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

—Quran, sura al-Furqan 25:7

INTRODUCTION

Since the emergence of Islam in the early seventh century (610-632), Islamic law has developed through the free markets of jurisprudence, which may be called iswaq al fiqh. A jurisprudence (fiqh) market consists of jurists (mufti), scholars (mujtahid), and followers (ashab). This article describes muftis and mujtahids as opinio-jurists. 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, i.e., the Quran and the Sunna. These opinions, known as fatawaa, compete in the jurisprudence markets to win over Muslim followers. Each competing opinion may receive some following. An opinion (fatwa) that gains the most Muslim followers becomes a rule of Islamic law. Even minority opinions 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. An important exception exists, however: no option is available with respect to mandatory rules of the Basic Code, which all Muslims must obey. 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 Quran, 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 opiniojurist who issued it, nor does it require that followers be students of the opiniojurist or that they formally belong to the school of fiqh the opiniojurist 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.” An opinion that fails to produce compliant conduct (amal) 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.

The fiqh markets incorporate a fundamental distinction between mu’minin and munkiriin. Mu’minin are Muslims who believe in the Quran and the Prophet’s Sunna. Their scholarship, which is anchored in faith (iman), does not contravene the basic beliefs of Islam. By contrast, 

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6 This is the reason why Islamic law is also known as personal law rather than territorial or tribal law. See L. Ali Khan, A THEORY OF UNIVERSAL DEMOCRACY 36 (Kluwer Law International, 2003)
7 Quran, sura al-Hazab 33:36.
8 Sahih Bukhari, Vol. 2, Bk. 23, No. 448. 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 27-58, at 57 (2001).
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 sense of legal obligation to follow the practice come together as a unity. See Mark W. Janis, AN INTRODUCTION TO INTERNATIONAL LAW 46-48 (Aspen Publishers, 2003).
munkiriin are persons who may deny the existence of God, Muhammad’s prophethood, or the Quran’s revelatory authenticity. Per the Quran: “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.’”\(^{12}\) In their scholarship, munkiriin may not accept all constraints of the Islamic faith.

So divided, \textit{mu’miniin} and \textit{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.\(^{13}\) 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.\(^{14}\) The Islamic law markets are essentially the phenomenon of \textit{iman} (trust in Islam), and not of \textit{inkar} (mistrust of Islam). This Article calls the works of \textit{mu’miniin} the internal scholarship, and those of \textit{munkiriin} the external scholarship.\(^{15}\) 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 \textit{fiqh}.

Therefore, the \textit{fiqh} markets presume that the scholar’s situated consciousness is inseparable from the contents of scholarship. \textit{Mu’miniin} and \textit{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 \textit{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,

\footnotesize{\begin{itemize}
  \item \textbf{12.} Quran, sura al-Furqaan 25:4.
  \item \textbf{13.} \textit{JANE DAMMEN McCALIFF, ENCYCLOPEDIA OF THE QU’AN}, viii (Brill, 2001)
  \item \textbf{14.} See text infra Part III A.
  \item \textbf{15.} 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. \textit{See} Stanford Encyclopedia of Philosophy, Externalism About Moral Content (available online) <http://plato.stanford.edu/entries/content-externalism/> 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 that the action is correspondingly caused and strengthened. For example, the reason for revealing the Quran to the Prophet in pieces rather than as a whole was so that “(God) may strengthen your heart thereby.” Quran, sura al-Furqan 25:32.
\end{itemize}}
and state of spirituality are also relevant. Can a Jewish or a Christian scholar write a credible piece on the exegesis of the Quran? Is a Hindu as qualified as is 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.\(^1\) The markets may disqualify or discount the scholarship situated in inkar.\(^1\) In matters of Islamic exegesis, the quality of person is as important as the quality of his research.\(^2\)

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 Quran, are kaafiriin.\(^3\) The distinction between kaafiriin and munkiriin is crucial. Christians and 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.\(^4\) Persons are free, however, to declare themselves as kaafiriin.

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 kufr (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.\(^5\) It rejects all notions of life after the worldly life.

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1. Even translations, let alone exegeses, of the Quran by non-Muslims are unacceptable to the fiqh market. Ahmed Von Denffer, ULUM AL QURAN, chapter 6 (Interpreting the Text) available online <http://www.islamworld.net/UUQ/6.txt>
2. Id. (listing the qualities of an exegete, including a firm belief (aqida) in Islam).
3. Quran, sura aali-Imraan 3:100; Sura al-Ma’idah 5:102; Sura al-Anam 6:130; Sura al-A’raf 7:37 & 7:93; Sura an-Naml 7:93; Sura ar-Rum; Sura al-Ahqaf 46:6. The Quran also uses another word Kaafiruun, which also appears a number of times, and which is also the plural of kaifir.
4. Quran, sura an-Nisaa 4:94 (Say not to the people in foreign lands: “you are not believers.”); sura al-Anam, 6:108 (Do not curse even false gods).
5. 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
The _kufr_ 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 Quran 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).  

Self-declared _kaafiriin_, however, continue to attack the sources and substance of Islamic law. In contrast to _kufr_ 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. All things submit to One God, and therefore the _kufr_ ideology cannot comprehend Islamic legal methods or Islamic law. _Kufr_ is the opposite of Islam. _Kufr_ denies the revealed truth. It is no surprise, then, that the _kufr_ 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 _kufr_. The denial of Islam and of God both generate dubitancy about Islamic law. The _kufr_-inspired scholarship may also aim at bringing down the edifice of Islamic legal history and Islamic law. Daniel Pipes, an avowed critic of Islam, welcomes such scholarship as the scholarship of termites. Ironically, though, the _kufr_ scholarship has the least effect on the _fiqh_ markets because Muslims decline to take it seriously, dismissing it under the principle of disengagement.

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23 Perhaps, the best articulation of this concept is available in the writings of Shah Wali Allah (1703-) 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. Marcia K. Hermansen, Shah Wai‘ī 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 143-157 (1986).
24 Quran, sura aali-Imraan 3:5-6; sura Az-Zumar 39:42. Some external scholars argue that Islam’s One God is arbitrary and that Musim 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 the British Journal of Sociology 217-225, at 218 (September 1956). This external views fails to appreciate that the Quran presents a universe perfectly ordered and balanced without arbitrariness. See, e.g., Quran, 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).
26 Daniel Pipes, Lessons from the Prophet Muhammad’s Diplomacy, MIDDLE EAST QUARTERLY (September 1999).
27 Id.
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 also discusses the disengaged scholarship that manufactures disrespect against the Quran and the Prophet. It also highlights external scholarship that paints Islamic law as a system founded on fraud and plagiarism. The *fiqh* markets disregard the disrespectful scholarship because assaults on the Quran 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 opinion 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. Although the disengaged scholarship rarely affects the *fiqh* markets, it nurtures prejudice and hostility against Muslims by perpetuating dangerous stereotypes. 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 Quran 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. The Quran provides a set of normative principles whereas the Sunna furnishes the case law that the Prophet decided in light of the Quran. The Basic Code consists of both the Quran (text) and the Sunna (case law). These two primary sources of law are immutable. No Muslim community may repeal or modify the Basic Code.

29 See infra Part III.
30 See infra Part I.
31 See infra Part II.
32 Seumour Vesey-Fitgerald, Muhammadan Law (Oxford University Press, 1931) (chapters on family law, change of religion, paternity, guardianship, inheritance, administration of estates, property, loans and security, gift, and trusts). Muslims do not call Islamic law as Muhammadan law; some external scholars use this phrase to provide a parallel with Christian law.
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. Even alterations through interpretation are blasphemous. Good faith interpretations of the Basic Code delivered by pious and knowledgeable Muslim opiniojurists, however, may freely compete in the fiqh markets for the Umma’s approval and compliant behavior. Bad faith interpretations, offered to deceptively undermine clear commandments of the Basic Code, rarely find a place in the fiqh markets.

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. 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.

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

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33 Quran, sura al-Anam 6:115 (None can change God’s words); sura an-Nasr 10:64 (no change can there be in the words of God).
35 Quran, sura aal-e-Imran 3: 7 (The Quran itself distinguishes between clear and allegorical revelations, warning that persons with perverse heart interpret allegorical verses to create mischief and discord.).
36 Quran, sura Ibrahim 14:51 (God keeps accurate accounts).
37 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 Irshad Abdal-Haqq, Islamic Law: An Overview of its Origins and Elements, in UNDERSTANDING ISLAMIC LAW 10 (Edit. Hisham M. Ramadan)(2006).
monopoly over the interpretations of the Basic Code. 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 Quran and the Sunna. 

There is only One Quran for all Muslims, and all Muslims are committed to follow the Prophet’s Sunna. 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. Even in Iran, however, Sunni Muslims are constitutionally protected and cannot be compelled to follow the juristic rules of the Shia fiqh. Article 12 of Iran’s Constitution provides that “other Islamic schools are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites.” 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. 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

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38 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 57 Muslim states. This international organization is a political organization, a mini united nations for the Muslim nations. See http://www.oic-oci.org/

39 The Quran recognizes the twin principles of unity and diversity. All Muslim constitute One Ummah, i.e. One Community. This unity is recognized in the Quran, sura al-Anbiya 21:92 (Muslims constitute one community or one religion or a single brotherhood). See also Iran Constitution, Article 11 (recognizing that all Muslims constitute a single community). Contrast this recognition of unity with diversity that is also acknowledged in the Quran. See sura al-Hujraat 49:14 (the creation of tribes and nations).

40 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.


42 Iran Constitution, Art. 12 (1979). This article recognizes the pluralism of madhabs that have existed in Islamic law.


44 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>
strict clerical hierarchy or state control over the fiqh markets have failed in the past and they are unlikely to succeed in the future.\footnote{Khaled Abou El Fadl, Rebellion and Violence in Islamic Law 90-92 (Cambridge University Press, 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 Islamic legal system. Id., at 93.}

B. Historical Fiqh Markets

Although the Basic Code, the Quran 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.\footnote{Khan, Second Era of Ijtihad \textit{, supra note} \text{1 at 348.}} This first era of \textit{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.\footnote{Id. 362-363.} 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.\footnote{Id.} Unrestrained imagination to interpret the Quran and the Sunna was discouraged.\footnote{Id.} 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.\footnote{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. Sahih Muslim, Bk. 4, No. 1885. But see the concept of “excellent innovation.” Sahih Bukhari, Bk. 32, No. 227. (available online in the USC-MSA Compendium of Muslim Texts).}

Medina\footnote{Imam Malik and his students established the fiqh market in Medina, the Prophet’s city, a jurisprudence deeply entrenched in hadith. The followers of this school are called \textit{Ah\textbar{l} al Hadith} or the traditionalists. See Taha Jabir Al-Awani, \textit{USUL AL Fiqh A\textbar{l} Islami} (Trans. Yusuf Talal DeLorenzo and A.S. Al Sheikh Ali), Chapter 3 & 4 explain the origin of the traditionalists and the competing schools of Medina and Kufa. Available online <http://www.usc.edu/dept/MSA/law/alawani_usulalfiqh/index.html> \text{>} and Kufa\footnote{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 \textit{Ah\textbar{l} al Ra\textbar{‘}i\textbar{'}or the rationalists. Al-Awani, supra note 51, Chapter 3.} were the two most vigorous competing jurisprudential markets in which reputable opiniojurists with broad regional follow-
ing established the rules of an emerging legal tradition, called fiqh. In the tenth century, the Hanafi jurisprudential market further flourished in Baghdad (Iraq), Balkh (Afghanistan), and Bukhara (Transoxania). “In each network there was at least one central figure . . . distinguished by his numerous and famous students and by his being the principal opiniojurist to issue fatwas in his region.” 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 opiniojurists of later centuries.

Historically, Muslims have belonged to distinct communities of Islam fiqh, known as schools of law or madhabs. For centuries, Islamic fiqh has been broadly available through five distinct schools that freely developed under the guidance of great scholars and opiniojurists. It is common for an entire Muslim community to follow the rules of a particular madhab. 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. In the past, the adherence to a particular school has been strict, and crossing from one madhab to the other (tafliq) was uncommon and considered unfavorable. The Shia-Sunni jurisprudential divide, the most remarkable development that has in recent decades, has been overly politicized and the split has been internationalized.

53 See Al-Awani, supra note 51. Chapter 3 & 4 explain the competing school of Medina and Kufa.
55 Id.
56 Id. at 29.
57 Madhab is singular, and Madhabs is plural. Madhabs is an Anglicized plural of madhab.
58 Khan, Second Era of Ijtihad, supra note 1, at 348.
60 The combining of rulings of different schools or madhabs is known as tafliq or takhayyur. By contrast, taqlid is the following of a particular madhab. Arbitrary tafliq 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, tafliq is acceptable if different rulings are selected in unrelated matters. William R. Rolf, Whence Cometh the Law? The Dog Saliva in Kelantan, 1937, 25 Comparative Studies in Society and History 323-338, at 329, 330, 332 (April,1983)(using tafliq to allow the use of dogs in a Shafi jurisdiction).
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 find solutions to problems facing a particular Muslim community or the Umma at large. The opiniojurist 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 the current affairs. The more knowledge the opiniojurist has, the more credibility he commands in his opinions. The markets of fiqh carefully scrutinize the opiniojurist’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, each is viewed with suspicion and his opinions are discounted. The markets demand that Muslim opiniojurists be both highly pious and highly knowledgeable. Piety without intellect or intellect without piety does not impress the markets.

The fiqh markets respect opiniojurists who have devoted their lives to God’s worship and the attainment of high knowledge.

The fiqh markets are free but solemn. They reject the idea of experimentation, innovation, or revolution away from the Basic Code. Opiniojurists may not experiment with jurisprudence by offering solutions that challenge the fundamentals of the Islamic faith. Any proposal to amend the text of the Quran, for example, is an idea that the markets would never ac-

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61 Ahmed Von Denffer, supra note---------
63 Caution must be used to accept the views of a scholar who lacks piety or intellect. Ahmed Von Denffer, supra note-------
64 For qualifications of a mujtahid, see Abdal-Hakim Murad, Understanding the Four Madhhabs, Islamica (1995) available online <http://www.iu.edu.my/deed/lawbase/newmadhab.html>
65 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, 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 Khan, Ali L. "Will the European Court of Human Rights Push Turkey Toward Islamic Revolution?". Jurist, September 9, 2002 Available at SSRN: http://ssrn.com/abstract=941002
Likewise, any suggestion that the Sunna should be discarded as a source of Islamic law and that opiniojurists must confine their analysis to the Quran 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. 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. 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.

Furthermore, the fiqh markets disdain all forms of cultism. Even though Makkka and Medina house the sacred places of worship and pilgrimage, the markets of fiqh are neither territorial nor cultish. No nation or people may claim a privileged station to found or influence the development of fiqh.

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. 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 opiniojurists. A scholar from Indonesia, South Africa, or the United States is equally competent and free to offer opinions, as is an opiniojurist from Egypt or Saudi Arabia. The concept of a chosen people or a preferred

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66  The Quran repeatedly prohibits changing the revealed words of God. It condemns the people who have changed the words in previous holy books. Sura al-Maeda 5:13 (God curses those who break the covenant and change the words); Id. 5:14 (Jews change the words from their right times and places); sura al-Anam 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).

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

68  Id.

69  In this sense, there exists a profound separation between governments and fiqh markets. The fiqh markets do not seek legitimacy from government not does a government may 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.

70  The Quran discloses a common human inclination in that each nation thinks very highly of itself, but each nation is equally accountable to what it does. Sura al-Anam 6:108 (every nation takes pride in its own virtues). Sura al-Jathiya 45:28 (each nation is held accountable).

71  The Quran does indicate that God has created a nation that guides with truth and establishes justice. 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 uura al-Anam 6:108 (every nation indulges in self-pride).
nation to interpret the Basic Code cannot survive in the free markets. Any Muslim opiniojurist, 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. 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 Quran was revealed. Rejecting all cultish criticisms, the markets elevated Abu Hanifa to be the greatest opiniojurist of Islam. The markets, of course, not prejudiced against Makka or Medina either. Imam Malik, the founder of another classical school, was a native of Medina, where the Prophet established the first Islamic state and where he is buried.

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. Each madhab also offers a comprehensive code of substantive rules dealing with worship (ibadat) and worldly transactions (mu’amalat). A jurisprudential market, however, is not confined to a single madhab, but accommodates all competing schools of law. Jurisprudential 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 opiniojurists live there. Historically, some of these cities are Mecca, Medina, and Baghdad, all of which have been prominent centres for the development and dissemination of Islamic law. However, the fiqh markets can exist anywhere in the world for they are not primarily geographical.

72 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 for him not being an Arab. Eerick Dickinson, Ahmed B. al Salt and His Biography of Abu Hanifa, 116 Journal of American Oriental Society 406-417, at 406 (July-September 1996).

73 The 114 suras (chapters) of the Quran 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.

74 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.


76 Khan, Second Era of Ijtihad, supra note 1, at

77 Imam Feisal Abdul Rauf, What is Islamic Law? 57 Mercer Law Rev. 595, at 600 (2005)(pre-Islamic customs are the laws provided they are compatible with the Quran and the Sunna).
Historically, Kufa, Baghdad, Medina, Mecca, Bukhara, and Bukh have served as great jurisprudential markets. 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. 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, including those of the great Imams, Shia and Sunni. 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 opiniojurists, 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.

78 See, e.g., the Balkh and Bukhara Hanafite jurists shifting the classical tax on landed property from the owner to the tenant. See Baber Johansen, THE ISLAMIC LAW ON LAND TAX AND RENT (Methuen, 1988). In Iraqi town of Kufa, public debates (munazara) were held to argue differing legal viewpoints on specific issues. See Asma Afasruddin, Muslim Views on Education: Parameters, Purview, and Possibilities, 44 Journal of Catholic Legal Studies 143, at 151 (2005).


80 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, Idjihad and Taqlid in 18th and 19th Century Islam, 20 Die Welt des Islams 131-145, at 132 (1980).
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.81 A government runs the risk of losing spiritual credibility if it interferes with the private markets of opiniojurists. 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 Ummayad, Abbasid, Ottoman, and Mughal empires, attempted to universalize the official interpretations of the Basic Code. Most attempts backfired.82 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 shut down 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.”83

In most cases, government opiniojurists enter the law markets as equal participants. The *fiqh* markets critically evaluate the credentials, motives, and qualifications of government opiniojurists. As a general rule, the *fiqh* markets are suspicious of the independence of government opiniojurists. The markets assume that government opiniojurists 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 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 fun-


82 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 1-13, at 6-7 (1970).

83 Wael B. Hallaq, The ORIGINS AND EVOLUTION OF ISLAMIC LAW 204 (Cambridge University Press, 2006).
damental 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.84

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.85 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.86 The governor arrested Imam Malik and publicly flogged him.87 Imam Shafi was also arrested in Yemen for fomenting political dissension.88 The fourth founder, Imam Hanbal was brought in chains before the court for refusing to submit to Caliph Mu’tasim’s official ideology.89 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. Opiniojurists and not rulers are the guardians of Islamic law. Opinions delivered in private chambers of honest and God-fearing opiniojurists are more worthy of consideration than those issued by government judges or government opiniojurists. The inherent mistrust of rulers informs the enterprise of Islamic law.90

84 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 74, at 90-96.
86 Biography of Imam Malik bin Anas available online <http://www.studentofknowledge.com/malikbio.htm>
87 Id.
88 Uthman Ibn Farooq, Imaam Shafi’ee available online <http://www.studentofknowledge.com/shafieebio.htm>
90 N.J. Coulson, Doctrine and Practice in Islamic Law: One Aspect of the Problem, 18 Bulletin of the School of Oriental and African Studies, 211-226 (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.”)
1. Shift from Jurists to Juristic Institutions

For many centuries, the free markets of fiqh have been composed of individual opiniojurists. As Muslim communities formed distinct nation-states in the twentieth century, a new phenomenon has come to define the fiqh markets. Each Muslim state has established a legal system with formal legislature and judiciary. Some Muslim nations have also established state institutions of prominent Muslim opiniojurists. 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. Muslim nations also participate in the making of international treaties and customary international law. 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 opiniojurist 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 gatekeeping 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 their compatibility with the Quran 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.” The Constitution also establishes the Council of Guardians, consisting of eminent Muslim opiniojurists, who review the

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91 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 L. Ali Khan, A THEORY OF UNIVERSAL DEMOCRACY (Brill, 2003).

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

93 However, Muslim states often make reservations to the treaties they sign so that no provision of the treaty violates the commandments of the Quran and the Sunna. See, e.g., the Convention on the Rights of the Child (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). The reservations are available online <http://www.unhchr.ch/html/menu3/b/treaty15.asp.html>

94 Iran Constitution, Article 4.

95 Iran Constitution, Article 91. 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.
laws to assure that they meet Islamic criteria.\textsuperscript{96} 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. Any contrary juristic opinions are dismissed and not allowed to compete with the views of the Council of Guardians.\textsuperscript{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.\textsuperscript{98} The free markets, however, will not completely dismiss opinions of the Council of Guardians because its opiniojurists 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 Quran and Sunnah . . . and no law shall be enacted which is repugnant to such Injunctions.”\textsuperscript{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.”\textsuperscript{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 Quran and Sunna, or understanding of the economic, political, legal or administrative problems of Pakistan.”\textsuperscript{101} The Council is not a religious entity of Muslim opiniojurists, since all of its members are not required to be the opiniojurists of the Quran and the Sunna.\textsuperscript{102} Secular scholars of economics, politics, and law may also serve the Council.\textsuperscript{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 legislature and judiciary, to assure that no law is repugnant to the basic principles of the Quran and the Sunna.

\textsuperscript{96} Iran Constitution, Article 4.  
\textsuperscript{97} Iran Constitution, Article 72 (providing the duty of the Council of Guardians to assure that the laws passed are not contrary to the official religion).  
\textsuperscript{98} Shias in other parts of the world may or may not adhere to the rulings or decisions of the Iranian Council of Guardians.  
\textsuperscript{99} Pakistan Constitution, Article 227.  
\textsuperscript{100} Pakistan Constitution, Article 228.  
\textsuperscript{101} Pakistan Constitution, Article 227.  
\textsuperscript{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 Constitution, Article 228(2).  
\textsuperscript{103} Id.
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. The jurist would interpret the text of the Quran 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 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 opiniojurist has dramatically changed. Now the opiniojurist 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. The governments may have established state juristic bodies for such review. Private Muslim opiniojurists not affiliated with the state, however, are free to issue their own opinions on any proposed or enacted laws and declare them to be harmonious with the Basic Code or not. The state opiniojurists 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. That sus-

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 (editor, M. Cherif Bassiouni, 1981).
105 National constitutions of Muslim states provide juristic review of laws for their compatibility with the Quran and the Sunna. See, e.g., Pakistan Constitution, Article 227 & 228; Iran Constitution, Article 4 & 91.
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 opiniojurists 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, The Christian Science Monitor, (November 17, 2006). <http://www.csmonitor.com/2006/1117/p07s02-wosc.html>
107 See Part
picion continues to linger even if state affiliated opiniojurists are pious and highly educated individuals.

E. 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 Quran 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 opiniojurists of Balkh (Afghanistan), for example, could not accept the rule of diya; that is, monetary compensation that the offender pays to the victim’s family.\(^ {110}\) The Arab Hanafi opiniojurists had 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.\(^ {112}\)

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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 International Journal of Middle East Studies, 29-50, at 30 (February 1998).
109 Imam Feisal Abdul Rauf, What is Islamic Law? 57 Mercer Law Rev. 595, at 604 (2005)(pre-Islamic customs are the laws provided they are compatible with the Quran and the Sunna).
110 Kaya, supra note 47 at 31
111 Id.
112 Id.
2. Differing Methods of Legal Reasoning

Diverse legal opinions may also arise from differing legal reasoning that the opiniojurist uses to solve legal problems. Imam Ahmed ibn Hanbal argued that the prayers said in a stolen garment were wholly null and void. 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. 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. The act of worshipping in stolen garment does not cure the act of stealing, and the act of stealing does not taint the prayers. Due to these conflicting and irreconcilable juristic opinions of the Great Imams, the matter is left to the individual discretion. When fiqh ruling 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.

In my opinion, most God-fearing Muslims would choose not to say their prayers in stolen garments, unless the necessity dictates otherwise. If the individual has no other garments to say his mandatory prayers, the prayers said in stolen garments are valid. The individual, however, is still accountable for his theft. 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.

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

113 Id.
114 Id.
116 Quran, sura al-Anaam 6:52 (each person is accountable to God).
117 Quran, sura al-Baqara 2:173 & 16:115 (the compulsion of necessity makes lawful what is otherwise unlawful; a person may eat the forbidden pork under the force of necessity). See also Quran, sura al-Anaam 6:119; 6:145.
118 Quran, sura al-Anaam 6:120 (persons who commit sins, secret or open, will get due recompense for what they have earned).
119 Quran, sura ar-Ar’aaaf 7:153 (God forgives those who commit a wrong, repent thereafter, and truly believe).
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 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.

F. Universal and Timeless Rules

The rules contained in the Quran 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.\textsuperscript{120} For example, fasting is prescribed for all Muslim communities, though there are exemptions for individuals suffering from certain specified disabilities.\textsuperscript{121} However, no community may claim exemption from fasting on the ground that fasting is contrary to its customs and local practices.\textsuperscript{122} Likewise, Muslim men and women of all nations and generations are under an obligation to get married, though this rule also has practical exceptions.\textsuperscript{123} These exceptions are available to individuals, however, and not to communities.\textsuperscript{124} No Muslim community may depart from the universal Islamic rule of marriage and establish a counter rule that undermines the institution of marriage.\textsuperscript{125}

Even some universal rules embodied in the Basic Code are flexible. The Quran, for example, prescribes the concept of the age of marriage.\textsuperscript{126}

\textsuperscript{120} Quran, sura Saba 34:28 (The Prophet has been sent as a universal messenger to give the good news and warn against wrongdoing). Sura ar-Rum 30:30 (God has created man in a state of al-fitra, i.e., the state of upright nature). Sahih Bukhari, Vol 6, Bk. 60, No. 298 (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 a of a nature that can be cultivated through submission to One God in accordance with His Laws revealed in the Quran and in accordance with the Prophet’s inspired wisdom contained in the Sunna.

\textsuperscript{121} Quran, sura al-Baqara 2:283-284 (Fasting is prescribed for all Muslims. However, the sick, the elderly, travelers, and women who are nursing may postpone their fasting.)

\textsuperscript{122} Local customs cannot overrule a clear commandment of the Quran. These customs however may be allowed to function only if they are compatible with injunctions of the Basic Code.

\textsuperscript{123} Abdur Rahman I. Doi, Marriage, USC-MSA Compendium of Muslim Texts (available online) <http://www.usc.edu/dept/MSA/humanrelations/womeninislam/marriage.html>

\textsuperscript{124} \textit{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 possesses no sexual desire. \textit{Id}.

\textsuperscript{125} Quran, sura an-Najm 53:45 (God has created the two spouses, male and female).

\textsuperscript{126} Quran, sura al-Nisaa 4:6. (balaghoo al-nikaha)
However, it prescribes no definite age as the age of marriage. The Quran’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. A Muslim community would breach its obligation under the Quran if it establishes no minimum age of marriage. But the setting of a certain minimum age of marriage is within the community’s discretion. 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. The classical fiqh has allowed Muslim men and women of less than eighteen years old to get married. This ruling may be changed in order for Muslim communities to comply with any universal rule that may in the future set a minimum age of marriage. Thus, the Quran’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 since uniformity or universality is not a condition 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 opiniojurists 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.

127 Mhamoud Hoballah, Marriage, Divorce, and Inheritance in Islamic Law, in UNDERSTANDING ISLAMIC LAW, supra note---------, at 112.
128 The state of affair 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 what that age ought to be. See Ann Laquer Estin, Toward a Multicultural Family Law, 38 Family Law Q. 501, at 508 (2004).
129 See, e.g., Convention on the Right of the Child, 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. Article 32 (employment) and Article 38 (armed conflicts). The Convention proposes no minimum age for marriage. Available online <http://www.unhchr.ch/html/menu3/b/k2crc.htm>
130 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.
H. Reopening Settled Rules

Once a rule has been firmly established in any legal system, it is difficult to uproot it. 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 lose touch with changing realities of the world. 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, i.e., ecstasy. Sama connects the minds and hearts of listeners to the beauties of faith. Abu Hamid al-Ghazzali (d. 1111) was a great proponent of sama and believed that the secrets concealed in the heart can only be brought about by sama. In his chapter on Music and Singing, Al Ghazali begins with an acknowledgement that the first Muslim scholars, including the great Imams, Shafi, Malik, and Abu Hanifa, viewed listening to music “as forbidden.” 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. In Medina, most Islamic scholars, including Imam Malik, declared singing to be unlawful. 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. 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.” But he also cites another

131. Classical common law, for example, did not allow the changing of the precedent. Even modern common law is highly respectful of the doctrine of precedent, even though it is now much more flexible and open to change.
134. For Al-Ghazali’s biography and works, see <http://www.ghazali.org/>
source to show that Imam Hanbal listened to the voice of a poet, known as Ibn al-Khababaza.\textsuperscript{140}

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.\textsuperscript{141} 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.\textsuperscript{142} And when the Prophet and his companions arrived in a new city, says Ghazali, the women on the house tops expressed their joy by singing poems with tambourines.\textsuperscript{143}

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 figh are more than mere opinions. Compliance is an essential part of a valid rule. This argument must be qualified, however, since the purpose of figh is not simply to report a community practice, but sometimes to change it. However, juristic preferences cannot be confused with figh. If a community of believers acts contrary to the prescriptive 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.\textsuperscript{144} Nass are the fixed texts; that is, the texts of the Quran and the Sunna. Qiyas, also known as analogy, is a legal method that early Muslim opinionjurists developed to cull meaning from the nass.\textsuperscript{145} In analyzing these sources, Ghazali articulates the issue in a starkly clear language: to say that music is prohibited in Islam is to contend, reminds Ghazali, that God has forbidden it under penalty.\textsuperscript{146}

Ghazali lays out the nass arguments to demonstrate that God loves beautiful voices. The Quran states that “Verily the harshest voices without

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\textsuperscript{140} Id. at 204-205.
\textsuperscript{141} Id. at 202, 220-227.
\textsuperscript{142} Id. at 202-03.
\textsuperscript{143} Id. at 224.
\textsuperscript{144} Id. at 207.
\textsuperscript{145} Id. at 207; Khan, Second Era of Ijtihad, supra note 1 at 363.
\textsuperscript{146} Id. at 207.
doubt is the voice (braying) of the ass.” This *nass*, the words of God Most High, says Ghazali, contains “implicit praise of a beautiful voice.” 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 without a beautiful voice.” “God listens more intently to a man with a beautiful voice reading the Quran.” The Prophet also praised Biblical Prophet David, says Ghazali, whose beautiful singing of the Psalms would enchant human beings, jinns, wild beasts, and birds. 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, to provide further proof 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. The Prophet, however, did turn his face away. When Aisha’s father, Abu Bakr, came to the scene, he rebuked Aisha, protesting how she could allow the Devil’s pipe in the presence of God’s Apostle. The Prophet, however, said to Abu Bakr: “Leave them alone.”

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 at the tambourines. 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 opiniojurist, not even the Prophet,

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147 Quran, sura Luqmaan 31:19.
148 Ghazali, supra note------, at 209.
149 Id.
150 Id.
151 Id. (David is mentioned as Da’ud).
152 See text accompanying supra notes---------
153 Sahih Bukhari, Vol. 2, Bk. 15, No. 70.
155 Ghazali, supra note------, at 226-27.
may universalize his personal tastes and preferences as binding rules for the larger Muslim community.  

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, drinking wine, says Ghazali, is essentially unlawful. 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.

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.” On the basis of this analogy, Ghazali argues that listening to music and singing is lawful unless some external factors vitiate their lawfulness. Music that generates unlawful sexual craving makes the music unlawful not because music is 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.” 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.

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. 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. Muslim communities and groups who still hold on to classical fiqh may have doubts about the legitimacy of sama. But a Mus-

156. 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. Id. at 242.
159. Id. at 237.
160. Adam Nayyar, Origin and History of the Qawwali, (available online) <http://www.osa.co.uk/qawwali_history.html>
161 Nustrat Fateh Ali Khan & Michael Brook, Mustt, Mustt (This compilation of music combines qawwali with western instruments).
lim 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). 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 (asr) 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 requirement under the Hanfai rules of ablutions. 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 Quran 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 opiniojurists have ruled differently upon the same issue.

I. Tainted Opinions

The fiqh markets protect their independence and authenticity by discounting tainted opinions. The opinions of jurists and juristic bodies, in-

162 This concept of choice is also known as taqdis or takhaysur. 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, available online <http://www.messageonline.org/2002aprilmay/cover4.htm>

163 Ihsan Yilmaz, Inter-Madhhab Surfing, Neo-Ijthad, and Faith-Based Movement Leaders 198 in The Islamic School of Law (editors: Bearman, P; Peters Rudolph, and Vogel Frank)(Harvard University Press, 2005).

164 Id.

165 Id.

166 Quran, sura al-Maeda 5:1 (believers are commanded to fulfill all obligations).
cluding courts, are considered tainted if the markets are unsure about the freedom of opiniojurists or juristic bodies. The markets presume that government opiniojurists and judges render tainted opinions. Even the opinions of private jurists and juristic institutions closely associated with governments are considered tainted. Any opiniojurist who works for a non-Muslim institution or government will almost always be viewed with suspicion. By contrast, opiniojurists who suffer abuse and persecution enjoy higher credibility in the free markets and their opinions are presumed to be authentic. Of course, governmental abuse per se does not render an opinion authentic, because the fiqh markets will scrutinize credentials of the persecuted opiniojurist 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 opiniojurists living in the United States and other Western countries, for these opiniojurists are considered to be intellectually, emotionally, and spiritually unfree despite the fact that most Western legal systems protect free speech and do not persecute opiniojurists for their opinions. That said, the

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167 See, e.g., 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 1-13, at 6-7 (1970)(explaining the rise of official jurists in Muslim India through the centuries).

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

169 After the 9/11 terrorist attacks on the United States, a number of organizations has emerged in America to “reform” Islam. For example, the American Islamic Congress, <http://www.aicongress.org/sop.html> directed by eminent professors from notable universities and academic centers, promotes the separation of church and state in the Muslim world. <http://www.aicongress.org/faq_islam.html> 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. <http://www.aicongress.org/sop.html>

170 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 on the Commission. <http://www.uscirf.gov/about/commissioners.html> Professor El Fadl is an eminent scholar whose works are serious and authentic. His close association with the US government, however, might discount his works in some juristic 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.

171 Some of the most influential Muslim jurists of the 20th 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 subververe.
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. Muslim opiniojurists living in the Western legal tradition are psychologically predisposed or coerced to find ways to synthesize Western values with the Islamic way of life. In their attempts to find solutions agreeable to non-Muslims, Muslim opiniojurists may offer tainted opinions, overtly dishonest in analytical reasoning, or unknowingly compromised because of positional consciousness. In the post 9/11 world, tainted opinions issued in Western countries have proliferated as Muslim opiniojurists fear personal safety and mobility.

The importance of these principles becomes evident when one considers the use of 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

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172 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, Washington Post (October 1, 2006). This episode informs the fiqh markets that the US freedoms of speech and religion are unavailable to some Muslim jurists. Yusuf Islam (Cat Stevens) was similary denied entry in the United States. Some argue that the US 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>

173 Recently, I published a piece on the problems of wearing the Islamic veil in the United Kingdom, available at Khan, Ali L., “The Veil and the British Male Elite” (October 2006). Available at SSRN: <http://ssrn.com/abstract=940025> . I received a lot of mail in response to the article, ranging from admiration for speaking the truth to condemnation for promoting “disingenuous” ideas. On another piece, Khan, Ali L., “Fighting Words: The Abuse of Islam in Political Rhetoric”. Jurist, October 2006 Available at SSRN: <http://ssrn.com/abstract=945079>. I received plenty of hateful mail, some containing obscene language. 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.

174 Daniel Pipes, Why Revoke Tariq Ramadhan’s U.S. Visa? New York Sun (August 27, 2004). Pipes, an external Islamic scholar argues that Ramadhan’s visa was rightfully revoked because Ramadhan questioned the thesis that Bin Laden was behind 9/11).
the occupation infrastructure and military assets. 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 Quran 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 opiniojurists must provide an answer. Opiniojurists from all over the world may participate in the fiqh market to determine the validity of suicide bombing. These opiniojurists will use classical legal methods, including analogy, logic, customs, purposes, and preferences, to interpret the text of the Quran 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 opiniojurists might influence their opinions on suicide bombing. Opiniojurists living in the occupied territories of Palestine, for example, will have a unique perspective on suicide bombings that other opiniojurists residing elsewhere might not share. Sheikh Ahmed Yassin, the spiritual founder of the Hamas and a Muslim opiniojurist, appeared to have sanctioned suicide bombings. Dozens of soldiers belonging 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.”

Abu-Basir al-Tartusi, a Muslim opiniojurist who lives in London, issued an opinion in which he declared that suicide bombing is haram (forbidden). 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”; “[a] Muslim and his blood, possession, and honor are haram to another Muslim”; “the Muslim is the one who Muslims are safe from his tongue and hand”; and, “[t]he Believer is the one that people

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175 John Alan Cohan, Necessity, Political Violence and Terrorism, 35 Stetson Law Rev. 903 (2006)(discussing how Alan Dershowitz and Nathan Lewin propose to punish the culture that takes pride in suicide bombings.)
177 BBC, Israel vows to hit Hamas again (March 24, 2004)(available online) <http://news.bbc.co.uk/2/hi/middle_east/3559905.stm>
179 Id.
180 Id.
181 Id. Sahih Muslim Bk. 1, No. 64 available online at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muslim/001.smt.html#001.006>
trust with their possessions and lives." Al-Tartusi concluded that suicide operations contravene a number of the Sharia texts. Al-Tartusi’s opinion generated huge criticism. One Muslim asked: “What do you expect from him when he lives in London?” Others warned that the law of war comes from the fighters in the battlefield and not from opiniojurists sitting in London.

This all is not to take a particular position on the matter, but rather to illustrate the importance of an opiniojurist’s situated consciousness in determining how it will fare in fiqh markets. Indeed, at this point, the fiqh markets are receiving conflicting opinions from Muslim opiniojurists. 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 opiniojurists 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.

2. Believers and Non-Believers

While the fiqh markets are open to all Muslim opiniojurists, 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 opiniojurists 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 opiniojurists. In highly fluid processes of fiqh lawmaking, external scholars may freely introduce their ideas to influence the opinions of Muslim jurists.

182 Id.
183 Id.
184 Id.
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. 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 opiniojurists 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 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 opiniojurists of all nations and times who 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 opiniojurists 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. 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.

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187. 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.
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.188 The Mormon Church is similarly fortified against external interventions.189 Ancient tribal systems, even when the tribe moved from place to place, had internal sources of law.190 As a general rule, legal systems are officially closed to external lawmakers, even though external influences are at times difficult to resist. 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 Quran 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.191 Mu’minin are practicing Muslims who believe in the Quran 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.192 Yet the fiqh markets weigh and consider the contributions of external scholars. The

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188 Vivian A. Petersen, The Development of the Canon Law since 1500 A.D., 9 Church History 235-252 (September 1940)(canon law is defined 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.

189 Newell G. Brighurst, Saints, Slaves, and Blacks, The Changing Place of Blacks in Mormonism (Greenwood Press, 1981)(showing complex political and social forces at work that forced the Church of Latter-Day Saints to finally allow black priests).

190 Tshekedi Khama, The Principles of African Tribal Administration, 27 International Affairs 451-456, at 452 (October 1951)(when the tribes move and resettle they retain their tribal legal system).

191 See supra Intro.

192 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.
Quran itself refers to previous books of revelation, particularly Torah (Old Testament) and Injeel (New Testament), and urges Muslims to believe what has been revealed in the Quran and what has been revealed in the previous books. The scholars of faith who explain the Torah and the Injeel may illuminate biblical stories that are mentioned in the Quran but not fully described. Hence, Islam is not a historically isolated religion, but instead forms unbreakable bonds with other monotheist religions. The Quran 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).’

This invitation to participate in a common enterprise refutes the notion that the fiqh markets must be confined to Muslims. The fiqh markets recognize that the scholars of faith who do not believe in Islam nonetheless share numerous common beliefs with Muslim opinoijurists. The scholars of faith, for example, see no indispensable connection between lack of religion and and modernity. Nor do they see any contradictions between faith and inter-faith. 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. 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. 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

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195. Quran, sura aal-e-Imran 3:64.
196. Muslim individuals and states actively participate in the making of international law with the People of the Book and even others.
199. Quran, sura al-Baqarah 2:3; Arnold Bergstrasser, Goethe’s View of Christ, 46 Modern Philology 184 (February, 1949). Goethe’s God is both of life and spiritual law. Id. at 185.
with the unknown. The scholars of faith reject value cynicism. 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 Quran.

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, criticisms, and still others who mount attacks on Islamic law. As noted earlier, one principle teaches disengagement. The principle of Lakum Diinukum wa li-ya Diin (To you be you 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 Quran asks believers to leave the company of persons who are cursing God or showing utter disrespect to His most beautiful names. 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 faith. The Quran specifically advises all believers to “have patience at what they (the peoples of scriptures and unbelievers) say” for what they say is often mentally and spiritually “hurtful.” 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.

The disengagement principle embodied in lakum Diinukum wa li-ya Diin is framed in personal terms. In sura al-Kafirun, 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. The same principle is also binding on each Muslim who must similarly disengage.

201. Robert Merrihew Adams, Moral Faith, The Journal of Philosophy 75-95, at 80 (February, 1995)(arguing that moral life has intrinsic value and is worth living for its own sake even if no great consequences flow from it).
202. See supra Intro.
203. Quran, sura al-A’raaf 7:180
204. Quran, sura ash-Shuara 42:15(unto us our works and unto you your works; no argument between us and you).
205. Quran, sura Sad 38:17.
207. Sahih Bukhari, Vol. 6, Bk. 60, Number 89. This is a highly informative hadith that describes how the Prophet used the disengagement principle to stay away from acrimonious disputes.
209. Id.
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 *kufr* 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 Quran 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 Quran as well as those found in the Old and New Testaments. 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 Quran states so in unambiguous terms: “Of the bounties of thy Lord We bestow freely on all-these as well as those: The bounties of thy Lord are not closed (to anyone).” 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 Quran instructs Muslims to argue in ways that are best and most gracious (*jaadilihum bil-latii hiya ahsan*). 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 opiniojurists must wait for external scholarship to appear before they respond. Muslim opiniojurists may be proactive in inviting dialogue with the external scholars. *Invitation* (*D’awah*) is an essential part of the engagement principle. In the *fiqh* markets, the principle of gracious engagement allows Muslim opiniojurists 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

213. *Id.*
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 opiniojurists, 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 opiniojurists 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.” Abu Talib was the Prophet’s beloved uncle who did not become a Muslim but did nothing to harm the cause of Islam. In fact, he used his personal prestige and tribal influence to protect the Prophet and other Muslims from their enemies. The Prophet prayed for his uncle’s conversion to Islam but, according to the Quran, the matters of faith are in God’s hands. 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. She clarifies in the introduction to her treatise that the conception of the Quran that undergirds her study is one of the committed Muslim; namely, one who believes that the Quran is God’s own word. This clarification instructs the reader that the

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

215. 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, book 23, No. 442; Sahih Muslim, book 1, No. 36.


219. Id. at 3 n.4.
treatise is written from an internal viewpoint. After reading the treatise, most Muslim opiniojurists would conclude that McAuliffe has adhered to the internal viewpoint in her rigorous and illuminating analysis of the Quran’s verses dealing with Christians and Christianity. And yet, her analysis of the Quran 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?”

Muslim opiniojurists 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. 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 Quran and explained through *tafsirs*. 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.

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 would be an earlier book that Cook coauthored with Patricia Crone, in which they challenged just about everything that constitutes the core of Islamic faith.

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

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

221 Id. at 8-9.

222 Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (Cambridge University Press 2000).


Muslim jurists would readily spot in his new book. Throughout the new book, for example, Cook chooses to spell Quran as Koran, though he cites it with a Q and not a K—a minor irritation that poisons the well.225 Contrast this with McAuliffe’s generous care in citing the Quran not through numbers only but by providing names of the suras, a practice of citation that Muslim scholars prefer.226 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”227 may come across to Muslim jurists as disrespectful, since it seems to suggest that God’s word is unclear.228 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.229

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.”230 Fraud is attributed to the person of the Prophet, to the compilation of the Quran’s text, and to the gathering of the Prophet’s Sunna.231 The allegations of fraud are not limited to the Prophetic era (610-632), but extend to Muslim historians, scholars, and opiniojurists who were the first authors of the Islamic literary tradition.232 Muslim historians are accused of writing fraudulent accounts of existent and non-existent facts.233 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...
of the disengaged scholarship have been on the Quran, the Sunna, and the Prophet.\textsuperscript{234} 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 opinionjurists 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.\textsuperscript{236}

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 reasons, wisdom and interfaith dialogue, though small in number and ineffective, were raised to protest the murderous intentions of hateful literature against Islam and Muslims.\textsuperscript{237}

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.\textsuperscript{238} In the East, the Ottoman Empire had penetrated into the Balkans and was closing in on Hungary and Austria. The Muslim Tartars had seized much of southern Russia.\textsuperscript{239} In the Christian Europe, Islam was seen as a competing religion that must be defeated by all means necessary. As the Muslim empires began to lose their world domination and the Europeans experienced a Protestant reformation coupled with an outward


\textsuperscript{235} See infra Part II.C.

\textsuperscript{236} Id.

\textsuperscript{237} Kritzeck, at 394.

\textsuperscript{238} Ira M. Lapidus, A History of Islamic Societies 365-413 (Cambridge University Press, 1988).

\textsuperscript{239} C.E. Bosworth, A Dramatization of the Prophet Muhammad’s Life: Henri de Bornier’s “Mahomet”, 17 Numen (August 1970)(showing that the eighteenth century Europe was starting to treat Islam with less venom and mores respect).
expansion through colonialism, the negativity toward Islam changed course. Overt hatred of Islam was no longer fashionable. 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 had deluded millions of people over hundreds of years. Western universities began to research Islam more seriously. The rise of orientalism, however, analyzed Islamic law through the eyes of colonial superiority. 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. It now embarked on a rational scrutiny of Islamic history and fiqh. It was now determined to demonstrate that the Muslim history of Islam has been founded on uncritical devotion to original sources. No longer would the Prophet be portrayed as an imposter. The secular Europe began to research Muslim opiniojurists and historians who had 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. It also failed to build durable interfaith bridges. The following discussion is offered to furnish the examples of disengaged scholarship that has 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 that may assist in the development of genuine and respectful interfaith discourse.

240 Id. at 112.
241 Id. at 112-114.
242 Id. at 114. Thomas Carlyle, Heroes, Hero Worship and the Hero in History (1840).
243 For further insights into charges and counter-charges of the distortions of colonial scholarship, see Gyan Prakash, Orientalism Now, 34 History and Theory 199-212 (October, 1995).
244 Bosworth, supra note 239, at 113.
245 F. E. Peters, The Quest of the Historical Muhammad, 23 Journal of Middle East Studies 291-315 (August 1991) (concluding that Islamic sources are unreliable). Id. 308-315 (extensive footnotes examine the critical literature).
246 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.
1. Scholarship on the Quran

The fiqh markets unflinchingly assume that the Quran is God’s immutable word that has been preserved in its original purity. According to the Islamic tradition, the Quran was revealed to Prophet Muhammad, in small portions, over a period of 22 years (610-632). In its original form, the Quran is an oral text that was later transferred to writing. Because of its oral textuality, the Quran is easier to remember. During the Prophet’s life, each and every portion of the revealed Quran was memorized in the breasts of believers. In addition, all portions of the revelation were preserved in tangible media, including bones, palm leaves, and other materials. The first two Caliphs, Abu Bakr (d. 634) and Umar (d. 644) gathered these pieces of the Quran and prepared a written copy of the entire scripture, known as mushaf, which was under the custody of Hafsa, Caliph Umar’s daughter. 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 Quran. Within thirty years after the Prophet’s death, the entire text of the Quran 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.

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

These external assertions about the history of the Quran point to an inescapable conclusion that a great fraud was perpetrated centuries ago. The fiqh markets disregarded these new findings about the Quran. 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 Quran 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.”

The external scholars may reject the “new findings” about the origin of the Quran but nonetheless argue that the Quran was concocted from external sources available to the Prophet. The Quran contains numerous biblical stories, though most are described in less detail than versions found in the Old and New Testaments. The Quran describes events related to Adam, Eve, Abraham, Isaac, Ishmael, Jacob, Noah, John the Baptist, Mary, and Jesus. Old Testament episodes are mentioned

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256. Id. at 45.
257 Hagarism, supra note——.
258 Whelan, at 3.
259 Norman O. Brown, The Apocalypse of Islam, 8 Social Text 155-171 (1983-84). The notion that Muhammad was a charlatan who stole from Western civilization to fool unsophisticated Bedouins is very much alive. Id. at 169.
260 Quran, sura al-Baqara 2:31-38 (creation, Satan’s temptation, and expulsion from the heavens).
261 Id.
262 Abraham is mentioned in more than 65 verses of the Quran in various contexts. See, e.g., sura as-Saffat 37:102 (Abraham had a dream of sacrificing his son).
263 Isaac is mentioned in more than 16 verses of the Quran in various contexts. See, e.g., sura Ibrahim 14:39 (Abraham praising God for giving him Isaac and Ishmael in old age).
264 Ishmael is mentioned in more than 12 verses of the Quran in various contexts. See, e.g., sura al-Baqara 2: 127 (Abraham and Ishmael jointly building the House of God).
265 Jacob is mentioned in more than 16 verses of the Quran in various contexts. See, e.g., sura al-Baqara 2:133 (Jacob asking his sons whom they would worship after his death).
266 Noah is mentioned in more than 44 verses of the Quran in various contexts. See, e.g., sura al-Ankubat 29:14 (mentioning Noah and the flood that engulfed the people).
267 John is mentioned in 5 verses of the Quran. See, e.g., sura aal-e.Imran 3: 39 (the good news of the birth of John).
268 Mary the mother of Jesus is mentioned in more than 31 verses of the Quran in various contexts. See, e.g., sura al-Maida 5:75 (Mary was a saintly woman).
269 Jesus is mentioned in at least 25 verses of the Quran in various contexts. See, e.g., sura az-Zukhruf 43:63 (Jesus came with clear proofs).
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.\textsuperscript{270} 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.\textsuperscript{271} The second view argues that biblical stories had become part of Arab folklore and were circulating when the Prophet was receiving the revelations.\textsuperscript{272} The third view credits the Quran to Talmud, contending that the Prophet gathered these stories from Talmud, which had been completed by the time the Prophet started his ministry.\textsuperscript{273}

The theories of the Quran’s historical concoction are disregarded in the \textit{fiqh} markets. At the heart of these theories is a simple assertion that the Quran is not God’s Word but the Prophet made it up by borrowing stories from biblical sources. The \textit{fiqh} markets are quite familiar with these charges, and no findings are likely to undermine the markets’ confidence in the Quran’s truth. Ever since its revelation, the attacks on the Quran’s genuineness have been relentless. The Quran itself mentions the charges of \textit{iftra} (invention) made against its authenticity.\textsuperscript{274} These \textit{iftra} charges include that the Prophet fabricated the Quran,\textsuperscript{275} that “this is nothing but the tales of the ancient,”\textsuperscript{276} and that the Quran is mere poetry. “We have not instructed the (Prophet) in poetry,” says the Quran.\textsuperscript{277} Reaffirming its relationship with previous revelations, the Quran presents the concept of the Mother Book.\textsuperscript{278} From this Mother Book are derived the Old Testament, the New Testament, and the Quran. “This Qu’ran 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

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\textsuperscript{270} D. Shepardson, The Biblical Element in the Quran, 10 The Old and New Testament Student 207-212 (April 1890)(analyzing the theories of borrowing from biblical sources); J. Leveen, Mohammad and his Jewish Companions, 16 The Jewish Quarterly Review 399-406, at 401 (accusation that Jews were feeding distorted biblical stories to the Prophet for “leg-pulling” purposes).

\textsuperscript{271} Shepardson, supra note 270, at 212. Crawford H. Toy, Mohammad and the Islam of Koran, 5 The Harvard Theological Review 474-514, at 478 (October 1912)(the Prophet receiving information from Jews and Christians).

\textsuperscript{272} Shepardson, supra note 270, at 212. G. W. Davis, Islam and the Kuran, 10 The Old and New Testament Student 334-342 (June 1890)(discussing Jewish, Christian and Persian belief systems at the time of the Prophet’s ministry).

\textsuperscript{273} Shepardson, supra note 270, at 212.

\textsuperscript{274} Quran, sura an-Nasr 10:38 (describing the charge that the Prophet had invented the Quran and challenging that let someone produce a sura comaparable to one in the Quran).

\textsuperscript{275} Quran, sura al-Huud 11:13

\textsuperscript{276} Quran, sura al-Ahqaaf 46:17

\textsuperscript{277} Quran, sura al-Yassiin 36:69

\textsuperscript{278} Quran, sura al-Rad 13:39
there is no doubt - from the Lord of the worlds."  Therefore, the *fiqh* markets also connect the Quran 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 Quran is wicked. In the past centuries, few European publishers dared to publish translations of the Quran because even the publishers of Latin translations that had smeared the Quran were “rebuked for disseminating such damnable material.” Most writers attacked the Quran on hearsay without reading it in Arabic or in their own tongue. The first English translation of the Quran appeared in 1649 without a named translator, publisher, or printer. Its lack of credibility was further illuminated by Alexander Ross, who introduced the translation with a scathing preface to mitigate the act of publication. The translator, wrote Ross, had bared a monster whose ugliness enhanced the beauty of the Gospels and therefore no reader should consider this translation as an act of proselytizing.

It was enough, however, to portray the Quran 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. In fact, some of these conceptions originated in Byzantine literature during the period when the Byzantine Empire was fighting for its survival.

The more recent attacks on the Quran’s integrity have come from a pair of scholars who wrote a sensational thriller in their youth in England. Michael Cook and Patricia Crone argue that there exists “no hard evi-
dence for the existence of the Koran in any form before the last decade of the seventh century.\textsuperscript{290} They surmised that the Quran was assembled from a plurality of materials, put together possibly by Al-Hajjaj, who governed Iraq in the suggested period.\textsuperscript{291} The authors also insist that the literary character of the Quran, 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 Quran was “a sudden, not to say hurried, event.”\textsuperscript{292} This charge challenges a core belief of the \textit{fiqh} markets that the Quran was revealed to Prophet Muhammad over a period of 22 years (610-632) and collected soon after his death.\textsuperscript{293}

Under the disengagement principle, the \textit{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 “this piece of \textit{kulturgeschicht} full of glib generalizations, facile assumptions, and tiresome jargon.”\textsuperscript{294} Leon Nemoy questions the sources that Cook and Crone used to attribute a Machiavellian \textit{tour de force} to the seventh century Arabs, including the Prophet.\textsuperscript{295} J. Wansbrough, on whom Cook and Crone showered gratitude for giving them the courage to rethink the conventional Islamic sources,\textsuperscript{296} remarks that the “eccentricity” of Hagarism “lies as much in its historical methodology as in its controversial thesis.”\textsuperscript{297} Indeed, the authors themselves have repudiated the thesis.\textsuperscript{298} As indicated earlier, the \textit{fiqh} markets are likely to disregard all scholarship that Cook and

\begin{itemize}
  \item \textsuperscript{290} Hagarism, supra note----- at 3.
  \item \textsuperscript{291} Al-Hajjaj governed Iraq for 23 years (692-715) and implemented draconian policies to bring peace to the region. Ira M. Lapidus, A History of Islamic Societies 60 (Cambridge University Press, 1988). This is the period in which the authors (Crone and Cook) speculated the writing of the text of the Quran.
  \item \textsuperscript{292} 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, Magaritai 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 (Palestine). Id., at 8-9. Hagarism is a term coined to capture these two meanings of the activities of early Muslims.
  \item \textsuperscript{293} Id. at 180-181.
  \item \textsuperscript{294} Id. at 18 Footnotes 16 & 18.
  \item \textsuperscript{295} J. Wansbrough, Book Review: Hagarism: The Making of the Islamic World, 41 JOURNAL OF NEAR EASTERN STUDIES, at 159 (April, 1982).
\end{itemize}
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.299 Even more generally, the Quran prohibits annoying believing men and women.300 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.301 The disengaged scholarship has relentlessly demonized the Prophet of Islam over the centuries. Because the Prophet was the transmitter of the Quran 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 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 (Quran) 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.302

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.303 For the most part, substandard research informed the literature. Even Muhammad’s basic biographical facts were reported inaccurately.304 Some writers presented Muhammad as of Jewish ancestry, some as a Persian, some of an unknown

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299 Quran, sura al-Hazab 33:56.
300 Quran, sura al-Hazab 33:58.
302 Even in the Prophet’s time, critics called the Prophet “all kinds of names,” a historical fact that the Quran itself memorialized. Quran, sura al-Furqan, 25:9.
origin, and some as a slave sold to a Palestinian merchant.\footnote{Id. at 44.} Some took his wife Khadijah as his mother; while others reported that he finished writing the Quran at the age of twenty-five.\footnote{Id.} In the Latin literature, Muhammad was portrayed as a citizen of Rome who, upon failing to become a pope, rebelled against the church.\footnote{Id. at 45.}

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 groveled along the ground and foamed piteously at his mouth.”\footnote{Salem, supra note-----, at 45 (quoting Henry Smith, God’s Arrow against Atheism and IRRELIGION 44 (London, 1617)).} 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.\footnote{Salem, supra note---- at 48.} Such stories not only show disrespect for the Prophet, but they also paint Muslims as ignorant believers.

Even the United States Supreme Court cases refer to an untrue story known as the “Mahomet’s coffin.”\footnote{Sims’ Lessee v. Irvine, 3.U.S. 425, at 454.} 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 magents. Edward Pococke (1604-91), the first chaired professor of Arabic studies at Oxford,\footnote{P. M. Holt, The Study of Arabic Historians in Seventeenth Century England: The Background and Work of Edward Pococke, 19 Bulletin of the School of Oriental and African Studies 444-455 (1957).} repudiated the story with ridicule.\footnote{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.} The story, however, lingered in popular fables. The story’s metaphorical meaning survived even longer.\footnote{See P.M. Holt, The Study of Arabic Historians in Seventeenth Century England: The Background and the Work of Edward Pococke, 19 Bulletin of the School of Oriental and African Studies, University of London 454 (1957).} 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
This metaphor has not totally disappeared from court opinions. It has been used thirty times in the state courts of Michigan, Kansas, Texas, Pennsylvania, Florida, and others. More recently, the Georgia Court of Appeals used the metaphor in 1970. It is unclear whether the American courts were aware of the historical meaning of the metaphor. If they were, which is a strong possibility, 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.

Consider another story contending that the Prophet kept a dove and trained the bird to eat from his ear. This charade, as the story goes, 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. This story was so popular that even Shakespeare could not resist its inclusion into one of his plays. “Was Mahomet inspired with a dove?”

Ironically, Voltaire, himself guilty of writing a scandalous play on the Prophet, offered a line delivered through the Prophet that ridicules

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314. Sims’ Lessee v. Irvine, 3 U.S. 425, 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, at 501.


321. 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--------, at 455.


323. Holt, supra note------ at 454.

324. Shakespeare, 1 Henry VI, Act 1, Scene 2.
false stories: “prejudice rules o’er the vulgar with despotic sway.”

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. Other allegations paint him as a fraudulent magician who would resort to trickery by conjuration of demons and through visions induced at will. 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.” 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. 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 had possessed the Prophet of Islam.

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. It highlights the fact that the Prophet married Khadija, a rich and influential woman, to improve his class, and he resorted to the fraudulent enterprise of prophecy to overcome his humble origin. 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 kingdom. 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 epi-

325. Voltaire, Mahomet (Trans. E.P.Dupont, 1901)(original 1741), Act 1, Scene iv.
326. Norman Daniel, at 47.
328. Normal Danile, 262.
329. Id.
330. Roger Bacon, Moralis Philosophia, Norman Daniel, supra note ----at 51.
331. Norman Danille, at 262
332. Id.
333. Id.
leptic had been abandoned. 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. However, the Prophet lost these gifts after he made his many marriages. 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.”

The disengaged scholarship is determined to revise history to show that at no point there existed 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. 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. 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. 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 numerous 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.

335 Id. at 144-45.
336 Id. at 144-45.
337 Id. at 145.
339 Shamir, at 220.
340 Id. at 220.
that the Prophet brought the world only evil and inhuman things. 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 opiniojurists spent decades sorting out the authentic ahadith. 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 opiniojurist 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 Quran and Sunna. The following discussion provides examples where external scholars might be engaged.

A. Scholarship on the Sunna

After the Quran, the Prophet’s Sunna is the second major source of Islamic law. It is composed of the Prophet’s decisions, explanations, clarifications, and other pronouncements, collectively called ahadith. If the

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342 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. BBC, Pope comment ‘linked to Crusade’ (September 18, 2006). <http://news.bbc.co.uk/1/hi/world/europe/5356820.stm>

343 For an insightful of the historical process of ahadith collection, see Mohamed Fadel, Ibn Hajar’s Hady al-Sari, 54 Journal of Near Eastern Studies 161-197 (July 1995).

344 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 per se do not create the binding norms of Islamic law. 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 WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 47-49 (Cambridge University Press, 2005).
Quran is the text, each hadith is a case. The Sunna is thus the case law decided in light of the Quran. The Sunna is the first tafsir al-Quran. The Quran 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.”

Therefore, the Sunna embodies a valid and mandatory source of law. However, not every hadith embodies an obligatory rule. Some hadith contain the Prophet’s personal preferences that he did not wish to impose on all Muslims. Some hadith are fact-based and must not be interpreted in an over-inclusive manner, while others contain clear rules. Muslims who wish to follow the Prophet’s personal preferences in each and every way are free to do so. However, the hadith 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.

Since the hadith were collected long after the Prophet’s death, their authenticity was less than automatic. This is so because some hadith were falsely attributed to the Prophet. Some of these fabrications were harmless, while others were fabricated to promote concrete political and ideological goals. One of the greatest scholarly enterprises in the Islamic legal tradition has been to identify the false hadith. Scholars of great piety and

346. 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 Dawd (Translation by Ahmed Hasan), Bk. 1, No. 33 <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/abudawud/satintro.html>. This hadith contains the Prophet’s personal preference. Left-handed Muslims may switch the uses of hands without breaching the rule.
347. A hadith, for example, contains a clear rule that there is no zakat on less than five camels. See Malik bin Anas, Muwatta, 17.1.1 (Translators: ‘Aisha Abdarahman and Yaqub Johnson) <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muwatta/017.mmt.html#017.17.1.2>
348. For example, the Prophet prohibited every intoxicant. Sahih Muslim Bk 23, No. 4956–4966. 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. 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.
349. Wael B. Hallaq, The Authenticity of Prophetic hadith: A Pseudo-Problem, 89 Studia Islamica 75-90 (1999)(explaining the traditional Islamic viewpoint on sorting out the authenticity of hadith, using distinct methodologies of their textual veracity and meaning veracity).
350. For example, a famous hadith says that “the reward for deeds depend upon intentions.” Sahih Bukhari, Vol. 1 Bk. 1 No.1. This hadith even if shown to be weak is harmless and promotes a worthy behavior among Muslims. It will be waste of scholarly time and resources to dispute the authenticity of this hadith. But see, Hallaq, supra note 9, at 89 n. (Ibn al-Salah challenging the high validity of this hadith).
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 Bukhari and Imam Muslim, have been broadly accepted as the most reliable compilations of authentic ahadith.

The monumental work of painstakingly separating the false ahadith took about two hundred and sixty years following the Prophet’s death. By the end of the ninth century, Muslims scholars had 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 Quran 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. 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 was rejected.”

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

351. For Imam Bukhari’s biographical information, see <http://www.islamonline.com/cgi-bin/news_service/profile_story.asp?service_id=838>
352. For Imam Muslim’s biographical information, see <http://www.sunnah.org/history/Scholars/Imam_muslim.htm>
354. Khan, Second Era of Ijtihad, supra note 1, at
355. Ibn Khaldun, supra note-------, at
356. Hallaq, supra note----Origins, at 105.
357. 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 with 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 Bulletin of the School of Oriental and African Studies, 223-236
358. 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 Journal of Middle East Studies 95-109 (February 1983).
Ignaz Goldziher,⁵³⁹ 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."⁵⁶⁰ 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 hadith 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,⁶¹ 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. Schacht praised Goldziher and his conclusion that the Sunna is "not the inherited knowledge of the views and practices of Muhammad"⁵⁶² "but [rather] reflect opinions held during the first two and a half centuries after the hijra."⁵⁶³ Schacht calls it a “fundamental discovery.”⁵⁶⁴ For the first time, says Schacht, “our study of early Islam” has been put “on a sound basis.”⁵⁶⁵ 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 hadith going back to the Prophet.⁶⁶ The recognition of any such core, says Schacht, is prejudicial to the historical understanding of hadith.⁶⁶ As far as legal hadith are concerned, Schacht posits a broad thesis that all these traditions containing legal elements must be presumed “fictitious” until the contrary is proved.⁶⁸

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⁵⁶⁰. Goldziher, supra note------at 40.
⁵⁶⁴. Id.
⁵⁶⁵. Id. at 141.
⁵⁶⁶. Schacht, at 144-45.
⁵⁶⁷. Id.
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 D, 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).”

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, from aunt to nephew, or from master to freedman.” 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.”

Schacht furnishes good insights into the dynamics of intellectual fraud. 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

369. Schacht, at 147.
370. Schacht, at 145 (Ian Edge); 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 31-50 (1987).
371. Schacht at 145 (Ian Edge).
other criminal characters as the intergenerational transmitters who ultimately attribute the *mahn* 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, even though external scholars have also criticized Schacht’s findings. The *fiqh* markets have dismissed his work without much debate, but the external scholars continue to pay homage to him. 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. 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

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373. 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 (Ian Edge) was cited 9 times. Majid Khadduri is cited 117 times. Khadduri’s The Islamic Conception of Justice is cited 27 times. Khadduri’s Islamic law of Nations is cited 12 times. 374. John Burton, An Introduction to the Hadith (Edinburgh University Press, 1994)(disagreeing with Schacht’s thesis but presenting an equally problematic thesis that the hadith literature was fabricated for exegetical wars).
376. See supra Part I.
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. 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 opiniojurists 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.

For the most part, the fiqh markets did not receive Goldziher and Schacht studies. Even Muslim scholars who might have known these 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 originals sources, especially when they challenge the Quran 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 opiniojurists, including the Prophet himself, have 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 of generating its own laws. Goldziher


378. Many modern constitutions of Muslim states specifically identify, in addition to the Quran, the Sunna as a fundamental super-source of law. See, e.g., Pakistan Constitution, Article 227.

379. In the United States, there were present too few Muslim jurists to challenge these authors. Nonetheless, Fazalur Rahman of the Chicago University 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 Fazalur Rahman, Book Review: On Schacht’s Origins of Muhammadan Jurisprudence, 47 Journal of Near Eastern Studies 228-229 (July 1988).

380. 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
contends that Prophet Muhammad borrowed from Zoroastrianism that the Sabbath day was not a rest day. According to the Quran, God made the universe in six days, but there is no mention that He rested on the seventh day. In another verse, the Quran declares that God needs no rest, slumber, or sleep because He feels no fatigue. 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.

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. 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 Prophethood at the same age. Lessner 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. Lessner knows that the Quran itself declares that the man achieves his full strength at the age of forty years. The Quran, however, makes no connections between Moses’s ministry and the age of forty. On the contrary, the Quran clarifies that Moses was given forty nights, and not forty years, for pre-Prophetic solitude.

Lessner offers no explanation why Ibn Ishaq would concoct the age linkage that the Quran 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, Quran, sunna, ijma (consensus), and qiyas (reasoning) have all been borrowed from the

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382. Quran, sura al-A‘raaf 7:54.
386. Id. at 221-222.
Torah and the Talmud. The first two sources, the Quran and the Sunna, are related both etymologically and conceptually to the Hebrew terms. The Quran is derived from Miqra (Torah) and the Sunna is drawn from Mishnah (Jewish oral law). Ijma, the third source, is conceptually related to ha-kol in that each term means juristic consensus. The fourth source of Islamic law, qiyas, tells the story of what Wegner calls “misborrowing” from Jewish sources. Qiyas, which is reasoning by analogy, was indeed a Talmudic legal method, says Wegner, which Muslim opiniojurists imported into the Islamic fiqh. However, in borrowing the concept, the Arabs misapplied the Hebrew phrase. 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.

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 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. Some words undergo dramatic changes and are “misborrowed” when they enter into other languages. If Wegner is indulging in Hebrew/Arabic linguistic cross-influences, she will find hundreds of words to prove her point.


390. Id. at 49-54
391. Id. at 56.
392. Id. at 49-54
393. Id. at 56.
394. Id. at 56.
395. 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.

396. Karl F. Koenig, German Loan Words in America, 1930-40, 15 The German Quarterly 163-168 (May, 1942). During this period, most of the loan words from Germany acquired prejorative meaning. For example, the word “Nazi” that was simply the abbreviation of “National Socialist” 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.
words both inside and outside Islamic and Talmudic jurisprudence.\textsuperscript{397} 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 opiniojurists freely borrowed, over a period of more than two hundred years, from Jewish sources without crediting the Torah and Talmudic law.\textsuperscript{398} 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 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.\textsuperscript{399} Wegner’s thesis of Islam’s clandestine acquisitions from Jewish texts is momentous in the case of the Quran. The concept of the Quran, both as a book of divine revelation and as a primary code of law, says Wegner, is Jewish in origin.\textsuperscript{400} Wegner invokes linguistic parallels that supposedly exist between the words Quran and Miqra to show that “in coining the term \textit{qur’an}, Muhammad used Hebrew/Aramaic terminology.”\textsuperscript{401} The word Quran was apparently invented to absorb the meaning of \textit{miqra}, which refers to Torah read aloud during public worship.\textsuperscript{402} Wegner allows the possibility that the word Quran might have been derived from the Aramaic word \textit{qeryana}, itself a term for “reading,” a word that Christians used for their

\textsuperscript{397} For a rewarding analysis of the early differentiation of Semitic languages, see W. Volck & D.M. Welton, The Semites. 2 Hebraica 147-161 (April 1886). The authors argue that all Semitic languages, including East Aramaic, West Aramaic, the Hebrew of the Old Testament, the language of the Quran, Syriac and Babylonian dialects, all these variations branched off from “one primitive mother language.” The seat of the primitive mother language, however, is disputed. Some scholars place it in Arabia, others in Mesopotamia. Id. at 149. Some scholars have proposed to call this group of languages as Syro-Arabic, rather than Semitic. Id. at 148. The word “Semitic” as 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 Quran.

\textsuperscript{398} Wegner, supra note at 389, at 81 (references to foreign sources were expunged). Wegner also implies that if Imam Shafi produced his classical work \textit{Risala} in a short time, he must have “tapped a ready-made but unacknowledgeable source.” This is a charge of plagiarism placed on one of the most revered Muslim jurist of all times.

\textsuperscript{399} Wegner, for example, makes statements that northern Semitic languages (Hebrew/Aramaic) were more developed than Arabic. Id. at 42.

\textsuperscript{400} Id. at 42.

\textsuperscript{401} Id.

\textsuperscript{402} Id. 41-42.
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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 Quran 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.*

Wegner offers no original research of her own to trace the origin of the word Quran from *miqra*. She credits her linguistic thesis to Arthur Jeffrey, an author of a book on the foreign vocabulary in the Quran. Borrowing from Jeffrey, Wegner intimates that the word Quran is derived from *qara’a.* To this extent, Wegner breaks no new ground, as other scholars would agree to a similar origin. 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. 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.”

Put simply, Wegner is saying that since Northern Semites could read long before Arabs, the word *qara’a* (translated as reading) 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. 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 Quran was revealed as an oral text, for God did not send the Quran 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

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403. Wegner, at 42.
405. Arthur Jeffery, at 233. Some Muslim philologists speculated that the word *qara’a* was derived from *qaran*, which means “to put together.” Other Muslims believed that the Quran was a unique word derived from no other word. Id. at 233-234.
408. Id.
409 Id. at 41 n. 28.
In terms of Islam, this would mean that the word *miqra* had existed in north Semitic languages for at least eleven hundred years before the Quran 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, including Medina and other towns. 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 Quran. 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*. If *qara’a* and its derivatives were foreign words, it is unclear why the Quran would use a 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.” 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 Quran.

Wegner is not alone in asserting the presence of foreign words in the Quran. There has been a sturdy scholarly industry devoted to finding foreign words in the Quran. For example, the word *iman* (faith), which connotes believing, embodies a fundamental concept of the Quran. 

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410 Id. at 42.
412 G. W. Davis, Islam and the Kuran, 10 The Old and New Testament Student 334-342 (June 1890)(showing the the presence of Jews, Christians, and Persians).
413 Quran, sura al-Alaq 96:1. In English translations of the Quran, 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. available online <http://www.translatedquran.com/meaning.asp?pageitle=AL-A >&ALAQ&sno=96&tno=1803>. See also, Tafsir Ibn Kathir, Al-Alaq, The Beginning of the Prophethood of Muhammad and the First of the Qur’an revealed (quoting the exchange between the Prophet and the angel over “reading” the first revelation. Available online <http://www.theholybook.org/en/a.48498.html>
414 Quran, sura Ash-Shuuraa 42:7.
415 See, e.g., sura al-Baqra begins with a set of beliefs required to seek guidance from the Quran. 2:2-4 (Quran is guidance for those who believe in the Unseen and those who believe in the Revelation). Repeatedly, the Quran identifies the people who believe and do good works. Sec, e.g., 2:25 & 2:82 (those who believe and do good works).
is a person who possesses *iman*, one who believes. The Quran repeatedly addresses Muslims as *mu'miniin*. Ringgren correctly points out that the word *mu'min* and its plural *mu'miniin* appear more frequently in the Quran than the word *Muslim*. 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 loanword,” borrowed from Syriac, Aramaic, Ethiopic, or Hebrew. He concedes, however, that the word *amana* in the sense of “safety” did exist in Arabic. But the native meaning of *amana*, concludes Ringgren, does not fully explain most verses of the Quran in which *amana* connotes the belief of the mind and of the heart. 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 Quran aims at refuting the claim that the Quran was revealed in clear Arabic, contrary to the Quran, which says, “Behold, We have made it a Qur’an in clear Arabic language that you may fully understand.” By showing the presence of foreign words in the Quran, the externalist scholarship is also suggesting, as discussed above, that the Prophet was concocting the Quran by consulting foreign sources. At the time of revelation, however, the objections were raised from the opposite side. The critics were questioning why the Quran was revealed in Arabic and not in another language. To these objections, the Quran 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.'

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416. See, e.g., 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).


418. Helmer Ringgren, The Conception of the Faith in the Koran, 4 Oriens 1 (August 15, 1951). In sura al-Baqara, for example, the word “Muslim” appears only in one verse (2:128) whereas the word “believe” in its various forms appears in 41 verses.

419. Id. at 1 & 16.

420. Id. at 16.

421. Id. at 16-20. But see Quran, sura al-Anam 6:82 (the word *amana* appears in both senses of “faith” and “security” in the same verse).

422. Quran, sura Yuusuf 12:2; sura Az-Zukhruf 43:3.

423. See text accompanying supra notes--------

424. Quran, sura Haa-Miim Sajdah 41:44.
In light of these verses, the fiqh markets disregard etymological scholarship that belabors to show that numerous words of the Quran originated in other regional languages.\textsuperscript{425} Furthermore, the point is trivial. According to the Quran, 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.”\textsuperscript{426} The presence of foreign words does not diminish the revelatory character of the Quran.

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.\textsuperscript{427} It is no coincidence that the abusive scholarship about Islam first emerged in what Southern calls “the ignorance of a confined space,”\textsuperscript{428} a period of several centuries in the Middle Ages when authentic information about Islam was unavailable or the scholars were unprepared to accept it.\textsuperscript{429} 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.\textsuperscript{430} 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.\textsuperscript{431}

In the twentieth century, independence movements against European colonialism provided a backdrop for external scholars to deform the letter and spirit of Islam.\textsuperscript{432} Even today, the Bosnian Muslims seeking separation from Christian Serbs, the Arabs struggling to regain occupied Palestine

\textsuperscript{425} See e.g., James A. Bellamy, More Proposed Emendations to the Text of the Koran, 116 Journal of American Oriental Society 196-204 (April-June, 1996) (showing word “errors” in the text of the Quran); Textual Criticisms of the Koran, 121 Journal of American Oriental Society, 1-6 (January-March 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.

\textsuperscript{426} Quran, sura Ar-Ruum 30:22

\textsuperscript{427} Palmer A. Throop, Criticism of Papal Crusade Policy in Old French and Provencal, 13 Speculum 379-412 (October, 1938) (defeat in crusades caused despair).

\textsuperscript{428} R.W. Southern, Western Views of Islam in the Middle Ages 13 (Cambridge University Press, 1962).

\textsuperscript{429} Norman Daniel, supra note \textsuperscript{1} at 16.

\textsuperscript{430} Norman Daniel, supra note \textsuperscript{1} at 271.

\textsuperscript{431} See Throop, Supra note \textsuperscript{407}.

\textsuperscript{432}
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. 433 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. 434

The 9/11 terrorist attacks proved a godsend for the propagandists. As before, geopolitical rivalries have 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. 435 In post-9/11 America, the understanding of Islam has been shockingly simplified. Islam is now equated with gratuitous violence. 436 Since Muslims living in America constitute a marginal minority, they have little resources to turn the tide of distortions. 437

The establishment of Israel in the Middle East has also spawned externalist scholarship that does not view Islam kindly. 438 It is no secret that the Quran speaks more softly about Christians than Jews, even though in many aspects Islam is closer to Judaism. Sir William Muir notes the Quranic verses that capture the differing view of Jews and Christians and offers an explanation of why the Quran treats the two communities of believers differently. 439 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. 440 This acceptance was a welcome relief as compared to the complete Judaic repudiation of the New Testament. 441 Christians and Muslims were also aligned because they both believed in the Jewish scriptures. Furthermore, Muir states that

434 Id. see chapter on the essentialist terrorist.
435 Id.
436 Id.
439 Sir William Muir, Sura V, v. 91 (the Coran), 1 The Hebrew Student 14 (May 1882).
440 Id.
441 Id.
per Quran, the Christians were not arrogant and they “are never accused of
wresting the Scriptures, or dislocating passages from the context.”

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 Mo-
hammed.” These lies paved the way for aggression and genocide. Euro-
pean warriors committed to liberate Holy Jerusalem “saw Muslims as god-
less heathens; others thought them polytheists who worshipped a blasphem-
ous trinity of gods; still other thought they worshipped Muhammad him-
self.” Most of this confusion was introduced through scandalous scholar-
ship. 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.

The role of external scholars in intense periods of geopolitical rival-
ries, 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. Others fanned the igno-
rance, while still other others manufactured their own distortions to perpetu-
ate ignorance. The European age of distortions produced crusades. The
American distortions have given birth to the war on terrorism. In every
crash-riden period, some external scholars stood up against the tide and
refused to lay blame on the Basic Code or Islamic fiqh.

2. Temporary Coercions

External forces, including international institutions, may pressure
Muslim opiniojurists 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. The

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442. Id.
443. J. Kritzeck, Moslem-Christian Understanding in mediaeval Times: A Review
Article, A COMPARATIVE STUDIES IN SOCIETY AND HISTORY 388-401, at 395 (April 1962)
444. Kritzeck, Id.
(2005).
446.
447. Khan, The Essentialist Terrorist, supra note——
448 See Reynolds v. United States, 98 U.S. 145 (1878) (affirming criminal
conviction of a Mormon man for practicing polygamy).
Mormon Church was threatened to forfeit its property if it did not comply with the laws of the federal government in outlawing polygamy.\textsuperscript{449} In order to preserve itself, the Mormon Church changed its doctrine on polygamy.\textsuperscript{450} 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.\textsuperscript{451} 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.\textsuperscript{452} Since conversions from Islam are few and far between, the campaign has been unable to gain momentum.\textsuperscript{453} But even when Muslim’s conversion to another religion receives international attention, Muslim states diffuse the matter by finding a loophole, such as the convert’s mental illness, for not enforcing the apostasy law.\textsuperscript{454} Some resist the pressure and uphold the law.\textsuperscript{455} 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...
The fiqh markets may adopt more flexible rules on apostasy through a genuine reconsideration of the freedom of religion that the Quran preserves and mandates. 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. According to the laws of waqf, property placed in a public trust could not be sold in the free market. Such public trusts are created to provide charitable services in perpetuity. This forcible change, however, did not dismantle the Islamic law of waqf property, which has served the Islamic civilization for centuries.

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 Muslims. 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.
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. 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 Quran, 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. 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 Islamic studies to the United States. Edward Said (1935-2003), a Christian Palestinian, has been even more influential in exposing distortions of the Orientalists. Even though these authors were not Muslims, they did

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463 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 enragèd, 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 Quran 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 Said, ORIENTALISM (Vintage Books, 1979).


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 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. 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 a terrorist, demonstrates that Muslims throughout the world have become increasingly more assertive in reacting to gratuitous distortions of their faith. The murder of Dutch filmmaker 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 Quran tattooed on the semi-naked bodies of dancing girls, 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 films—not react vio-

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468. Cem Ozdemir, Germany’s Integration Challenge, 30-SUM Fletcher F. World Aff. 221, at 225 (15 million Muslims in Europe protested over the publication of the cartoons); Prophet Drawings Anger Kuwait Lawmakers, 11/8/06 AP Online Reg. November 8, 2006 (Kuwait’s parliament passes a resolution to sever diplomatic relations with Denmark over the cartoons and spend $50 million to defend the Prophet’s image in the West).

lently. 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 Quran, the Sunna, and the Prophet under the disengagement principle: Lakum Diinukum wa la-yi Diin (To you be your Way, and to me mine). It appears, however, that a new rule has emerged in the fiqh markets. If an artist or writer publicly insults the Prophet or the Quran, Muslims populations will protest and show their resentment.

CONCLUSIONS

The fiqh markets are founded on the belief that the Quran and the Sunna are the primary sources of Islamic law. Muslim opiniojurists, pious and able, may offer opinions on new issues. An opinion compatible with the Basic Code and that is broadly followed in the Muslim world becomes the rule of Islamic law. Because opiniojurists 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 Quran 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.