



Of “Scalpels” and “Sledgehammers”: Comparing British and
American Approaches to Muslim Charities Since 9/11

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Several commentators have remarked that, since 9/11, Muslim charities have met with a softer and more flexible hand in the United Kingdom and continental Europe than in the United States. The American federal government has resorted to “sledgehammer”-style tools – wholesale freezing of assets, designation of entire entities as terrorist organizations, and aggressive criminal prosecutions – in its efforts to police Islamic philanthropy. By contrast, the Charity Commission in Britain has employed “scalpel”-like measures, such as the removal of individual trustees or temporary transfer of a charity’s management, that have generally spared British Muslim charities from American-style criminalization. The continental European states, for their part, have tended to gravitate more closely to the British than the American pole of this comparative dichotomy. The sweeping assertion of executive branch authority during the Bush administration only partly explains this difference. Contrasting traditions of religious liberty are also at stake. A First Amendment culture of “non-entanglement” has historically kept the federal government out of the business of administering religious institutions. In the U.K. and continental Europe, albeit to differing degrees, traditions of state involvement in religious institutions and functions (including the classic Christian function of providing charity) have permitted a more targeted and nuanced approach to the regulation of Muslim charities. Lacking the administrative and legal tools descended from those traditions, American policymakers have resorted to criminalization and its accessories as a path of first, rather than last, resort.

I. INTRODUCTION

On February 3, 2003, the Charity Commission for England and Wales – the independent body that oversees most registered charities in the United Kingdom –

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ordered that an outspoken Muslim cleric named Abu Hamza al-Masri be removed from his post as preacher at the Finsbury Park mosque in north London.¹ In a report dated July 1, 2003 summarizing the results of its inquiry into Abu Hamza’s activities, the Commission stated that the controversial imam had illegitimately seized control of the mosque from its trustees, had engaged in a “highly inflammatory” conference marking the first anniversary of 9/11, and had delivered a sermon so “extreme and political” that it violated the mosque’s charitable status.² News reports indicated that, on the day before the Commission’s removal order, Abu Hamza also declared that the space shuttle Columbia disaster was an act of divine retribution against the United States and Israel. (An Israeli astronaut was a member of the seven-member crew that perished on February 1, 2003). Somewhat implausibly, the Commission denied any connection between these pronouncements and the removal order issued the following day.³ The July 2003 report nonetheless makes clear that Abu Hamza’s removal was based, in large part, on his expression of caustic political and religious views.

The Commission described its deposal of Abu Hamza as an effort to restore the integrity of the North London Central Mosque Trust (“NLCMT”), the charitable entity that owns and operates the Finsbury Park mosque. London police had raided the mosque as part of a separate criminal investigation into the discovery of the deadly poison ricin at

¹ Don Van Natta, Jr., *London Imam is Removed as Leader of Mosque*, N.Y. TIMES, Feb. 5, 2003. The Commission’s order is reproduced in the appendix to this essay. Charities in Scotland are overseen by the Office of the Scottish Charity Regulator. Pending establishment of a separate regulator, charities in northern Ireland are registered with HM Revenue and Customs.

² Charity Commission for England and Wales, Report of Inquiry into North London Central Mosque Trust, Reg. Charity No. 299884 ¶¶ 14, 22 (July 1, 2003) (on file with author).

³ Van Natta, Jr., *supra* note 1.

a London apartment earlier in 2003.⁴ For its part, the Commission applied no criminal or civil sanctions to the charity itself, but rather adopted an essentially cooperative, even supportive approach. In their report, the regulators expressed hope “that the trustees of NLCMT can now begin afresh, rebuild its reputation and ensure that the Mosque flourishes for the benefit of the Muslim community at large.”⁵

The Abu Hamza case illuminates a number of critical differences between British and American approaches to the regulation of Muslim charities since 9/11. In Britain, regulators have at their disposal a comparatively subtle array of powers: requiring information and answers from the managers of a charity, removing individual trustees or officers, and handing over interim management of the charity. At the extreme, the Charity Commission is authorized to freeze bank accounts (wholly or partly) and close a charity down. But these extreme measures are balanced by the availability of what one British regulator calls more “targeted, intelligent” alternatives.⁶

In the United States, by contrast, the Treasury Department is both empowered and hampered by “the rather more limited – and limiting – power to freeze the entire charity” in cases of suspected terrorist financing.⁷ Indeed, by post-9/11 standards, the wholesale freezing of assets has emerged as one of the less aggressive measures that American regulators and law enforcement officials have used against Muslim charities in the United States. The designation of charitable organizations as “specially designated global

⁴ *Id.*

⁵ Charity Commission NLCMT Report, *supra* note 2, ¶ 35.

⁶ James Shaw-Hamilton, *Recognizing the Umma in Humanitarianism: International Regulation of Islamic Charities*, in UNDERSTANDING ISLAMIC CHARITIES 19 (Jon B. Alterman and Karin von Hippel, eds., 2007). Shaw-Hamilton is an attorney who directs the Charity Commission’s International Programme.

⁷ *Id.* at 19-20.

terrorists” (“SDGTs”) has fundamentally altered the Muslim philanthropic landscape.⁸ And the criminal prosecution of charities in federal court, often based on theories of liability that stretch the boundaries of already expansive antiterrorism and tax laws, is now a standard tool of the regulatory trade. Reflecting on these differences, a Department of Justice official has recently compared the “scalpel” of the British approach to the “sledgehammer” style of American policymakers.⁹

This contrast is not an absolute one. We can point to examples on either side of the Atlantic divide that complicate the assertion of a broad contrast in British and American law enforcement patterns vis-à-vis Muslim charities. British regulators have sometimes opted for the sledgehammer, and the new U.S. administration of President Barack Obama appears sympathetic, at least in principle, to the scalpel.¹⁰ Indeed, the Abu Hamza case, as we will see, itself partakes of elements of the American drift towards criminalization (not least because the Department of Justice has indicted Abu Hamza and

⁸ SDGTs are designated by the Treasury Department pursuant to Executive Order 13224 and the President’s authority under the International Economic Emergency Powers Act (“IEEPA”). “Foreign terrorist organizations” (“FTOs”) are designated by the Secretary of State pursuant to the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”). The U.S.-based charitable organizations that have been targeted by federal investigators since 9/11 have been designated or investigated as SDGTs rather than FTOs, but these classifications have effectively overlapped as a result of alleged ties between American-based Muslim charities and Muslim charities headquartered overseas. *See infra* notes 117-126 and accompanying text.

⁹ Shaw-Hamilton, *supra* note 6, at 19.

¹⁰ President Barack Obama, Remarks on a New Beginning, June 4, 2009, *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-cairo-university-6-04-09> (last viewed 4/9/10). The scalpel/sledgehammer contrast has also recently been invoked in the military context. In May 2010, President Obama’s top counterterrorism adviser, John O. Brennan, declared that the United States would begin to rely more frequently on the “scalpel” than the “hammer” in its fight against Al Qaeda. John O. Brennan, Securing the Homeland by Renewing American Strength, Resilience and Values, Remarks at the Center for Strategic and International Studies, May 26, 2010, *available at* <http://www.whitehouse.gov/the-press-office/remarks-assistant-president-homeland-security-and-counterterrorism-john-brennan-csi> (last viewed Aug. 15, 2010). *See also* Scott Shane et al., *A Secret Assault on Terror Widens on Two Continents*, N.Y. TIMES, Aug. 15, 2010, at A10.

sought to secure his extradition to the United States¹¹). Moreover, the argument set forth here is not a comparative sociological one about the relative integration of Muslim communities in England versus the United States. In general, Muslim Americans seem to enjoy a degree of economic and political security that many Muslims elsewhere in the world still lack.¹² Despite these comparative advantages, however, the American landscape has proved to be an especially challenging one for Muslims engaged in the ongoing effort to institutionalize the religious commands associated with *zakat*. For these Americans – some of them citizens, others permanent residents – the crackdown on Muslim charities has aggravated a sense of political alienation from the American state.¹³ A robust culture of patriotic citizenship is one of the victims of this state of affairs. Understanding why the American approach to Muslim charities has taken a comparatively harsh form matters greatly if we are to restore that culture to its prior status.

How, then, are we to interpret the difference in British and American policy styles? This essay argues that the contrast is, in part, a function of divergent traditions of religious liberty in the United Kingdom and the United States. The American culture of “non-entanglement” of church and state discourages policymakers from engaging in the kind of ongoing, dialogic, and collaborative problem-solving approach that British regulators have striven, with mixed success, to follow. Instead, the culture of separation

¹¹ United States Department of Justice, Abu Hamza Arrested in London on Terrorism Charges Filed in the United States, Press Release (May 27, 2004), *available at* http://www.justice.gov/opa/pr/2004/May/04_crm_371.htm (last viewed July 9, 2010); United States of America v. Mustafa Kamel Mustafa, a/k/a “Abu Hamza”, Indictment, No. 04-Cr-356, S.D.N.Y. (April 19, 2004).

¹² On the shortcomings of Muslim integration in Britain, *see* H.A. HELLYER, MUSLIMS OF EUROPE: THE ‘OTHER’ EUROPEANS 160-162, 174 (2009).

¹³ AMERICAN CIVIL LIBERTIES UNION, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE “WAR ON TERRORISM FINANCING” 14 (2009).

substantially limits the pool of policy choices that are deemed workable for American regulators. Given a post-9/11 security crisis that appears to drastically raise the stakes of charitable surveillance, criminalization has emerged as the most practical and efficient of the available tools. In Britain, by contrast, which has an established (if largely vestigial and ceremonial) church, a long tradition of formal government control over religious doctrine and personnel seems to permit a much greater degree of state involvement in the life of pious civil society than is tolerable in light of American constitutional traditions. The relative imbrication of church and state in Britain facilitates more nuanced and organic methods of regulating religious charities.

It is highly unlikely that a federal official or judge could direct an American mosque or other religious institution to remove a particular preacher from the pulpit on viewpoint grounds without facing an almost certainly successful First Amendment challenge. The same is probably true of at least some other measures that British charitable regulators have used in the years since 9/11 to govern the Muslim charitable sector. Nonetheless, my claim here does not, strictly speaking, rest on the actual dictates of the free exercise and establishment clauses of the First Amendment.¹⁴ As best I can tell, there is no Supreme Court precedent that would clearly apply to a situation of the sort raised by the Abu Hamza investigation in Britain, though the American law involving the settlement of disputes over church property is instructive of the differences between the two national traditions.¹⁵ Rather, this essay speaks primarily to the force of legal culture: the impact that a First Amendment culture of separation (or non-

¹⁴ U.S. CONST. amend. I.

¹⁵ See *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); and *Jones v. Wolf*, 443 U.S. 595 (1979).

entanglement) has on the understanding of what tools are most appropriate to regulate the conduct of (Muslim) religious institutions in the post-9/11 security climate.

The irony of the American predicament here is difficult to avoid. The very strength of the American culture of religious liberty seems to entail that Muslim charities are today less free in the United States than in other parts of the western world where a constitutional commitment to the separation of church and state figures less prominently, or not at all. In the evangelical tradition, the religion clauses of the First Amendment have always represented a “revolutionary formula for promoting faith by leaving it alone”, to borrow a phrase from Steven Waldman.¹⁶ The recent experience of Muslim charities suggests a different and arguably more paradoxical perspective on the American culture of non-entanglement. The restraints imposed upon Muslim-American charitable conduct over the past decade or so, which are partly rooted in the culture of separation, are the same restraints that the First Amendment religious libertarian tradition was designed to prevent. The constitutional culture of religious liberty, whose separationist and free exercise principles sometimes work at odds with one another, has become an especially cross-purposive one in the Muslim-American charitable context.¹⁷

And yet, this is not a story of intractable constitutional dilemmas, but rather one of contingent cultural and policy commitments whose dampening effect on religious liberty can be mitigated both in the short run and the long. Moreover, this is not a

¹⁶ STEVEN WALDMAN, *FOUNDING FAITH: PROVIDENCE, POLITICS, AND THE BIRTH OF RELIGIOUS FREEDOM IN AMERICA* xvi (2008).

¹⁷ *Cf.* PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 14 (2002) (“The federal and state constitutional provisions designed to protect religious liberty have, ironically, come to be understood in terms of an idea that substantially reduces this freedom.”). For a critique of Hamburger’s thesis that the separation of church and state is a modern doctrinal innovation that goes well beyond the framers’ narrower preoccupation with disestablishment, *see* KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 42-44 (2008).

comparative morality tale about administrative good and evil. The British regulatory methods that several commentators have praised for their collaborative and non-punitive style are, in some ways, even more invasive than the drastic solution of criminalization, and they too impose a cost in terms of religious autonomy. Both civil oversight and criminal punishment can serve to restrict the liberties of religious citizens and institutions. To the defendant serving a lengthy sentence for material support to terrorism or tax fraud in an American prison, the organic regulatory tutelage of the British state no doubt has its appeal. But the tension between bureaucratic control and the vitality and autonomy of civil society, particularly religious society – a theme as old as Tocqueville – is not an imaginary one.

In this relatively short essay, I do not pretend to try to do the large amount of intellectual work that would be needed to sustain my claim about the force of First Amendment culture in full. For example, a more comprehensive approach would need to consider at greater length the implications of the divided nature of charitable regulatory authority in the United States. In Britain, comprehensive supervisory powers are vested in a single, national-level institution; in America, the federal government and the states share responsibility for policing the conduct of tax-exempt entities. It may well be that the federal government's lack of plenary oversight authority over charitable institutions in general helps to account for the relatively more severe American approach towards Muslim charities discussed here.

Rather than striving for comprehensiveness, then, my goal in this essay is simply to sketch the contours of a tentative and comparative hypothesis. It is tentative in that it merely points toward the in-depth historical and legal research that would be necessary to

amplify the claim, to qualify it in the ways it will inevitably need to be qualified, and to demarcate all of the elements of the argument. It is comparative in that the argument proceeds explicitly on the basis of an observed contrast between American policy, on the one hand, and the policies of the British regulators, on the other (with a cursory glance at the tactics adopted by certain EU member states). Nonetheless, within these parameters, I want to raise some questions about the role of comparative constitutional culture in patterns of criminal law enforcement, and in the American federal approach towards Muslim religious institutions post-9/11 specifically. And I will try to suggest some possible solutions to the dilemma presented. The solutions depart from the understanding – suggested by both the American church property cases and the British regulatory example – that Muslim charities, no less than other religious institutions, are typically riven by internal conflicts over competing versions of what Islam requires in the way of charitable conduct.¹⁸

In Part One of this essay, I elaborate on the contrast between the British and American regulatory styles, with particular emphasis on the Abu Hamza investigation that links the two. Part Two discusses the relationship between the American “sledgehammer” approach and the First Amendment culture of non-entanglement of church and state. In Part Three, I consider a number of alternative explanations for the British-American contrast, including the civil libertarian view that ascribes the criminalization of Muslim charities to an excess of legislative and executive power, rather than to the limits imposed by constitutional culture. Part Four concludes with some brief suggestions for how a more productive encounter between the federal

¹⁸ On the role of internal organizational disputes in the American church property cases, *see infra* text accompanying notes 95-101.

government and Muslim-American charities might be realized, within the limits of our constitutional traditions.

I. THE BRITISH CONTRAST

The perception that Muslim charities have met with a softer and more flexible hand in the United Kingdom than in the United States appears to be widespread, and extends to a broader American-European divide. “The approach in America is to prevent the worst, whereas in Britain the approach is to encourage the best,” argues one British scholar.¹⁹ The authors of a recent survey of the Islamic charitable landscape in continental Europe invoke the “much harder line on charities” that characterizes American policy.²⁰ In their view, European policy reflects a “long-standing preference in Europe for monitoring and engagement of charitable organizations versus a propensity in the United States toward preventive action and closing charities down with little supporting evidence.”²¹

Nor is the perception felt only on the Old World side of the Atlantic. Kay Guinane, an observer with the Washington, D.C.-based OMB Watch, which advocates for government transparency, has decried the “complete taint” theory of the Treasury Department.²² Under that approach, an entire charity is subject to designation as a

¹⁹ Ian Fisher, *Terrorism Plot Raises Concern about Islamic Charities*, N.Y. TIMES, Aug. 8, 2006.

²⁰ Julianne Smith and Natalia Filipiak, *Islamic Charities in Europe*, in UNDERSTANDING ISLAMIC CHARITIES, *supra* note 6, at 82.

²¹ *Id.* at 90. See also *id.* at 82 (noting that this European posture aggravates transatlantic tensions independently fueled by discrepancies among the policies of EU member states).

²² See Neil MacFarquhar, *As Muslim Group Goes on Trial, Other Charities Watch Warily*, N.Y. TIMES, July 17, 2007.

terrorist entity if any one single individual associated with that charity is suspected of aiding Islamic militants. By contrast, Guinane asserts, the British approach leaves room for charities under surveillance to continue humanitarian work pending the outcome of an investigation.²³ The Treasury Department does not appear to believe that it is possible to separate “real charitable work from the alleged terrorist activity.”²⁴

It may well be that these differences in worldview have as much to do with the magnitude and location of the 9/11 attacks, which triggered a new commitment to American “homeland security,” as anything else. Certainly 9/11 was a profoundly traumatic event with no clear parallel in the domestic history of the United States. And it is abundantly obvious that the attacks expressed Al-Qaeda’s determination to single out the United States as a special target among all other Western nations to which the Bin Laden group is hostile. Nonetheless, other Western countries, including Britain, have been victimized by large-scale terrorist acts perpetrated in the name of Islam in the years since 9/11, and these nations have generally responded differently to the task of regulating Islamic charities in light of those incidents. It seems improbable that American policymakers are alone in suspecting Muslim charities of at least some kind of

²³ *Id.*

²⁴ *Id.* MacFarquhar references May 2007 testimony by the director of the Treasury Department Office of Strategic Policy for Terrorist Financing and Financial Crimes, Chip Poncey, that seems to confirm Guinane’s assessment. In response to questioning from Senator Susan Collins, Poncey observed that if any aspect of an organization is engaged in terrorist support, then there is a problem with the entire charitable organization. See OMB WATCH, *Summary of Treasury’s May 2007 Senate Testimony on Charities and Islamic Extremism*, available at <http://www.ombwatch.org/node/3327> (last viewed July 9, 2010). Poncey’s prepared testimony is more nuanced. See Testimony of Chip Poncey, Director, Office of Strategic Policy for Terrorist Financing and Financial Crimes, U.S. Department of the Treasury, before the U.S. Senate Homeland Security and Governmental Affairs Committee (May 10, 2007), available at www.investigativeproject.org/documents/testimony/287.pdf (last viewed July 9, 2010). For an influential argument about the inseparability of charitable work and support of terrorism in the Palestinian Hamas movement, see MATTHEW LEVITT, *HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD* (2006). Levitt served as Deputy Assistant Secretary for Intelligence and Analysis at the U.S. Department of the Treasury from 2005 to 2007. His portfolio involved terrorist financing.

a role, however indirect, in financing terrorist attacks. There is almost certainly a range of views on this question in Britain and Europe, just as there is in the United States. The question is why perceptions take such different institutional and procedural forms in the United States than they do in nations that have generally averted an outright criminalization response. The differences in approach are real and have had a tangible differential impact on the fate of Muslim charities situated on either side of the Atlantic.

Moreover, the Muslim charitable context is not the only area of divergence between American and European law enforcement patterns: the contrast between American harshness and continental mildness appears to apply across the criminal law board, even if Britain continues to occupy an ambiguous position in that polarity.²⁵ Thus, while the federal government's crackdown on Muslim charities is surely a function of the exceptional nature of 9/11, it seems unlikely that the devastating impact of the Al-Qaeda attacks on the United States alone explains the American turn towards criminalization.

There is something to be said for the explanatory power of American exceptionalism in this context. Where Muslim charities are concerned, however, the force of that explanation stems at least in part from comparative constitutional cultures. Simply put, the British and continental traditions have permitted a much greater degree of direct government involvement in religion than would be acceptable in American legal culture.²⁶ The consequence of this greater level of involvement has been a greater degree

²⁵ See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2005). This explanation will be considered in further detail in section III.C below.

²⁶ See James Q. Whitman, *Separating Church and State: The Atlantic Divide*, *HIST. REFLECTIONS*, Winter 2008, at 86, 89-90, 97. Whitman distinguishes between an American-style institutional separation of church and state, and a European separation of religion and politics. *Id.* at 89-90. On the French state's ongoing involvement in religious matters, see JOHN BOWEN, *WHY THE FRENCH DON'T LIKE HEADSCARVES* 3-4 (2006)

of familiarity with the institutions of religious civil society, including charitable institutions – which historically were the domain of the Church in medieval and early modern times.²⁷ The organicism bred by greater familiarity between church and state in the United Kingdom and in the continent has made it less likely, over time, that the state would respond to real or perceived deviations in the conduct of religious institutions by resorting to criminalization, that is, the writing of religious institutions out of the social contract.

By contrast, First Amendment culture in the United States fosters an arms-length relationship between church and state. This “hands off” relationship has bred an odd sort of estrangement between the American federal government and the institutions of religion: a lack of familiarity and easy interaction on the day-to-day level.²⁸ When religious institutions are deemed to imperil the social order, there are only so many tools in the administrative and legal toolkits to address the situation. Some of these tools, such as ordering the removal of a preacher from his pulpit on viewpoint grounds, are flatly inconsistent with the First Amendment. Others are merely strongly discouraged by the culture of separation. Criminalization remains as one of the most prominent, efficient, and seemingly effective options.

This approach has the further advantage of having been upheld by nearly all federal courts that have considered its application to the domain of humanitarian and

²⁷ See Whitman, *supra* note 26, at 91. Whitman argues that historic functions performed by the medieval Church were gradually taken over by the state in northern continental Europe, whereas in America these functions were either retained by local churches or withered away. Though Whitman’s argument focuses on northern continental Europe (France in particular), I think his point also helps to explain the contrast between Britain and the United States, at least where the regulation of charitable institutions is concerned.

²⁸ I borrow the “hands off” language from Kent Greenawalt’s analysis of the Supreme Court’s approach to church property disputes. See KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 262 (2006).

charitable actors. The Supreme Court’s recent decision in *Holder v. Humanitarian Law Project* removes any doubt that the First Amendment bars prosecution of a charitable organization and its donors for either material support to terrorism or fraud, the charges on which most of the Muslim charitable criminal cases of recent years have hinged.²⁹ This is one of those areas of law that, like antitrust or securities regulation, the Supreme Court has deemed to lie beyond the boundaries of the First Amendment – to lack “constitutional salience,” in Frederic Schauer’s terms.³⁰ But the disconnect is more apparent than real, at least so long as we do not confuse the constitutional litigator’s understanding of salience with the broader salience of constitutional traditions in framing government policies. For the culture of separation has facilitated the prosecution of Muslim charities in ways that are simply not addressed in the Court’s recent case law (and, *ipso facto*, in most constitutional commentary). At the point at which pious institutions are suspected of threatening national security, the freedom of religion tends to give way all too easily to the criminalization of religion. At least in the case of the crackdown on Muslim charities, religious liberty has ceded this ground without any larger sense of crisis in the separationist or free exercise models of church-state relations, but these models are very much at play in the forces that have shaped the crackdown. This is the dilemma that the American resort to wholesale asset freezing, designation of

²⁹ *Holder v. Humanitarian Law Project*, 2010 U.S. LEXIS 5252 (2010). This is a material support of terrorism case but its reasoning will likely be deemed applicable to fraud cases as well. On the lack of clarity that the Supreme Court’s holding poses for Muslim charitable donors, see Muslim Advocates, Statement Regarding Supreme Court Ruling in *Holder v. Humanitarian Law Project* (June 21, 2010), available at http://www.muslimadvocates.org/latest/charity_update/supreme_court_ruling_further_c.html (last viewed July 11, 2010).

³⁰ See Frederic Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

entire entities as terrorist outfits, and aggressive criminal prosecution expresses at its core.

Before elaborating further on the terms of this dilemma in relation to the British establishment tradition, let me address three initial objections that might be raised to my argument. The first is the claim that religion, far from existing in a “hands off” relationship to the federal government, is in fact deeply implicated in the workings of American democracy.³¹ To be sure, religion and *politics* are hardly isolated from one another in the United States. On the contrary, organized religion seems to play a far greater role in the rough-and-tumble of American electoral politics than do religious institutions in British and continental politics.³² The American-style separation of church and state, not the European-style separation of religion and politics, fosters the legal and constitutional estrangement to which I refer.³³

A second objection is that the contrast between American non-establishment and British establishment is too facile. It goes too far, some might argue, to say that the United States enjoys a separation of church and state, whereas Britain and certain continental states do not. While the Church of England is an established church, its role in British life is largely ceremonial, its establishment in law a vestigial rather than substantive matter.³⁴ In neither Britain nor Denmark does the state church enjoy

³¹ See, e.g., MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY (2008), 5-9.

³² Whitman, *supra* note 26, at 87-89.

³³ *Id.* at 89-90.

³⁴ CHRISTOPHER CALDWELL, REFLECTIONS ON THE REVOLUTION IN EUROPE: ISLAM, IMMIGRATION, AND THE WEST 195 (2009).

precedence over other religions.³⁵ Sweden is sometimes cited as another example of a nation in which strong protections for religious liberty can coexist with an established church.³⁶ As Kent Greenawalt has argued, however, even purely formal establishmentarian traditions have substantive consequences, and some of these legacies persist into the present. To this day, for example, bishops occupy seats in the British House of Lords.³⁷ And British citizens of all confessions are required to contribute, through the general tax funds, to the upkeep of the Anglican Church, even though doing so may violate their religious consciences (or lack thereof).³⁸ These examples and others illustrate the point that, however secular countries such as Britain, Denmark, and Sweden have become, the mere fact of recognizing a church as the official religion of the government “may be thought to compromise religious liberty to some degree.”³⁹ Indeed, where religious charities in contemporary Britain are concerned, the history of establishment is far more than a passive or background historical fact. For one of the leading features of the English tradition of establishment was (and is) government control over religious doctrine and personnel.⁴⁰

³⁵ *Id.*

³⁶ GREENAWALT, *supra* note 17, at 5.

³⁷ *Id.* at 4.

³⁸ *Id.* at 5. *Cf.* HELLYER, *supra* note 12, at 165 (“The overriding concern in the [British] Muslim community does not seem to be the existence of a ‘Church-State’ link; rather, it is whether that ‘Church-State’ link is used only to the benefit of Anglican Christians.”).

³⁹ *Id.* at 4. *See also id.* at 5 (“[T]he maximum degree of religious freedom may be realized when no church is established.”).

⁴⁰ *See* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 15 (2nd ed. 2006) (“The Act of Supremacy, passed in 1534, made the King or Queen of England the official head of the Church, and gave the monarch power to correct ‘the ecclesiastical state and persons, and . . . all manner of errors, heresies, schisms, [etc.]. During the reign of Edward VI, Parliament enacted the Thirty-Nine articles – the doctrinal tenets of the Church of England – as well as the Book of Common Prayer, which prescribes the liturgy for religious worship. The Uniformity Act required all ministers (with the exception of certain Trinitarian Protestant ministers exempted under the Toleration Act of 1689) to conform to these requirements. The

A third objection appeals to the now notorious headscarf ban in France. France has not had an established church since at least 1905, but this is only one of several markers of the French state's famously rigorous secular identity. A culture of so-called *laïcité* (secularism) pervades French debates about the public role of religion. The 2004 legislation banning the wearing of headscarves in public schools has come to symbolize the severity of French republican intolerance of religious influence in the public sphere.⁴¹ Meanwhile, by a vote of 335 to one, the National Assembly has just approved a categorical ban on the *burka* (the full-body veil or *voile intégral* worn by some Muslim women in France), notwithstanding an advisory opinion by the Conseil d'État that a "outright and generalized" prohibition of the *burka* might be constitutionally infirm.⁴² Given these developments, some might argue, it is difficult to maintain that continental European nations have adopted a more collaborative or less aggressive posture towards Muslim religious conduct than the United States and its culture of non-entanglement. There is not space here to address the French situation in all of its complexity.⁴³ For present purposes, I will have to content myself with the observation that French constitutional culture is exceptional in its own way, and that its history of non-

Archbishop of Canterbury and other high church officials were (and are) appointed by the government.") (internal citations omitted). See also GREENAWALT, *supra* note 17, at 4 (noting that at the time of the founding, Parliament "had adopted the basic regulations, doctrinal statements, and liturgical forms of the Anglican church, and participated in the designation of occupants for ecclesiastical positions").

⁴¹ BOWEN, *supra* note 26, at 2; CALDWELL, *supra* note 34, at 194.

⁴² Ben Hall, *French lawmakers approve ban on full veil*, FINANCIAL TIMES, July 13, 2010; CONSEIL D'ÉTAT, ETUDE RELATIVE AUX POSSIBILITÉS JURIDIQUES D'INTERDICTION DU PORT DU VOILE INTEGRAL (March 25, 2010), available at <http://www.conseil-etat.fr/cde/fr/rapports-et-etudes/possibilites-juridiques-d-interdiction-du-port-du-voile-integral.html> (last viewed July 15, 2010).

⁴³ For a thoughtful exploration of the reasons for the absence of a legal ban on Muslim headscarves in the United States, see Daniel Gordon, *Why Is There No Headscarf Affair in the United States?*, HIST. REFLECTIONS, Winter 2008, at 37.

establishment is less continuous, and more ambiguous, than its American counterpart.⁴⁴ The headscarf ban is not simply an expression of French secularism, but also reflects the legacies of the early modern wars of religion and of French Catholicism, as well as the history of French colonialism in Algeria and elsewhere in North Africa (which include the tensions generated by contemporary Arab-Muslim immigration to France).⁴⁵ Finally, severe as it is for the students who have been expelled from school, the headscarf ban does not entail, nor has it led to, the criminalization of religious expression or conduct identified as distinctively Muslim.

Taken together, these three objections are by no means superficial. But they amount, in practice, to what one scholar has labeled a European separation of religion and politics, rather than church and state.⁴⁶ European nations are secular in the sense that they seek to exclude explicitly religious discourse from the conduct of everyday politics and public affairs. While this exclusionary impulse can sometimes take the form of extreme measures such as the French headscarf ban, it does not prohibit dialogue and interaction between state and religious authorities.

To the contrary, in both Britain and the continent, states have quite self-consciously partnered with religious institutions to manage a wide array of challenges associated with religious pluralism, from the provision of social services to the quelling of suburban riots. And British and continental regimes continue to exert various kinds of

⁴⁴ For example, the Conseil d'État in France recognizes religions to the extent that it determines whether religious associations comply with the disestablishment law of 1905. This determination involves, *inter alia*, consideration of whether a religious association's activities threaten the public order. BOWEN, *supra* note 26, at 18.

⁴⁵ BOWEN, *supra* note 26, at 20-22, 66-67. See also OLIVIER ROY, SECULARISM CONFRONTS ISLAM (George Holoch trans., 2007).

⁴⁶ Whitman, *supra* note 26, at 89-90.

formal and informal control over religious institutions – controls that stem from the establishment tradition. Thus, the German government levies a church tax and “uses religious organizations as a means of distributing health and other social services.”⁴⁷ In Britain and France, state-sponsored or state-affiliated religious councils serve as interlocutors with government officials.⁴⁸ In 2007, then-French interior minister Nicolas Sarkozy established the French Council of the Muslim Faith (Conseil français du culte musulman, or CFCM) as a vehicle for regulating matters of interest to the French Muslim community.⁴⁹ In Britain, the Bradford Council for Mosques and the London-based Muslim Council of Britain play an analogous role, albeit with less of an *étatist* flavor than their French counterpart.⁵⁰

The use of parastatal communal organizations to mediate between European governments and minority religious groups has a complex history that dates back to the nineteenth-century French and British empires, if not earlier.⁵¹ But these intermediate entities are also sustained by the legacies of establishment traditions. By promoting and

⁴⁷ CALDWELL, *supra* note 34, at 194.

⁴⁸ On the French context, see Elisa Wygul, *The Headscarf: The French State as Mediator Between Civil Society and Individuals*, HIST. REFLECTIONS, Winter 2008, at 61; BOWEN, *supra* note 26, at 3-4; and CALDWELL, *supra* note 34, at 194. On the Bradford Council for Mosques, see CALDWELL, *supra* note 34, at 196.

⁴⁹ CALDWELL, *supra* note 34, at 194, 199.

⁵⁰ Unlike the CFCM, these organizations are entirely private entities. But the Bradford municipal government was instrumental in supporting the creation of the Bradford Council in response to immigrant riots in that city in the 1980s, and the city has given significant funding to the Council. The creation of the Muslim Council of Britain was encouraged by Britain’s Conservative Party government in the mid-1990s, and the MCB has enjoyed a close relationship as well as substantial funding from the British government since that time. See KENAN MALIK, FROM FATWA TO JIHAD: THE RUSHDIE AFFAIR AND ITS AFTERMATH 73-79, 123-130 (2010); FOIA Centre, Home Office Funds Muslim Council of Britain (June 5, 2006), available at <http://www.foiacentre.com/news-MCB-060510.html> (last viewed Aug. 15, 2010).

⁵¹ The imperial state’s recognition of colonized religious traditions seems relevant here. Under French colonial law, at least after 1881, Muslims were a separate, “indigenous” population governed by a legal regime called the “*indigénat*”, which permitted matters of personal and family law to be determined by the standards of Islamic law. BOWEN, *supra* note 26, at 36.

organizing dialogue between government and particular religious communities, interlocutory communal bodies seem to have played a role in fostering the relatively more collaborative and productive style of British regulatory oversight of Muslim charities.⁵² In 2007, the U.K. Charity Commission established a Faith and Social Cohesion Unit (“FSCU”) “dedicated to supporting faith-based charities.”⁵³ Originating in a 2003 initiative involving independent evangelical Christian churches, the FSCU’s inaugural project is to support the British Muslim charitable community in “enhancing and promoting high standards of governance and accountability.”⁵⁴ In furtherance of that goal, the Commission has created a Mosques and Imams National Advisory Board (“MINAB”) comprised of representatives from the various British Muslim associations, including the aforementioned Muslim Council of Britain.⁵⁵

If there is an evident “consumer satisfaction” rationale to the concept of the FSCU and MINAB, the strategy also serves a more ambiguous policing function that flows from the establishment tradition. The specifically Muslim focus of the Charity Commission’s dialogue with faith-based charities follows not long in the aftermath of a major terrorist attack on British soil, the 2005 London subway bombings. By limiting official recognition to certain religious bodies and excluding others, the state effectively signals that unrepresented entities are of lesser status, not part of the regimen that prescribes best

⁵² Cf. Wiygul, *supra* note 48, at 64 (arguing that France’s state-sponsored religious councils serve to make religious traditions “more comprehensible and less threatening”).

⁵³ Charity Commission for England and Wales, Introduction to the Faith and Social Cohesion Unit, available at www.charity-commission.gov.uk/Library/about_us/fscintro.pdf (last viewed April 2010); Shaw-Hamilton, *supra* note 6, at 20.

⁵⁴ Charity Commission, Introduction to FSCU, *supra* note 53.

⁵⁵ *Id.* The other associations are the British Muslim Forum, the Muslim Association of Britain, and the Al-Khoei Foundation.

practices and ensures good governance. The very name “Faith and Social Cohesion Unit” euphemistically suggests that faith-based charities pose a particular problem for national unity. It also clearly implies that the regulatory state can and should seek to play a leading role in ensuring “cohesion” between (minority) religious groups and the body politic: a project redolent of the establishment tradition. The unit’s explicit interest in remedying the current under-representation of Muslim charities on the Register of Charities confirms that the mission of “supporting faith-based charities” is a complex one that includes elements of national security and domestication. The formal registration of hitherto underground Muslim charities is clearly intended to enlist them in the social contract, on the evident understanding that unregistered charities are more prone to evading oversight and surveillance.

At the same time, we should not discount that the FSCU was self-consciously established to provide a means of engaging British Muslim charities independently of the Commission’s investigatory and counterterrorism sections.⁵⁶ As Julianne Smith and Natalia Filipiak have argued, this institutional structure reflects the Commission’s preference for “promoting and protecting the benefits of charitable organizations instead of engaging solely in its role on the front line of the war on terrorist financing.”⁵⁷ That preference, however, is not an idiosyncratic choice of the current management of the Charity Commission, but rather speaks to the legacy of British establishmentarianism, just as do the country’s more than seven thousand faith-based schools, many of them administered by the Church of England. Indeed, Britain has recently extended this tradition to provide direct state funding of Muslim schools, a policy that would likely be

⁵⁶ Smith and Filipiak, *supra* note 20, at 92.

⁵⁷ *Id.*

considered unconstitutional in the United States even in the aftermath of the Supreme Court's 2002 decision in the Cleveland school voucher case.⁵⁸

British policy towards Muslim charities, in other words, is best viewed not only as the product of a commitment to multiculturalism and religious diversity, or as an extension of antiterrorism policy. Rather, it can be seen as a distant remnant of the state's historic function to exercise control over religious doctrine and personnel. But how exactly does that tradition manifest itself in the Muslim charitable arena?

Several commentators have rightly pointed to the Charity Commission's handling of the Palestinians Relief and Development Fund (Interpal) as a leading example of the more interlocutory nature of the relationship between the British state and Muslim charities. Designated as a SGDT by the U.S. Treasury Department in 2003, Interpal was twice investigated by the Charity Commission, in 1996 and 2003, and twice cleared of charges.⁵⁹ A third investigation was opened in 2006, following accusations made in a BBC program that the charity had donated to groups guilty of "promoting terrorist ideology or activities."⁶⁰ This latest investigation was concluded in February 2009, with the Charity Commission issuing a report finding the BBC materials of "insufficient evidential value" to support the allegations in question.⁶¹ The Commission also found, however, that Interpal "had not taken sufficiently vigorous steps" to investigate its

⁵⁸ Eric Pfanner, *Britain Debates State Aid for Muslim Schooling*, N.Y. TIMES, Oct. 31, 2005. In *Zelman v. Simmons Harris*, 536 U.S. 639, 644 (2002), the Supreme Court upheld a voucher program for low-income families in Cleveland. For a discussion of the scope of this decision, see GREENAWALT, *supra* note 17, 414-424.

⁵⁹ Fisher, *supra* note 19.

⁶⁰ Charity Commission for England and Wales, Press Release on the Interpal inquiry report (Feb. 27, 2009), available at www.nefafoundation.org/miscellaneous/.../CharComm_0209interpalPR.pdf (last viewed July 9, 2010).

⁶¹ *Id.*

partner organizations. As a result, the Commission directed the charity's trustees to discontinue its relationship with a Hamas-affiliated entity known as the Union for Good and to enhance its due diligence and monitoring procedures with respect to partner organizations.⁶²

These measures usefully exemplify the “scalpel” approach that has permitted British regulators to avoid the significant costs of criminalization and across-the-board freezing of assets characteristic of American policy. While the British handling of Interpal seems to call upon a set of lesser-included powers that are theoretically implicit in the (greater) American power of criminalization, the Commission's tactics actually entail more thoroughgoing forms of intervention into the life of a charity than do the indictment or asset freezing order. The scalpel approach “entangles” the Commission with a charity. The resolution of the most recent Interpal inquiry underscores this propensity to commingle regulatory and “private” charitable authority, noting that the Commission “will be reviewing with the Trustees” the implementation of its findings regarding the Union for Good.⁶³ The Commission's exercise of supervisory authority over charities is typically provisional and ongoing rather than definitive or finite.

Although the Interpal investigation is highly instructive, the Abu Hamza case arguably provides an even more dramatic illustration of the differences between the British and American approaches. It also suggests that these differences must be seen as relative and qualified rather than absolute or unconditional. The Abu Hamza affair has involved criminal as well as civil charges, antiterrorism and police investigations as well as regulatory probes. Not coincidentally, it has also involved both British and American

⁶² *Id.*

⁶³ *Id.*

law enforcement efforts. All of these inquiries have profoundly affected the Finsbury Park mosque that is the nominal subject of the Charity Commission's regulatory jurisdiction.⁶⁴ The mosque was inaugurated in north London in 1988. Abu Hamza arrived in 1997. One year later, the Charity Commission initiated its first investigation into the affairs of the NLCMT, based upon allegations that Abu Hamza was using the mosque to house some of his followers and for other "personal and political, rather than charitable purposes."⁶⁵ In 1999, British antiterrorism officials initiated the first of several separate criminal probes into the Muslim preacher's conduct and affiliations.⁶⁶ In January 2003, the London police raided the mosque on suspicion that the premises were being used to make materials related to a potent chemical toxin known as ricin. The mosque trustees then decided, of their own accord, to close the mosque down pending arrangements for "essential and necessary repairs . . . to meet health and safety requirements."⁶⁷ One month later – the day after Abu Hamza issued his hateful statements about the Columbia space shuttle disaster – the Charity Commission concluded that Abu Hamza had essentially hijacked the mosque for use as a base of radical Islamist activism. In the Commission's view, Abu Hamza's fiery sermons and his support of militant causes, such as the website of a group known as "Supporters for

⁶⁴ See Faisal Bodi, *Fear and loathing: Like Catholics during the Troubles, British Muslims are being persecuted in the name of security*, THE GUARDIAN, Jan. 21, 2003.

⁶⁵ Charity Commission NLCMT Report, *supra* note 2, ¶3.

⁶⁶ Dominic Casciani and Sharif Sakr, *The battle for the mosque*, BBC NEWS, Feb. 7, 2006, available at http://news.bbc.co.uk/2/hi/uk_news/4639074.stm (last viewed July 2010).

⁶⁷ Charity Commission NLCMT Report, *supra* note 2, ¶27.

Shari'ah," disqualified him from serving as imam of the Finsbury Park mosque.⁶⁸ On February 3, 2003, the Commission ordered Abu Hamza removed from his position.⁶⁹

While these separate criminal and regulatory inquiries of Abu Hamza were unfolding in Britain, the U.S. Department of Justice (DOJ) was preparing its own criminal probe of the controversial preacher. In May 2004, the DOJ indicted Abu Hamza on grounds of providing material support to a 1998 terrorist attack in Yemen that resulted in the death of four hostages, and providing material support to Al Qaeda via an alleged terrorist training camp in Oregon from 1999 to 2000.⁷⁰ The DOJ indictment led to Abu Hamza's arrest in London, and he was also separately arraigned in London's Central Criminal Court on various charges including solicitation to murder and hate speech.⁷¹ The London jury convicted Abu Hamza on most of these charges in 2006, and he has been sentenced to seven years.⁷² As of this writing, the European Court of Human Rights in Strasbourg has just ordered a new stay of a British court's order of extradition to the United States.⁷³

The overlapping British and American criminal prosecutions into Abu Hamza demonstrate that the crackdown on Muslim charities has become a transatlantic effort. Bilateral comparisons between British and American approaches to the regulation of Muslim charities must therefore incorporate elements of convergence and interaction as

⁶⁸ *Id.*, ¶¶14-16.

⁶⁹ *Id.*, ¶29.

⁷⁰ See Press Release and Indictment, *supra* note 11.

⁷¹ Jan Jun, *Muslim Extremist Preacher Gets Seven Years in Jail*, RADIOFREEEUROPE/RADIO LIBERTY, Feb. 8, 2006, available at <http://www.rferl.org/articleprintview/1065551.html> (last viewed July 2010).

⁷² *Id.*

⁷³ John F. Burns, *Court Delays Muslim Cleric's Extradition to U.S.*, N.Y. TIMES, July 8, 2010. For an overview and timetable of the Abu Hamza investigations, see Casciani and Sakr, *supra* note 66.

well as national distinctiveness. Two aspects of the Abu Hamza affair nonetheless remain noteworthy from a comparative law point of view. The first is the extraordinary nature of the Charity Commission's removal order of February 2003 – extraordinary, that is, from the perspective of the American culture of separation of church and state. Second, throughout all of these many probes, the NLCMT itself was spared both civil sanctions and criminal scrutiny. The Commission opted instead to collaborate with the trustees in rebuilding a future for the Finsbury Park mosque independent of Abu Hamza's influence.⁷⁴ Even the February 2003 removal order partook of civil rather than criminal sanctions; it was only if Abu Hamza continued to preach at the mosque that he could have been charged with criminal contempt, and in the interim he enjoyed the right to file an appeal with the High Court.⁷⁵

Although the DOJ has spoken as to Abu Hamza, we cannot say exactly how it or the Internal Revenue Service (“IRS”) would have handled the NLCMT and the mosque trustees. But it seems safe to say that federal authorities in the United States could *not* have done what the Charity Commission did in these circumstances. While characterizing its removal of Abu Hamza as an effort to guard the boundaries between charitable and non-charitable (“personal and political”) conduct, the Charity Commission was exercising a remnant of one of the oldest authorities in the establishment tradition: government control over religious doctrine and personnel. This kind of regulatory control does not seem to be a lesser-included power of the American government's

⁷⁴ Charity Commission NLCMT Report, *supra* note 2, ¶¶ 33-35. The Commission's inquiry into the NLCMT was closed on February 7, 2003 after investigating officers concluded that “control of the Mosque was again properly in the hands of the NLCMT.” *Id.* ¶ 33. The Commission noted that it would “continue to monitor the progress made by the trustees to reopen the refurbished Mosque for the benefit of the community.” *Id.*

⁷⁵ Van Natta, Jr., *supra* note 1.

prerogative to criminalize a charity, but rather partakes of a different political and constitutional tradition altogether – a tradition that is foreign to American sensibilities.

The Charity Commission’s commitment to using “scalpel”-like procedures that spare a charity from more extreme measures such as asset freezing or criminalization should not be exaggerated. In 2006, for example, the Commission froze the entire assets of a charity known as Crescent Relief pending the outcome of an investigation.⁷⁶ Suspected of links to a foiled plot to bomb planes departing London’s Heathrow Airport, Crescent Relief had been active in providing relief to post-earthquake Kashmir and in Indonesia following the 2004 tsunami.⁷⁷ Even then, however, the Commission’s director, Andrew Hind, was quoted in *The New York Times* insisting that counterterrorism measures constitute “a very small part of our overall” mission. There “have not been more than one or two cases a year” since 9/11 involving concerns about terrorism, he affirmed.⁷⁸

Hind somewhat misleadingly suggests that the Commission’s counterterrorism caseload is solely the product of an “external” reality in the situation of British Muslim charities, rather than the reflection in part of a specifically British approach to the oversight of Islamic philanthropy. The divergent approaches that American and British policymakers have taken to the Interpal and Abu Hamza matters, among other examples, suggest that national legal cultures and traditions are one important factor in shaping understandings of the association between Muslim charities and terrorism.

⁷⁶ Heather Timmons, *Britain Freezes Funds in Probe of Islamic Charity*, N.Y. TIMES, Aug. 24, 2006.

⁷⁷ *Id.*

⁷⁸ *Id.*

II. THE CULTURE OF SEPARATION AND MUSLIM CHARITIES IN THE UNITED STATES

Understanding the role of the culture of separation in American policy towards Muslim charities begins at the institutional level. Umbrella associations that serve as spokespersons for American religious groups and interlocutors with government officials are not unknown in the United States. The Council on American Islamic Relations, the Islamic Society of North America, the United States Conference of Catholic Bishops, the American Jewish Congress, and other organizational structures play an important role as brokers between American faith traditions and the state. But for reasons rooted in the First Amendment, these organizations are strictly the initiatives of civil society, do not enjoy any direct government funding or sponsorship, and have no formally privileged status as interlocutors with federal and state officials.

Just as important, authority over British charitable institutions is exercised by an independent, non-ministerial governmental organ that is part of the British Civil Service. The Charity Commission is, in principle, “completely independent of Ministerial influence.”⁷⁹ By contrast, charities in the United States are regulated as a subset of nonprofit organizations, themselves regulated as a subset of corporations subject to the oversight authority of the IRS. Housed administratively within the Treasury Department, the IRS is headed by a commissioner, nominated by the President, who reports to the Secretary of the Treasury, who herself is answerable to the President.⁸⁰ Charitable

⁷⁹ Charity Commission for England and Wales Website, available at http://www.charity-commission.gov.uk/About_us/About_the_Commission/Our_status_index.aspx (last viewed July 10, 2010). The Commission reports on its performance annually to Parliament.

⁸⁰ Unlike, for example, the Federal Trade Commission, which is an independent federal agency, the IRS belongs to the Treasury Department, which is a cabinet agency. The heads of independent agencies, though

regulation in the United States, in short, is a political function that is subsumed into an overarching fiscal project of tremendously broad scope, namely, the administration and enforcement of the nation's tax laws. Beginning in the 1990s, IRS officials grew increasingly concerned that charities were being created to avoid taxes, and that debate may also have informed the American response to Muslim charities after 9/11.⁸¹

To the best of my knowledge, the White House Office of Faith-based and Community Initiatives created under the Bush administration, and since reestablished under a different name by the Obama administration, has played no particular role as a mediator between federal authorities and Muslim charities.⁸² This situation may well change, given President Obama's expressed commitment, in his June 2009 Cairo speech, to facilitate the ability of American Muslims to perform their *zakat* obligations.⁸³ In the meantime, the fraught relationship between the federal government and Islamic philanthropy since 9/11 is perhaps best illustrated by the experience of the short-lived National Council of American Muslim Nonprofits ("NCAMN"). The NCAMN was created in 2005 as an assembly of leading Muslim American charities to serve as a liaison between them and federal administrative and law enforcement authorities. It was disbanded less than two years later, in mid-2007, after the Treasury Department froze the

appointed by the President and confirmed by the Senate, can be removed from office only for cause, rather than at the will of the executive.

⁸¹ See Shaw-Hamilton, *supra* note 6, at 22.

⁸² The Obama office was established by executive order on Feb. 9, 2009. See White House Press Release, *Obama Announces White House Office of Faith-based and Neighborhood Partnerships* (Feb. 5, 2009), available at http://www.whitehouse.gov/the_press_office/obamaannounceswhitehouseofficeoffaith-basedandneighborhoodpartnerships/ (last viewed July 10, 2010).

⁸³ Muslim Advocates, a 501(c)(3) sister entity to the National Association of Muslim Lawyers, recently organized a nationwide call-in to urge President Obama to carry through on this pledge. See Muslim Advocates Website, available at http://www.muslimadvocates.org/latest/charity_update/american_muslims_ask_president.html (last viewed July 11, 2010).

assets of KindHearts for Charitable Humanitarian Development and raided the offices of LIFE for Relief and Development, both members of the NCAMN steering committee.⁸⁴ The premature death of NCAMN seems to confirm the judgment that, “[o]n the U.S. side, monitoring efforts have also been limited on account of the more hard-line approach of officials and the U.S. government toward nonprofit sector oversight.”⁸⁵

The institutional and bureaucratic dimensions of this more hard-line approach interact with the invisible and abstract tenets of the culture of separation. Although the American law of church and state or free exercise does not expressly restrict law enforcement officials and courts from adopting many of the policies of the Charity Commission, it strongly discourages the use of these methods as forms of entanglement in the life of religious charitable institutions.

The doctrine of non-entanglement is a famously convoluted and unsettled area of constitutional law, but its basic orientation and application to the charitable context can be briefly described. Along with other federal agencies and the courts, the I.R.S. is generally reluctant to define what it means to be a “religious” institution or a “religion” in the first place.⁸⁶ Whenever the government’s investigation or surveillance of a charity requires it to engage in “analysis of the sincerity or application of religious beliefs, of a religion institution, there is likely to be a violation of the establishment clause.”⁸⁷ For

⁸⁴ Smith and Filipiak, *supra* note 20, at 93.

⁸⁵ *Id.*

⁸⁶ BRUCE HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 297, 305 (9th ed., 2009). *Cf.* Holy Land Foundation for Relief and Development v. Ashcroft, 219 F.Supp.2d 57, 83 (D. D.C., Aug. 8, 2002) (declining to reach plaintiff’s claim under the Religious Freedom Restoration Act for failure to adequately plead that HLF is a religious organization conducting charitable activities in the exercise of religious beliefs, notwithstanding a paragraph in the complaint alleging that “Holy Land’s work . . . fulfills [its] religious obligations as Muslims to engage in zakat”).

⁸⁷ HOPKINS, *supra* note 86, at 300.

many years, the Supreme Court’s leading non-entanglement decision was *Lemon v. Kurtzman*, which involved the constitutionality of conditioning state aid to religious schools on an ongoing regime of detailed restriction. Under *Lemon*, a law or government practice violates the First Amendment if it lacks a secular purpose, has the primary effect of advancing or inhibiting religion, or entails excessive entanglement between government and religion.⁸⁸ The *Lemon* court’s three-pronged test has been refined and modified in important ways since 1971.⁸⁹ By 1995, seven justices had cast doubt on the applicability of the test.⁹⁰ No majority opinion has yet rejected the doctrine, however, and its elements continued to be considered in subsequent cases.⁹¹

For present purposes, the critical language from *Lemon* is as follows:

[A] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. . . . This kind of state inspection and evaluation of religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches . . . and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.⁹²

Conditioning state aid to religious schools on adherence to certain requirements, of course, is factually distinguishable from oversight of a charity’s right to benefit from a

⁸⁸ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁸⁹ See, e.g., GREENAWALT, *supra* note 17, at 160-161; RICHARD FALLON, *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW* 62-63 (2004).

⁹⁰ The culmination of this trend was represented by Justice O’Connor’s concurring opinion in *Board of Education of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 721 (1994) (stating that Establishment Clause jurisprudence would be better off if freed from the “rigid influence” of *Lemon*). See GREENAWALT, *supra* note 17, at 160-161 n.13.

⁹¹ GREENAWALT, *supra* note 17, at 160-161 (noting that cases decided under *Lemon* are still treated as authoritative).

⁹² *Lemon*, 403 U.S. at 619-620, *quoted in* HOPKINS, *supra* note 86, at 300.

tax exemption. But there is arguably at least some overlap between the issue of state aid to religious schools, on the one hand, and the kind of invasive (but limited) surgical procedures adopted by the Charity Commission in respect of British Muslim charities, on the other. An order to remove a preacher from his pulpit based on the views expressed in sermons would raise a substantial constitutional question in the United States and would likely not be upheld.⁹³ (Under the 1954 Johnson Amendment, it should be noted, the IRS may constitutionally revoke the tax-exempt status of a church or other tax-exempt entity that engages in partisan political activity.)⁹⁴ A program of temporary federal supervision of a religious charity, or an order directing the trustees of a religious charity to distribute the charity's resources in a specific manner, is equally likely to be fraught with establishment and free exercise concerns.

Given the *Lemon* test's uncertain application to these scenarios, we might look for additional guidance to the Supreme Court's case law involving the settlement of disputes over church property. The typical facts of these cases involve the local affiliate or diocese of a national or international hierarchical church falling out of favor or choosing to secede from the mother church. The courts are generally asked to decide which side of the dispute – the local congregation or the church hierarchy – enjoys title to the property used by the affiliate or diocese. The Supreme Court's basic approach to these disputes,

⁹³ In these circumstances, the government might be able to rely upon a showing that the preacher was inciting his listeners to imminent lawless action. The imminent lawless action test was announced in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). For a discussion of the role of free speech viewpoint discrimination doctrine in the charitable context, see HOPKINS, *supra* note 86, at 302.

⁹⁴ The Internal Revenue Code defines "political activity" in the tax-exempt context to mean activity "on behalf of (or in opposition to) any candidate for public office." I.R.C. ¶501(c)(3) (2000). This restriction is currently the subject of a legal challenge by the Alliance Defense Fund known as the Pulpit Initiative. See Alliance Defense Fund Website, available at <http://www.alliancedefensefund.org/issues/religiousfreedom/churchandstate.aspx?cid=4491> (last viewed July 11, 2010).

which dates back to a Reconstruction-era decision in *Watson v. Jones*, has been summarized by one prominent scholar of the religion clauses in terms of the “hands off” principle: civil courts should refrain from deciding religious disputes where judgment requires the court to weigh or make determinations of religious doctrine and practice.⁹⁵ These cases are particularly noteworthy here because they expressly reject the traditional English approach to adjudicating church property disputes. In *Watson v. Jones*, the issue was whether the national church forfeited its right to dispose of local church property because the national church had abandoned the founding principles of its faith. Under the so-called “English approach,” an English court could consider the departure-from-doctrine element in deciding whether to create an implied trust in favor of the local church. The Supreme Court in *Watson* found that such judgments impermissibly entangled civil courts in the religious business of deciding intra-church conflicts.⁹⁶

The Court’s modern case law continues to enshrine this disavowal of the English rule, which epitomizes the contrast between the American non-establishment and British establishment traditions.⁹⁷ But the modern law complicates the “hands off” framework to the extent that it now offers lower courts a choice between two distinct methods of implicating federal authority in the resolution of church property disputes. The first permits courts to decide such cases provided that, in doing so, judges rely only on “neutral principles of law,” which essentially means giving effect only to religious

⁹⁵ *Watson v. Jones*, 80 U.S. 679 (1872); GREENAWALT, *supra* note 28, at 261.

⁹⁶ *Watson*, 81 U.S. at 727-728; GREENAWALT, *supra* note 28, at 263-264.

⁹⁷ See *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969); and *Serbian Eastern Orthodox v. Milivojevich*, 426 U.S. 696, 699 (1976).

documents that avail themselves of a straightforward and unambiguous application.⁹⁸

The second invites courts to defer to the decisions and interpretations of the highest authoritative body within a hierarchical church.⁹⁹ In *Serbian Eastern Orthodox v. Milivojevich*, the Court held that principles of non-entanglement required civil courts to accept the decision of a hierarchical church tribunal to remove a diocesan bishop from office.¹⁰⁰

It can be debated whether the “neutral principles of law” analysis is susceptible to clear application in the church property litigation context in which it was developed.¹⁰¹ As applied to the kinds of Muslim charitable controversies that have come before British and American law enforcement officials in recent years, it seems even more difficult to see how the line between “charitable” and “non-charitable” conduct can be drawn without entering into some of the doctrinal controversies and considerations that animate the field of Islamic philanthropy. The church property cases are thus highly instructive in this context, suggesting as they do that an “English approach” in the establishment vein is incompatible with the First Amendment. Nonetheless, as with the case law involving state aid to parochial schools, important factual and doctrinal distinctions remain. And it seems beyond argument that “neutral principles of analysis” permit legislatures and

⁹⁸ See *Jones v. Wolf*, 443 U.S. 595, 602-604; GREENAWALT, *supra* note 28, at 262.

⁹⁹ See *Wolf*, 443 U.S. at 602; GREENAWALT, *supra* note 28, at 262.

¹⁰⁰ *Serbian Eastern Orthodox*, 416 U.S. at 708-720

¹⁰¹ See *Wolf*, 443 U.S. at 617 (Powell, J., dissenting) (arguing that only deference to the determinations of highest church authorities permits courts to resolve intra-church property disputes consistent with the free exercise clause).

courts to enjoin material support of terrorist violence as criminal in its own right, not merely inconsistent with charitable status.¹⁰²

There is some federal case law implying that the states have broader leeway to monitor and even administer the ongoing affairs of religious institutions than do federal authorities. But these cases were decided on abstention grounds rather than on the constitutional merits.¹⁰³ Under state common law, it is not unusual for courts to intervene in the management of religious charities. A good example is the common law *cy prè*s doctrine, which permits a court to conform the terms of a charitable trust as closely as possible to the original intent of the testator in order to prevent the trust from failing.¹⁰⁴ In short, it may well be that the states have historically enjoyed greater freedom than the federal government to regulate religious institutions in ways that approximate the policies of the Charity Commission, though there is little serious dispute today that the religion clauses of the First Amendment apply to states and localities.¹⁰⁵

¹⁰² The ongoing dispute between civil libertarians and federal law enforcement authorities over the constitutionally legitimate scope of the “material support” of terrorism provisions (18 U.S.C. §§2339(A & B)) has, for the foreseeable future, been resolved by the Supreme Court’s recent decision in *Humanitarian Law Project*, 2010 U.S. LEXIS 5252. Without entering into the complexities of the arguments developed in that litigation, I simply advert here to the self-evident proposition that the religion clauses do not bar the government from criminalizing the knowing provision of financial assistance to properly designated terrorist organizations, regardless of the religious character of those entities.

¹⁰³ See *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986); *Worldwide Church of God v. California*, 623 F.2d 613 (9th Cir. 1980).

¹⁰⁴ See, e.g., *In re Kensington Hospital for Women*, 358 Pa. 458 (Pa. 1948) (applying *cy prè*s to award assets of defunct nonsectarian hospital to a sectarian hospital); *In re Hawley's Estate*, 223 N.Y.S.2d 803 (N.Y. Sur. 1961) (applying *cy prè*s to reform a will providing for annual scholarship prizes to pupils in a Protestant Episcopal school so as to remove requirements that recipients be communicants in Protestant Episcopal Church in the United States and be sons of native-born American citizens); *Islamic Center of Harrison, Inc. v. Islamic Science Foundation, Inc.*, 692 N.Y.S. 2d 94 (N.Y. A.D. 2 Dept. 1999) (upholding trial court order directing religious corporations to hold reorganizational meeting for purposes of electing a new board of trustees, as a remedy for plaintiffs’ action brought to remove individual officers).

¹⁰⁵ GREENAWALT, *supra* note 17, at 36. As Greenawalt notes, there is some controversy today as to whether the First Amendment religion clauses should apply in the same way to the states and the federal government. States nonetheless have their own non-establishment clauses. *Id.* at 25.

It requires a fair amount of guesswork to determine how the U.S. Supreme Court would rule in cases challenging the constitutionality of the various measures adopted by the Charity Commission in Britain. Certain of these measures seem more clearly beyond the constitutional pale than others, the Abu Hamza removal order being Exhibit A in this respect.¹⁰⁶ But what is ultimately at issue in the American context is the culture of separation itself, rather than the actual demands of the establishment clause – which can be more ambiguous and more modest than the stirring invocations of religious liberty that dot the First Amendment landscape would suggest. It would be a mistake to assume, however, that regulatory and law enforcement styles are shaped only by the express demands of concrete judicial decisions. Constitutional cultures also exert a powerful influence on government action. Against the comparative backdrop of the Charity Commission’s record in Britain, the impact of the American culture of separation on the criminalization of Muslim charities can be fairly clearly divined.

III. SOME ALTERNATIVE EXPLANATIONS

While the culture of separation tells us something significant about the American crackdown on Muslim charities, it does not afford the only possible explanation for the contrast between British and American policies since 9/11. A brief look at some alternative hypotheses can serve to widen the spectrum of views that might usefully be

¹⁰⁶ The law governing reorganization of churches in bankruptcy might also provide a fruitful source of analogies. See Ryan J. Donohue, *Thou Shalt Not Reorganize: Sacraments for Sale*, 22 EMORY BANKR. DEV. J. 293, 321 (2005) (“the heavy judicial supervision required in a reorganization case is easily characterized as the type of government intrusion into religious affairs that the Establishment clause was designed to protect against.”), *quoted in* LESLIE GRIFFIN, LAW AND RELIGION: CASES AND MATERIALS 313 (2007).

brought to bear on the problem at hand. I will consider three competing narratives: a civil libertarian narrative associated with the political left, a comparative foreign policy narrative that has found favor with conservative intellectual circles, and an influential comparative law thesis concerning the historical origins of differences in American and European punishment norms and practices. Only the first of these has explicitly addressed the situation of Muslim charities since 9/11, in the form of an important ACLU report released in June 2009.¹⁰⁷ The second involves a general comparison of American and European foreign policy in the “New World Order”: an American embrace of the need for military exertion in the post-9/11 state of nature vs. a putative European commitment to peace, diplomacy, and dialogue.¹⁰⁸ The third features an opposition between American “harshness” and European “dignity” and “mildness” in styles of criminal punishment.¹⁰⁹ By developing the possible relevance and pointing to the limits of these approaches, I mean primarily to clarify the thrust of the First Amendment argument set forth above, recognizing that the first perspective is not a comparative one, and that the second and third focus primarily on continental Europe rather than Britain.¹¹⁰

A. The Civil Libertarian Thesis

¹⁰⁷ BLOCKING FAITH, FREEZING CHARITY, *supra* note 13.

¹⁰⁸ ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER (2003).

¹⁰⁹ JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2005).

¹¹⁰ This is, of course, only a partial catalog of alternative approaches that can help to explain the comparison developed in this essay. Other frameworks could almost certainly be applied to the problem at hand. A prime suspect is the impact of nineteenth-century British colonial law on British policies and attitudes towards Muslim and other former colonial subjects, a history without parallel in the American experience. I leave this and other possible explanations for another occasion.

The civil libertarian thesis is exemplified in Jennifer Turner’s superb report for the ACLU, entitled “Blocking Faith, Freezing Charity.” Combining legal analysis with in-depth interviews of Muslim Americans across the nation, the ACLU report ascribes the criminalization of Islamic philanthropy to a ratcheting up of statutory and administrative authority in the post-9/11 era.¹¹¹

The ACLU report persuasively argues that U.S. counterterrorism policy has profoundly chilled Muslim Americans’ full and free exercise of their religion.¹¹² This is a story, not of direct infringements on free exercise and free association, but rather one about the cumulative impact of certain rules and law enforcement patterns on the Muslim American commitment to charity for the poor. The report’s discussion of First Amendment concerns never quite congeals in the way a constitutional litigator seeking to envision a court challenge might wish to see.¹¹³ Nonetheless, in the context of a cumulative, “chilling effect” narrative about religious liberty, it is hard to deny the salience and power of the many anecdotes recounted in the report.¹¹⁴ If religious freedom

¹¹¹ See generally BLOCKING FAITH, FREEZING CHARITY, *supra* note 13. I should note here that I serve as a director of the ACLU of Massachusetts. The views expressed herein reflect my personal beliefs only. While the ACLU is probably the best known and most visible exponent of this approach to the problem, other groups that are not “civil liberties” advocates *per se*, but who are concerned with issues of governmental transparency and accountability, share the broad emphasis on executive branch overreaching. OMB Watch, for example, has been prominent voice in the debate over the criminalization of Muslim charities. Its very name suggests that the problem to be resolved is one of (excessive or unaccountable) presidential authority.

¹¹² *Id.*

¹¹³ To the best of my knowledge, no federal court has held that a specific measure adopted in an individual Muslim charity criminal case or investigation has, by itself, violated a constitutional right to practice Islam. The free exercise and free association clauses seem to have played a minor role, at best, in recent litigation involving Muslim charities. This might appear to confirm Frederick Schauer’s argument that, in certain areas of the law, such as criminal solicitation and conspiracy or securities regulation, the First Amendment is simply held not to apply. See Schauer, *supra* note 30.

¹¹⁴ BLOCKING FAITH, FREEZING CHARITY, *supra* note 13, at 89-115 (discussing Muslim Americans’ fear of criminal liability for donations to legal charities, fear of interview by law enforcement, fear of immigration consequences of donating, inability to donate *zakat* to preferred recipients, religious rights violations due to

matters, it must matter not simply on the technical level of constitutional doctrine but also on the substantive level of lived experience.¹¹⁵

Highly suggestive of the negative consequences of the crackdown on Muslim charities, “Blocking Faith, Freezing Charity” clearly outlines the specific statutory and regulatory mechanisms by which it has proceeded. The ideological and constitutional origins of the crackdown, however, remain somewhat obscure, or at least incompletely theorized, in documents such as the ACLU report. The civil libertarian thesis tends to attribute the chilling effect on the free exercise of *zakat* to the abuse of power by the executive branch, i.e., the specific policies adopted by the Bush administration since 9/11. Thus, the ACLU report argues, “U.S. terrorism financing laws and policies developed under the Bush administration are inhibiting American Muslims’ ability to freely and fully practice their religion.”¹¹⁶

To be sure, Congress is also a culpable party in this interpretation, since Congress was responsible for enacting the material support to terrorism provisions in the 1996 Antiterrorism and Effective Death Penalty Act (“AEDPA”) of 1996 and the 2001 PATRIOT Act.¹¹⁷ In their overbreadth and lack of any general exception for

continued sequestering of charities’ funds, and limitations on freedom of association due to climate of fear). Muslim Americans have expressed fear that they could be punished for donating to an organization that five years *later* is eventually designated as a terrorist organization. BLOCKING FAITH, FREEZING CHARITY, *supra* note 13, at 14, 32.

¹¹⁵ See also Laurie Goodstein, *Muslims Hesitating on Gifts as U.S. Scrutinizes Charities*, N.Y. TIMES, April 17, 2003; Neil MacFarquhar, *Fears of Inquiry Dampen Giving by U.S. Muslims*, N.Y. TIMES, Oct. 30, 2006. President Obama’s June 2009 speech in Cairo, which directly addressed the “chilling effect” phenomenon, demonstrates that the work civil libertarians have done over the past several years in bringing the vulnerabilities of Muslim American *zakat* culture to the attention of the media and policymakers has borne some important fruit.

¹¹⁶ BLOCKING FAITH, FREEZING CHARITY, *supra* note 13, at 9.

¹¹⁷ The AEDPA provisions are codified at 18 U.S.C. §§2339(A & B). For the PATRIOT Act reforms, see Pub. L. No. 107-56, §§805 and 810, 115 Stat. 272 (2001).

humanitarian assistance, these statutes have permitted the imposition of punishment “without regard for the intent or character of the support provided.”¹¹⁸ The President’s ability to designate Muslim charities as “specially designated global terrorists” and freeze their assets in *toto* is also rooted in legislative authorization. The International Emergency Economic Powers Act (“IEEPA”), enacted in 1977 as an amendment of the 1917 Trading with the Enemy Act and revised most recently in 2007, gives the Treasury Department this authority.¹¹⁹ Without it, the executive branch would not have been able, shortly after 9/11, to shutter the country’s three largest Muslim charities: Holy Land Foundation for Relief and Development, Global Relief Foundation, and Benevolence International Foundation.¹²⁰ In total, six U.S.-based Muslim charities have been closed by way of designation, and a seventh was ended when the Treasury Department declared it to be “under investigation” and froze its assets.¹²¹ The prerogative to designate an entity as a terrorist organization under IEEPA amounts to an effective power of life or death over Muslim charities because the statute permits the Treasury Department to act without notice or hearing, on the basis of classified evidence, and without any judicial review.¹²² Indeed, as shown by the example of six other Muslim American charities that were

¹¹⁸ BLOCKING FAITH, FREEZING CHARITY, *supra* note 13, at 10.

¹¹⁹ International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, tit. II, 91 Stat. 1625 (1977), 50 U.S.C.A. §§1701-1707 (2007), amended by Pub. L. No. 107-56, § 106 (2001). A 1995 executive order by President Clinton extended IEEPA’s authorization beyond foreign countries. Exec. Order No. 12947, 60 Fed. Reg. 5,079 (Jan. 23, 1995).

¹²⁰ *See* BLOCKING FAITH, FREEZING CHARITY, *supra* note 13, at 7.

¹²¹ *Id.*

¹²² 50 U.S.C. §1702(c), *cited in* BLOCKING FAITH, FREEZING CHARITY, *supra* note 13, at 35.

“merely” raided by law enforcement authorities, the federal government can manage to shut down a charity short of actually designating it as a terrorist entity.¹²³

The civil libertarian narrative, then, departs from a series of legislative grants of authority deemed inherently subject to executive branch overreaching and encroachment.¹²⁴ But the focus of the ACLU diagnosis is on the interpretation and application of these statutory provisions by federal law enforcement authorities. Thus the “lack of accountability for the Treasury’s designation and asset blocking actions” has assumed a critical role in the chilling of *zakat* as it is practiced on the ground level. Executive Order 13224, issued by President Bush in December 2001, blocked the assets of some twenty-seven organizations and individuals and anyone found to be acting “for or on behalf of” them.¹²⁵ As described in the ACLU report, E.O. 13224 is emblematic of the executive branch abuses that have resulted in the disabling of Muslim charities in the United States, for it “confers broad powers on the Secretary of Treasury and Secretary of State, contains vague criteria for designation, and lacks any evidentiary standard for designation.”¹²⁶ These regulatory flaws have been confirmed by the revelation of serious weaknesses in the evidence used in criminal prosecutions of Muslim charity leaders and associates.¹²⁷ Only one of the six Muslim American charities designated as a terrorist

¹²³ BLOCKING FAITH, FREEZING CHARITY, *supra* note 13, at 7.

¹²⁴ In the words of the ACLU report, “[t]he counterterrorism laws are inherently vulnerable to mistake and abuse.” *Id.* at 10.

¹²⁵ Exec. Order No. 13224, 60 Fed. Reg. 49,079 (Sept. 23, 2001), *cited in* BLOCKING FAITH, FREEZING CHARITY, *supra* note 13, at 34.

¹²⁶ BLOCKING FAITH, FREEZING CHARITY, *supra* note 13, at 34.

¹²⁷ *Id.* at 10 (noting that the criminal cases “have demonstrated a lack of persuasive evidence of terror financing by U.S.-based charities”).

organization since 9/11 has been successfully prosecuted, and that conviction came only after a previous trial resulted in a hung jury on nearly all counts.¹²⁸

While entirely consistent with the civil libertarian interpretation in its larger contours, the culture of separation thesis hinges on the notion of a constitutionally limited rather than overreaching government. In comparison to the British establishmentarian state, the American government is limited in the array of tools it can call upon in seeking to govern the conduct of Muslim charities, and correspondingly limited in the imaginative resources it brings to bear on this highly contested aspect of the post-9/11 legal landscape. The resort to wholesale asset freezing, designation of entire entities as terrorist organizations, and criminal prosecution of charities and individuals alike are not the work of a weak federal government. But they are the product of a government that, for complex historical reasons, cannot lay claim to the more organic, nuanced, and in some ways more far-reaching tradition of state prerogatives vis-à-vis religious institutions that is reflected in British (and continental European) policy toward the Muslim charitable sector.

B. The Comparative Foreign Policy Narrative

In 2003, Robert Kagan published a stimulating and perceptive short essay entitled *Of Paradise and Power: America and Europe in the New World Order*.¹²⁹ Kagan's essay posited that the strategic cultures of American and European foreign policy are

¹²⁸ Neil MacFarquhar, *As Muslim Group Goes on Trial, Other Charities Watch Warily*, N.Y. TIMES, July 17, 2007; Gretel C. Kovach, *Five Convicted in Terrorism Financing Trial*, N.Y. TIMES, Nov. 25, 2008.

¹²⁹ KAGAN, *supra* note 108.

essentially different. American leaders inhabit an “anarchic Hobbesian world” in which strong nations must act as strong nations can – that is, without relying on international laws and rules, and with full acceptance of the legitimate need to apply military might to defend liberal civilization at home and abroad.¹³⁰ Europe, by contrast, purports to live in a Kantian world of perpetual peace and relative prosperity, where international law, diplomacy, and commerce are best suited to handling the conflicts that emerge between nations.¹³¹ According to Kagan, Europe has been “moving beyond power into a self-contained world of laws and rules and transnational negotiation and cooperation.”¹³²

These differences do not inhere in the historical trajectories of the United States and Europe, but rather reflect the contingencies of international relations since the Second World War. The Kantian project of the European states is a postwar phenomenon, a deliberate turning away from the traditions of *machtpolitik* and militarism that had hitherto dominated European politics and strategy. The United States, for its part, had once embraced the value of international law, diplomacy, and commerce very early on in its history. But the founding generation’s commitment to Kantian principles reflected the reality that it was, back then, a weak state in a world of strong states. Today, American foreign policy reflects the undeniable fact of a large and growing transatlantic disparity of power, a disparity fostered above all by the transformation of American military power in response to the two world wars of the twentieth century.¹³³

¹³⁰ *Id.* at 3.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 1.

In the sphere of foreign policy, Kagan argues, power determines ideology, which in turn shapes how power is exercised.¹³⁴

Kagan is somewhat ambiguous on where Britain fits into this polarity. At times, he seems to suggest that Britain has become assimilated to the European pacific worldview, and discusses British foreign policy in the same vein as its continental counterparts.¹³⁵ At other moments, Kagan portrays British policy as more sympathetic to the leadership role that America has inherited, part of an “Anglo-American” attitude towards power that reflects the twentieth-century “special relationship” between Britain and America.¹³⁶ The tension is encapsulated in Kagan’s assessment of former Prime Minister Tony Blair, who sought at one and the same time “to lead Britain into the rule-based Kantian world of the European Union” and “to lead Europe back out into the Hobbesian world, where military power remains a key feature of international relations.”¹³⁷

There is a distinct post-9/11 tinge to this analysis, despite Kagan’s claim that, after the World Trade Center attacks, America “did not change” but “only became more itself.”¹³⁸ The American approach to the “war on terror” – indeed the very concept of a “war on terror” – bespeaks a Hobbesian vision of international politics. The prison at Guantanamo, the resort to rendition and torture, the war in Iraq, the battles over the constitutionality of military commissions, and other policies reflect an understanding that

¹³⁴ *Id.* at 3 (arguing that “material and ideological differences reinforce one another”).

¹³⁵ *Id.* at 23, 60.

¹³⁶ *Id.* at 74.

¹³⁷ *Id.* at 75.

¹³⁸ *Id.* at 85.

powerful nations must act preemptively when possible in order to address the strategic threat of terrorism. And the European denunciation of these policies in the years since 9/11 reflects an equally ingrained vision that world politics must operate according to some higher principles than raw national interest and power, if global order is to be preserved.

Often understood as an element of the Bush administration's war on terror,¹³⁹ the crackdown on Muslim American charities does seem to reflect aspects of the "preemptive" philosophy of recent American foreign policy. The effective shuttering of entire institutions by freezing their assets or designating them as terrorist entities is entirely consistent with the Hobbesian frame of mind that characterizes U.S. policymakers in Kagan's analysis. And the European preference for a more restrained approach, one that seeks primarily to "encourage the best" rather than "prevent the worst,"¹⁴⁰ can similarly be interpreted, if somewhat cynically, as a manifestation of the post-modern paradise of European strategic culture, with its emphasis on negotiation and international law over the use of force, seduction over coercion.¹⁴¹

At the same time, the response to Muslim charities in the United States cannot be understood simply as a domestic analog to Guantanamo-style lawlessness and the foreign policy of preemption. The crackdown on Muslim charities has been conceived and executed within the framework of domestic American constitutional, statutory, and administrative law. By contrast, the thrust of the Guantanamo project and other

¹³⁹ See, e.g., IBRAHIM WARDE, PRICE OF FEAR: THE TRUTH BEHIND THE FINANCIAL WAR ON TERROR 127-150 (2008); BLOCKING FAITH, FREEZING CHARITY, *supra* note 13.

¹⁴⁰ Fisher, *supra* note 19.

¹⁴¹ KAGAN, *supra* note 108, at 55.

preemptive foreign policies is to promote national security through the lens of the “war on terror” approach. “Mere” criminalization, in this view, is inadequate to deal with the threat posed by persons deemed to be enemy combatants. There is debate as to whether the government’s conduct vis-à-vis Muslim charities has respected constitutional norms of due process and religious liberty. But the reliance upon domestic statutes and regulations suggests that the policing of Islamic philanthropy relates to an American “rule of law” culture as much as it reflects a distinctively American style of foreign policy.

C. “Harsh Justice”?

The divergent treatment of Muslim charities in the post-9/11 Atlantic world also brings to mind James Whitman’s recent comparative history of the “widening divide” between American and European criminal punishment.¹⁴² Whitman’s overarching thesis is that American criminal punishment makes for significantly harsher treatment of offenders than does continental criminal justice, particularly in France and Germany. American criminal law is harsher, among other respects, in the broader range of conduct that it criminalizes, in its extension of criminalization to new classes of persons (such as minors and white collar offenders), and in its punishment norms and practices.¹⁴³

Whitman accounts for this contrast by reference to differing histories of state power. The French and German criminal justice systems are the legacies of strong aristocratic states that have bequeathed traditions of mercy and mildness, respect and dignity in the treatment of criminal defendants. These traditions have played out in

¹⁴² WHITMAN, *supra* note 109.

¹⁴³ *Id.* at 43-62.

modern times in the form of a tendency to respect honorable status for all offenders, a form of leveling up that results in individuals at the bottom of the social ladder being treated with the same grace as those at the top. This equalization of honorable status is a reaction to an older style of criminal punishment in France and Germany, whereby strong centralized bureaucracies promoted status-differentiation in punishment according to the individual offender's place in the social hierarchy. The mildness of aristocratic life in continental prisons during the Old Regime provides the template for European criminal punishment today, which has emphatically abolished the old tradition of degradation for low-status offenders.¹⁴⁴

By contrast, status-differentiation in punishment had already begun to break down in England in the late Middle Ages, so that by the time of the American Revolution, Anglo-American criminal law was already operating against the background of a very different tradition.¹⁴⁵ The characteristic impulse in this tradition was not to accord different statuses to different offenders depending on their place in the social order, but rather to treat all offenders similarly. Formal equality became the hallmark of American criminal justice in part because it was never under the control of a strong bureaucratic state that made the dispensation of mercy one of its central objectives. After the mid-eighteenth century, American criminal punishment tended to accord the same low-status punishment to high- and low-status persons alike, a trend reinforced by the American Revolution's rejection of Old World status-differentiation generally.¹⁴⁶ A broadly applicable social logic of degradation has thus come to characterize American criminal

¹⁴⁴ *Id.* at 9-16.

¹⁴⁵ *Id.* at 152 ff. (discussing the breakdown of status-differentiation in English criminal law).

¹⁴⁶ *Id.* at 11, 15-16, 152, 162, 165-173.

justice and can be seen perhaps most visibly in the white-collar world of financial and tax-related criminal law.¹⁴⁷

Whitman's comparative sociology of American and continental criminal law does not, on its face, suggest why Britain would adopt a milder approach to Muslim charities than the United States. Although status hierarchy mattered in eighteenth-century English common law, and continued to matter after the American Revolution, Britain and America were alike in that neither followed the continental drive to abolish low-status punishment and generalize high-status mildness to all in reaction to the status-differentiation of Old Regime law.¹⁴⁸ Lacking the two-track system of continental criminal justice, Anglo-American law remained fixed on overall ethic of punishing low-status persons – the vast majority of criminal offenders – with low-status treatment.¹⁴⁹ But since Whitman attributes great significance to the role of the American Revolution and its denunciation of status consciousness in this story,¹⁵⁰ it stands to reason that modern British and American penal cultures are opposed to one another in significant ways. Focusing as he does on the differences between America and the continent, Whitman does not seek to explain the English place in his story.¹⁵¹

Having joined the European Union in 1973, Britain is now subject to some of the constraints that characterize the broader European culture of dignity and mildness in

¹⁴⁷ *Id.* at 155. There is a substantial academic literature on the theme of “overcriminalization” that might also be brought to bear on the treatment of Muslim charities in the federal criminal justice system. For a recent survey of this literature, see Daniel C. Richman, *The Demand Side of Overcriminalization – A Celebration of Bill Stuntz* (March 30, 2010), Columbia Public Law Research Paper No. 10-234, available at <http://ssrn.com/abstract=1581752>.

¹⁴⁸ *Id.* at 152.

¹⁴⁹ *Id.* at 177-181.

¹⁵⁰ *Id.* at 16, 170.

¹⁵¹ *Id.* at 178.

criminal punishment, at least at the level of appellate review. (Abu Hamza's pending appeal of the British court's extradition order to the European Court of Human Rights is a case in point.) And it seems difficult to avoid the impression that the European abolition of low-status degradation in criminal punishment has informed, at least at a very broad level, the responses of continental governments to Muslim charities since 9/11. The general reluctance to resort to criminalization as a framework for policing the work of Muslim charitable institutions seems part and parcel of a larger cultural antipathy to the values that make for harshness in American criminal justice.

The comparative criminal law thesis suggests a sociological basis for the different policies of U.S. and European law enforcement officials towards Muslim charities. But it does not necessarily explain why the American authorities have resorted to criminalization as the appropriate framework in the first place. Nor does it account for why the Charity Commission has been able to avail itself of more "scalpel-like" regulatory tools. To understand these aspects of the crackdown on Muslim charities requires attention to dynamics that lie outside the history of criminal law *per se*.

IV. WHAT IS TO BE DONE?

The criminalization of Muslim charities represents a critical moment, and possibly a turning point, in the history of American religious liberty. So long as the criminal law continues to serve as a broadly used tool for managing the fraught relationship between Islamic philanthropy and the post-9/11 American state, it becomes increasingly difficult to reverse the widespread perception in Muslim American

communities that the First Amendment does not apply with equal force to them.¹⁵² In this perception, it turns out that many Muslim Americans are at least partly mistaken. First Amendment culture, and particularly the culture of separation, seems to have played a very significant, if largely invisible and paradoxical, role in the confluence of circumstances that have resulted in the criminalization of Muslim charities. It is a less inspiring role than the one we conventionally associate with the First Amendment, as a beacon and guardian of religious liberty and the rights of the politically unpopular. The heroic First Amendment of the great free exercise, non-establishment, free speech and free association cases here gives way to an ironic First Amendment. The culture of separation has had unintended and unforeseen consequences that have shaped the legal landscape in which Muslim charities now operate.

This does not mean that the current status of Muslim charities in the United States expresses an intractable or necessary constitutional dilemma. There are ways of mediating the current antagonistic relationship between the American state and Muslim charities that do not require dispensing with the liberties we associate with the separation of church and state or the free exercise of religion.

Some of the changes that are needed call for adjustments in attitude and perception. For Muslim Americans, the message is that the criminalization of Islamic philanthropy is not necessarily the product of a deep-seated hostility to Islam and Islamic values. The legal culture of American religious liberty is a deeply complicated and even convoluted one that sometimes operates at cross-purposes with itself. It is full of strands that do not connect and fraught with internal tensions and conflicts that are still being

¹⁵² See, e.g., BLOCKING FAITH, FREEZING CHARITY, *supra* note 13, at 91, 131.

worked out. The idea of separation has exacerbated the bind in which Muslim charities find themselves, but for reasons that are largely unintended and paradoxical, rather than malicious in nature.

American law enforcement officials, for their part, might also find something of value in the example of the British experience and its relationship to the establishment tradition. British regulators have worked hard to understand that the controversies engulfing Muslim charities in the post-9/11 world do not necessarily reflect a monolithic or broad-based movement within Islamic philanthropic institutions to commit acts of terrorist violence against the United States and other Western nations. Rather, Muslim charities, like all religious institutions (including those at issue in the Supreme Court's church property cases), typically grapple with internal doctrinal, political, and personality conflicts. And they are struggling to find a way to express the complex humanitarian message of Islam in a way that remains true to that faith while also finding favor and acceptance in American and Western society generally. The world of Islamic American philanthropy is connected to far-flung, loosely organized networks of institutions and groups overseas. Some of these institutions and groups will sometimes be found to cross paths in tangential ways – through phone calls, emails, websites, or mailings – with individuals who have committed violent acts or who have harmful intentions. But these webs of association often involve very distant and tenuous links that should not be read to implicate entire charities or Muslim sub-communities in acts of violence purportedly committed in the name of Islam.¹⁵³

¹⁵³ See WARDE, *supra* note 139, at 139. See also JONATHAN BENTHALL, THE PALESTINIAN ZAKAT COMMITTEES 1993-2007 AND THEIR CONTESTED INTERPRETATIONS 18 (Graduate Institute of International and Development Studies, Program for the Study of International Organization(s) Occasional Paper 1/2008), available at http://graduateinstitute.ch/webdav/site/iheid/shared/iheid/514/08-07-22_OP%202008-

Such an understanding of the complexity and diversity of Islamic philanthropic networks has concrete policy implications. In the field of white-collar criminal law, the DOJ regularly makes use of pretrial diversion policies – primarily non-prosecution and deferred prosecution agreements (NPAs and DPAs) – that spare corporations from the unmitigable damage wrought by an indictment in exchange for concessions in conduct.¹⁵⁴ These agreements are preceded by extended formal and informal communications and exchanges of documents between corporate attorneys and federal investigators that occur completely outside the public view. NDAs and DPAs typically involve recognition that what looks like “corporate fraud” from the outside does not always reflect upon the motives or orientation of the corporate institution as a whole. Rather, allegedly fraudulent acts may simply be the work of one or two individuals within the corporation, or the DOJ will conclude that there is no basis of any kind for a fraud prosecution. If the evidence produced in the course of investigation and discovery points to specific individuals within the corporate hierarchy, prosecutors can then focus their follow-up efforts on those particular persons. There is no reason why this practice, and the deference towards corporate interests that it represents, cannot and should not be extended to charitable institutions, including religious ones. There is nothing in First Amendment law that prohibits the DOJ from so conducting its investigations of Muslim charities.

[1_Palestinian%20ZC.pdf](#) (last viewed Aug. 14, 2010). For an argument that runs counter to Benthall’s, see LEVITT, *supra* note 24. I do not purpose to resolve the dispute between Benthall and Levitt over the Palestinian zakat committees here. Whatever the appropriate resolution of that controversy may be, it seems clear enough that the Palestinian situation cannot serve as a stand-in for the condition of Islamic philanthropy generally.

¹⁵⁴ For a recent example, see Stephanie Kirchgassner, *DOJ deal with Barclays ‘raises questions of fairness and justice’*, FIN. TIMES, Aug. 19, 2010.

Law enforcement officials and Muslim charities alike have strong incentives to avoid use of the criminal process entirely. Criminal investigations and prosecutions are enormously time-consuming and costly enterprises, and nearly all of those undertaken by the DOJ against Muslim charities since 9/11 have proven to be of little or no merit.¹⁵⁵ This is a vast waste of federal law enforcement and judicial resources, and has imposed a regrettable and largely unjustifiable burden on good-faith charitable giving by the Muslim American community. The clampdown on Muslim charities has also created what economists would call a perverse incentive. By forcing Muslim charitable activity underground – i.e., into an anonymous, informal cash economy that can be monitored only with great difficulty – the government’s response may have unintentionally served to channel some *zakat* funds along hidden and potentially illegitimate paths.¹⁵⁶ Moreover, federal policy since 9/11 has hampered humanitarian relief efforts in war-torn regions abroad where poverty and deprivation ultimately serve to foster acts of anti-American violence.¹⁵⁷

The White House Office of Faith-based and Neighborhood Partnerships is arguably well positioned to facilitate the kind of dialogue and trust that British regulators have sought to create through the Charity Commission’s Faith and Social Cohesion Unit

¹⁵⁵ BLOCKING FAITH, FREEZING CHARITY, *supra* note 13, at 8, 10-12.

¹⁵⁶ BLOCKING FAITH, FREEZING CHARITY, *supra* note 13, at 122-124. *See also* Warde, *supra* note 139, at 155. We may wonder whether this analysis, if taken too far, ends up supporting the dominant narrative about the affinities between Muslim charitable conduct and terrorist financing that the civil libertarian thesis seeks to interrogate.

¹⁵⁷ BLOCKING FAITH, FREEZING CHARITY, *supra* note 13, at 124-128. For a variation on this theme, denying that the spotlight on Muslim charities has resulted in any tangible improvements for American national security, *see* OMB WATCH, MUSLIM CHARITIES AND THE WAR ON TERROR 6-7 (2006), *available at* www.policyarchive.org/handle/10207/bitstreams/5088.pdf (last viewed July 11, 2010).

and related initiatives.¹⁵⁸ But other federal agencies have a critical role to play here as well.

Chief among these, of course, are the Treasury Department and its IRS unit. Federal enforcement of the law governing religious charitable conduct in the United States has tended to veer somewhat erratically between two extreme poles. On the one hand, the IRS tends to limit itself to an essentially annual, distinctly arms-length, question-and-answer type of relationship with charitable institutions. This is an administrative culture of forms 1023 and 990, of instructions and reporting requirements, its impersonal detachment and bureaucratic formality tempered only slightly by the relatively recent availability of anti-terrorist financing guidelines and voluntary best practices for U.S.-based charities.¹⁵⁹ And significantly, if not surprisingly, the guidelines note in their very first paragraph that “[c]ompliance with these guidelines shall not be construed to preclude any criminal or civil sanctions by the Department of the Treasury or the Department of Justice.”¹⁶⁰

The irregular, frozen-in-time, snapshot-nature of the current reporting requirements has engendered a kind of passive-aggressive administrative culture. The passivity of the culture is apparent both from the broad reliance on occasional formal reporting requirements as a mechanism for oversight, and from the absence of anything like a proactive, faith-based initiative of the sort recently established by the Charity

¹⁵⁸ Private organizations such as Muslim Advocates, which runs an important initiative to assist Muslim charities with their reporting requirements and other interactions with the federal government, have made important contributions toward this end.

¹⁵⁹ U.S. Treasury Department, Anti-Terrorist Financing Guidelines: Voluntary Best Practices For U.S.-Based Charities (undated), available at www.ustreas.gov/press/releases/docs/tocc.pdf (last viewed July 11, 2010).

¹⁶⁰ *Id.* at 2.

Commission in Britain. The unsatisfactory nature of this administrative culture has led a former director of the IRS tax-exempt organizations division, Marcus Owens, to conclude that a new, more dynamic and interactive agency, akin to the National Association of Securities Dealers that governs the world of stock brokers, is needed to oversee the tax-exempt sector.¹⁶¹ A more interactive, dialogic, and cooperative regulatory approach would benefit the entire universe of American charitable institutions, but would perhaps be especially welcomed in the beleaguered world of Islamic philanthropy. Short of such a dramatic reform, the IRS should make greater use of warning letters in the Muslim charitable context, a practice it has followed with respect to churches that have been found to engage in partisan political advocacy. That policy permits a kind of dialogue between tax-exempt entities and the IRS, giving charities an opportunity to address the concerns of federal regulators and to conform their conduct to the law before having to face the prospect of criminal sanctions.¹⁶²

The aggressive pole of the federal administrative culture of charitable oversight is apparent in the Treasury Department's resort to wholesale freezing of assets, designation of entire entities as terrorist organizations, and criminal indictments of Muslim charities and individuals alike. As a result of the Treasury Department's broad-based use of this drastic class of measures, the regulation of Muslim charities has evolved in the same direction that the oversight of personal churches has evolved: away from the law of tax-exempt organizations *per se*, and into the realm of criminal law, including criminal tax

¹⁶¹ MARCUS S. OWENS, CHARITY OVERSIGHT: AN ALTERNATIVE APPROACH (Hauser Center for Nonprofit Organizations, Working Paper No. 33.4, 2006), available at www.hks.harvard.edu/hauser/PDF_XLS/.../workingpaper_33.4.pdf (last viewed July 11, 2010).

¹⁶² Suzanne Sataline, *Obama Pastors' Sermons May Violate Tax Laws*, WALL ST. J., March 10, 2008.

fraud.¹⁶³ In addition to the more regular use of PDAs and NDAs, reform of this status quo should involve at least some of the recommendations contained in the recent ACLU report. There is an ongoing need to restore accountability to the executive branch and oversight to the judiciary, and an end to pernicious law enforcement practices such as racial profiling. The amendment or repeal of irredeemably overbroad administrative regulations and laws, such as E.O. 13224 and the material support to terrorism statute, can also help put a stop to the chilling of legitimate Muslim charitable conduct and due process violations of the sort catalogued in the ACLU report.¹⁶⁴

If there is a midpoint between these passive and aggressive extremes that is already available under IRS regulations, it is power of revocation, which the I.R.S. has used in respect of at least three major American Muslim charities.¹⁶⁵ But in all three cases, the revocation power was used only after the issuance of orders freezing the entire assets of these charities and their designation as terrorist entities.¹⁶⁶ Revocation may well be an unwarranted sanction in particular situations, but it is certainly preferable to the irreversible effects of an indictment or terrorist designation.

The story narrated here should not be read as a comparative parable of administrative villains and heroes. It seems that the establishment tradition can

¹⁶³ HOPKINS, *supra* note 86, at 313.

¹⁶⁴ BLOCKING FAITH, FREEZING CHARITY, *supra* note 13, at 17-20 (recommendations to the President and federal agencies), 21-22 (recommendations to Congress). *Id.* at 18, 19, 22 (calling for end racial profiling at administrative and statutory levels).

¹⁶⁵ See *Three Muslim Charities No Longer Tax-Exempt*, N.Y. TIMES, Nov. 15, 2003. The charities in question are Holy Land Foundation, Global Relief Foundation, and Benevolence International Foundation.

¹⁶⁶ On the I.R.S.'s authority to revoke the tax-exempt status of religious organizations that engage in political campaigning, see HOPKINS, *supra* note 86, at 684-685. The leading cases involving free exercise challenges to the IRS's revocation authority are *Bob Jones University v. Simon*, 416 U.S. 725 (1974); and *Bob Jones University v. United States*, 461 U.S. 574 (1983).

sometimes create a greater space for the pragmatic accommodation of religious liberty in specific contexts than does a strict culture of separation. The situation of Muslim charities in Britain is a case in point. But a regime of non-establishment is generally more consistent with the free exercise of religion, and we should be wary about making reforms to current federal law that are designed with only the struggles of Muslim charities in mind.¹⁶⁷ There is cause to be concerned about the surgical character of British and continental approaches to Muslim charities since 9/11, for they seem to involve a degree of administrative tutelage that may well compromise the autonomy and vigor of religious institutions in the long run. The severity of the French ban on the wearing of headscarves suggests that there are costs as well as benefits in store for Muslim communities still waiting to see how European policy towards Islamic philanthropic conduct will unfold in the years ahead. The British law of religious freedom has thus far averted such extreme outcomes, but the adoption of European Union-wide norms and codes of conduct vis-à-vis the charitable sector will put pressure on British policymakers to conform their choice of scalpels to continental practices.¹⁶⁸

Muslim American civil society is at a crossroads today. Like other faith communities, it has benefited from the expansive liberties that religious institutions enjoy in the United States. But it has also been severely constrained by a crackdown on Muslim charities that derives in part from those same liberties. The work of organizations such as Muslim Advocates inspires hope that the Muslim American charitable landscape can still adjust and recover from the blows it has sustained in recent

¹⁶⁷ GREENAWALT, *supra* note 17, at 5.

¹⁶⁸ See European Union Civil Society Contact Group, Contribution on NPO Transparency and Counter-Terrorism, March 2009, available at http://www.act4europe.org/code/en/actions.asp?id_events=142.

years. The expressed commitment of the Obama administration to support that recovery is encouraging, but will necessarily unfold against the backdrop of the same constitutional traditions that coexisted with the prior administration's policies. Whether the federal government will be able to adopt a more flexible and less adversarial approach to the challenge of reviving a flourishing culture of *zakat* in the United States remains to be seen.

Appendix:

The Charity Commission's Feb. 3, 2003 Removal Order in the Abu Hamza Matter

Sealed 3rd February 2003

36
2003

Charity: North London
Central Mosque Trust

ID(Ldn)
299884/109658

Order under Charities Act
1993, s.18(2)(i) removing
employee, officer or agent

CHARITY COMMISSION

In the matter of the charity called North London Central Mosque Trust "the Charity"; and
In the matter of the Charities Act 1993

THE CHARITY COMMISSIONERS FOR ENGLAND AND WALES ("the Commissioners") in pursuance of section 18 sub-section (2)(i) of the Charities Act 1993 **HEREBY ORDER** that:

Mr Mustapha Kamel Mustapha, otherwise known as Sheikh Abu Hamza Al Misri %
BCM Hamza London WC1N 3XX; 9 Albourne Road, Shepherds Bush, London W12
OLW; 8 Adie Road, Hammersmith, London W6 OPW;

being an employee, officer or agent of the Charity as or in connection with his position as Khateeb of the Charity or otherwise as a person appointed to give the Friday or other sermon, is removed from the exercise of such employment, office or agency and consequently from acting as a Khateeb of the Charity or otherwise as a person authorised to give sermons and from carrying out any relevant or associated functions, duties and activities at the North London Central Mosque, St. Thomas's Road, London N4 2QH

By way of incidental or supplementary provision **the Commissioners direct** Mr Mustapha Kamel Mustapha otherwise known as Sheikh Abu Hamza Al Misri not to hold himself out as a representative of the Charity as Khateeb or otherwise as a person authorised to give sermons or in any associated function or office or at all

If you the within named Mustapha Kamel Mustapha otherwise known as Sheikh Abu Hamza Al Misri disobey this Order you may be held to be in contempt of Court and liable to imprisonment

Sealed by Order of the Commissioners this 3rd day of February 2003.

L.S.

Hamza Al Misri