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### American Law: Integrating Ultra-Traditional Muslims Through Accommodations

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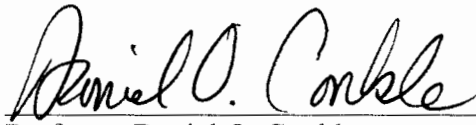
INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

AMERICAN LAW: INTEGRATING ULTRA-TRADITIONAL  
MUSLIMS THROUGH ACCOMMODATIONS

MOHAMED A. ELSANOUSI

Submitted to the Faculty of the University Graduate School  
in partial fulfillment of the requirements for the degree  
Doctor of Juridical Science (S.J.D)  
in the School of Law  
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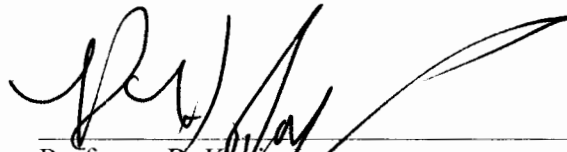
Accepted by the Law Faculty, Indiana University Maurer School of Law, in partial Fulfillment of the requirements for the degree of Doctor of Juridical Science (S.J.D)



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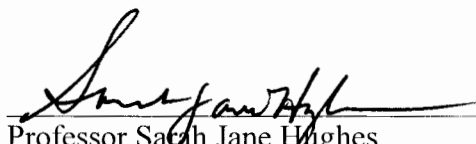
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May 10, 2010

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## ABSTRACT

Appropriate legal accommodations for religious minorities can support their integration into American society. Historically, the teachings and practices of many religious communities that have otherwise conflicted with state or federal law have been successfully preserved through legal accommodations. A brief comparison with the experiences of such groups as the Hasidic Jewish community will provide a context for religiously based legal accommodations for various religious communities within the United States.

This dissertation examines the particular situation of a Tablighi Jamaat community, a Muslim missionary movement, as a means to explore how legal accommodations facilitate the successful, stable integration of such groups. This community, in Arabi, Louisiana, adheres to a strict interpretation of Islamic law prohibiting them from purchasing casualty and property commercial insurance, and, as a result, they suffered extraordinary losses in the aftermath of Hurricane Katrina. This community's situation illustrates a much larger need for religious accommodations in state insurance regulations.

The focus of this dissertation will be on the unique perspectives of the Tablighi Jamaat community and how their experiences reflect the necessity and desirability of religious accommodations in general. In light of the unfortunate outcomes of the Tablighi community's decision to opt-out of insurance coverage, this dissertation recommends that changes be made to state insurance regulations. Specifically, for the Tablighi community, Shari'ah-compliant policies should be developed. State insurance commissioners may find it both necessary and desirable to provide greater legal accommodations for religiously based mutual insurance companies to address concerns about commercial insurance that groups like the Tablighis may otherwise have. These recommendations will be further supported by providing a statutory and constitutional basis for such religious-based accommodations.

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## INTRODUCTION

The immigrant religious community's experience in America is a topic rich in meaning. For me, it is personal, since my understanding has been informed both by my own story and my work for several years now with American Muslims, mostly immigrants, who are frequent in their observance. America has a complex and conflicted relationship with immigrant religious groups. It is a country that is full of promise, but wary of newcomers. America's artistic history is strongly influenced by its diverse religious communities. The experiences of majority religious communities, such as Protestant Christians, as well as minority communities, such as the Amish and the Hassidic Jews, have been prominently displayed in literature, not only defining for other Americans the story of these communities, but also revealing aspects of the American character that accommodate special needs based on religious practices.

Until now, the story and experience of the American Muslim community in general and one group, the Tablighi Jamaat (a specific religious minority within the American Muslim community dedicated to a life of evangelism within the Muslim community), in particular have been largely untold and therefore, are less familiar to common Americans.

The Tablighi Jamaat ("TJ") movement was founded in the 1920s in Northern India and for a short period of time spread all over the world in virtually every country where there is a Muslim presence. Maulana Muhammad Ilyas Kandahlwi, the founder of the TJ movement, believed that Muslims had strayed far from the fundamental teachings of Islam and therefore needed to return to strict adherence to Shari'ah and constant

engagement with Tabligh, through which Muslims can strengthen their own faith as well as help others to do so. He believed that this is the only mechanism by which Muslims can attain the pleasure of God in this worldly life and the hereafter. To achieve this objective, Ilyas crafted a clear vision for the TJ, a vision that focuses on strict observance of the commandments of Islam in their personal lives and in their dealings with others. He consistently instructed his followers both to not engage in politics and to stay away from controversial issues; instead, he concentrated on spiritual development as the only way that would make them committed Muslims.

In general, the American Muslim community has seen remarkable growth, especially over the past four decades since the liberalization of United States immigration laws in 1965 for non-European immigrants. A large number of Muslims from different parts of Asia and Africa, from diverse backgrounds with regards to sects, school of thought, and Sufi orders, thus came to complement the diversity that already existed among Muslims in America. Consequently, the American Muslim community institutions also witnessed tremendous development, from one congregation in the mid-1920s to more than 2,000 institutions of all types at the end of the twentieth century.<sup>1</sup>

This tremendous growth in a short period suggests a growing diversity within American Muslims that resulted in the emergence of a group like the TJ, which seeks special accommodations to fulfill its religious exercise needs. The need for legal accommodations to the TJ community evolved out of the devastating consequences of Hurricane Katrina and the extraordinary damage endured by the TJ of Arabi, Louisiana,

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<sup>1</sup> IHSAN BAGBY, PAUL M. PERL & BRYAN T. FROCHLE, *THE MOSQUE IN AMERICA: A NATIONAL PORTRAIT* 23(2001), available at [http://www.cair.com/Portals/0/pdf/The\\_Mosque\\_in\\_America\\_A\\_National\\_Portrait.pdf](http://www.cair.com/Portals/0/pdf/The_Mosque_in_America_A_National_Portrait.pdf) (last visited Sept. 5, 2010).

and the challenge they faced to recover because of their religious reasoning on the prohibition of purchasing casualty and property insurance.

The TJ of Arabi purchase liability insurance from conventional insurance providers in compliance with local insurance laws in order to operate their businesses. Some of these conventional insurance providers also provide property and casualty insurance. However, the TJ of Arabi object to the ways in which conventional insurance companies are structured, particularly regarding the companies' investments in Islamically prohibited activities such as alcohol and gambling, as well as the possibility that they might also put the money in the bank and earn interest, which is also not permitted according to Islamic law. These mechanisms of conventional insurance companies are religiously objectionable to the TJ, who, as a result, do not have property and casualty insurance. Therefore, there is a need for religiously based accommodations in state insurance regulations.

Despite the fact that the TJ view American custom and culture as discordant with their interpretation of Islam and practice, they represent a small fraction of the majority of the American Muslim community, who have assumed themselves to be participating in mainstream America and see no conflicts between mainstream American customs and their interpretation of Islam. This Muslim majority considers most of the core American legal structures to conform with basic Islamic teachings. The fundamental notions enshrined in these legal American documents are respect for religious freedom, equal access and equal opportunity, antidiscrimination laws, and the basic framework for religious accommodation. These American values are consistent with the Muslim

majority's interpretation of normative Islam. Furthermore, American and Islamic values respect fairness, equality, freedom, the norms of hard work, entrepreneurship, and a functioning civil society that gives voice to competing interests. None of the above suggests any dilution of Islamic values; on the contrary, both complement the other. Stated differently, it is possible to be both a patriotic American Muslim and a committed practicing Muslim. But these commonalities have gone unnoticed thus far, largely because the greater American Muslim community and the mainstream American society have been talking past each other, rather than to each other. Nevertheless, the existing Islamophobic environment of fear and mistrust in mainstream America toward Muslims necessitates immediate engagement between these compatible cultures.

Muslims have been part of the American story for more than two centuries. But their absence in many spheres of American public life is noticeable. Despite comprising about two percent of the population, the American Muslim involvement in social justice institutions and issues concerning mainstream America is negligible. American Muslims have been underrepresented in American policy-making circles, even though many policies directly affect them, both domestically and abroad.

While the debate about American Muslims' participation in American public life continues, American Muslims need to address issues of their own diversity that may differentiate them from one another. To invest in and build bridges between African American Muslims and immigrant Muslims, both perspectives must benefit from shared experiences and cultural understanding. As a result, Islam, and Muslims, will be seen as an American entity that contributes to the success of peaceful coexistence in America.

They will then be more prepared to participate in America's pluralistic society, where they may share their common experiences and enrich society as a whole.

This dissertation presents a limited case study of the experiences of the Tablighi Jamaat community in Arabi, Louisiana, whose members believe that their religious observances forbid them from using the services of property and casualty insurance companies that operate under conventional Western insurance rules. Their view is that conventional insurance is akin to gambling, which Islamic law forbids. Because of their beliefs, the community did not procure casualty and property insurance for their homes or businesses and suffered substantial losses following Hurricane Katrina, losses that they might have avoided had they been able to purchase Shari'ah-compliant insurance for these purposes. In addition to the direct losses suffered by the TJ to their own properties, the absence of property and casualty insurance also caused losses to persons outside their religious community who were employed by or relied upon TJ services, exacerbating the overall effect of the hurricane for these individuals as well.

From the case study, this dissertation moves to an examination of the implications of the particular TJ community on the broader issue of the relationship between Western insurance companies, Shari'ah-compliant insurance models, and the American legal history of religious accommodation. This dissertation explores the different rationales for the TJ's rejection of conventional Western insurance and also studies other Islamic theological understandings of insurance. Based on this exploration, this dissertation articulates several alterations that could be made to state insurance laws, allowing them to form and license Shari'ah-compliant insurance companies. Finally, the most extensive

chapter in this dissertation traces the history of the development of the principles of religious accommodation, suggesting that prior court decisions provide a legal foundation for the formation of Shari'ah compliant insurance firms. In particular, this dissertation concludes by discussing general accommodation laws such as the Religious Freedom Restoration Act of 1993, a broadly applicable statute that aims to relieve the burdens individuals face in the free exercise of their religions.

To this end, Chapter I commences this analysis by defining the concept of integration as used in legal contexts and clarifying how this term was employed by minorities to gain equal access and equal opportunity. It will briefly discuss the historical development of the Hassidic Jewish community and examine some of their religious and cultural practices. The chapter will narrate the history of the TJ movement and shed light on some of their practices and perspectives on commerce and politics. Finally, it will compare the assimilation experiences of the Hassidic Jewish community of New York City with that of the TJ of Arabi, Louisiana.

Chapter II discusses the big picture of the assimilation experiences of the American Muslim communities, describes different methods of assimilation that are employed by them, and identifies areas in which achieving greater assimilation is feasible. It reviews these areas based on existing paradigms by illustrating specific examples as signs of inclusion, as well as by discussing some challenges. The chapter then assesses the adequacy and the efficacy of these areas and makes suggestions for further engagement and participation with mainstream American society. It will also

identify current impediments to the path of assimilation and suggest solutions to these obstacles.

Chapter III considers whether the concept of communitarianism is related to insurance, surveys the current forms of insurance, and then provides a brief discussion on the historical development of commercial insurance and how it was defined. By way of comparison, the chapter will examine three historical narratives of the Shari'ah compliant insurance system. It will provide an in-depth description of the notion of Shari'ah-compliant insurance, and will support this notion with Qur'anic and Hadith textual evidence. It mentions the successful experiments of worldwide Muslim communities in establishing different forms of Islamically viable insurance systems. The chapter then will provide specific examples related to the absence of Shari'ah compliant insurance policies in America, and the negative integration implications encountered by the Muslim TJ of Arabi, Louisiana, in the aftermath of the Hurricane Katrina. It will state some regulatory impediments to introducing Shari'ah compliant insurance systems in the United States, offer some suggestions to overcome these impediments, and provide practical suggestions for the American Muslim community in introducing an American-based Shari'ah compliant insurance system. Finally, the chapter compares the mutual insurance company scheme as the closest insurance model to the Shari'ah-compliant insurance system. It discusses the mutual insurance laws in Texas and Virginia and offers recommendations as possible solutions for the need for religiously based accommodations in state insurance regulations.



Chapter IV analyzes the historical development of the American legal structure that guarantees freedom of religion and prohibits discrimination, examines the basic legal framework for religious accommodation, reviews cases articulating the scope and limits of religious accommodation, and compares this legal structure with those in Islamic law.<sup>2</sup> The chapter also explores the scope of the distinction between mandatory and permissive accommodations, by examining cases that articulate this distinction, and discusses a few specific legal accommodations. The chapter concludes by explaining the Department of Justice's role in enforcing these various accommodation laws.

The final chapter, Chapter V, offers some concluding observations.

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<sup>2</sup> While the readers of this work are expected to have some exposure to American law so that they would understand the documents mentioned in this dissertation, no such background in Islamic law is expected; therefore, I have provided a basic summary of Islamic law and its resources in my other academic research. See Mohamed A. Elsanousi, *The Law of Islamic Banking and Finance Origins, Modes, and Significance* (Apr. 2005) (unpublished LL.M. thesis) (on file with the law library at the Indiana University Maurer School of Law—Bloomington).

## **CHAPTER I. THE MUSLIM TABLIGHI JAMAAT OF ARABI, LOUISIANA**

### **A. Introduction**

The idea of writing a chapter on “integration” evolved out of the devastating effect of Hurricane Katrina on a tiny Muslim community, the Tablighi Jamaat (“TJ”), who live in southern Louisiana. During my work experiences with the Islamic Society of North America (ISNA), I came across this small segment of American Muslims who may need accommodations that are outside mainstream American norms to obtain benefits provided to other citizens pursuant to conventional or western-style State-licensed insurance programs. The TJ of Arabi, Louisiana, represent a small fraction of the American Muslim community. This research assumes that the vast majority of the self-identified American Muslim community is fully assimilated into American society and, therefore, participates in many spheres of public life. The focus of this chapter, however, will be on the TJ, who defy this assumption by resisting assimilation into American society, emphasizing their historical development and unique perspectives on issues such as commerce and politics.

This chapter will briefly discuss the legal definition of integration and how it was employed by various minority groups to gain equal rights and equal opportunities. It will briefly narrate the historical development of the Hassidic Jewish movement for the purpose of comparing that movement with the TJ. The chapter will attempt to provide an overview of the TJ movement’s ideology, structure, goals, practices, and history. Within this broader framework, this chapter will briefly highlight the unique perspective of this movement on politics and commerce. Finally, it will also draw an analogy between the assimilation experiences of the Hassidic Jewish community and that of the TJ.

## B. Integration as Understood through American Laws

Legally, the term “integration” was understood as a guarantee of the rights of equal opportunity, equal access, and equal treatment protected by law.<sup>3</sup> This understanding of integration is supported by the Constitution of the United States, specifically the Fourteenth Amendment, which prohibits any action of state officials denying due process or the equal protection of its laws.<sup>4</sup> This amendment provides a broad definition of citizenship—“[a]ll persons born or naturalized in the United States . . . are citizens”—and it also provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the law.”<sup>5</sup> The Equal Protection Clause is the commonly held basis for the protection of minorities against predation by the majority.<sup>6</sup>

In addition to the Equal Protection Clause, Congress has enacted Civil Rights statutes such as the Civil Rights Act of 1964,<sup>7</sup> which is considered to be the most important and comprehensive United States law aimed at ending discrimination based on race, color, religion or national identity.<sup>8</sup> The Civil Rights Act also guarantees equal voting rights; prohibits segregation or discrimination in places of public accommodation; bans discrimination, including sex-based discrimination, by trade unions, schools, or employers that are involved in interstate commerce or that do business with the federal government; calls for the desegregation of public schools; and assures nondiscrimination in the distribution of funds under federally assisted programs.<sup>9</sup>

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<sup>3</sup> MARK V. TUSHNET, THURGOOD MARSHALL: HIS SPEECHES, WRITING, ARGUMENTS, OPINIONS AND REMINISCENCES 92 (2001).

<sup>4</sup> U.S. CONST. amend. XIV, § 1.

<sup>5</sup> *Id.*

<sup>6</sup> TUSHNET, *supra* note 3, at 92.

<sup>7</sup> 42 U.S.C. § 2000e-2(a)(1)–(2) (2000).

<sup>8</sup> *Id.*

<sup>9</sup> For a full discussion of the Civil Rights Act of 1964, see *infra* ch. IV.

Moreover, the United States Supreme Court has decided a series of cases interpreting the Fourteenth Amendment as guaranteeing equal opportunities and equal access in various aspect of life to all citizens of the United States, regardless of their religion or race. The clearest example is the achievement of racial integration in education, which occurred through a series of judicial decisions by lower courts and the Supreme Court. As early as 1896, suits were filed against an educational system that mandated racial segregation.<sup>10</sup> The most significant judicial turning point in the development of educational equality occurred in 1954 when the Supreme Court decided *Brown v. Board of Education*,<sup>11</sup> ruling that the segregation of children in public schools solely on the basis of race had a detrimental effect on African American children, denying them the equal protection under the law guaranteed by the Fourteenth Amendment to the Constitution.<sup>12</sup> Further, the Court decided that the doctrine of “separate but equal” adopted by some localities had no place in the field of public education, and the discriminatory nature of racial segregation “violates the 14th amendment to the United States Constitution, which guarantees all citizens equal protection of the laws.”<sup>13</sup> The *Brown* decision initiated educational and social reform throughout the United States and was a catalyst in launching the modern Civil Rights Movement.<sup>14</sup> Bringing about change in integration in the years since *Brown* continues to be difficult, but the *Brown* victory brought this country one step closer to living up to its

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<sup>10</sup> Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. NEGRO EDUC. 316, 317–18 (1952).

<sup>11</sup> 347 U.S. 483 (1954).

<sup>12</sup> *Id.* at 495.

<sup>13</sup> *Id.*

<sup>14</sup> J. CLAY SMITH, JR., *SUPREME JUSTICE: SPEECHES AND WRITINGS: THURGOOD MARSHALL* 94–99 (2003).

democratic ideas and laid the foundation for shaping future national policies regarding human rights.<sup>15</sup>

The *Brown* decision was not simply about children and education. The laws and policies struck down by this decision were products of the human tendencies to prejudge, discriminate against, and stereotype other people by their ethnic, religious, physical, or cultural characteristics. Ending this behavior as a legal practice had far-reaching social and ideological implications, which continue to be felt throughout the United States. The *Brown* decision inspired and galvanized human rights struggles across the country and reinforced the doctrine of equal access and equal opportunity.

Although equal access and equal opportunities have been won for all Americans and enacted in laws and doctrines that clearly define integration, there are some religious minorities within American society who attempt to isolate themselves from the mainstream. Some of these religious minorities may need accommodations that may further segregate them from the American way of life, not due to a lack of equal access but because of their desire to isolate themselves based on religious reasoning. For example, the New York Board of Education once created a segregated school district for the children of the Hassidic Jewish community of New York City due to that community's claims of religious constraints, but this act was deemed unconstitutional by the United States Supreme Court in *Board of Education of Kiryas Joel Village School District v. Grumet*.<sup>16</sup> The case involved a community populated by Hassidic Jews, who believed sending their children to public school would create hardships based on their

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<sup>15</sup> *Id.*

<sup>16</sup> 512 U.S. 687 (1994).

unique religious practices.<sup>17</sup> The New York Board of Education decided to create a separate school district that would serve only the children of the Hassidic Jewish population, “a move which was challenged as a form of direct government support of religion.”<sup>18</sup> The Supreme Court ruled that the New York Board of Education had overstepped the boundary between church and state under the Establishment Clause.<sup>19</sup> Put another way, the Court recognized that the New York Board of Education had used religious preference as the basis for creating and determining who would attend the special school district by way of supporting the Hassidic segregated school.

The Hassidic attempt at segregated education for their children opposes the very spirit of integration which aims to bring together people from different backgrounds in various public forums such as education and employment. Various orthodox religious communities have found difficulty in integrating and assimilating into American society because of their interpretation of what it means to participate in these traditions. Such groups include orthodox and Hasidic Jews, pre-Vatican II Catholics, and the Amish community. There is thus a historical landscape in the United States in which religious minority groups seek special accommodations because they are unable, for a variety of reasons, to make the same concession that other people in their tradition have made. The following sections will offer a brief discussion of the origin, practices, and views of two such religious communities—the Hasidic Jews of New York and the Muslim Tablighi Jamaat.

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<sup>17</sup> *Id.* at 726.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

### C. Origins, Beliefs, and Practices of the Hasidic Movement

The Hasidic Jewish movement originated among the eighteenth century East European Jews.<sup>20</sup> The movement was specifically founded in Poland by Rabbi Israel Ben Eliezer, the Ba'al Shem Tov (the Master of the Good Name) as a result of his dissatisfaction with the representation of Jewish culture and society throughout Europe.<sup>21</sup> The founder hoped to change the normal practice of Judaism at that time and instead create a revitalization movement. At its heart, the Hasidic movement began as a “fundamentalist movement whose aim was to restore the religion to its pristine splendor and to revitalize religious values which have lost their potency.”<sup>22</sup> Since its inception, the Hasidic movement has maintained a unique position within the scope of reform Judaism as its members adhere to a strict, largely inwardly focused interpretation of Jewish law and practice. Eliezer aimed to have a deliberate, organized, and conscious effort by members of society to construct a more satisfying culture. He was very famous in his storytelling talent, his ability to heal people through his religious passion, and his strong appeal among the general Jewish population.<sup>23</sup>

Eliezer’s message was the absolute adherence to the teaching of the written law (the Torah) and the oral law (the Talmud).<sup>24</sup> He also believed that the worship of the Divine should not be limited to prayer and study of the Torah, but it could also be through uplifting melody, spirited dance, or an inspiring story where the Almighty was

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<sup>20</sup> JANET S. BELCOVE-SHALIN, *NEW WORLD HASIDISM: ETHNOGRAPHIC STUDIES OF HASIDIC JEWS IN AMERICA* 3 (1995).

<sup>21</sup> *Id.*

<sup>22</sup> MOSHE SAMET, *THE BEGINNING OF ORTHODOXY* 249 (1988).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

praised.<sup>25</sup> Hasidic Jews provide opportunities for people to join nonscholarly forms of communion and upgrade these forms in importance to the level of formal Torah study.<sup>26</sup> The highest Hasidic ideal is *devekut*—communion and attachment to God.<sup>27</sup> They believe that this closeness to God should lead to a lifestyle of sacred significance, turning seemingly everyday exercises into indisputable good deeds.

The Hasidic community began to come to the United States in the late-nineteenth and early-twentieth century before the Second World War.<sup>28</sup> At the time, most of them viewed the United States as a nonreligious country, inhospitable to their religious practices.<sup>29</sup> The main goal of those who arrived in the 1920s was to earn some money and return home to Europe to live in the communities of their forefathers.<sup>30</sup> They looked at America as a place whose environment only tempted and encouraged Jews to assimilate and leave the faith of their forefathers.

This Hasidic thinking changed after the Holocaust, because they shared the plight of mainstream Jews in having no family or community to which they could return. So those who arrived to the United States before the Holocaust decided to settle permanently in the United States, mainly in Brooklyn.<sup>31</sup> The main body of the Hasidic movement remained in Europe until the Holocaust, when tremendous numbers of Hasidic Jews were slaughtered by the Nazis.<sup>32</sup> Some escaped the massacre, immigrated to the United States, and joined their fellow Hasidic Jews in settling in Brooklyn. While the exact population

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 210.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> YALE STROM, *THE HASIDIM OF BROOKLYN*, at xxviii (1993).

<sup>32</sup> *Id.*



figures are difficult to obtain due to their reluctance toward divulging sensitive demographic statistics, it is estimated that there are roughly 200,000 Hasidic Jews in the United States.<sup>33</sup>

Hasidic Jews in Brooklyn are isolated from the American culture and lifestyle, and they try very hard to insulate their children from any medium that may expose them to mainstream American culture.<sup>34</sup> Many Hasidic homes have no DVD player or television, and parents do not let their children go to the movies or theater and censor all books written in English, feeling they are some of the most influential tools that inculcate American culture.<sup>35</sup> Instead, they keep their children busy with attending Hasidic religious schools, visiting relatives, going to religious celebrations, helping their mothers in the home, and joining their fathers in the Synagogue.<sup>36</sup> Hasidic men of all ages dress in their traditional black garb with wide-brimmed black hats, long coats, and long grey beards.<sup>37</sup> The Hasidic women wear attractive long dresses that cover their arms and necks and wigs that cover their cropped hair.<sup>38</sup> This closed lifestyle and custom is the product of both strictly kept tradition and values held by generations of Jews who once lived in Eastern Europe and the circumstances they face in the United States. Thus, Hasidic Jews have maintained their strict orthodox religious way of life through strong adherence to the teaching of the Torah.

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<sup>33</sup> Immy Humes, *A Life Apart: Hasidism in America—Settlement in America* (1998), [http://www.pbs.org/alifeapart/intro\\_91.html](http://www.pbs.org/alifeapart/intro_91.html) (last visited Sept. 5, 2010).

<sup>34</sup> STROM, *supra* note 31, at 3.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> ROBERT POLLOCK, *THE EVERYTHING WORLD'S RELIGIONS BOOK: DISCOVER THE BELIEFS, TRADITIONS AND CULTURES OF ANCIENTS AND MODERN RELIGIONS* 141 (2002).

<sup>38</sup> *Id.*

The Hasidic community works very hard in taking certain measures, such as those discussed above, to keep themselves isolated from America's cultural influences. They are able to shield themselves from social and cultural assimilation, but they have participated in political activities and used the mainstream economic financial system to prosper and integrate economically.<sup>39</sup> The Hasidic Jews of Brooklyn, New York, participate in the American interest-based economic system. For example, they own the successful jewelry businesses in New York City called the "Diamond District"; one wouldn't imagine they run all these businesses without interaction with the mainstream economic system. Professor George Kranzler, in his article *The Economic Revitalization of the Hasidic Community of Williamsburg*, notes that "the relative strength of Brooklyn's economic revitalization and the spirit of enterprise, especially among middle aged and younger Hasidim, [occurs] in spite of their socio-cultural isolation and scrupulous adherence to the ultra-Orthodox Hungarian Hasidic ideology and lifestyle."<sup>40</sup> This reality shows that the Hasidic Jews of Brooklyn are integrated into the economy to the extent that they have played a role in the revitalization of the city of Brooklyn economy.

Regarding political involvement, the Hasidic Jews are politically well-organized and sophisticated. They often vote as a strong, and usually very conservative, bloc and have acquired influence in New York City politics and among a variety of federal agencies.<sup>41</sup> This homogeneous, shielded community shares much in common with the

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<sup>39</sup> *Id.*

<sup>40</sup> George Kranzler, *The Economic Revitalization of the Hasidic Community of Brooklyn*, in *NEW WORLD HASIDIM* 182 (Janet Shalin ed., 1995).

<sup>41</sup> *Id.* at 192.

Tablighi Muslim community, whose similar lifestyle has resulted not in success and affluence, but in socioeconomic problems.

#### **D. The Origins, Beliefs, and Practices of the Tablighi Muslim Community**

The origins of the Tablighi community movement in Islam emerged in Northern India in the wake of the collapse of Muslim power and consolidation of British rule in the early nineteenth century.<sup>42</sup> The founder of this group, Maulana Muhammad Ilyas, an Islamic religious scholar in the tradition of the orthodox Deoband Seminary in India, was instrumental in establishing a *Madrastas* (Islamic School) system in Northern India in 1926.<sup>43</sup> Ilyas' objective was to use these *Madrastas* as an instrument to promote Qur'anic education in Northern India through these mosque-based schools.<sup>44</sup> However, Ilyas soon became disillusioned with this approach, realizing that the Islamic schools were producing "religious functionaries" but not adequately equipped to produce preachers who were willing to go from door to door to remind people of the key values and practices of Islam.<sup>45</sup> As a result, he decided to leave his teaching position and traveled to a city called Basti Nizamuddin in the old quarter of Delhi, arguing that in order to make Muslims "true believers" it was not only the duty of a few scholars graduated from these Islamic schools but of all Muslims to carry out *tabligh* (missionary) work aimed at the

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<sup>42</sup> Mumtaz Ahmad, *Islamic Fundamentalism in South Asia: The Jamaat -i- Islami and the Tablighi Jamaat of South Asia*, in *FUNDAMENTALISM OBSERVED* 457, 512 (Martin E. Marty & R. Scott Appleby eds., 1991).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

moral transformation of Muslims. Thus, the idea of the Tablighi movement was originated and launched by Ilyas in Basti Nizamuddin.<sup>46</sup>

Muhammad Ilyas al Kandahlwi's goal was to take the *ulema* (scholars) out of their *madaris* (schools) and to the common person. Unfortunately, the *ulema* met his plans unenthusiastically. Ilyas's mission was to give "access to the symbolic resources of 'high' scripturalist Islam traditionally associated with the *ashraf* (upper class)" to the *ajlaf* (lower class).<sup>47</sup> Tablighi Jamaat ("TJ") thereby opened up an "avenue for upward social mobility" for the *ajlaf* "that had hitherto been effectively closed to them."<sup>48</sup> Many *ajlaf* who partook in movements like the TJ were "inspired by a messianic zeal to restore the 'golden age' of Islam as a solution to their woes."<sup>49</sup> Ilyas categorized *tabligh/dawa* to be amongst every individual's *farz-e-ayn* (obligation). In her analysis of Tablighi texts, Barbara Metcalf, the foremost Western expert on the TJ movement, notes that "printed books make possible religious learning outside the theological schools and the privileged relationships of teachers and students: this movement explicitly proclaims that any Muslim can be a preacher, not only the *ulama*."<sup>50</sup>

Leadership in TJ is more about charisma than about having knowledge; since the preachers are all *taqlidi* (traditional), much of what is taught is repetitive. The *amirs* (leaders) of TJ have charisma, and there is a democratization of the religious debate in the public sphere—it is not about free interpretation (*i.e.*, knowledge open to criticism), but

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<sup>46</sup> *Id.*

<sup>47</sup> YOGINDER SIKAND, THE ORIGINS AND DEVELOPMENT OF THE TABLIGHI – JAMA'AT (1920–2000): A CROSS-COUNTRY COMPARATIVE STUDY 21 (2002).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Barbara Metcalf, *Living Hadith in the Tablighi Jama'at*, 52 J. ASIAN STUD. 584, 603 (1993).

rather about “What the Quran really says.”<sup>51</sup> The preacher’s charisma manifests itself through the repetition of TJ’s basic texts, issuing *barakat* (blessings) and advising on correct action.<sup>52</sup> Based on this strategy, Ilyas started sending missionary tours around the world comprised of lay preachers; such tours became the landmark of this group. Hence, Basti Nizamuddin in India became the international headquarters of the TJ Movement.

The TJ deliberately encouraged non-*ulama* (non-scholars) to take an active role in Tabligh activities, such as *bayan* (public speech) and *talim* (reading sessions). Tablighis often made mistakes during the readings of their books; someone suggested that it might be better if the *ulama* were asked to read them, but the leaders of TJ advised that the *ulama* would be invited to read by the *amir* (leader) only in keeping with TJ’s egalitarian spirit, and that if they had corrections they should do so in private, allowing for mistaken statements in public to go unchecked. This phenomenon caused many of the *ulama* to criticize TJ.<sup>53</sup> TJ leaders were admonished by the likes of Mawlana Abdur Rahim, who advised against the

immature leaders [the illiterate preachers] of the TJ who address the public whereas they are not allowed to do so by *Shari’ah* . . . it is a pity that a person cannot practice as a [paramedic] without a certificate but the matter of religion is considered so frivolous that any person may stand up to speak—no qualification required.<sup>54</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 600.

<sup>53</sup> Muhammad Khalid Masud, *Ideology and Legitimacy*, in TRAVELERS IN FAITH: STUDIES OF THE TABLIGHI JAMA’AT AS A TRANSNATIONAL ISLAMIC MOVEMENT FOR FAITH RENEWAL 79, 101 (Muhammad Khalid Masud ed., 2000) [hereinafter TRAVELERS IN FAITH].

<sup>54</sup> *Id.* at 102.

One must remember, however, that Ilyas was very particular about the method and he believed that Tablighi's work should not be undertaken without proper training.<sup>55</sup> While TJ base their practice on a limited number of texts, they still hold a "deep reverence for tradition" as preserved by their *ulama*.<sup>56</sup>

The methodology of the Tablighi community is to organize small groups and spread them across the world to invite Muslims to gather in mosques to hear the message of Tabligh, which focuses on the Qur'an and rituals. They do not participate in any other spheres of life, such as political involvement or issues of social significance. They take comfort in their own communities, and do not embrace this nation's fabled melting pot of shared values and common culture. They believe in the seclusion of women and regard any secular education of girls as unnecessary. Tablighi communities are also very particular about their dress; men keep their trousers above their ankles, wear a long *Julbab* (rope), cover their heads, and keep the beard. They believe that this is the proper way of following the path of the Prophet Muhammad. Their main message to the assembled group in the mosque is formulated in six commandments which are the core of their ideological agenda. These commandments are:

- 1- Recite and know the meaning of the Shahada<sup>57</sup> (There is no God but Allah and Muhammad is His messenger). Their idea here is to make Muslims aware of the implications of Shahada.
- 2- Say Salaat (obligatory ritual prayer) correctly and in accordance with its prescribed rituals.<sup>58</sup>
- 3- Learn the basic teachings of Islam and do ritual remembrance of Allah.<sup>59</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 513.

<sup>58</sup> *Id.*

- 4- Pay respect to and be polite to fellow Muslims.<sup>60</sup>
- 5- Take time from worldly pursuits and regularly tour areas away from home in the form of groups in order to preach Islam to others.<sup>61</sup> This point is considered to be important element of this group method of preaching.
- 6- Inculcate honesty and sincerity of purpose in such endeavors.<sup>62</sup>

Ilyas based his movement on these six principles. Coupled with them are certain demands which are considered essential for the effective implementation of these principles and which provide the structure for the TJ. He was convinced that the best way to acquire knowledge about Islam in a public setting and for the public was to follow the model of the Prophet Muhammad of structuring groups which through travel and effort would convey the religious calls to all sections of the community.<sup>63</sup> The ultimate objective was to make each and every member of the community an instrument for transmitting Islam through learning and teaching.<sup>64</sup> In order to meet this goal, a believer had to leave his home and occupation in life for a certain period of time and go into the path to a place where he could focus in learning about his faith.<sup>65</sup> To make religious endeavors as an ongoing part of their lives, Ilyas demanded his followers to observe the following (apart from the six principles of the movement upon which he laid great emphasis):

- i. Every week they should preach in their own locality about the basic principles of religion (*Kalimah* and prayer); forming a regular group of ten to twelve members who gather and choose an *irshad* (a guide) and an *amir-e-tabligh*, a leader. Under that leader and adopting the proper method, they should tour their

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> M. ANWARUL HAQ, THE FAITH MOVEMENT OF MAWALANA MUHAMMAD ILYAS 147 (1972).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

neighborhood.<sup>66</sup> They do *Jihad/Nafar fi sabi lillah* by knocking on the doors of Muslim homes and calling the men folk to congregational *isha* prayers. This process is called *Gasht* (Persian for patrolling), and resembles the method of Jehovah's Witnesses. These outings are carefully planned and usually "accompanied by influential or wealthy local men, to put at ease any apprehension that the people they addressed might have."<sup>67</sup> Another feature of *Tabligh* is *Tashkil*, a process in which men were recruited and registered for the next *tabligh* outings. Members report back to the mosque centers on how they did.

- ii. For three days every month they should go to nearby village within a distance of five *kos*<sup>68</sup> to preach and hold meetings to persuade the local people to undertake similar tours.<sup>69</sup>
- iii. For at least four months they should leave their homes and go to centers of learning to study about religion.<sup>70</sup> Olivier Roy points out how such practices like *khuruuj* for longer periods of time imitate the Mormon template in which Mormon men are each asked to make a mission trip at least once in their lifetime, chillas appropriated from Sufism span 40-day stretch once per year for three consecutive chillas in one's lifetime.<sup>71</sup> Later the ideal *mubaligh* would participate in worldly affairs for four months, leaving the remaining 8 months in a year on *tabligh* trips.<sup>72</sup>

None of these processes are recorded, as the *tabligh* eschews print literature, a primary reason why conducting research on the *tabligh* can prove so difficult and shrouded in secrecy. Rather than print, the movement relies solely on face-to-face meetings. Moreover, one solution to the lack of patronage that Ilyas found was the self-funding of the *mubalighin*, only those that could afford to would make the *tabligh*, the same restrictions as the *hajj*.

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<sup>66</sup> *Id.* at 116.

<sup>67</sup> SIKAND, *supra* note 47, at 78.

<sup>68</sup> A unit of distance varying in length from one to three miles.

<sup>69</sup> ANWARUL HAQ, *supra* note 63, at 116.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> SIKAND, *supra* note 47, at 80.



In his letter to Miyan Muhammad Isa, one of his followers, Ilyas urged for the implementation of the above stated preaching tour schedule as well as expressed his concern for the safety of his followers from the unexpected Hindu attacks by saying:

Unless your people are very diligent about making preaching tours part of your lives and go from one area to another for four months, you will not be able to enjoy the fruits of true religiousness and belief. Whatever you have achieved now is temporary. If endeavors are given up you will be degraded further. Till now your ignorance was protecting you and people paid no attention to you. Now, unless you protect yourselves with the fortification of religion, you will fall a victim to other people.<sup>73</sup>

Ilyas felt that all these endeavors should be undertaken under the supervision of institutions and Muslim academies. He prepared an elaborate program for the traveling units and asked them to implement it as they traveled, transmitting his call for religion. There was time for preaching tours, time for learning and instruction, and also time for fulfilling one's personal needs.<sup>74</sup> The schedule was organized in such a way that the preaching units in the path seemed like a mobile school and a moral and religious training ground.<sup>75</sup> Importantly, a Tablighi follower is really a Tablighi only when he is out on the path, and outside of that he follows the TJ principles but he is not really a Tablighi, and would say he is only a Tablighi for those few months or few weeks every year that he is gone out on the path.

Taking into account the amount of work undertaken by Mawalana Ilyas, his followers, the size of the movement, and the way it spread all over the world, one would expect an enormous and well-established organization, but this is not the case. They do have a clear chain of command and informal hierarchy of officers and seniority judged by

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

a person's commitment to the movement and how long he has been on the path. Despite the informality, one would know in a gathering of Tablighis who is in charge as the Imam (leader). After recognizing this leader, the Tablighis would listen to what the Imam says. For instance, sometimes the leader of the groups might mandate that the Tablighis sit and read the Qur'an all day or pray all day, or he might ask a member of the group to stay behind and perform supplications for the group. There is a hierarchy that emerges in the TJ that is much clearer than in the Sunni Muslim community. The movement functioned and spread all over the Indian sub-continent and the globe because of the dedication of its followers generated by Ilyas through his personality, which "inspired trust and confidence on them."<sup>76</sup>

Isolation from one's family, occupation, and geographical environment for a period of time is one of the methodologies used by this group. The rationale is to create an inner dynamism between the group, even for a short time, which should result in transforming their character and personalities according to the Tablighi understanding of Islam. In fact, their daily program is structured to focus on learning about Islam, praying and inviting people to join them in the Tablighi path. Steven Johnson observed that Tablighi communities confine themselves to the ritualistic elements of Islam and exert most of their efforts in inviting "lapsed Muslims," as they call them, to come back to worship in the mosque.<sup>77</sup>

Between 1926 and 1965, the Tablighi movement spread throughout the entire Indo-Pakistan subcontinent and its missionaries traveled to Southeast Asia, the Middle

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<sup>76</sup> *Id.* at 142.

<sup>77</sup> Steven Johnson, *Political Activity of Muslims in America*, in *THE MUSLIMS OF AMERICA* 112 (Yvonne Yazbeck Haddad ed., 1999).

East, Africa, Europe and North America. The movement reached the United States in the mid-twentieth century. TJ's US headquarters appeared to be at the Alfalah mosque in Queens, New York City. Its members were largely Muslim immigrants from the sub-Continental region (India, Pakistan and Bangladesh) and some African American Muslims. This composition was due to the movement's origin in South Asia, the influence of Deobandi Islamic teachings, and the fact that most of the missionaries spoke Urdu as their first language, which helped them communicate easily with and recruit immigrant Muslims from South Asia.

When Ilyas sent his missionaries around the world, he always instructed them to use their best judgment in finding leaders or influential people in the areas they visited and talk to them, instead of addressing the people directly.<sup>78</sup> He thought that a direct approach is harmful unless the environment had been made suitable for preaching activity.<sup>79</sup> He was convinced that direct criticism for un-Islamic behavior was undesirable even regarding religious issues or social reform. Instead, his strategy was to create religious awareness among people that would automatically lead them to practice Islamic faith.<sup>80</sup> For Ilyas to make sure the mission was alive, he instructed his workers to avoid controversial issues in general and to avoid bringing such controversies into the movement. The following example from Chicago shows that even a quarter of a century after the death of Ilyas, his followers strictly implemented his instruction to not become entangled in any controversy. A preaching unit was sent to Chicago in the summer of 1967 and worked in the Muslim community, inviting them to the local mosque to hear

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<sup>78</sup> ANWARUL HAQ, *supra* note 63, at 177.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

Ilyas' message.<sup>81</sup> A Caucasian American who had converted to Islam asked the leader of the preaching group in one of their meetings how he was expected to behave in a western society where women have considerable freedom.<sup>82</sup> Should he allow his wife to wear western dress or demand that she adopt Muslim dress which comes down to the ankles?<sup>83</sup> Should he forbid her to wear a bikini or go swimming when other women in the country do so?<sup>84</sup> The unit's reply was that it was not their objective to enter any controversy.<sup>85</sup> The groups were in Chicago to explain the message brought by Prophet Muhammad which is Islam and to inform the Muslims in Chicago about the fundamental beliefs and basic religious observances.<sup>86</sup> The rest is left to one's own conscience and it is up to the individual to determine what should be done when confronted with these kind of situations.<sup>87</sup> The preaching unit's answer clearly demonstrates that TJ is avoiding engagement in any controversial discussions that might turn people away from their movement. Further, in proselytizing to fellow Muslims, TJ seeks to focus on joining in the good rather than dispelling the evil. No compulsion in religion is stressed in TJ. TJ rejects any effort to impose its practice on others, seeing its role simply as ensuring that Islam's message has reached the individual. The proselytization and compulsion-free approach of the TJ and their avoidance of controversial issues have helped the movement spread across the world in a relatively short period of time.

The TJ rejects assimilation into American society and isolates itself from the mainstream American way of life. It avoids participation in political activities, avoids

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

American cultural activity, and utilizes American economic schemes, such as mandatory liability insurance, only insofar as required to comply with the law in order to participate in financial transactions. Mandated participation in certain schemes such as liability insurance is the sole form of Tablighi participation in American public spheres. According to Tablighi belief, “the priority of the Muslim community should be the pillars of faith, especially prayers, and the formation of an ideal Islamic community inside, but separate from, the larger American society.”<sup>88</sup>

### **1. Tablighi Jamaat Views on Political Involvement**

As noted previously, the founder of TJ believed that Muslims had strayed far from the teachings of Islam. Hence, he felt the urgent need for Muslims to return to the basic principles of their faith, and to strictly observe the commandments of Islam in their own personal lives and in their dealings with others. This alone, he believed, would earn them God’s favorable opinion, and God would then grant them success in this world and in the life after death. Based on these beliefs and teachings, scholars differ regarding the political stance of the TJ. Most writers consider the movement to be apolitical and they have taken TJ’s detachment from direct involvement in party politics as evidence of this. Thus, for example, Farouqi opines that the Tablighi Jamaat advocates a “complete and deliberate isolation from politics.”<sup>89</sup> Ilyas divorced the movement from politics at its inception and refrained from indulging in politics in his speeches, never mentioning politics at all but rather discouraging people from political involvement. He believed that political authority and power were undesirable for his movement and very difficult for

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<sup>88</sup> *Id.*

<sup>89</sup> Zia ul-Hassan Farouqi, *The Tablighi Jama'at*, in S.T. LOKHANDWALA: INDIA AND CONTEMPORARY ISLAM 60 (Indian Inst. of Advanced Studies ed., 1971).

Muslims to attain because of politicians' negligence of God's laws; he firmly believed that Muslims should not strive for political positions at all.<sup>90</sup> Rather, Ilyas reminded his followers that the foremost duty of a Muslim was to be of service to his faith.<sup>91</sup> Ilyas believed that religion could be disassociated from politics and that the only way to safeguard Indian Muslims at that time was to ask them to refrain from politics. The theory that Muslims of diverse political views could work together even in the highly political setting of India can be attributed to Ilyas.<sup>92</sup> Ilyas firmly restrained himself from politics and instructed his followers not to involve themselves in any political debate, discussion or involvement.<sup>93</sup> He strongly believed that attaining political influence or controlling the government should never be an objective of Muslim people.<sup>94</sup> However, he said that if Muslims achieved political authority while they are walking in the path of the prophet through their discipline, then they should not evade that responsibility.<sup>95</sup> When the movement gained some momentum and he felt that his followers might start discussing politics, Ilyas instructed them not engage in political discussion during the preaching units. But he added that as individual followers, they were free to shape their political opinions and participate in political activities if they never brought their views to the preaching circle.<sup>96</sup> This strategy made TJ activists and leaders persist in their claims that they had no relationship with politics. "We concern ourselves only with what is in the heavens above and the grave below" is a favorite Tablighi refrain.<sup>97</sup>

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<sup>90</sup> ANWARUL HAQ, *supra* note 63, at 169.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 170.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 171.

<sup>97</sup> *Id.*

TJ's emphasis on faith and spirit, rather than the external trappings of religious learning, has had important implications for the relationship of its members to politics. Barbara Metcalf notes that although the movement's aim is to remake adherents' lives, the sought-for transformation:

is not viewed instrumentally, that is, by the expectation that the transformation of individuals will ultimately produce a just society. On the contrary, the concern is wholly with orienting Muslims toward an Islamic pattern in individual lives, the one dimension of life over which one appears to have full control. The shape of the larger world is simply left to God.<sup>98</sup>

Tablighis do not believe that Islam specifies an ideal political system; in fact, they are studiously apolitical. The fundamentalist dream of creating an Islamic state that compels people to perform their prayers or to fast during Ramadan appalls Tablighis. Without the power of an individual's faith and conscience behind them, Tablighis believe that such prayers and fasting would be worthless.

Some scholars have doubts that the TJ is completely apolitical, with one even accusing the movement of being political and hiding its true political views in order to avoid oppression.<sup>99</sup> However, no detailed analysis of what Masud calls the TJ's "political vision"<sup>100</sup> has ever been undertaken. Professor Imtiaz Ahmed argues that while it is true that the primary and immediate focus of the Tablighi movement is to reform individual spiritually rather than to capture state power, this does not necessarily demonstrate that the TJ has nothing at all to do with politics. As Imtiaz notes, "Even staying aloof from party politics or even such personal acts as growing a beard or donning a veil are

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<sup>98</sup> BARBARA D. METCALF, *ISLAM IN SOUTH ASIA IN PRACTICE* 242 (2009).

<sup>99</sup> Elke Faust, *Close Ties and New Boundaries: Tablighi Jama'at in Britain and Germany*, in *TRAVELERS IN FAITH*, *supra* note 53, at 137, 150.

<sup>100</sup> *Id.* at 137.

themselves powerful political acts, political statements that have their own political implications.”<sup>101</sup> And, as Mumtaz Ahmed remarks, individual’s choices to remain aloof from direct involvement in party politics, when added together, have their own share of political consequences because, “For religion or for politics, whether the original choice is neutrality or activism the result is equally political.”<sup>102</sup> Based on these opinions, some scholars conclude that the TJ does have a long-term political agenda despite the fact that their immediate attention is the reform of individual believers’ personal lives.

The TJ vision of politics is not clearly stated by its leaders and it can only be uncovered through an examination of the various political roles that it has played in different historical contexts. Such examination, however, is not an easy task. For one thing, the TJ has no official literature of its own in which the stand of the movement on political affairs is articulated. In the words of a Tablighi activist, the movement’s policy is “no literature, no talk, no expenditures.”<sup>103</sup> This policy is not only due to the founder’s belief that Islamic missionary work should be practical activity and not something that people should write or talk about, but also designed to not bring government attention to the movement which might interfere with the movement’s affairs. As another Tablighi leader puts it, “let sleeping dogs lie. Why wake them up when we are still weak.”<sup>104</sup>

Some scholars such as M. Anwarul-Haq, who has written on TJ and its founder Ilyas, claim that Ilyas’s emphasis on the separation of religion from politics may have been a result of the objection he faced from the Saudi Arabian political authority’s refusal

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<sup>101</sup> Ahmed, *supra* note 42, at 522.

<sup>102</sup> *Id.*

<sup>103</sup> Masud, *supra* note 53, at 97.

<sup>104</sup> *Id.*



to allowing him to spread his new movement in the Arabian Peninsula, specifically in Mecca and Medina.<sup>105</sup> The Saudi Arabian authorities are always suspicious of any new religious movement that may become political and thereby threaten their puritanical government.<sup>106</sup> Ilyas concluded that he was unable to preach his new movement in Saudi Arabia, the heart of Islam. Ilyas's conclusion supported his original belief that political authority and Islam cannot work together.

The TJ movement's initial objective was to focus on individual reform. But like other religious movements, it went through different phases and transitioned from one stage to another. Scholars argue that the movement's original philosophy with regards to avoiding political involvement has shifted and that the shift has not been noticed by its followers because they closely followed the footsteps of Ilyas. There are several factors that contributed to this shift: the death of Mawalana Ilyas in 1944 which prompted his successor to start sending missionaries around the world, the separation of Pakistan from India in 1947, and the question of the movement's survival and expansion.<sup>107</sup> TJ played a fairly moderate role in Pakistan and India by accepting and participating in political regimes.<sup>108</sup> At least since the mid-1980s, political leaders of all stripes in Pakistan and Bangladesh invariably appeared at the TJ's annual conventions and were welcomed accordingly.<sup>109</sup> This situation, coupled with the previously mentioned factors, has led some observers to suggest that the movement is in fact covertly political.<sup>110</sup> This argument is heard most often in Pakistan where a majority of Tablighi belongs to the

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Ahmed, *supra* note 42, at 522.

<sup>108</sup> Barbara D. Metcalf, *Traditionalist Islamic Activism: Deoband, Tablighi, and Talibs, in ISLAMIC CONTESTATIONS* 265, 279 (2004).

<sup>109</sup> *Id.* at 280.

<sup>110</sup> *Id.*

province adjacent to Afghanistan and their leaders occupy notable political positions.<sup>111</sup> But even though observers suggest that the movement's activities have political consequences, the leaders of the movement have not articulated this in official declaration or texts. The controversial political role of the movement remains a matter of debate. It is clear, however, that the formally apolitical missionary tours, gatherings in local mosques and homes, and annual conventions continue to be the norm of the movement, a movement that offers meaning and dignity to many who participate.

## 2. Tablighi Jamaat Views on Commerce

The Tablighi Jamaat stress action rather than particular positions on subjects such as commerce, finance, banking, and insurance; in fact, they have produced no major intellectual works on these subjects. TJ was initially dealing with a largely illiterate population, so the texts that it used were meant for oral recitation.<sup>112</sup> Metcalf argues that TJ “is not a movement that encourages reading over all. To that extent, even compared with the Deobandi reformers of the late nineteenth century, whose heirs they are, Tablighis encourage a kind of narrowing and intensification of the use of texts.”<sup>113</sup> Sikand echoes Metcalf and commiserates over the difficulty in studying TJ because of its lack of literature.<sup>114</sup>

The TJ movement also resists recording any “worldly” history about itself except about Ilyas and they also refuse to deal with issues of modernity, women's rights, and are unenthusiastic about modern science and technology.<sup>115</sup> Hence, when the TJ write about

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<sup>111</sup> *Id.*

<sup>112</sup> Metcalf, *supra* note 50, at 584.

<sup>113</sup> *Id.* at 596.

<sup>114</sup> SIKAND, *supra* note 47, at 6.

<sup>115</sup> *Id.* at 20.

trade and business and encourage their followers to engage in business, it is always in order to sustain themselves for a larger goal: exerting more time in worship. Maulana Muhammad Zakaria, a close relative and disciple of Ilyas, was asked by Ilyas to write a book on the Fazaail Tijaarat (Virtues of Merchandise) to encourage his followers to engage in *halal* (permissible) earning as needed as a deed secondary to the other fundamentals of Islam such as prayer, Zakat, etc.<sup>116</sup> In other words, although it is a Muslim's duty to acquire *halal* (pure and clean) earnings, this duty is not as important as the other fundamental duties, such as the five pillars of Islam.

TJ views the obligation of earning in general as a duty for those Muslims who are in need of income for their daily necessities, whether those needs are for themselves or to support their dependants.<sup>117</sup> However, people who are not in need of monetary support such as landowners or people who have other sources of income are not obliged to earn money.<sup>118</sup> TJ justifies this position by arguing that God has created wealth for the sole purpose of fulfilling needs so that one can be free to put more time in the worship of God.<sup>119</sup> Without proper food and drink a Muslim will not be able to perform *ibadah* (worship). Hence, TJ followers believe that the acquisition of wealth is not a goal in itself, but a means towards a goal.<sup>120</sup> They require that the income must be made through permissible transactions and they forbid prohibited earning mechanisms stated in the Qur'an and *Hadith* such as through charging interest, gambling, pornography, or alcohol. Earning through prohibited means is completely devoid of blessings and whoever earns

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<sup>116</sup> MAULANA MUHAMMAD ZAKARIYYA KANDHLAWI, VIRTUES OF CHARITY AND HAJJ 392 (2006).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

such wealth will continuously be cursed and live in disgrace in both his spiritual and worldly life.<sup>121</sup> They also instruct their followers to believe that if a person's intention is to earn through permissible means, God will facilitate the means because God will assist whomever desires to follow the path of Shari'ah God by granting unexpected and unthought-of resources.<sup>122</sup> TJ strongly believes that pure intention is very essential for pursuing *halal* earning and it is the only way in which God will make permissible earning available for his servants. According to the TJ, this assistance from God can be observed in the experiences of men as well as in the promises of the Qur'an and the sayings of the prophet Muhammad on various occasions. Further, TJ emphasizes the concept of complete *tawakul* (reliance in God) as he is the provider.<sup>123</sup> *Tawakul* and reliance in God are particularly encouraged for those who wish to engage in business. TJ considers *tawakul* an act of worship more meritorious than to obtain sustenance through hard work.<sup>124</sup> They believe that *tawakul* is the essence of the firm belief in the *Tauheed* (Oneness of God) and that the more firmly grounded a person is in their belief in *Tauheed*, the more advanced he will be in *tawakul*, and the more reluctant he will be to seek the help of anyone other than God in a time of need.<sup>125</sup> The notion of *tawakul* is not only employed by the TJ on issues of earning and business, but it is also used by them in other matters of human needs. For example, the TJ of the city of Arabi, Louisiana justified their rejection of property and casualty insurance based on this idea of *tawakul* (the following insurance chapter will further elaborate their views on commercial insurance).

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 23.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 378.

### 3. The Best Forms of Earning According to the Tablighi Jamaat

TJ prioritizes the ways in which a person should earn money, if needed, and they discuss the best forms of earning according to scholars' opinions. For example, they state that Imam Shafi considers business to be the best occupation, while Imam Abul Hasan Mawardi is of the opinion that agricultural farming is the best, and Imam Nawawi views earning living through manual labor, including business and farming, is the best.<sup>126</sup> TJ concludes that according to the learned scholars of the Hanafi school of thought, "the best occupation is business, thereafter industry and then skilled labor."<sup>127</sup> Maulana Muhammad Zakariyya Kaandhlawi, the author of the book *Virtues of Merchandise*, believes that "occupations may be divided into three kinds: business, farming and labor."<sup>128</sup> He thinks that many *ahadith* support his opinion and explains the virtues of each of the categories he mentions, including industry and skilled labor. However, he is of the opinion that these latter two occupations are not ways of earning a living, but of earning an income, which may be acquired in many ways such as inheritance, charity, and gifts.<sup>129</sup> He thinks that it is a mistake to include all those ways of obtaining wealth in the ways of earning a living.<sup>130</sup> He supports his argument by giving an example:

if a man knows how to manufacture shoes, it does not necessarily mean that he has earned a living. And if he does manufacture shoes, of what benefit will it be for him unless he has been able to sell these shoes? So, either he sells those shoes, which makes him a businessman, or he manufactures shoes for people according to their liking and specifications, which in turn makes him a hired skilled laborer.<sup>131</sup>

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<sup>126</sup> SHAIKHUL HADITH MAULANA MUHAMMAD ZAKARIYYA KANDHLAWI, *VIRTUES OF MERCHANDISE* 50 (2006).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

Maulana Zakariyya states that business is the best occupation because in business, a person can be his own boss with regards to the time spent running the business, which provides a greater opportunity to allocate more time for studies, teaching, and tabligh which is one of the main directives of the founder of the TJ movement. And if a person spends more time in tabligh and serving the religion while involved in business activity, the activity becomes even more virtuous. To illustrate the claim that business is the best form of earning, Munir Ahmad Munir recounts in the *Khabrain* newspaper on December 24, 2003, that one Haji Muhammad Yusuf of the TJ traded in cloth and boasted that he would work without the curse of bank interest (*riba*), after which God would increase his profits.<sup>132</sup> Members of the TJ and widows invested with him and he gave them returns of up to twenty-four percent.<sup>133</sup>

The TJ believe that when a person has the necessary resources to live with dignity and is able to support his dependants, the person should stop searching for further wealth or seek to increase one's possessions out of pure greed.<sup>134</sup> They also believe that those of adequate means are not required to search for ways to increase their wealth. They view greed as something that leads to negligence and ultimately forces the person into numerous sinful practices.<sup>135</sup>

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<sup>132</sup> Khaled Ahmed, Urdu Press Review, *Second Opinion: What Is Muslim Extremism?*, DAILY TIMES (Pak.), Jan. 23, 2004, [http://www.dailytimes.com.pk/default.asp?page=story\\_23-1-2004\\_pg3\\_6](http://www.dailytimes.com.pk/default.asp?page=story_23-1-2004_pg3_6).

<sup>133</sup> *Id.*

<sup>134</sup> KANDAHLAWI, *supra* note 116, at 431.

<sup>135</sup> *Id.*

## E. Discussion and Conclusion

Compared to the long history of Judaism and Islam, the Hasidic movement and the TJ movement have fairly short histories. Since the time of their inception, these two movements have maintained unique positions within the scope of modern Islam and Judaism because their members adhere to strict, largely inward-focused interpretations of their sacred texts and practices. As tiny minority religious groups in the United States, the Tablighi and the Hasidic share a great deal in common including their strict interpretation and adherence to their sacred books and their strategies to provide opportunities to common people by, for example, inviting them to join small groups to study these sacred books. Both the Hasidim and the Tablighi communities also share unique traditions of wearing religious attire. Both groups emerged believing that their followers were turned away from strict adherence to their sacred books, and hence offered alternative spiritual pathways for their co-religionists. The Hasidic and the Tablighi communities share a devout commitment to their religious texts, the Torah and the Qur'an respectively, and they rely on isolation to allow the appropriate degree of social integration within the context of their religious beliefs.

The most compelling similarity between the Tabligh and Hasidim is that both groups are socially closed societies, making them uniquely susceptible to disasters, such as the one faced by the Tablighi community of New Orleans, Louisiana.<sup>136</sup> Unlike the Tablighi community of New Orleans, the Hasidic Jews of Brooklyn, New York, participate in the American interest-based economic system. The economic prosperity of

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<sup>136</sup> See *infra* ch. III (discussing the problem faced by the Tablighi community of New Orleans as a result of their resistance to use American conventional insurance based on their interpretation of their religious beliefs).

the Hasidic community of Brooklyn demonstrates their full integration into the United States economic system. On the other hand, the Tablighi community of New Orleans has been unable to recover their businesses from the losses caused by the Hurricane Katrina because they do not use commercial casualty and property insurance to protect their businesses. Consequently, their losses, which stemmed from their refusal to participate in the American insurance system, created problems for society at large. The isolation of the Hasidic community is only socio-cultural, as the Hasidim have successfully adopted American economic systems. In contrast to the majority of the self-identified Muslims, however, the Tablighi community is completely isolated from the American lifestyle, except in systems that are mandated by law.

TJ followers have isolated themselves from the larger American society, refraining from the use of mainstream mortgage companies to finance their homes and from purchasing property and casualty insurance based on their religious views. Despite the TJ's isolation, the vast majority of the American Muslim population participates in the American way of life and therefore, has used different forms of integration to participate in the mainstream. The following chapter describes the experiences of some American Muslims in assimilating into American society, which they achieved by participating in certain spheres of American life.



## **CHAPTER II. DIFFERENT FORMS OF INTEGRATION PROVIDE OPPORTUNITIES AND RAISE CHALLENGES**

This chapter acquaints readers with the different forms of integration that the vast majority of the American Muslim community employs toward achieving successful integration. It will briefly describe these forms, explain how they facilitate the integration process, and point out those areas in which achieving full integration is more and less feasible, such as the existence of legal difficulties that might be a challenge to particular forms of integration. In addition to illustrating some specific examples as signs of social, economical and political integration, it will also mention some of the current challenges of achieving the goal of complete integration. In the conclusion, practical steps for further engagement with the American system in ways designed to lead to full integration will be suggested.

### **A. Paving the Way for Integration**

Tariq Ramadan, Professor of Islamic Studies at the University of Fribourg in Switzerland, argues that today's reality calls for fresh thinking (reopening the gates of *ijtihad*) or “new thinking based on current realities.” This, together with recognition of the constant flow of people across the world, means that the West is now part of the Muslim world. Muslims living in the United States or Europe should no longer think of themselves as living in an “other” society but should see themselves as being at home in the West. The term he proposes is “*Dar al Ahd*,” or “Abode of the Covenant,” which includes all the civic responsibility that such a term connotes. Such understanding is perfectly formulated to allow for the Muslims living in the West to abide by the legal

documents of these countries, participate in the life of their societies and not focus on the temporary problem of Islamaphobia or political social discrimination.<sup>137</sup>

For Muslims all over the world, civic responsibility will lead to the needed reform of Muslim thinking, and it will be a reform from within, not one imposed from outside. Islam is a complex and sophisticated religious and ethical system, but as Dr. Maher Hathout articulated in his presentation addressing the Muslim Public Affairs Council convention, “it emerged as a majority system and has little experience as a minority religion.”<sup>138</sup> It would behoove Muslim thinkers to engage in discussion and dialogue with those of other religious-ethical systems that have found ways to function well in the minority. When Judaism transitioned from a majority to a minority system in ancient Iraq, it developed the concept “dina de-malkhuta dina,” meaning that in many economic and social matters, the law of the land is also the law of the Jews. However, in ritual, moral-ethical, and purely religious matters, the law of Judaism remains the law for Jews. We can all learn positively from this aspect of introspection, and Islam would benefit from a relationship to other religions. It is critical to offer suggestions and recommendations to both the mainstream American and American Muslim communities in order to avoid any potential societal problems in the future. This will also help enhance the ongoing process of integration. American religious and political leaders have an obligation to be inclusive and encourage the integration of new faith communities into this society. As Professor Judith Martin stated in her presentation to the Dayton Mercy Society, “Politicians and religious leaders have a social responsibility to create a climate

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<sup>137</sup> TARIQ RAMADAN, *WESTERN MUSLIMS AND THE FUTURE OF ISLAM* 6 (2004).

<sup>138</sup> Maher Hathout, Address at the 7th Annual Muslim Public Affairs Council (Dec. 15, 2007).

of inclusion that is in keeping with the tradition of pluralism that has served us so well in the centuries since it was envisioned by the Founders.”<sup>139</sup>

Muslims and people of other faiths need to build bridges with mainstream America, and they can achieve this by creating joint programs and activities aimed to increase understanding between societies. Organizations like the Islamic Society of North America, the Muslim Student’s Association of the US and Canada, and the growing network of Muslim organizations along with schools and mosques educate, motivate, and help build bridges with the larger society. Likewise, they serve to promote the full incorporation of Muslims into the American mainstream. The creation of the Islamic Society of North America Office for Interfaith and Community Alliances is an important step toward the right direction and to achieve the goal of inclusion. The National Council of Churches, the US Conference of Catholic Bishops, the Alliance of Baptists, the Presbyterian Church USA, the Union for Reform Judaism, and many similar organizations have allocated huge resources to inter-religious activities. There are several institutions that have also joined hands with American Muslims to help build trust and confidence, and change the current climate of fear to mutual misunderstanding. The leading institute on such initiatives is the East West Institute, which works under the banner of the One Nation Initiative. This institute aims to gather Muslim leaders and provide communication training, with the hope that they will communicate well with the media and the public in order to clear the image of Muslims and Islam in the US.<sup>140</sup>

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<sup>139</sup> Judith G. Martin, Professor of Religious Studies, Univ. of Dayton, American Muslims and American Society: Can We Move Forward Together?, Address to the Dayton Mercy Society (May 11, 2007).

<sup>140</sup> One Nation: Voices from the American Muslim Community, About One Nation, <http://www.onenationforall.org/content/view/14/98/> (last visited Jan. 3, 2008).

In his book *Identity and Violence: the Illusion of Destiny*, Nobel peace prize winner Amartya Sen noted that the Muslim community needs to move away from the perception of fear and a victim mentality. This identity was built primarily on the “dialectics of a colonized mind,” in which one is obsessed and overcome by a relationship to the “powerful other.” American Muslims, along with national, regional, and local institutions, need a paradigmatic shift away from a so-called victim mentality in order to effectively guide their resources through these challenges to a place that allows the growth of plural, diverse, and authentically American experiences.

### **B. Different Forms of Integration**

The discourse on the importance of Muslim integration within American society picked up momentum among sociologists and politicians after the 9/11 terrorist attacks. Before then, the American Muslim community received very little attention, and often no attention, from American society as a whole. The primary reason for this neglect was because American Muslims were less involved in the country’s social and political life. Some researchers might argue that their modest population contributed to this absence. Nevertheless, the community participated and integrated into American society with regards to various forms of integration whether voluntarily or required by law.<sup>141</sup> Some people consider the forced integration as “social change through law” as simply describing a state action that preserves certain structures of legality.<sup>142</sup> In the American Muslim context, this meant that in some cases, Muslims had no choice but to comply with the country’s laws like other citizens. On the other hand, there are voluntary forms

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<sup>141</sup> LAWRENCE M. FRIEDMAN, *LAW AND SOCIETY: AN INTRODUCTION* 157 (1977).

<sup>142</sup> *Id.*

of integration in which the community can choose to participate or not, such as individual choices and to what degree he or she would like to get involved. The intention and purpose of such involvement may vary based on the particular individual and community. This part of the chapter will briefly explain how the different American Muslim communities have practiced these different forms of integration and how they continue to impact the process of integration.

### **1. Forced Integration**

Forced integration is integration that is required by law for every member of American society regardless of religion. For instance, American law often requires certain kinds of insurance, such as automobile insurance before you can get a driver's license. This type of insurance is mandated by law and is bound by culture and time.<sup>143</sup> Mandatory automobile insurance laws require the American Muslim community to interact with mainstream society through a practice that benefits society as a whole.

This type of integration affects society as a whole and its benefit is connected to the entire state-run system. Therefore, immigrant groups, regardless of their religious beliefs—whether they are Hasidic Jews or Tablighi Muslims—have to abide by these kinds of laws whether or not they are accustomed to similar laws in their homeland. In addition, refusal to do so would have legal and other consequences.

The state requires several types of forced integration so that it can govern the country systematically. The above example is given only to articulate what this form of integration means. Generally, immigrants cooperate with such integration measures for

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<sup>143</sup> *Id.*

various reasons: perhaps the same system was used in their homeland, they accepted the realities of their new home, or they want to avoid the consequences of breaking the law.

Another example for forced integration is the compulsory education for children as required by state laws to enroll children in elementary and secondary education whether through public, private or home schooling. These state laws are applicable to all members of the American society and the refusal of enrolling children to school is penalized by law. Since 1918, all states have had compulsory education laws through the elementary school level, only differing in the length of time that they require each young citizen to receive state-approved education.<sup>144</sup> These types of laws force immigrant communities to interact with the existing system that constitutes a form of integration. Such integration promotes the development and assimilation of immigrants into mainstream society. Education is often an influential factor for minority assimilation as it was for Jewish immigrants. For them, education was the primary factor that contributed to their assimilation and attainment of a respectable place within mainstream society. It is important to note here that forced integration is the only form of integration that is used by the Tablighi Muslim community. This observation is based on comments made to me by their members, who state that they practice this form only to avoid legal implications and not because they believe that forced integration can benefit society.

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<sup>144</sup> KENNETH THOMPSON, *THE EARLY SOCIOLOGY OF EDUCATION* 192 (1938).

## 2. Economic Integration

The economy was an important element for the American Jewish community's assimilation into mainstream American society. They were able to acquire the necessary business skills and engage in the national economy to the extent that they sought acceptance into the white merchant and professional classes in the early stages of their assimilation.<sup>145</sup> At a time where acceptance into these classes was difficult, the non-Jewish members of the economic elite would not accept their participation except in few business, and allowed few to participate with them on some public boards, such as public libraries and museums—institutions to all of which Jewish businessmen gave large amount of money.<sup>146</sup> In spite of all these challenges, they were adamant about the significance of their involvement in the economy as a means to assimilation into America. The majority of the American Muslim immigrants I met during my work experience were more affluent than the Jewish immigrant community when they arrived in America; a scholar concluded that Jews came to this country with limited education, no money, very basic business skills and they were confronted with an environment of discrimination.<sup>147</sup> During the Jewish immigration period, immigrants entered the United States with considerably lower skills compared to the Americans and therefore they confronted challenges in pursuing economic opportunities.<sup>148</sup> For instance, studies show that in 1990s, the newly arrived immigrant workers earned about 34 percent less than the

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<sup>145</sup> JEWISH ASSIMILATION IN MODERN TIMES 176 (Bela Vago ed., 1981) [hereinafter JEWISH ASSIMILATION].

<sup>146</sup> *Id.*

<sup>147</sup> See *supra* ch. I (describing the immigration journey of the American Muslim community).

<sup>148</sup> George J. Borjas, *Economic Assimilation: Trouble Ahead*, in REINVENTING THE MELTING POT: THE NEW IMMIGRANTS AND WHAT IT MEANS TO BE AMERICAN 199 (Tamar Jacoby ed., 2004).

native-born American worker.<sup>149</sup> However, as time goes by the immigrant workers are able to develop themselves and acquire the necessary professional skills to compete with native born American workers.<sup>150</sup>

Hence, the notion of economic integration for American Muslim communities can be described as the community employing their professional advantages, acquiring the necessary business skills, and using the existing economic and financial system to further integrate into mainstream businesses. They can also use these skills to develop their own businesses within this mainstream system. Establishing acceptable economic institutions for Muslims that are allowed by the existing financial system without altering the system, and that simultaneously fulfill their religious obligations, could be another form of economic integration. For instance, these Muslim communities can establish Islamic investment institutions that follow American investment regulations and can design their investment portfolios in a way that satisfies their customers' religious requirements. This can be described as partial integration, because this business interacts and deals with the mainstream investment companies, but contains an additional system that monitors all transactions to ensure their compliance with Shari'ah in order to satisfy the needs of these religiously active Muslim communities.

For the purpose of articulating the concept of economic integration, a description of some of these successful Islamic mortgage companies will be presented in the following sections. These mortgage companies have designed a product that complies with state mortgage laws as well as satisfies many Muslims in term of the Islamicity of

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*



their product. In addition, they have formed Shari'ah supervisory boards that consist of Muslim jurists that evaluate contracts and approve the Islamicity of their transactions. Some scholars, however, criticize such boards and their relationship with the companies' owners,<sup>151</sup> especially when members of the Shari'ah supervisory boards are involved in the marketing elements of the product. They also participate in conferences and workshops and are featured in newsletters and other marketing publications designed to promote the company or companies in question.

Dr. Mahmoud El-Gamal, a Professor of Economics at Rice University, explained the integration of Islamic economics through its operation within the conventional system. In short, he identified three major players involved in making Islamic financial products related to investment and mortgage operative in a secular economy: bankers, lawyers, and Islamic jurists.<sup>152</sup> These are the people who engage in discussions and negotiations designed to reengineer existing conventional products that have no Islamic counterpart. They try their best to replace the product's non-Islamic components with "Islamic" alternatives.<sup>153</sup> It is important to note that regulators require the formal inclusion of the Shari'ah board's report in the annual financial statements and similar documents.<sup>154</sup> The regulations require the inclusion of the Shari'ah board's report and other documents in the annual financial statement as a way to ensure that these Islamic financial institutions are in compliance with the best practices in the financial sector.

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<sup>151</sup> The criticism of this kind of board is actually based on the fact that these boards are considering this kind of service as a business, and, therefore, some individuals will be associated with many companies even if there is some doubt about the Islamicity of those companies' products.

<sup>152</sup> MAHMOUD A. EL-GAMAL, ISLAMIC FINANCE: LAW, ECONOMIC AND PRACTICE 11 (2006).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

**a. Practical Examples of Achieving Economic Integration**

Recent Pew research found that American Muslims have all the necessary components to assimilate into American society and significantly contribute to social justice.<sup>155</sup> The research concluded that American Muslims are financially sound and generally mirror the U.S public in education and household income.<sup>156</sup> This is a very encouraging sign for the greater involvement of Muslims in the American economy.

Those religiously active within the Muslim community are not far from the global development of Islamic economics. As immigration becomes easier in the age of globalization, allowing tremendous access to the international community, these influences have contributed to Muslims' strategic thinking in developing their own Islamically viable financial institutions. Islamically viable financial institutions may attract ultra-traditional Muslims such as the Tablighi community.

Despite the fact that the global development of Islamic finance is in its nascent stages, Observant American Muslims are successfully building Islamic investment institutions. While they have been able to established several Islamic mortgage and investment institutions, this group of the American Muslims have been unable to work with American regulations to establish Islamic banks in the United States. Muslim communities in Europe are able to work with their governments to come up with understandings that satisfy the regulations and at the same time comply with Islamic requirements. The forthcoming segment of this chapter will briefly describe the development of the Islamic financial institutions in North America and how they are developed to serve the growing needs of the American Muslim community as well as to

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<sup>155</sup> PEW RESEARCH CENTER, MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 18 (2007).

<sup>156</sup> *Id.* at 19.

contribute to the process of the Muslim community's economic integration and social justice involvement in this country.

**b. Islamic Financial Institutions in North America**

The religiously active Muslim community in North America over the last two decades has made several attempts to establish Islamic financial institutions. Early efforts focused on creating Shari'ah-compliant institutions and required extensive research into Shari'ah financial restrictions and requirements. Later efforts built upon the prior effort with the intent to make Shari'ah-compliant institutions comparable, compatible, and competitive with conventional Western-style financial institutions. Unfortunately, many of these attempts failed. Mismanagement of the projects, lack of accurate feasibility studies, and inadequate marketing and visibility were all contributing factors in the failure of early American Islamic financial institutions. For instance, the lack of preparation and in-depth research may be the reason for the failure of the Islamic bank that was established in Atlanta, Georgia, as well as the effort initiated by participants of the Islamic Society of North America's International Business and Trade Forum in 2002.

Observant American Muslims have hesitated to establish typical banks in North America with checking and savings accounts due to the regulation of banks in the West, in particular due to the rules which require a guarantee that deposits will be protected. However, some Muslim jurists opine that it is permissible to follow the rules pertaining to protection of depositor capital. This has led to the establishment of Islamic banks in some European countries.

Despite the failure of the previously mentioned ventures, there have been several successful Islamic financial institutions in the last two decades. These institutions finance houses, cars, and equipment according to Islamic financial laws. There are also Islamic investments companies in North America providing to Muslims who desire the opportunity to invest their capital in methods permitted by Islam. The most prominent Islamic financial institutions in North America are the following:

1. American Finance House LARIBA, established in 1987 in Pasadena, California.<sup>157</sup> This company finances family homes and equipment using the Islamic modes of finance *Ijara* (leasing) and *Musharaka* (partnership).<sup>158</sup>

2. Islamic Co-operative Housing Corporation, Ltd. was established in 1980 in Ontario, Canada.<sup>159</sup> The corporation finances houses for their members using Islamic instruments *Musharaka* and *Ijara*.<sup>160</sup> Membership requires a sign-up fee of \$75, and a minimum purchase of six shares (currently \$600), with an additional purchase of at least six shares each calendar year to keep the membership alive. The Housing Co-operative pays off the existing mortgage for any members whose shares equal 10 percent or more of their outstanding mortgage balance and who have been invested in the Co-operative for at least six months, thereby acquiring the house. After the Housing Co-operative acquires the house from the mortgaging party, the shares bought (previously and in the future) by the member are counted as payments toward eventual ownership of the house, with a proportional monthly occupancy charge.<sup>161</sup>

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<sup>157</sup> American Finance House – LARIBA, [http://www.lariba.com/background.shtm\\_\\_](http://www.lariba.com/background.shtm__) (last visited Jan. 5, 2009).

<sup>158</sup> See Elsanousi, *supra* note 2, at 47–53 (providing a full description of *musharaka* and *ijara*).

<sup>159</sup> Ansar Co-operative Housing Corp. Ltd. & Islamic Co-operative Housing Corp. Ltd., Ansar Housing—About Us, [http://www.ansarhousing.com/about\\_us.htm](http://www.ansarhousing.com/about_us.htm) (last visited Sept. 7, 2010).

<sup>160</sup> See Elsanousi, *supra* note 2, at 47–52, 52–53 (providing a full discussion of *musharaka* and *ijara*).

<sup>161</sup> For full details of the payment schedule, visit <http://www.isnacanada.com/ichc.htm>.

3. Guidance Financial Group, founded in 1999 in Northern Virginia,<sup>162</sup> is now the largest Islamic financial institution in North America with more than a billion dollars investment in houses. They use *Musharaka Mutanaqisah* (diminishing partnership) as a mode of Islamic finance.<sup>163</sup>

**c. Islamic Investment Companies in North America**

There are several Islamic investment companies in North America, such as Amana Mutual Fund, Dow Jones Islamic Fund, and other institutions operating within Western-style financial institutions.<sup>164</sup> These companies invest according to Islamic principles. Generally, these principles require that investors avoid interest (*Riba*) and investments in businesses such as liquor, pornography, gambling, and banks.<sup>165</sup> Both Amana Mutual Fund and the Dow Jones Islamic Fund also avoid bonds and other fixed-income securities.<sup>166</sup>

**d. Small Business Financing**

The only Islamic financial institution in North America that finances small businesses is LARIBA. According to their website, LARIBA uses *Murabaha* (cost-plus financing) to finance small businesses for their clients.<sup>167</sup> This company substitutes

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<sup>162</sup> GUIDANCE FINANCIAL GROUP, <http://www.guidancefinancialgroup.com/company/company.asp> (last visited Jan. 5, 2009).

<sup>163</sup> See Elsanousi, *supra* note 2, at 47–53 (discussing *Musharaka* generally with a detailed discussion of the diminishing partnership form of *Musharaka*).

<sup>164</sup> Amana Mutual Funds Trust: Sharia Compliant Investment Solutions, <http://www.amanafunds.com/> (last visited Dec. 3, 2009) [hereinafter Amana Mutual].

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See Elsanousi, *supra* note 2, at 53–56 (discussing *Murabaha* in greater detail).

*Murabaha* for the working capital, short-term, *Riba* financing used by the conventional banking system in the West.

These are some of the examples of economic integration and of how this segment of the American Muslim community can retain its uniqueness regarding its members' financial matters. However, some important financial issues remain unsettled and require far more elaborate negotiations with the regulators. Some of these concerns are the establishment of a full-fledged Islamic bank in America, similar to the Islamic Bank of Britain, and creating Islamic insurance products that cater to a segment of the American Muslim community who do not use conventional insurance companies. This latter concern will be discussed in the upcoming chapters in greater detail, because it is feasible to establish such a product and also a great component for the integration process.

Finally, economic integration is even possible for the American Muslims who are not necessarily supporting assimilation because they need to have some level of transaction with the nation's economic institutions. There are some Islamic economic institutions as well that could cater partially to their needs. This form of economic integration has occurred in the American Jewish community. Orthodox Jews were able to achieve the economic integration despite their isolation from the mainstream society, much like their fellow religionists, the Reformed Jews. Orthodox Jews dress and conduct their social lives in certain ways, but are integrated with mainstream society. Therefore, people expect that Muslim isolationists, such as the Tablighi community, will follow the same pattern as Hasidic and Orthodox Jews, and integrate with mainstream economics. This expectation is highlighted in a latter chapter with respect to the case of the Muslim

community in the city of Arabi, Louisiana. The Tablighi community remains isolated socially but has been partially forced to use the economic system of the US.

### 3. Social Integration

Social integration can be described as the American Muslim community's desire to participate voluntarily in the mainstream's existing social justice institutions or establish their own social institutions that could, at least in theory, serve the whole society regardless of race, ethnicity, or religious affiliation. Social integration and involvement in social clubs and institutions was the most difficult process for the American Jewish immigrants. Despite the Jews' great economic accomplishments, their wealth, and their education, they were forced to remain socially isolated from mainstream society. Lloyd P. Gartner, Professor of Modern Jewish History at Tel-Aviv University, concluded in his paper "Assimilation and American Jews" that "the only sphere in the United States in which Jews have largely not been accepted has been the social."<sup>168</sup> This is telling testimony to the difficulty of social integration during that time. Nevertheless, in recent history Jewish community leaders were heavily involved in the campaign for the civil rights of African Americans. Their participation in the civil rights movement was, among other things, part of their effort to present Jews as more American than were non-Jewish Caucasian Americans, precisely because Jewish concerns with social justice heightened their dedication to American ideals of social justice and democracy.<sup>169</sup> Since then, this form of integration is now achievable in terms of participating in mainstream

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<sup>168</sup> JEWISH ASSIMILATION, *supra* note 145, at 179.

<sup>169</sup> KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA 158 (1998).

social clubs and social services institutions that allow diverse community members to join.

Isolationist Muslims are encouraged by Islamic scripture to engage in social justice projects to help people in need. Such service is also commanded by many religions practiced in America as well as basic American values. This fundamental consensus in social justice values between American Muslims and the mainstream is a viable factor for social integration. Sociologists consider the consensus of values is a positive sign and is a guarantee to hold society together, as well as a fundamental ingredient for a socially integrated system.<sup>170</sup> In a pluralistic society like the US, which has legalized the freedom of religion, minority religious groups are comfortable maintaining their cultural identity while still showing a high level of interaction with the dominant culture. The willingness of America's pluralistic society to respect differences and view diversity as a source of strength strongly encourages American Muslims to invest more in that area. Such social interaction fosters mutual understanding and overcomes barriers and advances the goal of Muslim community integration. Unlike community service, there are some Muslim cultural norms that are completely different from those of the dominant society. For example, some segments of the American Muslim community dress and conduct their social lives very differently from other Americans, and this trait presents integration challenges. However, there has been some progress in areas of social integration.

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<sup>170</sup> STEVEN VAGO, *LAW AND SOCIETY* 21 (1981).



### a. Practical Examples of Social Integration

The observant American Muslim community has established quite a few social institutions such as the UMMA Free Health Clinic in Los Angeles, California, which benefit all Americans. In fact, they are religiously motivated to build such social institutions because the very idea of social justice is deeply rooted in the Islamic tradition. The Qur'an emphasizes the Muslim responsibility to care for and protect one another, regardless of religious affiliation and socioeconomic status, and Islam prohibits usury/interest because it exploits the poor.<sup>171</sup> In fact, the Qur'an mentions eight categories of people that deserve help through *zakat* (almsgiving), one of the five pillars of Islam, and through *zakat* social justice could be achieved. The Qur'anic command for helping these categories of people through the social justice system stated in the following verse:

إِنَّمَا الصَّدَقَتُ لِلْفُقَرَاءِ وَالْمَسْكِينِ وَالْعَمِلِينَ عَلَيْهَا وَالْمُؤَلَّفَةِ قُلُوبِهِمْ وَفِي الرِّقَابِ وَالْغَرَمِينَ  
وَفِي سَبِيلِ اللَّهِ وَأَبْنِ السَّبِيلِ فَرِيضَةً مِّنَ اللَّهِ وَاللَّهُ عَلِيمٌ حَكِيمٌ ﴿٩٠﴾

Alms are for the poor and the needy, and those employed to administer the (funds); for those whose hearts have been (recently) reconciled (to Truth); for those in bondage and in debt, in the cause of Allah, and for the wayfarer. (Thus is it) ordained by Allah, and Allah is full of knowledge and wisdom. (9-60)<sup>172</sup>

*Zakat* consists of giving 2.5 percent of one's total wealth/*zakatable* assets annually to support the less fortunate. However, there are certain conditions and requirements to be met before a Muslim is obligated to give 2.5 percent to one of the above mentioned categories. For example, the wealth from which *Zakat* is to be

<sup>171</sup> The concept of usury and interest from the Islamic perspective was discussed in my LL.M thesis. See Elsanousi, *supra* note 2.

<sup>172</sup> ABDULLAH YUSUF ALI, THE MEANING OF THE HOLY QUR'AN 456 (1999).

extracted should be in the possession of its owner for one complete lunar year. The Muslim's net worth, less any debt needs to meet the minimum requirement, called the *Nisaab*, which in essence defines the poverty line. This scriptural commandment motivates this sector of American Muslims community to involve themselves in social justice endeavors that facilitate their interaction with people of other faiths.

Unlike Jewish immigrant social involvement in the 18<sup>th</sup> and the 19<sup>th</sup> centuries, the American Muslim community may find their participation welcome in social justice institutions. It is imperative for them to increase their participation in social justice institutions in order to perfect this integration objective. In fact, the Los Angeles Muslim community has done just that: in 1996, members of that community established a Muslim-run clinic to serve the greater Los Angeles area. Known as the University Muslim Medical Association (UMMA) Community Clinic and a recipient of national recognition, its vision is as follows:<sup>173</sup>

UMMA envisions itself as part of a larger network of institutions addressing the health and wellbeing of the underserved and indigent, mindful of the cultural, spiritual, social and economic realities that impinge upon them and the traditional barriers to accessing care.<sup>174</sup>

The clinic's work was recognized in the U.S House of Representatives when, during a U.S. Congressional session on July 26, 2006, Congresswoman Maxine Waters of California, proudly proclaimed that "the UMMA Clinic provides Muslim-Americans with an institution in which they can take pride, one that enriches the community with services that save lives."<sup>175</sup> The clinic is currently celebrating its tenth anniversary of dedicated

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<sup>173</sup> UMMA Community Clinic, [http://www.ummaclinic.org/?cls=Our\\_Story](http://www.ummaclinic.org/?cls=Our_Story) (last visited Jan. 20, 2008).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

service to the residents of South Los Angeles, regardless of race, religion, or socioeconomic status. Her statement may be the first time in over two centuries of Congressional history that a Muslim-American institution was hailed as a model of hope, progress, and benefit for all Americans.

The UMMA Clinic emerged, according to Congresswoman Waters, “as a result of the obligations Muslim-Americans feel to ensure the well-being of everyone in society. At a time when Muslim-Americans face unfair discrimination and scrutiny, the UMMA Clinic allows Muslims to put their faith into action through service, selflessness and compassion.”<sup>176</sup> Her address represents a courageous and refreshing recognition of a long-standing, though overlooked, fact: Muslim Americans are an inseparable part of the nation’s fabric, and, as she said, the “UMMA Clinic is one of the many ways that Muslim-Americans serve their fellow citizens.”<sup>177</sup>

UMMA Clinic is one of the most prominent Muslim-led social justice institutions and contributes tremendously to social integration. However, there are many other social justice institutions that also provide services in all aspects of life. The American Muslim community that I work with always participates with and is involved in mainstream social justice institutions such as the Children Defense Fund and many soup kitchens across the nation. Such collaboration with other American religious groups is clearly designed to help achieve social integration.

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

## **b. New Opportunities for Social Integration Supported by the Federal Government**

Another element of social integration is the individual's relationship with the State and with those state employees who are going to take care of these economic needs. In this context, in 2001 the Bush administration established the Office of Faith Based and Community Initiatives (OFBCI) in order to acknowledge the efforts of faith-based communities in supporting those in need and, at the same time, to make it easier for religious institutions to partner with the federal government to help Americans in need.<sup>178</sup>

Faith-based and community organizations (FBCOs) have a long tradition of helping Americans in need and together represent an integral part of our nation's social service network. Yet, all too often, the Federal government has put in place complicated rules and regulations preventing FBCOs from competing for funds on an equal footing with other organizations. President Bush believes that besides being inherently unfair, such an approach can waste tax-payer dollars and cut off the poor from successful programs. Federal funds should be awarded to the most effective organizations—whether public or private, large or small, faith-based or secular—and all must be allowed to compete on a level playing field.<sup>179</sup> President Bush created the White House Office of Faith-based and Community Initiatives and Centers for Faith-Based and Community Initiatives in eleven Federal agencies to lead a determined attack on need by strengthening and expanding the role of FBCOs in providing social services. The Federal government has worked to accomplish this mission through an array of regulatory and policy reforms, legislative efforts, and public outreach to FBCOs. Additionally, by making information about Federal grants more accessible and the application process less burdensome, the Initiative has empowered FBCOs to compete more effectively for funds. The ultimate beneficiaries are America's poor, who are best served when the Federal government's partners are the providers most capable of meeting their needs.<sup>180</sup>

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<sup>178</sup> White House Faith - Based and Community Initiative, <http://www.whitehouse.gov/government/fbci/president-initiative.html> (last visited Jan. 21, 2008).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

Despite the nobility of this initiative, there are challenges in its implementation. The American Muslim community is clearly under-represented in those programs and conferences geared to inform the religious community about the funding opportunities under this initiative.<sup>181</sup> The level of Muslim participations in two major OFBCI-organized national conferences illustrates that the Muslim community is unaware of such opportunities.<sup>182</sup> The funding the Muslim community receives for capacity building is considered very minimal when compared to those received by other religious communities.<sup>183</sup> This is a two-way street. If coherent faith groups' involvement was the desired outcome, then the Bush administration should have used a different approach. One way of using this particular program to help the Muslim community accelerate its social integration would be to grant them the same chance as other religious communities to participate in such programs. In addition, such an approach would be a promising way to achieve social cohesion.

The establishment of the OFBCI and the way it was run by the Bush administration raised serious issues regarding the line between church and state, and whether the program would jeopardize the establishment clause.<sup>184</sup> The Obama administration kept the office but changed its name to the Office of Faith-based and Neighborhood Partnerships (OFBNP).<sup>185</sup> The Obama administration gave assurances that the work for this office must uphold the free exercise of religion and forbid the

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<sup>181</sup> I represented the ISNA in these conferences and there was no other Muslim representative despite the diversity of the Islamic community in the United States.

<sup>182</sup> *Id.*

<sup>183</sup> An elaborative future research project supported by hard evidence could be achieved in this area.

<sup>184</sup> This research is narrow to include discussion on the constitutionality of this initiative and whether it violates the Establishment Clause or not.

<sup>185</sup> White House Office of Faith-Based and Neighborhood Partnerships, Promoting Interfaith Dialogue and Cooperation, <http://www.whitehouse.gov/administration/eop/ofbnp/policy/interfaith> (last visited Nov. 26, 2009).

establishment of religion.<sup>186</sup> The Obama administration also increased the office outreach to religious minorities in the United States as well as encouraged inter-religious dialogue and cooperation in carrying out services to poor and struggling families and individuals.<sup>187</sup> One of the priorities of the Office of Faith-based and Neighborhood Partnerships under the Obama administration is to create opportunities for interreligious cooperation in social justice issues.<sup>188</sup> To do this, this Office works with offices and programs throughout the Federal and State Governments, such as the United States Agency for International Development and the Corporation for National and Community Service, to foster dialogue and social justice cooperation between faith-based and secular groups.<sup>189</sup> This new direction for the OFBNP is helpful for the American Muslims seeking to enhance their social collaboration with mainstream faith-based institutions and is a step forward toward social integration. Also, the OFBNP demonstrates the important role government should play to advance religious minority integration into mainstream society.

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

#### 4. Political Integration

Political integration could be defined as the ability of the American Muslim community to participate in the political process, and to become politically active and civically engaged. Political involvement has played a key role in the integration of religious and ethnic minorities and greatly helped the Jewish community attain recognition within the mainstream society.<sup>190</sup> Jews have in fact become involved in politics even at a time when political activism for religious and ethnic minorities was difficult to imagine. They were able to contribute financially to electoral campaigns, ensure high rates of voter participation and run for various levels of office.<sup>191</sup> In contrast, today only a small minority of American Muslims that are mainly indigenous Muslims are politically active and serve the country in various offices. There is political activism within the Muslim immigrant community but it remains slim compared to the political success within the African American Muslim community.

Some immigrant Muslims use political involvement as a self-fulfilling desire, and this practice is not far from general behavioral theory, which addresses societies regardless of their religious affiliation. For instance, Maslow's "hierarchy of need" speaks directly to this phenomenon within the wealthy American Muslim immigrants. Maslow identified five essential human needs: physiological, safety, affection, esteem, and self-actualization.<sup>192</sup> The fourth level is more relevant to the political involvement of the immigrant Muslim community. After the first three needs have been satisfied, esteem (that is, things that reflect on self-esteem, personal worth, social recognition, and

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<sup>190</sup> For a brief discussion about the political integration of the Jewish community, see *supra* ch. II.

<sup>191</sup> NATHAN GLAZER, *BEYOND THE MELTING POT* 170 (1976).

<sup>192</sup> MASLOW ABRAHAM, *MOTIVATION AND PERSONALITY* 23 (1954).

accomplishment) becomes increasingly important. To a certain extent, this particular level is applicable to segments of the immigrant Muslim community with regard to their political, and in some instances social involvement with the mainstream society. From an experiential point of view, many American Muslims who came as immigrants and, over the years, managed to fulfill their physiological, security, and social needs, begin to actively pursue social recognition within their own community as well as mainstream society. For example, they become involved in high-level social clubs and become active in politics by supporting politicians financially and attempt to run for office.

**a. Toward Political Integration of the American Muslims**

For the Muslim community, hopes for integration are buttressed by the positive advances of the American legislative and executive branches that have helped to include American Muslims in political activities. The United States, founded on the principle of the separation of church and state, has become the most religiously diverse nation in the world. Diversity, however, is not to be confused with pluralism. Diversity merely signals the presence of differences; pluralism consists of affirming and engaging those differences in a positive and constructive way.

One significant sign of the public and political affirmation of Islam in America occurred in the year 1991 when Imam Siraj Wahhaj of Al-Taqwa mosque (in New York City) became the first Muslim leader ever to offer a prayer before the U.S. House of Representatives.<sup>193</sup> One year later, W. D. Mohammed of the organization Mosque Cares,

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<sup>193</sup> GARBI SCHMIDT, ISLAM IN URBAN AMERICA: SUNNI MUSLIMS IN CHICAGO 8 (2004).



and the prominent leader of a majority of orthodox African-American Muslims, was invited to deliver the first Muslim invocation in the U.S. Senate.<sup>194</sup>

Additionally, Muslims were invited to the White House in 1996 to celebrate Eid al-Fitr, the celebration that marks the end of Ramadan. In her welcome address, First Lady Hillary Clinton acknowledged Islam as part of the fabric of this country, stating:

This celebration is an American event. We are a nation of immigrants who have long drawn on our diverse religious traditions and faiths for the strength and courage that make America great. For two centuries, we have prided ourselves on being a nation of pluralistic beliefs, united by a common faith in democracy.<sup>195</sup>

In addition to the above-mentioned positive signs of inclusion, in the year 2001, the U.S. Postal Service (USPS) issued the first stamp commemorating Eid al Fitr.<sup>196</sup>

According to the official press release:

The 34-cent Eid stamp will be issued on Sept. 1, 2001 at the annual Islamic Society of North America at the Donald E. Stephens Convention Center, 5555 North River Road, Des Plaines, III, at 11:45 a.m. The stamp will be available at the convention and at post offices nationwide on Sept. 1.<sup>197</sup>

The most recent example of the Muslims' involvement in the process of political integration occurred in November 2006, when Minnesota's Keith Ellison became the first Muslim to be elected to the U.S. House of Representatives. Immediately after expressing his thoughts about taking the oath of office with holy Qur'an, Ellison received a flood of criticism and negative comments. Dennis Prager, a conservative talk-show host, charged

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<sup>194</sup> STEVEN ANZOVIN & JANET PODELL, FAMOUS FIRST FACTS ABOUT AMERICAN POLITICS 73 (2000).

<sup>195</sup> DIANA L. ECK, A NEW RELIGIOUS AMERICA: HOW A "CHRISTIAN COUNTRY" HAS BECOME THE WORLD'S MOST RELIGIOUSLY DIVERSE NATION 76 (2001).

<sup>196</sup> Press Release, U.S. Postal Serv., U.S. Postage Stamp Celebrating Muslim Holiday To Be Issued by United States Postal Service: Eid Stamp Part of Holiday Celebration Series (Aug. 1, 2001), *available at* [http://www.usps.com/news/2001/philatelic/sr01\\_054.htm](http://www.usps.com/news/2001/philatelic/sr01_054.htm) (last visited Jan. 2, 2009).

<sup>197</sup> *Id.*

that Ellison's decision “undermines American civilization.”<sup>198</sup> Moreover, he declared that if Ellison cannot use the Christian Bible, then he should not be allowed to serve in Congress. Prager's erroneous comments clearly contradict the U.S. Constitution. Based on Article VI of the Constitution:

The Senators and Representatives before mentioned, and the Members of the several States Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.<sup>199</sup>

In addition, the establishment clause and free exercise clause of the Constitution mandate the equal treatment of people without regard to their religious beliefs. This unequivocally means that the government cannot dictate what a person uses as a religious book.

In addition to Prager's remarks, Virgil Goode, a Republican representative from Virginia, warned his constituents that “if American citizens don't wake up and adopt [Goode's] position on immigration, there will likely be many more Muslims elected to Congress and demanding to use the Qur'an.”<sup>200</sup> Goode's comments are particularly disturbing in that they were made by a man who knows from experience that oaths of office are choreographed with texts, sacred or otherwise, and are purely ceremonial photo-ops that occur after the actual swearing in.

Nevertheless, in a move aimed to connecting Islam with American history, Ellison, a Detroit-born African-American convert to Islam, borrowed Thomas Jefferson's

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<sup>198</sup> *Id.*

<sup>199</sup> U.S. CONST. art VI; *see also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 2 (2000).

<sup>200</sup> Rachel L. Swarns, *Congressman Criticizes Election of Muslim*, N.Y. TIMES, DEC. 21, 2006, [http://www.nytimes.com/2006/12/21/us/21koran.html?\\_r=1&fta=y&oref=slogin](http://www.nytimes.com/2006/12/21/us/21koran.html?_r=1&fta=y&oref=slogin) (last visited Jan. 8, 2008).

Qur'an from the Library of Congress for his swearing-in ceremony. It was a bold statement linking Islam with America's Founding Fathers.

Moreover, as a member of Congress and through his interaction with his colleagues, Ellison has contributed tremendously to the acceleration of the community's political integration. As a result of his efforts, in the year 2007 the U.S. Congress passed a resolution that for the first time officially recognized the beginning of Ramadan, the Islamic holy month of fasting and spiritual renewal.<sup>201</sup> It also became customary for nearly every official, from the President to the Speaker of the House and Cabinet officials, to issue congratulatory messages to Muslim Americans who were observing the fast. These are positive signs for American Muslim political inclusion and the community needs to take advantage of them to increase their political involvement.

### **C. Contemporary Obstacles to Integration**

Despite the hopeful future for the American Muslim community's full integration into mainstream America, the previously mentioned legal structure and the social capital the Muslim community possesses, its members face many challenges that differ from those faced by earlier-arriving religious and ethnic communities. The primary cause of these obstacles in the recent history is the tragic event of September 11, 2001, which has engendered a lack of trust and confidence, as well as fear. Some of these challenges will be summarized as follows.

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<sup>201</sup> H.R. Res. 635, 110th Cong. (as passed by House, Oct. 2, 2007).

## 1. Muslim Charities as an Instrument of Social Justice

Many American Muslim charities were shut down in the past several years without clear and final verdicts pertaining to the accusations launched against them. Most of these cases remain unresolved. This delay in resolving these cases has created a great deal of mistrust among Muslim Americans who support charity work due to religious obligations to their communities and neighbors. In addition to this, observant American Muslims give to charity for spiritual and patriotic reasons. The absence of resolution to Muslim charity issues remains a huge problem, not only for the community, but also for the individuals who, in good faith, wrote checks to these charitable organizations, most of which had IRS tax-exempt numbers. Some of them had even received government grants, and yet found themselves on official government watch lists. However, this climate has had one positive impact on American Muslim nonprofits in terms of compliance with the non-profit sector rules and regulations, financial transparency, accountability and other governance issues. For instance, the Muslim Advocate recently launched their new initiative to assist American Muslim charitable organizations and nonprofits to meet the highest standards of legal compliance, financial accountability and good governance.<sup>202</sup> This new initiative is conducted in collaboration with the Better Business Bureau Wise Giving Alliance, a mainstream watchdog organization.<sup>203</sup> This initiative is part of a comprehensive community education campaign, led by Muslim Advocates and supported by major national Muslim organizations, such as the Islamic Society of North America and the Muslim Public

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<sup>202</sup> Press Release, Muslim Advocates, Muslim Advocates Announces New Accreditation Initiative with the Better Business Bureau Wise Giving Alliance to Assist American-Muslim Charitable Organizations (Aug. 13, 2008), *available at* [http://www.muslimadvocates.org/press\\_room/muslim\\_advocates\\_announces\\_new.html](http://www.muslimadvocates.org/press_room/muslim_advocates_announces_new.html) (last visited Nov. 29, 2009).

<sup>203</sup> *Id.*

Affairs Council, to strengthen the governance and legal compliance of American-Muslim charitable and nonprofit organizations. Surely, this initiative will help Muslim charities to excel in their operation and practices, but the issue of Muslim charities remain unresolved.

## **2. The Diversity and Complexity of the American Muslim Community**

The huge diversity within the American Muslim community presents a challenge to completing the swift integration of Muslims into American society. The American Muslim community is unique in its diversity. Studies conducted by the American Muslim Studies program at the Georgetown University indicate that 36 percent of American Muslims were born in the United States, while 64 percent were born in 80 different countries around the world.<sup>204</sup> No other country has such a rich diversity of Muslims. The American Muslim community is thus a microcosm of the Muslim world. American Muslims come from different ethnic origins and with various interpretations of Islam and are confronted with a situation in which they need to have a basic unified understanding on various religious issues, as well as immersing themselves into American Society.

Religious Studies Professor Ingrid Mattson portrayed this disparity as being divided into four different paradigms: the first is the paradigm of resistance that is used by the Muslims who believe that America is a decayed (*Jahili*) society; the second is called the paradigm of embrace, which openly allows Muslims to be loyal to the American culture; the third paradigm is floating between the extremes of strict resistance and full embrace, and it is called “selective engagement”; and the last is where Muslims

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<sup>204</sup> Rita Rudusa, A Miniature Replica of the Muslim World: An Interview with ACMCU’s Zahid Bukhari, <http://blogs.georgetown.edu/?id=34892> (last visited Dec. 2, 2009).

are carefully active in social engagement but without compromising their faith.<sup>205</sup> These four paradigms are great demonstrations of American Muslims' various perspectives on how to continue their integration into American society, and they illustrate the misconceptions, among some Muslim groups, about the Islamic perspective on the necessity of positive relationship with the host society and the theological understanding of citizenship. Therefore, the diverse American Muslim community needs to come to a common agreement as how to be an American Muslim in order to show that it is possible to preserve your values and simultaneously be part of American culture. In other words, the community must agree on how to be both American and Muslim at the same time.

### **3. The Myth of Return**

The “myth of return” is another issue facing the integration of segments of the immigrant Muslim community due to the fact that some immigrants still tie themselves to their countries of origin. Until recently this myth caused some immigrant Muslims to think of themselves as “temporary” immigrants who will one day leave; therefore, they focused on preserving their Islamic identity, and not on exerting efforts toward civic engagement. The myth of return has, for all practical purposes, faded, and these immigrant Muslims should accept the fact that they are not only here to stay, but are and should be an integral part of American society. Toward that end they should tackle other obstacles to integration by promoting the proper understanding of community's healthy cooperation with the rest of the society, intensifying and diversifying American Muslims outreach efforts for civic engagements. Above all, integration is a vital issue for all

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<sup>205</sup> Ingrid Mattson, *How Muslims Use Islamic Paradigms to Define America*, in RELIGION AND IMMIGRATION: CHRISTIAN, JEWISH, AND MUSLIMS EXPERIENCES IN THE UNITED STATES 199, 202–09 (Yvonne Yazbeck Haddad, Jane I. Smith & John L. Esposito eds., 2003).

future American-born Muslims. American Muslim immigrants should liberate themselves from the myth of return and adopt the perspective of Dr. Maher Hathout, Senior Advisor to the Muslim Public Affairs Council, who described his own immigration journey by saying “I came [to America] knowing that home is not where my grandfather is buried. Home is where my grandson ought to be brought up”.<sup>206</sup>

#### **4. Absence of Greater Cooperation Between Indigenous and Immigrant Muslims**

Indigenous American Muslims are defined in this dissertation as people who have been Americans for at least two centuries. We might therefore conclude that indigenous American Muslims are mainly African American, with a small percentage of Caucasian Americans. Immigrant Americans in this paper refer to those immigrants who have been part of American society for less than a century. Immigrant American Muslims are mainly from Asia, the Middle East, and Africa. These two sets of Muslim communities have not cooperated in their social capital and experiences. Both communities own unique resources that could potentially help them integrate into American society. For example, indigenous American Muslims are vocal in politics, matters of social justice, and a greater knowledge of the American culture. American Muslim immigrants have considerable potential for economic and professional leverage, but they know little about the American civil engagement culture. Thus, the convergence of the communities' resources will increase the participation of American Muslims in the American public sphere and will ultimately lead to community integration.

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<sup>206</sup> Mehammed Mack, *An American Muslim: Maher Hathout and His Philosophy of Radical Openness*, L.A. WEEKLY, Jan. 4, 2007, <http://www.laweekly.com/2007-01-04/news/an-american-muslim/> (last visited Dec. 2, 2009).

## **5. The Negative Image of Islam and the Islamophobic Environment: The Current Climate of Fear**

Recently, the climate of fear and mistrust created by recent tragic events perpetrated by Muslims on American soil and elsewhere and subsequent violence and anti-American images from Muslim-dominated countries around the world has caused American society to fear Islam and Muslims. This climate created Islamophobia within mainstream American society and subsequently became a problem for the integration process. As Samuel Huntington observes, “Muslims, particularly Arab Muslims, seem slow to assimilate compared to other post-1965 groups. In part, this may be the result of Christian and Jewish prejudice toward Muslims enhanced in the late 1990s by the highly publicized terrorist incidents perpetrated or thought to have been perpetrated by extremist Muslim groups.”<sup>207</sup> These tragic incidents created anti-Muslim sentiment in America and subsequently hindered social integration because it depends on the improvement of the images and impressions of Islam and the American Muslim community. National Muslim organizations and Muslim leaders of mosques and local Islamic centers across the nation have been working hard for the past several years to portray the correct image of Islam, and to ensure that the American Muslim community continues to engage and fully participate in the social, economic, and political spheres of American society.

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<sup>207</sup> SAMUEL P. HUNTINGTON, WHO WE ARE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 185 (2004).



## Conclusion

This research suggests four different forms of integration that could be utilized by the American Muslims as means for possible integration into American society. Some of these forms are legally mandated. However, some are voluntarily and are more likely to be instrumental in increasing community engagement with mainstream society. While there are several means that could be considered by American Muslims for achieving integration, one method, establishing an Islamic insurance company, is particularly important and should be considered by the community.<sup>208</sup> This recommendation is a direct result of the negative impact of the Hurricane Katrina and the absence of any Islamic insurance options to many Muslims living in New Orleans area.<sup>209</sup> Establishing such an insurance company is feasible because of the economic power enjoyed by the American Muslim community, as well as the successful previous models of establishing mortgage and investment companies that are in compliance with Islamic law.

In one decade, the American Muslim community was able to establish Islamic financial institutions catering to some parts of their Islamic financial needs—namely, the Islamic mortgage companies and Shari’ah-compliant investment businesses. These enterprises have not only grown tremendously in a short period of time, but have also attained considerable levels of trust within the mainstream American community. For instance, 60% of the more than two billion dollars invested in Amana Mutual Fund are assets that belong to non-Muslim Americans.<sup>210</sup> This form of economic integration will

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<sup>208</sup> See my recommendations for establishing Shari’ah compliant insurance companies in the United States in Chapter 3 section I.

<sup>209</sup> *Id.*

<sup>210</sup> See Amana Mutual, *supra* note 164.

accelerate and help all aspects of the integration process. However, there are many obstacles preventing the community from using its economic power to establish Islamic banks or operate Islamic mortgage models. These challenges are regulatory in nature and need to be addressed at the federal and state level. In the federal context, legislators need to look into the possibility of accommodating Islamic requirements within the existing financial regulations so that they can allow for the establishment of Islamic banks in the US while complying with financial regulations.

If States could adopt regulations to facilitate the offering of Shari'ah-compliant insurance products, that would assist Muslims not only in their religious observances but also has the potential to allow them to contribute to social justice.<sup>211</sup> One of the most important principles of Islam is that all things belong to God, and that wealth is therefore held by human beings in trust.<sup>212</sup> Therefore, social justice is actually an integral part of the Islamic faith. Muslims are religiously obligated to give 2.5% of wealth and assets annually after fulfilling all their necessary needs and debts.<sup>213</sup> In addition, Islam encourages giving to the poor and needy.

Despite the signs of American Muslims assimilation mentioned above, the integration process of the American Muslim community into American society could encounter various challenges, ranging from within the community itself, such as

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<sup>211</sup> See Mohamed A. Elsanousi, *A Growing Economic Power: Muslims in North America and Integration and Contribution to Social Justice*, 9 J.L. SOC'Y 100, 135 (2008) ("If the Islamic finance is strengthening in the U.S. through proper regulations, it would automatically reflect tremendously in the contribution of Muslims to social justice.").

<sup>212</sup> For a brief discussion on the Islamic principle of *Zakat* (almsgiving), see *supra* notes 171–73 and accompanying text.

<sup>213</sup> See *supra* notes 171–73 and accompanying text.

developing a common theological understanding to critical issues, the myth of return,<sup>214</sup> and Islamaphobia—the recent climate of fear and mistrust that was created by recent tragic events perpetrated by Muslims. Another challenge is labeling Muslim Americans a suspect community which goes hand in hand with excluding Muslim Americans from a place in the public square. Failure to distinguish between Islamic political and religious groups makes Muslims feel increasingly isolated and defensive and presents a barrier to successful integration. The challenge for the American Muslim community is to help America overcome its insecurities and trust its Muslim community. The outlook for the future is positive, as many Muslim Americans are not experiencing challenges to same extent or magnitude as other religious minorities endured in the past.

Based on the above discussion about the growing American Muslim community and the availability of their social capital, one can conclude that there is a huge potential for the American Muslim community to fully integrate and participate in the American system. The community is described by the Pew survey as mainstream, educated and ready to be included in the integration process.<sup>215</sup> It is in the interest of this nation to facilitate the process of the American Muslim community integration. There should be collaborative efforts between the host society and the American Muslim immigrants. In particular, the Muslim community needs to strengthen relationships between different sects of the community. In this particular effort, the immigrant Muslim community needs to bring the African-American Muslim community to the forefront and find a way to close the gap between the immigrant community and the indigenous African-American Muslim community. For this integration process to succeed, it is imperative to depend

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<sup>214</sup> Unfortunately, a sizable number of Muslim immigrants believe that they are temporary immigrants.

<sup>215</sup> Pew, *Supra* note 155, at 18.

heavily on African-American Muslims. The examples given in this dissertation regarding the political integration process for American Muslims indicate that the main players who represented the American Muslim community in the political sphere in the past few decades were African-American.<sup>216</sup> In all norms of this integration process, whether it deals with political, social, or educational issues, African-American Muslims are in leadership positions. Therefore, the immigrant Muslim community must support the African-Americans financially so that they can be empowered to use their tremendous civic engagement potential to accelerate this integration process of the American Muslim community.

Complete assimilation of American Muslims into American society remains critical for the betterment of American society, a reality that requires Americans to change their ambivalent attitudes toward the integration of the American Muslim with one that firmly encourages integration. As far as American Muslims are concerned, they need to work on the areas that make their integration difficult and focus on integration factors that have proven to be successful in the past. In the wake of complex national and international issues, it remains uncertain when American Muslims will be deemed by the mainstream to be a fully assimilated part of American society and to what extent America's assimilation success in the past will extend to its diverse Muslim immigrant groups.

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<sup>216</sup> For several examples of the African American Muslims' political involvement with mainstream American society, see *supra* ch. II.B.4.

## CHAPTER III. HURRICANE KATRINA AND THE ABSENCE OF SHARI'AH COMPLIANT INSURANCE

### A. Introduction

The idea of writing a chapter on the notion of insurance in general and with greater details the concept of Shari'ah compliant insurance in particular evolved out of the devastating effect of Hurricane Katrina on an ultra-traditional Muslim community, the Tablighi Jamaat (hereafter referred to as TJ)<sup>217</sup> a tiny minority sect within the American Muslim community who live in the town of Arabi, Louisiana, located on the banks of the Mississippi River. The TJ's religious view against commercial insurance caused them tremendous challenges in their struggle to recover their livelihoods. Their position against commercial casualty and property insurance differs from the understanding of the many observant American Muslims who use commercial insurance.

Although there are no Shari'ah compliant insurance companies in America, some Muslim scholars permit Muslim minorities to use commercial home and other insurance policies. Abu Hanifa<sup>218</sup> has said that if you live in a non-Muslim country, it is permissible to participate in a *Riba*-based financial system. He based this ruling on the belief that the *Qur'anic* prohibition of *Riba* is due to the injustice that interest-based systems can create (rather than due to moral grounds), and on two guiding principles of the *Shari'ah* – 1) the protection of the assets and wealth of everybody, Muslim or non-Muslim, and 2) the belief that religion should not create an undue hardship. Abu Hanifa argued that since

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<sup>217</sup> See *supra* ch. I (discussing the Tablighi community).

<sup>218</sup> Imam Abu-Hanifa Numan is known in the Islamic world as the greatest Imam, and his school of thought has the largest number of followers among the four well-know Sunni Muslim schools of thought. He was a successor and met some of the companions of the Prophet Muhammad. See Posting of Salman Ahmad Younas to Sunni Forum, Brief Bio of Imam Abu Hanifa, <http://www.sunniforum.com/forum/showthread.php?75-Brief-Bio-of-Imam-Abu-Hanifa> (June 18, 2004, 21:53 EST).

Muslims would face undue difficulties if they refrained from participation in non-Muslim society and since the prohibition of *Riba* is based in the issue of justice, not morality, it is permissible to finance houses, for instance, with the banking systems available in the country if no Islamic financial institutions are available.<sup>219</sup> American Muslims who own homes financed through mainstream or Shari'ah compliant mortgage companies have to purchase homeowners insurance as a condition of the loan. However, members of the TJ, who purchase their homes in cash, do not use commercial insurance due to their extreme interpretation of Islam.<sup>220</sup> Consequently, if the Tablighi community were to lose their businesses because of natural or man-made disasters, they would not be able to recover, which would result in negative consequences to society as a whole.

As America's Muslim community continues to grow and develop, there will be a minority segment that faces the challenges of aligning their interpretation of Islamic principles to the American way of life. This situation requires continuous research regarding how this minority segment practices their version of principles of Shari'ah within the American pluralistic society which provides religious liberty, inclusion, and accommodation of religious minorities. Such research will benefit from an examination of the experiments of Muslims communities in majority Muslim countries as well as of Muslim minorities in the Western society.

This chapter will briefly discuss the concept of communitarianism as it relates to insurance and survey the current forms of insurance. It will discuss the concepts of friendly societies, mutual insurance companies, and commercial insurance, and it will suggest that a Shari'ah compliant insurance model could operate successfully under both

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<sup>219</sup>. See Monzer Kahf, Lecture at the ISNA Financial Planning Seminar at the Islamic Society of Baltimore (June 14, 2003).

<sup>220</sup> See *supra* ch. I (discussing the Tablighi community).

Islamic law and the American legal system. The chapter briefly discusses the definition and the historical development of commercial insurance. It will examine three famous historical narratives of Islamic insurance as supported by the Qur'an and the Hadith. It will also discuss differences between commercial and Shari'ah compliant insurance systems, and the problems faced by the Tablighi Jamaat of Arabi as a distinct and conservative minority, with particular reference to the implications of Hurricane Katrina on this community. The chapter will elaborate on the concept of *Takaful* (Shari'ah compliant insurance system), examine the legal impediments toward achieving it, and compare mutual insurance laws in Virginia and Texas. Finally, the chapter will suggest ways in which Shari'ah compliant insurance models may operate, and will propose steps that interested entities might take to establish an Islamic insurance company in the United States.<sup>221</sup>

## **1. The Communitarian Basis of Insurance**

The principles of communitarianism were founded as early as 1751 when Benjamin Franklin helped founded the Philadelphia Contributorship, a fire insurance company with 70 contributors that discussed, drawn up and wrote 143 policies in its first year of operation.<sup>222</sup> Despite the fact that the idea of communitarianism was existed as early as 16<sup>th</sup> century in the Philadelphia Contributorship fire insurance company,, contemporary insurance holds more in common with the more recent practical notion of

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<sup>221</sup> See *infra* notes 399 to 428 and the accompanying texts.

<sup>222</sup> The Philadelphia Contributorship, <http://www.ushistory.org/tour/philadelphia-contributionship.htm> (last visited Nov. 7, 2010).

communitarianism, which began in the late 20<sup>th</sup> century.<sup>223</sup> Communitarianism emphasizes “the notion of the existence of a community of interconnected society who emphasize the need to balance their responsibilities as individuals with that of the members of their group on the one hand and on the other hand expect certain benefits from it in return.”<sup>224</sup> For instance, communitarianism emphasizes the importance of social networks that create norms, reciprocity and trustworthiness through working collectively for the common good.<sup>225</sup> Communitarians insist that the best way to achieve social objectives is through entities such as neighborhood associations, small groups of unelected concerned citizens that gather to extend services to each other.<sup>226</sup>

As the discussion in the upcoming sections will focus on the history of the various forms of insurance, the communitarian aspect of each form of insurance, including for-profit insurance, will be highlighted through various examples. Examining the historical development of insurance reveals that at their essence, all forms of insurance seek to alleviate unexpected suffering and thus, to some degree, contribute to the welfare of participants. This reality is present in the commercial insurance system as well as in various schemes of mutual cooperation.

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<sup>223</sup> Niki Rapaana, Speech at the Washington State Libertarian Party: Communitarianism and Civil Society (Apr. 21, 2001), *available at* [http://www.citizenreviewonline.org/april\\_2001/communitarianism\\_and\\_civil\\_socie.htm](http://www.citizenreviewonline.org/april_2001/communitarianism_and_civil_socie.htm) (last visited Sept. 7, 2010).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Communitarianism Facts, Discussion Forums, and Encyclopedia Article, <http://www.absoluteastronomy.com/topics/Communitarianism> (last visited Sept. 7, 2010).



## 2. The Concept of Mutual Insurance

The concept of mutual insurance originated in England in the 16<sup>th</sup> century when the first mutual life insurance company was formed: The Equitable of London.<sup>227</sup> Since then, mutual insurance companies have steadily developed in most countries, organized either by large companies or small firms. The first mutual insurance company in the US was a fire insurance company organized in Philadelphia, Pennsylvania in 1752, the Philadelphia Contributionship for the Insuring of Houses from Loss by Fire.<sup>228</sup> This Company is the oldest property insurance company in the nation, continues to operate to this day, and has maintained its heritage as a mutual company.<sup>229</sup> However, many mutual companies in the United States demutualized in the 1990's and more recently in order to raise capital in the capital markets.<sup>230</sup> A mutual insurance company may be defined as:

A cooperative enterprise in which the members constitute both the insurer and insured, where the members all contribute by a system of premiums or assessments, to the creation of a fund from which all losses and liabilities are paid, and in which the profits are divided among the members in proportion to their interest.<sup>231</sup>

The mutual insurance company is owned and managed by the policyholders, with business conducted for their benefit.<sup>232</sup> Policyholders can be from all over the country or from a single region or town.<sup>233</sup> There are also mutual insurance companies that only serve members of a single profession.<sup>234</sup> A company can still be a mutual company even

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<sup>227</sup> CHARLES F. TRENERRY, THE ORIGIN AND EARLY HISTORY OF INSURANCE: INCLUDING THE CONTRACT OF BOTTOMRY 244 (Lawbook Exch. Ltd. 2009) (1926).

<sup>228</sup> The Philadelphia Contributionship, <http://www.ushistory.org/tour/philadelphia-contributionship.htm> (last visited Sept. 7, 2010).

<sup>229</sup> The Contributionship Companies, <http://www.contributionship.com/main.html> (last visited Sept. 7, 2010).

<sup>230</sup> Selling Demutualized Shares, <http://www.bankrate.com/> (last visited June 18 2010).

<sup>231</sup> AM.J. JURIS, AMERICAN JURISPRUDENCE 2d ed Vol. 43 Insurance §74 p 116 (2003).

<sup>232</sup> ALY KHORSHID, ISLAMIC INSURANCE: A MODERN APPROACH TO ISLAMIC BANKING 97 (2003).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

if the right to vote and control the management of an insurance company is vested in only those members who are guarantors.<sup>235</sup> A mutual company operates differently based on the laws of the particular state.

### 3. Friendly Societies and Insurance

The concept of a friendly society arose in the 17<sup>th</sup> century in England and was spread in its colonies.<sup>236</sup> Subsequently, independent nations adopted and adapted the concept as part of the British legal, judicial, political, and economic system.<sup>237</sup> Friendly societies grew from the simple premise that if a group of people contributed voluntarily to a mutual fund, then they could receive benefits in a time of need.<sup>238</sup> For example, in return for a small weekly or monthly contribution paid into a common fund, a group member receives sickness and funeral benefits.<sup>239</sup> Members of the society would meet monthly in a local public house to transact business and have a convivial time.<sup>240</sup> The early meetings were often held as a social gathering during which the subscriptions would be paid.<sup>241</sup>

The friendly society is based on the cooperative notion of pooling resources together and transferring the risk from the individual to the group. In other words, only the members of the group are responsible for responding collectively to any disaster that might occur and compensating the unfortunate from the common fund. To define the magnitude of the risk against which they guarded and to determine how much members

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<sup>235</sup> *Id.* at 117.

<sup>236</sup> Friendly Society: Definition of Friendly Society, HighBean.com Online Dictionary, <http://www.encyclopedia.com/doc/1O18-FriendlySociety.html> (last visited Sept. 7, 2010).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

should contribute to meet that risk, friendly societies used what is now the basic principle of insurance. If the claims exceed the premium in a particular year, then the contributors were required to contribute more to cover the loss. However, if the claims did not exceed the pool of premiums in that particular year, then the surplus would be refunded to contributors proportionally according to their share in the pool.<sup>242</sup> The friendly society model, although on a small scale, is similar to the Lloyd's of London approach, which was founded in London in 1688, where wealthy individuals and corporations joined together as syndicates to insure risk.<sup>243</sup> It is important to note the similarities between the Shari'ah compliant insurance model, which will be discussed in the upcoming sections, and the Lloyd's of London model. Like the Lloyd's of London model, the Shari'ah compliant insurance model also requires each member to pay premiums into a common pool, which is then divided and credited by the Shari'ah compliant insurance company into two separate accounts, namely, a Participant's Account (PA) and a Participant's Special Account (PSA).<sup>244</sup> A substantial portion of the premium paid by a participant is credited into her PA solely for the purpose of her saving and investment.<sup>245</sup> The balance is credited into her PSA as a donation for the company to pay benefits to fellow-participants who have been struck with disaster.<sup>246</sup> It is made clear to the participant in the contract she signs that this donation fund is to be retained to compensate for future losses. Since this type of Shari'ah compliant insurance model is not in operation

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<sup>242</sup> *Id.*

<sup>243</sup> Lloyd's History – About Lloyd's, <http://www.lloyds.com/Lloyds/About-Lloyds/Explore-Lloyds/History> (last visited Sept. 7, 2010).

<sup>244</sup> M. KABIR HASSAN & MERVYN K. LEWIS, ISLAMIC FINANCE 415–20 (2007).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

anywhere in the United States, the Tablighi Jamaat mosque in Arabi did not have such an insurance model or a pool of funds to help individuals recover their livelihoods.

## **B. Brief History of Commercial Insurance**

The historical origin of banking in Europe had significant influence on the development of the banking industry in the United States in various aspects.<sup>247</sup> For instance, the early idea of the separation of banking and commerce originated in England and was included in the founding laws of the Bank of England under Section XXVI of the Bank of England Act which says that “the Corporation is not to trade.”<sup>248</sup> In other words, the banks were not supposed to engage in commerce or insurance, but they are permitted to deal with financial instruments of many types. Although some experts on the history of banking think that the Bank of England would not have engaged in commerce under any circumstances, the separation of commerce from banking influenced the banking laws in the United States.<sup>249</sup> Though this separation of banking and commerce might not guarantee the safety of depositors or achieve the government objectives of stabilizing the economy, the early experiences in Europe do suggest that the separation of banking from commerce could help provide the safety desired.<sup>250</sup> In his preparation of banking legislation in the United States, Alexander Hamilton appeared to have benefited from this perspective and adopted much based on English experiences.<sup>251</sup>

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<sup>247</sup> HOWELL JACKSON & EDWARD SYMONS, JR., REGULATION OF FINANCIAL INSTITUTIONS 432 (1999).

<sup>248</sup> Bank of England Act, 1694, 5 & 6 W. & M., c. 20, § 26.

<sup>249</sup> JACKSON & SYMONS *supra* note 249, at 32.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

The commercial insurance concept was first developed in America in the colonial era in the form of marine insurance.<sup>252</sup> British merchants wanted to insure their ships and goods, and as a result introduced marine insurance.<sup>253</sup> Most of the policies for this type of insurance were purchased from English insurance companies due to the 1719 British Parliament Act, which made it illegal for stock insurance companies to be chartered in British colonies.<sup>254</sup> The purpose of this was to ensure that the lucrative insurance market remained based in England. The British Parliament's decision was implemented in the American colonies in 1741; nonetheless, the Act continued to allow unincorporated companies and individuals to underwrite policies.<sup>255</sup>

Despite the British Parliamentary Act of 1719, the first American insurance offices were opened in Philadelphia in 1721 and in Massachusetts in 1728.<sup>256</sup> The first company established domestically had a religious affiliation—the Corporation for the Relief of Poor and Distressed Presbyterian Ministers and of the Poor and Distressed Widows and Children of Presbyterian Ministers, which was headquartered in Philadelphia.<sup>257</sup> This shows that the history of insurance in the United States contains a religious element, given the Presbyterian community's foundational role in establishing this corporation.<sup>258</sup> During the colonial period Presbyterians were concerned about the vulnerability of members of their community, particularly the poor and distressed widows and children of Presbyterian ministers.<sup>259</sup> Once they established the Corporation in

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<sup>252</sup> *Id.* at 432.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 432–33.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> 1 JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES 187–88 (2002).

1761,<sup>260</sup> the contributors to this scheme were given annual payments, which varied in proportion to the size of the premium, starting one year after the death of the insured.<sup>261</sup> This arrangement illustrates the Presbyterian community's concern for the disadvantaged members of their society.<sup>262</sup>

The insurance industry grew slowly until the first half of 19<sup>th</sup> century, when it started to have greater significance within the rapidly expanding national economy.<sup>263</sup> State legislatures placed various restrictions on the incorporation of new companies.<sup>264</sup> The legislatures restricted the type of investments that an insurance company could make and required the companies to maintain reserves to cover possible losses.<sup>265</sup> The insurance companies hoped that a legislative act similar to National Bank Act of 1864, which provided uniformity of laws regulating financial transactions at the federal level and stability for the financial industry, might provide them opportunities to gain relief from these varied and oppressive state regulations and restrictions.<sup>266</sup> The insurance industry was able to introduce bills in Congress for the purpose of passing a federal insurance law, but these attempts never succeeded.<sup>267</sup>

In the absence of the federal regulations, the insurance industry remained regulated at the state level. However, the swift growth of the insurance industry in the nineteenth century necessitated greater uniformity in the industry. As the result, state insurance commissioners met in 1871 to discuss issues such as uniform methods of

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<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> JACKSON & SYMONS, *supra* note 249, at 433.

<sup>264</sup> *Id.* at 433.

<sup>265</sup> *Id.* at 433–34.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 434–35.

valuing the assets of insurance corporations and establishing standardized annual forms.<sup>268</sup> This meeting produced a new organization known as the National Association of Insurance Commissioners (NAIC), which since its founding has played a significant role in coordinating insurance regulations across state lines and in facilitating periodic reform efforts.<sup>269</sup>

With the support of the NAIC, the insurance industry decided to take its problem to court, hoping that the courts might grant some relief from excessive state regulation of the industry. In *Paul v. Virginia*, the court held that the Virginia statute pertaining to the state's insurance requirements did not violate the Commerce Clause and was therefore constitutional.<sup>270</sup> There, an insurance agent from the State of New York protested against the local Virginia statute, which required out-of-state insurance companies and their local agents to comply with additional licensing requirements that did not apply to Virginia companies. Specifically, the statute required higher capital resources and required that certain securities be deposited as a precondition before the out-of-state companies were granted a State of Virginia insurance license.<sup>271</sup> Mr. Paul, the insurance agent, received financial support from the National Board of Fire Underwriters, the group that unsuccessfully attempted to have the federal insurance law passed by Congress.<sup>272</sup> The group hoped that the court would declare the Virginia statute unconstitutional and would similarly move to strike down similar restrictions in other states, motivating Congress to pass a national insurance statute similar to the National Bank Act.<sup>273</sup> Instead the Court

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 435–36.

<sup>270</sup> *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

held that the Virginia statute did not violate the Commerce Clause and was therefore constitutional.<sup>274</sup> Justice Field explained that insurance policies “are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States.”<sup>275</sup>

In many other cases, the Supreme Court reaffirmed its decision in *Paul*.<sup>276</sup> One such example was the famous case of *New York Life Insurance Co. v. Deer Lodge County*, which dealt with a Montana statute that imposed higher taxes on out-of-state insurance companies than it imposed upon in-state companies.<sup>277</sup> The New York Life Insurance Company argued that this statute created an unconstitutional burden on interstate commercial transactions.<sup>278</sup> The Supreme Court held that the Montana regulations pertaining to out-of-state insurance companies were constitutional and, moreover, stated that the business of insurance is not commerce.<sup>279</sup>

Thus despite these challenges and the attempts at federal regulation, insurance regulation remained the province of the states. However, in the 1940s, the Department of Justice responded to complaints of price-fixing among fire insurance companies by investigating the South-Eastern Underwriters Association, which resulted in criminal

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<sup>274</sup> *Id.* at 183.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 168.

<sup>277</sup> *N.Y. Life Ins. Co. v. Deer Lodge County*, 231 U.S. 509 (1913).

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*



indictments of Association officers and member companies for violation of federal anti-trust laws.<sup>280</sup> Invoking the *Paul* doctrine and *Deer Lodge* holding that insurance was not “commerce,” the defendants persuaded the district court to dismiss the indictments, arguing that the business of insurance was not commerce, and, therefore, that no interference with “interstate commerce” was possible and federal anti-trust laws did not apply.<sup>281</sup> The DOJ appealed the case to the Supreme Court, and in *United States v. South-Eastern Underwriters Association*, the Court reversed the lower court’s ruling and held that fire insurance transactions across state lines constituted interstate commerce.<sup>282</sup>

Within a year of *South-Eastern Underwriters*, Congress enacted the McCarran-Ferguson Act of 1945 in response to states’ concerns that they no longer had broad authority to regulate the insurance industry in their boundaries.<sup>283</sup> The Act gives states the authority to regulate the business of insurance without interference from federal regulations by providing that no act of Congress shall invalidate any state law, and therefore, the insurance industry is to be exempted from the applicability of antitrust laws.<sup>284</sup> Under the Act “the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.” And Sec. 2 of the Act provided: “(a) the business of insurance [shall] be subject to the laws of the several States which relate to the regulation or taxation of such business. (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of

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<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944).

<sup>283</sup> 15 U.S.C. § 1011 et seq. (2006).

<sup>284</sup> *Id.* § 1012(b).

insurance, or which impose a fee or tax upon such business, unless such Act specifically relates to the business of insurance.”<sup>285</sup> In summary, the McCarran-Ferguson Act gives primary insurance regulation to the states without requiring them to follow regulations set forth by the federal government unless certain practices interfere with federal law.

## **1. The Historical Basis for Communitarianism within Insurance**

The above discussion demonstrates that all forms of insurance, even for-profit insurance, are communitarian in nature, because they provide the social security that promotes the welfare of people who participate or purchase insurance. In addition, the friendly society model provides an excellent opportunity for its members to interact socially and practice the high moral values associated with mutual help. Insurance is a very effective way to protect members’ wealth from any unexpected natural or man-made disaster and to accelerate the restoration of its members’ businesses. Based on these three examples (mutual insurance, friendly societies and commercial insurance) we find that the very idea of Western insurance has a communitarian theoretical basis, an understanding that resonates well with religious concerns for the well-being and stability of the community. Thus, the very history of commercial insurance bears certain similarities to the history of the Shari’ah compliant insurance, to be discussed *infra*.

The historical notion of insurance in the American scene is more or less communitarian-based; one of the people who played a heroic role in advancing the communitarianism of insurance in America is Wallace Stevens, the great poet who was also an insurance salesman committed to furthering the idea of life insurance. He thought it would be terrible if somebody were to die in a car accident and thus expose her

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<sup>285</sup> *Id.* § 1012.

surviving family members to potentially serious financial and other hardships. Stevens wrote:

I guarantee the future. I let a man sleep nights because he knows that his family is protected from the random cruelties of this world.<sup>286</sup>

In addition, he tried to achieve communitarian goals by arguing that members of a community must figure out how to provide for one another.<sup>287</sup> Stevens devoted his life to the field of insurance for the best communitarian reasons. As the vice president of Connecticut Mutual Life Insurance Company, he helped create appropriate forums and approaches to help societies and individuals understand the importance of life insurance. For example, Stevens introduced the idea of “Insurance and Social Change,” which meant that if people participated collectively in mutual life insurance policies, it would change their social condition.<sup>288</sup> He promoted this idea through his writing and public presentations.<sup>289</sup>

## 2. Definition of Commercial Insurance

It is not the intention of this chapter to provide a comprehensive discussion of commercial insurance, but a brief definition and history of commercial insurance is offered to help the reader navigate the following sections. The commercial insurance system can be summarized as follows:

Insurance is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency. As regards property and liability insurance, it is a

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<sup>286</sup> DAVID LAVERY, IMAGINATION AND INSURANCE: WALLACE STEVENS AND BENJAMIN WHORF AT THE HARTFORD 24 (2000).

<sup>287</sup> *Id.*

<sup>288</sup> Michael Szalay, *Wallace Stevens and the Invention of Social Security*, 5 MODERNISM/MODERNITY 49 (1998).

<sup>289</sup> *Id.*

contract by which one party promises on a consideration to compensate or reimburse the other if he shall suffer loss from a specified cause, or to guarantee or indemnify or secure him against loss from that cause. "It is contract" to indemnify the insured against loss or damage to a certain property named in the policy by reason of certain perils to which it is exposed.<sup>290</sup>

According to Robert Riegel, commercial insurance is considered a social device whereby one person can contract with another.<sup>291</sup> The second party assumes certain definite risks of the first party upon payment by the latter of compensation called the premium.<sup>292</sup> This agreement is subject to the general law of contract, the application of which is limited in many essential respects by the unique nature of the contract and by well-understood customs and usages of the business.<sup>293</sup> The insurance company promises full or partial reimbursement upon satisfactory evidence of loss. This reimbursement is paid to people or companies whose concern about hazards prompted them to pay premiums to an insurance company.<sup>294</sup> There is a written contract called the policy or certificate of insurance and this policy include small details pertaining to the agreement between the insurance company and the insured party.<sup>295</sup>

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<sup>290</sup> JACKSON & SYMONS, JR., *supra* note 249, at 457.

<sup>291</sup> ROBERT RIEGEL & HARRY JAMES LOMAN, *INSURANCE PRINCIPLES AND PRACTICES* 19 (1921).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> WORDNET, <http://wordnet.princeton.edu/perl/webwn?s=insurance> (last visited June 2, 2009).

<sup>295</sup> *Id.* [the regulation of insurance and my recommendations that regulations may be modified to allow Shari'ah compliant insurance to be written and paid were discussed in Sub-section H of this chapter] See text accompanying notes 399 to 428, *infra*, for a discussion of the regulation of the business of insurance by the States. My recommendations as regard to regulations modifications are discussed in Sub-section I of this chapter.

### C. Three Historical Narratives of Ta'min (Islamic Insurance)

There are three different narratives that illustrate the origins and development of Shari'ah compliant insurance. Each of these three narratives is discussed in the following sections. The first two narratives provide significant conceptual resources for the development of Shari'ah compliant insurance, while the third narrative indicates why certain Muslim scholars see problems with attempts to reconcile Shari'ah compliant insurance principles with Western insurance.

#### 1. Narrative One: Qur'anic Verses Implying an Islamic Notion of Insurance

Unlike Islamic finance, modern commercial insurance is not explicitly mentioned in the Qur'an or the Sunnah. However, in the late 1970s, Aly Khorshid analyzed the concept of insurance and found a basis for Shari'ah compliant insurance in the Qur'an derived from the terms *aman* (security, peace, safety, and protection) and *ta'min* (to reassure, safeguard, and guarantee).<sup>296</sup> The derivative noun *amin* denotes a guard or a secure place, as in its frequent usage as a description of Mecca.<sup>297</sup> There are said to be 879 instances of the word *aman* or its derivative in the Qur'an.<sup>298</sup> The following are some of the relevant Qur'anic verses that Khorshid cites to support his point of view:

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ ۗ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ ۗ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا ﴿٥٨﴾

God commands you to give back your trusts to those to whom they are due and that when you judge between man and man, that you judge with justice. Verily, how excellent is the teaching which He gives you, for God is He Who hears and sees all things (4:58).<sup>299</sup>

<sup>296</sup> ALY KHORSHID, ISLAMIC INSURANCE: A MODERN APPROACH TO ISLAMIC BANKING 11 (2004).

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> YUSUF ALI, *supra* note 172, at 203.

قَالَ هَلْ ءَامَنُكُمْ عَلَيْهِ إِلَّا كَمَا أَمِنْتُكُمْ عَلَىٰ أَخِيهِ مِنْ قَبْلُ ۖ فَاللَّهُ خَيْرٌ حَفِظًا ۖ وَهُوَ أَرْحَمُ

الرَّحِيمِينَ ﴿١٤﴾

He asked: “Shall I trust you with him with any result other than when I trusted you with his brother aforesaid? But God is the best to take care (of him), and He is the most merciful of those who show mercy (12:64).<sup>300</sup>

قَالَتْ إِحْدَاهُمَا يَنَابِتٍ أَسْتَعِجِرُهُ ۖ إِنَّ خَيْرَ مَنْ أَسْتَعَجَرْتَ الْقَوِيُّ الْأَمِينُ ﴿٢٦﴾

Said by one of the daughters: “O my (dear) father, engage him on wages. Truly the best of men for you to employ is the (man) who is strong and trustworthy (28:26).<sup>301</sup>

وَمِنْ أَهْلِ الْكِتَابِ مَنْ إِنْ تَأَمَّنْهُ بِقِنطَارٍ يُؤَدِّهِ إِلَيْكَ وَمِنْهُمْ مَنْ إِنْ تَأَمَّنْهُ بِدِينَارٍ لَا يُؤَدِّهِ إِلَيْكَ إِلَّا مَا دُمَّتْ عَلَيْهِ قَائِمًا ۗ ذَٰلِكَ بِأَنَّهُمْ قَالُوا لَيْسَ عَلَيْنَا فِي الْأُمِّيِّينَ سَبِيلٌ وَيَقُولُونَ

عَلَى اللَّهِ الْكَذِبَ وَهُمْ يَعْلَمُونَ ﴿٧٥﴾

Among the People of the Book are some who, if entrusted with a hoard of gold, will (readily) pay it back; others, who, if entrusted with a single silver coin, will not repay it unless you constantly stood demanding, because they say: There is no call on us (to keep faith) with these ignorant (Pagans). But they tell a lie against Allah, and (well) they know it (3:75).<sup>302</sup>

According to Khorshid, the Islamic conception of Faith and Insurance,<sup>303</sup> and Insuring the Hereafter<sup>304</sup> encompasses a number of concepts, including peace of mind, absence of fear, protection of one’s self, wealth, and offspring, protection against the vicissitudes of fate, poverty, and disease, protection during travel, and protection of one’s residence. There are not substantial differences between these two classifications, Faith

<sup>300</sup> *Id.* at 567.

<sup>301</sup> *Id.* at 968.

<sup>302</sup> *Id.* at 146.

<sup>303</sup> KHORSHID, *supra* note 298, at 12.

<sup>304</sup> *Id.*

and Insurance and Insuring the Hereafter. Faith Insurance is practiced because of fear of the Creator and out of a belief that a believer should not abuse the trust bestowed on her by another human being.<sup>305</sup> Insuring the Hereafter means that if your deeds conform to your belief, then you are guaranteed a place in the hereafter.

## 2. Narrative Two: Mutuality and Cooperation

The second narrative of the origin of Islamic insurance concerns mutuality and cooperation, the pooling of common resources to help the needy—a method that is very much in line with the principles of compensation and shared responsibility within a society, as practiced between the Makkan immigrants and their Madinan hosts, following the Prophet Muhammad’s migration to Madinah in 622 C.E.<sup>306</sup> In addition, the concept of insurance is reflected in the various schemes of mutual help and assistance whenever a disaster strikes a person or a community.<sup>307</sup> In most cases, insurance took the form of compensating for the evil deeds of a member of the community or a specific tribe by all other community members (a form of civil society victim’s compensation fund) or by one individual who is rich in that society and who volunteers to compensate the affected person.<sup>308</sup> Therefore, the doctrines of mutuality and cooperation were not conceived as encompassing the profit-making business of insurance, but as a means to help the needy in a communitarian manner. According to Afzal-ur-Rahman:

Even before the Ministry of Muhammad the Makkan merchants had formed a fund to help the victims or survivors of natural hazards or disasters during their trading journeys to Syria, Iraq and other countries. It also happened that once, when Muhammad was engaged in trade in

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<sup>305</sup> *Id.*

<sup>306</sup> MOHD YUSOF, *TAKAFUL ISLAMIC INSURANCE CONCEPT AND OPERATIONAL SYSTEM FROM THE PRACTITIONER’S PERSPECTIVE* 12 (1999).

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

Makkah, a whole trading caravan, apart from a few survivors, was lost in the desert. The managing boards, composed of the members of the contributory fund, decided to pay the price of the merchandise, including the value of camels and horses destroyed, to the survivors and families of those who perished in the disaster out of the common fund. Muhammad, who was trading with the capitol of Khadijah,<sup>309</sup> had also contributed to that fund from his profit.<sup>310</sup>

Numbers of Muslim scholars accept this notion of shared responsibility practiced among the Makkans and Madinans as a foundation of mutual cooperation. Based on the Makkans' example of mutuality, these scholars conclude that insurance in Islam should be founded upon mutuality and cooperation.<sup>311</sup> As a result, the Shari'ah compliant insurance model embodies the elements of shared responsibility, joint indemnity, common interest, and solidarity.<sup>312</sup>

### **3. Narrative Three: Marine Insurance as Adopted by Muslim Scholars**

The third narrative regarding the origin of Islamic insurance is that its contemporary structure and rules are a modern invention demonstrating a lack of guidelines from the past. In addition, this narrative deems insurance to be both a modern and an alien concept, introduced to the Muslim world by the West in the form of foreign laws and regulations in the late nineteenth century.<sup>313</sup>

Due to the extensive commerce between the East and the West during the European industrial revolution, marine insurance was the first kind of insurance introduced to Islamic countries.<sup>314</sup> This happened because foreign traders demanded some

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<sup>309</sup> Khadijah was the wife of the prophet Muhammad.

<sup>310</sup> AFZAL-UR-RAHMAN, BANKING AND INSURANCE (ECONOMIC DOCTRINES OF ISLAM)\_32 (1979).

<sup>311</sup> *Id.*

<sup>312</sup> YUSOF, *supra* note 308, at 7.

<sup>313</sup> KHORSHID, *supra* note 298, at 13.

<sup>314</sup> *Id.*



sort of insurance to guarantee their import deals.<sup>315</sup> European Traders used to appoint agents who lived in the coastal area of Islamic territory (this is the area along the Mediterranean Sea between modern Egypt and Turkey) and collected insurance premiums from Muslim traders with permission from the Sultan (a ruler in every country that permit western marine insurers to operate). These agents would reimburse traders for any damage to their goods while at sea.<sup>316</sup> Many Sultans decided to allow insurance in order to benefit from trade.<sup>317</sup>

After the introduction of marine insurance into Islamic countries in the late 19<sup>th</sup> century, the idea, meaning, and legal characteristics of an insurance policy were formulated by the famous *Hanafi* lawyer Ibn Abidin<sup>318</sup> in his book *Radhul Mukhtar*.<sup>319</sup> He was followed by several Islamic scholars including Abu Johra, another *Hanafi* scholar who accepted Ibn Abidin's idea, and Mufti Muhammad Abduh, who agreed to the validity of insurance practices in general.<sup>320</sup> In 1906, Mufti Sheikh Muhammad Baqit of Egypt also accepted Ibn Abidin's idea of insurance.<sup>321</sup> Ibn Abidin's conception of insurance fits within the broader context of Islamic theology because prayer, which is Islam's second pillar, is an insurance premium based on the hope of receiving a divine dividend (forgiveness) in the Hereafter. Therefore, the notion of insurance particularly resonates with Muslims because the deeds practiced in life are believed to secure a peaceful afterlife.

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> Abdeen Mohammed Amin Bin Omer Bin Abdul Azeez Aldemashqy, (1784-1836), was born and died in Damascus. He was the most influential jurist of his time.

<sup>319</sup> Mohd. Masum Billah, *Islamic Insurance: Its Origins and Development*, 13 ARAB L.Q. 386 (1998).

<sup>320</sup> Mankabady Samir, *Insurance and Islamic Law*, 4 ARAB L.Q. 199 (1989).

<sup>321</sup> *Id.*

## D. The Contemporary Situation: Conflicts and Problems

### 1. Incompatibility of Commercial Insurance with Shari'ah

In 1976, the First International Conference on Islamic Economics was held at Makkah, Saudi Arabia. The conferees resolved, "Commercial insurance as presently practiced does not satisfy the Islamic conditions for it to become acceptable."<sup>322</sup> The Muslim scholars who attended the conference analyzed how conventional insurance operates and declared that it was not compatible with the Shari'ah.<sup>323</sup> They provided the following three reasons for this incompatibility:

a) *Riba*<sup>324</sup> (interest) refers to transactions involving unequal exchange of the same thing. Commercial insurance is viewed as unequal exchange of money in premiums and compensations,<sup>325</sup> as the amount paid in premiums may never equal the amount received in indemnity.<sup>326</sup> The insured receives less or nothing, as the case may be, in exchange for the premium when he does not experience peril deserving indemnity.<sup>327</sup> Moreover, compensation received from insurers may be far greater than the premiums if a disaster strikes.<sup>328</sup> So *riba* disproportionally benefits the insured if the indemnity is more than the premiums and if it benefits the insurers when compensation is nil or falls short of premiums. Moreover, there was an additional *riba* beyond the *riba* embedded in the insurance contract because insurers invest its premiums in interest-bearing securities.

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<sup>322</sup> Muhammad Nejatullah Siddiqui, *Muslim Economic Thinking: A Survey of Contemporary Literature*, in *STUDIES IN ISLAMIC ECONOMICS* 217 (Khurshid Ahmad ed., 1980).

<sup>323</sup> *Id.*

<sup>324</sup> See Elsanousi, *supra* note 2 (the concept of interest was discussed in my LL.M thesis pgs 21-36).

<sup>325</sup> KHORSHID, *supra* note 298, at 63.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

Therefore, some scholars at the conference concluded that commercial insurance contract should be considered an exchange of money.

b) *Gharar* (uncertainty) which is also defined as risk, hazard, danger, or peril, in business terms means to undertake something blindly without sufficient knowledge; to risk oneself in a venture not knowing exactly what will be the outcome; or to rush headlong into a peril without regard to the consequences. Every contract of an open-ended nature contains some elements of *gharar*.<sup>329</sup> In other words, *gharar* is fraudulent and deceptive exchange and, therefore, risk is essential for all transactions. Some scholars think this way with regards to the commercial insurance because, at the time of the contract, the insured are uncertain about (i) occurrence of indemnity, (ii) amount accrued in case of indemnity, and (iii) the timing of indemnity.<sup>330</sup>

c) *Gimar* and *Maysir* (gambling) are clearly forbidden to Muslims. Commercial insurance contains an element of gambling, which is a consequence of the presence of uncertainty.<sup>331</sup>

Muslim scholars base their arguments on the above three reasons, which they view as unjust ways of compensating the premium payer at the expense of the other. They also say that this kind of arrangement has always led to a loss for a majority of commercial insurance policyholders, especially those who are responsible for maintaining their properties and who never claim anything from their insurance companies, despite paying substantial premiums. Muslim scholars consider *riba* and *gharar* to form the basis of prohibiting commercial insurance.

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<sup>329</sup> AFZALUR RAHMAN, ECONOMIC DOCTRINES OF ISLAM: BANKING AND INSURANCE 173 (4th ed. 1979).

<sup>330</sup> KHORSHID, *supra* note 298, at 61.

<sup>331</sup> *Id.*

**2. The Implementation Differences between Commercial and Shari’ah Compliant Insurance as Revealed by Muslim Scholars**

The theological reasons for the incompatibility of conventional insurance with Islamic teachings are addressed in the previous sections. However, Muslim scholars also argue that there are practical differences between the Shari’ah compliant and Western insurance models. These differences are demonstrated in the following chart:

Western Insurance	Shari’ah-Compliant Insurance
<p>Comprised of profit-making insurance companies with stock sold on the exchanges, mutual insurance companies with policyholders owning the stock, or friendly societies and other forms of cooperatives in which there was not stock.</p>	<p>Based on solidarity and mutual assistance and motivated by community welfare and protection.<sup>332</sup></p>
<p>Developed from custom in trading. A social decision on how to organize. As insurance companies grow in importance and take individual’s premiums, they may draw regulation from the state in order to protect the expectations of those who pay premiums and expect benefits.</p>	<p>Not divinely revealed, but revealed by Muslim scholars, who then recommend to government the adoption of Islamic insurance as an acceptable Islamic form of insurance and suggest a broad model of conducting this business. Then government accept scholars’ recommendations and enact laws organizing<sup>333</sup></p>
<p>Managers have complete discretion as to where and how to invest their premiums, even if such investments might involve portfolios that Islam prohibits.</p>	<p>Participants know where and how their premiums are invested and could make sure they are not invested in interest-earning schemes and business prohibited by Islamic law such as pornography and gambling.<sup>334</sup></p>

<sup>332</sup> MOHAMMED OBALDULLAH, ISLAMIC FINANCIAL SERVICES 126 (2005). For more information on Takaful, see *infra* notes 367–88 and accompanying text.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<p>If the company is dissolved, the surplus/excess belongs to the shareholders.</p> <p>The distribution of profits is a managerial decision.</p>	<p>Any surplus belongs to the participants or is donated to charity, depending upon the terms and conditions of the <i>takaful</i> contract.<sup>335</sup></p> <p>Management has no claim in underwriting surpluses. The <i>takaful</i> contract will determine how and where the surplus should go.<sup>336</sup></p>
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**a. Gharar (uncertainty)**

Before they defined Shari’ah compliant insurance and determined whether it was permissible, many Islamic scholars who attended the Makkah conference reiterated the fundamental position that Muslims should believe whatever happens to them to be *qada* (fate) and *qadar* (destiny) and thus face their destinies with strong faith and patience.<sup>337</sup> Without denying that negative occurrences originate from God, other scholars argue that believers have to strive hard to protect against such incidents, while also being fully prepared to face any consequences should the incident occur.<sup>338</sup> Such fundamental preparedness measures involve Muslims taking certain precautions and buying insurance through various policies offered by Islamic insurance companies.<sup>339</sup>

**b. Islamic Insurance Grew out of Arab Tribal Custom**

According to other scholars, insurance as a concept does not contradict Islamic principles, so long as the ways in which funds are invested are made compatible with Islamic law.<sup>340</sup> These scholars argue that insurance is, in fact, compatible with the Islamic

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<sup>335</sup> *Id.*  
<sup>336</sup> *Id.*  
<sup>337</sup> Siddiqui, *supra* note 324, at 217.  
<sup>338</sup> *Id.*  
<sup>339</sup> *Id.*  
<sup>340</sup> KHORSHID, *supra* note 298, at 57–59.

tradition of mutual help that grew out of the Arab tribal custom of paying blood money.<sup>341</sup> Before Islam, Arab tribes entered into tribal agreements to address violent situations between tribes, under which one tribe was obligated to pay a certain number of cows or camels when a tribal member was killed by another tribe.<sup>342</sup> In this situation, the offending tribe compensated the victim's family. This custom still exists in some parts of the Arab world. It is widely practiced, for example, in some Middle Eastern countries and Sudan.

Some tribes enter into bilateral agreements as a precaution against future unfortunate incidents.<sup>343</sup> This form of security or insurance is not only to address negative financial consequences that result from violence, but also to guarantee the peaceful existence between participating tribes and to prevent revengeful behavior. All the tribes who have signed the bilateral agreement must contribute a specific number of animals to support the perpetrating tribe meet its obligation to the victim's family, even absent any participation of wrongdoing on their part. Thus, this practice is a form of insurance that guarantees societal welfare because all tribes in that specific region or geographical area participate and benefit from this spreading of loss.

**i. Examples of *Gharar* Transactions according to the Shari'ah**

According to *ahadith* of Prophet Muhammad (peace be upon him), any transactions based on ignorance and uncertainties are deemed hazardous (*gharar*).<sup>344</sup>

Several examples are narrated in the prophetic traditions:

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<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> These observations are based on the author's formative years growing up in Sudan and understanding the Arab region.

<sup>344</sup> See *supra* note 332 and accompanying text.

- Selling fish still in the water, that is, before they are caught.<sup>345</sup>
- Sale of an unborn camel, one not yet delivered by its mother.<sup>346</sup>
- Sale of fruits in an orchard at the initial stage of fruition.<sup>347</sup>

Indeterminacy and risk are considered to be involved in all transactions in which the quantity and quality of the commodity is neither known nor predetermined.<sup>348</sup> These examples were considered the foundation for prohibiting commercial insurance as a sale of a service, where the right and obligations of each party are not known and are certainly *gharar*.<sup>349</sup>

One of the principles of contract in Islam is being aware of the object of trade so that *gharar* may be avoided. According to Islamic doctrine, a sale is valid only when buyers sell goods that they personally own.<sup>350</sup> This principle is derived from the prophetic *hadith* that says: “Do not sell what is not with you.”<sup>351</sup> Prophet Muhammad forbade people to sell what they did not own. The Prophet Muhammad issued this prohibition in the context of Medina’s agricultural produce system in which there was no guarantee of full delivery.<sup>352</sup>

## ii. Analysis of Gharar in Commercial Insurance

Based on the definition, examples, textual references, and the practice of *gharar* in sales transactions, some Islamic scholars have ruled that commercial insurance

<sup>345</sup> SAIFUL AZHAR ROSLY, CRITICAL ISSUES ON ISLAMIC BANKING AND FINANCIAL MARKETS 483 (2005).

<sup>346</sup> IMTIAZ ALI, TAKAFUL T&T A PROPOSAL FOR ISLAMIC INSURANCE IN T&T 8 (1998).

<sup>347</sup> *Id.*

<sup>348</sup> Siddiqi, *supra* note 324, at 217.

<sup>349</sup> Reasoning by analogy is considered by the majority of scholars of Islam as the fourth source of Islamic law. To perform reasoning, the jurists will search Islamic history for a situation that is similar to the one at hand and reflect on the similarities from which he or she can derive rulings to suit the particular situation. See HISHAM M. RAMADAN, UNDERSTANDING ISLAMIC LAW FROM CLASSICAL TO CONTEMPORARY 6 (2006).

<sup>350</sup> KHORSHID, *supra* note 298, at 38.

<sup>351</sup> MUHAMMAD MOHSIN KHAN, THE BOOK OF SALES AND TRADES IN THE ENGLISH TRANSLATION OF SAHIH AL-BUKHARI 419 (1996).

<sup>352</sup> *Id.*

contains a level of *gharar* that is unacceptable under Islamic teachings. Commercial insurance contracts contain *gharar*, because in the event that no claims are made by the individual who insured her property, the insurance company will acquire the entire premium and the profit it generates. Thus, the insured party will not gain anything in return for her premium payment. Insurance costs a specific price and only covers a specific timeframe. In the event that something happens to the insured object, the insured person may receive some benefit depending upon the circumstances of the incident. However, if nothing happens to the insured object, then the insured party will lose the premium that was paid at the time of the contract. Therefore, the insured paid a definite sum of money for a highly contingent benefit.

Some Islamic scholars argue that *gharar* does not prohibit an insurance contract if the following three criteria are met:

- a) Insurance coverage must be genuinely required by a section of or all people in order to safeguard their interests;<sup>353</sup>
- b) The interests of people can only be safeguarded through effecting insurance; and<sup>354</sup>
- c) Insurance must be transacted on a cooperative basis.<sup>355</sup>

A permissible policy would avoid *gharar* and would be constructed in a cooperative manner. In such a policy, the premium would be considered a contribution by all policyholders, rather than a payment. By making contributions, policyholders would be assisting those who might need assistance in the event of a loss. This type of arrangement would foreclose any possible exploitation of one group by another.

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<sup>353</sup>HASSAN & LEWIS *supra* note 246, at 415–20.

<sup>354</sup>*Id.*

<sup>355</sup>*Id.*



Policyholders might receive refunds of their contributions if the total contributions are in excess of what is needed to compensate victims or they might be called upon to make additional contributions to cover any deficit.<sup>356</sup> As noted above, such an insurance model is similar to the Lloyd's of London arrangement, which essentially operates as a clearinghouse for risk.

#### **E. The Arabi Community and the Challenges of Insurance**

The case in point is the Tablighi Jamaat community in the town of Arabi, Louisiana, which is located on the banks of the Mississippi River. According to local legend, some two hundred years ago, Algerian, Moroccan, and other immigrants founded Arabi on one side of the river, while other immigrants settled on the opposite side, naming their town Algiers. Arabi has at least four hundred Muslim families, all of whom are connected with the Yasin mosque and the local Islamic school for memorizing the Qur'an. Of these families, two hundred are Arabs mainly from Palestine, while the other two hundred are mainly Urdu speakers from Hyderabad, India, with some from Pakistan. Arabi is located in Jefferson County, which was one of the areas most affected by Hurricane Katrina; in some parts of Arabi, the flood waters reached 8–10 feet high.

The Tablighi community's dynamic spiritual leader is Sheikh Abdulrahman Khan, who emigrated from Hyderabad four decades ago and since then has established himself as a strong leader within Arabi's Muslim community. Khan and his relatives owned numerous small businesses, including gas stations and convenience stores. He built Yasin mosque and the Islamic school for his community, and supported his community

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<sup>356</sup> A brief discussion of *Gharar* as a major problem of conventional insurance was discussed in previous sections. See *supra* text accompanying notes 331–58.

financially through his businesses. As a result of Hurricane Katrina, Khan and his followers lost their homes, businesses, and livelihoods; none of these institutions had property or casualty insurance. According to Khan, if the school and the mosque had been insured, they could have received \$500,000 to rebuild the school and at least \$200,000 to rebuild the mosque. Without insurance, the people in this community are finding it difficult to restore their livelihoods and reopen their businesses.

Most of the people associated with the Yasin mosque under the leadership of Abdurrahman Khan opposed property and casualty insurance for religious reasons. Khan confirmed that no one in his community “owned” home insurance because they do not use mainstream mortgage companies to finance their houses and Shari’ah compliant mortgage companies are yet to reach Louisiana. Therefore members of the community purchased their homes with cash.

Khan said, however, that some within the Arabi community possessed liability insurance in order to operate their businesses in compliance with local insurance laws. Mr. Khan said that he himself uses liability insurance to operate his gas stations and convenience stores not because he is convinced that insurance is important but because the local government requires him to have liability insurance to operate his businesses. Mr. Khan and his followers purchase their cars with cash and hold liability insurance as state law requires. He uses insurance when the law requires it and also when he cannot operate his businesses unless he has liability insurance. His explanation regarding his use of insurance is that necessity required him to use liability insurance in order to run his businesses, but that insuring his house, the mosque and the Qur’anic school was optional,

so he decided not to use commercial insurance based on his interpretation of Islam.

While discussing his theological view about insurance, Khan said:

People will not insure their belongings because insurance companies invest the money in *haram* [Islamically prohibited] activities such as alcohol and gambling; and, they might also put the money in the bank and get interest. Not only that, even the fact that when you insure your property somebody is going to lose when you have an accident or any calamity because the insurance company will not pay from their own pocket but they will take it from somebody else and give it to you. This is not proper, in other words, according to the *Shari'ah*. First of all if you have a loss, it is *muqaddar* (destiny from God), If you are insuring, you are indirectly saying that, well even if it is *muqaddar* to lose, I will try to get it from somebody else, meaning from the insurance company. There are many points by which scholars do not permit taking out insurance, unless it is required by law. The theological reason behind it is simple, because our *yaqeen* (belief) is in God (no doubt), and whatever happens is from God, whatever your *muqaddar* is you are going to get it. You have to use the *asbab* (reasons), but this is not an *asbab* because insurance is exploitation in this country, the exploitation of the people. It is another form of gambling, because you pay for 20 years \$1,000 a year, and when you have a claim, you claim \$25,000 or \$100,000. And immediately they will hike up your rate and other people's rates as well because they will turn to other people to take their money to pay you.<sup>357</sup>

When asked about insurance companies' investments of their premiums, he responded:

Investment should be in proportion to your premiums; the profit they will give to you should be proportional to your investment. Now it is not the case with insurance companies. Also, the basic reason why I do not have insurance is that instead of having *tawakul* (total dependence upon God) on Allah, I will have *tawakul* on the insurance companies. Just the fact that you are insuring, means that instead of depending on Allah, you are depending on the insurance company. This is a basic teaching in the *Kalimah* (the confession of faith); whatever happens is from *Allah* (God). As far the *asbab* are concerned, if you have a car, drive it carefully, if you have an accident it is from Allah. Insuring your car is not *asbab*. *Asbab* is protecting you by driving carefully and depending on Allah.<sup>358</sup>

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<sup>357</sup> This research on Mr. Abdurrahman Khan and the TJ of the Arabi, LA was conducted as part of my employment with the Islamic Society of North America (ISNA) on October of 2005 in New Orleans, LA immediately after the devastating effects of Hurricane Katrina.

<sup>358</sup> *Id.*

In his capacity as the community's leader, he was asked about what would happen to the 400 families and their businesses as a service to society at large. If your business is damaged and you cannot restore it through money received from your insurance company, aren't you also hurting society? The question probed whether Khan's responsibility as a businessman who owns, but does not insure, businesses burdens society at large. Mr. Khan replied:

If they [the community] are free and willing to help somebody (donation for example) this is permissible. If they are forced in the form of insurance . . . in the ideal Islamic society and if I lose everything, everybody else should come forward to help me restore my business. So we should leave it to Allah. You can be allowed to do what you want to do but it might not be practical. They [local laws] force you to get liability insurance on your car; I also had liability on my business. The society wants to take advantage of any chance they get. For example, if somebody falls down in my gas stations and sues me for \$100,000, he will take whatever I have . . . that's why I have liability. But other than that, my personal loss I leave it to Allah. I used to have two gas stations, one leased from Shell and they require insurance. The other one, I own it and I was not required to buy insurance. But in this society, people can sue if something happens to them in your property and take all money you have. Human beings are given a choice when they have *Shaitan* [Satan] to deceive them, but the wind is totally from Allah, and the Hurricane is from Allah.<sup>359</sup>

When asked about establishing a Shari'ah-compliant insurance company, here is what he had to say:

If you can get consent of every person that wants to buy insurance according to Islamic teachings then in case of loss, everybody should be willing to share the loss. Islamic insurance companies should not get bankrupted. Maybe the Islamic Society of North America [ISNA] should do something about it. In terms of solidarity between the communities, for those who are religious this should be an incentive to buy this type of insurance.<sup>360</sup>

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<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

Khan was told that there are now Islamic financing companies with several portfolios that do not invest in Islamically prohibited transactions, and that their return rate is slightly higher than mainstream investment companies. A proposal introducing the insurance company to the Shari'ah compliant concept of insurance could be submitted to the insurance company through which the majority of Muslims insure their homes and businesses. This might lead the company to start a branch that incorporates Islamically permissible portfolios and activities. The notion of Shari'ah compliant insurance could also be presented to Islamic investment companies such as *Amana* (trust) Mutual Funds as a religiously acceptable solution for people who adhere to Khan's interpretation. He responded:

Insurance companies will not agree [to the possibility of opening a Shari'ah compliant branch]. Because first of all people think that this is not a secure arrangement and might collapse anytime. And [insurance] companies have their own set of investments; I do not think that they will deviate from that. These insurance companies might agree if there are enough people to demand where their money should be invested. Most insurance companies deal with lots of fraud. People file false claims (persons who burn their own places and file claims). If we have insurance companies and only Muslims insure, we will not have frauds. The companies will be successful. Another idea is to have charity. If there are enough funds in the company that could be another possibility rather than reimbursing only for those who are insured, even for those going through calamity or disaster and the person is really needy, that would be another function of the company.<sup>361</sup>

Another issue with regards to Khan's interpretation was the justification he offered for his position, which is at odds with the idea that the lack of insurance negatively impacts, not only Muslims, but the society at large, and that not owning insurance impedes the prompt restoration of businesses. Khan agreed, saying: This is true; we will not get Federal Emergency Management Agency (FEMA) support for the

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<sup>361</sup> *Id.*

business, only for homes. But here, the main reason for not having insurance for businesses is not because of interest rates, it is because of the issue of *tawakul* and *qadar* (destiny). He added: There is no justification to buy life insurance, but maybe there is justification to insure property or business but life... No.”<sup>362</sup> When asked about mortgages, he said: “We buy houses on cash. Those who had mortgages, they have to take insurance. I really do not know if it can be done honestly.”<sup>363</sup> Regarding the issue of the Muslim community assimilating into the larger society with their businesses, he was asked whether having insurance might help to protect the person’s ability to stay in the community. He said: There might be an incentive for the community [to purchase insurance], but it has to be Islamic and within our belief.<sup>364</sup>

The experiences of the Muslim community in Arabi highlighted the need for alternative insurance that is compliant with Islamic law. Though some American Muslims do not obtain policies for casualty and property commercial insurance because of conflicts with Islamic principles, the notion of insurance is strongly rooted in Islamic traditions, as it is with many other religions. Just as the Presbyterians developed insurance practices in the seventeenth century to help others, American Muslims have the unique opportunity to introduce Shari’ah compliant insurance alternative. This alternative could be employed not only by the American Muslim Tablighi Jamaat, but also by people who desire similar insurance products. This is imperative because American Islamic investment companies feature a large percentage of investors of other faiths such as the Amana Mutual Fund Investment Company. As the American Muslim

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<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

community continues to grow and develop, the notion of establishing Shari'ah compliant insurance company is becoming more feasible and there are more opportunities for communities such as the Arabi community to participate in insurance that satisfy the kind of religious interpretation they follow. This possibility should be explored by the existing Shari'ah compliant mortgage and investment companies in the US.

#### **F. Principles and Practices of Takaful (Shari'ah Compliant Insurance)**

The discussion in this section will focus on the concept of *takaful*, which has received great attention in the Muslim world as a model that satisfies Islamic beliefs and provides an acceptable means of insuring, and protecting Muslims' wealth and properties. This section will explain the practices of *takaful* and support the notion of *takaful* with Qur'anic and Hadith textual references. The section will also briefly discuss different forms of insurance used by businesses operating under the principle of *takaful*, and will suggest why American Muslims should develop Shari'ah compliant insurance, arguing that this type of insurance can provide one means of facilitating the positive inclusion of the American Muslim community into mainstream America. Finally, the section will suggest steps the American Muslim community can take to explore the possibility of creating a Shari'ah compliant insurance model which is both acceptable to their religious needs and able to satisfy state insurance law requirements.

##### **1. Islamic insurance as a social responsibility**

One of the main differences between commercial non-mutual companies and Islamic insurance is the notion of social responsibility. The commercial insurance system consists of multiple bilateral contracts between individuals and insurance companies.

These individual contracts transfer the risk of loss to the insurance company for the benefit of the individual policy holder. From the Islamic perspective, however, insurance is a collective responsibility that reduces risk for the benefit of the social group. This Islamic concept of social responsibility confirms the purpose of Islamic economics, which is to create socio-economic justice for the well-being of humanity. It also confirms the notion of *takaful* (solidarity), which is the Islamic form of insurance based upon a system of cooperation, mutuality, and shared responsibility.

## 2. What is *Takaful* (Solidarity)?

The term *takaful* means a joint guarantee or “act of a group of people reciprocally guaranteeing each other.”<sup>365</sup> This is the foundation of Shari’ah compliant insurance system. Some Islamic scholars agree that any Islamically acceptable form of insurance must be based upon cooperation and mutuality.<sup>366</sup> They argue that this type of insurance is acceptable for the following reasons:

- The policyholders co-operate among themselves for their common good.<sup>367</sup>
- Every policyholder pays his or her subscription to help those who need assistance.<sup>368</sup>
- It falls under the donation contract, which is intended to divide losses and spread liability according to the community pooling system.<sup>369</sup>
- The element of uncertainty is eliminated, insofar as subscription and compensation are concerned.<sup>370</sup>

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<sup>365</sup> KHORSHID, *supra* note 298, at 4.

<sup>366</sup> *Id.*

<sup>367</sup> DATO MOHD FADZIL B. YUSOF, *DIRECTORY OF ISLAMIC INSURANCE* 14 (1999).

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*



- It uses *Mudaraba*, a profit and loss sharing investing model, where there is an agreement between two parties, one of whom is the financier, the other the entrepreneur. The profit is shared in accordance with the contract, the entrepreneur being rewarded for her efforts and the financier (who can be the bank or individual) for the use of her capital and the risk in providing the capital.<sup>371</sup> *Takaful* does not seek to derive any advantage at the cost of other individuals.<sup>372</sup>

The concept of *takaful* was first announced in the 1970s as an organizing premise of Shari'ah compliant insurance.<sup>373</sup> It was not conceived to be a bilateral contract, but a charitable collective enterprise by which Muslims could pool their resources to help each other in the event of a casualty or a loss.<sup>374</sup> Professor Frank Vogel of Harvard University explained this notion of *takaful*, stating that:

A new form of insurance company called *Takaful* (lit., “solidarity”) has been devised, offering a “*takaful* contract.” By this contract, members in the company promise to make periodic payments, which the company maintains in account in their names and invests Islamically. Members agree that if one of their members should suffer a covered loss, each will make a proportionate gift from his or her account to cover that loss. The legality of this contract seems to depend on the general principle that gratuitous acts tolerate relatively high degrees of *gharar*, and also on a *Maliki* view that gift promise can be binding.<sup>375</sup>

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<sup>370</sup> *Id.*

<sup>371</sup> The *Mudaraba* (Trust Financing) concept and the way it operates is discussed thoroughly in my LL.M thesis research. See Elsanousi, *supra* note 2, at 45–48.

<sup>372</sup> YUSOF, *supra* note 308, at 14.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> FRANK E. VOGEL & SAMUEL L. HAYES III, ISLAMIC LAW AND FINANCE RELIGION, RISK AND RETURN 152 (1998).

### 3. Qur'anic Textual Reference for *Takaful*

*Takaful* (mutual guarantee) and *ta'awun* (mutual cooperation) are not directly mentioned in the Qur'an as alternatives to commercial insurance. However, some Muslim scholars consider that such mutual cooperation is certainly part of the Qur'an's broader framework. Therefore, such Muslim scholars offer the following textual evidence to support their argument:

وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَىٰ

Help one another in righteousness and piety (5:2).<sup>376</sup>

According to Islamic teachings, God's command to engage in mutual cooperation is not absolute; rather, it is limited to specific instances. Therefore, God prohibited people from cooperating in anything involving sins. To that effect, He revealed:

وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ

Do not help one another in sin and transgression (5:2)<sup>377</sup>

In light of these verses, the concept of cooperation and the practice of Shari'ah compliant insurance clearly agree with the Islamic concept of cooperating if the transactions adhere to the Islamically approved operational principles.

### 4. Hadith Textual Reference for Shari'ah Compliant Insurance

Numerous traditions apart from beside the Qur'an can be used to demonstrate the validity and permissibility of Shari'ah compliant insurance concepts and practices. For instance, an insurance policy embodies the concept of *tawakkul* whereby a person would

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<sup>376</sup> YUSUF ALI, *supra* note 172, at 244.

<sup>377</sup> *Id.*

strive to overcome their unexpected future risk or hazard before leaving their fate in God's hands. Such a concept is justified according to one of the prophetic traditions: Anas bin Malik narrated that the Prophet told a Bedouin Arab who left his camel untied, trusting the will of God, to "tie the camel first then leave it to God."<sup>378</sup>

Moreover, an insurance policy seeks to protect the insured from future material constraints upon the occurrence of a particular unexpected future risk. Such a protection for those in need is justified by the following prophetic tradition: Abu Hurayra narrated that the Prophet said,

Whosoever removes a worldly grief from a believer, God will remove from him one of the griefs of the Day of Judgment. Whosoever alleviates [the lot of] a needy person, God will alleviate [his lot] in this world and the next. Whosoever shields a Muslim, God will shield him in this world and the next. God will aid a servant [of His] so long as the servant aids his brother.<sup>379</sup>

### **G. Insurance Businesses that Use Takaful**

Malaysia is considered to be a *takaful* pioneer because it is the only Muslim country that has introduced a special law to regulate *takaful* businesses. In the *Takaful* Act of 1984, Malaysian regulators gave permission to two types of *takaful* businesses under two different licenses.<sup>380</sup> Syarikat *Takaful* Malaysia is one example of a company that practices the following two types of *takaful*:<sup>381</sup>

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<sup>378</sup> 4 CAGRI YAYIANLARI, SUNAN AL-TIRMIZI 668 (1981).

<sup>379</sup> IBRAHIM EZZEDDIN ET AL., SAHIH MUSLIM: IN NAWAWI FORTY HADITH 144 (1985).

<sup>380</sup> YUSOF, *supra* note 308, at 17.

<sup>381</sup> *Id.*

## 1. Family *Takaful* Business (Islamic life insurance)

The concept of family *takaful* is based on the notion of a *mudaraba* (trust financing) contract. In this contract, the family plan provides mutual aid coverage among the participants in the form of financial benefits paid from a specific fund in the event any defined disaster impacts one of the members.<sup>382</sup> Individuals participate by saving for retirement possibly through a long-term contingency fund for the purpose of investing according to the Shari'ah and securing mutual financial aid.<sup>383</sup> The Islamic notion of family *takaful* corresponds with the Western concept of a retirement plan, although they operate differently.

## 2. General *Takaful* Business (Islamic General Insurance)

The concept of general *takaful* can be used to offer Shari'ah compliant insurance policies to the devout as an alternative to commercial insurance. In this type of insurance, the company manages various types of general *takaful* programs that are then provided to individuals and corporations, such as motor *takaful* to cover automobiles, fire *takaful* to cover homes from loss or damage against fire, accident/miscellaneous *takaful* schemes, public liability *takaful* to cover the individual against third party liability, marine *takaful* (which includes the cargo and hull), and engineering *takaful*.<sup>384</sup> The availability of varieties of general *takaful* business means that the insurer could offer general liability insurance to groups like the TJ. The participants in any one of these types of insurance will pay a certain amount of money, called a *takaful* contribution.<sup>385</sup> In

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<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* at 23.

<sup>385</sup> *Id.*

the event no claim is made, after deducting all operational costs, the surplus will be shared among the participants under the principle of *mudaraba*.<sup>386</sup>

## H. The Muslim World and Islamic Insurance

As previously discussed, Malaysia is considered the most advanced Muslim country with respect to the Shari'ah compliant insurance business even though the industry itself began to develop in the late 1970s with the incorporation of the Sudanese Islamic Insurance Company, the Dubai Islamic Bank, and the Arab Insurance Company. The following years witnessed the inception of two Shari'ah compliant insurance companies in Bahrain, the Dallah Albaraka Group Islamic Insurance Company, and the *Takaful* Islamic Insurance Company by the Dar Al-Maal Al-Islamic Group. In the early to mid-1980s, these initiatives were followed by similar companies in Saudi Arabia, Jordan, Malaysia, Indonesia, Brunei, Pakistan, and Singapore. Based on this short history, it is obvious that the Shari'ah compliant insurance concept is being practiced in the Muslim world, but there is no Shari'ah compliant insurance company in America; this has had a negative impact on the American economy, as demonstrated by the Hurricane Katrina and the experience of the Muslim Tablighi Jamaat community of Arabi.<sup>387</sup> However, in the 1970s and 1980s, the Islamic Society of North America sought to educate the community and convince Muslim immigrants that home insurance was crucial because it provided social security and financial stability to the growing immigrant Muslim community.

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<sup>386</sup> *Id.*

<sup>387</sup> See *supra* sub-section E of this chapter and the accompanying text. (Negative consequences for the American economy were explained in the context of the huge loss suffered by the Tablighi community of Arabi, Louisiana).

The tragedy in Arabi should certainly serve as a lesson to Muslims in other parts of the country. The negative effect of this small Muslim community's views on insurance extends beyond New Orleans, because its school has produced at least fourteen Islamic spiritual leaders who have wide-spread influence and who oppose using commercial insurance despite the absence of Shari'ah compliant alternatives.<sup>388</sup> However, the TJ position on insurance is not the norm of the vast majority of American Muslims who use commercial insurance.<sup>389</sup>

The TJ argue that seeking insurance or protection from risk is unbecoming of a Muslim who should live in a state of *tawakkul* (total dependence upon God) and thus, insurance has no place in an Islamic system. This argument is countered by the argument that an insured person does not seek to change God's will. Muslims are fully aware that they cannot control future events whether they have insurance or not. Muslims are instructed to take precautions and then fully trust and depend upon Almighty God. Seeking to minimize risk conforms with Islamic rationality.

### **1. Shari'ah-Compliant Insurance as a Means for Inclusion**

The developments of *takaful* in the Muslim communities across the world could serve as models for American Muslims. It is imperative for the American Muslim community to explore the experiences of these communities and attempt to customize them to serve the needs of some segments of the Muslims in America. The absence of Shari'ah compliant insurance company in America prevented segments of the Muslim

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<sup>388</sup> My work for several years with the American Muslim community provided me the opportunity of meeting many graduates of the Tablighi community of Arabi School who subscribe to the similar understanding of opposing commercial insurance despite the absence of Shari'ah compliant alternative. On the other hand majority of Muslim I met use commercial insurance for various purposes.

<sup>389</sup> *Id.*

community from insuring their properties, as seen in the case of Arabi. If the community is able to establish a Shari'ah-compliant insurance company that can cater to the needs of this segment of the Muslim community who do not use commercial insurance, this will help them secure their wealth. This security will ultimately reduce the disastrous consequences to communities surrounding them and avoid the loss of jobs and services provided by Muslim-owned businesses.

## **2. Why Muslims in America Must Develop Shari'ah-Compliant Insurance**

As has been discussed previously, insurance as a concept is allowed by some Islamic scholars, provided that the specific requirements of Islamic law are met: insurance companies must avoid profiting from interest, must avoid investing in Islamically prohibited investments, and must operate according to principles of mutuality rather than simply serving the interests of shareholders. The scholar Imtiaz Ali agrees, stating that because the notion of insurance is permissible in Islam under certain guidelines, Muslims are encouraged to develop their own Shari'ah-compliant insurance as an alternative to commercial insurance. Imtiaz suggests that such alternative forms of insurance should be developed for the following reasons:

- It is important for Muslims to practice their economic activities according to the guidelines of their faith,<sup>390</sup>
- Muslims desire to protect their assets and property against damage or loss,<sup>391</sup>
- Muslims want to mobilize savings for investment,<sup>392</sup>

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<sup>390</sup> IMTIAZ, *supra* note 348, at 2.

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

- Muslims seek to establish a linkage with the already-established insurance industry, as well as with emerging Islamic financial institutions,<sup>393</sup> And,
- Muslims desire to participate in the global economy, which is heavily dependent upon insurance.<sup>394</sup>

These are logical reasons for the Muslim community to become involved in the insurance business. These reasons also justify the American Muslim community's desire to establish Shari'ah-compliant insurance companies to cater to their financial needs and responsibilities toward society at large. Today, insurance is not only an individual responsibility that would have negative impact on a single life in case of its neglect; in fact, it is a responsibility toward the larger society. The risk of not insuring one's properties is not merely personal damage because it will damage and impact the welfare of the whole community.

As has been previously discussed, there is a concern within segments of the Muslim community about whether it is religiously acceptable to participate in commercial insurance contracts. This concern should be addressed through a contemporary understanding of the Shari'ah's objectives under which the protection of wealth is essential. Such an understanding might lead to the establishment of Shari'ah compliant insurance companies in the US.

American Muslims enjoy a level of religious freedom guaranteed by the American legal structure, as well as economic opportunities that are unavailable to Muslims in other parts of the world. American Muslim household incomes and education

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<sup>393</sup> *Id.*

<sup>394</sup> *Id.*



levels mirror the national average.<sup>395</sup> Many Muslim-owned small and professional businesses serve the needs of society at large. Due to the success of Muslim businesses, there has also been a significant growth in Shari'ah-compliant investment companies in America. As they grow and expand economically, these companies will make it even more feasible for the community to engage in Islamically-acceptable insurance businesses. The significance of insurance for the community is articulated by Khorshid:

Eventually, we must conclude that insurance is as natural a part of today's financial and societal framework as are banking and transportation, and that any individual, nation or religion that refuses to use it is at an immediate disadvantage and the gulf between Islamic and non-Islamic worlds can only widen. Islam is not anti-business – indeed, its Prophet Muhammad was himself a businessman of repute – so the principle of a fair system must be in place in order to thrive. By blocking a mechanism that allows businesses to experiment and cover losses, the world of Islam will ever be at a disadvantage – and there are many *jurists* who agree. Insurance does not have to contradict a single law of the Qur'an – these laws are unbreakable – but by careful consideration and cooperation, insurance can become a part of the Muslim's life.<sup>396</sup>

Korshid's argument is useful for the American Muslim community as they explore the idea of establishing Shari'ah compliant insurance companies. However, in addition to benefiting from existing models in the Muslim world, proponents of Shari'ah compliant insurance must overcome some regulatory impediments within state insurance laws. These impediments have workable solutions based on the previous experiences of Muslim communities in Islamic financial enterprises, such as Islamic mortgage companies.

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<sup>395</sup> *Id.*

<sup>396</sup> KHORSHID, *supra* note 298, at xiii.

### 3. **Regulatory Impediments for Establishing Islamic Insurance Company in the United States**

As previously discussed, the McCarran Act gives each state the ability to self-regulate insurance businesses within their state without having to follow regulations set by the federal government unless certain practices interfere with federal law.<sup>397</sup> These state-level regulatory arrangements for the insurance industry make it easier to overcome any legal impediments to the establishment of Shari'ah compliant insurance companies in the United States, because it is more attainable to convince state commissioners to provide religious accommodations allowing Shari'ah-compliant insurance company to operate. This may be less restricted to accomplish at the states because commissioners may find it reasonable to use their power and interpret existing laws to accommodate Shari'ah compliant insurance products. Although nearly every state allows mutual insurance companies, the Shari'ah-compliant insurance model is slightly different from mutual insurance with respect to its investment of premiums. As noted previously, in mutual insurance the insured themselves are the insurers. The income from premiums is used to cover the cost of operations and to pay claims. The balance, if any, is returned to the members. The only difference between *Takaful* and mutual insurance is that under the *Takaful*, contributions (premiums) are not invested in interest-earning schemes and non-Shari'ah-compliant business, such as companies that operate hotels with casinos in those areas where casinos are permitted. The accommodation required here is for the states commissioners to work with interested entities to come up with a formula that allows the suggested Shari'ah-compliant model to operate and serve as an alternative to those, Muslims and non-Muslim alike, who desire to use it. In the past, Islamic mortgage

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<sup>397</sup> See *supra* text accompanying notes 285–87 (discussing the McCarran-Ferguson Act of 1945).

companies have already managed to obtain licenses in most states<sup>398</sup> in order to provide Shari'ah-compliant products in the mortgage market, a precedent that provides encouragement for the American Muslim community to pursue negotiations with state commissioners for obtaining licenses to establish Shari'ah compliant insurance businesses.<sup>399</sup> Local state lawmakers could draw upon the experiences of the Islamic mortgage and investment companies operating at several states, as well as Islamic investment branches within conventional investment companies, to find the most appropriate regulatory environment for a Shari'ah compliant insurance model. It is obvious that due to restrictions of *riba*, drawing from commercial insurance companies will require adaptation to reflect the unique characteristics of Islamic finance.

Although this research suggests that Shari'ah compliant-insurance products could be an effective means for the inclusion of the ultra-orthodox segment of the American Muslim community, there are legal impediments to achieving that goal, and these legal impediments require a more comprehensive examination than can be accommodated in this dissertation, but would be a fruitful future research project. However, a brief discussion on mutual insurance laws in Texas and Virginia will offer the reader basic information about the likelihood of creating Shari'ah-compliant insurance company in one of these states. It is also important to identify states with mutual insurance laws that may be more hospitable to the inclusion of Shari'ah-compliant insurance model. Though there might be similarities between state laws in regard to the formation of mutual

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<sup>398</sup> Guidance Financial Group, LLC, <http://www.guidanceresidential.com/> (last visited July 5, 2010).

<sup>399</sup> *Id.*

insurance companies, there are also differences; each state has its own set of mutual insurance company laws.<sup>400</sup>

Virginia's mutual insurance company laws<sup>401</sup> differ from Texas law<sup>402</sup> in many ways that may make a substantial difference in working with local authorities to overcome the legal impediments for establishing a Shari'ah-compliant insurance company. In Virginia, mutual insurance companies are organized and owned by their policyholders. They have no stockholders, which means they are companies without capital stock, and that they only insure property located in or protected against losses of members who are residents of the Commonwealth of Virginia.<sup>403</sup> The original net worth of a mutual company consists only of surplus paid by the original policyholders or by an interested party who wishes to get the company into operation.<sup>404</sup> This definition of Virginia Mutual Insurance Company is similar to the State of Texas Domestic Mutual Insurance Company organized under Chapter 883 of the Code of Texas.<sup>405</sup>

There are numerous other similarities between Texas and Virginia law on mutual insurance companies. The second similarity involves the number of people required to incorporate the mutual insurance company. In both states, the law requires twenty or more natural persons, a majority of whom are resident of the particular state, to sign and acknowledge the articles of incorporation of the company.<sup>406</sup> The third similarity is that both states require, in addition to the incorporation, a license or a certificate of authority from the insurance commissioner of the state, which is to be obtained before the company

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<sup>400</sup> See *infra* notes 403–422 and accompanying text.

<sup>401</sup> VA.CODE ANN. § 38.100-3 (2009).

<sup>402</sup> TEX. (INS.) CODE ANN. § 883.001 (Vernon 2009).

<sup>403</sup> VA.CODE ANN. § 38.100-3(2009).

<sup>404</sup> *Id.*

<sup>405</sup> TEX. (INS.) CODE ANN. § 883.001 (Vernon 2009).

<sup>406</sup> *Id.*

can engage in the business of insurance.<sup>407</sup> Fourth, the Virginia and Texas mutual insurance laws require the company to deposit \$50,000 cash or securities that have a similar current market value with the commissioner before a license is issued and the company is allowed to engage in the business of insurance in the state. The differences between mutual insurance laws in Virginia and Texas are stated in the following chart:

Virginia Mutual Company Law <sup>408</sup>	Texas Mutual Company Law <sup>409</sup>
<p>Only applies the statutory requirements for a mutual insurance company pursuant to Chapter 10 of title 38.2 of the Code of Virginia and those laws related to insurers generally.<sup>410</sup></p>	<p>Domestic mutual insurance companies organized or operating under Chapter 883 of the Code of Texas are subject to laws applicable to stock insurance company, investments; valued policies; policy forms and rates; reciprocal and retaliatory laws; insolvency and liquidation; publication and defamatory statements.<sup>414</sup> In addition, except to the extent of any conflict with Texas code, the Texas Non-Profit Corporation Act article 1396-1.01 of the Vernon's Texas Civil Statutes<sup>415</sup> is also applies to Texas domestic mutual insurance company.<sup>416</sup> Moreover, Texas law generally does not exempt a domestic mutual insurance company from being subject to other laws governing the incorporation, organization, regulation, and operation of a company and organization writing insurance in the state of Texas.<sup>417</sup></p>

<sup>407</sup> *Id.* § 883.055.

<sup>408</sup> VA. CODE ANN. § 38.100-3(2009).

<sup>409</sup> TEX. (INS.) CODE ANN. § 883.001 (Vernon 2009).

<sup>410</sup> VA. CODE ANN. § 38.2-2506.

<p>Requires the financial examination of mutual insurance company at least once every five years, in accordance of article 4 of Chapter 13.<sup>411</sup></p> <p>Requires the mutual insurance company to have paid at least a surplus of at least \$1,600,000<sup>412</sup></p> <p>Requires the mutual insurance company to have fully paid in capital stock of at least one million dollars.<sup>413</sup></p>	<p>Require the president and the secretary of a mutual insurance company to immediately notify the commissioner any time the admitted assets of the company are less than the largest single risk for which the company is liable.<sup>418</sup></p> <p>Requires a surplus in an amount of \$2,500,000<sup>419</sup></p> <p>Requires the mutual insurance company to have capital stock in an amount of at least 2.5 million dollars.<sup>420</sup></p>
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The brief discussion above reveals that Virginia Mutual Company law is less complicated than Texas Mutual Company law. The additional incorporation and non-profit laws for mutual insurance companies may make it difficult to operate a Shari’ah-compliant insurance company in Texas, even if the state were to allow mutual insurance companies to invest premiums in Shari’ah-compliant investment companies. Therefore, it may be easier for devout Muslims to obtain commissioner approval to start a mutual company in Virginia and negotiate with the local authorities in order to set up legal ways to invest mutual insurance company premiums that follow Islamic principles. In

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<sup>414</sup> TEX. (INS.) CODE ANN. § 883.001 (Vernon 2009).

<sup>415</sup> *Id.* §1396-1.01.

<sup>416</sup> *Id.* § 883.003.

<sup>417</sup> *Id.*

<sup>411</sup> *Id.* § 38.2-1317.

<sup>412</sup> *Id.* § 38.2-1029.

<sup>413</sup> *Id.* § 38.2-1028.

<sup>418</sup> *Id.* § 8883.

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

Virginia, devout Muslims may only have to deal with the state's mutual insurance company laws and the insurance laws to start the company whereas Texas law requires the application of other relevant laws not directly related to insurance.

**a. Slight Difference between Takaful and Mutual Insurance Companies**

*Takaful* companies and mutual insurance companies operate on very similar bases. In mutual insurance the insured themselves are the insurers. The income from premiums is used to cover the cost of operations and to pay claims. The balance, if any, is returned to the members. The only difference between *Takaful* and mutual insurance is that under *Takaful* contributions (premiums) are not invested in interest-based investments portfolios and businesses that Muslims deem to be un-Islamic such as companies that operate hotels with casinos.

**I. Practical suggestions and Recommendations for American Muslims**

Many details in this area of Islamic law need to be researched and addressed in-depth to implement the suggestions in this paper. This is simply because it is impossible to discuss every ramification of the complex insurance industry. However, in view of the insurance industry's history, conceptual foundations, and importance in the current financial industry, the American Muslim community is well positioned to make a serious attempt to establish a Shari'ah-compliant insurance entity in America. In order to make further progress toward that objective, the following steps need to be taken:

**1. Education and Research**

A serious discussion regarding the viability of this undertaking has to take place in the form of seminars, conferences, and round-table discussions. This can be facilitated

by inviting scholars with different specializations from all sectors of the insurance industry to join the discussion. It is important to involve experts from both the commercial and the *Takaful* systems. This educational phase should benefit from and make use of already existing academic forums to enrich the discussion in the field, such as the Law and Society Association, the Insurance and Society Study Group, and the insurance law centers of various academic institutions. These particular forums have been incubators for ideas and have played a crucial role in the birth of many successful initiatives, such as the one addressed in this research.

Engaging mainstream institutions and scholars during the preliminary stages of this project will broaden the concept, and raise issues and questions that might not be considered if the discussion were confined to academia. These discussions could be extended to examine the process of accommodation itself and could address whether establishing branches for Shari'ah-compliant insurance within existing commercial insurance companies or creating separate Shari'ah-compliant companies would further help the American Muslim community merge into American society.

## **2. Establish an Islamic Insurance Company**

The existence of reputable Islamic investment companies in the United States make it feasible to establish a Shari'ah compliant insurance company or engage in business discussions with commercial insurance companies to offer a Shari'ah-compliant product for those who prefer to use them. Besides investing the premium in such Shari'ah-compliant investment companies, such as Amana Mutual Fund, there are other religiously sound opportunities to invest the insurance participants' premiums: investing in real estate, keeping the money as equity insurance, not investing at all, and using the



newly established University Islamic Financial Corporation at the University Bank of Michigan. This bank was founded in 1890, but seven years ago it began offering Islamic products such as Shari'ah-compliant home financing because the local Muslim population encouraged them to get involved. The legal basis for University Bank to offer an Islamic product was based on a letter<sup>421</sup> issued by the Office of the Comptroller of the Currency (OCC) allowing them to use *Murabaha* (Cost Plus Financing)<sup>422</sup> as an alternative to conventional bank mortgages. The letter states in part:

*Murabaha* financing facilities for the acquisition of real estate properties, real estate construction transactions, commercial inventory operations and the acquisition of commercial equipment to accommodate the Islamic schools, mosques, community centers and businesses that traditionally have not had access to financing arrangements that are consistent with the religious beliefs of the participants in such community entities or the owner of such business. . . . *Murabaha* financing transactions are permissible for a national bank and the economic substance of the *Murabaha* financing transactions is functionally equivalent to either a real estate mortgage or an inventory or equipment loan agreement.<sup>423</sup>

The Office of the Comptroller of the Currency based its decision to permit *Murabaha* financing transactions on the National Bank Act and, in particular, on its basic “powers” provision, 12 U.S.C. § 24 (Seventh).<sup>424</sup> The Comptroller, in his discussion, considers *Murabaha* to be a part of, or incidental to, the “business of banking.”<sup>425</sup> Section 24 (Seventh) of the National Bank Act provides that national banks shall have the power:

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<sup>421</sup> Office of the Comptroller of the Currency, [http://www.occ.treas.gov/OCCSearch/Search.aspx?CiScope=%2F&CiMaxRecordsPerPage=10&TemplateName=query&CiSort=rank\[d\]&HTMLQueryForm=queryhit.htm&q=letter+867&site=Internet&client=OC Cgov&proxystylesheet=OCCgov&output=xml\\_no\\_dtd&search.x=22&search.y=3](http://www.occ.treas.gov/OCCSearch/Search.aspx?CiScope=%2F&CiMaxRecordsPerPage=10&TemplateName=query&CiSort=rank[d]&HTMLQueryForm=queryhit.htm&q=letter+867&site=Internet&client=OC Cgov&proxystylesheet=OCCgov&output=xml_no_dtd&search.x=22&search.y=3)

<sup>422</sup> *Murabaha* is defined as a cost plus contract; in this contract the client expresses his desire to purchase specific goods or commodities and requests the Islamic Bank to buy the item and resell it with transfer of title to the client at predetermined markup on the purchase cost. See Elsanousi, *supra* note 2, at 45–48.

<sup>423</sup> Office of the Comptroller of the Currency, <http://www.occ.treas.gov/interp/nov99/int867.pdf>.

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

[t]o exercise ...all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes ...<sup>426</sup>

Based on this legal basis, the University Bank uses Murabaha financing to meet the special needs of its customers who adhere to the principles of Islam. In Murabaha financing transactions, the bank acquires a property on behalf of the customer and then resells the property to the customer at a mark up on an installment basis. The University Bank example provides a model for those who wish to enter a Shari'ah-compliant insurance business.

It is imperative for the American Muslim community to work with state commissioners and legislative authorities to obtain necessary assistance to facilitate initiatives designed to achieve the goal of establishing a Shari'ah-compliant insurance company. For instance, state insurance commissioners may be able to reasonably interpret their existing authority to allow for the licensing of Shari'ah-compliant insurance companies. Alternatively, state insurance commissioners might be compelled via court judgment to license Shari'ah-compliant companies. Another option is to convince state legislatures to amend insurance laws to allow Shari'ah-compliant insurance products, in order to serve the TJ and others who may desire to use them. Such arrangements will provide vital contributions towards the development of America's Muslim community, because the parties can manage any risk that might occur to their property. Moreover, this financial stability will help to insure the economic prosperity of the community.

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<sup>426</sup> 12 U.S.C. § 24 (1994).

One of the key impediments to the growth of Shari'ah-compliant insurance in America is the lack of awareness among both American Muslims and commercial insurance companies about the economic and social potential of the Shari'ah-compliant insurance system. The Muslim community might not be aware of the fact that it has many options to produce insurance products that fulfill both their religious beliefs and their societal obligations. By not having casualty and property insurance, the community risks devastation, like the Arabi faced in the aftermath of Hurricane Katrina. In today's world, insurance is a key factor for systematic community development and could help facilitate the healthy inclusion of group such as the Tablighi Jamaat and those who desire similar accommodation.

## **CHAPTER IV. THE AMERICAN LEGAL STRUCTURE AS IT RELATES TO RELIGIOUS ACCOMMODATION WITH A COMPARISON TO ISLAMIC LAW**

The goal of this chapter is to outline a legal framework for the growing American Tablighi Jamaat Muslim community so they understand and benefit from laws that facilitate inclusion into American society. The Constitution and the First Amendment support and permit legal accommodations laws. Specific accommodation laws are enacted by Congress or state legislatures, such as the National Defense Authorization Act of 1988-89 and the Civil Rights Act of 1964. Conversely, general accommodation laws are enacted by Congress in response to enforcement challenges of the Free Exercise Clause, particularly Supreme Court decisions that burden religious practices. Examples of general accommodation laws are the Religious Freedom Restoration Act of 1993 (RFRA), and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). These laws guarantee religious liberty, help religious communities expand in their worship places, accommodate military personnel who want to wear religious gear, and provide certain reasonable accommodations within work places. Hence, educating and raising awareness within the TJ American Muslim community about these laws will benefit the integration process.

The American legal structure guarantees freedom of religion and prohibits discrimination in public life and at the workplace against minorities on the basis of religion. Greater understanding of this legal structure is necessary for the integration of the American Muslim community into American society. Integration will not compromise American Muslims' beliefs; rather, the United States legal structure's respect for religious freedom is consistent with basic Islamic principles ensuring the freedom of religion.

By comparing the American legal structures that ensure freedom of religion and legal protection of religious minorities with parallel tenets of Islamic law, this Chapter provides a foundation for successfully integrating religious minorities into American society. Part A addresses the historical development of religious freedom laws. Part B examines the theoretical and practical challenges of defining and implementing the Free Exercise Clause in a diverse society. Part C explains the basic legal framework for religious accommodation, examines how it has developed as a legal concept through Supreme Court cases, and articulates the scope and limits of religious accommodation. The section focuses on the cases that defined and distinguished mandatory and permissive accommodation. Part D defines and discusses a few specific accommodation laws. Part E focuses on general accommodation laws and religious freedom statutes enacted by Congress in response to court decisions regarding obstacles to religious exercise. Finally, Part F discusses the Department of Justice's role in enforcing these various accommodation laws. Explaining the structures of American accommodation laws in juxtaposition with fundamental Islamic principles will show that the American Muslim community can successfully integrate into American secular society without compromising the integrity of their distinctive religious convictions.

**A. The Principles of Religious Freedom: The First Amendment, the Virginia Statute for Religious Freedom, and Selected Qur'anic Verses**

The volatile political and social divisions between English Protestants and Roman Catholics and the power struggles between the English monarchy and Parliament sparked the early development of free speech in England.<sup>427</sup> However, many early religious leaders during the American colonial period believed that law and order in their newly

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<sup>427</sup> JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1144 (2004).

found communities should be imposed under a government controlled by religious authorities—despite the fact that they were fleeing a government controlled by a clergy that persecuted them because of their religious convictions.<sup>428</sup> This understanding of government and religion as two aspects of the same entity that was adopted by these early religious leaders contradicts the idea of freedom of speech because it creates a chilling effect on a citizen’s freedom to express beliefs and views that are inconsistent with those of the dominant religious authority. Freedom of speech is also crucial because it protects individual religious freedom.<sup>429</sup> Before the Declaration of Independence, religious communities had convincingly established that political authority derived its legitimacy from religious authority.<sup>430</sup> The colonies’ early struggles to distinguish political from religious authority helped set in motion the intellectual and philosophical developments that produced the Declaration of Independence,<sup>431</sup> the ratification of the American Constitution (1787), and the adoption of the First Amendment (1791).<sup>432</sup>

The First Amendment of the United States Constitution—ensuring the freedom of religion, speech, press, assembly, and petition—became the first major development

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<sup>428</sup> *Id.* at 1411.

<sup>429</sup> DANIEL O. CONKLE, *CONSTITUTIONAL LAW: THE RELIGION CLAUSES*, 75 (2003).

<sup>430</sup> NOWAK & ROTUNDA, *supra* note 429, at 1144.

<sup>431</sup> The Declaration of Independence stands out as a symbol of liberty that removes government pressure from all religious groups and provides them with the inalienable rights. Thomas Jefferson, the author, had studied philosophers such as John Locke, who expressed the ideals of individual liberty and tolerance which Jefferson paraphrased. The Declaration’s most memorable introduction states: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights that among these are Life, Liberty, and the pursuit of Happiness.” See ALLEN JAYNE, *JEFFERSON’S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY AND THEOLOGY* 109 (2000). Religious freedom was a priority for Jefferson, leading him to write the Virginia Statute for Religious Freedom soon after the signing of the Declaration of Independence. *Id.* His goal for these documents was to protect all persons regardless of their religious or nonreligious beliefs, and to respect all religions regardless of their content. *Id.* We see many of Jefferson’s ideas regarding the right of religious freedom reflected in the Qur’an, the sacred book of Islam. See *infra* note 427 and accompanying text.

<sup>432</sup> ROTUNDA & NOWAK, *supra* note 429, at 1144.

when it was included in the Bill of Rights.<sup>433</sup> The discussion in this chapter will be limited to the Free Exercise and the Establishment Clause of the First Amendment. These two clauses force the government to be neutral towards religion, and they were intended to prevent the new government from establishing a state or national religion, and from compelling or inhibiting religious practices.<sup>434</sup> These two clauses are significant pieces of a broader Constitutional structure, carefully and intentionally designed to protect society's minority groups from fear of oppression inherent in a government in which an established majority dominates the political machinery.

The Supreme Court requires the government to be neutral towards religion and prohibits it from expressing religious opinions or preferences of its own.<sup>435</sup> In a nation with such great diversity of religious views and practices, government neutrality is crucial for the credibility and legitimacy of a government based on the principle that all men are created equal and are endowed with inalienable rights. Thus, the Court's willingness to hold government officials accountable for performance of their Constitutional duties should provide significant reassurances to religious minorities.<sup>436</sup> The United States Supreme Court is the final arbitrator on the United States Constitution, and it is intended to be insulated from the social and political pressures that influence the other branches of the American government. There are dissenting voices who would like the government to endorse particular religious beliefs, but the Supreme Court has finally

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<sup>433</sup> OETJE JOHN ROGGE, *THE FIRST AND THE FIFTH* 3 (1960).

<sup>434</sup> RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* 3 (1999).

<sup>435</sup> Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 *DEPAUL L. REV.* 998 (1990).

<sup>436</sup> *Id.*

and effectively limited the ability of these individuals to re-merge religion and government into a single authority.<sup>437</sup>

In more recent history, hardships endured by the American Catholic and Jewish communities provoked changes in social attitudes that demanded new accommodation laws and regulations protecting civil rights and religious freedom for diverse religious communities. The Muslim community can benefit from the lessons of the Jewish and Catholic experiences, given the many factors that unite these communities in terms of social, political, cultural, and economic aspects of life.<sup>438</sup>

History also provides the American Muslim community with the lessons of the African American community's ongoing struggle for equality, exemplified by a civil rights movement that has fundamentally shifted all aspects of American society. This movement fought for and achieved laws protecting the civil rights of African Americans and other minorities. The nondiscrimination provisions of Title VII of the Civil Rights Act of 1964 are significant provisions with effects that touch nearly all aspects of American society and the legal structure. Of particular importance in this chapter are the ways in which the Act has facilitated religious accommodation in the workplace.

The American Muslim community has benefited from the struggles and victories of religious communities, secular institutions, and movements that have led to a restructured legal system that is equipped to meet the changing needs of society. The result has been a legal mechanism that provides a solid foundation for minority integration and economic prosperity. For example, the Albanian Muslim community in

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<sup>437</sup>*Id.* (explaining the difference between equality and neutrality is another encouragement for the American Muslim community to pursue integration policies).

<sup>438</sup> *See supra* Chapter II, which briefly mentions the experience of the American Catholic and Jewish communities.



Berkeley, Illinois, has benefited from the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), a federal law that was originally enacted in response to the struggle of a particular Catholic community in the city of Boerne, Texas.<sup>439</sup> The Albanian Muslim community used RLUIPA to expand its mosque by working with federal and state officials. Unlike other legal systems found in other countries, the American legal system is experienced in confronting difficult issues surrounding minority integration and religious accommodation, and has developed tools and remedies particularly suited to redressing these specific issues.

The protections of the First Amendment should encourage American Muslims to embrace their religious practices freely and openly, and to demand that their constitutionally guaranteed rights be respected to the same degree as these rights are respected in other religious communities. The First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances<sup>440</sup>

The Establishment Clause (“Congress shall make no law respecting an establishment of religion . . .”) and the Free Exercise Clause (“or prohibiting the free exercise thereof . . .”) provide freedom of religion in two parts: (1) the freedom from compulsion to affirm, practice, or support any particular religion or no religion at all, (2) and the freedom for the individual to believe in religion or non-religion.

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<sup>439</sup> These two cases will be discussed in greater detail in the general accommodation and the Justice Department enforcement sections of this chapter.

<sup>440</sup> NOWAK & ROTUNDA, *supra* note 429, at 1146.

In a presentation to the Dayton Mercy Society, “American Muslims and American Society: Can We Move Forward Together?”<sup>441</sup> Judith Martin spoke of the legal foundations available to help minority communities integrate into American society. Martin invokes Thomas Jefferson’s draft of the Virginia Bill for Religious Freedom, a document that came to serve as the inspiration behind the First Amendment.<sup>442</sup> In this document, Jefferson set forth an argument that should resonate with Muslims who recite the following Qur’anic verses:

لَا إِكْرَاهَ فِي الدِّينِ ﴿٢٥٦﴾

Let there be no compulsion in religion (2:256)<sup>443</sup>

وَلَوْ شَاءَ رَبُّكَ لَأَمَنَّ مَنْ فِي الْأَرْضِ كُلَّهُمْ جَمِيعًا ۚ أَفَأَنْتَ تُكْرِهُ النَّاسَ حَتَّىٰ يَكُونُوا  
مُؤْمِنِينَ ﴿١٠٩﴾

If it had been the Lord’s will, they would all have believed – all who are on Earth! Will you then compel humanity, against its will, to believe? (10:99)<sup>444</sup>

The second verse was revealed at the very early stage of Prophet Muhammad’s prophethood (*nubuwah*) in Mecca, after his migration (*hijrah*) to Medina.<sup>445</sup> According to Muhammad Hashim Kamali, a noted professor of Islamic Law, freedom of religion has consistently been one of the fundamental principles of Islamic legislation regardless of

<sup>441</sup> Judith Martin, *American Muslims and American Society: Can We Move Forward Together?*, 36 ISLAMIC HORIZONS 52–54 (2007).

<sup>442</sup> *Id.*

<sup>443</sup> YUSUF ALI, *supra* note 172, at 106.

<sup>444</sup> *Id.* at 505.

<sup>445</sup> *Id.*

the circumstances.<sup>446</sup> Various Muslim scholars subscribe to Kamali's view of the significance of religious freedom in Islam.<sup>447</sup>

These verses teach that forcing someone to adhere to certain religious practices is contradictory to the essence of faith, which must grow from a person's free will and becomes meaningless if compelled by force.<sup>448</sup> These verses tell us that religion lies in the heart: Live your life, fulfill your purpose, serve your Creator by serving His creation, and have faith that life will be good and others will find their way.<sup>449</sup>

Another verse makes a related point:

لَكُمْ دِينُكُمْ وَلِيَ دِينِ ﴿١٠٩﴾

To you be your way, and to me mine (109:6).<sup>450</sup>

According to the classical-era Muslim philosopher/theologian Al-Ghazali, this verse emphasizes the fundamental principle of human relations and the recognition of all traditions.<sup>451</sup> It teaches tolerance and peaceful coexistence and encourages interfaith and intra-faith dialogue.<sup>452</sup> Al-Ghazali's interpretation is similar to George Washington's understanding of tolerance, as he expressed in a letter to the Jewish Congregation of Newport, Rhode Island. Washington claims that tolerance is not something imposed by a superior authority, but rather is an inherent natural right.<sup>453</sup>

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<sup>446</sup> MUHAMMAD HASHIM KAMALI, FREEDOM OF EXPRESSION IN ISLAM 89 (1997).

<sup>447</sup> This disagreement is in fact centered on the issue of apostasy (whether a person has the right to revert to a different tradition after becoming a Muslim, and what the punishment, if any, should be in that case). This issue is not directly pertinent to this dissertation should be left for future research at this time.

<sup>448</sup> SHAYKH MUHAMMAD AL-GHAZALI, A THEMATIC COMMENTARY ON THE QUR'AN 26 (2000).

<sup>449</sup> *Id.*

<sup>450</sup> YUSUF ALI, *supra* note 172, at 1708.

<sup>451</sup> AL-GHAZALI, *supra* note 450, at 26.

<sup>452</sup> *Id.*

<sup>453</sup> MICHAEL MCCONNELL, JOHN GARVEY & THOMAS BERG, RELIGION AND THE CONSTITUTION 46 (2d ed. 2006).

God revealed these verses to the prophet Muhammad more than 1,400 years ago and yet, their relevance has not diminished. These verses were relevant in 1779 when Thomas Jefferson and James Madison wrote the Virginia Statute for Religious Freedom, and they remain relevant today in the modern American legal system.<sup>454</sup> The Statute captures to the spirit of these verses in the second of its three sections:

Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish enlarge, or affect their civil capacities.<sup>455</sup>

Both the Qur'anic verses and the Virginia Statute strongly endorse the principle that individuals should be free from religious compulsion. This parallel between the Qur'anic verses and the Virginia Statute is more evidence of the potential of American Muslims to successfully integrate and become fully participating members of American society. This and other parallel foundations are invaluable tools that can help institutions and scholars educate the American Muslim community about the legal principles that underscore a legal system that is ready and willing to ensure their freedom of religious practice. Although America is described by some as a Judeo-Christian society, and when some Americans think of religion, they think of it primarily in terms of the three categories [Protestantism, Catholicism, and Judaism] as religious communities,<sup>456</sup> the American legal structure gives no preference or special treatment to any religion and guarantees religious freedom for all. The presence of Muslims and other religious groups

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<sup>454</sup> Virginia Act for Establishing Religious Freedom, ch 34, § 2. 12 (1823).

<sup>455</sup> *Id.*

<sup>456</sup> An Act for Establishing Religious Freedom, ch 34, § 2. 12 Virginia Statute at Large 84-86 (1823).

in America has changed the social composition of American society. Hence, the description of Americans as Protestant, Catholic, and Jew (PCJ) is no longer suitable due to the growing diversity of the American society.

The preamble of the Virginia Statute provides that “there should be religious freedom because: the Holy Author of our religion, who being Lord of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do.”<sup>457</sup> History further reveals that Jefferson was vehemently opposed to attempts to insert the name of “Jesus Christ” into the preamble, and when the Statute passed in 1786 without naming Jesus, he declared that the more universal wording proved that legislators intended the Statute “to comprehend within the mantle of its protection, the Jew and Gentile, Christian and Mahometan, the Hindoo, and infidel of every denomination.”<sup>458</sup> Five years later, the First Amendment made this broad mantle of religious freedom a permanent part of America’s legal structure, providing for separation of church and state and paving the way for pluralism as a framework for free, open, and public debate.<sup>459</sup>

These Qur’anic verses discussed above are in agreement with the principle of religious freedoms guaranteed by the First Amendment to the United States Constitution and the Virginia Statute for Religious Freedom. The Qu’ran and the Constitution both support the concept of freedom of whether or not to exercise religion. The American legal system that protects the freedom of religion reflects the spirit of the previously discussed Qur’anic verses.

The American legal system’s separation between church and state has, throughout history, presented challenges to different religious groups. These issues, which take

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<sup>426</sup> ECK, *supra* note 195, at 76.

<sup>458</sup> MARTIN MARTY, WHEN FAITHS COLLIDE 112 (2004).

<sup>459</sup> *Id* at 53.

several forms, include work on the Sabbath, attire or regulations about facial hair or headwear, prayer in the workplace, school choice and longevity (how long must parents send their children to school), use of controlled substances in religious worship, prayer at school, religious preferences/rules that conflict with other commercial regulations such as Truth In Lending Act (TILA), and polygamy, and remain challenges today.<sup>460</sup> Similar issues will ultimately impact the American Muslim community as they navigate their integration process and receive religious accommodations.

One possible example of such issues faced by the American Muslim community is polygamy, which the Qur'an restricts. As polygamy existed in the pre-Islamic era, a husband was allowed an unlimited number of wives. The Qur'an limited the number of wives to four, provided that each wife was treated equally.<sup>461</sup> This religious practice in some cases is similar to the Mormon practice of polygamy before Utah became a state.<sup>462</sup> The immigrant American Muslims I dealt with understand the country's outright prohibition of this practice, but there have still been isolated cases of Muslim polygamy in the US. Courts addressed this issue in the context of the Mormon community and found the laws prohibiting polygamy to be nondiscriminatory and constitutional.<sup>463</sup> The issue of polygamy is one area where further scholarly interpretation should be done to bring the teachings of the sacred scriptures and the requirements of the Constitution into harmony.<sup>464</sup> However, whether Mormon or Muslim, such agreement should not

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<sup>460</sup> See *infra* Part 2.

<sup>461</sup> YUSUF ALI, *supra* note 172, at 184.

<sup>462</sup> CONKLE, *supra* note 431, at 14.

<sup>463</sup> *Id.*

<sup>464</sup> I will consider undertaking further research on the issue of polygamy. Are there fundamental policies that bans on polygamy foster—that is, protection of health of the offspring of such unions, protection against involuntary servitude. I will look into the holdings of the Texas Mormon child abuse custody cases for more on this issue. There is evidence that the prohibition of polygamy was adopted in the United States during a hostile time for the Mormon community. See CONKLE, *supra* note 4431, at 14.

compromise the fundamental beliefs of the community. Based on these Qur'anic verses discussed above, however, the Muslims' sacred scriptures support the principles underlying the First Amendment and the Virginia Statute for Religious Freedom in their mandates of religious pluralism.

## **B. The Challenges of Implementing the Free Exercise Clause**

Federal and state governments face tremendous challenges in implementing the Free Exercise Clause of the First Amendment. The Supreme Court has gone through several different stages to reach its current interpretation of the Free Exercise Clause. Initially, the Supreme Court read the clause narrowly in *Reynolds v. United States*, where the defendant was prosecuted for bigamy and found guilty under § 5352 of the Revised Statutes of the United States.<sup>465</sup> The Statute stated:

“Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States has exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than \$ 500, and by imprisonment for a term of not more than five years.”<sup>466</sup>

Reynolds, a Mormon living in the Territory of Utah, married a second wife in contravention of applicable Territorial law.<sup>467</sup> He argued that it was his religious duty as a member of the Church of Jesus Christ of Latter-Day Saints to practice polygamy, and therefore, to punish him would be a violation of his First Amendment right of free of religious exercise.<sup>468</sup> The Supreme Court disagreed, holding that polygamy was not a

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<sup>465</sup> *Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>466</sup> U.S. Rev. St. §5352 (1878).

<sup>467</sup> *Reynolds*, 98 U.S. at 161.

<sup>468</sup> *Id.* at 163.

protected exercise of religion and, therefore, Reynolds’s sentence of two years in prison and a \$500 fine was appropriate as ordered by the lower court.<sup>469</sup>

Reynolds’s case raises many questions regarding religious conduct and practices deemed criminal by civil society at large. Reynolds’s action, criminal under a federal statute, at first glance might seem to be actions that would be protected as religious expression under the Free Exercise Clause. However, the *Reynolds* decision established the doctrine that conduct, even religious conduct, is not protected by the Free Exercise Clause if such conduct is prohibited under generally applicable law.<sup>470</sup> The Court reasoned “to permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”<sup>471</sup> The law of the land is to be uniformly applied to all citizens regardless of their religious affiliation, and religious belief cannot be a justification for conduct that constitutes a criminal act<sup>472</sup> under the law of the land.<sup>473</sup>

The Court later adopted a more expansive analysis of the Free Exercise Clause, interpreting it as requiring the government to reasonably accommodate religiously motivated practices in the absence of a compelling state interest. The Court applied this interpretation to laws that burdened religious practice. While there may be subtle

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<sup>469</sup> *Id.* at 152.

<sup>470</sup> *Id.* at 167.

<sup>471</sup> *Id.*

<sup>472</sup> In discussing with Professor Hughes whether there may be a proper distinction to be made between *malum in se* and *malum prohibitum* in this context, she mentioned that my conclusion became weaker when applied to issues such as the terminology or substantive provisions of the truth and lending act. I will defer this discussion for future research.

<sup>473</sup> There are differences between and non-criminal behavior. The anti-bigamy statute in *Reynolds* was a felony-level crime, not a misdemeanor. This could be compared to the treatment of a failure to give a truth in lending disclosure statement—it is a civil violation of law (generally, that is) and , while important to comparative shopping and understanding of credit obligations, it lacks the moral or health benefits underpinnings of the bigamy statute. Basically, this is a compelling interest analysis.



distinctions between individual legal doctrines within the Court's Establishment Clause jurisprudence, this dissertation focuses on how these legal standards will impact the American Muslim community in its quest to receive accommodations.

Although there were other Free Exercise decisions in the years between *Reynolds* and 1962, the next major development that directly affects the type of accommodation discussed in this dissertation was *Sherbert v. Verner*.<sup>474</sup> In *Sherbert*, the Court held that a South Carolina law was unconstitutional because it denied unemployment benefits to a Seventh Day Adventist who quit her job because it included Saturday work.<sup>475</sup> The employee argued that in Exodus 20:8-11, God forbade working on Saturdays (Adventists' Sabbath) and that she was fired because she had refused to work that day.<sup>476</sup> She could not find other work and thus applied for unemployment compensation.<sup>477</sup> The Employment Security Commission denied her claim, and the trial court and the State Supreme Court affirmed the decision.<sup>478</sup> The Supreme Court reversed, finding that the state law, as applied, burdened Sherbert's free exercise of her religion, and did not serve a compelling government interest.<sup>479</sup>

The Supreme Court applies strict scrutiny to laws that significantly burdened religious practices. Strict scrutiny is statutorily defined as a compelling state interest that is necessary to achieve that interest, which is pursued by the least restrictive means.<sup>480</sup> There is no strict scrutiny under neutral law of general application such as criminal law or

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<sup>474</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>475</sup> *Id.*

<sup>476</sup> *Id.* at 399–400.

<sup>477</sup> *Id.*

<sup>478</sup> *Id.*

<sup>479</sup> *Id.* at 406–08.

<sup>480</sup> See Religious Freedoms Restoration Act, 42 U.S.C. §2000bb-1 (1994) (“Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”).

commercial regulations. The only time strict scrutiny used as a constitutional matter is in case of discrimination against religion with laws targeting religion. For example, in *Church of Lukumi Babalu Aye v. City of Hialeah*, the court invalidated the city ordinance that outlawed animal sacrifices for religious purposes. The ordinance, which was passed by Hialeah, Florida city council, forbade members of Lukumi Babalu Aye Church who practice Santeria faith which employs animal sacrifice as one of its principal forms of devotions, from killing animals during private rituals or ceremony. The court held that: (1) the ordinances were not neutral laws; (2) the ordinances were not of general applicability; and (3) the governmental interest asserted did not justify the targeting of religious activity. The *Lukumi* case exemplifies strict scrutiny as a constitutional requirement for discrimination against religion. Thus, we have strict scrutiny as a constitutional requirement under *Lukumi* for discrimination, but there is also strict scrutiny as a statutory requirement which Congress has given but may take away and is not part of the Constitution. Such statutory law includes: the Religious Freedom Restoration Act of 1993 (RFRA), which applies to federal laws; and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which applies to state laws affecting prisoners and zoning.

The court applies strict scrutiny by looking into laws that hinder religious exercise and then determining whether to apply constitutional strict scrutiny or statutory scrutiny. For example, in *Lukumi* the court decided that there was a discrimination against religion and therefore used constitutional strict scrutiny. Otherwise the court uses statutory scrutiny if there is a federal law that imposes a substantial burden on religious practices.

In 1972, in *Wisconsin v. Yoder*, the United States Supreme Court held that placing Amish children in compulsory public education past the eighth grade violated the religious and parental rights of Amish parents to rear their children as they believe God dictates.<sup>481</sup> This case affirmed the right of all parents to bring up their children as they see fit, without unreasonable interference from the government.<sup>482</sup> This right, as the Court specified it, was not exclusive; the state has the right to interfere in certain circumstances with strong justifications.

If, for example, America experienced a pandemic, and a vaccination was ordered for everyone, the country may vaccinate those with religious objections, which would include vaccinating their children, over these objections. Short of a pandemic, courts may recognize a privilege for parents to exercise judgments over their children's health—and this issue will continue to arise. If there is no religious basis, but rather a deep-seeded suspicion of government or a fear that vaccinations contribute to autism and that the public health is a less important concern, then a different set of constitutional questions, including basic undifferentiated privacy rights would be the more likely basis for a constitutional challenge.

Both federal and state courts regularly address the differences between mandatory and permissive religious accommodations, and there may be subtle distinctions between how state and federal courts address these issues. Specifically, mandatory accommodations are required by the Constitution and the First Amendment, whereas permissive accommodations for religious practice are acceptable if the legislatures decide to grant them. Within permissive accommodations, there is a relevant distinction

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<sup>481</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972).

<sup>482</sup> *See id.*

between general and specific accommodations. Specific accommodations, for example, address targeted religious practices, while general accommodations more broadly accommodate religious activities as a matter of statutory scheme.<sup>483</sup> For example, in *Frank v. Alaska*, the Alaska Supreme Court applied the *Yoder* standard and held that the State could not enforce its hunting laws against a religious group's legitimate religious practice of hunting at times outside of the state's codified hunting seasons.<sup>484</sup>

However, after many years of this expansive interpretation of the Free Exercise Clause, *Employment Division v. Smith* ushered in a significant development in religious accommodation jurisprudence.<sup>485</sup> In certain circumstances, states have the discretion to tolerate and accommodate practices undertaken because of religious conviction; however, they are not required to do so. In *Employment Division v. Smith*, the Supreme Court held that the State may constitutionally deny unemployment benefits to employees fired for violating a State prohibition on the use of peyote, even though their use was part of a religious practice.<sup>486</sup> The *Smith* holding is broadly drafted to create a category of laws that are essentially immune from Free Exercise invalidation—and that category includes all laws that are neutral and general such as family law, criminal law, or commercial regulations. It is a broad rule.

In *Smith*, Mr. Black and Mr. Smith were members of the Native American Church and at the time employed by a private drug rehabilitation organization.<sup>487</sup> They were fired because they ingested peyote while participating in religious ceremonies as members of

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<sup>483</sup> See *infra* Part 3. This Part provides a larger explanation of the differences between permissive and mandatory accommodations.

<sup>484</sup> *Frank v. Alaska*, 604 P.2d 1068–69 (Alaska 1979).

<sup>485</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>486</sup> *Id.*

<sup>487</sup> *Id.* at 874.

the Native American Church.<sup>488</sup> They applied to the Oregon Employment Division for unemployment benefits, but their applications were denied when the agency determined they had been dismissed because of work-related “misconduct.”<sup>489</sup> The Oregon Court of Appeals reversed the Employment Division, holding that rejecting the plaintiffs’ application for unemployment compensation violated their free exercise rights under the First Amendment.<sup>490</sup> The Oregon Supreme Court affirmed.<sup>491</sup>

The State of Oregon appealed to the United States Supreme Court, arguing that using peyote was a crime in Oregon and, therefore, that denying unemployment benefits was not an unconstitutional burden on the employee’s free exercise of religion.<sup>492</sup> The Supreme Court agreed, holding that because ingestion of peyote was prohibited under generally applicable Oregon law, and because the prohibition is constitutional, the State of Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of drugs.<sup>493</sup> The Court characterized Smith’s and Black’s argument as an attempt to use religion to place themselves beyond the reach of Oregon’s neutral, generally applicable ban on the possession and ingestion of peyote.

Echoing the reasoning from *Reynolds*, the Court held that the First Amendment’s protection of the free exercise of religion does not allow a person to use religion as a reason not to obey the generally applicable laws of a State.<sup>494</sup> The Court quoted the argument of *Reynolds* stating that: “To permit this would be to make the professed

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<sup>488</sup> *Id.* at 875.

<sup>489</sup> *Id.*

<sup>490</sup> *Id.* at 877.

<sup>491</sup> *Id.* at 879.

<sup>492</sup> *Id.*

<sup>493</sup> *Id.* at 874.

<sup>494</sup> *Id.*

doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”<sup>495</sup> Thus, an individual’s religious beliefs do not excuse him from complying with generally applicable State laws that apply equally to everyone, including laws forbidding polygamy, child labor laws, Sunday closing laws, laws requiring citizens to register for selective service, or laws requiring payment of social security taxes.<sup>496</sup>

The *Smith* decision raised questions regarding freedom of religious practice and proved unpopular within both liberal groups and conservative religious communities. These community reactions galvanized Congress to respond by overwhelmingly passing the Religious Freedom Restoration Act of 1993 (RFRA)<sup>497</sup>. This Act aimed to bring religious accommodation jurisprudence back to the pre-*Smith* broader interpretations of the Free Exercise Clause. In addition to RFRA, Congress also enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)<sup>498</sup> in response to *City of Boerne v. Flores*,<sup>499</sup> to be discussed in later sections.

### **C. Different Forms of Legal Accommodation: Mandatory and Permissive**

This section is an analysis of general accommodation laws and their limits, and thus, it is important to briefly discuss the concept of accommodation, particularly the distinction between mandatory and permissive accommodation, and some cases that demonstrate how these accommodation laws apply. The difference between mandatory and permissive accommodation is that the First Amendment requires mandatory accommodation, whereas permissive accommodations are legislatively permissible.

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<sup>495</sup> *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

<sup>496</sup> *Id.* at 879.

<sup>497</sup> See Religious Freedom Act, 42 U.S.C. §2000bb-1.

<sup>498</sup> Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc-1 (2000).

<sup>499</sup> *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

Another relevant distinction between specific accommodation and general accommodation is that specific accommodation addresses specific religious practices, and general accommodation broadly accommodates religious practices as a matter of statutory scheme.

The notion of accommodation has various meanings according to different scholars.<sup>500</sup> On the one hand, accommodations can be understood as permitting the government to allow individuals to practice certain aspects of their religion within Establishment Clause boundaries. This is a relaxed interpretation of the Establishment Clause that protects the free exercise of all groups.<sup>501</sup> There are two highly pertinent United States Supreme Court cases that specifically approve the constitutionality of permissive accommodation. One case allows specific accommodation in the context of employment and that is the *Corporation of the Presiding Bishop v. Amos*,<sup>502</sup> where the court approved as permissible accommodation, a religion-based exemption in Title VII of the Civil Rights Act of 1964.<sup>503</sup> Professor Daniel O. Conkle writes: “The 1964 Act generally prohibits religious discrimination in employment, but it exempts religious organizations so that they can make religion-based employment decisions, even for jobs without specifically religious duties. According to the Amos Court, Congress permissibly concluded that without the exemption, the Act’s prohibition would have substantially burdened the exercise of religion. In particular, it would have impaired the ability of religious organizations to define and carry out their religious missions by

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<sup>500</sup> CONKLE, *supra* note 431, at 130.

<sup>501</sup> *Id.*

<sup>502</sup> *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

<sup>503</sup> See *infra* note 546-548 and the accompanying texts. .

preventing them from making and implementing religious decision in selecting organizational personnel.”<sup>504</sup>

The *Amos* decision clearly shows that the 1964 congressional statute specifically exempts religious organizations from otherwise applicable anti-discrimination laws, as individuals cannot discriminate as an employer or hire based on religion. The one exception is for religious organizations that may discriminate in favor of their own members as the Supreme Court held in *Amos* that this exception is an accommodation of religious liberty rather than an attack against or favoritism for religion.

The second case is more recent and approved the permissibility of accommodation using congressional statute. In *Cutter v. Wilkinson*,<sup>505</sup> the Court approved the constitutionality of RLUIPA, stating that the statute does not violate the Establishment Clause as it is not favoring religion, but rather is accommodating religious practices. Thus, it is protecting freedom of religion. This decision clearly allows permissible accommodation and rejects establishment claims based on such accommodation. It is important to note, however, that when the government exercises its power to accommodate the freedom of religion it is not promoting religion *per se*.<sup>506</sup>

Professor Conkle further articulated this latter interpretation as follows:

[W]hen accommodation is permitted, there is no benefit to religion that is constitutionally cognizable under the Establishment Clause. The point is subtle but important: it is religious freedom, not religion as such, that the government is advancing and endorsing. Thus, it is better to think of accommodation as religion-specific governmental action that facilitates and prefers the exercise of religion, but that does so in a manner that legitimately satisfies the Court’s conventional Establishment Clause doctrine.<sup>507</sup>

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<sup>504</sup> CONKLE, *supra* note 431, at 145-146

<sup>505</sup> *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

<sup>506</sup> *Id.*

<sup>507</sup> *Id.* at 131.



Therefore, accommodation of religion can be defined as government policies towards religion that are not aimed at promoting a government-favored religion, but rather to allow individuals or groups to practice the religion of their choice without unreasonable government interference. It is important to differentiate religious accommodation from the establishment of religion, which is government action specifically intended to channel, promote, or compel a particular variety of religious exercise in a socially-accepted manner.<sup>508</sup> Individuals or groups are free to choose whether to engage in religious exercise, as well as what type of exercise in which to engage, independent of government interference.<sup>509</sup> This freedom of choice should not be used in venues, such as a public school, where public prayer would violate the Establishment Clause.

The government is required to respect and accommodate individual religious choices; it may not impose specific religious doctrines or tenets on people, or favor a particular religion by providing direct or indirect incentives<sup>510</sup> for subscribing to it. Opponents of accommodation argue that in granting accommodations, the government uses its power and resources to favor one religion over another and therefore, such accommodations violate the Establishment Clause. It is challenging for the government to strike a workable balance between the accommodations required by the Free Exercise Clause and the prohibitions of the Establishment Clause. Legal concepts, such as

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<sup>508</sup> Michael McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 688 (1992).

<sup>509</sup> *Id.*

<sup>510</sup> Although the Bush administration developed government-funded faith-based initiatives, these policies were carefully crafted so as not to violate the Establishment Clause. Nevertheless, there remain questions about the constitutional validity of these initiatives.

‘mandatory’ versus ‘permissive’ accommodation have developed as government policy has tried to affect this balance.

## **1. Mandatory vs. Permissive Accommodation**

The distinction between mandatory and permissive accommodation is a classification drawn by courts and commentators as public debate continues on how much accommodation the government can provide without crossing into policies establishing a state religion.

### **a. Mandatory Accommodation**

Mandatory accommodation is the concept that the Free Exercise Clause, in some circumstances, requires exemptions from generally applicable laws that place an unreasonable burden on an individual’s free religious exercise. In other words, accommodations are mandatory when they are required by the Constitution and the First Amendment. This is the type of accommodation exemplified by the decision in *Sherbet*.<sup>511</sup> Most claims of mandatory accommodation are free exercise issues because the basic legal argument is that the Free Exercise Clause is violated if the accommodation is not granted.<sup>512</sup> Mandatory accommodation is largely a legal concept from before *Employment Division v. Smith*, when the Free Exercise Clause regularly required exemptions to relieve a burden on religious conduct even if the burden was the result of nondiscriminatory, generally applicable laws.<sup>513</sup>

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<sup>511</sup> Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 751 (1992); see *supra* note 442 and accompanying text.

<sup>512</sup> Lupu, *supra* note 513, at 751.

<sup>513</sup> CONKLE, *supra* note 431 at 132 (“[T]he concept of accommodation means that the government does not violate the Establishment Clause when it takes action that is constitutionally required by the Free Exercise Clause.”); see also *supra* note 467 and accompanying text.

Opponents of accommodation argue that these government actions exempting religious conduct, and *only* religious conduct, amount to a religious advantage that violates the Establishment Clause.<sup>514</sup> The Supreme Court rejected this argument because when it read the Free Exercise and Establishment clauses together, it found that alleviating hardships from individuals or groups to allow them to exercise their religion freely does not constitute the "establishment" of religion.<sup>515</sup> This reasoning remains relevant today, but it has been difficult to apply in practice. In the current legal environment, although the Free Exercise Clause does not require accommodation, the Establishment Clause does not forbid it. As a result, legislators have some discretion to grant protection or differential treatment for religious groups.<sup>516</sup>

**b. Permissive Accommodation**

Permissive accommodation refers to exercises of legislative discretion benefitting religion that the Constitution neither requires nor forbids.<sup>517</sup> Opponents of permissive accommodations claim that these legislative grants are thinly disguised attempts to promote a particular religion, and this claim has merit where the legislators intend that the primary effect of the accommodations should advance religion.

The Supreme Court, in its 1971 decision in *Lemon v. Kurtzman*, explained the language and function of the Establishment Clause.<sup>518</sup> In *Lemon*, the Supreme Court held that the Pennsylvania State Nonpublic Elementary and Secondary Education Act violated the Establishment Clause because it permitted the State to reimburse nonpublic religious

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<sup>514</sup> CONKLE, *supra* note 431, at 132.

<sup>515</sup> *Id.*

<sup>516</sup> *Id.*

<sup>517</sup> Lupu, *supra* note 513, at 751.

<sup>518</sup> *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

schools for teachers' salaries, textbooks, and instructional materials.<sup>519</sup> The Court held that by granting these reimbursements, which typically went to Roman Catholic schools, the State was promoting Roman Catholicism as the favored religion of the state, a clear violation of the Establishment Clause.

The *Lemon* decision is particularly significant because it articulated the legal standard for evaluating laws which tend to suggest or strengthen an impermissible relationship between church and state. The *Lemon* test is the standard courts apply to determine when a law has the effect of establishing a state religion. Chief Justice Warren Burger wrote the majority opinion setting out the three-pronged test for determining when a legislative accommodation is permissible under the Establishment Clause. First, legislative accommodation must have a secular legislative purpose. Second, its principal or primary effect must neither advance nor inhibit any particular religion. Finally, it must not foster an 'excessive government entanglement' with religion.<sup>520</sup> This test has served as the foundation for many of the Court's post-1971 Establishment Clause cases.

Subsequent courts have faced challenges in implementing the second prong of the *Lemon* test. In applying the second prong, courts consider three factors to be particularly relevant for determining whether a legislative accommodation advances religion. These factors are: (1) the severity of the burden the accommodation seeks to relieve, (2) the burden the accommodation imposes on third parties, and (3) the scope of the accommodation.<sup>521</sup> Professor Anne Y. Chiu defines "legislative accommodation" as "a

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<sup>519</sup> *Id.* at 194.

<sup>520</sup> *Id.* at 197.

<sup>521</sup> Anne Y Chiu, *When Prisoners Are Weary and Their Religious Exercise Burdened, RLUIPA Provides Some Rest for their Souls*, 79 WASH. L. REV. 999 (2004).

statute enacted by the legislature to lift a neutral, generally applicable burden on religion imposed by the government.”<sup>522</sup> In other words, legislatures enact accommodations for the purpose of requiring government actors to honor the values underlying the Free Exercise Clause.<sup>523</sup>

**(i) The Limits of Permissive Accommodation**

Congress responded to the decisions in *Employment Division v. Smith* and *City of Boerne v. Flores*,<sup>524</sup> by enacting the Religious Freedom Restoration Act and the RLUIPA. These laws provided greater accommodations to religious groups to practice their faith freely by prohibiting laws that substantially burden an individual’s right to free exercise. However, the government must respect certain limits in enforcing the substance of these accommodation laws. Professor Conkle characterizes these limits as two basic requirements for legislative action (or state constitutional interpretation) in order to mount a permissive accommodation and avoid nullification under the Establishment Clause.<sup>525</sup>

First, the accommodation ought to remove what would otherwise be a governmentally imposed, substantial burden on the exercise of religion.<sup>526</sup> A substantial burden is defined as a direct or indirect interference by the government to discourage the practice of religion by putting pressure on an individual’s religious choices.<sup>527</sup> If a substantial burden does not exist, the accommodation might be a promotion of religion rather than a facilitation of religious exercise, thus violating the Establishment Clause.

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<sup>522</sup> *Id.* at 1001.

<sup>523</sup> *Id.*

<sup>524</sup> See *infra* note 616 and accompanying text.

<sup>525</sup> CONKLE, *supra* note 431, at 135.

<sup>526</sup> *Id.*

<sup>527</sup> *Id.*

Second, the accommodation must be based on “nondiscriminatory” policy.<sup>528</sup> Conkle defines non-discriminatory accommodations as merely precluding discrimination “between or among religions.”<sup>529</sup> This requirement raises several discrimination questions regarding exemptions for religious groups, particularly about government preference for the practice of religion over non-religion, and what practices constitute religion. These issues are as of yet unresolved by the Supreme Court.<sup>530</sup>

Permissive accommodation is very complex because it is inherently difficult to navigate the shades of gray which differentiate a permissive accommodation from an impermissible establishment of religion. The line between these two concepts is very thin and ill-defined, and the Supreme Court has not been forthcoming with additional guidance on the issue.<sup>531</sup>

Professor Kent Greenawalt agrees with Professor Conkle’s identification of the two requirements for permissive accommodation and adds three additional requirements he has gleaned from Supreme Court jurisprudence, for a total of five requirements as follows:

1. *Relief of a Relevant Burden.*<sup>532</sup>

The purpose of the accommodation should be to relieve a hardship on religious exercise, and not to favor one particular religion over another. Additionally, the government should remain neutral when granting permissive accommodations, and take painstaking

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<sup>528</sup> *Id.*

<sup>529</sup> *Id.* at 137.

<sup>530</sup> These very important questions need to be answered to guarantee the neutrality of the government when it provides a religion-based exemption.

<sup>531</sup> Kent Greenawalt, *Establishment Clause Limits on Free Exercise Accommodation*, 110 W. VA. L. REV. 343 (2007).

<sup>532</sup> *Id.* at 348.

precautions to ensure that its actions do not cross the line toward establishment by promoting particular religions. An example of an impermissible law is a state tax code that exempts religious publications from state taxes, but not publications as a whole.<sup>533</sup>

## 2. *Unconstitutional Forms of Relief.*<sup>534</sup>

The permissive accommodation should be concurrent with the Constitution. An accommodation cannot remedy a burden that is imposed by a measure that is intrinsically unconstitutional.<sup>535</sup> An example would be drafting school district boundaries according to religious affiliation—a state practice that would assign political authority to a religious group based solely on its religion.<sup>536</sup>

## 3. *Relation of Relief to Religious Need.*<sup>537</sup>

The accommodation should be reasonable and tailored to provide specific relief of a specific burden. This consideration is very important to maintain the constitutionality of the accommodation because it could potentially go beyond relieving a burden to providing a benefit, in which case it becomes a promotion of religion. An example would be an employment contract that includes more vacation days for religious purposes than provided to the general working population.<sup>538</sup>

## 4. *Permissive Classification.*<sup>539</sup>

The legislature must ensure that it treats similarly situated religious groups uniformly when granting a legislative accommodation.<sup>540</sup> A state, for example, may not allow the

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<sup>533</sup> *Id.* (citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 (1989)).

<sup>534</sup> Greenawalt, *supra* note 533, at 350.

<sup>535</sup> *Id.*

<sup>536</sup> *Id.*

<sup>537</sup> *Id.* at 351.

<sup>538</sup> *Id.* at 352.

<sup>539</sup> *Id.* at 352.

use of peyote for one religious group without also permitting the use of a similar substance by another.

5. *Who Bears the Burden of Privilege and How Great is the Burden's Weight?*<sup>541</sup>

When an accommodation that relieves the burden on one religious group has the result of requiring other religious groups to bear consequences that result from the use of the accommodation, it may be unconstitutional. A public school that accommodates one religion and places an unfair burden on other religious adherents might be unconstitutional. However, this is not always the case; often, the accommodation does not have any negative impact on other religious groups.<sup>542</sup>

Notwithstanding these requirements for permissive accommodations for religious practice, one can conclude that the line between permissive accommodation and impermissible establishment remains very narrow and necessitates continuous vigilance to avoid a constitutional violation. The government must ensure that all persons are treated equally, and therefore is responsible for maintaining its separation from religion by institutionalizing safeguards that prevent the expression of any state preferences or opinions that support particular religious beliefs or practices.

There is no doubt that Free Exercise principles require accommodation. Since accommodations were first embraced by the Supreme Court in 1963, in *Sherbert v. Verner*, the idea has weathered continual criticism. However, it continues to face tremendous challenges.<sup>543</sup>

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<sup>540</sup> *Id.*

<sup>541</sup> *Id.* at 354.

<sup>542</sup> *Id.* at 354.

<sup>543</sup> MICHAEL MCCONNELL, JOHN GARVEY & THOMAS BERG, *RELIGION AND THE CONSTITUTION* 86 (2d ed. 2006).



Demographics show that America is progressing towards a more diverse community with different religious practices that require reasonable accommodations to allow their adherents to exercise their religion freely. This increased diversity was able to develop because the Free Exercise and Establishment Clause encouraged religious freedom, and it is for this reason that protection of these clauses are crucial to help religious minorities successfully integrate into American society. This protection does not require new laws, but may be better achieved by raising community awareness of those legal protections and remedies available under existing law.

**(ii) Accommodations must be consistent with the spirit of the Constitution**

Another testament to the favorability of the legal concept of permissive accommodation is that its attendant constitutional interpretation is consistent with the spirit of the Constitution as a whole, particularly the principles of the First Amendment.<sup>544</sup> In this view, accommodation is necessary for the protection of followers of minority religions from the inevitable effects of the tyranny of the majority, which often includes ignorance and overt hostility.<sup>545</sup> It is important to note the rigorous limitations for permissive accommodations and that the government must be neutral, fulfilling the role of facilitator to ensure individual or group religious decisions are not encouraged or compelled. As Justice Brennan explained in a majority opinion for a 1978 case:

[The] government [may] take religion into account . . . to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish.<sup>546</sup>

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<sup>544</sup> McConnell, *supra* note 510, at 690.

<sup>545</sup> *Id.* at 693.

<sup>546</sup> *McDaniel v. Paty*, 435 U.S. 618, 639 (1978).

Therefore, any government action to accommodate religious groups or individuals should be viewed as a government policy allowing these groups or individuals to practice their religion without impediments.

#### **D. Specific Accommodation Laws**

Specific accommodation laws are measures enacted by Congress or state legislatures to address certain circumstances impeding religion. Often, where these measures are used, the existing circumstances render religious practices all but impossible without such laws.<sup>547</sup> These circumstances are accommodated by legislatures and are not typically recognized by courts. In cases involving the military and prisons, the courts tend to defer to the assessments of the other branches of government regarding the need to protect constitutional rights.<sup>548</sup> The legislatures, by enacting these measures, conclude that the particular kind of specific accommodation is possible without undue damage to a compelling government interest.<sup>549</sup> There are two laws that are current examples of specific accommodation laws: a law regarding military headgear and, to a degree, the Civil Rights Act.

##### **1. Wearing Religious Apparel While in Uniform: The National Defense Authorization Act of 1988–89**

Some accommodation laws cater to specific circumstances, such as the military headgear accommodation law enacted by Congress in response to *Goldman v. Weinberger*.<sup>550</sup> This case involved a Jewish soldier who wore a yarmulke indoors when

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<sup>547</sup> McConnell, *supra* note 510, at 712.

<sup>548</sup> *Id.* at 711.

<sup>549</sup> *Id.*

<sup>550</sup> *Goldman v Weinberger*, 475 U.S. 503 (1986).

military regulations prohibited him from wearing headgear inside a military hospital.<sup>551</sup> He claimed that the application of Air Force regulations to prevent him from wearing his yarmulke infringed upon his First Amendment freedom to exercise his religious beliefs. Therefore, he argued, it was necessary that the Air Force make an exception for religious apparel to its uniform dress requirements.<sup>552</sup> The Supreme Court ruled against the soldier, holding that the military was, by necessity, a “specialized society separate from civilian society” and that “to accomplish its mission the military must foster instinctive obedience, unity, commitment, and *esprit de corps*.”<sup>553</sup> Rather than give priority to their own beliefs, individuals in the military were to subordinate themselves to the needs of the service.<sup>554</sup> One of the ways the military created cohesiveness, said the Court, was by requiring servicemen to maintain uniform visibility.<sup>555</sup> The First Amendment did not require the military to accommodate all religious views, nor did it specifically preclude the uniform regulation.<sup>556</sup>

*Goldman* prompted Congress to adopt the National Defense Authorization Act of 1989, which changed military regulations.<sup>557</sup> This Act provided for protections and accommodations for religious apparel while in military uniform, stating:

- (a) General rule —Except as provided under subsection (b), a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member’s armed force.
- (b) Exceptions.—The Secretary concerned may prohibit the wearing of an item of religious apparel—

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<sup>551</sup> *Id.* at 528.

<sup>552</sup> *Id.* at 509.

<sup>553</sup> *Id.* at 507.

<sup>554</sup> *Id.*

<sup>555</sup> *Id.*

<sup>556</sup> *Id.* at 510.

<sup>557</sup> National Defense Authorization Act of 1989 (NDAA), 10 U.S.C. § 774(b) (1987) (legislative history shows that this Act was passed by both houses of Congress in 1987, but it was included in the public laws of 1988–89).

- 1) in circumstances with respect to which the Secretary determines that the wearing of the item would interfere with the performance of the member's military duties; or
- 2) if the Secretary determines, under regulations under subsections (c), that the item of apparel is not neat and conservative.<sup>558</sup>

This Act also authorized the Secretary of Defense to prescribe regulations concerning the wearing of such items.<sup>559</sup> The law defined the term "religious apparel" as "apparel, the wearing of which is part of the observance of the religious faith practiced by the member."<sup>560</sup> This law provides specific religious accommodations for military personnel to observe their religious dress while on duty. This kind of specific religious accommodation is important for those who would like to observe their religious practices while fulfilling their duty toward their country. Further, such accommodations neither impose a burden on non-beneficiaries nor attempt to persuade non-religious observers to take up religion or follow any particular tradition. This is important because recognizing the desires of service personnel to observe particular religious rituals while on duty may have the positive effect of increasing troop morale. Furthermore, troops not targeted by these accommodations feel no negative effects while performing their service duties.

## **2. Civil Rights Act of 1964 And Religious Accommodation in the Workplace**

One of the major milestones for minorities and religious groups originates in the Civil Rights movement and the critical role of the African American community, which resulted in the passing of the Civil Rights Act of 1964.<sup>561</sup> This Act not only cemented, but also expanded, on the principles discussed earlier underlying legal documents with

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<sup>558</sup> *Id.*

<sup>559</sup> *Goldman*, 475 U.S. at 521.

<sup>560</sup> See 10 U.S.C. § 774(d).

<sup>561</sup> 42 U.S.C. § 2000e-2(a)(1)-(2) (2000). Possibly there are discrimination cases at the state level between the framing of the First Amendment and the 1960s, an area which may be reserved for future research.

great historical significance, such as the Declaration of Independence and the First Amendment. Among its provisions, the Act requires that private employers cannot discriminate against any minority group, whether racial, religious, or gender- or sex-based. The relevant provision of Title VII of the Civil Rights Act of 1964 as amended states:

[i]t shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with his respect to his compensation, term, condition, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>562</sup>

Title VII prohibits private employers from discriminating against individuals on the basis of race, color, religion, sex, or national origin. Under the title, private employers may not discriminate against any individual in hiring, firing, training, retraining, or any advertisements seeking to fill open positions. Furthermore, it became unlawful to discriminate against any employee or potential employee regarding compensation or the terms, conditions, or privileges of employment based on race, color, religion, sex, or national origin. If any of these unlawful practices occurs, the individual who is discriminated against may file a complaint with the Equal Employment Opportunity Commission (EEOC), which has the authority to investigate and prosecute individual cases of employment discrimination.<sup>563</sup>

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<sup>562</sup> *Id.*

<sup>563</sup> 29 C.F.R. § 1601.1 (2007).

The 1972 amendments to Title VII added a new section defining “religion” to include all aspects of religious observance, practice, and belief, so as to require employers to allow reasonable accommodations for employees whose religious practices differ from the employer’s standards, schedules, or other business-related conditions.<sup>564</sup> According to the amendments, such accommodations should not cause undue damage or hardship on the employer’s business.<sup>565</sup> To refuse an accommodation, employers must prove that the refusal is a matter of business necessity, such that the accommodation amounts to an unreasonable burden on the employer’s business.<sup>566</sup> The employer’s own faith must not be a factor in the employer’s refusal of the accommodation.<sup>567</sup>

Religious groups have formed a united front to counter religious discrimination in the workplace. In the case of *Sturgill v. United Parcel Services (UPS)*, UPS failed to accommodate an employee’s wish to observe his Sabbath.<sup>568</sup> Consequently, a coalition of religious national organizations representing Jews, Christians, and Muslims submitted amicus briefs expressing their concerns that if the United States Court of Appeals accepted UPS’s arguments, the consequences for religious employees could be drastic. UPS argued that Title VII of the Civil Rights Act of 1964 only provided employees the right to minimize conflict with their religious beliefs.<sup>569</sup> The United States Federal District Court in Fayetteville, Arkansas, found that UPS violated Title VII by failing to reasonably accommodate the employee’s religious observance.<sup>570</sup>

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<sup>564</sup> See 42 U.S.C. § 2000e -2(1)–(2) (2006).

<sup>565</sup> *Id.*

<sup>566</sup> *Id.*

<sup>567</sup> *Id.*

<sup>568</sup> *Sturgill v. UPS*, 512 F.3d 1024 (8th Cir. 2008).

<sup>569</sup> See 42 U.S.C. § 2000e-2.

<sup>570</sup> *Sturgill*, 512 F.3d. at 1024.

Workplace issues for Muslims are generally covered under Title VII. In *Equal Employment Opportunity Commission (EEOC) v. Alamo Rent-A-Car LLC; ANC Rental Corporation*,<sup>571</sup> the defendant, Ms. Bialn Nur, was a Muslim woman employed by Alamo. Ms. Nur sought permission to wear a headscarf at work during the holy month of Ramadan, in observance of her religious practices, but was denied an accommodation.<sup>572</sup> Alamo previously permitted Ms. Nur to wear a headscarf during Ramadan in 1999 and 2000;<sup>573</sup> however, in December 2001, Alamo refused to permit Ms. Nur to wear her headscarf.<sup>574</sup> Alamo told Ms. Nur that the company dress code prohibited wearing a headscarf, when in fact Alamo had no such policy.<sup>575</sup> Alamo subsequently disciplined, suspended, and finally terminated Ms. Nur for failing to remove her headscarf.<sup>576</sup> The EEOC, representing Ms. Nur, filed a discrimination lawsuit against Alamo, alleging violations of Title VII of the Civil Rights Act of 1964. Judge Roslyn Silver ruled in Ms. Nur's favor, holding that Alamo discriminated on the basis of religion when it terminated Ms. Nur in December 2001.<sup>577</sup> In her decision, Judge Silver wrote:

It is undisputed that the accommodation Alamo offered Ms. Nur required her to remove her head covering during Ramadan when she served clients but still required her to serve clients, making it impossible for Ms. Nur to avoid removing her head covering at work. Accordingly, Alamo's proposal would have failed to accommodate Ms. Nur's religious practices and was not a reasonable accommodation. Thus, Alamo failed to uphold its burden to attempt to accommodate Ms. Nur's beliefs, and was left with the alternative burden to show that permitting Ms. Nur to wear a head covering during Ramadan while dealing with clients would impose an undue hardship.<sup>578</sup>

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<sup>571</sup> *EEOC v. Alamo Rent-A-Car, LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006).

<sup>572</sup> *Id.* at 1008.

<sup>573</sup> *Id.* at 1012.

<sup>574</sup> *Id.*

<sup>575</sup> *Id.* at 1008.

<sup>576</sup> *Id.* at 1009.

<sup>577</sup> *Id.* at 1017.

<sup>578</sup> *Id.* at 1013.

The reasoning applied in *Alamo Rent-a-Car* ties case law together in a way that continues to serve other religious employees in similar situations. By applying this reasoning, the Civil Rights Act can be reliably interpreted as affording protections to Muslims who leave work to attend Friday prayer, fast during the month of Ramadan, and wear a headscarf or turban in the workplace.

Ms. Nur's case is one of many discrimination cases<sup>579</sup> involving Muslims under Title VII; however, these cases rarely reach trial as Ms. Nur's case did. Most are resolved before or during trial by summary judgment or a mutually agreed settlement, which may result in the dismissal of the allegation or a consent decree.<sup>580</sup> Thus, they are rarely litigated fully in court.

**a. The Differences Between the Civil Rights Act and RFRA**

The Civil Rights Act differs from RFRA in that it applies to all parties, not just government actors. The Civil Rights Act provisions pertain to all employers who have fifteen or more employees for each working day in each of twenty or more calendar weeks of the calendar year.<sup>581</sup> For this reason, an employer with fewer employees would not be required to make accommodation for workplace dress under Title VII of the Civil Rights Act.

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<sup>579</sup> Interestingly, Supreme Court Justice Samuel Alito dealt with a variety of religious accommodation cases as an appeals court judge. One 1999 case involved Muslim police officers who brought suit against the City of Newark, arguing that the city's police department violated the officers' Free Exercise rights by demanding that the officers shave their beards. The opinion, drafted by then-judge Alito, held that the police department had violated the Free Exercise clause and that the Muslim police officers were entitled to keep their beards.

<sup>580</sup> I have surveyed many discrimination cases involving Muslims; however, I have found very few cases that have been decided in court through a means other than Summary Judgment.

<sup>581</sup> See 42 U.S.C. § 2000e.



**b. Contemporary Implementation Challenges Facing the Muslim Community**

Although the Act provides substantial protection for religious minorities regarding employment issues, a considerable number within the Muslim community feel there has been an increase in discrimination against them over the past several years. They attribute this to the post-9/11 climate of fear toward people who affiliate themselves with Islam. Muslim civil rights organizations have received many complaints from the Muslim community alleging that they have suffered discrimination in the workplace because of their religious practices, such as those endured by Ms. Nur.<sup>582</sup> Even though the Act clearly prohibits such discrimination, Ms. Nur's case is one example of the various challenges to implementing its mandates successfully, due to current socio-political circumstances.

To overcome these challenges, Professor Steven Jamar has concluded that it is necessary to adopt principles of tolerance, inclusion, neutrality, equality, and most importantly, accommodation.<sup>583</sup> He argues that accommodation is particularly pertinent for resolving religious employment discrimination because of the distinct nature of this discrimination, as opposed to discrimination based on race or sexual orientation.<sup>584</sup> American Muslims are now found in all sectors of society. This growing Muslim population adds new dimensions that employers must consider when dealing with issues of multiculturalism and diversity. Employers must adopt and implement policies that help create an environment that is culturally sensitive to Muslim employees. For instance, Muslims observe the month of Ramadan through fasting, refraining from eating,

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<sup>582</sup> COUNCIL ON AMERICAN-ISLAMIC RELATIONS, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 2005, available at <http://www.cair.com/PDF/2005CivilRightsReport.pdf>.

<sup>583</sup> Steven Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40. N.Y.L. SCH. L. REV. 727 (1996).

<sup>584</sup> *Id.*

drinking, and smoking from sunrise to sunset (except when one is sick or traveling).<sup>585</sup>

The month of Ramadan is a period of personal restraint and renewed focus on moral conduct for Muslims, as well as a time to empathize with those who are less fortunate and to appreciate the gifts one has been given. This month-long fast does not mean that Muslims cease to work, and an employee observing the fast does not eat during typical lunch times. However, he or she will need to eat after sun down, and, for those working night shifts, before dawn. Mutually convenient adjustments can be reasonably made between employees and employers. For example, a work shift could be shortened by the length of the lunch break if the break is not taken. This particular accommodation during the month of Ramadan is different from accommodations that are provided to other religious groups, therefore, employers should make an effort to be culturally aware of their Muslim employee's religious needs. This is but one illustration of many variations available to reasonably accommodate the religious practices of the American Muslims. Muslim employees should not be afraid to inform employers of their religious duties, to start a dialogue to figure out an arrangement that meets both their needs and those of their employers. Employers are not allowed to ask about religion when hiring, or at any time, so it is often the employee's responsibility to make his employer aware of his needs.

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<sup>585</sup> YUSUF ALI, *supra* note 172, at 74. (stating that Islam provides relief for many of the burdens of travelers and people suffering from illness) A traveler or a sick person is exempt from fasting during the month of Ramadan. *Id.*

## **E. General Accommodation Laws 586**

Congress enacted general accommodation laws, which are typically broadly applicable statutes, in response to implementation challenges of the Free Exercise Clause and certain Supreme Court decisions that burdened religious practices. These general accommodation laws are generally-framed religious liberty statutes such as the Religious Freedom Restoration Act of 1993,<sup>587</sup> and the Religious Land Use and Institutionalized Persons Act of 2000.<sup>588</sup> The following discussion focuses on these particular laws and their role in permissive accommodation.

### **1. The Religious Freedom Restoration Act of 1993 (RFRA)**

The Religious Freedom Restoration Act (RFRA), passed in 1993, was aimed at prohibiting laws that substantially burden a person's free exercise of religion.<sup>589</sup> RFRA reinstated the standard from *Sherbet*, mandating that strict scrutiny<sup>590</sup> be applied when determining whether the Free Exercise Clause has been violated.<sup>591</sup> In applying this test, the court must first determine whether the person's claim is based on a sincere religious belief, and second, decide whether the government action substantially burdens that person's ability to act on his belief. Where these two elements are met, the burden shifts so that the government must then prove that the restriction furthers a compelling state interest, and the restriction is narrowly tailored to meet that interest in the manner least

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<sup>586</sup> General accommodation laws are an accommodation that protects religious practices in a broad range of contexts, not in specific contexts. The Civil Rights Act of 1964 generally accommodates the employment setting and could be described as a general accommodation, but for the purposes of this dissertation I am defining general accommodation as broadly applicable statutes such as The Religious Freedom Restoration Act of 1993 (RFRA) and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).

<sup>587</sup> See Religious Freedom Restoration Act (RFRA), 42 U.S.C. §2000bb-1 (1994).

<sup>588</sup> See The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc-1 (2000).

<sup>589</sup> 42 U.S.C. §2000bb-1.

<sup>590</sup> See *supra* note 482 and accompanying text.

<sup>591</sup> 42 U.S.C. §2000bb-1.

restrictive, or the least burdensome, to religion.<sup>592</sup> RFRA does not simply address the concept of religious freedom; it emphasizes its application:

The purposes of this Act are—(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.<sup>593</sup>

RFRA has proven to be an effective tool for protecting the rights of individuals to practice their faith and simultaneously participate in society. Several cases involving religious communities and their right to practice their religion freely were resolved under RFRA. The most famous case among these, *Gonzales vs. O Centro Espirita Beneficiente Uniao do Vegetal*, involved the New Mexico congregation of the Uniao do Vegetal religion, a branch of a Brazilian religion that blends elements of Christianity with native rituals.<sup>594</sup> Members of the group believe that sainthood can be achieved through drinking cups of a hallucinogenic tea.<sup>595</sup>

In 1999, federal officials tried to prevent church members from importing *hoasca*, a tea made from a plant that contains a psychotropic chemical banned by the Controlled Substances Act. Uniao do Vegetal adherents drink the tea, which is ritually brewed from local plants and blessed by church members in Brazil before exportation, as part of their worship rituals.<sup>596</sup> The congregation then sued Attorney General Alberto Gonzalez, alleging that RFRA prohibits federal officials from unduly burdening the free exercise of their religion by banning the importation of *hoasca*. Under RFRA, the government must

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<sup>592</sup> *Id.*

<sup>593</sup> *Id.*

<sup>594</sup> *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418 (2005).

<sup>595</sup> *Id.* at 423–24.

<sup>596</sup> *Id.*

prove not only that it has a “compelling interest” in limiting religious freedom, but also that it has done so by the “least restrictive means” possible. The case was appealed to the Supreme Court by the government and the Supreme Court decided in favor of Uniao do Vegetal, holding that the government failed to demonstrate that the law served a compelling interest by barring the sacramental use of hoasca for religious purposes.<sup>597</sup> The Court also rejected the government’s argument that the Controlled Substances Act (CSA) is a law of general application and is not open for exceptions, particularly for Schedule 1 substances such as Dimethyltryptamine (DMT) in hoasca.<sup>598</sup> The long-standing exception for the religious use of peyote by the Native American Church, which is also a Schedule 1 substance under the CSA, undercut this argument.<sup>599</sup> Further, Congress purposefully created the possibility of judicial exceptions to generally applicable laws when it enacted RFRA, and it instructed the courts to apply the strict scrutiny test.<sup>600</sup>

In addition to their basic argument about the general applicability of the CSA, which was challenged by the earlier exemption for peyote, the government also argued that it had a compelling interest in complying with the 1971 United Nations Convention on Psychotropic Substances, a treaty signed by the United States and enforced by the Controlled Substances Act.<sup>601</sup> The Court rejected this argument, however, mainly because the government did not submit evidence of the international consequences of granting an exemption for the Uniao do Vegetal Church (UDV).<sup>602</sup> Implicitly, the Court

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<sup>597</sup> *Id.* at 437–38.

<sup>598</sup> *Id.* 425–26. Dimethyltryptamine is a naturally-occurring psychedelic drug.

<sup>599</sup> *Id.* at 425.

<sup>600</sup> *Id.* at 425–27.

<sup>601</sup> *Id.*

<sup>602</sup> *Id.* at 438.

found that affidavits submitted by two State Department officials attesting to the general importance of honoring international obligations and maintaining the United States leadership position in the international war on drugs failed to show a “compelling government interest,” and such “general government interests” were not sufficient to do so.<sup>603</sup>

It is important to note here that Islamic tradition and Muslims’ ritual practices do not involve forbidden substances, such as the one at issue here. In fact, Islam prohibits all substances that intoxicate the mind in order to change a person’s perception of reality, such as the hallucinogen used by Uniao do Vegetal church.<sup>604</sup> Therefore, Muslims do not require accommodation in this context.<sup>605</sup>

**a. The Invalidation of RFRA in Reference to State and Local Laws**

In *City of Boerne v. Flores*, the Supreme Court invalidated RFRA as it applied to state and local laws.<sup>606</sup> In this case, the Archbishop of the St. Peter Catholic Church in Boerne, Texas decided to expand the church’s capacity to accommodate its growing congregation, and he applied for the requisite building permit.<sup>607</sup> The City of Boerne denied the application because a city ordinance designated a historic district which, the city argued, included the church.<sup>608</sup> The Archbishop challenged this denial and filed suit against the city in the United States District Court for the Western District of Texas,

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<sup>603</sup> *Id.* at 439.

<sup>604</sup> The Prophet Muhammad stated that whatever intoxicates the mind of an individual is prohibited. Narrated Abu Al-Juwairiyya: “I asked Ibn 'Abbas about Al-Badhaq. He said, ‘Muhammad prohibited alcoholic drinks before it was called Al-Badhaq [by saying], Any drink that intoxicates is unlawful.’ I said, ‘What about good lawful drinks?’ He said, ‘Apart from what is lawful and good, all other things are unlawful and not good’ [unclean Al-Khabith]. See 7 Sahih Al-Bukhari 69 (Muhammad Muhsin Khan, eds. 1979).

<sup>605</sup> One major context that will require accommodation for Muslims is financial regulations, discussed in Chapter III.

<sup>606</sup> *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

<sup>607</sup> *Id.* at 513.

<sup>608</sup> *Id.*

alleging violations of RFRA.<sup>609</sup> The District Court concluded that by enacting RFRA, Congress had exceeded the scope of its enforcement power under § 5 of the Constitution's Fourteenth Amendment.<sup>610</sup> The court certified an order for interlocutory appeal and the Fifth Circuit reversed the decision, finding that RFRA was constitutional. The Supreme Court granted certiorari, ruled in favor of the City of Boerne, and affirmed the District Court's ruling that RFRA exceeded Congress's power under § 5 of the Fourteenth Amendment.<sup>611</sup> Thus, RFRA impermissibly intruded on the powers of the states to enact laws for the general health and welfare of their citizens.<sup>612</sup>

RFRA did not help the St. Peter Catholic Church obtain the permit to enlarge its church so that its congregation could worship comfortably despite the fact that RFRA was passed originally to draw permissive accommodations for religious groups. RFRA was a direct response to the Supreme Court's decision in *Employment Division v. Smith*, *supra*.<sup>613</sup> RFRA restricted state laws from burdening religious practices, but in the *Boerne* case, the Supreme Court found RFRA to be invalid with regard to the local laws of the city of Boerne. Ultimately, the Supreme Court holds the power of defining the substantive rights guaranteed by the Fourteenth Amendment, and thus invalidated RFRA as it applied to state and local laws. RFRA remains a valid restriction of federal laws, as shown by the *Gonzales* case discussed earlier.

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<sup>609</sup> *Id.* at 512.

<sup>610</sup> U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). The Constitution incorporates the Free Exercise Clause for application to state and local laws.

<sup>611</sup> *City of Boerne*, 521 U.S. at 524.

<sup>612</sup> The Supreme Court decision in *Boerne* is part of a recent trend to limit congressional power. This trend is visible in other cases such as *United State v. Lopez* (1995), where the Supreme Court ruled that Congress had exceeded its constitutional authority under the Commerce Clause when it passed a law prohibiting gun possession in local school zones.

<sup>613</sup> See *supra* note 487.

## 2. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)

RLUIPA, enacted in 2000,<sup>614</sup> is a partial response to the *Boerne* decision. Unlike RFRA, which required religious accommodation in virtually all spheres of life, RLUIPA covers only two basic areas: land use for religious purposes as they relate to state and local zoning laws and the religious liberty of institutionalized persons, typically prisoners. RLUIPA prohibits a state or local government from imposing land use restrictions in a manner that burdens religious development.<sup>615</sup> It also bars zoning restrictions that impose a “substantial burden” on the religious exercise of a person or institution, unless the government can show that there is a “compelling interest” for the restriction and that it is the least restrictive way for the government to meet that interest.<sup>616</sup> The law provides, in pertinent part:

No government shall impose or implement a land-use regulation in a manner that imposes a substantial burden on the religious exercise of a person unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.<sup>617</sup>

RLUIPA is a very significant development because it provides protections for minority religious practices, houses of worship, and religious learning centers or schools. The United States Department of Justice (DOJ) has used RLUIPA to resolve issues pertaining to building religious institutions for religious minorities.

When the Albanian Muslim community in the Village of Berkeley, Illinois, decided to expand its mosque to accommodate its growing membership and to give it a

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<sup>614</sup> See Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc-1 (2000).

<sup>615</sup> *Id.*

<sup>616</sup> *Id.*

<sup>617</sup> See 42 U.S.C. §2000cc-1.



more mosque-like appearance, the Village denied the application, arguing that the land on which the mosque sits had been rezoned as a business district, which permitted only tax-generating businesses and residences on top of ground-floor businesses.<sup>618</sup> Over 3 years, the mosque submitted four different applications to construct an approximately 13,000-square-foot addition, including a minaret.<sup>619</sup> The Village rejected all four of these applications. After exhausting available local solutions, the mosque leadership asked the DOJ for assistance. The DOJ responded immediately and opened an investigation into whether the Village had violated the RLUIPA by refusing the permit.<sup>620</sup> Seven months after the DOJ officially notified the Village that it had opened an investigation into the issue, the Village approved the mosque's proposed expansion. The DOJ then closed its investigation.

As far as RLUIPA's provision regarding prisoners rights' to exercise their religion is concerned, the law states:

No government shall impose a substantial burden on the religious exercise of a person presiding in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1999), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person – (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.<sup>621</sup>

This provision of RLUIPA prohibits state or local government from substantially burdening the religious exercise of an institutionalized person unless the government

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<sup>618</sup> United States Department of Justice Religious Freedom in Focus, [http://www.usdoj.gov/crt/religdisc/newsletter/focus\\_32.htm](http://www.usdoj.gov/crt/religdisc/newsletter/focus_32.htm) (last visited on Apr. 15, 2008) [hereinafter Religious Freedoms in Focus]. [the Albanian mosque is the only Islamic institution in the Village of Berkeley and the only mosque in Illinois that aims specifically to serve Albanian Muslim immigrants].

<sup>619</sup> *Id.*

<sup>620</sup> *Id.*

<sup>621</sup> See 42 U.S.C. § 2000cc-3(a), (b) (2000).

demonstrates that restriction furthers a compelling governmental interest and is the least restrictive means available to further that interest.<sup>622</sup> The law provides prisoners with greater protection for religious practice and requires the government to lift any neutral, generally applicable burden on religion it has imposed.<sup>623</sup> Because of the religious liberty guaranteed by RLUIPA, prisoners are able to exercise their religion in an environment that may otherwise be hostile to religious practices. This legislative accommodation not only ensures that religious practices are protected, it may also assist prisoners in advancing their moral values because of religious beliefs instilled while the prisoners are incarcerated.

As it relates to Muslim prisoners, RLUIPA enables them to practice many aspects of their religion while they are incarcerated. RLUIPA defines “religious exercise” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>624</sup> This definition is broad enough to include prayer services, religious instruction, and dietary requirements. For example, in *Fayson v. Earle*, a Muslim inmate requested a Halal diet, in accordance with her religious beliefs.<sup>625</sup> This was, according to the court, a valid claim under RLUIPA.

If an inmate feels that his or her religious exercise has been restricted, in order to prevail under RLUIPA, he or she must demonstrate that the State has imposed a “substantial burden” on his or her “religious exercise.” If prison officials refuse a religious accommodation requested by an inmate, they must demonstrate that the

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<sup>622</sup> Chiu, *supra* note 523, at 1000.

<sup>623</sup> *Id.*

<sup>624</sup> See 42 U.S.C. § 2000cc-5.

<sup>625</sup> *Fayson v. Earle*, 2006 U.S. Dist. LEXIS 81567 (D. Del. Nov. 7, 2006).

challenged regulation furthers a compelling governmental interest and is the least restrictive means of furthering that compelling interest.<sup>626</sup>

In *Williams v. Bitner*, Mr. Williams,<sup>627</sup> a Muslim inmate in a Pennsylvania correctional institution, filed a lawsuit alleging violations of RLUIPA when he was assigned to work as a cook.<sup>628</sup> Mr. Williams' religious beliefs did not allow him to consume pork or to assist in its preparation for consumption of others.<sup>629</sup> He brought his concerns to the attention of head cook, a fellow inmate who coordinated the other inmate's daily responsibilities.<sup>630</sup> The head cook was sensitive to Mr. Williams' religious obligations and accommodated them by transferring Mr. Williams to another assignment where he would not be in a position that required him to handle pork.<sup>631</sup> The arrangement continued until the supervising prison official, in addressing a shortage of cooks, ordered Mr. Williams to help with the lunch meal service, which included preparation and handling of pork.<sup>632</sup> Citing his religious beliefs, Mr. Williams requested that the supervisor reassign him.<sup>633</sup> The supervisor suggested that he wear gloves, as other Muslim inmates had done in the past. Mr. Williams refused, stating that wearing gloves would not prevent the violation of his religious beliefs, because he would still be assisting others in consuming pork.<sup>634</sup>

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<sup>626</sup> See 42 U.S.C. § 2000cc-1(a), 2(b).

<sup>627</sup> *Williams v. Bitner*, 359 F. Supp. 2d 370 (M.D. Pa. 2005).

<sup>628</sup> *Id.* at 374.

<sup>629</sup> *Id.* at 372.

<sup>630</sup> *Id.*

<sup>631</sup> *Id.* at 373

<sup>632</sup> *Id.*

<sup>633</sup> *Id.*

<sup>634</sup> *Id.*

In response to Mr. Williams' firm refusals, prison authorities held a disciplinary hearing and found Mr. Williams guilty of refusing to obey an order.<sup>635</sup> As punishment, the corrections hearing examiner recommended that Mr. Williams' security classification be raised from low to medium, and placed him on cell restriction. Mr. Williams served 27 days under the restrictions, missing a religious observance before he was discharged.<sup>636</sup>

Subsequently, Mr. Williams filed a suit against the prison officials alleging that his rights under RLUIPA had been violated.<sup>637</sup> The court agreed with Mr. Williams, holding that he was entitled to relief for the prison officials' violations of his religious rights. In ruling for Mr. Williams, the court explained that:

For purposes of the RLUIPA, it matters not whether the inmate's religious belief is shared by ten or tens of millions. All that matters is whether the inmate is sincere in his or her own views . . . Williams was placed in the unenviable position of choosing between punishment by prison officials or observance of religious teachings. This is the type of choice that the RLUIPA was enacted to prevent.<sup>638</sup>

The court held that many of the arguments presented by the prison officials were not sufficient to justify the sanctions that Mr. Williams suffered. The fact that other Muslims interpreted these creeds less strictly and wore gloves while preparing pork was irrelevant to the sincerity of Mr. Williams' interpretation of his beliefs. The prison authorities did have a compelling interest in maintaining institutional order and security, but these actions were not the least restrictive means available to them.<sup>639</sup>

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<sup>635</sup> *Id.*

<sup>636</sup> *Id.* at 374.

<sup>637</sup> *Id.*

<sup>638</sup> *Id.* at 376.

<sup>639</sup> *Id.*

**F. Efforts of the United States Department of Justice Supporting Free Exercise of Religion**

Although the above-mentioned legal documents that protect Americans' religious liberty and civil rights are still in effect, they are increasingly violated in regards to the emerging Muslim community in America. These violations prompted the Administration of former President George W. Bush to increase its efforts to help those communities struggling to defend their constitutionally protected rights. The Civil Rights Division of the U.S. Department of Justice has since expanded efforts to educate American Muslims about their rights and the legal remedies available if these rights are violated.

In 2007, DOJ launched the First Freedom Project, an initiative that highlights the work it has done to protect religious freedom.<sup>640</sup> This project seeks to encourage vigorous enforcement of federal laws such as:

- Federal statutes prohibiting religion-based discrimination in education, employment, housing, public facilities, and public accommodations.<sup>641</sup>
- Federal laws against arson and vandalism of houses of worship and bias crimes against people because of their faith.<sup>642</sup>
- The Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>643</sup>

By serving as an intervener and a friend-of-the-court in cases involving the denial of equal treatment based on religion, the Justice Department's Civil Rights Division works to protect the rights of people of all faiths to participate fully in public life.<sup>644</sup> In addition, the Division has created a series of seminars to explain how the federal government enforces the laws protecting religion freedom. One of the efforts to reach out to the wider Muslim community involves active collaboration with Muslim

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<sup>640</sup> See Religious Freedoms in Focus, *supra* note 620.

<sup>641</sup> *Id.*

<sup>642</sup> *Id.*

<sup>643</sup> See Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc-1 (2000).

<sup>644</sup> See Religious Freedoms in Focus, *supra* note 620.

organizations such as the Islamic Society of North America (ISNA) and the Muslim Public Affairs Council (MPAC) in order to organize workshops and seminars.<sup>645</sup>

In several cases, DOJ involvement was critical for settling religious accommodation cases. In *Haqq v. New York State Department of Correctional Services (DOCS)*, DOJ filed a suit on behalf of Mr. Haqq, a DOCS employee<sup>646</sup> at a halfway house who had been permitted to wear a prayer cap (*kufi*) for years, but was told by DOCS in 2005 that he must remove it while at work.<sup>647</sup>

The suit alleged that there was no policy in place for DOCS to review requests for reasonable accommodation of religious practices, as required by Title VII of the Civil Rights Act of 1964. Based on these facts, the Manhattan federal court approved a consent decree between DOJ and DOCS settling the lawsuit, declaring that DOCS failed to accommodate the religious practices of correctional officers, as required by federal law.

Under the settlement, DOCS was required to adopt and implement procedures under which employees seeking religious accommodations regarding workplace policies (e.g., uniform issues, keeping the Sabbath, and religious holiday observances) are provided with an individualized review and determination.<sup>648</sup> As a result, the Muslim corrections officer was permitted to wear a dark blue or black *kufi* with his uniform while working at the halfway house. The general rule DOJ stated during the course of the

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<sup>645</sup> The Civil Rights Division of the Department of Homeland Security (DHS) also reaches out to the American Muslim community to learn about its members' concerns and help them resolve problems involving civil rights violations. Its members meet with Muslim community leaders nationwide to dialogue with them and to educate them on how they can use the system to resolve such issues.

<sup>646</sup> *Haqq v. N.Y. State Dept. of Corr. Servs.*, No. 07 CV 2243, (S.D.N.Y. 2007).

<sup>647</sup> *Id.*

<sup>648</sup> *See Religious Freedoms in Focus*, *supra* note 620.

litigation was: “Denial of a requested reasonable accommodation may only be made after a detailed consideration of the impact of the accommodation on performance of job duties.”<sup>649</sup> This settlement underscores the DOJ’s commitment to protecting the religious liberties guaranteed by federal law for religious minorities.

In another religious discrimination case involving education, DOJ’s involvement was essential. In *Hearn and United States v. Muskogee Public School District*, the department’s Civil Rights Division advocated on behalf of the student, who had been told that she could not wear a headscarf to school.<sup>650</sup> This case was settled by a consent decree, which stated in part:

Nashala Hearn shall be permitted to wear a hijab while a student in Muskogee Public Schools effective immediately. Such hijab shall cover the hair, neck and ears of the student, but not her face. Nashala Hearn shall otherwise comply with the School District’s dress codes, including the uniform requirements at the Muskogee Seventh and Eighth Grade Center, as they exist at the time of the execution of this agreement.<sup>651</sup>

DOJ’s argument centered on the fact that the school, in enforcing its uniform policy, was simultaneously violating the Equal Protection Clause of the Fourteenth Amendment, as well as Title IX of the Civil Rights Act of 1964, by discriminating on the basis of religion.<sup>652</sup>

Although the case was settled in the student’s favor, the consent decree still faces many obstacles because implementing the Free Exercise Clause is not a simple task. For example, a student cannot wear a headscarf until her request has been approved by the school board after she has made a written application and provided a bona fide religious

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<sup>649</sup> See *Supra* note 648 *Haqq*, 402 , No. 07 CV 2243.

<sup>650</sup> *Hearn and United States v. Muskogee Pub. Sch. Dist.*, No. CIV 03 598-S (E.D. OK 2004).

<sup>651</sup> *Id.*

<sup>652</sup> *Id.*

reason for that request, or until the school's administration has approved her request for a special school activity. This agreement has resulted in a rather complicated procedure that a student must initiate to fully enjoy his or her freedom of religion while on school grounds, because the personal beliefs of a Muskogee Public Schools student have to be confirmed by the superintendent and approved by the school board. Such an arrangement may violate the spirit of the Free Exercise Clause because it adds a burden to students who want to exercise their basic religious rights.

## **CONCLUSION**

The basic legal framework for religious accommodation in the United States 1) bans laws restricting the practice of religion without sufficient justification, and 2) bans discrimination based on religious belief. The American Muslim community is fortunate that these debates over the free exercise of religion occurred before the emergence of the American Muslim community. What makes these developments crucial for American Muslims is that they occurred before the tragic incidents of terrorism carried out by criminals adhering to the Islamic faith, which resulted in a very hostile, Islamophobic environment. This legal framework allows Muslims to continue to practice their religion freely and to receive religious accommodation in spite of the somewhat hostile environment because of sound principles underlying the American legal system. These principles have endured several periods of political upheaval and will survive moments of tragedy and turmoil. Therefore, any reversals in the judiciary system will likely be short-lived, since Congress has historically intervened and ended threats against religious liberty that courts have allowed.



As American Muslims assess their status in America, measure their impact on its public life, and seek to address its socio-political environment, it becomes evident that they must be socially and politically engaged to have a real public impact. Many American Muslim communities practice their faith, which makes them spiritually strong, but this strength is not carried over to the social or political landscape. This nationwide community is neither socially nor politically unified, let alone integrated. Educating Muslims about the significance of American legal developments and their protections of various individual rights is a necessary step to achieve integration. Through education, Muslims will learn to present their vision of a vibrant and pluralistic American society where Muslim citizens can actively engage in the ongoing public discourse about religion and contemporary issues.

## CHAPTER V. IMPORTANT OBSERVATIONS AND CONCLUSIONS

The American legal structure has historically defined the term “integration” as the right for the citizens of the United States to have equal access to and equal opportunity within American institutions. This legal understanding of the term was further emphasized through court cases before or immediately following *Brown v. Board of Education*, which led up to the enactment of the Civil Rights Act of 1964, with much credit to be given to the works of Thurgood Marshall, prior to his appointment to the Supreme Court. Justice Marshall laid out a clear doctrine of integration through his speeches, writings, opinions, reminiscences and arguments before courts advocating for the enforcement of this term, maintaining that everyone should have equal rights regardless of race or religious affiliation.

Despite the fact that equal rights have been legally protected, the enforcement of these rights did not take place until many years after *Brown*. Even today one finds incidents of discrimination and denial of these guaranteed rights, where some have ignored the legally achieved integration for religious groups who encountered hardship practicing their religion in places where equal access is guaranteed, or who encountered conflicts with government actions that hindered the exercise of their faith.

The term “integration” is misunderstood and popularly seen as the one of participation in American society. Often people confuse this term with the term “assimilation”; however, these two terms are not interchangeable. Integration has to do with equal rights and equal opportunity whereas assimilation has to do with free participation in society. In other words, integration is guaranteed by law, and

assimilation is demonstrated by the choice one makes to participate in American life. Religiously speaking, assimilation pertains to free exercise. For example, the choice that the Tablighi Jamaat of Arabi made to not purchase casualty and property commercial insurance is, from a legal standpoint, a choice not to assimilate. The Tablighi who purchase liability insurance because it is necessary has chosen to assimilate for some purpose and not to assimilate for other purposes.

The Tablighi Jamaat's decision not to assimilate or participate in society for religious reasons, and instead to seek religious accommodations, is not without precedent. Religious groups such as Hassidic Jews, Orthodox Jews, pre-Vatican II Catholics, and the Amish have found difficulty in integrating and assimilating into American society and have sought legal accommodations to overcome these hardships. There is a religious landscape in the United States of religious minority groups who, for various reasons, seek special accommodations because they interpret their traditions in such manners that they are unable to make the same concession as others within their tradition. The Tablighi Jamaat of Arabi resemble Jehovah's Witnesses or the Amish: they are not mainstream; they are dedicated to a life of evangelism within the Muslim community, and they dress in a particular way to demonstrate their version of Islam for other Muslims.

The Tablighi Jamaat (TJ) who settled in Arabi, Louisiana have chosen to assimilate as little as possible. In spite of this fact, their partial assimilation is evident because they have legal access to liability insurance and they have used this insurance for certain purposes. However, due to their religious practices, they chose not to use casualty and property insurance, to their own great detriment and to the great detriment of people who live and work around them. This situation needs to be addressed.

One solution is to make religious accommodation in insurance policies available to the TJ, arguing that the concept of integration defined legally as equal access and equal opportunity is applicable to religious groups like the TJ. Furthermore, one could argue that the TJ do have access to and the opportunity to apply for standard insurance policies. The counter argument is that because of legal constraints, such access is a fallacy: it would require the abandonment of the TJ's religious observances for them to use standard insurance policies.

Therefore, this dissertation examined accommodation laws to discern whether the community would actually benefit by allowing a Shari'ah-compliant insurance system for purposes of inclusion and protection. It briefly studied commercial insurance—particularly mutual insurance—laws in Texas and Virginia as a possible models that could be modified to conform with the religiously based Shari'ah-compliant insurance system allowed elsewhere. The dissertation concluded that, based on the previous history of religiously based accommodations, such a Shari'ah compliant insurance model could be achieved to serve people like the Tablighi and others who may desire to use similar accommodations.

This research has raised the question of the extent of legal progress in the United States regarding religious accommodations, and has examined whether the Constitution, particular cases, and relatively recent statutes tell us about the access a group like the TJ would have to their desired accommodations. Then, by examining the different mutual insurance laws in Texas and Virginia, the research recognizes a need for religiously based accommodations in state insurance regulations, and recommends several ways to meet this need. This accommodation, which is appropriate for the Tablighi Jamaat, may set

the stage for religious accommodations under American law for others who might wish to avail themselves. Historically, the American legal structure granted such religious-based accommodations to groups confronted with hardships in exercising their religion, so there is no reason not to accommodate groups such as the TJ and allow them to live up to this tenant of their faith.

It may be necessary for the Tablighi Jamaat to take liability insurance in spite of their religious objection, but being forced by the state into a position where there is only one option, which is to take commercial insurance as opposed to Shari'ah-compliant insurance, suggests that the accommodation has not been achieved. However, if the state allows a Shari'ah-compliant insurance product and if it is presumed that someone would offer it, then the problem of accommodation is resolved. The Tablighi Jamaat or other groups might choose not to use the Shari'ah compliant product, but the integration has still been achieved because access to the product is neither guaranteed nor required by law. Rather, such a product would provide an opportunity to participate. Other groups or people who are like-minded might seek some of the accommodations sought by the Tablighi Jamaat, even if they are not so foundational in their approach or strictly adherent to a particular interpretation. Some of the things that would accommodate the Tablighi would also accommodate others whose views are broader.

By surveying the historical development of the American legal structure, this dissertation determined that America is well prepared to accommodate religious groups of diverse traditions such as the Muslim Tablighi Jamaat. The American founders proposed to resolve potential accommodation issues necessitated by religious diversity by

decisively repudiating domination of one tradition. They created a model not only based on the notion of individual freedom, but also on constitutional protections and great respect for individual achievement, regardless of religion affiliation. Later, this concept expanded to include broader accommodations for people of various races and ethnicities. However, despite this fundamental protection and respect for diverse religious groups, historically there have been egregious violations of these principles, such as the various types of discrimination experienced by Catholic and Jewish communities. American legal structures provided the foundation for minority religious groups to exercise their religion freely and receive accommodations that further protected their religious practice, but they have been unevenly applied and enforced.

A convergence of American legal structure, traditional American values, and the social capital of the American Muslim Tablighi Jamaat and similar religious groups would facilitate the overall integration process of such groups into mainstream American society. As a result, American society would be stronger, with increased contributions from these various religious groups to social justice. Ultimately, more understanding, dialogue, integration and inclusion are better for the American society as a whole.

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