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**Title**

The Protection and Empowerment of People With Disabilities in Islamic Law

**Permalink**

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**Journal**

UCLA Journal of Islamic and Near Eastern Law, 19(1)

**Author**

Austen, Margaret R.

**Publication Date**

2021

**DOI**

10.5070/N419156054

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# THE PROTECTION AND EMPOWERMENT OF PEOPLE WITH DISABILITIES IN ISLAMIC LAW

Margaret R. Austen

## ABSTRACT

Around the world, the experience of people with disabilities, like many marginalized classes, does not always align with the promises codified in statutes and case law. However, inclusive ideals are found in even the earliest of Islamic legal texts, where people with disabilities are included within etymology, storytelling, the duty of almsgiving, and the influence of physiognomy on Islamic law. People with disabilities are also integrated in contemporary Islamic legal principles, including penal, family, and municipal Islamic law. While it is tempting to contrast the everyday experiences of people with disabilities against the principles declared in laws or religious creeds, this type of analysis requires a sophisticated blend of sociology, theology, psychology, and even anthropology. This Comment seeks instead to survey the protections and power granted to people with disabilities within Islamic law. While this is a primarily legal analysis, the overlap of theology, morality, and scholarship inherent in Islamic law renders sifting out the solely legal principles affecting people with disabilities nearly impossible. In addition to highlighting the work of contemporary scholars such as Vardit Rispler-Chaim and Mohammed Ghaly, this Comment examines classical sources and early works of Islamic jurists.

## ABOUT THE AUTHOR

Margaret R. Austen, known by friends and family as Maggie, studies International Law at Suffolk University Law School in Boston, Massachusetts. She has a bachelor's degree from Gordon College in History and Secondary Education. Margaret has a congenital vision impairment and identifies as a person with a disability; she believes in the importance of changing individual and societal mindsets towards individuals with disabilities around the world. In addition, Margaret is an American with no cultural ties to Arab or Islamic nations, except for her employment with and support of Empowerment Through Integration (ETI), [www.etivision.org](http://www.etivision.org). Margaret is also a devout Christian holding deep respect and curiosity towards other faiths. Margaret believes that "the law," including religious creeds and doctrines, has a powerful impact on the experiences of people with disabilities around the world, and has experienced firsthand the marginalization that occurs when misunderstanding and ignorance of the law prevails. Margaret would like to thank her Professor, Ali Rod Khadeem, her classmate Colin Taylor Donnelly, and the editors of

the Journal of Islamic and Near Eastern Law for their generous assistance in developing this Comment.

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## INTRODUCTION

Religions, societies, and governments frequently fall short of the ideals outlined in their founding creeds and doctrines. In 1776, the United States Declaration of Independence stated that “all men are created equal;” nevertheless, it was not until 1870, with the passage of the 15<sup>th</sup> Amendment, that the first black man voted in an American election.<sup>1</sup> Furthermore, individuals with disabilities were not acknowledged as equal members of American society until the passage of Section 504 of the Rehabilitation Act in 1973.<sup>2</sup> While it is tempting to contrast the everyday experiences of people with disabilities against the principles declared in laws or religious creeds, this type of analysis requires a sophisticated blend of sociology, theology, psychology, and even anthropology. While acknowledging this tension, this Comment seeks to focus

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1. THE DECLARATION OF INDEPENDENCE pmb. (U.S. 1776). *See also* U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”); *Thomas Mundy Peterson Made History as the First Black Man to Cast a Ballot in a United States Election*, ELY TIMES (Feb. 28, 2020), <https://elynews.com/2020/02/28/thomas-mundy-peterson-made-history-as-the-first-black-man-to-cast-a-ballot-in-a-united-states-election> (describing Mr. Peterson’s historic vote).

2. 29 U.S.C. § 794 (2019) (codifying segregation and exclusion of people with disabilities as discrimination). *See also* Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada>. (“Previously, public policy had been characterized by addressing the needs of particular disabilities based on diagnosis. Each disability group was seen as separate, with differing needs. Section 504 recognized that while there are major physical and mental variations in different disabilities, people with disabilities as a group faced similar discrimination in employment, education and access to society. [With the passage of Section 504.] people with disabilities were seen as a legitimate minority, subject to discrimination and deserving of basic civil rights protections.”)

on surveying the protections and power granted to people with disabilities within Islamic law.

Many Muslim-majority nations have been faced with some form of conflict over the past several decades which has created a population of disabled veterans and civilians that were injured during wartime or through postwar accidents.<sup>3</sup> In many instances, the high burden of war-based disability has forced Islamic nations to create services for people with disabilities.<sup>4</sup> In addition, poverty has left many families with disabilities, such as visual or hearing impairment from otherwise preventable causes.<sup>5</sup> These realities can seem at odds with the empowering examples of disability jurisprudence in some of Islamic laws earliest sources.

Islamic nations are not alone. Around the world, the experiences of people with disabilities, like many marginalized classes, do not align with the promises codified in statutes and case law, or with the scholarship of the jurists and the fatwahas of the muftis. With the overlap of theology, morality, and scholarship in Islamic law, sifting out the solely legal principles affecting people with disabilities is nearly impossible. As such, while this analysis does not seek to compare the realities of people with disabilities under Islamic law, it does include theological and sociological themes represented within the broad scope of Islamic Law—seeking to provide a legal overview, not a sociological or anthropological analysis. This Comment includes classical sources and early works of the jurists, demonstrating the inclusive ideals embedded within the etymology (Part I), storytelling (Part II), duty of almsgiving (Part III), and the influence of physiognomy on Islamic law (Part IV). This Comment further examines the treatment of people with disabilities in Islamic penal law (Part V) and family law (Part VI).

## I. WHAT'S IN A NAME? AN ETYMOLOGY OF ACCEPTANCE

Terminology is a critical, and even polarizing, theme within both Islamic law and disability law. Like the jurists who spend pages defining the meaning of one word in a Qur'anic verse, disability rights activists have spent years fighting for empowering and humanizing terminology in legislation worldwide. While individuals living with disabilities may choose them as identifiers, laws in America and abroad frequently include outdated and offensive terms, such as handicapped, special needs, and retardation.<sup>6</sup> On the other hand, some social

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3. Bhatti et al., *infra* note Error! Bookmark not defined., at 171.

4. *Id.*; MAJID TURMUSANI, DISABLED PEOPLES AND ECONOMIC NEEDS IN THE DEVELOPING WORLD: A POLITICAL PERSPECTIVE FROM JORDAN 19 (2003) (describing a 1995 UNESCO report outlining the proportion of impairment). The rising number of veterans with disabilities after WWII are also credited with making disability rights more visible in the United States.

5. See Bhatti et al., *infra* note Error! Bookmark not defined., at 171.

6. See Melissa Healy, *What's in a Name? Legislation would end use of the term 'mental retardation'*, L.A. TIMES (Nov. 19, 2009) (describing legislation introduced to outlaw use of

movements and even countries have chosen ‘empowering’ terminology, such as “differently-abled” and “people with determination,” much to the chagrin of many activists with disabilities.<sup>7</sup> While not easy, giving something a name gives it power, and its etymology can tell a lot about its history, culture, and legal context.

Islamic law, governed by Arabic terminology, provides a unique and powerful context for understanding people with disabilities. For example, the classical sources of Islamic law, including the declaratory verses of the Qur’an, the recorded sayings of the prophet in the hadith, and the practices and customs in the Sunnah, do not include a broad and encompassing word for disability.<sup>8</sup> Instead of identifying one particular term to encompass the impairments associated with the general notion of disability, classical Islamic sources use specific terms for describing various individuals with disabilities, such as blind, deaf, mute, lame, or insane.<sup>9</sup> Scholars note that “the lack of a term comparable with disability in the classical Islamic sources affirms the moral neutrality and normalcy of disability as a fact of life.”<sup>10</sup> The Qur’an and hadith do, however, contain several generalized adjectives to describe disadvantaged individuals, including the Arabic words for orphan, weak, oppressed, sick, and needy.<sup>11</sup> Scholars, including Vardit Rispler-Chaim, point out that the words used are entirely descriptive and do not stigmatize or demonize individuals with disabilities.<sup>12</sup>

The classical sources seem to recognize disability in the context of both individual condition and social marginalization. Scholars note that these contexts emerged through the classical sources’ use of the above terminology to

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“mental retardation” in federal statutes and policy papers).

7. See *People of Determination*, U.A.E. (last visited Feb. 12, 2021), <https://u.ae/en/information-and-services/social-affairs/people-of-determination> (referring to “people with disabilities as ‘people of determination’ in recognition of their achievements in different fields”). These euphemisms for “people with disabilities” can be viewed as condescending or even offensive, and simply a way of avoiding talking about disability. See *Disability Language Style Guide*, NAT’L CTR. ON DISABILITY AND JOURNALISM, <https://ncdj.org/style-guide> (last visited 9/27/2021).

8. See Isra Bhatti et al., *Disability in Islam: Insights into Theology, Law, History, and Practice*, in 1 DISABILITIES: INSIGHTS FROM ACROSS FIELDS AND AROUND THE WORLD 157, 159 (Catherine A. Marshall et al. eds., 2009) (describing classical Arabic terminology). Bhatti, et al, analyze the Qur’an and Sunnah, as well as writings of the jurists, to examine the attitudes toward people with disabilities within Islam. While Islamic Law includes many sources, primarily the Qur’an, hadith, and fatwas (rulings of the jurists), for the purposes of this Comment the distinctions are not critical. See DANIEL W. BROWN, *RETHINKING TRADITION IN MODERN ISLAMIC THOUGHT* 7 (1999) (defining primary sources of Islamic Law and theology). “Hadith” and “Sunnah” may be used interchangeably as the hadith, the recorded sayings of the Prophet, document the Sunnah, traditions and practices of the Prophet Muhammed. *Id.*

9. See VARDIT RISPLER-CHAIM, *DISABILITY IN ISLAMIC LAW* 3 (2007) (introducing Arabic “disability” terminology).

10. Bhatti et al., *supra* note 8, at 160.

11. *Id.*

12. See *id.*; see also RISPLER-CHAIM, *supra* note 9.

discuss individual rights as well as obligations, societal responsibility, and service.<sup>13</sup> Examples include “excusing certain individuals from religious duties (e.g., Qur’an 24:61), . . . encouraging people to serve the disadvantaged segments of society (e.g., Qur’an 4:75), or providing a statement of equality.”<sup>14</sup> Over a thousand years later, in 2001, the World Health Organization (WHO) redefined disability by highlighting the individual and societal contexts already represented in the Arabic terminology. WHO’s redefinition, adopted by the United Nation’s Convention on the Rights of Persons with Disabilities (CRPD), asserts that disability will impact all of us at some point in our lives, a perspective on disability for which the modern disability movement cannot take credit.<sup>15</sup>

Scholars further contend that, “while the English term disability contains an explicit denotation of ‘lacking ability’ and is laced with a negative connotation, the classical Arabic words do not contain an indication of ‘absence,’ thereby avoiding the creation of an implicit norm that excludes disability.”<sup>16</sup> While the classical sources may have not used an Arabic equivalent to the English “disability,” their use of generalized adjectives, described above, indicate an intention to describe the broader group of individuals with disabilities.<sup>17</sup> The Arabic term for “ill” or “individual with an illness” and its noun form (illness), for example, are often used in the classical sources to describe a broad class that includes individuals and conditions that today would fall under the umbrella of disability.<sup>18</sup> While an etymological analysis of “disability” and the experiences of people with disabilities throughout history support the negative perception of the English word, “people with disabilities” is the broadly accepted legal terminology when distinguishing this particularly marginalized class of individuals in society.<sup>19</sup> The English word “disability,” not

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13. Bhatti et al., *supra* note 8, at 160.

14. *Id.*

15. 2515 U.N.T.S. 44910 (hereinafter “CRPD”); WORLD HEALTH ORGANIZATION, WORLD REPORT ON DISABILITY 4–5 (2011), [http://www.who.int/disabilities/world\\_report/en](http://www.who.int/disabilities/world_report/en). While it included no definition of disability, the protected “class” in the CRPD integrates factors of physical impairment, society, and environment, echoing the World Health Organization’s definition of disability. *Id.*; see also Maya Sabatello, *A Short History of the International Disability Rights Movement*, in HUMAN RIGHTS AND DISABILITY ADVOCACY 20 (Maya Sabatello & Marianne Schulze eds., 2013). The CRPD does not focus on the alleged deficiencies of what people with disabilities have or do not have. *Id.*

16. Bhatti et al., *supra* note 8, at 160.

17. *Id.* at 160–61.

18. *Id.*

19. See Disability: People with disability vs persons with disabilities: Q&A, WORLD HEALTH ORGANIZATION (Dec. 7, 2020) <https://www.who.int/news-room/q-a-detail/people-with-disability-vs-persons-with-disabilities> (“The word ‘people’ is normally used when referring to a collective group . . . Persons with disabilities as defined in the [CRPD] refers exclusively to persons with long-term impairments.”); see also Identity-First v. Person-First Language, PEOPLE WITH DISABILITY AUSTRALIA, <https://pwd.org.au/resources/disability-info/language-guide/identity-vs-person> (last visited 7/5/2021) (describing language preferences

unlike the classical sources use of “illness” in Islamic law, however, represents a protected class, a protected minority group in United States law. These labels in both Islamic and United States law may be laced with negative societal connotations, but they are also (mostly) leveraged to protect and empower the individuals they intend to define.

Finally, contemporary Arabic law and literature do in fact utilize broader terms to refer to individuals with disabilities in a manner similar to the English usage.<sup>20</sup> Like the inherent negativity within the word disability, these Arabic terms are derived from root words such as defect, limitation, difficulty, inability, or weakness.<sup>21</sup> Scholars note, for example, that the Arabic term referring to individuals somehow limited in their physical or mental ability is similar to the English phrase “mentally or physically challenged,” and is regularly used in legal treatises on the subject in the Muslim world.<sup>22</sup> While the experiences of people living with disabilities may not reflect the seemingly inclusive and empowering intentions behind the English and Arabic terminology noted above, the words we find at the intersection of disability and Islamic law do provide a powerful foundation for the topic.

## II. THE FIRST BLIND MUSLIM: REPRESENTATION WITHIN STORYTELLING

Islamic law from Qur’an and hadith reference Abdullah Ibn Umm-Maktum, the first blind Muslim. Abdullah was the cousin of the Prophet Muhammed’s first wife, Khadija. He converted to Islam early and accompanied the Prophet during the hijrah (migration) to Medina. Charged by the Prophet, Abdullah would frequently lead prayer in Medina when Muhammed was away. The hadith includes two powerful stories of Abdullah, the first providing the context of the revelation of the first ten verses of Surah Abasa.<sup>23</sup> While the Sunni and Shia traditions approach this hadith differently, the story describes the text as God admonishing the Prophet for turning away from Abdullah while preaching to a group of influential chieftains.<sup>24</sup> The story continues by demonstrating a change in the Prophet’s treatment towards Abdullah, documenting early precedent for treating people with disabilities with respect and compassion.

Abdullah’s influential role in early Islam is even memorialized in the story of his death. Abdullah was ultimately killed on the battlefield while serving as

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within the disability community).

20. See RISPLER-CHAIM, *supra* note 9, at 3–4.

21. *Id.*

22. Bhatti et al., *supra* note 8, at 160; see also RISPLER-CHAIM, *supra* note 9, at 3–4; May-saa S. Bazna & Tarek A. Hatab, *Disability in the Qur’an: The Islamic Alternative to Defining, Viewing, and Relating to Disability*, 9(1) J. RELIGION, DISABILITY & HEALTH 5, 17 (2005).

23. See Qur’an 80:1–10.

24. See MALIK IBN ANAS, MUWATTA IMAM MALIK 15.4.8 (8<sup>th</sup> Century); see also SHAWQI ABU KHALIL, ATLAS OF THE QUR’AN 375 (2004).

the flag-bearer under Umar, the second caliph.<sup>25</sup> Scholars point out that this is one of many examples of people with disabilities serving in their Islamic communities.<sup>26</sup> These stories are powerful representations of Islamic law's view of people with disabilities. While representation alone can be empowering, representation is that much more significant when combined with the acceptance of people with disabilities as human with the capacity to participate fully in society.

### III. AN INVITATION TO EMPOWERMENT: AN INCLUSIVE NUANCE TO ALMSGIVING

Charitable philosophies and attitudes towards people with disabilities can marginalize and disempower, except when perhaps combined with a broader commitment to inclusion. Scholars seem to suggest that Islamic law is inherently inclusive because of Islam's belief that all people are descended from Adam and Eve, therefore, there is no need to discriminate between people.<sup>27</sup> Policies embedded in the Qur'an call its followers not only to accept the reality of disability as a fact of our human experience, but emphasize the protection of the "weak."<sup>28</sup> This protective duty may include charity towards the needy, orphans, and the sick; however, scholars argue that this obligation is better described as justice.<sup>29</sup> Muslims with disabilities, historically, ground their expectations in "a traditional sense of mutual responsibility and religious duty within communities, under the all-seeing eye of Allah."<sup>30</sup> The Qur'an seems to go as far as forbidding the social derision or exclusion of people with disabilities, instructing instead that people with disabilities are expected to participate in daily life like their nondisabled peers.<sup>31</sup> Surah An-Nur 24:61, for example,

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25. See Matthew J. Schuelka, *A Faith in Humanness: Disability, Religion and Development*, 28(4) *DISABILITY & SOC'Y* 500, 506 (2013).

26. *Id.*; Dunya Ahmed Abdullah Ahmed, *Gender, Disability and Islam: Living with Visual Impairment in Bahrain* (Sept. 2007) (unpublished Ph.D. dissertation, University of Warwick) (on file with School of Health and Social Studies, University of Warwick).

27. See Schuelka, *supra* note 25, at 505 (citing ALI ABDUL AL-WAHID WAFI, *EQUALITY IN ISLAM* (1991)).

28. See Schuelka, *supra* note 25, at 505 (citing Ahmed, *supra* note 26).

29. See M. Miles, *Disability in an Eastern Religious Context: Historical Perspectives*, 10(1) *DISABILITY & SOCIETY* 49, 58 (1995) (hereinafter "Historical Perspectives") (utilizing historical data to examine the viewpoints and attitudes on disability in Hinduism, Buddhism, and Islam). Miles presents global approaches for understanding, remediating, and accommodating disability, specifically approaches to disability that are appropriate and acceptable to the non-western majority.

30. *Id.*

31. See Firoozeh Kashani-Sabet, *The Haves and the Have Nots: A Historical Study of Disability in Modern Iran*, 43(2) *IRANIAN STUD.* 167, 172 (2010) ("In other words, disability in Islam is not necessarily a cause for social derision or exclusion; rather the disabled are enjoined to participate in daily life like their able-bodied peers."); see also Maysaa S. Bazna & Tarek A. Hatab, *Disability in the Qur'an: The Islamic Alternative to Defining, Viewing, and Relating to Disability*, 9(1) *J. RELIGION, DISABILITY & HEALTH*, 5, 14-15 (2005) (explaining



exhorts followers of Islam to take “no offence for the blind, the lame, and the sick, to eat at your table.”<sup>32</sup> The posture of Islamic law and policy, therefore, is not intended to be one of charitable belittlement, but one of just mutuality. If disability is a universal human experience and people with disabilities are included in daily life and society, as this surah demonstrates, then the duty of almsgiving empowers, not marginalizes or disenfranchises, people with disabilities.

The five pillars of Islam, the traditional religious duties at the core of Islamic law, include almsgiving, which emphasizes the significance of charitable work and extends to people with disabilities. Surah An-Nisa declares “not [to] give the feeble-minded the property with which God has entrusted you for their support; but maintain and clothe them with its proceeds, and speak kind words to them.”<sup>33</sup> Compassion towards people with physical and intellectual disabilities largely defined the culture of benevolence in classical Islam.<sup>34</sup> When demonstrated with the understanding that disability can happen to any of us at any time, compassion can shift the classical charitable paradigm to one of inclusion and empowerment. This classical charitable paradigm is otherwise inherently disempowering, because it reinforces social hierarchy—described further below—and makes almsgiving transactional instead of transformational.<sup>35</sup> For example, if disability is a universal human experience, then almsgiving is not merely the “haves” giving to the “have nots,” or the “able” giving to the “disabled.” Instead, as described below, people with disabilities are empowered as almsgivers, a paradigm shift within Islamic law that addresses the legal capacity of people with disabilities.<sup>36</sup>

There are only a few passages within the Qur’an demonstrating Islamic law’s policy towards people with disabilities in public life, of which some people have interpreted to suggest a less tolerant perspective. The sermons of Ali ibn Abi Talib, the fourth caliph, for example, place the “destitute and afflicted” in the bottom rung of public life.<sup>37</sup> His message, while establishing an arguably

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what it means in Islamic Law for a person with a disability to participate within their power); see, generally, M. Miles, *Some Historical Texts on Disability in the Classical Muslim World*, 6(2–3) J. RELIGION, DISABILITY & HEALTH 77 (2002) (introducing and annotating materials pertinent to disability, mental disorders and deafness, in the context of religious belief and practice in the Middle East, South Asia and East Asia).

32. Kashani-Sabet, *supra* note 31, at 172.

33. Surah An-Nisa 4:5

34. Kashani-Sabet, *supra* note 31, at 172

35. See *id.* at 173. If the only reason to give to the poor and disabled is to get into heaven, then is it even charity?

36. RISPLER-CHAIM, *supra* note 9, at 39. Art. 12 of the CRPD articulates the legal capacity of people with disabilities in international law. See CRPD, *supra* note 15, at 12(2) (“States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”); see also Universal Islamic Declaration of Human Rights (1990) at III(a) (“All persons are equal before the Law”) (hereafter “UIDHR”).

37. Kashani-Sabet, *supra* note 31, at 172.

disempowering social hierarchy, nevertheless, promotes charitable treatment of the “low class.” Shia theologian, Mohammad Baqir Majlisi (d. 1699) cites various hadith, noting that the poor and weak occupy a place of prominence in paradise.<sup>38</sup> Majlisi argues that but for the existence of the poor and people with disabilities, the rich and nondisabled would not experience heaven. Majlisi further refers to hadith that inspires the humane treatment of people with hearing or visual impairments with promises of granted wishes and entry into heaven.<sup>39</sup> Perspectives like Majlisi’s seem to create a charitable policy and posture that reinforces a social hierarchy where people with disabilities are “used” by the top rung of society as a “means to an end.” Even when viewed within the overall empowering posture of Islamic law, the reciprocal intention of these teachings, behind an otherwise inequitable hierarchy, have likely disenfranchised people with disabilities.

On the other hand, Islamic law’s expectations around charity extends to people with disabilities as almsgivers, as the ones being charitable. This paradigm shift includes discussions on whether a person with a psychological or intellectual disability must give alms from their personal funds.<sup>40</sup> In fact, the discussion arises from the rational condition required for any duty under Islamic law, not dissimilar to the concept of legal capacity or competency.<sup>41</sup> In a fatwa issued in 1981 and published in 1983, Sheikh al-Azhar, Jad al-Haqq (d. 1996), relied on a scholarly majority who determined that it is one’s wealth which owes the alms.<sup>42</sup> Consequently, the guardian of the person with a disability should give alms on their behalf. Only jurist Abu Hanifa challenged this view, exempting people with disabilities from the duty.<sup>43</sup> The fatwa of Jad al-Haqq reiterated a majority ruling dating back to the 8th and 9th centuries.<sup>44</sup> Rispler-Chaim asserts, however, that Abu Hanifa’s opinion is the “practical norm today,” because the Hanafis constitute a majority among Sunni Muslims.<sup>45</sup> The inclusive intent found within the law of almsgiving provides powerful evidence for the legal capacity and empowerment of people with disabilities in Islamic Law.

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38. *Id.* at 173.

39. *Id.*

40. RISPLER-CHAIM, *supra* note 9, at 39.

41. *See supra* note 36. Much discussion in contemporary international disability law today focuses on the issue of legal capacity, legal capacity was the first article of the CRPD addressed by the Committee. *See* Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) (describing the content of this civil right and explaining the areas in which people with disabilities have traditionally been denied the right).

42. RISPLER-CHAIM, *supra* note 9, at 39.

43. *Id.*

44. *Id.*

45. *Id.*

#### IV. PHYSICAL APPEARANCE: PHYSIOGNOMY AND PHILOSOPHICAL ESTEEM

Islamic law, like many legal and cultural traditions, did not develop in a historical or national silo. The sciences explored by early Islamic jurists are heavily influenced by other cultures and traditions, especially as the prominent writings of the Greeks were collected by the caliphs and translated by jurists.<sup>46</sup> For example, the Greek tradition of physiognomy, the study of the relationship between physical attributes and personality traits, overlaps with the Islamic tradition of *firasa*, the discernment or perception of truth.<sup>47</sup> While the Greek understanding of physiognomy impacted the Islamic tradition of *firasa*, Islamic scholarship likewise influenced the Greek science.<sup>48</sup> Islamic sources include four distinct definitions of *firasa*; the third definition embodies the mystical or pious practice of examining ones internal spiritual or psychological condition.<sup>49</sup> The fourth definition more closely resembles the Greek science of physiognomy and was considerably more available to the general public in the classical Muslim world.<sup>50</sup> Of the four meanings of *firasa*, these last two interpretations received further attention by the jurists and developed contradictory standpoints concerning people with disabilities.<sup>51</sup>

The intended focus of the mystical *firasa* was the practitioner, not a targeted person whose invisible character the practitioner intended to read. The purpose of *firasa* is to “gain the light of God,” which “enlightens, opens up and thus discloses the hidden sides of people’s characters.”<sup>52</sup> In his dissertation, Mohammed Ghaly explains that “to obtain this light one must dedicate themselves to the worship and service of God and fulfill a number of conditions.”<sup>53</sup>

46. Prof. Ali Khadem (Islamic Law course notes on file with author).

47. See Mohammed Ghaly, *Islam and Disability: Perspectives in Islamic Theology and Jurisprudence*, 102 (Feb. 27, 2008) (unpublished Ph.D. dissertation, Leiden University) (on file with the Faculty of Religious Studies, Leiden University) (exploring the position of people with disabilities within early and modern writings of Muslim jurists). Ghaly looks at the opinions of early and modern Muslim theologians and philosophers on the existence of disability, including reconciling the existence of disability and specific divine attributes such as the Mercy of God. Within Islamic Jurisprudence, Ghaly investigates the contentions of early and modern muftis concerning a broad scope of topics with modern relevance. This research includes the human dignity of people with disabilities, their employability, medical treatment, social life with main focus on marriage-related issues, financial life, and means of living for this group of people.

48. *Id.* at 106–07 (discussing influence of Greek physiognomy on Muslim culture, economics, literature, and science).

49. *Id.* at 101–02. The first meaning of *firasa*, in the earliest Arabic lexicons, refers broadly to once astuteness, or capacity to find information and solve a mystery. The second meaning focuses on the inherited ability to track birds, animals, or humans.

50. *Id.* at 104.

51. *Id.* at 108.

52. *Id.*

53. *Id.*; Robert Hoyland, *Physiognomy In Islam*, 30 JERUSALEM STUD. IN ARABIC AND ISLAM 360, 387 (2005) (quoting ABŪ NU’AYM AL-AṢBAHĀNĪ, 10 HILYAT AL-AWLIYĀ’ 237 (presenting elements of Sufi thought and practice in complete compatibility with Muslim orthodoxy)).

Sufi literature, for example, shows that physical build and outward appearance actually play no role in determining a person's character nor as a prerequisite to gain this divine light. People with different disabilities including blindness, lameness, hemiplegia, paralysis, and leprosy were repeatedly presented in Sufi literature as people with good character and pure hearts who were allowed to obtain the ranks of "Friends of God," and thus deserving high esteem and appreciation.<sup>54</sup>

Unlike the mystic *firasa*, the main focus of Greek physiognomy was the person whose character was being evaluated. The physical build of that person was crucial in the physiognomic process. This focus made Greek physiognomy produce a very negative image towards people with disabilities.<sup>55</sup> The general principle to be deduced from the applicable Greek works purports that any malformation in one's body indicates a similar one in one's character.<sup>56</sup> The ascending popularity of Greek physiognomy, however, did not merely remain within Islamic society and literature but likewise emerged within Islamic jurisprudence.<sup>57</sup> As physiognomy penetrated many aspects of Islamic society, its recognition by Muslim jurists was inevitable, especially considering the jurist's role in dealing with the common life of people and their daily affairs. This led to the development of the aforementioned fourth definition of *firasa*.<sup>58</sup>

Jurists also applied physiognomic statements regarding disability to religion and the law, with significant consequence. Ghaly points out the example of Rāghib al-Isfahānī (d. 1108), who quotes Aristotle saying, "[t]he testimony of the humpbacked and the short people should not be accepted even if [their credibility was] recommended because of their maliciousness." Ghaly goes on to explain that when al-Isfahānī was asked why, he said, "because their heads are close to their hearts."<sup>59</sup> Scholars seemingly argue that it is the influence of the Greek science of physiognomy, not the intended practice of Islamic *firasa*, that had a disempowering effect on people with disabilities. The Sufi influence reminds the Muslim world, however, of the empowering principles also available for people with disabilities.<sup>60</sup>

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54. See Ghaly, *supra* note 47, at 108, n. 70 (citing Abū Hāmid, al-Ghazālī, vol. 4, 348–49; Abū Bakr Aḥmad b. al-Husayn al-Bayhaqī (1410/1989), vol. 4, 118; and others).

55. See Ghaly, *supra* note 47, at 108, n. 71; ROBERT GARLAND, *THE EYE OF THE BEHOLDER: DEFORMITY AND DISABILITY IN THE GRAECO-ROMAN WORLD* 89, 96–104 (1st ed. 1995) (describing other positive side in Greek literature on people with disabilities).

56. See Ghaly, *supra* note 47, at 108; *KITĀB ARISṬĀTĀLĪS AL-FAYLASŪF FĪ L-FIRĀSA: IN THE TRANSLATION OF HUNAYN B. ISHAQ* 29 (Antonella Ghersetti ed. 1999).

57. See Ghaly, *supra* note 47, at 109.

58. *Supra* note 50, and accompanying text.

59. *Id.* at 110.

60. See *id.* at 108 (explaining how Sufi literature does not use disability to judge people's character).

## V. DISABILITY AND ISLAMIC PENAL LAW: LIABILITY AND PUNISHMENT

The ‘rubber hits the road’ when these fundamental concepts of acceptance, inclusion, and esteem towards people with disabilities is demonstrated within practical jurisprudence, such as Islamic penal law and family law. Offenders with disabilities, in Islamic criminal law, may have unique rights on account of their disabilities. Similar to the required condition noted earlier around the duty of almsgiving, there are three requirements under Islamic criminal law for the application of punishment: (1) will, (2) knowledge, and (3) intent. That is, to be punishable by law, “the offender must have had the power to commit or not to commit the act; he must have known that the act was an offence; and he must have acted with intent.”<sup>61</sup> Muftis seem to agree that, given these requirements, individuals who are insane or whose disabilities render them unaware of their deeds are not to be held liable.<sup>62</sup> This tangible protection of people with disabilities exemplifies the inclusive and empowering intention of Islamic law as outlined above.

This protection and intention is, however, undermined by the deliberate creation of disability as physical punishment throughout Islamic law. The practice of physical punishment seems to imply that the law not only tolerates but indeed requires the creation of disabilities in offenders as punishment for their crimes.<sup>63</sup> The crimes of theft and robbery, for example, are punishable by amputation of hands, unless the thief seeks forgiveness from God by repenting and amending his conduct.<sup>64</sup> In addition, the intentional injuring of a person’s organs, which, when feasible, is punishable through inflicting on the offender a similar injury to what they have previously caused.<sup>65</sup> Islamic penal law also considers injuries intentionally inflicted upon others out of anger, vengeance, and hatred as the planned creation of a disability.<sup>66</sup> An intended injury that does not end in killing or loss of life means that the intended injury has destroyed an organ or several organs, but no death ensued. On this matter, Qur’an 2: 194 reads: “And one who attacketh you, attack him in like manner as he attacked you. Observe your duty to Allah, and know that Allah is with those who ward off (evil).”<sup>67</sup> The law allows that for each intentionally injured organ, the same offender may be “equally” disabled.<sup>68</sup> While a person may

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61. See Bhatti et al., *supra* note 8, at 167; RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY 20 (2006) (explaining criminal responsibility under Islamic Criminal Law).

62. See Bhatti et al., *supra* note 8, at 167.

63. See RISPLER-CHAIM, *supra* note 9, at 75.

64. See Quran 5:39; see also Silvia Tellenbach, The Oxford Handbook of Criminal Law, “Islamic Criminal Law” (Markus D. Dubber and Tatjana Hornle, Oxford University Press, 2015), 251–53.

65. *Id.* at 76.

66. *Id.* at 75.

67. *Id.*; MOHAMMAD MARMADUKE PICKTHALL, THE MEANING OF THE GLORIOUS KORAN: AN EXPLANATORY TRANSLATION (1930).

68. *But see* Quran 5:45 (stating there is reward for someone that forgives in such

be born with a disability or may have acquired one through illness or accident, Islamic penal law demonstrates that disabilities can also be intentionally inflicted upon people by people, as crimes and as punishments.

These punishments which cause disabilities are prescribed in the Qur'an under the laws of hudud, crimes against God, and qisas, crimes against a person. While these laws on their face appear to be harsh and uncompromising, scholars point out the nevertheless humane considerations which are observed. Rispler-Chaim emphasizes that the physical punishments are devoid of sadistic motivations and are designed to leave the criminal with a minimal measure of human dignity.<sup>69</sup> "The intentions conveyed by the laws of hudud and qisas is that criminals must pay their dues so that there be a better quality of life for society as a whole," writes Rispler-Chaim.<sup>70</sup> The most redemptive writings of the jurists regarding Islamic criminal law do, however, highlight acceptance and inclusion by exhorting the punished and rehabilitated criminal to again become an effective member of society.

## VI. THE RIGHT TO FAMILY AND INDEPENDENCE

Islamic family law further demonstrates the implementation of protective and sometimes empowering ideals regarding disability. Even some of the most critical scholars agree that the rights for all people, including people with disabilities, to live independently and have a family play a significant role in Islamic doctrine.<sup>71</sup> While Islamic law does not suggest that marriage is solely for the purpose of having a family, it is considered a blessing when a marriage produces offspring.<sup>72</sup> Critical to the marriage, however, is the couple's ability to engage in physical and emotional intimacy. This priority requires that impediments, such as physical impurity of the wife or of the husband—including menstruation or bleeding after giving birth, the fast of Ramadan or pilgrimage to Mecca, are avoided or mitigated when possible.<sup>73</sup> This traditional view of marriage within the complexities of Islamic law has developed into particularly interesting debates today.

Islamic family law debates today, specifically as they include people with disabilities, highlight the geographic diversity common to different interpretations of Islamic law. For example, one Islamic law professor claims that

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situations instead of retaliating, as forgiveness is preferable).

69. See RISPLER-CHAIM, *supra* note 9, at 92.

70. *Id.*

71. See Schuelka, *supra* note 25, at 505; Majid Turmusani, *Disabled Women in Islam: Middle Eastern Perspective*, 5(2-3) J. RELIGION, DISABILITY & HEALTH 73 (2001). Article 19 of the CRPD recognizes the equal right of all people with disabilities to live independently and be included in the community, while Art. 23 guarantee of the rights of people with disabilities to create and maintain families. See CRPD, *supra* note 15; see also UIDHR, *supra* note 36, at XIX(a) ("Every person is entitled to marry, to found a family and to bring up children").

72. See RISPLER-CHAIM, *supra* note 9, at 47.

73. *Id.*

government may stipulate that anyone who wishes to marry has to undergo medical tests to verify that they are not afflicted with a contagious, genetically transmitted, disease, Syrian family law even includes such a clause.<sup>74</sup> Furthermore, in an Egyptian fatwa, the mufti distinguishes between intellectual disability and insanity, claiming that ‘intellectual disability’ is a quiet insanity and ‘insanity’ is a violent extrovert insanity.<sup>75</sup> He permits the marriage of a person with an intellectual disability only as long as he or she can differentiate between good and evil, and if they have their guardian’s consent to marry. This judgement further limits the legal capacity of a person with disabilities under Islamic law.<sup>76</sup>

In her chapter on “People with Disabilities and Marriage,” Rispler-Chaim points out yet another fatwa from June 1981, writing that, “the mufti Jad al-Haqq declares an existing marriage void considering that the husband has been continuously insane since 1968—namely prior to the marriage, which was in 1978.” Rispler-Chaim connects this fatwa to Egyptian law no. 462 of 1955, where the law in the Hanafi tradition asserts that, “if both partners are not sane when the contract is made the marriage is void.” While fatwas like this may appear superficially to protect people with disabilities, they ultimately reinforce stereotypes about their capabilities as independent decision makers, as well as their legal capacity. While these laws are inclusive of people with disabilities, it is not hard to imagine the barriers people with disabilities face when seeking marriage within the Muslim faith.

Like almsgiving, Islamic family law seemingly sets out to protect, not only the sanctity of the marriage relationship, but people with disabilities as well. The result of Islamic family law’s protections is, however, disempowering disability jurisprudence that reinforces negative stereotypes and the limitations of people with disabilities. Like many of the topics discussed above, Islamic family law’s development over the centuries has increased “protections” for people with disabilities, while simultaneously undermining their legal personhood. This tension, coupled with disagreement amongst schools, and even divergence among jurists within the same school, make a conclusory finding about Islamic family law, and Islamic law generally, nearly impossible. However, for Islamic family law to be fully empowering of people with disabilities, jurists and policymakers across the Muslim world will have to consistently challenge modern “protective” and “charitable” ideals, while embracing the inherent dignity and rights of people with disabilities under the law.

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74. *Id.* at 52; IMAM, DR. MUHAMMAD KAMAL AL-DIN, *AL-ZAWAJ WAL-TALAQ FI AL-FIQH AL-ISLAMI* 79 (1996) (writing of Dr. Muhammad Kamal al-Din Imam, a professor of Islamic law at the universities of Beirut and Alexandria); see also RISPLER-CHAIM, *supra* note 6, at 52, fn. 350.

75. See RISPLER-CHAIM, *supra* note 9, at 52; see also JAD AL-HAQQ, 8 *AL-FATAWA AL-ISLAMIIYA* 3003–06 (1981).

76. See *supra* note 36 (CRPD)

## CONCLUSION

Most of this evidence of the empowerment and protection of people with disabilities in Islamic law emerges from classical text and historical scholarship with some contemporary Islamic jurisprudence that ostensibly expands these inclusive principles. For example, policymakers in various Muslim countries have made modern accommodations for disabled people such as ramps, curb cuts, and designated parking in mosques in Mecca, important mosques around the world, and at newer mosques.<sup>77</sup> In a recent fatwa issued by the Sheikh al-Azhar, Dr. Muhammad Sayyid Tantawi, he declared that an interpreter in sign language should sign the content of Friday sermons for the benefit of the deaf and hard of hearing.<sup>78</sup> This ruling replaced an earlier prohibition of signing during Friday sermons because the interpreter's presence beside was considered distracting to the healthy praying people.<sup>79</sup> Finally, the Universal Islamic Declaration of Human Rights (UIDHR) was drafted in 1980, including provisions applicable to people with disabilities. The UIDHR was seen as a watershed moment for those advocating for human rights in the Islamic world.<sup>80</sup> Like various contemporary Islamic policies, the UIDHR is a tangible articulation of policymakers' intention to empower and protect people with disabilities.

While the realities facing people with disabilities around the world improve with each enactment and enforcement of empowering disability laws, the disparities within society are challenging to reconcile with many of the inclusive principles found within Islamic laws earliest sources. These realities, though not examined in parallel with the above evidence in this paper, cannot entirely erase the inclusive principles embedded in classical Islamic Law. While the influence of physiognomy and contemporary Islamic penal and family laws frequently fail to protect—let alone empower—people with disabilities, classical Islamic jurisprudence does include tangible empowerment and protections for people with disabilities. The United States and secular legal systems around the world struggle with similar tensions, and in Islamic law we can look to etymology, representational storytelling, inclusive almsgiving, and the mystical practice of *firasa* as empowering foundations for people with disabilities within Islamic law.

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77. See Bhatti et al., *supra* note 8, at 174.

78. *Id.*; see also RISPLER-CHAIM, *supra* note 9, at 24 (“The first exemplary signed sermon, based on Tantawi’s fatwa, was given in Cairo, on June 30, 2000, in the mosque of al-Sayyida Zaynab.”)

79. See RISPLER-CHAIM, *supra* note 9, at 24.

80. See Bhatti et al., *supra* note 8, at 174; see also RISPLER-CHAIM, *supra* note 9, at 15.



