of a loan, \textit{mutuum}.\textsuperscript{161} In a loan, it was

\begin{itemize}
\item See Qur'an, 2:177 ("The truly good are those who believe in God and the Last Day, in the angels, the Scripture, and the prophets; who give away some of their wealth, however much they cherish it, to their relatives, to orphans, the needy, travelers and beggars, and liberate those in bondage.")
\item See Qur'an, 4:161 ("They took riba, though they were forbidden and that they devoured men's substance wrongfully - We have prepared for them a grievous punishment."); see also Qur'an, 2:280 ("If a debtor is unable to pay, than wait for a better time [before collecting]. [However] if you give up the loan as a charity, it would be better for you, if you only knew.")
\item NOONAN, \textit{supra} note 82, at 215-17.
\end{itemize}
argued, mine (meum) becomes yours (tuum). This etymology reflected the legal classification. Roman law played two key roles in the development of usury doctrine. The first was as a source of conceptual structure. Roman law did not recognize the concept of contract in the abstract; it treated only specific types of contract, each of which was subject to its own rules. One of these contract types was the "mutuum," in which one party transferred property to another in exchange for a promise to return the same property or its equivalent. The canonists seized upon the mutuum concept, added a normative element, and used it in defining usury. Previous tradition had defined usury as "to demand more than one gives." The canonists recast usury as profit on a mutuum contract, thus making the mutuum concept an important doctrinal anchor for the usury norm.

Roman law also provided a solution to the usury problem that was resisted at first, but later adopted. Roman law did not prohibit loans at interest, but it did proscribe interest in excess of rates fixed by the authorities (usually ten percent). Initially, Romanists and canonists thus had to explain why Roman law's apparent acceptance of (moderate) interest should be disregarded. They avoided this obstacle by explaining that on this point Roman law was not authoritative, because Justinian's compilation

162 Id.
163 Id.
165 Id.
166 Id.
168 NOONAN, supra note 12, at 100-01.
169 Id.
170 HOMER AND SYLLA, supra note 11, at 71.
171 ACKERMAN, supra note 1, at 74.
explicitly incorporated changes made by the church. Nevertheless, the idea that the better solution might be merely to restrict interest rates was continually present, and it was eventually readopted.

As defined by Roman law a *mutuum* was the transfer of ownership. If what was mine was now yours, it would be a contradiction in terms to charge for its use. Put in Roman law terms, one cannot enter into both a transfer of ownership (such as a *mutuum*) and a contract for use (such as a *locatio conductio rei*) for money. By entering into a *mutuum*, the attribute of use has vested in the recipient with the *mutuum*. Return of the good was, of course, stipulated for by the contract, but there was an inherent contradiction in temporarily transferring ownership and also requiring payment for the use of the good during the time it was loaned. The legal classification of the loan was itself violated by making the gratuitous act productive of gain.

In this argument, "nature" seemed to be nothing other than the order established by law. According to this "natural law" theory of usury, someone who lends money for the purpose of consumption, as opposed to investment in a business venture, should be entitled merely to compensation for loss incurred in making the loan ("interest" in the

---

173 NOONAN, *supra* note 82, at 215-16.
174 DIGESTA 50.16.121, IN CORPUS JURIS CIVILIS.
175 McCALL, *supra* note 10, at 566.
176 Id.
177 NOONAN, *supra* note 82, at 215-16.
178 See HOMER & SYLLA, *supra* note 11, at 71. ("The prohibition was against usury, 'where more is asked than is given.' The Latin noun usura means the 'use' of anything, in this case the use of borrowed capital; hence, usury was the price paid for the use of money. The Latin verb intereo means 'to be lost'; a substantive form interisse [sic] developed into the modern term 'interest.' Interest was not profit but loss.")
179 NOONAN, *supra* note 82, at 216.
original Roman law meaning of the word).\textsuperscript{180} It was not made clear why another contract to pay usury could not be added to the gratuitous loan contract, especially as the Roman law itself recognized this possibility.\textsuperscript{181} It was not apparent why, for a man entering into the loan relationship, the legal description of the loan contract was decisive.\textsuperscript{182} The argument based on the nature of the \textit{mutuum} gradually became obsolete. The charging of "usury" in the scholastic sense (and used in this Article as distinguished from modern usury statutes) is the exaction of the payment of a gain above compensation for loss.\textsuperscript{183} The charging of usury is impermissible.\textsuperscript{184}

A more substantial argument was based on the nature of money. Its classic formulation was by Aristotle.\textsuperscript{185} Money, he said, was invented to facilitate exchange, as the exchange of real goods was too awkward for civic life.\textsuperscript{186} To use money in a loan to gain more money was to misuse money, "for money was intended to be used in exchange, not to increase at usury."\textsuperscript{187} Aristotle believed that interest was inherently

\textsuperscript{180} \textsc{Noonan, supra} note 12, at 105-06.

\textsuperscript{181} The \textit{Corpus Juris} consisted of four parts: The codex, primarily a collection of edicts of Roman emperors; the digest, a compilation of opinions of jurisconsults from the classical period; the institutes, a basic introduction to Roman law; and the novels, selections from Justinian's own legislation. For a discussion of the roles played by the various materials in legal education during the medieval period, \textsc{See Alan Watson, The Making of the Civil Law} 10-13 (1981).

\textsuperscript{182} \textsc{McCall, supra} note 10, at 549.

\textsuperscript{183} \textsc{Pope Benedict XIV, Vix Pervenit, P3.I-III (Nov. 1, 1745)}, available at http://www.ewtn.com/library/ENCYC/B14VIXPE.htm ("The nature of... usury has its proper place and origin in a loan contract. This financial contract between consenting parties demands, by its very nature, that one return to another only as much as he has received.... [A]ny gain which exceeds the amount [the lender] gave is illicit and usurious.").

\textsuperscript{184} \textsc{McCall, supra} note 10, at 567.

\textsuperscript{185} Id.

\textsuperscript{186} Id.

\textsuperscript{187} \textsc{Aristotle, Politics} 1256-1258b, tr. B. Jowett, in 10 \textsc{Works}.
unnatural and unjust.\textsuperscript{188} This conclusion was based upon Aristotle's analysis of economics. He stated that the goal of economic activity was to satisfy physical requirements such as food and clothing.\textsuperscript{189} The production of goods to fill these needs is the commendable, "natural" form of money-making.\textsuperscript{190} Farming, stock raising, and manufacturing fall into this category.\textsuperscript{191} They produce their own "increase" in a natural and beneficial way.\textsuperscript{192} Money functions properly as a medium of exchange to facilitate the transfer of goods.\textsuperscript{193} The argument here was still legal, but in its focus on the purpose of money it looked beyond the law to the human purpose in inventing money.\textsuperscript{194} It did not indicate, however, how this human purpose was frustrated if money were used both in commerce and in interest-bearing loans.\textsuperscript{195} It seemed to assume that, once the purpose of money was fixed by man, it was immoral to find some other purpose.\textsuperscript{196}

Associated with this analysis of the purpose of money was a contrast between money and naturally fruitful goods. The Greek word itself for usury, tokos, meant "offspring."\textsuperscript{197} Usury, Aristotle said, was offspring "against nature," and the nature Aristotle appealed to was the nature of the universe. He compared this offspring of sterile coin with the fruit of plants and the offspring of animals: these were "in accordance with nature." All mercantile trade was "against nature." But usury was most against nature, for

\textsuperscript{188} Ackerman, \textit{supra} note 1, at 69.
\textsuperscript{189} Id.
\textsuperscript{191} Ackerman, \textit{supra} note 1, at 70.
\textsuperscript{192} McCall, \textit{supra} note 10, at 566.
\textsuperscript{194} Noonan, \textit{supra} note 82, at 216 (1965).
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Noonan, \textit{supra} note 82, at 216 (1965).
here sterile coin itself bore fruit. Thus, money was considered "sterile," since it did not increase or diminish over time. From this perspective, the usury prohibition was absolute and included any profit on a loan. This Aristotelian analysis was a favorite of Christian theologians. God the creator had given fertility only to sexually differentiated animals. Among the medieval theologians the sterility of money was a commonplace, and the conclusion was regularly drawn that from a naturally sterile good no increase should be taken.

Reflecting this sterility of money theory, the canon law promoted the belief that only charitable loans were acceptable. The linking of charity to loans answered the Church's communal "precept of helping one's neighbor in necessity" because the need for a loan would most often arise when the borrower had suffered some misfortune, and would therefore be in a weak bargaining position. "In such situations the cohesiveness of the community required that others make the needed loan without asking for the payment of interest." Because a lender could not receive title to repayment beyond the principal, any interest-bearing loan was considered usurious.

\footnotesize

198 Id.
200 Id.
201 NOONAN, _supra_ note 82, at 216 (1965).
202 Id.
203 ACKERMAN, _supra_ note 1, at 74-75.
204 Id.
205 NOONAN, _supra_ note 12, at 42.
207 Id.
St. Thomas Aquinas attempted a subtle reformation of the sterility of money theory, and in turn, produced the most influential analysis of the interest question.\textsuperscript{209} His condemnation of interest, a reformulation of Aristotle's idea of the "sterility" of money, became the basis for later Catholic doctrine.\textsuperscript{210} Aquinas divided goods into two classes: "fungible" and "non-fungible."\textsuperscript{211} With non-fungible goods, the use of the loan can be separated from the thing itself.\textsuperscript{212} A house or farm, for example, are not essentially consumed in their use. They may deteriorate over a period, but to use them is not necessarily to consume them.\textsuperscript{213} Thus, the use of a farm could be lent, the profits taken, and the farm returned undiminished.\textsuperscript{214} Since the use was separable from the farm, a charge for this use was justified.\textsuperscript{215}

Fungible goods, on the other hand, were products such as wine or grain in which the intended use consumed the product.\textsuperscript{216} For these goods the value of their use and the value of their substance are identical.\textsuperscript{217} In contrast to a non-fungible good such as a farm, it is essential to the nature of drinking wine that the wine be consumed.\textsuperscript{218} For goods consumed in their use it is wrong to charge for the use, for the use is identical with the substance.\textsuperscript{219} To sell wine, and then to sell its use, is to sell the same thing twice.\textsuperscript{220}

\begin{footnotes}
\item[209] ACKERMAN, supra note 1, at 74-75.
\item[210] Id.
\item[211] Id.
\item[212] Id.
\item[213] NOONAN, supra note 82, at 216-217 (1965).
\item[214] Id.
\item[215] ACKERMAN, supra note 1, at 74-75.
\item[216] Id.
\item[217] Id.
\item[218] NOONAN, supra note 82, at 216-217 (1965).
\item[219] Id.
\item[220] ACKERMAN, supra note 1, at 75.
\end{footnotes}
Similarly, to lend money and get it back with a payment for its use is to be given back more than you have given.\textsuperscript{221}

The influence of Aquinas's thought was widespread. For example, the Fifth Lateran Council in 1515 defined usury as "gain sought from the use of a thing not fruitful in itself (as a flock or a field), without labor, expense or risk on the part of the lender."\textsuperscript{222}

Preceding the Fifth Lateran Council, however, the Church issued similar decrees at the Second, Third, and Fourth Lateran Councils (1139, 1179, and 1215)\textsuperscript{223} which proscribed excommunication for usurers, refused usurers burial in Christian grounds, and interdicted usurers' offerings.\textsuperscript{224} In 1234, Pope Gregory IX (1227-1241) issued his Decretales, which forever classed usurers as infames (making them ineligible to hold public office, honors, or to testify in court), commanded princes to expel usurers from their realms, forbade landlords from renting property to usurers, and invalidated the wills and testaments of usurers.\textsuperscript{225} Throughout the twelfth and thirteenth centuries, the

\textsuperscript{221} Id.
\textsuperscript{222} See also Jacques Le Goff, Licit and Illicit Trades in the Medieval West, in Jacques Le Goff, Time, Work and Culture in the Middle Ages 58, 64-66 (Arthur Goldhammer trans., 1980).
\textsuperscript{223} Id.
Church's "campaign against usury" crystallized into a staunch prohibition in any form, and the moneylender was linked with the worst type of evildoers.226

The proposition that interest on money loans was inherently immoral created a serious roadblock to further economic expansion.227 Unlike the Roman usury laws, which were widely ignored when inconvenient, medieval religious sanctions were taken very seriously by merchants.228 It was a time of faith; sin was feared, and excommunication dreaded.229 The problem was not how to evade legal restrictions, but how to trade without sinning.230 The prohibition against usury was, at least in theory, an absolute one: any return beyond the principal was prohibited, but it applied only to loan contracts.231 This opened up the possibility of evading the prohibition by disguising loans through the use of more complicated contracts.232 To provide spiritually acceptable commercial capital, investment schemes were developed which provided for a rate of return without formally relying on a loan or interest charge.233

C. Application of The Scholastic Theory to Actual Economic Situations.

226 ACKERMAN, supra note 1, at 74-75.
227 For a discussion of the moral context in which these values were shaped, see WAYNE A. MEEMS, THE MORAL WORLD OF THE FIRST CHRISTIANS (1986) and ROBIN L. FOX, PAGANS AND CHRISTIANS 265-608 (1986).
228 PAUL B. RASOR, BIBLICAL ROOTS OF MODERN CONSUMER CREDIT LAW, 10 J.L. & RELIGION 157, 171 (1994).
229 Id.
230 Id.
232 RASOR, supra note 223, at 171.
233 Id.
Evasive Tactics – Emergence of Two Financial Systems – Interest

V. No-Interest

Contractum Trinius, or the “triple contract”, was a form of partnership developed as a common means of avoidance. Its aim was to bypass the canon law ban of usury, a law the Church aggressively tried to uphold. The lender was designated as the investing partner in a venture. The active partner, in separate contracts, guaranteed full repayment of the investment even if the venture failed and stipulated a fixed share of profits for the investor. Together, the three contracts essentially created a loan at interest, but since profits from actual trade were permissible, the transaction was not considered usurious. It was an amalgamation of three separate contracts, each individually acceptable to the Church, but which together generated a fixed rate of return, i.e., an interest-bearing loan in all but name. The fast spreading and widespread practice of Contractum Trinius (i.e., usury) by European merchants in the Middle Ages began to place undue pressure on the Catholic Church’s doctrine which banned such money practices. Eventually, the Church yielded to this commercial pressure.

---

234 McCALL, supra note 10, at 583-85.
235 Canon law is the ecclesiastical law of the Roman Catholic Church. It is complete legal system which encompasses courts, lawyers, judges, a fully articulated legal code and principles of legal interpretation. See Canon Law, Catholic Encyclopedia, http://www.newadvent.org/cathen/09056a.htm.
236 Although those holding the triple contract not a usurious loan in substance prevailed in establishing a consensus, there were those who argued even into the eighteenth century that the form of a societas was so altered that in substance the triple contract was a loan and thus profit usurious. See NOONAN, supra note 12, at 225-28.
237 Id.
238 Id.
239 ACKERMAN, supra note 1, at 76.
240 Id. See McCALL, supra note 10, at 583-85.
241 Id.
Another very common form of investment was the sale of "annuities," also called "rentes" or "census.\textsuperscript{242} The seller received a sum of cash, and in exchange the purchaser received the profits from a designated piece of productive land (usually a farm) for a period of time.\textsuperscript{243} Frequently, the annuity was to last for the purchaser's life.\textsuperscript{244} Originally, the profits were actually collected in produce.\textsuperscript{245} Later, annual payments of money were fixed.\textsuperscript{246} The annuity was an important means of support for widows and disabled people.\textsuperscript{247} Sellers were frequently governments or landed nobles who needed to raise quick cash.\textsuperscript{248}

Merchants could also use "bills of exchange" to produce the effect of interest.\textsuperscript{249} The bill of exchange was essentially a personal check used to make purchases in foreign trade.\textsuperscript{250} The seller who took the bill was extending credit for the time (usually months) required to send the bill back to its source for redemption.\textsuperscript{251} Normally, the transaction involved conversion of one form of currency to another.\textsuperscript{252} By setting an artificially high rate of currency exchange, the seller could receive a profit on his extension of credit.\textsuperscript{253}

\textsuperscript{242} ACKERMAN, supra note 1, at 76.
\textsuperscript{243} Id.
\textsuperscript{244} For example, many scholastics considered a personal census (one whose base was all the assets of the seller including his future income from wage labor) which was required to be redeemed by the seller on a certain date to be a usurious loan disguised under the mere name of census. See NOONAN, supra note 12, at 158-62.
\textsuperscript{245} HOMER AND SYLLA, supra note 11, at 74-75; ACKERMAN, supra note 1, at 76.
\textsuperscript{246} Id.
\textsuperscript{247} McCall, supra note 10, at 583-85.
\textsuperscript{248} Id.
\textsuperscript{249} HOMER AND SYLLA, supra note 11, at 74-75 (4th ed. 2005); ACKERMAN, supra note 1, at 76.
\textsuperscript{250} Id.
\textsuperscript{251} Id.
\textsuperscript{252} ACKERMAN, supra note 1, at 76-77.
\textsuperscript{253} ACKERMAN, supra note 1, at 77.
A spinoff from the medieval pawnshop\textsuperscript{254} was the "mons pietatis."\textsuperscript{255} Subsidized by the state or charitable contributions, the mons pietatis was a pawnshop run for the benefit of the poor.\textsuperscript{256} The interest charge was a low 6\%.\textsuperscript{257} Despite clerical misgivings, Pope Paul II approved the scheme on the theory that the charge was not profit but only enough to cover the cost of operation.\textsuperscript{258} The institution spread throughout Europe, gradually expanding its sphere of activity to include business loans and even deposit banking.\textsuperscript{259}

Islamic banks function very similarly to regular commercial banks in that they must fix their financial rate of returns ("ROR") at the onset for most of their businesses (which is essentially prohibited under Shari'ah).\textsuperscript{260} Currently, many money lending institutions making loans to the Muslim community are adopting the same approaches used in the Middle Ages to defeat the usury prohibition in Islam.\textsuperscript{261}

The fundamental reason for the prohibition of interest in Islam is that the depositor should not profit unduly from the hard work and risk bearing of others.\textsuperscript{262} To a Western-trained economist, a competitively determined market interest rate serves an

\begin{itemize}
\item \textsuperscript{254} ACKERMAN, \textit{supra} note 1, at 77 (1981); HOMER AND SYLLA, \textit{supra} note 11, at 74-76
\item \textsuperscript{255} ACKERMAN, \textit{supra} note 1, at 76-77. HOMER AND SYLLA, \textit{supra} note 11, at 74-76.
\item \textsuperscript{256} Id.
\item \textsuperscript{257} Id.
\item \textsuperscript{258} Id.
\item \textsuperscript{259} Id.
\item \textsuperscript{261} MAHMOUD A. EL-GAMAL, \textit{ISLAMIC FINANCE: LAW, ECONOMICS, AND PRACTICE} 62 (2006).
\item \textsuperscript{262} REHMAN, \textit{supra} note 260, at 634.
\end{itemize}
indispensable function in a market economy. Interest rates affect savings and investment and efficiently allocate capital from where it is plentiful to where it is scarce. In competitive markets, this allocation of capital is achieved most efficiently; namely, capital is attracted to where it will earn the highest rate of return ("ROR"). Moreover, interest rates offer policymakers an important instrument for macroeconomic management. Although Islam prohibits interest (riba), it encourages profit and return from investment where the investor takes calculated risk. Thus financial institutions can offer an investor a share of their annual profits (and losses) in proportion to the investor's deposit (the share of an individual's deposit relative to total assets of the bank). This rate of return to the investor is different from interest in two important ways: a priori its size is unknown (there are no guarantees); and the investor has to take more of a risk (in a Western system the depositor takes less of a risk because the capital of the financial institution's stockholders is first at risk before the capital of the depositors).

---

263 It must be emphasized here that the only way to achieve a true understanding of Islamic banking and finance is to not look at the Islamic system through "Western eyes." In other words, to fully understand Islamic banking and finance, it is necessary to understand Islam from a broadly encompassing perspective. An excerpt from DeSeife's book on the Shari'ah may help clarify this point: "Much has been written on Islamic law ... yet often, because the perspective of most Americans is not grounded in an adequate knowledge of Islam, misconceptions abound, particularly as to the real meaning of the Shar'ia ... Viewed as a system of law without the context of the religious and ethical provisions of the Qur'an, the Shar'ia may strike us as a throwback to the medieval times when witches were burned at the stake in Christian countries." RODOLPHE J.A. DESIEFE, THE SHAR'IA: AN INTRODUCTION TO THE LAW OF ISLAM 1 (1994).

264 EL-GAMAL, supra note 256, at 63.

265 Id.
In essence, the modern day practice of avoiding riba is similar to the Contractum Trinius\textsuperscript{266} as can be seen in, for example, Islamic "murabaha" contract.\textsuperscript{267} This Islamic mortgage financing contract looks very much like Contractum Trinius (two separate contracts for one project so it becomes Shari'ah-compliant).\textsuperscript{268} Murabaha works essentially as follows: in the Western financial tradition, if a person wishes to finance the purchase of an item, he or she goes to the bank and asks for a loan at a set rate of interest, which is paid back over time. The bank typically gets a lien on the item until it is paid off.\textsuperscript{269} With murabaha, the bank buys the item and then "sells" it to the customer at cost plus.\textsuperscript{270} The "plus" is the bank's profit, and works the same as a rate of interest.\textsuperscript{271} The customer, who does not have the money to pay immediately for the total value, plus profit, of the item, pays over time.\textsuperscript{272} The payments include the principal amount of the purchase price, plus the profit, in installments.\textsuperscript{273} This has exactly the same effect as a traditional equipment-financing loan, where the principal plus the interest are amortized and paid back to the bank over the life of the loan. Understanding this, a bank that offers these products does not tend to make the text of such types of contracts readily available to outsiders and uninterested parties.\textsuperscript{274} These contracts also tend to be drafted very

\bibliography{references}{266-274}
strictly and tightly to ensure that the bank does not lose money on the deal if the beneficiary defaults (as Shari'ah-compliance mandates profit/loss sharing). 275

There are many other examples of similar Islamic Contractum Trinius type contracts. In investment financing, for example, to list just a few, there are the mudaraba, 276 musharaka, 277 bai'muajjal, 278 and ijara, and bai'salam modes of financing. 279 Musharaka financial transactions were known and practiced among the Arabs before Islam, were continued during and after the life of the Prophet Mohammed, and thus are considered by many scholars to be the most authentic form of Islamic finance. 280 Critics have complained that the banks are following the letter of the law instead of the spirit of the law. 281 They argue that combining Islamically permissible contracts to produce interest-bearing loans is the heart of the modern day financial specialization of Islamic banking--and that, they contend, is a violation of Shari'ah law. 282 They are quick to point out that "economic and social justice," a key tenant in Islam, recognizes capital as a factor of production, but just not the excessive use of it on a "down-trodden man." 283

275
276 TAYLOR, supra note 257, at 392.
277
278
279 REHMAN, supra note 251, at 634.
280 Id. at 636.
281
282
283
According to religious obligations proscribed by Islamic law, Muslims who practice Islam are prevented from using some conventional financial products. 284 Shari'a (Islamic law) prohibits paying or receiving riba, 285 which is often translated as interest, but may be better understood as theory of unjust enrichment. 286 Riba has also been defined as "unlawful advantage by way of excess or deferment." Prohibitions of riba in the Qur'an seek to prevent usurious conditions in exchanges and loans. 288 "As a result, legal transactions are restricted to exchanges of literal equality, like barter and sale: dollar for dollar, with no adjustment for time-value." Usurious conditions (usury) could occur where there is an increase on an initial capital sum, whether because it is bargained for or because there are date-uncertain future transactions. 289

The classical view adopted in many Islamic law jurisdictions is that the interest component in financial transactions, a feature entrenched in Western financing schemes, is completely prohibited. 290 A more modern view, however, makes allowances for some types of excess in financial dealings by assigning money no intrinsic value, therefore allowing interest on money, excess on a loan, or excess on another exchange to fall

285 Id. ("The root of the Arabic word riba (transliterated as the English-language letters r, b, and w) signifies 'increase.' The grammatical form of riba, a verbal noun, means 'excess, increase, augmentation, expansion or growth.'" BARBARA L. SENIAWSKI, RIBA TODAY: SOCIAL EQUITY, THE ECONOMY, AND DOING BUSINESS UNDER ISLAMIC LAW, 39 COLUM. J. TRANSNAT'L L. 701, 707 (2001).)
287 Id.
288 Id.
289 Id.
290 Id.
291 Id. at 247.
outside the scope of the prohibited riba. 292 For example, under a more modern view, one allowance often made in the modern globalized economy is a modest interest rate, consistent with or less than the rate of inflation. 293

**SHARI’AH COMPLIANT BANKING AND FINANCIAL INSTRUMENTS**

In order to provide interest-free banking and financial services to the Muslim community, Islamic banks practice certain methods within defined areas of operation. 294 There are three general areas of operation for Islamic banks: (1) non-fund transactions, (2) investment activities, and (3) social activities. 295

Non-fund transactions are similar to the service-oriented transactions of conventional banks. Transactions from current accounts, savings accounts, and investment accounts are generally considered non-fund transactions. 296 In these accounts, the bank does not give interest, and they are, in essence, "a safekeeping (al-wadiah) arrangement between the depositors and the bank, which allows the depositors to withdraw their money at any time and permits the bank to use depositors' money." 297

Investment activities (which are the most pertinent to this discussion) involve the use of a variety of mechanisms in order to gather financial resources and to provide capital financing to "provide finance for trade, industry, and agriculture." 298

---

292 Id. (See also ZIAUL HAQUE, *RIBA: THE MORAL ECONOMY OF USURY, INTEREST AND PROFIT* 48-50 (2D ED. 1995) (explaining the historical practices creating distinction between riba al-fadl and riba al-nasi'a).)

293 Id.


295 Id. at 52.


297 Id.

298 SIDDIQUI, *supra note* 294, at 52.
commonly used modes of investment activities in Islamic banking are **mudaraba**, **musharaka**, **murabaha**, **bai’muajjal**, **ijara**, and **baisalam**.299

**Mudaraba** is generally equivalent to the type of transaction in conventional finance known as venture capitalism.300 **Mudaraba** allows the entrepreneur with a business plan to make use of an investor's capital.301 Here, the owner of capital, *i.e.*, the investor, shares in the profit earned by the entrepreneur and bears any losses on his own. The scheme designates the entrepreneur as a type of agent for the investor or investors so that those owning the capital entrust the entrepreneur with it.302 In exchange for the use of the capital, the entrepreneur agrees to give a specified share of future profits to the investors, who in turn are exclusively responsible for any loss to the capital while in the care of the entrepreneur.303

Though this arrangement seemingly circumvents the prohibition of *riba*, it appears in conflict with the notion of equal risk allocation. After all, only the owner of capital assumes the risk of loss while both share in the venture's profits. Perhaps, the discrepancy in loss can be justified by the fact that the borrower in a **mudaraba**

---

299 **Sharawy**, *supra* note 148, at 168.
301 **Sharawy**, *supra* note 148, at 168 (The owner of capital is referred to in Arabic as the "rabbulmal", literally the "owner of the capital." The entrepreneur borrower is known as the "mudarib").
302 **Sharawy**, *supra* note 148, at 168; See **Shahrukh Rafi Khan**, *Profit and Loss Sharing: An Islamic Experiment in Finance and Banking* 79 (1987) (describing one of the theories of the revival of Islamic banking as the result of the new-found wealth among the Muslim OPEC members).
303 Id.
transaction risks the loss of his time and effort so that the two parties are not simply profit-sharing, but "profit and loss sharing." In this manner, both investor and entrepreneur benefit from a transaction in which one risks loss of capital while the other risks loss of the more metaphysical capital--that of time and effort. To further add to its appeal, the mudaraba transaction was approved and practiced by the Prophet, according to Islamic jurists.

Another alternative to interest based investments is musharaka, the Islamic equivalent of the capitalistic partnership arrangement. In the musharaka transaction, partners contribute capital to the partnership, sharing profits and losses according to an agreed-upon formula based on the contribution of each partner. Islamic banks are involved in both mudaraba and musharaka transactions. In a mudaraba transaction, the bank acts as a "mudarib", or borrower, managing the funds of the depositors to generate profits. It thereby operates on a "two-tier mudaraba system in which it acts both as the mudarib on the saving side of the equation and as the "rabbulmal" ("investor") on the investment portfolio side." Further, the bank may also enter into a profit and loss sharing scheme with its customers according to the musharaka formulation by using deposited funds.

304 TAYLOR, supra note 257, at 397.
305 Id.
307 Id.
308 Id.
309 CHIAN WU, ISLAMIC BANKING: SIGNS OF SUSTAINABLE GROWTH, 16 MINN. J. INT'L L. 233, 233-34 (2007) (exploring the feasibility of interest-free Islamic finance in a global market that is dominated by interest-bearing transactions).
310 Id.
The *mudaraba* and *musharaka* modes of finance theoretically constitute the primary methods of financing in Islamic banking, but in practice, they are considered quite risky. As a result, other less risky methods are used more often.\(^{311}\)

Another mode of financing commonly used by Islamic banks is "ba’i bithaman ajil" ("Deferred Payment Financing").\(^{312}\) *Ba’i bithaman ajil* involves a credit sale of goods on a deferred payment basis. At the request of its customer, the financial institution purchases an existing contract to buy certain assets on a deferred payment schedule and then sells the goods back to the customer at an agreed upon price, including a profit.\(^{313}\) The payments by the financial institution to the original supplier of the goods are progressive, as the goods are manufactured or purchased. The financial institution's customer "can repay in lump sum or make installment payments over an agreed-upon period."\(^{314}\)

"*Ijara*" is yet another form of finance that does not involve *riba* and is commonly used by Islamic banks when equipment and machinery are involved.\(^{315}\) In the *ijara*, or lease transaction, the bank is the owner of the machinery or equipment and the clients pay a fixed amount for its use.\(^{316}\) The lessee can buy the equipment from the bank and thus the installments would include both the rental and purchase fees of the equipment.\(^{317}\)

---

\(^{311}\) SHARAWY, *supra* note 281, at 168.

\(^{312}\) TAYLOR, *supra* note 257, at 393.

\(^{313}\) Id.

\(^{314}\) Id.

\(^{315}\) Bilal, *supra* note 300, at 146. (See Al-OMAR & ABDEL-HAQ, *supra* note 300, at xvi) (defining *ijara* as "an arrangement under which the Islamic bank leases equipment, a building or other facility to a client, against an agreed rental. The rent is so fixed that the bank gets back its original investment plus a profit on it.").

\(^{316}\) Id.

\(^{317}\) TAYLOR, *supra* note 257, at 393.
One of the final methods of financing used by Islamic banks where the sale of goods is involved is known as “bai’salam”.\(^{318}\) In a bai’salam transaction, the goods purchased are paid for in advance at the time of execution of the contract. But, delivery of the goods is delayed until a later date.\(^{319}\) "This mode enables an entrepreneur to sell his output to a bank at a price determined in advance."\(^{320}\)

It is clear from the above modes of financing that Islamic banking has established creative methods of financing in order to foster economic growth within the Muslim community without compromising the goals of Islam. In fact, these methods foster the goals of Islam. Although these methods represent the majority of financing methods in Islam, they are by no means exhaustive, nor do they represent the outer limits of the development of other alternatives to traditional modes of banking and finance. Furthermore, as critics within the Islamic community dissect the methods in terms of Shari'ah compliance, there is the possibility that the methods may change.

The financial tools set forth above serve to promote the growth of principal without implicating the forbidden use of riba.\(^{321}\) Notably, not all of these tools are available in the banking system of the United States, but some are remarkably similar to financial vehicles approved by banking regulators, and thus, may be utilized in conformance with existing regulations.

In a nutshell, Islamic finance is based on the trade of productive assets, the sharing of risks in the development of projects, the promotion of entrepreneurship and the

\(^{318}\) SHARAWY, supra note 281, at 169.
\(^{319}\) Id. (See BILAL, supra note 300, at 146) (discussing the possibility of advance or deferred payments under an “istikna” (“commissioned manufacturing”) contract).
\(^{320}\) Id.
\(^{321}\) TAYLOR, supra note 257, at 393.
provision of social benefits to those who are often exploited by lenders.\textsuperscript{322} The continuing growth of Islamic finance as an alternate system to conventional finance creates competition, which is beneficial to borrowers.\textsuperscript{323} Additionally, this growing financial sector offers an additional avenue for raising funds from Muslim investors by allowing consumers and financiers to choose financial instruments that are compatible with their business needs, social values and religious beliefs.\textsuperscript{324}

**CONCLUSION**

Skeptics may argue that principles developed in a different economic environment are irreconcilable with the modern economy. Scholastic usury principles just cannot function today. The rise of Islamic finance in recent decades, however, may prove this objection incorrect. The Islamic approach to usury, which prohibits the charging of *riba* or profit on loans but permits profit-sharing on investment in productive activities,\textsuperscript{325} bears striking similarities to the scholastic theory.\textsuperscript{326} While in the West the scholastic theory has not yet been applied to modern banking and finance, Islamic theory has been able to adapt modern banking products to its usury proscriptions.\textsuperscript{327}

\textsuperscript{322} BJLAL, \textit{supra} note 300, at 153.
\textsuperscript{323} Id.
\textsuperscript{324} Id.
\textsuperscript{325} Karasik et al., \textit{supra} note 15, at 383-85.
\textsuperscript{326} Id. at 381.
\textsuperscript{327} "What appears apparent, however, is that Christian financial corporations and ethicists have yet to provide a systematic approach to financial relationships and ethics for the modern economy that re-imagines and rearticulates core religious teachings on finance. Islamic financial institutions have spent over three decades developing financial products modelled [sic] for the modern economy that, never the less, incorporate and reference long-established religious ethics and prohibitions." CONSTANT J. MEWS & IBRAHIM ABRAHAM, \textit{USURY AND JUST COMPENSATION: RELIGIOUS AND FINANCIAL ETHICS IN HISTORICAL PERSPECTIVE}, 72 J. BUS. ETHICS I, 11 (2007).
The usury prohibition was at the center of the conflict between the forces of the market economy, on the one hand, and the religious-supported values of community on the other. It was a focus not only of intellectual concern, but also of popular fervor, because it became a symbol of resistance to the values of commercial society. It had an extraordinary impact because it was not merely a norm, but also the description of a form of evil.

Because of its symbolic poignancy and deep penetration of society, the usury norm served a central perceptual function. It structured the ways in which people perceived the commercialization process, reinforcing the image of the moneylender as a vile enemy of the community and underscoring the need to protect the weak from exploitation.

The usury prohibition was also a central context for the development of economic thought. According to John T. Noonan, “the scholastic theory of usury is an embryonic theory of economics ... [and] the first attempt at a science of economics known to the West.”328 Intellectuals were faced with the task of reconciling traditional values with the needs of the newly-emerging mercantile component of society, and it was in this context that they began to examine economic processes in a systematic way.

Finally, the usury prohibition also affected the development of economic patterns. People went to great lengths to avoid being classified as usurers. Henceforth, merchants developed partnership and other risk-sharing devices in order to test the limits of the usury doctrine and achieve the financing objectives of the loan without being categorized as usurers.

328 NOONAN, supra note 12, at 2.