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TEXTS OF TENSION, SPACES OF EMPOWERMENT:
Migrant Muslims and the Limits of Shi'ite Legal Discourse

Linda Darwish

A Thesis
in
The Department
of
Religion

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ABSTRACT

Texts of Tension, Spaces of Empowerment:
Migrant Muslims and the Limits of Shi'ite Legal Discourse

Linda Darwish, Ph.D.
Concordia University, 2009

This dissertation examines *fatwās* (expert legal opinions) produced by the Shi'ite legal establishment (*marji'īyah*) for Shi'ites in the West, looking at the construction, support, and communication of minority Muslim identity in the Western cultural context. Its significance lies in examining how law is socially relevant to the construction of identity in relation to the religious or cultural other, how it may be used to negotiate tensions, to compensate for feelings of otherness and powerlessness, and to strengthen group solidarity.

Shi'ite legal methodology makes a strong claim to a dynamic method of legal reasoning (*ijtihād*), continually responding to changing social conditions. Contemporary migration provides a case study by which to observe and evaluate its exercise in meeting practical, ethical, and moral challenges. Is migration a place for unprecedented innovation in legal interpretation? Does the law open up to the possibility of change in the Western context? What social, rhetorical, or ideological factors might propel or restrain *ijtihād*? Moreover, the *fatwā* genre of law is not restricted to experts but brings the recipients of the law into dialogue with the law-givers. It is this "interpretive relation" between scholar, layperson, and social context that generates the conclusions of my study.

Laypersons appear to be highly optimistic regarding the law's possibilities for legitimizing cultural adaptation and see its flexibility as essential to supporting a

“selective engagement” model of minority identity. In contrast, by adhering largely to the classical Qur'anic model of *hijrah* and to an ideological conception of Muslim-other relations that posits a strong differentiation of the non-Muslim “other,” scholars are able to largely avoid high-risk *ijtihād*, while promoting a “resistance model” of minority identity. Scholars exhibit the perception that religious safety depends on the construction of Muslim spaces bounded by normatively enjoined words, symbols and practices.

However, in place of the power of force, which nearly always accompanied *hijrah* in the classical model, scholars uphold what they describe as Islamic morality, not simply as a legal imperative, but as an instrument of empowerment and influence. It is this positioning of piety and morality as a means of empowerment that makes the contemporary legal discourse socially relevant.

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Tina Montandon and Munit Merid, administrative assistants in the Department of Religion are the absolute best! My now long years of acquaintance with them have only added to the number of blessings I have received in my life. The staff members of Concordia's Webster Library, McGill's Institute of Islamic Studies Library, and that of Mount Allison University, where I taught from 2007 to 2008, were always as cheerful as they were helpful. My friends and family, especially my parents, have been a great support and encouragement. Walks with friends in winter or summer, cups of coffee, meals, glasses of wine, prayers, and conversations whether on or off the topic, all contributed in some meaningful way to the work and, far more so, to its author.

Finally, this thesis is dedicated to my mother and the memory of my dear father, whose wish to see the completed work before his sudden death in 2006 remained unfulfilled. I had, however, sent him a lengthy summary of the work until that point, which he read. In typical fashion, his excitedly positive comments far exceeded the worth of the work then in his hands.

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TRANSLITERATION

Arabic transliteration follows the Library of Congress style

INTRODUCTION

“Fatwās [...] are always the same, and yet endlessly varied.”¹

Taped to my computer monitor is a three by five piece of paper on which is written the following question: “What do *fatāwā* (sing., *fatwā*) produced for Shi'ites living in the West tell us about how the *marjī 'īyah* shapes and supports Shi'ite minority identity in the West?” I have kept this paper attached to my computer screen through several moves over the last few years. In its now crumpled and tattered state, it has helped me to maintain my focus on the central question of this dissertation, which has been my primary occupation for longer than I care to admit. But before this piece of paper sees the recycle bin, I shall let it perform its final task. By isolating six key words in two groupings of three each in this question, I can construct the framework of my inquiry.

Fatwā is the first term of importance. It defines the source material for the study, within certain limitations which will be defined in chapter one on methodology. A Shi'ite *fatwā*, as is explained in detail in chapter two, is an authoritative legal opinion issued by a qualified legal scholar (*mujtahid*), which is the result of his independent legal reasoning (*ijtihād*) on any question of law (*istiftā'*) submitted to him. The scholars, as their identity and legitimacy unfolded, came to inherit the delegated authority of the central spiritual leaders of Shi'ite Islam, the Imams, who are by necessity descendents of the Prophet

¹ Gregory C. Kozlowski, “A Modern Indian Mufti,” in *Islamic Legal Interpretation: Muftis and Their Fatwas*, edited by Muhammad Khalid Masud, Brinkley Messick, and David S. Powers (Cambridge, Mass.: Harvard University Press, 1996), 250.

Muhammad.² The *fatwā* is a very practical and dynamic area of legal discourse, the study of which sheds light on contemporary legal thought.

The second key word is Shi'ite, which refers to the smaller of the two main sectarian divisions within Islam. The term Shi'ite is an anglicized form of the Arabic, *shī'ah*, meaning party or partisan. At its most basic level, it refers to the handful of individuals who gathered around Ali³ in support of his candidacy to the caliphate following the death of the prophet Muhammad (632 CE). These supporters were thus referred to as *Shī'at 'Ali*. For some time, they remained defined simply by this show of loyalty to Ali, and, by extension, the family of the Prophet (*ahl al-bayt*). According to Marshall Hodgson, this political grouping gradually developed a religious sectarianism, largely in consequence of the massacre of Ali's second son, the Prophet's grandson, Husayn (d. 680), known to Shi'ites as Imam Husayn,⁴ and his party of seventy-two men

² The term *imām* (lower case i) is commonly understood to refer to a congregational prayer leader and sometimes, in addition to that, to someone in a similar role to that of a pastor or priest in a Christian church, or a rabbi in the Jewish tradition. In Shi'ite Islam, however, Imam (distinguished in English by the upper case I) refers to twelve descendents of the Prophet Muhammad, especially designated as political and religious leaders of the Shi'ite community, and believed to be infallible. All but the last of them died between the years 661 and 874 CE. The twelfth Imam is said to have disappeared from public access in the outer boundary year. This is when the period known as the Lesser Occultation—because the Imam was accessible only by way of four deputies in succession—began. It lasted until 941 CE when communication with the Imam shifted to a purely esoteric mode. This marks the beginning of the Greater Occultation which continues until today. For the Shi'ites, or according to orthodox Shi'ite doctrine, this twelfth and final Imam remains spiritually active within the Shi'ite community from his place of occultation. It is said that his return at the end of time, along with the Messiah Jesus, will vindicate the Shi'a and usher in a period of unparalleled universal justice. "He will fill the earth with justice," an authoritative Shi'ite Tradition states, "as it had been filled with injustice." The place of the Imams in the Ja'fari school of law (as the branch of Shi'ite law with which we are concerned is called) is the fundamental distinction between it and the four extant Sunni schools. Shi'ite Traditions, which, along with the Qur'an, reason (*'aql*), and consensus (*ijmā'*), form the basis of Shi'ite law, are generally traced through a line of transmission to the authority of one of the Imams, which is not the case for Sunni Traditions. Unless otherwise stated, my use of the term Imam in this dissertation always refers to this specific Shi'ite meaning.

³ Aside from being the fourth Caliph for the whole of the Muslim community, for the Shi'ites, Ali was also the first Imam. The son-in-law and cousin of the Prophet Muhammad, he died in 661 CE at the hands of a former supporter turned Kharijite; (originally supporters of Ali, the sect became some of Ali's most ardent opponents).

⁴ Husayn was the third Imam, after his brother Hasan, the second Imam, died in 669 CE.

on the plains of Karbala.⁵ Out of the community's response to these sad and pivotal events in Islamic history a world of religious devotion and piety emerged, revolving around the concept of the Imamate.⁶

This brings us to the third term of importance, the *marji 'iyah*, or, as framed in our question, the institution of the *marji 'iyah*. Chapter two provides an in-depth discussion of how the institution of the *marji 'iyah* evolved. Here, we briefly note that *marji 'al-taqīd* (source of emulation) refers to the highest level Shi'ite legal scholar, whose reasoned opinions best reflect those of the Imams, collectively, and especially, that of the last and "hidden" Twelfth Imam, known as Imām al-Mahdi (the rightly guided). Their opinions, that is, those of the scholars, constitute a structural and institutionalized authority unparalleled in Sunni Islam.

The second set of terms takes us into the problematic area of peoples and places, and common territorial definitions of cultural difference. The assumed correspondence between space and culture, as is commonly understood by the terms (Muslim) "minority" and "the West," has been criticised in postcolonial scholarship. In line with this scholarship, postmodern cultural theorists Akhil Gupta and James Ferguson propose a new approach to identity and difference that questions this isomorphic association of culture with place, and thus, with identity.⁷ They suggest that it might be more useful to

⁵ The total number of companions, including women and children, many of the latter of which were also slain or died of thirst, was closer to a hundred and fifty. Imam Hassan Qazwini (Qazwini is here using the term imam in its more general sense of Muslim cleric) offers a concise, yet poignant narrative of these events in his interesting biography, entitled *American Crescent: A Muslim Cleric on the Power of his Faith, the Struggle against Prejudice, and the Future of Islam and America* (New York: Random House, 2007), 12-16.

⁶ Marshall Hodgson, "How Did the Early Shi'a Become Sectarian?" *Journal of the American Oriental Society* 75 no. 1 (Jan.-Mar., 1955): 1-13. Hodgson's is an interpretation that appears to me consistent with the historical record and the place that the Imams came to occupy in Shi'ism.

⁷ Akhil Gupta and James Ferguson, "Beyond 'Culture': Space, Identity, and the Politics of Difference," in *Culture, Power, Place: Explorations in Critical Anthropology*, ed. Akhil Gupta and James Ferguson (London: Duke University Press, 1997), 33-51.

speak of identity as process, rather than essence; as in flux, rather than fixed and tied to particular geographic spaces and territories, themselves historical constructions of modern colonialism and post-colonialism. Thus, in post-colonial theory, identity is always in process, perpetually constructing itself out of fluctuations of relationships tied to power and place.⁸ I will discuss identity more fully below. The point at present is to say that these terms define the object of my study as one of analyzing the construction of Muslim identity in geographical and social contexts marked by an intersection between tradition and post-modernity in Western societies.

At its broadest, then, this is a study of religion, migration, law, and identity. Along with other studies of migrant Muslim communities, I endeavour to theorize Muslim “minorityness,”⁹ with specific reference to the Twelver Shi’ite community of religious scholars and laypersons. I ask how those positioned as religious leaders apply the authority of their learning and control of authoritative textual sources to the construction, protection, and extension of Shi’ite Muslim minority identity in non-Muslim environments of the West. The questions I bring to the texts explore ways in which contemporary religious scholars, trained in traditional methodologies, negotiate the inevitable tensions. As a primary discursive source of authoritative ethical guidance, the *marji’iyah* has a potentially powerful influence on the community’s sense of place and identity.

Like other immigrant communities, Muslims in the West face numerous issues in the process of defining themselves in relation to the larger community. However, concern

⁸ Ibid.

⁹ Yvonne Haddad notes that the term was coined by Syed Z. Abedin “in his foreword to Kettani’s book, *Muslim Minorities*, xiii. See Haddad, “At Home in the *Hijra*: South Asian Muslims in the United States,” in *The South Asian Religious Diaspora in Britain, Canada, and the United States*, ed. Harold Coward, John R. Hinnells, and Raymond Brady Williams (New York: SUNY Press, 2000), 257 n. 25.

for the observance of a religious law that addresses a considerable number of daily life issues further complicates the already problematic relationship between religion and secular society. The organization of time and space, the body and its covering, education, gender relations, attitudes to secular authorities—to mention just a few issues—in the context of the West become susceptible to new kinds of questioning and doubt. That these issues fall within the category of “law” is comprehensible upon recognition of the totality and unity of religion and social intercourse in Islamic legal thought.

As in other legal systems, Islamic legal methodology encompasses principles that offer potential for change, for constant revision and updating, conditioned by time and place and the theoretical approach of the legal school (*madhhab*), as well as the individual jurist within a given *madhhab*. In other words, it is theoretically possible that two or more legal opinions within the same school of thought be equally legitimate though different from each other. It is theoretically possible, also, that different legal authorities propose different solutions to the problem of Muslim identity in the West. It is this potential for diversity of opinion on a timely and relevant subject that inspires the rationale for embarking on this study.

In reading these sources it becomes evident, however, that solutions to the problem of Muslim minority identity in the West are proposed belongs not just to the experts; they are forged, in the institution of *iftā'* (*fatwā* giving), out of an ongoing dialogue between the *mujtahid* and the *mustaftī* (person seeking a *fatwā*). As others have put it, “Behind the encounter of *mustaftī* [sic] and *mufti* [sic], the posing of a query and the giving of a *fatwa* [sic], lies a complex social and interpretive relation.”¹⁰ In addition

¹⁰ Muhammad Khalid Masud, Brinkley Messick, and David S. Powers, “Muftis, Fatwas, and Islamic Legal interpretation,” in *Islamic Legal Interpretation: Muftis and Their Fatwas*, 20.

to these two conversational partners is the third element, that of social context. This study suggests that it is out of this “interpretive relation” between scholar, layperson, and social context that particular conceptions of Shi’ite Muslim identity in the West may be quarried. I see this dynamic intersection of non-static elements as reflective of what Gupta and Ferguson call the “interstitial space” between places or cultures of difference.¹¹ These “borderlands,” Gupta and Ferguson argue, the “marginal zones” where differences meet and where tensions and dialogues take place, are “the ‘normal’ locale of the postmodern subject,”¹² and are thus places that can yield new understandings of cultural knowledge.

In the present case, the triologue challenges our assumed understanding of categories such as Islam and the West. Tensions are found to exist *within* as well as between these categories, suggesting that far from being discrete and closed entities, they are defined by more fluid and moveable boundaries. For example, if at times a *mustaftī* identifies closely with his or her Muslim heritage, say, with regard to a political relationship to the non-Muslim state, but feels that breaking with traditional Muslim gender boundaries does no harm to their Islam, a *mujtahid* may draw the lines differently, regarding a supportive and loyal political relationship with the Western government mandatory, while maintaining strict support for head coverings and beards. Both seek to isolate certain symbols as essential markers of identity and discard those that seem not to fulfil that purpose.

Close scrutiny of the legal discourse on Shi’ite Muslim identity in the West demonstrates further the construction of cultural spaces that push the boundaries of our

¹¹ Akhil Gupta and James Ferguson, “Beyond ‘Culture’,” 48.

¹² *Ibid.*

assumed isomorphic definitions of territory and culture. While the morphing of territory with culture may suit the classical Islamic legal discourse of what counts as Muslim space, the model is inadequate for understanding the processes of identity formation in the post-modern world, where space and place are understood to mean far more than territory. It seems that being able to disentangle the naturalized association of culture with place (Gupta and Ferguson) means that a more richly textured understanding of cultural space becomes possible. Interpreting texts that remain essentially classical in form and orientation through post-modern lenses allows us to focus on the use of symbols, rather than territory, as the central defining element of cultural space.

This notion of space as culturally constituted suggests a particular kind of sacred space, constructed not by territory, as in the classical view, but by the symbols of words, behaviours, and especially, “normatively enjoined practices.”¹³ Consequently, while the content of what defines space as Muslim, that is, the pre-eminence of Islamic law, remains continuous, it takes shape in a different form. While the classically rooted thrust to expand the borders of Muslim space continues to be active, traditional definitions of what constitutes Muslim space, closely linked to discrete and bounded territories, open up to more individualized forms, characterized by personal behaviour. The post-modern “home” or “abode” of Islam (*dār al-islām*) becomes, then, transportable, mobile, transnational, and, in some sense, the private property of individual Muslims who choose to define their own universe of meaning (i.e. culture and identity) by an appropriation of the requisite symbols of what it means to be Muslim in the West.

MUSLIMS IN CANADA: A DEMOGRAPHIC OVERVIEW

¹³ Barbara D. Metcalf, “Introduction: Sacred Words, Sanctioned Practice, New Communities,” in *Making Muslim Space in North America and Europe*, ed. Barbary Daly Metcalf (Berkeley: University of California Press, 1996), 5.

As the *fatāwā* analyzed in this research do not often specify geographic location, apart from the general designation of the West, it is impossible to situate the community that requests legal guidance more precisely. I have chosen Canada as a demographic case study because it has a very high level of immigration. Reliable research puts Canada's foreign born population at 17.4 percent in 2003.¹⁴ This is comparatively higher even than the United States, which in 2003 had a foreign born population of 11.5 percent.¹⁵ Whereas most studies of Islam and Muslims in the North American context focus on the United States, the Canadian context represents an interesting experiment in multiculturalism. While an analysis of the intersection of Shi'ite legal discourse with Canadian multiculturalism is beyond the scope of this writing, it is fitting to provide at least a preliminary survey of population numbers and demographic trends, the data for which is conveniently accessible.

Muslim population figures in North America generally do not differentiate between Sunni and Shi'ite Muslims. It is generally understood that Shi'ites make up approximately 15% of the total Muslim population worldwide. Recent events in Iraq and Lebanon might suggest that the ratio would be slightly higher in diaspora. Abdulaziz Sachedina notes the lack of statistical data regarding Shi'ites in North America. His research, based on oral history, suggests that Shi'ite families would likely have come to North America "well before the middle of [the 20th] century, although the appearance on the American scene of a significant well-educated and professional Shi'i middle class is a

¹⁴ Carola Suárez-Orozco, "Formulating Identity in a Globalized World," *Globalization Culture and Education in the New Millennium*, ed. Marcelo M. Suárez-Orozco and Desirée Baolian Qin-Hilliard (Berkeley: University of California Press, 2004), 173.

¹⁵ *Ibid.*

comparatively recent phenomenon.”¹⁶ Liyakat Takim, also on the basis of oral accounts, traces the beginnings of Shi’ite migration to the West to the latter two decades of the 19th century and the first decade and a half of the 20th century. Most of these migrants were from Lebanon and settled primarily in the Detroit/Dearborn area. By the 1940s, Takim notes, there were at least 200 Muslim families (both Sunni and Shi’ite) in Detroit, though the greatest influx took place in the 1950s.¹⁷

This is corroborated by Linda Walbridge whose studies of the Shi’ite community in Dearborn suggest that their presence in North America became numerically significant in the second half of the 20th century. The Islamic Center of America, for example, a major Shi’ite institution in the Detroit-Dearborn area, was founded only in 1963.¹⁸ The relatively late institutional establishment of the Shi’ite Muslim community in North America may be indicative of Takim’s observation that it is only where Shi’ites make up a large portion of the Muslim community are they inclined to emphasize their specifically Shi’ite identity; otherwise, feelings of vulnerability incline them to blend with the larger Muslim community.¹⁹

Besides the lack of statistical data on Shi’ites in North America, Canadian census figures are also not wholly reliable in documenting the Muslim population in general, as they are based not on religious, but on linguistic self-identification. This would tend to

¹⁶ Abdulaziz Sachedina, “A Minority Within a Minority: The Case of the Shi’a in North America,” in *Muslim Communities in North America*, ed. Yvonne Y. Haddad and Jane I. Smith (Albany: State University of Albany Press, 1994), 5. I discuss leadership aspects of the Shi’ite community in North America in detail in chapter two.

¹⁷ Liyakat Takim, “Multiple Identities in a Pluralistic World: Shi’ism in America,” in *Muslims in the West: From Sojourners to Citizens*, ed. Yvonne Yazbeck Haddad (New York: Oxford University Press, 2002), 218.

¹⁸ Linda Walbridge, “The Shi’a Mosques and Their Congregations in Dearborn,” in *Muslim Communities in North America*, 340.

¹⁹ Liyakatali Takim, “Foreign Influences on American Shi’ism,” *The Muslim World* 90, no. 3-4 (Fall 2000): 466.

inflate the figures, particularly where speakers of Arabic are concerned, as a large percentage of Arabic-speaking immigrants are not, in fact, Muslims.²⁰ On a smaller scale, the same may be said of Persian or Urdu speakers; many Persian-speaking immigrants are Jews and Christians, and many Urdu-speakers in North America are Christians.

In 1871, the year of Canada's first national census, a total of 13 people identified themselves as Muslim.²¹ There are no reliable statistics for the total number of Muslims in Canada today. Most research puts the figure at about 750,000, though in 2009 it could well be as high as a million.²² An unpublished demographic study by a Université de Montréal sociology of religion professor, Glen Smith, tables Census Canada's 2001 and 2006 statistics by language²³ for each of the cities of Halifax, Quebec City, Montreal, Ottawa-Gatineau-Hull, Toronto, Hamilton, Winnipeg, Calgary, Edmonton, and Vancouver.²⁴ Bearing in mind the weakness of the linguistic method identified above, by analyzing these figures we are able to track patterns of settlement in different cities and regions of Canada.

Taking Montreal as an example, the differences between the 2001 and 2006 censuses show an overall increase of more than 26%, with relatively equal increases in the Arabic, Persian, Urdu, and Bengali populations (between 25%-36%), but only 3% increase in the Gujarati population. Arabic speakers in Toronto, on the other hand, had

²⁰ Using language as an indicator also fails to take into account conversions to and from Islam.

²¹ Karim H. Karim, "Crescent Dawn in the Great White North: Muslim Participation in the Canadian Public Sphere," in *Muslims in the West: From Sojourners to Citizens*, 262.

²² See, for example, Abdul Malik Mujahid, assisted by Amerah Egab, "Profile of Muslims in Canada," <http://soundvision.com/info/muslims/muslimsincanada.asp> (accessed February 1, 2009); The Canadian Society of Muslims, "Muslim Population Statistics," <http://muslim-canada.org/muslimstats.html> (accessed February 1, 2009). The latter source cites the 2001 census which put the number of Muslims in Canada at approximately 650,000.

²³ Smith includes figures for speakers of Arabic, Persian, Urdu, Bengali, and Gujarati.

²⁴ Smith unfortunately omits statistics for London, Ontario, which had a Muslim population of 11,725 according to the 2001 census. This is comparable to Hamilton's 12,880 and far beyond Winnipeg's 4,805 Muslims, or Quebec City's 3,020.

the lowest percentage increase at only 17%, compared to the Urdu-speaking population's increase of over 45%. Despite this high number, the total increase of Muslim language speakers in Toronto rose only by just under 15%, well below the 26% rate of increase in Montreal.

At just under 24%, Vancouver's rate of increase in the five year period was closer to that of Montreal. Overall, Vancouver saw virtually equal rates of increase to Montreal within each language group. For example, Persian speakers increased in Vancouver and Montreal at a rate of 24% and 25% respectively. However, the city that showed the highest rate of increase between 2001 and 2006 for all language groups was Calgary. The Bengali speaking population alone rose by more than 63%, with Urdu and Persian speakers not far behind at 57% and almost 52% respectively. Calgary's Arabic speaking population's 22% increase represents roughly the same rate as in Montreal and Vancouver. Overall, the Muslim population of Calgary increased at a rate of 40%, compared to its general population increase of slightly more than 18% during the same period, roughly double the rate.²⁵

This figure is well beyond the Canadian national average of 5.4% growth and is therefore, relatively consistent with the explosion in Calgary's overall population.²⁶ By way of comparison, for example, while Montreal's overall population increased by only 2.3%, just half of the national average, its Muslim (or speakers of Arabic and other

²⁵ According to the 2006 census, Calgary's population was at 1,162,310, while the 2001 figure was 951,395.

²⁶ Others put the rate of increase at 12%, still more than double the general population's national average growth of 5.4%. CBC News, <http://www.cbc.ca/canada/calgary/story/2007/03/13/calgary-census.html> (accessed February 1, 2009).

Muslim languages) population increased by 26%, as noted above.²⁷ That is, the Muslim population of Montreal increased at a rate at least eleven times faster than the general population of the city. These figures suggest at least two possible conclusions. On the one hand, according to Calgary's statistics, the Canadian Muslim population is following the same urban trends as the general Canadian population. On the other hand, Montreal's 26% increase in the Muslim population represents a growth pattern well in excess of its general population growth, suggesting that if these trends continue, Montreal will continue to outstrip many other Canadian cities as a centre of Muslim life.

LITERATURE REVIEW

I am, of course, indebted to several writings on the subject of Islam and Muslims in the West. Such studies are plentiful. A survey of any major bibliography of works on Islam in the West reveals that the number of monographs and articles written during the last two decades of the 20th century far outnumbers the output of the previous eight decades.²⁸ Since September 2001, scores of publications have been added to that number. Studies of Islam in the West take different approaches, which may be classified into three broad trends: history and demographics; social issues, including approaches to Islamic

²⁷ CBC News, "Quebec sees population rise but Montreal loses ground," <http://www.cbc.ca/canada/montreal/story/2007/03/13/qc-quebecensus20070313.html> (accessed February 1, 2009).

²⁸ Studies published prior to 1980 cited in *Muslim Communities in North America* (1994) include: M. M. Aijian, "Mohammedans in the United States," *The Moslem World*, 10 (1920), 30-35; Barbara C. Aswad, ed., *Arabic Speaking Communities in American Cities* (Staten Island: Center for Migration Studies, 1974); Allan D. Austin, *African Muslims in Antebellum America* (New York: Garland Publishing, 1974); Harold Barclay, "The Muslim Experience in Canada," in *Religion and ethnicity in Canada*, ed. Harold Coward and Leslie Kamamura (Waterloo, Ont.: Wilfred Laurier University Press, 1978), 101-113; G. H. Bousquet, "Moslem Religious Influences in the United States," *The Moslem World*, 25 (1935), 40-44; Lois Gottesman, *Islam in American Life: A Background Report* (American Jewish Committee, Institute of Human Relations, 1979); Daoood Hasan Hamdani, "Muslims and Christian Life in Canada," *Journal Institute of Muslim Minority Affairs* 1, no. 1 (1979), 51-59; Mary Caroline Holmes, "Islam in America," *The Moslem World*, 26 (1926), 262-266; Eric C. Lincoln, *The Black Muslims in America* (Boston: Beacon Press, 1961). The bibliography also includes at least half a dozen theses and dissertations on Islam and Muslims in the United States, many written prior to 1980.

law; and ritual practice. The concept of Muslim minority identity is often a sub-theme of all three types. This review focuses on research that includes some element of identity, or that studies the methods of interpretation and/or application of Islamic law in the West.

Standing out as “the first of its kind” is *The Muslim Community in North America*, published in Canada in 1983.²⁹ This collection of papers presented at a conference held at the University of Alberta in 1980 on the theme of “Islam in North America,” is a cross-disciplinary foundational study of Islam and Muslims in North America. Contributors, both members and non-members of the Muslim community, express a variety of different opinions, sometimes disagreeing sharply with each other. One area of agreement is that the contributions all attempt to answer the question of how “a religious system that is much more a way of life than a theological structure [can] adapt to North America.”³⁰

Several chapters express minority Muslim status in terms of the problematic of vulnerability to outside influences. At least one author suggests that the community faces two options in overcoming that vulnerability. “If Islam and Muslims are to survive as a minority,” Murray Hogben writes, “either religious purism or cultural semi-isolation or a more liberal interpretation and cultural integration must succeed in protecting them from

²⁹ Introduction to *The Muslim Community in North America*, ed., Earle H. Waugh, Baha Abu-Laban, and Regula B. Qureshi, (Edmonton: University of Alberta Press, 1983), 1.

³⁰ *Ibid.*, 2. The question alludes to the twin and in my view false assumption that Islam is relatively unconcerned with theology and that its presumed emphasis on lifestyle is unique amongst Western religions, particularly as compared with Christianity. While it is true that Islam never had an equivalent of the early church councils, nor as official an excommunication agenda, it is my understanding that both of these assumptions ignore the fact that Islamic law presupposes what it considers correct belief and is significantly attuned to matters of excommunication (*takfir*); and that while religions differ in how they address lifestyle, Western religions in general are at once systems of belief and ways of life. In my opinion, it is, rather, the secularization of religious belief in the West that gives the appearance, especially of Christianity, that it is concerned predominantly with the private conscience of the believer. That Islamic law has tended to predominate Islamic ethics and morality, as opposed to doctrinal or esoteric approaches, suggests only an emphasis on law as a *method* of religious guidance, rather than any *a priori* statement of its nature.

non-Muslim influences.”³¹ The latter option alludes to what Waugh identifies as the need for a renewed *ijtihād* that will help “reconcile” Islamic legal doctrine to the North American context while addressing the perceived problems of “protection” and “integration.”³² These are some of the key ideas that I deal with in the present work.

In an earlier article, Waugh focuses on the role of the imam or mosque leader in the West and suggests that the imam’s role as mediator between law as ideal and law as performed by the community in the West opens up opportunities for creative explorations of new models while preserving ancient traditions.³³ His study shows that imams are often caught between adopting Western cultural forms to win the younger generation and maintaining tradition to preserve the older. In addition, they face new responsibilities for which their training does not equip them. His conclusions, based on a case study mosque in Edmonton, Alberta, point to a need for new avenues in leadership preparation to help imams deal with guiding Muslims through the ambiguities of decision-making “in the new world.”

Waugh develops these thoughts further in an article in *The Muslim Community*, cited above.³⁴ He suggests that the tension observed earlier between the ideals imagined by the institutional leadership and the practices of the *ummah* (Muslim community) in North America are exacerbated by the lack of unanimity or stability regarding what it means to be Muslim. The tension is often resolved, he says, through successive rationalizations that generate agreed upon compromises between leadership and *ummah*,

³¹ Murray Hogben, “The Socio-Religious Behaviour of Muslims in Canada: An Overview,” in *Muslim Community*, 111.

³² Waugh, Introduction to *The Muslim Community*, 3.

³³ Earle Waugh, “The Imam in the New World: Models and Modifications,” in *Transitions and Transformations in the History of Religions, Essays in Honor of Joseph M. Kitagawa*, ed. Frank E. Reynolds and Theodore M. Ludwig (Leiden: E. J. Brill, 1980), 124-49.

³⁴ Earle Waugh, “Muslim Leadership and the Shaping of the Umma: Classical Tradition and Religious Tension in the North American Setting,” in *Muslim Community*, 11-33.

and that signal new expressions of Islamic tradition adapted to the modern secular context. Thus, leadership and *ummah* are and must be engaged in dialectical relationship around values generated by the intersection of Islam and Western culture.

Baha Abu-Laban echoes Waugh's warning that for the community to survive in the West, a new kind of leadership, trained not just in the Islamic sciences, but also in Western culture, needs to emerge. Only this kind of leadership will succeed at renewing *ijtihād* and reforming Muslim law in dialogue with the cultural conditions of Muslims in the West.³⁵ In this same volume, Muhammad Abdul-Rauf expresses his optimism about the future of Muslims in the West, whose beliefs he holds to be in fundamental agreement with American values of liberty, equality, and human dignity.³⁶ Further, he says, the American Constitution's guarantee of freedom of religion provides protection and support for the Muslim community to formulate its own manner of expressing their shared values in the American context.³⁷ In sum, the authors in this volume see the success of the community issuing out of a dialogue between the interpreters of Islamic law, the Muslim community, and Western cultural values. These correspond to the more precisely defined groupings of my analysis: *marāji' al-taqlīd* (sing. *marji'*), *mustaftīs*, and the Western social context.

Continuing on the theme of identity touched on above, a publication that has been particularly helpful to me is *Making Muslim Space in North America and Europe*, a collection of case studies around the theme of space and the way that diasporic Muslim communities treat what the authors refer to as "a vivid sense of 'displacement,' both

³⁵ Baha Abu-Laban, "The Canadian Muslim Community: The Need for a New Survival Strategy," in *Muslim Community*, 76-92.

³⁶ Muhammad Abdul-Rauf, "The Future of the Islamic Tradition in North America," in *Muslim Community*, 271-72.

³⁷ *Ibid.*, 277.

physical and cultural.”³⁸ The authors look at how rituals and Islamic institutions in America reflect Muslims' spatial conceptions of minority identity and how they wish that identity to be read by non-Muslims. The authors argue that spatial manifestations function as “a clear form of resistance to the dominant categories of the larger culture.”³⁹ As such, they are said to empower Muslims in asserting their “otherness.” The work suggests that the negotiating endeavours of the younger generation of Muslim immigrants is opting neither for strict tradition, nor for the adoption of Western cultural models, but is developing new forms of assertion of American Muslim identity, reflective of a greater confidence in Muslim self-definition in North America and Europe.

Another helpful work looking at identity is one of several studies edited by Yvonne Haddad and John Esposito, entitled *Muslims on the Americanization Path?*⁴⁰ The central question of the book asks if Muslims will remain as ‘Muslims in America,’ or if they will evolve with a distinctly American Muslim identity. If the latter, how does the history of Muslim immigration and past experience contribute to the shape American Muslim identity will take? In chapter one, “The Dynamics of Islamic Identity in North America,” Haddad suggests that as the number of Muslims in the United States increases and as their institutional infrastructure develops, the tendency will be to become more assertive of a specifically “Muslim presence” in North America.⁴¹ Haddad’s finding that Muslims who arrived before and after 1960 have differed markedly in their approaches would seem to substantiate this prediction. Earlier arrivals tended to adapt more readily to

³⁸ Metcalf, “Sacred Words,” 2.

³⁹ *Ibid.*, 18.

⁴⁰ Yvonne Yazbeck Haddad and John L. Esposito, ed., *Muslims on the Americanization Path?* (Oxford: Oxford University Press, 2000).

⁴¹ Yvonne Haddad, “The Dynamics of Islamic Identity in North America,” in *Muslims on the Americanization Path?*, 33.

American life, fitting Islam into their Christian contextual framework. Later arrivals see accommodation as an unwarranted compromise and feel that their educational and technological contribution to American society entitles them to propose Islam as the best solution to America's social problems.⁴²

Some of the articles in this volume expect that answers to the questions listed above must involve a deeper examination of legal issues, Islamic and American, facing Muslims living in the West. Khaled Abou Fadl's chapter on the history of Islamic legal discourse on Muslim minorities is especially helpful, as is a contribution from Yusuf Talal DeLorenzo that provides an overview of the origins and development of the Fiqh Council of North America. A Sunni body, the Council offers legal opinions, advice, and resources on a great variety of issues of concern to Muslims, as well as to such non-Muslim professionals as lawyers and journalists. Redressing the inadequacy of relying on "imported" scholars, the Council adds to the traditional qualifications obligatory on its members the requirement of "at least five years of residence in North America."⁴³ The author adds an appendix consisting of a sampling of *fatāwā* issued by members of the Council, demonstrating the complexities of North American Muslim life. Although valuable in and of themselves, uncovering the identity dynamics implicit in the *fatāwā* would require examination and analysis.

In another edited volume, Haddad and Esposito are joined by Jane Smith, also a prolific writer on Muslims in the West, in looking at Muslim diaspora communities in North America within the broader context of Christian and Jewish immigrant

⁴² Ibid., 21-22.

⁴³ Delorenzo, "The Fiqh Council in North America," in *Muslims on the Americanization Path?*, 69.

communities in the United States.⁴⁴ Particularly apropos to the present research is Ingrid Mattson's discussion of the use of Islamic paradigms in defining Muslim approaches to America, which I discuss in chapter one in the context of my methodology.

Identity is a central theme of several other studies. I discuss here three that focus on Islamic law, from different approaches. The first is a 1987 ethnographic study done by Yvonne Haddad and Adair T. Lummis, entitled *Islamic Values in the United States*. The authors use extensive interviews and questionnaires to determine the subjects' levels of social integration on issues such as loans and interest, food and alcohol consumption, occupations, inheritance, American holidays, relations between men and women, pets, education, and other matters. The study asks how Muslims in the United States perceive the relevance of Islamic law in their everyday lives. The authors detect two approaches to Muslim identity in the United States within their sample. The liberals have a weak, if any, connection to their Muslim identity, whereas conservatives maintain standard Islamic norms regarding food and ritual practice, but otherwise assimilate to Western norms.⁴⁵ Their conclusion is that those who "welcome assimilation into American life" feel "at home" in the West, whereas others "are genuinely concerned that [assimilation] will jeopardize the maintenance of Islamic values."⁴⁶ As an ethnographic study, relying on surveys and interviews, the study does not deal with normative values from the perspective of legal authorities.

⁴⁴ Yvonne Yazbeck Haddad, Jane I. Smith, and John L. Esposito, ed., *Religion and Immigration: Christian, Jewish, and Muslim Experiences in the United States* (Walnut Creek, CA: AltaMira Press, 2003).

⁴⁵ The authors identify three further possible "worldviews" that do not feature widely in their study: the missionary-minded approach that maintains strict adherence to Islamic law, and tends to be isolationist; those who take the missionary element of the previous group yet further, endeavouring to make Islam normative in American public life; and finally, those who adhere to the mystical approach of Sufism. Yvonne Yazbeck Haddad and Adair T. Lummis, *Islamic Values in the United States: A Comparative Study* (New York: Oxford University Press, 1987), 170-71.

⁴⁶ *Ibid.*, 171.

Kambiz GhaneaBassiri uses a similar methodology with a concentrated sample of Muslims living on the West Coast of the United States.⁴⁷ He suggests that the wide diversity of Muslims in Los Angeles is a microcosm of America. This ‘diversity’ is, nevertheless, questionable, as his sample consists overwhelmingly of youth between the ages of 9 and 30.⁴⁸ His objective, as that of Haddad and Lummis, is to investigate attitudes towards the application of Islamic law in the West. He analyzes his data in terms of two sets of competing factors: religious sources such as texts, rituals, dogmas, and institutions on the one hand; and individual goals, needs, cultures, and religious understanding on the other. The results of his study show that the latter set of concerns are far more influential in determining what it means to be Muslim in America. Again, his study is from data collected in field research and does not deal with the authoritative textual sources produced for this population.

Finally in this regard, in *Western Muslims and the Future of Islam*, Tariq Ramadan⁴⁹ looks at the construction and interpretation of Islamic law for Muslims in the West. As an active participant, his objective is “to protect the Muslim identity and religious practice” while helping Muslims to become full citizens of the West.⁵⁰ As do a growing number of liberal (as well as more mainstream) Muslims, he argues that overseas legal experts are unsuited to the task of supplying legal guidance to Muslims in the West. The universality of Islamic law, he says, demands a renewed *ijtihad* “in the

⁴⁷ Kambiz GhaneaBassiri, *Competing Visions of Islam in the United States: A Study of Los Angeles* (Westport, CT: Greenwood Press, 1997).

⁴⁸ Fifty-six percent of his sample is under 30 years old, 36% as young as 9 – 17. Less than 10% are over 50 years of age.

⁴⁹ Tariq Ramadan, *Western Muslims and the Future of Islam* (Oxford: Oxford University Press, 2004). This is an expanded version of his earlier book, *To Be a European Muslim: A Study of Islamic Sources in the European Context* (Leicester, UK: Islamic Foundation, 1999).

⁵⁰ Ramadan, *Western Muslims*, 27.

light of our new western context.”⁵¹ This, he argues, would help to move Islam and Muslims out from the margins of Western societies and into the mainstream, where they can contribute as European or American Muslims. He pleads with Western Muslims to abandon their “bipolar” and reactionary, self-protecting postures that alienate them and confirm them in “Otherness.”⁵² He insists that the tools for an authentic Islamic adaptation, not just *to*, but *of*, Western society are available and beckon Muslims to make all that is good in Western society their own. As a result, Muslims will not remain as “minority” communities, but become responsible adults in societies that are “home” to wherever they reside. In sum, Ramadan offers a *fiqh*-based solution of “*legal integration*” to the problem of acculturation.⁵³

While the majority of the studies surveyed above deal predominantly or uniquely with Sunni Islam, their findings with regard to the relationship of Islamic law to Muslim identity in the West apply equally, if not more so, to Shi’ites in the West whose leadership issues are more complex and demanding. A recurring question regarding identity asks whether leadership styles and popular perceptions are leading Muslims in the West to define themselves as ‘Muslims in the West,’ or as ‘Western Muslims’? The differences between these two models indicate something about which model of minority Muslim identity, discussed in the next chapter, is favoured. Further, many of the sources surveyed identify ambiguities and tensions around interpretation and application of Islamic law within Muslim communities in the West; and stress the need for a more culturally relevant and appropriately trained leadership able to engage Western culture while taking full advantage of the tools of legal interpretation.

⁵¹ Ibid., 4.

⁵² Ibid., 5.

⁵³ Ibid., 99 (italics in original).

However, among the sources discussed thus far, none conduct a close examination of popular level Islamic legal discourse and its bearing on Muslim minority identity. What I mean by popular legal discourse is a genre of literature deeply embedded within classical legal methodology, but produced for and in a style intended for use by common lay people, that is, the expansive and growing *fatwā* literature generated by highly qualified Muslim scholars and, in Sunni Islam, by ideological leaders such as Osama bin Laden and others, as well.⁵⁴ We turn our attention now to a few studies that look primarily at modern Sunni *fatāwā*, some, but not all of which, is produced for Muslims in the West. Given that Shi'ite legal interpretation takes place within the institution of the *marji 'iyah*, I discuss writings that treat Shi'ite legal discourse for Muslims in the West in chapter three, where I discuss the *marji 'iyah* in detail. While all of these writings make a significant contribution to the field, none conduct a comprehensive analysis of *fatāwā* across a broad spectrum of social and religious aspects of daily life. This is where I hope that my research will fill in a gap. A review of these writings will help to put my work within its academic context more specifically.

In his PhD dissertation, published in 1997, Jakob Skovgaard-Petersen reviews the history of scholarship on *fatāwā*.⁵⁵ His review highlights the study of *fatāwā* issued during periods of major social change, beginning with a work by Christian Snouck Hurgronje at the turn of the 20th century.⁵⁶ Hurgronje observed how *fatāwā* served as a popular forum for scholarly debate about religion and social change, *muftīs* (Sunni

⁵⁴ For a detailed discussion of the *fatwā* genre in Shi'ite Islam, see chapter two.

⁵⁵ Jakob Skovgaard-Petersen, *Defining Islam for the Egyptian State: Muftis and Fatwas of the Dar al-Ifta* (Leiden: Brill, 1997), 11-13; 15-19. With the exception of Kate Zebiri, I will not cover these sources. The reader is referred to Skovgaard-Petersen's work, particularly for his review of the several German writings to which I have no linguistic access.

⁵⁶ Christian Snouck Hurgronje, *Islam und Phonograph* (1900), in *Verspreide Geschriften* (Bonn und Leipzig: Kurt Schröder, 1923), 419-47.

scholar who issues *fatwās*) even inventing *mustafīīs* at times in order to put forward their point of view.⁵⁷ After this, Skovgaard-Petersen remarks, the study of *fatāwā* among Western scholars declined until the Islamic resurgence of the 1970s that was accompanied by a virtual explosion of *fatwā* publications.⁵⁸ The *fatwā* became the ideological battle ground for diverse visions of normative Muslim life, attempting “to circumscribe the mental and moral universe of their day, always balancing around the boundaries of what is conceivable, legitimate, and right.”⁵⁹ Following Peter Berger’s theory that religion in the modern world is significantly affected by choice, the author concludes that state *muftīs*, unlike their independent and more radical counterparts, function as agents of the state in furthering adaptation to modernity.

Skovgaard-Petersen’s work is valuable in demonstrating how state *muftīs* are instrumental in institutionalizing a particular vision of Islam for the modern Egyptian state, a vision that encourages *mustafīīs* to choose between conflicting *fatāwā*. His work is beneficial also in considering some of the problems of studying *fatāwā*. He discusses, for example, the invention both of *fatāwā* and *mustafīīs*. Given the difficulties of ascertaining the authenticity, particularly of the latter, he suggests that this does not detract from the value of exploring this material as a barometer of the *muftī*’s worldview and understanding of Islamic social values and morality.

Differences between Sunni and Shi’ite structures of legal authority do not lessen the validity of his observation. Whether or not all of the questions put to Shi’ite *mujtahids* are genuine cannot be determined with certainty. I am inclined, nevertheless, to accept the vast majority of those coming from minority contexts as genuine essentially because

⁵⁷ Skovgaard-Petersen, *Defining Islam*, 11.

⁵⁸ *Ibid.*, 12.

⁵⁹ *Ibid.*, 13.

they appear to reflect lived experiences and describe situations that are commonly beyond the practical knowledge of Shi'ite *mujtahids*, none of whom reside in the West. Also, I am informed that the general stylistic uniformity of *istiftā'āt* is due not to fabrication, but to the work of editors who prepare questions submitted to *mujtahids* according to a standard format.⁶⁰

In a later publication, "A Typology of State *Muftis*,"⁶¹ Skovgaard-Petersen highlights the value of studying a religious class who consider themselves "defenders of the *sharī'a* and its norms in a society moving toward secularization."⁶² His article goes beyond his earlier work in comparing Egyptian *muftīs* with their counterparts in Lebanon and Syria. His analysis leads him to observe that, particularly in Egypt, the *muftī* is an important player in debates around the role of Islamic law in contributing to an Islamic response to issues of modernity. He observes a widespread popularity of progressive *muftīs* among moderates, demonstrating that religious professionals continue to exercise an influence and to be seen as authorities in some circles.

He notes also an increased number of *fatāwā* during times of social upheaval and change, such as emerge during periods of intense inter-cultural contact. This suggests the continued relevance of the *fatwā* as an instrument of religious guidance in society. It also implies that these would be periods of lively legal debate out of which new perspectives could emerge. One such development that he notes is the practice of some contemporary *muftīs* to refer to experts in diverse fields of secular learning. Kate Zebiri's study of Shaykh Mahmud Shaltut, discussed below, is a case in point. Some Shi'ite scholars, such

⁶⁰ Conversation with Seyed Mahdi Shahrestani, one of Ayatollah Sistani's North American *wakīls* (sing., representative).

⁶¹ Yvonne Yazbeck Haddad and Barbar Freyer Stowasser, ed., *Islamic Law and the Challenges of Modernity* (Walnut Creek, CA: AltaMira Press, 2004).

⁶² Jakob Skovgaard-Petersen, "A Typology of state Muftis," in *Challenges of Modernity*, 82.

as Ayatollah Muhammad Ali Taskhiri, call for the same in Shi'ite legal reasoning.⁶³ My study shows that this is found extremely rarely in *fatāwā* for Muslims in the West.

*Islamic Legal Interpretation: Muftis and Their Fatwas*⁶⁴ is the “first case-based volume on Islamic legal interpretation [...]”⁶⁵ The first and second chapters provide a critical history of the development of *iftā’* in Sunni Islam and of *iftā’* and *ijtihād* in Sunni legal theory respectively.⁶⁶ It is unfortunate that there is no parallel survey of the institution in Shi’ism. Likely, this is due to Hallaq’s observation that “the institutional history of futya [in Shi’ism] is not well documented.”⁶⁷ Each chapter thereafter treats a particular *fatwā* or set of *fatāwā* in the pre-modern, early modern and modern periods from across the Islamic world. In total, 53 *fatāwā*, conveniently listed in an appendix, are discussed.

Attention is paid to “the institutional context in which the *fatwā* was issued, the sources cited by the *mufī*, the language and rhetorical strategies employed, the method of reasoning, and the intended audience.”⁶⁸ Some authors include a discussion of the legal history of the issue being raised.⁶⁹ Several footnote brief explanations of legal principles employed by the *mufī*.⁷⁰ Having a uniform methodology gives the book a coherence that the absence of a conclusion makes all the more urgent, and cumulatively demonstrates the methodology’s effectiveness. On the whole, the book provides a methodological

⁶³ Taskhiri’s views are discussed in more detail in Chapter One on the *marji’iyah*.

⁶⁴ See footnote 1.

⁶⁵ Preface to *Islamic Legal Interpretation*, x.

⁶⁶ Masud, Messick, and Powers, “Muftis, Fatwas, and Islamic Legal interpretation,” in *Islamic Legal Interpretation*, 3-32; Wael B. Hallaq, “Ifta’ and Ijtihad in Sunni Legal Theory: A Developmental Account,” in *Islamic Legal Interpretation*, 33-43.

⁶⁷ Masud et al., “Muftis, Fatwas,” 13. The authors discuss it only briefly in the first chapter, as does Shahla Haeri in the context of discussion of a *fatwā* on temporary marriage. Shahla Haeri, “Mut’a: Regulating Sexuality and Gender Relations in Postrevolutionary Iran,” in *Islamic Legal Interpretation*, 363 n. 11.

⁶⁸ Preface to *Islamic Legal Interpretation*, ix-x.

⁶⁹ See, for example, Haeri, “Mut’a,” 251-261; Vardit Rispler-Chaim, “Postmortem Examinations in Egypt,” in *Islamic Legal Interpretation*, 283-284.

⁷⁰ See, for example, Rispler-Chaim, “Postmortem,” 368, n. 2 and n. 3.

model for the present work in terms of structure and analysis. I have attempted to adhere to this model throughout my work.

Although none, apart from Juan Cole's discussion of a Shi'ite *fatwā* in India, deal specifically with a minority context, *fatāwā* of the modern period frequently treat new questions emerging out of technological advancement or interaction with non-Muslims. There is a noticeable tendency for *mufīīs* to treat modern issues by supporting Islamic textual evidence with scientific or pseudo-scientific analysis. It seems reasonable to hypothesize that the *mujtahids* examined in this research might likewise make at least strategic use of non-traditional sources of knowledge.

While virtually all of the *fatāwā* examined in *Islamic Legal Interpretation*, whatever the subject matter, have some relationship to government bodies and political implications, this is not the case in *fatāwā* produced for Muslims in the West. While the *fatāwā* examined in this thesis are overwhelmingly apolitical, it would be naïve, however, to presume that they concern the private lives of Muslims only. Rather, they represent a potential source of reference in shaping the direction some Muslims might take in defining themselves in multicultural societies of the West.

As noted above, Kate Zebiri treats the *fatāwā* of Shaykh Mahmud Shaltut, formerly the leading *mufīī* of al-Azhar, within a wider discussion of his legal methodology and his approach to Islam and modernism.⁷¹ Her interest is in his "methodology in issuing *fatwās*, rather than on his opinions *per se*."⁷² She analyzes his use of the traditional sources of Sunni law (Qur'an, Sunna, *ijmā'*, and *ra'y*), and his opinion of the views of previous *mufīīs*. Zebiri finds that the spirit of the Qur'an,

⁷¹ Kate Zebiri, *Mahmud Shaltut and Islamic Modernism* (Oxford: Clarendon Press, 1993).

⁷² *Ibid.*, 108.

embodied in its principles, is at the heart of Shaltut's legal decisions, whether or not it speaks directly to the question at hand. Secondly, his use of *aḥādīth* is impartial, as he considers the import of sound *ḥadīth* he does not agree with. He is suspicious of the traditional understanding of *ijmā'* (consensus) as "absolute unanimity,"⁷³ relying rather on textual sources and independent reasoning. The latter, *ra'y* (opinion), has wide application and like other modernists, he makes liberal use of *maṣlahah* (common good), not so much as the basis of *'illa* (effective cause),⁷⁴ but as a general principle. Similarly, he prefers *ḥikmah* (the wisdom behind the ruling)⁷⁵ to *'illa*. This recourse to what one might refer to as the internal logic of a case may widen or restrict permissions.

In addition to these traditional sources, Shaltut employs what Zebiri refers to as empirical evidence, such as scientific knowledge, including a confident reliance on the assumed goodness of human nature and the guidance of conscience. Regarding the rulings of previous *muftīs*, Shaltut has an attitude of "detached respect."⁷⁶ Finally, so confident is Shaltut in the sources of the law and their accessibility, ultimately, his objective is to educate and thus empower ordinary Muslims to make legal decisions "as far as possible independent of *muftīs*."⁷⁷ By analyzing the legal methodology of one leading modernist *muftī*, Zebiri provides us with a helpful model that can be extended to comparative study.

M.B. Hooker's recent study⁷⁸ shows how traditional Islamic legal methodology provides tools that enable jurisdiction to extend its coverage to modern issues such as

⁷³ Ibid., 116.

⁷⁴ Ibid., 117.

⁷⁵ Ibid., 118.

⁷⁶ Ibid., 122.

⁷⁷ Ibid., 123.

⁷⁸ M. B. Hooker, *Indonesian Islam: Social change through contemporary fatawa* (Honolulu: University of Hawai'i Press, 2003).

abortion or euthanasia authoritatively. He finds that contemporary Sunni *fatāwā* are highly determined by the principles of *maṣlahah* and *sadd al-dharā'ī* (preventing access to a wrongful action). These methodological principles facilitate two inter-related tendencies in contemporary Indonesian *fiqh* (jurisprudence). The first tendency is to provide a highly determinative role for the elements of time and place (*zamān-wa-makān*). So contextual is this approach to law that Hooker is tempted to suggest that Indonesian *ijtihād* comes close to constituting its own *madhhab*.⁷⁹ The second tendency is that extensive use of these principles renders the category of *mubāḥ* (legally permitted actions) “highly charged,”⁸⁰ allowing an extensive space for ethical ambiguity, inconsistency and uncertainty, particularly on what the author refers to as “‘edge’ issues.”⁸¹ What this means finally is that the promotion of these principles sustains a legal system that is predisposed to interpretive heterogeneity.

Vardit Rispler-Chaim suggests that *fatāwā* provide the most reliable route to contemporary Islamic legal thought, whether of “establishment” or “fundamentalist” Islam.⁸² She examines medical *fatāwā* gathered from *fatwā* collections and Egyptian newspapers and periodicals. Her method is to group the *fatāwā* according to ten topics: abortion, organ transplants, post-mortem examinations, and AIDS, to name a few, in addition to a chapter dealing with several less prominent issues such as freezing sperm or using a *siwāk* (wooden toothpick) to clean one’s teeth. In each chapter, she summarizes the most salient issues and questions raised by the *fatāwā*, important considerations

⁷⁹ Ibid, 228.

⁸⁰ Ibid, 87.

⁸¹ Hooker distinguishes between the general offence of “non-compliance with *fiqh*” and specific legal offences which he terms ‘edge’ issues. He defines these as “controversial issues in contemporary public life” among which he focuses on money and money contracts (*ribā*), food and drugs, and public morality (specifically public massages and various forms of lottery). Ibid, 194.

⁸² Vardit Rispler-Chaim, *Islamic Medical Ethics in the Twentieth Century* (Leiden: E. J. Brill, 1993).

involved in the debates and what some prominent *mufī* has opionated or what the general view of the *mufīs* is. She makes frequent reference to historical precedent or significant historical changes. While many issues are occasioned by questions of concern to modern Western medicine, a few deal directly with contact with non-Muslims.⁸³

The author draws attention to the social dimension of Islamic medical ethics; that is, that permissions are predicated on the social benefit of an ethical choice. The individual is not the sole, nor the primary subject of concern in these decisions. Her second major point is that Islamic ethics is inseparable from theology and law. Abortion, for example, is tied to the place and role of women and the family; AIDS to sexual morality; and euthanasia to family responsibility and God's ownership of the body. Just as Western ethics cannot proceed today without giving human rights central place, Islamic ethics, Rispler-Chaim suggests, is bound to a comprehensive and systematized Islamic worldview. I would add that Islamic ethics, while deeply rooted in theology and law, and so relatively stable, is also prone to be situational, particularly insofar as regard for benefit to Islam and the Muslim community is concerned. If it were not so, there would be little theoretical justification for *ijtihād*, an interpretive methodology that is at least partly premised on the presupposition that social reality is not static and that the law's intent is to make practical the divine will in changing circumstances.

Gary Bunt's *Islam in the Digital Age*, a development of his previous book,⁸⁴ is a phenomenological exploration of "Cyber Islamic Environments, an umbrella term which can refer to a variety of contexts, perspectives and applications of the media by those who

⁸³ The matter of organ transplants, for example, raises questions as to whether it is or is not legal to donate one's organs to or receive organs from a non-Muslim. See *ibid*, 35-37.

⁸⁴ Gary Bunt, *Virtually Islamic: Computer-mediated Communication and Cyber Islamic Environments* (Cardiff: University of Wales Press, 2000).

define themselves as Muslims.”⁸⁵ Bunt endeavours to describe and analyze the content and symbolic meanings of Islam on the internet. He is interested in changes in the communication of knowledge, and how these influence forms of expression, dialogue, and self-understanding. Two notions that form the hub to which the material connects are *jihād* and *fatwā*. His project hopes, by “rational analysis and discussion,” to “defuse” the sensationalism often associated with these terms.⁸⁶ In his discussion of online authority, Bunt observes how the internet facilitates shifts in “traditional notions of authority” whereby unrecognized individuals and organizations acquire an aura of authority beyond their merits.⁸⁷ This phenomenon, particularly relevant to Sunnism, intensifies traditional lines of competition and introduces new competitors. Similarly, the internet reveals a variety of opinions, some of which “are safer to articulate in cyberspace than in real space and time [...]”⁸⁸ Technologically connected Muslims have immediate access to this knowledge, further extending the boundaries of communication.

Bunt’s study yields an important observation regarding the effect of the internet on traditional definitions of majority and minority populations. There is more connection, he finds, between online Muslims universally than between Muslims of different social status in the same country. This “digital divide” – those with access to cyberspace and those without – is an important factor in Muslim life today, blurring the boundaries between majority and minority contexts. On the basis of this consideration, it would seem proper to make a methodological distinction between print and online *fatāwā* in this

⁸⁵ Gary Bunt, *Islam in the Digital Age: E-Jihad, Online Fatwas and Cyber Islamic Environments* (London: Pluto Press, 2003), 5.

⁸⁶ *Ibid*, 3.

⁸⁷ *Ibid*, 2. The unjustified exaggerated authority of *fatāwā* and participation of unqualified individuals in issuing them is not limited to, but perhaps exacerbated by, the internet. The authors of *Fatwas Against Women in Bangladesh* (Grabels, France: Women Living Under Muslim Laws, 1996) draw attention to these very phenomena in their critique of the genre as an instrument of female oppression.

⁸⁸ Bunt, *Digital Age*, 205.

work. However, the fact that most *fatāwā* are available in both formats makes this not only tedious, but unnecessary. Further, Bunt observes that some sites catering to the needs of Muslim minorities have a decidedly more candid approach, suggesting that methods of expression in majority and minority contexts are not always uniform. A further question would ask if the content of a *fatwā* remains the same whether it is issued for a *mustafī* in the West or in a Muslim environment.

On a practical level, Bunt supplies a wealth of references to websites offering online *fatāwā*. His chapter on Shi'ite online advice notes several sites, some of which I became aware of by this means. About a site based in Qom, Bunt remarks, "As this site evolves, it will surely contain a greater proportion of content from a wider band of scholarly opinion in Qom, and would be a useful focus for a study of contemporary opinion (in conjunction with 'traditional sources')".⁸⁹ The present study – limiting itself to guidance for minority contexts – attempts to make just such a contribution. While not strictly a study of religion on the internet, this work is greatly aided by Bunt's attention to technical and methodological aspects of the study of online *fatāwā*.

The authors of the first set of studies summarized may be broadly characterized as ethnographic studies. Although the latter set looks at legal texts and methods of interpretation, the specific legal texts of *fatāwā* for Muslims in the West appear only in article length studies, or as small sections of books, such as Bunt's. What the present study offers is a thorough analysis of Muslim minority identity through the lenses of jurisprudential sources generated by and for the community. My objective is to study the dynamics involved in the process of the construction of Muslim identity in the West, observing at the same time how the authoritative legal sources articulate their

⁸⁹ Ibid, 191.

understanding of Muslim relations with non-Muslims and non-Muslim society within the post-colonial historical context. Specifically, I examine how these scholars – and the community that recognizes their authority – treat values underlying law, education, and public life in secular societies. Given this, I ask: What patterns of permissions and prohibitions emerge and what does this tell us about how religio-legal discourse contributes to the shaping of Shi'ite minority identity in the West?

OVERVIEW OF CHAPTERS

The thesis is divided into two parts. Part I provides the background material that helps to situate the primary focus of the study. Chapter one outlines the methodology used in studying the textual material and a small number of interviews conducted with leaders within the Shi'ite community in Montreal. I employ elements from a variety of methodologically related sources, including discourse analysis, analysis of Jewish responsa literature, and gleanings from some of the sources on Islam in the West discussed above. The chapter also provides the theoretical framework that helps to situate the analysis within the field of minority Muslim identity. After a very brief synopsis of the main trends in contemporary identity theory, I discuss the particular model of minority identity, elucidated by Ingrid Mattson, which I use for charting the approach to identity that best characterizes the legal opinions expressed in each of the chapters, each of which is devoted to a different set of legal issues. The chapter sets the stage for identifying how jurists use the tools of legal interpretation in crafting Muslim minority identity in the West.

The next two chapters place the legal sources within their textual and historical context. Chapter two provides an historical survey of the development of the institution

of the *marji 'iyah* and of *fatwa*-giving. I discuss problems with the institution identified by contemporary Shi'ite scholars, both clerical and Western trained academics. This prepares the way for interpreting the implications of the opinions of modern and contemporary *mujtahids* for proposed reforms of the institution of the *marji 'iyah* and for its influence in the West.

Chapter three is an historical survey of the Twelver Shi'ite (Imamī) *madhhab* on the issue of migration from classical to modern times. It begins by examining the intended purpose of migration to *dār al-islām* (constituted as Medinah) in the period before, as compared to after, the conquest of Mecca. This places us in a more advantageous position for understanding the legal reasoning and rationale behind contemporary legal opinions. It is found that *fatāwā* attempt to maintain the principles associated with early legal discourse on *hijrah*. This contributes to the tensions between *mujtahids* and *mustaftīs*.

Part II examines *fatāwā* on at least five major areas of legal questioning. Each chapter deals with a subset of Islamic law as delineated in most legal handbooks. Issues emerging specifically out of the modern immigrant experience appear as distinct chapters in some of these handbooks, while in others they are scattered throughout various chapters, or designated as miscellaneous questions towards the end of a scholar's *resālah* (legal treatise).

The first chapter of Part II, chapter four, looks at the foundational question of purity and impurity, specifically Shi'ite legal discourse on the purity status of non-Muslims. Traditional legal handbooks commonly begin with this subject of central importance to Islamic legal, and particularly ritual, practice. The discussion on purity

extends to an analysis of *fatāwā* regarding food and drink, a subject sometimes linked to the purity status of non-Muslims in legal thought. The chapter demonstrates a dissonance between person-related and product-related *fatāwā*, showing generally more inclusive opinions with regard to the former and retentive opinions in the latter, easing and complicating Muslim life in the West respectively.

Chapter five follows from matters of purity, as do traditional legal manuals, with questions of ritual worship (*‘ibādāt*). Here, I look particularly at how questions of prayer and fasting in the Western social and geographic context impact upon the scholars’ and laypersons’ views of Muslim minority identity. The chapter demonstrates how ritual worship is crucial in supporting an uncompromised Muslim identity in the West while also going beyond identity to witness, and calling Muslims to engage in the universalist mission of *da‘wah* (calling people to Islam).

In chapter six, I turn to the second major division of Islamic legal manuals, that of social relations (*mu‘āmalāt*), and examine *fatāwā* dealing with an issue not generally covered in pre-modern manuals, that of education. In fact, only one contemporary *mujtahid*, Ayatollah Muhammad Husayn Fadlallah of Lebanon, gives the subject a chapter of its own in his *resālah* for Muslims in the West. Other scholars include *fatāwā* related to education in other chapters, notably, gender relations. The chapter shows how social context impels a significant retention of conservative values on the part of scholars, further extending the call to mission (that is, *da‘wah*). It also highlights the tension between *mustaftīs* and *mujtahids* evident throughout the study.

Chapter seven examines a second issue not generally dealt with as a discreet subject in legal manuals, but an important one historically and in the present. This is the

matter of personal appearance, a theme that involves men wearing beards or working as barbers, and female head coverings and modest dress, as well as other matters touching on appearance. I relate my analysis of this material to contemporary discourses around the *ḥijāb* (female head covering), popular, scholarly, and legal. The chapter demonstrates a coalescence of practice on the matter of *ḥijāb* between *mujtahids* and a community of educated females, though for radically different reasons.

The penultimate chapter, chapter eight, looks at *fatāwā* regarding government, and the Muslim immigrant's legal rights in relation to and obligations towards Western political institutions. Here, it appears that the disconnect between *mujtahids* and *mustaftīs* is reversed, in that while the former, with only some exceptions, stress the selective accommodation model of minority identity via civil obedience and fulfilling contract obligations, the latter demonstrate influence from more revolutionary Islamic and Third World discourse that inclines them towards an identity of resistance.

The conclusion looks at some of the implications arising out of an observed tension between applying legitimizing principles of *ijtihād*, evidently the preference of *mustaftīs*, and the *mujtahids*' tendency to severely limit their application to matters of purity. It argues further that this is done within an overall framework that facilitates the evident objective of establishing enclaves of Muslim space which, in turn, endeavour to serve the purpose of enhancing *hijrah* (migration) by *da'wah*.

**PART I: METHODOLOGICAL
AND THEORETICAL BACKGROUND**

CHAPTER ONE

METHODOLOGY

THEORY AND METHOD

Several authors have been helpful to me in providing the theoretical framework and analytic tools for my research. I accept, and attempt to demonstrate, the fundamental, underlying theory developed by Leonard Pospisil's anthropology of law, as presented by Peter Haas. According to Haas, Pospisil argued that "legal systems should be seen as ways of organizing reality the same way as myths and rituals are."¹ What Pospisil adds to our understanding of law, to my mind, is not that law is a way of organizing reality, which seems self-evident, but the insight of its congruence, and thus comparability, with myths and rituals. Consequently, as others have studied the way that religious beliefs and ritual practices contribute to the shaping and support of Muslim identity in the West, I look at a practical expression of law (that is, *fatāwā*) from this same perspective, relating it especially to the concept of minority identity, which I discuss in detail below.

In my methodology, I attempt to follow the example modeled by the authors and editors of *Islamic Legal Interpretation*, also described below.² I am likewise greatly indebted to the method and theory of discourse analysis described by James Paul Gee. Gee maps the methodology and outlines the ways one can enter deeply into the world of meanings a text holds but does not reveal without the analyst expending great effort.³ Thirdly, Peter J. Haas' theory of communication, which he models in a methodological

¹ Peter J. Haas, *Literary History of a Rabbinic Genre*, Semeia Studies: Society of Biblical Literature (Atlanta: Scholars Press, 1996), 20.

² See introduction to the present work, n. 1.

³ James Paul Gee, *An Introduction to Discourse Analysis: Theory and Method*, 2nd Edition (New York: Routledge, 2005).

study of Jewish *responsa* literature, is, due to similarities of style and content, easily transferable to Islamic *fatwā* literature.⁴ These are the main sources from which my analytic method is culled.

Muslim migration is, however, different from the Jewish case in at least one very significant manner. While the Jewish community has, by historical necessity, been accustomed to migration and residence amongst non-Jews for the last two millennia, Muslim migration to non-Muslim territory is neither obligatory nor does it have as extensive a historical precedence.⁵ Rather, Muslim migration for reasons not specifically religious or political, such as a strategic element of conquest, is a considerably recent phenomenon, as some scholars have noted.⁶ Thus, while Jewish scholars have had to grapple with the question of why Jews have been forcibly scattered among the nations, Muslim scholars are compelled to deal with a different question. Prior to deriving rules about behaviour once Muslims are in the West, scholars must first deal with the philosophical foundations of permanent and voluntary migration to non-Muslim territory. In other words, the discourse needs first of all to justify this type of migration in the face of the far more highly preferred option of residence in Muslim territory, safely under the

⁴ Haas, *Literary History*. I am grateful to Professor Norma Joseph for recommending this work to me.

⁵ This is not to deny the validity of the point made by Khaled Abou El Fadl, namely that “[f]or centuries large Muslim populations lived in non-Muslim territories [...]” Abou El Fadl, “Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries,” *Islamic Law and Society* 1, no. 2 (1994), 141-187. The point being made above is that of mass movements of people once living in Muslim territory voluntarily leaving it to establish themselves in the West. The question is also not as straightforward as it appears, as defining *dār al-islām* is a far more nuanced and complex endeavour than simple formulae, such as “wherever the Sharī’ah is the law of the land” suggest. Sunni jurists have sometimes considered territory ruled by a Muslim, or even non-Muslim territory where Muslims are free to practice Islam as *dār al-islām*. See Muhammad Khalid Masud, “Being Muslim in a Non-Muslim Polity: Three Alternate Models,” *Journal Institute of Muslim Minority Affairs*, 10, no. 1 (January 1989).

⁶ See, for example, Bernard Lewis, “Legal and Historical Reflections on the Position of Muslim Populations Under Non-Muslim Rule,” *Islam and the West* (New York: Oxford University Press, 1993), 43-57; M. Ali Ketani, “Muslims in Non-Muslim Societies: Challenges and Opportunities,” *Journal Institute of Muslim Minority Affairs* 11, no. 2 (July 1990): 226.

banner of divine law. Classical jurists indeed treated the subject at length at least at the theoretical level. That it remains a fundamental concern of the law is amply demonstrated by the contemporary juristic discourse.

Juristic discourse for Muslims in the West continues to draw upon its justificatory foundations throughout the process of deriving rules of behaviour. The integration of foundational principles that justify voluntary migration to the West on the one hand and legal norms of behaviour on the other provides the logic of a central conclusion of the study. Despite living outside of the formal boundaries of Islamic legal authority, migrant Muslims are exhorted, through the transportability of the law, to remain within the normative boundaries that it creates. This in turn gives rise to numerous tensions around what qualifies as legitimate Islamic practice in the West and why.

My analysis of the contemporary material is strengthened by reference to legal opinions within the Twelver Shi'ite *madhhab* on a given topic by a longitudinal and latitudinal comparative approach. As it is not feasible and would detract from my primary objective to trace the history and development of every legal opinion included in this work, I select those where most benefit is gained by longitudinal comparison, such as the law of migration to non-Muslim territory (chapter three), and the purity status of non-Muslims (chapter four). Latitudinal comparisons take place naturally, as a matter of course in analyzing the views of more than one *marji'*.

I base my theoretical framework of minority identity on a paradigm developed by Ingrid Mattson, which I describe below. I have also made methodological use of the general bibliography of sources on Islam and Muslims in the West outlined in the literature review. Though all of these have been helpful in different ways, I should note

GhaneaBassiri's work for suggesting several useful questions applicable to my study.⁷ As discussed in the Introduction, GhaneaBassiri's study attempts to uncover the role that "Islam play[s] in the development of the identity of Muslim immigrants[.]" To this end, he asks: "How is it appropriated in their daily lives? How are its obligations met in the context of the U.S. secular mainstream, which often views Islam with derision?"⁸ GhaneaBassiri's study is based primarily on interviews with Muslims on the West coast of the United States, the results of which indicate the community's self-reflective, and potentially shifting perceptions of their own identity in a Western context. My study asks how these same questions are dealt with in the authoritative legal texts that are intended to shape Muslim identity in the West, and in the exchange of ideas between the community and its clerical leadership.

My methodology, then, follows three broad tracks: a) discourse analysis informed by a methodology applicable particularly to legal texts of the *fatwā* genre; b) legal context; and, c) a theoretical framework of Muslim minority identity with reference, at times, to the social context for which the *fatāwā* are produced. Below, I describe my methodology further according to these three categories.

a. Discourse Analysis

The authors of *Islamic Legal Interpretation* identify several areas of inquiry for analyzing *fatwā* literature which I use in my study. These may be summarized as related to four general categories: source context; textual analysis proper; social context; and, legal context. Source context questions ask who the author of a *fatwā* is and what his general position regarding contemporary social issues is. Where is the *fatwā* located?

⁷ See Introduction, n. 44.

⁸ GhaneaBassiri, *Competing Visions*, 8.

What is its “home”—the internet, or a print source? If it is a print source, is it in a standard legal manual or in a collection of *fatāwā* published specifically for the West? If the latter, is it a collection of *fatāwā* belonging to only one *mujtahid*, or does it belong to a group collection? Who is included, and who is not? Are the *fatāwā* responses to real or hypothetical situations? What kinds of editorial adjustments may be discerned? Asking about the source of a *fatwā* helps to understand its purpose in relation to a scholar’s other work and in relation to the overall theme of *fiqh* of minorities (*fiqh al-aqalliyāt*).

The second set of questions treats the texts themselves, both questions (*istiftā’āt*) and responses (*fatāwā*) in terms of form, style, and content. This is the most prevalent and detailed element of the methodology. Although the *fatwā*’s form is generally uniform, structural details sometimes differ. To what purpose does a *mujtahid* structure a *fatwā* differently? What is its length? What kind of language style does he use? Are there key words indicating his purpose, method, or alluding to his larger body of work and thought? What issues does he privilege? What, perhaps, does he ignore? With regard to *istiftā’āt*, how does a question influence, or appear to attempt to influence, the resulting *fatwā*? What grammatical turns of speech are used in the question and the response? Are certain patterns of speech observable?

In his introductory text to the methods of discourse analysis, James Gee shows how identifying “conversations” embedded in discourse that happens between two or more interlocutors can elucidate a speaker’s argument and fit it within a larger social debate. By “conversations” he means “public debates over issues or themes.”⁹ Similarly, he suggests that intertextual references, that is, quotations from or allusions to other sources, also help to illuminate the speaker’s frame of reference. I refer to these as

⁹ Gee, *Introduction to Discourse Analysis*, 52.

presuppositional worldview discourses that shape the *mujtahids*' points of view.¹⁰ Thus, in regard to conversations, I might ask how a *mujtahid*'s use of language in a *fatwā* on the subject of women's clothing, or on the *ḥijāb* more specifically, correlates to the larger discourse on *ḥijāb* historically, politically, and sociologically. What does this tell us about his objectives in taking the position he takes? In regard to intertextuality, I look for allusions to or quotations from sacred texts, and ask how the *mujtahid* uses the texts to support his argument and how he aligns himself in relation to those texts. What are his primary sources of authority?

Gee speaks also of the "situated meanings" of words or phrases that an interlocutor uses.¹¹ This refers to language whose primary home of meaning belongs to a specific discursive discipline, such as *uṣūl al-fiqh* (principles of jurisprudence), for example. How do *mustaftīs* and *mujtahids* employ the situated meanings of language to persuade the other, or to otherwise strengthen their argument? One prime example of this is the legal principle of *ḥaraj*, or excessive hardship that might result from observing a ruling in certain circumstances. Given other conditional factors, this would serve to lift the force of a ruling in those circumstances. While *mustaftīs* appear to have a broad understanding of the principle and strongly incline to its use, *mujtahids* tend to restrict its application to only the most severe conditions. On the other hand, *mujtahids* make frequent use of the principle of precaution (*iḥtiyāt*) that tends to limit permissive interpretations of a question.

In his *Responsa: Literary History of a Rabbinic Genre*, Peter Haas outlines a theory of communication developed from semiotics which posits a symbiotic relationship

¹⁰ Ibid.

¹¹ Ibid., 69.

between sender, receiver, and medium of communication.¹² He suggests that in order to reduce misunderstanding and ambiguity—inherent in the nature of symbols—and to enhance clarity, the sender and receiver of *responsa* literature must understand the “universe of discourse” in which communication takes place.¹³ By this Haas means the literary and social context to which a particular use of language belongs. Haas gives a helpful example here, in the sentence, “The batter ran home.”¹⁴ Without understanding the referent of the symbol “home” within its discursive universe, i.e., baseball, the sentence remains ambiguous: did he make a homerun, or run home for dinner? Further, the clues that the surrounding context in the real world of space and time would provide are absent in this form of communication. Thus, without employing tools of analysis, one is forced to rely on assumptions, which are often misleading.

This is all the more urgent, Haas argues, when communication takes place across distance, as is the case between *mustaftīs* and *mujtahids*. For then, the receiver is all but “fictional” to the sender, and communication “is much more representative of the writer’s [i.e., the sender’s] reality than of the actual readership.”¹⁵ As Setrag Manoukian puts it, *mustaftīs* are generally “totally unknown and ‘exist’ only inside the texts [...]”¹⁶ To the researcher, also then, *mustaftīs* remain fairly anonymous, with social variabilities such as age, ethnicity, specific locality, or gender most often unspecified in the literature. Consequently, although we are limited in what we can say about *mustaftīs*, critical

¹² Haas, *Literary History*, 56-62.

¹³ *Ibid.*, 58.

¹⁴ *Ibid.*, 58.

¹⁵ *Ibid.*, 57.

¹⁶ Setrag Manoukian, “Fatvas as Asymmetrical Dialogues,” in *Islamic Legal Interpretation*, 164. The title of Manoukian’s article is, in my opinion, a great description of the nature of the *istifta’-fatwa* relationship.

analysis can uncover possible motivations, worldviews, and attitudes towards Muslim identity in the West.

In analyzing the *istiftā'* and *fatwā* material I ask, therefore, what effect distance has on the communication? How do *mustaftī* (as receiver) and *mujtahid* (as sender) attempt to compensate for distance and potential misunderstanding? What techniques do they use to try to situate the other in their world, *mustaftīs* by describing their social context in the West, and *mujtahids* by attempting to persuade the *fatwā* receiver of the moral logic of the decision? Attention to Haas' theory of communication helps to bring into relief what I call "juristic worldview discourses" that tend to characterize the "senders" of my research.¹⁷

b. Legal Context

Analyzing certain major legal issues relevant to today is helped by reviewing the legal discourse treating them historically, as this allows us to see developments and changes which in turn bring out significance that is otherwise inaccessible. This is especially true for the general theme of migration itself, as with the question of the purity status of non-Muslims. Hence, I examine these issues from a more historical perspective than others. On other questions, I sometimes refer to earlier sources that demonstrate links with the past, or reveal shifts of focus or interpretation. More commonly, however, the legal context becomes current by making explicit the legal principles implicit in the texts, and the particular usage to which a *mujtahid* puts them. I discuss some of these principles below and at various places throughout the text. A complete discussion is, of course, impractical, as that would be a work in itself. Chapter two is, however, devoted to a detailed overview of the fundamental structure of Twelver Shi'ite jurisprudence and the

¹⁷ I define this term below, in the section on terminology.

institution of the *marji 'iyah*, including the practice of *iftā'*. Here, it is helpful to note—in very broad strokes—the philosophical and ethical theory underlying Shi'ite law.

Twelver Shi'ism developed two theories of theological ethics associated with the *Akhbārī* and *Uṣūlī* schools. Robert Gleave's illuminating comparison of them demonstrates how each responds to the problem of context and change in radically different ways. Following Muhammad Baqir al-Bihbahani (d. 1205/1790), who secured the dominance of the *Uṣūlī* rational methodology in Shi'ite *fiqh*, '*aql* (reason) and revelation are "mutually supportive", agreeing with each other "on all matters [...]."¹⁸ A minority of jurists even attributed to '*aql* the same certainty as that derived from the law. Along with Bihbahani, the majority of present-day *Uṣūlīs* recognize the uncertainty of the results of *ijtihād*.¹⁹ The case for reason's moral discernment being of legal (*shar'ī*) quality is argued, Gleave explains, from the premise that God is not irrational, which is what one would have to conclude if the findings of moral reason and revelation were in conflict. This is the doctrine of *mulāzama*, that is, the logically *necessary* correlation between reason and revelation.

It follows that with regard to the question of "the nature of right and wrong,"²⁰ early Twelver Shi'ites agreed with the Mu'tazilites that "[v]alues truly exist in the world, waiting to be perceived by human beings." That is, they "subscribe to an objective ontology of moral values."²¹ According to Bihbahani, the theory that actions merely have properties that suggest their necessary moral value to '*aql*; or the theory that the moral

¹⁸ Robert Gleave, *Inevitable Doubt: Two Theories of Shi'i Jurisprudence* (Leiden: Brill, 2000), 219, 218.

¹⁹ See the diagram depicting Shi'ite positions on the relationship of reason to revelation in *ibid.*, 185.

²⁰ Fakhry, *Ethical Theories in Islam* (Leiden: E. J. Brill, 1994), 11.

²¹ Gleave, *Inevitable Doubt*, 219. Some Mu'tazilites also held one of two other views, neither of which subscribe to the moral ontology of acts: 1) that the evil of an act lies in certain properties it possesses that '*aql* understands as evil; 2) that an act is considered evil when performed in circumstances in which it is evil to perform it. Gleave associates these with the early Basran, and later Basran schools respectively, and the ontological view with the Baghdadi School. See *ibid.*, 210.

value of an action lies in the context in which it might be performed, and its motives, are faulty. The latter is especially so as it opens the door to a wrong action being considered right in some circumstances, thereby attributing evil to God and basing legal change on external circumstances. For *Usūlīs*, then—the school to which the *mujtahids* examined here belong—an “evil act” is by definition a “forbidden act.”²²

However, for Bihbahani and the *Uṣūlī* school, necessity (*darūra*) allows that a greater evil be outweighed (*marjūh*) by a lesser evil.²³ For example, Bihbahani argues that although lying and killing are prohibited, they may be outweighed by the greater evil of allowing harm to come to the Prophet. Thus, the moral imperative of protecting the Prophet outweighs that of not lying or killing in that particular situation only; in all other situations lying and killing remain evil and forbidden. Bihbahani is able, by this theory, to protect the ontological morality inhering in actions while at the same time legitimizing situational ethics. Similarly, Bihbahani considers actions to be of two moral properties: essential (primary) and non-essential (secondary). The former, such as abusing one’s children, are unchanging, whereas the latter, the neglect of prayer for example, may be permitted in certain circumstances because their moral value is designated by the Lawgiver according to His knowledge and will.²⁴

These theories are significant to the derivation of rules, particularly with respect to contemporary problems,²⁵ and they raise what Hourani terms the ethical question of

²² Gleave, 187.

²³ Ibid., 211.

²⁴ See *ibid.*, 207-212.

²⁵ Contemporary legal ethical thought follows this classical reflection closely. Modern Shi’ite ethical philosophers, such as Soroush and Ayatollah Mutahhari, build on elements of this classical foundation but derive much of their theories rather from modern western philosophy as well. Mutahhari, for example, maintains the notion of objectivity of moral values but on quite different grounds than the Mu’tazilite framework adopted by legal scholars, especially since Bihbahani. See Murtada Mutahhari, “Eternity of

“what constitutes a right action?”²⁶ Or, what Kevin Reinhart refers to as the scholar’s task of “assessing acts.”²⁷ All acts in both Sunni and Shi’ite law are classified according to five moral values: 1) *wājib*—obligatory acts, for which commission is rewarded and omission is punished; 2) *mustahabb*—recommended acts, commission of which is rewarded but omission is not punished; 3) *mubāḥ*—indifferent or permitted acts which are neither rewarded if done nor punished if left undone; 4) *makrūh*—disliked acts, whose commission is not punished, but the omission of which is rewarded; 5) *ḥarām*—forbidden acts which are punished and rewarded if committed or omitted respectively. In addition, jurists often use the terms *jā’iz* or *ḥalāl* in *fatwās*, both meaning “permissible.” These are not technically *mubāḥ* because the law is not, as Frederick Denny points out, merely indifferent towards them; rather, they require a juridical declaration of permission. As Denny rightly observes, there is really “nothing toward which the Islamic system is truly indifferent within the possible range of human actions [...]”²⁸

While acts cannot arbitrarily shift from one category to another, because Islamic law is also essentially situational certain conditions may legitimize a forbidden act becoming permitted, or *vice versa*, etc. Contemporary problems in the West appear to present innumerable opportunities for such rationalization, particularly in the minds of laypersons. How legal scholars treat such questions is one of the more note-worthy aspects of this study. As Shi’ite legal methodology prides itself on an engaged and rigorous *ijtihād*, it is instructive to look at how scholars and laypersons treat the problems

Moral Values,” *al-Tawhīd* 14:3, available from: <http://al-islam.org/al-tawhid/default.asp?url=eternity.htm> (accessed January 23, 2009).

²⁶ Hourani, *Reason and Tradition in Islamic Ethics* (New York: Cambridge University Press, 1985), 58.

²⁷ A. Kevin Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought* (Albany: State University of New York Press, 1995), 4.

²⁸ See Frederick M. Denny, “Ethical Dimensions of Islamic Ritual Law,” in *Religion and Law*, ed., Edwin B. Firmage, Bernard G. Weiss, and John W. Welch (Winona Lake, Ind.: Eisenbrauns, 1990), 206.

of migrants where principles intended to make the law adaptable to particularly challenging situations may be deemed relevant.

One such principle that appears frequently in the *fatwā* material analyzed in this research is that of difficulty and hardship (*'usr wa ḥaraj*). As a principle of negation (*qā'idat al-naḥī*) *'usr wa ḥaraj* is intended to relax regulations in contexts where observing a ruling would contravene the Qur'anic notion of the divine law as balanced and not burdensome.²⁹ Specifically, it allows that a primary ruling (*ḥukm awwalī*) be lifted when a person is unable—for valid reasons—to fulfill it. The principle is based on verses of the Qur'an, often quoted in the classical texts defining such situations, which suggest God's wish to not unduly burden his servants.³⁰ The broader textual context of the Qur'anic verses validating this principle and the explanation given in Ja'far Sajjadi's dictionary of specialized terms in Shi'ite law and other religious sciences indicate that the primary reference is to lifting rules of *'ibādāt*, such as ablution, prayer, and fasting, when following them is not possible or is extremely vexing.³¹ If, for example, one is unable to complete ritual ablutions (*wuḍū'*) of an area of the body that requires ablution because it is covered by a bandage which is laborious to remove, on the basis of *'usr wa ḥaraj* it is permitted to simply wipe that area instead.³²

²⁹ Ja'far Sajjadi, *Farhang-i Ma'ārif-i Islām* (Tehran: Kavian, 1979), 1:1,257.

³⁰ The first part of the phrase is found in Q2:185, "God desires ease (*yusr*) for you and does not wish difficulty (*'usr*) for you..." The latter portion is found in Q22:78, "He has not laid any hardship (*ḥaraj*) upon you in religion..." (and similarly, Q5:6).

³¹ Women in contemporary Iran often appeal to the principle of *'usr wa ḥaraj* in arguing for the right to end an unsatisfactory marriage. However, whatever harm a woman suffers in this regard has to be proved in court for the judge to issue a divorce on this basis. See Ziba Mir Hussaini, *Marriage on Trial: A Study of Islamic Family Law*, revised edition (I. B. Taurus, 2000), 65. See also Morteza Hajipoor, "Women's Right and the Ambiguity of the *Osre-o-Ḥaraj* Concept (Hardships)," *Pizhuhish-e-Zanān* (A Quarterly Journal of the Center for Women's Studies, University of Tehran) 2 no. 2 (Summer 2004), n/p.

³² Sajjadi, *Farhang*, 1:1,257.

In my own search amongst classical sources the term *ḥaraj* shows up primarily in the context of *ṣiyām* (fasting), as suggested by Sajjadi.³³ Moreover, rulings are often expressed as instances of the Qur’anic verse, “And God has not made religion to be hardship [*ḥaraj*] for you.”³⁴ But there are also references to *ḥaraj* being relevant to other matters. For example, it is understood to be behind extending permission to marry the wife of one’s adopted son on the precedent of the Prophet’s controversial marriage to his adopted son Zayd’s wife. This, al-Murtada says, is “so that believers would not be burdened by hardship [*ḥaraj*] in what concerns marrying [the wives of] their adopted sons.”³⁵ This, to me, suggests the possibility of understanding *ḥaraj* in a psychological as well as material sense.

Like everything else in legal interpretation, the specific conditions that constitute *ḥaraj* vary to some degree from one jurist to another, giving rise to doubts and questions in the minds of laypersons. As we will see, several *mustaftīs* invoke the idea of hardship when attempting to obtain a lenient ruling as, for example, in shaking hands with the opposite sex. Contemporary jurists seem, in contrast, to hold a very narrow definition of hardship, generally defining it as something that endangers the legally obligated person’s life. Being at a geographic distance from their followers and anxious to protect Muslims in the West from perceived dangers to their religious practice and identity, legal scholars

³³ E.g. Sharif al-Murtada, *al-Intiṣār* (Qom: Muassasat al-Nashr al-Islami, 1415), 188-189. Accessed via CD-ROM (*al-Aqaed*, version 1.0). Al-Murtada argues here that the Imami *madhhab* does not require rinsing the mouth and nose before prayer when one is fasting, as this would entail *ḥaraj*. According to al-Murtada, Imamis also advise that abstaining from all night prayers does not constitute *ḥaraj*. Put positively, he seems to be suggesting that requiring all night prayer would constitute *ḥaraj*, but notes that no jurist would require such a duty. *Ibid.*, 159.

³⁴ Surat al-Ḥajj 78. “*Wa mā ja’ala ‘alaykum fī al-dīn min ḥaraj.*” As, for example, in al-Murtada, *al-Intiṣār*, 368.

³⁵ Sharif al-Murtada, *Tanzīh al-anbiyā’ ‘alayhim al-salām*, 2nd ed. (Beirut: Dar al-Adwa’, 1409, 155). Accessed via CD-ROM (*al-Aqaed*).

tend to place more stress on *iḥtiyāt*, a principle that appears to function in binary opposition to *'usr wa ḥaraj*.

In his definition of *iḥtiyāt*, Sajjadi states that *iḥtiyāt* must not lead to *'usr wa ḥaraj*.³⁶ The intention, it seems, is to arrive at a reasonable balance between hardship and duty. Further, it is said that *iḥtiyāt* “is generally good in every situation unless it results in disrupting the social order.”³⁷ More precisely, Sajjadi states, *iḥtiyāt* becomes necessary when the following conditions are present: in the absence of certainty regarding an obligation; when the rule regarding any matter falls between duty and permission (*ibāḥah*) or recommended practice (*mustaḥabb*), or between forbidden (*ḥurmah*) and permitted; or when general knowledge of a ruling is present but not the details of how to do it. It is applicable, moreover, to both areas of Islamic law: *'ibādāt* and *mu'āmalāt*, but pertains strictly to actions (as opposed to beliefs, for example).³⁸ It is a characteristic of the *Uṣūlī* endorsement of *ijtihād* and the principle of *zann* (probable opinion, valid conjecture) derived from it that, in theory, makes it possible for *Uṣūlī mujtahids* to not rely so heavily on *iḥtiyāt*. As we will observe, actual practice seems not to take full advantage of this generous provision.

c. Minority Identity

Identity, some say, “is the most widely used concept these days in the social sciences and humanities from which it has passed into popular discourse.”³⁹ It has been the subject of numerous studies in philosophy, sociology, social psychology, anthropology, religious studies, and other disciplines. Identity, it is said, moreover, “is

³⁶ Ibid., 1:88.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Dennis Wrong, “Adversarial Identities and Multiculturalism,” *Society* (January/February 2000), 10.

always problematic, something that is not just given but that has to be sought, striven for, and forged out of fragments [...]” and always subject to change or “even to outright dissolution.”⁴⁰ It is, some theorists maintain further, always in process, perpetually constructing itself out of fluctuations of relationships tied to power and place.⁴¹ This becomes observable in the analysis of some of the *fatāwā* in subsequent chapters.

Two trends have dominated the study of identity construction: social theory, which emphasizes the role of human agency and parallel notions of “choice and intentionality”; and cultural, or poststructural theory, which downplays the role of the subject and attributes agency to one or another historical process.⁴² In line with this theory, Gupta and Ferguson maintain, difference is not the starting point of identity, but the “end product” of a “historical process that differentiates the world as it connects it.”⁴³ One could say that identity, according to this theory, has no concrete existence; rather, it is the *perception* of the place of a given element—one’s gender, race, religion, ethnicity, sexuality, or values—in relation to others.

Consequently, cultural theorists of identity de-emphasize personal agency in the construction of identity, and speak, rather, of “the subject as constituted through discourse.”⁴⁴ It is through discourse that relationships of power are perceived, processed, and finally, some theorists maintain, “performed.” Identity is thus constructed for the subject in relation to discourses emerging out of a theoretical framework that interprets the world “in terms of binary oppositions and in relation to their “other,” their

⁴⁰ Wrong, “Adversarial Identities,” 11. (emphasis original)

⁴¹ Gupta and Ferguson, “Beyond ‘Culture’,” 33-51.

⁴² Sasha Roseneil and Julie Seymour, “Practising Identities: Power and Resistance,” in *Practicing Identities: Power and Resistance*, ed. Sasha Roseneil and Julie Seymour (New York: St. Martin’s Press, Inc., 1999), 4-5.

⁴³ Gupta and Ferguson, “Beyond ‘Culture’,” 46.

⁴⁴ Roseneil and Seymour, “Practising Identities,” 4.

‘constitutive outside’.⁴⁵ This defining of oneself over against one’s perceived opposite is descriptive especially of resistance identities, though according to the theory, the power to produce one’s identity belongs not to the subject, but to the discourse, against which “human beings have little agency [...]”⁴⁶ As discourses of resistance become embedded in a given population, so an identity of resistance emerges in human practice. Discourse, therefore, is fundamentally linked to the production and performance of identity. In connecting this theory to the development of Muslim minority identity, I wish to engage in an analysis of the discursive ‘practice’ of juridical discourse for Muslims in the West. Returning to a slightly revised version of the fundamental question of this research, I ask: What do *fatāwā* produced for Shi’ite Muslims in the West tell us about how *the juristic discourse* of the *marji’īyah* seeks to shape and support Muslim identity in the West?

Sociologists have identified three main patterns of identity formation among immigrant groups. Although slightly different names may be used to define these patterns, they essentially refer to the same three basic models. The assimilation model is characterized by “ethnic flight” from one’s own cultural references and total embrace of the majority culture. Those who adopt this model believe that social success in a minority context is dependent on complete rejection of the perceived source of one’s barriers to upward mobility.⁴⁷ At the other end of the spectrum is what is variously termed “resistance” or “separatist identity,” which is a largely adversarial response (for which reason it may also be called “adversarial identities”) born out of the perception of one’s own group as intentionally marginalized by the dominant community. Informed by a

⁴⁵ Ibid. The authors here reference Derrida and others.

⁴⁶ Ibid.

⁴⁷ See Carola Suárez-Orozco and Marcelo M. Suárez-Orozco, *Children of Immigration* (Cambridge, Mass.: Harvard University Press, 2001), 103-6.

construction of otherness that is framed by relationships of power, it attempts to compensate for its own perceived powerlessness by manifesting contempt for the dominant culture and an attitude of superiority for one's own group.⁴⁸ The midway response is constructed by blending elements from the two primary cultures. It is involved in negotiating between assimilation and resistance, as it attempts to forge a new, blended identity. This category is variously called "combined identity," "selective engagement,"⁴⁹ or "selective assimilation," and "transcultural identity."⁵⁰

But there is another, less obvious, way that discourse shapes the way Muslim minority identity is perceived in the West. This is the various historical paradigms that may be culled from the authoritative sources of Islam—the Qur'an and Islamic traditions of the Prophet and early Muslim community. Ingrid Mattson looks at how contemporary Muslims in the United States interpret a number of these paradigms as sustentative of three different approaches to Muslim identity in the West.⁵¹ She rightly states that each of these discursive paradigms has implications regarding the particular kind of society it would produce.⁵² Further, Mattson makes explicit the implicit notion that defining Muslim identity in the West is at the same time a process of defining the West. "In order to understand their role in America, Muslims need to define not only Islam but also America. Muslims need to place America in its proper theological and legal category so they can determine what kind of relationship is possible and desirable for them to have with this country."⁵³

⁴⁸ Ibid., 107-12.

⁴⁹ Ingrid Mattson, "How Muslims Use Islamic Paradigms to Define America," in *Religion and Immigration*, 208ff.

⁵⁰ Suárez-Orozco and Suárez-Orozco, *Children of Immigration*, 112ff.

⁵¹ See Mattson, 199-215.

⁵² Ibid., 200.

⁵³ Ibid., 200-1.

Mattson connects a spectrum of Islamic theological and legal categories of America with three basic models similar, though not identical to those outlined above, identifying them as “embrace,” “resistance,” and “selective embrace” paradigms respectively. The paradigm of “embrace” sees broad compatibility between Western democracy and Qur’anic pluralism. Not yet a well developed model, she says, it may be patterned on the first Muslim migration to the Christian land of Abyssinia, where the persecuted Muslim community was granted state protection. “As a paradigm for cooperation between Muslims and Christians, it therefore has a strong emotive effect. Further, the fact that many Muslim immigrants to American [sic] have taken flight from oppressive governments or situations of conflict and are welcomed by kind and tolerant Christians makes this an exceedingly suitable precedent for Muslims in America.”⁵⁴

Another model that supports full participation in the state institutions of the West is the Qur’anic account of the prophet Joseph’s enslavement in Egypt, where Joseph rose to occupy a top position in the Egyptian government.⁵⁵ In contrast to the assimilation model described above, the paradigm of embrace does not advocate rejecting one’s own traditions. Rather, its embrace of Western culture is premised on an assumption that American constitutional democracy at its best is confluent with the ideal Islamic state, so that, in effect, one embraces Islamic ideals, but in Western form.

In contrast, according to Mattson’s “resistance” paradigm, Western society is “irreconcilably opposed to the Islamic premise that society should be based on obedience to God’s commands, that is, an Islamic society.”⁵⁶ Thus, the resistance model patterns itself after the “medieval bifurcation of the world,” into Islamic and *jāhili* (morally and

⁵⁴ Mattson, 206.

⁵⁵ Ibid., 207.

⁵⁶ Ibid., 203.

spiritually ignorant, pre-Islamic) society, or similarly, *dār al-islām* (the Abode of Islam) and *dār al-ḥarb* (the Abode of War). The model emphasizes the centrality of *sharī'ah* in defining Muslim life in the West. It corresponds to the “separatist” or “adversarial” identities described above.⁵⁷

The moderate middle paradigm, which Mattson identifies as the most common, is that of “selective embrace,” in which Muslims seek to make a positive contribution to Western society. This finds its legitimation in the Qur’anic command to Muslims to call others to good and to forbid what is wrong (*al-amr bi al-ma'rūf wa al-nahī 'an al-munkar*). As Mattson puts it, “The dilemma for such Muslims is how to correct wrongs within American society generally without compromising their beliefs and allegiance to Islam by participating in the system without reservation. In other words, what these Muslims would like to do is to engage selectively in those organizations and institutions through which they can effect societal change but also bring an Islamic perspective to the issues and not compromise their essential religious principles.”⁵⁸ This is the paradigm that underlies some Muslim grassroots community groups that conduct social programs primarily for other Muslims. Others are motivated by this paradigm to engage American society at the political level.

Each of these paradigms has both detractors and supporters, and for each, Qur’anic justification and criticism may be found. It becomes, therefore, a matter of interpretation, an endeavour that always involves making choices about what counts as a valid principle and how it should be applied.

⁵⁷ See Suárez-Orozco and Suárez-Orozco, *Children of Immigration*, 107-12.

⁵⁸ *Ibid.*, 208-9.

LIMITATIONS

As mentioned previously, this research does not include Sunni *fatāwā*. Most work on Islam and Muslims in the West deals primarily with Sunni Islam, leaving a gap in research on Shi'ism. Treating Shi'ite legal texts alone defines the boundaries of the research and allows for a more detailed and focused study of this community's approach to minority identity. This is valuable for several reasons. As I discuss in detail in chapter two, the Shi'ite legal structure and institution of *iftā'* is distinct in several ways. Whereas the practice of *fatwā*-giving in Sunni Islam is relatively amorphous in that any learned individual may aspire to the role, if not the office, of *mufī*, the Shi'ite system restricts such activity strictly to those who have attained the highest level of training within its authorized institutions and have had their authority established by the production of a *resālah* demonstrating comprehensive knowledge of the textual sources and methods of legal interpretation (comprehensive *ijtihād*, that is, *ijtihād muṭlaq*). The aspiring *mujtahid* must then be authorized by an established *marji'* to the office of *marji' al-taqlīd* and establish a popular following on the basis of knowledge and piety, among other qualifications. The centralization of the Shi'ite legal institution means also that scholars interpreting the law for Muslim minorities in the West remain at a geographical and thus existential distance from their followers living in the West, which is not the case amongst Sunnis. Limiting the study to Shi'ite legal scholars respects this theoretical distinctiveness.⁵⁹

Three additional characteristics of Shi'ite legal authority suggest the usefulness of this limitation. If, as discussed in the previous paragraph, issuing *fatāwā* within the Sunni

⁵⁹ It should be noted that not all Shi'ites adhere to the system of following the rulings of a *mujtahid*. The results of the present study reflect my interpretation of the views of only a segment of the total Shi'ite population in the West.

legal system is relatively diffuse amongst people of widely differing approaches and levels of training in Islamic sciences, it is also a less emphatically authoritative institution. Sunni *fatāwā*, while respected as educated and reliable opinions, particularly when issued by recognized *muftīs*, carry no theoretically binding authority. A person seeking a *fatwā* need not restrict his or her request to a given scholar, but may investigate opinions from any one or more of several scholars. He or she is then free to evaluate and to heed or ignore the advice given. A Shi'ite layperson, on the other hand, must in theory remain faithful to seeking the advice of one recognized living scholar and is bound, by moral obligation, to obey the opinion offered. While there is no legal mechanism for enforcing *fatāwā*, legally observant Shi'ite laypeople nevertheless feel themselves bound to the opinions of their chosen *marji'*. Thus, as an important and influential institution, the *marji'iyah* merits a focused study in terms of its relevance to Muslims in the West.

The second characteristic of Shi'ite legal authority relevant here is its relationship to *ijtihād*. Whereas it is said that the door of *ijtihād* in Sunni Islam was closed in the 9th century, soon after the establishment of the four extant schools of law (Maliki, Hanafi, Hanbali, and Shafi'i),⁶⁰ *ijtihād* continued virtually uninterrupted among Shi'ite legal scholars since its introduction into Shi'ite legal methodology sometime in the 14th century. The necessity of *ijtihād* was premised, among other things, on the perception of Islamic law as a dynamic and flexible system, continually responding to changing social conditions. Contemporary Muslim migration to the West provides a fitting case study by which to observe and evaluate the exercise of *ijtihād* in a context that is not just modern,

⁶⁰ This is a disputed claim, and Sunni legal experts of different ideological persuasions from fundamentalist to modernist have often engaged in *ijtihād*. Ibn Taymiyya (d. 1328) is a famous example of the former persuasion from the medieval period as Muhammad Abdu (d. 1905) is of the latter in modern times. For a ground-breaking essay on the question of the closing of the door of *ijtihād*, see Wa'el Hallaq, "Was the Gate of Ijtihad Closed," *International Journal of Middle East Studies* 16, no. 1 (1984): 3-41.

but one that is complicated by the historical and political impact of colonialism and post-colonialism. Examining a set of *fatāwā* that is shaped by a uniform methodological presupposition—that of the ongoing necessity of *ijtihād*—enables us to focus our question on how legal scholars use their tools of interpretation in responding to the unique situation of Shi'ites in the West. Is this a place for unprecedented innovation? What social, rhetorical, or ideological factors propel or restrain the dynamism of *ijtihād*? In sum, what is the role of *ijtihād* in shaping Shi'ite Muslim identity in the West?

Thirdly, unlike the Sunni legal system where the number of individuals issuing *fatāwā* is difficult to determine with any certainty, the Shi'ite institution makes it possible to access a significantly representative sampling of legal authority; the boundaries around who can issue *fatāwā*, and thus who to include in the study, are clearly defined. This enables the generation of viable conclusions.

Finally, implied in the above is the additional factor that the Western context allows freedom for Shi'ite minorities to explore a distinctly Shi'ite identity that is not always possible in the larger Muslim world, where Shi'ite minority identity is constrained by a different set of variables. To assume that Shi'ites would simply blend into and reflect larger Muslim minority identities in the West would be to disregard the reality of Shi'ite self-awareness as an integral community and thus risk unwarranted generalizations.

TERMINOLOGY

Standard terms of Islamic legal interpretation are given in English translation in parentheses throughout the text and are also listed in the Glossary of Terms. Where relevant, I further discuss the significance of some terms as they appear in the text. What I define here are terms that, because of historical usage or variations in signification,

evoke some ambiguity; that is, the classical legal terminology defining and differentiating between Muslim and non-Muslim space, namely, *dār al-islām* and *dār al-ḥarb*. I also define a term that I have found useful that as far as I know originates with myself, namely “juristic worldview discourses.”

Some readers may find the terminology of *dār al-islām* and *dār al-ḥarb* problematic as it may appear to them outmoded and inappropriate in the modern world of nation states. Although I do not use these terms extensively, I do find them appropriate as descriptive of a particular frame of mind that lingers within some conceptualizations of the relationship between Islam and the West. A functional definition of *dār al-islām* is that it is the abode “where it is possible to live an ethical life under the guidance of the Shari‘a.”⁶¹ *Dār al-ḥarb* would then refer to territory not under Islamic law and where Muslims are not free to practice the Islamic rituals. While helpful, this definition is vague, as the first half may be interpreted liberally to include places where *sharī‘ah* is not the law of the land but where Muslims may live without effectively violating that law. Such an interpretation would further infer ambiguity regarding the latter half. The definition implies questions such as: is it required that the ruling government be Islamic, or simply that there are no legal or social impediments to the performance of an essential ethical core of the *sharī‘ah*? Which aspects of the *sharī‘ah* need to be in place, or at least unobstructed, for a given territory to be considered *dār al-islām*?

A stricter definition offered by A. Abel, “territory in which the law of Islam prevails,”⁶² suggests a narrower set of criteria for determining what counts as *dār al-islām* and suggests a perception of social reality characterized by strong cleavages along

⁶¹ Abou El Fadl, “Islamic Law and Muslim Minorities,” 142 .

⁶² *Encyclopedia of Islam* 2nd ed., s.v. “Dar al-Islam,” (Leiden: Brill, 1965), 127.

religio-political lines. Khaled Abou El Fadl's work is based on the more inclusive definition cited above and his discussion of juristic discourse on migration suggests that the linguistic dichotomy implicit in the stricter definition could not be maintained in practice. In other words, as in most areas of law, historical realities belie the clarity strictly dichotomous language presupposes. As El Fadl remarks, the apparent "linguistic dichotomy" between *dār al-islām* and *dār al-ḥarb* "obscures a much more complex historical reality[.]"⁶³ This is at least partly because variety of opinion on the legality of migration was itself "a function of historical specificity."⁶⁴

M. K. Masud further demonstrates the juristic complexity betrayed by oversimplified linguistic dichotomies. Whereas *dār al-islām* in the strict definition referred to a state governed by *sharī'ah*, historical realities admitted conditions such as *dār al-'ahd* (Abode of the Covenant) and *dār al-ṣulḥ* (Abode of Peace), implying a more heterogeneous reality. In addition, legal discourse dealt with the status of Islamic territory that is re-conquered by non-Muslims.⁶⁵

Legal opinions of contemporary jurists regarding residence in non-Muslim territory seem to assume the broader definition of *dār al-islām*—any place "where it is possible to live an ethical life under the guidance of the Shari'a." Indeed, the narrower definition—"territory in which the law of Islam prevails," would all but rule out the possibility of migration to the West. At the same time, as we will see throughout this study, contemporary jurists interpret the application of freedom to practice specific elements of the *sharī'ah* with a scrupulousness typical of the profession. Moreover, their

⁶³ Abou El Fadl, "Islamic Law," 142.

⁶⁴ Ibid., 143.

⁶⁵ Khaled Abou El Fadl, "Striking a Balance: Islamic Legal Discourses on Muslim Minorities," in *Muslims on the Americanization Path?*, 47.

oft-employed term *dār al-kufr* (Abode of Unbelief), rather than *dār al-ṣulḥ* or *dār al 'ahd*, suggests that their primary frame of reference is moral and ethical before it is political, and that permission for permanent residence in the West is granted only after careful moral deliberation.

By “juristic worldview discourse” I mean a body of reasoning that is shaped by a *fiqh*-based approach to what it means to lead a good Muslim life. One such discourse is the classical Islamic argument that the rights of God (*ḥuqūq Allah*) have a decisive claim on human beings. The term *ḥaqq* in Islamic legal terminology is commonly rendered as ‘having a right upon oneself,’ that is, “something incumbent upon one to do (*ḥaqq 'alayya 'an af'ala dhālika*).”⁶⁶ The common sense understanding of the phraseology and the philosophy clearly portrays the notion of *ḥaqq* as a duty owing, such that it is correct to deduce, as Anver Emon does, that “*ḥaqq* signifies both an obligation on one person and a claim of right on another.”⁶⁷ This is quite different from a Western anthropocentric notion of (human) rights as “entitlements due to every man, woman, and child because they are human.”⁶⁸

Semantically related to the notion of *ḥaqq* is the legal term *qaḍā'* (literally: decision or ruling). Implicit in its primary meaning of divine decision is the notion of “the payment of a debt” owing, or fulfilment of an obligation, especially to God, such as a

⁶⁶ Anver M. Emon, “*Ḥuqūq Allah and Ḥuqūq al- 'ibād*: A Legal Heuristic for a Natural Rights Regime,” *Islamic Law and Society* 13 no. 3 (2006), 328. Emon’s source is Ibn Manzur, *Lisān al- 'Arab* 6th Edition (Beirut: Dar al-Sadr, 1977), 10:51.

⁶⁷ Emon, “*Huqūq Allah*,” 329. See also Ayatullah Muhammad Taqi Misbah Yazdi, “The Source of ‘Rights’,” *Al-Tawḥīd* 17 no. 2 (2003), who explains the notion of rights as being in reciprocal relationship to duties.

⁶⁸ Edward Lawson, forward to *Encyclopedia of Human Rights* (Washington: Taylor & Francis, 1996, 1991), xix.

lapsed prayer obligation.⁶⁹ For example, Sistani speaks of “a person who has qadha (i.e. *qaḍā*) prayers on him.”⁷⁰ Legal handbooks provide numerous rules as to how to perform *qaḍā* prayers, and enumerate the conditions under which prayers may shift to *qaḍā*. Usually, *qaḍā* is required because of accidental lapse (oversleeping, for example), or travel.⁷¹

Two further terms merit brief definitions. By “the West” I mean the broad geographical area designated by legal scholars in their legal treatises as *al-gharb*, by which they mean any non-Muslim country that is politically secular and socially and religiously pluralistic, and in which Muslim law is not given any special consideration. As the literature by and large does not specify location or social context beyond this general description—apart from again general descriptions of social behaviour—my own definition remains similarly broad.

The term “progressive” should also be defined. I use this term in the very limited sense of an approach to legal interpretation and practice that is not fully bound to the past, theoretically or intellectually, but sees the law as capable of adapting to the modern world and permits that world a measure of participation in the process of *ijtihād*. Thus, my definition is not as far reaching as that of the authors of *Progressive Muslims*, for whom the term progressive “refers to a relentless striving towards a universal notion of justice in which no single community’s prosperity, righteousness, and dignity comes at

⁶⁹ See *Encyclopedia of Islam* 2nd ed., s.v. “ḳada,” and Joseph Schacht, *Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 4:364-365. This meaning is made clearer by the notion of the obligatory prayer as among the rights of God (*ḥuqūq Allah*). See Ibrahim al-Kalbasi, *Minhaj al-Ḥadāyah*, (n.p., n.d), 199; Imam Ali, *Nahj al-Balāghah*, [CD-ROM, *ALAQAED*, version 1.0] (Beirut: Dār al-Ma’rafah, n.d.), 2:199.

⁷⁰ Ayatollah Ali al-Husayni al-Seestani (Sistani), *Islamic Laws*, English Version of *Taudhihul Masae’l* (Stanmore, Middx: The World Federation of K.S.I. Muslim Communities Islamic Centre, 1994), 257.

⁷¹ See, for example, *ibid.*, 257-61.

the expense of another.”⁷² The reason for not adopting this definition is that the cases in which I use the term do not reflect the depth of critical reflection and “serious engagement with the full spectrum of Islamic thought and practices”⁷³ elucidated by these authors. What my definition has in common with Safi’s is that it does not imply a coterminous relationship between progress and Westernization and, by the same token, does suggest continuity with Islamic legal and theological tradition in conversation with modernity.

PRIMARY SOURCE MATERIALS

The primary sources used for this research are of three main types: a) print *fatwā* collections of current and recently deceased *mujtahids* who have addressed questions specific to the Western context; b) online *fatāwā* issued by *mujtahids* of the same description; and c) *fatwā* and *non-fatwā* sources authored by classical, pre-modern, and contemporary Muslim scholars. The majority of these sources are in Arabic and a minority in Persian. Where English translations are available, these have been consulted along with the original Arabic or Persian. Print sources are of two types: collections of *fatāwā* for Muslims in the West issued by several *mujtahids*; and a single *mujtahid*’s publication.⁷⁴ Three contemporary *mujtahids* have published works of the latter type: Ayatollahs Sistani, Fadlallah, and al-Hakim. Sistani and Fadlallah also have their own websites where they treat questions dealing with migration and life in the West.

⁷² Omid Safi, “Introduction: *The Times They are A-Changin’* – a Muslim Quest for Justice, Gender Equality, and Pluralism,” in *Progressive Muslims on Justice, Gender, and Pluralism*, ed. Omid Safi (Oxford: Oneworld, 2003), 3.

⁷³ *Ibid.*, 7.

⁷⁴ These are listed in the bibliography.

A compilation of *istiftā'āt* and *fatāwā* from ten *mujtahids*, recently deceased and contemporary, is published in Beirut.⁷⁵ This source, which I use extensively, includes Ayatollahs Khomeini, Khui, Muhammad Reza Golpayegani, Muhammad Ali al-Araki, Shaykh Javad al-Tabrizi, Ali Khamenei, Sistani, Luft Allah al-Safi Golpayegani, al-Fadil al-Lankarani, and Makarim Shirazi. The text is organized topically, with several *mujtahids* contributing legal opinions under each chapter. Its chapters follow the general format of standard legal manuals, beginning with issues of purity and impurity, and moving from matters of worship (*'abādāt*) to social relations (*mu'āmalāt*). Additional chapters deal with questions of specific relevance to the non-Muslim context. Indicative of his general disfavour among some in Qom is the exclusion of Ayatollah Muhammad Husayn Fadlallah from this compilation.

BIOGRAPHICAL SKETCHES

Here, I provide the biographical context of only the main *marāji'* whose *fatāwā* are analyzed in the research.

The major centres of Shi'ite learning today remain Iran and Iraq, specifically Qom and Najaf, respectively. Along with Karbala in southern Iraq, the site of Imam Husayn's defeat by the armies of Yazid, Najaf is also an important pilgrimage city as the site of Imam Ali's shrine. Until the early twentieth century, Qom was not nearly as prestigious as Najaf. That began to change only in the 1920s, initially as a result of consolidating the new, modern nation of Iraq's borders with Iran. It is said that the seminary population of Najaf dropped from about eight thousand to under two thousand at this time.⁷⁶ Najaf's

⁷⁵ *Ahkām al-Mughtaribīn waḥqan li-fatāwā 'asharāh min marāji' al-taqlīd* (Beirut: Dār Ihyā' al-Turāth al-'Arabī), 2005.

⁷⁶ Yitzhak Nakash, *Reaching for Power: The Shi'a in the Modern Arab World* (Princeton: Princeton University Press, 2006), 10.

importance waned further in the early 1960s when, as part of its targeted assault on prominent Shi'ite figures, the Baath party imposed restrictions on the number of non-Iraqi students permitted entrance, and again further after the Iranian revolution, when Saddam Hussein “changed those caps to an outright ban [...]”⁷⁷ By 1981, Najaf had only about two hundred students, as opposed to Qom’s thirty-five thousand.⁷⁸ The biographical sketches of some of the more frequently cited *mujtahids* in this study are divided by their respective geographical spheres of activity.

Iraq

Ayatollah Ali al-Sistani (b. 1931), from here on identified simply as Sistani, was one of those who left his native Iran to study in the holy city of Najaf in the early 1950s, several years prior to the restrictions placed on foreign students. As do the majority of the highest ranking clerics, Sistani comes from a long family line of Muslim scholars. Sistani acquired the office of Grand Marji’ (*al-marji’ al-‘uzmā*) after the death of his former teacher, Ayatollah Abol Qasim al-Khui in 1992,⁷⁹ and now “enjoys the largest following in the Shi’i world today [...]”⁸⁰

Unlike most Shi'ite clerics, apart from Ayatollah Khomeini, Sistani has in recent years become well known even amongst North Americans, though for quite different reasons than Khomeini. Habitually apolitical by conviction—he has traditionally followed the quietist line of Shi'ite political theory—Sistani has effectively been thrust into the frontlines of Iraq’s fragile political scene, often mediating a measure of stability in volatile situations. Due to his noted “moderate stance, his juristic notion of democracy,

⁷⁷ Qazwini, *American Crescent*, 41.

⁷⁸ *Ibid.*

⁷⁹ The method of transference of highest authority in the Shi'ite legal institution is discussed in chapter two.

⁸⁰ Nakash, *Reaching for Power*, 7.

and his capacity for even-handedness [...]” some observers of contemporary Iraqi politics see Sistani as the voice of reason, and Iraq’s only viable ““guarantee of democracy.””⁸¹ More importantly for purposes of this research, however, are his views on the *marji ‘īyah* and his legal methodology.

Contrary to Khomeini’s theory, described below, Sistani maintains a traditional view of the *marji ‘īyah*, that is, that it is an institution “confined to religious scholarship and piety,”⁸² answerable to the people who have the right to choose whom they wish to follow and pay their religious taxes to.⁸³ His extensive learning in Islamic as well as non-Islamic sciences is well attested to and it is said that his methodology reflects this learning in his inclusion of modern legal theory and cultural ideas in his hermeneutics.⁸⁴ Whether or not this is the case, it is not generally observable in his *fatāwā* for Muslims in the West which still reflect a traditional conservatism on many issues expressed in traditional terms. In line with his traditionalism, he is opposed to clerics assuming the Islamic nation’s highest political office (i.e., Khomeini’s theory of *walāyat al-faqīh*, guardianship of the jurist), but supports their role in providing “direction, guidance” and oversight to “committees set up to run civil affairs, enforce security and provide public

⁸¹ Nabeel Yasin, “A Man of His Word,” *Index on Censorship* 33 Issue IV (2004), 85. The latter quote is the author’s quoting of Iraq’s then interim president, Ghazi Alyawer. See also, Yitzak Nakash, cited above, and Babak Rahimi, “Ayatollah Ali al-Sistani and the Democratization of Post-Saddam Iraq,” *The Middle East Review of International Affairs* 8 Issue IV (December, 2004), 12-19. Rahimi is less sanguine about Sistani’s direct political role in bringing democracy to Iraq. Describing Sistani as a quietist in terms of opposing clerical participation in actual government, and an activist with regard to providing Islamic legal guidance in times of political injustice, Rahimi suggests that the “most significant contribution that Sistani and his type of political activism could provide in democratization and peacemaking in the country lies in its potential to strengthen Iraqi civil society” (14). More importantly, Rahimi draws attention to Sistani’s resolve that all legislation be fully consistent with Shari’ah norms.

⁸² Linda S. Walbridge, “The Counterreformation: Becoming a *Marja’* in the Modern World,” in *The Most Learned of the Shi’a: The Institution of the Marja’ Taqlid*, ed. Linda S. Walbridge (Oxford: Oxford University Press, 2001), 237.

⁸³ Called the *khums*, this specifically Shi’ite tax is separate from *zakat*, payable by all Muslims to the state for distribution.

⁸⁴ Yasin, “A Man of his Word,” 83.

services.”⁸⁵ As Walbridge notes, Sistani’s dissociation from the anti-West rhetoric characterizing Khomeini’s persona makes him a preferable option to the latter for Muslims in the West to follow.⁸⁶ His *fatāwā* may be found in a special *resālah* devoted to questions for Muslims in the West, or in collections of such *fatāwā* issued by a variety of *mujtahids*, in local magazine publications of Islamic centres, such as the Lebanese Islamic Centre of Montreal, as well as on Sistani’s official website and other online venues.

Prior to Sistani, his famed teacher, Abol-Qasim Khui (1899-1992) had the largest following of Shi’ite Muslims in several countries, including Iraq, Pakistan, and India.⁸⁷ He had acquired the position, Walbridge notes, in preference to the two highly revered *mujtahid* sons of Ayatollah Muhsin al-Hakim upon the latter’s death in 1970 and in accordance with the conventional method of popular recognition of his station, that is, “the reverence shown to him, [and] the *khums* paid to him.”⁸⁸ Khui was staunchly apolitical, refusing to take sides in the Iran-Iraq war. Nevertheless, his followers were not spared arrest and torture in the government crackdown on the Shi’ite religious establishment in the late 1970s and Khui himself “was placed under a virtual house arrest that continued until his death twelve years later.”⁸⁹

Khui differed from Muhsin al-Hakim in his opinion regarding the permissibility of *tab’id* (composite legal rulings), that is, following the *fatwā* of a different *mujtahid* than one’s own on a given issue. According to Khui, *taqlid* is defined as “reliance on the

⁸⁵ *Ibid.*, 82.

⁸⁶ Walbridge, “The Counterreformation,” 243. Although Shi’ite law does not permit following a dead *mujtahid*, it is acceptable to do so if one was *muqallid* (a follower) to him prior to his death.

⁸⁷ *Oxford Encyclopedia of the Modern Islamic World*, s.v. “Kho’i, Abol-Qasem,” (New York: Oxford University Press, 1995), 423.

⁸⁸ Walbridge, “The Counterreformation,” 232-3.

⁸⁹ Wiley, 423.

opinion of another at the point of action.”⁹⁰ Since an unconditioned proof cannot include two contradictory arguments, it is unreasonable, in Khui’s opinion, to emulate two jurists whose opinions are not in agreement. It is preferable, he argues, to exercise *iḥtiyāt* and avoid the action altogether. If the conflict between these opinions is not known, however, it is permissible to follow the opinion of another jurist. Muhsin al-Hakim’s permission for *tab‘īd* is premised on a definition of *taqlīd* (emulation) as reliance on the opinion of an expert at the level of commitment; that is, commitment is attached to the principle of following the rulings of the jurists; which jurist one follows is a matter of choice. Unless it is for “frivolous reasons,”⁹¹ one is therefore permitted to choose the ruling of one jurist over another in a given situation, a concession that Ali Taskhiri argues may well be of benefit to the highest aspirations of Islam in the modern world.⁹²

Very little is written about Ayatollah al-Sayyid Muhammad Sa‘id al-Tabataba‘i al-Hakim, one of three senior clerics in Najaf after Sistani.⁹³ Yitzhak Nakash says only that he has, along with his two colleagues, taken the quietist position of Sistani.⁹⁴ Faleh Jabar mentions him in reference to Muqtada al-Sadr’s belligerent attitude towards all and sundry. In a first step, Jabar says, al-Sadr eliminated some important rival clerics. “His second step was to pressure the old Ayatollah Muhammad Said al-Hakim into paying

⁹⁰ Ayatollah Muhammad Ali Taskhiri, “Combining Legal Rulings,” in *Shi‘ite Heritage: Essays on Classical and Modern Traditions*, ed. and trans. Lynda Clarke (New York: Global Publications, 2001), 237.

⁹¹ As stipulated by ‘Abd al-‘Ali al-Ansari, and quoted by Taskhiri, “Combining,” 240.

⁹² *Ibid.*, 241.

⁹³ The other two are Muhammad Ishaq Fayyad and Bashir Najafi. Nakash, *Reaching for Power*, 7.

⁹⁴ *Ibid.* A handful of internet sites identify him as the nephew of Muhsin al-Hakim’s sons, Muhammad Baqir al-Hakim and Abdul Aziz al-Hakim, but this seems curious to me, as the latter two are far younger than the senior ayatollah. Baqir al-Hakim was one of those whose candidacy for senior *mujtahid* was sidelined in favour of Khui. A political activist along with Baqir al-Sadr, Baqir al-Hakim was assassinated in Najaf in 2003. Abdul Aziz al-Hakim has served on the U.S. appointed Iraqi Governing Council as its President. Since his brother’s death in 2003 he is leader of the Supreme Council for the Islamic Revolution in Iraq.

allegiance to him.”⁹⁵ Al-Hakim’s interest in migrant Shi’ites is unaccounted for. He has published at least one *resālah* devoted to questions from migrants. His decisions tend to be more conservative than those of other scholars on several matters. Al-Hakim is also the most openly critical of Western society, about which he evidences very little actual knowledge.

Iran

Born in 1902 in central Iran, Ruhollah al-Musavi Khomeini (d. 1989) came from a long line of religious clerics. As a youth, he studied under Shaykh ‘Abd al-Karim Ha’iri Yazdi (d. 1936). Khomeini became a *mujtahid* in the early 1930s and very soon thereafter began to openly oppose the pro-Western Pahlavi regime. As one of his biographers puts it, his aim “was more to islamize politics rather than to politicize Islam.”⁹⁶ His political statements and public agitation led to his arrest in 1963 and exile in 1964. Khomeini settled in Najaf where his thought was radicalized and from where his teachings were recorded and sent to Iranian students around the world. It was Khomeini’s exposition of a revolutionary interpretation of Shi’ite history reflected in its popular piety of suffering and martyrdom, along with the teachings of Ali Shari’ati (d. 1977),⁹⁷ and Ayatollahs Murtaza Mutahhari (d. 1979),⁹⁸ and Mahmud Taliqani (d. 1979),⁹⁹ that led to the

⁹⁵ Faleh A. Jabar, *The Shi’ite Movement in Iraq* (London: Saqi Books, 2003), 26.

⁹⁶ *Oxford Encyclopedia of the Modern Islamic World*, s.v. “Khomeini, Ruhollah al-Musavi,” 2:427.

⁹⁷ A very popular lay Shi’ite thinker, Shari’ati did his graduate studies in Paris, from where he developed a version of revolutionary Shi’ism very similar to that of Khomeini. Shari’ati was, however, highly critical of the clerical class and wove an anti-clericalist thread into his revolutionary interpretation of Islam. He was found dead at 44 years old in a London hotel room under suspicious circumstances.

⁹⁸ One of Ayatollah Mutahhari’s greatest intellectual successes was in combating the growing threat of atheistic communism, even within the seminaries of Qom. Mutahhari’s philosophical writings and religious expositions remain popular among educated religious Iranians.

⁹⁹ Taliqani was a progressive and “independent-minded” cleric whose “prominence and popularity” prior to the 1979 Revolution was very close to that of Khomeini. Of a far less autocratic bent than the latter, Taliqani’s vision of institutional reform of the *marji’iyah* centred on “consultation and consensus.” That is, he was opposed to the idea of centralizing the authority of *marji’iyah* in one single highest ranking cleric, preferring a central committee of scholars of different specializations who would make decisions on the

overthrow of the Shah and Khomeini's triumphant return (from Paris to which he had been exiled in 1978) to lead what turned out to be the "Islamic" revolution in Iran in 1979.

It is likely during his communication with Iranian students abroad that Khomeini issued his *fatāwā* addressing questions regarding life in the West, though these never amounted to a volume dedicated to this purpose, as it has for Fadlallah, Sistani, and al-Hakim. Khomeini's *fatāwā* for Shi'ites in the West appear in the major collections of *fatāwā* issued by several *mujtahids* for Shi'ites living in places of migration. His following extends beyond Iranian Shi'ites. Linda Walbridge documents the views of a number of Lebanese and Iraqi Shi'ites living in Dearborn, Michigan whose *taqlīd* of Khomeini was frequently intended to reflect their support for his political leadership, as well as his austere religious conservatism.¹⁰⁰

The principles on which Khomeini bases his political theory also inform his legal methodology. According to orthodox Shi'ite political thought, in the absence of the Imam who represents, and in fact embodies, the divine law, all human government is illegitimate. However, through *ijtihād*, the divine law is accessible to the human mind. Since only those with the requisite training, that is, the jurists, have access to *ijtihād*, they alone can interpret and apply the law. These ideas belong to the general Shi'ite legal theory as it evolved over the centuries, and resulted—on the level of juristic representation of the Imam on the religious level—in the institution of the *marji'īyah* and

basis of consensus. Forough Jahanbakhsh, *Islam, democracy and religious modernism in Iran, 1953-2000: from Bazargan to Soroush* (Leiden: Brill, 2001), 70-77.

¹⁰⁰ See Linda Walbridge, *Without Forgetting the Imam: Lebanese Shi'ism in an American Community* (Detroit: Wayne State University Press, 1997); and Walbridge, "The Shi'a Mosques," 337-357.

the twinning of *ijtihād* and *taqlīd*.¹⁰¹ Khomeini takes these principles a step further in asserting that as representatives of the divine law, the jurists logically have the right to represent, as custodians, the authority of the absent Imam in both his religious and temporal duties.

With regard to his legal methodology, the merging of political and religious authority suggests an epistemological assumption that the law and the highest authoritative jurist's interpretation of the law must be one and the same. Dissent and diversity of opinion are ruled out. This represents a radical departure from traditional legal theory that virtually prides itself on difference of opinion, and suggests an ideological, rather than purely religious, approach to legal interpretation.

In 1989, the *marji 'iyah* in Iran faced the problem of appointing a successor to fill both the spiritual and temporal leadership positions left vacant by Khomeini's death. According to Khomeini's modified interpretation of *walāyat al-faqīh*, this did not have to be the same person, as in his own case, so long as the temporal leader was from the clerical class.¹⁰² The spiritual leadership was already limited, of course, to the *mujtahids*. As Linda Walbridge explains, to maintain its power, the government needed to appoint a senior *marji'* from within its own ranks. Thus it was that the temporal post of "president" was filled by a low ranking *mujtahid*, 'Ali Khamene'i, while "two very elderly *mujtahids* [were appointed] as the government-endorsed *maraji'* [sic] [...]."¹⁰³

After the deaths of the latter, Khamene'i, though considerably lacking in requisite credentials to be considered the highest ranking *marji'*, was nevertheless seen as the most

¹⁰¹ See chapter one for a more complete discussion of this topic.

¹⁰² Linda Walbridge, "Counterreformation," 234.

¹⁰³ These were Ayatollah Muhammad Reza Gulpayegani (d. 1993) and Ayatollah 'Ali Araki (1994). Walbridge, 235.

expedient choice. As Walbridge observes, the government's imposition of Khamene'i violated at least two basic principles of the *marji 'iyah*. Khamene'i was neither qualified by expertise in legal reasoning, nor, it follows, could he be freely selected by the people on the basis of their respect for his learning.¹⁰⁴ Though some have chosen to follow him—thereby demonstrating their compliance with the government—the vast majority of Shi'ites inside and outside of Iran have ignored the government's choice and follow Sistani, Fadlallah, or one or another among several other options, including Ayatollahs Yusuf Sanei, Muhammad Sa'id Tabataba'i al-Hakim, or the outspoken clerical critic of the government, Grand Ayatollah Hossain-Ali Montazeri.

Lebanon

Born in Najaf in 1935 to a notable family from south Lebanon, Sayyid Muhammad Husayn Fadlallah spent his early years in the sacred shrine city, where, from a young age, he began his studies in the traditional seminary curriculum. Like Sistani, Fadlallah was a student of Khui, as well as Muhsin al-Hakim (d. 1970).¹⁰⁵ It was the latter, however, along with his politically active fellow student, Muhammad Baqir al-Sadr (1933-1980), and Ayatollah Khomeini (d. 1989), whose examples Fadlallah has sought to emulate.¹⁰⁶ While critical of Khui's apolitical approach, Fadlallah has actively supported

¹⁰⁴ Walbridge, "Counterreformation," 235-37.

¹⁰⁵ Al-Sayyid Muhsin al-Hakim is one of a large family of Shi'ite clerics, 125 of whom were arrested on the orders of Saddam Hussein, 18 of whom were later executed. Though a follower of the quietist school himself, Muhsin al-Hakim's sons Muhammad Baqir al-Hakim and Abdul Aziz al-Hakim (his only remaining sons after the arrests of the 1970s), have been politically active. Muhammad Baqir was, until his assassination in a massive sectarian bombing in Najaf, the chairman of SAIRI (Supreme Assembly for the Islamic Revolution in Iraq) after his return to Iraq from exile in Iran in 2003. Jabar, *Shi'ite Movement*, 97. Abdul Aziz al-Hakim, appointed by the U.S. to the Iraqi Governing Council, replaced his brother as leader for the SAIRI.

¹⁰⁶ *Oxford Encyclopedia of the Modern Islamic World*, s.v. "Fadlallah," 1:453.

Khomeini as the first successful modern leader of an Islamic state, by whom he was rewarded in being granted the title of *marji' al-taqlid* in 1986.¹⁰⁷

Inspired also by al-Sadr's political activism, Fadlallah launched his own revival movement among the many disenchanted and poverty-stricken Shi'ite youth of east Beirut, where he established youth clubs, clinics, and community centres, and where he also took up residence in 1966.¹⁰⁸ His eloquent and dramatic sermons, weaving together "traditional Islamic themes and the fashionable rhetoric of anti-imperialist nationalism,"¹⁰⁹ gained him much repute among the youth. Through his experiences of suffering with the Shi'ites and other citizens of Lebanon during the prolonged civil war (1975-1988) and numerous Israeli bombings, he became known also as an *'alim* of the people.

Fadlallah has also been critical of the structure and training of the clerical class. During his studies, he co-founded a journal with Baqir al-Sadr, in which he published editorials calling for a more modern approach to Islamic studies and for making the teachings of Islam "relevant to changing circumstances [...]."¹¹⁰ Fadlallah's legal methodology reflects an awareness of modern fields of knowledge. This sometimes leads him to different opinions than other *mujtahids*, particularly on modern and scientific issues.¹¹¹ While some of Fadlallah's *fatāwā* for Muslims in the West do reflect this more progressive thinking in terms of results, others use a popular philosophical or scientific

¹⁰⁷ Ibid., 453.

¹⁰⁸ Ibid.

¹⁰⁹ Martin Kramer, "The Oracle of Hizbullah: Sayyid Muhammad Husayn Fadlallah," in *Spokesmen for the Despised: Fundamentalist Leaders of the Middle East*, ed. R. Scott Appleby (Chicago: University of Chicago Press, 1997), 93.

¹¹⁰ Ibid., 89.

¹¹¹ For example, Fadlallah advises a *mustafti* living in northern Europe to arrange his or her own prayer times at regular intervals. This issue is discussed in chapter five of the present work. For a discussion of progressive leaning *fatāwā* from Fadlallah on issues not directly linked to life in the West, see Talib Aziz, "Fadlallah and the Remaking of the Marja'iyā," in *The Most Learned of the Shi'a*, 205-215.

frame of reference to put forward a traditional opinion. In other words, while Fadlallah's legal reasoning often differs from other *mujtahids* in terms of form—and length—this should not lead one to assume that they differ also in terms of content.

In contrast to Sistani, Fadlallah envisions the *marji'iyah* as a tightly structured, politically relevant institution. He argues also against its de-centralization on the argument that the *marji'iyah* provides religious leadership and guidance for “the entire Shi'ite community” and as such “should transcend political boundaries, just as the papacy is not restricted to Rome or Italy.”¹¹² Like the Vatican, the *marji'iyah* should be led by one, highest ranking *marji'*, who would command universal allegiance and be supported by scholars specializing in all fields of modern learning. Fadlallah's vision of the *marji'iyah* would seem incompatible with the notion of a Western-based *marji'iyah*, as discussed in chapter two, and might suggest further that his interest in addressing issues facing Muslims in the West is reflective of this broader vision of a universally authoritative institution, and perhaps, of himself as a promising candidate for the position.

I have not come across any collections of *fatāwā* for Muslims in the West that include those issued by Fadlallah. Instead, Fadlallah's *fatāwā* appear in several of his own publications dedicated to this purpose. His official website also has more than one section dealing with his views on migration, with the concept of *fiqh* (legal thought) for the West, and with specific questions for Muslims in the West.

¹¹² Ibid., 213.

CHAPTER TWO

THE *MARJI'ĪYAH*: FROM QOM TO CALIFORNIA

The historical survey of the institution of the *marji'iyah* to follow reveals a substantially closed authoritative structure. Thus, developing a *fiqh* for the West meaningfully conscious of cultural context would perhaps require a development of *ijtihad* as significant as the 14th century acceptance of the principle, which I discuss below. A recent congress on *ijtihad* in the modern world, sponsored by the College of Islamic Schools at Tehran University, expressed support for principles of *ijtihad* such as time and place (*zamān va-makān*). One participant suggested that applying this principle would prevent “a superficial approach” (*saṭḥī negarī*) to legal responses to modern questions, implying that this is at least sometimes the case.¹ Deriving rulings (*aḥkām*; sing., *ḥukm*) for new situations places a heavy demand on scholars to apply these and other principles of legal interpretation so as to engage dynamically with contemporary problems. A description and history of *fatwā*-giving will help to set the stage the modern context.

***IFTĀ'* (PRACTICAL LEGAL INTERPRETATION): SCHOLARLY LEADERS AND LAY FOLLOWERS**

In theory, *fatāwā* are authoritative replies from qualified scholars—usually brief—to questions (s. *istiftā'*) followers submit to them. In Shi'ite *fiqh*, they are considered commands (sing. *dastūr*)² and differ from (court) rulings (sing. *qaḍā'*) in that a *fatwā* is absolute and complete (*ḥukm kulli*), whereas a *qaḍā'* is reliant on corroborating

¹ *Hawzah*: *akhbār va itlā'āt*, “*Hamāyesh-e ijtihad dar dore-ye mo'āser bā ḥudūr-e ra'īs-e majlis-e khabar gān-e rahbarī*,” <http://www.hawzah.net/Hawzah/News/NewsPrint.aspx?id=76271> (accessed January 13, 2009).

² See for example, Ayatollah Ali al-Sistani, *Tawḍīḥ al-Masā'il* [CD-ROM, *ALAHKAM*, version 2.0] (Qom, 1415), 1:6.

evidence (*maṣādiq*).³ Further, while court rulings are based on case evidence and are enforceable by the state, the scholar issuing a *fatwā* draws upon scriptural teachings of the Qur'an and Traditions, as well as classical law. *Fatāwā* are therefore the result of independent legal reasoning conducted by a *mujtahid* (often used as a synonym for *marji*').⁴

According to Shi'ite *fiqh* it is obligatory for every layperson to do *taqlīd* of the living scholar that he or she, after thorough investigation, considers the most qualified. The *muqallid* (one who does *taqlīd*) is then bound to the *fatāwā* of his or her *marji*' and may not choose to follow a *fatwā* from a different *marji*' simply out of preference for his opinion, though under exceptional circumstances it may be possible to do so.⁵ Shi'ite scholars see it as necessary to mention that *taqlīd* signifies acting in accordance with the *fatāwā* of one's *marji*' and not simply having knowledge of them.⁶

Since about the middle of the 19th century, it is said in Shi'ite juridical theory that to act in accordance with one's own knowledge—effectively under one's own authority—particularly in matters of '*ibādāt*,⁷ is prohibited, so much so that even what is done correctly (performing ablutions in the correct manner, for example) apart from

³ Al-Sayyid al-Yazdi, *Su'āl va Javāb* [CD-ROM ALAHKAM, version 2.0] (Tehran: Markez Nashr 'Ulūm Islāmī, 1376 h.sh.), 1:13. However, unless attached to a court ruling, the binding character of the *fatwā* can be largely theoretical, as there is no institutional mechanism for enforcing it.

⁴ While all *marāji*' (pl.) are logically *mujtahidūn*, not all *mujtahidūn* have the status of *marji*'. As used in this work, *mujtahid* is coterminous with *marji*'.

⁵ Ayatollah Ruhollah Khomeini, *Tahrīr al-Waṣīla* [CD-ROM ALAHKAM, version 2.0] (Qom: Dār al-Kutub al-'Ilmīya), 1:6. An exceptional circumstance would be that one's chosen *marji*' has not issued a *fatwā* on a given issue; one is permitted in this case to follow another *marji*' on this issue only.

⁶ E.g. al-Khui, *Minhāj al-Ṣāliḥīn* (Qom: Madīnat al-'Ilm, 1410 h.), 1:5.

⁷ Shi'ite *fiqh*, as is Sunni, generally divided into two main areas: '*ibādāt* (matters related to worship such as performing ablutions (*wuḍū'* and *ghusl*), prayer (*ṣalāt*), and other obligatory acts of worship); and *mu'āmalāt* (matters related to worldly affairs). Often, they are given the shorthand of matters affecting one's relationship with God and one's fellow human beings, respectively.

taqlīd is considered *bāṭil* (futile) from a legal perspective.⁸ The Shi'ite *fatwā*, then—unlike the Sunni counterpart which is merely “‘informational’ or communicative”⁹—in theory carries potential for significant influence on the community.¹⁰ While some *fatāwā*—for Muslims in the West or elsewhere—appear to be rather mundane (stating that it is permissible to use soap made of pig fat, for example), others (stating whether or not it is permissible to disobey the government of a Western country in select matters, for example) have more serious implications. It is my contention, however, that all *fatāwā*, no matter how apparently mundane, participate in the construction of a discourse and that this discourse as a whole produces or shapes a certain conception of minority Muslim identity.

According to Ahmad Dallal, *fatāwā* may be broadly classified into two categories; what Dallal calls a “minor” *fatwā* is generally private and will contain such elements as guidance, practical instruction, doctrinal explanation, or suggestions for settling disputes. They are noteworthy for aiding in the daily affairs and smooth running of society. Dallal’s “major” *fatwā* is generally of public application and may well address political decisions such as a declaration of war or peace, or “administrative and fiscal measures and reforms.”¹¹ The 1891 smoking ban issued by Mirza Hasan Shirazi against the British tobacco monopoly in Iran is an example of a major *fatwā* in the modern Shi'ite world, as

⁸ See, for example, Muhammad Kazim Moussavi, *Religious Authority in Shi'ite Islam: From the Office of Mufti to the Institution of Marja'* (Kuala Lumpur: International Institute of Islamic Thought and Civilization, 1996), 175.

⁹ *Oxford Encyclopedia*, s.v. “FATWA: Process and Function,” 2:10. Even so, Sunni *fatāwā* from particularly high ranking scholars such as the chief *muftī* of al-Azhar, currently Sheikh Yusuf al-Qaradawi, can carry great weight amongst the general population. *Oxford Encyclopedia*, s.v. “FATWA,” 12.

¹⁰ Hallaq argues that many Sunni *fatāwā*, being at once “legal discourse” and “social instrument,” have had long term influence, having been regularly incorporated into substantive law. See Hallaq, “From *Fatwās* to *Furū'*: Growth and Change in Islamic Substantive Law,” *Islamic Law and Society* 1.1 (1994), 29-65.

¹¹ *Oxford Encyclopedia*, s.v. “Fatwa: Modern Usage,” 2:14.

is Khomeini's 1971 ban on celebrating the 2,500th anniversary of monarchy in Iran.¹²

While "death sentence" *fatāwā* such as Khomeini's call for the killing of author Salman Rushdie for his novel, *The Satanic Verses*, seem typically to define the term in popular Western understanding, far more standard are the literally thousands upon thousands of every day "minor" *fatāwā* dealing with points of doctrine or private ethical questions, which, nevertheless, have social consequences, directly or indirectly. This study treats solely this type of *fatwā*.

Ayatollah Khomeini enumerates the criteria by which a scholar qualifies as a *marji'*; he must have maturity (*al-bulūgh*), knowledge (*al-'aql*), faith (*al-īmān*), capacity of *ijtihād* (*al-ijtihād*), justice (*al-'adl*), purity (i.e. legitimacy) of birth (*tahārat al-muwallad*), and restraint (*ḍabt*); and, he must be male and living, for it is not permitted to follow a dead *mujtahid*.¹³ As for justice, Ayatollah Ali al-Sistani explains that this describes someone whose general and specific conduct complies with the divine law, as testified by people around him.¹⁴ Usually, it takes many years of study and interpretive practice to reach this level of knowledge, so a scholar is often quite advanced in years by the time he becomes a *marji'*. The most qualified among them acquire a following which adds to their prestige, further boosting their credibility.

With the potential for more than one *marji'* to fit the description given above, how does an ordinary person know whom to follow? In general, one should, upon reaching the age of accountability, which coincides roughly with puberty (12 for boys and 9 for girls), inquire of knowledgeable and pious relatives (notably one's parents) as to who is the most learned and pious scholar. According to Ayatollah Sistani, identifying

¹² Ibid., 16.

¹³ Khomeini, *Tahrīr al-Waṣīla*, 1:6.

¹⁴ Seestani, *Islamic Laws*, 2.

such a person rests on three general guidelines: if one is him or herself a learned person, one may rely on one's own judgment regarding a scholar in question; or, when the positive testimony of two learned and just individuals regarding a scholar is not contradicted by another two equally learned and just individuals, their judgment is to be taken as valid. The same applies in the case of one learned and just individual; or thirdly, when the accumulated testimony of several individuals attests to a scholar's qualifications and one is convinced by their testimony, one may follow the *marji'* in question. However, one should not allow this rather technical procedure to obscure the weight of personal charisma that was often significant in raising the status of one jurist above that of his contemporaries.¹⁵

Once a *muqallid* has chosen his or her *marji'*, the next issue is how to gain access to his *fatāwā*. The methods are the same according to all scholars. The contemporary scholar Shaykh Luft Allah al-Safi explains that it may be through one of four ways: by hearing it directly from the *mujtahid*; by hearing it from two just individuals; by hearing it from one trustworthy individual; and, finally, by reading it in the *mujtahid's resālah*, which includes the scholar's independent legal statements as well as *istiftā'āt* and *fatāwā*.¹⁶ *Resalahs* are commonly arranged in a uniform format, beginning with matters of *taqlīd*, followed by purity and methods of ritual purification, moving on to ritual practices (*'ibādāt*) and then finally addressing matters of social intercourse (*mu'āmalāt*). *Resalahs* are commonly expanded through the publication of additional *istiftā'āt/fatāwā* as new issues and questions arise.

¹⁵ Ibid. I take Taskhiri's reference to a jurist's "personal capabilities" as alluding to this quality. See Ayatollah Muhammad Ali Taskhiri, "Supreme Authority (*marji'iyah*) in Shi'ism," in *Shi'ite Heritage*, 163.

¹⁶ Shaykh Luft Allah al-Safi, *Tawḍīḥ al-Masā'il* [CD-ROM ALAḤKAM, version 2.0] (Qom: Dār al-Qur'ān al-Karīm, 1414 h.), 1:5.

The fourth method, that is, reading the *mujtahid*'s published legal treatise and responsa, is considered the least reliable because the *mujtahid* may have changed his mind in the intervening time.¹⁷ New technology, such as a *marji*'s official website, is helpful here, as a scholar's *fatāwā* can be updated regularly.¹⁸ Lesser reliance on print sources clearly suggests that issuing *fatāwā* is an ongoing task subject to continual acquisition of knowledge that may change with time and circumstance. This suggests that *fiqh al-mughtaribīn* (Islamic law for Muslims in the West) might well represent a dynamic and evolving field, one with great potential to direct the path and shape the identity of, as well as to provide unity to the community in the West.

The form given to *fatāwā* reveals something of their character. *Fatāwā* generally attempt to be non-specific in applicability, as shown by the use of conventional naming substitutes (Zayd and 'Amr, for example).¹⁹ Further, as Wa'el Hallaq points out, questions should be worded in the third person, even if one is speaking, as is most often the case, about a situation with which one is personally involved. This non-personalized use of language might suggest a detached and formalized tone in *istiftā'āt* and *fatāwā*. On the contrary, because *fatāwā* are necessarily based on real and not hypothetical problems, they also reflect the human quality of individual religious thought or development.

Further, there is no set format that questions must follow. This allows questioners to exercise a measure of control over the way a question is put, and could, as Brinkley Messick observes, affect the response (i.e., the *fatwā*) to some degree; for it is the questions that "define the terms of the [*mujtahid*'s] engagement with the problem under

¹⁷ Ibid.

¹⁸ Indeed, the internet has become a major medium for disseminating religious guidance, a phenomenon that opens up a whole series of new research questions. See Gary Bunt's very interesting studies, notably, *Islam in the Digital Age*.

¹⁹ Hallaq, "Iftā'," 33; Messick, "Muftīs," 11.

consideration.”²⁰ For the most part, this does not appear to be a highly significant factor in the *fatāwā* examined in this study, but it may account for some apparent discrepancy between two *fatwās* from the same scholar treating virtually the same question. While the majority of questions examined in this study simply state the situation more or less objectively, a number of *istiftā’āt* do include bits of cultural or situational information expressed in such a way as to try to sway the *fatwā* in a more lenient direction, more often without success. Ayatollah Montazeri’s online *muqallidūn* are notably explicit in articulating their circumstances and wishes.

Detailed *istiftā’āt* may be due to at least two factors. As we will see below, some Shi’ite academics in North America have argued that the geographical distance between *mujtahids* and their followers in the West creates a parallel cultural distance; *mujtahids* lack the cultural experience necessary to engage the issues in an intellectually comprehensive manner. Secondly, as we will observe in the several chapters analyzing *fatāwā*, an apparent hesitancy to exploit possibilities within the legal methodology further distances *mujtahids* from *mustaftīs*. While methods for obtaining contextually sensitive legal opinions exist, scholars geographically far removed from the context of their subjects tend, rather, to rely on the past and avoid taking risks in the direction of innovation. One area where significant change has occurred in spite of this widespread tendency is in the area of the purity status of scriptuary non-Muslims, where majority opinion has shifted radically in the modern period.²¹ *Mustaftīs* may include detail in an effort to provide rationalization for a more dynamic *ijtihad*.

²⁰ Messick, “Muftīs,” 10. *Muftī* is the common term in Sunni Islam to refer to someone who issues a *fatwā*. Though at one time of use also in Shi’ism, the more common term in the latter is *mujtahid*.

²¹ For a detailed discussion of this subject see chapter four on purity and food.

The cultural gap between *mujtahid* and *mustaftī* opens up the potentially active role of the *mujtahid*'s *wakīl* (representative) resident in the West. While the primary job of the *wakīl* is to relay the *fatāwā* of his (*wakīls* are, to my knowledge, always male) *marji*' , a subject we discuss in greater detail below, a *wakīl* may also have a formative influence by relaying first-hand knowledge of the cultural context of the followers of the *mujtahid* he represents.

THE DEVELOPMENT OF THE *MARJĪ'ĪYAH*: RESPONSIBILITY AND DUTY

Being qualified to issue *fatāwā* clearly rests on an acquired and restricted authority. This authority is rooted in an aspect of prophetic succession. The Arabic root *fatiyā* occurs in two verbal forms in the Qur'an that refer, respectively, to asking (the Prophet) for practical guidance (*istiftā'*) and to giving a response (*yuftī*).²² In Twelver Shi'ite Islam, after the Prophet's death the responsibility of authorizing individuals to issue *fatāwā* devolved upon a special class of the Prophet's descendents, known as Imams. According to Hamid Algar, the first Imam, Ali (son-in-law and cousin to the Prophet), authorized others to continue the prophetic practice of issuing *fatāwā*, whether or not the Imam himself was present.²³ Algar suggests, in line with Modaressi Tabataba'i, that this may indicate a certain distribution of authority on the part of the Imams, who delegated the task of "inferring of details and specific rulings [...] to their learned followers."²⁴ Further, from his place of occultation, the twelfth and last Imam called upon those who narrated the prophet's traditions (s. *riwāyah*) to provide guidance to the people

²² Q. 4:127—"They consult thee [*yastaftūnaka*] concerning women. Say: Allah giveth you decree concerning them..."; Q. 4:176—"They ask thee for a pronouncement. Say: Allah hath pronounced [*yufīkum*] for you concerning distant kindred. [...]"

²³ Hamid Algar, "Fatwā," <http://www.iranica.com/articles/v9f4/v9f440.html> (accesses February 1, 2009).

²⁴ *Ibid.*

on “newly occurring problems.”²⁵ As Algar observes, this would suggest the then close association between legal scholarship and knowledge of the Imami traditions.

Initially the custody of the tradition narrators, knowledge of the opinions of the Imams eventually came to be the unique possession of those highly specialized in legal reasoning. The technical term used to denote this type of authority, *walāyah*, suggested a guardianship role: jurists simply exerted their best effort to uncover and protect knowledge of the divine will, held solely by their infallible Imams. By the 14th c. CE, *ijtihād* as a source of law was added to reliance on tradition, gradually overtaking it in preeminence. However, as Ayatollah Taskhiri points out, it was the link between the jurists’ guidance and “that of the divinely-protected (*ma’ṣūmah*) leadership [of the Imams] in learning and conduct” that continued to validate the leadership of the former.²⁶

Even at this relatively early stage, the acceptance of *ijtihād* set the course for the already subtly present division between two classes of believers, as authority to practice legal interpretation was associated only with those trained in its methods.²⁷ Qur’anic justification for a special scholarly class is typically found in Surah 9:122, which reads: “Nor should the believers all go forth together [into battle]: if a contingent from every group remained behind, they could devote themselves to studies in religion and admonish their people when they returned to them, that they [might learn] to guard themselves [against evil].”²⁸ With the task of deriving legal opinions devolving upon an especially learned and increasingly specialized class (*‘ulāmā’*, *fuqahā’*), the duty of common people

²⁵ Ibid.

²⁶ Taskhiri, “Supreme Authority,” 163.

²⁷ Norman Calder quotes a tradition narrated by Kulayni (d. 941) in which a “distinction between the ‘*ammi* [common person] and the ‘*ālim* [scholar] was already implicit [...]” See Norman Calder, “Doubt and Prerogative: The Emergence of an Imāmī Theory of *ijtihād*,” *Studia Islamica* 70 (1989), 74.

²⁸ As articulated by Taskhiri, “Supreme Authority,” 159.

(*'ammi*) was only to inquire and obey; ultimate responsibility before God as to the validity of a ruling rested on the shoulders of the *mujtahid*.²⁹ Although adoption of the title *mujtahid* roughly coincided with acceptance of the practice of *ijtihād*, the formal office emerged only under the Shi'ite Safavid state that ruled Iran from 1501-1726.³⁰

A group calling itself *Akhhārīs* (after the technical term *akhhār*, meaning Imami tradition) in the 18th c. attempted to again centre legal authority solely in narrated traditions, apart from *ijtihād*. The attempt failed, largely due to the work of Vahid Bihbahani (d. 1792), an apparently indefatigable scholar whose extraordinary intellect pushed the *Akhhārīs* to the margins of Shi'ite *fiqh*, saved legal reasoning from the last great assault against it, and established once and for all the role of the *mujtahid* as authoritative interpreter of the law. This *Uṣūlī* (from the technical term for a fundamental [legal] principle, *aṣl*) victory further distanced the clergy, with their specialized knowledge, from the laity.³¹

The culmination of this development saw the emergence of the supreme *mujtahid* in the office of the *marji' al-taqlīd* in the 19th c. Prior to this period, *taqlīd* had looser reference to a general practice of the less knowledgeable masses following the legal guidance of the highly trained minority. Pairing the term *taqlīd* with the terms *ijtihād*, *mujtahid*, and *marji'* clearly suggested an unequal yet symbiotic relationship between them. "By the nineteenth century," writes Lynda Clarke, "discussion of *ijtihād* and *taqlīd* frames juridical treatises either as a preface or postscript, highlighting the fact that authority is the product of expertise in a discipline of complex legal reasoning limited to

²⁹ Ibid.

³⁰ Moussavi, *Religious Authority*, 2.

³¹ Juan Cole, "Shaykh Ahmad al-Ahsa'i on the Sources of Religious Authority," in *The Most Learned of the Shi'a*, 83.

only a few.”³² When Sayyid Muhammad Kazim Yazdi (d. 1919) institutionalized the rule that every Shi’ite not qualified to do *ijtihād* (the vast majority of the community) be required to follow the rulings of a living *marji’*, the corollary of which was the invalidation of religious observances performed outside of this framework, the institution of the *marji’iyyah* became the defining element of Shi’ite *fiqh* and Shari’ah-based religiosity.³³ Thus, what in the 14th c. one of the earliest scholars to admit legal reasoning, ‘Allamah al-Hilli (d. 1325), stated as merely permissible—that the ‘*ammi* act on the basis of *taqlīd* of the *mujtahid*—was elevated in the late 19th/early 20th c. to legal obligation. Consequently, the practice of seeking a *fatwā* became increasingly indispensable, as reflected in the twinned terminology of legal identity: *marji’* (source of emulation) and *muqallid* (the one who emulates).³⁴

The introduction of *ijtihād* also precipitated a fundamental epistemological shift from the certainty of knowledge earlier assumed to characterize the infallible traditions to acceptance of the principle of doubt (*shakk*) and the possibility of error implied in the act of human reasoning, which is at the heart of *ijtihād*. Shaykh Murtada Ansari (d. 1864), whom Ahmed Kazemi Moussavi refers to as “the most famous *marja’* [sic] of the pre-Modern Age,” further expanded the scope of juristic authority when he systematized principles for dealing with four different levels of doubt.³⁵ He also divided legal decisions

³² Lynda Clarke, “The Shī‘ī Construction of *Taqīd*,” *Journal of Islamic Studies* 12, no. 1 (2001), 41.

³³ Though attributed primarily to Yazdi, the binding obligation that every lay Shi’ite follow the rulings of a living *mujtahid* was earlier conceptualized by Shaykh Murtada Ansari (d. 1864). See Moussavi, *Religious Authority*, 174-75; 271-72.

³⁴ Clarke, “The Shī‘ī Construction,” 40.

³⁵ These included (and remain valid today): “*al-barā’a* (allowing the maximum possible freedom of action); *at-takhyīr* (freedom to select the opinions of other jurists or even other schools of law if these seem more suitable); *al-istiṣhāb* (the continuation of any state of affairs in existence or legal decisions already accepted unless the contrary can be proved); and *al-ihṭiyāṭ* (prudent caution whenever in doubt).” Moojan Momen, *An Introduction to Shi’i Law: The History and Doctrines of Twelver Shi’ism* (New Haven: Yale University Press, 1985), 187.

into four categories according to their respective level of certainty: *qaṭʿ* (certainty); *ẓann*; *shakk* (subdivided as described in the last footnote); and *wahm* (erroneous conjecture).³⁶ Ansari's contribution expanded the scope of juristic authority, further supporting the necessity of popular recourse to specialized knowledge.

Another important development in the *marji'iyah* occurred in the 19th c., which the highly influential modern scholar Muhammad Baqir al-Sadr (d. 1980)³⁷ classifies as the beginning of the third period, the period of the "grand *marji'iyah*" (*al-marji'iyah al-'uzmā*) which extends into the present time. As the *marji'iyah* narrowed the number of those qualified to pronounce on legal matters on the macro-level, so did the "grand *marji'iyah*" on the micro level, to the point that authority might be said to be consolidated in one universally authoritative grand *marji'*, beginning with the *marji'iyah* of Kashifu'l-Ghita (d. 1813).³⁸ Still seen as the ideal by some jurists, in reality there have, since al-Ghita, been very few periods when the community was able to settle on one most learned and pious scholar.³⁹

After Ayatollah Burujirdi (d. 1962), there was no sole *marji'*. Among the several high-ranking *marāji'* to die in the latter decades of the last century, J. Calmard lists Ayatollahs Abul-Qassim al-Khui (d. 1992), Ruhollah Mousavi Khomeini (d. 1989), Mohammad Kazem Shariatmadari (1986), who were, at times, in competition with each

³⁶ Ibid.

³⁷ Al-Sadr was one of "scores of Shi'i jurists" killed by the regime of Saddam Hussain "to keep his shii subjects cowed." Roy Parviz Mottahedeh, introduction to Muhammad Baqir al-Sadr, *Lessons in Islamic Jurisprudence*, trans. Roy Parviz Mottahedeh (Oxford: Oneworld, 2003), 23.

³⁸ Talib Aziz, "Baqir al-Sadr's Quest for the Marji'iyah," in *The Most Learned of the Shi'a*, 143-44.

³⁹ Ayatollah Burujirdi (d. 1960) was sole *marji'* after the death of the last of his contemporaries, Sayyid Aqa Husayn Qummi (d. 1947), helping to maintain the rising status of Qom. He was followed by several *mujtahids*, none of whom was considered the sole *marji'*. For a discussion of the crisis in the *marji'iyah* following his death see below.

other.⁴⁰ Momen's list of the generation after Burujirdi is more complete. In addition to the three above, Momen lists Ayatollahs Muhammad Rida Gulpayegani, Mar'ashi-Najafi (d. 1990), Muhammad Hadi Milani (d. 1975), Ahmad Khwansari, 'Abdu'l-Hadi Shirazi (d. 1961), Al Kashifu'l-Ghita, and Muhsin al-Hakim (d. 1970), whom Momen identifies as the most broadly supported.⁴¹ Among those listed here, this study includes *fatāwā* from Ayatollahs Khui (often spelled Khoei) and Khomeini, as, although now deceased, they issued *fatāwā* specifically for Muslims in the West.

Today, there are again several Grand *Marāji'* concentrated in the major Shi'ite centres of Qom, Mashhad, and Najaf, though some reside in other areas such as Beirut, Tehran, as well as Pakistan and Afghanistan. Sources vary as to their number. One web source lists twenty-three names of *marāji'* born between 1920 and 1942.⁴² The majority (fifteen)⁴³ were educated in Najaf, Iraq and the rest in Qom, Iran. A related website on the city of Qom lists thirty-eight, including Muhaghegh Damad, residing in Tehran, whose views on *ijtihād* are discussed briefly below.⁴⁴ A Shi'ite site lists thirty-two names, with photos, all of whom are given the title "Grand Ayatollah," along with links to their official websites.⁴⁵ One or two of this list are deceased (e.g. Ayatollah al-'Udhma Sayyid Kadhim al-Haeri). Ayatollah Sayyid Ali Khamenei tops the list, followed by Sayyid Ali

⁴⁰ *Encyclopedia of Islam* 2nd ed. s.v. "Marja'-i Taqlid," 553. See also *Oxford Encyclopedia*, s.v. "Marja' al-Taqlid," 3:47-8, whose list is likewise brief. Calmard (*EI*) describes Shariatmadari as a moderate who was also the most influential Ayatollah prior to the 1979 revolution. He was eventually "deposed from his position as Ayatullah al-'Uzma," having been accused of subversion against Khomeini's rule.

Encyclopedia of Islam, s.v. "Marja'-i Taqlid," 553.

⁴¹ Momen, *Introduction*, 248-49.

⁴² *Wikipedia, The Free Encyclopedia*, s.v. "List of marjas," http://en.wikipedia.org/w/index.php?title=List_of_marjas&oldid=267640051 (accessed 1 February 2009).

⁴³ Two of these (Bashir Hussain Najafi and Muhammad Hussain Najafi) received part of their training in their native Pakistan (pre-partition India).

⁴⁴ *Wikipedia, The Free Encyclopedia*, s.v. "Qom,"

<http://en.wikipedia.org/w/index.php?title=Qom&oldid=263232131> (accessed February 1, 2009). And

http://www.upto11.net/generic_wiki.php?q=Qom (accessed February 1, 2009).

⁴⁵ Shia Chat, <http://www.shiachat.com/forum/index.php?showtopic=71812> (accessed February 1, 2009).

al-Sistani and Sayyid Muhammad Husayn Fadlallah. *Fatāwā* from these *marjāji* ' are used extensively in this work, as are those of five of the remainder of the first ten names: Mirza Jawad Tabrizi, Sayyid Muhammad Saeed Tabataba'i al-Hakim, Shaykh Muhammad Fazel Lankarani, Shaykh Yousif Saanei, Shaykh Nasir Makarim al-Shirazi, and two listed further down, Lutfollah Safi al-Golpayegani, and Janaati. The criterion used to select the sample is that a *mujtahid* has issued *fatāwā* for Muslims in the West, whether in his own publications, such as those of Sistani, Fadlallah, and al-Hakim, or in a compilation of *fatāwā* from several *mujtahids*. The study also includes some *fatāwā* from Ayatollah Montazeri (stripped of his title by Khomeini in 1989). The vast majority of these men are over 70 years of age.

RECENT DEVELOPMENTS: FROM DECENTRALIZATION TO INCLUSIVITY

Since at least the 1960s, the *marji* 'iyah has been in process of internal reform. Ann Lambton identifies the major intellectual trends that emerged out of a series of papers occasioned by the uncertainties created by the death of Ayatollah Burujirdi, the sole *marji* ' in the world at that time, in 1962. The initiative was led by a group of Iranian scholars who called themselves the Islamic Societies, and whose membership consisted largely of the clerical class. Questions around "the functions and choice of the *marji* ' *al-taqlid*" were deeply impacted by political events threatening the institution's independence from both government and people, and challenging its responsibility towards society.⁴⁶

⁴⁶ Ann K. S. Lambton, "A Reconsideration of the Position of the *Marja* ' *al-Taqlid* and the Religious Institution," *Studia Islamica* no. 20 (1964), 119.

One solution put forward was to decentralize the institution, advocated by at least two participants (Sayyid Murtada Jaza'iri and Ayatollah Sayyid Mahmud Taliqani⁴⁷). This would be accomplished partly by the establishment of a *fatwā* council. Supporters argued that the rule of centralizing authority in one most learned *mujtahid* was a modern invention and that it was virtually impossible to fulfill, as no single individual “could be ‘the most learned’ in all aspects of religion.”⁴⁸ For some, such as Murtada Mutahhari (d.1979),⁴⁹ this implied the need to reexamine the meaning and scope of *ijtihād*. Defining it as “the adaptation of general laws to new problems and changing circumstances,” Mutahhari argued, presupposed that the *mujtahid* be “in touch with current affairs.” He proposed, therefore, that every *mujtahid* specialize in a certain area and “be ‘followed’ only in that field in which he has specialized.”⁵⁰

Mutahhari’s proposal was closely tied to his dissatisfaction with the then political ineffectiveness of the clerical class. Specialization would free up the time of a few to concentrate on social and political issues.⁵¹ Contemporary jurists have continued to call for the establishment of a *fatwā* council (*dār al-iftā’*) as the most practical way of deepening and broadening the knowledge base of the *marji’iyah* as a whole, thereby

⁴⁷ Mahmud Taliqani (d. 1979) was, in the words of one scholar, “an extremely independent-minded member of the clergy.” His support for national democratic initiatives in his native Iran earned him several jail sentences and periods of exile. See Jahanbakhsh, *Religious Modernism*, 69-70.

⁴⁸ Lambton, “Reconsideration,” 125.

⁴⁹ Jahanbakhsh describes Ayatollah Mutahhari as “one of the most prominent and most enlightened Iranian ‘ulama’ of this century.” Jahanbakhsh, *Religious Modernism*, 126. His ability to interpret Western secular philosophy from an Islamic perspective made him very popular among students. Ayatollah Mutahhari was assassinated, allegedly by rivals within the clerical class itself.

⁵⁰ *Ibid.*, 127.

⁵¹ Hamid Dabashi, *Theology of Discontent: The Ideological Foundation of the Islamic Revolution in Iran* (New York: New York University Press, 1993), 343.

maintaining and extending the scope of its relevance in the contemporary world. Grand

Ayatollah Ali Taskhiri⁵² writes:

In order for the *marji'* to serve as a general authority for all sectors of the community and in order for him to remain fully aware of all the community's juristic problems and everything required to distinguish the correct social, legal, and political position, he should seek the assistance of a committee of senior scholars capable of issuing legal opinions as well as leading specialists in the area for which an authentic Islamic position needs to be identified. It may no longer be possible for any individual, isolated *ijtihād* to address all the contemporary problems.⁵³

Taskhiri is careful to ground his call for specialized knowledge firmly within the *raison d'être* of the *marji'iyah*. "Above all," he writes, "it must be kept in mind that the *marji'iyah* is only a *marji'iyah* in so far as it issues *fatwās*."⁵⁴ Further, in Taskhiri's view, the establishment of a *fatwā* council would not eliminate the necessity of a supreme *marji'*; rather, the latter would call upon the specialized expertise of the former to express "the Islamic position (*mawqif Islāmī*)" on any given issue in a united and comprehensive manner.⁵⁵ In addition to contextual knowledge of society and politics, "new interpretations of 'superiority in learnedness'" include "expertise in determining the welfare (*maṣlahah*) of the Islamic community"⁵⁶ and inferring rulings in accord with "what is best for Islam."⁵⁷ These proposals, if applied, would inevitably strengthen the institution by expanding its knowledge base and furthering its social relevance.

⁵² A native of Iran, Ayatollah Taskhiri is the general secretary of the World Assembly for Proximity among the Islamic Schools of Thought (also known as the Forum for the Rapprochement of Islamic Schools in the World). A prolific writer and sought-after speaker he is described by Islamic Magazine as "one of the most authoritative spiritual leaders of the Shiite world community." Pierluca Azzaro, "Interview with Muhammad Ali Taskhiri," 30Days (in the Church and in the World) International Monthly, edited by Giulio Andreotti. <http://www.30giorni.it/us/articolo.asp?id=11639> (accessed February 1, 2009).

⁵³ Taskhiri, "Supreme Authority," 162.

⁵⁴ Ibid.

⁵⁵ Ibid, 161, 166.

⁵⁶ Ibid, 165.

⁵⁷ Ibid, 179.

As will be shown in this study, this expanded definition of *a'lamīya* (supreme knowledge) appears to be at work in the *fatāwā* of some contemporary *mujtahids* who make at least cryptic allusions to socio-political factors influencing their legal reasoning. In addition, phrases such as “the Islamic position” and “for the sake of Islam” are typical, especially of Ayatollah Fadlallah’s *fatāwā*. It is conceivable that a *mujtahid*’s use of such language is intended to demonstrate his expertise in the new methodology. Further, one could safely assume that the comprehensive approach detailed above would inevitably provide resources not only for treating new social issues, but also for dealing with common questions in fresh ways. Fadlallah is again a case in point.

While the majority trend is to seek an expanded role for the clergy, as outlined above, dissenting voices within the clerical class argue for the opening up of the institution to lay participation. Muhammad Mujtahid Shabistari,⁵⁸ for example, suggests that because *fiqh* is a human science, it necessarily must include knowledge from outside of religion proper, something that lay people have as much if not more access to; secondly, it means that jurisprudence is subject to elements of context and change, so that *fatāwā* should not be merely theoretical or hypothetical, but specific to concrete reality in a given time and place.⁵⁹ Finally, that *fiqh* is a human science means for Shabistari that a

⁵⁸ Shabistari is a contemporary Shi'ite cleric active in the religious-reform movement in Iran. He is known for his application of modern hermeneutical method to Islamic textual sources. According to Said Amir Arjomand, Shabistari's 1996 publication, *Hermeneutics: the Book and Tradition*, is “a rigorous critique of the foundations of theocratic government in legalistic Islam [...]” S. A. Arjomand, “The Reform Movement and the Debate on Modernity and Tradition in Contemporary Iran,” *International Journal of Middle East Studies* 34 (2002), 719-31, 724. Accessed online at: http://www.dr.soroush.com/PDF/E-CMO-20020000-The_Reform_Movement_in_Contemporary_Iran.pdf (accessed January 27, 2009).

⁵⁹ *Ibid*, 255.

fatwā “is merely an expert view, not a divine imperative exempt from discussion and criticism.”⁶⁰

Taking these points to their logical conclusion, Shabistari argues that jurisprudence should not be the prerogative solely of the clerical class, and the laity should not merely “confine themselves to ‘emulating’ (n. *taqlīd*) the jurists.”⁶¹ Rather, as human beings, the laity has been endowed by God with an intellectual capacity to understand the difference—“to some extent”—between good and evil. It would seem that in relying on the same principle (i.e., *ijtihād*) that in earlier centuries implied a clear division between expert and laity, Shabistari’s reasoning around *fiqh* as a human science and *ijtihād* as a universal human capacity would tend to blur that boundary.⁶² One might even suggest that were his theory to be broadly accepted it could radically alter the centuries’ long character of Shi’ite *fiqh* most clearly symbolized by the *marji’īyah*.

THE MARJI’ĪYAH IN NORTH AMERICA: A PROBLEM OF LEADERSHIP

For some Shi’ite academics in the West, the major problem of the *marji’īyah* is its supposed looming irrelevance, said to be a result of an inadequately trained leadership. There are different reactions to this perceived problem, ranging from calls to modernize the structure of the *marji’īyah* while maintaining its essential function to institutionalizing mechanisms that would promote unity and centralization. A scholar such as Abdulaziz Sachedina⁶³ has no problem, it seems, with the theoretical assumptions

⁶⁰ Ayatollah Muhammad Mujtahid Shabistari, “Religion, Reason, and the New Theology,” in *Shi’ite Heritage*, 259.

⁶¹ Ibid, 260

⁶² Lynda Clarke makes the same point in “The Shī’ī Construction of *Taqlīd*,” 64.

⁶³ Educated at the University of Mashhad and the University of Toronto, Abdulaziz Sachedina is the Frances Myers Ball (Chair) Professor of Religious studies at the University of Virginia. He has also served as a consultant to the United States’ Department of Defense and was involved in the drafting of the Constitution of Iraq, effective 2005. *Wikipedia, The Free Encyclopedia*, s.v. “Abdulaziz Sachedina,”

of the institution. *Taqīd*, Sachedina argues, is a fully reasonable approach to the religious life, a reasoned decision to trust the judgment of experts in “religious practice.” It does not entail the necessity of accepting their opinions in other fields, even religious ones, “such as theology or mysticism, history or philosophy [...]”⁶⁴ While recognizing an inadequate grasp of relevant knowledge among members of the institution, Sachedina argues not for a wider learning, but, rather, for alternative sources of guidance: “Modern life is complex. Most of the marja’ [sic] live in a limited and narrow social-cultural environment to grasp [sic] the critical need to understand the problems of modernity, and provide an adequate guidance for maintaining faith.”⁶⁵ Along the lines of Shabistari’s proposal, Sachedina’s argument might suggest not a broadening, but a narrowing of the scope of juristic authority, and extension of responsibilities to an educated laity.

On the other hand, Sachedina’s proposals could suggest reform and change in the methodology of clerical training. In a 1994 article, he identifies an inadequately prepared leadership as the emigrant community’s most pressing issue, even within the fields in which they traditionally function. He grieves the fact that leaders are commonly imported from the East whether for legal guidance or ritual worship at major festivals. He envisions a locally trained leadership conversant both in traditional religious sciences and Western culture as the best solution to the “practical irrelevance”⁶⁶ of the institution and its perceived disconnect with the concerns of the community, especially women and youth.⁶⁷ Liyakatali Takim⁶⁸ offers the same critique. In organization and training, he says,

http://en.wikipedia.org/w/index.php?title=Abdulaziz_Sachedina&oldid=260624073 (accessed February 1, 2009).

⁶⁴ Abdulaziz Sachedina, “Taqīd: Blind Adherence or Rational Acceptance?” available online at <http://www.people.virginia.edu/~aas/article/article5.htm>, 2 (accessed January 28, 2009).

⁶⁵ *Ibid*, 3.

⁶⁶ Sachedina, “Taqīd,” 3.

⁶⁷ Sachedina, “A Minority within a Minority,” 11.

the institution fails to provide adequate leadership for the emigrant community, particularly the youth, who are largely alienated from the legal perspectives of a foreign trained leadership.⁶⁹ The problem of clerical cultural training will become readily apparent in our examination of *fatāwā* for Muslims in the West.

With these concerns in mind, a seminary was established in New York State in the early 1980s.⁷⁰ The project was, however, short-lived. It was closed in 1996, according to the former president, Shaykh Mukhtar Fyzee, due to a lack of support and even opposition from centres in the Middle East and the Subcontinent.⁷¹ Further, according to Shaykh Fyzee, since it followed the curriculum of Qom and Najaf, it did not produce graduates equipped “to make a significant impact on the religious lives of Shi‘is in America.”⁷² Instead, the institution of the *marji ‘īyah* has, for its North American reach, relied solely on the production of a genre of juridical texts—*mustahdathāt* (new events, issues)—produced in Qom, Beirut, and Najaf, and disseminated via the internet and print publications, including *resālahs* and popular media such as magazines. More recently, a *hawzah* (seminary) was established in Montreal for training religious scholars. Called *Dār al-Ḥikmah*, at the time of this writing it has four students in residence and several more via internet courses.⁷³

⁶⁸ A native of Tanzania, Liyakatali Takim studied religion in Qom, Iran, and received his doctorate from the School of Oriental and African Studies in London. Dr. Takim is Associate Professor at the University of Denver, Colorado. University of Denver, “Portfolio Community: Liyakatali Takim,” <https://portfolio.du.edu/pc/port?portfolio=ltakim> (accessed February 1, 2009). In addition to his academic activities, Professor Takim is a popular community speaker and active contributor to the NASIMCO (North American Shia Ithna ‘Ashari Muslim Communities Organization), <http://www.nasimco.org/IEBPublications.asp> (accessed February 1, 2009).

⁶⁹ Takim, “Multiple Identities,” 224.

⁷⁰ The *Hawzeh-ye ‘Ilmī* functioned from 1980 to 1996 in Medina, NY.

⁷¹ Telephone conversation, July 22, 2005.

⁷² Takim, “Multiple Identities,” 223.

⁷³ Personal conversation with Seyed Mahdi Shahrestani, a founding member of the institution, May 29, 2008.

TRANSCENDING DISTANCE: DEPUTIES OF THE AYATOLLAHS IN NORTH AMERICA

The little direct contact between the institution and the emigrant community necessitates the use of intermediaries. The most common way a *marji'* communicates with his followers is by appointing a resident representative (*wakīl*).⁷⁴ The qualifications of a *wakīl*, though far less stringent than those of a *mujtahid*, particularly with regard to knowledge, nevertheless share the same principles. The *wakīl* should have a background in *hawzah* (theological seminary) studies, particularly in Islamic law, and should be a righteous and trustworthy person. If the *marji'* is not well acquainted with a candidate, the latter may be appointed on the testimony of two righteous individuals. The *wakīl's* qualifications are commensurate with his responsibilities. As an intermediary between the people and the *marji'* he represents, the *wakīl's* primary responsibility is to transmit questions to the *marji'* and to receive and communicate the latter's responses. He may also have additional duties, as assigned and authorized in writing by the *marji'*. He could, for example, be assigned to collect finances on behalf of the *marji'* and make charitable disbursements.

Sistani's official resident *wakīl* in North America is a talented young man by the name of Seyed Mohammad Mahdi Shahrestani,⁷⁵ who resides in Montreal and is a founding member of the Canadian *Dār al-Ḥikmah*.⁷⁶ Though not a *mujtahid* himself, he functions much as a cultural informer would and in this way can have an indirect

⁷⁴ Liyakat Takim, "Foreign Influences, 460.

⁷⁵ According to Shahrestani, he holds the only official authorization from Sistani. Because of his youth, however, he is reluctant to publicize his position widely. Because his close connection to Sistani is known in the community, he does not see publicity around his role as necessary. Much of my discussion of the nature and function of the office of *wakīl* is based on conversation with and written correspondence from Seyed Mahdi Shahrestani.

⁷⁶ Founded in 2006, the Canadian *Dār al-Ḥikmah*, operating from Montreal, Quebec, offers a *hawzah* (Islamic seminary) education via online and resident courses. Part of the Dar al-Hikmah Foundation, their website and related *Dār al-Ḥikmah* websites are: <http://www.chwou.net/>; <http://www.hawzah-online.com/hawza/>; and <http://canadianhw.org/persian/> (accessed December 16, 2008).

influence on the *marji*'s *ijtihad*. In addition to his resident *wakil*, Sistani has also appointed his son-in-law, Sayyid al-Kashmiri, who resides in Qom, or sometimes Dubai or London, as *wakil* for North America. Kashmiri visits mosques throughout the continent by invitation, but his connection to emigrants is limited by his itinerancy.⁷⁷

It is not unheard of for a *marji*' to have more than one resident *wakil* and not having official authorization does not prevent others from communicating a *marji*'s *fatāwā*. In Canada since the end of 1990, Seyed Nabil Abbas, imam of the Lebanese Islamic Center of Montreal and representative of the Islamic Chiite Supreme Council of North America, is but one of several scholars acting as *wakil*.⁷⁸ The Shia Scholars of North America website contains a link to a list of similarly positioned scholars in North America, along with their contact information. The highest concentrations are in the states of New York, Michigan, and California.⁷⁹ While only some of the scholars listed here might have official *wakil* status, all perform the duties of a *wakil*, that is, transmitting and explaining messages between *muqallids* and *mujtahids*.⁸⁰ For "regular" questions, the *wakil* need not consult the *marji*' directly, but may simply answer according to his knowledge of the latter's rulings; for more complicated questions, he will communicate with the *marji*' by email.

As are other local leaders, Seyed Nabil Abbas is regularly called upon to help solve people's personal issues, by personal pastoral counseling as well as legal teaching. With regard to the latter, Seyed Abbas includes an explanation of Sistani's *fatāwā* in his

⁷⁷ Interview with Seyed Nabil Abbas, Imam of the Lebanese Islamic Center of Montreal, and Representative of the Islamic Chiite Supreme Council, September 9, 2005. The same information was communicated to me by Seyed Mahdi Shahrestani.

⁷⁸ Whether a scholar has or does not have official *wakil* status is not always evident. According to Mr. Abbas, he is *wakil* for Ayatollahs Hakim and Sistani, for the Lebanese Shi'ite community.

⁷⁹ Council of Shia Muslim Scholars in North America, "Find the Nearest Shia Scholar," <http://www.imams.us/> (accessed February 1, 2009).

⁸⁰ Discussion with Seyed Mahdi Shahrestani, October 1, 2008.

Friday sermons and other teaching venues. He also answers people's questions on matters of law, according to the guidance of Ayatollahs Hakim and Sistani.

While some mosques, as those studied by Linda Walbridge in Dearborn, Michigan, promote the teachings of one *marji'* over another, other mosques give their constituents freedom of choice. Most of Seyed Abbas' congregation (75%-80%) follows Sistani, but there is no obligation to do so and the mosque (Islamic center) that Seyed Abbas leads has no official link to Sistani.⁸¹

THE SUCCESS OF THE *MARJI'ĪYAH* IN NORTH AMERICA: UNITY AND DIVIDED LOYALTIES

In spite of what some scholars have seen as weaknesses in leadership formation, the *marji'īyah* still exercises substantial control over the emigrant community, particularly in larger Shi'ite population centres. Linda Walbridge observes the gradual reification of *sharī'ah*-minded Islam among Shi'ite immigrants to Dearborn, the largest Shi'ite population in North America.⁸² Her study compares the three Shi'ite mosques established there between 1963 and 1989, observing how each of the latter two further narrowed the field of acculturation.⁸³ This was accomplished, at least in part, by mosque leaders actively promoting strict adherence to the *marji' al-taqlīd*⁸⁴ without recognizing the need to accommodate Islam to its cultural context. It was, according to Walbridge, the conservative attitude of the leadership that set the standard for the community at large, especially in regard to female modesty, which appeared to function as the barometer of religiosity. Thus, a large percentage of the community saw its identity as linked to the

⁸¹ Interview with Seyed Abbas, September 9, 2005.

⁸² Linda Walbridge, "The Shi'a Mosques," 337-357.

⁸³ The Islamic Institute (the *Majma'*) and The Islamic Council of America (the *Majlis*) were established in 1985 and 1989 respectively. The first institution, The Islamic Center of America (the *Jāmi'*), was established in 1963.

⁸⁴ At the time of writing, this was primarily to Ayatollah Abu'l Qasim Khui of Najaf, but the Council promoted '*ulāmā*' of Qom, particularly Ayatollah Khomeini.

official centres of authority. Of the three, only the “Islamic Center of America” attempted to maintain institutional independence and to reflect the identity of its members as American Muslims. As reflected in Walbridge’s account, this seems to have been due, at least in part, to the leadership of Sheikh Chirri who promoted American cultural understanding—understood by Chirri as Christian culture—among the members of his congregation. As Walbridge explains, Chirri’s desire to maintain local jurisdiction over the affairs of the Center led him even to turn down a generous offer from Ayatollah al-Khui to build a school.⁸⁵

In general, Walbridge observes a significant increase in the practice of following a *marji’*, particularly among the Lebanese, many of whom had never heard of the institution until the 1980s. She attributes this to the 1979 revolution in Iran and to the growth of the Shi’ite community in Dearborn/Detroit. Not all members of the community follow the same *marji’*. The choice of *marji’*, Walbridge suggests, has a considerable impact on the direction the communities in North America will take. It is a divisive issue. Lines are drawn both nationally (between Lebanese, Iraqis, and Iranians)⁸⁶ and regionally (within a given national community).⁸⁷ Walbridge’s study highlights the ways in which regional differences might influence the relationship between the North American Shi’ite community and the *marji’iyah*. She suggests that Lebanese involvement in business could temper the strict adherence of Iraqi Shi’ites to the “official” Islam of the *marji’iyah*,

⁸⁵ Linda Walbridge, *Without Forgetting*, 48-9; 63-4. Walbridge’s plans to study the mutual influences of North American Shi’ites and the *marji’iyah* was terminated by her untimely death in December, 2002.

⁸⁶ Although not a part of Walbridge’s study, a significant proportion of Shi’ites in North America comes from the Subcontinent.

⁸⁷ Khui held the overwhelmingly majority of adherents, followed by Khomeini, and Musa Sadr. Some combined *marāji’*, following Khui on religious matters and Khomeini on political ones (see text for quote, 80-81). This, as well as a degree of selectivity regarding which issues one will follow a *mujtahid* on, suggests a certain self-instruction regarding the rules of *taqlid*.

contributing to a more adaptive and accommodating posture.⁸⁸ Assuming that all three regional communities continue to be influenced by the *marji'iyah*, one could expect this to be reflected in the choice of *marji'*.

Liyakat Takim sees the *marji'iyah* partially as a “focus of unity” in the West, as the community rallies around a given *marji'* more than ethnic, linguistic, cultural or political bonds. But Takim also highlights several weaknesses of this arrangement.⁸⁹ His analysis identifies reliance on and competition between different centres for external funding from *khums*⁹⁰ as a major inhibitor of independent local initiatives. “In the American context,” he writes, “the *khums* factor has enabled the religious leaders, although residing abroad, to direct the religious and socio-economic lives of the Shi'is in America.”⁹¹ The splitting up of loyalties between different *marāji'* along political lines further divides the community, sometimes manifesting in differing ritual observances, as, for example, in determining the start of the *'Eid* holiday at the end of Ramadan.⁹²

These problems have prompted responses from the Shi'ite community in North America. One such attempt is the Council of Shi'a Muslim Scholars, established in 1993 in order to promote the development of local leadership and to unify the community. The Council's mandate is to “support the Shi'a communities in North America through unification and cooperation of scholars; to serve Islam and spread the religious awareness and in particular the way of Ahlul-Beit; to follow the line of Marja'eyyah [sic],” and to

⁸⁸ Walbridge, *Without Forgetting*, 213.

⁸⁹ Takim, “Multiple Identities,” 220.

⁹⁰ The *khums* is a one-fifth tax on income and certain other commodities payable to members of the clergy, half of which (the *sahm-i-imām*) “is to be spent on maintaining and preserving the religion.” While the tax helps to empower the religious establishment *vis-à-vis* government, in the opinion of Mutahhari, it also weakens its freedom by keeping them answerable to an “ignorant, decadent, and uninformed” public. Mortaza Motahhari, “The Fundamental Problem in the Clerical Establishment,” in *The Most Learned of the Shi'a*, 170, 172.

⁹¹ Takim, “Multiple Identities,” 220.

⁹² *Ibid.*, 222.

ensure that the above goals are met.⁹³ However, in Takim's assessment, the Council has been largely unsuccessful, effectively institutionalizing leadership problems that are felt on the ground and furthering apathy within the community. More importantly to the present discussion, according to Takim, it has not managed to unite the community or to provide a uniform method for treating questions of religious practice in the American context. Largely dissatisfied with these solutions, Takim says, many young Shi'ites are turning to Western trained academics such as Mahmoud Ayoub, Abdulaziz Sachedina, Sayyid Hossein Nasr, and Abdolkarim Soroush for guidance.⁹⁴

The sources examined here are in basic agreement that as the North American Shi'ite population has increased, so has connection to institutions in the Middle East, with law and ritual closely presided over respectively by '*ulamā*' (religious scholars; sing. '*ālim*) and preachers from abroad. In examining the political, religious, and cultural repercussions of this affiliation on the formation of Shi'ite identity in North America, the primary objective of the *ulamā*', Takim suggests, appears to be to mark differentiation from the Sunni community. Staging performances of Shi'ite rituals as performed in Shi'ite majority locations and maintaining close links with legal authorities there is understood to strengthen this distinctive identity.

However, judging by the *fatwā* literature, maintaining a distinctly Shi'ite as opposed to universal Muslim identity does not appear to be a major concern to the immigrant population. Questions from Shi'ites in the West are evidently geared more towards overcoming challenges to the fulfillment of personal life-goals in a Western environment without having to forfeit an Islamic identity derived from legal observance.

⁹³ Council of Shia Muslims Scholars, "goals," http://www.imams.us/#b_1_3 (accessed February 1, 2009).

⁹⁴ Takim, "Multiple Identities," 223. I would suspect that it is only humility that prevents Takim from including his own name in this list.

In sum, the analyses offered by scholars such as Sachedina and Takim draw attention to the complexity of the challenges facing the Shi'ite community in North America. Their discussions also clarify significant differences with the Sunni community, whose far less centralized leadership structure might offer greater possibilities for local initiatives.

***FIQH AL-AQALLIYĀT* (JURISPRUDENCE OF MINORITIES): BETWEEN RESISTANCE AND ACCOMMODATION**

Sunni scholars have been revisiting the well established discipline of *fiqh al-aqalliyāt* for at least two decades. Not a new discipline, minority *fiqh* has appeared scattered throughout Sunni and Shi'ite legal handbooks from classical times to the present.⁹⁵ Contemporary Sunni *fiqh* approaches the issue on at least three different levels. After briefly introducing each level, I will discuss their standing in contemporary Shi'ite legal thought.

At the first level, studies present the theoretical bases justifying a sub-discipline specializing in legal reasoning for Muslims in the West. The argument from history in support of Western-based *fiqh* is as follows: classical and medieval laws regarding the relationship of Muslims to a non-Muslim polity or social environment took place in historical conditions in which Muslims found themselves in lands previously governed by Islam but overtaken by others. In this context, to allow formal means of adaptation, or resemblance to non-Muslim social practices, as in food or dress, for example, would indicate acquiescence to foreign domination. In the contemporary context, residence in a non-Muslim environment is largely a result of migration which is both voluntary and in

⁹⁵ Classical and medieval minority *fiqh* commonly addressed five inter-related questions: permissibility of residence, inviolability of the Muslim person and property, Islamic identity, extent of jurisdiction of Islamic law, and the relationship of minority Muslims to the non-Muslim state. See Abou El Fadl, "Islamic Law and Muslim Minorities," 141-87. For a discussion of Shi'ite views on these questions see chapter three on *hijrah* (migration) to the West.

pursuit of the wellbeing of Muslims in education, employment, and asylum from political or religious oppression. These factors suggest the need for a different approach.

At the second level, Sunni studies explore principles of contextual legal hermeneutics and their application to common ethical questions facing Muslims in the West.⁹⁶ Three principles for generating legal change generally associated with reform movements may be noted: the principle of time and place (*zamān wa-makān*); the principle of harm and benefit (*mafsada wa maṣlahah*); and the principle of necessity (*ḍarūrah*). Tariq Ramadan⁹⁷ argues that a systematic and strictly regulated application of these principles to contemporary issues facing Muslims in the West is needed to connect the stable “universal principles” of scriptural sources with shifting social realities of time and place.⁹⁸

It is perhaps the third level that is most innovative in Sunni *fiqh al-aqalliyāt*. This is the establishment of local training institutions, such as seminaries, and a *fiqh* council for providing contextually relevant legal guidance in the West. A Sunni body called The Fiqh Council of North America, which grew out of earlier organizations, was established

⁹⁶ See, for example, Shaykh Taha Jabir al-Alwani, *Towards a Fiqh for Minorities: Some Basic Reflections*, Occasional Papers Series 10. London, Washington: International Institute of Islamic Thought, 2003 <http://www.iiituk.com/docs/pdf/preamble-op10-en-v3.pdf> (accessed February 2, 2009). The author is president of the Fiqh Council of North America since 1988. Others are by lay people and are posted on the world-wide-web. See, for example, Nuh Ha Mim Keller, “Which of the four orthodox madhhabs has the most developed fiqh for Muslims living as minorities?” *QNews, the Muslim Magazine*, <http://www.masud.co.uk/ISLAM/nuh/fiqh.htm> (accessed February 1, 2009); Ahmad Alkatib, “Sexual relationships for Muslims in the West: The problem and its different solutions,” presented at the 5th annual AMSS (UK) Conference, February, 2004, organized by the Association of Social Scientists (UK) London. <http://www.alkatib.co.uk/sexual%20problem.htm> (accessed January 29, 2009); and numerous pertinent articles published by the International Institute for the Study of Islam in the Modern World (ISIM).

⁹⁷ Tariq Ramadan is a Swiss born Muslim academic who advocates strengthening local Muslim identities in the West, at least in part, by interpreting Islamic law in dialogue with the legislation active in a given nation. He suggests that adapting Islamic law to the West is far less difficult than appears at first glance. See his *Western Muslims*, cited in the Introduction. Nevertheless, much controversy has been raised around his persona, particularly by those on the political right in the United States. In 2006, American authorities revoked the visa that would have allowed him to take up a position at the University of Notre Dame in Indiana on alleged terrorist connections.

⁹⁸ Tariq Ramadan, *Western Muslims*, 37, 43. In this book, Ramadan provides a useful overview of six major tendencies in the history of Sunni *ijtihād*. See 24-30.

in 1986.⁹⁹ The Council sees its mandate as “advising and educating its members and officials on matters related to the application of Shari‘ah in their individual and collective lives in the North American environment.”¹⁰⁰ This three-step process in Sunni *fiqh al-aqalliyāt* suggests that reaching this final level of establishing institutional support for locally and contextually trained legal scholars presupposes a recognition of the value of such a project (level one) and requires the application of a dynamic and enterprising interpretive methodology (level two).

With regard to level one—justifying a sub-field of *fiqh* for the West theoretically—the Shi‘ite legal establishment appears somewhat skeptical. Fadlallah, for example, treats *fiqh al-aqalliyāt* from the perspective of universal Islamic citizenship and seems hesitant to recognize the validity of local expressions of Islamic identity. In giving ultimate priority to the universal applicability of Islamic law, Fadlallah’s primary focus is on the Islamic legal position on immigration and citizenship and the emigrant’s dual contractual responsibility to the non-Muslim state on the one hand and what he calls “the interests of Islam” on the other. The question of citizenship is fundamental to Fadlallah’s thought on minority *fiqh*. While Muslim citizenship in the West in and of itself is not advisable as it threatens the Islamic identity of future generations, he says, it is permissible on two conditions: the provision of safety-nets, or what his translators call “incubators” (*muḥaṣṣin*)¹⁰¹ such as Islamic schools and social clubs, that would ensure that future generations learn who they are; and the utilitarian value citizenship offers in

⁹⁹ Namely, the Religious Affairs Committee of the then Muslim Students Association of the United States and Canada and the Fiqh Committee of the Islamic Society of North America (ISNA).

¹⁰⁰ The Fiqh Council of North America, <http://www.fiqhcouncil.org/> (accessed February 1, 2009).

¹⁰¹ Ayatollah Sayyid Muhammad Husayn Fadlallah’s official website, Arabic pages, <http://arabic.bayynat.org.lb/marjaa/almahjar.htm> (accessed February 1, 2009). A more literal translation of this term might be “fortress” or “protective shelter.”

the propagation of Islam and in influencing the foreign policies of Western governments.¹⁰² Thus, for Fadlallah, the jurisprudence of minorities is subject to the supportive and strengthening potential it might offer to “the interests of Islam” in the West.

With regard to methods of interpretation, some Shi'ite scholars argue that context has a legitimate, though strictly regulated place in *ijtihad*. The contemporary scholar, Muhaghegh Damad,¹⁰³ for example, considers the idea that “the fiqh of the last millennium and a half has no meaning or relevance [today]” to be “entirely without substance and indefensible.”¹⁰⁴ That is, change for the sake of change is unnecessary and invalid. Nevertheless, Muhaghegh Damad agrees that change may be effected by certain conditions, notably, what he calls “changes in perception.”¹⁰⁵ His theory links the first two principles listed above: time and place; and harm and benefit. He explains that change in the former may precipitate—but not legitimate—change in the latter, and thus affect the law.¹⁰⁶ This is because while changes in law are tied to an “evolution in the needs and requirements of society,” proof of harm or benefit in Shi'ite *uṣūl al-fiqh*, unlike Sunni, must be textual. In other words, historical and social context may permit change in

¹⁰² Based on his articles, “The Jurisprudence of Minorities,” Fadlallah’s website, English pages, <http://english.bayynat.org.lb/Jurisprudence/minorities.htm> (accessed February 1, 2009); and “Role and problems of emigrants,” <http://english.bayynat.org.lb/Issues/letter.htm> (accessed February 1, 2009). The latter is a letter from Fadlallah to the annual conference of the Jammaa Islamia in the U.S. and Canada (December 2003).

¹⁰³ Muhaghegh Damad is a legal scholar and Ayatollah associated with the University of Tehran.

¹⁰⁴ Ayatollah Seyyed Mostafa Muhaghegh-Damad, “The Role of Time and Social Welfare in the Modification of Legal Rulings,” in *Shi'ite Heritage*, 217.

¹⁰⁵ *Ibid.*, 218.

¹⁰⁶ He gives the example of marital laws obliging men to live with their wives, in the words of the Qur'an, “in accordance with that which is recognized as good (*al-ma'rūf*).” (4:19) Whereas what was perceived as “good” during the time of the prophet in the case of financial compensation for divorce, for example, would not suit today’s economy. Therefore, while the duty of financial compensation is fixed in the text, the precise amount is not; the latter is conditioned by social and temporal context. *Ibid.*, 218-19.

what is considered harmful or beneficial in a given situation, as long as the criteria for determining this remains stable, that is, textual.

Some scholars see factors such as “time” as having more extensive application. Ayatollah Kashani, for example, suggests that even conflicting Imami *ḥadīths* may be reconciled on this principle. Whereas in the majority opinion, the esoteric unity of the Imams places them (and thus their statements) outside of time, Kashani allows the possibility that one Imam may have decided differently on an issue because his temporal social context differed from that of another. “This,” Muhaghegh Damad says, “is an entirely different view from that of other jurists, and even though Kashani’s discussion pertains to the problem of conflicting traditions it might well be taken as a guide for *ijtihād* based on the social needs of different times.”¹⁰⁷ That is, according to Muhaghegh Damad’s understanding of Kashani, while social context may not abrogate earlier laws, it may provide grounds for a different interpretation of the law.

Fadlallah’s hermeneutic of change is similarly connected to the principle of competition or balance between benefits and harms (*al-tazāḥum bayna al-maṣāliḥ wa’l-mafāsīd*), zealously tempered by his concern that Muslims in the West maintain a delicate balance between adaptation to cultural and philosophical currents on the one hand, and an unambiguous Islamic identity on the other.¹⁰⁸ The over-arching principle guiding his methodological theory is that of benefit to Islam and the contribution a ruling makes to the Muslim emigrant’s primary responsibility “to gain the people to the cause of the Islamic call [...]”¹⁰⁹ An individual should refrain from doing anything that would reflect

¹⁰⁷ Ibid, 218.

¹⁰⁸ Fadlallah, “Role and problems of emigrants,” Fadlallah’s official website <http://english.bayynat.org.lb/Issues/letter.htm> (accessed February 1, 2009).

¹⁰⁹ Ibid.

negatively on the reputation of Islam and the community; for example, he cautions against the performance of non-essential Islamic practices, such as certain mourning rituals, that might be misunderstood in the Western context. Further, he argues, Islam must always be an agent of change in its environment, rather than the object of influence.

It is overarching principles such as these that inform Fadlallah's hermeneutic. In negotiating costs and benefits associated with obligations and permissions, his theory allows that in cases where implementing a *ḥukm* would result in *mafsadah*, a ruling may be suspended; but this is not permissible if done merely to gain some temporary personal advantage in Western society. According to Qur'an 2:173, he argues, the only other condition that would allow the suspension of a ruling is dire necessity (*darūrah*), defined as imminent risk to one's life or wellbeing.¹¹⁰ We may conclude that in admitting the principle of *al-tazāḥum*, Fadlallah cautiously anticipates the possibility of a more progressive reasoning. However, his dedication to a tightly controlled and goal-driven application of contextual interpretation suggests a less confident optimism in this regard.

As to the third level of Sunni *fiqh al-aqalliyāt*, the Shi'ite institution is hindered on two main fronts. In the first place, the institutional structure of *marji' al-taqlīd* suggests an incongruity between a highly centralized leadership and local training initiatives, as proposed by Takim and others. This was evidently the case in the first failed attempt discussed above. Secondly, without a vigorous application of interpretive principles geared towards context and change, the usefulness of such a project seems restricted largely to relocating the organs of authority, rather than to developing something similar but different—similar in form and structure, but different in

¹¹⁰ Fadlallah, "The Jurisprudence of Minorities," <http://english.bayynat.org.lb/Jurisprudence/minorities.htm> (accessed February 1, 2009).

methodology and content. Shi'ite minority *fiqh* seems limited at the present time to the collection of *fatāwā* produced in the major centres of Shi'ism by a class of scholars reticent to apply their interpretive skills to the development of something like Ramadan's hyphenated Muslim.¹¹¹

CONCLUSION: A FRAGILE STABILITY

Critiques of the *marji'iyah*'s function in the West indicate that while the institution seems relatively stable, significant problems of connection, ideologically and practically, are pressing for change. While the *wakīl* system may be helpful in bridging the gap between the *marji'* and his followers in the West, secular trained Shi'ite scholars such as Sachedina and Takim point to more fundamental weaknesses. Unless these are addressed adequately, the skepticism with which some view the institution may become the primary vantage point of the younger generation, especially those born in the West.

¹¹¹ That is, the Canadian-Muslim, or French-Muslim, etc.

CHAPTER THREE

THE SHI'ITE LAW OF MIGRATION (*HIJRAH*): FROM MEDINA TO MISSISSAUGA

Muslim thinking on the question of migration to *dār al-islām* begins in the period of the Qur'an's emergence. Legal reasoning on the subject developed in the following centuries, but derives the core of its theoretical principles from the framework given in the Qur'an. Though all five of the major Islamic legal schools¹ share the main outlines of this framework, minor differences exist between schools, and not infrequently between different jurists and eras within each school.²

In Imāmī *fiqh* the rules of migration tend to revolve around the central concept of freedom to manifest one's identity as a Muslim.³ In general, the central feature of Shi'ite Muslim identity is the unhindered practice of religious rituals, whether in their common Muslim or specifically Shi'ite form. Sometimes, however, rules also address freedom to manifest a specifically Shi'ite identity, in which case Shi'ite law distinguishes between *dār al-islām* and *dār al-īmān* (the land of true faith).⁴ In most cases, however, Shi'ite law does not stipulate a sharp intra-Muslim social divide, which is of practical relevance only

¹ I refer here to the four extant Sunni schools: Mālikī, Hanafī, Shāfi'ī and Hanbalī; and the Twelver Shi'ite Jā'farī school, often identified as Imāmī. I make no reference to the Isma'īlī Shi'ite school of law, nor to the Zaydī. The former has, in general terms, its own distinctive approach and the latter does not differ significantly from Twelver Shi'ite law.

² The most comprehensive treatment of the issue of Muslim minorities in pre-modern legal discourse is Abou El Fadl, "Islamic Law and Muslim Minorities," cited in chapter one, note 5. The author discusses rulings of jurists from the four Sunni schools and the Ja'fari and Zaydi schools of law. See also, by the same author, "Striking a Balance," in *Muslims on the Americanization Path?*, 47-63; and "Legal Debates on Muslim Minorities: Between Rejection and Accommodation," *Journal of Religious Ethics* (2001), 127-162; See also, Bernard Lewis, "Legal and Historical Reflections," cited in chapter one, note 6; and Muhammad Khalid Masud, "The obligation to migrate: the doctrine of *hijra* in Islamic law," in *Muslim Travellers: Pilgrimage, Migration, and the Religious Imagination*, ed. Dale F. Eickelman and James Piscatori (Berkeley, Los Angeles: University of California Press, 1990), 29-42.

³ While this condition is characteristic of Sunni schools to some degree, it is more pronounced in Shi'ite law. See Abou El Fadl, "Islamic Law and Muslim Minorities," 152.

⁴ Abou El Fadl, "Islamic Law and Muslim Minorities," 152.

when Shi'ite identity becomes a self-consciously held criterion for migration from Sunni dominated lands.

Bernard Lewis suggests that the position of Muslims residing under a non-Muslim polity was of little concern to jurists after the first three centuries of Islam. Lewis argues that the earliest jurists were occupied with the question of non-Muslims living in Muslim territory, but that the “corresponding problem of the Muslim under non-Muslim rule hardly arose and, where it did, received only minor and fleeting attention.” It was, he says, “largely a hypothetical question.”⁵ In contrast, Khaled Abou El Fadl observes that while not constituting an area of law in itself, rules around *hijrah* represent a sufficiently important topic to have been dealt with in substantial detail by successive jurists in all the major schools of Islamic law.⁶

Nevertheless, deliberate and permanent migration from *dār al-islām* to non-Muslim territory emerged as a serious legal question in the nineteenth century under conditions quite different from the Qur'anic and classical periods.⁷ Migration in the modern world has more often been motivated by the possibility of social and economic advancement rather than for religious reasons.⁸ Importantly, however, classical and pre-

⁵ Lewis also claims that the question arose only in the context of conversion of a non-Muslim and “whether he may remain where he is or must leave his home and migrate to a Muslim country.” He further reduces all Sunni jurists into one stream of thought, with only minor and insignificant differences in points of detail, and Shi'ites into another. The former, he says, required *hijrah* to a Muslim polity, even as the prophet commanded all Muslims to emigrate to Medina as long as Mecca was still pagan. The latter, he observes, were more accustomed and sensitized to living in hostile environments, and so regarded residence in a non-Muslim territory a means of Islamic witness. While there is some truth to this, it seems to be an overgeneralization, as will be demonstrated in this chapter. See Bernard Lewis, *Islam and the West* (New York: Oxford University Press, 1993), 48.

⁶ Further, according to El Fadl, the debate was considered under several categories of thought and definitions of terms and was not restricted, as Lewis claims, to discussions of *jihād*. Abou El Fadl, “Islamic Law and Muslim Minorities,” 148-49.

⁷ See Masud, “The obligation to migrate,” 42ff.

⁸ Emblematic of this development is a *fatwā* on the issue of studying in the West requested by Algerian students in 1985, discussed by Muhammad Khalid Masud. The *fatwā* brings together post-colonial theory

modern discourses on migration provide the foundation for contemporary interpretations. Modern jurists have allowed themselves varying amounts of flexibility in interpreting the primary textual sources of Qur'an and Hadith and the classical and medieval law for the contemporary challenge of defining a host of legal issues surrounding migration to the West. I look at the views of modern and contemporary jurists, including Muhammad Ali al-Ansari, and Ayatollahs Khomeini, Golpayegani, Ali al-Sistani, and Muhammad Husayn Fadlallah within this broader context.

Following this introduction I discuss the framework given in the Qur'an and Imami traditions, which looks at migration in terms of departure from *dār al-shirk* (the Abode Polytheism), or *dār al-kufr* (the Abode of Unbelief)—often in the reduced form of *dār al-ḥarb* to *dār al-islām*, concentrated at the time in Medina (i.e., *dār al-hijrah*, the Abode of Migration).⁹ The Qur'an commonly links *hijrah* to *jihād* (struggle in the way of God), indicating that migration had a dual purpose of consolidating the Muslim community and strengthening the Islamic movement beyond its territorial borders. Definitions are, of course, relevant to interpretation and I discuss the hermeneutical implications of some of these terms below. I next survey the main trends of classical and

and classical Islamic legal approbation of the pursuit of knowledge to come to a favourable response. Masud, "The obligation to migrate," 42-43.

⁹ These are the most common translations of these terms. Literally, *shirk* signifies associating others with God and in this sense suggests the notion of polytheism. Toshihiko Izutsu identifies it as a subcategory and "the most typical manifestation of *kufr*" (136). *Kufr* itself is a multi-layered term signifying thanklessness as well as the unbelief that underlies it. While both deny the absolute Oneness of God, the more comprehensive term, *kufr*, in Qur'anic usage, "functions as the center of the whole system of 'negative' properties" (156). Izutsu's detailed study of these terms is illuminating. His analysis of *kufr* suggests that the term functions as a system involving five essential elements: *fisq*, *fajr*, *zulm*, *i'tidā'*, and *isrāf*, translated as 'sin' or 'disobedience', 'bad conduct', wrong/injustice/evil/tyranny, 'to pass beyond one's proper limits,' or 'to transgress (the bounds of God)', and 'to be immoderate', or 'to commit excesses' respectively. Toshihiko Izutsu, *Ethico-Religious Concepts in the Qur'an* (Montreal: McGill-Queen's University Press, 2002), 156-177. *Dār al-ḥarb* refers to territory not only not under Islamic control, but also to be won over for Islam.

medieval Shi'ite juristic texts; finally, I look more closely at modern and contemporary issues.

If, as Abou El Fadl observes, the classical discourse represents a fluid process of legal discussion, not hardened in dogmatic positions,¹⁰ the contemporary discourse continues this trend, constrained, nonetheless, by the classical and pre-modern frame of reference. The present study of Shi'ite legal discourse on migration shows a picture of continuous revisiting of the same questions and re-articulating and rationalizing of legal opinions anew with each generation. Though the content of these opinions changes little until the modern period, it is not unreasonable to suggest that it is precisely because of having occupied space in juristic discourse throughout the centuries, however monotonously, that jurists of the modern period are able to rework and update the legal tradition with relative ease.

THE VALUE OF *HIJRAH*: BELIEVERS OF A HIGHER RANK

The high estimation early jurists have of *hijrah* and *muhājirūn* (migrants) to *dār al-islām* can be seen in the earliest Shi'ite traditions and Qur'anic legal exegesis. Surah 4:97-101 stipulates migration from lands of oppression – Mecca and the land of the Bedouins in the immediate context – for all except “the feeble among men, women, and children who are unable to devise a plan and are not shown a way” (4:98). It is said that God will, or rather, may, forgive these for remaining separated from the Muslim community and exposed to the influence of and possible harm from non-Muslims. Similarly, El Fadl notes that “early Shi'ite jurists reportedly disapproved of Muslims residing among nomads because this was bound to lead to ignorance.”¹¹ The hardship and

¹⁰ Abou El Fadl, “Striking a Balance,” 47-63.

¹¹ Abou El Fadl, “Islamic Law and Muslim Minorities,” 148.

sacrifice involved in *hijrah* is acknowledged in the Qur'anic text and the migrant is promised an appropriate recompense and provision in this life, in material and status wealth. "Those who spent and fought before the conquest are not on the same level as the rest of you"¹² underscores the hierarchical distribution of honour within the early Muslim community, as determined by a person's relationship to the *hijrah*. Should the journey prove to be too arduous and the migrant perish in the process, he or she is promised a special reward from God.¹³

If the Qur'an speaks to the honour accorded to the *muhājirūn*, two frequently quoted Traditions express the importance of *hijrah* as the obligatory duty and enduring symbol of Muslim identity. "*Hijrah* will not end until repentance ends, and repentance will not end until the sun rises from the west,"¹⁴ expresses its endurance. "*Hijrah* will remain as long as *kufr* (unbelief) remains,"¹⁵ is indicative of its central and lasting role of boundary-marker between believers and unbelievers. On the other hand, jurists have consistently interpreted these Traditions in the light of a third that limits *hijrah* to the time of Mecca's *jāhiliyah*: "There is no *hijrah* after the conquest [of Mecca]"¹⁶ suggests that the intent of *hijrah* is to create a space for the flourishing of a social order governed

¹² Surah 57:10 (*al-Ḥadīd*).

¹³ Surah 4:100 (*al-Nisā'*).

¹⁴ Al-Shaykh al-Tusi, *al-Mabṣūt fī fiqh al-imāmīyah* (Tehran: al-Maktabah al-Murtadawīyah li-ihyā' al-Āthār al-Ja'fariyah, 1967/8), 3:4; 'Allamah al-Hilli, *Tadhkirat al-fuqahā'* (Qom: Mu'assasat Āl al-Bayt li-Ihyā' al-Turāth, 1993), 9:10; Mirza al-Qummi, *Jāmi' al-shaṭāt* [CD-ROM, *ALAHKAM*, version 2.0] (Tehran: Mu'assasat Kayhān, 1413), 1:371; al-Shahid al-Thani, *Masālik al-afhām*, (n.p., d.n.), 3:16.

¹⁵ Al-Tusi, *al-Mabṣūt*, 3:4; 'Allamah al-Hilli, *Tahrīr al-ahkām* (n.p, n.d.), 2:130; 'Allamah al-Hilli, *Tadhkirat al-fuqahā'*, 9:10.

¹⁶ Al-Kulayni, *Uṣūl al-Kāfī*, [CD-ROM, *ALAQAEED*, version 1.0] (Tehran: Dār al-Kitāb al-Islāmīyah, 1388 q.), 5:433; al-Tusi, *al-Mabṣūt*, 3:4; 'Allamah al-Hilli, *Tadhkirat al-fuqahā'*, 9:10, 1:405; al-Muhaqqiq al-Thani, *Jāmi' al-maqāṣid fī sharḥ al-qawā'id* (Qom: Mu'assasat Āl al-Bayt li-Ihyā' al-Turāth, 1408/1987), 3:373; Mirza al-Qummi, *Jāmi' al-shaṭāt*, 1:371; al-Shahid al-Thani, *Masālik al-afhām*, 3:16.

by Islam, and to provide an environment in which Muslims will be safe from the temptation to revert to their former religions and ways of life.¹⁷

Classical and medieval law continues and develops this Qur'anic and Traditional evaluation of the *muhājir* to the lands of Islam as a highly honourable position and an expedient path to the growth and success of the community. Early converts are praised, for example, when they can add to their early conversion the fact that they also migrated to Medina with the Prophet. Ali, for example, is favourably compared to Abbas, the prophet's uncle, who elected to remain in Mecca at the time of the *hijrah* in 622 CE.¹⁸ Similarly, a person who converted earlier than someone else but did not migrate is less honoured than one who converted later but migrated.¹⁹ Finally, all other things being equal – early conversion, knowledge of Qur'an, pleasantness of voice – the *muhājir* is chosen over the non-*muhājir* to lead prayers.²⁰

Migration is understood as a decisive and costly moral act, demonstrating one's commitment to Islam. Those who forsake their means of livelihood to migrate “to God and to the Prophet” are promised ample provision and protection.²¹ A portion of this economic support is derived from the *ahl al-kitāb* (People of the Book) in the form of the *jizyah*. Some jurists argue that a convert from *ahl al-kitāb* should not be exempted from

¹⁷ Sufis interpret these ideas spiritually, emphasizing “the spirit of the dweller” rather than the geographic location of their dwelling.¹⁷ In Rumi's (d. 1273) verse, “the home of the Beloved” is the believer's heart, a place of “no borders or boundaries, no prohibitions or restrictions”—the “Land of Love.” This presents a challenge to the legal discourse. See Haideh Ghomi, “The Land of Love: Rumi's Concept of ‘Territory’ in Islam,” in *The Concept of Territory in Islamic Law and Thought: A Comparative Study*, ed. Yanagihashi Hiroyuki (New York: Kegan Paul International, 2000), 74.

¹⁸ Muhammad Baqir al-Majlisi, *Bihār al-anwār* [CD-ROM, ALAQAEED, version 1.0] (Beirut: Mu'assasat al-Wafā', 1983), 10:241. Others acknowledge the different choices made without attaching any particular value judgment to them. See, for example, al-Shaykh al-Tusi, *al-Mabṣūṭ*, 3-4; al-'Allamah al-Hilli, *Tahrīr al-ahkām*, 2:130; Mirza al-Qummi, *Jāmi'a al-shaṭāt*, 1:371.

¹⁹ Sharif al-Murtada, *al-Nāṣirīyāt* (n.p., n.d.), 368.

²⁰ al-'Allamah al-Hilli, *Mukhtalaf al-Shī'ah fī ahkām al-sharī'ah* (Qom: Markaz al-Abḥāth wa-al-Dirāsāt al-Islāmīyah, 1412/1991 or 1992), 67, 55-56; al-Shahid al-Thani, *Masālik al-afhām*, 1:318

²¹ Surah 4:100.

paying the *jizyah* (tribute) because it is for the support of the *muhājirūn*.²² While demonstrating a practical economic decision, this also indicates the priority, even over conversion, of caring for the needs of “the first to lead the way”²³ who serve as models of correct Islamic practice.²⁴

Rules of migration also impact marital issues and female conversion within marriage, indicating an ambivalence in Islamic attitudes towards women. For example, a Bedouin man who marries a *muhājirah*, is not permitted to take her out of *dār al-hijrah* unless he is knowledgeable of the prophetic Sunna.²⁵ Rules regarding female conversion to Islam and migration are far more restrictive. If the wife of a *kitābī* (scriptuary) converts to Islam in *dār al-hijrah*, the husband is not permitted, according to classical ‘*ulamā*’, to remove her from there and take her to *dār al-ḥarb*.²⁶ One gathers from what is stated elsewhere that the primary intention here is to protect the female convert from persecution and/or the threat of apostasy. Moreover, in the event of a war, her presence in *dār al-shirk* would clearly put her at risk. However, the sexual politics of migration reveal that although her Islam does not officially void their marriage contract, her non-Muslim husband is not permitted to live with her in *dār al-hijrah* and has only severely

²² Al-Shaykh al-Mufid, *al-Muqni‘a* (Qom: Mu‘assasat al-Nashr al-Islāmī, 1410/1989 or 1990), 279; Shaykh al-Tusi, *al-Nihāyah fī mujarrad al-fiqh wa-al-fatāwā* (Tehran: Chāpkhānah‘i Dānishgāh, 1342/1963), 193.

²³ That is, “of the Muhājirīn and the Ansār, and those who followed them in goodness—Allah is well pleased with them and they are well please with Him, and He hath made ready for them Gardens underneath which rivers flow, wherein they will abide for ever. That is the supreme triumph” (Surah 9:100).

²⁴ al-‘Allamah al-Hilli, *Muntaha al-maṭlab fī taḥqīq al-madhhab* (Mashhad: Qism al-Fiqh fī Majma‘ al-Buḥūth al-Islāmīyah, 1412/1992), 1:297.

²⁵ Ibn Babawayh, *al-Muqna‘ wa-al-hidāyah lī al-Shaykh al-Ṣadūq* (Mashhad: Majma‘ al-Buḥūth al-Islāmīyah, 1409/1989), 318.

²⁶ Ibid.; Shaykh al-Mufid, *al-Masā‘il al-saghanīyah* (n.p. n.d.), 70; Shaykh al-Tusi, *al-Nihāyah*, 457; Ibn Babawayh mentions only a Christian husband, al-Mufid Christians and Jews, and al-Tusi, Jewish, Christian, and Zoroastrian husbands. Rather than see this as a progression in the law, it is more likely simply progressively precise specification of the same range of legal applicability as those possibilities expanded.

limited sexual access to her, if any.²⁷ Full terms of the marriage contract are automatically re-activated if he converts to Islam. Likewise, sexual access is unhindered if only the husband converts to Islam.²⁸

Inheritance laws also demonstrate the favoured position of migrants that must have been a significant financial incentive for migration as more and more Meccans converted to Islam. The law stipulated that unbelievers would not inherit from believers, but believers would inherit from non-believers. Likewise, even though a Muslim, and therefore entitled to inheritance, a non-migrant was disinherited from his or her Muslim kin in Medina, so long as Mecca remained *dār al-shirk*.²⁹ Intended to prevent contributing to the general economic strength of *dār al-ḥarb*,³⁰ this provision might have also worked unintentionally against migration. The fourteenth century scholar, al-Shahid al-Awwal, advises that those in financial straits should work towards the capacity to migrate.³¹ Being divested of a potential inheritance would do little to advance a person's financial capacity.

The pietistic value of migration is evident also in that those who travelled to the Christian kingdom of Abyssinia starting in about 615, in addition to Medina in 622, are spoken of as having participated in two migrations, for which they are doubly praised.³²

Migration to Abyssinia, as to Medina, was motivated by the intention of finding safe

²⁷ Ibid. Ibn Babawayh says he can visit her during the day and implies that children may be born of these visits. Al-Mufid says that he is not permitted to visit during the day and that no sexual intercourse is permitted so long as he does not convert to Islam, while al-Tusi says that he cannot sleep with her at night, nor be alone with her.

²⁸ Ibid.

²⁹ al-Sharif al-Murtada, *al-Intiṣār* [CD-ROM, ALAQAED, version 1.0] (Qom: Mu'assasat al-Nashr al-Islāmī al-Tābi'ah li-Jamā'at al-Mudarrisīn bi-Qom, 1415/1995), 591; Baqir al-Majlisi, *Bihar al-Anwār*, 10:241, 244.

³⁰ See below.

³¹ al-Shahid al-Awwal, *al-Durūs al-shar'iyah fī al-fiqh al-imāmīyah* (Qom: Mu'assasat al-Nashr al-Islāmī al-tābi'ah li-Jamā'at al-Mudarrisīn bi-Qom, 1412-1414/1992-1993), 2:35.

³² E.g. Sharif al-Murtada, *al-Nāṣiriyat*, 113.

haven. Unlike the *hijrah* to Medina, however, it was completely voluntary.³³ Moreover, it did not lead to the establishment of an Islamic social order.

DEFINING MIGRATION: SEPARATION AND COMMITMENT

But what, linguistically and theologically, is migration? How is it understood, and defined? Modern scholars such as W. M. Watt observe that the stem of the first form of the verb, “*hadjara*, means ‘to cut someone off from friendly association with’” and this is the sense intended in Qur'an 4:34, 38 and 73:10, also noted by Watt.³⁴ This gives *hijrah* a rather different meaning, as Watt notes, than the popular understanding of “flight.” It includes, from this standpoint, a deliberately positive function of community building with a specific group of people, in this case “believers,” and a parallel rejection of one’s former community as a necessary means to those ends.

Watt’s interpretation is reflected in M. K. Masud’s analysis. Masud likewise suggests that the Qur'an’s use of various forms of *h.j.r.* to convey ideas such as “to reject,” “to shun,” and “to depart,” in Qur'an 23:67 and 69, 74:5, and 19:46 respectively, connects the idea of migration—understood from Surahs 59:9; 2:218; and 3:195—with that of “a distancing – physical or otherwise – usually from evil and disbelief.”³⁵ *Hijrah* thus suggests a dichotomous action of rupture and commitment; as Masud nicely puts it, of abandoning “one’s property and relations in order to support the nascent community of Muslims in Medina.”³⁶ However, while non-migrants were disinherited from the *muhājirūn* and given a lower status in the community, it would seem something of an

³³ See also, Masud, “The obligation to migrate,” 30.

³⁴ *Encyclopedia of Islam* 2nd ed., s.v. “Hijrah,” 366.

³⁵ Masud, “The obligation to migrate,” 32.

³⁶ *hajara*: 59:9; 2:218; 3:195 and *muhājir*: 9:100, 117; 33:6; 59:8; 60:10; 8:72. See M. K. Masud, “The obligation to migrate,” 31.

overstatement to suggest, as Masud does, that “refusal to migrate signalled exclusion from the society.”³⁷

In summary, when we consider the prevailing culture of Mecca from which the early Muslims were commanded to dissociate themselves, a case can be made that the internal constitution of *hijrah* signifies the breaking of relations with the spirit and mental attitude of *jāhilīyah*, from—as Toshihiko Izutsu puts it—the sense of “tribal honour, the unyielding spirit of rivalry and arrogance,”³⁸ in order to form a new society based on Islamic principles where honour belongs to those whose migration demonstrates their strong commitment to the new community. *Hijrah* thus represents a new beginning, the birth of a new society in embryonic form, as the marking of the Islamic *hijrī* calendar further indicates. It is similar, in this sense, to Christian baptism which signifies the spiritual birth of a new creation within the consciousness of the individual believer even as the believer leaves behind the ways and life-foundations of the past, patterned on the death and resurrection of Jesus Christ.³⁹

Turning to classical Shi'ite scholars, we note that Sharif al-Murtada (d. 1044) offers a territorial meaning of *hijrah* rooted in prophetic history that emerges out of his *ta'wīl* (esoteric exegesis) of Surah 4:100: “and whoso forsakes his home, a fugitive unto Allah and His messenger.” He argues that when the Qur'an says “And Lot believed him [Ibrahim], and said: Lo! I am a fugitive unto my Lord (*innī muhājir ilā rabbī*)”⁴⁰ it does not mean that he is literally ascending to heaven, but that he is going to the very place

³⁷ Masud, “The obligation to migrate,” 32.

³⁸ Izutsu, *Ethico-Religious Concepts*, 29.

³⁹ This idea is conveyed in several places in the Christian New Testament. See, for example, Romans 6:3-4; Colossians 2:11-15; 3:1-11; 1 Peter 2:21-22.

⁴⁰ Surah 29:26.

that God commanded him to go.⁴¹ It is metaphorical language, he says, in the same way that anthropomorphisms used of God need not and should not be understood literally. Similarly, he argues, Surah 4:100 means, “He made his *hijrah* to the place which he commanded him to migrate, which is to the place of the *hijrah* of the prophet.”⁴²

Consequently, according to al-Murtada, the idea of leaving one’s home and family “as a fugitive to God” has pre-Muhammadan prophetic precedence, and the departure of the *muhājirūn* from the idolatry of Mecca is, in essence and in obligation, imitative of that of Abraham and Lot from Harran. Al-Murtada specifies the destination as the place to which the Prophet was commanded to go, a point that reoccurs in the prophetic *hadīth* urging Muslims to visit the Prophet’s tomb in Medina, also associated with the concept of *hijrah*. “Whoever visits me after my death,” the Prophet is believed to have said, “is like the person who migrated to me during my lifetime, and if they cannot, then let them send me greetings and it will reach me.”⁴³ The blessings promised in Surah 4:100 are, according to this tradition, not restricted to pre-conquest Muslims, but are extended, through ritual, to future generations. The ritual of prophetic visitation or greetings thus universalizes *hijrah* esoterically and attributes its merits to any believer within the entire Islamic era.

Al-Majlisi’s (d. 1698) interpretation of Surah 26:29, on the other hand, emphasizes the faith aspect of Lot’s journey in that by it, much like Ali to Muhammad, Lot demonstrated his early belief in the prophethood of Abraham.⁴⁴ Moreover, he ties sincerity of belief to separation from evil, as indicated in the meaning offered above by

⁴¹ al-Sharif al-Murtada, *Resā'il al-Sharīf al-Murtadā* (Qom: Dār al-Qur'ān al-Karīm, 1405/1985), 282.

⁴² Ibid.

⁴³ al-Shaykh al-Mufid, *al-Muqni'a*, 457.

⁴⁴ Muhammad Baqir al-Majlisi, *Biḥār al-anwār* 12:26.

Watt. In migrating to his Lord, Majlisi argues, Lot “departed from amongst the wrongdoers in the way of migration, while they remained in the disgrace of their deeds.”⁴⁵

Thus, Majlisi’s emphasis reminds Muslims that migration is not only *to* somewhere but also *from* something, that is, oppression and *shirk* (associating another with God). His is a deliberate and condemnatory stance towards those who are, rightly or wrongly, deemed to be in error and sin.

We can conclude from the above that while the term *hajara* is employed in the sense of geographic migration, its predominant sense is ideological. That is, in Qur’anic usage and classical commentary, *hijrah* has a consistently marked association with the construction, confirmation and consolidation of identity for which separation from non-Islam—often territorial but always ideological—is required. While exceptions are admissible under certain conditions, migration in this sense is the divinely mandated normative practice and honoured preference, especially, Masud argues, if accompanied by *jihād*.⁴⁶ It is encouraged by the bestowal of status and privilege on the *muhājir* and removal of the same from those who subject their faith to the threat of loss by remaining among the unbelievers.

With the development of Islamic societies, and their encounter with non-Islamic civilizations, one might expect this ideological meaning of *hijrah* to come to the fore as an important criterion in the juristic discourse on *hijrah*. What we find is that the terms of reference used in this discourse tend to include both the language of territorial migration and the concern for socio-religious identity, which is its internal constitution.

⁴⁵ Ibid.

⁴⁶ Masud argues that according to the majority of Sunni and Shi’i jurists the highest level of faith that of the believer who migrates *and* performs *jihād* against the unbelievers. See Masud, “The Obligation to Migrate,” 34.

FROM AL-TUSI (D. 1067) TO AL-QUMMI (D. 1816): AN ENDURING THEME

Shaykh al-Tusi provides a legal systematization of the norms set forth in Surah 4:97-101. As he explains, the verse delineates three legal categories regarding the law of *hijrah* and every Muslim fits into one or another of these three: there are, he says, those for whom *hijrah* is obligatory; those for whom it is recommended; and those for whom it is neither obligatory nor recommended.⁴⁷ Several later jurists re-iterate this schema almost verbatim.⁴⁸ For al-Tusi and succeeding jurists, the main elements used to determine the category to which a person belongs are security from religious oppression; freedom to manifest the signs of Islam; and possession of the means, financial and otherwise, to undertake migration.

In al-Tusi's first category are those who are oppressed, do not have freedom to practice Islam nor the protection of family, and who have the necessary means of migration. These are obliged to migrate. According to 'Allamah al-Hilli (d. 1325), because women and boys are exempt from the obligation of *jihād*, they are also exempted from the obligation of *hijrah*, again stressing the connection between *hijrah* and *jihād*.⁴⁹ In the second category are those who are free to "manifest [their] religion"⁵⁰ or have strong family or tribal protection.⁵¹ These are recommended nevertheless to migrate "so as not to increase the number of the *mushrikīn*."⁵² Implied is the notion that "to stay in

⁴⁷ al-Shaykh al-Tusi, *al-Mabṣūṭ*, 3-4.

⁴⁸ See, for example, 'Allamah al-Hilli, *Tahrīr al-ahkām* 1:132-33; 'Allamah al-Hilli, *Tadhkirat al-fuqahā'* 1:405; and in the modern period, Mirza al-Qummi, *Jāmi'a al-shaṭāt* 1:352, 371-373/4, 399.

⁴⁹ 'Allamah al-Hilli, *Tahrīr al-ahkām*, 2:13.

⁵⁰ 'Allamah al-Hilli adds, "to practice the duties of Islam" which may be suggestive of a wider scope of freedom beyond ritual duties. *Tadhkirat al-fuqahā'*, 9:10.

⁵¹ al-Tusi, 3-4. 'Allamah al-Hilli adds, "against the *mushrikīn*." Ibid.

⁵² al-Tusi, 3-4. That is, the general population of the lands of *mushrikīn*, thereby contributing to their strength economically and otherwise. Cf. al-Shahid al-Thani, *Masālik al-afhām*, 3:16.

dar al-harb [sic] meant to strengthen the enemies of Islam.”⁵³ Al-Tusi cites Abbas Ibn Abd al-Muttalib and Uthman ibn ‘Affan as examples of those who could have but did not migrate. In what may be understood as a polemical point, the later scholar, Muhammad Baqir al-Majlisi suggests that, along with the prohibition of inheritance imposed on the non-migrant, remaining in *dār al-ḥarb* gives a Muslim a status inferior to someone such as Ali, who did migrate.⁵⁴

According to al-Tusi, the third category consists of those who are neither obliged nor recommended to migrate because they are enfeebled by illness or lack of financial means, as indicated in the Qur’anic text. It is possible, the text goes on to say, that God may forgive them. Even so, these are also recommended, on the basis of the Tradition “*hijrah* remains as long as *shirk* remains,” to migrate if and when their situation improves. In contrast to the early notion that performing *hijrah* deserves reward as an obligatory act, ‘Allamah al-Hilli insists that *hijrah* is in the first instance an “uncompensated duty”⁵⁵ that may be relaxed only under certain specified conditions. Apart from these conditions, not fulfilling this obligation is *ḥarām*.⁵⁶

‘Allamah al-Hilli stipulates that a man⁵⁷ who asks his relatives to bring him back to *dār al-shirk* may be given permission to return with them, as long as he is confident that he has the internal moral fortitude to resist the temptation to apostatize, even though he is not obliged to leave *dār al-hijrah*.⁵⁸ However, if he lacks strength of will and character he must not leave *dār al-hijrah*, a view that the author says is shared by al-

⁵³ Masud, “Being Muslim in a Non-Muslim Polity,” 120. See also Masud, “The obligation to migrate,” 31.

⁵⁴ It is one thing to believe as Abbas did, he says, but quite another to both believe and migrate, as did Ali. According to the Q8:72, “*mālakum min walāyatihim min shay’ ḥatta yuhājirū*.” Muhammad Baqir al-Majlisi, *Bihār al-anwār*, 10:241

⁵⁵ ‘Allamah al-Hilli, *Mukhtalaf al-Shī’ah*, 4:424.

⁵⁶ Ibid.

⁵⁷ The indication is that this applies only to males. “...*muslim^{an} min al-rijāl*...”

⁵⁸ ‘Allamah al-Hilli, *Tadhkirat al-fuqahā’* 9:360.

Shafi‘i. Interestingly, al-Hilli adds that the Imam advises that such a person try to escape from his relatives (presumably they are putting pressure on him to return, which is clearly at odds with the above—asking them to come and get him) and join the Muslims in fighting against them. In any case, he concludes, those of the Imāmī school oblige only the religiously oppressed to migrate.⁵⁹

Migration is thus never seen in completely neutral terms; it is always the ideal, or at the very least, the preferred opinion of the jurists wherever possible. In principle, *hijrah* is determined by the oppressive presence of *shirk* or *kufr*, as noted above.

Although the Tradition, “There is no *hijrah* after the conquest [of Mecca],” might seem to terminate this principle, some jurists argue that its interpretation is subject to certain hermeneutical nuances.⁶⁰ It is restricted, for example to place, since after the conquest the duty of *hijrah* was lifted from Mecca, but not necessarily from other places dominated by *kufr* or *shirk*. Conversely, once Mecca became permanently part of *dār al-islām*, the merit *hijrah* from *dār al-ḥarb* was reversed such that the obligation—along with its requisite rewards—became *not* to migrate from *dār al-islām*. In other words, although the duty of migration from Mecca ended, the symbolic significance of *hijrah* as a community boundary marker over against *kufr* and the spirit of *jāhiliyah* remained a key element in the construction and affirmation of Muslim identity.⁶¹

⁵⁹ Abou El Fadl, “Islamic Law and Muslim Minorities,” 152, 157. Maliki, Hanafi and Shafi‘i law are not altogether dissimilar though the range of opinion within each school makes it difficult to generalize. According to the eponymous founders of the Sunni *madhahib*, *hijrah* is required, recommended, or required only if there is fear of apostasy according to b. Malik, Abu Hanifa, and al-Shafi‘i respectively. See Abou El Fadl, 153ff. Ja‘fari law is evidently closest to Shafi‘i in this respect.

⁶⁰ ‘Allamah al-Hilli, *Tadhkirat al-fuqahā*, 1:405.

⁶¹ The thirteenth century addition of two additional categories designating *hijrah* as either *ḥarām* (forbidden) or *makrūh* (reprehensible) is simply the logical inverse of the three categories discussed by al-Tusi. That is, “it is *ḥarām* for someone who has the means of making *hijrah* and is afraid to manifest his religion there to stay in *dār al-shirk* and it is reprehensible for someone who has the means, [even though he or she] is secure and is able to manifest his religion.” But the author is careful to add that this is

The 15th – 16th c. jurist al-Muhaqqiq al-Thani (d. 1533)⁶² holds a different interpretation of the “no *hijrah* after the conquest” Tradition. He maintains that the duty of *hijrah* remains, but, in agreement with ‘Allamah al-Hilli, says that its reward is terminated or decreased in value.⁶³ Further, following the authority of al-Shahid al-Awwal (d. 1384),⁶⁴ he limits the definition of “the rituals of Islam” (*sha‘ā’ir al-islām*) to their Shi’ite form. It would thus become obligatory to migrate from Sunni dominated lands if living there posed a hindrance to an open manifestation of one’s Shi’ite identity, suggesting again that a primary function of *hijrah* was to denote and protect community identity; to al-Muhaqqiq al-Thani, that identity is simply more narrowly defined. At the same time, however, he appears to consider this ambitious ruling impractical, suggesting that al-Shahid might be referring to the time when the Imam was present, but that during his absence it is sufficient to practice *taqīyah* (religious dissimulation).⁶⁵

A critical factor in pre-modern discussions of whether Shi’ites should migrate from Sunni dominated lands is the role of *taqīyah* in a jurist’s reasoning. While for al-Muhaqqiq *taqīyah* might alleviate the requirement to migrate from Sunni dominated lands, three centuries after him, al-Mirza al-Qummi (d. 1816) argues persuasively that this is indeed the case, as substantiated by prophetic hadith.⁶⁶ In al-Qummi’s opinion, supported as he says by other unnamed scholars of his time, these earlier authoritative

conditional on having a clear practical strategy for migration. Yahya Ibn Sa’id al-Hilli, *al-Jāmi‘ lī al-shara‘ī: taḥqīq wa-takhrīj jam‘ min al-fuḍalā’* (Qom: Mu’assasat Sayyid al-Shuhadā’ al-‘Ilmīyah, 1405/1984-1985), 239.

⁶² Also known as Ali al-Karaki.

⁶³ al-Muhaqqiq al-Thani, *Jāmi‘a al-maqāṣīd*, 3:373

⁶⁴ al-Shahid al-Awwal, *al-Rawḍah al-bahīyah fī shar‘ al-lum‘ah al-dimashqīyah* (Qom: Maktabat Ayat Allāh al-‘Ulāmā al-Mar‘ashī al-Najafī), 86.

⁶⁵ Al-Muhaqqiq al-Thani, *Jāmi‘a al-maqāṣīd*, 3:373

⁶⁶ Mirza al-Qummi, *Jāmi‘a al-shaṭāt*, 1:371-73

scholars were painting a highly exaggerated picture of the situation for Shi'ites in Sunni dominated lands. But, in his time, as in theirs, he argues, even *taqīyah* is unnecessary.⁶⁷

Al-Qummi suggests that the key to resolving the dispute is to define the term *sha'ā'ir*. He offers two explanations specifying the actions to which the term refers: the rituals themselves—*ṣalāt*, fasting for Ramadan, and the *adhān* (call to prayer); and their primary objective, that is, the denoting of religious identity. Thus far, all Muslims are in agreement, he says. One may, therefore, be excused from migration so long as these conditions are met. It is only in what he alleges are merely minor issues, such as wiping the feet in ablution, “prostrating on something suitable for prostration, and saying “*ḥay 'alā khayr al-'amal*” [come to good works] in the *adhān*, and things like this” where Sunnis and Shi'ites differ.⁶⁸ And these have not with certainty been classed as absolute duties “such that we could argue that their performance is dependent upon *hijrah*, so that *hijrah* is a necessary precondition [to the performance of a command from God].”⁶⁹ Whereas, he reasons, the difference between *īmān* on the one hand and *kufr* and *shirk* on the other is undeniably evident.

Al-Qummi concludes that to infer, as al-Shahid has done, that *hijrah* is obligatory from Sunni lands because it is obligatory from *bilād al-kufr* (land of unbelief), is erroneous as it wrongly conflates Sunni Islam with *kufr* and, similarly, because it makes too much of the notion of “the signs of faith (*īmān*) [i.e. Shi'ism]” as distinguishable from “the signs of Islam [what all Muslims practice in common].”⁷⁰ Such distinctions are exaggerated, he says, being derived from a methodology of inference from the text and

⁶⁷ Ibid., 1:372

⁶⁸ Ibid.

⁶⁹ Ibid, 1:373.

⁷⁰ Ibid, 1:372.

having no sound basis in *uṣūl al-fiqh*. Further, the Imams authorize close association with Sunnis in social and ritual life and sanction the practice of *taqīyah* – indeed, maintain that it is the highest religious duty – if manifesting one’s Shi’ite identity in this context becomes hazardous.⁷¹ This is why, he says, the command to migrate from Sunni lands is not supported by the Imams or any of the leading jurists, except al-Shahid al-Awwal and less strongly by al-Muhaqqiq al-Thani. If anything, the weight of *uṣūl al-fiqh* tends rather towards the maximum liberty allowed (*barā’at al-dhimmah*).⁷²

Al-Qummi contrasts this with the obligation to migrate from *bilād al-kufr*, an obligation, he says, that is lifted only if one has relatives to assist in the preservation and manifestation of one’s Islam. In defending this position, he supports a minimalist view of Sunni-Shi’ite differences while maintaining the commonly held Muslim/non-Muslim dichotomy.

CONTEMPORARY MIGRATION TO THE WEST: FROM PROTECTION TO PROPAGATION

Unlike the Qur’an and Traditions which dwelt primarily on the question of migration to *dār al-islām*, jurists of the middle period had cause to deal more equally with migration both to *dār al-islām* and from *bilād al-kufr*. For contemporary jurists, the dominant question is clearly whether Muslims are permitted to reside permanently in non-Muslim nation-states. A survey of the modern discourse shows that the majority opinion maintains the early principles identified above—the freedom to manifest a Muslim identity and security against the loss of faith—as the fundamental criteria of legitimation. As is usual in law, juristic opinion is not completely uniform. Differences

⁷¹ Ibid, 1:373.

⁷² Ibid.

tend to revolve around the question of motivation, with greater stress placed on the propagation of Islam.

We look first at the contemporary scholar, Muhammad Ali al-Ansari al-Shushtari. Al-Ansari argues from the legal principle that whatever the *sharī'ah* makes obligatory, it commands what is necessary to its performance as well (*muqaddimat al-lāzim*).

Likewise, what the law permits, it renders permissible whatever actions are inseparable from its performance. It is as if, for example, a father gives his son permission to obtain knowledge that is only obtainable in the West; one ought to assume that its precondition, i.e., travel to the west, is included in that permission.⁷³ It is difficult to tell if Ansari is hereby sanctioning migration to the West, subject to parental approval, or if he is using this as a purely hypothetical example. Reason suggests that he would not use an example of something of which he disapproved. It is logical to conclude, then, that this represents his own position on migration to the West.

While other *mujtahids* deal with questions regarding migration to the West, two contemporary *mujtahids* who take an active interest in the subject are Ayatollahs Ali al-Sistani and Muhammad Husayn Fadlallah. Sistani follows the classical approach to the question of whether Muslims may voluntarily choose to reside in a non-Muslim country and environment.⁷⁴ That is, the central element of his argument is whether this would pose a threat to a Muslim's religious belief and practice or to that of his or her dependents. But his ruling ignores both the Qur'an and the arguments between various classical and medieval jurists. His only source of authority is the Traditions of the Imams.

⁷³ Muhammad Ali al-Ansari, *al-Mawsū'ah al-fiqhīyah al-muyassarrah; wa-yalihā al-mulḥaq al-uṣūlī* (Qom: Majma' al-Fikr al-Islāmī, 1415- [1994 or 1995-]), 1:403.

⁷⁴ Ayatollah al-'Uzma al-Sayyid Ali al-Husayni al-Sistani, *al-Fiqh li al-Mughtaribīn* (London: Imam Ali Foundation, 1999).

Perhaps this is because he wants to underline the earliest Shi'ite precedents of his legal opinion.

Sistani begins with what might appear to be an unconditional negation of permission for travel to the West, or any non-Muslim country for that matter. He quotes several Imami Traditions that list *al-ta'arrub ba'd al-hijrah* (literally, assimilation after migration)⁷⁵ among “the seven major sins” whose consequence is Hellfire.⁷⁶ *Al-ta'arrub ba'd al-hijrah* is the official legal term that, in Sistani's words, means “leaving an environment where you could follow Islam and moving to a place where you maybe [sic] prone to not following Islam.”⁷⁷ Although on a par with *kufr*, interpreting the term inconclusively, as in, “may be prone to,” opens up a range of possibilities. Sistani explains that it is applicable only to situations in which an individual feels susceptible to the temptation to apostasy. “Travel to non-Islamic countries, whether in the East or the West, is *ḥarām*,” he says, “if it results in the loss of the Muslim's religion whether the purpose of travel is tourism, or commerce, or study, or temporary residence, or permanent, or any other reason.”⁷⁸ He adds that this is the case even if the purpose is to preach Islam to Muslims and others in the West. His primary concern appears to be born

⁷⁵ The term *ta'arrub*, coming from the root *'r.b.*, means literally “to assimilate to the ways of the Arabs.” This is the term that Sistani uses consistently in his text. Professor Mahmoud Ayoub (in conversation) suggests logically that the correct term would be *tagharrub*, from the root *gh.r.b.* That is, the difference between the two words is only a *ġ* (gh) in place of the *ξ* (‘). The latter term would mean to assimilate to the West. Thus, the use of *ta'arrub* must be a typographical error. Given that Sistani's explanation of *al-ta'arrub ba'd al-hijrah*, discussed above, refers to leaving *dar al-Islam* for any non-Muslim territory, Western or non-Western, it may be that Sistani is importing the term in its assimilation sense only, and ignoring its etymological signification of “the ways of the Arabs.”

⁷⁶ Sistani, *al-Fiqh*, 61-62. For example, “Abid ibn Zurarah said, ‘I asked Aba ‘Abdullah (SA) about the major [sins] and he said: In the Book of Ali (SA) they are seven: unbelief in God [*kufr*], murder, causing distress to parents, obtaining interest knowingly, enriching oneself on the money of orphans, running away from battle, and *al-ta'arrub ba'd al-hijrah*. Then I said: So, are these the major sins? He said: Yes,” 62.

⁷⁷ Online English translation of Sistani, *al-Fiqh li al-Mughtaribin* (A Code of Practice for Muslims in the West), <http://www.sistani.org/local.php?modules=nav&nid=2&bid=53> (accessed February 1, 2009). The definition does not appear in the original Arabic text.

⁷⁸ Sistani, *al-Fiqh*, 64.

of a scepticism regarding Western society's capacity to be hospitable to an Islamic lifestyle.

There are, however, exceptions to the *ta'arrub ba'd al-hijrah* clause. Threat to one's life in a Muslim country is one such exception, overriding the potential threat migration poses to religious commitment. The sole limitation on migrating to a non-Muslim country in this case is that it be "only to the extent that it saves your life."⁷⁹ Presumably, what Sistani means by this is that once the danger is over, normal criteria apply. Ayatollah Ali al-Khameini concurs with this general principle. In his legal opinion, there is no problem in taking political asylum in the West, so long as the prospective refugee does not obtain this status on the basis of a fabricated testimony of persecution.⁸⁰ Although on the one hand, Sistani stipulates that any sin, major or minor, delegitimizes migration, he disregards minor sins that are committed only occasionally.⁸¹ Finally, great rewards are promised to those whose motive for migration is to propagate Shi'ism, subject to standard conditions discussed above. According to Sistani, it is *wājib kifāya*, that is, the duty is sufficed by a portion of the community fulfilling it; but all who are able should join in doing so.⁸²

Sistani's readers reveal a concern to know what is meant by such open-ended terms as "loss of religion" and what the conditions are that might lead to it. Sistani explains: "What the *fuqahā'* mean by 'loss of religion' is either doing what is *ḥarām* by indulging in minor or major sins such as drinking alcohol, or committing adultery, or eating *maytā* [carrion] or drinking unclean things or other *ḥarām* activities or failure to

⁷⁹ Ibid, 65.

⁸⁰ Khameini, *Ajwabat al-Istiftā'āt* (al-Kuwayt: Dār al-Naba' lil-Nasr wa-al-Tawzī', 1995), 2:104.

⁸¹ Sistani, *al-Fiqh*, 68-69.

⁸² Ibid, 70.

perform one's legal obligations such as *ṣalāt* or *ṣawm* or *ḥajj* or other religious duties."⁸³

It is worth noting that environmental temptations such as "the open display of pretty women,"⁸⁴ in and of themselves are not problematic. Likewise, the right kind of environmental influences that strengthen one's religious feelings and knowledge is also not considered an indubitable safeguard against the loss of religion.⁸⁵ Rather, for Sistani, as others, it is individual agency that determines the effect of environmental factors. Permissiveness, then, begins with one's own sense of inner moral confidence. Further, a wife's lack of confidence in this regard prohibits only herself from travel; it does not affect her husband.⁸⁶ Nor does Sistani consider it urgent to teach one's children Arabic beyond what is necessary for reciting *ṣalāt*.⁸⁷ Instead, they should be encouraged to understand the rituals in the language of their social upbringing.

Ayatollah Khomeini's *fatāwā* on migration follow the general thrust of Sistani's. We have noted above his ruling on political asylum. In addition, he advises migrants that they should not live somewhere where their religion might be despised, and, as if to overstate the case for not losing one's religious commitment, "it is obligatory on this person, besides preserving his religion and legal school, to be active in defending Islam and Muslims and whatever else is required for the spread of the religion and the laws [of Islam...] to the extent he is able."⁸⁸ On the interesting question of what women converted in *dār al-kufr* are required to do "if they are unable to manifest their religion there due to fear of family or society," Khomeini stipulates pragmatically that if migration will cause

⁸³ Ibid, 65.

⁸⁴ Ibid, 68.

⁸⁵ Ibid, 67.

⁸⁶ Ibid., 65.

⁸⁷ Ibid, 69. Sistani does, of course, concur that learning Arabic in order to better understand Islamic sources is recommended. But he does not prioritize it.

⁸⁸ Khomeini, *Ajwabat al-Istiftā'āt*, 2:104.

them distress, they are not required to leave, but “they are obliged to persist in *ṣalāt* and *ṣiyām* and other duties of Islam as much as possible.”⁸⁹

Ayatollah al-Sayyid Muhammad Husayn Fadlallah deals with Muslim migration to the West in his book, *Taḥaddiyāt al-Mahjar* (Remaining in the Place of Migration).⁹⁰ His primary concern is to help Muslims in the West to move forward in their thinking from an isolationist mentality that tries to reproduce the Islamic life of the East in the West to an adaptive model that prepares them to form a new Islamic Western culture that can impact and influence the West. The extensive re-assessment of the philosophical foundations necessary for an effective and affective Muslim presence in the West offered in Fadlallah’s work is atypical and suggests a deeper engagement with the social realities in which the legal discourse functions. However, in the final analysis, regardless of the position taken by a *mujtahid*, it must at some point be legitimated within the context of Islamic legal discourse on *hijrah*.

Although Fadlallah’s interpretation of *hijrah*, theoretically and practically, is apparent throughout *Taḥaddiyāt al-Mahjar*, it is the writer of the Introduction, Mustafa al-Shawki, who deals with *hijrah* as a theoretical concept in Islamic thought in a manner consistent with Fadlallah’s thesis. It is necessary only to introduce this theory briefly. Al-Shawki draws on the literal definition given earlier by Watt, that is, that *hijrah* “in and of itself involves separation from social and family ties,” but gives it a distinctly modern gloss—“in search of a better life.”⁹¹ This allows for a liberal amount of flexibility in the interpretation of conditions that permit it. For example, as a secondary motivation after

⁸⁹ Ibid.

⁹⁰ Muhammad Husayn Fadlallah, *Taḥaddiyāt al-Mahjar: Bayna al-Iṣālah wa al-Mu‘āṣarah* (Beirut: Dar-Al-Malak, 1421/2000).

⁹¹ Ibid., 6.

purely religious reasons, migration is permissible for the pursuit of (secular) education and economic advancement.⁹² Secondly, migration is permitted if it is undertaken to carry the banner of Islam throughout the world.⁹³ Fadlallah will incorporate this incentive—that of *da'wah*—into his argument extensively.

Primarily, however, migration is to serve the purpose of providing Muslims with religious freedom, as suggested by Qur'an 4:97. As do others, al-Shawki broadens the scope of this scripture to refer to freedom from persecution whether that persecution is under a Muslim, or, as in the scriptural context, a non-Muslim polity. In this case, the Shi'ite priority of justice suggests that a non-Muslim just government is preferable to an unjust Muslim one. Thus, escape from religious oppression, termed “the escape to God,” is the first and most important motive for migration,⁹⁴ placing these Muslims in the ironic position of escaping to God in the West. This also suggests an interpretation of Islamic rule based on practical, rather than purely theoretical criteria, as a government that is Islamic in name only may be considered, in the context of Surah 4:97, to be un-Islamic.

We may note, as well, the positive and negative consequences of migration suggested by al-Shawki and implied in the above. These will re-appear as fundamental principles in Fadlallah's philosophical construction of the Muslim migrant to the West. Positive consequences of migration include the potential for Muslims to be actors in influencing the West for Islam; in bringing Muslims from various parts of the world together; and “whatever benefits arise out of these two.”⁹⁵ Negatively, migration puts Muslims at risk of being acted upon such that their spiritual constitution is weakened and

⁹² Ibid., 7.

⁹³ Ibid., 6-7.

⁹⁴ Ibid., 6.

⁹⁵ Ibid., 7.

their performance of religious obligations gradually abandoned. Further, there is the danger of political compromise. Most seriously of all, the Muslim in the West may face the loss of his or her religious identity, which, ironically, may have been the primary cause for migration in the first place. Finally, al-Shawki notes, there are other dangers specific to each country that he is not in a position to discuss at this point.

Instead, al-Shawki poses several legal and philosophical questions raised by migration. In anticipation of Fadlallah's thesis, he asks what kind of Islamic discourse will best equip Muslims to face the challenges of their new Western social context. Is it an isolationist discourse that advises hiding one's Islam in the secrecy of the heart? Is it a materialist discourse that completely obliterates the memory of God? What kind of discourse will enable Muslims to engage the Western societies in which they live so as to "preserve their principles and their honour in the midst of these societies" and maximize their influence?⁹⁶ It is with these issues that Ayatollah Fadlallah will occupy the reader in the remainder of his book and which we will look at in various sections throughout this study.

CONCLUSION: RELIGIOUS FREEDOM

As a general framework, we may suggest that the issue of migration began with the priority of migrating "to the Prophet and to God" as important for the formation of a new community and consolidation of Muslim identity. As societies became more settled, probably around the time of 'Allamah al-Hilli in the 14th century, it became more acceptable to remain in *dār al-shirk* on condition of religious freedom for Muslims. Finally, jurists of the modern period permit voluntary temporary and permanent migration to non-Muslim territory if the same condition is present and, subject to its

⁹⁶ Ibid., 8.

intention, may even attribute religious virtue to it. The overriding concern in all cases remains that the *mukallaf* (legally capable) be free to discharge his or her religious obligations.

More specifically, what emerges from this historical survey of the concept of *hijrah* in legal discourse is the consistent presence of three central principles established from at least the time of al-Shaykh al-Tusi (11th c.), that is: the establishment and maintenance of Muslim identity; the symbolic importance of boundaries between the Muslim and other communities; and the concern to circumvent potential temptations to apostasy. It becomes evident in the modern *fatwā* literature that whatever the position of the jurists, their concern is with how best to express these essential foundational principles in the changing conditions of modern life. However, some modern jurists add to the justifications for migration two significant criteria: the pursuit of higher education and the possibility of influencing the West for Islam (*da'wah*), the latter positioned front and centre by Fadlallah and regarded as valid by Sistani. These represent a more recent interpretation aimed at the empowerment and expansion of the *ummah* and its sphere of influence.

With regard to the traditional framework, contemporary juristic texts suggest conformity to the spirit of the law. That is, the preferred state is to remain amongst the community but permission to migrate may be extended in situations of necessity. On the other hand, religious oppression, manifesting itself as the obstruction of Islamic ritual practice, in consequence of which Muslim identity is excluded from the public space, constitutes the primary reason to forbid residence in a non-Muslim country. This is so particularly if the situation further suggests the enfeeblement of Islam and Muslims and

empowerment of non-Muslims over Muslims, in consequence of which Islam is dishonoured. The same principle extends, as will be observed in later chapters, to particular situations in which the freedom to obey the divine law is threatened with compromise. Thus, the contemporary jurist has the delicate task of determining the relative weight of risks and benefits of Muslim migration to the West and of the specific ethical choices migration to non-Muslim lands generates.

PART II: ANALYSIS OF *FATĀWĀ*

CHAPTER FOUR

PURITY, FOOD, AND COMMERCIAL RELATIONS: “AT HOME IN THE HIJRAH”?¹

The number of detailed Western scholarly studies of the Muslim purity code is an inaccurate reflection of its importance in Islamic law.² Legal handbooks—Sunni and Shi'ite—begin, as a matter of custom, with several chapters devoted to meticulously detailed explanations of what acts, substances, and creatures cause ritual impurity (impurity: *najāsah*).³ Handbooks pay particular attention to which substances pollute water and under what conditions, rendering such water unsuitable for use in ritual ablutions (*wuḍū*). Ayatollah Khomeini, for all his revolutionary political discourse, and while bemoaning the narrow focus of his colleagues on matters of purity at the expense of developing Islamic political theory, nevertheless pays no less attention than apolitical clerics to the adverse effects of blood, feces, urine, semen, and the like. His *Tahrīr al-Waṣīlah*, for example, follows the traditional pattern in devoting the first several chapters,

¹ The phrase is adapted from Yvonne Haddad's article entitled, "At Home in the *Hijra*: South Asian Muslims in the United States," edited by Harold Coward, John R. Rinnells, and Raymond Brady Williams (Albany: SUNY Press, 2000), 239-258.

² This is understandable, Ze'ev Maghen argues, for at least two reasons. Most western scholars of Islam come from social and intellectual contexts in which purity issues do not weigh very heavily; it is easy, therefore, to assume that the enormous amount of time needed for such study can more justifiably be spent pursuing other – more obviously relevant – issues, such as politics and fundamentalism. In this, Western scholars are not alone; Ayatollah Khomeini himself, while devoting hundreds of pages to questions around ritual purity, decried such attention as a fatal distraction from the societal relevance of religion. Given this, the meticulous linguistic facility required for such research hardly seems worth the effort. Thus, Western scholars understandably find it more worthwhile to expend their intellectual and material resources on more apparently momentous matters than the allegedly harmful effects of bleeding, urinating, copulating, vomiting, and handling of bodily or other substances. Nevertheless, some excellent studies have managed both to begin to untangle this complex issue, and to demonstrate the fallacy of the field's insignificance. See in the bibliography: Julie Marcus, (1984); A. Kevin Reinhart (1990); Ze'ev Maghen (1999), (1999b), (2004); Marion Holmes Katz (2002).

³ In Shi'ite legal handbooks, the chapters on *ṭahārah* (purity) are preceded only by a brief exposition of the necessity and proper manner of *taqlīd*.

after a brief discussion of *taqlīd*, to matters of purity (*tahārah*) and impurity, approximately one hundred and twenty-five pages in all.

Purity chapters include rules of pre-worship washings: *wuḍū'* in the case of minor pollution (*ḥadath*), and *ghusl* (full washing) in the case of major (*janābah/junub*). These are customarily followed by chapters dealing with ritual itself, notably four of the five pillars (*arkān*; pillar: *rukṅ*) of religion: prayer (*ṣalāt*), fasting (*ṣawm*), religious tax (*zakāt*), and pilgrimage (*ḥajj*), indicating the intimate relationship between purity and fitness for ritual worship.⁴ But purity also extends beyond ritual. In a thought-provoking article, Ze'ev Maghen observes the social relevance of purity issues, noting Muhammad Iqbal's⁵ comment that scrupulous attention to ritual purity is not only *not* "socially harmless" (read: irrelevant), but positively powerful.⁶

In order to appreciate the legal context and socio-cultural significance of contemporary *fatāwā* involving purity issues, a brief summary of the main outlines of the Shi'ite purity code is offered below. While broadly parallel to the Sunni code, Shi'ite law

⁴ On this point, see Kevin Reinhart's helpful article, "Impurity/No Danger," *History of Religions* 30 (1990), 1-24.

⁵ Muhammad Iqbal (1877-1938) was an important philosopher-poet and part-time politician of the Indian Subcontinent who is credited with having planted the intellectual seeds for the creation of Pakistan, as the fulfillment of a Muslim nationalism in India. Iqbal was a modernist, influenced by Shah Wali Allah, founder of Islamic modernism, and Sir Sayyid Ahmad Khan. Iqbal, who completed three graduate degrees in Europe, wrote his most famous work in 1930, *The Reconstruction of Religious Thought in Islam* (Lahore, 1930) a collection of lectures on Islamic modernism delivered two years earlier. *Oxford Encyclopedia*, s.v. "Iqbal, Mohammad."

⁶ Ze'ev Maghen, "Much Ado About Wudu'," *Der Islam* 76 (1999), 252. Maghen, perhaps over-stating his case, goes so far as to say that attention to purity may be perceived to be as revolutionary and anti-imperialistic as politics itself, persisting as possibly the final "bulwark" against the incursion of Westernization, the one persistent "focus of Muslim unity, identity and religiosity [...]." His point is that while it may appear to be purely a religious ritual of little social consequence, this assumption is open to question. As an example of the compelling social and political force that Maghen sees hidden within ritual ablutions, he recounts an event reported by a weekly paper of the Algerian Front Islamique de Salut (FIS) in which a number of Islamist organizations had held a mass rally in anticipation of "Operation Desert Storm." He quotes the correspondent as commenting that while it is often said that a full concert hall has the potential to motivate a crowd into action on behalf of their nation, he replies with "Give me young people who are not afraid to perform ablutions with cold water at the crack of dawn, and I will give you a prosperous Algeria and a liberated Palestine!" Maghen, "Much Ado," 205.

differs in some respects, most notably in having traditionally held a majority opinion on the impurity of non-Muslims (*najāsat al-kuffār*). As we will see below, this controversial doctrine has, since the late twentieth century, begun to decline and resemble the Sunni view more closely, leading to significant social implications. We look at this development in some detail, including the relationship of the doctrine to dietary restrictions.

The chapter argues that through the use of *ijtihād*, the notion of non-Muslim impurity, though deeply rooted in classical and pre-modern legal discourse, has in contemporary legal thought ultimately given way to a more socially inclusive approach. In contrast, dietary laws unrelated to questions of non-Muslim purity have retained significant force in sustaining social and moral boundaries between believers and unbelievers, boundaries that are implicit in the notion of non-Muslim impurity. In consequence, *fatāwā* addressing the whole of this inter-related field of inter-religious bodily contact, food, and employment in the West reflect only a very cautious opening to the other, hedged about and compensated for by measures intended to protect the boundaries within which it is thought safe to mingle with Western society.

SHI'ITE MUSLIM PURITY LAW: TRANSCIENCE AND PRECLUSION

The structure of purity law can be outlined briefly and clearly by answering five main questions: What substances are intrinsically impure? How does a person or item become defiled and what are the different states of pollution that one may be in? What are the consequences of defilement? How is purification accomplished? And finally, what does this tell us about the logic of the Muslim purity code as applied to the focus of our inquiry? I leave the final question till the conclusion of the chapter. To answer these

questions, I rely primarily on a contemporary legal treatise by Ayatollah Sistani. As is typical in all topics of Muslim law, Shi'ite purity law varies in some respects from one jurist to another. These differences will become relevant in our analysis of contemporary *fatāwā* (legal opinions) later in the chapter. For the present, it is possible to ignore them without detriment. Prior to answering the five questions posed above, I look at a substance of fundamental importance: water.

All water unmixed with other liquids, such as fruit juice, for example, is called pure (*muṭlaq*). This is the default status of water, such that it may be ruled as impure only when one knows with certainty that it has been changed into mixed, or impure, water.⁷ Of the five types of *muṭlaq* water, two are commonly used for purification: *kurr* water, which refers to a measurement of water legally permitted for purification; and *jarī* (running) water, also used for purification.⁸ Conversely, jurists also use the term *jārī* water to refer to the form of moisture that, when disconnected from its source and found in contact between something of intrinsic impurity (the hand of a *kāfir*, for example) and something pure (food otherwise permitted handled by that hand), contaminates the latter.⁹ Water, then, depending on specific conditions, may act either as a purifier or a conduit for pollution.

⁷ Seestani, *Islamic Laws*, 10. Jurists discuss how much of another liquid or item is needed pure water to become mixed, and thus impure. In brief, it depends on attending factors such as whether the added element changes the smell or appearance of the water. In other words, impurity depends on whether or not the defiling substance (which may or may not be an impure substance such as blood; it may be juice, for example) affects or changes the water's primary constitution as water. Note on spelling: when using my own transliteration, I use the standard format (e.g. Sistani, *tawdīh*). Otherwise, I follow the format used by the source to which I am referring. This results in different spellings for the same referent, as, for example, Seestani and Sistani.

⁸ *Ibid.*, 5. The other types of pure water are water of lesser measurement than *kurr*, rain water, and well water. The first may also be used for purification under certain conditions.

⁹ *Ibid.*, 8.

According to Ayatollah Sistani, ten things are intrinsically impure (*najis al-‘ayn*): urine, human feces, semen, dead body, blood, dog, pig, *kāfir*, alcoholic drinks, and the sweat of an animal that eats *najāsah*.¹⁰ We may divide this list somewhat neatly into three categories. The first category includes substances that regularly exit the body whether through sexual or non-sexual activity: urine, feces, semen, and blood—blood, of course, is slightly different in that the only regular or natural pattern of exit is through menstruation.¹¹ The second category consists of living and dead beings: living *kāfirs*,¹² dogs, and pigs, and the dead body of any creature.¹³ The third category is less definitive. We may designate it as consisting of other substances: alcohol and the sweat of animals that eat *najāsah*. Kevin Reinhart divides the list into two categories: the first is “pus, vomit, blood, urine, excreta of all animals (except birds) [...]” He defines these as “[n]early anything that has left its proper place in the body.” Reinhart finds the impurity

¹⁰ Ibid., 15. Urine and feces of animals that are forbidden to eat “and whose blood gushes out forcefully when its large vein (jugular) is slit” are also impure. It is also true, as Sistani elsewhere states, that water left (*su’r*) in a vessel after a dog, pig, or [non-scriptuary] *kāfir* have drunk is impure. Ibid., 11.

¹¹ Maghen’s theory regarding the origins of blood impurity in Islam is intriguing. A detailed discussion would divert from our focus. In brief, he argues that permitting flowing blood into the sanctuary or God would be a violation of the very meaning of sanctuary, which essentially designates a place of safety, illustrating the fundamental incompatibility between places of sanctuary (and the worship that takes place there) and the pollution of bloodshed. For this reason, for example, a double tax was levied on people entering Mecca with blood-stained weapons. The prohibition against shedding blood while in the state of *ihrām* further illustrates this hypothesis. See Ze’ev Maghen, “First Blood: Purity, Edibility, and the Independence of Islamic Jurisprudence,” *Der Islam* (2004), 49-95. See especially 91-95.

¹² Differences of opinion exist among Muslim (Sunni and Shi’ite) scholars as to which religious communities should be classified as *kuffār* (plural of *kāfir*). We will look at the views of some Shi’ite Qur’an commentators below, but this will be far from a comprehensive study. Western studies of the classification of non-Muslims in Shi’ite law are few. One exquisite study of Sunni law shows a significant presence of the idea that all unbelievers constitute one undivided community. See Yohanan Friedmann, “Classification of unbelievers,” in *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition* (Cambridge: Cambridge University Press, 2003), 54-86. Shi’ite reluctance to differentiate between scripturaries and non-scripturaries, where such reluctance exists, must be somehow linked to a Shi’ite interpretation of Qur’an 2:213 and 10:19 referring to a time when “the people were one community.” Friedmann cites Etan Kohlberg’s comments that a majority of Shi’ites interpreted this as a “predominantly infidel” community, for “had it consisted of believers, [...] prophetic missions would have been superfluous.” Friedmann, *Tolerance and Coercion*, 14-15. See also Etan Kohlberg, “Some Shi’i views of the antediluvian world,” *Studia Islamica* 52 (1980), 41-66.

¹³ With regard to animals, this refers to what has died of itself, carrion. In this case, the products derived from the animal, such as its meat, leather, or milk, are also impure. What is slaughtered following Islamic legal requirements (*al-dhibh al-shar‘ī*) is pure, *muzakkā*.

of these substances to be explained by logic. The second category discerned by Reinhart includes “pigs, dogs, wine, carrion, corpses, water used by unclean animals, the food left over by an unclean animal, its milk, and so on [,]” which Reinhart suggests must have an historical, rather than logical explanation.¹⁴

All of these items are impure in and of themselves and have the capacity to trigger a temporary state of defilement, minor or major. Legal sources refer to minor defilement as *ḥadath* (affected). *Ḥadath*, or “transient effect,” to use Kevin Reinhart’s translation,¹⁵ takes place when an impure bodily substance (or wind) exits the body. Sleep also triggers minor impurity as impure substances are likely to have exited the body during sleep, though one is mostly unaware of it. *Ḥadath* is also caused by sexual acts apart from intercourse, such as touching with desire.¹⁶ A person affected by minor impurity is prohibited exclusively from ritual activities, such as worship, both obligatory and recommended prayers.¹⁷ Reinhart suggests, for this reason, that impurity in the Muslim code carries no social stigma, unlike impurity in other religious systems. Being in a state of *ḥadath*, Reinhart emphasizes, simply requires “a new act of ritual ablution” (*wuḍū’*)

¹⁴ Reinhart, “Impurity,” 7-8. Apart from certain assumptions implicit in his description of category one items, Reinhart’s categorization is helpful. Reinhart’s error, in my view, is defining category one substances as impure only when they “have crossed boundaries of the body [...]” Otherwise, he suggests, they are not impure. My objection to this argument is two-fold, textual and logical: firstly, nothing in the legal sources, to my knowledge, suggests that these substances *become* impure at a given point. The sources simply list them as impure, wherever they are found. It simply happens that one rarely comes into contact with them unless they have left the body. The one exception to impurity regardless of place may be blood, which, it is specifically stated, is impure when flowing outside of the body. Secondly, this argument, clearly based on the theory developed by Mary Douglas, assumes that impure bodily substances “ought not to be outside the body [...]” This is a questionable assumption. The condition of human beings when excrement and urine *do not* leave the body is problematic, to say the least. Common sense makes it clear that these substances ought indeed to leave the body at regular intervals.

¹⁵ *Ibid.*, 9.

¹⁶ *Ibid.*, 10.

¹⁷ See the discussion of *wuḍū’* below.

before ritual worship may legally be performed.¹⁸ Likewise, Marion Holmes Katz refers to actions that trigger minor pollution as “cancelers [sic] of *wuḍū’*.”¹⁹ While Reinhart’s theory is interesting, it breaks down at the point of major impurity, as will be seen below.

Major impurity (not to be confused with intrinsic) is called *janābah*. (preclusion).²⁰ It is caused by sexual intercourse and discharge of semen, whether voluntarily or involuntarily. Again, to cover all possibilities, jurists discuss the details of distinguishing an emission of semen from one of urine (the latter causing only minor pollution).²¹ The term “precluded” describes the condition of major impurity well, as it precludes the affected person from ritual activity and makes it “reprehensible” (*makrūh*) to perform some non-ritual activities. Sistani’s list of nine activities that are reprehensible to perform when in a state of *janābah* includes both religious actions such as “reciting more than seven verses of the Qur’an,” as well as ordinary activities of eating or drinking.²² While not contagious, thereby reducing the potential for social stigma, the strong recommendation to not engage in the latter type of activities suggests that the Islamic purity code is less rigidly ritual-bound than argued by Reinhart.

Legal sources also refer to both minor and major impurity as *najāsah ‘araḍīyah* (circumstantial impurity), or *najāsah fiqhīyah* (legal impurity),²³ to contrast the transient nature of this state of impurity with the intrinsic impurity (*najāsah ‘aynīyah*) belonging to the elements listed above. A Muslim, it should be clear, can never be intrinsically impure,

¹⁸ Reinhart, “Impurity,” 9. In some cases, notably in relation to dogs and pigs, the contact is contaminating only if it takes place through flowing water.

¹⁹ Marion Holmes Katz, *Body of Text: The Emergence of the Sunni Law of Ritual Purity* (Albany: SUNY Press, 2002), 101.

²⁰ Reinhart, “Impurity”; Katz, *Body of Text*.

²¹ Sistani, *Islamic Laws*, 61.

²² *Ibid.*, 63.

²³ By *najāsah fiqhīyah* legal scholars infer a technical or formal impurity that attaches to people because of legal determinants but does not belong intrinsically to a group of people as class.

and in the Sunni system, this immunity extends to all human beings. Shi'ite law, as noted above, allows for the possibility of non-Muslim intrinsic impurity. But human beings are not the only location where contamination occurs. Virtually any item may become defiled, and law books discuss numerous cases, offering rulings on a variety of potential situations, such as, for example, how to treat an egg with a drop of blood in it.²⁴

A key element in determining pollution is certainty of knowledge. An example from Sistani illustrates the effect of certainty: "If a fly or an insect sits on wet, *najis* thing, and later sits on wet, *Pak* [pure, clean] thing, the *Pak* [sic] thing will become *najis* [sic], if one is sure that the insect was carrying *najāsah* [sic] with it, and if one is not sure, then it remains *Pak* [sic]."²⁵ The point is that two distinct but related factors comprise the necessary conditions for determining *najāsah*: material reality and certain knowledge of that reality. The principle of *yaqīn* (certainty), as we will observe later, is very effective in neutralizing the conditions that might trigger anxiety for Muslims living in Western cultures, which pay little or no attention to any systematized purity code.

Purification, simply stated, is the process by which a state of purity is restored. Naturally, only pure water of sufficient amount (*kurr*) to not itself become contaminated in the process may be used for purification of any kind.²⁶ The most visible and commonly known form of purification, even among non-Muslims, is the pre-ritual worship ablutions

²⁴ If it is found only in the yolk, the skin of which remains intact, Sistani says, the white part of the egg remains pure and edible. Seestani, *Islamic Laws*, 17.

²⁵ *Ibid.*, 22. The place of certainty is, of course, more complex than this. Additional principles govern situations of ambiguity. The principle of *istiṣhāb* (to drag along), for example, results in a ruling that if at nine in the morning, one is certain that a carpet is pure, and then, at eleven one questions that knowledge, the carpet remains pure because the certainty that determined it as pure in the first place "is dragged" along (*istiṣhāb*) into the rest of the day, such that mere doubt or questioning cannot undo it. My understanding of this concept was enhanced by a most interesting conversation with Seyed Mahdi Shahrestani.

²⁶ Jurists discuss several more details of the conditions surrounding water used for purification. For example, if the water is of such a small amount that it takes on the smell of the impurity it is purifying an object of, it is said to have become contaminated and, naturally, has not affected the desired purification. See Seestani, *Islamic Laws*, 25-33.

called *wuḍū'*.²⁷ *Wuḍū'* is the means of purification from minor pollution, *ḥadath*, and is obligatory, Sistani says, on six occasions. These include but are not limited to: prior to all obligatory and recommended prayers, apart from the prayer for the dead, and prior to washing and purifying a Qur'an that has become *najis* (impure, unclean).²⁸ *Ghusl* (lustration) is obligatory in seven situations, including major pollution, *junub*.²⁹ As stated above, failing to perform *ghusl* when required makes it *makrūh* to perform a variety of religious as well as non-religious activities.

But Islamic law requires purification (*tathīr*) also of items that may have contracted impurity, such as vessels for food or water, cooking pots, clothing, or carpets, etc. Sistani discusses this under the rubric of *muṭahhirāt* (things that purify). For example, a utensil that was licked by dog is purified in the following manner: “If the mouth of a utensil which a dog has licked, is narrow, dust should be thrown into it and after adding some quantity of [pure] water, it should be shaken vigorously, so that the dust may reach all parts of it. Thereafter, the utensil should be washed in the manner mentioned above” [i.e.] “three times if less than Kurr water is used, [etc.]”.³⁰ Not unlike ordinary washing, this “non-religious” method of purification recalls a comment Ayatollah Makarim al-Shirazi attributes to Fadl ibn Hasan al-Tabarsi (d. 1154) suggesting that what we call impurity may simply be religion’s vocabulary for an aversion to what people, on the basis of culture, consider disgusting.³¹

²⁷ For details of how this done, and the rules surrounding *wuḍū'*, refer to any jurist’s legal manual, for example, Seestani, *Islamic Laws*, 41-60.

²⁸ See *ibid.*, 55, where all six situations are listed.

²⁹ Too knotty to simply be listed here, details may be found in *ibid.*, 61-69.

³⁰ *Ibid.*, 26.

³¹ *Aḥkām al-Mughtaribīn waḥḥān li-fatāwā ‘asharah min marāji‘ al-taqlīd* (Tehran: Markaz al-Taba‘ah wa al-Nashr li’l-Majma‘ al-‘ālamī lī ahl al-bayt, 1420/1999), 17 n.1. The relationship between “religion” and “culture” can be ambiguous. It is certainly tempting to predict a pronounced correspondence between a strong religious purity code and cultural traits of a given society. The general repulsion towards (and fear

Ablutions, it may be said, have no necessary hygienic purpose (though they may be said to aid this and popular understanding often associates ablution with actual cleanliness.) Rather, the primary intent, especially of *wuḍū'*, appears to be symbolic of the worshipper separating himself or herself from moral evil in the act of worship. We will elaborate on this idea in the next section. The legal permission to use sand or dry dust when no water is available clearly reveals the symbolic function. More demonstrably, perhaps, a person afflicted with minor impurity (*ḥadath*) is not barred from engaging in non-ritual activities, though as stated above, this is not the case with major impurity (*janābah*).

It should be noted, in conclusion, that according to the Muslim code, the natural state of all things, apart from what the law determines as unclean, is purity (*tahārah*). Ablutions (*wuḍū'*), lustration (*ghusl*), and purification (*tathīr*) simply restore nature's equilibrium. Contracting pollution, though frequent and literally impossible to avoid, is in reality a temporary yet significant aberration from the divinely created condition of purity.³² "The transient nature," Katz observes, of various impurities "and the routine ease of their ritual reversal made the alternation of purity states into a background rhythm

of) dogs in (especially Shi'ite) Muslim cultures—feelings hardly shared by Western countries—is a case in point. Claude Fischler argues that strong distrust of and emotional disgust towards unknown foods "arises from a strictly cultural difficulty of identification and classification, often rooted in religion. He refers to this phenomenon as "a socially (re)constructed biological safeguard." See Claude Fischler, "Food, Self and Identity," *Social Science Information* 27, 2 (London: SAGE, 1988), 282-4. Against this theory, it is said that in Mali, where the majority of the population is Muslim, "best friends throw excrement at each other and comment loudly on the genitals of their respective parents – [as] a proof of the love of friends." Here, dissonance between the Muslim purity code and a cultural practice could not be more explicit. Robert Brain, *Friends and Lovers*, quoted in Ray Pahl, *Friendship* (Cambridge: Polity Press, 2000), 97.

³² As a 'natural state,' purity may be paralleled with the fundamental Islamic doctrine of *fitrah*, the primordial and natural human condition of submission to God, marred only by violations of faith, such as holding beliefs considered un-Islamic or Islamically unorthodox. This doctrine is based on Qur'an 7:172, "And when thy Lord took from the children of Adam, from their loins, their seed, and made them testify touching themselves, 'Am I not your Lord?' They said, 'Yes, we testify'—lest you should say on the day of Resurrection, 'As for us, we were heedless of this.'" For an interesting discussion of *fitrah*, particularly in application to a modern Muslim interpretation of religious freedom, see Abdulaziz Sachedina's *The Islamic Roots of Democratic Pluralism* (New York: Oxford University Press, 2001).

of ritual life, one that could be slowed by devotional exercises such as fasting and vigils but never definitively halted.”³³ This daily experience of transit from one state to the other would suggest ambivalence in one’s relationship to the world around oneself, creating both a level of comfort as well as an acute awareness of the potential for pollution lurking in the world. In other words, it would appear to produce a sense of safety and security along with a conscious awareness of danger. The literature indicates that the latter is particularly accentuated amongst purity-conscious Muslims in the West. *Fatāwā* in response demonstrate an intention on the part of scholars both to elevate feelings of safety in some areas, and to warn of dangers in others.

Before leaving this overview of the Shi’ite purity code, it is helpful to briefly discuss the matter of spittle or backwash (*su’r*, literally: leftover). Ze’ev Maghen’s treatment of the legal status of *su’r* in Sunni Islam is illuminating.³⁴ In his analysis of *ḥadīths* dealing with the spittle of ritually contaminated Muslims, Maghen shows that in contrast to other bodily fluids which are in all circumstances either pure or impure consistently, saliva “has an indifferent/neutral—or fluctuating/dependent—ritual [I would use the word legal] status [...]”³⁵ Even in the most ritually polluted state, a Muslim’s saliva remains pure; yet, the saliva of an intrinsically impure creature, pig for example, is seen to be consistently impure and ritually contaminating.

The point Maghen draws from this is two-fold: firstly, as part and parcel of the essence of an organism, *su’r* is neutral with regard to purity. It is defined in this regard

³³ Katz, *Body of Text*, 145.

³⁴ *Su’r* refers not just to saliva in the mouth, but, primarily in fact, to the liquid left behind in a vessel after a person or animal has drunk from it (backwash), as seen in the example of the vessel licked by a dog above. See Ze’ev Maghen, “Close Encounters: Some Preliminary Observations on the Transmission of Impurity in Early Sunni Jurisprudence,” *Islamic Law and Society* 6 no. 3 (Leiden: Brill, 1999), 359.

³⁵ *Ibid.*, 362.

only by acquisition; *su'r* acquires its legal status from the being with which it is associated; secondly, *su'r* demonstrates how defilement, as Maghen puts it, is never “absorbed”: pollution somehow fails to penetrate, pervade or in any essential way alter one’s ‘person’.”³⁶ In other words, Maghen’s analysis shows the ‘superficiality’ and transience of ritual impurity, as well as the inalterability and permanence of intrinsic impurity; the latter can neither become pure, nor can a pure being ever (logically) become intrinsically impure, even in the most ritually defiled of conditions. The relevance of this fundamental principle of the purity code for our purposes is in relation to the classical and pre-modern Shi’ite majority opinion regarding the impurity of non-believers, as discussed below. The status a jurist gives to *su'r* in relation to non-Muslims indicates his opinion on non-Muslim impurity and underlines the intrinsic quality of that status.

Finally, some of the insights drawn from scholarly analyses of purity codes across religious traditions are worth mentioning very briefly. Much of this discussion originates in biblical scholarship. David Freidenreich’s fascinating study of purity and food in the three Abrahamic traditions brings to light three categories of impurity within the Hebrew context: “ritual” impurity, identified, Freidenreich notes, by Jonathan Klawans and Tikva Frymer-Kensky, while easily contracted via contact with bodily fluids and highly contagious, is neither sinful nor permanent. It is roughly parallel to minor and major impurity in Islam. “Moral” impurity, on the other hand, expresses what Klawans describes as a highly contagious and dangerous defilement resulting from sinful actions. The Muslim code, as will be seen below, also has a strong underlying moral current, though this is not seen as physically contagious. The third biblical term Freidenreich

³⁶ Ibid., 364.

discusses is what Christine Hayes calls “genealogical” impurity.³⁷ Intrinsic and permanent, this form of impurity is fundamental to inter-communal identity formation. Further, in respect of being inalterable and ethnically defined, Judaic genealogical impurity is similar to Shi’ite conceptions of intrinsic impurity of non-Muslims, although the analogy is not complete.

THE MORAL CURRENT OF ISLAMIC PURITY LAW: QUR’ANIC TERMINOLOGY

Qur’anic language of purity and impurity is characterized by dichotomous categories, by interlocking sets of binary opposites connoting strong moral boundaries between belief and unbelief. Similarly, clear Qur’anic associations between purity and fitness for the right kind of worship—that which is endorsed by the Qur’an—are contrasted with a perceived coherence between pollution and idol worship, once again highlighting the terminology’s symbolic current. This internal agreement between purity, belief, and fitness for worship on the one hand and impurity, unbelief, and unfitness for worship on the other brings into relief the highly individualistic character of the Islamic purity code and the consequently general—though not altogether absolute—notion of the non-contagious nature of pollution. As every human being, according to Islam, is individually accountable before God in morality and worship and does not access God’s pleasure or displeasure through the merits or demerits of another human being, so ritual pollution attaches only to the person who contracted it and cannot be transferred to others merely by contact with a “precluded” person.³⁸ Rather, a person must come into direct contact with the polluting agent itself.

³⁷ David Moshe Freidenreich, *Foreign Food: A Comparatively-enriched Analysis of Jewish, Christian, and Islamic Law*, Unpublished Doctoral Dissertation (Columbia University, 2006), 16-18.

³⁸ For a helpful discussion on the place of the individual in Islamic thought and society, see Richard Bulliet, “The Individual in Islamic Society,” in *Religious Diversity and Human Rights*, ed., Irene Bloom, J. Paul

The Qur'an uses several nearly synonymous words to indicate substances, actions, entities, and sometimes people that it considers polluted. The most common, *rijs*, appears 10 times in the Qur'an³⁹ and is commonly understood as a synonym for *najas*, the technical legal term—especially for Shi'ism—denoting “intrinsic impurity.”⁴⁰ A key verse for *rijs*, Surah 5:90, “O you who believe, wine (implying any alcoholic beverage) and games of chance (*al-maysir*) and idols and divining arrows are a filth (*rijs*) of Satan’s doing, so avoid it so that you may succeed,” shows the close association between moral evil, uncleanness, and divine prohibition. That believers are addressed specifically suggests that moral filth is an identifying feature only of unbelievers. This is made clearer in Surahs 22:30 and 9:125, where the obstinate worship of idols in spite of the divine Revelation is said to accumulate *rijs*. Surah 9:95 specifically identifies “wrong-doing folk” (*al-qawm al-fāsiqīn*) as *rijs*.⁴¹ The same idea is conveyed in Surah 9:28, which is the sole occurrence of the term *najis*:

Oh you who believe! Truly, the associaters (*mushrikūn*) are impure (*najis^{un}*); so let them not approach the holy sanctuary (*al-masjid al-ḥarām*) after this their year. And if you fear poverty then God will enrich you from his bounty, if he wills. God is the Knower, the Wise.”

Martin, and Wayne L. Proudfoot (New York: Columbia University Press, 1996), 175-191. Bulliet argues that the strong historical evidence that Muslim piety is often grounded more in following the personal example of others than on conformity to doctrine demonstrates a strong individualism in Islamic practice, reinforced by the sense of individual responsibility of confessing Islamic faith, fulfilling religious obligations, and answering finally to God on the Day of Judgment.

³⁹ Surahs 5:90; 6:125; 6:145; 7:71; 9:95; 9:125; 10:100; 22:30; 33:33. The last one eludes me.

⁴⁰ See Katz, *Body of Text*, 13, 48.

⁴¹ “They will swear by Allah unto you, when ye return unto them, that ye may let them be. Let them be, for lo! They are unclean (*rijs*), and their abode is hell as the reward for what they used to earn.” The identity of “they” is not clearly specified. Toshihiko Izutsu understands the verse as speaking to “*kafirs*” where I have understood it in light of the term used in the following verse (*al-qawm al-fāsiqīn*) which Pickthall translates as “wrongdoing folk.” In the end, it is the same group of people being referred to. See Izutsu, *Ethico-Religious Concepts*, 240-41.

Shi'ite scholars have commonly read the word *najis* in the technical sense, as a formal legal term denoting moral, doctrinal, or substantial impurity.⁴² For a number of Shi'ite commentators and jurists, as will be explained below, substantial impurity suggests that unbelievers may be classified—as far as purity is concerned—with *rijs* substances such as wine, carrion, pork, urine, and vomit (among others), which, when ingested or eliminated from the body, render believers circumstantially impure. The same concept is also found in a non-legal sense in several other verses, such as Qur'an 10:100: “It is not for anyone to believe except by the permission of God. And he has appointed filth (*al-rijs*) upon those who have not understanding.”⁴³

Both *najas* and *rijs*, then, denote an extreme form of impurity. In a Sunni tradition on the authority of Abu Hurayra, their association with unbelievers is contrasted with dissociation from Muslims, as the Prophet exclaims that a believer “*la yanjus/yanjis*.”⁴⁴ As Maghen explains, the word is rendered without vowels and could read either “a believer is never contaminated!” or “a believer never contaminates!” Maghen concludes that both readings are consistent with the logic of the Islamic purity code and underline the fact that the code allows that nothing intrinsically pure, such as a believer, can ever change its status; nor can it contaminate or pollute others.⁴⁵ In other words, whatever circumstantial impurity believers might experience, this can never alter their intrinsic purity. In the Sunni code, human beings are, as a class, much like water in that they are distinct from substances that, if impure, carry pollution with them and affect the world

⁴² Katz, *Body of Text*, 48.

⁴³ See also 6:125; 7:71; 9:95; and 9:125, which reads: “But as for those in whose hearts is a disease, it (Surahs of the Qur'an, it seems) added to them filth upon filth and they died while yet unbelievers (*kāfirūn*).” In other words, hearing the Qur'an only increased them in unbelief and emphasized the contrast in moral quality between the hearts of unbelievers and of believers.

⁴⁴ Muslim, *Hayd*, 29: 371, cited by Maghen, “Close Encounters,” 365.

⁴⁵ Maghen, “Close Encounters,” 365-69. Maghen notes that al-Nawawi's commentary allows for both readings, 365.

around them. As we will see, the classical Shi'ite majority position on the intrinsic impurity of unbelievers ruptures this principle to some degree.

Impurity and purity in Qur'anic vocabulary are also conceptually associated with prohibition and permission. The most common Qur'anic word denoting something that is morally filthy, *khabīth*, is the precise antonym of *ṭayyib* which carries the notion of pleasant and typically refers, among other things, to permitted foods.⁴⁶ The pair is also parallel to the legal terminology that divides the world into things forbidden (*ḥarām*) and permitted (*ḥalāl*). The verb *ḥarrama*—meaning to make “unlawful, forbidden, prohibited,”⁴⁷—identifies certain behaviours, as well as persons, places, times, or objects (especially certain foods) as “taboo.” Qur'an 2:173, for example, says: “He has forbidden you carrion (*mayta*), blood, the meat of swine (*laḥm al-khinzīr*), and whatever has been consecrated to other than God [...]” In its original meaning, taboo carries the idea of setting apart as sacred and unapproachable, thus referring simultaneously to what belongs to the divine realm and to the forbidden.⁴⁸ As Toshihiko Isutzu observes, in its connection to taboo, *ḥarām* refers not only to “an action punishable by law,” decided solely by God’s free will, but also to the sacred state of heightened ritual purity (*iḥrām*) required of those who make the pilgrimage.⁴⁹ Maghen points out that the term is also used to describe the state of ritual purity required for daily *ṣalāt*.⁵⁰ In its strongest sense, then, to be in the state of ritual purity, which theoretically occurs several times daily, is at the same time to be in “the state of taboo.”

⁴⁶ Isutzu, *Ethico-Religious Concepts*, 235.

⁴⁷ *Encyclopedia of the Qur'an*, s.v. “Lawful and Unlawful,” (Leiden: E. J. Brill, 2001-2006), 3:172.

⁴⁸ *Encyclopedia of Religion* 1st edition, s.v. “Taboo,” (New York: Macmillan, 1987-), 14:233. See also, Isutzu, *Ethico-Religious Concepts*, 237.

⁴⁹ Isutzu, *Ethico-Religious Concepts*, 237-38.

⁵⁰ Maghen, “First Blood,” 93.

Purity, we understand then, is in the first instance the condition of readiness for worship, being inwardly cleansed of the most serious taboo (that is, unbelief), avoiding association with sinful substances and behaviours, and being symbolically purified by the rites of *iḥrām*. The Qur'anic terminology suggests utter incompatibility between faith and its works on the one hand and unbelief and its practices on the other, parallel to the divide between purity and impurity. By including unbelief within the conceptual and legal framework of purity and impurity, Isutzu notes, the Qur'an "creates, as it were, a new moral and spiritual conception of taboo, and gives an ethical content to the primitive idea of *ḥarām*, by placing 'under taboo' various manifestations of *kufr*."⁵¹ Fadlallah's interpretation of unbeliever impurity, as will be seen below, appears to draw from this Qur'anic frame of reference.

In more general terms, the moral framework of the Shi'ite purity code—one that presupposes and builds upon an ethical divide between belief and unbelief—translates into a social paradigm that has, not unlike that of the ancient Judaism studied by Christine Hayes, been used "not only to describe but also to inscribe" and indeed to sanctify "sociocultural boundaries" between insiders and (in this case non-Muslim) others.⁵² This tendency is manifested in numerous areas where direct or indirect social contact threatens to undo purity. The most ubiquitous case for Shi'ites is foodstuffs. Shi'ite law identifies three categories of prohibited food: food touched with moisture by non-Muslims which is then considered impure; food containing something *najis*, such as pork or wine; and food derived from an illegitimately slaughtered animal (*ghayr mudhakkā*). For Muslims in a non-Muslim society, care must be taken with regard to contact with all three, which raises

⁵¹ Isutzu, *Ethico-Religious Concepts*, 238.

⁵² Christine E. Hayes, *Gentile Impurities and Jewish Identities: Intermarriage and Conversion from the Bible to the Talmud* (Oxford: Oxford University Press, 2002), 3.

questions regarding several contingent areas of life: commercial transactions involving foodstuffs or animal products, renting accommodations, frequenting barbershops and laundromats, sitting on trains and buses, burying the dead, and using cleaning agents, among other things.

In conclusion, I suggest that the framework described above lends itself to a legal interpretation that could be expected to reproduce a sacred-profane dichotomy on the social level, thereby reinforcing the perception that rigid social boundaries between insider and outsider are sanctified and thus permanent expressions of cosmic reality. The analysis to follow later in the chapter will examine this hypothesis.

CONTROVERSIAL CLEANLINESS: NON-MUSLIM FOOD AND PURITY IN CLASSICAL LEGAL DISCOURSE

My treatment of these subjects of Shi'ite legal discourse between the seventh to the fifteenth centuries relies largely on secondary source materials, particularly that of David Freidenreich, whose work looks closely at this period. My own research into the primary sources takes Freidenreich's study further by looking at Qur'anic exegesis on the topic of non-Muslim impurity for the same period and legal discourse on the impurity of non-Muslims and their food in modern and contemporary times. On the question of the relationship between the impurity of non-Muslims and their food, secondary research reveals some ambiguity. Maghen, for example, argues that there is no connection between the Muslim purity code and food prohibitions, even into the modern period. His argumentation is persuasive but, in my opinion, he overstates his case, neglecting or minimizing the importance of evidence to the contrary, particularly in Shi'ite *fiqh*.⁵³

⁵³ Maghen, "First Blood," 67ff. Admittedly, Maghen's conclusion is based on a study of primarily Sunni *fiqh*. While some of Maghen's reasons are convincing, they do not, in my opinion, warrant a summary denial of connection between impurity and prohibition. Maghen's critique of Mary Douglas' general theory

In agreement with Freidenreich, I argue that following the introduction of legal rationalism in Shi'ite *fiqh* a fundamental shift in the relationship between unbeliever impurity and food prohibitions took place. This study therefore looks at the issue from the perspective of two quite distinct phases within the early period. This shift is best demonstrated by dividing the discussion more or less into two parts: a) food of non-Muslims; and b) non-Muslim impurity. I argue further that scholars in the contemporary period make a different and perhaps more subtle shift by maintaining a connection between non-Muslim impurity and food prohibitions while reversing the majority opinion on non-Muslim impurity or employing other legal principles that effectively neutralize any negative repercussions the association holds.

a. Food of non-Muslims

Freidenreich's study demonstrates that the pre-rationalist period of Shi'ite legal discourse finds no direct connection between the purity status of non-Muslims and prohibitions on consuming their food. Authorities prior to al-Mufid (d. 1022) and al-Murtada (d. 1044) prohibited non-Muslim food for reasons other than the intrinsic impurity of non-Muslims. When impurity was mentioned by early authorities at all in this context, it clearly referred to circumstantial impurity only. "If they eat from your food and they perform ritual ablutions, then there is not harm," Ja'far al-Sadiq is said to have stated.⁵⁴ Freidenreich, I believe, is correct in concluding that had al-Sadiq (or those in the community who produced the statement in his name) intended to pronounce on the

of purity, especially as applied to Islam, along with her tacit and explicit pairing of impurity and dietary prohibition, is especially illuminating. Maghen himself also admits that Sunni "*fiqh al-ṭahārah* [...] does occasionally interweave issues of legal edibility and ritual purity." Ibid., 89. Further, some association must be admitted on the basis of the Qur'anic material (e.g. 5:90 / 6:145) as discussed above. Kevin Reinhart prudently suggests some association between purity and dietary law in the Sunni context: "The underlying meaning of *rijs*, when not specifically contamination, is certainly 'something worthy of avoidance' but the 'why' of that avoidance is elusive. *Encyclopedia of the Qur'an*, s.v. "Contamination," 1:411.

⁵⁴ Quoted by Freidenreich, *Foreign Food*, 326.

intrinsic impurity of non-Muslims, “his requirement that they perform ablutions prior to sharing a meal would make no sense.”⁵⁵ This prohibition was, however, difficult to rationalize, Freidenreich shows, as the food of circumstantially impure Muslims was not similarly prohibited. As a rationally unsatisfying discourse, it could not be maintained without modification once Shi'ite legal theory admitted the principle of reason.

A key scripture regarding the food of non-Muslims for both pre- and post-rational theology is Qur'an 5:5, stating: “the food of the People of the Book is permitted to you.” The verse is widely interpreted by Sunni scholars to include meat slaughtered by non-Muslims, but early Shi'ite authorities advanced a more restrictive interpretation. The argument was two-fold. The first part conditions the apparent permissiveness of the text on a pair of clauses found in 6:118-121, “Eat of that over which the name of God has been mentioned if you are believers in his signs [...] And do not eat of that over which the name of God has not been mentioned for this is grave sin [*fisq*] [...]”⁵⁶ It might be argued that as a minority, the Shi'ite community had more interest in defining their boundaries more closely.⁵⁷ On the other hand, partaking of the food of outsiders to the same degree as Sunnis could have been used, on the basis of *taqīyah* (dissimulation), to deflect undue attention from themselves.

⁵⁵ Ibid, 327.

⁵⁶ I use Toshihiko Izutsu's translation of *fisq* here as “grave sin,” a word that Izutsu argues denotes a particularly high degree of *kuf*r, expressed as disobedience to what God commands, whether that be performing the forbidden, or failing to perform what is commanded (157-61). As a synonym of *kuf*r, it is contrasted with *imān*, which means “to follow the guidance of God [...]” Izutsu, *Ethico-Religious Concepts*, 162.

⁵⁷ Religiously based food prohibitions have long been used by different religious traditions as a marker of community identity. As an introduction to this oft-discussed phenomenon, see Fischler, “Food, Self and Identity,” 275-92; Paul Fieldhouse, *Food and Nutrition: Customs and Culture*, 2nd Edition (London: Chapman & Hall, 1995), 120-49; and Joelle Bahloul, “Food Practices Among Sephardic Immigrants in Contemporary France: Dietary Laws in Urban Society,” *Journal of the American Academy of Religion* LXIII no. 3 (1995), 485-96.

Whatever the motivation, with remarkable consistency, Shi'ite traditions from the "Four Books" explain that only Muslims (and sometimes only Shi'ites) are capable of invoking God's name properly; Christians and Jews, not to mention non-scripturaries, may not, on account of their false doctrines regarding God, be trusted in this matter.⁵⁸ Although also citing traditions that permit meat slaughtered by Jews and Christians, the last of these authoritative traditionists, Muhammad b. al-Hasan al-Tusi (d. 1067) concludes, nevertheless, that these "must be interpreted as exceptions to the general prohibition of foreign food."⁵⁹ Al-Tusi allows for exceptions in two standard situations of necessity: the absence of an alternative sustenance, and the threat of danger, in which case the Shi'ite is justified in practicing *taqīyah*.⁶⁰ The minority who permits non-Muslim slaughter does so on the basis of a more inclusive or pluralistic theology that accepts "the legitimacy of non-Shi'i references to God's name [...]"⁶¹ Freidenreich notes that each of the four authoritative Imami tradition collections contain such traditions.⁶²

The second part of the argument used by restrictive authorities is that "food" in 5:5 cannot mean all food, including meat, as Sunnis understand it, for such an inclusive meaning would suggest the absurd notion that pork, carrion, and blood are likewise permitted. The verse, they argue, requires a delimiter to make sense, and most authorities advance the interpretation attributed to al-Sadiq that "this refers to grains and whatever

⁵⁸ See Freidenreich, *Foreign Food*, 314-17.

⁵⁹ *Ibid.*, 316.

⁶⁰ *Ibid.*, 317. Maintaining strict abstinence could, for example, result in unnecessary identification of themselves as Shi'ite in situations where this could compromise personal security.

⁶¹ *Ibid.*, 319.

⁶² *Ibid.*, 318. Freidenreich notes in this connection that some traditions, notably the Isma'ili jurist al-Nu'man b. Muhammad (d. 974) added the condition that the non-Muslim and non-Shi'ite invocation of God's name be witnessed by the Shi'ite who was to eat the meat. Including non-Shi'ite Muslims in this clause suggests a strong current of distrust among Isma'ilis of anyone outside of the community.

does not require slaughter.”⁶³ This interpretation raises the question as to why Muslims would need permission to consume the (uncooked) grain of non-Muslims, a question I have not come across in my research.⁶⁴ Thus, while the majority opinion on non-Muslim, including scriptuary, slaughter was clearly the more restrictive, permissive interpretations existed alongside, but these were either in the minority or were explained away as exceptions to the rule.

Another situation concerned whether some of the meat sold in Muslim markets might have non-Muslim origins, suggesting a sufficiently integrated market to anticipate this possibility. Al-Mufid’s leniency in this regard is typical of the general principle that excessive investigation—that is, beyond what can be clearly and easily ascertained about the source of meat, particularly in a Muslim context—is unnecessary and unwarranted. One needn’t go beyond the surface, al-Mufid says, “because the outward appearance of Islam is sufficient for you to regard the meat as permitted.”⁶⁵ Later jurists also argue that anything that marks a meat product as having been in Muslim hands is sufficient evidence of its legal slaughter (*tazkīyah*).

So, from where did the notion that the food of unbelievers is forbidden because unbelievers are impure originate? Freidenreich argues that in the new atmosphere of rationalism that arose in the early 11th century, the argument articulated above was

⁶³ This is the rendering that Muhammad Baqir al-Majlisi gives the tradition. Others offer a slightly different version, such as “and the like,” where al-Majlisi has “whatever does not require slaughter.” al-Majlisi, *Biḥār al-anwār* (Tehran: al-Maṭba‘ al-Islāmīyah, 1956), 80:42-3. See also Freidenreich, who discusses interpretations of this tradition by the Shi’ite Traditionists al-Kulayni (d. 939/40), ibn Babawayh (d. 991/2), al-Mufid (d. 1022) and Ahmad b. Muhammad al-Barqi (d. ca. 893/4), 397, 398, 407. Early Shi’ite Qur’an commentators advanced the same argument. See, for example, Al-Shaykh al-Ajall Jamal al-Din (Suyuri) al-Miqdad, *Kanz al-‘irfān fī fiqh al-Qur’ān* (Tehran: Haidar, 1384 q.), 1:48, and n. 2 & 3; Ahmad ibn Muhammad al-Ardabili, *Zubdat al-bayān fī aḥkām al-Qur’ān* (Qom: Salmān Fārsī Press, 1375 sh.), 1:68.

⁶⁴ Cooked grain is another issue, being susceptible to the transfer of impurity through wetness. Perhaps this is why it was felt necessary to state that uncooked grain could be eaten. But this hypothesis depends on the doctrine of the impurity of non-Muslims and so could only have affected the discourse during and after the time of al-Murtada.

⁶⁵ Cited by Freidenreich, *Foreign Food*, 321.

rationally unsatisfying. Freidenreich demonstrates that it was al-Mufid's student, al-Shaykh al-Murtada, who was the first to offer a new interpretation of Qur'an 5:5 by pairing it not with 6:118-121 but with 9:28,⁶⁶ which, incidentally, says nothing about food.⁶⁷ My own reading of al-Murtada comes to the same conclusion as Freidenreich. That is, al-Murtada argues that non-Muslim food is prohibited both on the basis of 6:118-121 as well as 9:28. The latter verse indicates that Surah 5:5 cannot be interpreted simply on its surface meaning. It must, he says, be referring only to grains and not to the *su'r* of non-Muslims, which is forbidden to use in *wuḍu'*, as is "anything they have touched with their bodies."⁶⁸ The proof for this, al-Murtada reasons, is that unbelievers are impure, both intrinsically (*najāsāt al-'ayn*) and legally (*najāsāt al-ḥukm*).⁶⁹

It seems then, as Freidenreich points out, that while the two ideas (food prohibitions and non-Muslim impurity) existed independently of each other in the pre-rationalist period, the rationalist discourse of 11th century Shi'ite law, in searching for a reasoned defense of the intrinsic impurity of non-Muslims, looked to the prohibition against eating their meat and vice versa. Thus, for adherents of the rationalist school, the impurity of non-Muslims as a causal factor in restrictive opinions regarding their food became standard legal opinion and from thence seeped into popular Shi'ite piety.

b. Non-Muslim Impurity

As the discussion above suggests, al-Mufid's successors must have felt the exclusion of non-Muslim food on the requirement of properly invoking the name of God

⁶⁶ See *ibid.*, 330-36.

⁶⁷ "Oh you who believe! Truly, the associaters (*mushrikūn*) are impure (*najis^{un}*); so let them not approach the holy sanctuary (*al-masjid al-ḥarām*) after this their year. And if you fear poverty then God will enrich you from his bounty, if he wills. God is the Knower, the Wise."

⁶⁸ Al-Shaykh al-Murtada, *al-Intiṣār* (Beirut: Dar al-Adwa, 1985), 89-90.

⁶⁹ *Ibid.*

inadequate for sustaining identity boundaries. Prohibiting non-Muslim meat needed, it seems, additional defense. As argued above, while not completely abandoning the general lines of the earlier interpretation, scholars from al-Shaykh al-Murtada onwards strengthened the prohibition on non-Muslim food (Qur'an 5:5 and 6:118-121) by linking it with the idea of non-Muslim impurity (Qur'an 9:28). Al-Murtada formulates his argument explicitly in contrast to the lenient Sunni view that both permits scriptuary slaughter and sees non-Muslims as circumstantially impure at worst. For al-Murtada, Surah 9:28 clearly establishes the fallacy of both these premises. Since, as the verse declares, unbelievers are intrinsically impure, there is no permission to eat “nor to derive benefit from” the animal products of non-Muslims.⁷⁰ Al-Murtada’s interpretation implies a tightening of social boundaries in social and commercial life. We will explore these questions further in the section on contemporary *fatāwā* below.

The seeds of al-Murtada’s exegesis may have been planted in earlier juristic discourse around the *su’r* of non-Muslims. *Su’r*, we pointed out above, acquires and is therefore an indicator of the purity status of the being to which it belongs. According to Freidenreich, the classical traditionist Muhammad b. Ali ibn Babawayh (d. 991), author of *Man lā yahḍuruhu al-faqīh*, one of four authoritative early compendiums of tradition, cites a tradition on the authority of al-Sadiq prohibiting food “contaminated by Jewish or Christian *su’r*,” as does the seventh Imam, Musa al-Kazim with regard to that of Magians and Jews.⁷¹ Al-Kazim also expresses displeasure at the idea of sharing dishes or beds with these non-Muslims, or shaking hands with them. Likewise, al-Murtada prohibits Muslims from performing ablutions with water contaminated by the *su’r* of non-Muslims,

⁷⁰ Ibid., 193. As cited by Freidenreich, *Foreign Food*, 331-32.

⁷¹ Freidenreich, *Foreign Food*, 326. The tradition Freidenreich cites is from Ibn Babawayh, *Man lā yahḍuruhu al-faqīh* (Tehran: Dār al-Kutub al-Islāmīyah, 1970), 3:219, #1014.

as pointed out above. As Freidenreich observes, these traditions reflect the early presence of concern “not only about the transmission of pollution via *su’r* but also through direct and even indirect contact with the body of a non-Muslim.”⁷²

However, the majority trend in pre-rationalist discourse reflects a view of non-Muslims as circumstantially, but not necessarily intrinsically, impure. The evidence for this is that more permissive traditions, while permitting the consumption of water polluted by the *su’r* of non-Muslims, still prohibit its use in ablutions,⁷³ (which is also indicative, in my view, of the value placed on ritual worship.) Further, other traditions permit sharing food with non-Muslims if the latter have performed ritual ablutions.⁷⁴ As Freidenreich points out, were non-Muslims considered intrinsically impure at this time, their performing of ablutions would make no difference,⁷⁵ as intrinsic impurity, jurists tell us, is not altered by this means.⁷⁶

While this argument is reasonable, the fact that their impurity is understood as transferable suggests to me that it is understood as somehow beyond circumstantial, especially as traditions on the same authorities permit the use of water containing *su’r* of circumstantially impure Muslims.⁷⁷ Moreover, circumstantial impurity is nowhere considered indirectly contagious. Making sense of this suggests the altogether reasonable possibility that the traditions cannot be taken as a reliably consistent and systematic compendium of doctrine at this time; or, it could imply the presence of a third somewhat undefined category of impurity between intrinsic and circumstantial. Without further and

⁷² Freidenreich, *Foreign Food*, 326.

⁷³ See *ibid.*, 325.

⁷⁴ As cited by Freidenreich, *Foreign Food*, 326, and 535, n.60.

⁷⁵ *Ibid.*, 326-27.

⁷⁶ See, for example, footnote 83. Nor, as we have seen, is intrinsic impurity alterable by any other means, though it is commonly taken that conversion to Islam changes the purity status of non-Muslims, who are then required to perform *ghusl* to remove the circumstantial impurity accumulated during one’s lifetime.

⁷⁷ Freidenreich, *Foreign Food*, 325.

clearer references to such a category, however, especially in the later, more developed juristic sources, the latter option seems unlikely.⁷⁸ As we will observe, later sources seem to be aware of this dilemma and, not surprisingly, resolve it by classifying the ambiguous category as intrinsic impurity.

Qur'anic exegesis of Surah 9:28 by Shi'ite commentators subsequent to al-Murtada suggests that scholars felt it necessary to establish the intrinsic impurity of non-Muslims doctrinally. My own study of a representative sampling of these commentaries bears this out. As a comparative point of reference, the pre-Murtada Sunni scholar Abu Ja'far ibn Jarir al-Tabari's (d. 923) commentary notes the disagreement around the implications of Surah 9:28 and the precise meaning of the term *najis*. He cites several traditions stating that the impurity connected with the *mushrikūn* is due to their failure to perform *ghusl*, suggesting a perpetual state of circumstantial impurity.⁷⁹ Others, he says, including Ibn 'Abbas, equate *najis* with *rijs*, the term used to describe the impurity of dogs and pigs. Tabari rejects this interpretation outright, though he accepts the inclusion of Jews and Christians within the designation of *mushrik* while limiting the prohibition of mosque entry to the *Masjid al-Ḥarām* and the surrounding area.⁸⁰ Tabari is typical of Sunni interpreters, apparently accepting the idea that non-Muslims may be circumstantially impure but are not themselves impure in substance.

In contrast, the majority of Shi'ite scholars follow al-Murtada's lead. Al-Murtada's student, al-Tusi (whose views as tradition narrator were examined above)

⁷⁸ Against my argument, it is possible, as some scholars note, that the boundary between major ritual impurity (*junub*) and substantial impurity (*najāsah*) was at some very early period, less rigid. See *Encyclopedia of the Qur'an*, s.v. "Ritual Purity," 4:504.

⁷⁹ Abu Ja'far Muhammad ibn Jarir al-Tabari, *Tafsīr al-Tabarī: Jāmi' al-bayān 'an ta'wīl al-Qur'ān*, (Cairo: Dār al-Ma'ārif, n.d.), 14:190-91.

⁸⁰ *Ibid.*, 14:191, 192.

agrees with al-Tabari that the verse includes the People of the Book. In addition to their failure to perform *ghusl*, however, al-Tusi argues that Jews and Christians qualify as *mushrikūn* because their beliefs about Ezra and Jesus allegedly compromise the strict monotheism of Islam.⁸¹ Further, in taking “as lords besides God their rabbis and monks, they obey prohibitions and permissions contrary to what God has commanded.”⁸² Al-Tusi evidently accepts the theology that associates deviation from the Qur'anic position on *ḥarām* and *ḥalāl* with unbelief because this is equivalent to “forging against God a lie.”⁸³

Commentators after al-Tusi do not depart greatly from the broad lines of his interpretation. If anything, they refine it with more extensive linguistic analysis, as though attempting to defend the position against criticism. One of the most influential of Shi'ite scholars, al-Tabarsi (d. 1153), introduces an analysis around the term *najis* that appears to clinch the argument, as it persists for centuries. *Najis*, he says, is a *maṣḍar* (verbal noun), admitting no qualifiers of number or gender. Unbelievers are, therefore, impure as a class and without exception.⁸⁴ Later commentators, such as al-Miqdad al-Hilli (d. 826/1423), repeat the *maṣḍar* analysis virtually verbatim.

Like al-Tabarsi, Miqdad sees the impurity of unbelievers as their identifying mark: so pervasive is their impurity, he says, there is no other way to describe them—*laysa lahum waṣf illā al-najāsah*.⁸⁵ As a legal commentary, al-Miqdad's is one of the most extensive on this issue. In addition to clarifying the impurity of unbelievers as

⁸¹ According to Q9.30, Jews are said to refer to Ezra as the son of God and Christians, of course, refer to Jesus in the same way.

⁸² The first part of this statement is an allusion to Q9.31. The second part follows the argument that one obeys the laws of whomever one takes as lord and the supposed laws of Ezra and Jesus are allegedly contrary to God's commands. Abu Ja'far Muhammad ibn Hasan al-Tusi, *Tafsīr al-Tibyān* (Najaf: Maktabat al-Qusayr, 1960), 5:234.

⁸³ Izutsu, *Ethico-Religious Concepts*, 131. See Surah 10:69-71.

⁸⁴ Fadl ibn Hasan al-Tabarsi, *Mukhtaṣar Majma' al-Bayān fī Tafsīr al-Qur'ān*, (Mu'assasat al-Nashr al-Islami, 1413 a.h.), 1:20

⁸⁵ (Suyuri) al-Miqdad, *Kanz al-'irfān*, 1:45 n. 2.

najāsah 'aynīyah (intrinsic impurity), having nothing to do with failure to perform *ghusl* or *wuḍū'*,⁸⁶ al-Miqdad argues that the *shirk*-like beliefs of *ahl al-dhimma* include them in this category.⁸⁷ Finally, he says, the legal consequences of this status are such that any food touched by unbelievers with wetness is contaminated and prohibited to Muslims;⁸⁸ moreover, unbelievers are forbidden entry into all mosques, as the Qur'an uses the noblest part of a thing (*al-masjid al-ḥarām*) to refer to the whole.⁸⁹

However, in the period between these two scholars, Allamah al-Hilli (d. 1325) provides a truly Shi'ite rationalization for the impurity of non-Muslims which makes no reference to the *maṣḍar* argument. Al-Hilli borrows Qur'an 9:28 to shore up the Shi'ite doctrine of prophetic purity against statements by the Sunni eponymous founders of their respective *madhāhib*, Imam Malik ibn Anas and Muhammad ibn Idris al-Shafi'i, in support of non-Muslim purity. The prophets all were Muslims, al-Hilli quotes from a tradition attributed to Ja'far al-Sadiq, as were all their ancestors. The saying provides textual proof in the form of the famous tradition in which Muhammad is believed to have said: "They [the prophets] continued to pass through pure loins to pure wombs until God brought me into this your world." Al-Hilli clinches his argument with a combination of reason and scripture. "If any one of [the prophets] was a *kāfir*," he argues, "he would not be worthy of the characteristic of purity, because God has said that the *mushrikūn* are *najis*, and so he ruled that *kuffār* are impure."⁹⁰ Thus, while al-Murtada brought Surah 9:28 into the discussion on non-Muslim food, al-Hilli used it to substantiate the purity of

⁸⁶ "If they washed their bodies seventy times, they would not add anything [to themselves] except impurity," he says, as is stated in "*rewāyāt ahl al-bayt*." Miqdad, *Kanz al-'Irfān*, 1:47.

⁸⁷ *Ibid.*, 1:49, 50.

⁸⁸ *Ibid.*, 1:48, and n.2 & 3.

⁸⁹ *Ibid.*, 1:49, n.1.

⁹⁰ Allamah al-Hilli, *al-Nāfi' Yawm al-Ḥaṣhar*, (Dar al-Adwā', 1417), 90.

the prophets and their ancestors. Both scholars evidently had in mind the prevailing Sunni view that did not sufficiently differentiate between Muslims and non-Muslims in the matter of purity. By invoking 9:28, the masters of Shi'ite rationalism were able, at least to their own satisfaction, to demonstrate the superior piety of the Imami *madhhab*.

Until the modern period when new interpretations are introduced,⁹¹ commentators simply repeat and elaborate on the main threads of the classical position. Al-Kashani (d. 988/1580), for example, suggests that the impurity of the *mushrikūn* is due to the filth (*khubth*) not solely of their beliefs, but of their inward constitution (*bāṭinihim*), suggesting a notion that beliefs have a direct link with human physiology.⁹² As do other commentators, al-Kashani implicitly acknowledges the still controversial nature of these views and, against the more lenient Sunni position that sees the impurity of unbelievers as legal (*najas al-ḥukm*) only, argues that the narrower view is consistent with a tradition on the authority of Hasan al-Basri requiring Muslims to wash after shaking hands with a *mushrik*.⁹³ The majority opinion among Qur'an commentators after al-Murtada, then, is clearly that the *mushrikūn* as a class are intrinsically impure. Most, if not all commentators, include Jews and Christians in this category. Muhammad Baqir al-Majlisi (d. ca. 1659), who was instrumental in formulating the Shi'ite worldview supported by and supportive of the Safavid dynasty (1501-1726) that made Shi'ism the Iranian state

⁹¹ For details, see below.

⁹² Malatafah Allah Kashani, *Tafsīr al-Ṣāfi* (Beirut: Mu'assasat al-'Ilm li al-Matbu'at, 1982), 2:333. This latter point is not without parallel in other belief systems, notably Eastern philosophies and indigenous traditions wherein what one believes in one's heart and mind manifests in the body, in terms of health, for example. The same may be said even of Western traditions with regard, for example, to the perceived connection between prayer and bodily wellbeing.

⁹³ Ibid.

religion, also affirms the by now standard Imami opinion on the intrinsic impurity of non-Muslims and the prohibition against sharing their food and dishes.⁹⁴

In conclusion, though the earliest basis for prohibition against non-Muslim food was related not to impurity but rather to the non-Muslim's lack of proper belief, with al-Murtada's new interpretation sometime in the early 11th century, a further basis of prohibition—that of non-Muslim impurity—is added. Nevertheless, this later doctrine was, like the first, determined first and foremost by a group's distance from the Islamic doctrine of *tawhīd* (oneness of God). That is, the less a religious group's idea of God conformed to the Islamic idea of oneness—or the more it implicitly or explicitly violated it—the more likely that group would be considered impure. This principle is seen in the idea that such groups are unable to properly pronounce God's name when slaughtering an animal. Thus, I suggest that the extension of the notion of doctrinal error into the methodology for determining impurity facilitated the addition of non-Muslim impurity as a basis for prohibition and, by extension, for strengthening social boundaries.⁹⁵ Not until the contemporary period do we see any major shift in this opinion.

THE PURITY SHIFT: MODERN AND CONTEMPORARY LEGAL OPINIONS

Taking Al-Sayyid Muhammad Kazim Yazdi (d. 1919) as the middle of the modern period, we see that a shift to accepting the purity of scriptuaries is a very recent development. Yazdi was the sole *marji' al-taqlīd* during the latter years of his life. His legal text, *al-'Urwah al-Wuthqā*, is a standard reference work for contemporary jurists.

⁹⁴ Baqir al-Majlisi, *Biḥār al-anwār*, 80:42-53.

⁹⁵ The doctrinal basis for connecting *haram* and *najis* is brought out by a *fatwā* from Sistani regarding the slaughter of “extremists” – who curse the prophet or the Imams. Their slaughter, he says, “is forbidden and impure.” *Aḥkām al-Mughtaribīn*, 313.922. (The format used for this work, i.e. 313.922, refers to the page number and *fatwā* number respectively.) Likewise, al-Safi collapses the terms “permissible” and “pure” in his *fatwā* regarding various fringe groups whose Islam is questionable: “If the groups mentioned [in the question] believe in the double witness, even in general, and do not deny a necessity of religion, their slaughter is pure (*tāhirah*).” *Aḥkām al-Mughtaribīn*, 313.923.

As a fundamental text of study within the *suṭūh* (externals) level of the *ḥawzah* curriculum,⁹⁶ it assumes a very high level of learning among those who would interpret or comment on it. In the fashion of the *ḥawzah* methodology, the contemporary *fatwā* collection I am using quotes Yazdi's opinion at the start of the Book of Impurity and Purity. The text reads:

[among impure things are] the *kāfir* of every kind, including the apostate of any kind, Jews, Christians, and Zoroastrians; likewise, his wetness and parts [of his body], whether containing life or not [an example of the latter would be hair or nails]. What is meant by *kāfir* is anyone who denies [the existence of] divinity, or *tawḥīd* [the unity of God], or the message [of Islam and its messenger], or a necessity of religion, on condition he is aware that it is a necessity, and such that his denial amounts to the same as a denial of the message [as above]. The rule is that one is to avoid, out of [obligatory] precaution,⁹⁷ someone who denies a necessity of religion, regardless of whether or not [the denier] is aware that what he denies is a necessity [of religion]. [...] The person about whom there is doubt whether he is Muslim or *kāfir* is pure, even though we do not apply the rest of the rules of Islam to him [that is, we do not treat him as Muslim in every legal sense; only in so far as purity is concerned].⁹⁸

As is customary for seminal texts such as this, numerous full length commentaries exist, in which *mujtahids* note where they disagree and provide proof for the same. The ten

⁹⁶ Momen, *Introduction*, 201. This level follows on from preliminary studies (*muqaddimāt*).

⁹⁷ The text uses only the word *al-aḥwaṭ* (precaution) but I am informed that when used alone, without the qualifying adjective “recommended” that it is to be understood as meaning “obligatory.” Source: Seyed Mahdi Shahrestani.

⁹⁸ *Aḥkām al-Mughṭaribīn*, 17-18, 20. My thanks to Seyed Mahdi Shahrestani for his valuable assistance in deciphering this text. The unquoted portion of the text, which is not of great concern to us, defines the purity status of someone born of a mixed, Muslim-non-Muslim, union. Generally speaking, a child born of at least one Muslim parent—legitimate or illegitimate—is considered Muslim as far as purity is concerned. Likewise, non-Twelve Shi'ites, unless they share one or more unacceptable beliefs of “extremists,” or if they curse the Imams, are pure. “Extremists” (*al-ghulāt*) of any kind, however, are unambiguously impure. *Ibid.*, 19-20. By extremists is meant groups—archaic and modern—that might consider themselves Muslim but who hold beliefs contrary to orthodox Islam, such as those who deify one of the Imams, or, less traditionally, who hold to the mystical doctrine of *waḥdat al-wujūd* (unity of being).

footnotes⁹⁹ written by five highly regarded *mujtahids* accompanying the portion quoted above give us a general idea of some of these disagreements.

Ayatollah al-Khui, Ayatollah Ali al-Sistani's predecessor, accepts Yazdi's *fatwā* regarding the impurity of the People of the Book, including apostates from these religions, but allows some measure of uncertainty in that he lowers the absoluteness of Yazdi's ruling to the level of "[obligatory] precaution."¹⁰⁰ In his opinion, then, though neither purity nor impurity can be proven with certainty, the stricter of the two should be followed. In a separate text, al-Khui likewise argues that scripturaries who deny the prophethood of Muhammad are impure "by majority opinion"¹⁰¹ and avoiding them is consistent with precaution.¹⁰² While more lenient than Yazdi, Khui's opinion is not quite as doubtful of Yazdi, as we will see below, as Sistani's.¹⁰³ Ayatollah al-Tabrizi likewise states that the majority of jurists hold that all unbelievers, including *ahl al-kitāb*, are intrinsically impure, and does not mention any disagreement with this.¹⁰⁴ In another *fatwā*, however, Tabrizi excludes scripturaries when equating the impurity of *kāfirs* with that of dogs and pigs, living or dead.¹⁰⁵

Sistani glosses Yazdi's ruling by insisting that, in order for it to be legally relevant, a person's denial of belief in God and the Prophet must be attested to—by said

⁹⁹ However, these represent close to a dozen actual opinions, as at least two of the footnotes combine the opinions of more than one jurist.

¹⁰⁰ *Ibid.*, 17-18 n.3.

¹⁰¹ Sistani clarifies this (see above) as being equivalent to the principle of precaution.

¹⁰² *Tawdīh-i masā'il-i marāji' mutābiq bā fatāvā-yi davāzdah nafar az marāji-i mu'azzam-i taqlīd* (Qom: Daftar Intashārāt al-Islāmī, n.d.), 86.

¹⁰³ Similarly, al-Safi rules that scripturaries are impure by majority opinion (*benā bar qawl-e mashhūr*) and concedes to this position on the basis of obligatory precaution (*iḥṭiyāt-e wājeb*). *Fatāvā-ye davāzdah nafar*, 84.

¹⁰⁴ *Aḥkām al-Mughṭaribīn*, 21.10.

¹⁰⁵ *Ibid.*, 22.11.

denier—verbally.¹⁰⁶ It seems, as we will see below, that Sistani is in the minority on this point. More central to our concern, Sistani remarks that including scriptuaries within the general category of *kāfir*, as Yazdi does, is not beyond dispute. On the contrary, he says, the *kitābī* may be included in this ruling only to the degree of recommended precaution (*al-iḥtīyāt al-istiḥbābī*), a legal category that is contingent on the absence of certainty to the contrary, and carries no definitive obligation of obedience.¹⁰⁷ Elsewhere, Sistani is less forthright, arguing that scriptuaries who deny belief in the prophethood of Muhammad¹⁰⁸ “are impure on the basis of majority opinion, but ruling them as pure is not [a] far-fetched [idea].” Nevertheless, he says, “it is better to avoid them.”¹⁰⁹

In his book of *fatāwā* for Muslims in the West, Sistani goes the full length on the purity of scriptuaries, where he makes the legal principle “everything is pure for you unless you know of its impurity” central to his whole approach.¹¹⁰ A person whose religion is unknown is also pure, and regarding someone who is inclined towards Islam

¹⁰⁶ Ibid., 18.2. According to the text, this clearly refers to unbelievers, and not to Muslims who might deny belief in God, etc., which suggests to me that Sistani would wish to assume that all people are Muslim unless they specifically deny the Islamic statement of faith.

¹⁰⁷ Ibid., 17 n.1. This is so particularly because of the adjective, *istiḥbābī* (recommended). In the opinion of Muhammad Baqir al-Sadr, however, precaution itself carries an obligation of obedience on the basis of logic. If, he argues, we know that the Lawgiver “has a rightful claim to the obedience of His servants,” then it follows that this obligation must include “both known and possible injunctions[.]” Therefore, anything concerning which there is a possibility of prohibition should be treated as prohibited; likewise, anything concerning which there is a possibility of obligation to perform should be treated as duty. Whatever falls into either of these categories of possibility calls for the *obligation* of obedience as a matter of precaution. As al-Sadr puts it, “[t]his means that in a fundamental way whenever we consider prohibition or mandatoriness [sic] possible, the source of law is the exercise of precaution. Thus we omit what we consider to be possibly prohibited and perform what we consider to be possibly mandatory.” Al-Sadr identifies this principle as “the priority of precaution,” and suggests that his opinion is not widely held among legal scholars. The majority opinion among jurists is to give priority, rather, to the principle of “rational exemption” (*barā’ā*). That is, where there is absence of certainty regarding a matter, it is rational to treat it as standing outside of the human agent’s legal responsibility. Al-Sadr also recognizes this principle, but treats it as a secondary, rather than primary or fundamental procedural principle. Muhammad Baqir as-Sadr, *Lessons in Islamic Jurisprudence*, trans. and introduction Roy Parviz Mottahedeh (Oxford: Oneworld Publications, 2003), 120-25. See also, pp. 165-69.

¹⁰⁸ What exactly he, and many others who use this expression, mean by this is unclear to me. Is he suggesting that the denial must be explicitly stated on a case by case basis, or can it be assumed—as the ordinary person would likely assume—that this describes all scriptuaries generally?

¹⁰⁹ *Fatāwā-ye davāzdah nafar*, 86.

¹¹⁰ Sistani, *al-Fiqh lī al-Mughtaribīn*, 85.

but not a believer, it is problematic, Sistani says, to rule them impure.¹¹¹ For Sistani, it appears that the only way a Jew or a Christian might be impure is circumstantially so, but this must be known without doubt and be affected by flowing wetness to be of any legal or practical consequence. The mere assumption that non-Muslim scriptuaries do not practice ritual ablutions does not, evidently, count as proof of ritual impurity. Tabrizi likewise says that Muslims need avoid scriptuaries only when they have specific knowledge of circumstantial impurity; otherwise, they need not.¹¹²

Sistani also alleviates the risk of inadvertently contracting ritual impurity from *non-scriptuary* unbelievers by ruling that it is not required to ask a person about his or her religious beliefs prior to taking what could be considered a doubtful course of action.¹¹³ Sistani is evidently interested in widening the circle of those who might, by the slightest indication, come within the domain of the pure, and likewise in encouraging his followers in the West to be confident that they are not surrounded by a constant danger of ritual preclusion. Khamenei similarly says, without further explanation, that the intrinsic impurity of *ahl al-kitāb* is not commonly accepted, and states that they are ruled as intrinsically pure.¹¹⁴

Makarim al-Shirazi provides a lengthy notation on Yazdi's text and his view represents a more strongly worded deviation from the latter's opinion. According to al-Shirazi, there is no certain proof that even non-scriptuary unbelievers are impure.¹¹⁵ As for scriptuaries, he says, many esteemed traditions and verses of the Qur'an provide evidence for their intrinsic purity (*ṭahāratahum dhātⁱⁿ*) and circumstantial impurity

¹¹¹ *Fatāwā-ye davāzdah nafar*, 86.

¹¹² *Aḥkām al-Mughṭaribīn*, 22.12.

¹¹³ Sistani, *al-Fiqh lī al-Mughṭaribīn*, 86.

¹¹⁴ *Aḥkām al-Mughṭaribīn*, 22-3.15/16.

¹¹⁵ *Ibid.*, 17 n.1.

(*najāsatahum ‘araḍīyah*). The latter, he says, is due solely to the *kitābi*’s lack of attention to matters of purity. This general state of circumstantial impurity justifies recommended precaution—not with regard to considering them *najis*—but to avoiding what passes through their hands.¹¹⁶ Al-Shirazi sees his interpretation as making sense of an apparent contradiction between scriptural texts that both indicate the purity and impurity of *kitābis*.¹¹⁷ His rationalization allows for non-Muslim purity as an intrinsic quality, while making allowance for the likely possibility of their circumstantial impurity, which could be passed on to a Muslim via direct contact with the polluting item. Al-Shirazi’s advice of cautionary avoidance covers both considerations.

Elsewhere, however, al-Shirazi says that all non-believers, scriptuary and non-scriptuary, are *najis*, but by precaution (only).¹¹⁸ It seems that the qualifiers of precaution (*iḥtīyāt*) and precautionary avoidance (*ijtināb*) can work to narrow the definitional gap between intrinsic and circumstantial impurity of non-Muslims by maintaining intrinsic impurity, but less definitively so.

Al-Shirazi’s non-absolutist claim for non-Muslim purity is further demonstrated in his statements regarding non-scriptuaries. Al-Shirazi says that there is no definite proof of their impurity; but nor is there proof of purity, as that would require understanding such a reference as contrary to the general thrust of the Imami traditions, which allude to their impurity.¹¹⁹ While al-Shirazi seems to favour a shift towards non-Muslim purity, he is clearly reluctant to abandon the alleged consensus on the matter, which would, he says, be unwise. In the absence of clear proof, al-Shirazi rules, the legal principle, “all things

¹¹⁶ On avoiding scriptuaries in all but necessary situations, see also al-Shirazi’s *fatwās* in *Aḥkām*, 29-30.48.49.

¹¹⁷ See also al-Shirazi’s note 5 on page 18, where he again qualifies precaution as recommended.

¹¹⁸ *Fatāwā-ye davāzdah nafar*, 85.

¹¹⁹ *Aḥkām al-Mughtaribīn*, 17 n.1.

are pure unless there is proof of impurity,” prevails.¹²⁰ However, the word on interaction is again one of caution. Muslims should not be lax about interacting with non-Muslims; rather, they should exercise caution in all but situations of necessity.

Al-Shirazi then interjects the problematical text of Surah 9:28 into his argument, focusing on the disputed meaning of the term *najis*. Rather than repeat the common classical argument that its *maṣḍar* form suggests unmitigated comprehensiveness, he notes that the term comprises two possible meanings: literal and abstract; similarly, he says, it has been defined as having two sides: internal and external. He notes that in his *Majma' al-Bayān*, al-Tabarsi explained that its root meaning referred to anything that is repulsive or hateful (*mutanaffir*) to human nature, such as diseases for which there is no cure or wicked people. In this sense, we might think of the term as a general cultural manner of expression for anything that repels, is unpleasant, or disgusting. After some ambivalence, al-Shirazi concludes that we are dealing with a general term of many possible meanings and that “the literal manner in which it is interpreted in the contemporary world may have no connection to what it meant at the time of the Qur'an's revelation or in ancient lectionaries.”¹²¹

In the strongest statement yet, Ayatollah al-Fadil al-Lankarani candidly admits that “it is problematic—even prohibited—to consider People of the Book as impure.”¹²² It seems to him something unthinkable. On the other hand, al-Fadil (as our text refers to him) accepts the designation as *kāfir*—whom he rules as intrinsically impure—of anyone who denies (as Yazdi says), or disbelieves (al-Fadil says) in the three fundamentals listed

¹²⁰ Ibid.

¹²¹ Ibid., 17 n.1.

¹²² Ibid, 17 n.2. See also *Fatāwā-ye davāzdah nafar*, 87.114, where al-Fadil states that “the atheist [...] is impure but the People of the Book, such as Jews and Christians, are pure.” He does not qualify this with the common statement that Jews and Christians who deny the prophethood of Muhammad are impure.

above: existence of God, *tawhīd*, and the message and messenger of Islam.¹²³ Further, al-Fadil conditions the purity status of *ahl al-kitāb* on their not being *mushrikūn*. When asked by a *mustafī* if believing in the Trinity, as Christians do, is not associating partners with God, al-Fadil agrees that if they truly believe those they ascribe as partners with God to be divine, this counts as *shirk*. Yet, he insists that there are Christians who are not “associationists” and these are pure, even if one is not sure of their belief in this regard.¹²⁴

Like al-Fadil, Ayatollah Khomeini says that denial of the Islamic fundamentals includes the failure to acknowledge them.¹²⁵ For Khomeini, however, it appears that all unbelievers are *najis*, as his official legal treatise, *Tawdīh al-Masā'il*, makes clear; Khomeini there declares that “the whole body of an infidel, even the hair, nails and its wetness, is unclean.”¹²⁶ The person who doubts the core beliefs or who regards as futile a necessary practice of Islam is likewise to be considered an infidel, and impure. However, if one is unsure if someone is a Muslim or not, they should be considered pure, though they assume the legal position of nonbeliever as far as marriage and burial are concerned.¹²⁷ Khomeini follows the majority opinion that someone about whom it is not known whether or not they are Muslim is pure.¹²⁸ For Makarim al-Shirazi, this is so even if the person lives in a non-Muslim society.¹²⁹

Apart from the exception of Khomeini, the views of contemporary scholars represent a fundamental shift of opinion regarding the purity status of non-Muslims. A

¹²³ *Aḥkām al-Muḡtaribīn*, 18 note 1. On the impurity of *kāfirs*, see *Aḥkām*, 29.47. Al-Khui adds the resurrection to this list of essential beliefs. See 18 n.3.

¹²⁴ *Ibid.*, 28.38/39.

¹²⁵ *Ibid.*, 18 n.1.

¹²⁶ Ayatollah Sayyed Ruhollah Mousavi Khomeini, *A Clarification of Questions: An Unabridged Translation of Resaleh Tawdhih al-Masa'el*, trans. J. Borujerdi (Boulder: Westview Press, 1984), 13.

¹²⁷ *Ibid.*, 14.

¹²⁸ See *Fatāvā-ye davāzdah nafar*, 87.

¹²⁹ *Ibid.*

further exception is Ayatollah Sanei of Iran. While Sanei maintains the medieval opinion, he downplays its ramifications for Muslims in daily life. In his legal handbook, Sanei declares that all non-Muslims, scriptuary or not, are impure. He argues, however, that the conditions needed to contract impurity, including direct contact with flowing wetness and absolute certainty of the same, are too difficult to reach, making the doctrine “of no significance” (*ma ‘nī nadārad*).¹³⁰ His opinion does not detract substantially from the majority contemporary consensus on the purity of scriptuary non-Muslims.

Having observed a significant shift in majority opinion, we might ask from where it began. Ayatollah Muhammad Ibrahim Jannati of Iran is said to have been the first modern legal scholar to embrace the purity of non-Muslims.¹³¹ According to Seyed Shahrestani, who was a student of his, although Jannati’s opinion was not at that time authoritative (as he was not yet a high ranking *mujtahid*) it was adopted by the famous Iraqi jurist Ayatollah Muhsin al-Tabataba’i al-Hakim, who then influenced the views of other jurists.¹³²

Jannati accepts the conventional definition of a *kāfir* as someone who disbelieves in God, or ascribes a partner to God, does not accept the prophethood of Muhammad, or knowingly denies an element of Islam that Muslims consider essential, if that element

¹³⁰ Ayatollah al-‘Uzma Sanei, *Majmū‘ al-masā‘el: istiftā‘āt* (Qom: Daftar Tablighāt-e Islāmī-e Hawze-ye ‘Ilmī, 1376), 42.79. See also 42-44.80.82.85.86.

¹³¹ Personal conversation with Seyed Mahdi Shahrestani, July 28, 2008, who related this as being applicable to scriptuaries.

¹³² Ibid. Seyed Shahrestani tells me that even Khomeini was thus influenced, but I have not as yet been able to locate Khomeini’s more liberal view. Al-Hakim’s *fatwā* is here quoted. “[*Fatwā*]: The scriptuary is pure if he is pure of impurities that befall [a person] – such as urine, semen, blood, wine, and the like – so if he is pure of these impurities, his *su‘r* is pure and it is permissible to eat his food and drink. [Question]: If the scriptuary’s food is pure, even that which he cooks with his [own] hand, and it is permissible to eat it, then why is his meat that he slaughters with his [own] hand impure? [*Fatwā*]: The condition for legal slaughter is that the slaughterer is a Muslim; if the slaughterer is a *kāfir*, the slaughter is void [*batil*] and the animal is carrion, not legal slaughter. Peace to you, and the mercy of God and His blessings.” Al-Shaykh Muhammad Ibrahim al-Jannati, *Ṭahārat al-Kitābī fī Fatwā al-Sayyid al-Ḥakīm* (Beirut: Dar al-Awdha’, 1986), 22-3.

effectively denies the revelation itself.¹³³ This is the standard *fiqhī* definition, divergence from which would require an elaborate new *ijtihād*, which Jannati does not do. Although indeed a *kāfir*, Jannati says, such a person is nevertheless intrinsically pure in body. On what basis, he does not say explicitly, but we may surmise his reasoning from the following: “But,” Jannati continues, “from a spiritual (*rūhī*) and moral (*ma‘navī*) perspective, he [or she] is dirty [foul] (*pelīd ast*).”¹³⁴

This suggests that Jannati understands impurity associated with beliefs as manifesting within their own field of meaning; that is, as the unbeliever’s impurity is derived from their unbelief, it remains an abstract, moral quality that has nothing to do with matter. Impure material substances, such as feces, etc., in contrast, are—and cannot but be—physically and intrinsically impure. Nor, Jannati says, is the *kāfir* circumstantially impure if he or she avoids substances that Islam considers impure (pork and alcohol, for example). Since Jannati does not distinguish between scriptuaries and non-scriptuaries in his *masā’il*, but includes those who deny the prophethood of Muhammad (such as Christians and Jews) in the category of *kāfir*, it would appear that this same ruling applies to both types of non-Muslims.

Muhammad Husayn Fadlallah of Lebanon likewise reflects a more inclusive interpretation of non-Muslim impurity. Whether or not Fadlallah derived his views from Jannati, I do not know, but Fadlallah holds to the same notion of moral or spiritual impurity. His book of *fatāwā* for Muslims in the West does not have a chapter devoted to purity and impurity; my understanding of Fadlallah’s views on the subject comes primarily from his Qur’an commentary dealing with Surah 9:28. As discussed above,

¹³³ Ayatollah al-‘Uzma Muhammad Ibrahim Jannati, *Risāleye Tawdīh al-Masā’el* (Qom: Inteshārāt-e Ansāriān, 1381), 76.

¹³⁴ Ibid.

Shi'ite legal commentators have traditionally interpreted this verse to assert the intrinsic impurity of non-believers, scripturaries (more often than not) and non-scripturaries alike. Fadlallah's opinion diverges radically from this boundary-laden interpretation, even as he draws the same distinction between *tawhīd* and *shirk*. For Fadlallah, these terms designate fundamentally opposed ideas about God. Though unquestionably impure, being an intellectual and symbolic impurity (*al-najāsah al-dhihnīyah*, or *najāsah ma'nawīyah*), *shirk* does not and cannot transmit its spiritual ugliness or shamefulness (*qubḥ*) physically.¹³⁵ In no sense, then, are unbelievers intrinsically impure. No human being, Fadlallah stresses, "be they *mushrik*, atheist (*mulḥid*), *kitābī*, Buddhist, or anything else," may be called impure in and of themselves.¹³⁶

That unbelievers are prohibited from the mosque does not, for Fadlallah, serve as counter-proof to his argument (as it does, for example, for Muhammad Jawad Mughniyya of southern Lebanon);¹³⁷ rather, he says, the prohibition is rooted in the notion of the incompatibility of opposing religious ideas. It is linked to the fact that "*al-masjid al-ḥarām* is a *masjid* of *tawhīd* and has been raised on the foundation of *tawhīd* such that no one who has built his life on *shirk* should enter it, because *shirk* and *tawhīd* do not go together."¹³⁸ It is the potential that the *mushrik* has of reintroducing idolatry into the mosque, whose foundation and reason for existence is the elevation and propagation of

¹³⁵ Al-Sayyid Muhammad Husayn Fadlallah, *Al-Nadwā* (Beirut: Dār al-Malāk, 1997), 1:674.

¹³⁶ *Ibid.*, 1:676.

¹³⁷ For Mughniyya, everything impure, human or animal, must be prohibited entry and expelled from all mosques because *najāsah* defiles and dishonours the mosque and God's honour in it. Like Fadlallah, however, Mughniyya excludes *ahl al-kitāb* from the category of *mushrik*. For Mughniyya, the former are implicitly declared pure in Surah 5:5! Muhammad Jawad Mughniyya, *Al-Tafsīr al-kāshif* (Beirut: Dār al-'Ilm li'l-Malāyīn, 1969), 4:28.

¹³⁸ Fadlallah, *Al-Nadwā*, 1:676.

tawhīd, which produces the command to banish them from its premises.¹³⁹ In any case, in defining the category of *mushrik*, Fadlallah definitively excludes non-Muslim monotheists. Evidently, he takes the Christian belief in one triune God as compatible with *tawhīd*.

The question of where to place *ahl al-kitāb*, particularly Christians, with respect to *tawhīd* and *shirk*—and thus with respect to purity—is, as we have seen, irregular and laden with ambiguity. When pressed, some (such as al-Fadil) are forced into the position common in classical and modern Qur'an exegesis of first converting Christians into covert Muslims (by distancing them from trinitarian doctrine according to historic Christian orthodoxy) before pronouncing on their intrinsic purity.¹⁴⁰ Ayatollahs Jannati and Fadlallah are able to avoid having to do this by rejecting the notion that beliefs affect a person's bodily purity. For Jannati and Fadlallah, while all non-Islamic beliefs are impure or constitute "moral filth," whether trinitarian or polytheistic, impurity remains a property of the beliefs themselves, and does not, as *su'r* does, become attached to the physicality of the people who hold them.

Before leaving this topic, it is helpful to point out that what we might call the *kāfir* purity code includes laws regarding suspect or marginal Muslims. It is common practice among the above mentioned jurists to rule that someone who denies a necessary part of Islamic practice, such as prayer or fasting, knowing that it is an Islamic duty, is

¹³⁹ Ibid. Fadlallah's interpretation is reminiscent of Ali Shari'ati's revolutionary interpretation of *shirk* and *tawhīd*. In Shari'ati's thought, these terms are symbols designating two entirely different and conflicting systems of thought, way of life, and government. See Ali Shari'ati, *On the Sociology of Islam*, trans. Hamid Algar (Berkeley: Mizan Press, 1979), 86.

¹⁴⁰ On the exegetical tendency of interpreting verses in the Qur'an that praise Christians as referring to those among them who effectively deny central Christian beliefs such as the divinity of Jesus, and excluding those who testify to their faith in such doctrines, see Jane Dammen McAuliffe, *Qur'anic Christians: An Analysis of Classical and Modern Exegesis* (Cambridge: Cambridge University Press, 1991).

impure and should be avoided.¹⁴¹ Likewise, the *ghulāt* (extremists) who either deify or despise and curse any one of the twelve Imams (some include Fatima) are unanimously considered impure, and, logically, it is obligatory at most, precautionary at the very least, to avoid them.¹⁴² Similarly, al-Shirazi (Makarim) rules that according to obligatory precaution, those who believe in the philosophy of *waḥdat al-wujūd* (unity of being)¹⁴³ should also be avoided.¹⁴⁴

Looking at the whole picture, then, we may suggest some implications. Within the general or what we are calling the ritual purity code, we see a concern to put boundaries of protection around all of the spaces—the body of the worshiper as well as the physical space where worship takes place—where ritual is performed. The symbolism suggests that impurity is diametrically opposed to the places where God is glorified. The Shi'ite *kāfir* purity code, we argue, similarly reflects the construction of an allegedly divinely ordained pattern by which the believer may determine the intellectual, moral, and social boundaries of his or her existence. Avoiding people considered impure may be seen as a *shar'ī* way of minimizing personal contact with ideas contrary to standard orthodox belief and thus precluding morally and intellectually harmful influence. Our analysis below of specific *fatāwā* touching on purity issues bears this out.

LIVING AMONG NON-MUSLIMS: CONTEMPORARY *FATĀWĀ*

Classical and pre-modern opinions on the impurity of nonbelievers, carried forward by some modern jurists, could give the impression that living among non-

¹⁴¹ Some include those who deny an obligatory practice without knowing its importance. See *Fatāwā-ye davāzdah nafar*, 84-5.

¹⁴² *Ibid.*, 87.

¹⁴³ The author of this doctrine is the well known Spanish born philosopher and mystic, Muhyiddin ibn al-Arabi (d. 1240). According to Makarim al-Shirazi, the doctrine includes ideas such that all reality is God, or that God may take on visible or bodily form.

¹⁴⁴ *Fatāwā-ye davāzdah nafar*, 87.

Muslims would result in enormous hardship, or at least confusion, for purity-conscious Muslims. Indeed, purity issues affect numerous aspects of daily life in the public realm that appear to be of concern to *sharī'ah*-minded believers. Eating, working with food, sitting on public seats, shaking hands, brushing one's teeth, buying clothes, wearing clothes, washing clothes, praying in clothes, proselytizing, and being buried, among other things, all give rise to questions around the proper—legally and ethically acceptable—way to behave. My examination looks primarily at the relation of purity to food prohibitions and to employment involving food, drink, and animal products.

While contemporary *mujtahids* do not deny the possibility of a connection between impurity and food prohibition, they effectively neutralize it. The doctrinal basis of this neutralization involves three general principles. These principles diminish the possibility of contracting impurity from non-Muslims. The principles are: assumption of purity (*aṣālat al-ṭahārah*); necessity of certainty of knowledge (*yaqīn*); and non-investigation (investigation: *taḥqīq*). I define these principles below and discuss how they function in the *fatwā* material, which I divide into two general categories: person-related and product-related *fatāwā*. By person-related I mean *fatāwā* treating the possibility of contracting impurity from contact with non-Muslims who are considered impure. By product-related I mean purity issues that exist independently of potentially impure persons. Though the former may also involve products, the potential for impurity rests merely with a product's physical contact with a person considered legally impure.

a. Person-Related *Fatāwā*: Impossible Impurity

Among person-related *fatāwā*, the most common area of questioning is that related to food products; what, for example, are the rules around food touched by a non-

Muslim who is impure? This kind of issue appears with some regularity in a variety of contexts, such as university life, employment, and friendship, and is closely linked to other person-related issues evoked by purity concerns: shaking hands, sitting on seats in public transport, using laundromats, renting apartments, or being buried, for example. We turn now to the principles that *mujtahids* employ in an apparent effort to minimize the impact of impurity while preserving the code.

The principle of *aṣālat al-ṭahārah* says that everything in the world is assumed to be pure. When conditioned by the second principle which states that certainty of knowledge that something is impure removes that item from the category of purity, this deceptively simple principle opens the door to subtle varieties of opinion. Put negatively, the two principles combined state that in the absence of certain knowledge (*yaqīn*) of impurity (or, similarly, in the presence of doubt, *shakk*) an item remains pure. Knowledge here may be of two types. One is general legal knowledge of the rulings of one's *mujtahid* to the effect, for example, that all non-Muslims are intrinsically impure, as are dogs and pigs. This type of knowledge removes the said group of people from the assumption of purity. It still does not, however, translate automatically into a principle of avoidance under all circumstances. For this, a second type of knowledge is needed, that is, specific knowledge that the right conditions are present to render such impurity communicable. For a negative ruling to be applicable, the first knowledge is fundamental, and the second knowledge must amount to complete certainty. The following example illustrates:

A student at a Western university asks Khamenei for a ruling when there is a strong probability that utensils used for food and food itself have been touched during

preparation by the wet hands of unbelievers. While it seems logical, given the context, to presume that the said items have indeed been touched by non-Muslims (thus pointing to prohibition if these unbelievers are considered impure), Khamenei's response is that "mere probability (*mujarrad ihtimāl*) of the *kāfir*'s wet touch is not sufficient to obligate avoidance."¹⁴⁵ In other words, the objective presumption of purity outweighs any circumstantially-derived assumptions to the contrary, no matter how probable, so long as they remain assumptions. If the questioner had stated absolutely that he or she saw the *kitābī* non-Muslim hand him or her a wet apple, Khamenei would have reason—if he held to the intrinsic impurity of scriptuaries—to oblige avoiding consuming the contaminated item.¹⁴⁶ Though he answers the question in the terms in which it was submitted to him (that is, on the assumption that scriptuary *kāfirs* are intrinsically *impure*), Khamenei adds a more fundamental reason for not requiring abstention. This is that he holds to the intrinsic purity of *ahl al-kitāb*.¹⁴⁷ For Khamenei, this automatically nullifies the possibility of contracting impurity from such a person.

However, Ayatollah al-Sayyid Muhammad Sa'id al-Tabataba'i al-Hakim demonstrates how the principle of *ihtiyāt* could alter this ruling and again put up boundaries. Concerning food that has been touched by the wet hands of a European shopkeeper whose religion is not known, al-Hakim says that the food is pure, "but, nevertheless, it is preferable and better as being more consistent with the most precautionary by recommendation (*al-ahwaṭ istiḥbāb^{an}*) to keep away from it or purify it if

¹⁴⁵ *Aḥkām al-Mughṭaribīn*, 25.24. Emphasis added.

¹⁴⁶ Yazdi's *Al-'Urwah al-Wuthqā*, as quoted in *Aḥkām al-Mughṭaribīn*, states in this regard: "*mā yu'khadh min yad al-kāfir aw yūjad fī arḍihim maḥkūma bī al-najāsa illā idhā sabīqa yad al-muslim 'alayhi.*" (Whatever is taken from the hand of a *kāfir* or is found in their land is ruled as impure, unless it is known to have first been in the hand of a Muslim.) Yazdi elsewhere identifies the *kāfir* category as comprising scriptuaries and non-scriptuaries alike. See the discussion above. *Aḥkām al-Mughṭaribīn*, 39.74.

¹⁴⁷ *Ibid*, 25:24. Al-Fadil offers the same ruling, adding only that the purity of the food of *ahl al-kitāb* does not include forbidden meats and drinks. *Aḥkām al-Mughṭaribīn*, 27.36.

possible.”¹⁴⁸ Considering that al-Hakim holds to the intrinsic purity of *ahl al-kitāb*, his *fatwā* suggests a significantly strong cautionary tendency. Though giving a permissive ruling, he nevertheless advises caution, likely on the basis of the possibility that the shopkeeper may be a non-scriptuary *kāfir*. While, for Khamenei, ambiguity of knowledge nullifies a prohibition, for al-Hakim this same ambiguity leads in an opposite direction. This is possible because of *iḥtīyāt*, a technique used by more conservative jurists to cover all possibilities of error particularly when knowledge of the situation is incomplete.¹⁴⁹

Returning to the example of Khamenei’s *fatwā* above, if a *mukallaf* knows with certainty that items in the house of a non-scriptuary have been touched with wet hands, then anything used for eating, drinking, or prayer must be purified before use. Other items, however, such as doors and walls, do not need to be purified.¹⁵⁰ This latter point suggests the hypothesis that impurity affects different items and their uses differently. It appears that prayer, consuming (and sometimes storing) food and water, and burial are more carefully surrounded by concern for purity than are instances of incidental contact with the day-to-day, such as doors, or train seats, or defiled clothing worn other than in prayer. In the case of having one’s laundry done, for example, al-Khui rules that it is not necessary to know about the purity of instruments used for washing clothes, nor about the religion of the operators of the machines. All that is necessary is that the water be of a sufficient amount to wash off impurities that were previously attached to the clothing.¹⁵¹ Khamenei rules that even if non-*kitābī* *kāfirs* (whom he considers intrinsically impure) have worked on machines and possibly touched them with oil on their hands, this is not

¹⁴⁸ Ayatollah al-Sayyid Muhammad al-Sa’id al-Tabataba’i al-Hakim, *Murshid al-Mughtaribīn*, (Beirut: Mu’assasat al-Murshid, 1422/2002), 167.31.

¹⁴⁹ See the discussion of *iḥtīyāt* in chapter one.

¹⁵⁰ *Aḥkām al-Mughtaribīn*, 23-4.19.

¹⁵¹ *Ibid.*, 21.8.

an adequate basis of prohibition. Rather, it is necessary that the would-be contaminated Muslim witness the incident (i.e., have *yaqīn*). However, in the event that “one is certain of having contracted impurity from such a machine, one is obliged to purify one’s body and purify or change one’s clothing for prayer.”¹⁵²

It seems from the above that jurists who remain committed to the impurity of non-Muslims are, nevertheless, at pains to demonstrate its innocuousness. Ayatollah Sanei provides an excellent example. Sanei, as noted above, rules that all non-Muslims are intrinsically impure but does not on this basis encourage social segregation. Again, this is clearly due to the principle of *yaqīn*. In answer to a question requesting classification of all non-Muslims and non-observant Muslims on a purity scale, Sanei replies that “*Kuffār* are completely impure, but socialization with non-Muslims is not a matter of concern – as in eating food for example – because making food or something else impure is dependent on knowledge and one hundred percent certainty that does not normally reach that level.”¹⁵³ In a different *fatwā*, he further explains the precise content of that knowledge: “[...] Becoming impure from contact is conditional upon contagious wetness, and knowledge of such contact must be as clear as the light of the sun [...]”¹⁵⁴ Further, he says, modern ways of cleaning can be trusted to purify utensils and plates used by *kuffār*.¹⁵⁵

Finally, the third principle—non-investigation (investigation: *tahqīq* or *taftīsh*) in order to reach certainty of knowledge—further narrows the possibility of prohibition. That is to say, the first principle (assumption of purity) may not be over-ruled by the

¹⁵² Ibid., 25.25.

¹⁵³ Sanei, *Majmū‘ al-Masā‘el*, 42.79.

¹⁵⁴ Ibid., 42-3.79/85. Sanei goes on in *fatwā* 80 to state that he includes Christians and Jews within the category of impure *kuffār*.

¹⁵⁵ Sanei, 43 & 47-48.85/99,

second principle (necessity of certainty of knowledge to the contrary) if obtaining that knowledge requires any amount of investigation on the part of the *muqallid*. So, for example, Sistani states that one is permitted to buy canned goods sold at a non-Muslim supermarket, so long as he or she is not aware of something *ḥarām* in them. It is not necessary, moreover, to ask about the ingredients.¹⁵⁶ This is the responsibility of the shopkeeper only.¹⁵⁷

The non-necessity of asking questions explains the high level of confidence jurists such as Sanei exhibit in virtually eliminating the possibility of a person reaching *yaqīn* during the course of his or her daily life. Why, one may be justified in asking, is investigation viewed so unfavourably? One explanation, offered by Freidenreich, is that “[t]he burden on the consumer would be onerous if he had to ascertain the precise origin of every item being purchased.”¹⁵⁸ This is especially so, I would think, for a law that prides itself on balance and not making the lives of Muslims difficult.¹⁵⁹ An additional possibility is that being too inquisitive may give Muslims a reputation for superfluous fastidiousness that could harm the image of Islam in the eyes of Westerners. *Mujtahids* express this concern in other contexts, such as obeying the government.

In conclusion, we may say that the principles of the assumption of purity and of non-investigation make the principle of *yaqīn*, which is what is needed to produce a negative ruling, difficult to obtain. Consequently, the “treacherous path” threatened by dividing the world into pure and impure is effectively avoided by the principles of *ijtihād*. It is my contention that this is a deliberate attempt to minimize the practical implications

¹⁵⁶ *Aḥkām al-Muḡtaribīn*, 323.951.

¹⁵⁷ *Ibid.*, 322.949.

¹⁵⁸ Freidenreich, *Foreign Food*, 321.

¹⁵⁹ Surahs 2:185 and 22:78, discussed in chapter one.

of a rather unpalatable doctrine (impurity of non-Muslims) and avoid bringing the burden of *tawhīn* (weakening [Islam])—in this case in the eyes of non-Muslims) upon Muslim minorities. We turn now to the operation of these principles in the field of product-related *fatāwā*.

b. Product-Related *Fatāwā*: Prohibition and Danger

More numerous—and more inhibiting—than person-related *fatāwā* are questions dealing with impure and/or forbidden products in the contexts of the *mukallaf* as employee, consumer, and member of a Western society, in which such products are commonplace. In the case of employment, is a *mukallaf* permitted to deliver pizzas with forbidden meats on them, or to clean warehouses and offices where one is required to move boxes of alcoholic beverages? Can a Muslim work for an establishment such as a grocery store or restaurant that sells *ḥarām* products? Are the wages derived from selling *ḥarām* products legitimate? Are Muslims permitted to buy products produced in the West and stamped as *ḥalāl*? What about buying *ḥalāl* products from a Muslim store that also sells *ḥarām* items, such as beer and wine? Finally, as member of a Western society, are those who are *mukallaf* permitted to frequent restaurants, cafés, or meetings where alcohol is served? Looking at these *fatāwā* in terms of the Muslim’s diverse roles in relation to the items helps us to identify a corresponding logic.

Included in the product-related category are *fatāwā* dealing with “what is taken from the hand of a *kāfir* [or found in his lands].”¹⁶⁰ Although the non-Muslim person’s involvement is a crucial factor here, the point of interest is not the non-Muslim’s bodily purity status, but the purity status of the item in his or her hands. Animal products also

¹⁶⁰ This is a commonly used heading for this kind of *fatwā*, as is the opposite: what is taken from the hand of a Muslim or found in the lands of Islam.” See, for example, *Aḥkām al-Muḡtaribīn*, 318ff.

give rise to questions regarding whether leather items may or may not be worn during prayer. It is not always the case that prohibition of an item's use for one purpose carries over into other uses. As with person-related *fatāwā*, the level of an activity's sanctity—which falls into a relatively stable and consistent pattern—is a relevant factor. Again, my methodology is to highlight interpretive principles and how they are used to achieve specific results; examples from the *fatwā* literature support the analysis.

While the three principles governing legal interpretation discussed above remain operative in the field of product-related questions to some extent, they function somewhat differently here. Assumption of purity, for example, when applied to products, generally works in precisely the opposite direction than when applied to people. The basic principle here is that whatever comes from the hands of unbelievers or is found in their lands, is ruled as impure (*ghayr muzakkā*),¹⁶¹ unless it is known to be, or shows convincing indications of being, otherwise.¹⁶² Secondly, the principle of certainty of knowledge (*yaqīn*) remains a means of easing restrictions, but shifts its value. That is, if *yaqīn* was needed to establish the impurity of a *kafir*'s touch, *iḥtimāl* (probability) is sufficient to establish the purity of a product the status of which is questioned. Finally, the matter of *taḥqīq* becomes incumbent upon individuals in certain circumstances, such as upon the seller of meat to Muslims. These principles tend to make issues related to products more complex than those treating people.

Further complicating matters, the above are joined by three additional principles, two increasing and one diminishing the potential for prohibition. A principle that, in some circumstances, could increase the likelihood of prohibition is that of aiding the

¹⁶¹ That is, not properly slaughtered. Here, the question has nothing to do with the impurity of non-Muslims themselves.

¹⁶² A common example is if it has been previously in the hand of a Muslim.

performance of something forbidden by Islam (*i'ānat al-ḥarām* or *i'ānat al-sharr* [evil/sin]), even if among those for whom a given activity is permitted, such as eating pork. The principle that one is not permitted to benefit from what is forbidden¹⁶³ also increases the likelihood of a prohibitive *fatwā*. The diminishing principle is that of *istiḥlāl* (transformation): when an impure product undergoes a constitutional transformation, such that it may no longer be called by that name, or be recognizable as such, it loses its prohibitive force. This is a relatively rare event. An obvious example would be wine vinegar, that is, vinegar the basic ingredient of which is wine but which no longer bears any trace of intoxicants. *Istiḥlāl* explains al-Khui's *fatwā* permitting the use of soap made from pig fat.¹⁶⁴ Further, though pig hairs remain *najis*, there is no problem in using them in matters unrelated to purity; thus, Khamenei's *fatwā* permitting the use of pig-hair paintbrushes.¹⁶⁵

I discuss primarily the two principles that increase prohibition as these are the most commonly employed in product-related *fatāwā*. The general thrust of these *fatāwā* can be organized around three central questions: can one hold employment that involves working with forbidden products? I look at this under the rubric of the *mukallaf* as employee. The second question treats the flip side of this: What are a *mukallaf*'s duties as a consumer in Western society? Finally, I look briefly at the third set of questions, which deal with product-related issues that arise for the *mukallaf* as a member of Western society. I find that by employing the principles explained above, product-related *fatāwā* are more likely to circumscribe than to ease Muslim life in the West.

Mukallaf as Employee

¹⁶³ Recalling al-Murtada's opinion, above.

¹⁶⁴ *Aḥkām al-Mughṭaribīn*, 42.82.

¹⁶⁵ *Ibid.*, 43.84.

Aiding sin is a common hazard in the field of employment, as is the principle of not gaining benefit from what is forbidden. For example, Ayatollah Golpayegani rules it impermissible to work in or receive wages for translating and dispatching requests for items that include wine and pork, as “this is considered helping to promote sin [...]”¹⁶⁶ With or without this additional basis for prohibition, however, working with forbidden foodstuffs is commonly forbidden on its own grounds. For example, Khamenei rules that it makes no difference whether one is delivering pizza with pork pepperoni to those permitted or not permitted to eat it; it is forbidden just the same.¹⁶⁷ Likewise, according to Khui, it is not permitted to accept employment that involves cooking pork or non-Islamically slaughtered meat.¹⁶⁸

But selling or serving such meat to non-Muslims depends on knowledge and informing the buyer. If one knows for certain that the animal was not slaughtered according to Islamic law, it is forbidden regardless of the buyer’s religion. But what is not known to be forbidden meat (that is, not slaughtered according to Islamic law or *najis* food) may be sold to non-Muslims; likewise, the animal’s products may be sold even to Muslims, but not as food.¹⁶⁹ Elsewhere, Khui says that doubted (as to manner of slaughter) and *najis* meat¹⁷⁰ may be sold, even to Muslims, on condition the buyer is informed. Tabrizi, in contrast, forbids it on obligatory precaution, particularly if it was

¹⁶⁶ Ibid., 145.377.

¹⁶⁷ *Aḥkām al-Mughṭaribīn*, 145.379.

¹⁶⁸ Ibid., 152.401.

¹⁶⁹ Ibid., 269-70.777. See also al-Khui’s *fatwā*, 261.748, permitting the purchase of shares in a company dealing with food if it is not known for certain that the meat is not *ḥalāl*. If the company is owned by a Muslim, he says, probability that the meat was slaughtered Islamically is sufficient basis for permission to work for the company or to buy shares in it.

¹⁷⁰ According to the question, this refers to meat touched by the wet hand of a *kāfir*.

slaughtered by cutting the animal's throat.¹⁷¹ Carrion, however, may not be sold, al-Khui says, under any conditions¹⁷² as it is not permissible to gain benefit from what is forbidden.¹⁷³ The prohibition against benefiting from what is forbidden seems to be the most prevalent reason behind prohibiting employment that involves forbidden foods. Yazdi's ruling to this effect is followed with little deviation in succeeding *fatāwā* from Khomeini, Golpayegani, and others.¹⁷⁴ Sistani moderates it only slightly by qualifying the prohibition as based on precaution.¹⁷⁵ Similarly, he reasons that "serving pork even to those for whom it is permitted is problematic and is better to avoid out of [obligatory] precaution."¹⁷⁶ Khui's list of commercial prohibitions surely reflects this concern, expressed more explicitly in his *fatāwā* that follow it.¹⁷⁷

Al-Khui's *fatāwā* regarding employment in the food sector appear to be somewhat inconsistent. How might we account for this? One possible interpretation is that Khui bases his opinions on a ranking of forbidden foods; while pork and carrion rank foremost among forbidden meats, those about which the manner of slaughter is doubted, along with allegedly *najis* food, rank lower on the scale of problematic meats. This interpretation seems to be supported by other *fatāwā* from al-Khui. Alcohol, for example, would be ranked among the most forbidden along with work that promotes its use. Al-Khui expresses this in a *fatwā* that emphatically prohibits working in dispatching orders for alcoholic beverages; it is not permitted under any circumstances, regardless of the risk

¹⁷¹ The reason for this condition is a mystery to me. *Aḥkām al-Mughṭaribīn*, 263.755.

¹⁷² *Ibid.*, 262-63.755.

¹⁷³ This is in accordance with Yazdi's ruling. See *ibid.*, 268.771

¹⁷⁴ *Ibid.*, 268.771.

¹⁷⁵ Sistani advises obligatory precaution regarding *najis* things, and recommended for others. *ibid.*, 268, note 1.

¹⁷⁶ *Ibid.*, 163.425. Fadlallah represents Sistani's opinion as one of non-permission. Fadlallah, *Taḥaddiyāt al-Maḥjar*, 138.

¹⁷⁷ *Aḥkām al-Mughṭaribīn*, 269.774. *Fatwā* #776, for example, specifically states the prohibition against taking a salary from dealing with what is forbidden.

to one's chances of employment.¹⁷⁸ On the other hand, al-Khui allows for the possibility of moving boxes of alcohol if that is but a part of one's duties, but prohibits that portion of the worker's salary.¹⁷⁹

Ayatollah Montazeri likewise forbids employment in restaurants and hotels that serve alcohol, even if the majority of customers are non-Muslims. The *mustaftī*'s question is presented methodically and thoroughly. "Take note," the writer says, "that the majority of the customers are not Muslims." He further points out the fact that Islamic standards are uncommon in such places. Finally, he reminds Montazeri that when alcohol is boiled or heated in cooking it becomes vapour. Montazeri's response is definitive. All such activity "is aiding the performance of sin and therefore impermissible." Further, he advises the *mustaftī* to "ask God's help in finding work in which doing what is forbidden is not required because God never puts anyone in a position of having to do what is *harām*."¹⁸⁰

Noteworthy is that the loss of educational credentials that many migrants have the misfortune to experience is not classified as necessity, legally a basis for permission. The pressure to take jobs below the migrants' professional qualifications does not, according to *mujtahids*, overrule the principle of not taking benefit from what is *harām*.¹⁸¹ The only *mujtahid* to offer a different view is Fadlallah. He rules that it is permissible to work as an employee who sells forbidden foodstuffs to those for whom it is permitted on behalf of

¹⁷⁸ Ibid., 146.383.

¹⁷⁹ Ibid., 147.385. Uncharacteristically, Tabrizi suggests that the entire salary may be permitted.

¹⁸⁰ Ayatollah Montazeri's official website, <http://www.amontazeri.com/farsi/default.asp> (accessed February 12, 2009).

¹⁸¹ See, for example, a *fatwā* from Tabrizi where the questioner specifically mentions this hardship. Tabrizi's response is that dealing with wine or forbidden meats is "absolutely forbidden." *Aḥkām al-Mughtaribīn*, 270.778.

the same; “but one is not permitted to buy it in order to sell it.”¹⁸² In other words, following Fadlallah’s logic, it would not be permissible, or it would be at least reprehensible, for a Muslim shop owner to stock forbidden meat, but one may serve in the role of employee. Fadlallah’s opinion in this matter has significant implications for legally observant Muslim migrants’ chances for employment in the West.

In sum, the general trend among *mujtahids* to rank the prohibition against benefiting from what is forbidden above difficulties of finding employment results in limiting opportunities for employment in the West. There appears to be very little effort to apply legal reasoning contextually, to find innovative solutions that would open up Muslims’ employment options without necessarily compromising religious obligations. Rather, the solution seems to be one of ghetto formation (or, possibly, forcing the alternative—disregard for Islamic law where keeping it is inconvenient). Al-Shirazi, who cautiously permits working with forbidden meats in situations of necessity, goes so far as to propose that Muslims in the West would do better to open their own stores and “establish their own associations so that in working amongst themselves, they would be able to maintain Islamic laws in all things.”¹⁸³ His solution highlights the negative correspondence between working in the mainstream sector and maintaining Islamic law implied in many employment-related *fatāwā*.

Mukallaf as Consumer

There is widespread agreement among *mujtahids* on the matter of meat consumption. Even Sistani and Fadlallah, who often deviate slightly towards permission on other matters, here tend towards more restrictive opinions. Generally speaking, meat

¹⁸² Fadlallah, *Taḥaddiyāt al-Maḥjar*, 138.

¹⁸³ *Aḥkām al-Muḡtaribīn*, 163.426.

slaughtered by non-Muslims is forbidden, not on account of non-Muslim impurity, as al-Murtada deduced in the 11th century, but due to the standard classical position that non-Muslims, even if they use the knife correctly, cannot—by default—pronounce the name of God with correct belief over the animal. Islam, Tabrizi says, “is the condition for the one slaughtering.”¹⁸⁴ Sistani and Fadlallah also prohibit meat slaughtered by non-Muslims, but only on precaution.¹⁸⁵ Ayatollah Montazeri forbids it outright.¹⁸⁶

Similar to determining non-Muslim impurity, prohibiting meat is conditioned on certain knowledge that it was not slaughtered Islamically (or that it is, like pork, *najis*).¹⁸⁷ However, several possible variables make the matter of determining legality of meat and animal products more complex. The central axis around which *mujtahids* calculate the relative weight of these variables is the religious affiliation of the product’s primary economic location: is the market Muslim or non-Muslim? Is the product’s original connection to a Muslim’s or a non-Muslim’s hand? Which affiliation indicates the more dominant actor or induces trust? A *fatwā* from Montazeri regarding leather goods reflects the same principle. The *mustaftī* asks about the permissibility of buying leather goods from Dubai or other Muslim countries that sell imported leather products. So long as the vendor is Muslim and it is clear that he bought it from a Muslim or if from a *kāfir* he made certain it was both *tāhir* and *ḥalāl*, it is permissible. But if the vendor is non-Muslim, Montazeri says, or if he is a Muslim who bought it from a non-Muslim without due inquiry, then the product is forbidden.¹⁸⁸

¹⁸⁴ Ibid., 313.919.

¹⁸⁵ Ibid., 312-13.916/919-921; Fadlallah, *Taḥaddiyāt al-Mahjar*, 142-43.

¹⁸⁶ Atatollah Montazeri’s website, <http://amontazeri.com/farsi/default.asp> (accessed February 13, 2009).

¹⁸⁷ *Aḥkām al-Mughtaribīn*, 320.943.

¹⁸⁸ Ayatollah Montazeri’s official website, <http://www.amontazeri.com/farsi/default.asp> (accessed February 12, 2009).

According to Golpayegani, what is in a Muslim's hand but in a non-Muslim market must be avoided out of precaution. Further, if an animal product currently in the hand of a Muslim is known to have been previously in the hand of a non-Muslim, "it must be avoided."¹⁸⁹ Similarly, Sistani forbids from a non-Muslim market meat that was previously in the hand of a Muslim. He likewise forbids meat received "from a non-Muslim, or from a Muslim who got it from a non-Muslim and did not inquire about its slaughtering according to Islamic laws [...]."¹⁹⁰ Sistani does, however, permit that animal products found in the hand of a non-Muslim, the legality of which is (merely) probable, be worn in prayer.¹⁹¹ Though not considered *najis*, it is still *ḥarām* to eat it. A *fatwā* from Sanei is perhaps the most restrictive. According to Sanei, "meat and its by-products in the lands of the *kuffār* are ruled as carrion and are *najis*."¹⁹² Sanei has a tendency in his *fatāwā* to collapse the three types of impermissible food (forbidden meat such as pork, carrion, and food contaminated by a *kāfir*'s touch), making it difficult to know the precise cause of the food's impurity.

In all of these *fatāwā*, a non-Muslim market or an origin in the hand of a non-Muslim signifies non-legal slaughter. In contrast, standard opinion is that food purchased in Muslim markets in the West, whether in the hand of a Muslim or someone whose religion is not known for certain, can generally be trusted as *ḥalāl*, and it is not permitted under these conditions to inquire about how or by whom it was slaughtered.

¹⁸⁹ Ibid., 321.944.

¹⁹⁰ Sistani, "Code of Practice for Muslims in the West," <http://www.shiamasjid.net/books/Code/> "Food and Drink," #161 (accessed August 16, 2008).

¹⁹¹ *Aḥkām al-Mughtaribīn*, 321.946.

¹⁹² Sanei, *Majmū' al-Masā'el*, 47-48.99.

The matter of trust is also operative in the realm of testimony. The mere assertion by a non-Muslim that meat is *ḥalāl* is insufficient basis for permissibility,¹⁹³ although al-Fadil permits the testimony of a non-Muslim vendor so long as he is working in a Muslim market.¹⁹⁴ The testimony of non-Muslims is likewise of no consequence when stamped onto the product. This is confirmed by *fatāwā* from Khui, Sistani, and Golpayegani. As Golpayegani puts it, “If it is imported from Muslim countries, it is ruled as *ḥalāl* and *tāhir*, and it is permitted to eat, sell, and buy it. But if it comes from non-Muslim countries, it is ruled as *mayta*; the writing is of no consequence unless it is clearly determined (*aḥraza*) to have been slaughtered according to Islamic law.”¹⁹⁵ Sistani likewise rules as impermissible meat, whether fresh or canned, bearing a stamp of approval but produced by non-Muslims.¹⁹⁶ In contrast, the word of a Muslim, even if non-observant, is trustworthy unless, Fadlallah says, “he is known for certain to be a liar.”¹⁹⁷ Non-meat products are less threatening. For example, Sistani permits his followers to purchase non-meat food products of unknown ingredients from a Western store, so long as the buyer “doesn’t know that it contains *ḥarām* items, or ingredients derived from them”; moreover, in this case, it is not necessary to inquire.¹⁹⁸

Montazeri provides a similar response to a *muqallid* living in a small town in Canada, where the only Iranian store is suspected of being run by a Baha’i. “If buying from this store is problematic,” the *muqallid* adds, “then what of the thousands of other

¹⁹³ *Aḥkām al-Muḡhtaribīn*, 319.936.

¹⁹⁴ *Ibid.*, 323.953.

¹⁹⁵ *Ibid.*, 320.942.

¹⁹⁶ *Ibid.*, 321-22.947/948. In conversation about this point, Lynda Clarke observed the interesting parallel here with a general preference for oral over written testimony both in authentication of *ḥadīth*, and what counts as testimony in a court of law. One wonders if the “meaninglessness” of the certification stamp has any conscious connection to this tendency.

¹⁹⁷ Fadlallah, *Taḥaddīyāt al-Maḡjar*, 140.

¹⁹⁸ *Aḥkām al-Muḡhtaribīn*, 323.951.

stores the vendors of which we don't know their religion, or even the Chinese and Japanese who have no religion?" Montazeri's reply is double-sided. One need not ask the Iranian vendor's religion and may purchase from the store; however, his meat and other animal products are not permitted.¹⁹⁹ Montazeri does not say, but it would seem that he is invoking the principle of precaution.

In another *fatwā*, Montazeri suggests that difficulty of finding Islamically slaughtered meat in Europe is insufficient reason to abandon "the Qur'an and the practice (*sunnat*) of the infallibles (the Imams)." On the contrary, he says, "the presence of modern means for coming and going and of freezers in most homes should resolve the problem. And [besides]," he adds, "no-one is forced to remain somewhere in which the possibility of acting in accordance with God's law is not easy for him or her, because 'the earth is wide enough.'"²⁰⁰ Montazeri might be understood as suggesting that in addition to freedom to practice the rituals of Islamic worship, classically the central criterion used to legitimate residence outside of *dār al-islām*, living in a non-Muslim environment might also be conditioned on having access to properly slaughtered meat, even if this required extra effort. Similarly to some *fatāwā* from Fadlallah, as will be seen in later chapters, the message conveyed here is that *mustaftīs* might be too quick to jump to what *mujtahids* seem to view as rather weak excuses for 'hardship'.

Consumers also face moral issues with regard to their purchases. For example, Sistani permits purchasing *ḥalāl* products from a Muslim store that also sells wine, "if it is probable that the Muslim shop owner investigated [the meat's] legality."²⁰¹ It seems that Sistani's concern is not so much one of business ethics, but one of trust; a Muslim

¹⁹⁹ Montazeri's official website, <http://www.amontazeri.com/farsi/default.asp> (accessed February 12, 2009).

²⁰⁰ Montazeri's official website, <http://www.amontazeri.com/farsi/default.asp> (accessed February 13, 2009).

²⁰¹ *Ibid.*, 322.949.

who sells wine suggests the need for a measure of caution, though hardly one of vigilante activism. Moreover, in permitting the purchase, Sistani effectively puts the greater responsibility on the Muslim proprietor or employee rather than the consumer. It might be reasoned that in purchasing permitted products, regardless of what else is sold, the consumer—to whom the *fatwā* is here directed—does not gain from what is forbidden. Though the purchase may well benefit the shop owner generally, this is not the consumer’s responsibility. More leniently, Fadlallah gives cautious permission to a *mustaftī* who asks if it is permissible “to buy meat from stores of non-observant Muslims who sell wine and other forbidden items in their stores.” Fadlallah replies: “If we are able to buy from those who do not sell alcohol/wine (*khamr*) then it is obligatory (to buy from them); but if this is not possible, then it is permitted (to buy from the other).”²⁰²

In sum, the thrust of these *fatāwā* indicates carefully placed boundaries around the consumption of meat and purchase of animal products in Western countries and from people not known for certain to be Muslim. The requirement that meat and animal products be from a *ṭāhir* animal, slaughtered by a Muslim and certified by the same, places significant restrictions on grocery shopping and making other purchases in the West. Nevertheless, proprietors, employees, and consumers have unequal responsibilities in this regard. The consumer, though restricted to *ḥalāl* meat products, is responsible only for his or her own choice of shopping venue. If done according to the *fatwā* literature, this would mean good business for Muslim butchers, shopkeepers, and markets, not to mention lending support to communal solidarity.

Mukallaf as Member of Western Society

²⁰² Fadlallah, *Taḥaddiyāt al-Mahjar*, 138.

One question dominates the discussion around food and drink in the context of social intercourse, and that is what a Muslim is to do in the presence of wine or other alcoholic beverages. This is, of course, a very common occurrence in the West. Avoiding it completely could easily present a formidable obstacle to ordinary social intercourse. Nevertheless, there is widespread agreement among *mujtahids* that such avoidance is necessary. Khomeini, Khui, Golpayegani, and Khamenei forbid sitting at the same table where alcohol is served. Khamenei likewise forbids merely attending a gathering where it is present and adds that this serves as a testimony to one's Muslim identity.²⁰³ Fadlallah and Sistani take a slightly more nuanced approach. Sistani states that "the table" from which the Muslim is barred is literally only the one where alcohol is being drunk; it does not refer to other tables within the same room, as in a restaurant. The prohibition against sitting at the same table, Sistani says, is based "on precaution."²⁰⁴ Although attendance at meetings where alcohol is served is not forbidden, according to Sistani, not attending is, on the basis of necessary precaution, the better option. But, he adds, "If it is possible to use it as an opportunity to dissuade others from sin, it's okay (*lā ba's*)."²⁰⁵

Socializing in the presence of *harām* food items where one is tempted to consume them, might also be problematic. For Fadlallah, merely sitting at a table where there is carrion or pork is permitted.²⁰⁶ Montazeri considers a *mustafī*'s concern to not offend his non-Muslim colleagues by not eating their meat when invited to their homes insufficient grounds for partaking of it. Moreover, he adds, it is a matter of mutual respect. "In the same way that your colleagues – whatever their religion – consider themselves free of

²⁰³ *Aḥkām al-Muḡtaribīn*, 310.907-911.

²⁰⁴ *Ibid.*, 310-11.912.

²⁰⁵ *Ibid.*, 311.914.

²⁰⁶ Fadlallah, *Taḥaddiyāt al-Maḡjar*, 153.

Islamic laws of slaughter and you respect their belief,” he says, “you should likewise consider yourself free [to maintain such laws] and they also must respect your religious beliefs.”²⁰⁷

CONCLUSION: AT HOME IN THE *HIJRAH*?²⁰⁸

This study shows that it is in the field of product-related issues where life in the West presents the greatest challenge in terms of purity and food concerns and where the weight of prohibition may be said to neutralize the more socially integrative character of person-related *fatāwā*. The “assumption of purity” principle, widely applied in this domain, makes rulings of non-Muslim impurity difficult to obtain. Even when a *mujtahid* holds the opinion, as Sanei does, that non-Muslims are impure, conditions for contamination are so rare that it still results in what Kevin Reinhart calls an “impurity no danger” principle.²⁰⁹

We might ask why, in spite of its deep roots in classical and pre-modern legal discourse and Qur'an exegesis, contemporary *mujtahids* would downplay or even contradict traditional opinion on non-Muslim impurity. From a psychological point of view, it is reasonable to speculate that with the rise of Muslim migration to the West, the repercussions of a closed social network based on judgments regarding persons amongst whom the migrant community lives could give an unwanted impression of anti-social and intolerant attitudes. In addition, the relative unimportance of person-related impurity gives Shi'ite Muslims in the West a greater affinity with Sunni Islam, for which non-Muslim impurity is essentially a non-issue.

²⁰⁷ Ayatollah Montazeri's website, <http://www.amontazeri.com/farsi/default.asp> (accessed February 13, 2009).

²⁰⁸ Adapted from Haddad, “At Home in the *Hijra*: South Asian Muslims in the United States,” ed. Harold Coward, John R. Rinnells, and Raymond Brady Williams (Albany: SUNY Press, 2000), 239-258.

²⁰⁹ The phrase is borrowed from Kevin Reinhart's article, “Impurity/No Danger.”

Both Sunni and Shi'ite Muslims, in any case, express concern regarding legal slaughter and permit each other's meat, a fact that propels the *sharī'ah*-minded amongst the community towards the formation of a subculture built around buying, selling, and consuming food. As a necessary daily activity, preparing and eating food is universally surrounded by diverse cultural customs and habits that are not easily discarded. When tied to religious values, the sense that dietary habits are part and parcel of one's identity is even more pronounced. As one food scholar put it, the common adage "you are what you eat" suggests that if you don't know what you're eating, your identity is put into question.²¹⁰

A final possible reason for the shift only in non-Muslim impurity is that not only are dietary laws shared with the broader Muslim community, they are also far less likely to raise suspicions in the non-Muslim majority community, as such laws are common in many cultures (most Westerners are at least minimally familiar with Jewish kosher laws). Consequently, they are more widely acceptable. A recent article in the Montreal Gazette shows how lively an issue dietary law is within the Muslim community at large. While the Toronto-based Halal Monitoring Authority looks after inspecting and certifying food the producers of which claim is *ḥalāl*, the article states, no such body exists as yet in Montreal. Though hiring inspectors adds significantly to a butcher's expenses, the article suggests that many of Quebec's Muslims feel it is worth the effort to ensure certification. "[...] if we say it's halal," one proprietor states, "we have to make sure it's halal."²¹¹

This study suggests that rigorous inquiry might be less crucial than recognition that a butcher or market is Muslim, a requirement that supports the notion that safety and

²¹⁰ Interview on CBC Radio 1, "The Current," hosted by Anna Maria Trimonti, August 13, 2008.

²¹¹ Giuseppe Valiante, "Food Labelling: Imams want halal controls," *The Montreal Gazette*, August 7, 2008, Page: A1 / FRONT, Edition: Final.

security lies in the construction of social spaces that are noticeably defined by Islam. This is a theme that repeats itself over and over in the *fatwā* literature for the West, not only in the area of purity-related concerns, but from ritual duties to education to dress. Though there is a range of opinions, this is not so plentiful as to negate my thesis that, for the legal scholars, space in the West is truly safe for Muslims only in as much as it is Muslim space.

This has intriguing associations with the notion of home as sacred space. Safety and security, it is said, are fundamental to human beings' "attachment to place," reflected in the universal notion of home.²¹² Similarly, the house (*dār*) of Islam is the place "where the believers live in safety, while *dār al-ḥarb*, 'the abode of war,' is the world outside the ideal home of the believers."²¹³ As the home protects its inhabitants from hostile forces around it, so it also needs protection. Nothing illustrates this more than boundaries, a concept filled with sacred meaning. The very word sacred, *sanctus*, derived from the word *sancire*, meaning 'to limit' or 'to enclose,' Annemarie Schimmel tells us, suggests the notion of "making sacred by separation."²¹⁴ Boundaries around the (African-American) Muslim home in America "define an area of control," Beverly McCloud adds.²¹⁵

McCloud shows how in the Western Muslim context this translates into an insider-outsider paradigm, where protection signifies preventing the hostile forces of the outside world of *harām* from entering the metaphorical home of Islamic legal observance

²¹² David Brown, *God and Enchantment of Place: Reclaiming Human Experience* (New York: Oxford University Press, 2004), 158-9.

²¹³ Annemarie Schimmel, *Deciphering the Signs of God: A Phenomenological Approach to Islam* (Albany: State University of New York Press, 1994), 49.

²¹⁴ *Ibid.*

²¹⁵ Aminah Beverly McCloud, "'This is a Muslim Home': Signs of Difference in the African-American Row House," in *Making Muslim Space*, 68.

and harming its inhabitants. I suggest that for the *marji' al-taqlid*, the custodians of this law, life in the West is neither sacred, nor fully safe; nor, yet, is it home. Perhaps *mujtahids* are too far removed from the situation in the West to appreciate the depressing consequences of legal rigidity in the minority context. I suggest that without taking adequate account of legally valid contextual factors of time and place, and applying a very narrow interpretation of necessity, their opinions risk alienating followers.

Finally, we may note the tendency of *mujtahids* to correlate responsibility with role, a reflection, perhaps, of the fundamental philosophy behind the institution of the *marji'iyah* itself, where the *muqallid* “hangs” his or her responsibility on the shoulders of the *muqallad*, the legal scholar. As those who possess training and knowledge, *mujtahids* bear the brunt of moral responsibility on behalf of their followers who lack the time and training needed to gain such knowledge. This pattern is reflected in the case of product-related *fatāwā*. We see there a structured method of deferral of responsibility – responsibility rests with the nearest source of the food product and his access to knowledge, the shopkeeper before the customer; or with the producer/butcher before the shopkeeper. Consequently, while each individual is responsible for his or her own moral choices, the level of accountability corresponds to one’s degree of access to knowledge. This apportioning of responsibility might be understood to offset the otherwise difficult task *sharī'ah*-minded migrants face in leading a legally defined moral life in the midst of a “hostile” environment outside of the Abode of Islam.

CHAPTER FIVE

RITUAL LIFE: DUTY AND IDENTITY

To say that the field of *'ibādāt* is of great importance in Islamic law, as it is to observant Muslims, would be an understatement. As the contemporary Sunni scholar Sayed Sikandar Shah put it, “*Ibādah* stands central in the teachings of Islam. The Qur'an describes it to be [sic] the *raison d'être* of human creation: ‘I have not created man and jinn except for my *ibadah*’” (Q51:56).¹ As a field in *fiqh*, *'ibādāt* are also less given to alteration than are *mu'āmalāt*. As Ayatollah Mostafa Muhaghegh-Damad has noted, “obligatory and forbidden acts,” such as acts of worship, are “fixed.” They “do not change with time and place and are not determined by the government.”² Moreover, neither the necessity nor manner of ritual performance is rationally determined. There is, it is said, no rational explanation for why worship is commanded by God “except that these were commanded by the Lawgiver, and it is rational to obey him.”³ This might help to explain the negligible amount of interpretive reasoning *mujtahids* appear to exercise in *fatāwā* on this subject.

Yet questions on ritual matters in the West are plentiful. Why is this? One can postulate that one reason is that laypeople are not always familiar with what the law says and, as discussed earlier, obtaining this knowledge from a qualified authority is the *mukallaf's* full legal responsibility.⁴ Robert Gleave has rightly stated that in accordance with *Usūlī* legal theory, “[o]ne who refuses to obtain for himself the guidance necessary

¹ Seyed Sikandar Shah, “*Ibādah: A Concept Beyond Ritualism in Islam*,” *Islamic Quarterly* 44, 3 (2000), 537.

² Muhaghegh-Damad, “Role of Time and Social Welfare,” *Shi'ite Heritage*, 213-222, 215.

³ Gleave, *Inevitable Doubt*, 124.

⁴ This is in conformity to the position reached by Shaykh Murtada Ansari (d. 1864), discussed in Chapter Two, that knowledge of the law and personal discretion are not in themselves sufficient bases for action on the part of ordinary Muslims.

to fulfil [sic] the law of God is not forgiven his errors. Even if by chance, some of his actions accord with the rulings of God, his intention is faulty.”⁵ This is especially serious in matters of ritual law according to Shaykh Ansari’s ruling that ritual performance is legally void if not performed in obedience to a recognized *marji*.⁶ Variables added by the Western context would inevitably augment the need for specialized knowledge of the proper manner of ritual worship. As situations prevalent in the West are not commonly covered in standard legal manuals, *mukallafs* who wish to comply with the system are obliged to refer to the designated authorities.

Secondly, it appears that *mustaftīs* anticipate guidance that enables them to accommodate to the Western social context to some degree. Many inquire about possible mitigating circumstances. This suggests an expectation of legal interpretations that utilize principles intended to relax regulations in certain contexts. One such principle is that of difficulty and hardship (*‘usr wa ḥaraj*). *‘Usr wa ḥaraj*, as discussed in chapter one, is a principle of Shi’ite law that allows a rule to be lifted when a person is unable to fulfill it.⁷ It appears to function in binary opposition to the principle of *iḥtiyāt*, which is favoured rather by *mujtahids*, and which I discuss below. As discussed in chapter one, the context of the Qur’anic verses,⁸ and the explanation given by Ja‘far Sajjadi, indicates that the primary reference of *‘usr wa ḥaraj* is to lifting rules of *‘ibādāt*, such as ablution, prayer, and fasting, when following them is made difficult by illness or travel. As we will see below, *mustaftīs* frequently try to obtain permission to lift a ruling due to some form of perceived “hardship.” More often than not, however, the type of hardship they describe is

⁵ Gleave, *Inevitable Doubt*, 17.

⁶ See Moussavi, *Religious Authority*, 174-75; 271-72.

⁷ Sajjadi, *Farhang*, 1:88.

⁸ Surah 2:185, “God desires ease (*yusr*) for you and does not wish difficulty (*‘usr*) for you...” and Surah 22:78, “He has not laid any hardship (*ḥaraj*) upon you in religion...” (and similarly, Q5:6).

related to variable contextual factors such as not having time to pray at work and does not correlate to any textually determined, or certain, cause.

This serves as an interesting example of how new situations challenge the Imami legal methodology. According to Muhaghegh-Damad, the methodology requires that factors such as benefit and harm be established solely “on the basis of textual evidence,” and not, as in Sunni law, be reached by *qiyās* (analogy) or other methods such as “‘discerning the public interest’ (*istiṣlāḥ*).”⁹ While analogical reasoning is practiced in Shi’ite law, it is not the *qiyās* of Sunni schools, in which the *‘illa* may be determined by the jurist’s opinion (*ẓann*). Where Muhaghegh-Damad appears to rule out analogical reasoning altogether, Gleave explains that in Shi’ite law, “the identification of the *‘illa* must be certain.”¹⁰ Thus, it seems that one factor preventing *mujtahids* from accepting the contextual factors pleaded by *mustaftīs* is the methodology of the Shi’ite *madhhab* with regard to analogy. Another, as we will observe, is *iḥtīyāt*.

The combination of factors outlined above results in some predictability in terms of concrete results in legal opinions. Be this as it may, an analysis of the dialogue between *mustaftīs* and *mujtahids* in the field of *‘ibādāt* yields some interesting observations. The chapter demonstrates that *fatāwā* in the field of *‘ibādāt* reflect a tendency towards a “paradigm of resistance” to the West on the part of *mujtahids*, while also resisting *mustaftīs*’ timid initiatives towards a paradigm of “selective engagement.” While this is at least partly due to methodology, the literature suggests that a broadly based adoption of Metcalf’s paradigm of “resistance” issues also out of *mujtahids*’ values and attitudes towards the West and their views of Muslim minority identity. While

⁹ Muhaghegh-Damad, “Role of Time,” 215.

¹⁰ Gleave, *Inevitable Doubt*, 130.

ardently endeavoring to preserve Islamic identity and values, with some notable exceptions, *mujtahids* seem generally to lack appreciation for the values of Western society and appear to be unfamiliar with problems and realities of minority integration.

There is common consensus that Islamic ritual life, expressed as the pillars (*arkān*) of Islam,¹¹ is of critical importance to Muslim identity and the fundamental value of maintaining the legal strictures of their performance is perceived as especially vital for those who reside in the West. Earlier, it was pointed out that *hijrah* to non-Muslim territory in Shi'ite legal discourse was itself conditional upon “freedom to manifest [or perform] the signs of Islam,” commonly understood as the ritual duties. The problem of ritual performance is thus crucial to the larger juristic discourse on migration to the West. In the *fatāwā* of *'ibādāt*, the “signs of Islam” become the enduring and uncompromising locality of a manifest Muslim minority identity, constructed around a strict legalism. Rituals performed in the West emerge as pillars in a very literal sense, such that any weakness in their observance would result in the whole edifice of Islamic identity to collapse and to give way to the ascendancy of unbelief over *īmān*, for which reason migration itself is prohibited.¹²

The *fatāwā* analyzed in this chapter treat the performance of ritual worship in a non-Muslim Western context only, though some overlap with more general questions is inevitable. I have chosen for analysis the most representative out of the fifty or so consulted.¹³ I catalogue them into three general categories: questions occasioned by a

¹¹ After confession of faith (*shahādah*), the four pillars of worship are the five times daily ritual worship (three in Shi'ite Islam) (*ṣalāt*), the yearly month long fast of Ramadan (*ṣawm*), paying the obligatory religious tax (*zakāt*), and pilgrimage (*hajj*) to the holy sites of Mecca.

¹² See chapter three.

¹³ *Fatāwā* on ritual practices have been issued also by Khomeini, Khamenei, Fadil al-Lankarani, Golpayegani, Tabrizi, and Makarim. These may be found in *Aḥkām al-Mughtaribīn*, 92-96, and 100-101.

non-Muslim social context; questions that arise out of geographic location relative to the natural environment; and questions related to Western sources of knowledge and instruments of technology. These are, of course, heuristic categories only and should not be considered rigidly defined. As several *fatāwā* might be placed in more than one category, I use my own discretion in assigning them to the category of primary relevance. After a summary of the most salient features of the *fatāwā*, I will discuss a selection in more detail.

SUMMARY OF STYLISTIC CHARACTERISTICS

In terms of stylistics, *istiftā'āt* concerning ritual worship and *fatāwā* both tend to be brief, with some exceptions. Al-Hakim is habitually more verbose than others, often providing detailed justifications for his opinions. *Mujtahids* tend to structure their responses in direct reference to the questions, avoid responding to unarticulated questions that might be implied in the language used, and tend not to assume motives. These stylistic features give the *fatāwā* an appearance of legal objectivity, though elements of subjectivity are often not far beneath the surface. We look first at the general characteristics of *istiftā'āt*.

Istiftā'āt

Mustaftīs appear to be familiar with the generalities of Islamic law. Much of this may be attributable more to the editors who rework *istiftā'āt* to conform to a relatively standard pattern that uses conventional legal terminology.¹⁴ The simplest of what I see as four standard formulae is to go directly to the question of permissibility. For example, the following question put to Fadlallah: “Is it right to pray in the home of a person from *ahl*

¹⁴ The standard format of *istiftā'āt* gives this impression. This was confirmed by Seyed Mahdi Shahrestani, mentioned in chapter two, in personal conversation on July 3, 2006.

al-kitāb and on a piece of material that he says is washed?”¹⁵ A slightly more detailed question would include sub-questions giving possible variables, each of which requires legal guidance. For example: “If the time for prayer arrives when we are working, are we allowed to use some of our work time to perform the prayer, if this does not affect the progress of our work? And if it does affect our work, is it allowed? And is the prayer valid? Is seeking the permission of the work boss obligatory?” also asked of Fadlallah.¹⁶

The third pattern includes a brief description of the *mustaftī*’s situation, with or without sub-questions. For example, “In some areas in Sweden the sun doesn’t set for a period of 52 days, and in other regions, the day will be 23 hours long, and in others, the day will last for 17 hours. What is the ruling on the prayer and fasting of the Muslim brothers who are residing in these areas?” asked of Fadil al-Lankarani.¹⁷ Finally, there are questions that include one or more of the above components as well as a veiled or unveiled attempt to persuade the *marji*’. Such is the following question answered by at least three *mujtahids*: “The time of prayer arrives during the Muslim employee’s work hours and work here is highly in demand and precious. The worker will encounter difficulties in leaving his job for prayer; it might result in his being dismissed from his job. Under these circumstances, can he perform his prayer as *qadā*’ (an obligation owing)?¹⁸ Or, is he obliged to do it even if it leads to having to leave his job that he needs?”¹⁹

¹⁵ Fadlallah, *al-Hijrah wa al-ightirāb: ta’sīs fiqhī li-mushkilat al-lajū’ wa al-hijrah* (Beirut: Mu’assasat al-‘Arif al-Matbū’ūt, 1999), 376; Fadlallah, *Islamic Lanterns, Conceptual and jurisprudence questions for natives, emigrants and expatriates*, comp. Adil al-Qadi and S. al-Samarra’i, trans. S. al-Samarra’i (Beirut: Dār al-Malāk, 1425/2004), 309.D12.

¹⁶ Fadlallah, *Islamic Lanterns*, 311-12.D21.

¹⁷ *Aḥkām al-Mughtaribīn*, 100-101.238.

¹⁸ See below.

¹⁹ al-Hakim, *Murshid al-Mughtaribīn*, 193-94.74.

In chapter one, we discussed the legal term *qaḍā'* as referring to an obligation owing, especially to God, and noted the strict conditions by which it becomes legally operative. *Mustaftīs*, in contrast, tend to use the term in a wider sense of intentional postponement due to some practical cause and anticipate the validity of delaying prayers until, for example, after employment hours. The legal and theological notion that only God has absolute claim of obedience would tend to reinforce the unlikelihood of a ruling such as this, as doing so would violate the primary right (*ḥaqq*) of *'ibādah*, and indeed of obedience, one owes ultimately to God alone.²⁰

By articulating the problems perceived to be relevant to themselves, *mustaftīs* set the terms of engagement with *mujtahids*. The fundamental rules of worship being familiar enough, questions commonly revolve around three inter-related concerns:

1. how to define “hardship” (*'usr wa ḥaraj*) in different situations – i.e., what constitutes hardship in the legal sense;
2. determining legal conditions for performing ritual duties as *qaḍā'*²¹
3. determining conditions for other forms of suspension or alteration of these duties.

We may problematize these tasks in two ways. In terms of adaptation, how does a person adapt the practice of Islamic ritual life—which assumes a God-centered social order within which human beings stand in relation to God in positive affirmation of

²⁰ See, for example, Ayatullah Muhammad Taqi Misbah Yazdi, “The Source of ‘Rights’,” *Al-Tawḥīd* 17, no. 2 (2003). Available online at: http://www.al-islam.org/al-tawhid/source_rights/ (accessed January 26, 2009). Yazdi is within the centre of the tradition when he speaks of rights as being embedded in the relationship of the Creator to the created. “Hence,” he says, “the first right of possession of creatures is established for the Creator. On this basis the right of possession for every existent being has finally to be authenticated by divine design. Therefore, if the Almighty Allah (SwT) did not permit man to use his limbs and organs he could not have this right. The right to possession of other beings, all of which are the total and absolute property of the Creator could not, therefore, be imagined. Also, the first duty of a man originates from the real over lordship of the Almighty Allah (SwT) and no duty can take precedence over it. All other ‘rights’ and duties spring from this right and duty.”

²¹ See below.

God's lordship²²—to a Western secular public sphere defined by an alternate, human-centered paradigm? And, secondly, in terms of identity, what constitutes the essential and uncompromising features of Muslim identity and what is their meaning in a minority situation?

Fatāwā

The *fatāwā* indicate some general tendencies in terms of rulings, methodologies, and reference, explicitly or implicitly, to a number of sub-discourses. *Fatāwā* of ritual are largely restrictive and tend towards dichotomizing the perceived socio-ethical world of Islam and that of non-Muslims or the West. The majority offer a negative ruling even in cases in which social context suggests a need for leniency, which might conceivably be granted via juristic principles such as *'usr wa ḥaraj* or change in a ruling to adjust to time and place (*zamān wa-makān*). Although *'usr wa ḥaraj* is invoked on occasion, what I am calling “juristic worldview discourses” appear to function more pervasively and decisively.²³

Another prominent underlying discourse is that of *da'wah*. A search of the term *da'wah* in any standard *risālah* would produce few visible results. Apart from the injunction to call on the enemy in expansive warfare (*jihād*) to convert in lieu of war, the early conquests do not display any major missionary objective. On the contrary, the term more frequently paired with *jihād* was not *da'wah*, but *hijrah*, as discussed briefly in chapter three. Early Muslims were strongly encouraged to migrate to Medinah in order to

²² Seyyed Hossein Nasr, “Standing Before God: Human Responsibilities and Human Rights,” in *Humanity Before God: Contemporary Faces of Jewish, Christian, and Islamic Ethics* (Minneapolis: Fortress Press, 2006), 299-300. The concept is in reference to the classical Islamic notion that humanity as a whole answered affirmatively to God when asked, “Am I not your Lord? They said: Yea, verily. We testify” (7:172).” Nasr puts it eloquently when he states: The response, ‘Yea,’ [...] involves not only Adam but *all* human beings, that is, to be human is to have said yes to God.” *Ibid.*, 300.

²³ For an explanation of this phrase see chapter one.

fortify the community, while staying behind when one was able to migrate was faulted for contributing to the strength of Mecca. From the Muslims' place of strength, they would then be in a position to launch military *jihād* against surrounding tribes.

In his study of Islamic *da'wah* in the West, Larry Poston reaches virtually the same conclusion of the early period. He demonstrates that *da'wah* during the classical period of Islamic history was primarily pragmatic. Its main objective was to eliminate the potential for rebellion against Islamic political hegemony, which in turn was necessary to create the right conditions for religious propagation.²⁴ In agreement with Richard Bulliet, Poston concludes that the overall objective of this strategy was the consolidation of the rapidly expanding empire, which the Mongol invasions brought to an abrupt though not altogether conclusive end.²⁵

This does not mean, necessarily, that the idea of *da'wah* is un-Islamic or that it cannot be included within a legal framework of migration. It is certainly plausible that frequent appeal to *da'wah* as a justifying element for migration in the contemporary *fatwā* literature may be a deliberate substitute for *jihād* in the *hijrah wa* (and) *jihād* model. A *fatwā* issued by al-Hakim illustrates this hypothesis. In this *fatwā*, al-Hakim employs the metaphor of *jihād* in reference to *da'wah*. He suggests to a Muslim employee that the believer who maintains ritual prayer at work in spite of the threat of job loss is comparable to a person who fights in the path of God (*yuqātil...fī sabīl Allāh*), reminding an unbelieving society of the God they have forgotten.²⁶ As will be shown in several chapters of this work, Fadlallah also makes frequent reference to *da'wah*

²⁴ Larry Poston, *Islamic Da'wah in the West: Muslim Missionary Activity and the Dynamics of Conversion to Islam* (Oxford: Oxford University Press, 1992), 20.

²⁵ *Ibid.*, 20-21.

²⁶ al-Hakim, *Murshid al-Mughtaribīn*, 193-94.74.

activities as a legitimizing factor for permissive *fatāwā* in the Western context. Thus, I suggest that the correlation between *da‘wah* as motive for migration to the West that *mujtahids* sometimes make recalls the classical link between *hijrah* and *jihād*, further underlining the paradigm of resistance to the West.

Returning to the theme of freedom to manifest the signs of Islam as justification for migration, we note that the idea put forward in these *fatāwā* is that by “freedom of religion” jurists imply something more than freedom to maintain private religious observance—as has historically been the case in Islamic law regarding religious minorities. In contrast, the discourse of this literature suggests something quite beyond this limited notion of freedom, envisioning a social reality that has existed very rarely in any pre-modern society. Rather, the concept of freedom evidently presupposed here assumes, at least as far as the practice of Islam is concerned, absolute and comprehensive application of and non-obstruction to public religious expression of the faith. Religious expression is understood primarily in terms of ritual performance in the precise manner mandated by the law in every detail, such that it can maintain an integrity that is to a great degree indifferent to social context.

Consequently, finding legal justification for postponing a given ritual on account of contextual causes is rare. Exceptions are, as mentioned above, more often textually than contextually determined. This is not to say that there is no attempt at all to test the capacity of the law to adapt to new environmental conditions. Nor is it the case that any given *marji‘* is consistently and without exception predictable in his responses, though one does, as might be expected, observe a general consistency of approach and worldview with each *mujtahid*. Further, it would not be true to say that the *mujtahids*

speak unequivocally with one voice on all matters. Fadlallah's more nuanced style, for example, shows at least the blurry presence of a sub-discourse of dialogue (*hiwār*), or engagement with the West, even though this is still secondary to the more critically significant discourse of *da'wah*.

We turn now to an analysis of selected *fatāwā* according to topic. My analysis asks: What happens when text and context clash, when freedom to observe the law is obstructed by the context in which it lives? To what degree does context play a role in shaping responses?

I. THE NON-MUSLIM SOCIAL CONTEXT

PERFORMING PRAYER DURING HOURS OF EMPLOYMENT

This question comes up frequently, and is addressed by Fadlallah, al-Hakim, Sistani, and Khui. Not surprisingly, all either suggest or explicitly state that prayer is an obligatory Islamic duty that cannot be compromised to suit one's schedule. In spite of this consensus, there are some noticeable differences in approach. Fadlallah's brief response extends beyond the boundaries of ritual law to the matter of the obligation to fulfill one's contracts. Al-Hakim's relatively lengthy *fatwā* speaks to the fundamental legal and symbolic importance of prayer to Muslim identity and *da'wah*. Sistani suggests a partial compromise of symbolic bodily gestures in exceptional situations, and Khui's cryptic response to a detailed and doubtful *istiftā'* asserts the impermissibility of personal initiative on the part of a *muqallid* (one who follows the rulings of a *mujtahid*) in this regard. Khui thereby underlines the divine authority of the law and, by extension, the delegated authority of the '*ulamā*'. With this as introduction, we turn to the salient features of each of four *fatāwā* in turn.

Fadlallah

Istiftā': If the time of prayer arrives when we are working, are we allowed to use some of our work time to perform the prayer, if this does not affect the progress of our work? And if it does affect our work, is it allowed? And is the prayer valid? Is seeking the permission of the work boss obligatory?

Fatwā: This matter depends on the job contract. If the contract implies using the whole time for work, then getting the boss's [sic] permission is obligatory; but prayer can never be left unperformed.²⁷

The four questions in the *istiftā'* suggest that the *mustaftī* desires to be faithful to two apparently competing obligations that correlate to the two major divisions of the *sharī'ah*: *ibādāt* and *mu'āmalāt*. We might say that the individual is attempting to balance two sets of rights recognized by Islam—the right of God to worship and the right of an employer to honest labour. Whatever decision is made will also help to resolve an underlying question about identity and role. One might paraphrase the question as: “To what extent can my identity as a Muslim interfere with my role as an employee, or as a Muslim employee in a secular environment? How does the law prioritize my obligations in this context?” Further, the *mustaftī* asks about the legal status of a ritual obligation if performed in violation of secular legal conditions, such as doing so while infringing on the employer's rights.

We are not told where the *mustaftī* resides, but it is plausible that local labour laws contain provisions for religious obligations. According to Natalie Fraser of “The Lawyers Weekly,” the Canadian Human Rights Act requires that employers in Canada “accommodate their employees’ religious beliefs, unless doing so creates undue hardship.”²⁸ This legislation reflects the value given to multiculturalism in contemporary

²⁷ Fadlallah, *Islamic Lanterns*, 311-12.D21.

²⁸ LexisNexis Canada, “Understand your Legal Issue,” <http://www.canadian-lawyers.ca/understand-your-legal-issue/employment/1036166/> (accessed February 1, 2009). According to a U.S. lawyers association

Canadian politics. Though it usually affects accommodating diverse religious holidays, as the actual case examples given by Fraser show, it is conceivable that the law could also be applied to daily worship requirements, so long as negotiated agreements do not compromise the terms of employment or place the employer's business in jeopardy.²⁹

Although Fadlallah makes no reference to these provisions, he directs the *mustaftī* to the contract of employment. The Islamic legal code is unambiguous with regard to fulfilling one's contracts, as is clearly emphasized in the matter of obeying governments discussed in chapter eight of this study.³⁰ The present case similarly obliges the *mustaftī* to act according to the terms of the contract. If the contract allows for breaks, Fadlallah implies that the *mustaftī* may use these breaks for prayer. If not, he or she must request permission. Though not making any direct reference to secular discourse, Fadlallah's choice of reference is oriented towards a factor relevant both to Islam and Western social values, an approach not shared by his colleagues. As will be seen below, the latter tend to keep their arguments to religious interests specific to Islam.

Having said this, the final directive of the *fatwā* returns the reader to a religiously oriented sub-discourse concerning the non-negotiability of the rights of God (*huqūq* Allah). There is no question but that prayer must be performed at the legally stipulated times. Fadlallah does not entertain the possibility of performing them as *qaḍā'*, perhaps

called NOLO, a similar provision exists in U.S. Law. See NOLO, "Your Rights against Religious Discrimination," <http://www.nolo.com/article.cfm/objectID/066F46D6-60DF-4734-B6EBBFC79FE3F80E/104/150/175/ART/> (accessed February 1, 2009).

²⁹ In their Report to the Consultation Commission on Accommodation Practices Related to Cultural Differences, authors Gérard Bouchard and Charles Taylor outline two possible routes for resolving such conflicts of interest: the legal route and the citizen route. The former relies on the courts to issue a ruling, and which commonly results in a winner and a loser. Bouchard and Taylor favour the citizen route "which is less formal and relies on negotiation and the search for a compromise. Its objective is to find a solution that satisfies both parties and it corresponds to a concerted adjustment." *Building the Future: A Time for Reconciliation* (Consultation Commission on Accommodation Practices Related to Cultural Differences, 2006), 52. Accessed via Concordia University Library's electronic resources: <http://0-site.ebrary.com.mercury.concordia.ca/lib/concordia/Doc?id=10232014> (accessed January 28, 2009).

³⁰ See pages 15-16 of chapter eight.

because the *mustaftī* does not ask about this possibility. In any case, Fadlallah's reply suggests that the rights of God transcend human authorities and are not restricted to Islamic territory. Fadlallah is here consistent with the view of the Imami legal school, according to which the jurisdiction of Islamic law, not just with regard to ritual, but in all fields, extends beyond the borders of an Islamic polity.³¹ He makes no attempt, however, to contextualize its application.

In summary, if the *istiftā'* implies a question of identity Fadlallah's response suggests two essential features: as a Muslim *employee*, the *mustaftī* must be faithful to his or her contracts; as a *Muslim*, he or she must fulfill his or her religious duties as stipulated by Islamic law. Thus, the *mustaftī's* dilemma remains; the matter of ritual duties must become a topic of discussion and possibly a cause of tension between the *mustaftī* and his or her employer. In light of Fadlallah's enthusiasm for *da'wah* in the West, it is possible that he sees this situation as providing just such an opportunity.

al-Hakim

Istiftā': The time for prayer arrives during the Muslim employee's work hours and work here is *highly in demand*. The worker will encounter *difficulties* (*ṣa'ūbah*) in leaving his job for prayer; it might result in his being *dismissed from his job*. Under these circumstances, can he perform his prayer as *qaḍā'*? Or, is he *obliged* to do it *even* (*hattā*) if it leads to leaving his job that *he needs?* (emphasis added)

Fatwā: It is *necessary* to observe the prayer *on time*, *even* (*hattā*) if at the end of it [the required time slot]. It is *not permitted to delay* it from its [appointed] time and perform it as *qaḍā'*, *whatever the cost*, because prayer is a *pillar* of religion

³¹ According to Abou El Fadl, the Shafi'i, Hanbali, and Maliki schools are generally of the same opinion. The Hanafi school alone maintains that Islamic law retains only moral, but not legal jurisdiction over Muslims residing in a non-Muslim state. This means, El Fadl explains, that a Hanafi Muslim in the West "may deal in usury (*ribā*) with non-Muslims, may sell or buy prohibited substances such as alcohol, pork or an animal killed by Islamically unacceptable means such as suffocation or clubbing (*mayta*), and may engage in gambling or questionable financial dealings such as insurance schemes and the like – on the condition that such transactions are legal under the laws of the host territory and that the transactions are between a Muslim and a non-Muslim." Abou El Fadl, "Islamic Law and Muslim Minorities," 172-74. (quotation, 174)

and the *symbol* of Islam, and by it the Muslim *imposes* (*yafrid 'alā*) *his presence and character and respect on others*, and by it he draws God's pleasure and His success and blessing, *especially* since you are in countries that do not remember God, [knowing] that the person who remembers God in the midst of negligence is *like the one who fights in the path of God*.

It is the duty of the believer to depend on God and improve his mind (literally: beautify his thinking) by him, and trust his promise when he guarantees his provision by his word: "Whoever fears God, God will make a way out for him and will provide for him from where he has not reckoned. And whoever trusts in God, God will suffice him. God is faithful to his commands and has set a measure for all things" (Surah 65:2-3).

We have discussed this previously in [previous] matters of instruction and advice. You should review it and think about it. God bless you (emphasis added).³²

In terms of identity, the *mustaftī* here suggests that identity issues out of a dialogue between what is constant (religious faith) and changing environmental conditions. For the *mustaftī*, it appears that conversation with the West is not perceived as a threat to one's identity as a Muslim, especially since religious law can, in theory make allowances for situations of necessity and hardship. In contrast, where the *mustaftī* emphasizes hardship and necessity, al-Hakim stresses duty and honour in a context of perceived clash, or even battle between values and worldviews. The same word—even (*ḥattā*)—that the *mustaftī* uses to highlight extenuating circumstances, al-Hakim uses to stress the extent of the law's inviolability.

Though essentially one ruling, the *fatwā* addresses three distinct, but interconnected duties—the duty of prayer, of *da'wah*, and of trust in God. The first duty—regular prayer—is stated both positively and negatively, justified on the basis of its status legally, sociologically, ideologically, and pietistically. Legally, as a pillar of religion not only is it indispensable, its practice also cannot endure modification, regardless of alleged hardship, socially or economically. For al-Hakim, the cost of

³² al-Hakim, *Murshid al-Mughtaribīn*, 193-94.74.

faithfulness does not mitigate, but in fact accentuates, the value of the duty and the scope of *qaḍā'* is severely limited to real incapacity. Difficulties of the sort the *mustaftī* mentions are considered mere inconveniences.

Perhaps al-Hakim has in mind al-Shaykh al-Mufid's (d. 1022) rationalized solution to the disappearance of the Twelfth Imam in the 10th c. CE. Al-Mufid's theory is that as God's justice demands that God always do the best for his creatures, the occultation of the Imam provides opportunity for God to do better for his creatures than if the Imam was known openly. Further, since it is more meritorious to obey and do right in difficult times than in good times, the Imam disappeared in order to increase the merit of his followers who must now struggle harder against unbelief. Their faithfulness in this situation will bring them a far greater reward (*thawāb*) than had the Imam been present with them.³³ In more general terms, al-Hakim's *fatwā* expresses the same idea of greater reward for faithfulness in more trying conditions.

Looked at sociologically, it is plausible to deduce that the rules are inflexible because prayer is understood as the locus of Muslim identity. When connected to *da'wah*, faithful observance of prayer in a non-Muslim context becomes a means of calling others to Islam. Thus, rather than fulfill the *mustaftī*'s hope of flexibility, al-Hakim charges him with a second duty, which he reinforces by interpreting it ideologically, as a form of "fighting in the path of God." Though not on a literal battlefield, the Muslim is understood to be in an ideological conflict with a society described as one that fails to "remember God." This intertextual reference prepares al-Hakim for the final segment of his argument, that is, the pietistic one of advising trust in God's provision. This

³³ Martin McDermott, *The Theology of al-Shaykh al-Mufid* (Beirut: Dār al-Machreq, 1978), 125ff.

comprises the third duty imposed on the *mustaftī*, made more persuasive by the strength of the scriptural promise of divine provision.

Sistani

Sistani's *fatwā* is in response to the question quoted above for al-Hakim.

Fatwā: If his need to continue in this job reaches the level of compulsion, he should pray on time as much as possible, even if just bending and prostrating [halfway for *rukū'* and fully for *sajda*.] However, this happens only rarely. Therefore, he should fear God the blessed and exalted and not practice anything that would lead to abandoning a pillar of his religion. He should remember God's word (as above, Surah 65:2-3).³⁴

Sistani's approach is quite different than that of al-Hakim. Sistani seems to recognize socio-economic realities, while affirming the importance of legally valid prayer obligations. His response attempts to balance these two obligations. However, Sistani also advises a preventative measure, effectively counseling the *mustaftī* to limit his or her job opportunities to those that would not compromise faithful observance of a pillar of Islam. This is the preferred reading in the English version, where the translator renders the words "should [...] not practice anything that would lead to abandoning a pillar of his religion" as "should not accept a job which leads to neglecting the pillar of faith."³⁵ In this sense, Sistani's *fatwā* ultimately maintains the *status quo*. However, his tone is gentler, using the language of "let him pray" or "let him not practice" (*lī yuṣalli, wa lā yumāris* respectively) rather than al-Hakim's "it is not permitted" (*la yajūz*) or "the believer is obligated to," (*'alā al-mu'min an*) and suggesting, albeit only in exceptional circumstances, a symbolic acknowledgement of the prayer where full participation is prohibitive. These opinions suggest a certain empathy with the realities of life.

³⁴ Sistani, *al-Fiqh li al-Mughtaribīn*, 108.87.

³⁵ Sistani, *Code of Practice*, Chapter on Salat: Ritual Prayer, F88. This is reminiscent of Montazeri's *fatwā*, discussed in chapter four, advising a *mustaftī* to find alternative employment to one that involves "aiding sin."

Khui

Istiftā': If someone works in a shop that belongs to non-Muslims and it is difficult for him to pray the *'ashā* prayer at its appointed time, is it permissible to postpone it until after midnight before dawn, especially when the break time, which is usually only half an hour, is 'not sufficient to remove one's eyebrows'? He might [even] be obliged to leave his work [lose his job] if he wanted to pray at a time other than the break.

Fatwā: He is not permitted to postpone it of his own accord.³⁶

In providing details of his or her situation, this *mustaftī* appears to assume that context is relevant to legal interpretation. Again, he pleads hardship (*yaṣ'ab 'alayhi*) as justifying postponement of the prayer. If not having time for a break disqualifies as hardship, surely, losing one's job is serious business. Khui's brief response reveals the central force of his argument and his implicit recognition of prayer as a higher good than, in this case, employment. Therefore, altering a pillar of the faith is not a matter of human will, including, one might read, that of the *'ulamā'*, as their will, too, is subject to standard legal procedures and, as delegated authorities, it is their responsibility to preserve the law's intent.

In sum, these four *fatāwā* demonstrate that the law is thought of by its representatives as being precise. The implication seems to be that if employment were a cause for cancelling, postponing, or reducing prayer, it would have been incorporated into the law, along with pregnancy, illness, travel, and the like.³⁷ The requirement of basing change on textual proof limits the law's capacity to allow flexibility in new cases where context might have provided the incentive to do so. Inflexibility is also attributable

³⁶ *Aḥkām al-Mughṭaribīn*, 94.220.

³⁷ Traveling, for example, requires only reduced prayers, and the remainder may be prayed after travel as *qaḍā'*. Further, any ritual act that requires purification (*wuḍū'*), such as the daily *ṣalāt*, is forbidden for a woman while she is menstruating or after childbirth. Missed prayers due to menstruation or post-partum condition do not have to be compensated or prayed at another time. Grand Ayatollah Haj Shaikh Mohammad Fazel Lankarani, *Resālah of Tawḍīḥ al-Masā'el* (Tehran: Islamic Cultural Publication Center, 1999/1378), 145, 254, 90.

to a manifest concern of the *mujtahids* to avoid opening the door to personal discretion by setting new precedents or otherwise pushing the boundaries of the law. Moreover, maintaining the rituals as required by religious law is central to sustaining an “authentic” Muslim identity in Western society.

While these marks of tradition are shared by the *mujtahids*, there is one notable distinction in methodology. None but Fadlallah make reference to the job contract, which, as a feature both of Islamic and secular Western law, may function as a bridge for mutual understanding and demonstrates, comparatively speaking, an atypical resourcefulness. Fadlallah indicates that he can, to some extent, engage Western secular discourse, a matter that would render his guidance appealing to Western educated Muslims. Although Fadlallah’s methodology does not change the law, it demonstrates a measure of compatibility with modern secular discourse.

Gary Bunt identifies this kind of facility with Western, and especially scientific, discourse as the most compelling quality of a religious leader in the eyes of Muslim youth in Britain. One young interviewee praises a particular Mullah in the UK who, unlike his more traditional colleagues, draws large crowds to his meetings. According to one youth, besides speaking in English, Mullah Sahib Salim “used to make sure that you are aware of what happens when you are smoking. Even going to scientific terms, telling them what happens to you and stuff like that, whereas the other *imams* they don’t speak in scientific terms, they just want to tell stories from the past. In a way you would learn things from it, but you wouldn’t learn it. They wouldn’t express what the story tells you,

they'll just tell out the story.”³⁸ Though Fadlallah's method is not quite as fresh, his ability to reach beyond traditional boundaries is perhaps more compelling.

PRAYER WITH NON-SHI'ITES

Fadlallah

Istiftā': At university there is a prayer room for Muslims. Is it allowed to pray with the congregation, even though it does not belong to my school of thought?

Fatwā: It is allowed to pray with them, but recite for yourself, and you shall have the reward of congregation.³⁹

As often occurs in minority situations, sectarian divisions within the same religious group call for rethinking otherwise uneasy relations. It is broadly accepted that despite some exceptions, Sunni-Shi'ite relations since the 8th century have generally been characterized as mutually suspicious.⁴⁰ Chapter three of this study noted that Shi'ites were sometimes recommended or even obliged to leave Sunni dominated lands if it meant obtaining freedom to assert their Shi'ite identity. As a formal movement, *taqrīb* (rapprochement) had its beginnings in the 20th century and has since become a significant

³⁸ Gary Bunt, "Decision-Making Concerns in British Islamic Environments," *Islam and Christian-Muslim Relations*, 9 no. 1 (1998), 109-110.

³⁹ Fadlallah, *Islamic Lanterns*, 310.D16.

⁴⁰ Despite the characterization, several scholars have shown there to have been significant interaction in legal thought and methodology. Devin Stewart centres his argument for Shi'ite adaptation of "Sunni juridical concepts" around the Sunni theory of consensus. "The Sunni legal system and the theory of consensus on which it was based set the ground rules for marginal sects' negotiation of their identity and place with respect to Islamic legal orthodoxy and the international system of legal education in the Muslim world." Devin Stewart, *Islamic Legal Orthodoxy: Twelver Shi'ite Responses to the Sunni Legal System* (Salt Lake City: University of Utah Press, 1998), 18, 21. Ahmed Kazemi Moussavi surveys the history of Sunni-Shi'i relations and finds several common elements in their respective approaches to Islam. His discussion of *taqrīb* in the modern era suggests that a renewed commitment to *ijtihād* on the part of Sunnis signals a positive move towards rapprochement. Some Shi'ite scholars, for their part, have begun to incorporate Sunni juristic principles such as public welfare (*maṣlahah*). Moussavi's hope is that utilizing "modern scholarship" along with "traditional knowledge" in addressing modern issues will lead to abandoning peripheral doctrinal differences "in an effort to revive Islamic values" (315). Ahmed Kazemi Moussavi, "Sunni-Shi'i Rapprochement," *Shi'ite Heritage*, 301-315.

and lively issue.⁴¹ A congress on *ijtihād* held in Tehran in December, 2008, and discussed briefly in chapter two, expressed as its goal “coming together and unity amongst the Islamic schools” (*hambastegī va vahdat-e madhāhib-e islāmī*).⁴² One of the main organizers of the congress stated that examining issues related to *ijtihād* in the modern world was “an opportunity to bring together different schools (of law) and their ideas.”⁴³ This is not a new idea; it was eagerly promoted as early as the late 19th century by Rashid Rida, following the pioneering efforts of Muhammad Abduh in promoting Sunni-Shi‘i rapprochement.⁴⁴

The specific matter of intra-sectarian prayer among Muslims does not appear to have raised a great deal of discussion in scholarly literature. Fadlallah’s *fatwā* implies that he sees the issue as doctrinal and not sectarian in that he permits joining the congregation for worship but specifies that the Shi’ite Muslim should perform his prayers correctly, that is, according to Shi’ite belief and practice. His *fatwā* suggests that he sees the difference as a relatively minor issue that should not overtake the common Muslim identity of Sunni and Shi’a, a position that is reflective of his approach to *taqrīb* as expressed elsewhere. In his *Ahādīth fī al-waḥdah al-islāmīyah*, Fadlallah says that the fact that the differences between Sunni and Shi’a Muslims are fewer than their commonalities should motivate both sides to recognize the other as Muslim and that their

⁴¹ Moussavi, “Sunni-Shi‘i Rapprochement,” 301.

⁴² “*Hamāyesh-e ijtihād dar dore-ye mo‘āser bar gozār shod*,” <http://www.turkmenstudents.com/modules/news/article.php?storyid=9919> (accessed January 15, 2009).

⁴³ *Hawzah: akhbār va itlā‘āt*. “*Hamāyesh-e ijtihād dar dore-ye mo‘āser bā ḥudūr-e ra‘īs-e majlis-e khabar gān-e rahbarī*,” <http://www.hawzah.net/Hawzah/News/NewsPrint.aspx?id=76271> (accessed January 13, 2009).

⁴⁴ See Rainer Brunner, *Islamic Ecumenism in the 20th Century: The Azhar and Shi‘ism between Rapprochement and Restraint*, trans. Joseph Greenman (Leiden: Brill, 2004). Interestingly, Brunner points out that as far as he can tell, the term *rapprochement* (*taqrīb*) “emerged explicitly for the very first time” out of the activities of a “secret society” established by Muhammad Abduh and others in 1884 which had as its goal “a rapprochement among Islam, Christianity, and Judaism” (38).

differences should propel them not to enmity but towards the pursuit of truth from God.⁴⁵ Unity, he says, is not a matter of one side convincing the other but is “Muslims coming together on the foundation of truth.”⁴⁶ From this perspective, differences in doctrine may be considered on an individual basis, rather than be identified purely in sectarian terms. Sectarian divisions, he argues, only weaken Islam and Muslims as a whole in the face of greater threats from America and elsewhere.

MUSLIMS BORN OF UNMARRIED NON-MUSLIM PARENTS LEADING PRAYER

This issue is addressed to al-Hakim, whose intriguing *fatwā* demonstrates considerable ambivalence in dealing with the problem.

Istiftā': Some new Muslims in America are dealing with a problem, which is that their births were the result of friendships between their non-Muslim fathers and mothers. This is a general situation in their circles such that the condition of marriage according to any law is rare or non-existent. Since they place a lot of importance on congregational prayer and consider it an obligatory ritual, it is very difficult to relinquish it. What should they do? Is it permissible for one of them to lead and the others to pray behind him, and to overlook the condition of purity of birth since all or most of them are such? What is the legal solution in your opinion?

Fatwā: There is no solution to the problem once the unrestricted condition of legitimate birth is established as evidence. [This is the ruling,] unless [what is mentioned above] is [considered] marriage for them according to their customs, such that it is established as the religion of the parents, even in a secondary sense, or if doubt can be established with regard to the parents, such that they consider this legal marriage and not adultery. But if it is without doubt adultery, then there is no solution to the problem.⁴⁷

The novelty of this problem calls for a longer than usual question. The *mustafī* demonstrates familiarity with the law and possible bases for a solution to the problem by attempting to appeal, as it appears, to the principle of *'urf* (social custom). The problem

⁴⁵ Fadlallah, *Ahadith fi al-wahdah al-islamiyah* (Tehran: 'Ilamah Tabatabā'i, 1989), 135-36.

⁴⁶ *Ibid.*, 100.

⁴⁷ al-Hakim, *Murshid al-Mughtaribin*, 206-207 F100.

raises questions regarding the development of “indigenous” communities of Western converts to Islam (or reverts, as is the popular nomenclature).⁴⁸

Al-Hakim implicitly corrects the *mustaftī*'s understanding of *'urf*, explaining that it is not simply a matter of what people do, regardless of legal recognition. But, if the practice is by local custom considered marriage in a formal legal sense, then the union is legal and the problem is resolved. He seems, however, to doubt this is the case. His goal, it appears, is to find some cause to doubt that these are in fact cases of adultery, whether by the means just described, or by establishing doubt concerning their illegitimacy of birth, since this is the absolute condition for leading prayers, and more so in Shi'ite law.⁴⁹ Etan Kohlberg's study of the status of *walid zinā* (offspring of illegitimate sexual relations) in Imami law reveals a strong tendency in pre-modern and some modern Shi'ite jurisprudence to link anti-Alid feelings to *walid zinā*. It is said that amongst the many detestable and unfailing characteristics of *walid zinā* is hatred for *ahl al-bayt*, such that it is thought that “a common denominator of all anti-‘Alids is illegitimate descent [...]”⁵⁰

Although the matter may not be overlooked due to common practice, as the *mustaftī*

⁴⁸ The preference for this term is explained with reference to the concept of Islam as *al-dīn al-fitrī* (the religion of nature). It is said that when someone converts to Islam they are in reality ‘reverting’ to the universal natural human state into which all people were born, and this condition is understood to be that of Islam. The notion is based on some prophetic sayings common to Sunni and Shi'ite traditions. For example, the prophet is believed to have said: “Every newborn is born in the natural condition (*yuladu 'alā al-fitrah*); his parents transform him into a Jew, a Christian or a Zoroastrian.” *Sahīḥ Bukhārī, Kitāb al-Janā'iz* 81 (1:3451), quoted and referenced by Friedmann, *Tolerance and Coercion*, 109. The famous Shi'ite compilation of sayings attributed to Imam Ali, *Nahj al-Balāghah*, has the following, slightly different rendering: “The people make the forbidden permissible and despise the wise. They are born in *fitrah*, and they die in *kufrah*.” (*wa al-nās yastahilūn al-ḥarīm, wa yastadhilūn al-ḥakīm. yuḥyūn 'alā fitrah, wa yamūtūn 'alā kufrah*). Imam Ali, *Nahj al-Balāghah*, 2:38 (CD-ROM, ALAQAED version 1.0). The editor explains the latter sentence as meaning that people are born in *fitrah* but “apart from the knowledge of the divine law [...]” but after they come to know it, “they change and exchange it, and take idols for Gods and the wind as the law, and so die as unbelievers (*kuffār*).

⁴⁹ See, for example, Lankarani, *Resalah*, 267, “The Imam of the congregational prayers should be: adult (*bāligh*); sane; Twelver Shi'ite (*iḥna 'asharī Shī'ah*); just (*'ādil*); of legitimate birth; and being able to offer the prayers correctly. Furthermore, as an obligatory precaution, the Imam also should be a male.”

⁵⁰ Etan Kohlberg, “The Position of ‘walid zinā’ in Imāmī Shī'ism,” *Bulletin of the School of Oriental and African Studies* 48 no. 2 (1985), 239.

suggests it be, it may become neutralized by reliance on local laws which would effectively nullify the prohibitive element. Otherwise, the question tests the limits of jurisprudence.

SERVING LUNCH TO NON-MUSLIMS DURING RAMADAN

Istiftā': Does someone who is fasting during the blessed month of Ramadan in a non-Islamic country have the right to provide lunch (*iṭ'am al-ṭa'ām fī al-nahār*) for non-Muslims?

Fatwā: Yes, he is permitted to do this unless it is an occasion to weaken (*tawhīn*) his religion and his mission (*da'wā*) of making it known that he is a Muslim. The prohibition against serving food would be a visible (manifest) sign of his adherence to his religion and his pride in it, while serving food would be a dishonour to the sign mentioned and would manifest contempt and scorn for his religion.⁵¹

This *fatwā* is from al-Hakim. Similarly to his *fatwā* on prayer at work, a central element here is an underlying discourse of identity and *da'wah*. The Ayatollah initially grants permission, apparently because there is no real legal reason to prohibit it. But he immediately goes on to qualify the permission to the point that it becomes a virtual prohibition on pietistic, if not legal, grounds. Al-Hakim's anxiety to have Muslims in the West publicly affirm their Islamic identity as a means of religious propagation adds to the prohibition a moral obligation to uphold the honour of Islam and Muslims. Failing in this regard, al-Hakim reasons, is tantamount to manifesting "contempt and scorn" for one's religion. His central concern, in other words, is for the pride of Islam, most clearly portrayed through the Muslim's public and unapologetic practice of Islamic ritual.

The following *fatwā* from Fadlallah on giving charity to non-Muslims demonstrates a similar, though perhaps more understandable, preoccupation with turning ritual practice into *da'wah*.

⁵¹ al-Hakim, *Murshid al-Mughtaribīn*, 218-19.115.

Istiftā': Some foreigners come to the door with a little box in which they are collecting donations towards helping cancer [patients] or other illnesses. Should we help them?

Fatwā: It's fine to do so in order to affirm our humanity to people in sharing in human suffering so that it becomes propaganda for Islam (*di'āyah li al-islām*).⁵²

Fadlallah's recognition of the value of charity as a means of *da'wah* reflects his understanding of the nature of the latter. *Da'wah*, he says, is a spiritual and intellectual endeavour whose appeal must be made to the hearts and minds of people, which, he argues, is only possible to do by peaceful means, in line with the Qur'anic message of submission to God offered without compulsion. According to Fadlallah, *da'wah* differs from two other related concepts in the Qur'an. In contrast to commanding good and forbidding evil (*al-amr bi al-ma'rūf wa al-nahī 'an al-munkar*), "*da'wah* is the movement that Muslims engage in outside the Islamic boundaries for the sake of bringing others into Islam."⁵³ While both are important,⁵⁴ the former is directed towards Muslims; the latter towards non-Muslims.

Da'wah, Fadlallah says, is also different from *dawlah* (a formalized social order), in nature and in method. The Qur'an speaks both of calling people to God (*da'wah*), and establishing a social order based upon people's acceptance of its message, but it does not confuse the two. Unlike *dawlah*, which may include military force (*jihād*) and killing (*qitāl*) to realize its goals, *da'wah* is by nature peaceful because it is an appeal to the human mind and spirit. Accordingly, it can rely only on intellectual and spiritual methods

⁵² Fadlallah, *al-hijrah wa al-ightirāb*, 393-94.

⁵³ Fadlallah, *Uslūb al-da'wah fī al-Qur'ān* (Beirut: Dār al-Zahrā', 1979/1399), 20.

⁵⁴ "Islam came to spread *da'wah* and to build *dawlah*" Ibid., 22.

that give people freedom to reflect and choose Islam.⁵⁵ *Da'wah* is therefore the necessary prelude to establishing an Islamic society.⁵⁶

It is evident that both al-Hakim and Fadlallah would like Muslims in the West to understand their presence there as the fulfillment of a calling to spread Islam through word and deed. It is perfectly conceivable that they would envision this as the first step towards the Islamization of Western society.

II. NATURAL ENVIRONMENT OF WESTERN NATIONS TIMES OF PRAYER AND FASTING IN NORTHERN TIME ZONES

This question is addressed to Fadlallah several times, as well as to al-Hakim, Sistani, Khui, and others. Responses reflect a flexibility not seen in the context of employment. Perhaps this is due to the natural causes of the difficulties in the current question which would not so much test the divine law as demonstrate its essential connection to creation. The following question represents the main ideas common to all:

Istiftā': In some countries, the sun does not go down (there is no sunset), or, (conversely) – in certain seasons – it does not rise for many days or months. On which set of times should a person depend for his prayer and fasting?⁵⁷

Due to their common reliance on the lunar calendar, prayer and fasting frequently converge in the same question. While there is substantial agreement on regulations for both rituals, there are also notable differences of opinion resulting from differing weights given to various obligations.

Regarding prayer, al-Hakim includes a detailed astronomical calculation and advises the person, on the basis of obligatory precaution, “to perform the two ‘*ashā*’ prayers after the sun enters in the lowest middle of the circuit and to perform the morning

⁵⁵ *Ibid.*, 22-24.

⁵⁶ *Ibid.*, 27.

⁵⁷ Fadlallah, *Islamic Lanterns*, 307.D5; *Tahaddiyāt al-Mahjar*, 134.

prayers before it leaves this middle.”⁵⁸ Fadlallah and Sistani both advise, on precaution, following the times of “the nearest places that have night and day covering all twenty-four hours.”⁵⁹ In addition, Fadlallah suggests a more lenient solution of arranging one’s own schedule for praying the five prayers within a twenty-four hour period.⁶⁰ Khui says that if it is possible for the person to migrate “somewhere where it is possible to pray and fast, this is obligatory for him.” Otherwise, as a precautionary measure, he offers Fadlallah’s more liberal suggestion of spreading the five prayers throughout the day.⁶¹ Al-Fadil echoes Khui’s travel advisory but on the basis of precaution, and recommends following one’s homeland timings as an option.⁶²

Rules for fasting likewise exhibit a range of reasonable opinions. In one *fatwā*, Fadlallah recommends that the person make up the fast as *qaḍā’* at some time.⁶³ Al-Hakim similarly advises postponing it till a time when night can be distinguished from the day.⁶⁴ In another *fatwā*, however, Fadlallah says that if daylight lasts 18 hours or longer, one should fast for 18 hours, but one is permitted to break the fast “if he is afraid of harm.”⁶⁵ Sistani and Khui say that it is obligatory that the person move or migrate to another country, but if this is “impossible,” Sistani requires giving *fiḍyah* (monetary compensation for valid omission of an obligatory religious duty) instead.⁶⁶ Al-Fadil al-Lankarani regards fasting as obligatory “regardless of how long the time is,” but suggests

⁵⁸ al-Hakim, *Murshid al-Mughṭaribīn*, 197-98.83.

⁵⁹ Sistani, *Aḥkām al-Mughṭaribīn*, 98.231.

⁶⁰ “Regarding prayer, he should pray the five prayers at any time he wants, (but) as a precaution (*aḥwat*), the times should conform to the nearest towns or countries. As for fasting, if there is no day at all, or the day is continuous, fasting is not obligatory, and he must perform it later (*qaḍā’*).” Fadlallah, *Islamic Lanterns*, 307.D5.

⁶¹ Sistani, *Aḥkām al-Mughṭaribīn*, 94.217.

⁶² *Ibid.*, 100-101.238.

⁶³ Fadlallah, *Islamic Lanterns*, 307.D5.

⁶⁴ al-Hakim, *Murshid al-Mughṭaribīn*, 197-98.83.

⁶⁵ Fadlallah, *Taḥaddiyāt al-Mahjar*, 134.

⁶⁶ *Aḥkām al-Mughṭaribīn*, 98.231 (Sistani); 94.217 (Khui).

that “in order to facilitate performing prayers at proper intervals, and likewise to perform the obligatory fast,” one may travel elsewhere out of precaution (*iḥtiyāt*).⁶⁷

What is the significance of these rulings to the question of Islamic identity in the West? Interpreting these *fatāwā* within the context of juristic discourses and wider Islamic worldview raises several relevant issues. For example, if ritual performance cannot, at times, be sustained at legally acceptable levels in some Western countries, is migration to these places thereby rendered forbidden, as the juristic discourse on migration stipulates, and as Sistani and Khui rule in the case of fasting and Khui in that of prayer? If, as observed repeatedly in this study, freedom to manifest the signs of Islam is the necessary precondition to migration, is the source of impediment to this freedom relevant? Are only political or sociological obstacles implied in this directive, or does it include those that are rooted in nature, the former being a case of “oppression”⁶⁸ and the latter of divine dominion? Fadlallah’s opposite statements on prayer in the place of employment on the one hand and in northerly time zones on the other suggests an implicit distinction between impediments of human and natural origin.

Or, do Sistani’s and Khui’s relative inflexibility with regard to prayer and fasting in northerly time zones suggest, rather, a moral anxiety to not replace divine law, by which ritual time is ordered, with human discretion? Would permitting personal choice in ritual performance, as Fadlallah suggests, open the door to choice in matters of ethics and morality as well? The status of rituals as “pillars” of religion adds some weight to this speculation. One could easily comprehend, in this case, the consistent inflexibility exhibited in this field and the reluctance to provide rulings susceptible to serious

⁶⁷ Ibid., 100-101.238.

⁶⁸ Surah 4:97-100.

adaptation to context. Or, do more rigid opinions reflect other factors, such as a cautious initial period in the very recent development of *fiqh al-aqalliyāt*? Khui is already deceased, and his *fatāwā* for Shi'ites in the West are fewer in number than those of the younger and still living authorities such as the relatively liberal Fadlallah.

Finally, al-Fadil's *fatwā* advising a person to follow the ritual timings of one's homeland has implications for the integration of a person's identity in a minority context. In his *risālah*, Sistani rules that any place a person lives permanently is his homeland (*waṭan*), "irrespective of whether he was born there," or other conditions.⁶⁹

Differentiating between the location of one's ritual and one's ordinary life would likely hinder the development of an integrated identity by creating a psychological and practical dichotomy between two fundamental areas of life. Fadlallah's opinions, though lacking in juristic rigour, have the merit of facilitating a more localized identity.

III. WESTERN SOURCES OF KNOWLEDGE AND INSTRUMENTS OF TECHNOLOGY FINDING THE QIBLAH FROM AND PRAYING IN AN AIRPLANE

This question is addressed by Fadlallah, al-Hakim, and Sistani. It is also helpful to include a ruling by Khomeini for comparative purposes. The first question is the one put to Fadlallah, and the second to al-Hakim and Sistani. The latter includes reference to the important legal matter, as seen elsewhere, of certainty of knowledge. Rather than quote the *fatāwā* in full, I will incorporate quotes where they are useful to the discussion.

Istiftā': How can one pray in an airplane, with regard to determining the *qiblah*? Is it necessary to pray in a standing position, or is it permitted to pray while sitting, even if there is no [physical] incapacity for praying while standing?⁷⁰

⁶⁹ Seestani, *Islamic Laws*, 250.1338.

⁷⁰ Fadlallah, *Tahaddiyāt al-Mahjar*, 135. Cf. *Islamic Lanterns*, 307.D3.

Istiftā': How do we pray our obligatory prayers in an airplane, since the *qiblah* is unknown and we lack confidence [in knowing it]?⁷¹

Ordinary rules of prayer for travelers consist primarily of determining whether or not the distances covered oblige the person to offer shortened prayers (*qaṣr*), and determining the direction of the *qiblah* (prayer direction).⁷² Airplane travel represents a *mustahdathah* not often covered by regular *risālahs*. As the question does not address the issue of *qaṣr* (brevity), it is unclear whether the *mustaftīs* assume the prayer requirement to be full or shortened. That the questioners do not entertain the possibility that it be performed as *qaḍā'* might be inferred from silence, given what we have seen of *istiftā'* regarding prayer at work.

Fatāwā

The question of praying while in flight turns out to be quite straightforward. All the *mujtahids* agree that finding the *qiblah* is both necessary and, with the possible exception of al-Hakim, not a complicated or difficult matter, a point underlined by Sistani's personal narrative.⁷³ One is permitted to inquire of anybody who might know, particularly the captain or other airline staff, and may act on that knowledge, even if it is only "valid supposition (*ẓann*)."⁷⁴ This latter point is virtually consistent with, but slightly more relaxed than the standard position with regard to determining the *qiblah* in situations where uncertainty prevails. For example, in his *risālah*, Sistani says: "A person who wishes to offer prayers, should make efforts to ascertain the direction of Qibla, and for that, he has to either be absolutely sure, or acquire such information as may amount to

⁷¹ al-Hakim, *Murshid al-Mughtaribīn*, 194.76.

⁷² The minimum distance required to make shortened prayer obligatory is approximately 28 miles. Seestani, *Islamic Laws*, 241ff.

⁷³ Sistani, *al-Fiqh li al-Mughtaribīn*, 21ff.

⁷⁴ Fadlallah, *Taḥaddiyāt al-Mahjar*, 135; al-Hakim, *Murshid al-Mughtaribīn*, 194.76; Sistani, *Aḥkām al-Mughtaribīn*, 98.232.

certainty, like [the] testimony of two reliable persons.” However, where this is not possible, it is permissible to act on “an idea,” even if this is obtained from a non-Muslim using a “scientific method.”⁷⁵

The effort al-Hakim urges upon *mukallafs* to “investigate and do their utmost to know the *qiblah*” suggests a closer adherence to the rule of certainty, though he likewise permits acting on the basis of *ẓann*. Al-Hakim further advises that failure to reach either certainty or valid speculation requires waiting until one is on the ground if the time permits that it does not become necessary to perform the prayer as *qaḍā’*. As a last resort, one may pray “in whatever direction is closest to probability.”⁷⁶

The question of praying while seated is answered by Fadlallah as “not permissible ... so long as it is possible to do so standing.”⁷⁷ This ruling is not given explicit legal justification or a socio-religious purpose such as asserting one’s Islamic identity in public. However, Sistani’s personal account of airplane prayer, mentioned above, does make explicit reference to the value of conspicuous performance in drawing positive attention from non-Muslims and bringing honour to Islam.⁷⁸

Khomeini’s interesting judgment provides five different rulings on facing the *qiblah* according to an equal number of hypothetical problems.⁷⁹ The fourth ruling invalidates prayer performed in an airplane passing over Mecca, given the impossibility

⁷⁵ Seestani, *Islamic Laws*, 153.790.

⁷⁶ al-Hakim, *Murshid al-Mughtaribīn*, 194.76.

⁷⁷ Fadlallah, *Taḥaddiyāt al-Mahjar*, 135; *Islamic Lanterns*, 307.D3.

⁷⁸ Sistani, *al-Fiqh lī al-Mughtaribīn*, 24.

⁷⁹ “It is permitted to pray in airplanes if one takes care to face the *qiblah*. If someone started to pray in the right direction and the plane moved to the right or left, and the worshipper turned to the *qiblah* after the recitation and remembrance, his prayer is legitimate, even if it gradually drifted back to the direction it faced at first. However, if he turned his back (to Mecca?) and then turned (in the right direction?), his prayer is void. If he prayed in an airplane passing over Mecca or the *ka’bah* his prayer is void because of the lack of possibility of maintaining the right position. However, if it flew around Mecca and the worshipper turned his face gradually (by degrees) towards the *qiblah*, it is legitimate. *Aḥkām al-Mughtaribīn*, 92.210.

“of maintaining the right position.” His ruling underlines both the comprehensive possibilities of the law and the importance of the *qiblah* orientation.

CONCLUSION

This analysis of *fatāwā* addressing practical concerns of Shi'ite ritual observance in the West uncovers very little socially integrative *ijtihād*. From the perspective of *mujtahids*, it appears that context does not readily provide occasion to reform Islamic law. I suggest that this is partly due to methodological constraints. Although proudly professing a comprehensive *ijtihād* (*ijtihād muṭlaq*), the range of interpretive possibilities available even to the highest jurists is nevertheless restricted by the *Usūlī* legal methodology that requires a textual determinant (*'illah*) for defining hardship or adapting laws to time and place (*zamān wa-makān*). Rather than inspire a more innovative *ijtihād*, the non-Muslim context serves to test and display the comprehensiveness of the law's resources to deal with new situations without making fundamental changes in its content. What *fatāwā* of ritual worship for the West appear to showcase, then, is the law's capacity to remain unchanged and uncompromised through social change.

At the same time, while *mujtahids* are by and large far more reluctant to consider the relevance of social context to rulings than are *mustaftīs*, some contexts may serve to justify rulings of prohibition. This is particularly noticeable where a prohibition or conservative ruling has the potential to enhance *da'wah*. Given the exceptionally high value of *'ibādah* in Islamic law and worldview, it is not surprising that any *ijtihād* exercised in this domain would tend to enhance, rather than weaken the importance of *'ibādah*. In addition to being an uncompromising duty, *'ibādah* in the West becomes a fundamental and indispensable topos of minority Muslim identity.

CHAPTER SIX

FATĀWĀ ON EDUCATION: RETICENCE AND RESISTANCE

Fatāwā on education provide a rich resource for the central problematic of this study—the construction of Shi'ite minority identity in the West. To recall, I have applied a typology of identity models that enables us to map the material according to trends that an analysis of language and key elements of *Usūlī* methodology renders observable. According to this analysis, *fatāwā* on education demonstrate a strong tendency towards the resistance identity model. If education is a developed nation's primary source of cultural influence those who stand, and wish to remain, outside of the dominant worldview are compelled to provide a rationale for resistance, if not an alternative model. Members of the Shi'ite legal establishment utilize two elements common to such a process: exposing the dangers of assimilation; and presenting the moral world of one's own group as superior. Added to this rubric is the notion of divine mission, or the sense that the community is called to use its moral superiority to influence the wider culture.

While the resistance identity model characterizes the leadership, who comfortably issue *fatāwā* from their places of residence at a fair distance from the believing community, the community itself reflects a somewhat different dynamic. An analysis of *istiftā'āt* on education reveals some inclination towards the “selective assimilation” model characteristic generally of the majority of immigrants. *Mustaftīs* regularly refer to the context in which they must not only function, but succeed. There is a sense in which it is understood that if they fail in the realm of education, they fail as individuals and families. The evident desire to succeed appears to raise an objective awareness of the

values of Western education culture that prompts questions regarding how far religious legal observance will allow them to go in adapting to context. Thus, education *fatāwā* highlight the tensions between *mustaftīs* and *mujtahids* also evident in other arenas of life.

FADLALLAH AND THE CLASSICAL MODEL OF MIGRATION: SEPARATION AND STRENGTH

Fatāwā on education are solicited from several *mujtahids* including Fadlallah, Khui, Sistani, al-Hakim, Tabrizi, Khamenei, Makarim, and Fadil. The only *mujtahid* to give the subject a section of its own is Fadlallah, who, intentionally or not, links his valorization of education with the central legitimizing element of migration in the foundational period of Islam. We recall that the original emigration of the Muslim community that was to Medina stressed the objective of strengthening the community in order to expand further afield. Fadlallah's proposal reflects this early model of emigration on at least three levels. He argues, firstly, that it is legitimate, in principle, to emigrate to the West for educational purposes, as education strengthens the Muslim community.¹ Thus, Fadlallah shares the early motivational justification for migration while giving it a modern application.

Secondly, the language Fadlallah uses, and the practical details of his propositions mirror this early model yet further. For Fadlallah, migration to the West for education may legitimately be considered migration "to Allah and His Messenger."² It appears that Fadlallah would have his readers understand that when done for the sake of Islam, as is the case in migration for education, migration to the West carries a religious value equal to that of the original *hijrah* and migrants are thus no less honourable than the *muhājirūn*

¹ Fadlallah, *Islamic Lanterns*, 199.

² *Ibid.*

of the Prophet's time. Fadlallah thus shares the early valorization of migration for the sake of Islam.

Thirdly, Fadlallah shares the strategic structural model of the original migration. He recognizes, however, that there are dangers to the contemporary expression of this model. In structural terms, the early *muhājirūn* were moving from profane space in Mecca to the sacred space of Medinah, that is, from a situation of weakness to one that contributed to the strengthening of the believing community. This is not the case in migration to the West. Thus, in order to reflect the structure of the early model more precisely, migration to the West requires some modification. Fadlallah addresses this by encouraging spatial delimiters that effectively sacralize specific places within profane space. Rather than simply blend into the educational system in the West, Fadlallah says, Muslims should establish Islamic schools that can function as what he calls "incubators" against the "deviant atmospheres" of Western primary and secondary educational institutions.³ According to Carola and Marcelo Suárez-Orozco the establishment of such "safety nets" is an important element of the adaptation process, generating support for negotiating one's path in the new environment.⁴ Fadlallah relies heavily on this strategy but goes further in framing his "incubators" as places of separation from and preparation to influence mainstream society.

GENERAL FEATURES OF EDUCATION *FATĀWĀ*: CONTENT AND STYLE

In general, education *fatāwā* deal predominantly with questions of social morality. Concerns are centered on sexual temptations occasioned by coeducation, easy access to alcohol, and courses that involve allegedly forbidden activities, such as dance and art; all

³ Ibid., 205-6.

⁴ Suárez-Orozco and Suárez-Orozco, *Children of Immigration*, 90.

of this is surrounded by an apprehension regarding perceived underlying philosophical values such as atheism, and what is frequently understood as a generally morally lax environment. Fadlallah is again a special case in that while he shares these concerns, his *fatāwā* also include matters of medical ethics,⁵ performance of religious duties in academic settings, and a more explicit perception of educational institutions as places of potential influence from Christianity and other cultural ideas. This added dimension might suggest that Fadlallah's followers have a broader conceptualization of morality beyond the more established and traditional matter of male-female relations that seems to pervade the legal approach to social morality. Or, it may simply be that he has more followers and thus a larger pool of questions. Generally speaking, his *fatāwā* exhibit the same anxiety and "fear" (*khawf*)—this is the word he uses repeatedly—of moral laxity, a fear that presses his decisions towards prohibition.

Two elements appear prominently in the exchange between *mustaftīs* and *mujtahids*: the question of social context, and reference to *Usūlī* principles of *ijtihād*. With regard to the former, *mustaftīs* often stress that their context is the Western educational system where there is no sexual segregation in public schools or universities, the school curriculum includes sex education, drawing of living objects, and other allegedly prohibited activities; universities employ male and female professors, the latter of which are not veiled; politesse involves minimal physical contact with the opposite sex (shaking hands), and alcohol is often present at academic gatherings of a professional or social nature. All of these factors, incidental and inconsequential to the average Western student, raise serious questions for the legally observant Muslim. At the same time, they provide a contextual framework for the *mustaftī*'s terms of reference.

⁵ Khamenei also responds to questions on medical ethics.

Mustaftīs also frequently make tacit reference to *Usūlī* principles of *ijtihād*, apparently in the attempt to influence a *mujtahid*'s decision. The most popular principle is that of *ḥaraj*, or excessive harm incurred by observing a legal precept, on the basis of which the rule may be lifted. In the matter of handshaking between unrelated men and women the standard rule, as quoted from al-Yazdi's *al-Urwah al-Wuthqā*, is that it is forbidden except on condition of wearing gloves or something similar.⁶ Likewise, al-Khui and Sistani consistently allow it only when all routes of escape—including wearing gloves or not shaking anyone's hand at all, men included—fail, but forbid it otherwise. As this issue arises regularly in academic or other formal meetings and elicits some tension between *mustaftīs* and *mujtahids*, it provides a suitable case study, which I will examine below. For the moment, I use it to demonstrate my point about *mustaftīs*' tendency to rely on social context and *Usūlī* principles. *Mustaftīs* tend to see the inter-gender handshake contextually: a harmless cultural necessity, neglect of which produces *ḥaraj*.

According to *mustaftīs*, *ḥaraj* is here understood to be the result of a course of action that reflects badly on Muslims and their manners. *Mujtahids* on the other hand tend to understand *ḥaraj* in a significantly narrower manner and tend not to accede to the claims of *mustaftīs* that maintaining the non-handshake rule elicits hardship. As used by *mujtahids*, *ḥaraj* does not appear to extend to the psychological or social harm that observing some Islamic restrictions are likely to bring about, as a contextualized

⁶ Al-Sayyid Muhammad Kazim al-Yazdi, *al-Urwah al-Wuthqā* (Qom: Mu'assasat Isma'iliyyan, 1412/1991), 2:637. The ruling reads: "*Lā yajūz muṣāfaḥat al-ajnabīyah; na'm lā ba's bihā min warā' al-thawb kamā lā ba's bi-lams al-maḥram.*" This text, as noted elsewhere, remains the standard reference work of contemporary jurisprudence.

interpretation might suggest.⁷ On the contrary, minimizing Western cultural obligations in this regard, *mujtahids* classify forbidding the inter-gender handshake as a non-negotiable Islamic legal duty, on the level of not imbibing or serving alcohol and other sins.⁸ Sistani includes women shaking hands with unrelated men in a list of activities that, if forced to do by her husband, justifies her leaving him and remaining entitled to full maintenance.⁹ Fadlallah goes so far as to imply that the alleged *ḥaraj* claimed by a *mustafī* is nothing but intentional self-deception.¹⁰ “Man is a telling witness against himself although he tender his excuses,” Fadlallah quotes from Surah 75:14-15. Elsewhere, however, Fadlallah acknowledges the permissibility of shaking hands in “compelling cases” but not otherwise.¹¹ Al-Sayyid Ja‘far Murtada similarly argues that a medical doctor need not shake hands with his female patients to provide good care. People, he suggests, are quick to imagine the presence of *ḥaraj*. “Will their imagination that social custom equals *ḥaraj* also make adultery permissible?” he asks cynically.¹²

Although *fatāwā* on education are brief and do not commonly include the *mujtahid*'s reasoning processes, some allusions to specific choices within the legal methodology may be observed. When dealing with controversial or problematic issues, *mujtahids* tend to rely on principles that favour conservatism, such as obligatory

⁷ Similarly, according to al-Sayyid Ja‘far Murtada, harm and necessity may not be invoked in the interests of academic success, or embarrassment, such that the forbidden becomes permissible. (reference below, 143).

⁸ See, for example, al-Sayyid Ja‘far Murtada al-‘Amili, *Khalḥiyāt Kitāb Ma’sat al-Zahrā’* [CD-ROM, ALAQAED, version 1.0] (Beirut: Dār al-Sīrah, 1419/1998), 1:64, 143.

⁹ Ayatollah Ali al-Sistani, *Fatāwā al-Masīrah* [CD-ROM, ALAḤKAM, version 2.0] (Maktab al-Samahah, 1417/1996), 427. Aside from shaking hands with unrelated men, the list includes being forced to remove her *ḥijāb* in front of strangers, serve alcohol to guests, and participate in games of chance.

¹⁰ Fadlallah goes on to say, “If there was a genuine hardship above and beyond ordinary inconveniences such that it caused harm, then it would be possible (to shake hands). People are the ones who determine this.” *Taḥaddiyāt al-Mahjar*, 317.

¹¹ Fadlallah, *Islamic Lanterns*, 329.

¹² al-‘Amili, *Khalḥiyāt*, 5:151.

precaution (*iḥtiyāt wājib*) or a narrow definition of *ḥaraj*, rather than apply a more rigorous use of *Usūlī* methodology which could potentially produce a different opinion. Our hand-shake *fatāwā* are a case in point, as are other issues in which *mujtahids* are evidently partial towards *iḥtiyāt*. Although a legitimate *Usūlī* principle, *iḥtiyāt* is far more common in *Akhbārī* legal theory, which lacks a set of principles for deriving a diversity of opinions in cases of ambiguity, revelatory silence, or new situations. *Usūlī* theory, on the other hand, need not rely so heavily on precaution as the process of *ijtihād* may lead to more specific rulings based only on probable opinion (*ẓann*).¹³ The following *fatāwā* illustrate in more detail the analysis described in general terms above.

SHAKING HANDS WITH THE OPPOSITE SEX: HONOURING ISLAM

Reading several handshake *fatāwā* in sequence clearly shows the efforts of the *mustaftīs* to obtain a favourable ruling. For example:

Istiftā': A male student in a western country is applying to university and needs to attend interviews with that university's teachers. When attending these interviews the student needs to greet the teachers with a simple hand shake. If the teacher is female and the student does not shake hand [sic] with her then the student will be discriminated against for his religion and this will jeopardize his chances to be admitted to the university and this will drastically change his life. Is he permitted to have [sic – the *istiftā'* is cut off at this point]

Fatwā: Under circumstances where a problem may arise, light handshake sans any sexual feelings is allowed.¹⁴

Interestingly, this *fatwā* appears, and has appeared for a long time, on the homepage of Khui's website, perhaps a result of site managers wishing to give his *marjī 'īyah* an air of comparative progressiveness, although as a deceased *mujtahid* he should no longer be

¹³ This means that while *Akhbārīs* can issue fewer *fatwās*, those they do issue are established with certainty, whereas the principle of *ẓann* permits *Usūlīs* to issue innumerable *fatwās*. For a good comparison of the two methodologies and their respective application of *iḥtiyāt*, see Gleave, *Inevitable Doubt*.

¹⁴ Imam al-Khoei Islamic Center, www.al-khoei.org/kb/Article.aspx?id=10117 (accessed February 1, 2009).

followed (apart from those who followed him prior to his death). Its completely positive approach is, however, misleading in light of additional details that appear in an Arabic print source:

Hand-shaking is not permitted (*la yajūz*) unless not doing so would result in corruption (*mafsadah*) and harm (*ḍarar*). It is also okay (*lā ba's*) between a veil (*al-sitr*) and without any misgivings or sexual feelings (*rībah wa shahwah*).¹⁵

While the English version (quoted first) does not even mention the general prohibition, the Arabic (quoted second) gives it priority before shifting to a rather weakly worded permission, the term used to grant it, *lā ba's*, being the mildest form of permissive expression. It reflects an atypical engagement with a *mustaftī* whose use of the *mujtahid's* language demonstrates a vigorous attempt to extract a permissive ruling. The *mustaftī* emphasizes a perceived compulsion in the situation (*idhā iḍtarra al-insān*, i.e., if someone is compelled), innocence of motive (without any misgivings or desire (*min dūn aya rībah aw raghbah*), the fact that it is initiated by the woman in the context of a formal meeting, and the extreme hardship (*ḥaraj shadīd*) and dire consequences not shaking hands would occasion, including insult to the Muslim and disdain of his religion and his testimony to Islam,¹⁶ drawing on the cultural rubric of honour and shame as well as the idea of *da'wah*.

The *mustaftī's* apparent success here raises the question as to whether *mustaftīs*, in the manner in which they pose their questions, can have any significant influence on *fatwā* giving. A survey of several hand-shake *fatāwā* suggests that if this is the case in the above example, it is not typical. Nor is extensive detail in the *istiftā'* always helpful; it can even be counter-productive. In one such case, Sistani adds that his permission is

¹⁵ *Ahkām al-Muḡtaribīn*, 187.506.

¹⁶ *Ibid.*

qualified by a condition of necessity in attending these meetings, but that “if one is not able to avoid *ḥarām* then it is forbidden to attend.”¹⁷

Ayatollah Tabrizi is not in the least persuaded by the arguments of *mustaftīs*. To Khui’s *fatwā* above, he adds the comment that even in a situation of “harm (*ḍarar*) and corruption (*mafsadah*)” the most precautionous course of action is to desist because “by [this ruling] the honour (*sharaf*) of Islam is preserved.”¹⁸ Similarly, Tabrizi identifies the non-handshake as among *sha‘ā’ir al-dīn*.¹⁹ We noted previously how the *sha‘ā’ir al-dīn* have special significance in legal discourse on migration as essential symbolic markers of Islamic identity. By locating the rule on not shaking hands within this essential category Tabrizi implies that he sees it as a highly significant marker of Muslim identity.

Although the handshake is widely held as forbidden, not all *mujtahids* follow Tabrizi’s method. Al-Sayyid Ja‘far Murtada argues that although not shaking hands in and of itself is not an absolute and necessary precept, if one allows it to be subject to new *ijtihād*, there will be a ripple effect, leading to the breakdown of such fundamentals as the imamate, the number of *rak‘ahs* (bowings) in each prayer, or other rules for prayer, the consumption of alcohol, sexual ethics, and so on.²⁰ The issue here is not hand-shaking *per se*, but a clearly articulated reticence to allow new situations in the West to initiate alternative and relevant *ijtihād*. It is not, I suggest, simply a reluctance to exercise the full potential of *Usūlī* methodology that is evident here, but rather, the socio-political context of residence in the West that compels such resistance. Analysis of additional *fatāwā* in light of post-colonial theory of identity suggests that the institutional leadership’s

¹⁷ Ibid, 188.511.

¹⁸ Ibid, 187.506.

¹⁹ Ibid, 188.509.

²⁰ al-‘Amili, *Khalḥfīyāt*, 5:64-65.

preferential option for *iḥtiyāt* over *ijtihād* is rooted in this over-arching discourse of resistance to the host culture and adoption of what some authors call “adversarial identities.”²¹ Seen from this perspective, it becomes easier to comprehend the inflexibility with which *mujtahids* treat this issue.

Ayatollahs al-Fadil and al-Makarim forbid the unclothed handshake outright and remind *mustaftīs*, who feel culturally obliged to shake hands so as not to insult their professors, of their legal obligation to explain the Islamic origins of this tradition and absolve themselves of the accusation of “bad manners.”²² This echoes Fadlallah’s frequent calls for Muslims to use such opportunities as this to propagate Islam by describing and defending its ethical principles.²³ Likewise, to al-Hakim, the handshake is a practice of “infidels” that represents a threat to Islamic identity, on the level, by implication, of cultural imperialism, again reflecting a post-colonial construction of resistance identity. Consequently, he says: “It is the duty of believers to eliminate these conventions and customs that deny religion, as following these customs leads to the loss of our religious identity.”²⁴

Interestingly, although an apparently non-negotiable benchmark of Islamic ethics, or at least a preserver of one, not one *mujtahid* draws on a scriptural source, Qur'an or

²¹ See Wrong, “Adversarial Identities, 10-14. See also Haddad, “Dynamics of Islamic Identity,” 19-46. Haddad underlines the role that conflicting ideological allegiances and historical power dynamics play in the shaping of Muslim minority identity in the United States. Her article is filled with the language of oppositional differentiation characteristic of resistance identity: Muslims in the U.S. are portrayed—in Haddad’s assessment of American attitudes—as victims, a constructed enemy, powerless minority, uncivilized people, a cancer, war mongers, villains, consummate terrorists, and “conspiratorial forces of hatred.” American attitudes are expressed in terms of: negative propaganda, anti-Islamic “wave sweeping across the United States,” prejudice, deliberate falsifications, perpetrated demonization, and Christian missionary assaults. While, offering a reasonably valid critique, Haddad’s article suffers from overgeneralization and unbalanced positive and negative stereotyping of Islam/Muslims and Christianity/Americans respectively.

²² *Aḥkām al-Muḡhtaribīn*, 189.514.517.

²³ See, for example, *Taḥaddiyāt al-Maḡjar*, 321-22.

²⁴ Al-Hakim, *Murshid al-Muḡhtaribīn*, 443.476.

Tradition, to support his position against male-female handshaking, even though such traditions exist. It is said that when Ali was given the oath of allegiance at Ghadir Khumm, he placed his hands, along with those of unrelated women, in a basin of water so as to avoid direct contact.²⁵ Further, al-Hurr al-‘Amili cites a tradition on the authority of al-Sadiq reporting that handshaking between non-related men and women is forbidden.²⁶ A Sunni *muftī*, M. Sa‘id Ramadan al-Bouti, who rejects the idea that minority *fiqh* is at all justified, claims that the prohibition is based on a *ḥadīth* to the effect that the Prophet was never known to shake hands with a woman.²⁷

In conclusion, there seems to be no remarkable influence on *fatāwā* by questions of elaborate detail and verbal manipulation. Such attempts to elicit favourable answers seem futile. They only highlight the tension between the *mustaftīs*’ desire for cultural accommodation and the *mujtahids*’ strong resistance to Western cultural practices—such as the male-female handshake—practices that are believed to invite moral corruption and loss of religion. As does the treatment of other issues in this literature, *fatāwā* on handshaking demonstrate how deeply legal discourse for the West is embedded in the historical context of post-colonial discourse. As Yvonne Haddad argues, Muslims in the West today struggle to find acceptance, particularly in the American (U.S.) context of widespread distrust of Islam and Muslims. Perceiving themselves to be “a powerless

²⁵ al-Shaykh Mehdi, *al-Imām ‘Alī fī Arā’ al-Khulafā’*. (Qom: Mu’assasat al-Ma‘ārif al-Islāmīyah, 1420 *a.h.*), 73.

²⁶ al-Hurr al-‘Amili, *Al-Fuṣūl al-Muhimmah*, [CD-ROM, *ALAQAEED*, version 1.0] (Qom: Mu’assasat Ma‘ārif Islāmī Imām Riḍa, 1418), 2:342.

²⁷ Muhammad Sa‘id Ramadan al-Bouti, official website, http://www.bouti.com/bouti_e_fatawa_c8.htm#1 (accessed February 1, 2009).

minority” in the lands of their “conquerors,” Muslims in the United States have adopted a variety of strategies in response, including the adversarial stance of cultural resistance.²⁸

Mujtahids such as al-Murtada, al-Hakim, and others should be situated within this theoretical context. Their *fatāwā* of resistance may then be understood as attempts to compensate for feelings of victimization, insecurity, and inferiority by asserting the opposite pole of Muslim moral superiority. Casting the practice of not shaking hands with the opposite sex as a mark of superior moral orientation and a solution to the moral decay of the West demonstrates a strategy of resistance to a perceived threat of cultural and political hegemony. It suggests that while powerlessness may bring shame and dishonour, Muslims in the West may recover their honour by maintaining Islamic morality in spite of the challenges.

OTHER QUESTIONS: MORALS AND MISSION

Other education-related topics include attending co-educational and non-Muslim schools and universities; questions related to medical education; certain types of classes; influence of unbelieving teachers; and miscellaneous issues. *Mustaftīs* are either parents or guardians of children and youth asking on behalf of a silent party, or university students asking on behalf of themselves. Both frequently select the kind of detail they provide apparently in an effort to sway the *mujtahid's fatwā* in one direction or another. However, as in the handshaking *fatāwā*, these attempts do not appear to have a significant impact. Further, with few exceptions, *fatāwā* on these questions, like that of handshaking, demonstrate the same reticence to exercise new *ijtihād* and the same resistance to the dominant culture.

²⁸ Haddad, “Dynamics of Islamic Identity,” 21.

Questions from medical students deal predominantly with looking at or touching the private parts of patients, the same or opposite sex, in the course of study, or viewing the same in pictures, models, or films. Khamenei is remarkably permissive on these matters.²⁹ His permission appears to be based on the legal principle of *muqaddimat al-lāzim*. That is, what the law permits, it renders permissible whatever actions are inseparable from its performance. Since saving lives is assuredly permissible, whatever activities are a necessary in training towards this goal are also permitted. However, it is not permissible simply on the grounds that it is asked of the student by the professor; if this were the only criterion, it would be forbidden.³⁰ Thus, in spite of an intractable cultural conservativeness, Khamenei's *ijtihād* allows him some flexibility in deriving permissive rulings.

Khamenei's medical *fatāwā* are striking in comparison with those of Sistani and Fadlallah. Fadlallah gives permission to examine genitals only from a negative perspective—if forbidding it “is a cause of [the student's] failure,” and “if [failure] is a distress for [the student].”³¹ The connection between medical training and practice does not appear to be a causal factor in his decision. Sistani is singularly illogical in forbidding the performance of autopsy on a dead Muslim for educational “or other purposes” but permitting it in the actual saving of the life of another Muslim, “even if in the future.”³²

This is about the limit of qualified permissive *fatāwā*; the remainder tends strongly towards prohibition. The matter of non-Islamic schools is problematic,

²⁹ Khamenei, *Practical Laws of Islam*, available at <http://www.leader.ir/langs/EN/index.php# Fatwās> #1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1310.

³⁰ Ibid, #1302: “The medical examination being part of the curriculum or an assignment required from the student by his professor does not justify the commission of what Islamic law has decreed unlawful. However, the criterion here is the need for the training to save the human life or the requirement of a necessity.”

³¹ Fadlallah, *Tahaddiyāt al-Mahjar*, 318.

³² Sistani, *al-Fiqh lī al-Mughtaribīn*, 249.350.

especially for Fadlallah, who advances a vigorous appeal for the foundation of Islamic schools in the West to act as “incubators” against the “deviant atmospheres” of Western primary and secondary educational institutions.³³ His theory is that as children and youth lack sufficient grounding in Islamic knowledge they can easily become accustomed to the Western outlook they learn at school, such that it becomes “natural” and comfortable to them. They then become confused and irritated by their parents’ criticisms.³⁴ As their guardians, parents are responsible to “rescue” children from “moral and intellectual deviation.”³⁵ Separate schools are seen as facilitating protection from outside influence while also strengthening the community for advancing Islamic religious, moral, social, and political interests in the West. Fadlallah’s *fatāwā* are guided by this underlying principle. For example:

Istiftā’: You have spoken in the *Bayyanāt* about how a university student must not blend in with the laden atmosphere. Does this mean, then, that we must try to change the society there? What is our role in such an environment?

Fatwā: I was saying that when a person lives in a society that is overcome with error he should not lay down his armor, and not fall before this society. Rather, he should work from the beginning to be balanced and guard his mind and heart so as to not allow deviation to enter in, and to protect his steps as well, to the best of his knowledge. Further, he should try to further his knowledge and to develop relationships in order to steer the conversation towards Islam and the ethical steps that God wants from people, to protect himself when he takes on himself the character of a missionary (*dā’iyah*) because this suggestion and practice might give him another (kind of) strength.³⁶

Suárez-Orozco and Suárez-Orozco explain that according to the adversarial identity model, embracing elements of the dominant culture is perceived as acquiescence or surrender to the dominant culture, rendering that culture the victor in a struggle for

³³ Fadlallah, *Islamic Lanterns*, 162, 263, 279.

³⁴ *Ibid.*, 205-206.

³⁵ *Ibid.*, 225.

³⁶ Fadlallah, *Tahaddiyāt al-Mahjar*, 321-322. Alternatively, *dā’iyah* may be translated as propagandist, herald, or one who calls others to something.

power.³⁷ Fadlallah's advice reflects this approach in Islamic terms. Although not advancing a call to military *jihād* against *dār al-ḥarb*, he maintains these conceptual categories and a *jihādī* approach to life in the West. According to Fadlallah, Muslims in the West are at the forefront of a moral, spiritual, and political *jihād*, and should use their presence there to advance "the call of Islam" and gradually transform non-Muslim society into an Islamic one.³⁸ For Fadlallah, Islam is a religion of the mind, perfectly in harmony with the "universal laws of the cosmos" and the "laws of history." Rationality and Islamic social values are part of the "armor" that Muslims should always wear, as they hold the key to the transformation of America's apparent social malaise. Consequently, to the student struggling to maintain his Islam in a foreign university, Fadlallah advises him or her to "make the greatness of God have command over [him or herself]." He suggests that:

the more you are certain of physics, chemistry, and biology, the more you'll know God; and if you know God more, then the more you can feel your need to obey and get closer to God, as Imam Ali said in the Hadith about the certainties, 'They glorified the Creator in themselves and the things around them looked smaller in their eyes.' Therefore, if you want to strengthen your commitment, then try to strengthen your faith in God.³⁹

In spite of his preoccupation with rationality and the scientific approach, Fadlallah tends to be no more or less permissive than other *mujtahids*. His one outright permission is in regard to studying about loans and interest in economics courses. Since this is only for the purpose of knowledge, he says, there is no problem with it.⁴⁰ The point, of course, is that Western culture should have no influence on the Muslim migrant, but the migrant

³⁷ Suárez-Orozco and Suárez-Orozco, *Children of Immigration*, 107.

³⁸ See, for example, Fadlallah, "His Eminence's call to emigrants in all countries," *Islamic Lanterns*, 225-31.

³⁹ Fadlallah, *Taḥaddiyāt al-Mahjar*, 322-23.

⁴⁰ *Ibid.*, 320.

should work to influence Western society for Islam. This requires that Muslims in the West adopt an identity of difference and Fadlallah's *fatāwā* facilitate this process by compensating for the Muslim's apparent powerlessness in Western society by juxtaposing it with a perceived moral superiority in Islam. By avoiding rigorous *ijtihād* and stressing the ethical strength of the traditional Islamic moral code Fadlallah clearly positions himself within the resistance identity camp that utilizes themes of difference and othering to flex its socio-moral muscles.

But Fadlallah also encourages a methodology of time and place with respect to applying cherished legal practices. He frames this as understanding the difference between the unchanging moral principles of religion, based in "humanity," and "traditions" tied to circumstances of time and place, by which he means that while the law provides unchanging principles, the changing conditions of socio-historical context provide opportunity for creative application of the law. He refers to this as an intellectualization of Islamic morals aimed at jurisprudential reform so that rulings may be formulated along "general Qur'anic lines" and in awareness of the new realities.⁴¹ For example, since the main problem with Western schools is sexual promiscuity, he advises alternatives such as making marriage easier, and regulating the practice of temporary marriage.⁴² In light of this, Fadlallah may be said to promote a minority identity of selective engagement, though to a very limited degree and, more importantly, on Islamic legal terms only.

Sistani is in full agreement that the lax sexual mores of Western schools is a prohibitive factor for Muslims attending co-ed schools:

⁴¹ Fadlallah, *Islamic Lanterns*, 207-208.

⁴² *Ibid.*, 163.

Istiftā': Is it permissible for male and female pupils in elementary school to mix when one knows that this mixing will surely lead one day to a forbidden act by the male or the female student, even if just a forbidden glance?

Fatwā: It is not permissible under the circumstances described.⁴³

A *fatwā* from Sistani in response to a question presenting both sides of the argument still prioritizes a conservative Islamic moral code over the possibilities for social advancement via education. Given the *fatwā* above, it would appear that the ruling would not change even if segregated schools did not exist, leaving families with limited options.

Istiftā': Is it permissible for those who reside in the West to send their *muhajjabah* daughters to co-ed schools (irrespective of whether or not education is compulsory) while there exist segregated schools which obviously are expensive, located far away or of a low academic standard?

Fatwā: It is not permissible [even] if it [just] corrupts their character, let alone if it harms their beliefs and commitment to the faith which is what normally happens!⁴⁴

However, responsible young adulthood seems to lessen the restrictions somewhat, as a Muslim woman is advised that she may attend a co-ed college in spite of the lax moral atmosphere “if she is confident that she can preserve her faith, fulfill her religious duties, including the *ḥijāb*, refrain from *ḥarām* looking and touching, and be immune to immoral and adverse atmosphere [...]; otherwise, it is not allowed.”⁴⁵ Male and female university students enjoying leisure travel time together receives the same highly cautious permission.

Al-Hakim's *mustaftīs*, as those of other *mujtahids*, include a brief description of the immoral and corrupt atmosphere of these schools in what appears to be attempts to support the restrictions they wish to impose on their children with the authority of the

⁴³ Sistani, *al-Fiqh li al-Mughtaribīn*, 237-38.328. English translation: *fatwā* 325.

⁴⁴ *Ibid.*, 238.329; English translation, *Fatwā* 328.

⁴⁵ Sistani, *al-Fiqh li al-Mughtaribīn*, 318-19.535. English translation, *fatwā* 483.

mujtahid. Al-Hakim's position is that in and of itself, co-education is not forbidden, but it is reprehensible and the young person must be certain of their immunity to influence; if not, then it is forbidden.⁴⁶

The presence of alcohol at academic meetings, conferences, and parties is clearly problematic. *Mustaftīs* tend to simply present the facts of the situation. Some point out that non-attendance could be an obstacle to their careers, and thus a cause of *ḥaraj*. Khamenei advises Muslim students that participation in these gatherings is forbidden unless attendance is obligatory. In this case, it should be of sufficient length to fulfill the obligation only and be accompanied by an explanation as to the Islamic moral code regarding alcohol.⁴⁷

Attending certain types of classes such as dance, music, art, or sex education, according to Fadlallah, might be permissible—if the intent is educational and no forbidden activities ensue.⁴⁸ Attendance at a Christian school, on the other hand, while cautiously permitted, is highly discouraged, (as is attending secular schools).⁴⁹ Similarly, according to Fadlallah, it is forbidden—unless nothing else is available—for children to attend schools where teachers “deny the existence of God.” If no Muslim school exists, Muslim parents should establish one and in the meantime, must assure that their children attend mosque regularly.⁵⁰ For Sistani, parents are responsible to ensure that their children do not attend such schools.⁵¹

⁴⁶ See, for example, al-Hakim, *Murshid al-Mughtaribīn*, 432.450.451.

⁴⁷ *Aḥkām al-Mughtaribīn*, 47, 310.

⁴⁸ Fadlallah, *Islamic Lanterns*, 369.

⁴⁹ Fadlallah, *Taḥaddiyāt al-Mahjar*, 320.

⁵⁰ Fadlallah, *Islamic Lanterns*, 395.

⁵¹ Sistani, *al-Fiqh lī al-Mughtaribīn*, 237.327.

It is worthy of note that no *mujtahid* suggests the possibility that other religious communities might share the same fears regarding influence of a perceived immoral social climate on their youth. It is well known that social and personal morality, particularly in regard to sexual ethics, is a major pre-occupation of conservative Jewish, Christian other religious communities. The *mujtahids*' apparent unawareness of this reality leads them to negatively over-generalize their perspective on Western culture and to intensify assumptions of incompatibility between Islam and the West, thereby elevating feelings of isolation in the community. This allows the *mujtahids* to reinforce the missional motivation of migration, but at the same time might result in missing opportunities for dialogue on social concerns shared by other religious communities.

CONCLUSION: OBLIGATORY PRECAUTION

Education *fatāwā* demonstrate a consistent application of conservative legal principles such as certainty of immunity, absolute necessity, and obligatory precaution (*iḥtiyāt wājib*). These are more prominent than are principles of a more flexible *ijtihād* such as time and place, or the presence of *ḥaraj*. The *fatāwā* underline the idea that Muslims' legal responsibility, as parents and as *muqallids*, obligates them to tolerate inconveniences, difficulties and obstacles in the course of upholding their Islamic moral commitment and expressing a positive witness to Islamic ethics. The hand-shaking dilemma once again demonstrates a tension between *muqallids* and *mujtahids* regarding boundary lines around cultural accommodation and compromise.

Aside from supporting the fundamental principle in modern juristic theory of migration to the West, that is, that migration is conditional on the preservation of religion and protection from non-Islamic influence, *mujtahids* seem to be keenly aware of the

ability of education to penetrate a people's worldview. This is especially characteristic of Fadlallah whose *fatāwā* on education are probably among his most restrictive. They consequently seek to maintain a position not only of passive but also proactive resistance to Western influence. The perceived moral corruption of Western society provides a backdrop for advancing Islam as the solution to the moral crisis of the West, even as Islamic educational institutions provide the safety net needed to fulfill this calling. *Fatāwā* in this field thus support a strong leaning towards resistance identity, articulated within a post-colonial interpretation of Muslim-other relations.

CHAPTER SEVEN

CLOTHING AND BEARDS: ASSERTION OF IDENTITY OR RELIGIOUS OBLIGATION?

Legal discourse on clothing and other aspects of appearance finds its roots, as is usual for all matters of law, in the Qur'an and the supplementary and explanatory literature of *ḥadīth*. These texts provide the principles for legal discourse regarding male and female appearance, the central features of which are piety and modesty. In the context of appearance, piety and modesty refer not just to an attitude of obedience to the divine law and sexual propriety, but also reflect the Qur'anic value of economic frugality or moderation. Thus, we find that items such as gold and silk, specifically for men, are usually forbidden, or at least not recommended to be worn. A third stream of thought contributing to legal discourse on Islamic dress and appearance is that of identity and the socio-political and religious values that clothing and appearance communicate.

The most well known item of Islamic modest dress is what is commonly known as the female *ḥijāb*. Much has been written on this very controversial subject. The purpose of this chapter is not to determine which interpretation of the several possibilities is the correct one, nor is it to investigate the origins of the custom. This is a theoretical matter that, while relevant to the wider ideological context, is beyond the scope of the present study.¹ Further, as much of the field research drawn on for this analysis indicates,

¹ Debates abound about the meaning of Qur'anic vocabulary that has, in popular parlance, been subsumed under the term *ḥijāb* and interpreted as an item of clothing that should be added to a woman's attire, specifically a headscarf. Similarly, it may also refer to a wider understanding of modest dress, including some form of head-covering. This is the predominant view in popular understanding. Classically, the *ḥijāb* was more often interpreted as a curtain, or veil of seclusion, modeled after the injunction of Surah 53:33, that was intended to protect Muhammad's wives from the indiscretions of other men. Lynda Clarke shows how this seclusion interpretation was carried on in *ḥadīth* and eventually worked its way into law, expressed as a series of rules conditioning women's freedom of movement to the permission of her husband. The *ḥijāb* as clothing can then be understood as a modern modification, a sort of portable

a large proportion of women who wear the *ḥijāb* in the West are relatively uninformed of this literature. We will therefore content ourselves with footnotes summarizing the main lines of argument and otherwise refer the reader to more specialized studies.²

seclusion, allowing woman greater freedom of mobility. See Lynda Clarke, “*Ḥijāb* According to the *ḥadīth*,” in *The Muslim Veil in North America: issues and debates*, ed. Sajida Alvi, Homa Hoodfar, and Sheila McDonough (Toronto: Women’s Press, 2003), 214-86.

The contemporary Iranian cleric, Ayatollah Azeri-Qomi, alludes to the classical interpretation when he speaks of a “culture of *ḥejāb* [sic],” by which he means a social structure that protects women’s pious character as well as their bodies. His vision of the ideal Islamic society that follows this culture of *ḥijāb* would also include female seclusion behind the walls of their homes and otherwise have them covered in full *chādor*. See Ziba Mir-Hosseini, *Islam and Gender: The Religious Debate in Contemporary Iran* (Princeton: Princeton University Press, 1999), 67.

For a modern Shi’ite treatment of *ḥijāb* that carries the wider meaning of female modest dress, see Murtaza Mutahhari, *The Islamic Modest Dress: Ḥijāb*, trans. Laleh Bakhtiar (Chicago: IL: Kazi Publications, 1992), 7-9. Mutahhari offers a concise summary of the standard legal definition of *ḥijāb* in the following: “The philosophy behind the *ḥijāb* for woman in Islam is that she should cover her body in her associations with men ‘whom she is not related to according to the Divine Law’ (*nā-mahram*) and that she does not flaunt and display herself” (8). Mutahhari’s argument against a definition of *ḥijāb* as a veil secluding the prophet’s wives from other men, even though the sole use of the word *ḥijāb* in the Qur’an in relation to women is precisely with this meaning (53:33), admits this Qur’anic usage, but goes on to negate it by saying that this is not the meaning of *ḥijāb* because it “is not the intention of Islam to imprison women” (8). It is likely that Mutahhari’s unsubstantiated argument was intended to appeal to modern revolutionary, but pious women.

For a different interpretation, reflective of the classical view, see Soraya Hajjaji-Jarrah, “Women’s Modesty in Qur’anic Commentaries: The Founding Discourse,” *The Muslim Veil*, 181-213. Hajjaji-Jarrah argues that of the Qur’an’s eight references to *ḥijāb*, none refer to women’s clothing and all suggest “either a physical or a metaphorical barrier without any reference to women or their clothing [...] Thus, the Qur’anic usage of the term *ḥijāb* seems somewhat removed from the notion of dress or clothing of any kind” (184). Yet the *tafsīr* (exegesis) tradition demonstrates strong support for this latter understanding. Hajjaji-Jarrah suggests that this is a product of “an affective relationship between the commentators and their social reality. [...] As a result,” she argues, “assumptions of female inferiority in medieval Islamic societies derived more from scriptural commentaries than from the Qur’anic verses themselves” (183).

In this same volume, Lynda Clarke demonstrates that, like the Qur’an, the *ḥadīth* pays minimal attention to women’s clothing, and contains “no explicit reference to covering either the head or the hair,” even though numerous *aḥadīth* refer to the necessity of men covering their *‘awrah*, meaning their “private or shameful parts.” Clarke, “*Ḥijāb* According to the *Ḥadīth*,” 218, 222. Clarke advises me that for the traditional Muslim scholars, the absence of clothing meaning in the Qur’an and Tradition does not diminish the legitimacy of the developed law and the *ijma’* that underlies it. For a sociological analysis of the debate on the *ḥijāb*, see Anne Sofie Roald, “Islamic Female Dress,” in *Women in Islam: The Western Experience* (London: Routledge, 2001).

² Leila Ahmed’s *Islam and Gender: Historical Roots of a Modern Debate* (New Haven: Yale University Press, 1992) is a seminal work on the origins of the veil. For a different perspective, see Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women’s Rights in Islam*, trans. Mary Jo Lakeland (Reading, Mass.: Addison-Wesley Publishing Company, 1991); see also Barbara Freyer Stowasser, *Women in the Qur’an: Traditions and Interpretation* (New York: Oxford University Press, 1994). More recent writings include the already cited *The Muslim Veil in North America* (2003); Amina Wadud-Mohsin, *Inside the Gender Jihad* (Oxford: Oneworld, 2006); and Asma Barlas, “Women’s Readings of the Qur’an,” in *Cambridge Companion to the Qur’an*, ed. Jane Dammen McAuliffe (New York: Cambridge University Press, 2007). See also the sources cited in footnote 1.

This chapter examines contemporary legal discourse on clothing and other aspects of appearance, such as ties, beards and make-up, around the three central foci mentioned above: piety, modesty, and Muslim identity. As is the pattern in other chapters, I also look for meaning in an analysis of the conversation between *mustaftīs* and *mujtahids*. The chapter does not include questions dealing with clothing from a ritual point of view; these are included sporadically in issues of purity and impurity.

In addition to the primary sources of our research, that is, contemporary Shi'ite legal and popular discourse, I also incorporate the results of the significantly large pool of published scholarly field research. Although the majority of this research focuses on Sunni women, the findings are, in this case, widely applicable to Shi'ites as well. For example, as Sunni styles of wearing *ḥijāb* are found to be indicative of a woman's ideological sympathies, Linda Walbridge's research shows that Shi'ite styles often signify specific political affiliations, particularly, to the Lebanese Hizbullah and Amal parties; or indicate that one is an admirer of Ayatollah Khomeini.³ In view of my inclusion of the results of field research among Sunni women, as well as the contribution they add to our analysis, I also include some *fatāwā* from Sunni *muftīs*.

The chapter begins with a summary of findings from documented field research, followed by a brief account of Canadian attitudes (or, more correctly, Muslim perceptions of those attitudes) to the veil. I then examine the *fatāwā* along the lines of three analytic foci. I use the term piety to delineate observance of the law; by modesty, I mean the form of dress that hides a person's attractive qualities; the third focus of identity is expressed also in terms of resembling unbelievers (*al-tashabbuh bi al-kuffār*), which I understand to be a less sophisticated traditional version of the contemporary socio-political discourse

³ Walbridge, *Without Forgetting*, 177-82.

described in the field research section. Throughout, there is a subtext of *ḥijāb* as an instrument of *da‘wah*. While the matter of not resembling unbelievers addresses several questions regarding male appearance, questions related to piety and modesty deal predominantly with female appearance. This typically medieval phenomenon stands in contrast to the *ḥadīth* literature which, as pointed out above, places far more emphasis on covering male nakedness.⁴

In this chapter, I argue that while the motivations of Muslim women in the West and of the *mujtahids* are fundamentally at odds, in practical terms, they reinforce each other. Whereas for a certain segment of veiled women in the West, the *ḥijāb* has socio-political meaning, representing personal autonomy and rejection of Western sexist values, for the religious class as a whole, the *ḥijāb* affirms female subordination to male honour and authority. In consequence, while deciding for *ḥijāb* for very personal reasons, veiled Muslim women in the West in effect enhance the standard legal orthodoxy and give credence to an impression of clerical authoritarianism as both relevant and vital.

SUMMARY OF FINDINGS FROM FIELD RESEARCH MATERIAL

Recent field research on the *ḥijāb* in the West demonstrates a high level of identity politics among Muslim women.⁵ Several researchers conclude that the veil is often taken up by women in the West as a symbolic strategy to articulate what one author has called “Muslim first identities.”⁶ This is understood to be in tension with identities

⁴ Clarke, “*Ḥijāb According to the Ḥadīth*” 217-18.

⁵ Research done about 15 years earlier in the U.S. showed a far lower percentage of women wearing *ḥijāb*, with only one quarter agreeing that it was important, slightly less than half disagreeing, and another quarter undecided. Although there was constant pressure from the mosque to cover, women who did not do so outside of the mosque were more influenced by the desire not to draw undue attention to themselves. Statements such as: “I want to blend in as far as my clothes go. I want to look normal” were typical of this sample. See Haddad and Lummis, *Islamic Values*, 122-134.

⁶ Nadine Naber, “Muslim First, Arab Second: A Strategic Politics of Race and Gender,” *Muslim World* 95 (October 2005): 479-495.

based primarily on ethnicity and tradition.⁷ Further, while rooted in religion, it makes short use of the notion of obligation; rather, religion functions more as a symbol of identity, the markers of which may be taken up or discarded at will. Exemplifying this particularly well is one young female informant cited by Nadine Naber, who wore *hijāb* when with her local MSA (Muslim Students' Association) chapter but took it off when among secular Arabs.⁸ Although the results of the two discourses often reinforce each other in practice—which is what makes the “Muslim first” discourse so strategically valuable—differences between the discourses as they inform and motivate women’s choices are more significant.

In “Muslim first” identities, women understand themselves to be asserting Islamic values of female personhood and individuality over against their parents’ authoritarian cultural justification for traditional gender roles. Young adherents of “Muslim first” identities, both male and female, attempt to disentangle the religious norms they choose to embrace from the “cultural essentialism” handed down to them from their parents. As young adults everywhere, they wish to be “actively engaged in a process of building their own personalities and beliefs.”⁹ Rejecting what they see as their parents’ unwarranted conflation of the pervasive cultural value of “*abe*” (shameful) with the religious notion of *ḥarām* (forbidden), they attempt to shed the moral authority of the former, which they see

⁷ See also Syed Ali, “Why Here Why Now? Muslim Women Wearing *Hijāb*,” *The Muslim World* 95 (October 2005): 515-530. Although the author’s thesis expresses a distinction between religious and ethnic identities, this is not always clearly maintained in his analysis. His statement, “and here I consider religion to be a type of religious identity” (516) blurs the boundary later articulated in his article between these two fields. See also Reem Meshal, “Banners of Faith and Identities in Construct,” in *The Muslim Veil*, 95, where she observes the high statistical ratio of “Muslim-Canadian” as opposed to other possible self-identity labels among *hijābī* women.

⁸ Naber, “Muslim First, Arab Second,” 482.

⁹ Marie Mc Andrew, “The hijab controversies in Western public schools: Contrasting conceptions of ethnicity and of ethnic relations,” *Muslim Diaspora: Gender, culture and identity*, ed. Haideh Moghissi (New York: Routledge, 2006), 154, 155.

as irrational and gender biased, in favour of the latter, which, conversely, they idealize as both fully rational and gender equal.

Nevertheless, when asked specifically about their own expectations regarding gender roles, informants confirmed the traditional values held by their parents in cultural terms. In consequence, as Naber points out, the selectively strategic Islamic rationalization for *hijāb*, while changing the discourse, does not present a formidable challenge to cultural or family norms.¹⁰ Even so, by adopting the veil for religious reasons, women are able, much as in some Islamic societies, to “gain or maintain esteem within a patriarchal society...”¹¹ and so to successfully negotiate a greater measure of self-autonomy.

But the veil as a visible Islamic identity marker, or “flag,” as one informant put it,¹² is the inevitable destination of a brief, but significant history that brings together several motivating strands. Homa Hoodfar tracks this narrative in her lucid analysis of the data obtained by a team of researchers among young Muslim women in Toronto and Montreal in the late 1990s.¹³ She observes that while very few women (4/59) initially claimed that the veil was a mark of Arab or Muslim identity, the data showed otherwise. Hoodfar’s analysis indicates an increasingly politicized interpretation of the veil that women’s collective experience before and after taking up the veil brings to light.

In the initial stages, young Muslim women from traditional, even if not religious homes, found their options for social engagement increasingly limited after puberty. In

¹⁰ Naber, “Muslim First, Arab Second,” 488-89.

¹¹ Pat Mule and Diane Barthel, “The Return to the Veil: Individual Autonomy vs. Social Esteem,” *Sociological Forum*, 7 no. 2 (1992), 324.

¹² Meshal, “Banners of Faith,” 102.

¹³ The results of this research are compiled in the aforementioned volume, *The Muslim Veil in North America*.

response to the social stigmatization of socially active unveiled Muslim women within the community, young women began to take up the *ḥijāb* as a means of asserting their will to pursue an education and socialize with friends without the high cost of losing respectability in the eyes of their families and communities. So successful was the strategy, that one informant boasted that “the veil is the answer to all Muslim girls’ problems here in North America.”¹⁴

Having adopted the *ḥijāb*, women found that Islamic teachings in other areas, such as the right to choose a spouse, provided them with an effective vehicle of resistance to confining cultural traditions, a step that represents what I see as the second stage of development. At this stage, study groups around what was seen as *true* Islam began to form among increasingly knowledgeable, articulate, and often second generation, veiled women. The group solidarity forged by this project made what was often initially a difficult and lonely choice appear more attractive. The third stage therefore saw a more confident assertion of Muslim identity associated with veiling. Rather than remaining marginalized, women founded social groupings that affirmed and strengthened their moral values while allowing them to avail themselves of opportunities offered by Canadian society. Similarly, as Naber’s study suggests, non-white social groupings that emerged in California to counter racist policies strengthened identity politics among Muslim youth, such that one informant claimed it was popular to think that “to be somebody, you have to hang with Blacks, Asians, Latinos, or Muslims.”¹⁵

At the fourth stage, women developed a contextual argument in response to feminist accusations that the veil symbolized the oppression of women. Rather, they

¹⁴ Homa Hoodfar, “More than Clothing: Veiling as an Adaptive Strategy.” *The Muslim Veil*, 20.

¹⁵ Naber, “Muslim First, Arab Second,” 482.

argued, the pervasive North American sexualization of women's bodies was the real source of oppression. The Islamist argument stressed the value of the *ḥijāb* in enabling women to be seen as useful members of society, and not "sexual objects, their half-naked bodies used to sell everything from toothbrushes to sports cars."¹⁶ Informants in several studies expressed this instrumental interpretation of the veil as a symbolic statement of dissociation and liberation from female exploitation that was seen to emanate from "the dictates of the fashion industry and the demands of the beauty myth."¹⁷

In a similar way, Walbridge's study of Shi'ite women in Dearborn Michigan showed that for these women, the *ḥijāb* was not worn primarily to hide their beauty, but to make a statement concerning sexual and religious values. It underlined their commitment to the notion that modern was a heterogeneous term not inseparable from Westernization. Wearing *ḥijāb* meant that they could be fully modern without buying into the entire Western value system of sexuality.¹⁸

These inter-related elements combine to represent the final stage, in which the veil functions as a symbolic marker of Muslim identity, in the sociological and religious meanings elucidated here. The veil is a powerful way of making that identity public and thereby shaping an ideological basis for social and communal solidarity. Nevertheless, I would argue that while being relatively successful at disentangling the cultural from the religious, the women studied in this field research tend to conflate the functional with the normative. While adopting the veil largely for functional reasons, they come to see its

¹⁶ Hoodfar, "More Than Clothing," 29.

¹⁷ Roald, "Islamic Female Dress," 258, quoting Haleh Afshar in Mai Yamani, *Feminism and Islam* (Ithaca Press, 1996), 201.

¹⁸ Walbridge, *Without Forgetting*, 177-80.

liberative aspects as coalescent with Islamic norms and so become ardent defenders of an idealized reification of Islamic legal discourse on gender.

In conclusion, we observe that along with their Islamist moorings, “Muslim first” identities are closely aligned with what Roald and others refer to as the “socio-political reasons behind the new veiling [...]”¹⁹ The matter of veiling or unveiling remains a potent political and ideological tool in Islamic countries, but increasingly also, among many women in the Muslim minority context of the West. In privileging interpretations of Islam that they see as congruent with modern society, women find the veil a strategic means of advancing the pursuit of their own legitimate interests.²⁰

As will be demonstrated in subsequent sections of this chapter, the legal discourse, in contrast, grounds veiling in an ethic of duty and obedience to perceived scriptural dictates. I argue that the *mujtahids*’ emphasis on duties rather than rights issues not only from the classical discourse that focuses on duty, but also out of a manifest concern with how Muslim women in the West can best serve the interests of Islam and the Muslim community. That *mujtahids* either consciously distance themselves from the socio-political discourse or are unaware of it – a less likely explanation – becomes evident in the analysis that follows.

It is perhaps ironic that Shi’ite *mujtahids* should be largely mute on the symbolic value of the *ḥijāb*, considering the long history of the veil’s role in anti-colonial discourse. The slogan, made popular during the 1978-79 Iranian revolution, “Sister, your *ḥijāb* is more combative than my blood!” demonstrates the passionately felt political, even revolutionary significance of the female Islamic covering. In that particular

¹⁹ Roald, “Islamic Female Dress,” 259.

²⁰ Hoodfar, “More Than Clothing,” 37.

instance, Hoodfar notes, women's veiling became a potent symbol of political victory for the new regime, even as de-veiling had been pursued by pro-Western regimes in Iran and elsewhere in the Middle East since the 19th century.²¹ As Hoodfar and others argue, the issue of women's emancipation or rights, though touted as such, was nowhere envisioned as a matter of actual concern by either side of the modernist-conservative divide in Iran of the late 1970s. Rather, women's clothing and make-up was "the symbolic battlefield on which the modernists and conservatives fought out their differences."²²

Though leading to a similar praxis, the integrally religious character of the legal discourse would appear to be at odds with the socio-political discourse of identity developed by Muslim women in the West. One Egyptian informant, Mona, captures this tension well:

I would never have taken up the veil if I lived in Egypt. Not that I disagree with it, but I see it as part of the male imposition of rules. [...] But since the Gulf War, seeing how my veiled friends were treated, I made a vow to wear the veil to make a point about my Muslimness and Arabness. I am delighted when people ask me about my veil and Islam, because it gives me a chance to point out their prejudices concerning Muslims.²³

In this case, the "subversion" of the veil²⁴ as a socio-political symbol grounded in religion nevertheless fuses well with what emerges as the primary interests of the *mujtahids*, that is, advocating adherence to a strict code of Islamic dress on grounds of a traditional Islamic interpretation of female sexuality and subjection of personal interests to those of religion. This broad-based coalescence between "subversive" uses of the *hijāb* and the traditional gender orthodoxy of the clerical class lends considerable credence to Haideh Moghissi's astute observation that the former's eloquent theorizations of the veil

²¹ See *ibid.*, 5-11.

²² *Ibid.*, 8.

²³ *Ibid.*, 30.

²⁴ *Ibid.*, 33.

as liberator of female personhood may well in fact – knowingly or unknowingly – be instrumental in reinforcing “the oppressive discourses and actions of Islamist ideologues [...]”.²⁵ Clearly, the fine distinctions between the two sets of logic are lost on most of the observing mainstream population. In the final analysis, what the *ḥijāb* actually means remains elusive, having whatever meaning one’s perception of and method of dealing with reality ascribes to it.

PERCEPTIONS OF THE *ḥijāb* IN THE WEST

Having described the factors leading to popular support for the *ḥijāb* among Muslim women in the West, we look briefly now at the second, though less conspicuous, major player in this field: the Western non-Muslim public. Given the diversity of Western views, I focus on Canadian perspectives. What is expressed in the literature as representing their views is a valuable backdrop to the exchange between *mustaftīs* and *mujtahids*.²⁶ The dual impact of the *ḥijāb* in the West, *vis-à-vis* in-group and out-group, is succinctly summarized by Reem Meshal: “The act of donning the *ḥijāb* renders its wearer more visible even as it covers her form. Veiled, she is marked and identifiable, not just to the Muslim community, but also to the wider Canadian society.”²⁷

The Canadian context is distinctive for its adoption of official multiculturalism. Nevertheless, perceptions of the *ḥijāb* do not necessarily conform to the values typical of multicultural theory. While the research shows a range of views in Canadian society from tolerance and support on the one hand to disdain and even insult on the other,²⁸ the

²⁵ Haideh Moghissi, *Feminism and Islamic Fundamentalism: The Limits of postmodern analysis* (New York: Zed Books, 1999), 37.

²⁶ I recognize that this research corresponds to the texts I am analyzing in general terms only. It appears, nevertheless, to be informative and helpful to my analysis.

²⁷ Meshal, “Banners of Faith,” 93.

²⁸ *Ibid.*, 85.

general atmosphere has been one of mistrust and misunderstanding, particularly in Quebec where the memory of women's bitter struggle against ecclesiastical control of women is still fresh. Having said this, advances made in education of the Canadian public since the publication of these sources may well have changed the landscape here described for the better.

Sheila McDonough's analysis of popular Canadian journalistic writing in the 1990s shows a high level of mistrust based on a widely held one-dimensional understanding of a woman in *ḥijāb* "as an instrument of the threat of fundamentalist attack on the democratic values of Quebec and Canadian society."²⁹ This negative stereotyping is reflected in Meshal's statistical analysis of Canadian perceptions of *ḥijābī* women. Perceptions of this sort are subject to misinterpretation, given the range of potential variables that might be behind discriminatory actions, in addition to the (hyper) sensitivity to the issue already felt by veiled women in post-9-11 Western society. Nevertheless, given the corroboration provided by other studies, Meshal's data may be taken as relatively reliable. Moreover, it is instructive for its allusions to what McDonough more explicitly identifies as Western women's reactions to an auto-constructed definition of *ḥijāb* and not to the subtle symbolic meanings held by many of those who wear it. Ironically it seems, as Western women who react strongly against *ḥijāb* usually do so on the understanding that it represents male dominance of women and lack of respect for women's personhood, women who wear *ḥijāb* often do so, as explained above, in order to assert this same person-centered rather than sexuality-centered definition of femaleness. More than anything, it is this talking at cross-purposes

²⁹ Sheila McDonough, "Perceptions of the *ḥijāb* in Canada," in *The Muslim Veil*, 125-26.

that is indicative of the “mutual incomprehension [that] exists between Muslim-Canadians and non-Muslims.”³⁰

As the debates in France in particular make clear, for many on the political right, the *ḥijāb* represents a threat, a potent symbol of a dogmatic and institutionally supported assertion of resistance to Western values and non-integration into mainstream society.³¹

Mc Andrew refers to this phenomenon as a product of a “heterocentrist cultural constructivism” wherein the *ḥijāb* is symbolic of “the failure of integration and/or a sexist/fundamentalist plot.”³² Although, as discussed in the previous section, many women who wear *ḥijāb* state that they do so in order to better integrate into Western society, Meshal’s data indicates that 29% of women who did not wear the *ḥijāb* referred to themselves as “very integrated” and only 4% “described themselves as “not integrated at all.” The remainder “considered themselves ‘integrated to some degree.’” Among *ḥijābī* women, on the other hand, only 10% considered themselves “very integrated” and 21% “not integrated at all.” When the number of non-Muslim friends a Muslim woman has was used as a measure of integration, the results were similarly weighted in favour of non-*ḥijābī* women.³³ Thus, the statistics are indicative of a positive correlation between *ḥijāb* and non-integration.

That Meshal finds these statistics unsurprising is understandable but intriguing, given women’s statements to the contrary elsewhere, as discussed above. From my perspective, this disparity does not call into question the women’s integrity, but underscores the complexity of the issue. Any notion that women, or anyone else for that

³⁰ Ibid., 121.

³¹ For an in-depth analysis of European debates on the *ḥijāb*, see W. Shadid and P. S. Van Koningsveld, “Muslim dress in Europe: Debates on the Headscarf,” *Journal of Islamic Studies* 16 no. 1 (2005): 35-61.

³² Mc Andrew, “Hijab Controversies,” 156.

³³ Meshal, “Banners of Faith,” 96-97.

matter, are free agents in an absolute sense, constructing their own identity, is belied by the data. As Mc Andrew points out, explanations of the *ḥijāb* as a product of “individualistic constructivism,” while popular in liberal thought, do not adequately acknowledge “the complex grid of constraints linked to internal and external power relationships that Muslim women face when they have to decide for themselves whether or not to wear the *ḥijāb* [...]”³⁴ Given the absence of consensus on the meaning of the *ḥijāb* among Muslims themselves—not to mention some Muslim and secular feminists for whom the *ḥijāb* also represents oppression of women—one gains sympathy for the fact that there is a lack of understanding on the “true” meaning of the *ḥijāb* among Westerners.

Finally, and what brings us to the central section of this chapter, any ambiguities present in the statistical data on the relationship between *ḥijāb* and integration is noticeably absent from the *fatwā* literature. Rather, the perception that the *ḥijāb* is a protection against the threat of integration and assimilation (*al-ta'arrub ba'd al-hijrah*) finds ample support among the *mujtahids*. Also in agreement with the legal discourse is the number of Muslim women, whether they wear or do not wear *ḥijāb*, who draw a direct link between piety and Islamic female covering, demonstrating how pervasive is the standard orthodoxy promoted by the clerical class.

ISTIFTĀ'ĀT AND FATĀWĀ ON CLOTHING AND APPEARANCE

As mentioned above, the logic of *fatāwā* on clothing and appearance revolves around three central foci: cultural difference, piety, and modesty. The cultural framework involves a debate around the meaning of common markers of Islamic identity, notably the

³⁴ Mc Andrew, “Hijab Controversies,” 159.

female *ḥijāb*, male beard, and lack of necktie. Apart from maintaining close attention to the classical imperative of not resembling unbelievers, *mujtahids* tend to distance themselves from the strong sense of symbolic value of the *ḥijāb* articulated by many Muslim women in the West. However, they sometimes fall back on this logic as part of their manifest concern that migrants not fail in preserving their Islamic identity, and also fulfill their calling as messengers for Islam in the West.

In contrast to the socio-political discourse of the *ḥijāb*, *mujtahids* frame their support for Islamic modest dress in terms of a religious obligation that has little to do with cultural symbols or the Western context in any way. I refer to this as the logic of piety. The logic of piety leads to a strong reluctance to allow exceptions due to contextual factors, as is typical of other areas of law that we have already examined. Again, context is important only in so much as it provides the contrast needed to emphasize a perceived superiority of Islamic modesty. It is here, in the role that clothing and appearance play in facilitating an Islamic witness in the West, that piety, modesty, and not resembling unbelievers demonstrate their mutual symbiosis.

CULTURE, PIETY, AND MODESTY: DISTINGUISHING BELIEVERS FROM UNBELIEVERS

Several *istiftā'āt* ask if it is forbidden (*ḥarām*) or permitted (*ḥalāl*) to wear clothing and hair styles that are fashionable in Europe, since this “is commonly known among people as *tashabbuh beh kuffār* [Persian].”³⁵ Whatever else it may refer to, for *mustaftīs*, the concept of *al-tashabbuh bi al-kuffār* (Arabic) refers to clothing style, as it does in the group of *ḥadīth* that establishes the concept. Ties receive a particularly unfavourable evaluation in the contemporary Islamic dress code of Iran as they are seen

³⁵ Ayatullah Shaykh Yusuf Sanei, official website, Persian pages, <http://saanei.org/page.php?pg=showistifta&id=64&lang=fa> (accessed February 1, 2009).

as indicative of Western culture. Thus, in the print text of the *istiftā'* quoted above, the questioner goes on to ask if it is permissible "to wear a tie or other things that people wear that look like *kuffār*."³⁶ Sanei's response contains an unexplained conditional prohibition: "If this promotes the culture of hostile forces who are enemies of Islam, it is forbidden and not permissible," he says.³⁷

Under what conditions would wearing Western clothing contribute to war against Islam? Is Sanei's response in reference to the common understanding of clothing as a cultural identity marker, such that wearing the latest Western fashions would imply a capitulation to cultural imperialism? Or is it in aiding the economy of Western culture? Who are the enemies of Islam in this *fatwā'*? Is Sanei making reference to a particular segment of the West or to the West as a whole? It is plausible that specific mention of the necktie underlies his rather strongly worded reply.

Similarly, a questioner attempts to cover both the religious and cultural perspectives on the matter of clothing, asking if Muslims should follow the example of the Prophet in regard to clothing style and, presumably if not, should they follow their "own people and nationality?" Sanei's response, vague as it is, encourages maintaining cultural and religious autonomy. "What is desirable in terms of clothing and shelter is that a person does not settle on being influenced by Western culture."³⁸ Sanei presumably accepts the notion that one's style of dress, as well as architecture and interior design, reveals one's cultural outlook and he implies, further, that western cultural forms of dress and housing are incompatible with Islamic identity. Muslims are distinct from others, he

³⁶ Sanei, *Majmū' al-Masā'el*, 313.

³⁷ Sanei, official website, Persian pages, <http://saanei.org/page.php?pg=showistifta&id=64&lang=fa> (accessed February 1, 2009).

³⁸ Sanei, *Majmū' al-Masā'el*, 313.

implies, not just in religion, but in the way they appear in their clothing styles and environmental context. He therefore encourages visible marks of Islamic identity.

Sistani likewise rules that “based on obligatory precaution it is not permissible for Muslims to adorn themselves with adornment particular to unbelievers.”³⁹ It is unclear what “adornment particular to unbelievers” refers to, as Sistani permits men to wear ties, even if made of silk; the latter detail is permitted because the tie is not a large enough article of clothing to affect prayer.⁴⁰ Beards, however, are not to be shaved. “On the basis of obligatory precaution, it is not permitted for men to shave their beards, nor is it permitted, on the basis of obligatory precaution, to leave the hair on the chin and shave the sides of the face.”⁴¹ The rule is not changed if maintaining the beard “merely” hinders one’s chances for employment in certain companies, but it is permitted to shave it if it causes “undue hardship” or is necessary for medical treatment.⁴²

Al-Hakim likewise allows little leeway on the beard rule, permitting Muslims who work as barbers to shave only those who are justified (*ma’dhūr*) [presumably for medical reasons] in going beardless. The rule applies to Muslims and non-Muslims alike, a position that is not unique to al-Hakim.⁴³ The Muslim barber in the West is even required, he says, to investigate whether the person requesting a shave is among those so

³⁹ Sistani, *al-Fiqh li al-Mughtaribin*, 174. The translation on Sistani’s website gives a slightly different meaning to mine: “Based on obligatory precaution, Muslims are not allowed to dress up in clothes that are specifically known as the dress of non-Muslims.” Sistani, “Code of Practice,” <http://www.sistani.org/local.php?modules=nav&nid=2&bid=53&pid=2784> (accessed February 1, 2009).

⁴⁰ The allusion is to the rule that silk may not cover one’s private parts in prayer. “Is it permitted to wear a tie if it is made of natural and pure silk?” “It is not forbidden to wear a tie even if it is made of pure silk because it is not possible for it to cover nakedness [private parts] with it [that must be covered in prayer].” Sistani, *al-Fiqh li al-Mughtaribin*, 175.

⁴¹ *Ibid.*, 298.

⁴² *Ibid.*, 305-6; 298 respectively.

⁴³ al-Hakim, *Murshid al-Mughtaribin*, 457-58. Golpayegani, for example, also forbids shaving the beards of non-Muslims, while providing no explanation apart from the customary exclamation: “God knows.” See *Aḥkām al-Mughtaribin*, 146.

permitted or not. If not, and the barber goes ahead and shaves the beard regardless, his wages are not permissible.⁴⁴

It is difficult to conclude that al-Hakim's insistence on the beard is due purely to its Islamic symbolic value, given the ruling on non-Muslims as well. What seems more likely is al-Hakim's severe reluctance to admit contextual factors in his *ijtihād*. To the argument that shaving is so common in society it would be absurd to forbid it, al-Hakim replies that "prevalence in society does not change the Islamic ruling."⁴⁵ This principle seems indicative of his theoretical frame of reference generally. In contrast, al-Khui allows one whose occupation involves shaving other peoples' beards to do so, "if he is obliged because he has no other means of earning a living [...]"⁴⁶

Though suggesting similarity to Sanei on the level of cultural distance between Islam and the West, Fadlallah's approach to the question of resembling unbelievers is more original. He suggests that "resembling" refers not to appearance but to attitude and behaviour. Muslims in the West are therefore free to dress in whatever fashion appeals to them on two conditions: 1) they must maintain Islamic modesty, including *ḥijāb* for women and proper covering, preferably a beard as well, for men. The latter, and not the tie-less apparel advocated by Iranian clerics, functions for Fadlallah as a symbol (*shi'ār*) of Islam, for which reason it should not be abandoned;⁴⁷ 2) they must preserve their intellectual and moral autonomy, resisting the impact of Western cultural imperialism, on behalf of which the media acts as weaponry. At the same time, Fadlallah refuses to allow

⁴⁴ al-Hakim, *Murshid al-Mughtaribīn*, 457.

⁴⁵ Ibid. *Al-ta'arruf fī al-mujtama' lā yubaddil al-ḥukm al-shar'ī*.

⁴⁶ *Aḥkām al-Mughtaribīn*, 146.

⁴⁷ Fadlallah, *Taḥaddiyāt al-Maḥjar*, 163. See also *al-Hijrah*, 364, where the symbolic value of the beard, identifying its wearer as Muslim, is recognized as what classifies keeping it as recommended (as opposed to simple permission to shave it).

the excuse, as he intimates, of female engagement in society to justify easing *ḥijāb* restrictions on the premise that the latter is a valuable assertion of Muslim identity. Its abandonment, he argues, suggests capitulation to an “imagined” intimidation that does not normally exist in Western society.⁴⁸ Fadlallah seems to have a decidedly favourable impression of Muslim minority conditions in the West.

Fadlallah’s reasoning, similar to the manner in which he deals with the purity of non-Muslims, distinguishes between mental worlds of discourse on the one hand and material conditions on the other. The former is the privileged locality of reality, the latter merely superficial and extraneous to the real condition of things. At the same time, however, he acknowledges that mental worlds are manifest in externals and that a Muslim should not have, what he calls, a divided personality.

In contrast to other *mujtahids*, Fadlallah also looks at fashion from a historical perspective, arguing that as fashions change with time, there is no fixed notion of Islamic or non-Islamic clothing styles. The following is quoted in full:

Istiftā’: What is the ruling on a woman wearing Western clothing when no Westerners are present? Is this not a case of ‘resembling the West’?

Fatwā: A woman has the right to wear whatever she likes so long as she does not live a glittering life. There is a difference between someone who dresses his mind in Western garb and someone else who dresses his body; there is no objection to the latter. The problem is when the things of the West [*al-gharbīyūn*] enter our minds, since the important thing is that we do not follow Western fashions of thinking or behaving. But in the matter of dress [it is a fact that] in the contemporary movement, people exchange their clothing customs, and this is something very natural, as there is no people who has kept their historical clothing [styles].⁴⁹

The historicism Fadlallah displays here does not extend to the wearing of *ḥijābs* and beards; there are, it seems, some fixed ideas of Islamic appearance that suggest that Fadlallah shares with others a perception of the symbolic significance of these items.

⁴⁸ Fadlallah, *Islamic Lanterns*, 283, 326.

⁴⁹ Fadlallah, *Taḥaddiyāt al-Mahjar*, 164-65.

Likewise, Fadlallah forbids Muslims from wearing other symbols, such as a cross, because, he says, they promote unbelief.⁵⁰ Given his critical approach, his insistence on the *ḥijāb* and beards indicates that he sees the wearing of these items as a religious obligation, and not simply a cultural option.

The Sunni Muftis, Dr. ‘Ali Jum‘ah, Mufti of Egypt, and Sheikh Yusuf al-Qaradawi, likewise reject the symbolic justification for wearing *ḥijāb*. They are, it seems, forced to this conclusion by the implications accepting the symbolic meaning of *ḥijāb* would entail with regard to the current debate in Europe. Thus, ‘Ali Jum‘ah argues that *ḥijāb* “is not merely a symbol that distinguishes Muslims from non-Muslims. It is an obligation that forms part and parcel of the Islamic religion.”⁵¹ He continues with the alleged scriptural justifications for this requirement. It is clear that his objective, as al-Qaradawi’s, is to counter some of the right wing elements in Western society who claim that public announcement of one’s commitment to Islam is somehow a threat to the wider society and its alleged values of freedom and equality.

Al-Qaradawi’s more elaborate denunciation of the socio-symbolic meaning of the *ḥijāb* serves as a major premise of his argument against efforts to ban the *ḥijāb* from certain public spaces in Europe: “Claiming that hijab is a sign of religion is by no means acceptable,” he says, “because a religious sign or symbol has no function but to declare the religious beliefs of the one who wears it, such as the cross for a Christian and the kippa for a Jew. [...] Hijab, on the other hand, has a religious function, namely, to protect Muslim women and preserve their chastity.” He goes on to reveal his unawareness, intentional or unintentional, of the popularity of this option, “It could not strike the mind

⁵⁰ Fadlallah, *Islamic Lanterns*, 323; *al-Hijrah*, 379.

⁵¹ Quoted in *Islam in Transition: Muslim Perspectives*, ed. John J. Donohue and John L. Esposito (New York: Oxford University Press, 2007), 213.

of hijab-clad women to wear it for declaring their religious beliefs,” he asserts.

“Therefore, the hijab ban *contradicts the principles of freedom and equality that have been asserted by the French Revolution* [...and...] is a form of persecution against the committed Muslim women; it infringes upon their freedom; it prevents them from their right to learn and work to the favor of non-Muslim and uncommitted Muslim women.”⁵²

The typically legal understanding of *ḥijāb* on the part of Sunni *muftīs* expressed above is generally in keeping with the Shi'ite legal discourse, though no Shi'ite *mujtahid* I have studied argues explicitly against the *ḥijāb*'s symbolic value, and Fadlallah at least suggests implicit support for such an interpretation, along with its legal obligation. In contrast to the lack of flexibility on wearing *ḥijāb* in a Western context observed among the majority of *mujtahids*, the Sunni Sheikh al-Azhar, Muhammad Sayyid Tantawi, argues that the Shari'ah justifies conformity “to the laws of a non-Muslim state,” even if their “rulers want to adopt laws in opposition to the veil, [...]” Muslim women in this case “are under the conditions of him who obligates them (*fī ḥukm al-muḍṭarr*)⁵³ and they do not, therefore, bear the responsibility (*wizr*) for the situation.”⁵⁴

As mentioned above, while addressing issues of modest dress for men and women, the *ḥadīth* corpus places far more emphasis on covering the nakedness of men.⁵⁵ Contemporary *istiftā'āt*, reflecting the conservative orthodoxy and developed classical

⁵² Quoted in *ibid.*, 213-14. Emphasis added.

⁵³ That is, under the law of compulsion, in this case, by the non-Muslim state. Islamic law habitually allows for the lifting of an obligation in situations of constraint, but this is typically interpreted as utter compulsion. Muhaqqiq al-Hilli gives the extreme example of a person having nothing but a human body to eat, without which he or she would literally die of hunger. See Muhaqqiq al-Hilli, *Sharā'ī al-Islam fī Masā'il al-ḥalāl wa al-ḥarām* [CD-ROM, *ALAHKAM*, version 2.0] (Qom: Intasharāt al-Istiqlāl, 1409), 3:231. It is significant that Tantawi considers the force of non-Muslim law forbidding *ḥijāb* to be at a level of compulsion comparable to a matter of life and death.

⁵⁴ Donohue and Esposito, *Islam in Transition*, 214. Tantawi made these comments before Nicolas Sarkozy, then French minister of internal affairs, when he was visiting al-Azhar University on December 30, 2003.

⁵⁵ Clarke, “*Ḥijāb* According to the *Ḥadīth*,” 217-18.

tradition, displays a far greater preoccupation with female modesty—inquiring about everything from coloured contact lenses to high heeled shoes. For all *mujtahids* generally, with some minor variations, the guiding principle is that women are forbidden to wear anything that draws lustful and unlawful attention from men.

According to Fadlallah, a woman should dress so as to project an image of herself as a human being, not one “inspired by her instinctive feelings of her femininity.”⁵⁶ It is not important, at least for Fadlallah, that this be specifically Islamic styles of dress, since both “Islamic” and “non-Islamic” clothing may accentuate the form of the body or not.⁵⁷ What is important is the principle of modesty, as defined by the *Sharī‘ah*. As such, feet, for example, must also be covered even though, as at least one *mustaftī* argues, “people [in the West] do not look at us [at our feet].” Fadlallah’s alleged reason for covering them up anyways is the lack of guarantee that this general expectation will hold true in every case.⁵⁸ Unlike al-Hakim, who, as noted earlier, dismisses contextual factors out of hand, Fadlallah avoids this route, finding reason enough to maintain his ruling in the legal principle of precaution.

In our exploration of the sociological research of *ḥijāb*-covered women in the West, I noted the relative independence with which women chose this style of dress. Fadlallah does not exclude this possibility when it is in choosing to wear *ḥijāb*, but he does not allow it in the other direction. So firm is Fadlallah on the *ḥijāb* as obligation it is a husband’s duty, he says, to oblige his wife, whether she is Muslim or non-Muslim, not to leave the house without proper *ḥijāb*. In the case of a non-Muslim wife, Fadlallah says,

⁵⁶ Fadlallah, *al-Hijrah*, 384-85.

⁵⁷ Fadlallah, *Taḥaddiyāt al-Mahjar*, 161.

⁵⁸ *Ibid.*, 165. Although Fadlallah weakens his stance on this in *al-Hijrah wa’l-ighdirāb*, saying that it is permitted to show the feet but on the basis of precaution one should not, the end result remains unchanged (365).

“He must make the *ḥijāb* obligatory for her, so that she harmonizes with his Islamic atmospheres [sic], for otherwise, this might bring harm to him as a believer and to his children in the future and to his Islamic social atmosphere.”⁵⁹

If a woman’s job (possibly in the public sector) precludes wearing *ḥijāb*, the former must be abandoned, as in any conflict between employment and obedience to a command of God.⁶⁰ Fadlallah again suggests that claiming oppression for observing religious obligations is more a consequence of the Muslims’ imagination than reality. In situations of actual “compulsion (*ḥaraj*), danger (*khaṭar*) or harm (*ḍarar*),” however, restrictions may be eased, “but only to the minimum extent that is needed.”⁶¹ As noted above, Fadlallah is reluctant to believe that Western freedoms do not extend to a broad tolerance for diversity of clothing styles, and, as he does with some regularity, suggests that the real motive in cases such as the one above is the Muslim’s wish to justify abandoning Islamic restrictions. Passport photos provide another exception. All of those surveyed agree that such a photo may be taken without *ḥijāb* —by a relative unless necessity dictates otherwise.⁶²

On the extent of covering, there is general consensus among the *mujtahids*; the face and hands need not be covered, but feet, and wigs, if worn, must be, as well as skin-coloured nylons. Ayatollah Qazvini⁶³ agrees with the majority opinion that “[t]he proper covering for women is to cover the entire body except the face, hands and feet. The body

⁵⁹ Qur’an 24:31 “And let them not display their ornaments.” Fadlallah, *Taḥaddiyāt al-Mahjar*, 161-62; *Islamic Lanterns*, 289-90.

⁶⁰ Fadlallah, *Islamic Lanterns*, 325-26.

⁶¹ *Ibid.*, 283-84.

⁶² al-Khui, *Munyat al-sā’il* [CD-ROM, *ALAHKAM*, version 2.0] (n.p., 1413), 208; Sistani, *al-Fatāwā al-masīra*, 420; al-Hakim, *Ḥawarīyat fiqhīyah* [CD-ROM, *ALAHKAM*, version 2.0] (Yārān, 1416), 324.

⁶³ Not to be confused with Seyed Ali Ghazvini, a lay Muslim leader residing in California.

figure and shape also may not show.”⁶⁴ In contrast, the early modern scholar Mirza al-Qummi (d. 1816) holds the more restrictive, minority position that *ḥijāb* includes the face and hands as well.⁶⁵ The debate on how extensively a woman’s body should be covered dates from at least the 9th c. CE, as Clarke discusses in her study of veiling in the *ḥadīth*. Early in this debate, the famous exegete, Ibn Jarrir al-Tabari (d. 923), defended a “liberal” interpretation of Q. 24:31, commanding women “not to reveal their adornment (*zīnah*) except to their husbands” and other close male relatives. Clarke’s reading of this *tafsīr* shows that al-Tabari’s objective was not so much to establish the covering of women, as it was to argue for its limitation.⁶⁶

The bottom line of al-Tabari’s argument—that women are not required to cover the face and hands—is not unique to him. As the majority position, it is not surprising to find in contemporary *fatāwā* that the face covering (*niqāb*) may even be prohibited, if it elicits undue negative repercussions from Western society. If covering the face causes “disapproval or repulsion among the general population,” Sistani classifies it as *libās al-shuhrah* (clothing of notoriety), in which case, he says, “it would not be permitted to wear it there.”⁶⁷

On the other hand, Fadlallah regards as whimsical a similar question that shows thoughtful reflection on contextualization:

Istiftā’: In some societies the *ḥijāb* is considered a sign of fundamentalism, and it affects Muslim women and may sometimes expose them to danger. Is this in itself a justification to take off the *ḥijāb*, especially if they preserve some sort of dress deemed respectable by that society?

Fatwā: This is not allowed, for we believe that Muslim men and women must not run away from every situation that frightens them, and we have to emphasize our

⁶⁴ Imam Sayyid Hassan al-Qazvini, official website, <http://www.qazwini.org/> (accessed February 1, 2009).

⁶⁵ al-Mirza al-Qummi, *Jāmi’ al-Shaṭāt*, 1:94.

⁶⁶ See Clarke, “*Ḥijāb* According to the *Ḥadīth*,” 220-22.

⁶⁷ Sistani, *al-Fiqh lī al-Mughtaribīn*, 315.

obligatory Islamic traditions, and to emphasize our religious adherence, and we should make an issue of standing fast at least in this matter before the oppressors. I believe that they cannot fight all Muslim society and all the Muslim women wearing the *ḥijāb*: **'It is Satan that prompts men to fear his followers; but have no fear of them, and fear Me, if you are true believers.'** 3:15.⁶⁸

Fadlallah's concern here is clearly not simply with modesty. He seems to acknowledge, at least implicitly, the symbolic potency of the headscarf and its political efficacy as a "flag" of resistance against the West. Moreover, his position displays an aggressiveness that is somewhat disconcerting, as it dismisses an opportunity for self-reflection, deflecting it to a supposed anti-Muslim conspiracy on the part of all Westerners, generally. This is quite unlike his rather more nuanced view of Westerners expressed elsewhere, including his *fatāwā* on respecting non-Muslim laws.

We discussed above the notion of resembling unbelievers as being particularly *apropos* of the Western context and suggested there a second arena of special applicability to the West. This is the idea that obedience to an Islamic ruling, in this case *ḥijāb*, provides yet another occasion for *da'wah*. Muslim women, especially the young, al-Hakim says, are expected by their modest dress and demeanor to demonstrate the honour of Islam and display its "sublime teachings." In this way, they can be messengers for Islam in the midst of the "vulgar and disintegrated societies" of the West.⁶⁹ Thus, by their morality and dress, women are responsible not just for maintaining family bonds and the moral fabric of society, as is clearly articulated by the modern religious class;⁷⁰

⁶⁸ Fadlallah, *Islamic Lanterns*, 326.

⁶⁹ Al-Hakim, *Murshid al-Mughtaribin*, 429.

⁷⁰ See Fadlallah, *Islamic Lanterns*, 289: "A woman must have a strong link with Allah, preserve her *ḥijāb* and her religious adherence, and refrain from rushing to adopt certain types of freedom that the law may grant her to rebel against her husband, or to move away from Islamic marital obligations. A pious, believing person does not commit forbidden things even if the doors to forbidden things are wide open, and not to accept forbidden things [sic] even if they are presented on a golden plate." Likewise, Ayatollah Mutahhari, "[...], a woman must not do anything that would disturb her family situation. For a woman to leave her house to go to her sister's house if her sister is a corrupt and licentious person or even to visit her

according to al-Hakim, they also shoulder much of the missionary responsibility of upholding confidence in the moral superiority of Islam over Western society.

In spite of the numerous traditions regarding the need for modesty in men's attire, I can find only one such question in the contemporary Western *fatwā* literature.⁷¹ This seems to reflect the likely possibility, as many have argued, that legal literature on female modesty is heavily influenced by cultural assumptions regarding the roles of men and women in society. The question on male modesty is addressed, not surprisingly, to Fadlallah and concerns wearing shorts in public. Fadlallah's response reflects the *ḥadīth* tradition, which specifies the legal requirement of "covering nakedness" (*sitr al-awrah*)—that is, "specifically the area from the knees upward, referred to as *fākhidh* or 'thighs'."⁷² While Fadlallah asserts the traditional norm of "covering nakedness," he also urges constraint, as wearing shorts "in front of people and in front of women could sometimes possibly result in forbidden acts and is, in any case, among things that are not acceptable (or not preferred; *laysat rājiḥah*) for believers."⁷³ Fadlallah appears to understand personal modesty as the duty of both men and women in society, reflective of his more progressive attitude towards women's issues in the Muslim context.⁷⁴

Several questions inquire about activities that involve beautification of oneself or other women. Al-Hakim forbids properly veiled women to remove unwanted facial hair

mother wherein the effects of the visit bring chaos to the house of a week, they say not to under such circumstances. The family must not be disturbed." *The Islamic Modest Dress*, 43.

⁷¹ We have discussed already questions regarding male dress with respect to looking like unbelievers. There are also a few scattered questions on men wearing gold jewelry but these are concerned only with the standard prohibition against men wearing gold jewelry and do not speak to the issues we are exploring here.

⁷² Clarke, "Hijāb according to the *Ḥadīth*," 218. The matter being addressed in the *ḥadīth*, Clarke points out, was the apparent lack of care men took to cover, or possibly "that they did not always own enough cloth to properly do so."

⁷³ Fadlallah, *Taḥaddiyāt al-Mahjar*, 159.

⁷⁴ See Aziz, "Fadlallah and the Remaking of the Marja'iyā," 208-211.

“if it is certain that it is for beautification.”⁷⁵ Sistani rules that this is permitted “on condition of the assurance she does not fall into *ḥarām* acts and if it is not done to invite forbidden glances her way.”⁷⁶ Al-Hakim cautions against “uncommon” (*ghayr muta‘arraf*) application of female ornamentation, such as *koḥl* (eye liner) and rings “if they affect men sexually.” At the same time, they are permitted if done innocently (*bi’l-wijih al-muta‘arraf al-baṣīt*) “even if they affect some men because it is the man’s responsibility to avert his affected glance.”⁷⁷ The distinction here seems to be between women who flaunt their beauty in order to attract allegedly illicit attention and those who do not. Sistani likewise permits *koḥl* and rings “on condition it is not for the purpose of arousing men’s passions and she is certain not to fall into *ḥarām* acts...”⁷⁸

Sistani’s cautionary permission for women to work in beauty parlours frequented by “traveling women who beautify themselves in front of foreign men” takes into account the same “highly unlikely” possibility that it is done “in the promotion and spreading of evil,” in which case it would be forbidden.⁷⁹ Al-Hakim, in this case, does not consider this possibility in his blanket permission: “Yes, she has the right to do this.”⁸⁰ Applying colour to one’s hair that, naturally, will be exposed in women’s meetings—“specifically for the purpose of marriage”—is permitted by Sistani on condition it is “simply for beauty and without deceit, such as hiding blemishes or age.”⁸¹

⁷⁵ Al-Hakim, *Murshid al-Mughtaribīn*, 426.

⁷⁶ Sistani, *al-Fiqh lī al-Mughtaribīn*, 316.

⁷⁷ Al-Hakim, *Murshid al-Mughtaribīn*, 427.

⁷⁸ Sistani, *Aḥkām al-Mughtaribīn*, 310.

⁷⁹ Sistani, *al-Fiqh lī al-Mughtaribīn*, 315-16. The official English translation renders “*ba’id jiddan*” (which I have translated as “highly unlikely”) “truly far-fetched.” Sistani, “Code of Practice,”

<http://www.sistani.org/local.php?modules=nav&nid=2&bid=53&pid=2784> (accessed February 1, 2009).

⁸⁰ Al-Hakim, *Murshid al-Mughtaribīn*, 425-26.

⁸¹ Sistani, *al-Fiqh lī al-Mughtaribīn*, 316. The matter of not deceiving a potential spouse by ‘false advertising’ is common in legal discourse on the subject.

Fadlallah's position on women using various means of beautification in public is highly restrictive. For example, like Sistani,⁸² he does not allow coloured contact lenses, "if it is for beauty as is the custom (*'urf^{an}*), or if it is confirmed to be for display."⁸³ Nor does Fadlallah permit a woman—on the basis of Qur'an 24:31 "and let them not reveal their ornaments,"—to leave her house with make-up on, even if accompanied by her husband. Further, her husband has the right to force her compliance in this matter, "but with wisdom and good speech."⁸⁴ Were the husband to give his permission, this, too, would not make it legal.⁸⁵ On the other hand, if the law permitted it, her husband would have no right to forbid her.⁸⁶ It seems that Fadlallah wishes to emphasize the individual character of a Muslim's legal responsibility—that woman is, as is man, accountable directly to God for her behaviour and even a husband has no place intervening between his wife and the divine law. Fadlallah is atypical among *mujtahids* in this regard.

Talib Aziz similarly notes Fadlallah's support for a woman's right to a higher degree of marital independence than is common among *mujtahids*. "In sermons," Aziz writes, "Fadlallah has articulated that a woman should be allowed to leave her husband's house to attend religious sermons and educational gatherings. Her husband should not deny her such rights once she has fulfilled her marital duties."⁸⁷ According to Aziz, Fadlallah's *fatāwā* regarding women are remarkably progressive, eliciting much controversy within clerical circles. For example, in contrast to many *fuqahā'*, Fadlallah rejects the notion of women's intellectual inferiority and suggests that she may even

⁸² Sistani, *al-Fiqh lī al-Mughtaribīn*, 318.

⁸³ Fadlallah, *Tahaddiyāt al-Mahjar*, 158-59.

⁸⁴ *Ibid.*, 161-62.

⁸⁵ *Ibid.*, 164.

⁸⁶ *Ibid.*, 162-63.

⁸⁷ Aziz, "Fadlallah and the Remaking of the Marja'iyah," 209.

excel some men in this regard. This leads Fadlallah to express support for women's participation in the public, and even political, sphere.⁸⁸ Aziz concludes that Fadlallah's more liberal views can be attributed to his legal method of privileging the Qur'an over traditions.⁸⁹ This is borne out, as we have previously observed, by Fadlallah's reliance on Qur'an 9:28 in his legal discussion of the purity of non-Muslims. It is balanced, however, by his *fatwā*, noted above, that a husband has the right to impose *ḥijāb* on his wife, as this is a non-negotiable rule. It seems, then, that while exhibiting a liberality with regard to controversial issues, Fadlallah remains closely attached to traditional consensus with regard to issues he consider non-negotiable.

Having said this, I would argue that Fadlallah's liberality is also due to his emphasis on the humanity of non-Muslims and women. Whereas others typically view women and non-Muslims as either ontologically or in some other manner inferior to Muslim males, Fadlallah's Qur'an centered hermeneutic is complemented by his humanistic focused approach. It should not be surprising then, that whereas others permit only temporary marriage with women from *ahl al-kitāb*, Fadlallah allows permanent marriage.⁹⁰ That Fadlallah should, in spite of his progressive stance on these issues, still maintain a traditional view on female modest dress suggests just how firmly he sees the issue to be a fundamental non-negotiable element of Islamic identity.

CONCLUSION

The research demonstrates that while women's choices regarding veiling and investigating their Islamic rights appear often to be "in consideration of how to best serve

⁸⁸ Ibid.

⁸⁹ Ibid., 212.

⁹⁰ Fadlallah, *Taḥaddiyāt al-Mahjar*, 174.

their own particular situations,”⁹¹ the primary consideration for *mujtahids* is the woman’s duties to Islamic legal requirements. While the reasons for choosing to veil may be different, the results are very similar, a fact that underscores the hidden complexities of the issue and renders “the distinction between a religious and political hijab more blurred.”⁹² Further, whereas some *mustaftīs* reflect a willingness to adapt Islamic garb to Western standards of modesty, the tendency among *mujtahids* is to resist contextualization. In some cases, the preference is even to take the legal requirements to the limit so as to accentuate visible piety “to make a point [...] against the Western world.”⁹³

In terms of methodology, *mujtahids* appear reluctant to allow new terms of discourse to influence their *ijtihād*, even though the end result may well agree with that of these discourses. In insisting on relying solely on a classical legal frame of reference, they prevent the possibility of exploiting new forms of discourse to support their positions. As we discussed in chapter three, this is a matter that some members of the clerical establishment, such as Ayatollah Shabistari, see as problematic. Shabistari’s argument is that legal discourse ought to engage with modern cultural knowledge and ought to include insights from modern academic disciplines such as sociology, history, and political science within its *ijtihād*.

What an analysis of the data here reveals is reminiscent of the message depicted in a popular Iranian film, *Mārmūlak* (The Lizard).⁹⁴ In one pivotal scene, the main character, a prisoner disguised as a Shi’ite cleric, is attempting to learn the ropes of “his

⁹¹ Hoodfar, “More Than Clothing,” 37.

⁹² Mc Andrew, “Hijab Controversies,” 162.

⁹³ Ibid, 160-61.

⁹⁴ *Marmulak*, a film directed by Kamal Tabrizi, 2004.

new profession” through what he sees on religious television. While he gravitates towards a modern looking cleric relating Islam to contemporary pop culture, his advisor turns his attention to the traditional variety, saying: “Mullas don’t speak like that; they talk like this,” as he switches the station to a conservative talking head. Try as he may, Marmulak (as he is called) is unable to fit the role. Instead, he carves out a new way. He chooses to follow the path his heart takes towards God, as he attempts to make sense for himself of the meaning of religious guidance. The film depicts the warmth and attraction of the form of religion he finds for himself, contrasting it with the cold sterility of the institutionalized clerical legalism, depicted as disconnected both from the source of its strength and from the reality of human experience. The issue is one of context and relevance.

In a similar way, *mustaftīs* in the West appear to be searching for a religiously valid way to adapt Islamic customs to Western worldviews. The goal of *mujtahids*, on the other hand, seems to be directed towards resisting what they perceive as elements foreign to an Islamic worldview and identity. Whether of adaptation or resistance, each sees their own path as the most faithful way of being Muslim in the West.

CHAPTER EIGHT

RESPECTING THE LAWS OF NON-MUSLIM GOVERNMENTS: ASSUMING *JIHĀD*, ABIDING BY CONTRACTS, AND KEEPING THE FAITH

Legal discourse in the form of *fatāwā* on the question of obeying non-Muslim governments and observing their laws has received little attention from modern scholars.¹ This is surprising as such issues are of obvious importance and occupy a significant amount of space in the *fatwā* literature. The *fatwā* material to be examined here may be divided into two sections. The first category looks at *istiftā'āt* that approach the question in terms of political identity, asking how loyalty to Islam and Muslims might be compromised if preempted by legal obligations of living in a non-Muslim state. Questions revolve around whether actions that are otherwise illegal or unethical may be justified under certain circumstances, specifically, in some form of defensive *jihād*. *Mustaftīs* appear to be led by certain assumptions regarding the state of war with non-Muslims, how it is defined, and its rules of conduct. Analysis indicates that they may be influenced by non-legal or popular quasi legal discourse that promotes a vigilante activism not generally supported by the legal texts.

The second category highlights the tension between faithful observance of religious laws and customs that are marginalized in or legally excluded by non-Muslim societies. Which side ought to concede to the other in these cases? How can a person be a faithful Muslim in a secular society? *Mustaftīs* exhibit concerns raised by the tension

¹ See Majid Khadduri, "Muslims in non-Muslim Territory," in *War and Peace in the Law of Islam* (Baltimore: The Johns Hopkins Press, 1955), 170-74; Wasif Shadid and Sjoerd van Koningsveld, "Religious Authorities of Muslims in the West: Their Views on Political Participation," in *Intercultural Relations and Religious Authorities: Muslims in the European Union*, ed. Shadid and van Koningsveld (Leuven: Peeters, 2002), 149-68. Khaled Abou El Fadl, *And God Knows the Soldiers: The Authoritative and the Authoritarian in Islamic Discourses* (Lanham MD: University Press of America, 2001); Khaled Abou el Fadl, "Islamic Law and Muslim Minorities: the Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries," *Islamic Law and Society* 1, no. 2 (1994): 141-187.

between conscientious commitment to Islamic legal obligations and accommodating themselves to a non-Muslim context. *Fatāwā* bring to light those elements of religious law a *mujtahid* considers non-negotiable Islamic duties.

An examination of both of these categories of *fatāwā* offers intriguing insights both into the apparent ambivalence demonstrated by questioners towards the West and the tensions at times evident between *mustaftīs* and *mujtahids*. The chapter demonstrates that, unlike other fields of inquiry, dissonance between *mustaftīs* and *mujtahids* on the question of obeying non-Muslim governments reflects a reversal of the more common trend. If, in other areas, the trend is for *mustaftīs* to push for a model of selective engagement with the West, while *mujtahids* generally stress a model of resistance, in the field of civil obedience, it is *mustaftīs* who appear strongly inclined towards the resistance model. With the possible exception of al-Hakim, *mujtahids* demonstrate a notable leaning towards selective engagement in this field of activity, though within a particular frame of reference which will emerge in our analysis.

In spite of general disapproval among *mujtahids* of violating non-Muslim laws, some distinctions are worth mentioning. Fadlallah, for example, is the only *marji'* to provide a detailed rationale for his position. He is, further, the only *mujtahid* to include the Qur'anic sources on which his argument is based in the *fatāwā* themselves, and the only one to compare the Islamic moral code with that of others, notably, the Jews, his one habitual display of negative stereotyping. Although generally pacifistic, Fadlallah allows exceptions, in certain circumstances, to his high regard for and promotion of 'good citizenship'. These will be noted in the discussion below. Thus, while Fadlallah's

inclination to dialogue with the West is evident, his paramount commitment is unmistakably Islamic universalism.

In contrast to Fadlallah, al-Hakim appears far less conciliatory and exhibits little readiness to engage in a dialogue of equals with the West. It may be significant that the majority of al-Hakim's *mustaftīs* identify themselves as refugees, possibly Iraqis who fled the anti-Shi'ite persecutions of Saddam Hussain. Motives for settlement in the West are many, and it may be the case that al-Hakim has a disproportionately larger contingent of disaffected oppressed followers. While it is possible that their choice of al-Hakim is motivated simply by demographic factors—although Sistani is as well if not better known to Iraqis—some laypeople may choose to follow him precisely because of his more politically abrasive, or at least more abrupt, less discursive approach.

TERMS OF IDENTITY: *KUFR* AND THE WEST

We may make some preliminary observations on the basis of an examination of the terms of identification chosen by *mustaftīs* and *mujtahids*. More often than not, *mustaftīs* tend to refer to their place of residence or its people in non-judgmental terms: the West, Western or non-Muslim countries or people, and non-Islamic; or by more specific geographic terms: Europe, America, Sweden, etc. Derogatory religious terminology—*kāfir* (in reference to people or country) and the plural, *kuffār*—is used far less frequently, suggesting an awareness on the part of the *mustaftīs* of their environment in geopolitical, more than religious terms. How, then, to account for what was alluded to above regarding an apparent *jihādī* sense of entitlement—as Muslims—legally or illegally, to the benefits of the West? An analysis of the material will suggest the

hypothesis that *mustaftīs* conceptualize their entitlement in terms of post-colonial third-world political struggles.

Mujtahids, on the other hand, use the terms—*kāfir*, *kuffār*, and *kufr*—about as frequently as non-Muslim or non-Islamic, or other terms such as people, Jews, Christians, or Others (*al-ākharīn*). From the point of view of the Qur'an, *kufr* and its related terms are best described as “ethico-religious concepts” with a range of meanings embracing “all negative ethico-religious values.”² The root *k-f-r* is not applied to Christians and Jews in the Qur'an. But exegesis and law have broadened the term. Although the Qur'an commonly refers to Christians and Jews as *ahl al-kitāb* and those of them living in Islamic territory generally belong to the juristic category of *ahl al-dhimmah* (protected peoples, literally: people of the contract), the Qur'an is quite ambiguous regarding the religious value of their beliefs.³ The Qur'an and related material, notably works of exegesis, often subsume them under the larger category of *kuffār* and *mushrikīn*.⁴

² Izutsu, *Ethico-Religious Concepts*, 156. Izutsu identifies a number of ethical concepts associated with what he terms “the inner structure of the concept of *kufr*,” that are viewed negatively, including ingratitude (which appears to be its primary meaning), unbelief (a logically derived meaning), associating (*shirk*) others with God, going astray, arrogance or haughtiness, and contentiousness. The “semantic field of *kufr*,” he argues, encompasses, among others, the terms *fiṣq* (grave sin), *zulm* (evil, injustice, tyranny), and *i'tadā* (transgression beyond proper bounds, rebellion). See Izutsu, chapters VII and VIII, 119-55 and 156-77 respectively.

³ See Friedmann, *Tolerance and Coercion*. Friedmann examines the textual and historical application of the terms *kufr* and *shirk* to Christians and Jews, in addition to the more commonly known classification of *ahl al-kitāb*. See especially pages 69-72. Jane Dammen McAuliffe's superb examination of the exegetical tradition of a selection of Qur'anic verses mentioning Christians offers overwhelming evidence of this ambiguity. She argues that in the exegetical literature, the Qur'an's apparently generous attitude towards those it calls Christians is significantly narrowed to those whose beliefs exclude traditional Christian doctrines regarding God's nature and the identity of Jesus. See McAuliffe, *Qur'anic Christians*; and by the same author, “Persian Exegetical Evaluation of the *Ahl al-Kitāb*,” *Muslim World* 73 no. 2 (1983): 87-105.

⁴ The Christian belief in “the Trinity” is understood, according to Q. 5:76-77, as an instance of *shirk* and *kufr*, as is the related belief in the “Sonship” of Jesus in Q. 10:69-71. See Izutsu, *Ethico-Religious Concepts*, 156.

Shi'ite exegetical tradition on Q. 9:28 permits a particularly comprehensive understanding of the term *mushrikīn*, frequently including Jews and Christians.⁵ That contemporary jurists continue to apply these theologically value-laden terms broadly to Western non-Muslims, the overwhelming majority of whom belong to *ahl al-kitāb*, indicates a continuing attachment to early scriptural and legal terms of reference. Such use of ethico-religious terminology would indicate that with regard to the relationship between Muslims and non-Muslim governments, *mujtahids* take a different approach than that of *mustaftīs*. If the latter conceptualize the relationship in terms of a political struggle for recognition and justice, *mujtahids* tend to prioritize expressly religious values and rationalizations for preferred modes of behaviour.

Having said this, in the doctrine of *jihād*, *kufr* takes on a social, in addition to its more commonly understood theological, signification. Sachedina points out that while unbelief may be directed primarily against God, its semantic connotation of *ẓulm*—oppression or evil—may be understood to express *kufr*'s social or moral dimension of threat to and disruption of the Muslim public order. In the purely theological sense of *kufr*, Sachedina explains, human beings are responsible only before God, who will exercise judgment in the hereafter. The socio-moral dimension, in contrast, represents a condition against which “the Qur'an justifies, even commands the use of force by the believers[.]”⁶ As will become apparent in what follows, *mustaftīs* appear to have some

⁵ Exegetes who classify Jews and Christians as *mushrikūn* also, in consequence, deny them access to Muslim holy places, especially the *ḥarām* of Mecca. Unpublished study by the author, “The Notion of Impurity in Muslim-Other Relations: Shi'i Exegesis of Surah 9:28,” 2002.

⁶ Abdulaziz Sachedina, “The Development of Jihad in Islamic Revelation and History,” in *Cross, Crescent, and Sword: The Justification and limitation of War in Western and Islamic Tradition*, ed. James Turner Johnson and John Kelsay (New York: Greenwood Press, 1990), 43. Sachedina quotes Qur'an 2:190-91 “Fight [*qātilū*] in the way of God against those who fight against you, but begin not hostilities. Lo! God loveth not aggressors. And slay them wherever ye find them, and drive them out of the places whence they drove you out, for persecution [*fitna*] is worse than slaughter” in support of this claim.

form of this notion in mind, perhaps as absorbed by Islamic revolutionary discourse which re-articulates this latter understanding of unbelief as active hostility against “the rights of God.”⁷ Moreover, possible influence from other quarters, including numerous *fatāwā* issued by radical Sunni leaders, the theologically qualified and unqualified among them, should not be underestimated.⁸

In contrast, the contemporary Shi‘ite legal discourse tends towards the more quietist line of the pre-modern juristic tradition after the disappearance of the divinely guided Imam. Before analyzing the *fatāwā*, it is valuable to offer a brief survey of *jihād* tradition and of modern revolutionary political discourse in Shi‘ite Islam.⁹

CLASSICAL JURISTIC TRADITION ON *JIHĀD*

According to Etan Kohlberg, sayings on the authority of the Prophet and the legitimate Imams extolling the pious virtues of *jihād* and citing it as a duty imposed by God are a prominent theme in early Shi‘ite tradition-texts.¹⁰ Kohlberg suggests that “the

⁷ Ibid., 42.

⁸ Shmuel Bar, preface to *Warrant for Terror: Fatwas of Radical Islam and the Duty of Jihad* (Maryland: Rowman & Littlefield Publishers, Inc., 2006), xiii. The author underlines the vital role that *fatawa* play in re-interpreting authoritative sources to provide religious legitimation for acts otherwise considered legally prohibited (xiv).

⁹ A hot topic for academics, journalists, political theorists, various classes of Islamic leaders, and other interested parties, the question of Islam’s relation to war and peace is strenuously argued and is not lacking in polemics. John Kelsay puts it well when he states that there are two trends in modern discussions about *jihād*, particularly in Islamic writings: the apologetic, which seeks to dissociate Islam from violence; and the revolutionary, which stresses “the justice of Islamic struggle against Imperialism.” John Kelsay, “Islam and the Distinction between Combatants and Noncombatants,” in *Cross, Crescent, and Sword*, 209. While these comments are made primarily in reference to Sunni Islam, they are equally applicable to the Shi‘ite context.

¹⁰ Etan Kohlberg, “The Development of the Imami Shi‘i Doctrine of *jihād*,” in *Belief and Law in Imami Shi‘ism* (Brookfield VT: Gower Publishing Company, 1991), XV 64-65. For example: “‘The root of Islam is prayer, its branch is alms-giving, and the top of its hump *jihād* for the cause of God.’” This is a Tradition on the authority of the fifth and sixth Imams, Muhammad al-Baqir (d. 114/732 or 117/735) and Ja‘far al-Sadiq (d. 148/765) respectively. The author provides the Arabic text, which reads: “*Aṣluhu ‘l-ṣalāt wa-far‘uhu ‘l-zakāt wa-dhurwatu sanāmih ‘l-jihād fi sabil allāh*” and cites a number of sources including Muhammad b. Ya‘qub al-Kulayni, *Usul al-kafi*, ed. ‘Ali Akbar al-Ghaffari (Tehran 1375), 7:II, 23-24. Ibn Babawayh (d. 381/991) states: “‘*jihād* is a religious duty imposed by God on mankind.’” Again, Kohlberg quotes the Arabic: “*Al-jihād farīda wājiba min Allāh ‘ala khalqih*” and cites the source as Ibn Babawayhi, *al-Hidāya*, (Tehran, 1377), 11; as well as Muhammad Baqir al-Majlisi, *Biḥār al-anwār* (Persia 1305),

typically Shi'i view of history" evident in some traditions is that "all believers (i.e. Shi'is) are by definition *mazlūmūn* [oppressed], since they have been robbed of their rightful property, the territory at present held by the unbelievers (the *dār al-ḥarb*). Thus, according to this view, all Shi'ites are in a state of "perpetual *jihād*."¹¹

By the late 8th century CE, after the period of the early conquests and Civil Wars, the so-called wars of *fitnah*, the notion of perpetual war between two opposing worlds (Islam and unbelief) became normalized in the juristic literature. The introduction of the terms *dār al-islām* and *dār al-ḥarb* reflected the dichotomous juristic understanding of legitimate warfare, which was premised on the objective of expanding the political, if not religious, hegemony of the former.¹² As Elizabeth Mayer observes, the use of these terms and their associated notion of "Islamic military expansion at the expense of non-Muslim countries" persisted in the literature well beyond the times in which they could have had practical reality.¹³

Pre-modern Shi'ite law urged offensive *jihād* against two groups of people: unbelievers who did not submit willingly to Islamic rule, and Muslims "who rise against one of the twelve legitimate Imams" (*ahl al-baghī*).¹⁴ Although the latter category does not concern us here, it may be noted that both in terms of how *ahl al-baghī* are defined and the level of duty attached to fighting such people, this is a point of difference

15:XXI, 93. The prophet is also said to have included *jihād* with prayer and charitable piety as "the three works most beloved by God." Among his cited sources is Ibn Babawayhi, *Kitāb al-khisāl*, ed. Ali Akbar al-Ghaffari (Tehran, 1389), 163, 185. Kohlberg, "Doctrine of *jihād*," 64-65.

¹¹ Kohlberg, "Doctrine of *jihād*," 67. As noted by Kohlberg, Shi'ite scholars of the classical period of law cite Qur'an 22:39/40 in support of this position: "those who are fighting have permission [to do so] since they have been unjustly dealt with" (Ibid).

¹² Fred M. Donner, "The Sources of Islamic Conceptions of War," in *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, ed. John Kelsay and James Turner Johnson (Westport, Conn.: Greenwood Press, 1991), 50.

¹³ Ann Elizabeth Mayer, "War and Peace in the Islamic Tradition and International Law, in *Just War and Jihad*, 195.

¹⁴ Kohlberg, "Doctrine of *jihād*," 69.

between Sunni and Shi'ite theories of *jihād*.¹⁵ Further, in contrast to Sunni theory, which allows the Muslim head of state to declare *jihād*, Shi'ite doctrine conditions offensive *jihād* on the permission of the Imam or his representatives, the jurists.¹⁶ Sachedina suggests that this reflects *jihād*'s intention of establishing a social order that recognizes the authority of a divinely guided leadership. Moreover, such leadership is essential to ensuring that the motives for undertaking *jihād* conform to Qur'anic criteria and "the goals of Islam."¹⁷ Further, unlike rituals of devotion such as prayer or fasting, which are the duty of every Muslim individually (*farḍ 'ayn*), *jihād* is a duty incumbent on the community at large (*farḍ kifāyah*). That is, only some need undertake it for the duty to be fulfilled on behalf of all. An exception is made in a situation in which Muslims are faced with "grave danger," a matter with which Sunni law is in agreement.¹⁸

The disappearance of the Imam in the 9th century CE severely limited offensive *jihād* in practice, though its theoretical constitution persisted in the juristic tradition. It was supported by the notion that the Imam's absence does not reconcile the Shi'ites with their enemies, but allows for a "temporary truce (*hudna*)" until the Imam is again revealed. The vulnerable position of Shi'ites in a Sunni dominated empire meant, however, that even prior to the Imam's total absence, *jihād* effectively went into abeyance in anticipation of conditions that would guarantee victory, a situation that, it is

¹⁵ Ibid., 68-74. While Sunnis define *the ahl al-baghī* as political dissenters and the duty to fight them depends on the presence of actual threat, for Shi'ites, *jihād* against *ahl al-baghī* is "a central tenet, which is not contingent upon any particular historical occurrence" (69). Hence, unlike Sunni historians, Shi'ites lawyers speak of the three civil wars of Ali's caliphate as instances of *jihād* against *bughāt* (74). Although there is consensus that *ahl al-baghī* are considered unbelievers, Imami jurists debate the terms of their treatment in *jihād* (See Kohlberg, "Doctrine of *jihād*," 74-78).

¹⁶ Muhammad Husayn Fadlallah, *Kitāb al-Jihād: dirāsah istadlālīyah fiqhīyah ḥawl mawḍu'āt al-jihād wa masā'ilīhi* (Beirut: Dār al-Malāk, 1416/1996), 251-56. This differs from the Sunni position which authorizes the Muslim head of state to declare offensive *jihād*. See Kohlberg, "Doctrine of *jihād*," 69, 80-81.

¹⁷ Sachedina, "Development of Jihad," 41; 44-45.

¹⁸ Kohlberg, "Doctrine of *jihād*," 68. See also Sachedina, "Development of Jihad," 45.

understood, will precipitate the return of the Twelve Imam, or Mahdi, and the messianic age he ushers in.¹⁹ Until that time, the followers of the Hidden Imam are urged, as a matter of precautionary wisdom, to practice *taqīyah*.

In contrast to this quietist trend, Abu Ja‘far al-Tusi (al-Shaykh‘ut-Ta‘ifa, d. 460/1067) declared that, as a moral obligation, defensive warfare remains incumbent on the community and does not require the permission of the Imam. Al-Tusi does not apply the term *jihād* to this type of warfare and does not allow it to be used to convert people to Islam, as this—the only type of war he classifies as offensive *jihād*—requires the presence of the Imam.²⁰ Prominent jurists of the 13th and 14th centuries added that defensive warfare nevertheless does require the authority of those “appointed by the Imam,” that is, the jurists.²¹ Others, such as al-Shahid al-Thani (d. 966/1558), declared that defensive war to protect Muslims’ lives and property did not require even the jurists’ authority.²²

Regarding lawful targets of *jihād*, juristic discourse distinguishes between combatants and noncombatants. Although the *ahl al-ḥarb* is considered collectively responsible for opposing Islamic hegemony, apart from certain exceptions, only active

¹⁹ Kohlberg, “Doctrine of *jihād*,” 78. For further discussion of the Mahdi’s role as leader of the end times’ battle, see the present article by Kohlberg, “Doctrine of *jihād*,” and al-Shaykh al-Mufid, *Kitāb al-Irshād*, trans. I.K.A. Howard (W. Sussex: Balagha Books, 1981); and Abdulaziz Sachedina, *Islamic Messianism: The Idea of the Mahdi in Twelver Shi‘ism* (Albany: State University of New York Press, 1981).

²⁰ Abdulaziz Sachedina, *The Just Ruler in Shi‘ite Islam: The Comprehensive Authority of the Jurist in Imamite Jurisprudence* (Oxford: Oxford University Press, 1988), 111-13. According to Sachedina, “later jurists” classified war against unbelievers who attack Muslims, those who kill Muslims and drive them from their homes, and those who rise up against the Imam, as defensive *jihad* (113).

²¹ Kohlberg, “Doctrine of *jihād*,” 80-81.

²² Sachedina, *Just Ruler*, 115. Quoting al-Shahid, Sachedina writes: “As for other forms of *jihād* [i.e. defensive ones], it is not necessary for the Muslims to engage in these under the aegis of the Imam, or his ‘special; or ‘general’ deputy.”

combatants may be killed.²³ The relevant question for our purposes is whether non-combatants may in other respects be despoiled, for example, of their property.

According to classical Islamic legal doctrine, moveable and immovable spoils may be appropriated only after victory is achieved by the Muslims in actual battle, as it is defeat in battle “which alienates the enemy’s rights of ownership and enables the Muslims to claim or divide the enemy’s property.”²⁴ In consequence, spoils may not be distributed until they are brought back to *dār al-islām* and divided according to legal norms,²⁵ a fifth belonging to the Imam.²⁶ Shi’ite law allows that spoils of war be allotted not only to those who entered the battlefield prior to the distribution of booty, but also to those who were willing to go to war but unable to do so.²⁷ Fadlallah argues that the legal proofs for this position are weak, and that booty belongs to active combatants only,²⁸ which he defines as those who arrived to the battlefield whether prior or subsequent to victory by the Muslims.

On the other hand, from the legal principle that “every person retains ownership of his property unless there is legal proof [otherwise,]”²⁹ Fadlallah argues that Muslims may recover whatever is taken as booty by the *kuffār* by whatever means available, including stealing, since there is no legal proof allowing the *kuffār* the right to booty from Muslims. In support, Fadlallah quotes the Hadith, saying: “The Muslim is more entitled

²³ Kelsay, “Combatants and Noncombatants,” 201-202. Women (unless they are polytheists), children and old men are not to be killed. They are, nevertheless, subject to “other types of force—e.g., enslavement.” Fadlallah notes two conditions in which non-combatants may be killed: when victory in war against unbelievers depends on it; when those it is not permitted to kill are armed. Fadlallah, *Kitāb al-Jihād*, 272, 274.

²⁴ Khadduri, “Muslims in non-Muslim Territory,” 120.

²⁵ John Kelsay, “Combatants and Noncombatants,” 202-3.

²⁶ Fadlallah, *Kitāb al-Jihād*, 397-98.

²⁷ *Ibid.*, 400.

²⁸ This is also the majority Sunni position. See Khadduri, “Muslims in non-Muslim Territory,” 120.

²⁹ Fadlallah, *Kitāb al-Jihād*, 403.

to his property wherever he finds it.”³⁰ It may be that these two legal trends—that only active combatants may avail themselves of the spoils of war, and that Muslims have the right to recover what the *kuffār* take as booty from the Muslims—in the context of the colonial and post-colonial narrative, represent one explanation for the evident disparity between Fadlallah’s legal opinion and the apparent confusion and sense of entitlement that marks some of the *istiftā’āt*.

MODERN DEVELOPMENTS

We noted above the shift from offensive *jihād* to *taqīyah* after the disappearance of the 12th Imam, a move that did not adversely affect defensive *jihād*. Moreover, for both Sunni and Shi’ite modern nation-states, the historical reality of political weakness and vulnerability obliged revision of the received tradition that allowed only for temporary peace treaties between otherwise warring nations.³¹ In consequence, modern theories of *jihād*, similarly to Western just war theory, found further justification for the shift towards support exclusively for defensive war. In the face of the threat posed by the Russian invasions of the 19th century, the Qajar jurists of Iran revived the imperative of defensive *jihād*. In such situations, where the community faced serious danger, defensive *jihād* was considered a *farḍ ‘ayn* in which every Muslim (including women, the elderly, the sick, and the insane, normally exempted from active participation) was expected to contribute to resisting the enemy in some manner.³²

Kohlberg summarizes a text entitled *Risāla-yi jihādīyah*, a collection of *fatāwā* expressing Qajar juristic thinking on *jihād*. The text renews the classical praise of *jihād* in place of *taqīyah* and declares that defensive war does not require the permission of the

³⁰ Ibid., 401.

³¹ Mayer, “War and Peace,” 196-97.

³² Kohlberg, “Doctrine of *jihād*,” 82-84.

Imam or the jurists, but may be called by “whoever is best equipped to win the war.”³³ It further defines defensive *jihād* as consisting of four justificatory branches: a) to defend territory and the community from attacks from unbelievers; b) to prevent unbelievers from gaining control over the persons of Muslims; c) to repel unbelievers who threaten to gain power over Muslims; d) to evict unbelievers who gained control over Muslim territory.³⁴ While relatively expansive, the text limits defensive *jihād* to political and territorial aggression, or to attacks against the persons of Muslims; it does not appear to sanction war for the spread of Islam, or for conversion. This is left to revolutionary discourse that, although framing their discourse in terms of defense, radically expands its definition.

REVOLUTIONARY POLITICAL DISCOURSE

Clerical advocates of Iran’s Constitutional Revolution (1906-1911) revived Shi’ite activist discourse, calling on the *‘ulāmā* to “defend [the nation] against the imperialism of the infidels.”³⁵ Popularized by the architects of the 1978-79 Iranian Revolution, modern Shi’ite revolutionary discourse as expressed by Ayatollah Khomeini, as well as Ayatollahs Murtada Mutahhari (d. 1979) and Mahmud Taleqani (d. 1979), and layman Ali Shari‘ati, among others, draws on the central Shi’ite motif of Husayn’s struggle against the Islamic “imperialism” of the Umayyad polity. In contrast to the Safavid image of Husayn, for whom weeping on the part of the faithful assures them of his intercessory powers, the revolutionary image of Husayn compels emulation of his self-sacrificing

³³ Ibid., 84.

³⁴ Ibid., 83 n.106.

³⁵ Said Amir Arjomand, “Ideological Revolution in Shi’ism,” in *Authority and Political Culture in Shi’ism*, ed. Said Amir Arjomand (Albany: SUNY Press, 1988), 179.

commitment to justice on behalf of the downtrodden.³⁶ It is this grievance for the fate of the Imams that has shaped Shi'ite approaches to *jihād* and served to preserve the oft-present link between *jihād* and justice.³⁷

For some modern clerical thinkers, fighting for justice and freedom from oppression on a global level falls within the definition of defensive, and thus permissible, *jihād*. As Mayer suggests, the objective of attaining justice is thought to qualify such struggles as compatible with just war theory, being interpreted as “a form of self-defense.”³⁸ Ayatollahs Mutahhari and Taleqani reflect this justice-oriented interpretation of defense that merits some attention. Mutahhari, a major clerical ideologue of the 1978-79 Iranian revolution, argues that while *jihād* against unbelievers simply because of their unbelief is illegitimate, *jihād* against aggression and in defense of human rights is as justifiable as it is mandatory.³⁹

Although Mutahhari uses language such as ‘human rights’ and ‘freedom,’ he does not interpret these terms in the Western sense of individual rights and freedoms. Rather, he interprets them in terms of the right to hear and the freedom to respond to the message of Islam. Mutahhari argues, therefore, that *jihād* is obligatory against any government that “creates a barrier against the call of Islam by negating its freedom and becoming an obstacle to its diffusion, whereas Islam stipulates that such barriers are to be destroyed;

³⁶ For a study of note treating this comparison, see Mary Hegland, “Two Images of Husain: Accommodation and Revolution in an Iranian Village,” in *Religion and Politics in Iran: Shi'ism from Quietism to Revolution*, ed. Nikki Keddie (New Haven: Yale University Press, 1983), 218-235. For popular expressions of both the interpretations, see also Reinhold Loeffler, *Islam in Practice: Religious Beliefs in a Persian Village* (Albany, NY: State University of New York Press, 1988).

³⁷ Assaf Moghadam, “The Shi'i Perception of Jihad,” *al Nakhlah* (Fall 2003) article 2. The Fletcher School Online Journal for issues related to Southwest Asia and Islamic Civilization. Available from http://fletcher.tufts.edu/al_nakhlah/archives/fall2003/moghadam.pdf (accessed January 28, 2009), 5.

³⁸ Mayer, “War and Peace,” 211.

³⁹ Ayatullah Murtada Mutahhari, “Jihād in the Qur'an,” in *Jihād and Shahādat: Struggle and Martyrdom in Islam*, ed. Mehdi Abdi and Gary Legenhausen (Houston, TX: Institute for Research and Islamic Studies, 1983), 92; 93-102.

[...]”⁴⁰ Whether those so ‘tyrannized’ request help or not is immaterial as the Muslim is duty-bound to ensure “the prosperity and happiness” of all peoples.⁴¹

Thus, the question, Mutahhari argues, is not about whether *jihād* is lawful only in defense; it is. The dispute, he says, is about how to define defensive warfare and whether it “is limited merely to self-defense, or at most to defense of one’s nation, or whether it should also include defense of humanity.”⁴² Mutahhari argues that defending the rights of others, as he defines them, is consistent with the sacred principle of enjoining good and forbidding evil. Where this intersects with *jihād* for the sake of religious beliefs lies in understanding monotheism as a human right, and polytheistic beliefs as against the best interests of humanity. Muslims are justified, therefore, in initiating military aggression “in order to pluck out the fundamental roots of evil from that society.” This is not the same as “imposing belief in monotheism” which is contrary to Islam.⁴³ Thus, defensive *jihād* is obligatory not only to liberate those who are *mazlūm* (oppressed) because of territorial occupation, but also to secure the social and political conditions necessary for the freedom of “the call” of Islam “in every nation.”⁴⁴

Likewise, Ayatollah Taliqani’s definition of ‘defensive’ blurs the boundary between the classical formulation of defensive *jihād* waged “to stop aggression” and *jihād* “aimed at conversion to Islam.”⁴⁵ For Taliqani, *jihād* in defense of one’s “rights, territory, dignity, nationality, and what have you” is a natural human instinct similar to

⁴⁰ Ibid., 83.

⁴¹ Ibid., 97, 104-106.

⁴² Ibid., 106.

⁴³ Ibid., 110.

⁴⁴ Ibid., 111.

⁴⁵ For a discussion of the classical tendency see Sachedina, “Development of *Jihad*,” 36.

the sexual impulse, or appetite for food.⁴⁶ The desire to protect one's self and interests arises, he argues, out of anger. Like sexual and culinary appetites, the expression of warlike emotions is healthy and natural when regulated by divine law and leads to human and social illness when left to human caprice. In place of the abolition of war, which, he argues, would be contrary to human nature,⁴⁷ Islam provides the most sensible solution – defensive war. He defines it as struggle and conflict “in the way of God,” that is, for the establishment and protection of a social order in conformity with divine revelation. The alternative, which is typical of unbelievers, Taliqani argues, is to “strive [*jāhada*] in the way of *ṭāghūt*.”⁴⁸

The meaning of the term *ṭāghūt* is disputed. The majority of English translations of its use in the Qur'an prefer the meaning of “an idol” or “false deity,” a translation that is borne out by verses that seem to place it in binary opposition with God.⁴⁹ Taliqani rejects this interpretation in favour of a more politicized meaning of a social despot, whose “overflow”⁵⁰ and excess of self-ambition drives him to trample on and extinguish the rights of others.⁵¹ Iranian revolutionary discourse, for which Taliqani was largely responsible, popularized the term in adjective form (*ṭāghūtī*) as a slur against wealthy and worldly persons apparently resistant to the values of the revolution, as interpreted by its ideological spokespersons. For Taliqani, the prevalence of *ṭāghūtī* values calls for and

⁴⁶ Mahmud Taleqani [sic], “Jihād and Shahādat,” in *Jihād and Shahādat*, 49. Emphasis added. (The more common spelling of his name, which I use throughout my text, is Taliqani. Abdi and Legenhausen's text, *Jihād and Shahādat*, uses Taleqani, which I therefore use in this context only.)

⁴⁷ And which, Taleqani argues, is characteristic of Christian naivety. “Jihād and Shahādat,” 53.

⁴⁸ *Ibid.*, 51.

⁴⁹ See *ibid.*, 72 n. 3 which summarizes commentary on the use of the term in the Qur'an. The term *ṭāghūt* appears in Surahs 4:51, 60, 76; 5:60. Surah 4:76, which Taleqani quotes, states: “Those who believe do battle for the cause of God and those who disbelieve do battle for the cause of *ṭāghūt*. So fight the minions of the devil. Lo! the devil's strategy is always weak.”

⁵⁰ Taleqani rightly points out that the root meaning of the term (*ṭaghā*) means “to exceed proper bounds, overstep the bounds, be excessive [...]; to overflow,” etc.

⁵¹ *Ibid.*, 51.

justifies *jihād fī sabīl Allāh*, that is, in defense of truth and justice. As prayer and fasting, activities that are intended to nurture “intimacy with God,” are likewise spoken of as being *fī sabīl Allāh*, *jihād* against tyranny over Muslims and others is likewise incumbent upon all believers as a means of them getting close to God.⁵² In the final analysis, it is “the mission of liberating the nations of the world from slavery to human laws and false religions which are for a particular class, and to lead them [sic] to the glory of Islam” that defines *jihād* as both ‘defensive’ and Islamic.⁵³

Defensive *jihād* also figures largely in political discourse linked to the cause of Palestinian liberation and Arab nationalism. This discourse, both Sunni and Shi’ite, identifies the three-fold enemy of Israel, Zionism, and world imperialism.⁵⁴ While direct struggle against these forces is seen as unquestionably just, the discourse also invokes the notion of guilt by association such that a class of people “who support the enemy or who stand idly by” while the rights of Muslims are being violated “incur guilt and become, in some sense, legitimate targets of military force.”⁵⁵ As Kelsay observes, the enemy becomes defined not by role (as soldiers, for example), but by presumed or actual ideological commitment.⁵⁶

Among Shi’ites, Khomeini’s writings and speeches clearly endorse an adversarial position towards American and British interests on the basis of their complicity with Israel, which, Khomeini avers, “derives from America” and is the cause of “[a]ll of our

⁵² *Ibid.*, 50.

⁵³ *Ibid.*, 54.

⁵⁴ The theory of *jihād* championed by Sunni Islamists such as Hasan al-Banna, Abu al-‘Ala al-Mawdudi, and especially Sayyid Qutb, a reinterpretation of classical theory, stresses *jihād* for the sake of protecting the mission of proclaiming the Islamic message and opposing non-Muslim imperialist politics whether Western or Communist, and is particularly anti-Zionist. See, for example, Richard Bonney, *Jihad: From Qur’an to Bin Laden* (NY: Palgrave Macmillan, 2004), 199-223.

⁵⁵ Kelsay, “Combatants and Noncombatants,” 208. See also Bonney, *Jihad*, 30.

⁵⁶ Kelsay, “Combatants and Noncombatants,” 208.

troubles today.”⁵⁷ Those who support Israel are “in a state of war with the Muslims [...]”⁵⁸ Resistance, therefore, is justified in terms of defensive *jihād*. In a 1978 speech that was, as were his other speeches, circulated to Persian-speaking Muslims in North America, Khomeini declared that it was “the duty of everyone to oppose [the Shah’s regime], to refrain from aiding it in any way, to refuse to pay taxes or render any other assistance [...]” to a nation that betrays Islam and Muslims by providing help to Israel.⁵⁹ Whether Khomeini’s call to withhold the payment of taxes to the Iranian government is applicable to others, such as the U.S.A, is an open question.

The discourse of *jihād* against the Zionist state and its supporters is likewise important to the Lebanese Hizbullah whose endorsement of political violence is defended, morally and religiously, by the imperative of resistance against the “insufferable and draconian [...] oppression” exhibited by the Zionist state and its tacit or overt supporters.⁶⁰ Foremost among the latter is the United States which, Fadlallah avers, does not even have “an American policy in the Middle East, but an ‘Israeli policy’, which stems from the US’ ideological commitment to Israel.”⁶¹ In spite of this intractable association, Fadlallah’s legal opinions acknowledge the political legitimacy of the United States. This, it will be seen, allows Fadlallah to stress the Islamic legal imperative of upholding contract obligations, a matter that is not applicable in the case of Israel.

In sum, while the classical law tends to minimize vigilante activity, 19th and 20th century reinterpretations broadened the scope of possibilities for *jihād*. Further, the

⁵⁷ Khomeini, Ruh Allah, *Islam and Revolution: Writings and Declarations of Imam Khomeini*, trans. Hamid Algar (Berkeley: Mizan Press, 1981), 187.

⁵⁸ Khomeini, 120.

⁵⁹ Khomeini, *Islam and Revolution*, 243.

⁶⁰ Amal Saad-Ghorayeb, *Hizbullah: Politics and Religion* (Sterling, Va.: Pluto Press, 2002), 24-25.

⁶¹ *Ibid.*, 91.

severity of the obligation to defensive *jihād* incumbent on the community blurs the distinction between legitimate and illegitimate fields of action, even as it resuscitates the dichotomous spirit expressed in the classical terminology of *dār al-islām* and *dār al-ḥarb*. Upon this foundation revolutionary Islamic political discourse mingles a re-interpretation of the classical connection between *jihād* and justice with a re-articulation of the central Shi'ite motif of Karbala. It is not uncommon to find this typically Islamic discourse then fused to the terminology and ideology of revolutionary third-world struggles wherein the concept of justice is extended towards “the desire to secure the well-being of all humanity.”⁶² With this as background, we are better positioned to examine *istiftā'āt* and *fatāwā* that treat attitudes to non-Muslim governments.

WHO IS MY ENEMY AND IS THIS *JIHĀD*?

Muhammad Husayn Fadlallah

Istiftā' (1): Is Norway considered to be at war with Islam and is it permitted to seize the wealth of the state illegally?⁶³

Istiftā' (2): We notice that you always speak about the duty of respecting the laws of Western countries that we travel to, but many laws of these countries are opposed to Islam, in addition to the obligatory high taxes of which a portion goes to help Israel. So, what is the problem if Muslims evade these laws?⁶⁴

Istiftā' (3): Regarding the impermissibility of using deception in relation to the wealth of unbelievers and the duty of respecting it, what do you say with regard to Western nations that steal the wealth of Muslims daily?⁶⁵

Istiftā' (4)': We commonly think of the West as the arrogant, imperialist West. This Islamic perception makes many Muslims violate the system, money, and property of Westerners. What is your legal opinion on this?⁶⁶

⁶² Sachendina, “The Development of *Jihad*,” 37.

⁶³ Fadlallah, *Taḥaddiyāt al-Maḥjar*, 205. See below for the quotation of the *fatwā* in full.

⁶⁴ *Ibid.*, 198-99. See below for the quotation of the *fatwā* in full.

⁶⁵ *Ibid.*, 206-7. See below for the quotation of the *fatwā* in full.

⁶⁶ *Ibid.*, 194. This *fatwā* is too long to quote in full. It essentially repeats themes presented in the other three *fatāwā* in more detail and will be quoted only in part.

It is important that we understand these *istiftā'āt* within the historical context alluded to above, that is, the “typically Shi‘i view of history” that appears to be confirmed by Western colonial history. While alluding to issues discussed in the law of *jihād*, these *istiftā'āt* effectively ask if Muslims are obliged to obey the laws of non-Muslim governments perceived to be hostile to the interests of Islam and Muslims. Their tone—especially that of questions (2) and (3)—intimates a challenge to Fadlallah’s perspective, implying that at least some *mustafīīs* consider juristic authority as susceptible to critique. *Istiftā'* (4) presents the question in a more neutral manner, while exhibiting awareness that there is a difference of opinion on how Muslims ought to respond to Western imperialism.

Istiftā' (1) suggests that the writer has in mind pre-modern juristic conceptions of Islam’s position with regard to non-Muslim nations, given the absence of any actual political conflicts between Muslim states and the European country named. The writer further seems to suggest that if the situation is as presumed, that is, if Norway is at war with Islam, there are questions regarding spoils that need to be addressed. Legal precepts regarding spoils of war, discussed above, make it difficult to conceive how any kind of property could be appropriated in the *mustafīī*’s context, i.e. by mere residence in a non-Muslim country in the absence of open conflict. To attempt to justify disobedience or to propose that Muslims “seize the wealth of the state illegally” on the premise that the West is “at war” with Islam would suggest an opportunism that is contrary to the letter of the law, of which the *mustafīī* is evidently uninformed.

Although different in their emphases, the writers of *istiftā'āt* (2), (3), and (4) raise the question of international complicity in Middle Eastern conflicts and suggest that this

ought to be a pertinent factor in formulating an appropriate Islamic legal response. *Mustaftīs* appear to draw on the anti-imperialist discourse discussed above that, in general, enlarges the scope of conflict and which may be phrased, in the Muslim context, in terms of *jihād*. In suggesting the validity of illegal, though peaceful, acts of resistance far removed from the geographic conflict, they seem to echo the Lebanese Hizbu'llah's "logic of resistance" against the injustice and oppression of the (former) Israeli occupation of south Lebanon. Based on speeches given by al-Sayyid Hassan Nasru'llah, the Lebanese Hizbu'llah leader, Saad-Ghorayeb describes the party's principle of popular resistance against Israel as a non-relinquishable "'religious legal obligation' (*wājib shar'ī*)" required of every Muslim.⁶⁷ Recognizing the impracticality of this expectation on the military level alone, Hizbu'llah qualifies its interpretation of individual obligation (*farḍ 'ayn*) for military *jihād* by insisting that other forms of resistance—cultural, educational, political, and economic—remain incumbent on every individual Muslim.⁶⁸ Thus, *mustaftī* (2)'s inclination to evade taxes may be interpreted in light of this Shi'ite understanding of individual responsibility for resistance to oppression and humiliation, reflected in the paradigm of Imam Husayn. The writer of *istiftā'* (4), though seemingly aware of the interpretation appears uncertain of the correct legal position and thus requests Fadlallah's opinion on the matter.

Finally, *mustaftīs* implicitly express the popular notion that Muslims may act as individuals in situations that are effectively matters of international relations. The writer of *istiftā'* (3), for example, implies that unilateral respect for the property and wealth of "unbelievers" in "Western nations" neglects to take full account of the legitimacy of

⁶⁷ Saad-Ghorayeb, *Hizbu'llah*, 125.

⁶⁸ *Ibid.*, 126.

acting in self-defense, on a rather *ad hoc* and individualistic basis. Mayer's discussion of "legal personality" suggests that the *mustaftī*'s reasons for assuming this position may not necessarily be due purely to religious reasons, as it is reflective also of modern Third World social justice discourse in which "peoples' enjoy legal personality and are covered by international law."⁶⁹ While its legal status is still debated in international law, the notion of the legal personality of peoples involved in struggles against imperialism enjoys popular support.

In conclusion, it may be argued that the *mustaftīs* above reflect tendencies characteristic of a leadership influenced by Iranian and Lebanese revolutionary discourse that feeds well into a general sense of alienation and entitlement also reflected in the *istiftā'āt*. Analysis of the *fatāwā* below will show that Fadlallah's position is clearly more conciliatory and pacifistic. Does Fadlallah signal a new generation of Shi'ite leadership or do his *fatāwā* reflect the reality of individual differences presupposed by the Shi'ite juristic method of original *ijtihād*, sometimes exercised in response to historical conditions? Or, might we conclude, rather, that when acting in a legal capacity, *mujtahids* are constrained by the methodology and classical tradition of the legal discourse, notwithstanding any revolutionary inclinations they may have on another level?

Fatwā (1): I do not permit seizing the wealth of *kāfirs* as long as they do not enter into actual war against Muslims. The mere unbelief of unbelievers does not make their wealth permitted [to Muslims]. God says: **"God does not forbid you to show kindness and act justly to those who have not warred against you on account of religion or driven you from your homes. God loves those who deal justly" (60:8). "But God forbids you to make friends of those who warred against you on account of religion or drove you out of your homes and helped to drive you out. Whoever makes friends of them, they are the wrongdoers" (60:9).** The Jews were blamed because they made lawful the wealth of all who were not Jews when they said: **"We have no duty to the Gentiles" (3:75).**

⁶⁹ Mayer, "War and Peace," 210.

But this country is a special case because it is considered a peaceful country and is not among the warring countries in the clear sense of the word war.⁷⁰

Fatwā (2): We say: it is a person's duty to not harm the security or the public order of the country to which he goes. The reason is that when someone goes to any Western country, whether on a visa, or as a refugee, it is his duty – and this is a condition of his travel there being accepted – to respect the laws of the country to which he travels and this becomes an agreement between him and that country. Yes, if there is something that violates Islam, such as someone saying some forbidden things, this is not permitted to him. With respect to taxes, these countries provide social security, health and such things for you by means of these taxes. Therefore, we say: when Muslims go to Western countries, it is their duty to present a radiant image of their duties and obligations, not like some do, who make the wealth and lands of people lawful to themselves, such that they distort the image of Islam in the name of Islam.⁷¹

Fatwā (3): There is a difference between countries at war that behave with warlike actions, and peaceful countries that behave with peaceful actions, and we have to distinguish between a country and the people. **“God has not forbidden you to show kindness and act justly to those who have not warred against you on account of religion or driven you from your homes. God loves those who deal justly” (Qur'an 60:8)**; this verse indicates that we must deal justly and follow the path of justice with everyone who does not fight against us on account of religion, and has not chased us from our homes. What we infer from this is that the Qur'an forbids us from taking the wealth of *kāfirs* simply because of their *kufr* **“God has forbidden you to be kind to those who have fought you on account of religion or drove you out of your homes and helped to drive you out” (Qur'an 60:9)**. We notice that when God blames the Jews, what he blames them for: **“There are those from among the people of the Book who, if you trust him with a weight of treasure will return it to you, and among them he who, if you trust him with a dinar will not return it to you unless you continue to stand over him. This is because they say we have no duty to the Gentiles” (Qur'an 3:75)**. God blames them because they consider themselves responsible to respect only Jews and their wealth, blood, and lands, and are not responsible to respect the whole world of non-Jews. So, if Muslims think in this way: **“We're not responsible for *kuffār*, so we can kill them and take their wealth by force and oppose them,”** what would be the difference between us and the Jews, when God blames them for this?!⁷²

Fatwā (4): God (may he be praised) desires for the Muslim, in his human duties regarding relations with people, and in his religious duties, that the trustworthy

⁷⁰ Fadlallah, *Tahaddiyāt al-Mahjar*, 205.

⁷¹ *Ibid.*, 198-99.

⁷² *Ibid.*, 206-7.

person, because of the value of trustworthiness that is a part of his Islamic personality, be far from the nature of other people, towards whom one is to be trustworthy. (Quran 3:75 as above) This reveals to us the Qur'anic inspiration that God does not want people to be trustworthy with Muslims and to be untrustworthy with non-Muslims; because trustworthiness, like honesty, is a value connected to the trustworthy person in his concept of responsibility towards the property of people. Likewise, honesty is embodied in the value expressed in the honest person regardless of other people. [Q 60:8-9 and religious duty of respecting property of people amongst whom Muslims live] *And if governments oppress us or fight against us, the people are not similarly in agreement with the activities of these governments. [...]*

From another perspective, the person who migrates to a country and takes an entry visa to that country holds within himself a contract [*ahd*] between himself and that country stipulating that he may enter the country to preserve its security, order, and all its vital affairs. Consequently, those who violate the property of a country or its people, who act unlawfully against its security or such things, violate the contract that they took upon themselves; therefore, I issue a *fatwā* prohibiting, as a basic principle (*bi'l-'anwān al-awwalī*), the violation of the wealth of people, whether they are Muslims or *kafirs*. As a basic principle, I do not deem lawful the wealth of *kafirs*. Even those *fuqaha'* who have issued a *fatwā* specific to this subject do not permit this as a secondary principle (when an additional factor intervenes – *bi'l-'anwān al-thānawī*), because it sullies the reputation of Islam and mars the image of Muslims. [...] I request all of my brothers and all my sons to be trustworthy with the wealth of people and to exemplify the radiant image of Islam in their trustworthiness and honesty and that they respond to the call of imam al-Sadiq: **“Be callers to the people without your tongues; let them see goodness, honesty, and godliness from you, for this is *da'wah*.”**⁷³

Fadlallah's *fatāwā* stress several inter-related lines of argument: determining the conditions that define a state of war, the legitimacy of non-Muslim governments and contracts made with them, distinguishing between governments and their citizens, and the ethical and missionary duty of modeling Islam before non-believers, that is, of engaging in *da'wah*. In addition, he employs an anti-Jewish polemic in an attempt to motivate his followers to differentiate themselves from their alleged enemies. Our discussion will elaborate on these themes, comparing his position with that of other modern jurists, and suggesting some implications.

⁷³ Ibid., 194-96. Emphasis added.

In saying that “the mere unbelief of unbelievers does not make their wealth permitted [to Muslims]” does Fadlallah mean precisely what he says, i.e. that unbelief is not equivalent to aggression, and therefore cannot justify defensive *jihād*? Or, do his *fatāwā* share the presuppositions evident in Mutahhari’s or Taliqani’s views? That is, are there hidden nuances to his otherwise pacifistic *fatwā*? For, as one journalist interviewer said of him, “With Master Fadlallah one has to read between the lines to find the truth.”⁷⁴

In principle, Fadlallah accepts the idea of *jihād* for the purpose of *da‘wah*, in addition to other religious objectives. “*Da‘wah* to Islam is an Islamic objective that justifies plunging into battle on its behalf (for its sake).”⁷⁵ However, he says, the Qur’an (2:193) qualifies this as a defensive permission only, to eliminate *fitnah*, which, he defines in this context as societal or political obstacles preventing the spread of Islamic doctrine and the fulfillment of its revolutionary objectives; and turning Muslims away from Islam. It is not, he says, a matter of using force to compel people to embrace Islam.⁷⁶ Rather, the universal mission of Islam justifies the use of force to protect its missionary efforts for the good of humanity.⁷⁷ Therefore, while denying any direct link between unbelief and aggression, Fadlallah affirms that when unbelief sets up obstacles to the spread of Islam—that is, when it manifests itself as oppression or persecution—it may justifiably be met with the sword.⁷⁸

With regards to political conflicts involving Muslims, Fadlallah does not appear hesitant to endorse conventional as well as unconventional forms of violence in defense

⁷⁴ Kramer, “Oracle of Hizbullah,” 114. The author is quoting Johnny Munayyir, preface to Fadlallah interview, *NAD*, 12 December 1988; FBIS DR, 15 February 1989.

⁷⁵ Fadlallah, *Kitāb al-Jihād*, 78.

⁷⁶ *Ibid.*, 79-81.

⁷⁷ *Ibid.*, 81-82.

⁷⁸ Fadlallah quotes several *aḥādīth* in support, such as: “All good is in the sword and under the shadow of the sword, and the people will not rise except by the sword; the sword is the key to paradise and hell,” on the authority of al-Sadiq, from *Wasā’il al-Shī’ah*, 15:9. Fadlallah, *Kitāb al-Jihād*, 83.

of the rights of Muslims. The latter, he argues, are the weapons of the “oppressed nations [which] do not have the technology and destructive weapons America and Europe have.”⁷⁹ However, when considering how Muslims should behave in Western nations—in spite of the complicity of some with Israel—Fadlallah’s stance is absolute in its call to peaceful, law-abiding, and upright, honest behaviour. There is no indication in the material that he makes any distinction in this regard between states the foreign policies of which are supportive of Israel, and others, such as Norway. Rather, followers are advised, even when living in the United States, “to be good and peaceful citizens if they have acquired the nationality and good guests if they have not.”⁸⁰

Fadlallah underscores the distinction between unbelief – a private matter; and aggression – a public threat, in a *fatwā* he gives against killing foreign tourists in Muslim space. While stating that Islamic law forbids harming anyone who legally enters Muslim territory, Fadlallah’s main argument is that hostility towards Islam does not have a direct correspondence to ethnicity, religion, or nationality; Muslims themselves may well be at fault in this regard. Furthermore, conversing with tourists is more likely to change their outlook than is killing them, he says.⁸¹

When asked specifically what a Muslim’s legal obligations are towards Western states that “cooperate, [and] perhaps even conspire, with the Zionist enemy,” Fadlallah

⁷⁹ Fadlallah interview, *Kayhān* (Tehran), 14 November 1985. As quoted by Kramer, “Oracle of Hizbullah,” 111. Cf. Kramer, 107-114. Discussing this further would take us away from the focus of our attention.

⁸⁰ Fadlallah, official website, “Role and Problems of Immigrant,” <http://english.bayynat.org.lb/Issues/letter.htm> (accessed February 1, 2009).

⁸¹ “[...] Every *kāfir* is not warring [against us] and it is not necessarily so that the one who is warring is the person who has a different religion or position from us. God said: ‘**And if anyone of the idolaters seeks your protection, then protect him so that he may hear the Word of Allah, and afterward convey him to his place of safety**’” (9:6). As for corruption, it is not just the foreigners who have done this, but some of the brothers of our countries are the ones that encourage it. They [the foreigners] come to visit the ruins and when they come – often – we talk to them, [hoping that] when they discuss with people in Islamic countries it might change their point of view.” Fadlallah, *Tahaddiyāt al-Mahjar*, 209-210.

quotes the same Qur'anic text as in *fatwā* (1) above, arguing that while the early Muslim community may have needed to “enforce its authority” through war, the more effective methods of bringing people to Islam today are those of peace.⁸² Muslims today are to follow Qur'an 41:34 instructing them to “repel (evil) with what is better.”⁸³ The utilitarian motive of his counsel is repeated frequently; Muslims should behave this way “so as to give Islam the civilized image that would encourage people to embrace it” and contribute to the transforming of “a big society into an Islamic one.”⁸⁴ To do otherwise would be counterproductive to this mission. In other words, while offensive *jihād* for the sake of *da'wah* was legitimate in its own historical context, today's context requires that it be replaced by *da'wah* and dialogue.⁸⁵

The second reason Fadlallah gives for supporting obedience to non-Muslim laws in matters not forbidden by Islamic law is the fundamental Islamic duty of abiding by contract (*'ahd*) obligations, the purpose of which is to provide mutual security to and peaceful relations between two parties.⁸⁶ The term *'ahd* is the same, the author of *lisān al-'Arab* states, as the *dhimmah* by which the Muslim state was bound to the protection of its primarily Jewish and Christian subjects.⁸⁷ Likewise, Fadlallah says, contracts “are by nature the frame of security and peace.”⁸⁸

⁸² Fadlallah's official website: “The Jurisprudence of Minorities,” <http://english.bayynat.org.lb/Jurisprudence/minorities.htm>, question 19 (accessed February 6, 2009).

⁸³ Ibid.

⁸⁴ Ibid. A better translation would of course be a “great society.”

⁸⁵ For Fadlallah's views on inter-religious dialogue see Sayyid Muhammad Husayn Fadlallah, *Min ajl al-Islām* (Beirut: Dār at-Ta'āruf al-Matbū'āt, 1409/1989), 475-88; 497-511; and Fadlallah, *Islam: The Religion of Dialogue*, trans. Najim al-Khafaji (Beirut: Dār al-Malāk, 1424/2003). This is a translation of *al-Hiwār fī al-Qur'ān* (Beirut: Dār al-Malāk, 2001).

⁸⁶ Fadlallah, *Kitāb al-Jihād*, 281-282.

⁸⁷ Jamal al-Dīn Muhammad ibn Mukarram ibn Manzūr, *Lisān al-Lisān: Tahdhīb Lisān al-'Arab* (Beirut: Dar al-kutub al-'ilmiyyah, 1993), 236.

⁸⁸ Fadlallah, *Kitāb al-Jihād*, 284.

Keeping contracts is central to Qur'anic social, legal, and personal ethics. Several texts identify contract keeping as a defining moral quality of Muslims. After cataloging a list of pious virtues such as believing in God and the Last Day, the prophets and angels, giving to the needy and setting slaves free, Surah 2:177 adds: "And those who keep their covenant (*'ahdihim*) when they have made one, and the patient in tribulation and adversity and the time of stress; these are the sincere ones and these are the pious." Surah 70:32-35 similarly lists "those who keep their trust (*amānah*) and covenant (*'ahd*)" along with those who give true testimony and are faithful in worship as the ones who will be honoured in Paradise.⁸⁹

These verses suggest that a contract in Islamic thought is essentially a religious undertaking; the Muslim party to any contract, large or small, is bound firstly to God who has commanded unfailing fulfillment of its provisions. As Azizah al-Hibri puts it, the Qur'anic view on contract obligations, including unilateral and bilateral, suggests that "reneging on one's commitment, whether in exchange for another or not, is wrong. This follows regardless of the presence or absence of formalities when the commitment was made, because the need to fulfill it does not derive from legal formalities but from divine orders and religious morality."⁹⁰

⁸⁹ The idea that keeping to one's agreements is a distinctive mark of Muslim piety in contrast to the ignorance of idol worship is brought out also in Ibn Hisham's biography of the Prophet. The Muslims who had taken refuge in Abyssinia are said to have explained their faith and their circumstances by saying: "We were an ignorant people, worshipping idols [...], until God sent us a Messenger [...] who commanded us to be honest in speech and to fulfill our trust (*amānah*), [...]." Ibn Hisham, *Al-Sīrah al-Nabawīyah* (Cairo: Mustafa Alban al-Halabi wa Awladihi, 1936/1355), 1:359.

⁹⁰ Azizah Y. al-Hibri, "The Nature of the Islamic Marriage: Sacramental, Covenantal, or Contractual?" in *Covenant Marriage in Comparative Perspective*, ed. John Witte Jr. and Eliza Ellison (Grand Rapids, Mich: William B. Eerdmans Publishing Company, 2005), 187.

Fadlallah mentions only one exception to the obligation of faithfulness to contracts.⁹¹ Muslims can break their contracts, he says, only if the other party has done so first, as the life of the Prophet illustrates in his relations with the Jews and the Quraysh.⁹² Thus, Fadlallah argues that any “initiator breach of contract” is “a grievous sin.”⁹³ Consequently, for Fadlallah, faithfulness to contracts is a fundamental and unconditional legal principle (*‘anwān awwālī*), not contingent upon factors extraneous to the law. Accordingly, it is not determined merely by the legitimate interest of presenting a favourable image of Islam, but by the legal and ethical responsibility of maintaining the public order of any state in which the Muslim resides; nor is it conditional on the religion of the other party. Other *mujtahids*, he notes, arrive at the same conclusion by other means, that is, by stressing the secondary element of concern for the reputation of Muslims, but for Fadlallah, fulfilling contract obligations is fundamental to Islamic morality and law.

In addressing the psychological conflict Muslims might suffer in expressing loyalty towards a state the foreign policies of which they may not agree with, Fadlallah argues that as in polygamous marriage, one is duty-bound to treat all wives equally, regardless of any emotional attachment one might have towards one wife over others. In other words, he reasons, obedience to the law does not require subjective feelings of

⁹¹ al-Hibri argues, with good reason, that Muslim jurists have typically understood an incident in the life of the Prophet as pointing to the non-obligation of abiding by contract conditions that violate Islamic ethics, or, as al-Hibri puts it, public policy. In brief, the Prophet had chastised the owners of a slave that ‘Aishah wanted to buy because they had tried to “overreach” the terms of the contract by imposing an “unconscionable stipulation” on her sale. The Prophet advised ‘Aishah to free the slave so as to render the terms of the contract, including its unconscionable provision, null and void. *Ibid.*, 190-194. Jurist have commonly interpreted this to mean that the duty to fulfill any contract “is implicitly contingent [...] on public policy, morality, and similar concerns,” 194. That Fadlallah doesn’t mention this does not, of course, mean that he doesn’t agree.

⁹² Fadlallah, *Kitāb al-Jihād*, 285.

⁹³ *Ibid.*, 284.

affection. Indeed, in the case of obeying non-Muslim governments, Fadlallah cautions against forming an emotional attachment or loyalty.⁹⁴ Fadlallah is fond of making fairly fine distinctions between closely related concepts; in this case, differentiating between legal and emotional loyalty enables him to reconcile two apparently conflicting moral issues. While promoting integration on the level of legal obligation, Fadlallah's analogy demonstrates a parallel desire to avoid promoting an internalization of patriotic emotions towards the host country.⁹⁵

However, the legal value of Fadlallah's directive is not insignificant. The tension between the pre-modern juristic discourse presupposing an inequality between Islamic and non-Islamic polities on the one hand and contemporary international law recognizing the legitimacy of the nation state on the other is reflected in conflicting attitudes towards the relationship between Islam and the international community in the contemporary world. Bassim Tibi summarizes these two positions in Sunni Islam: "Fundamentalists" adhere to the classical terminology and idea of a perpetual state of war between *dār al-islām* and *dār al-ḥarb*. In contrast, the more prominent "conformist" stance coming from institutions such as al-Azhar "[reinterprets] the Islamic notion of jihad to discourage the use of force."⁹⁶ Tibi notes how the duty of honouring agreements allows for the

⁹⁴ Fadlallah's official website: "The Jurisprudence of Minorities," <http://english.bayynat.org.lb/Jurisprudence/minorities.htm> Questions 8, 12, & 19 (accessed February 1, 2009).

⁹⁵ Abou El Fadl offers a most interesting analysis of a *fatwā* issued by a US Sunni institution decrying what it interprets as an analogous compromise of loyalties. The case involved a Muslim-American sports player who refused to stand for the American national anthem. The controversy that ensued led to the issuing of a *fatwā* in support of the player's action. El Fadl's interest is not in critiquing the directive itself but in demonstrating how the uncritical methodology of its authors, typical of such groups, unjustifiably allows them to speak with a presumed but false authority, a tactic El Fadl identifies as authoritarian. By authoritarian he means, in brief, "the misrepresentation that a matter that is open for inquiry and investigation is conclusively resolved" (99). Among other methodological defects, he says, their discussion fails to consider the legal value of contract obligations. See Abou El Fadl, *And God Knows*.

⁹⁶ Bassam Tibi, "War and Peace in Islam," in *Islamic Political Ethics: Civil Society, Pluralism, and Conflict*, ed. Sohail H. Hashmi (Princeton: Princeton University Press, 2002), 182-83.

recognition of the fundamental principle of international law which, unlike the Islamic law of nations that is community based, is defined by territorial borders.⁹⁷ Fadlallah's statements about contract obligations reflect the norms of international law and suggest that, like many of his mainstream contemporaries, Fadlallah sees Islamic law as compatible with these norms.

With regard to *zulm*, Fadlallah's definition is no different from Taliqani's. *Zulm* consists of three essential elements: 1) plundering the rights of others, which may be done by Muslims and non-Muslims alike; 2) unbelief, which is injustice against God; and 3) occupying positions of authority illegally. This is true even in cases where the state considers the government to be legitimate and where it is elected by the people. According to Fadlallah, the latter two definitions belong to all non-Muslims by default. Fadlallah's position regarding what counts as defensive war differs from that of Taliqani primarily on the level of semantics. In his *Kitāb al-Jihād*, Fadlallah argues that, in addition to repelling military aggression, defensive *jihād* includes the religious objectives of ensuring the supremacy of Islamic law and defending its doctrine against "oppression and imperialism."⁹⁸ While unbelief itself is not a declaration of war, and thus does not lead to the alienation of the property of unbelievers, it is possible to understand his position as defining relations between the West and the Muslim world in *jihād*ist terms of "oppression and imperialism." In other words, Fadlallah does not define defensive, and thus just, war unequivocally "as involving only a response to military aggression," which would render his view consistent with the rules of international law.⁹⁹

⁹⁷ Ibid., 187.

⁹⁸ Fadlallah, *Kitāb al-Jihād*, 74.

⁹⁹ Mayer, "War and Peace," 204.

Nevertheless, Fadlallah's more rationalistic method of interpretation than the ideologically inclined Ayatollahs Taliqani and Mutahhari, set as they were in the revolutionary environment of Iran in the 1960s and 1970s, and the prominence he gives to faithfulness to contracts, gives him opportunity for more subtle lines of distinction. Consequently, in place of actions of a *jihādī* nature, Fadlallah advises four inter-related courses of action: 1) obedience to the law, as discussed above; 2) "following the path of openness and cooperation" with non-Muslims without forming intimate bonds of friendship that might lead to compromise; 3) creating Islamic political parties in connection with "an Islamic movement;" and 4) "working towards making Islam a force" and getting Muslims into positions of power.¹⁰⁰ Muslims may even work for the security services or other government agencies if doing so "serves the interests of Islam" and can be effective in countering Zionism.¹⁰¹

Fadlallah's position is not dissimilar to the views of a large proportion of state sponsored Sunni *muftīs*¹⁰² who likewise direct their communities in the West both to obey the laws of non-Muslim countries and to participate in the political process.¹⁰³ Those in

¹⁰⁰ Fadlallah's official website: "The Jurisprudence of Minorities," <http://english.bayynat.org.lb/Jurisprudence/minorities.htm>, Questions 8, 11, 19, 29, & 32 (accessed February 1, 2009).

¹⁰¹ *Ibid.*, Question 15.

¹⁰² Two of the most well known of those who issue *fatāwā* for Muslims in the West are Yusuf al-Qaradawi, based in Qatar, and Taha Jaber al-Alwani in the United States. Shmeul Bar discusses numerous Sunni *fatāwā* denouncing terrorist acts over against a comparable number that encourage and promote politically motivated acts of violence and terror. See "The War of the Fatwas," in *Warrant for Terror*, 97-111.

¹⁰³ This is in contrast to the signatories of the "World Islamic Front for Jihad against Zionists and Crusaders: Declaration of War," (printed in David Cook, *Understanding Jihad* (Berkeley: University of California Press, 2005), 173-175), some of whom may be considered self-styled "muftis". The Arabic version of this declaration was published in the Arabic newspaper *al-Quds al-Arabi* (London, U.K.) on 23 February, 1998, p. 3 and may be accessed at: <http://www.library.cornell.edu/colldev/mideast/fatw2.htm> (accessed February 1, 2009). The first two signatories (Shaykh Usama b. Muhammad b. Laden and Ayman al-Zawahiri, appear on the FBI's most wanted list of terrorists. Available at Federal Bureau of Investigation, website: <http://www.fbi.gov/wanted/terrorists/fugitives.htm> (accessed February 1, 2009). The declaration typifies the goals of radical movements, calling on all Muslims to "kill Americans and to steal their possessions in everyplace they are to be found, and during every time possible."

the Muslim world, however, recommend doing so in some form of alliance with political movements in the Muslim world.¹⁰⁴ Fadlallah goes further by not permitting Muslims to join non-Muslim political parties on the assumption that this would weaken their ability to achieve Islamic objectives. Rather, they should form Islamic parties linked to those in the Middle East. Whether resident in the Muslim world or in the West, mainstream Sunni *muftīs*, like Fadlallah, advise cooperation with non-Muslims in order, as the Prophet did, to defend Muslim interests. Some *muftīs* resident in Europe depict this as responsible global citizenship.¹⁰⁵

Ayatollahs Al-Hakim, Sistani, and Others

Sistani does not issue significantly different legal opinions than those of Fadlallah. Likewise, he shares his evident concern for the reputation of Islam and Muslims. The main difference between them is in the matter of style and method. Where Fadlallah explains his decisions with reasoning both from Islamic textual sources and general but frequent reference to Western values, Sistani is far more concise, preferring to provide the sources of his reasoning in the preliminary sections of their General Legal Treatises. These are simply quoted, with no context or exegesis added. The apparent meaning is assumed to attach authority to the *fatāwā* to follow. In those sections, al-Hakim in particular supplies numerous *aḥādīth* and Qur'anic texts in support of his positions. Finally, both Sistani and al-Hakim differ from Fadlallah in their emphases and approaches to some questions.

¹⁰⁴ Shadid and van Koningsveld, "Religious Authorities," 167-68.

¹⁰⁵ Ibid, 159-161. *Muftīs* discuss this in the context of the mandate even the most liberal of *muftīs* see as the primary responsibility of Muslims in the West: to "proclaim his/her faith to the world" (p. 160).

If, as Haddad rightly observes, American attitudes towards Islam and Muslims indicate “an apparent need” to create an “other” who is different, and thus, an enemy,¹⁰⁶ al-Hakim may be said to mirror this approach. Al-Hakim rests a substantial measure of his decisions on presuppositions regarding the incompatibility of “corrupt” Western society with Islam and Islamic culture. He assumes an absence of common moral, cultural and religious ground, suggesting that the infidelity of the former is as absolute as the rightness of the latter. For al-Hakim, this presents an enormous challenge to Muslims whom he exhorts to make tremendous effort to acquire the means to protect themselves from the loss of religion, going into great detail outlining the essential components. He advises, for example, knowledge of the textual sources of Islam and legal decisions of what is *ḥalāl* and *ḥarām*; acquisition of and familiarity with legal manuals of *marāji*‘; regular observance of prayer and other religious rituals of remembrance; unity; visiting the homeland often; teaching Arabic to children and using Arabic at home; tolerating differences within the Muslim community; welcoming those who repent after having strayed from the path; collaborating with all Muslims in the missionary task; and taking individual responsibility to observe all the above.¹⁰⁷

At the same time, al-Hakim sees the absolute disparity between Islamic and Western society as presenting an opportunity for Muslims to “lift the flag of Islam and call [people to embrace it...].”¹⁰⁸ Muslims in the West should see themselves as “companions of the message calling the people there to their religion.”¹⁰⁹ The most important means of doing this is by good behaviour, an ethic al-Hakim endorses on two

¹⁰⁶ Haddad, “Dynamics of Islamic Identity,” 23.

¹⁰⁷ al-Hakim, *Murshid al-Mughtaribin*, 27-139.

¹⁰⁸ *Ibid.*, 125.

¹⁰⁹ *Ibid.*, 137.

premises: firstly, because it is an Islamic duty; and secondly, because by it, one gives Islam and Muslims a good reputation. This is particularly the case in the area of obeying the law of the land. Westerners, al-Hakim argues, have a high proclivity towards maintaining law and order, which inclines them to respect those who do the same. Similarly, disobeying the law is inadvisable, primarily it seems, because it brings Islam and Muslims into disrepute.

This is apparent in exceptions to the general rule that al-Hakim appears to allow. For example, in reply to a question regarding the permissibility of working “without the knowledge of the government so as not to cut off social assistance, and similarly, [of not paying] taxes by using various means,” al-Hakim states that this “is permitted in and of itself unless it involves putting the religion in danger of harm by defaming the reputation of Islam and Muslims.”¹¹⁰ Similarly, while faithfulness to contracts is stated as an Islamic duty, failing to do so because of negligence is not considered a breach of contract.

Istiftā': When a Muslim is presented as a refugee he signs some papers, among them [the obligation] to respect the laws of the country or to not violate them. It is possible that the refugee may not be attentive [*ghayr multafit*] to this. Do you consider violating the law to be a breach of the contract or guarantee that the sacred law does not permit?

Fatwā': This is not a breach of the contract.¹¹¹

In contrast, conscious contract violation is a serious matter, as Sistani and Khamenei make clear. Sistani specifies the categorical obligation of upholding local laws regarding theft and vandalism irrespective of the other party's religion and irregardless of the risk to the reputation of Islam and Muslims. “It is neither permissible,” he says,

to steal from the private as well as the public property of non-Muslims, nor vandalize it, even if that stealing or vandalizing does not tarnish the image of

¹¹⁰ Ibid., 272

¹¹¹ Ibid., 272-73.201.

Islam and Muslims. Such an act is counted as perfidy and violation of the guarantee given to non-Muslims indirectly when one asked permission to enter or reside in that country. And it is forbidden to breach the trust and violate the guarantee in regard to every person irrespective of his religion, citizenship, and beliefs.¹¹²

It is a position with which Khamenei agrees:

There is no difference between the property of people and the property of the government whether Muslim or non-Muslim and between whether this is in an unbelieving (*kufir*) country or Islamic country, or between the ruler being Muslim or *kāfir* in the requirement of maintaining respect for the property of others and in the prohibition of usufruct without their permission [...].¹¹³

Mustafīīs, in contrast, including some of Sistani's, appear to assume different rulings in dealings with non-Muslims than with Muslims; and to suppose that criminal behaviour is illegitimate only if it results in immediate consequences to the reputation of Islam and Muslims, or to their physical safety. For example, a *mustafī* asks Ayatollah Sanei if a Muslim who "travels to a communist country and is able, without any risk of harm to his person or money, to kill someone and take their possessions" is permitted to do so. It is entirely possible that the *mustafī* in question, who may be a Shi'ite Afghan and may be writing at the time of the Soviet invasion of Afghanistan, sees himself to be at war.

Earlier, we suggested the possibility of a popular though legally invalid notion that Islamic law permits vigilante despoiling of non-Muslims arising out of Shi'ite or general Third World revolutionary discourse, in which violating the property of non-Muslims has a retaliatory function. Whatever their views of the West morally or politically, legal scholars regularly stress the seriousness of contract obligations, which are, as Fadlallah says, the basis of law and order. In response to the question above, for

¹¹² Sistani, *Code of Practice*, General Rules, #218. *Fatāwā* #230 and #236 of the same *Code* confirm the comprehensiveness of this directive.

¹¹³ *Ahkām al-Mughtaribīn*, 402.1230.

example, Sanei emphatically insists that nothing short of war permits the violation of persons and property of Muslims or non-Muslims.¹¹⁴

Sistani's approach to political participation is more lenient than that of Fadlallah who, as observed above, advises attachment to parties in the Muslim world. Sistani omits this condition, permitting "membership of [sic] political parties" in the West, and participation in parliaments and representative assemblies "as much as is demanded by the interest [of the Muslim community...]." Short of having any formal association with Islamic parties elsewhere, the level of need demanded by the interests of Muslims must be determined "by consulting the trustworthy experts,"¹¹⁵ that is, "*ahl al-khibrah*," or, the *marji 'tyah*.¹¹⁶

ISLAMIC VERSUS SECULAR LAW: NEGOTIATING TENSIONS AND KEEPING THE FAITH

The *istiftā'āt* in this category appear to reflect a concern for personal piety rather than for questions of *jihād* or politics. They exhibit the perception of a conflict of priorities where Western laws prohibit or curtail adherence to Islamic laws and traditions.

The following are addressed to Fadlallah.

Istiftā' (1): Is it allowed to violate some laws of the host country if they contradict our Islamic habits, traditions, and values?¹¹⁷

Istiftā' (2): During his reception of the French Minister of the Interior and of Religion in 1998,¹¹⁸ the imam of al-Azhar, Sheikh Tantawi, said that Muslims who live in France or other non-Muslim countries are obligated to respect the laws of these countries. It is as if he justifies the Western administration's

¹¹⁴ Ayatollah Sanei's official website:

<http://saanei.org/page.php?pg=showistifta&id=81&query=????&lang=fa> (accessed February 1, 2009).

¹¹⁵ Seestani, *Code of Practice*, #223.

¹¹⁶ Sistani, *al-Fiqh li al-Mughtaribin*, 181.223. This is the original Arabic version of the same ruling.

¹¹⁷ Fadlallah, *Islamic Lanterns*, 390.N24. This question appears also on Fadlallah's website in both English and Arabic. Jurisprudence of Immigration appears to be the only section of this website that exists in both languages. This is not to be confused with Minority Jurisprudence which appears to exist only in English.

¹¹⁸ This is Nicolas Sarkozy, currently the President of France. When he was Minister of the Interior (2002-2004; 2005-2007), he was widely known for his unapologetic anti-immigrant bias, actively pursuing the expulsion of illegal immigrants.

rejection of girls wearing the Islamic *ḥijāb* in the schools of these administrations, considering that whoever does not like the laws of these countries can leave. What are your comments on this?¹¹⁹

As *istiftā'* (2) is a particular example of the more general question of *istiftā'* (1), their respective *fatāwā* similarly express general and specific principles:

Fatwā (1): It is allowed provided that this is done wisely and flexibly and in a way that does not harm the Muslims' situation or reputation there, for it is obligatory on Muslims to preserve their habits, values and Islamic rulings wherever they are, if this does not lead to very intense difficulty (*ḥaraj shadeed*); also, it is obligatory on them to preserve Islam's and the Muslims' reputation in the eyes of others.¹²⁰

Fatwā (2): There are two kinds of law – laws on which order, security, and the public conditions of the country depend; in these, we must not do harm to the system or security of the country to which we migrate; because the visa we receive from the embassy of any foreign country is understood to have established a contract between us and these countries, it imposes on us the duty of its laws. And there are laws which defy (*tataḥaddā*) our legal responsibilities in what relates to our religious duties; these we refuse; because they deviate from our obligations, exactly as the French government did when it forbade Muslim girls from wearing the *ḥijāb* in schools, even though France, as it professes, is a country of freedoms and this matter relates to personal freedom. The imam of al-Azhar should have reminded the French minister of religion or the minister of the interior to not prevent the freedom of Muslims in what they believe or wear, in whatever does not harm the public order.¹²¹

These two *fatāwā* elucidate three essential principles. The first, as suggested in the earlier section, is that the legitimacy of the laws of any state, Muslim or non-Muslim, lies in their intended purpose of protecting the public order and welfare of the people. Any behaviour that harms the public good is therefore forbidden to Muslims.¹²² Other

¹¹⁹ Fadlallah, *Taḥaddiyāt al-Mahjar*, 199-200.

¹²⁰ Fadlallah, *Islamic Lanterns*, 390.N24.

¹²¹ Fadlallah, *Taḥaddiyāt al-Mahjar*, 199-200.

¹²² This is repeated in numerous *fatāwā* by Fadlallah. A further example is the following: *Istiftā'*: "There are laws in Western countries against killing specific animals in particular seasons because they are in danger of extinction. What is the view of Islam on this, knowing that all animals are freely at the service of people, as shown in the Qur'an." *Fatwā*: "The believer must not violate the order there, especially if it has

laws concern only private behaviour and do not affect the public good. The second principle is that Muslims are forbidden to neglect their Islamic duties. The third principle is that if the performance of Islamic duties runs into conflict with Western laws that concern private behaviour only, the latter are not absolutely binding on Muslims.

Fadlallah argues in *fatwā* (2) that the present question represents a case in which the third principle becomes operative—Muslims are to give precedence to upholding their Islamic duties. Wearing the *ḥijāb*, it seems, is one such duty.¹²³ As does Fadlallah, Sistani and al-Hakim permit the violation of Western laws where they conflict with fundamental Islamic duties, obligatory or recommended.¹²⁴

Fadlallah also argues the point on the logic of Western values, a practice that sets him apart from his more traditionally inclined colleagues. Since, in the Western legal system, religious observance is considered a private matter, the state should have no right infringing on the individual's rights of observance, as long as such does not harm the public order. Fadlallah portrays the *ḥijāb* as an instance of private religious practice that, within the French legal system, should be of no concern to the government. From an Islamic perspective, it can be overridden only by an additional principle, which is that the Muslim must not do anything that brings Islam and Muslims into disrepute. In summary, any course of action where Western laws and Islamic religious duties collide should be decided by careful calculation of harms and benefits resulting from the intersection of a

to do with the specific welfare of the people, as is the case in the present question." *Taḥaddiyāt al-Mahjar*, 210.

¹²³ For a more detailed discussion of *fatāwā* concerning the *ḥijāb*, see chapter seven.

¹²⁴ Al-Hakim allows that marriage be included in the category of non-negotiables, as seen in the following: *Istiftā'*: "Some of the laws that are applicable to the refugee might forbid something recommended or obligatory to Muslims, such as marriage. Is it permissible to violate these laws in these situations?" *Fatwā*: "Yes, it is permitted." What this actually means is difficult to say. Al-Hakim, *Murshid*, 273.

three-fold obligation to maintain: the public order; Islamic religious duties; and the reputation of Islam and Muslims.

CONCLUSION: GOOD CITIZENSHIP

In summary, with one major exception, the trend among the *mujtahids* examined here is to advise obedience to non-Muslim governments and their laws in what concerns public order, differences being mainly in degree and rationale. For the majority of *mujtahids* surveyed, disobedience to non-Muslim governments is permitted only when Western laws conflict with Muslims' observance of what are considered 'private' Islamic duties. In addition to matters of *'ibādāt*, *mujtahids* include issues such as the female dress code and marriage as 'private' matters, thus enlarging the space that is kept safe from outside influence. Interpreting these issues as 'private' also places them within the boundaries of the modern Western understanding of religion as a personal and private matter. Disregarding the law in these matters may then be legitimized as the exercise of freedom of religion. Making this distinction allows observing Islamic law in 'private' matters, even when prohibited by Western secular law, to be understood as "harmless" to the public order, and thus permissible.

With regard to respecting the persons and property of non-Muslims, Fadlallah and Sistani express their position in absolute terms and agree that this is a primary legal precept; it is not contingent on the consequences, good or bad, to Muslims and Islam, though this is valid as a secondary principle. Thus, for Sistani and Fadlallah, even when obeying the law involves indirect aid to Israel, such as in paying taxes, the rule that beneficiaries of a service are obliged to pay for it prevails.¹²⁵

¹²⁵ Fadlallah's *fatwā* in this regard is quoted above. Khamenei issues a *fatwā* on the same reasoning in response to a different (and peculiar) question. *Istiftā'*: "It is well known among the people of our region

Al-Hakim's position is more equivocal, as is Khui's. Al-Hakim sometimes permits unethical behaviour so long as there is no risk of negative repercussions on the reputation of Islam. This is coherent with his methodology. In contrast to Sistani and Fadlallah, he appears to countenance obedience to non-Muslim laws mainly as a secondary principle, i.e., subject to conditional factors, which might suggest a less stable confidence in the objective value of non-Muslim laws. It will be remembered that some of al-Hakim's permissions to violate the law are in the context of contract obligations, to which Sistani and Fadlallah consistently advise strict compliance. Two *fatāwā* from al-Khui also exhibit atypical support for disobeying Western laws:

Istiftā': "Is stealing from *ḥarbī kuffār* or deceiving them in dealings or something else permitted or is its prohibition absolute?"

Fatwā: "Yes, there is no prohibition with them in what you have mentioned, and God knows."¹²⁶

Istiftā': "If someone traveled to one of the *kāfir* countries and there spoiled the property of *kuffār*, is he liable?"

Fatwā: "According to the question there is no liability, and God knows."¹²⁷

Some difference of opinion is also evident when a particular action implicates Muslims in providing indirect support for Israel. While not lacking in support for *jihād* against the Zionist entity, Fadlallah seems to advocate only direct confrontation with the enemy, while ruling that the primary consideration with regard to Western governments

that one mustn't pay the fee for water and electricity to the non-Islamic government that tries to annoy its Muslim population, especially if it differentiates between followers of *ahl al-bayt* and others in their treatment of them. Is it permissible for us to forbid paying water and electricity bills to these governments?" *Fatwā*: "This is not permissible but everyone who benefits from the use of water and electricity from government sources is obliged to pay its fee to the government, even if it is not Islamic." *Ahkām al-Mughtaribīn*, 401-2.1227. Sistani's conformist stance may also be a consequence of his habitual dissociation from revolutionary political discourse, which may be said to afford him a legal objectivity not enjoyed to the same degree by other *mujtahids*.

¹²⁶ Ibid., 400.1221.

¹²⁷ Ibid, 401.1224.

rests on other grounds, particularly the obligation of faithfulness to legal agreements. On the other hand, optional activities, such as buying “from companies that help and support the Zionist entity” may be forbidden by others, as, for example, by Ayatollah Tabrizi.¹²⁸

Further, all of those surveyed allow exemption where demanded by specific conditions: the higher interests of Islam and Muslims, or a situation of actual war with the country in question—apart, one is led to understand, from cases that relate to contractual obligations.¹²⁹ For example, although Fadlallah considers lying wrong regardless of whom one lies to, he rules that lying in a non-Muslim context is permitted if “benefit to Islam” depends on it, and may be permitted in other situations if the resulting benefit “exceeds the harm of lying [...]. But, if the harm of lying is stronger than the benefit, then it is not permitted.”¹³⁰

This ruling agrees with the legal principle of *mafsadah* and *maslahah*, according to which laws should be crafted so as to maximize good (or benefit) and minimize evil (or harm).¹³¹ Muhaghegh-Damad says that the principle is “of great significance to the process of *ijtihad*” and that it means that in certain situations, a rule may change.¹³² Thus, while at first glance, Fadlallah’s *fatwā* that only if lying would cause harm to Islam—by sullyng its reputation and character—would it be forbidden might seem utilitarian and imply the promotion of a feeble ethical dependability, the logic behind it suggests consistency with principles of *ijtihad*, especially when one takes into account the virtual “personhood” of Islam as far as law is concerned.

¹²⁸ Ibid., 401.1226.

¹²⁹ With the exception of al-Hakim, as noted above.

¹³⁰ Fadlallah, *Tahaddiyāt al-Mahjar*, 201. The question asks, “Is it permissible to lie if it is for the benefit of Islam or for another reason?”

¹³¹ Muhaghegh-Damad, “Role of Time,” 214.

¹³² Ibid.

It is conceivable that the roots of this principle go back to the work of early Muslim ethicists who, when discussing “the etiquette of the self (*adab al-nafs*),” explained that it was “designed to protect the limbs *as well as religious symbols* from harm: Implicitly this invokes the obligation not to inflict harm intentionally (the ethical principle of nonmaleficence).”¹³³ Thus, Fadlallah’s ruling may also be said to be consistent with an established ethical principle. Further, while on the surface, the *fatwā* appears conflictual with the unconditional tone of the “thou shalt not lie” ethical ideal valued in much of Western culture, the notion that lying can sometimes bring about greater good than can telling the truth is hardly a strange idea to Western ears.

Some of Fadlallah’s *fatāwā* are noteworthy also in demonstrating openness to dialogue with the West, though often accompanied by allusions to the universal mission of Islam.¹³⁴ It is in enthusiastic support for this mission that migrants should find the motivation for fulfilling their religious obligations. Hence, while Fadlallah presents Islam as a religion of dialogue (*dīn al-ḥiwār*), it would be naïve to interpret this as an indication that he shares the fundamental philosophical premises of the contemporary mainstream dialogue movement. His approach to dialogue appears to be largely one of expedience and unapologetically linked to *da‘wah* in the West.

Applying our typology of identity models, we may conclude that *fatāwā* on obeying non-Muslim governments would tend to support a model of “selective engagement,” conditioned by Islamic legal norms. In other words, *fatāwā* articulate an ethical approach to government that legitimates integration on its own terms, by

¹³³ *Encyclopedia of Islam and the Modern World* s.v. “Ethics and Social Issues,” (New York: Macmillan Reference USA, 2004), 1:225. Emphasis added.

¹³⁴ The function of dialogue as a means of *da‘wah* is repeatedly articulated in Fadlallah’s writings. See, for example, *Islam: The Religion of Dialogue*.

appealing to the nobility of service to Islam, wherein piety functions as an instrument of community identity and propagation. That is, integration may be considered a legitimate goal so long as it remains within the boundaries of authoritative interpretation of Islamic legal norms. In contrast, in this field alone *mustaftīs* reflect an atypical model of resistance identity that appears to be inspired more by revolutionary than legal discourse. In consequence, *mustaftīs* and *mujtahids* once again find themselves to some degree at cross purposes in the task of shaping minority Shi'ite identity.

In the final analysis, we note that *fatāwā* in this domain generally exercise a restraining influence on *jihād*ist leaning impulses and encourage civil obedience.¹³⁵ Exceptions tend to be associated with two conditions: observance of what are interpreted as private religious duties, and an idea pervasive in the *fatwā* literature for the West, succinctly expressed in the words, “for the sake of Islam,” which, as we have noted, complies with the principle of harm and benefit.

¹³⁵ Shmuel Bar attests to the potential of the *marji'iyah*, the force of revolutionary ideology promulgated by Iranian clerics in the 1960s and 1970s notwithstanding, to curtail *jihād*ist tendencies that might otherwise result in a legitimation of violence similar to that found among many Sunni *muftīs*, particularly, but not at all exclusively he shows, the less qualified among them. See Bar, *Warrant for Terror*, 116.

CONCLUSION

TEXTS OF TENSION, SPACES OF EMPOWERMENT

A central task of this study has been to examine the practical validity of a methodological claim within Shi'ite Muslim legal discourse. The claim, of course, is that of dynamic *ijtihād*, or legal interpretation conscious of and sensitive to the social context to which it is addressed. Throughout the work, I have endeavoured to see how the tools of *ijtihād* are applied in a social context of major change and challenge. Through methods of discourse analysis, I have undertaken to uncover major assumptions and expectations of each of the two parties to the discourse: layperson and scholar, and to comment on the significance of the thought patterns embedded in their conversation. I have attempted, further, to explain what I found in terms of Muslim minority identity in the West. This chapter brings together the various threads of meaning discovered throughout this process.

It would have been difficult as well as imprudent, I think, to draw conclusions had my study confined itself to one or two areas of legal discourse and especially, had it been limited solely to either *'ibādāt* or *mu'āmalāt*. By extending the analysis across a broad spectrum of fields of normative practice, it has been possible to discern trends and patterns that point toward some plausible conclusions and implications.

MUSTAFTĪS AND MUJTAHIDS: DIALOGUE AND DISSONANCE

In the requesting of a *fatwā* and in the issuing of a response, there is a constant negotiation taking place between *mustaftīs* and *mujtahids*. One word that sums up the findings is tension. Between *mujtahids* and *mustaftīs* is a tension that exists, it appears, because the assumptions, goals, and expectations of each party tend to push in opposite

directions. *Mustaftīs* assume that principles of *ijtihād*, particularly hardship (*ḥaraj*) and time and place (*zamān wa-makān*), would be relevant, perhaps especially so, to the development of new approaches to Muslim life in the West. They appear to expect that situations that they themselves see as justifying the use of these principles would stimulate some modification of the ideals of Islamic legal rulings formulated in different, often Muslim majority, contexts. Given theoretical principles in *uṣūl al-fiqh* that premise the need for ongoing *ijtihād* to meet the reality of changing circumstances, these would appear to be reasonable expectations.

In terms of minority identity, *mustaftīs* exhibit an empirical understanding of minority adaptation that is largely coherent with successful immigrant adaptation models developed by sociologists. *Mustaftīs* regularly search out ways to contextualize rules, or implicitly suggest the application of principles intended to legitimize adaptive behaviours. Thus, they reflect a belief that innovative solutions to the moral and practical dilemmas they face as Muslims in secular societies, influenced to some degree by a Judeo-Christian social ethic, may be found in the legal resources of their tradition. In suggesting, for example, postponing prayer because of practical difficulties caused by employment, *mustaftīs* do not appeal to humanistic values of Western secularism, but to Islamic legal principles of *qaḍā'* and *ḥaraj*. In suggesting that the no hand-shake rule complicates their lives to a degree that threatens their ability to provide for themselves and their families, their objections are likewise framed in terms of Islamic values of providing for one's family, respect for others, and with concern for the honour of Islam. Offending non-Muslims by not shaking hands with them, for example, it is believed, might reflect badly on Muslims and Islam.

Mustaftīs thus exhibit an awareness of sociological complexities and tensions between strict and uncompromising legal observance on the one hand and successful adaptation on the other. They display discernment around legal matters that seem to them unnecessary burdens in the Western context and that compete with what they see as more urgent concerns, such as education and employment opportunities. This recalls GhaneiBassiri's observation that in balancing personal needs and goals with the requirements of religion, Muslims in California tended to put more emphasis on the former. Like the young Muslims of California, the *mustaftīs* of this study may be said to reflect worldview discourses commensurate with their identity as laypersons with very practical objectives. It is not that *mustaftīs* wish to disregard religious observance, but rather that they understand the law to be largely in their favour and supportive of the project of cultural adaptation.

The *mustaftīs'* expectations, however, are often not realized, as the rigorous *ijtihād* that they anticipate appears to be considerably constrained by other factors and conflicting interests. The legal decisions offered by *mujtahids* indicate that the interests of the non-migrant scholars do not lie in facilitating the construction of a blended, localized, or contextualized identity, but in protecting the faithful from the pitfalls of straying from the straight path of the law as developed within Islamic social contexts. As discussed in chapters one and three, given the logic of *hijrah*, classically understood as fundamental to the building of a specifically Islamic society, contemporary Islamic legal discourse on migration must first provide the justificatory foundation that would permit Muslims to live in non-Muslim territory. The specific rules of behaviour that *mujtahids* derive must remain consistent with this foundation. *Mujtahids* are thus constrained by

philosophical presuppositions not always shared by *mustaftīs*, who tend to see their place in the West in more practical terms.

Further, from the perspective of *mujtahids*, living in Islamic society under the rule of Islamic law is the ideal; residence in non-Muslim society is acceptable under strictly regulated conditions only. Why, then, would Muslims choose this less preferred option? Are contemporary migrants implicitly suggesting something negative about Islamic society by migrating to the West? Perhaps the dissonance often revealed between *mustaftīs* and *mujtahids* may be partly understood as an expression of an underlying discourse related to tensions around this question. *Mujtahids* appear anxious to emphasize the negative characteristics of non-Muslim society in order to support the philosophical presuppositions of their position. It is here that legal discourse takes on a rather polemical dimension. *Mujtahids* tend, in their discourse, to construct a hostile external world that is sometimes Christian, sometimes atheist, but generally threatening to Muslim identity. They appear on the whole to be beholden to an ideological frame of reference given to sharp differentiation of the non-Muslim “other” and non-Islamic society.

For *mujtahids*, then, the beauty and efficacy of the law is in its ability to protect Muslim identity by containing it. Safety and security, as said earlier, are found deep inside the boundaries of the law, as they are in the interior space of *dār al-islām* itself. Thus, rather than exploit the *fatwā*'s potential to initiate legal reform, as Wa'el Hallaq argues has occurred in the past, not only do legal scholars seem anxious to maintain the status quo and to inhibit the generation of negotiated or adaptive solutions to problems of Muslim life in the West, but their decisions actually appear to be directed towards intensifying normative values against perceived threats and dangers. The *mujtahids*'

emphasis is on how the migrant's largely uncompromising adherence might support and advance the moral and practical triumph of Islam over Western social values. They tend to see migration largely as a means of *da'wah* given to upholding the honour of Islam.

Applying the typology of minority identity models to this conversation, we find two quite different models. While *mujtahids* are strongly inclined towards the resistance model, apparently because it strengthens the honour of Islam, *mustaftīs*, owing to their desire to live productive and uncomplicated lives in the West, appear to favour the model of selective engagement. Thus, while *mujtahids* and *mustaftīs* are engaged in the common project of determining what kind of Muslims they will be in the West and how the principles and results of legal interpretation might respond to that question, their journey takes them in different directions, largely because their primary objectives and the presuppositions with which they begin also differ. *Mujtahids* appear to be working with a set of presuppositions that encourages the construction of religious idealism and discourages contextualization. Al-Hakim's recurring message of the Muslim migrant's duty to uphold the honour of Islam by refusing to allow social context to alter, and thus weaken, fulfillment of religious obligations reflects his confidence both in the possibilities of an idealized practice and its value in rendering service to the cause of Islam in the West.

There is, however, one field of issues where *mustaftīs* and *mujtahids* take reverse positions on the model of minority identity. With regard to obeying non-Muslim governments, *mustaftīs* tend towards an ideology of entitlement and appear to be influenced by Islamic or third-world revolutionary discourse. They exhibit the notion that identification with Muslim countries on the political level entails some form of moral

obligation to not collaborate with or otherwise support political systems of the West, at times reflecting the classical paradigm of *hijrah* and *jihād*. *Mujtahids*, on the other hand, stress the legal and moral, even pietistic, value of contract obligations. While supporting Islamic triumphalism over Western values, they do so through a paradigm that situates *da'wah* (call to Islam) rather than *jihād*, as in the classical formulation, as the other half and primary objective of *hijrah*. According to this paradigm Muslims in the West are encouraged to understand themselves as the vanguard of a wide-reaching Islamization project.

DOING *IJTIHĀD* IN CULTURAL CONTEXT: THE FEAR FACTOR

It is true that some *mujtahids* are active in promoting a more progressive discourse when rendering legal decisions not directly associated with Muslims in the West. It is well known that Fadlallah has issued some radically progressive *fatāwā*, some of which have been mentioned in this work, that are not directly connected to questions about living in non-Muslim social contexts of the West.¹ On women's full participation in politics, for example, Fadlallah has stated that the Qur'an places men and women on equal footing of mutual social responsibility, that they should "endeavour to be each others' guides, protectors, helpers, lovers, and to be to each other all that *wilāyah* is meant to be."² Fadlallah also understands women to have the same intellectual and rational capacity as men,³ implying that the claim of alleged diminished mental capacity may not be used to justify female exclusion from public life.

¹ See chapter seven.

² Aziz, 209, quoting Fadlallah, "Anaween fi al-'Amal al-Islāmī," a lecture to *hawzah* students in Beirut, Nov. 26, 1995.

³ *Ibid.*

On matters of concern to Muslims in the West, Fadlallah is also at times more progressive than others. Yet he still retains a strongly protectionist approach, suggesting sharply separated spheres of Muslim and non-Muslim social engagement. He apparently prefers, for example, that Muslims avoid non-Islamic educational institutions or any situation of potential influence from non-Muslims. This study, then, calls into question the validity of assuming that an approach used in the Muslim social context would readily carry over to a Western environment or that progressive views in one field (gender, for example) would necessarily imply the same in other traditionally conservative areas (specifically, relations between Muslims and non-Muslims). The reasons for this are nowhere stated explicitly, but in analyzing the discursive language of *fatāwā*, it appears that fear of assimilation or influence, in general, fear of Muslims in the West losing their religious commitment, plays a prominent role in the reasoning behind restrictive legal opinions.

I would argue, then, that the data indicates the importance of place and context in shaping approaches to *ijtihād*. That is, opinions sometimes become *more* conservative in a Western context, where Islam is felt to be under a much greater threat than in Muslim-majority contexts. Likewise, it seems that *mujtahids* are less willing to take risks in *ijtihād* for minority contexts than when dealing with contemporary issues in the Muslim context. It is not necessarily that the legal basis for change is not present, but that choices about how, when, and where to apply these principles are influenced by factors external to the authoritative texts themselves.

Thus, Western social context does not appear to be operative in pushing *ijtihād* towards creative solutions to legal problems encountered by *mustaftīs*, who seem to have

some awareness of principles intended to heighten *ijtihād*'s contextually dynamic possibilities. On the contrary, the Western context appears to heighten *mujtahids*' hesitancy to use these principles in facilitating adaptive solutions to problems in the West. Rarely are the conditions for the use of principles duly noted by *mustaftīs* admitted by *mujtahids* to be present. Consequently, while the instruments of legal interpretation—principles geared towards balancing human needs and divine commands—often provide a sense of optimism for *mustaftīs*, the set of ideas to which *mujtahids* are beholden, which by and large are apologetic and polemical as they are juristic, do not answer to this optimism.

Mujtahids, then, appear to form their opinions in response to Western society as constructed within their own worldview, considerably shaped by a narrative of mutual incongruity and resistance. In understanding non-Islamic society as a dangerous force that threatens to unravel Muslim identity, *mujtahids* are compelled to construct walls of protection around spaces of safety and to ascribe to them a power of their own. This power is seen in that when confronted by the qualities of Islamic legal practice, it is claimed, non-Muslims in the West will surely recognize and honour Islam for its moral superiority. The narrative framework within which interpretation of the law takes place thus remains rooted in a post-colonial discourse of liberation from western dominance.

One major exception where change is made in favour of legal opinions that facilitate integration is that of the purity status of non-Muslims. The majority of *mujtahids* appear to base their argument for the purity of scriptuary non-Muslims by appealing directly to the scriptural sources that, in their opinions, suggest merely ritual impurity; it is not, therefore, necessary to avoid non-Muslims since ritual impurity is not

contagious. Ruling scriptuaries intrinsically pure has significant consequences for Muslims in the West. In the first place, *mustaftīs* can be confident, as mentioned in chapter four, that they are not surrounded by a constant danger of ritual preclusion. This eliminates a significant barrier to performing ritual worship, which, as made clear in chapters three and five, functions as the essential foundation of Muslim identity in the West. The purity of non-Muslims therefore also helps to support the *mujtahid*'s response to what it means to be Muslim in the West, faithfully upholding the honour of Islam by fulfilling ritual obligations without major impediments. Thus, ruling non-Muslims as pure might be understood to be a practical necessity for a community otherwise surrounded by the potential of ritual danger.

At the same time, however, *mujtahids* also tend to have an optimistic perception of religious liberty and tolerance in the West, to which they sometimes appeal when attempting to defend their case against *mustaftīs* who would plead hardship and difficulty as impediments to their full compliance with a strict interpretation of the law. From the viewpoint of *mujtahids*, far from impeding Islamic legal observance, Western cultural and political systems give Muslims the opportunity to enhance and expand the Islamic character of Western space.

WORDS, SYMBOLS, PRACTICES AND THE MAKING OF MUSLIM SPACE

As observed in chapter three, the ideal and most honourable practice for Muslims after the establishment of Medinah under the Prophet's authority was to make the *hijrah* there, to live in Muslim territory. The central element in determining the legality of remaining in *dār al-ḥarb* was freedom to practice Islam, strictly defined as ritual practices such as *ṣalāt*. This two-fold principle continues to determine the law's position

regarding contemporary migration to the West. Unless one has compelling reasons, it is best to remain in *dār al-islām*, as do the idealized sources of emulation. Migration is permissible if the would-be migrant is free to perform obligatory worship in the precise manner stipulated by the law. However, in addition to ritual worship, the fundamental elements of Islamic practice that legitimize contemporary migration seem to encompass a larger field of conduct than was prevalent in the early period, including behavioural norms belonging to the field of *mu'āmalāt*. Wearing *ḥijāb*, not shaving one's beard, avoiding dealings with alcohol, not shaking hands with the opposite sex, and generally bearing witness to Islamic morality, in the majority of cases in this discourse become the essential criteria for migration to the West. When not viewed as absolutely essential, as in the minority opinion, they remain highly significant symbolic elements of Muslim identity.

The reasons for this are at this point relatively speculative. There are indications in the discourse to suggest that the increased number of issues critical to a manifest Muslim identity in non-Muslim society (or simply to affirming one's obedience and faithfulness to God in such places for one's own sake) points to a set of inter-related socio-political factors. There is, as discussed in chapter one, the very modern and contemporary pre-occupation with identity and associated freedoms for individuals and communities to pursue assertive identities. As noted above, for all its faults in the eyes of *mujtahids*, Western societies are seen to be places of religious freedom where such identities need little censoring.⁴ Yvonne Haddad's theory that the American experience

⁴ This has been observed by other scholars researching Muslim identity in the West. Yvonne Haddad writes: "Muslims as a minority find that the guarantee of freedom of religion provides opportunities for new experiments and developments in ideas, institution building, and propagation, unequaled in the

itself provides not only freedom but also an unusually high expectation that people of non-white and non-Christian heritage display their “otherness,” thereby compelling Muslims towards an assertive identity, may have some credibility here.

There is also the historical background of power relations between Christendom and the Muslim world, and the ongoing lack of Muslim confidence in American foreign policy, setting the stage, as Haddad and others have noted, for a dynamic of reciprocal contestation. However, if the West in general appears to be maintaining its position of dominance on the political scene, the *mujtahids* of this study would suggest that it is losing on the moral level. It is plausible that the pressure on migrant Muslims to showcase the perceived moral superiority of Islam, as discussed above in the context of creating spaces of safety, may also account for treating matters of *mu‘āmalāt* with the same rigorous standards of compliance. Both *‘ibādāt* and *mu‘āmalāt* contribute to the goal, not just of maintaining one’s Islam for one’s self (though Sistani seems to confine himself largely to this matter), but to the larger project of expanding Islamic society, as seen primarily in *fatāwā* from Fadlallah and al-Hakim.

Thus, we can say that for the *mujtahids* in general, the social context of *al-fiqh lī al-mughtaribīn* is hardly silent or irrelevant. Assumptions about power and place latent in the narrative discourse give voice to an identity shaped by resistance to perceived relations between Islam and the West. Out of this dynamic a conception and construction of Muslim space emerges. We noted in the introduction the variety of ways, in addition to the conventional territorial conception, by which space may be defined. In particular, we took note of Gupta and Ferguson’s challenge to assumed isomorphic definitions of

countries from which they came.” Haddad, “Dynamics of Islamic identity,” 24. If this is the case for Sunni Muslims, it is even more so for Shi’ites outside of Iran and, more recently, Lebanon.

territory and culture and the value of symbols, rather than territory, to the task of defining cultural space. The notion of *dār al-islām* as space governed by Islamic law is particularly amenable to being constructed and bounded by “normatively enjoined” words, symbols and practices, and this is precisely what the *mujtahids* do.

As several contributions to a study of Islam in North America and Europe centered on the concept of sacred space suggest, the new *dār al-islām* need not be territorial or physical; it may also be psychological and personal, created by “a world of ritual, relationships, and symbols” carried by Muslims wherever they go. In her introductory essay to that study,⁵ Barbara Metcalf suggests that two key features are needed to constitute Muslim space: “the preeminence of sacred words and normatively enjoined practices.”⁶ A young Toronto Muslim put this individualized praxis-centered definition of *dār al-islām* most succinctly when he claimed that “where he was, was *daru’l-islam* [sic].”⁷

Haddad suggests that geographic space in the West, while not strictly Muslim, might still be considered “home.”⁸ I would argue, however, that from the *fatwā*’s point of view, the otherwise hostile space of Western society becomes “home” only as that space is Islamized through the transference of the symbols of Muslim identity. In the effort to protect against the undesirable condition of losing one’s faith because of migration, the *mujtahids* appear anxious to reinforce, if not the physical qualities of *dār al-islām*, its conceptual, ethical, and cultural boundaries. In maintaining a conservative approach to

⁵ Barbara Metcalf, “Introduction: Sacred Words, Sanctioned Practice, New Communities,” *Making Muslim Space in North America and Europe* (Berkeley: University of California Press, 1996), 3.

⁶ *Ibid.*, 5.

⁷ *Ibid.*, 11.

⁸ In Haddad, “At Home in the Hijrah: South Asian Muslims in the United States,” 239-258.

normative practice as a vital symbol of Muslim identity, the *fatwā* literature seems appreciably directed towards the Islamization of space in the West.

In some sense, then, we can say that what migrates to the West is not only people, not just a community, but *dār al-islām* itself. If, as noted earlier, *dār al-islām* is defined as the space within which it is safe to lead an ethical life in obedience to *sharīah*, I suggest that in the context of non-Muslim society, individual and collective normative behaviour becomes that space of safety and immunity from the influence of all that, culturally speaking, is not Islam and therefore, in the eyes of jurists, threatening. We see, in other words, the construction of sacred space that moves beyond geography to include a transnational, ideological space bordered by particular forms of behaviour.

THE FUTURE OF THE *MARJĪ'ĪYAH* IN THE WEST

The tension between *mustaftīs* and *mujtahids* described above puts the *marjī'īyah* in a precarious situation where the *fiqh* of minorities (*fiqh al-aqalliyāt*) is concerned. As the Western born Shi'ite population increases and exposure to alternative sources of religious guidance becomes more common, it is conceivable that the gap between *mujtahids* and *mustaftīs* currently evident may widen further. Scholars such as Abdulaziz Sachedina and Liyakatali Takim, who speak from within the migrant community, have identified an inadequate clerical training method as a key root of the problem. Training takes place with little or no experience of life in the West and or even academic training in Western cultural values.

If the *marjī'īyah* is going to maintain its relevance for Shi'ites in the west, it will likely require the emergence of one or two exceptionally intrepid reformers amongst the clerical class who can provide more adaptive solutions solidly based on principles of

ijtihād. A model for progressive legal interpretation may even be found within the *marji'īyah* itself, which does show some progressive thought in treating contemporary issues within the Muslim social context. Applying this work to the non-Muslim context would require shedding a narrative framework of the West in opposition to Islam and *vice versa*.

Alternatively, if one of Sistani's North American *wakīls*, Seyed Mahdi Shahrestani, is any indication, perhaps the hope of reinvigorating the *marji'īyah* for Shi'ites in the West lies in strengthening and gradually expanding the position of the *wakīls* and their role as intermediaries. Currently, however, *wakīls* are relatively few in number and do not have the authority to issue *fatāwā* themselves. This makes their current role as cultural mediators of great significance. A full study of the selection, training, and role of *wakīls* in North America and Europe has yet to be undertaken. This study suggests it as a useful undertaking.

If the *marji'īyah* fails to take any of these, or perhaps other, courses of action, the tone of questions coming from many *mustafīīs* indicates that they may increasingly choose to opt out of the system altogether and find their own sources of guidance. Thus, the fear of migrant Muslims losing their religious identity, which seems to be behind so much of the restrictive *fatāwā*, may, as a worst case scenario, elicit what I call the "Marmulak effect." Although the Marmulak escaped from the prison of an unyielding and uninspiring interpretation of Islam to shape an extremely compelling and humane one, more consistent with the spirit of the textual sources, as he and the majority of ordinary people saw it, he was in the end apprehended by the governing authorities and returned to his place of silence. Yet in the end, his warning echoed through the corridors

of austerity: “You can’t force people into heaven, dear brother; you will push so hard they might fall off the other side into hell.”⁹ Though a rather dramatic statement for the present context, one could say that the *mujtahids*’ efforts to maintain faithful adherence to entrenched symbols of identity through unimaginative and largely unyielding methods may turn out to be counter-productive to the project of strengthening Muslim identity in the West.

⁹ “*Ākhe, behesht keh zūrakī nemīsheh ‘azīzeh barādar; ānqadr feshār mīyārī keh az ūn var-e jahennam mīzaneh bīrūn.*” Marmulak, 2004.

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GLOSSARY OF TERMS

<i>'ahd</i>	contract
<i>ahl al-baghī</i>	those who revolt against a legitimate Imam
<i>ahl al-bayt</i>	the family (house) of the Prophet
<i>ahl al-kitāb</i>	People of the Book (Jews, Christians, Zoroastrians)
<i>ahl al-dhimmah</i>	Protected peoples (People of the Covenant)
<i>al-aḥwaṭ</i>	the most precautionary
<i>Akhhbārī</i>	Traditionist branch of Shi'ite <i>fiqh</i>
<i>a'lamīyah</i>	supreme knowledge
<i>'ālim</i> (pl. <i>'ulamā'</i>)	religious scholar
<i>al-amr bi al-ma'rūf wa al-nahī 'an al-munkar</i>	commanding good and forbidding evil
<i>'aql</i>	(enlightened) reason
<i>aṣālat al-ṭahārah</i>	presuppositional principle of purity
<i>bātil</i>	futile
<i>bilād al-kufr</i>	land of unbelief
<i>dār al-'ahd</i>	Abode of Contract
<i>dār al-ḥarb</i>	Abode of War
<i>dār al-hijrah</i>	Abode of Migration
<i>dār al-iftā'</i>	<i>fatwā</i> council
<i>dār al-islām</i>	Abode of Islam
<i>dār al-kufr</i>	Abode of Unbelief
<i>dār al-ṣulḥ</i>	Abode of Peace
<i>ḍarūrah/ī</i>	necessity/necessary
<i>da'wah</i>	calling to Islam
<i>dawlah</i>	a formalized social order
<i>faqīh (fuqahā')</i>	legal scholar
<i>fard 'ayn</i>	individual legal duty
<i>fard kifāyah</i>	duty sufficed by a portion of the community
<i>fatwā</i> (pl. <i>fatāwā</i>)	learned legal opinion based on original <i>ijtihād</i>
<i>fiqh</i>	Islamic jurisprudence (lit. understanding)
<i>fiqh al-aqallīyāt</i>	jurisprudence of minorities
<i>fiqh al-mughtaribīn</i>	jurisprudence of foreigners (those away from home)
<i>fiṭrah</i>	natural human condition
<i>ghayr mudhakkā</i>	not slaughtered Islamically (not pure)
<i>ghulāt</i>	extremists
<i>ghusl</i>	full bath of purification
<i>ḥadath</i>	minor pollution, transient effect
<i>ḥadīth</i> (pl. <i>aḥādīth</i>)	saying of the Prophet

<i>hajj</i>	pilgrimage to holy sites of Prophet
<i>halāl</i>	permitted
<i>haqq</i> (pl. <i>ḥuqūq</i>)	right
<i>haraj</i>	hardship (in legal sense)
<i>harām</i>	forbidden
<i>hawzah</i>	Islamic seminary
<i>ḥijāb</i>	female head covering
<i>hijrah</i>	migration
<i>ḥikmah</i>	wisdom
<i>ḥukm</i> (pl. <i>aḥkām</i>)	ruling
<i>ḥukm awwalī</i>	primary ruling
<i>i‘ānat al-ḥarām</i> or <i>i‘ānat al-sharr</i>	aiding the performance of what is forbidden or evil
<i>‘ibādāh</i> (pl. <i>‘ibādāt</i>)	worship, matters pertaining to one’s relation to God
<i>ibāḥah</i>	permission, authorization
<i>iftā’</i>	practical legal interpretation
<i>iḥrām</i>	state of ritual purity or taboo
<i>iḥtimāl</i>	probability
<i>iḥtiyāt</i>	precaution
<i>al-iḥtiyāt al-istiḥbābī</i>	recommended precaution
<i>iḥtiyāt mustaḥabb</i>	recommended precaution
<i>iḥtiyāt wājib</i>	obligatory precaution
<i>ijmā‘</i>	consensus
<i>ijtihād</i>	legal reasoning in search of an opinion
<i>ijtihād muṭlaq</i>	comprehensive legal reasoning
<i>ijtināb</i>	avoidance
<i>‘illah</i>	effective cause (of a legal opinion)
<i>imām</i>	leader of a mosque
<i>Imām</i>	one of twelve divinely designated Shi’ite leaders
<i>īmān</i>	faith
<i>istiftā’</i> (pl. <i>istiftā’āt</i>)	question in search of a <i>fatwā</i>
<i>istiḥlāl</i>	transformation
<i>istiṣlāḥ</i>	discerning the public interest
<i>jāhili</i>	ignorant (of true religion)
<i>jā’iz</i>	permitted
<i>janābah/junub</i>	preclusion
<i>jārī</i>	running (water)
<i>jihād</i>	exertion (especially in the way of God)
<i>jizyah</i>	tribute, head tax
<i>kāfir</i> (pl. <i>kuffār</i>)	unbeliever
<i>khabīth</i>	(morally) filthy, evil, bad
<i>khawf</i>	fear
<i>khubth</i>	(moral) filth, wickedness

<i>khums</i>	one fifth belonging to the Imam or his representative
<i>kitābī</i>	scriptuary
<i>koḥl</i>	a dark substance for colouring the eyelids
<i>kufr</i>	unbelief and its manifestations, unthankfulness
<i>lā ba's</i>	it's alright
<i>lahm al-khinzīr</i>	pork meat
<i>madhhab</i> (pl. <i>madhāhib</i>)	legal school
<i>mafsadah wa maṣlahah</i>	harm and benefit
<i>makrūh</i>	detested
<i>marjī'</i> (pl. <i>marāji'</i>)	source (of emulation)
<i>marjī'iyah</i>	institution of legal guidance
<i>marjī' al-taqlīd</i>	source of emulation
<i>al-marjī' al-'uzmā</i>	Grand source of emulation
<i>marjūh</i>	preferred
<i>mas'alah</i> (pl. <i>masā'il</i>)	question, matter, issue
<i>maṣdar</i>	root, verbal noun
<i>maṣlahah</i>	common good, benefit
<i>ma'sūm</i>	divinely protected from sin, evil
<i>al-mawqif al-Islāmī</i>	the Islamic position
<i>mayta</i>	carrion
<i>mazlūm</i> (pl. <i>-ūn/īn</i>)	oppressed
<i>mu'āmalāt</i>	matters pertaining to social relations
<i>mubāḥ</i>	legally indifferent or permitted
<i>mudhakkā</i>	pure, slaughtered Islamically
<i>muftī</i>	Sunni legal scholar qualified to issue <i>fatwās</i>
<i>muhājir</i> (pl. <i>-ūn/īn</i>)	migrant
<i>mujtahid</i>	one qualified to exercise <i>ijtihād</i>
<i>mukallaf</i> (pl. <i>-ūn/īn</i>)	legally capable; obliged to observe Islamic law
<i>al-muqaddimat al-lāzīm</i>	an act that is permitted because it is inseparable from a permitted act
<i>muqallid</i> (pl. <i>-ūn/īn</i>)	one under <i>taqlīd</i> of a <i>mujtahid</i>
<i>mushrik</i> (pl. <i>-ūn/īn</i>)	one who associates others with God
<i>muṭlaq</i>	absolute, comprehensive
<i>mustafī</i>	one who requests a <i>fatwā</i>
<i>mustahabb</i>	recommended
<i>mustahdathāt</i>	new, modern issues
<i>najas</i>	impurity, filth
<i>najāsah</i> (pl. <i>-āt</i>)	ritual impurity, filth
<i>najāsah 'aradīyah</i>	circumstantial impurity
<i>najāsah fiqhīyah</i>	legal impurity
<i>najāsah 'aynīyah</i>	intrinsic impurity
<i>najis</i>	impure, unclean

<i>qadā'</i>	owing
<i>qaṣr</i>	shortness, brevity
<i>qaṭ'</i>	certainty
<i>qiblah</i>	orientation for prayer
<i>qiyās</i>	analogy
<i>ra'y</i>	speculative opinion
<i>rijs</i>	filth
<i>risālah</i>	legal treatise
<i>riwāyah</i>	Shi'ite tradition
<i>rukṅ</i> (pl. <i>arkān</i>)	pillar (of religion)
<i>sadd al-dharā'ī'</i>	preventing access to a wrongful action
<i>ṣalāt</i>	Islamic ritual worship
<i>ṣawm</i>	fast
<i>sha'ā'ir al-Islām/al-dīn</i>	rituals or visible signs of Islam
<i>shakk</i>	doubt
<i>sharī'ah</i>	Islamic law
<i>shī'ah</i>	party (of 'Ali)
<i>shi'ār</i>	symbol
<i>shirk</i>	associating another with God
<i>ṣiyām</i>	fasting
<i>su'r</i>	backwash, spittle
<i>al-ta'arrub ba'd al-hijrah</i>	to assimilate after migration (although, cf. 127 n.75)
<i>tab'īd</i>	composite legal rulings
<i>ṭāghūt / ṭāghūtī</i> (adj.)	Qur'an: idol, false deity; also used in revolutionary discourse for a social despot
<i>ṭahārah</i>	ritual purity
<i>tāhir</i>	pure
<i>taḥqīq</i>	investigation
<i>takfīr</i>	to pronounce someone a <i>kāfir</i> (unbeliever)
<i>taqīyah</i>	religious dissimulation
<i>taqlīd</i>	emulation
<i>taqrīb</i>	rapprochement
<i>al-tashabbuh bi al-kuffār</i>	resembling unbelievers
<i>taḥhīr</i>	purification
<i>tawḥīd</i>	divine unity an unicity (lit. making one)
<i>tawhīn</i>	weakening through dishonour
<i>ṭayyib</i>	good, pleasant
<i>al-tazāḥum</i>	balance, competition
<i>tazkīyah</i>	legitimate slaughter
<i>ummah</i>	Muslim community
<i>'unwān awwalī</i>	a fundamental and unconditional legal principle
<i>'urf</i>	social custom

'usr wa ḥaraj	ease and hardship
uṣūl al-fīqh	principles of jurisprudence
Uṣūlī	Rationalist branch of Shi'ite <i>fiqh</i>
wahm	erroneous conjecture
wājib	obligatory
wājib kifā'i	duty sufficed by a portion of the community
wājib shar'i	religious legal obligation
wakīl	representative
walāyah	guardianship
walāyat al-faqīh	guardianship of the jurist
wuḍū'	ritual ablutions
yaqīn	certainty
zakāt	obligatory religious tax
zamān wa-makān	time and place
ẓann	valid conjecture
ẓulm	oppression