

FREE MARKETS OF ISLAMIC JURISPRUDENCE

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And they said, "What sort of a messenger is this, who eats food, and walks through the markets?"

—Qur'an, Sura al-Furqaan 25:7

INTRODUCTION

Since the emergence of Islam in the early seventh century (610-632),¹ Islamic law has developed through the free markets of jurisprudence, which may be called *iswaaq al fiqh*.² A jurisprudence (*fiqh*) market consists of jurists (*mufti*), scholars (*mujtahid*), and followers (*ashab*). This Article describes *muftis* and *mujtahids* as *opinio-jurists*.³ When a new legal issue arises that cannot be resolved under the existing body of Islamic law, Muslim jurists offer legal opinions consistent with the Basic Code, that is, the Qur'an and the Sunna.⁴ These opinions, known as *fatawaa*,⁵ compete in the jurisprudence markets to win over Muslim followers. Each competing opinion may receive some following. An opinion (*fatawa*) that gains the most Muslim followers becomes a rule of Islamic law. Even minority opinions

1. In 610, Prophet Muhammad received the first revelation. In 632, the Prophet died. During this period, the Qur'an, revealed in small portions at a time, was completed. The Sunna, that is, the Prophet's traditions, deeds, sayings, gestures, silence over issues, was also completed. The Basic Code, consisting of the Qur'an and the Sunna, was thus gradually completed over a period of a little more than 22 years (610-632). Ali Khan, *The Reopening of the Islamic Code: The Second Era of Ijtihad*, 1 U. ST. THOMAS L.J. 341, 349-54 (2003) [hereinafter Khan, *Second Era of Ijtihad*].

2. In this Article, *iswaaq al fiqh*, the *fiqh* markets, markets of Islamic law, and similar expressions are used synonymously unless the context suggests otherwise.

3. Both *muftis* and *mujtahids* issue opinions. A *mujtahid* is a Muslim scholar trained in the science of *ijtihad*, that is, the offering of new rules of Islamic law. A *mujtahid* devotes his life to understanding the interpretations of the Qur'an and Sunna, Islamic history, jurisprudence, the Prophet's life, logic, and legal methods. A *mufti* (jurist) is also a well-read, practicing Muslim who issues opinions on legal questions facing a community or an individual. Often, the distinction between *mujtahid* and *mufti* is one of degree. A *mufti* through regional or universal recognition may rise to the higher station of the *mujtahid*.

4. I introduced the phrase in Khan, *Second Era of Ijtihad*, *supra* note 1. The phrase is used for no other reason than for brevity.

5. *Fatawaa* is the Arabic plural of *fatawa*, which means opinion. *Fatawas* is also the Anglicized plural of *fatawa*.

with substantial followings are treated as rules of Islamic law. Each opinion is binding on the followers.

No new opinion, whether held by a majority or a minority, is binding on Muslims who decline to accept it. The option to follow or not to follow a new juristic rule is the defining attribute of Islamic law.⁶ An important exception exists, however: no option is available with respect to mandatory rules of the Basic Code, which all Muslims must obey.⁷ Hence, Islamic law is a combination of the fixed and the flexible. It contains the immutable, one divine law (the Basic Code) and mutable, pluralistic juristic precedents (*fiqh*). Free *fiqh* markets, therefore, may not be confused with the free markets of ideas. *Fiqh* markets shun the speculation of free thought. They function freely but within the parameters of shared faith, the God's Qur'an, and the Prophet's Sunna.

The concept of following is critical to understanding functionality of the *fiqh* markets. Following does not mean mere intellectual approval of an opinion or showing respect for the opinio-jurist who issued it, nor does it require that followers be students of the opinio-jurist or that they formally belong to the school of *fiqh* the opinio-jurist may have established. Following a legal opinion is essentially behavioral. It occurs when a sizable group of Muslims, or an entire Muslim community, acts in accordance with the rule for "people are Allah's witnesses on earth."⁸ An opinion that fails to produce compliant conduct (*amal*)⁹ in any Muslim community is an odd pronouncement. It is a paper opinion. It might even be blasphemous. Even if not blasphemous, an opinion without voluntary compliance has no room in the theory or practice of Islamic law.¹⁰

6. This is the reason why Islamic law is also known as personal law rather than territorial or tribal law. See generally L. ALI KHAN, A THEORY OF UNIVERSAL DEMOCRACY 36 (2003).

7. Qur'an, Sura al-Hazab 33:36 (translated by author).

8. Sahih Bukhari, Vol. 2, Bk. 23, No. 448, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/023.sbt.html>. This hadith narrates that the people's comments on the deceased's funeral indicate what might be in store for the deceased in the next world. Good comments suggest that the deceased was destined for the paradise. This hadith, along with others, has been interpreted to argue that the agreement of the community embodies divine approval. See Muhammad Qasim Zaman, *Death, Funeral Processions, and the Articulation Religious Authority in Early Islam*, 93 STUDIA ISLAMICA 27, 57 (2001).

9. See generally ABD AL-RAHMAN IBN KHALDUN, MUQADDIMA: AN INTRODUCTION TO HISTORY (Franz Rosenthal trans., N.J. Dawood ed.) (2005) (stating the bulk of a hadith in Sahih Bukhari and Shaih Muslim satisfy the requirement of *amal*); see Wael B. Hallaq, *The Authenticity of Prophetic Hadith: A Pseudo-Problem*, 89 STUDIA ISLAMICA 83-84 (1999).

10. This concept is close to the definition of customary international law. A custom is a state practice accompanied by *opinio juris*. Mere state practice without a sense of legal obligation is not custom, and mere prescriptive announcements without practice fall short of the definition of custom. A custom is said to exist when both state practice and a sense of

The *fiqh* markets incorporate a fundamental distinction between *mu'miniin* and *munkiriin*. *Mu'miniin* are Muslims who believe in the Qur'an and the Prophet's Sunna. Their scholarship, which is anchored in faith (*iman*), does not contravene the basic beliefs of Islam. By contrast, *munkiriin* are persons who may deny the existence of God, Muhammad's prophethood, or the Qur'an's revelatory authenticity. Per the Qur'an: "Those who disbelieve say: 'This (the Qur'ân) is nothing but a lie that he (Muhammad) has invented, and others have helped him at it.'"¹¹ In their scholarship, *munkiriin* may not accept all constraints of the Islamic faith.

So divided, *mu'miniin* and *munkiriin* rarely influence each other. They engage in what Jane McAuliffe has called two parallel conversations, one rooted in faith and deference and the other in doubt and skepticism.¹² *Munkiriin* may or may not be the scholars of faith. Generally, however, they are the critics of Islamic law. They often challenge the authenticity of Islamic sources. As such, they do not shape Islamic legal methods or Islamic law.¹³ The Islamic law markets are essentially the phenomenon of *iman* (trust in Islam), and not of *inkar* (mistrust of Islam). This Article calls the works of *mu'miniin* the internal scholarship, and those of *munkiriin* the external scholarship.¹⁴ Some scholars, though non-Muslims, nonetheless research and write within the parameters of the Islamic faith. Their scholarship shares many attributes with the internal scholarship. This Article treats all scholarship written by non-Muslims as the external scholarship, because writing within the Islamic faith is not a matter of scholarly strategy; it is an act of existential honesty in which the scholar's heart and mind function together without any contrived separation. If a scholar is not a Muslim, he or she cannot pretend to be one for scholarship purposes. Such pretension receives little credibility in *fiqh*.

legal obligation to follow the practice become unified. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 46-48 (4th ed. 2003).

11. Qur'an, Sura al-Furqaan 25:4 (translated by author).

12. See generally JANE DAMMEN McAULIFFE, ENCYCLOPAEDIA OF THE QUR'AN, viii (2001).

13. See text *infra* Part III.A.

14. In contemporary moral philosophy, internalists are distinguished from externalists. Internalism argues that there exists a direct connection between action and belief in that a person's behavior is determined by his beliefs. Externalists do not see any such necessary connection between belief and action. See *Externalism About Mental Content*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2003), available at <http://plato.stanford.edu/entries/content-externalism/> (last visited May 11, 2007). Islam takes a more developmental approach toward the distinction: Internalism is a gradual and dynamic process. Our beliefs become gradually solidified; and only when the state of mind is fully matured in the power of belief is the action is correspondingly caused and strengthened. For example, the reason for revealing the Qur'an to the Prophet in pieces rather than as a whole was so that "(God) may strengthen your heart thereby." Qur'an, Sura al-Furqan 25:32 (translated by author).

Therefore, the *fiqh* markets presume that the scholar's situated consciousness is inseparable from the contents of scholarship. *Mu'miniin* and *munkiriin* seldom share the same situated consciousness. Situated consciousness is composed of one's personal facts, including one's spirituality, state of knowledge, piety, geographical residence, racial consciousness, and religion. The *fiqh* markets evaluate all scholarship for its research methodology, analytical soundness, logic, and verifiability. But the question remains whether the scholar's personal beliefs, religious background, piety, and state of spirituality are also relevant. Can a Jewish or a Christian scholar write a credible piece on the exegesis of the Qur'an? Is a Hindu as qualified as a believer in expounding the oneness of God? The realm of possibilities will answer these questions in the affirmative. The *fiqh* markets, however, do not subscribe to any such objectivity. They presume that the externalists will research and analyze from a situated consciousness that, despite its objectivity and intellectual prowess, lacks the Islamic faith.¹⁵ The markets may disqualify or discount the scholarship situated in *inkar*.¹⁶ In matters of Islamic exegesis, the quality of person is as important as the quality of his research.¹⁷

To further clarify a scholar's situated consciousness, *munkiriin* who deny the authenticity of Islam may not be confused with those who deny the essence of religion. Some *munkiriin* believe in no religion, denying the existence of God, the concept of prophethood, and the authenticity of revelation. Such *munkiriin*, in the language of the Qur'an, are *kaafiriin*.¹⁸ The distinction between *kaafiriin* and *munkiriin* is crucial. Christians, Jews, and other peoples of the book are *munkiriin*. They are not *kaafiriin*. *Munkiriin* do not believe in Islam, while *Kaafiriin* do not believe in God. Because one does not know a person's inner state of belief—nor should one intrude in this zone of spiritual privacy—it is inappropriate to designate any persons as *kaafiriin*. Such blatant labeling of others is contrary to the principles of Islam.¹⁹ Persons are free, however, to declare themselves as *kaafiriin*.

15. Even translations, let alone exegeses, of the Qur'an by non-Muslims are unacceptable to the *fiqh* market. AHMED VON DENFFER, ULUM AL QURAN, ch. 6, available at <http://www.islamworld.net/UUQ/6.txt> (last visited May 11, 2007).

16. The external scholarship in Islamic theology may be disqualified on the ground that the scholar is a non-Muslim; but the external scholarship in Islamic history may not be discounted if it illuminates historical events without undermining the basic beliefs of Islam. *See id.*

17. *See id.* (listing the qualities of an exegete, including a firm belief (*aqida*) in Islam).

18. Qur'an, Sura aali-Imraan 3:100, Sura al-Ma'idah 5:102, Sura al-Anaam 6:130, Sura al-A'raf 7:37 & 7:93, Sura an-Naml 27:93, Sura al-Ahqaf 46:6. The Qur'an also uses another word *Kaafiruun*, which appears a number of times and which is the plural of *kaafir* (translated by author).

19. Qur'an, Sura an-Nisaa 4:94 (Say not to the people in foreign lands: "you are not believers."), Sura al-Anaam 6:108 (Do not curse even false gods) (translated by author).

The ideology of self-declared *kaafiriin* completely discounts the value of faith. It disentangles reason from faith and reason from revelation in which the *kaafiriin* do not believe. The *kufir* (complete denial of God) ideology sees God as Man's invention and religion as a social construct to exercise power over others. It promotes a rigid wall of separation between laws of the state and laws of religion, presuming that laws of religion are unworthy concoctions.²⁰ It rejects all notions of life after the worldly life. The *kufir* ideology constructs a view of law through material formula, excluding the intangible world of religion. Because of diametrically opposite viewpoints, Muslims and *kaafiriin* may never come to terms with each other. Therefore, the Qur'an separates the two groups by the principle of disengagement, called "*Lakum Diinukum wa li-ya Diin* (To you be your Way, and to me mine)."²¹ Self-declared *kaafiriin*, however, continue to attack the sources and substance of Islamic law.

In contrast to *kufir* ideology, Islamic law affirms a unified experience in which reason and faith, reason and revelation, judgment and emotions, the material and the spiritual, and this life and the next are all fused together.²² All things submit to One God, and therefore the *kufir* ideology cannot comprehend Islamic legal methods or Islamic law.²³ *Kufir* is the opposite of Islam. *Kufir* denies the revealed truth.²⁴ It is no surprise, then, that the *kufir* ideology challenges the authenticity of every source that nurtures Islamic law. Much of the external scholarship on Islamic law draws its inspiration either from *inkar* or *kufir*. The denial of both Islam and God generates dubitancy about Islamic law. The *kufir*-inspired scholarship may also

20. Even some believers may approve the separation of state and religion but their reasons are respectful of religion. Imad-ad-Dean Ahmed, *American and Muslim Perspective on Freedom of Religion*, 8 U. PA. J. CONST. L. 355, 364 (2006) (arguing that separation of church and state is good for religion).

21. Qur'an, Sura al-Kaafiruun 109:6 (translated by author).

22. Perhaps, the best articulation of this concept is available in the writings of Shah Wali Allah (1703-1762) who used the *tatbiq* methodology to fuse the intellectual with the intuitive to reach the underlying unity of what appears to be fragmented on the surface. See Marcia K. Hermansen, *Shah Waii Allah of Delhi's Hujjat Allah al-Baligha: Tension Between the Universal and the Particular in an Eighteenth-Century Islamic Theory of Religious Revelation*, 63 *STUDIA ISLAMICA* 143 (1986).

23. Qur'an, Sura aali-Imraan 3:5-6, Sura Az-Zumar 39:42. Some external scholars argue that Islam's One God is arbitrary and that Muslim theology is occasionalist in that there are no causes and no effects and that everything happens because God arbitrarily makes it happen. See Elie Kedourie, *Islam and Orientalists: Some Recent Discussions*, 7 *BRIT. J. SOC.* 217, 218 (1956). This external views fail to appreciate that the Qur'an presents a universe perfectly ordered and balanced without arbitrariness. See, e.g., Qur'an, Sura al-Hijr 15:19 (and the earth is spread out with firm mountains and in which everything grows in a balanced manner), Sura ash-Shura 42:17 (God has revealed a book of truth and a sense of balance for behavior) (translated by author).

24. See Marilyn Robinson Waldman, *The Development of the Concept of Kufir in the Quran*, 88 *J. AM. ORIENTAL SOC'Y* 442, 443 (1968).

aim at bringing down the edifice of Islamic legal history and Islamic law.²⁵ Daniel Pipes, an avowed critic of Islam, welcomes such scholarship as the scholarship of termites.²⁶ Ironically, though, the *kufir* scholarship has the least effect on the *fiqh* markets because Muslims decline to take it seriously, dismissing it under the principle of disengagement.²⁷

This Article examines both internal and external scholarships and their respective contributions to the *fiqh* markets. It first explains that the *fiqh* markets are sustained through internal scholarship that shapes the rules of Islamic law. It later examines the role of external scholarship that might influence these markets. Although the *fiqh* markets are essentially Islamic, the external scholarship may offer clarifying insights and constructive criticisms. Such external scholarship may not directly influence the development of *fiqh*, but its indirect impact on the *fiqh* markets cannot be ignored. Finally, the Article discusses the disengaged scholarship that manufactures disrespect against the Qur'an and the Prophet. It also highlights external scholarship that paints Islamic law as a system founded on fraud and plagiarism.²⁸ The *fiqh* markets disregard the disrespectful scholarship because assaults on the Qur'an and the Prophet furnish nothing useful. Sweeping allegations of fraud and plagiarism are similarly disregarded.

Such are the dynamics of the *fiqh* markets that no opinio-jurist or generation can rig the development of Islamic law. Rigging is impossible where law is developed through free and spirited competition of juristic opinions that millions of Muslims follow with no compulsion.²⁹ Although the disengaged scholarship rarely affects the *fiqh* markets, it nurtures prejudice and hostility against Muslims by perpetuating dangerous stereotypes.³⁰ The negative views about Islamic law owe much of their existence to external scholarship. It is hoped that external scholars will produce scholarship that builds interfaith bridges.

I. INTERNAL SCHOLARSHIP

The Basic Code, which consists of the Qur'an and the Sunna, provides rules and principles in diverse areas of human activity. It contains family law, criminal law, international law, trusts, wills, non-testamentary rules of distributing the decedent's estate, and the law of contracts.³¹ The Qur'an

25. See Daniel Pipes, *Lessons from the Prophet Muhammad's Diplomacy*, MIDDLE E. Q. 65 (Sept. 1999).

26. See *id.*

27. Qur'an, Sura al-Kaafiruun 109:1-6 (translated by author).

28. See *infra* Part III.

29. See *infra* Part I.

30. See *infra* Part II.

31. See generally SEYMOUR VESEY-FITZGERALD, *MUHAMMADAN LAW: AN ABRIDGEMENT ACCORDING TO ITS VARIOUS SCHOOLS* (1931) (chapters on family law, change

provides a set of normative principles whereas the Sunna furnishes the case law that the Prophet decided in light of the Qur'an. The Basic Code consists of both the Qur'an (text) and the Sunna (case law). These two primary sources of law are immutable. No Muslim community may repeal or modify the Basic Code.

This immutability, however, does not mean that the Basic Code is fixed in meaning. The *fiqh* markets distinguish between alterations and interpretations of the Basic Code. Outright alterations to the texts of the Basic Code are strictly prohibited.³² Even alterations through interpretation are blasphemous. Good faith interpretations of the Basic Code delivered by pious and knowledgeable Muslim opinio-jurists, however, may freely compete in the *fiqh* markets for the *Umma's* approval and compliant behavior.³³ Bad faith interpretations, offered to deceptively undermine clear commandments of the Basic Code, rarely find a place in the *fiqh* markets.³⁴

A. Beyond Organized Religion

The free markets of *fiqh* embody a profound theological truth about Islam. Islam establishes a direct relationship between the individual and God, eliminating the requirements for any religious intermediary. Islam is a faith of direct access to God. Each individual opens a separate account with God.³⁵ Muslims may learn from religious teachers, including men and women learned in Islamic laws. However, they are not required to join a clerical organization for expressing or practicing their faith, for Islam is not an organized religion. That said, not every direct access between the individual and God falls in the domain of Islam. Islam provides a basic framework of beliefs that cannot be rejected, and any rejection of this basic framework removes individuals and communities from the fold of Islam.³⁶

of religion, paternity, guardianship, inheritance, administration of estates, property, loans and security, gifts, and trusts). Muslims do not call Islamic law as Muhammadan law; some external scholars use this phrase to provide a parallel with Christian law.

32. Qur'an, Sura al-Anaam 6:115 (None can change God's words), Sura an-Nasr 10:64 (no change can there be in the words of God) (translated by author).

33. See generally Brinkley Messick, *The Mufti, the Text and the World: Legal Interpretation in Yemen*, 21 MAN 102 (1986) (explaining the role of the opinio-jurists in the formation of Islamic law).

34. Qur'an, Sura aal-e-Imran 3:7 (The Qur'an itself distinguishes between clear and allegorical revelations, warning that persons with perverse heart interpret allegorical verses to create mischief and discord.) (translated by author).

35. Qur'an, Sura Ibrahim 14:51 (God keeps accurate accounts) (translated by author).

36. For example, the belief that Prophet Muhammad was God's last prophet is part of the basic faith, called *iman*. Religious communities that believe otherwise, such as the Ahmadiyya, the Moorish Science Temple of America, The Lost Found Nation of Islam, and the Nubian Islamic Hebrews, are not considered Muslims by mainstream believers. See

While Islam furnishes a strong sense of the community, it departs from other organized communities such as the Catholic Church in that it does not mandate a hierarchical clerical structure to form a community of believers. Muslims have no Pope. No one person, therefore, speaks for all Muslims of the world. There exists no single clerical organization with a monopoly over the interpretations of the Basic Code.³⁷ In the absence of hierarchical structures, the free markets of Islamic law have shaped diverse Muslim religious communities with different sub-systems of Islamic law. What unifies these diverse communities are the Qur'an and the Sunna.³⁸ There is only one Qur'an for all Muslims, and all Muslims are committed to follow the Prophet's Sunna.³⁹ Beyond that, Muslim communities have historically been diverse and free to follow their own customs and laws, provided these customs and laws do not offend the Basic Code.

Since the 1979 revolution in Iran, the Shia Muslims appear to be more organized than the Sunni Muslims. In Iran, for example, the Shia clerical infrastructure is hierarchical, with a religious leader at the top.⁴⁰ Even in Iran, however, Sunni Muslims are constitutionally protected and cannot be compelled to follow the juristic rules of the Shia *fiqh*.⁴¹ Article 12 of Iran's Constitution provides that "[o]ther Islamic schools . . . are to be accorded full respect, and their followers are free to act in accordance with their own

Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, in UNDERSTANDING ISLAMIC LAW FROM CLASSICAL TO CONTEMPORARY 10 (Hisham M. Ramadan ed., 2006).

37. Contrast this absence of a global clerical organization with the formation of an international political organization, called the Organization of Islamic Conference, which consists of fifty-seven Muslim states. This international organization is a political organization, a mini united nations for the Muslim nations. See <http://www.oic-oci.org/> (last visited May 11, 2007).

38. The Qur'an recognizes the twin principles of unity and diversity. All Muslims constitute one *Ummah*, that is one Community. This unity is recognized in the Qur'an, Sura al-Anbiya 21:92 (Muslims constitute one community or one religion or a single brotherhood) (translated by author). See also Qununi Assassi Iumhuri' Isla'mal Iran [The Constitution of the Islamic Republic of Iran art. 11] 1358 [1980] (recognizing that all Muslims constitute a single community). Contrast this recognition of unity with diversity that is also acknowledged in the Qur'an. See Qur'an, Sura al-Hujraat 49:14 (the creation of tribes and nations).

39. The Prophet's Sunna, however, contains some controversy. If the Prophet's Sunna is authentic and beyond doubt, all Muslims follow it. However, since the Prophet's traditions were collected long after his death, Muslims disagree on the authenticity of some collections. See *infra* Part III.A.

40. See Qununi Assassi Iumhuri' Isla'mal Iran [The Constitution of the Islamic Republic of Iran art. 107] 1358 [1980]. Ali Khan, *Constitutional Kinship Between Iran and the Soviet Union*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 293, 305-08 (1988).

41. See Qununi Assassi Iumhuri' Isla'mal Iran [The Constitution of the Islamic Republic of Iran art. 12] 1358 [1980]. This article recognizes the pluralism of *madhabs* that have existed in Islamic law.

jurisprudence in performing their religious rites.”⁴² Furthermore, Iran’s Shia *fiqh* is territorial and not universal, meaning that Shia Muslims in other parts of the world may or may not follow the opinions of Iran’s clerics.⁴³ In other parts of the Muslim world, the Sunni Muslims are completely decentralized, with the possible exception of Saudi Arabia, where a loosely organized clerical structure has been established to discourage the proliferation of diverse opinions on the same subject matter. In most of the Muslim world, however, the free markets of Islamic law thrive. Attempts to superimpose a strict clerical hierarchy or state control over the *fiqh* markets have failed in the past and they are unlikely to succeed in the future.⁴⁴

B. Historical *Fiqh* Markets

Although the Basic Code, the Qur’an and the Sunna, provides solutions to numerous legal issues, new questions began to appear soon after the Prophet’s death. These questions were answered through legal opinions that prominent jurists issued. The most remarkable growth of Islamic law occurred in the first two hundred and fifty years of Islam.⁴⁵ This first era of *ijtihad* was open, bold, intellectually charged, and controversial, but it was also the most responsive to the need of constructing rules consistent with the Basic Code.⁴⁶ Juristic discussions focused on the appropriateness of legal methods as well as substantive rules. How a rule must be extracted from the Basic Code was considered as important as the substance of the rule.⁴⁷ Unrestrained imagination to interpret the Qur’an and the Sunna was discouraged.⁴⁸ A fundamental distinction that the Prophet himself drew between innovation (*bida*) and interpretation served as the guiding force to safeguard the emerging markets of *fiqh* from speculation and experimentation.⁴⁹

42. Qununi Assassi Iumhuri’ Isla’ mal Iran [The Constitution of the Islamic Republic of Iran art. 12] 1358 [1980].

43. The Shia population in Iraq, for example, has its own clerical structure and does not follow the commands of the Shia organization in Iran. See *Shias in Iraq*, <http://www.globalsecurity.org/military/world/iraq/religion-shia1.htm> (last visited May 11, 2007).

44. KHALED ABOU EL FADL, *REBELLION AND VIOLENCE IN ISLAMIC LAW* 90-92 (2001) (governmental laws do not carry precedential value unless jurists support them). The confrontation between rulers and jurists, however, is not a permanent feature of the Islamic legal system. *Id.* at 93.

45. Khan, *Second Era of Ijtihad*, *supra* note 1, at 348.

46. *Id.* at 362-63.

47. *Id.*

48. *Id.*

49. The Prophet said: “You must then follow my sunnah and that of the rightly-guided caliphs. Hold to it and stick fast to it. Avoid novelties, for every novelty is an innovation, and every innovation is an error.” Sunan Abu-Dawd, Bk. 40, No. 4590, *available at*

*Medina*⁵⁰ and *Kufa*⁵¹ were the two most vigorous competing jurisprudential markets in which reputable opinio-jurists with broad regional following established the rules of an emerging legal tradition, called *fiqh*.⁵² In the tenth century, the *Hanafi* jurisprudential market further flourished in Baghdad (Iraq), Balkh (Afghanistan), and Bukhara (Transoxania).⁵³ “In each network there was at least one central figure . . . distinguished by his numerous and famous students and by his being the principal opinio-jurist to issue *fatawas* in his region.”⁵⁴ Thus, the *Hanafi fiqh* was enriched by a robust supply of opinions from these diverse centers of learning. Some jurisprudential markets are more active and influential than others. And an influential market may lose its prominence as another jurisprudential market gains momentum and respectability. For example, the *Hanafi* jurisprudential market of Bukhara “enjoyed its Golden Age” in the eleventh century and became the most prominent circle in influencing the *Hanafi* opinio-jurists of later centuries.⁵⁵

Historically, Muslims have belonged to distinct communities of Islam *fiqh*, known as schools of law or *madhabs*.⁵⁶ For centuries, Islamic *fiqh* has been broadly available through five distinct schools that freely developed under the guidance of great scholars and opinio-jurists.⁵⁷ It is common for an entire Muslim community to follow the rules of a particular *madhab*.

<http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/abudawud/040.sat.html> (last visited May 11, 2007); Sahih Muslim, Vol. 1, Bk. 4, No. 1885, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muslim/004.smt.html> (last visited May 11, 2007). But see the concept of “excellent innovation.” Sahih Bukhari, Vol. 2, Bk. 32, No. 227, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/032.sbt.html> (last visited May 11, 2007).

50. Imam Malik and his students established the *fiqh* market in Medina, the Prophet’s city, a jurisprudence deeply entrenched in *ahadith*. The followers of this school are called *Ahl al Hadith* or the traditionalists. See TAHA JABIR AL-AWANI, USUL AL FIQH AL ISLAMI (Yusuf Talal DeLorenzo & A.S. Al Sheikh Ali trans.). Chapter 3 and 4 explain the origin of the traditionalists and the competing schools of Medina and Kufa. See http://www.usc.edu/dept/MSA/law/alalwani_usulalfiqh/index.html (last visited May 11, 2007).

51. Imam Abu Hanifa and his students established a vibrant *fiqh* market in Kufa, Iraq, a jurisprudence that drew its creativity from analogy. The followers of this school are called *Ahl al Ra’i* or the rationalists. See AL-AWANI, *supra* note 50, at ch. 3.

52. See AL-AWANI, *supra* note 50, at ch. 3-4 (explaining the competing school of Medina and Kufa).

53. EYYUP SAID KAYA, *Continuity and Change in Islamic Law: The Concept of Madhab and the Dimensions of Legal Disagreement in Hanafi Scholarship of the Tenth Century*, in THE ISLAMIC SCHOOL OF LAW EVOLUTION DEVOLUTION AND PROGRESS 26, 28 (Peri Bearman et. al. eds., 2005).

54. *Id.*

55. *Id.* at 29.

56. *Madhab* is singular, and *Madhaib* is plural. *Madhabs* is an Anglicized plural of *madhab*.

57. Khan, *Second Era of Ijtihad*, *supra* note 1, at 348.

Muslim communities of distinct geographical areas identify themselves as Hanafi, Maliki, Shafi, Hanbali (the four Sunni Schools), or Jafferi (Shia School) in their adherence to the *fiqh*.⁵⁸ In the past, the adherence to a particular school has been strict, and crossing from one *madhab* to the other (*tafiiq*) was uncommon and considered unfavorable.⁵⁹ The Shia-Sunni jurisprudential divide, the most remarkable development in recent decades, has been overly politicized and the split has been internationalized. Among ill-informed Muslims, the Shia-Sunni jurisprudential divide has resulted in bloodshed and sectarian violence.

C. Solemnity of Markets

The *fiqh* markets are essentially Muslim markets in which learned jurists offer opinions to solve problems facing a particular Muslim community or the Umma at large. The opinio-jurist must be a practicing Muslim, learned in the Basic Code, who has sound knowledge of legal methods, who is persuasive in legal reasoning and who is familiar with both Muslim history and current affairs.⁶⁰ The more knowledge the opinio-jurist has, the more credibility he commands in his opinions.⁶¹ The markets of *fiqh* carefully scrutinize the opinio-jurist's personal character, piety, honesty, as well as his intellect and knowledge. A highly pious person with deficient intellect or limited knowledge or a highly intelligent and educated person without a high personal character is viewed with suspicion and his opinions are discounted. The markets demand that Muslim opinio-jurists be both highly pious and highly knowledgeable. Piety without intellect or intellect without piety does not impress the markets.⁶² The markets respect opinio-jurists who have devoted their lives to God's worship and the attainment of high knowledge.⁶³

58. VESEY-FITZGERALD, *supra* note 31, at 10-16.

59. The combining of rulings of different schools or *madhabs* is known as *tafiiq* or *takhayyur*. By contrast, *taqlid* is the following of a particular *madhab*. Arbitrary *tafiiq* in related actions was often unacceptable. For example, one cannot follow the Shafi school in matters of ablution (*wudu*) and the Hanafi school in matters of prayers (*salat*), since *wudu* and *salat* are closely related. However, *tafiiq* is acceptable if different rulings are selected in unrelated matters. William R. Roff, *Whence Cometh the Law? Dog Saliva in Kelantan, 1937*, 25 COMP. STUD. IN SOC'Y & HIST. 323, 329-32 (1983) (using *tafiiq* to allow the use of dogs in a Shafi jurisdiction).

60. See VON DENFFER, *supra* note 15.

61. WAEEL B. HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* 202 (2005).

62. Caution must be used to accept the views of a scholar who lacks piety or intellect. VON DENFFER, *supra* note 15.

63. For qualifications of a *mujtahid*, see Abdal-Hakim Murad, *Understanding the Four Madhabs: The Problem with Anti-Madhabism*, available at <http://www.iiu.edu.my/deed/lawbase/newmadhhab.html> (last visited May 11, 2007).

The *fiqh* markets are free but solemn. They reject the idea of experimentation, innovation, or revolution away from the Basic Code.⁶⁴ Opinio-jurists may not experiment with jurisprudence by offering solutions that challenge the fundamentals of the Islamic faith. Any proposal to amend the text of the Qur'an, for example, is an idea that the markets would never accept.⁶⁵ Likewise, any suggestion that the Sunna should be discarded as a source of Islamic law and that opinio-jurists must confine their analysis to the Qur'an would find no recognition in the markets. Even the idea of taking a new analytical or substantive start with the Basic Code without the benefit or burden of the classical *fiqh* will be considered revolutionary and therefore rejected.⁶⁶ The classical *fiqh* cannot be abandoned in a wholesale manner. The markets favor seamless development of the *fiqh* without any abrupt or revolutionary departure from the past.⁶⁷ Muslim rulers and governments might be overthrown through revolutions and palace coups. These violent political changes in Muslim leadership, however, do not disturb the markets of *fiqh* that retain their solemnity and calm in periods of shared distress or upheaval.⁶⁸

Furthermore, the *fiqh* markets disdain all forms of cultism. Even though Makka and Medina house the sacred places of worship and pilgrimage, the markets of *fiqh* are neither territorial nor cultish. No nation or peo-

64. Revolutions away from the Basic Code may be distinguished from revolutions toward the Basic Code. The 1979 revolution in Iran, the Taliban movement in Afghanistan, and the rise of Muslim Brotherhood in Egypt offer examples of revolutions toward the Basic Code in that these movements wished to replace the existing legal systems with the enforcement of the Basic Code. The dismantling of the Ottoman Empire and the substitution of a secular legal system in Turkey is an example of a revolution away from the Basic Code. The *fiqh* markets disapprove of revolutions away from the Basic Code. The fall of the Iranian Shah in 1979 and the establishment of a theocratic democracy demonstrates that secular systems in Muslim communities are inherently unstable. Secular Turkey might similarly be unstable. See, Ali Khan, *Will the European Court of Human Rights Push Turkey Toward Islamic Revolution?*, JURIST, Sept. 9, 2002, available at <http://ssrn.com/abstract=941002>.

65. The Qur'an repeatedly prohibits changing the revealed words of God. It condemns the people who have changed the words in previous holy books. Qur'an, Sura al-Maeda 5:13 (God curses those who break the covenant and change the words) & 5:14 (Jews change the words from their right times and places), Sura al-Anaam 6:34 & 6:115 (none can alter the words of God), Sura an-Nasr 10:64 (no change can occur in the words of God);, Sura al-Kahf 18:27 (none can change God's words) (translated by author).

66. Khan, *Second Era of Ijtihad*, *supra* note 1, at 341-42.

67. *Id.*

68. In this sense, there exists a profound separation between governments and *fiqh* markets. The *fiqh* markets do not seek legitimacy from government nor may a government de-legitimize the *fiqh* markets. Of course, a secular system, such as one in Turkey, may refuse to embrace the laws of *fiqh*. Any such refusal, however, does not diminish the vitality of the universal and timeless *fiqh* markets.

ple may claim a privileged station to found or influence the development of *fiqh*.⁶⁹

Any attempt to superimpose the concept of sacred nation or sacred people on Islamic law is incompatible with the logic and spirit of the *fiqh* markets.⁷⁰ Even though the Basic Code is originally available in the Arabic language, the markets of Islamic law are not confined to Arab nations or Arab opinio-jurists. A scholar from Indonesia, South Africa, or the United States is equally competent and free to offer opinions, as is an opinio-jurist from Egypt or Saudi Arabia. The concept of a chosen people or a preferred nation to interpret the Basic Code cannot survive in the free markets. Any Muslim opinio-jurist, regardless of his ethnic, territorial, or racial background, is welcome to enter the markets and issue opinions. Imam Abu Hanifa, for example, was not an Arab.⁷¹ The markets rejected the insinuations that he was not an Arab and that he was not a native of Makka or Medina, where the Prophet had lived and where the Qur'an was revealed.⁷² Rejecting all cultish criticisms, the markets elevated Abu Hanifa to be the greatest opinio-jurist of Islam. The markets were, of course, not prejudiced against Makka or Medina either.⁷³ Imam Malik, the founder of another classical school, was a native of Medina, where the Prophet established the first Islamic state⁷⁴ and where he is buried.

69. The Qur'an discloses a common human inclination in that each nation thinks very highly of itself, but each nation is equally accountable to what it does. Qur'an, Sura al-Anaam 6:108 (every nation takes pride in its own virtues); Sura al-Jathiya 45:28 (each nation is held accountable) (translated by author).

70. The Qur'an does indicate that God created a nation that guides with truth and establishes justice. Qur'an, Sura al-Araf 7:181. This indication must inspire every nation to seek truth and establish justice. But this commandment cannot be read in a self-serving way to claim superior spirituality or privileged hierarchy. See also Qur'an, Sura al-Anaam 6:108 (every nation indulges in self-pride) (translated by author).

71. Imam Abu Hanifa drew huge criticisms from rival schools of jurisprudence. Part of the criticism originated for his lukewarm attitude toward the *ahadith* and part of the criticism was made because he is not an Arab. Eerik Dickinson, *Ahmad B. al-Salt and His Biography of Abu Hanifa*, 116 J. AM. ORIENTAL SOC. 406, 406 (1996).

72. The 114 suras (chapters) of the Qur'an are divided into Makkan and Medinan suras. The suras revealed in Makka are called Makkan suras and those revealed in Medina are called Medinan suras.

73. The Muslims of the world and of all generations hold these two cities in great esteem. The pilgrimage (*hajj*), one of the five pillars of Islam, is inextricably bound with these two cities. Kaaba, the holiest structure, is located in Makka. The Prophet is buried in Medina. All great jurists draw spiritual and intellectual inspiration from these cities. However, the *fiqh* markets can exist anywhere in the world for they are not primarily geographical.

74. ALI KHAN, *Commentary on the Constitution of Medina*, in UNDERSTANDING ISLAMIC LAW 205 (Hisham Ramadan ed., 2006).

D. Markets and *Madhabs*

The *fiqh* markets may not be identified with, or confused with, *madhabs*. A *madhab* is a distinct school of law that develops its own legal methodology to interpret the Basic Code.⁷⁵ Each *madhab* also offers a comprehensive code of substantive rules dealing with worship (*ibadat*) and worldly transactions (*mu'amalat*).⁷⁶ A jurisprudential market, however, is not confined to a single *madhab*, but accommodates all competing schools of law. Juristic opinions may differ and compete with each other even within a particular school of *fiqh*, for no school is internally monolithic or inflexible. A market, however, allows a more vigorous exchange of opinions and juristic discussions between and across schools.

A *fiqh* market is both physical and conceptual. Certain cities or countries serve as physical markets when eminent opinio-jurists live there. Historically, Kufa, Baghdad, Medina, Mecca, Bukhara, and Bulkh have served as great jurisprudential markets.⁷⁷ A market, however, is also a virtual entity. Conceptually, a jurisprudential market is a phenomenon. It is an exchange of legal opinions issued to respond to new issues and develop new rules of Islamic law or modify the existing ones. With modern technology, including the availability of the Internet, the markets of Islamic law are more likely to become virtual. Juristic discussions may no longer be confined to a particular city or country. The primary function of the market is to facilitate the cross-pollination of juristic opinions.

A mere exchange of legal opinions, however, does not constitute a jurisprudential market. Several parameters assure the existence of a genuine jurisprudential market. The most important aspect of a genuine market is the freedom that jurists have to issue opinions without duress, fear, and pressure.⁷⁸ When domestic governments, armed groups, or foreign nations compel jurists to issue legal opinions, the compulsion distorts the dynamics of the jurisprudential market. Likewise, ordinary Muslims as well as competing jurists must be free to accept, reject, or question the issued opinions,

75. Khan, *Second Era of Ijtihad*, *supra* note 1.

76. Imam Feisal Abdul Rauf, *What Is Islamic Law?*, 57 *MERCER L. REV.* 595, 600 (2005) (pre-Islamic customs are the laws provided they are compatible with the Qur'an and the Sunna).

77. An example is the Balkh and Bukhara Hanafite jurists shifting the classical tax on real property from the owner to the tenant. See BABER JOHANSEN, *THE ISLAMIC LAW ON LAND TAX AND RENT* (1988). In Iraqi town of Kufa, public debates (*munazara*) were held to argue differing legal viewpoints on specific issues. See Asma Afsaruddin, *Muslim Views on Education: Parameters, Purview, and Possibilities*, 44 *J. CATH. LEGAL STUD.* 143, 151 (2005).

78. See generally KHALED ABOU EL FADL, *REBELLION AND VIOLENCE IN ISLAMIC LAW* 90 (2001); Babak Rod Khadem, *The Doctrine of Separation in Classical Islamic Jurisprudence*, 4 *UCLA J. ISLAMIC & NEAR E. L.* 95, 132-33 (2005) (identifying jurists refusing to submit to coercion and compromise their views).

including those of the great Imams, Shia, and Sunni.⁷⁹ If the jurists and followers are not free, neither are the markets. An authentic jurisprudential market is founded on two distinct freedoms: that of the opinio-jurists and that of the followers. These combined and inseparable freedoms constitute a *fiqh* market in which legal opinions are freely issued and freely accepted, rejected, or criticized.

E. Markets and Governments

Throughout Islamic history, Muslim governments have issued laws and regulations. These laws and regulations, however, do not necessarily qualify as Islamic law. Free markets, not governments, determine whether official laws and regulations are to be considered Islamic.⁸⁰ A government runs the risk of losing spiritual credibility if it interferes with the private markets of opinio-jurists. It loses all trust if it closes down such markets. Acknowledging the power of private markets, governments have rarely attempted to completely close down the private markets of *fiqh*. Imperial governments during the Umayyad, Abbasid, Ottoman, and Mughal empires attempted to universalize the official interpretations of the Basic Code. Most attempts backfired.⁸¹ In the era of nation-states, the control of governments is more diffused. Secular governments that separate law and religion are not considered Islamic. Even religious governments that monopolize lawmaking and shutdown private juristic markets lose credibility and their decrees are viewed with suspicion. Wael Hallaq puts it succinctly: “Islamic law did not emerge out of the machinery of the body-politic, but rather arose as a private enterprise initiated and developed by pious men.”⁸²

79. Over the centuries, doctrinal constraints have been placed to entrench the strict following (*taqlid*) and thus remove the elements of reflective and active choice in following madhabs. These doctrines argue that the great Imams were infallible and enjoyed close contacts with divinity, and as such their interpretations of the Basic Code are authentic and immutable. The concept of the infallible Imam is critical to the Shia *madhab*. Such doctrines hinder the freedom of *fiqh* markets to re-interpret the Basic Code according to new needs and circumstances. See Rudolph Peters, *Idjtihad and Taqlid in 18th and 19th Century Islam*, 20 DIE WELT DES ISLAMIS 131, 132 (1980).

80. Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment*, 27 Fordham Int'l L.J. 4 (2003). “Particularly after the age of *mihna* (inquisition – 218-234/833-848) the ‘*ulama*’ [religious scholars or jurists] were able to establish themselves as the exclusive interpreters and articulators of the Divine law.” *Id.* at 26.

81. The most dramatic example of imperial impositions occurred in the reign of the Mughal Emperor Akbar in India. Discontent with legal disputes among the jurists and in an effort to create a unity religion, Akbar invented a new faith called *Din-illahi* (God’s religion) and arrogated himself with the consent of jurists the power to resolve the theological conflicts and pronounce the final ruling. This power of *mahdar* was a blatant innovation that could not survive the test of time. See Aziz Ahmed, *The Role of Ulema in Indo-Muslim History*, 31 STUDIA ISLAMICA 1, 6-7 (1970).

82. See HALLAQ, *supra* note 61, at 204.

In most cases, government opinio-jurists enter the law markets as equal participants. The *fiqh* markets critically evaluate the credentials, motives, and qualifications of government opinio-jurists. As a general rule, the *fiqh* markets are suspicious of the independence of government opinio-jurists. The markets assume that government opinio-jurists would interpret the Basic Code to support government objectives and policies. In secular legal traditions, governments are the ultimate source of law formation and law enforcement. The judges are assured judicial freedom through the safeguards of life tenures at their job. In Islam, however, governments rarely enjoy the ultimate power to dominate the law markets. If they overtly dominate the law markets, they lose credibility to influence the development of Islamic law. Even their covert domination has rarely succeeded in bringing about a fundamental change in Islamic *fiqh*. Because governments have coercive machinery to enforce the laws they make, they may temporarily rig the markets in their favor. In the long run, however, government gains obtained through coercion are reversed. That has been the power of the *fiqh* markets.⁸³

The founders of Islamic *fiqh* were highly skeptical of any association with government. Imam Abu Hanifa went to prison for refusing Caliph al-Mansur's offer to become the chief judge. Skeptical of the company of rulers, Abu Hanifa is reported to have compared the ruler with fire that benefits from a distance but burns from being too close.⁸⁴ When Medina's governor forced Muslims to take the oath of allegiance to Caliph al-Mansur, Imam Malik issued a legal opinion declaring such an oath to be unlawful.⁸⁵ The governor arrested Imam Malik and publicly flogged him.⁸⁶ Imam Shafi was also arrested in Yemen for fomenting political dissension.⁸⁷ The fourth founder, Imam Hanbal, was brought in chains before the court for refusing to submit to Caliph Mu'tasim's official ideology.⁸⁸ Thus, all the four founders of the legendary schools of jurisprudence demonstrated through their personal life stories that Islamic law must be severed from the power of the government. Opinio-jurists, and not rulers, are the guardians of Islamic law.

83. The most vivid example of imperial imposition of *fiqh* was during the period of *minha* (inquisition) when the ruling caliph used coercion to impose juristic viewpoints. Later caliphs restored the freedom of the *fiqh* markets. See EL FADL, *supra* note 78, at 90-96.

84. Charles C. Adams, *Abu Hanifah, Champion of Liberalism and Tolerance in Islam*, in ISLAMIC LAW AND LEGAL THEORY 377, 386 (Ian Edge ed., 1996).

85. *Imam Malik bin Anas*, <http://www.studentofknowledge.com/malikbio.htm> (last visited May 11, 2007).

86. *Id.*

87. Uthman Ibn Farooq, *Imaam Shafi'ee*, <http://www.studentofknowledge.com/shafieebio.htm> (last visited May 11, 2007).

88. *Imaam Ahmad Bin Hanbal*, <http://www.studentofknowledge.com/hanbalbio.htm> (last visited May 11, 2007); for a less flattering view of Imam Hanbal, external scholars view the facts somewhat differently. See, e.g., Michael Cooperson, *Ibn Hanbal and Bishr al-Hafi: A Case Study in Biographical Traditions*, 86 STUDIA ISLAMICA 71, 80 (1997).

Opinions delivered in private chambers of honest and God-fearing opinio-jurists are more worthy of consideration than those issued by government judges or government opinio-jurists. The inherent mistrust of rulers informs the enterprise of Islamic law.⁸⁹

1. *Shift from Jurists to Juristic Institutions*

For many centuries, the free markets of *fiqh* have been composed of individual opinio-jurists. As Muslim communities formed distinct nation-states in the twentieth century, a new phenomenon has come to define the *fiqh* markets. Each Muslim state established a legal system with formal legislature and judiciary.⁹⁰ Some Muslim nations also established state institutions of prominent Muslim opinio-jurists. In almost every state, the legislative activity is becoming highly technical and complex. New areas of law have surfaced that the Islamic markets of *fiqh* have not previously considered.⁹¹ Muslim nations also participate in the making of international treaties and customary international law.⁹² The sheer volume of law that each nation must generate to manage affairs of the community is formidable. It is beyond the capacity, even expertise, of a single opinio-jurist or scholar to provide rigorous commentary on the validity of each and every piece of legislation, domestic and international, that a Muslim nation must enact. These momentous changes will force the free markets of *fiqh* to adjust to new realities and to adopt useful ways to assure that the Basic Code is neither breached nor abandoned.

State institutions, including the legislature and judiciary, play the gate-keeping role in assuring that new laws are in conformity with the Basic Code. Most Muslim states have domestic constitutional provisions that obligate state institutions to review proposed laws, including treaties, for

89. N.J. Coulson, *Doctrine and Practice in Islamic Law: One Aspect of the Problem*, 18 BULL. SCH. ORIENTAL & AFR. STUD. 17, 211-12 (1956) (explaining the mistrust of association with government and quoting that “when Allah has no more use for a creature, He casts him into the circle of officials”).

90. A wide variety of governmental structures exist in Muslim states. Turkey, for example, has instituted a secular government whereas Iran is a democratic theocracy. Saudi Arabia is a monarchy without a constitution whereas Jordan is a constitutional monarchy. See KHAN, *supra* note 6.

91. Muslim countries, for example, must reckon with stem cell research, organ transplant, blood transfusion, and other medical advancements.

92. However, Muslim states often make reservations to the treaties they sign so that no provision of the treaty violates the commandments of the Qur’an and the Sunna. See, e.g., Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) 167, U.N. Doc. A/44/49 (1989). Reservations by Afghanistan, Egypt, Iran, Iraq, Jordan, Kuwait, Maldives, Mauritania, Saudi Arabia, Syria, United Arab Emirates (all mentioning Sharia or Islamic law as the overriding law). See http://www.unhchr.ch/html/menu3/b/treaty15_asp.htm.

their compatibility with the Qur'an and the Sunna. Iran's constitution, for example, mandates that "[a]ll civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria."⁹³ The Constitution also establishes the Council of Guardians,⁹⁴ consisting of eminent Muslim opinio-jurists, who review the laws to assure that they meet Islamic criteria.⁹⁵ The concept of the Council of Guardians may breach the principles of the free market because the Council has been empowered to rule on the validity of laws, and when it so rules, laws are binding.⁹⁶ Any contrary juristic opinions are dismissed and not allowed to compete with the views of the Council of Guardians.⁹⁷ The extraordinary powers of the Council of Guardians, however, do not affect the international markets of *fiqh* because no other Muslim community, Sunni or Shia, is bound to accept rulings of the Council of Guardians.⁹⁸ The free markets, however, will not completely dismiss opinions of the Council of Guardians because its opinio-jurists are pious and eminent.

The Constitution of Pakistan provides that "[a]ll existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah . . . and no law shall be enacted which is repugnant to such Injunctions."⁹⁹ This categorical language of the Constitution leaves no room for any laws, past, present, or future, to be incompatible with the Basic Code. To safeguard the Islamic roots of Pakistani laws, the Constitution establishes the "Council of Islamic Ideology."¹⁰⁰ The Council shall consist of at least eight scholars from "persons having knowledge of the principles and philosophy of Islam as enunciated in the Holy Qur'an and Sunna, or understanding of the economic, political, legal or administrative problems of Pakistan."¹⁰¹ The Council is not a religious entity of Muslim opinio-jurists, since all of its members are not required to be the opinio-

93. Qununi Assassi Iumhuri' Isla'mal Iran [The Constitution of the Islamic Republic of Iran art. 4] 1358 [1980].

94. Qununi Assassi Iumhuri' Isla'mal Iran [The Constitution of the Islamic Republic of Iran art. 91] 1358 [1980]. The Council consists of twelve persons, including six religious men and six jurists of different expertise in the areas of law. *Id.* The language of the article appears to allow women to be part of the juristic chamber of the Council of Guardians.

95. Qununi Assassi Iumhuri' Isla'mal Iran [The Constitution of the Islamic Republic of Iran art. 4] 1358 [1980].

96. Qununi Assassi Iumhuri' Isla'mal Iran [The Constitution of the Islamic Republic of Iran art. 94, 96] 1358 [1980].

97. Qununi Assassi Iumhuri' Isla'mal Iran [The Constitution of the Islamic Republic of Iran art. 72] 1358 [1980].

98. Shias in other parts of the world may or may not adhere to the rulings or decisions of the Iranian Council of Guardians.

99. PAKISTAN CONST. art. 227 (1980).

100. PAKISTAN CONST. art. 228(1) (1980).

101. *Id.*

jurists of the Qur'an and the Sunna.¹⁰² Secular scholars of economics, politics, and law may also serve the Council.¹⁰³ Unlike Iran's Council of Guardians, Pakistan's Council of Islamic Ideology is less theocratic. However, the substantive provisions of the Constitution require all state institutions, including the legislature and judiciary, to assure that no law is repugnant to the basic principles of the Qur'an and the Sunna.

2. *Shift from Extraction to Approval*

Another significant change in the *fiqh* markets is the shift from extracting new rulings from original sources to furnishing approval for laws made elsewhere. In the classical period, the scholar applied interpretive methods to extract a new ruling to solve a problem in the real world.¹⁰⁴ The jurist would interpret the text of the Qur'an and the substance of the Sunna to design a ruling that solves the problem. He would use legal methods such as analogy and public welfare in interpreting the Basic Code. The juristic opinions were essentially legislative in character, at least to the extent that the opinion offered a prescriptive rule. Of course, the prescriptive value of the opinion also depended on its acceptance in the general community. If the community refused to accept the opinion, it remained a paper rule with no corresponding practice in the functional world.

With the rise of national legislatures that seem to have monopolized legislative activity, the role of the opinio-jurist has dramatically changed. Now the opinio-jurist must review the laws for their compatibility with the Basic Code. The juristic opinion is now sought to seek approval of the laws that the legislature or the executive branch of the state enact.¹⁰⁵ The governments may have established state juristic bodies for such review. Private Muslim opinio-jurists not affiliated with the state, however, are free to issue their own opinions on any proposed or enacted laws and declare them to be

102. The members of the Council may either be persons having the knowledge of Islam or understanding of the economic, political, legal, or administrative problems of Pakistan. PAKISTAN CONST. art. 228(2) (1980).

103. *Id.*

104. Classical legal methods included *qiyas* (analogy), *ijma* (consensus), juristic preference, and compatibility with local customs. These methods restrained the jurist from interpreting the Basic Code without free fancy. For other supplementary sources of Islamic law, see M. Cherif Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 9 (M. Cherif Bassiouni ed., 1982).

105. National constitutions of Muslim states provide juristic review of laws for their compatibility with the Qur'an and the Sunna. *See, e.g.*, PAKISTAN CONST. art. 227-28 (1980); Qununi Assassi Iumhuri' Isla'mal Iran [The Constitution of the Islamic Republic of Iran art. 4, 91] 1358 [1980].

harmonious with the Basic Code or not.¹⁰⁶ The state opinio-jurists may be viewed with suspicion and biased. Close ties with the ruling elite have been suspect ever since the dawn of the free markets of Islamic *fiqh*.¹⁰⁷ That suspicion continues to linger even if state affiliated opinio-jurists are pious and highly educated individuals.

F. Diversity and Plurality of Rules

Since the beginning, Islamic law has been diverse and pluralistic in view of differing social customs and practices. No super norm requires the *fiqh* markets to drive out the rules that fail to win all Muslim communities. Even rules with a minority following survive and remain part of the Islamic legal tradition.¹⁰⁸ A rule of *fiqh* that makes perfect sense in one community may not successfully function in other communities. Of course, no community may hold on to a local custom contrary to the letter and spirit of the Basic Code. Local customs do not trump the Qur'an and the Sunna. But they may be accommodated in the juristic rules of the *fiqh*. Respect for local customs is a fundamental principle of Islamic *fiqh*.¹⁰⁹ The free markets thrive on this respect for diversity and dignity of local cultures. They refrain from universalizing a rule of the *fiqh* that discounts local traditions. Islamic jurisprudence is thus inherently flexible and resilient.

1. Differing Cultures

Legal opinions derived from the Basic Code may not differ simply because of different legal methods used to derive meaning from the texts. These opinions may differ because of cultural differences. The Hanafi opinio-jurists of Balkh (Afghanistan), for example, could not accept the rule of *diya*, that is, monetary compensation that the offender pays to the vic-

106. Pakistan, for example, is in the process of changing the 1979 Huddod (Enforcement of Zina) Ordinance, under which a woman who could not prove rape was charged with committing (*zina*) fornication on the theory that the woman has already confessed to sexual intercourse. The law silenced women and discouraged them from bringing claims of rape. The new law will not punish the woman if she fails to prove rape. Many opinio-jurists oppose the change in law and argue that the new law would not punish a confessed crime. See David Montero, *Rape Law Reform Roils Pakistan's Islamists*, CHRISTIAN SCI. MONITOR, Nov. 17, 2006, at 7.

107. See *supra* Part I.C.

108. The concept of *ikhtilaf*, that is positive recognition of differences of legal opinions, is a salient trait of Islamic jurisprudence. Oussama Arabi, *Contract Stipulations (Shurut) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya*, 30 INT'L J. MIDDLE E. STUD., 29, 30 (1998).

109. Abdul Rauf, *supra* note 76, at 604 (noting pre-Islamic customs are the laws provided they are compatible with the Qur'an and the Sunna).

tim's family.¹¹⁰ The Arab Hanafi opinio-jurists concluded that the offender's extended family was liable to pay *diya* for the commission of unintentional homicide.¹¹¹ This *diya* rule of *fiqh* presupposes a family structure built on mutual support. This rule could not be imported into Balkh where no such family solidarity existed.¹¹²

2. Differing Methods of Legal Reasoning

Diverse legal opinions may also arise from differing legal reasoning that the opinio-jurist uses to solve legal problems. Imam Ahmed ibn Hanbal argued that the prayers said in a stolen garment were wholly null and void.¹¹³ Under his analysis, saying prayers in a stolen garment fuse what is right with what is wrong. The purpose of prayer is submission to God and an affirmation of good intentions and the purity of heart. Thus, when the prayers are said in stolen garments, the spirit of submission is breached in a flagrant manner. Imam Abu Hanifa, however, reached the opposite conclusion. He declared the prayers said in a stolen garment to be valid on the ground that the act of stealing does not vitiate the act of worship.¹¹⁴ The person would be rewarded for his performance of obligation to God but punished for breaching his duty to man. According to Abu Hanifa, the two acts and the corresponding obligations are separate and may not be fused.¹¹⁵ The act of worshipping in a stolen garment does not cure the act of stealing, and the act of stealing does not taint the prayers.¹¹⁶ Due to these conflicting and irreconcilable juristic opinions of the Great Imams, the matter is left to individual discretion. When *fiqh* rulings conflict and provide no clear guidance, Muslims must search their conscience, under the principle of personal accountability, to decide whether or not, for example, to say the prayers in stolen garments.¹¹⁷

In all probability, most God-fearing Muslims would choose not to say their prayers in stolen garments, unless necessity dictates otherwise. If the individual has no other garments to say his mandatory prayers, the prayers

110. KAYA, *supra* note 53, at 31.

111. *Id.*

112. *Id.*

113. J.N.D. Anderson, *Invalid and Void Marriages in Hanafi Law*, 13 BULL. SCH. ORIENTAL & AFR. STUD. 357-58 (1950).

114. *Id.*

115. *Id.*

116. *Id.*

117. Qur'an, Sura al-Anaam 6:52 (each person is accountable to God) (translated by author).

said in stolen garments are valid.¹¹⁸ The individual, however, is still accountable for his theft.¹¹⁹ If a Muslim steals the garment for the primary purpose of saying the mandatory prayers, even the act of theft may be punished only lightly or completely forgiven.¹²⁰

These examples clarify that differing legal methods and reasoning may yield different *fiqh* rulings. No wrong is committed when prudent and honest jurists propose differing rulings on the same issue. As suggested before, the ultimate test of a ruling is what might be called a field test; that is, whether a Muslim community would accept a particular ruling. Once a strict loyalty to a particular *madhab* is relaxed, the field test offers an even more promising and permanent solution to differing opinions. Muslim communities are free to accept a particular rule in good faith and in accordance with their culture and social viewpoint.

G. Universal and Timeless Rules

The rules contained in the Qur'an and the Sunna constitute the universal and timeless rules of *al-fitra* binding on all Muslim communities of all temporal generations, regardless of their diverse culture, tradition, and history.¹²¹ For example, fasting is prescribed for all Muslim communities, though there are exemptions for individuals suffering from certain specified disabilities.¹²² However, no community may claim exemption from fasting on the ground that fasting is contrary to its customs and local practices.¹²³

118. Qur'an, Sura al-Baqara 2:173, Sura an-Nahl 16:115 (the compulsion of necessity makes lawful what is otherwise unlawful; a person may eat the forbidden pork under the force of necessity) (translated by author). See also Qur'an, Sura al-Anaam 6:119 & 6:145.

119. Qur'an, Sura al-Anaam 6:120 (persons who commit sins, secret or open, will get due recompense for what they have earned) (translated by author).

120. Qur'an, Sura al-Ar'aaf 7:153 (God forgives those who commit a wrong, repent thereafter, and truly believe) (translated by author).

121. Qur'an, Sura Saba 34:28 (The Prophet has been sent as a universal messenger to give the good news and warn against wrongdoing) (translated by author). Qur'an, Sura ar-Rum 30:30 (God has created man in a state of *al-fitra*, i.e., the state of upright nature) (translated by author). Sahih Bukhari, Vol. 6, Bk. 60, No. 298, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/060.sbt.html> (last visited May 11, 2007) (stating every child is born in a state of *al-fitra*). Islamic law contained in the Basic Code has thus been called *al-fitra* or natural law. It is not the law of raw instincts but of a nature that can be cultivated through submission to One God in accordance with His Laws revealed in the Qur'an and in accordance with the Prophet's inspired wisdom contained in the Sunna.

122. Qur'an, Sura al-Baqara 2:283-84 (Fasting is prescribed for all Muslims. However, the sick, the elderly, travelers, and women who are nursing may postpone their fasting) (translated by author).

123. Local customs cannot overrule a clear commandment of the Qur'an. These customs however may be allowed to function only if they are compatible with injunctions of the Basic Code.

Likewise, Muslim men and women of all nations and generations are under an obligation to get married, though this rule also has practical exceptions.¹²⁴ These exceptions are available to individuals, however, and not to communities.¹²⁵ No Muslim community may depart from the universal Islamic rule of marriage and establish a counter rule that undermines the institution of marriage.¹²⁶

Even some universal rules embodied in the Basic Code are flexible. The Qur'an, for example, prescribes the concept of the age of marriage.¹²⁷ However, it prescribes no definite age as the age of marriage. The Qur'an's injunction mandates that a Muslim community establish an age of marriage. But the injunction leaves it to each community to determine for itself what that age ought to be.¹²⁸ A Muslim community would breach its obligation under the Qur'an if it establishes no minimum age of marriage, but the setting of a certain minimum age of marriage is within the community's discretion.¹²⁹ Muslim communities would commit no wrong if they adopt an age of marriage that is universally accepted or mandated. For now, the human rights treaties have failed to set a definite minimum age of marriage.¹³⁰ The classical *fiqh* has allowed Muslim men and women of less than eighteen years old to get married.¹³¹ This ruling may be changed in order for

124. Abdur Rahman I. Doi, *Marriage*, available at <http://www.usc.edu/dept/MSA/humanrelations/womeninislam/marriage.html> (last visited May 11, 2007).

125. *Id.* Under the Hanafi school, a Muslim is forbidden from marriage if he cannot support his wife and children or suffers from an illness that would harm his wife and children. Marriage is also not recommended to Muslims who have no love for children or possess no sexual desire. *Id.*

126. Qur'an, Sura an-Najam 53:45 (God has created the two spouses, male and female) (translated by author).

127. Qur'an, Sura al-Nisaa 4:6 (*balaghoo al-nnikaha*).

128. Mhamoud Hoballah, *Marriage, Divorce, and Inheritance in Islamic Law*, in UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 111, 112 (Hisham M. Ramadan ed., 2006).

129. The state of affairs is no different under current international law of human rights. All states agree that there should be a minimum age for marriage but no agreement could be reached on what that age ought to be. See Ann Laquer Estin, *Toward a Multicultural Family Law*, 38 Fam. L.Q. 501, 508 (2004).

130. See, e.g., Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) 167, U.N. Doc. A/44/49 (1989), available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>. Article 1 defines a child as a human being below the age of eighteen. It however leaves open the possibility that the child may be defined with a lesser age for purposes of employment and armed hostilities. *Id.* art. 32 (employment), art. 38 (armed conflicts). The Convention proposes no minimum age for marriage.

131. Under customary laws of some Muslim communities, a person below the minimum age of marriage needs the approval of the guardian to contract a marriage. However, spousal consent is a cardinal principle of marriage. Sahih Bukhari, Vol. 9, Bk. 85, No. 79,

Muslim communities to comply with any universal rule that may in the future set a minimum age of marriage. Thus, the Qur'an's prescriptive flexibility allows Muslim communities to adjust the age of marriage according to the needs and moral imperative of the times.

The rules of *fiqh* are frequently diverse, as uniformity or universality are not conditions precedent for formulating the rules of *fiqh*. However, even some rules of *fiqh* might become universal through widespread acceptance. A universal rule of Islamic *fiqh* emerges in the free markets through a process of convergence and consensus. When the leading opinio-jurists of diverse communities offer similar opinions over the same legal issue, a process of convergence takes place. The commonality of their opinions emerges as the universal rule of Islamic *fiqh*. The rule is established as a firm precedent in its own period and for subsequent generations. A universal rule of *fiqh* established through the free markets may survive indefinitely across nations and cultures.

H. Reopening Settled Rules

Once a rule has been firmly established in any legal system, it is difficult to uproot it.¹³² This general observation is valid for Islamic law as well. The age of strict precedents was a period in which Islamic law could not be developed, leading to Muslim nations loing touch with changing realities of the world.¹³³ But even in this period, Islamic law continued to change and grow. Iron rigidity has never been part of the *fiqh* markets, as any rigidity doctrine defies open and free markets upon which Islamic law is built. Consistent with commands of the Basic Code, even settled rules of *fiqh* may undergo partial or complete repeal.

1. Interpretation of Authoritative Sources

The most striking example of such a process of change is the *sama* rule. *Sama* refers to listening to music to achieve a state of *wajd* (that is ecstasy). *Sama* connects the minds and hearts of listeners to the beauties of faith.¹³⁴ Abu Hamid al-Ghazali (d. 1111)¹³⁵ was a great proponent of *sama* and believed that the secrets concealed in the heart can only be brought

available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/085.sbt.html> (last visited May 11, 2007).

132. Classical common law, for example, did not allow the changing of the precedent. Modern common law is highly respectful of the doctrine of precedent, even though it is now much more flexible and open to change.

133. Khan, *Second Era of Ijtihad*, *supra* note 1, at 365-69.

134. Arthur Gribetz, *The Sama Controversy: Sufi vs. Legalist*, 74 *STUDIA ISLAMICA* 43 (1991).

135. For Al-Ghazali's biography and works, see <http://www.ghazali.org/>.

about by *sama*. In his chapter on Music and Singing, al-Ghazali begins by acknowledging that the first Muslim scholars, including the great Imams, Shafi, Malik, and Abu Hanifa, viewed listening to music “as forbidden.”¹³⁶ Imam Shafi compares listening to music with false sport and opines that a person who engages in this sport is disqualified as a credible witness and his testimony shall be rejected.¹³⁷ In Medina, most Islamic scholars, including Imam Malik, declared singing to be unlawful.¹³⁸ Likewise in Kufa, Great Imam Abu Hanifa and most other Muslim scholars left no doubt in their opinions that listening to singing was contrary to the teachings of Islam.¹³⁹ Ghazali presents a muddled picture with respect to the fourth Imam, Ahmed bin Hanbal. He quotes Ibn Daud to show that Imam Hanbal “disliked listening to music and singing.”¹⁴⁰ But he also cites another source to show that Imam Hanbal listened to the voice of a poet known as Ibn al-Khababaza.¹⁴¹

It appears that all the four great Imams had reached a consensus in prohibiting music and singing. To challenge these classical juristic prohibitions, Al-Ghazali makes several distinct arguments. The first argument highlights the gap between practice and juristic opinion. Ghazali lists a number of the Prophet’s companions who themselves listened to music, and others who, despite their asceticism and piety, expressed no disapproval for others.¹⁴² The people of Medina and Mecca did not cease listening to music even in holy days, such as the days of *at-Tashriq*, set aside for exclusive worship to God.¹⁴³ And when the Prophet and his companions arrived in a new city, says Ghazali, the women on the housetops expressed their joy by singing poems with tambourines.¹⁴⁴

Ghazali draws on these facts to show that no juristic opinion is valid if there is no compliance in the Muslim community. His observation is correct to the extent that the rules of *fiqh* are more than mere opinions. Compliance is an essential part of a valid rule. This argument must be qualified, however, since the purpose of *fiqh* is not simply to report a community practice, but sometimes to change it. However, juristic preferences cannot be confused with *fiqh*. If a community of believers acts contrary to the pre-

136. Duncan Black MacDonald, *Emotional Religion in Islam as Affected by Music and Singing*, 1901 J. ROYAL ASIATIC SOC’Y GR. BRIT. & IR. 195, 200-01, available at www.ghazali.org/articles/gz-music.pdf (translating Abu Hamid al Ghazali’s *Ihya Ulum ad-Din*).

137. *Id.* at 201.

138. *Id.*

139. *Id.* at 204.

140. *Id.*

141. *Id.* at 204-05.

142. MacDonald, *supra* note 136, at 202, 220-27.

143. *Id.* at 202-03.

144. *Id.* at 224.

scriptive demands of a juristic opinion, Ghazali correctly concludes, the opinion is simply a juristic preference and not a rule of law. Under this logic, the great Imams were simply expressing a preference that did not become a binding rule due to lack of compliance.

After showing the gap between juristic opinion and popular practice, Ghazali invokes the Basic Code to argue that listening to music and singing are not totally prohibited. Ghazali identifies two distinct sources, *nass* and *qiyas*, which must be consulted to find a rule for or against *sama*.¹⁴⁵ *Nass* are the fixed texts; that is, the texts of the Qur'an and the Sunna. *Qiyas*, also known as analogy, is a legal method that early Muslim opinio-jurists developed to cull meaning from the *nass*.¹⁴⁶ In analyzing these sources, Ghazali articulates the issue in a starkly clear language: to say that music is prohibited in Islam is to contend that God has forbidden it under penalty.¹⁴⁷

Ghazali lays out the *nass* arguments to demonstrate that God loves beautiful voices. The Qur'an states that "verily the harshest voices without doubt is the voice (braying) of the ass."¹⁴⁸ This *nass*, the words of God Most High, Ghazali says, contain "implicit praise of a beautiful voice."¹⁴⁹ Ghazali also cites a number of *ahadith*, the words of the Prophet, to reinforce his defense of music and singing: "God has not sent a prophet except with a beautiful voice."¹⁵⁰ "God listens more intently to a man with a beautiful voice reading the Qur'an"¹⁵¹ The Prophet also praised Biblical Prophet David, says Ghazali, whose beautiful singing of the Psalms would enchant human beings, *jinns*, wild beasts, and birds.¹⁵² Ghazali provides no sources from which he gathered these *ahadith*.

However, Ghazali does mention the *ahadith* collected in the two most authentic collections, Sahih Bukhari and Sahih Muslim,¹⁵³ further prove that singing and music are allowed under Islamic law. One *hadith* refers to an episode in which the Prophet's wife Aisha was listening to two singing girls. The Prophet was there but he did not stop the singing.¹⁵⁴ The Prophet, however, did turn his face away. When Aisha's father, Abu Bakr, arrived, he rebuked Aisha, protesting how she could allow the Devil's pipe

145. *Id.* at 207.

146. *Id.*; Khan, *Second Era of Ijtihad*, *supra* note 1, at 363.

147. MacDonald, *supra* note 136, at 207.

148. Qur'an, Sura Luqmaan 31:19 (translated by author).

149. MacDonald, *supra* note 136, at 209.

150. *Id.*

151. *Id.*

152. *Id.* (mentioning David as Da'ud).

153. *See id.*

154. Sahih Bukhari, Vol. 2, Bk. 15, No. 70, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/070.sbt.html> (last visited May 11, 2007).

in the presence of God's Apostle. The Prophet, however, said to Abu Bakr: "Leave them alone."¹⁵⁵

Ghazali analyzes this *hadith* to show that the Prophet, even though he was not looking at the singing girls, did listen to their singing and playing the tambourines.¹⁵⁶ There are other viable counter-interpretations, however. This *hadith* may also be interpreted to argue that the Prophet refused to impose his personal preference over his wife. His turning away from the singing girls and covering his face under the sheet may be seen as indications of minor disapproval. These gestures may also be interpreted as strong disapproval, since the Prophet was a mild-mannered person and made his points gently and subtly, particularly to the people he loved. An argument can be made that this episode does clarify that the Prophet tolerated music and singing even though he refused to absorb himself into the event—though it is one that Ghazali does not make in his teachings. But such an argument would support a broader thesis that no opinio-jurist, not even the Prophet, may universalize his personal tastes and preferences as binding rules for the larger Muslim community.¹⁵⁷

2. Arguments Drawn from Analogy (Qiyas)

The arguments drawn from *qiyas* (analogy) are the most striking in Ghazali's defense of *sama*. Employing the legal tool of analogy, Ghazali indulges in lawyer-like hairsplitting to challenge the scholastic ban on music. But his main argument appears to draw a sharp distinction between things essentially lawful and essentially unlawful, though each category has its own exceptions. For example, Ghazali says drinking wine, is essentially unlawful.¹⁵⁸ And yet it is lawful for a person choking with a morsel to drink wine if he cannot find any other liquid to relieve his distress. Thus, necessity makes lawful what is unlawful.¹⁵⁹

By contrast, says Ghazali, music and singing are essentially permissible. But there are circumstances under which what is permissible becomes prohibited. For example, doing business is essentially lawful, but becomes prohibited "at the time of the summons to prayer on Friday."¹⁶⁰ On the basis of this analogy, Ghazali argues that listening to music and singing are lawful unless some external factors vitiate their lawfulness. Music that generates unlawful sexual craving makes the music unlawful not because music is

155. *Id.*

156. MacDonald, *supra* note 136, at 226-27.

157. For love of the Prophet, Muslims may follow the Prophet's preferences and personal tastes, but with the understanding that what they are doing is an act of affection and not an act of duty.

158. MacDonald, *supra* note 136, at 241.

159. *Id.*

160. *Id.* at 242.

essentially unlawful, but because the purpose for which music is employed is unlawful. Likewise, singing is essentially permitted, but this permission cannot be blind to “the content of what is sung.”¹⁶¹ If the contents of a poem are obscene or contemptuous of God or His Prophet, reminds Ghazali, no melody can make the singing of the poem lawful.¹⁶²

Al-Ghazali’s defense of *sama* seems to have relaxed the classical ban on listening to music. Music is allowed in most Muslim communities. The invention of *qawwali* that started with devotional music at the shrines of Sufi scholars may have acquired some of its legitimacy from the works of al-Ghazali.¹⁶³ The genre of *qawwali* has now been perfected and is a popular medium of music in some Muslim countries. It has also been combined with Western music.¹⁶⁴ Muslim communities and groups who still hold on to classical *fiqh* may have doubts about the legitimacy of *sama*. But a Muslim community that generally belongs to a classical school of *fiqh* may select to relax the ban on *sama*.

3. Rule-Selectivity (Tarjih)

Within the four Sunni schools, the *fiqh* markets have allowed the concept of rule-selectivity (*tarjih*).¹⁶⁵ The strict hold of *madhab* particularism is yielding to rule-selectivity.¹⁶⁶ Muslims are selecting rules from diverse schools of *fiqh* to fulfill their obligations. For example, a Muslim who generally follows the Hanfai *madhab* may adopt a Shafi rule that permits, under bad weather, the combining of the noon prayer (*dhur*) with that of afternoon prayer (*as’r*) or the evening prayer (*maghrab*) with the night prayer (*isha*)—a convenience unavailable under the Hanafi *madhab*. The same Muslim may adopt a Hanbali rule under which he may perform ablutions (*wudu*) by touching his socks with a moist hand instead of washing his bare feet, a

161. *Id.* at 237.

162. *Id.*

163. Adam Nayyar, *Origin and History of the Qawwali* (1988), http://www.osa.co.uk/qawwali_history.html (last visited May 11, 2007).

164. NUSRAT FATEH ALI KHAN & MICHAEL BROOK, MUSTT MUSTT (Real World Records 1991) (This compilation of music combines qawwali with western instruments).

165. This concept of choice is also known as *tafliq* or *takhayur*. The concept of *tarjih* has been used in the science of collecting the authentic *ahadith*. However, the concept of *tarjih* must be distinguished from the legal method by which a preference is made. For example, Al-Bukhari used the concept of *tarjih* but used the legal method of “a greater number of transmitters” to exercise his *tarjih*. See Ermin Sinanovic, *Democracy and the Majority Principle in Islamic Legal-Political Thought* (2002), <http://www.messageonline.org/2002aprilmay/cover4.htm> (last visited May 11, 2007).

166. Ihsan Yilmaz, *Inter-Madhab Surfing, Neo-Ijtihad, and Faith-Based Movement Leaders*, in *THE ISLAMIC SCHOOL OF LAW: EVOLUTION, DEVOLUTION, AND PROGRESS* 191, 198 (Peri Bearman et al. eds., 2005).

requirement under the Hanfai rules of ablutions.¹⁶⁷ This selectivity offers great convenience to Muslims living a fast-paced life in places where ablutions facilities are inadequate or unavailable. The concept of *tarjih* does not apply to mandatory rules of the Qur'an and the Sunna. Muslims are forbidden from making any changes to the text and the meaning of the Basic Code. *Tarjih* applies only to juristic rules where different opinio-jurists have ruled differently upon the same issue.¹⁶⁸ Even with respect to *tarjih*, Muslims are careful not to follow rules of an opinio-jurist who lacks standing and respect in the circles of piety and knowledge. Nor can *tarjih* be used in bad faith to avoid obligations arising from law or contract.¹⁶⁹

I. Tainted Opinions

The *fiqh* markets protect their independence and authenticity by discounting tainted opinions. The opinions of jurists and juristic bodies, including courts, are considered tainted if the markets are unsure about the freedom of opinio-jurists or juristic bodies.¹⁷⁰ The markets presume that government opinio-jurists and judges render tainted opinions.¹⁷¹ Even the opinions of private jurists and juristic institutions closely associated with governments are considered tainted.¹⁷² Any opinio-jurist who works for a non-Muslim institution or government will almost always be viewed with suspicion.¹⁷³ By contrast, opinio-jurists who suffer abuse and persecution

167. *Id.*

168. *Id.*

169. Qur'an, Sura al-Maeda 5:1 (believers are commanded to fulfill all obligations) (translated by author).

170. Reference, for example, the rise of professional jurists in Muslim India who played a complex role in subverting the free and authentic *fiqh* markets. Aziz Ahmed, *The Role of Ulema in Indo-Muslim History*, 31 *STUDIA ISLAMICA* 1, 6-7 (1970) (explaining the rise of official jurists in Muslim India through the centuries).

171. *Id.* at 7 (discussing the distinction between evil and ruthless jurists) (*ulama-i-su* and *ulama-i-Haqq*).

172. After the 9/11 terrorist attacks on the United States, a number of organizations emerged in America to "reform" Islam. For example, the American Islamic Congress, directed by eminent professors from notable universities and academic centers, promotes the separation of church and state in the Muslim world. See American Islamic Congress, *Frequently Asked Questions*, http://www.aicongress.org/faq_islam.html (last visited May 11, 2007). This view, though meritorious even from an internal viewpoint, will be seen "tainted" as coming from an organization that advocates "American patriotism" more than Islamic values. See American Islamic Congress, *Statement of Principles*, <http://www.aicongress.org/sop.html> (last visited May 11, 2007).

173. For example, Professor Khaled Abou El Fadl serves as a commissioner on the United States Commission on International Religious Freedom. President George W. Bush appointed him to the Commission. See United States Commission on International Religious Freedom, <http://www.uscirf.gov/about/commissioners.html> (last visited May 11, 2007). Professor El Fadl is an eminent scholar whose works are serious and authentic. His close association with the U.S. government, however, might discount his works in some juristic

enjoy higher credibility in the free markets, and their opinions are presumed to be authentic.¹⁷⁴ Of course, governmental abuse per se does not render an opinion authentic, because the *fiqh* markets will scrutinize credentials of the persecuted opinio-jurist and contents of the banned opinion.

1. Positional Consciousness and the Tainting of Believers

For example, the *fiqh* markets may discount the opinions of Muslim opinio-jurists living in the United States and other Western countries, for these opinio-jurists are considered to be intellectually, emotionally, and spiritually unfree despite the fact that most Western legal systems protect free speech and do not persecute opinio-jurists for their opinions. That said, the *fiqh* markets penetrate deeper into the dynamics of personal freedom and are rarely fooled by a show of overt freedom that legal systems claim to grant.¹⁷⁵ Muslim opinio-jurists living in the Western legal tradition are psychologically predisposed or coerced to find ways to synthesize Western values with the Islamic way of life.¹⁷⁶ In their attempts to find solutions agreeable to non-Muslims, Muslim opinio-jurists may offer tainted opinions, overtly dishonest in analytical reasoning, or unknowingly compromised because of positional consciousness. In the post 9/11 world, tainted

circles in the Muslim world. Muslims would note the fact that a majority of countries accused by the Commission for committing egregious violations of religious freedom (countries of particular concern) are Muslim countries, including Saudi Arabia, Pakistan, and Iran.

174. Some of the most influential Muslim jurists of the twentieth century, for example, suffered great abuse in their personal lives. Hassan al-Banna (1906-48), the founder of the Muslim Brotherhood, was assassinated. Syed Qutb (1906-66), a critical figure in developing the *Salafi* ideology, a jurist educated in both Islamic and Western institutions, was executed on the absurd charges of being a Marxist subversive.

175. Tariq Ramadan, a jurist who has spent most of his life in Europe and has a European mother, was denied entry in the United States, subverting his contract to teach at the University of Notre Dame. Ramadan has accused the United States of being afraid of ideas. Tariq Ramadan, *Why I'm Banned in the USA*, WASH. POST, Oct. 1, 2006, at B1. This episode informs the *fiqh* markets that the United States' freedoms of speech and religion are unavailable to some Muslim jurists. Yusuf Islam (Cat Stevens) was similarly denied entry in the United States. Some argue that the United States would allow academics like Alan Dershowitz to argue for torture but demands progressive and moderate views from Muslim academics. See Blog on Journalism and Islam in America, <http://www.tabsir.net/?p=17> (last visited May 11, 2007).

176. Recently, I published a piece on the problems of wearing the Islamic veil in the United Kingdom. I received a lot of mail in response to the article, ranging from admiration for speaking the truth to condemnation for promoting "disingenuous" ideas. See Ali Khan, *The Veil and the British Male Elite* (2006), available at <http://ssrn.com/abstract=940025>. On another piece, I received plenty of hateful mail, some containing obscene language. See Ali Khan, *Fighting Words: The Abuse of Islam in Political Rhetoric*, JURIST (2006), available at <http://ssrn.com/abstract=945079>. In reactions to my opinion articles, I often feel limited in fully speaking my mind even though I am a law professor, an American citizen, and a man with less than revolutionary views.

opinions issued in Western countries have proliferated as Muslim opinio-jurists fear personal safety and mobility.¹⁷⁷

The importance of these principles becomes evident when one considers the use of the controversial tactic of suicide bombings in occupied Muslim lands such as Gaza, West Bank, Iraq, and Afghanistan. In these lands, Muslim militants have used guerillas strapped with bombs to attack military and civilian targets. Suicide bombing has been an effective weapon in asymmetrical conflicts, since it defies all theories of deterrence and has proven to be an elusive weapon to detect or control. The shock, surprise, and terror associated with suicide bombing have been a frustrating experience for occupiers and their formidable armed forces. It is also a weapon that the Westerners, including Israelis, do not use. Historically, part of warfare has been to ban the unique weapons of the enemy. The West is therefore determined to ban suicide bombing, citing all sorts of moral and legal reasons. Massive propaganda has been launched to associate suicide bombing with indiscriminate killing of the civilians, discounting its destructive power to the occupation infrastructure and military assets.¹⁷⁸ Some in the West, who may defend the use of nuclear weapons, resent the morality of suicide bombing.

What does Islamic law say about suicide bombing? The Qur'an and the Sunna do not provide a direct answer to the question. The issue, therefore, is one that belongs to the *fiqh* markets, where Muslim opinio-jurists must provide an answer. Opinio-jurists from all over the world may participate in the *fiqh* market to determine the validity of suicide bombing. These opinio-jurists will use classical legal methods, including analogy, logic, customs, purposes, and preferences to interpret the text of the Qur'an and the meaning of appropriate *ahadith* (Sunna). They may also consult classical opinions that the founders of original schools had issued in the context of the Islamic law of war.

The geographical location of opinio-jurists might influence their opinions on suicide bombing. Opinio-jurists living in the occupied territories of Palestine, for example, will have a unique perspective on suicide bombings that other opinio-jurists residing elsewhere might not share. Sheikh Ahmed Yassin, the spiritual founder of the Hamas and a Muslim opinio-jurist,¹⁷⁹ appeared to have sanctioned suicide bombings. Dozens of soldiers belong-

177. Daniel Pipes, *Why Revoke Tariq Ramadan's U.S. Visa?*, N.Y. SUN, Aug. 27, 2004, at 9 (Pipes, an external Islamic scholar argues that Ramadan's visa was rightfully revoked because Ramadan questioned the thesis that Bin Laden was behind 9/11).

178. John Alan Cohan, *Necessity, Political Violence and Terrorism*, 35 STETSON L. REV. 903 (2006) (discussing how Alan Dershowitz and Nathan Lewin propose to punish the culture that takes pride in suicide bombings).

179. Yassin was later assassinated by Israel. See Ali Khan, THE CHANGING LAW OF ASSASSINATIONS, DAILY STAR, Apr. 4, 2004, <http://www.thedailystar.net/2004/04/04/d404041502100.htm> (last visited Aug. 11, 2007).

ing to the Hamas undertook suicide bombing missions while he headed the organization. Israel defended the Sheikh's assassination since he allegedly "masterminded scores of suicide bombings."¹⁸⁰

Abu-Basir al-Tartusi, a Muslim opinio-jurist who lives in London, issued an opinion in which he declared that suicide bombing is *haram* (forbidden).¹⁸¹ Al-Tartusi invoked a number of *ahadith* to demonstrate that suicide bombing is closer to forbidden suicide than it is to favored martyrdom. He cited Prophet Muhammad's sayings: "Anyone who harms a believer has no jihad";¹⁸² "[a] Muslim and his blood, possession, and honor are haram to another Muslim";¹⁸³ "the Muslim is the one who Muslims are safe from his tongue and hand";¹⁸⁴ and "[t]he Believer is the one that people trust with their possessions and lives."¹⁸⁵ Al-Tartusi concluded that suicide operations contravene a number of the *Sharia* texts. Al-Tartusi's opinion generated huge criticism.¹⁸⁶ One Muslim asked: "What do you expect from him when he lives in London?"¹⁸⁷ Others warned that the law of war comes from the fighters in the battlefield and not from opinio-jurists sitting in London.¹⁸⁸

This discussion is not to take a particular position on the matter, but rather to illustrate the importance of an opinio-jurist's situated consciousness in determining how it will fare in *fiqh* markets. At this point, the *fiqh* markets are receiving conflicting opinions from Muslim opinio-jurists. It is unclear how the *fiqh* ruling on suicide bombing will eventually take shape. While it is unlikely that the *fiqh* would sanction an unrestricted use of suicide bombing, the opinio-jurists may consider factors such as the state of oppression, the availability of means of resistance, the intention of the suicide bomber, the harm caused to innocent civilians, and other considerations in justifying suicide bombing as a possible legal weapon.

180. *Israel Vows to Hit Hamas Again*, BBC NEWS, Mar. 24, 2004, available at http://news.bbc.co.uk/2/hi/middle_east/3559905.stm (last visited May 11, 2007).

181. Mohammed Al Shafey, *London-Based Salafi Scholar Issues Fatwa Prohibiting Suicide Operations*, ASHARQ ALAWSAT, Aug. 27, 2005, <http://aawsat.com/english/news.asp?section=1&id=1427> (last visited May 11, 2007).

182. *Id.*

183. *Id.*

184. *Id.*; Sahih Muslim Vol. 1, Bk. 1, No. 64, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muslim/001.smt.html#001.006> (last visited May 11, 2007).

185. Al Shafey, *supra* note 181.

186. *Id.*

187. *Id.*

188. *Id.*

2. *Believers and Non-Believers*

While the *fiqh* markets are open to all Muslim opinio-jurists, they are nonetheless skeptical of non-Muslim scholars of Islam. Knowing this barrier, many non-Muslims scholars serve as lobbyists. They clarify the rules of *fiqh* and offer ideas to Muslim opinio-jurists who take these offerings to the markets. Their influence is indirect but powerful. One might ask why non-Muslims are denied the formal opportunity to propose, amend, or repeal the rules of *fiqh*.

This denial is by no means unusual or unfair, since all legal systems interpose formal barriers to outsiders. In the United States, for example, the lawmaking activity is confined to a periodically elected Congress and the President. Outsiders may influence the legislative activity only indirectly, through lobbying with members of Congress and the President. Islamic lawmaking, however, is not territorial, nor is there a specific body authorized to make new rulings of *fiqh*. In fact, no formal procedures exist for influencing Muslim opinio-jurists. In highly fluid processes of *fiqh* lawmaking, external scholars may freely introduce their ideas to influence the opinions of Muslim jurists.

The scope of external scholarship varies from reverence to hostility toward the *fiqh* enterprise. Some non-Muslim scholars write within the constraints of the Islamic legal tradition, even though they do not accept the faith of Islam.¹⁸⁹ Others are critics of the *fiqh* markets, *fiqh* jurists, and *fiqh* rulings. External criticisms may play a constructive role in the development of *fiqh* rulings provided they engage Muslim opinio-jurists and persuade them to apply rigor in the defense of their opinions. Some external jurists are hostile to the *fiqh* markets. They raid the markets to de-legitimize *fiqh* processes, assumptions, and conclusions. Their highly negative criticisms belong to what might be called spurious or disengaged scholarship, which flourishes in circles and cultures that have serious doubts about the faith of Islam. As discussed below, it may also sow the seeds of prejudice and hostility against Muslims and the religion of Islam.

II. EXTERNAL SCHOLARSHIP

This Part examines the external scholarship produced to influence Islamic law, but which for the most part is ineffectual. This failure to influence the *fiqh* markets may be attributed to at least two causes. First, the *fiqh* markets disallow non-Muslim jurists to shape Islamic law. The *fiqh* markets are formally open to Muslim opinio-jurists of all nations and times who

189. See, e.g., JANE DAMMEN MCAULIFFE, *QURANIC CHRISTIANS: AN ANALYSIS OF CLASSICAL AND MODERN EXEGESIS* (1991).

may render opinions without fear or favor. But even the most learned external scholars have no formal authority to issue opinions. Their scholarship remains marginal and is considered suspect. Second, the external scholarship, mostly produced in the West, has been disrespectful of Islamic law and its fundamental sources embodied in the Basic Code. Muslim opinio-jurists dismiss disrespectful scholarship as blasphemous.

Although the external scholarship rarely influences the *fiqh* markets, it remains a potent source of information in the external world. Millions of people in the West and other parts of the non-Islamic world receive information about Islam only through external sources.¹⁹⁰ When the *fiqh* markets do not respond to blasphemous scholarship, negative and even dangerous caricatures about Islam and Islamic law multiply in the non-Muslim world, paving the way for misunderstanding, even prejudice and hatred. In recent years, however, Muslims have begun to openly protest and condemn blasphemous distortions of Islam.

A. Scholars of Faith

As indicated earlier, the exclusion of external “lawmakers” is not unique to Islamic law. Most legal systems protect themselves against external interventions. Territorial legal systems, including those of the nation-state, allow only domestic legislatures to make, modify, and repeal laws. No external legislature can make or repeal laws of a nation-state unless the state has been occupied or colonized. Even religious legal systems are internally autonomous. The Catholic Church, for example, has its own internal structure to make and modify the canon law.¹⁹¹ The Mormon Church is similarly fortified against external interventions.¹⁹² Ancient tribal systems, even when the tribe moved from place to place, had internal sources of law.¹⁹³ As a general rule, legal systems are officially closed to external lawmakers, even though external influences are at times difficult to resist.

190. In the United States law schools, for example, many professors who teach Islamic law are non-Muslims and they primarily use the external scholarship to construct courses on Islamic law.

191. Vivian A. Peterson, *The Development of the Canon Law Since 1500 A.D.*, 9 CHURCH HIST. 235 (1940) (defining canon law as the body of law that ecclesiastical authority makes for the community of believers). However, state intervention to curtail the authority of the church to legislate and even to modify canon law has been a perpetual struggle between church and state. *Id.* at 249.

192. NEWELL G. BRIGHURST, SAINTS, SLAVES, AND BLACKS: THE CHANGING PLACE OF BLACK PEOPLE WITHIN MORMONISM (1981) (showing complex political and social forces at work that forced the Church of Latter-Day Saints to finally allow black priests).

193. Tshekedi Khama, *The Principles of African Tribal Administration*, 27 INT'L AFF. 451, 452 (1951) (stating that when the tribes move and resettle they retain their tribal legal system).

But no legal system worth the name is open-sourced in that it allows itself to be freely changed.

Though self-protective, the *fiqh* markets are surprisingly open to non-Muslim scholars. External jurists are denied the formal authority to influence the shaping of Islamic law. But they are not denied access to the Basic Code or reflections upon it. Non-Muslims are free to study the Qur'an and the Sunna and produce informative scholarship. As mentioned in the introduction to this Article, a fundamental distinction between *mu'miniin* and *munkiriin* helps *fiqh* markets evaluate jurists' credibility.¹⁹⁴ *Mu'miniin* are practicing Muslims who believe in the Qur'an and the Prophet's Sunna. *Munkiriin* are non-Muslims who deny the basic elements of the Islamic faith. A fundamental background rule of Islamic law requires that jurists and scholars who issue the *fiqh* opinions be Muslims. Non-Muslim scholars are not formally qualified to make or change Islamic law.¹⁹⁵ Yet the *fiqh* markets weigh and consider the contributions of external scholars. The Qur'an itself refers to previous books of revelation, particularly *Torah* (Old Testament) and *Injeel* (New Testament),¹⁹⁶ and urges Muslims to believe what has been revealed in the Qur'an and what has been revealed in the previous books.¹⁹⁷ The scholars of faith who explain the *Torah* and the *Injeel* may illuminate biblical stories that are mentioned in the Qur'an but not fully described. Hence, Islam is not a historically isolated religion, but instead forms unbreakable bonds with other monotheist religions. The Qur'an describes the utility of the interfaith dialogue in the following verse:

Say: 'O People of the Book! Come to common terms as between us and you: That we worship none but Allah; that we associate no partners with him; that we erect not, from among ourselves, Lords and patrons other than Allah.' If then they turn back, say ye: 'Bear witness that we (at least) are Muslims (bowing to Allah's Will).'¹⁹⁸

This invitation to participate in a common enterprise refutes the notion that the *fiqh* markets must be confined to Muslims.¹⁹⁹

The *fiqh* markets recognize that the scholars of faith who do not believe in Islam nonetheless share numerous common beliefs with Muslim opinio-jurists. The scholars of faith, for example, see no indispensable con-

194. See *supra* Introduction.

195. This is so because an indispensable pre-qualification requires that a jurist believe in the basic tenets of Islam. However, non-Muslim scholars may, through their scholarship, assist Muslim jurists in arriving at rules consistent with the Basic Code.

196. Qur'an, Sura aal-e-Imran 3:3 (translated by author).

197. Qur'an, Sura al-Baqara 2:4 (translated by author).

198. Qur'an, Sura aal-e-Imran 3:64 (translated by author).

199. Muslim individuals and states actively participate in the making of international law with the People of the Book and even others.

nection between lack of religion and modernity.²⁰⁰ Nor do they see any contradictions between faith and inter-faith.²⁰¹ They strive to maintain the purity of their faith without damning other religions. They see no tension between the observable world of the material and the revealed word of the invisible, called *al-Ghaib*.²⁰² The scholars of faith do not see intellect as the exclusive source of information and insight, nor do they see faith as an irrational constraint on imagination or reason.²⁰³ The scholars of faith synthesize the per-rational with rational and post-rational, stretching the boundaries of reason. They use submission to God as a way to connect the known with the unknown. The scholars of faith reject value cynicism.²⁰⁴ They make sense of what we do in this life and what we might expect in the next. Interfaith discourse cannot be driven out of the *fiqh* markets, for any such exclusion is contrary to God's design expressed in the Qur'an.

B. Two Islamic Principles in Dealing with External Scholarship

The Basic Code provides guiding principles with respect to external scholars who respect the *fiqh* markets, others who raise legitimate questions, concerns, and criticisms, and still others who mount attacks on Islamic law. As noted earlier, one principle teaches *disengagement*.²⁰⁵ The principle of *Lakum Diinukum wa li-ya Diin* (To you be your Way, and to me mine) highlights the fruitlessness of dialogue with external scholars who advocate ideologies that cannot be reconciled with the basic elements of Islam. For example, the Qur'an asks believers to leave the company of persons who are cursing God or showing utter disrespect to His most beautiful names.²⁰⁶ Rather than engaging in useless discussions over irreconcilable elements of conflicting ways, disengagement is the best course. The disengagement principle rejects debates, coercion, and violence to settle the matters of

200. Philip L. Quinn, *The Recent Revival of Divine Command Ethics*, 50 PHIL. & PHENOMENONLOGICAL RES. 345 (1990).

201. Peggy Morgan, *The Study of Religions and Interfaith Encounter*, 42 NUMEN 156 (1995) (stating that interfaith conferences deepen the understanding of religions).

202. Qur'an, Sura al-Baqara 2:3; Arnold Bergstrasser, *Goethe's View of Christ*, 46 MOD. PHILOLOGY 172 (1949). Goethe's God is both of life and spiritual law. *Id.* at 185.

203. See Oswald O. Schrag, *Faith and Reason: Still Shifting for First Place*, 23 J. BIBLE AND RELIGION 197 (1955) (stating the relation between reason and faith has fluctuated from equivalency to supplementation to independence to opposition to contradiction); Paul Arthur Schlipp, *A Rational Basis Demanded for Truth*, 21 J. PHIL. 209, 212 (1924) (arguing the divine is the most rational).

204. Robert Merrihew Adams, *Moral Faith*, J. PHIL. 75, 80 (1995) (arguing that moral life has intrinsic value and is worth living for its own sake even if no great consequences flow from it).

205. See *supra* Introduction.

206. Qur'an, Sura al-A'raf 7:180

faith.²⁰⁷ The Qur'an specifically advises all believers to "have patience at what they (the peoples of scriptures and unbelievers) say"²⁰⁸ for what they say is often mentally and spiritually "hurtful."²⁰⁹ The Prophet showed patience when the peoples of scriptures and unbelievers tormented him, until God permitted him to fight back if and when tormenting turned into physical aggression.²¹⁰

The disengagement principle embodied in *lakum Diinukum wa li-ya Diin* is framed in personal terms. In *sura al-Kafirrun*,²¹¹ God offers the disengagement principle to the Prophet and commands him to "say" to the unbelievers that "your way" and "my way" are not the same and will not be the same; and, therefore, to you be your way and to me mine.²¹² The same principle is also binding on each Muslim who must similarly disengage himself or herself from ideologies that cannot be reconciled with Islam. When the disengagement principle is applied to external scholarship, it informs Muslim jurists to disregard writings that oppose the core beliefs of Islam. The responsibility to disregard *kufir* scholarship is placed on each Muslim jurist in a personal way. No prudent Muslim jurist should engage in fruitless debates with external scholars who reject the authenticity of the Qur'an or challenge the Prophet's integrity.

The disengagement principle, however, does not mandate that Muslim jurists become self-righteous and hastily dismiss any and all scholarship that non-Muslims may offer to the *fiqh* markets. A blind dismissal of all external scholarship is incompatible with the core essence of Islam, which teaches Muslims to believe in revelations found in the Qur'an as well as those found in the Old and New Testaments.²¹³ Biblical scholarship is part of the *fiqh* markets, since Islamic law is best understood in biblical contexts. Furthermore, a broad and thoughtless application of the disengagement principle will isolate the Muslim world from useful religious and secular knowledge that non-Muslim scholars have produced through intellectual labor and analytical rigor. The *fiqh* markets are aware that God's gifts are not denied to Muslims or non-Muslims. The Qur'an states so in unambiguous terms: "Of the bounties of thy Lord We bestow freely on all—these as

207. Qur'an, Sura ash-Shura 42:15 (unto us our works and unto you your works; no argument between us and you) (translated by author).

208. Qur'an, Sura Sad 38:17 (translated by author).

209. Qur'an, Sura aal-e-Imran 3:186 (translated by author).

210. Sahih Bukhari, Vol. 6, Bk. 60, No. 89, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/060.sbt.html> (last visited May 11, 2007). This is a highly informative *hadith* that describes how the Prophet used the disengagement principle to stay away from acrimonious disputes. *Id.*

211. Qur'an, Sura al-Kaafiruun 109:1-6 (translated by author).

212. *Id.* (translated by author).

213. Qur'an, Sura al-Baqara 2:4 (translated by author).

well as those: The bounties of thy Lord are not closed (to anyone).”²¹⁴ Accordingly, the *fiqh* markets cannot dismiss the bounties of intellect and insight that God has given to non-Muslims.

To prevent harmful self-cloistering under the disengagement principle, the Basic Code offers a second tenet, one that recommends interacting with the external circles. This second principle offers *gracious engagement* with the non-Muslim world. The Qur’an instructs Muslims to argue in ways that are best and most gracious (*jaadilihum bil-latii hiya ahsan*).²¹⁵ Gracious engagement allows Muslims to participate in discussions with non-Muslims and to answer their questions and concerns. Furthermore, the principle of gracious engagement is not simply reactive in that Muslim opinio-jurists must wait for external scholarship to appear before they respond. Muslim opinio-jurists may be proactive in inviting dialogue with the external scholars. Invitation (*D’awah*) is an essential part of the engagement principle.²¹⁶ In the *fiqh* markets, the principle of gracious engagement allows Muslim opinio-jurists to invite, and respond to, external scholarship that is sincerely inquisitive and respectfully exploratory. Islam is a religion of knowledge, and the *fiqh* markets cannot shy away from any knowledge, including the knowledge that external scholars provide to clarify rules of the classical *fiqh*.

1. *Gracious Engagement (D’awah)*

The external scholarship is at its best, and contributes much to the understanding of scholars, including Muslim opinio-jurists, when it undertakes to clarify the meaning of the *fiqh* rulings without challenging Islam’s basic tenets. If the clarificatory scholarship is analytically rigorous but respectful, Muslim opinio-jurists draw a good deal of instruction from it. Although the authors of such scholarship are non-Muslim, their scholarship becomes part of the Islamic literary tradition. From an internal viewpoint, the author’s lack of faith is no longer an irritant but a fact that does not disturb the quality or power of the offering.

Such external scholarship falls into what may be called “the Abu Talib legacy.”²¹⁷ Abu Talib was the Prophet’s beloved uncle who did not become a Muslim but did nothing to harm the cause of Islam.²¹⁸ In fact, he used his

214. Qur’an, Sura al-Isra 17:20 (translated by author).

215. Qur’an, Sura al-Asra 16:125.

216. *Id.*

217. Here, the Abu Talib legacy means a pro-Islamic attitude without embracing the faith of Islam.

218. It is reported in authentic *ahadith* that the Prophet invited his dying uncle, Abu Talib, to accept Islam and renounce his previous faith. But Abu Talib refused to do so. Sahih Bukhari Vol. 2, Bk. 23, No. 442, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/023.sbt.html>; Sahih

personal prestige and tribal influence to protect the Prophet and other Muslims from their enemies.²¹⁹ The Prophet prayed for his uncle's conversion to Islam but, according to the Qur'an, the matters of faith are in God's hands.²²⁰ Abu Talib represents a legacy, a phenomenon that has existed throughout the centuries. Thousands of non-Muslims do not accept the faith of Islam though their contributions to the preservation and development of Islam are held in high esteem. Belonging to this legacy are non-Muslim scholars who add value and insights to the development of *fiqh* through their works. Under the principle of gracious engagement, they are part of the *fiqh* markets.

In her superb treatise, *Quranic Christians*, Jane Dammen McAuliffe probes the Islamic understanding of Christians.²²¹ She clarifies in the introduction to her treatise that the conception of the Qur'an that undergirds her study is one of the committed Muslim; namely, one who believes that the Qur'an is God's own word.²²² This clarification instructs the reader that the treatise is written from an internal viewpoint.²²³ After reading the treatise, most Muslim opinio-jurists would conclude that McAuliffe adhered to the internal viewpoint in her rigorous and illuminating analysis of the Qur'an's verses dealing with Christians and Christianity. And yet, her analysis of the Qur'an through *tafsirs* (exegetical works of Muslim scholars) is not aimed at constructing a dishonest commonality or conflict between Christianity and Islam. One purpose of the treatise is to demonstrate that Islam views Christians with favor and respect, and yet it rejects some of the fundamental tenets of Christianity. The author's main purpose, however, is to study an important question: "Does Christian self-definition match the Muslim understanding of Christians?"²²⁴ Muslim opinio-jurists may consult McAuliffe's book to refine the juristic rules of religious tolerance. Even if the book does not dramatically influence any rule of *fiqh*, it shall remain a book of Islamic literary tradition, validating the point that the markets of *fiqh* will continue to receive and acknowledge the external scholarship written with intellectual rigor, honesty, and piety.

Thus scholarly rigor is not enough for a work of external scholarship to gain credibility. Contrast McAuliffe's book with that of Michael Cook.

Muslim, Vol. 1, Bk. 1, No. 36, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muslim/036.smt.html> (last visited May 11, 2007).

219. IRA M. LAPIDUS, A HISTORY OF ISLAMIC SOCIETIES 23, 26 (1988).

220. Qur'an, Sura al-Qassas 28:56. See also, Ali Khan, *Islam as Intellectual Property*, 31 CUMB. L. REV. 631, 667 (2001) [hereinafter Khan, *Intellectual Property*].

221. MCAULIFFE, *supra* note 189.

222. *Id.* at 3.

223. Khan, *Intellectual Property*, *supra* note 220, at 632 (describing internal viewpoint as one that treats the timeless assets of Islam, the Qur'an and the Sunna, as protected knowledge that cannot be dishonored).

224. MCAULIFFE, *supra* note 189, at 8-9.

Cook's new book, *Commanding Right and Forbidding Wrong in Islamic Thought*, is impressive scholarship meant to explain the concept of commanding right and forbidding wrong embodied in the Qur'an and explained through *tafsirs*.²²⁵ Cook's methodology is in some ways similar to that of McAuliffe. Cook examines numerous Islamic schools of law to compare and contrast the concept in their respective exegetical works.²²⁶ The intellectual rigor with which Cook presents his comparative analysis of Islamic sources spread over centuries cannot be discounted. But to most Muslim jurists, Cook will remain an untrustworthy scholar. Part of the reason is an earlier book that Cook coauthored with Patricia Crone, in which they challenged just about everything that constitutes the core of Islamic faith.²²⁷

The other reason his scholarship will be viewed warily stems from the lack of respect that Cook still seems to nurture against Islam, a distaste that Muslim jurists would readily spot in his new book. Throughout the new book, for example, Cook chooses to spell Qur'an as Koran, though he cites it with a Q and not a K—a minor irritation that poisons the well.²²⁸ Contrast this with McAuliffe's generous care in citing the Qur'an not through numbers only but by providing names of the *suras*, a practice of citation that Muslim scholars prefer.²²⁹ Furthermore, the language used by Cook, though erudite, would also strike Muslim jurists as contrary to *adaab* (manners) of discussion. His assertion, for example, that "the Koranic conception of forbidding wrong is vague"²³⁰ may come across to Muslim jurists as disrespectful, since it seems to suggest that God's word is unclear.²³¹ Cook's new book might be considered an important contribution in the external critical literature, but the piety-sensitive *fiqh* markets will remain distrustful of Cook's intentions.²³²

225. MICHAEL COOK, *COMMANDING RIGHT AND FORBIDDING WRONG IN ISLAMIC THOUGHT* (2000).

226. Ali L. Khan, Commentary, *Hagarism: The Story of a Book Written by Infidels for Infidels*, BALTIMORE CHRON. & SENTINAL, Apr. 26, 2006, available at <http://baltimorechronicle.com/2006/042606AliKhan.shtml> (last visited May 11, 2007) (describing the main points of the book including its challenging of the authenticity of the Qur'an and the traditional understanding of the Prophet Muhammad).

227. PATRICIA CRONE & MICHAEL COOK, *HAGARISM: THE MAKING OF THE ISLAMIC WORLD* (1977).

228. See, e.g., CRONE & COOK, *supra* note 227, at 15.

229. MCAULIFFE, *supra* note 189, at 3.

230. COOK, *supra* note 225, at 15.

231. The Qur'an itself intimates that its fundamental verses are crystal clear while some are "allegorical." The Qur'an warns that some commentators would misinterpret the allegorical verses to sow discord. Qur'an, Sura aal-e-Imran 3:7.

232. Professor Khaled Abou El Fadl, however, pays high tributes to Michael Cook and regards him as "true scholar and teacher." KHALED ABOU EL FADL, *REBELLION AND VIOLENCE IN ISLAMIC LAW* (2001).

2. *Disengaged Scholarship*

Unfortunately, most external scholarship has been ineffective in influencing the *fiqh* markets, yet highly influential in constructing a “wicked” view of Islam. Over the centuries, several successive generations of Western scholars have relied on the same facts to perpetuate themes that Islamic law is barbaric and fraudulent. As Norman Daniel puts it: “The style of the day changes, but the themes are perennial.”²³³ Fraud is attributed to the person of the Prophet, to the compilation of the Qur’an’s text, and to the gathering of the Prophet’s Sunna.²³⁴ The allegations of fraud are not limited to the Prophetic era (610-632) but extend to Muslim historians, scholars, and opinio-jurists who were the first authors of the Islamic literary tradition.²³⁵ Muslim historians are accused of writing fraudulent accounts of existent and non-existent facts.²³⁶ Muslim scholars are charged with plagiarism, stealing ideas and methodologies from Christian and Jewish sources. In this alleged enterprise of wholesale fraud, Islamic law and jurisprudence are presented as copied and corrupted versions of Hellenistic, Roman, and Talmudic traditions.²³⁷

The fiercest attacks of the disengaged scholarship have been on the Qur’an, the Sunna, and the Prophet.²³⁸ In their attacks, the disengaged scholars strive to demolish the foundation on which Islamic law is built. In the last fourteen hundred years, however, these scholars have been completely unsuccessful in weakening the Muslims’ internal viewpoint on the veracity or validity of the Basic Code. This failure to influence the *fiqh* markets occurs because Muslim opinio-jurists simply refuse to respond to what they see as blasphemous literature, which cannot shape the *fiqh* markets in any meaningful way. In the external circles, however, the disengaged scholars build on each other’s works to continue to challenge the authenticity of the Basic Code.²³⁹

Thus, two distinct bodies of scholarship, internal and external, flourish side by side, sharing little in common. One should not conclude, though, that the disengaged scholarship does not meet resistance in the external circles. Even in the times of the crusades, voices of reason, wisdom and inter-faith dialogue, though small in number and ineffective, were raised to pro-

233. NORMAN DANIEL, *ISLAM AND THE WEST: THE MAKING OF AN IMAGE* 17 (1993).

234. *See infra* Part II.

235. *See infra* Part III.

236. *See infra* Parts II & III.

237. *See, e.g.*, William Thomson, *The Renascence of Islam*, 30 Harv. Theological Rev. 51 (1937) (describing how “primitive Islam” received ideas from Hellenistic culture and Christian theology).

238. *See infra* Part II.C.

239. *Id.*

test the murderous intentions of hateful literature against Islam and Muslims.²⁴⁰

C. Historical Contexts

In the Middle Ages, the European negativity towards Islam and its Prophet reflected the threat that an overwhelming Muslim domination posed to the Christian Europe. South of the Mediterranean, Muslim powers held the whole of North Africa.²⁴¹ In the East, the Ottoman Empire penetrated into the Balkans and was closing in on Hungary and Austria. The Muslim Tartars had seized much of southern Russia.²⁴² In the Christian Europe, Islam was seen as a competing religion that must be defeated by all means necessary.²⁴³

As the Muslim empires began to lose their world domination and the Europeans experienced a Protestant reformation coupled with an outward expansion through colonialism, the negativity toward Islam changed course.²⁴⁴ Overt hatred of Islam was no longer fashionable.²⁴⁵ Positive images of the Prophet began to appear in European literature. Scotsman Thomas Carlyle rejected the entrenched notion that the Prophet was a scheming imposter or that Islam was quackery and fatuity that deluded millions of people over hundreds of years.²⁴⁶ Western universities began to research Islam more seriously. The rise of orientalism, however, analyzed Islamic law through the eyes of colonial superiority.²⁴⁷ Islamic law was no longer declared to be backward and barbaric.

Furthermore, a more secular Europe began to see all religions, including Islam, through the eyes of secular reason. The European scholarship against Islam and its infrastructure would no longer be written to defend Christianity. An intellectual Europe, fascinated with science and the scientific method, shunned pre-rational aversion of Islam.²⁴⁸ It then embarked on a rational scrutiny of Islamic history and *fiqh*. It was now determined to demonstrate that the Muslim history of Islam was founded on uncritical

240. J. Kritzeck, *Moslem-Christian Understanding in Mediaeval Times: A Review Article*, 4 COMP. STUD. SOC'Y & HIST. 388, 394 (1962).

241. LAPIDUS, *supra* note 219, at 365-413.

242. C.E. Bosworth, *A Dramatization of the Prophet Muhammad's Life: Henri de Bornier's Mahomet*, 17 NUMEN 105 (1970) (showing that the eighteenth century Europe was starting to treat Islam with less venom and more respect).

243. *See id.*

244. *Id.* at 112.

245. *Id.* at 112-14.

246. *Id.* at 114. *See also* THOMAS CARLYLE, SARTOR RESARTUS ON HEROES, HERO-WORSHIP AND THE HERO IN HISTORY (1840).

247. *See* Gyan Prakash, *Orientalism Now*, 34 HIST. & THEORY 199 (1995), for further insights into charges and counter-charges of the distortions of colonial scholarship.

248. Bosworth, *supra* note 242, at 113.

devotion to original sources.²⁴⁹ No longer would the Prophet be portrayed as an imposter. The secular Europe began to research Muslim opinio-jurists and historians who allegedly defrauded the world through false historical accounts.

In all these periods, the external scholarship produced in the West was predominantly fruitless in the *fiqh* markets.²⁵⁰ It also failed to build durable interfaith bridges. The following discussion is offered to furnish the examples of disengaged scholarship that failed to influence the *fiqh* markets but has nonetheless produced a culture of perceptions that paint Islam as an irrational, fraudulent, and even wicked religion. It is hoped that a new generation of external scholars will take a different course than the one taken in the past and that they will produce engaging scholarship which may assist in the development of genuine and respectful interfaith discourse.

1. *Scholarship on the Qur'an*

The *fiqh* markets unflinchingly assume that the Qur'an is God's immutable word that has been preserved in its original purity.²⁵¹ According to the Islamic tradition, the Qur'an was revealed to Prophet Muhammad in small portions, over a period of twenty-two years (610-632).²⁵² In its original form, the Qur'an is an oral text that was later transferred to writing. Because of its oral textuality, the Qur'an is easier to remember. During the Prophet's life, each and every portion of the revealed Qur'an was memorized in the breasts of believers.²⁵³ In addition, all portions of the revelation were preserved in tangible media, including bones, palm leaves, and other materials.²⁵⁴ The first two Caliphs, Abu Bakr (d. 634) and Umar (d. 644), gathered these pieces of the Qur'an and prepared a written copy of the entire scripture, known as *mushaf*, which was under the custody of Hafsa, Caliph

249. F. E. Peters, *The Quest of the Historical Muhammad*, 23 J. MIDDLE E. STUD. 291 (1991) (concluding that Islamic sources are unreliable). *Id.* 308-15 (including extensive footnotes that examine the critical literature).

250. In the Islamic mind, the West has been unable to erase its negative image of a crusading continent determined to defeat Muslims and Islam. This image derived from crusades and colonization warns Muslims to be extremely wary of what the West says about Muslims and Islam. As such, any reformative literature produced in the West by Muslims or non-Muslims is heavily discounted in the *fiqh* markets.

251. Ali A. Mazrui, *Religion and Political Culture in Africa*, 53 J. AM. ACAD. RELIGION 817 (1985). Mazrui presents the internal viewpoint of Islam that the Qur'an is the same as it was in the days of the Prophet Muhammad. *Id.* at 827.

252. This fact is also reported by some external scholars. See G. W. Davis, *Islam and the Kuran*, 10 OLD AND NEW TESTAMENT STUDENT 334, 337 (1890).

253. See *Brief History of the Compilation of the Quran*, <http://www.usc.edu/dept/MSA/quran/compilationbrief.html> (last visited May 11, 2007).

254. *Id.*

Umar's daughter.²⁵⁵ Caliph Uthman (d. 661) appointed a committee under the chairmanship of Zaid bin Thabit, the Prophet's scribe, to collect a final and authentic copy of the Qur'an.²⁵⁶ Within thirty years after the Prophet's death, the entire text of the Qur'an was standardized in accordance with the dialect of the Quraysh. The standardized copy was reduced to writing and sent to the major cities of an expanding Islamic empire.²⁵⁷

Beginning in the twentieth century, the external scholars began to challenge the Islamic consensus about the compilation of the Qur'an. In 1915, Alphonse Mingana argued that the Qur'an was compiled in the reign of the Umayyad Caliph Abd al Malik (685-705), and not during the reign of Caliph Uthman.²⁵⁸ In the 1970s, John Wansbrough located a compilation of the Qur'an dated even later, toward the end of the eighth century.²⁵⁹ He asserted that the canonical Qur'an appeared in the eighth century simultaneously with the appearance of exegetical literature (*tafsir*).²⁶⁰ Patricia Crone and Michael Cook reaffirmed Mingana's views and placed the Qur'an in Caliph Malik's reign with an additional twist. Crone and Cook argued that the Qur'an was concocted in Caliph Malik's reign, projected back in time, and attributed to the Prophet.²⁶¹

These external assertions about the history of the Qur'an point to an inescapable conclusion that a great fraud was perpetrated centuries ago. The *fiqh* markets disregarded these new findings about the Qur'an. A great controversy, however, erupted in the external circles. Commenting on Wansbrough's findings, Whelan points out that his thesis leads to an inescapable conclusion, though Wansbrough does not say it, that the entire Muslim tradition about the early preservation of "the Qur'an is a pious forgery, a forgery so immediately effective and so all-pervasive in its acceptance that no trace of independent contemporary evidence has survived to betray it."²⁶²

The external scholars may reject the "new findings" about the origin of the Qur'an but nonetheless argue that the Qur'an was concocted from external sources available to the Prophet.²⁶³ The Qur'an contains numerous biblical stories, though most are described in less detail than versions found

255. *Id.*

256. *Id.*

257. Estelle Whelan, *Forgotten Witness: Evidence for the Early Codification of the Quran*, 118 J. AM. ORIENTAL SOC'Y 1 (1998).

258. See Alphonse Mingana, *The Transmission of the Kuran*, JOURNAL OF THE MANCHESTER EGYPTIAN AND ORIENTAL SOCIETY 25 (1916).

259. JOHN WANSBROUGH, *QURANIC STUDIES: SOURCES AND METHODS OF SCRIPTURAL INTERPRETATIONS* (1971).

260. *Id.* at 45.

261. CRONE & COOK, *supra* note 227, at 3.

262. Whelan, *supra* note 257, at 3.

263. Norman O. Brown, *The Apocalypse of Islam*, 8 SOC. TEXT 155 (1984). The notion that Muhammad was a charlatan who stole from Western civilization to fool unsophisticated Bedouins is very much alive. *Id.* at 169.

in the Old and New Testaments. The Qur'an describes events related to Adam,²⁶⁴ Eve,²⁶⁵ Abraham,²⁶⁶ Isaac,²⁶⁷ Ishmael,²⁶⁸ Jacob,²⁶⁹ Noah,²⁷⁰ John the Baptist,²⁷¹ Mary,²⁷² and Jesus.²⁷³ Old Testament episodes are mentioned more frequently than New Testament events, and there is no mention of Mark, Luke, Peter, Paul, or John. Western scholars have raised the question of the sources of these stories.²⁷⁴ As a result, three distinct views have emerged from Western scholarship. One view is that the Prophet could read and write or, barring that, he heard biblical stories from his Jewish and Christian friends.²⁷⁵ The second view argues that biblical stories had become part of Arab folklore and were circulating when the Prophet was receiving the revelations.²⁷⁶ The third view credits the Qur'an to Talmud, contending that the Prophet gathered these stories from Talmud, which had been completed by the time the Prophet started his ministry.²⁷⁷

264. Qur'an, Sura al-Baqara 2:31-38 (discussing creation, Satan's temptation, and expulsion from the heavens).

265. *Id.*

266. Abraham is mentioned in more than sixty-five verses of the Qur'an in various contexts. *See, e.g.*, Qur'an, Sura as-Saffat 37:102 (Abraham had a dream of sacrificing his son).

267. Isaac is mentioned in more than sixteen verses of the Qur'an in various contexts. *See, e.g.*, Qur'an, Sura Ibrahim 14:39 (Abraham praising God for giving him Isaac and Ishmael in old age).

268. Ishmael is mentioned in more than twelve verses of the Qur'an in various contexts. *See, e.g.*, Qur'an, Sura al-Baqara 2:127 (Abraham and Ishmael jointly building the House of God).

269. Jacob is mentioned in more than sixteen verses of the Qur'an in various contexts. *See, e.g.*, Qur'an, Sura al-Baqara 2:133 (Jacob asking his sons whom they would worship after his death).

270. Noah is mentioned in more than forty-four verses of the Qur'an in various contexts. *See, e.g.*, Qur'an, Sura al-Ankubat 29:14 (mentioning Noah and the flood that engulfed the people).

271. John is mentioned in five verses of the Qur'an. *See, e.g.*, Qur'an, Sura aal-e-Imran 3:39 (the good news of the birth of John).

272. Mary the mother of Jesus is mentioned in more than thirty-one verses of the Qur'an in various contexts. *See, e.g.*, Qur'an, Sura al-Maeda 5:75 (Mary was a saintly woman).

273. Jesus is mentioned in at least twenty-five verses of the Qur'an in various contexts. *See, e.g.*, Qur'an, Sura az-Zukhruf 43:63 (Jesus came with clear proofs).

274. *See, e.g.*, D. Shepardson, Jr., *The Biblical Element in the Quran*, 10 OLD & NEW TESTAMENT STUDENT 207 (1890) (analyzing the theories of borrowing from biblical sources); J. Leveen, *Mohammed and his Jewish Companions*, 16 JEWISH Q. REV. 399, 401 (1926) (claiming that Jews were feeding distorted biblical stories to the Prophet for "leg-pulling" purposes).

275. Shepardson, *supra* note 274, at 212; Crawford H. Toy, *Mohammed and the Islam of the Koran*, 5 HARV. THEOLOGICAL REV. 474, 478 (1912) (discussing the Prophet receiving information from Jews and Christians).

276. Shepardson, *supra* note 274, at 212; Davis, *supra* note 252, at 334 (discussing Jewish, Christian, and Persian belief systems at the time of the Prophet's ministry).

277. Shepardson, *supra* note 274, at 212.

The theories of the Qur'an's historical concoction are disregarded in the *fiqh* markets. At the heart of these theories is a simple assertion that the Qur'an is not God's Word but the Prophet made it up by borrowing stories from biblical sources. The *fiqh* markets are quite familiar with these charges and no findings are likely to undermine the markets' confidence in the Qur'an's truth. Ever since its revelation, the attacks on the Qur'an's genuineness have been relentless. The Qur'an itself mentions the charges of *iftra* (invention) made against its authenticity.²⁷⁸ These *iftra* charges include that the Prophet fabricated the Qur'an,²⁷⁹ that "this is nothing but the tales of the ancient,"²⁸⁰ and that the Qur'an is mere poetry. "We have not instructed the (Prophet) in poetry," says the Quran.²⁸¹ Reaffirming its relationship with previous revelations, the Qur'an presents the concept of the Mother Book.²⁸² From this Mother Book are derived the Old Testament, the New Testament, and the Qur'an. "This Quran is not such as can be produced by other than Allah; on the contrary it is a confirmation of (revelations) that went before it, and a fuller explanation of the (Mother) Book—wherein there is no doubt—from the Lord of the worlds."²⁸³ Therefore, the *fiqh* markets also connect the Qur'an with Christian and Jewish sources. And yet the external scholarship and the *fiqh* markets stand apart on the subject. The external scholarship sees the connection in terms of secular borrowing, the *fiqh* markets in terms of spiritual unity of all revelations. The two viewpoints cannot be reconciled, meaning that the disengagement principle offers the best solution.

The external scholarship creates dangerous chasms between religions and cultures when it argues that the Qur'an is wicked. In the past centuries, few European publishers dared to publish translations of the Qur'an because even the publishers of Latin translations that had smeared the Qur'an were "rebuked for disseminating such damnable material."²⁸⁴ Most writers attacked the Qur'an on hearsay without reading it in Arabic or in their own tongue.²⁸⁵ The first English translation of the Qur'an appeared in 1649 without a named translator, publisher, or printer.²⁸⁶ Its lack of credibility was further illuminated by Alexander Ross, who introduced the translation with a scathing preface to mitigate the act of publication.²⁸⁷ The translator, wrote

278. Qur'an, Sura al-Nasr 110:38 (describing the charge that the Prophet invented the Qur'an and challenging that let someone produce a sura comaprable to one in the Qur'an).

279. Qur'an, Sura al-Huud 11:13.

280. Qur'an, Sura al-Ahqaaf 46:17 (translated by author).

281. Qur'an, Sura al-Yassiin 36:69 (translated by author).

282. Qur'an, Sura al-Rad 13:39.

283. Qur'an, Sura al-Yunus 10:37 (translated by author).

284. Elie Salem, *The Elizabethan Image of Islam*, 22 *STUDIA ISLAMICA* 43, 50 (1965).

285. *Id.*

286. *Id.* at 51.

287. *Id.*

Ross, bared a monster whose ugliness enhanced the beauty of the Gospels and therefore no reader should consider this translation as an act of proselytizing.²⁸⁸ The Qur'an is "without head or tail . . . being immethodical and confused, contradictory in many things, written in rude language, consisting of lies and useless follies."²⁸⁹

It was enough, however, to portray the Qur'an as "immethodical" and "rude." The portrayal of Muhammad as the incarnation of the Devil or Anti-Christ was a favorite theme of the Middle Ages that lasted until the beginning of the eighteenth century.²⁹⁰ In fact, some of these conceptions originated in Byzantine literature during the period when the Byzantine Empire was fighting for its survival.²⁹¹

The more recent attacks on the Qur'an's integrity have come from a pair of scholars who wrote a sensational thriller in their youth in England.²⁹² Michael Cook and Patricia Crone²⁹³ argue that there exists "no hard evidence for the existence of the Koran in any form before the last decade of the seventh century."²⁹⁴ They surmised that the Qur'an was assembled from a plurality of materials, put together possibly by Al-Hajjaj, who governed Iraq in the suggested period.²⁹⁵ The authors also insist that the literary character of the Qur'an, which lacks an overall structure, links disparate materials, repeats whole passages in variant versions, and uses obscure language; all of these editorial imperfections suggest that the Qur'an was "a sudden, not to say hurried, event."²⁹⁶ This charge challenges a core belief of the *fiqh* markets that the Qur'an was revealed to Prophet Muhammad over a period of twenty-two years (610-632) and collected soon after his death.²⁹⁷

288. *Id.*

289. *Id.* at 52.

290. *Id.*

291. Kritzeck, *supra* note 240, at 395.

292. CRONE & COOK, *supra* note 227. They suggest that the Qur'an was composed in the late seventh century during the reign of Caliph Abdul Malik (685-705), projected back in time, and attributed to the Prophet. *Id.* at 3.

293. *Id.*

294. *Id.*

295. Al-Hajjaj governed Iraq for twenty-three years (692-715) and implemented draconian policies to bring peace to the region. IRA M. LAPIDUS, A HISTORY OF ISLAMIC SOCIETIES 60 (1988). This is the period in which the authors (Crone and Cook) speculate the writing of the text of the Qur'an.

296. CRONE & COOK, *supra* note 227, at 18.

297. The authors even challenge the name "Muslims" and insist that the name is also a later invention. Early Muslims were known as Mahgraye in Syriac, Magaritari in Greek, and Muhajirain in Arabic. These terms have genealogical meaning. They refer to the descendants of Abraham by Hagar (thus distinguishing them from Jews who are descendants of Abraham by Sarah). These terms also mean exodus. However, the authors challenge the Muslim belief that this exodus took place from Mecca to Medina. They instead argue that the exodus refers to the emigration of the Ishmaelites from Arabia to the Promised Land

Under the disengagement principle, the *fiqh* markets, for the most part, ignored the Cook and Crone thesis. The Cook and Crone thesis, however, was condemned in Western intellectual circles. Michael Morony called it a “thin piece of *Kulturgeschichte* full of glib generalizations, facile assumptions, and tiresome jargon.”²⁹⁸ Leon Nemoy questions the sources that Cook and Crone used to attribute a Machiavellian *tour de force* to the seventh century Arabs, including the Prophet.²⁹⁹ J. Wansbrough, on whom Cook and Crone shower gratitude for giving them the courage to rethink the conventional Islamic sources,³⁰⁰ remarks that the “eccentricity” of Hagarism “lies as much in its historical methodology as in its controversial thesis.”³⁰¹ Indeed, the authors themselves have refuted the thesis.³⁰² As indicated earlier, the *fiqh* markets are likely to disregard all scholarship that Cook and Crone would produce about Islam and Islamic law, simply because the *fiqh* markets will no longer trust their motive and research.

2. Scholarship on the Prophet

The *fiqh* markets resent the scholarship that portrays Prophet Muhammad disrespectfully. Respect for Prophet Muhammad and all biblical prophets is a cardinal principle of Islamic faith.³⁰³ Even more generally, the Qur’an prohibits annoying believers.³⁰⁴ Even though Muslims worship One God and no one else, the principle of respect defines the ethos of Islam. In external scholarship, almost all prophets have been accused of being mad men. Moses, Noah, and Muhammad have all been called sorcerers, men possessed.³⁰⁵ The disengaged scholarship has relentlessly demonized the Prophet of Islam over the centuries.³⁰⁶ Because the Prophet was the transmitter of the Qur’an and the author of the Sunna, he is the ultimate source of the Basic Code from which the entire Islamic *fiqh* is directly or indirectly

(Palestine). *Id.* at 8-9. Hagarism is a term coined to capture these two meanings of the activities of early Muslims.

298. Michael G. Morony, Book Note, 41 J. NEAR E. STUD. 157, 159 (1982) (reviewing PATRICIA CRONE & MICHAEL COOK, HAGARISM: THE MAKING OF THE ISLAMIC WORLD (1977)).

299. *Id.* at 180-81.

300. CRONE & COOK, *supra* note 227, at 18.

301. J. Wansborough, Book Note, 42 BULL. SCH. ORIENTAL & AFR. STUD. 155 (1978) (reviewing PATRICIA CRONE & MICHAEL COOK, HAGARISM: THE MAKING OF THE ISLAMIC WORLD (1977)).

302. Khan, *Intellectual Property*, *supra* note 220 (noting interviews with the authors of the book revealed that the authors have repudiated the thesis of their book).

303. Qur’an, Sura al-Ahzab 33:56.

304. Qur’an, Sura al-Ahzab 33:58.

305. Shereen el Ezabi, *Al-Naysaburi’s Wise Madmen*, J. COMP. POETICS, 192, 197-98 (1994) (reviewing scholarly treatment of the prophets).

306. *See id.*

derived. All roads of Islamic law lead back to the Prophet. All scholars know this fundamental fact. If it can be successfully shown that the Prophet was a fraudulent operator, as the disengaged scholars seem to believe, the edifice of Islamic law borne of God's word (Qur'an) and God-inspired wisdom (Sunna) would crumble. Scholarly attempts at discrediting the Prophet have been inefficacious. The *fiqh* markets refuse to review the Prophet's piety, sincerity, and credibility.³⁰⁷

The negative scholarship about the Prophet makes no positive contributions to the *fiqh* markets, instead generating disrespect for Islam and deepening misunderstanding between cultures and civilizations. Elie Salem researched the Elizabethan literature to retrieve the images of the Prophet found in the writings of travelers, historians, and publicists.³⁰⁸ For the most part, substandard research informed the literature. Even Muhammad's basic biographical facts were reported inaccurately.³⁰⁹ Some writers presented Muhammad as of Jewish ancestry, some as a Persian, some of an unknown origin, and some as a slave sold to a Palestinian merchant.³¹⁰ Some took his wife Khadijah as his mother; while others reported that he finished writing the Qur'an at the age of twenty-five.³¹¹ In the Latin literature, Muhammad was portrayed as a citizen of Rome who, upon failing to become a pope, rebelled against the church.³¹²

Disrespectful stories most popular in Europe were invented during the Middle Ages; they lingered in the Elizabethan era and have not yet vanished completely from Western consciousness. One story presents the Prophet suffering from epilepsy or "falling sickness," a disease that "took him so extremely, that he grovelled along the ground and foamed piteously at his mouth."³¹³ The story about the Prophet's death is the most fantastic, as it incorporates all things forbidden in Islam. According to the story reported by several authors, the prophet drank a large quantity of poisoned wine and subsequently suffered a seizure and died. This resulted in his body—which was partly eaten by boars—to begin to rot in the open as it waited to be resurrected, and when nothing happened it was transported to the famous temple of Mecca.³¹⁴ Such stories not only show disrespect for the Prophet, but they also paint Muslims as ignorant believers.

307. Even in the Prophet's time, critics called the Prophet "all kinds of names," a historical fact that the Qur'an itself memorialized. Qur'an, Sura al-Furqan 25:9 (translated by author).

308. Elie Salem, *The Elizabethan Image of Islam*, 22 *STUDIA ISLAMICA* 43 (1965). See also DANIEL, *supra* note 233.

309. Salem, *supra* note 308, at 43.

310. *Id.* at 44.

311. *Id.*

312. *Id.* at 45.

313. *Id.* (quoting HENRY SMITH, *GOD'S ARROW AGAINST ATHEISTS* 44 (1617)).

314. *Id.* at 48.

Even the United States Supreme Court cases refer to an untrue story known as the “Mahomet’s coffin.”³¹⁵ A story popular in Europe but unknown in the Islamic world narrates that Prophet Muhammad’s coffin is hung in the air separating the ground and the sky, the iron coffin held there by two powerful magnets. Edward Pococke (1604-91), the first chaired professor of Arabic studies at Oxford,³¹⁶ repudiated the story with ridicule.³¹⁷ The story, however, lingered in popular fables. The story’s metaphorical meaning survived even longer.³¹⁸ In 1799, the United States Supreme Court referred to the story with respect to a legal action that failed in both law and equity jurisdictions because the remedy was suspended between law and equity.³¹⁹ This metaphor has not totally disappeared from court opinions. It has been used thirty times in the state courts of Michigan,³²⁰ Kansas,³²¹ Texas³²², Pennsylvania,³²³ Florida,³²⁴ and others. More recently, the Georgia Court of Appeals used the metaphor in 1970.³²⁵ It is unclear whether the American courts were aware of the historical meaning of the metaphor. If they were, the use of the metaphor demonstrates a highly negative image of the Prophet Muhammad prevalent even among the educated classes.

Disrespectful stories about the Prophet may have been concocted in missionary circles that wanted to promote Christianity by all means necessary but have since been accepted and promoted in subsequent scholarly works. External scholars who knew better made little effort, perhaps out of cultural or political fears, to present a more accurate account of the Prophet.³²⁶ Consider another story contending that the Prophet kept a dove and trained the bird to eat from his ear.³²⁷ This charade, as the story goes,

315. *Sim’s Lessee v. Irvine*, 3 U.S. 424, 454 (1799).

316. P. M. Holt, *The Study of Arabic Historians in Seventeenth Century England: The Background and Work of Edward Pococke*, 19 BULL. SCH. ORIENTAL & AFR. STUD. 444 (1957).

317. *Id.* at 454. Pococke presented Islam and Islamic history in a positive light, showing that the Islamic civilization was worthy of serious studies by educated men. *Id.* at 455.

318. *See id.*

319. *Sim’s Lessee*, 3 U.S. at 454. In 1832, Mahomet’s coffin was metaphorically mentioned yet another time before the Chief Justice Marshall’s Court. *Fowle v. Lawrason’s Ex’r*, 30 U.S. 495, 501 (1831).

320. *Scott v. Smart’s Ex’rs*, 1 Mich. 295 (1849).

321. *Hawkins v. Hansen*, 142 P. 280 (Kan. 1914).

322. *San Antonio & A. P. Ry. Co. v. Blair*, 196 S.W. 1153 (Tex. 1917).

323. *Plaugher v. Am. Viscose Corp.*, 24 A.2d 698 (Pa. Super. Ct. 1942).

324. *Poladian v. Johnson*, 85 So. 2d 140 (Fla. 1955).

325. *Touchstone v. State*, 174 S.E.2d 450, 456 (Ga. Ct. App. 1970).

326. However, some scholars, such as Edward Pococke, Ockley, Sale, and Gibbon, made serious efforts to present Islam in a more accurate light. Holt, *supra* note 316, at 455.

327. Grotius mentioned this story in his missionary writing known as *De veritate religionis christianae*. *Id.* However, Edward Pococke confronted Grotius on the dove story. *Id.*

was perpetrated to fool the Arabs that the dove was the archangel, the Holy Ghost, uttering God's revelations in the Prophet's ears. The story was perpetuated in the works of Hugo Grotius, a great Dutch jurist and the father of modern International law, who knew that the story was not based on Muslim authority.³²⁸ This story was so popular that even Shakespeare could not resist its inclusion into one of his plays. "Was Mahomet inspired with a dove?"³²⁹ Ironically, Voltaire, himself guilty of writing a scandalous play on the Prophet, offered a line delivered through the Prophet that ridicules false stories: "prejudice rules o'er the vulgar with despotic sway."³³⁰ When the most learned scholars embrace false stories, the *fiqh* markets begin to apply the disengagement principle even more strictly. Mistrust disrupts even positive communications between internal and external scholars.

The disengaged literature perpetuates stereotypes that increase misunderstanding between the West and the Muslim world. The boldest allegation accuses the Prophet of deliberately lying that he was a prophet.³³¹ Other allegations paint him as a fraudulent magician who would resort to trickery by conjuration of demons and through visions induced at will.³³² Still others paint him as a clever man who would publicly hide from family and friends but secretly consult his Christian co-conspirator "preparing the details of the fraud."³³³ The purpose of this fraud was to hoodwink the pagan and Jewish audience of Arabia, leading them to believe that Muhammad was receiving revelations from God.³³⁴ Roger Bacon, the thirteenth century English empiricist who was a noted skeptic of all religions, stopped short of charging the Prophet with feigned prophecy. Bacon, who also believed in occultism, conjectured that demons possessed the Prophet of Islam.³³⁵

International fraud is often purposeful. It has an aim and pursues an end game. Why was Muhammad feigning prophecy? What did he want? The disengaged literature seems to advance two distinct theories to explain the Prophet's fraud. One theory, focusing on the psychological import of the fraud, explains it in terms of the Prophet's need to overcome his low birth.³³⁶ It highlights the fact that the Prophet married Khadija, a rich and influential woman, to improve his class, and he resorted to the fraudulent

328. *Id.* at 454.

329. WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE SIXTH* act 1, sc. 2.

330. VOLTAIRE, *MAHOMET THE PROPHET* act 2, sc. 4 (E. P. Dupont trans. 1901) (1741).

331. DANIEL, *supra* note 233, at 47.

332. *Id.* at 30-31, 47, 51.

333. *Id.* at 262.

334. *Id.*

335. *Id.* at 51. ROGER BACON, *MORALIS PHILOSOPHIA* (Eugenio Massa ed., 1953).

336. DANIEL, *supra* note 233, at 262.

enterprise of prophecy to overcome his humble origin.³³⁷ The other branch of disengaged literature focuses on secular power as the prime motivation for undertaking the prophecy fraud. According to this thesis, the Prophet invoked divinity to seek and obtain a kingdom.³³⁸ This thesis highlights the wars with non-believers and presents these wars as further proof that the Prophet's ultimate purpose was to install himself as the most powerful man in Arabia and beyond.

Even in the twentieth century, the disengaged scholarship continued to generate speculative but disrespectful theories about the Prophet. In 1928, Worrel acknowledged that the old Western view that the Prophet was epileptic had been abandoned.³³⁹ However, he presents his own speculative thesis that the Prophet suffered from some sort of sexual ailment that, in its suppressive stage in Mecca, produced poetry and Prophecy.³⁴⁰ However, the Prophet lost these gifts after he made his many marriages.³⁴¹ His tranquil life with several wives in Medina, says Worrel, released him from his poetic prophecy, causing a "sore decline in poetic quality, sincerity, humility, idealism, and spirituality."³⁴²

The disengaged scholarship is determined to revise history to show that at no point did there exist any respect for the Prophet in the external circles. Yehuda Shamir argues that Maimonides, a great Jewish philosopher, who was raised in the Islamic culture, believed that Muhammad was a madman and a plagiarist who stole from the prophecies of Moses.³⁴³ Shamir begins with the assumption that Maimonides, who lived in Egypt and who had experienced fanaticism, could not have openly spoken his mind about Islam and its Prophet.³⁴⁴ Accordingly, Maimonides left subtle and indirect clues in his writings to reveal his innermost thoughts. Decoding overt and covert messages in Maimonides's writings, Shamir discovers that Maimonides held Muhammad to be a false prophet for many reasons, including that the Prophet was illiterate and had too many wives.³⁴⁵ True prophets are supposedly rational and unimaginative; and they banish all pleasures of the flesh. This reading of Maimonides's scholarship fails to explain why nu-

337. *Id.*

338. *Id.*

339. Willaim H. Worrell, *The Case of Muhammad*, 48 J. AM. ORIENTAL SOC'Y 136, 140 (1928).

340. *Id.* at 144-45.

341. *Id.*

342. *Id.* at 145.

343. Yehuda Shamir, *Allusions to Muhammad in Maimonides' Theory of Prophecy in His Guide of the Perplexed*, 64 JEWISH Q. REV. 212, 215, 222 (1974). *See also* Sabato Morais, *A Letter by Maimonides to the Jews of South Arabia Entitled "The Inspired Hope"*, 25 JEWISH Q. REV. 330, 343 (1935) (indicating that the Bible does not allude to the rising of Prophet Muhammad).

344. Shamir, *supra* note 343, at 220.

345. *Id.*

merous biblical prophets were polygamous. It also fails to note for most scholars of faith that reason is not opposed to imagination or vice versa.

In our own times, caricatured views of the Prophet continue to occupy popular and scholarly Western consciousness. In the popular media, the Prophet's cartoons have been published to portray him as a terrorist.³⁴⁶ Pope Benedict XVI quoted a fourteenth century Christian emperor to insinuate that the Prophet brought the world only evil and inhuman things.³⁴⁷ These criticisms are now defended under the freedom of speech and in the name of starting a new dialogue with Muslims who are presently engaged in wars with the United States and its allies. Disrespect for the Prophet, however, turns off the *fiqh* markets, disrupting scholarly communications between internal and external scholars.

III. BORDERLINE SCHOLARSHIP

All external scholarship cannot be divided into two neat categories of gracious and disengaged scholarship. Some external scholarship may fall into the middle. This borderline scholarship may be founded on questionable assumptions about Islam that nonetheless raises serious and difficult questions the *fiqh* markets must attempt to answer. Controversies about the Prophet's Sunna, for example, are not foreign to the *fiqh* markets. Early Muslim opinio-jurists spent decades sorting out the authentic *ahadith*.³⁴⁸ The *fiqh* markets may engage with external scholars who challenge the authority of what Muslims consider to be authentic *ahadith*. Similarly, the question of whether Muslim jurists borrowed from external sources may be examined. The *fiqh* markets are open to ideas compatible with the Basic Code. An opinio-jurist commits no wrong if he or she borrows a useful rule from some external source and demonstrates that the rule is compatible with the basics of the Qur'an and Sunna. The following discussion provides examples where external scholars might be engaged.

346. *Row over Danish Cartoon Escalates*, BBC NEWS, Oct. 10, 2006, <http://news.bbc.co.uk/1/hi/world/europe/6037597.stm> (last visited May 11, 2007). *But see* Michael J. Polelle, *Proposed Model Statute on Group Defamation*, 110 PENN. ST. L. REV. 717 (2006) (discussing how media communications have social consequences).

347. Iran's Supreme Leader condemned the Pope's remarks as part of the crusade. The Pope apologized and denied that the views quoted were his. Many Muslim groups accepted the apology; some did not. *Pope Comment 'Linked to Crusade'*, BBC NEWS, Sept. 18, 2006, <http://news.bbc.co.uk/1/hi/world/europe/5356820.stm> (last visited May 11, 2007).

348. For the historical process of *ahadith* collection, see Mohammad Fadel, *Ibn Hajar's Hady al-Sari: A Medieval Interpretation of the Structure of al-Bukhari's al-Jami al-Sahih: Introduction and Translation*, 54 J. NEAR E. STUD. 161 (1995).

A. Scholarship on the Sunna

After the Qur'an, the Prophet's Sunna is the second major source of Islamic law.³⁴⁹ It is composed of the Prophet's decisions, explanations, clarifications, and other pronouncements, collectively called *ahadith*. If the Qur'an is the text, each *hadith* is a case. The Sunna is thus the case law decided in light of the Qur'an. The Sunna is the first *tafsir al-Qur'an*. The Qur'an mandates that Muslims obey both God and the Prophet. "And whatever the Messenger gives you, take it, and whatever he forbids you, leave it. And fear Allah: truly Allah is severe in punishment."³⁵⁰ Therefore, the Sunna embodies a valid and mandatory source of law. However, not every *hadith* embodies an obligatory rule. Some *ahadith* contain the Prophet's personal preferences that he did not wish to impose on all Muslims.³⁵¹ Some *ahadith* are fact-based and must not be interpreted in an over-inclusive manner, while others contain clear rules.³⁵² Muslims who wish to follow the Prophet's personal preferences in each and every way are free to do so. However, the *ahadith* that impose obligations must not be confused with others that simply contain the Prophet's personal practices that he did not wish to be considered obligatory.³⁵³

349. In its more general meaning, the word Sunna simply means following the course of action set by another person. In this sense, the Sunna of the Prophet is confined to the Prophet's practices. The *sunan* of other Islamic leaders, including the first four *caliphs*, may also provide guidance for good behavior, but their *sunan* do not create the binding norms of Islamic law per se. Only when such *sunan* are broadly accepted as constituting the binding norms of behavior are they elevated to the level of law. Otherwise, these *sunan* compete in the *fiqh* markets for approval. For different meanings of the word *sunna*, see HALLAQ, *supra* note 61, at 47-49.

350. Qur'an, Sura al-Hashr 59:7 (translated by author). Other verses of the Qur'an reaffirm the same message. See Qur'an, Sura an-Nisa 4:80, Sura al-Ahzab 33:21.

351. A *hadith* states: "The Prophet used his right hand for getting water for ablution and taking food, and his left hand for his evacuation and for anything repugnant." Sunan Abu-Dawud, Vol. 1, Bk. 1, No. 33, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/abudawud/001.sat.html> (last visited May 11, 2007). This *hadith* contains the Prophet's personal preference. Left-handed Muslims may switch the uses of hands without breaching the rule.

352. A *hadith*, for example, contains a clear rule that there is no *zakat* on less than five camels. Malik bin Anas, Muwatta, Vol. 1, Bk. 17, No. 17.1.2, <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muwatta/017.mmt.html#017.17.1.2> (last visited May 11, 2007).

353. For example, the Prophet prohibited every intoxicant. Sahih Muslim, Vol. 3, Bk. 23, Nos. 4956-66, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muslim/023.smt.html> (last visited May 11, 2007). This is not simply the Prophet's preference but an obligation on all Muslims to refrain from intoxicants. Contrast this to the Prophet's preference for sweet things and honey. Sahih Bukhari, Vol. 7, Bk. 69, No. 504, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/069.sbt.html> (last visited

Since the *ahadith* were collected long after the Prophet's death, their authenticity was less than automatic. This is so because some *ahadith* were falsely attributed to the Prophet.³⁵⁴ Some of these fabrications were harmless, while others were fabricated to promote concrete political and ideological goals.³⁵⁵ One of the greatest scholarly enterprises in the Islamic legal tradition has been to identify the false *ahadith*. Scholars of great piety and intelligence devoted their entire lives to rigorously scrutinize each and every *hadith* attributed to the Prophet. Finally, the works of a few great scholars, particularly Imam Bukhari³⁵⁶ and Imam Muslim,³⁵⁷ have been broadly accepted as the most reliable compilations of authentic *ahadith*.³⁵⁸

The monumental work of painstakingly separating the false *ahadith* took about two hundred and sixty years following the Prophet's death.³⁵⁹ By the end of the ninth century, Muslim scholars finally agreed that a body of *ahadith* may be accurately attributed back to the Prophet, since the contents of the *ahadith* were compatible with the message of the Qur'an and chains of transmission were reliable. Furthermore, any *ahadith* that testified to the actual practices of a community of believers, including recognized pious men, were considered authentic.³⁶⁰ By contrast, the *ahadith* without any corresponding practice were more likely to have been fabricated. Thus the authenticity of a Prophet's *hadith* was not simply in the transmission of an abstract normative law. Its authenticity lies in the actual practice (*amal*) of the pious people. "In other words, hadith lacking foundations in practice

May 11, 2007). Muslims are under no obligation to eat sweet things or honey, even though they might do so to express their personal love for the Prophet.

354. Hallaq, *supra* note 9, at 75 (explaining the traditional Islamic viewpoint on sorting out the authenticity of a *hadith*, using distinct methodologies of their textual and meaning veracity).

355. For example, a famous *hadith* says that "the reward for deeds depend upon intentions." Sahih Bukhari, Vol. 1, Bk. 1, No.1, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/001.sbt.html> (last visited May 11, 2007). This *hadith*, even if shown to be weak, is harmless and promotes a worthy behavior among Muslims. It is waste of scholarly time and resources to dispute the authenticity of this *hadith*. *But see* Hallaq, *supra* note 9, at 89 (Ibn al-Salah challenging the high validity of this *hadith*).

356. For Imam Bukhari's biographical information, see Sheikh al-Hadith & 'Allama Ghulam Rasul Sa 'idi, Imam Al Bukhari, MINHAJ-UL-QURAN MONTHLY, Mar. 1995, at 30-37 ('Allamah Ishfaq Alam Qadri & M. Iqtidar trans.), available at http://www.islamonline.com/cgi-bin/news_service/profile_story.asp?service_id=838 (last visited May 11, 2007).

357. For Imam Muslim's biographical information, see Abdul Hamid Siddiqri, Imam Muslim, http://www.sunnah.org/history/Scholars/Imam_muslim.htm (last visited May 11, 2007).

358. Khan, *Intellectual Property*, *supra* note 220.

359. Khan, *Second Era of Ijtihad*, *supra* note 1.

360. *See* IBN KHALDUN, *supra* note 9.

was rejected.”³⁶¹ For the Islamic world, the debate over the sources of the Sunna had come to an end, but not for the external scholars.³⁶²

More than a thousand years later, however, the controversy over the authenticity of the Sunna erupted again, this time not in the *fiqh* markets but in the external circles of the West that had colonized almost the entire Muslim world.³⁶³ A new breed of Western scholars, Jews and Christians, began to attack the veracity of the Sunna. Some of these scholars spent time in Muslim countries and learned Arabic and Persian in order to gain legitimacy and inside information found in the ancient manuscripts of Islamic religious tradition. They concluded that the entire enterprise of the Sunna was fabricated and fraudulent.

Ignaz Goldziher,³⁶⁴ an Austrian Jew who experienced “the best, the happiest, and the most fruitful time of his life” in Damascus and Cairo, led the charge on the Sunna’s authenticity. Goldziher contended that the *hadith* served as an open-ended source, as a convenient mode, to borrow rules and principles from “[o]ld and new Testaments, rabbinic sayings, quotes from apocryphal gospels, and even doctrines of Greek philosophers and maxims of Persian and Indian wisdom.”³⁶⁵ This contention implies that a mass fraud was being committed in the Muslim world, and Muslim scholars were deceitful plagiarists who, disregarding their faith, were freely stealing materials from external sources and putting them in the Prophet’s mouth with impeccable chains of transmission. It also implies that Muslim scholars who spent their lives in identifying the fabricated *ahadith* were intellectual dopes who either completely failed in their research or they themselves were fabricators. These conclusions exposing a massive fraud in the Sunna are unlikely to influence the free markets of Islamic law.

Joseph Schacht,³⁶⁶ a Polish Catholic who was raised in Poland and who spent several adult years in Cairo learning Islamic law, carried on the attack on the Sunna, providing legitimacy to Goldziher’s dubious findings.

361. HALLAQ, *supra* note 61, at 105.

362. For example, Kister argues that *tahannuth* was an ancient Arab (*Quraysh*) custom (belonging to the period of Ignorance, i.e., *Jahiliyya*), under which Arabs would go to Mount Hira, do charitable deeds, and then pray at Ka’ba by going around it seven or more times. In presenting this thesis, Kister disputes Imam Bukhari, who reports that the Prophet went to Mt. Hira without his wife and that he loved solitude, which was a pre-Prophetic signal. M. J. Kister, *Al-Tahannuth: An Inquiry into the Meaning of a Term*, 31 BULL. SCH. ORIENTAL & AFR. STUD. 223 (1968).

363. For the prejudice that the Western scholars have shown toward Islam during the period of colonization, see Joseph H. Escovitz, *Orientalists and Orientalism in the Writings of Muhammad Kurd Ali*, 15 INT’L J. MIDDLE E. STUD. 95 (1983).

364. Richard Gottheil, *Ignaz Goldziher*, 42 J. AM. ORIENTAL SOC’Y 189 (1922).

365. IGNAZ GOLDZIHHER, INTRODUCTION TO ISLAMIC THEOLOGY AND LAW 40 (Andras & Ruth Hamori trans., 1981).

366. See generally Aharon Layish, *Notes on Joseph Schacht’s Contribution to the Study of Islamic Law*, 9 BULL. BRIT. SOC’Y MIDDLE E. STUD. 132 (1982).

Schacht praised Goldziher and his conclusion that the Sunna is “not the inherited knowledge of the views and practices of Muhammad”³⁶⁷ “but [rather] reflect opinions held during the first two and a half centuries after the hijra.”³⁶⁸ Schacht calls it a “fundamental discovery.”³⁶⁹ “[F]or the first time,” says Schacht, “our study of early Islam” has been put “on a sound basis.”³⁷⁰ Rejecting the Islamic conceptions of the Sunna, Schacht concludes that the West “must . . . abandon the gratuitous assumptions that there existed originally an authentic core of [*ahadith*] going back to the . . . Prophet.”³⁷¹ The recognition of any such core, says Schacht, is prejudicial to the historical understanding of *ahadith*.³⁷² As far as legal *ahadith* are concerned, Schacht posits a broad thesis that all these traditions containing legal elements must be presumed “fictitious” until the contrary is proved.³⁷³ This shifting of presumption and burden on the veracity of legal *ahadith* turns Islamic *fiqh* on its head, throwing away centuries of scholarly efforts to extract and refine rules from the rich mines of the Sunna. Schacht emphasizes the fraudulent nature of *isnads*, which confer legitimacy on the contents of *ahadith*.

Islamic legal methodology places special emphasis on *isnads* for tracing the accuracy and reliability of a reported *hadith*. *Isnads* are transmission lines, and each *isnad* constitutes a chain of persons through which the contents of a *hadith* were transmitted. An *isnad* may work as follows: D heard from C, C heard from B, B heard from A, and A heard from the Prophet. D, C, B, and A are persons belonging to different periods. If any person in the chain was of doubtful character, the *hadith* was not rated highly. But if all the transmitters in the chain are persons of credible knowledge and piety, the *hadith* is considered authentic. Challenging this methodology, Schacht argues that the reliability of the chain is a sure indication of its fraudulent nature; “the more perfect the *isnad*, the later the tradition [*hadith*].”³⁷⁴

In this fraudulent enterprise of manufacturing Prophetic traditions, Schacht focuses on what might be called the family fraud. Schacht points out that manufacturing *ahadith* within a family occurs when the sequential transmitters are related to each other, “e.g. from father to son and grandson,

367. John Burton, *Notes Toward a Fresh Perspective on the Islamic Sunna*, 11 BULL. BRIT. SOC'Y MIDDLE E. STUD. 3 (1984).

368. Joseph Schacht, *A Revaluation of Islamic Traditions*, in ISLAMIC LAW AND LEGAL THEORY 141 (1996).

369. *Id.*

370. *Id.*

371. *Id.* at 144-45.

372. *See id.* at 145.

373. JOSEPH SCHACHT, THE ORIGINS OF MUHAMMADAN JURISPRUDENCE 149 (1950).

374. Schacht, *supra* note 368, at 145.

from aunt to nephew, or from master to freedman.”³⁷⁵ Whereas Muslim scholars of *ahadith* analyze each *hadith* on its own merit, Schacht presents a broad thesis of fraud, asserting that “the existence of a family *isnad*, contrary to what it pretends, is a positive indication that the tradition in question is not authentic.”³⁷⁶

Schacht furnishes good insights into the dynamics of intellectual fraud.³⁷⁷ If someone is going to invent a *hadith* for worldly gain, he might as well do it right. A consummate crook will therefore forge the *isnad* as well as the *matn* (substance). A *hadith* with a highly reliable chain of transmitters, which include the Prophet’s family members and highly-regarded companions of the Prophet, will obviously look good on its face, adding apparent legitimacy to the *matn*. By contrast, only a stupid forger will invent a momentous *hadith* to advance or protect worldly matters, but will choose a dubious line of transmission that includes thieves, liars, or other criminal characters as the intergenerational transmitters who ultimately attribute the *matn* to the Prophet. It does not take a genius to figure out the dynamics of such a fraud. And if so, one wonders why *ahadith* with dubious transmitters would ever enter the *fiqh* markets.

Schacht’s fraud theory will have some credibility if the Sunna was fabricated in the secret chambers of an imperial government. The *ahadith* freely circulated in the *fiqh* markets. Any scholar was perfectly free to judge the validity of any *hadith*. The free markets in the Muslim world would raise a storm if state officials or fraudulent theologians were pumping fabricated *ahadith* into the system. To believe in Schacht’s fraud theory, we are left with no option but to assume that the *fiqh* markets of private opinion-jurists and scholars were corrupt or that there existed a grand and monolithic conspiracy to deceive ordinary Muslims with fabricated sayings of the Prophet. Historical facts, and even common sense, do not support the existence of a monumental fraud industry working in tandem to manufacture *ahadith* for crass worldly gains.

Despite the vacuity of his thesis, Schacht remains a scholar of Islamic law in the Western world. His works are cited as an authority on the subject,³⁷⁸ even though external scholars have also criticized Schacht’s find-

375. *Id.* For approval of Schacht’s theories, see Rafael Talmon, *Schacht’s Theory in the Light of Recent Discoveries Concerning and the Origins of Arabic Grammar*, 65 *STUDIA ISLAMICA* 31 (1987).

376. Schacht, *supra* note 368, at 145.

377. Juynboll has correctly pointed out that to Muslims, Schacht’s style of scholarship comes across as “apodeictical” and “supercilious.” G.H.A. JUYNBOLL, *MUSLIM TRADITION: STUDIES IN CHRONOLGY, PROVENANCE, AND AUTHORSHIP OF EARLY HADITH* 3 (1983).

378. A quick research (as of April 1, 2006) on Westlaw shows that Schacht’s *AN INTRODUCTION TO ISLAMIC LAW* has been cited about 108 times. *ISLAMIC LAW AND LEGAL THEORY* was cited nine times. Majid Khadduri is cited 117 times. Khadduri’s *THE ISLAMIC*

ings.³⁷⁹ The *fiqh* markets have dismissed his work without much debate, but the external scholars continue to pay homage to him.³⁸⁰ Once an erroneous work on Islamic law gains influence in external circles, subsequent scholars begin to rely on it, and the ripple effect compounds the error for generations.

The *fiqh* markets produced dozens of competing schools of jurisprudence that were fiercely independent of imperial government as well as of each other.³⁸¹ Each school of scholars was free to judge and critique each other's assumptions, materials, analysis, and conclusions. These schools did show profound respect for each other, but no evidence exists that they cooperated with each other to hoodwink their followers. Furthermore, the schools came up with competing solutions to the same problem. This jurisprudential diversity constructed in the *fiqh* markets demonstrates that legal scholars were not engaged in some monumental scam to fabricate the Sunna materials.

Goldziher and Schacht stunned Western scholars with their "fraud findings," as if an unassailable truth has been found to discard an essential part of the Basic Code.³⁸² Any further investigation into the truth of the Sunna was abandoned for the most part in the Western literature. Dismissing the scholarly works of Muslim opinio-jurists spanning over fourteen centuries, Goldziher and Schacht were also determined to shock the Muslim world with their fraud discoveries. But the *fiqh* markets were too seasoned to discard an entire past on the basis of fraud charges that non-Muslim jurists made thirteen centuries later.³⁸³

For the most part, the *fiqh* markets did not receive the Goldziher and Schacht studies.³⁸⁴ Even Muslim scholars who might have known these

CONCEPTION OF JUSTICE is cited twenty-seven times. Khadduri's ISLAMIC LAW OF NATIONS is cited twelve times.

379. See generally JOHN BURTON, AN INTRODUCTION TO THE HADITH (1994) (disagreeing with Schacht's thesis but presenting an equally problematic thesis that the *hadith* literature was fabricated for exegetical wars).

380. See generally G.M. AZMI, ON SCHACHT'S ORIGINS OF MUHAMMADAN JURISPRUDENCE (1985) (refuting Schacht's thesis and pointing out his misreading of the materials in Arabic).

381. See *supra* Part I.

382. Talmon, *supra* note 375, at 32 (disputing Schacht's "irrefutable truth").

383. Many modern constitutions of Muslim states specifically identify, in addition to the Qur'an, the Sunna as a fundamental super-source of law. See, e.g., PAKISTAN CONST. art. 227 (1980).

384. In the United States, there were present too few Muslim jurists to challenge these authors. Nonetheless, Fazalur Rahman of the University of Chicago offered an impressive critique of Schacht's thesis. When G. M. Azmi criticized Fazalur Rahman even for his limited acceptance of Schacht, Rahman promptly denied the charges. See generally Fazalur Rahman, Book Note, 47 J. NEAR E. STUD. 228 (1988) (reviewing G.M. AZAMI, ON SCHACHT'S ORIGINS OF MUHAMMADAN JURISPRUDENCE (1985)).

studies would dismiss them as enemy propaganda. Goldziher and Schacht challenge an established presumption in the *fiqh* markets. For over twelve hundred years, and after an intense controversy over fabricated *ahadith* in the first two centuries of Islam, the *fiqh* markets have settled the issue of the Sunna authenticity. It is unlikely that the *fiqh* markets would discard the Sunna on the basis of reasoning offered by two non-Muslims far removed in time and from original sources, especially when they challenge the Qur'an as God's Word. Goldziher and Schacht may shine in the external circles, but the pietistic and rational *fiqh* markets have no place for external scholars who analyze the Basic Code in a state of unbelief.

B. Scholarship on Borrowing

Another theme that runs through Western scholarship is the charge that Muslim opinio-jurists, including the Prophet himself, borrowed laws and jurisprudence from Jewish, Christian, Greek, and Roman sources. Implicit in this charge is perhaps the presumption that the Islamic tradition has been inherently incompetent in generating its own laws.³⁸⁵ Goldziher contends that Prophet Muhammad borrowed from Zoroastrianism that the Sabbath day was not a rest day.³⁸⁶ According to the Qur'an, God made the universe in six days, but there is no mention that He rested on the seventh day.³⁸⁷ In another verse, the Qur'an declares that God needs no rest, slumber, or sleep because He feels no fatigue.³⁸⁸ Accordingly, there is no Sabbath in Islam. Muslims are obligated to leave work for the Friday afternoon community prayer (*al-Jumu'ah*) but they are free to do business before and after the service.³⁸⁹

Lassner argues that in finding parallels between Moses and Muhammad, Muslim exegetes were linking the Islamic tradition with the Jewish tradition and claiming the Jewish history to be their own.³⁹⁰ In selecting Muhammad to the Prophethood at the age of forty, an age that embodies a perfect balance of physical and intellectual powers, God was invoking the ancient Jewish tradition, says Lessner, because Moses too was summoned to

385. Some external scholars argue that early Muslims lacked the "requisite intellectual capacity" to construct a fine legal system, a point that other external scholars do not accept. See S.V. Fitzgerald, *The Alleged Debt of Islamic to Roman Law* 67 L.Q. REV. 81 (1951), reprinted in ISLAMIC LAW AND LEGAL THEORY 25 (1996).

386. GOLDZIHHER, *supra* note 365, at 15.

387. See Qur'an, Sura al'Araf 7:54.

388. See Qur'an, Sura al-Baqara 2:255.

389. See Qur'an, Sura al-Juma 62:9 (commanding Muslims to leave business and attend the Jumu'a prayer).

390. See generally Jacob Lassner, *The Covenant of the Prophets: Muslim Texts, Jewish Subtexts*, 15 ASS'N JEWISH STUD. REV. 207 (1990).

Prophethood at the same age.³⁹¹ Lassner relies primarily on Ibn Ishaq's biography (the first biography of the Prophet that has survived) to advance his thesis of linkage. Lassner leaves the impression that Ibn Ishaq was deliberately concocting Muhammad's age of prophecy for an ulterior motive. That is, Ibn Ishaq was not simply reporting a fact but constructing a mystical linkage between Moses and Muhammad. Lassner knows that the Qur'an itself declares that the man achieves his full strength at the age of forty years.³⁹² The Qur'an, however, makes no connections between Moses's ministry and the age of forty. On the contrary, the Qur'an clarifies that Moses was given forty nights, and not forty years, for pre-Prophetic solitude.³⁹³ Lassner offers no explanation why Ibn Ishaq would concoct the age linkage that the Qur'an does not support.

Seemingly inspired by the works of Goldziher and Schacht, and relying heavily on the linguistic findings of other scholars, Judith Romney Wegner claims that the four basic sources of Islamic *fiqh*—Qur'an, *sunna*, *ijma* (consensus), and *qiyas* (reasoning)—have all been borrowed from the *Torah* and the *Talmud*.³⁹⁴ The first two sources, the Qur'an and the Sunna, are related both etymologically and conceptually to the Hebrew terms. The Qur'an is derived from *Miqra* (Torah) and the Sunna is drawn from *Mishnah* (Jewish oral law). *Ijma*, the third source, is conceptually related to *hakol* in that each term means juristic consensus.³⁹⁵ The fourth source of Islamic law, *qiyas*, tells the story of what Wegner calls "misborrowing" from Jewish sources.³⁹⁶ *Qiyas*, which is reasoning by analogy, was indeed a Talmudic legal method, says Wegner, which Muslim opinio-jurists imported into the Islamic *fiqh*.³⁹⁷ However, in borrowing the concept, the Arabs misapplied the Hebrew phrase.³⁹⁸ Finding no clear etymological connections between *qiyas* and some Hebrew/Talmudic phrase, Wegner conjectures that "what must have occurred here was a misreading of the Talmudic *maqqi's*."³⁹⁹

Wegner seems resolute in finding connections between Islamic and Talmudic jurisprudence. When Wegner cannot find direct borrowing from Hebrew/Talmudic sources, she paves a more belabored route to show the

391. See *id.* at 221-22.

392. Qur'an, Sura al-Ahqaf 46:15.

393. Qur'an, Sura al-Baqara 2:51, Sura al-A'raf 7:142.

394. See Judith Romney Wegner, *Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and Their Talmudic Counterparts*, 26 *Am. J. Legal Hist.* 25 (1982), reprinted in *ISLAMIC LAW AND LEGAL THEORY* 40-41 (1996).

395. See *id.* at 49-54.

396. *Id.* at 56.

397. See *id.* at 49-54.

398. See *id.*

399. *Id.* at 56.

way. In furnishing these connections, however, Wegner does not explain the reason and motive behind juristic borrowings.

Hebrew and Arabic were related languages, as are Urdu, Persian, and Arabic today. Words in closely related languages may have shared roots, but the shades of meaning frequently change as words cross languages.⁴⁰⁰ Some words undergo dramatic changes and are “misborrowed” when they enter into other languages.⁴⁰¹ If Wegner is indulging in Hebrew/Arabic linguistic cross-influences, she will find hundreds of words to prove her point, words both inside and outside Islamic and Talmudic jurisprudence.⁴⁰² What she seems to be doing is to establish the superiority and originality of Talmudic jurisprudence over Islamic *fiqh*. She is painting a picture in which first the Prophet and later Muslim opinio-jurists freely borrowed, over a period of more than two hundred years, from Jewish sources without crediting the Torah and Talmudic law.⁴⁰³ Wegner comes close to laying the charges of jurisprudential plagiarism. To promote her creditor-debtor thesis, Wegner relies on etymology as much as she does on concepts. In her analysis, she seems to be suggesting, hopefully unwittingly, how a lesser

400. For example, the word *ghulam* means boy in Arabic but servant in Urdu. From this misborrowing, one can make intriguing speculations depending on one’s flight of fancy, prejudice, or personal cultural presumptions. One could speculate that a less developed Urdu speaking world in India treated children as servants or that a class-oriented Urdu elite thought that servants’ intellectual competence was no more than that of children. Conversely, one could also fish for evidence to show that the Arabs treated their children as servants or belittled their servants as children.

401. Karl F. Koenig, *German Loan Words in America, 1930-40*, 15 GERMAN Q. 163 (1942). During this period, most of the loan words from Germany acquired pejorative meaning. For example, the word “Nazi” was simply the abbreviation of “National Socialist” and became so derogatory that the German government banned its use in German broadcasts. *Id.* at 164. Likewise, Fuhrer and Gestapo, ordinary words in German, became associated with ridicule and scorn in America. *Id.*

402. For a rewarding analysis of the early differentiation of Semitic languages, see W. Volck, *The Semites*, 2 HEBRAICA 147 (D.M. Welton trans., 1886). The authors argue that all Semitic languages, including East Aramaic, West Aramaic, the Hebrew of the Old Testament, the language of the Qur’an, Syriac and Babylonian dialects, all these variations branched off from one primitive mother language. *Id.* at 149. The seat of the primitive mother language, however, is disputed. Some scholars place it in Arabia, others in Mesopotamia. *Id.* Some scholars proposed to call this group of languages as Syro-Arabic, rather than Semitic. *Id.* at 148. The word “Semitic” is a descriptive label for all these languages, because the word is now primarily associated with Jews and not with other ethnic groups in Arabia, builds the false impression as if Hebrew had been the original mother language. At the micro level, some words may have originated in the Hebrew dialect and crossed over to others. At the macro level, however, there exists no evidence to demonstrate that the Hebrew of the Old Testament or that of the Talmud was the dominant language of Arabia and Mesopotamia during the time the Prophet received revelations of the Qur’an.

403. See Wegner, *supra* note 394, at 81 (noting Shafi expunged references to foreign sources). Wegner also implies that if Imam Shafi produced his classical work *Risala* in a short time, he must have “tapped a ready-made but unacknowledgeable source.” *Id.* at 80. This is a charge of plagiarism placed on one of the most revered Muslim jurists of all times.

people with a lesser language and lesser minds appropriated developed concepts from a superior legal tradition, instead of applying rigor and industry to the intricacies of their new faith-based jurisprudence.⁴⁰⁴

Wegner's thesis of Islam's clandestine acquisitions from Jewish texts is momentous in the case of the Qur'an. The concept of the Qur'an, both as a book of divine revelation and as a primary code of law, says Wegner, is Jewish in origin.⁴⁰⁵ Wegner invokes linguistic parallels that supposedly exist between the words Qur'an and *miqra* to show that "in coining the term *qur'an*, Muhammad used Hebrew/Aramaic terminology."⁴⁰⁶ The word Qur'an was apparently invented to absorb the meaning of *miqra*, which refers to Torah read aloud during public worship.⁴⁰⁷ Wegner allows the possibility that the word Qur'an might have been derived from the Aramaic word *qeryana*, itself a term for "reading," a word that Christians used for their scriptures. However, Wegner notes that *miqra*, both as a word and a concept, was in ritual practice over five centuries before the beginning of the Christian era. Thus per Wegner, even if the Qur'an is morphologically closer to Christian *qeryana*, both words *qeryana* and *qur'an* on "a first come, first serve" basis would be derivatives of Jewish *miqra*.⁴⁰⁸

Wegner offers no original research of her own to trace the origin of the word Qur'an from *miqra*. She credits her linguistic thesis to Arthur Jeffrey, an author of a book on the foreign vocabulary in the Qur'an.⁴⁰⁹ Borrowing from Jeffrey, Wegner intimates that the word Qur'an is derived from *qara'a*.⁴¹⁰ To this extent, Wegner breaks no new ground, as other scholars would agree to a similar origin.⁴¹¹ The next step Wegner takes, however, is critical. She asserts that the word *qara'a* has no native root in Arabic but is derived from Hebrew/Aramaic sources.⁴¹² The word *qara'a* first appeared in the north Semitic languages (Hebrew and Aramaic) and not in Arabic, proposes Wegner, "because of the earlier development of literacy among the northern Semites."⁴¹³ Put simply, Wegner is saying that since Northern Semites could read long before Arabs, the word *qara'a* (translated as read-

404. Wegner, for example, makes statements that northern Semitic languages (Hebrew/Aramaic) were more developed than Arabic. *Id.* at 42.

405. *See id.* at 43.

406. *Id.* at 42.

407. *See id.* at 41-42.

408. *See id.* at 42.

409. ARTHUR JEFFREY, *THE FOREIGN VOCABULARY OF THE QURAN* (1977).

410. *See id.* at 233. Some Muslim philologists speculated that the word *qara'a* was derived from *qaran*, which means "to be together." Other Muslims believed that the Qur'an was a unique word derived from no other word. *Id.* at 233-34.

411. *See* William Graham, *The Earliest Meaning of Quran*, 23 *DIE WELT DES ISLAMIS* 361, 365-66 (1984) (mentioning Wegner's claim, but concluding that *qara'a* is derived but not borrowed from Syriac sources).

412. *See* Wegner, *supra* note 394, at 42.

413. *Id.*

ing) is Jewish invention. While Wegner might be correct, the problem with her bold assertion is that *qara'a* also means "to recite," a fact that Wegner admits in a footnote.⁴¹⁴ Since *qara'a* (translated as recitation) is the ritual of an oral culture, as the culture of southern Semites (Arabs) is portrayed, it is equally likely the root word *qara'a* originated in oral communities. It must be kept in mind that the Qur'an was revealed as an oral text, for God did not send the Qur'an in a written form.

Indeed, suppose that the root word *qara'a* originated in literate north Semitic communities. Even then, Wegner's thesis need not be damaging, since an additional question must be asked: in which period did the word originate? Since *miqra* is derived from *qara'a* and since *miqra* denoted Torah read in synagogues, the root word *qara'a* must have preceded *miqra*. Wegner herself assumes that the ritual of *miqra* had been invented at least five hundred years before Christ, "since the time of Ezra in the fifth century B.C."⁴¹⁵ In terms of Islam, this would mean that the word *miqra* existed in north Semitic languages for at least eleven hundred years before the Qur'an was first revealed to Prophet Muhammad in 610. In these eleven hundred years, we cannot assume that *qara'a* remained confined to the north and did not enter the south Semitic dialects. Scores of Jewish tribes lived in south Arabia,⁴¹⁶ including Medina and other towns.⁴¹⁷ These tribes were reading Torah in synagogues. It is highly unlikely that the Jews in Medina were equally unfamiliar with the word *qara'a*. A more sensible conclusion would seem to yield that the word *qara'a* had entered the Arabic language, perhaps due to the courtesy of local Jewish tribes, long before the Prophet began to receive the Qur'an. It is highly improbable that the word *qara'a* was a foreign word in the seventh century Arabia.

According to the Islamic tradition, the very first word revealed to the Prophet was *iqra*, another word derived from *qara'a*.⁴¹⁸ If *qara'a* and its derivatives were foreign words, it is unclear why the Qur'an would use a

414. *Id.* at 41 n.28.

415. *Id.* at 42.

416. See generally Abraham I. Katsh, *Judaism and Islam*, 36 J. EDUC. SOC. 400 (1963) (discussing Jews living in Arabia).

417. Davis, *supra* note 252, at 334 (showing the presence of Jews, Christians, and Persians).

418. Qur'an, Sura al-Alaq 96:1. In English translations of the Qur'an, the word *iqra* in sura al-Alaq has been translated in three different ways: read, recite, or proclaim. According to one Muslim jurist, the first revelation was presented to the Prophet in a written form since the word *iqra* meant "read" to which the Prophet said that he could not read. Maulana Abu A'la Maududi, *The Meaning of the Quran*, sura al-Alaq, description No. 1., <http://www.translatedquran.com/meaning.asp?pagetitle=AL+-+ALAQ&sno=96&tno=1803> (last visited May 11, 2007). See also, Tafsir Ibn Kathir, Al-Alaq, *The Beginning of the Prophethood of Muhammad and the First of the Qur'an Revealed*, <http://www.theholybook.org/index.php/content/view/9105/2/> (last visited May 11, 2007) (quoting the exchange between the Prophet and the angel over "reading" the first revelation).

foreign word as its first word, a word foreign to the Prophet. After all, the purpose of the revelation was to empower the Prophet to convey God's message to the people of Arabia: "And thus: We have revealed to you a Qur'an in Arabic so that you may warn the major cities and those who dwell around it."⁴¹⁹ It defies common sense that, according to the externalist scholarship, neither the Prophet nor his Arab audience knew the very first word of the first revelation of the Qur'an.

Wegner is not alone in asserting the presence of foreign words in the Qur'an. There has been a sturdy scholarly industry devoted to finding foreign words in the Qur'an. For example, the word *iman* (faith), which connotes believing, embodies a fundamental concept of the Qur'an.⁴²⁰ *Mu'min* is a person who possesses *iman*, one who believes.⁴²¹ The Qur'an repeatedly addresses Muslims as *mu'miniin*.⁴²² Ringgren correctly points out that the word *mu'min* and its plural *mu'miniin* appear more frequently in the Qur'an than the word Muslim.⁴²³ Ringgren makes these accurate observations, though, to further argue that the word—*amana*—from which the words *iman*, *mu'min*, and *mu'miniin* are derived—in the sense of "believing" is "a loan-word," borrowed from Syriac, Aramaic, Ethiopic, or Hebrew.⁴²⁴ He concedes, however, that the word *amana* in the sense of "safety" did exist in Arabic.⁴²⁵ But the native meaning of *amana*, concludes Ringgren, does not fully explain most verses of the Qur'an in which *amana* connotes the belief of the mind and of the heart.⁴²⁶ It is unclear how Ringgren's linguistic assertion, even if it is credible, will change any article of faith in the *fiqh* markets.

The externalist scholarship that is determined to find foreign words in the Qur'an aims at refuting the claim that the Qur'an was revealed in clear

419. Qur'an, Sura ash-Shura 42:7 (translated by author).

420. See, e.g., Sura al-Baqara begins with a set of beliefs required to seek guidance from the Qur'an. Qur'an, Sura al-Baqara 2:2-4 (Qur'an is guidance for those who believe in the Unseen and those who believe in the Revelation). Repeatedly, the Qur'an identifies the people who believe and do good works. See, e.g., Qur'an, Sura al-Baqara 2:25 & 2:82 (those who believe and do good works).

421. See, e.g., Qur'an, Sura al-Baqara 2:91 (demanding explanation and showing inconsistency in the behavior of those who claim to be believers but who slew the prophets of God).

422. See, e.g., Qur'an, Sura al-Baqara 2:104, 2:153, 2:172, 2:178, 2:183, 2:208, 2:254, 2:264, 2:267, 2:278, 2:282. All these verses begin with an address: "Yā ayyuhā al-latheena amanoo" (O ye who believe!) (translated by author).

423. Helmer Ringgren, *The Conception of the Faith in the Koran*, 4 ORIENS 1 (1951). In sura al-Baqara, for example, the word "Muslim" appears only in one verse, Qur'an, Sura al-Baqara 2:128, whereas the word "believe" in its various forms appears in forty-one verses.

424. See *id.* at 1, 16.

425. See *id.* at 16.

426. See *id.* at 16-20. But see Qur'an, Sura al-Anaam 6:82 (the word *amana* appears in both senses of "faith" and "security" in the same verse) (translated by author).

Arabic, contrary to the Qur'an, which says, "Behold, We have made it a Qur'an in clear Arabic language that you may fully understand."⁴²⁷ By showing the presence of foreign words in the Qur'an, the externalist scholarship is also suggesting, as discussed above, that the Prophet was concocting the Qur'an by consulting foreign sources.⁴²⁸ At the time of revelation, however, the objections were raised from the opposite side. The critics were questioning why the Qur'an was revealed in Arabic and not in another language. To these objections, the Qur'an offers the following answer:

Now if We had made it a Qur'an in a non-Arabic tongue they would surely have said, 'Why is it that its verses have not been made clear? Why—a foreign tongue and an Arab (messenger)?' Say, 'For those who accept it, this is a guidance and a healing for a wholesome life. But as for those who will not believe (Arabs or non-Arabs), in their ears is deafness, and so it remains obscure to them. They are like a people who have been addressed from a far away place.'⁴²⁹

In light of these verses, the *fiqh* markets disregard etymological scholarship that belabors to show that numerous words of the Qur'an originated in other regional languages.⁴³⁰ Furthermore, the point is trivial. According to the Qur'an, God is the creator of all languages: "And among His Signs is the creation of the heavens and the earth, and the variations in your languages and your colors."⁴³¹ The presence of foreign words does not diminish the revelatory character of the Qur'an.

C. New Developments in *Fiqh* Markets

1. Geopolitical Rivalries

The disengaged scholarship flourishes the most in periods of intense geopolitical rivalry with the Muslim world.⁴³² It is no coincidence that the abusive scholarship about Islam first emerged in what Southern calls "the ignorance of [a] confined space,"⁴³³ a period of several centuries in the Middle Ages when authentic information about Islam was unavailable or the

427. Qur'an, Sura Yuusuf 12:2, Sura az-Zukhruf 43:3 (translated by author).

428. See text accompanying *supra* notes 394-426.

429. Qur'an, Sura Haa-Miim Sajdah 41:44 (translated by author).

430. See, e.g., James A. Bellamy, *More Proposed Emendations to the Text of the Koran*, 116 J. AM. ORIENTAL SOC'Y 196, 196 (1996) (showing word "errors" in the text of the Qur'an); *Textual Criticisms of the Koran*, 121 J. AM. ORIENTAL SOC'Y 1 (2001) (making fun of the Prophet that he did not proofread his revelations and making a sarcastic comment that the Prophet was indeed "illiterate" as the Muslims believe). Such blasphemous literature is unlikely to have any developmental influence on the *fiqh* markets.

431. Qur'an, Sura Ar-Ruum 30:22 (translated by author).

432. Palmer A. Throop, *Criticism of Papal Crusade Policy in Old French and Provençal*, 13 SPECULUM 379 (1938) (defeat in crusades caused despair).

433. R. W. SOUTHERN, *WESTERN VIEWS OF ISLAM IN THE MIDDLE AGES* 13 (Harv. Univ. Press 1962).

scholars were unprepared to accept it.⁴³⁴ Part of this ignorance stemmed from a belief among external writers and their audiences that Islam was a false faith and, therefore, all means, including misrepresentations and distortions of historical facts, were necessary to expose Islam's fraudulent foundation.⁴³⁵ The common people in ancient Europe knew little more than fictitious and ill-informed versions of Islam. The dread of a dominating Muslim world that had defeated the Byzantine and conquered Jerusalem and Spain furnished the catalyst for distortions about Islam.⁴³⁶

In the twentieth century, independence movements against European colonialism provided a backdrop for external scholars to deform the letter and spirit of Islam. Even today, the Bosnian Muslims seeking separation from Christian Serbs, the Arabs struggling to regain occupied Palestine from European Jews, and the Chechens fighting for independence from Russia, all these liberation movements have been successfully labeled as terrorism—as violent pictures of Islam.⁴³⁷ A new Western consensus has emerged, portraying Islam as essentially violent. Propagandists disguised as terrorist experts have been boldly arguing that the roots of terrorism sprout from the puritanical faith of Islam, and not from oppression, territorial theft, settlements, assassinations, and occupations.⁴³⁸

The 9/11 terrorist attacks proved a godsend for the propagandists. As before, geopolitical rivalries produced a massive scholarship of distortions. In pre-9/11 America, the Muslim world was seen through racial caricatures of Arabs and other Muslims and through the mixed menace of the Middle Eastern oil power and general social backwardness that had gripped most Muslim nations.⁴³⁹ In post-9/11 America, the understanding of Islam has been shockingly simplified. Islam is now equated with gratuitous violence.⁴⁴⁰ Since Muslims living in America constitute a marginal minority, they have little resources to turn the tide of distortions.⁴⁴¹

The establishment of Israel in the Middle East has also spawned externalist scholarship that does not view Islam kindly.⁴⁴² It is no secret that the Qur'an speaks more softly about Christians than Jews, even though in

434. DANIEL, *supra* note 233, at 17.

435. *Id.* at 271.

436. *See* Throop, *supra* note 432.

437. L. Ali Khan, A THEORY OF INTERNATIONAL TERRORISM: UNDERSTANDING ISLAMIC MILITANCY (2006) (analyzing in the first chapter the plight of aggrieved groups that resort to violence).

438. *Id.*

439. *Id.*

440. *Id.*

441. Ali Khan, *Fighting Words: The Abuse of Islam in Political Rhetoric*, JURIST Aug. 20, 2006, available at <http://jurist.law.pitt.edu/forumy/2006/08/fighting-words-abuse-of-islam-in.php> (last visited May 11, 2007).

442. Liaquat Ali Khan, *The Essentialist Terrorist*, 45 WASHBURN L.J. 47 (2005).

many aspects Islam is closer to Judaism. Sir William Muir notes the Qur'anic verses that capture the differing view of Jews and Christians and offers an explanation of why the Qur'an treats the two communities of believers differently.⁴⁴³ The Prophet fully acknowledged the scriptures of Jews and Christians. The Christians were pleased that the Prophet had accepted the truth of their gospels, though with modifications.⁴⁴⁴ This acceptance was a welcome relief as compared to the complete Judaic repudiation of the New Testament.⁴⁴⁵ Christians and Muslims were also aligned because they both believed in the Jewish scriptures. Furthermore, Muir states that per the Qur'an, the Christians were not arrogant and they "are never accused of wresting the Scriptures, or dislocating passages from the context."⁴⁴⁶

The distortions about Islam are not mere theological disputes, but can lead to war. "At the time of the Crusades, preposterous tracts against Islam were common in the West. Some fabricated outrageous lies about Mohammed."⁴⁴⁷ These lies paved the way for aggression and genocide. European warriors committed to liberate Holy Jerusalem "saw Muslims as godless heathen[s]; others thought them polytheists who worshipped a blasphemous trinity of gods; still others thought they worshipped Muhammad himself."⁴⁴⁸ Most of this confusion was introduced through scandalous scholarship. A similar phenomenon to paint Islam as a source of terrorism and fascism is brewing in the Western world, particularly in the United States where a legion of scholars are committed to malign Islam and pave the way for invasions and occupations.⁴⁴⁹

The role of external scholars in intense periods of geopolitical rivalries, classical and contemporary, has been complex and complicit toward distortions. In such times, some external scholars of Islam did have a more accurate understanding of Islam but said nothing,⁴⁵⁰ others fanned the ignorance, while still others manufactured their own distortions to perpetuate ignorance.⁴⁵¹ The European age of distortions produced crusades. The American distortions have given birth to the war on terrorism. In every conflict-ridden period, some external scholars stood up against the tide and refused to lay blame on the Basic Code or Islamic *fiqh*.

443. Sir William Muir, *Sura V, v. 91 (The Coran)*, 1 HEBREW STUDENT 14 (1882).

444. *Id.*

445. *Id.*

446. *Id.*

447. Kritzeck, *supra* note 240, at 395.

448. *Id.*

449. Khan, *The Essential Terrorist*, *supra* note 442.

450. *Id.*

451. *Id.*

2. *Temporary Coercions*

External forces, including international institutions, may pressure Muslim opinio-jurists and scholars to answer their concerns, questions, and criticisms of the *fiqh* rules. Because Islam is not an organized religion, however, external forces are rarely successful in shaping the Islamic *fiqh*. Organized religions, such as the Mormon Church, are more susceptible to external pressures. Its leadership may be persuaded, coerced, or threatened to change the Church law. The United States Supreme Court, for example, outlawed the Mormon Church's permissive rules on polygamy.⁴⁵² The Mormon Church was threatened with forfeiture of its property if it did not comply with the laws of the federal government in outlawing polygamy.⁴⁵³ In order to preserve itself, the Mormon Church changed its doctrine on polygamy.⁴⁵⁴ External coercions may pressure Muslim governments not to enforce the *fiqh*, but they have no influence on the *fiqh* markets. Thus free markets protect what Muslim governments cannot.

In recent decades, for example, Muslim states have come under external pressure to change some rules of the Islamic *fiqh*.⁴⁵⁵ An international campaign has been launched to change the Islamic law of apostasy, under which a Muslim who converts to another religion faces the death penalty.⁴⁵⁶ Since conversions from Islam are few and far between, the campaign has been unable to gain momentum.⁴⁵⁷ But even when Muslim's conversion to another religion receives international attention, Muslim states diffuse the

452. See *Reynolds v. United States*, 98 U.S. 145 (1878) (affirming criminal conviction of a Mormon man for practicing polygamy).

453. In 1890, twelve years after deciding *Reynolds*, the U.S. Supreme Court upheld the confiscation of church property. See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890). See also Todd M. Gillett, *The Absolution of Reynolds: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL RTS. J. 497, 518 (2000) (noting the practice of polygamy was a factor in the justification for confiscation).

454. Edwin Firmage & Richard Mangrum, *ZION IN THE COURTS* (1988) (The Mormon Church is not the official name of the people who believe in the Book of Mormon. The church is called The Church of Jesus Christ of Latter-Day Saints, a designation that affirms the church's relation with Christianity).

455. Amnesty International, *Pakistan: Blasphemy Laws Should Be Abolished*, Aug. 21, 2001, <http://web.amnesty.org/library/Index/engASA330232001?OpenDocument&of=COUNTRIES\PAKISTAN> (last visited May 11, 2007).

456. Donna E. Arzt, *Religious Human Rights in Muslim States of the Middle East and North Africa*, 10 EMORY INT'L L. REV. 139 (1996) (explaining the Islamic laws of apostasy in light of human rights treaties).

457. Despite the negative image of Islam in the Western world, particularly with respect to women, more and more Western women are converting to Islam rather than Muslim women converting away from Islam. See Anne Dixey, *Allah's Daughters: Muslim Converts*, TIMES (LONDON), July 1, 2006, at 33 (explaining that for British women, Islam offers an alternative view of feminism).

matter by finding a loophole, such as the convert's mental illness, for not enforcing the apostasy law.⁴⁵⁸ Some resist the pressure and uphold the law.⁴⁵⁹ Even when Muslim states succumb to external pressures, the *fiqh* markets are immune from any forced changes. And even when Muslim governments are forced to modify well-established rules of the *fiqh*, the *fiqh* markets continue to uphold the validity of impugned rules.⁴⁶⁰ The *fiqh* markets may adopt more flexible rules on apostasy through a genuine reconsideration of the freedom of religion that the Qur'an preserves and mandates.⁴⁶¹ External pressures will only stall the action of the *fiqh* markets.

That pressure can coerce rulers but not the *fiqh* markets is evident from colonial coercions. Western colonial powers played a big role in forcing occupied Muslim communities to abandon some rules of *fiqh*. In Algeria, for example, the colonial France passed laws to neutralize the restrictive elements of *waqf* property.⁴⁶² According to the laws of *waqf*, property placed in a public trust could not be sold in the free market.⁴⁶³ Such public trusts are created to provide charitable services in perpetuity.⁴⁶⁴ This forcible change, however, did not dismantle the Islamic law of *waqf* property, which has served the Islamic civilization for centuries.⁴⁶⁵

3. *The Erosion of Language Barriers*

For centuries, the externalist scholarship has been written in languages inaccessible to Muslim scholars, particularly European languages. For the most part, Islamic scholarship produced by Muslims was also inaccessible to non-Muslim scholars. There has been a language barrier between the two scholarships with each enjoying its own audience. External scholarship is written primarily for non-Muslims, whereas internal scholarship is written for Muslims. Even internal scholarship is not always accessible to all Mus-

458. See, e.g., Sultan M. Munadi & Christine Hauser, *Christian in Kabul Is Spared Execution*, INT'L HERALD TRIB., Mar. 29, 2006, at 1.

459. David A. Jordan, *The Dark Ages of Islam: Ijtihad, Apostasy, and Human Rights in Contemporary Islamic Jurisprudence*, 9 WASH. & LEE RACE & ETHNIC AN. L.J. 55, 64-65 (2003).

460. See, e.g., *Afghan Islamic Legal Expert Defends Death Penalty for Apostasy*, AGENCE FR. PRESS, Apr. 5, 2006.

461. Qur'an, Sura al-Baqara 2:256 (there is no compulsion in religion) (translated by author). See also Khan, *Intellectual Property*, *supra* note 220, at 663-66.

462. David S. Powers, *Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India*, 31 COMP. STUD. SOC'Y & HIST., 535 (1989).

463. *Id.*

464. Timur Kuran, *The Provisions of Public Goods Under Islamic Law: Origins, Impact, and Limitations of the Waqf System*, 35 L. & SOC'Y REV. 841 (2001) (explaining the concept of Islamic trust).

465. *Id.* at 848.

lims. For example, Islamic scholarship written in Arabic remains inaccessible to Muslims who do not speak Arabic. Even in external circles, language has been a barrier. It is unclear how frequently and how promptly the scholarship published in different European languages was accessible to the external scholars of Islam.

The language and audience barriers may have emboldened externalist scholars to attack Islamic law more ferociously, and somewhat irresponsibly, because they knew that their theses would not reach Muslim scholars for rebuttal.⁴⁶⁶ Even in these segregated times, the externalist scholarship was not free of all restraints. Some external scholars were more sympathetic to Islam than others. This division among external scholars created some scholarly rivalry, providing some checks and balances over their research methodologies and scholarly products.⁴⁶⁷ However, as Muslim scholars equipped with European languages begin to read and react to externalist scholarship, the external scholars will no longer be free to get away with sloppy or sensational research. In the new world, the language barriers are fast disappearing. Major works are promptly translated into the major languages of the world. Muslim scholars in the West can read the externalist literature and the Islamic literature is now available in the external circles. Furthermore, Muslims speaking both Arabic and European languages have translated the Qur'an, the Sunna, and other basic texts into European languages. These translations of basic Muslim texts furnish more reliable sources for scholarly research free of distortions caused through negligence, incompetence, or malice.

A new breed of scholars is producing externalist scholarship that is markedly different in tone and competence.⁴⁶⁸ This new externalist scholarship is owed to non-Muslim scholars from the Muslim world. Philip Hitti (1886-1978), a Christian Lebanese, has had great influence in introducing

466. Edward Said, however, argues that Western governments, corporations, and experts in the academy all are parts of a closed circle that distort Islam for domination and exploitation. See EDWARD W. SAID, *COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD* (1981).

467. Orientalists may be distinguished from other externalist scholars who may not share some of the orientalist assumptions or presumptions about Islam. Bernard Lewis, for example, is an orientalist who sees Muslim nations as enraged, irrational, and envious of the Western civilization. By contrast, an externalist scholar, though a non-Muslim, may reject some or all of the orientalist assumptions. As indicated earlier, external scholars do not write or analyze Islamic sources out of submission to One God, respect for Prophet Muhammad's Sunna, or belief in the Qur'an as the final source of revelation. But not all external scholars share the same assumptions about the genesis, history, or development of Islamic *fiqh*. The most powerful critique of orientalism, for example, has come from Edward Said, a Christian, not a Muslim. See EDWARD W. SAID, *ORIENTALISM* (1979).

468. Seyyed Hossein Nasr, *Foreword*, in *ISLAM, FUNDAMENTALISM, AND THE BETRAYAL OF TRADITION* viii (Joseph E.B. Lumbard ed., 2004) (naming Rene Guenon, Frithjof Schoun, and Tutus Burkhardt as scholars with deep knowledge of both worlds).

Islamic studies to the United States.⁴⁶⁹ Edward Said (1935-2003), a Christian Palestinian, has been even more influential in exposing distortions of the Orientalists.⁴⁷⁰ Even though these authors were not Muslims, they did understand the culture, language, and traditions of the Muslim world. Scores of non-Muslim scholars from the Islamic world occupy influential positions at premier colleges and universities.

Scholars who speak to both worlds with authority and credibility are a rare breed. External scholars unfamiliar with Islamic cultures, languages, and communities muster little credibility in the *fiqh* markets. Their scholarship has little positive influence on the development of Islamic law—just as a Muslim scholar who loathes the Western world and holds Western values in open contempt ceases to speak to the Western world. External scholars with double connectivity may be able to produce more effective scholarship. Double connectivity, however, is not an automatic ticket to influence the *fiqh* markets. Some Muslim and non-Muslim writers with dual connections have produced highly scandalous scholarship that contributes nothing to the *fiqh* markets.⁴⁷¹ Effective double connectivity emerges from a genuine understanding of and authentic respect for Islamic law as well as Western values.

4. Popular Protests

In the mix of new developments, a disturbing trend has arisen in the Muslim world. Popular Muslim reactions against the externalists' attacks on the Basic Code and the Prophet demonstrate that the principle of disengagement is no longer fully obeyed. The controversy over the cartoons of Prophet Muhammad, showing him as a terrorist, demonstrates that Muslims throughout the world have become increasingly more assertive in reacting to gratuitous distortions of their faith.⁴⁷² The murder of Dutch filmmaker

469. See PHILIP K. HITTI, *ISLAM: A WAY OF LIFE* (1970); PHILIP K. HITTI, *HISTORY OF THE ARABS* (1937); PHILLIP K. HITTI, *CAPITAL CITIES OF ARAB ISLAM* (1973).

470. The Orientalist scholar surveys the East, says Said, from above and through reductive categories, creating ideas without evidence and regardless of evidence. SAID, *supra* note 466, at 239.

471. See, e.g., Ibn Warraq, *WHY I AM NOT A MUSLIM* (1995); see also JEREMIAH D. MCAULIFFE, *TRENDS AND FLAWS IN SOME ANTI-MUSLIM WRITING AS EXEMPLIFIED BY IBN WARRAQ*, available at <http://www.city-net.com/~alimhaq/text/warraq.htm> (last visited May 11, 2007). For some details of Ibn Warraq's biographical facts, see http://en.wikipedia.org/wiki/Ibn_Warraq (last visited May 11, 2007).

472. Cem Ozdemir, *Germany's Integration Challenge*, 30 FLETCHER F. WORLD AFF. 221, 225 (reporting that fifteen million Muslims in Europe protested peacefully over the publication of the cartoons); see also *Prophet Drawings Anger Kuwait Lawmakers*, ASSOC. PRESS ONLINE, Nov. 8, 2006 (referring to the Kuwait parliament's passage of a resolution to sever diplomatic relations with Denmark over the cartoons and spend \$50 million to defend the Prophet's image in the West).

Theo van Gogh, who made a movie called *Submission*, which highlighted the ill treatment of women in the Islamic world by showing verses of the Qur'an tattooed on the semi-naked bodies of dancing girls,⁴⁷³ is another example of militant popular defense of Islam.

Under the disengagement principle, Muslims should ignore attacks like those of the Muhammad cartoons and van Gogh's film—not react violently. Respect for other religions is an issue that the external legal systems must address under their own values. Whether the people in external cultures should be free to trash prophets and holy books and whether it is appropriate under their laws to inflict emotional distress on communities of believers is not an Islamic problem, because Islam forbids Muslims from making fun of any religion. Muslims may simply ignore the attacks on the Qur'an, the Sunna, and the Prophet under the disengagement principle: "*La-kum Diinukum wa la-yi Diin* (To you be your Way, and to me mine)."⁴⁷⁴ It appears, however, that a new rule has emerged in the *fiqh* markets. If an artist or writer publicly insults the Prophet or the Qur'an, Muslim populations will protest and show their resentment.

CONCLUSION

The *fiqh* markets are founded on the belief that the Qur'an and the Sunna are the primary sources of Islamic law. Muslim opinio-jurists, pious and able, may offer opinions on new issues. An opinion compatible with the Basic Code that is broadly followed in the Muslim world becomes the rule of Islamic law. Because opinio-jurists may offer competing rules on the same issue, the *fiqh* markets are tolerant of pluralist rulings that may coexist. Islamic law in this sense is not monolithic. The *fiqh* markets do not allow non-Muslim jurists to issue opinions. However, external scholars may provide constructive criticisms that might persuade Muslim jurists to apply more rigor in proposing new rules of Islamic law. Unfortunately, the external scholarship has often been disrespectful of the Qur'an and the Prophet. Such blasphemous scholarship has had little impact on the *fiqh* markets but it negatively affects the interfaith discourse, straining relations between the West and the Muslim world.

473. *Dutch MP Plans New Islam Film*, BBC NEWS, June 17, 2005, <http://news.bbc.co.uk/2/hi/entertainment/4103206.stm> (last visited May 11, 2007).

474. Qur'an, Sura al-Kaafiruun 109:6 (translated by author).