

## **Transcribed Narrative to Presentation: Shariah-compliant Finance: Benign or Belligerent?\***

### **Slide 1**

Welcome, my name is David Yerushalmi and this presentation is entitled: Shariah-compliant Finance: Benign? or Belligerent? This presentation is timely and important for two reasons: first, the interest in Shariah-compliant finance in the West continues to grow, and second, the fragile state of our financial system of late due is to the catastrophic impact of toxic financial products designed as highly sophisticated black box solutions to undisclosed market risk. The same black box phenomenon now permeates Shariah-compliant finance.

Unfortunately, none of the professional literature to date has examined the risks and problems associated with Shariah-compliant finance in any analytical or critical fashion. Instead, it appears more akin to a cheerleader chorus line singing the praises of this year's new and improved profit center, much as we heard about sub-prime mortgage securitizations and credit default swaps in their heyday. This presentation is an effort to pry open this new and emerging black box.

We have organized this presentation to be accompanied by source materials available as downloadable PDF files linked on the web site where you have accessed this presentation. First, for attorneys and other professionals interested in an in-depth legal analysis of the risks and legal exposure financial institutions confront when they offer Shariah-compliant finance products, you can download a law review article I authored entitled, "Shariah's 'Black Box': Civil Liability and Criminal Exposure Surrounding Shariah-Compliant Finance, published in the Utah Law Review [Vol 2008, No. 3]<sup>†</sup>.

Second, we have a PDF file of a monograph sponsored by the McCormick Foundation and the Center for Security Policy which delves into these matters in more detail as well.

Third, there are three separate handouts to which this presentation refers at specific points.

And finally, the narrative that accompanies this PowerPoint presentation has been transcribed and also made available as a PDF file.

---

\* © 2009 Law Offices of David Yerushalmi, P.C. All rights reserved. This material may not be published, broadcast, rewritten, or redistributed without the expressed written approval of the Law Offices of David Yerushalmi, P.C. (V.5-20-09)

<sup>†</sup> Bracketed material throughout has been deleted from the presentation narrative.

## Slide 2

Shariah-compliant finance is first and foremost a financial product. While it is often marketed alternatively as a uniquely Islamic form of modern finance, or as an ethical [or just] approach to wealth creation, and even as a way to embrace and co-opt a huge Muslim population in search of an identity, at its core, Shariah-compliant finance is finance. As such, it boils down to a way to sell financial products. This necessarily invokes securities laws.

The sine qua non of securities and their regulation is disclosure. The rule of thumb for what must be disclosed is most succinctly summed up by the standard formulation that one must disclose all material facts relevant to the investment decision of a reasonable investor.

Now, you will note that our rule includes the modifier: post 9-11 investor. The reason for this is that subsequent to that fateful day, a whole host of issues touching upon civil liability and criminal exposure has added several layers of due diligence and analysis expected by an investor. Quite simply, John Q. Public does not want to find out after the fact that his bank or mutual fund employs a Shariah advisory board that includes a mufti who has called for violent jihad against the West [or a Shariah advisor who also serves as the legal advisor to jihad warriors intent on establishing an Islamic hegemony].

This new found wariness is more than merely good sense. Beyond the disclosure requirements, a company doing business with Shariah authorities who themselves provide material support to terrorism might find itself on the wrong side of a criminal investigation or the subject of a lawsuit alleging claims under the federal Anti-Terrorism Act which provides a private right of action against those who intentionally or recklessly enter the causal chain of terror. Both the civil liability and criminal exposure present first order risks and of course the second order exposure of reputational risks.

As alluded to earlier, financial products invariably must include what we call transactional transparency. This boils down to designing, operating, and marketing a financial product in such a way that all of its component parts are exposed to critical analysis so that there will be certainty, consistency, and predictability. If some major component of the financial product is hidden from view, it becomes a black box which is more likely than not to succumb to some market tension or stress precisely because the correcting mechanism is inside the black box and hidden to all but a select and self-interested few.

We are all tragically aware of this phenomenon in the securitization of sub-prime mortgages and credit default swaps. In both of these cases, the sophisticated derivatives were created and stuffed in a black box consisting of complex algorithms understood only by a select handful of mathematicians. The result of these algorithms was a risk calculation that worked on paper for the mathematician but had little basis in the real world of finance. Hidden from view, it created trillions of dollars of apparent wealth until it met the reality of an over-inflated market, resulting in an almost immediate melt down

and creating one of the worst financial nightmares of the post-industrial age. That black box is now being recreated in the Shariah-compliant finance world but instead of mathematics and algorithms, the box is blackened and rendered opaque by Shariah, a theo-political-legal code only accessible to the Shariah authorities who sit on the Shariah advisory boards of the various financial institutions who have entered this market. We will examine this further as the presentation continues.

This presentation is formatted as an abbreviated due diligence exercise.

The first thing any good lawyer needs to ask when examining a new kind of financial product is, what is it. This inquiry will be the focus of this presentation.

The second question in order is, who are we dealing with? Who has the key to the black box? For our present purposes, we will touch on this question but only in an effort to answer the first. And, finally, how does this new financial product operate? What are the specific rules and mechanisms that allow it to work?

This question we will have to put off for another presentation insofar as it involves a deeper drill down on the specifics of Islamic jurisprudence and the specific financial products offered as Shariah compliant.

### Slide 3

We begin then with, what is Shariah-compliant finance?

To get at this, we must first unpack it by examining what is Shariah standing by itself; second, we must examine what the compliance mechanism is to bring free market financial products into compliance with Shariah's prohibitions against interest, uncertainty, and risk; and finally, we must examine the new fangled financial products to understand how they work. As indicated, we will leave this last examination for another day, focusing our attention for this presentation on what Shariah is and the key element of compliance.

To answer the question, what is Shariah, it is best to think of the question as an examination of both the endogenous elements, meaning that which is intrinsic to Shariah in any environment, and an examination of the exogenous elements, those Shariah rules and regulations developed to fit Shariah to an environment foreign to it.

In this presentation, our focus is on the endogenous elements. To begin, you must understand that Shariah is the corpus juris of all of Islamic law. But by law we don't mean law in the western sense, but in the sense of a legal-theological-political doctrine including law, ritual, morality, ethics, and norms.

Shariah authorities and scholars themselves tell us that Shariah consists of 3 levels:

First, is the fundamental purpose and first order principles;

Second, is the science of Islamic jurisprudence used to take that purpose and those first order principles and to apply them in the real world; and

Third, the actual positive law (the *furu*) and specific legal rulings (*fatawa* or *fatwa* in the singular) which instruct the Shariah faithful on proper observance and behavior.

Unpacking the compliance mechanism of Shariah-compliant finance at the endogenous level is rather straightforward: to know what Shariah is you must consult a Shariah authority. The *ulema*, or Shariah authorities, are the exclusive gatekeepers to how a Muslim must comport himself in any given situation to comply with Shariah. This quite obviously is the beginning and the key to the black box we now confront with Shariah-compliant finance. We will discuss this in a bit more detail subsequently.

Finally, and only by way of citing an example of the exogenous aspects of Shariah, we might examine how this compliance mechanism of seeking direction from a Shariah authority actually works in a modern financial institution. The result we find is the development of formal and informal requirements of Shariah advisory boards, including various local and international standards. Thus, a requirement intrinsic or endogenous to Shariah—obtaining a *fatwa* from a Shariah authority--has been applied to a financial

world quite foreign to Shariah in its pristine state. The result is a whole set of exogenous rules and regulations to fit one world to the other.

#### **Slide 4**

We continue then with our initial inquiry: What are Shariah's endogenous or intrinsic elements? To answer this question we would suggest a methodological inquiry useful in any fact-based critical analysis of legal systems that have actually played out in history: There are essentially two approaches to establish a fact- or evidence-driven baseline:

[1] An examination of the legal system's own theories and doctrine with some measure of secondary literature from the academic world.

[2] An empirical study of how the legal system played out in real terms historically and in contemporary regimes.

Returning to the examination of theory and doctrine, this inquiry will look at the theory and doctrine as a historical study – in Shariah's case, during the classical period after the birth of Islam; and we will examine contemporary theory and doctrine of the most influential authorities in the world of Shariah-compliant finance.

Similarly, we will examine the empirical evidence of how Shariah played itself out in real political-legal terms. While we will touch upon the classical period, we will focus our attention on how modern Shariah regimes actually operate.

## Slide 5

To understand Shariah doctrine at its most foundational level, we turn to the two leading non-Muslim authorities on Shariah-compliant finance, Harvard professors Frank Vogel and Samuel Hayes, both active at the Harvard Islamic Finance Project. In their seminal and still authoritative book, *Islamic Law and Finance: Religion, Risk, and Return*, they write:

Islamic legal rules encompass both ethics and law, this world and the next, church and state. The law does not separate rules enforced by individual conscience from rules enforced by a judge or by the state.

We pause here to note that there is simply no debate within the four corners of Shariah that challenges the veracity of these statements. Now, there are individual Muslims and notably Muslim and non-Muslim academics who would argue or assert that there is a personal, pietistic Shariah that is wholly determined by the individual Muslim. While no one can gainsay the proposition that individuals can define their beliefs and normative structures any way they wish, and they can call themselves Muslims and their lifestyle Shariah-adherent, but it is essentially meaningful only to them precisely because it is wholly subjective, arbitrary, and subject to the individual's whim. At an institutional level, this statement by Vogel and Hayes is simply indisputable. We continue . . .

Since scholars alone are capable of knowing the law directly from revelation, laypeople are expected to seek an opinion (fatwa) from a qualified scholar on any point in doubt; if they follow that opinion sincerely, they are blameless even if the opinion is in error.

This statement is quite obviously confirmation of the earlier assertion that the key to the Black Box of compliance rests solely with the Shariah authorities.

Similarly, from an important text authored by Latifa Algaoud, a Bahrain Treasury official, and Mervyn Lewis, an Australian economics professor who specializes in Shariah-economics, we learn that there is no room for Western notions of a nation-state:

Since Islamic law reflects the will of [Allah] rather than the will of a human lawmaker, it covers all areas of life and not simply those which are of interest to a secular state or society. It is not limited to questions of belief and religious practice, but also deals with criminal and constitution [sic] matters, as well as many other fields which in other societies would be regarded as the concern of the secular authorities. In an Islamic context there is no such thing as a separate secular authority and secular law, since religion and state are one. Essentially, the Islamic state as conceived by orthodox Muslims is a religious entity established under divine law.

Note again this last statement. There is no question that one can find academics and even some marginal Shariah authorities arguing for a reform of the foundational doctrine that

Shariah is incompatible with a separation of mosque and state. They argue, and correctly so, that throughout the 1200+ years of the Islamic empire, it was not always the case that Shariah was the law of the land in a strict sense and, even when it was, the Caliph or provincial ruler (such as the, Sultan) often applied it according to his own needs and beyond that, would cherry pick an authority to suit his need. It is also certainly the case that in the last 75 or so years of the Ottoman Empire, Shariah's role was severely reduced. But, this is mixing doctrinal apples with empirical oranges. Shariah's role in the Caliphate and within the many sub-political orders within the Caliphate waxed and waned. But from within the Shariah world, at the theoretical-doctrinal level, this description by Algaoud and Lewis is unexceptionable.



## Slide 6

We turn now to at least glance at and appreciate the nuance and sophistication of the nuts and bolts of Shariah. The How, meaning how to move from the loftiest of fundamental principles and purposes to a living law for an empire. That is, *usul al fiqh* or the science of Islamic jurisprudence. Let's set aside for the moment the fundamental principles and the positive law to focus on the jurisprudence of *fiqh*, or what we have termed the black box.

We begin as the Shariah authorities do with the Quran, the holy scripture of Islam. It is considered divine because it is said to be the direct word of Allah and necessarily perfect and immutable. Out of the 6,236 verses of the Quran, most scholars agree that there are approximately 500 legal or normative verses that supply the Shariah with its constitutional-legal foundation.

The next level of authority in Islamic jurisprudence comes from the Sunna. The Sunna was derived from the thousands of oral traditions (in Arabic, *aHadeeth* or *Hadith* in the singular) collected over a period of time after the death of Mohammed discussing his life and behavior in various circumstances. These were collected by the newly organizing Shariah legal scholars who later formed the legal schools, or what are called the *maddhahib* (*maddhab* in the singular). The Shariah authorities graded the various *aHadeeth* through a process known as *Isnad*—loosely understood as the chain of authenticity—judging both the narrator's reputation for accuracy and the substance of the narration against other narrations for integrity. The most authoritative of these make up the Sunna which were ultimately canonized into the Six Collections (the *Sahih Sittah*), which are also considered divine (even if indirectly so) and immutable. These *aHadeeth* make up much of the second foundational level of Islamic jurisprudence. But how do Shariah authorities understand this canonized scripture? Like most religious scripture, it consists of idealized generalizations and particularized instances which render it almost useless as an institutional guide for a common people known as the *ummah* much less an empire known historically as the Caliphate and which survived for more than 1200 years and covered a land mass consisting at its peak of most of humanity. In addition to the political and legal institutional requirements, there are many verses that simply appear to contradict one another. We are all familiar with the dueling Mecca vs. Medina verses: the former sounding far more tolerant and peaceful and the latter far more intolerant and bellicose.

It is here where the Shariah authorities step in by developing, during a period that spanned hundreds of years, an incredibly sophisticated and nuanced jurisprudence or *fiqh*. *Usul al fiqh* is the science or study of this jurisprudence.

It is also here where the great debates took place over *ijtihad*, or the authority to engage in legal reasoning, over when there is *ijma* or consensus, over what amounts to legitimate *qiyas* or deductive reasoning, over the role of the Sunna versus *ra'ay* or over whether *ra'ay*, which is the jurist's personal opinion, is even a legitimate avenue of *fiqh*.

## Slide 7

So, having glanced at the science of Shariah jurisprudence, what do we need to take from this? First, it is the appreciation that while the specific rulings such as in the criminal law might appear primitive and medieval, the science of Islamic law is anything but.

What you should also understand is that ijma or consensus among the ulema controls, absolutely. When the Shariah authorities agree on a given interpretation as a matter of positive law as sourced in a specific verse in the Quran or an authoritative Hadeeth, it is ijma or consensus and that legal ruling is not subject to challenge by any individual Shariah authority. Consensus among the ulema plays a central if not ultimate role in fiqh.

The final point to take from this quick glance at Islamic jurisprudence is that *usul al fiqh*, at least within the Shariah world, is the exclusive domain of the ulema. [Without the proper grounding in a Shariah education, from reputable and authoritative Shariah scholars, one has no access to this Black Box. Two examples demonstrate this point. Osama bin Ladin's mentor, Abdullah Azzam was a Shariah scholar. Bin Ladin is not. He is a military leader among the mujahed or jihad warriors and to some a caliph or political leader, but no one considers him a Shariah authority. Similarly, in the Shia world, the relatively young Iraqi political and militant leader, Muqtadā al-Şadr, comes from a long line of esteemed Shariah authorities. His father, allegedly murdered by Saddam Hussein, was Grand Ayatollah Mohammed M. Sadeq al-Sadr and his father was also a grand ayatollah. Muqtada, however, never completed his Shariah studies and was greatly hindered as an authority because he lacked Shariah credentials. Just recently, however, he returned from a two-year Sabbatical in Iran where he is said to have completed his studies for the title of Grand Ayatollah. While it is not yet clear that this is in fact the case, it points to the importance in the Shariah-faithful world for the right credentials.]

## Slide 8

We now turn to examine Shariah's purposes and methods as evidenced in the texts of the Shariah authorities in what has been termed the classical period and even the Golden Era of Islam.

Again, looking at the full body of Shariah, we have already examined even if only briefly, the jurisprudence of Shariah. But before turning to the Purposes of Shariah and its positive law rulings, we pause here just to recall the framework for our analysis. To understand this law or any other, we examine it theoretically and empirically.

Here we begin with the theory and doctrine as outlined by the Shariah sources focusing first on the classical sources.

Thus, we turn to the doctrinal analysis of the Maqasid, or what can be understood as the telos or purpose of Shariah. What follows is an assertion of fact about what the classic authorities have said on this subject but which we will verify by pointing to some of the most authoritative of the scholars from the different Shariah schools of jurisprudence.

The most fundamental of Shariah's purposes, at least at the doctrinal level, is the submission of all of existence to Allah's will. Nature submits by its nature. Man, however, submits only when he submits to Allah's will as represented by Allah's law, Shariah. Again, law in this context is meant in the broadest sense, including religious ritual, morality, ethics, and normative values of any kind. The word Islam, we are told, is a cognate of the word aslam, which means submission. Now, it is also said that the purpose of Shariah is peace and it is true that Islam is related, although not etymologically as directly, to salem, or peace. But Shariah understands that true peace is only possible when all of humanity has embraced Allah's will—which is Shariah. The same can be said for the goal of justice. There is justice only when mankind abandons the hubris that law begins in his mind or volition and recognizes Allah's place as the Divine Law Giver.

More specifically, the Shariah scholars who have written on this subject have typically determined that this purpose of submission is achieved through a Shariah political order that protects five fundamental principles or interests: (1) the Islamic faith, (2) the Muslim's life, (3) his lineage, (4) his intellect, and (5) his property. Some Shariah authorities add a sixth, his honor.

This political order in turn is most attainable when it is articulated in the Caliphate, a worldwide political hegemony based upon Shariah. This doctrine of the One World Caliphate is so dominant in Shariah that the great Muslim Aristotelian al-Farabi, who most assuredly embraced Aristotle's notion that the best political order for Man was the City-State which allowed for far greater commonality of interest, brotherhood, and fidelity among the citizenry, was compelled by the law to write of the perfect state as the World Shariah Order since Shariah in theory bridges all of the distinctions between men based upon tribe, language, or culture.

So far we have only discussed what the classic Shariah authorities tell us of the ends of Shariah. But what did they understand Shariah to say about how to achieve these ends and what to do when the Shariah political order, or dar al-Islam (the Realm of Submission), came into contact with the non-Shariah world of dar al-Harb (or the Realm of War)? This is then the realm of the positive law and, more particularly the siyar, or what can be termed the Islamic Law of Nations.

The first method is da'wa, which includes all forms of calling the unbelievers to the observance of Shariah as a believing Muslim. The specific methods have varied over time and according to local custom but they include persuasion, education, active proselytizing, and political and social welfare activities.

The second method is dealing with those who refuse to convert. If they are from one of the People of the Book or, if not but granted a special dispensation by the Caliph or lesser political leader of the region, they may remain faithful to their religion but they must agree to live in a special "protected" state called dhimma. This "protection" against the natural state of war the Shariah demands between the Muslim Shariah faithful and the unbelievers allows them to live in a relatively protected state of subjugation, without real political franchise, paying a special tax, and only worshipping in a private way.

For those people and nations which do not fall into the first two categories, there is a permanent state of war or jihad halted only by the practical necessities of the day or in the event that the Caliph agrees to a temporary cessation of hostilities for tactical reasons.

Jihad itself can be waged through da'wa or through violence, qital. Not every Muslim is obligated to go to war even in a defensive war in which case it becomes a personal obligation on each and every Muslim. Just as in the case of existential war fought by modern nations, some men are drafted and others take up other patriotic duties. So it is according to Shariah: some provide financial resources for the jihad, some are involved in propaganda, and some in the general welfare of the Muslims. But all of the Shariah faithful must engage in jihad.

## Slide 9

To support our earlier assertions, we begin with the classical theory and doctrine from the academic world. One of the best and most authoritative academic statements on the classical Siyar (or Law of Nations, which includes the Law of Jihad) was written by Prof. Majid Khadduri, an Iraqi-American scholar who founded the Paul H. Nitze School of Advanced International Studies, a division of The John Hopkins University. Writing in 1965, long before the plague of academic political correctness had fully taken hold and before the abject fear of speaking truthfully on the question of Shariah-Islam infected academic discourse, he wrote:

The Islamic faith, born among a single people and spreading to others, used the state as an instrument for achieving a doctrinal or an ultimate religious objective, the proselytization of mankind. The Islamic state became necessarily an imperial and an expansionist state striving to win other peoples by conversion. At the very outset, the law of war, the jihad, became the chief preoccupation of jurists. The Islamic law of nations was essentially a law governing the conduct of war and the division of booty. This law was designed for temporary purposes, on the assumption that the Islamic state was capable of absorbing the whole of mankind; for if the ideal of Islam were ever achieved, the *raison d'être* of the law of war, at least with regard to Islam's relations with non-Islamic states, would pass out of existence. . . .

. . . The Islamic law of nations . . . is not a system separate from Islamic law. It is merely an extension of the sacred law, the shari'a, designed to govern the relations of Muslims with non-Muslims, whether inside or outside the territory of Islam.

## Slide 10

Prof. Khadduri also explained the Islamic conception of world order:

In Islamic theory, the world was split into two divisions: the territory of Islam (the dar al-Islam), which may be called *Pax Islamica*, comprising Islamic and non-Islamic communities that had accepted Islamic sovereignty, and the rest of the world, called the dar al-harb, or the territory of war. The first included the community of believers as well as those who entered into an alliance with Islam. The inhabitants of those territories were Muslims who formed the community of believers (the umma), and non-Muslims of the tolerated religious communities collectively called the “People of the Book” or Dhimmis (Christians, Jews, and others known to have possessed scriptures), who preferred to hold fast to their own law and religion at the price of paying a poll tax (jizya) to Islamic authority. The Muslims enjoyed full rights of citizenship while the followers of the tolerated religions enjoyed only partial civil rights . . . .

The dar al-Islam, in theory, was in a state of war with the dar al-harb, because the ultimate objective of Islam was the whole world. If the dar al-harb were reduced by Islam, the public order of *Pax Islamica* would supersede all others, and non-Muslim communities would either become part of the Islamic community or submit to its sovereignty as tolerated religious communities or as autonomous entities possessing treaty relations with it.

## **Slide 11**

Finally, Prof. Khadduri's examination included an explanation of how the Siyar used the Law of Jihad to achieve its grand purposes:

The instrument which would transform the dar al-harb into the dar al-Islam was the jihad. The jihad was not merely a duty to be fulfilled by each individual; it was also above all a political obligation imposed collectively upon the subjects of the state so as to achieve Islam's ultimate aim—the universalization of the faith and the establishment of God's sovereignty over the world. Thus the jihad was an individual duty, especially in the defense of Islam, as well as a collective duty upon the community as a whole, and failure to fulfill it would constitute a gross error.

## Slide 12

We now turn to the actual texts of the classical theory and doctrine.

For a textual presentation of the classical period spanning over 800 years, turn to the illustrative rulings in Handout #1. In these examples, you will find representatives from each of the 4 major schools of Sunni jurisprudence. We will not here do more than survey the sources since there is no need to repeat what is contained in the handout. But, it is important to recognize and indeed to confront the brute fact that the traditional and authoritative Shariah doctrine across all legal schools remains absolutely consistent with Prof. Khadduri's description. That is, Jihad for the sake of Allah to destroy the political realm of the infidels leading to a world state governed by Shariah:

We begin with the earliest of the Shariah authorities to write extensively on the subject of the Siyar, or the Law of Nations, Al-Shaybani, a Hanafi scholar and jurist who lived in the later 8th and early 9th centuries.

Also included is Al-Qayrawani, a 10th century authority and a leading Maliki jurist.

No listing of Shariah scholars would be complete without Ibn Rushd of the 12th century, also known in the West as Averroes. Ibn Rushd was a prolific writer, renowned philosopher, and Maliki legal scholar in Spain during the waning period known as the "Golden Era" of Islam and is often cited as an exemplar of Islamic philosophic thought and tolerance. While it is certainly true that Ibn Rushd was a courageous neo-Aristotelian defending philosophic thought against those who would rule such to be apostasy, a battle he ultimately lost, his legal writings remain absolutely orthodox on the question of jihad against the infidels in Dar al-Harb.

We have included Abu Bakr al-Marghilani, a 12th century jurist of the Hanafi school, who authored the authoritative work, *Hidaya*, which is today considered widely authoritative as a guide to Islamic jurisprudence in Central Asia, Afghanistan, and India.

Like the inclusion of Averroes, no listing of classical Shariah scholars would be complete without Ibn Taymiyya. Ibn Taymiyya was a 14th century Hanbali jurist of high repute, but one who was constantly in trouble with the ruling class of his time. He is a favorite of contemporary mujahideen precisely because he was the first major authority to rule that Muslim leaders, like the Mongol converts in his day, who introduce non-Shariah law into the polity, are not true Muslim leaders and the true Muslims have an obligation to wage jihad to cleanse dar al-Islam of their influence. He is also a favorite source among the Shariah-compliant finance authorities because of his lenient rulings on the use of conditions in contracts, typically forbidden.

Abu'l Hasan al-Mawardi of the 11th century, a renowned Shafi'i scholar is added to include the school of jurisprudence which first made it crystal clear that the motivation behind offensive jihad was the Muslim's obligation to rid the world of unbelief.



We have also included al-Misri, who in the 14th century compiled the Shafi'i manual, *'Umdat al-Salik* (available in English as *Reliance of the Traveller*. This text was certified as late as 1991 by the highest authority in Sunni Islam, Cairo's Al-Azhar University, as conforming "to the practice and faith of the orthodox Sunni community." This text makes clear that the "greater jihad", or the never-ending war of working on one's own character traits is certainly part of jihad but the far more detailed legal obligation focuses on one's duty to the "lesser jihad", which as we have seen is lesser because Shariah envisions an end to that war when Islam reigns supreme.

Finally, we have included Ibn Khaldun, who lived from 1332 until 1406, and who is famous as a pioneering historian and philosopher. He was a Maliki legal theorist and his well regarded *Muqaddimah* is the first work of historical theory, in which he notes that "in the Muslim community, the holy war is a religious duty, because of the universalism of the Muslim mission and (the obligation to) convert everybody to Islam either by persuasion or by force."

### Slide 13

We have now seen that the notion of jihad or war against the unbelievers follows a long pedigree of authoritative and mainstream Shariah rulings.

Returning to our analytical framework, we note that we have completed the examination of doctrine of the classical period, and we now turn our attention to a more contemporary context.

Before we begin a drill down, let's take a step back to look at a map of the contemporary scene of violence in the name of Shariah post 9-11. What is striking about this map is how the current narrative, which holds that all of these events are the product of the same quite un-Islamic extremism, continues to dominate policy discourse. Glancing across the landscape we see . . .

. . .there are Sunni Arab groups, like Hamas and the Wahhabis in the Gulf.

There are Shia Arab groups like Hezbollah in Lebanon and al-Sadr's gang in Iraq.

There are Persian Shia in Iran.

Sunni Salafi groups in Afghanistan like the Taliban and . . .

The Deobandi Salafis in Pakistan.

There are Salafis in India and Kashmir.

There are Salafi groups in the Maghreb . . . and even in Sub-Saharan Africa.

There are groups operating out of Asia.

And, now in Europe, including Bosnia and Albania.

Russia is not immune . . . and we now have learned of the Chinese Uighurs.

How do all of these disparate groups, sharing no national, cultural, racial, or even socio-economic commonalities, embrace the identical claim to a Shariah-centered Caliphate if it is all just a fiction created to slander a noble and peaceful religion? Without the understanding we have gained that these disparate groups in fact share the same doctrinal claims of traditional and authoritative Shariah dating back 1200 years, one is left much like most policy makers—groping for complex pseudo-causes, environmental triggers, and psychological explanations that always fail to connect their common threat doctrine—traditional and authoritative Shariah. In this and subsequent slides, we will see that the one nexus that ties all of these disparate groups, indeed even intra-sectarian warring groups separated by the Sunni-Shia divide, is the common threat doctrine fully vested in Shariah known as the Law of Jihad or the Siyar.

The Sunni Salafi world is of course well represented among these groups. While some like al Qaeda base their rationale for jihad on a defensive posture, their underlying claim is one that seeks the infidel West to retreat not simple from the Middle East and Asia, but much of Europe. As we will see shortly, the Deobandi leadership demands that Muslims living in the West, including the US, engage in violent jihad so that Christianity and secularism will no longer dominate the landscape.

The Shi'a are also adequately represented among both Arabs and Persians but it is the world revolutionary doctrine of Ayatollah Khomeini that continues to drive these mujahideen to support terrorism around the globe.

The global fraternity of the Muslim Brotherhood, funded in large part by Wahhabi money from the Gulf, creates one of the great threats to political stability in the West.

The Iqwan's motto —*"Allah is our objective. The Prophet is our leader. Qur'an is our law. Jihad is our way. Dying in the way of Allah is our highest hope."*—is more than polemics but is anchored in traditional Shariah and tied directly to the classical jihad charter mapping out their political and military agendas.

The intellectual founder of this movement, Al Banna, active in the aftermath of the break up of the Ottoman Empire during the mid-20th century, found his native Egypt and the rest of the Islamic world a victim of the infidel West and secular Muslim tyrants. While he himself could not claim the status of a Shariah authority, he most certainly drew on those we have cited earlier.

Sayyed Qutb, also Egyptian, followed in al Banna's footsteps. He also had no special claim to Shariah scholarship but relied on the traditional authorities well known to his generation.

The Muslim Brotherhood developed quickly among Arab and non-Arab Muslims during the latter half of the last century with more learned Shariah scholars like the Pakistani Maududi taking up the challenge. Each of these men have written extensively on the goal to engage in jihad to first gain local and regional footholds for a resurgent political Islam embracing Shariah with the ultimate goal to create a world wide dominance.

In more recent times, we discovered the first jihad against the Twin Towers supervised by the highly esteemed Shariah authority known as the Blind Sheikh, Omar Abdel Rahman. He began his career as a member of the Iqwan only to graduate to a more aggressive strain.

Al-Zawahiri, Osam bin Laden's right hand man, if not successor, also began as a member of the Brotherhood.

Finally, one of the world's greatest Shariah authorities, and one of the more important early authorities in the world of Shariah compliant finance is Qaradawi. This main stream

Shariah authority has explicitly authorized suicide attacks against Jewish women and children in Israel and announced that it was an individual duty for every Muslim to attack US soldiers and civilian workers in Iraq and Afghanistan. He has been barred from entry into the US and Britain.

The Muslim Brotherhood becomes an especially important player in the Shariah-compliant finance world because it was Al-Banna, Qutb, and Maududi who forged the very idea that Shariah could be reawakened after the demise of the Ottoman Empire. The goal was and is to create a cohesive worldwide umma in the Middle East, Asia, and the West, leveraging these Shariah-inspired connections to establish viable Shariah-based political orders and eventually worldwide dominion. One of the key elements to this revolutionary plan was the creation of a Shariah political economy in the heart of the Western financial system. This was the *raison d'être* of Shariah-compliant finance.

## Slide 14

Insofar as Shariah-compliant finance found its pedigree in its maternal line of traditional and authoritative Shariah and its paternal line following the Muslim Brotherhood, we take note of an important federal prosecution of a Muslim Brotherhood front group posing as an innocent Muslim charity. In late 2008, the US government won a decisive guilty verdict in the Holy Land Foundation trial which had charged the charity itself and its organizers and fundraisers with conspiring to provide and in fact providing material support to Middle East terrorist organizations, notably Hamas.

Prior to the trial actually beginning, the government filed a listing of the various Muslim Brotherhood members and associated groups and named them all as unindicted co-conspirators. The list is a who's who of the most prominent American Muslim organizations' leadership.

Named as Hamas front groups and co-conspirators were the Council on American-Islamic Relations or CAIR . . . Islamic Society of North America or ISNA . . . Muslim Arab Youth Association or MAYA . . . and the North American Islamic Trust or NAIT, the organization funded in large part by the Wahhabis in the Gulf in order to finance the establishment of mosques in the US, thereby providing the Salafi imams and worshippers with control.

In that trial, the government had uncovered a secret planning memo of the Muslim Brotherhood in America. The prosecution had the document translated, authenticated, and introduced into evidence. It was a critical link in the doctrinal chain leading to the defendants' convictions. We have provided the memo in full as Handout #2.

The planning memo spells out in great detail the plan to destroy the West and to establish a Shariah-centered order. The key element of this plan is what they call the process of Settlement. Which includes creating a host of seemingly legitimate organizations and businesses all working to institutionalize Shariah. When we look just a bit closer, we see that the Iqwan considers this Settlement process of legitimization and institutionalization as a Civilization Jihad.

## Slide 15

Moving on to the next page of the Brotherhood's planning memo, we come across the fuller meaning of this plan.

In what has now become the infamous paragraph 4, the Brotherhood brain trust wrote:

The process of settlement is a "Civilization-Jihadist Process" with all the word means. The Ikhwan must understand that their work in America is a kind of grand Jihad in eliminating and destroying the Western civilization from within and "sabotaging" its miserable house by their hands and the hands of the believers so that it is eliminated and Allah's religion is made victorious over all other religions. Without this level of understanding, we are not up to this challenge and have not prepared ourselves for Jihad yet. It is a Muslim's destiny to perform Jihad and work wherever he is and wherever he lands until the final hour comes, and there is no escape from that destiny except for those who chose to slack. But, would the slackers and the Mujahedeen be equal[?]

## Slide 16

While we are certainly not indicting all or even most Muslims, we now understand that the classical Shariah doctrine of Jihad is alive and well across the Muslim landscape. We now move on from the theoretical-doctrinal analysis, which we have covered fairly thoroughly, and we move to the empirical examination.

The history of Shariah applied as law in the Caliphate has been the subject of many academic studies so there is no need to review those here. What is clear from these studies, and we merely assert this for our present purposes, is the following:

1. The political-military leaders of the Caliphate relied on the Shariah authorities for legal rulings and clarifications of their responsibilities in running the Islamic empire but this was almost always a relationship in tension and flux.
2. Classical Shariah doctrine as issued from the citadels of learning was oftentimes not the law as it articulated itself in the actions of the political-military leadership and even at the qadi-level in the judicial decisions rendered in individual cases. This contrast between law as theory and law as praxis is hardly unique to the Islamic empire and is typically a matter of great contention in most societies.
3. Throughout the Islamic Empire's history and especially during what Prof. Khadduri calls the fragmentation period beginning at the height of the Ottoman Empire's power beginning sometime around the 16th century, the rise to power of competing and often warring sub-political units made this analysis of how effectively Shariah was applied in the political realm even messier. [It was often the case that one Sultan, or a contender, would wage war or begin an insurrection to cleanse the province of infidel practices. Or, sometimes that was the purported rationale, with the outcome telling a different tale altogether.] And,
4. Even as the Ottoman Empire began to consciously move away from classical Shariah doctrine, both in its relations with the infidel West and domestically with the introductions of civil codes, the Shariah world remained more or less neutral and at a distance—that is, while some Ottoman Hanafi scholars attempted to bridge the gap between classical theory and Ottoman practice, the bridge never actually materialized and classical Shariah doctrine survived intact if not irrelevant to the lives of every day Muslims outside of certain preserved areas such as family law. [This was especially true after the demise of the Ottoman Empire with the rise of putatively secular nation-states run by mostly secular tyrants during the mid-20th century. But all of this has changed with the rise of Salafi-Wahhabi oil wealth and the Muslim Brotherhood's successfully waged proposition (now echoed by the Iranian muftis and al Qaeda affiliated groups) that the embrace of Western political, social, and economic values was destroying Muslim societies. Interestingly enough, classical Shariah's fairly recent re-elevation to a lofty and authoritative perch among ordinary Muslims who themselves might not faithfully abide by traditional Shariah's dictates, has been accelerated by the rise of Shariah-compliant

finance and the concomitant elevation of the Shariah authorities schooled in and faithful to the classical law. ]

However, notwithstanding the history of Shariah as applied, the resurgence of classical Shariah cannot be gainsaid and this is especially evident in the move among Muslim nations toward a political order fully committed to the four corners of the classical Shariah or at least bound by a de jure or de facto Shariah supremacy clause. The Shariah Supremacy clause works to allow the regime to employ non-Shariah governing institutions like legislatures and civil and criminal codes which are not based upon the divine authority of the Shariah, while at the same time drawing a line in the Shariah sands across which no law or governmental act may tread. These Shariah Supremacy clauses, sometimes written explicitly as such and sometimes disguised as clauses to prevent social or political unrest, are often moving targets as applied given the temperament of the society at large and the notoriety of the issue which calls the clause into action. We will see this in real time as we move on to examine Shariah as applied in the contemporary context.

The US government has produced a comprehensive although not particularly in-depth analysis of the role of Islam within the political order. In effect, the role of Islam in politics is an analysis of Shariah's role.

The report breaks down the Muslim-dominated regimes into four categories: Declared Islamic States; Regimes where Islam is the Declared Religion; Undeclared States; and Regimes that have Declared they are Secular States.

In the first Declared Islamic State category, we find several regimes that also have declared and in fact impose Shariah as the law of the land.

In the remainder of the first category and in all of the second category, the regimes impose a de jure or de facto Shariah supremacy clause.

Finally, in the third category, Indonesia, has ceded the Aceh region to the Shariah-faithful, and Sudan and Somalia now belong to the Shariah category.



## Slide 17

Thus, fully-compliant Shariah regimes include: Saudi Arabia; Iran; Gaza; Sudan; Somalia, Taliban in Afghanistan & SWAT Valley-Pakistan; N. Nigeria; and Aceh, Indonesia.

Partially Shariah-compliant or regimes with a Shariah Supremacy Clause include: almost all Arab countries; Pakistan; Malaysia; and Afghanistan.

What does Shariah mean in practice?

For those fully Shariah compliant regimes, it means the full menu of rather harsh criminal penalties known as the hudood together with other forms of compensation, such as blood money.

But in all these regimes, the fully compliant and the partially, Shariah effectively works to establish that apostasy is a criminal act and the formal punishment is typically execution.

Similarly, in all of these regimes, non-Muslims live under a heavy oppression, which does not permit them to worship publicly and freely, it operates as a bar to meaningful political participation, and it exacts a heavy economic toll.

Finally, it should come as absolutely no surprise that within the regimes that are more Shariah-compliant, there is greater support for jihad among Muslims in the form of finances, manpower, territory, and da'wa than in political societies that fully reject Shariah.

## Slide 18

We find this latter point supported by a number of global studies of Muslim attitudes. Typically, the greater role Islam plays in political life, and in practical terms that means the greater role Shariah plays, the more positive is the attitude about terrorism.

Thus, in one study which examined and tested this thesis using Pew survey data, the results finding such a correlation surprisingly surprised the researcher.

The report concluded:

People who support a strong role for Islam in politics are somewhat more likely to also support terrorism.” Perhaps more surprisingly, people who perceive Islam to play a large role in the politics of their home country also seem to be slightly more likely to support terrorism (though this correlation does not rise to conventional levels of statistical significance).

One might conjecture that this latter correlation is due to people from countries where Islam does play a strong role also supporting terrorism more. However, as we will see in the statistical model, even controlling for country, the perception that Islam plays a large role in politics is a positive correlate of support for terror.

## Slide 19

We conclude this section of the presentation with one last bit of research empirical data from two studies. The first is from the Pew Research Center, which has conducted annual global Muslim attitude surveys relating to Shariah, terrorism, and political life.

In this study, Muslims from Jordan, Pakistan, Morocco, Indonesia, Lebanon, and Turkey were asked if they thought Islam's role was increasing in politics or decreasing. Again, in practical terms, this means the role of Shariah. Among those respondents who thought it was increasing, the overwhelming majority, with the exception of Turkey, thought it a good thing. The inverse was found for those respondents who thought Islam was playing a lesser role in politics—that is, a decreased role was perceived as a bad thing. Even Turkey's numbers, a country which prides itself as a secular state, attest to a real sea change ever since the AKP came to power on a platform of a greater role for Islam and economic reform.

In the second study, an even more rigorous in-person survey, sponsored by the University of Maryland's Program on International Policy Attitudes, the surveyors asked Muslims in Egypt, Indonesia, Pakistan, and Morocco whether they favored al Qaeda's goal of the imposition of strict Shariah as the law of the land. The numbers are breathtaking with two-thirds in favor in Egypt and three-fourths in favor in Pakistan and Morocco. Just as surprisingly, in Indonesia, trumpeted as the most moderate of all Muslim nations, one-half of the population supported an al Qaeda like Shariah. The fact that all of the countries overwhelmingly reject Western values is no surprise. What we also must keep in mind for both studies is that the cohorts for the surveys included both genders and all adult ages. Imagine the results had the researchers controlled for males between the ages of 18-45?

## Slide 20

We come now to the final step: a case study to test the thesis fully supported by our analysis that Shariah-compliant finance is first and foremost predicated upon classic Shariah and the Muslim Brotherhood's agenda of destroying Western Civilization from within. If our analysis is correct, we would expect to find among the leading Shariah-compliant finance authorities—not the lesser or marginal authorities—clear voices supporting classical Shariah, especially the Law of Jihad, and the Muslim Brotherhood's agenda of destroying Western Civilization from within.

We have already seen one very renowned and respected Shariah-compliant authority, Sheikh Yusuf al-Qaradawi, embrace Jihad for the sake of Allah—and by jihad he means war. He has issued fatwas to the faithful that they should give charity, zakat, to the jihad warriors. He terms this financial jihad.

But because of Qaradawi's intimate connection to the Muslim Brotherhood one might argue that he was already predisposed to jihad against the West. Thus, we have chosen for our test case Mufti Muhammad Taqi Usmani, one of the most senior and authoritative Shariah authorities in the world, and certainly one of the most authoritative on the subject of Shariah-compliant finance. His full resume is available in the McCormick Foundation-Center for Security Policy monograph provided as a downloadable file at the web page where you have watched this presentation. As a former Pakistan Shariah Supreme Court Justice, his seminal legal opinion on the prohibition on riba as interest rather than just usury was a major milestone in the jurisprudence on Shariah and finance. His pronouncements in late 2007 and early 2008 that the contemporary Sukuk, or Islamic bond market, was not properly adhering to Shariah's prohibitions, created a crisis in the entire Sukuk industry. Had any lesser authority made the statement, it could have been shrugged off. No so when Mufti Usmani made his declaration. Today, he continues in his senior status at HSBC, Citibank's Citi Islamic Investment Bank, the Bahrain Monetary Agency, the Bank of Kuwait, and most of the industry standards boards. We also choose Usmani because unlike most of today's Shariah finance authorities he also is considered a leading authority on all of Shariah and has written extensively on the Law of Nations.

In 1999, the very year Usmani joined the new Dow Jones Islamic Index Shariah Advisory Board as its senior member, a board he sat on for almost a decade, he published the English translation of his book *Islam and Modernism*, originally written in his native Urdu.

In chapter 11 of that book, he responds to a legal query made of him by another Shariah authority from Jeddah, Saudi Arabia. Usmani was asked: now that Muslims are permitted to live in the West (Dar al Harb) and to practice their religion freely, including the right and privilege to convert the infidel, are Muslims still under the legal obligation to engage in violent jihad to rid the world of the unbelievers who do not accept the subjugated state of a Dhimmi? We have provided the entire chapter as Handout #3, also available on the web page where you have watched this presentation.

While I will leave it to you to review this document on your own, what you will find, just as you find here in this highlighted section, Usmani repeats classic Shariah doctrine. His answer to his faithful colleague was unequivocal. Shariah demands violent jihad until there is complete submission to Shariah-Islam.

Thus, he explains:

Here, killing is to continue until the unbelievers pay Jizyah after they are humbled or overpowered. If the purpose of killing was only to acquire permission and freedom of preaching Islam, it would have been said “until they allow for preaching Islam.” But the obligation of Jizyah and along with it the mention of their subordination is a clear proof that the purpose is to smash their grandeur, so that the veils of their domination should be raised and people get a free chance to think over the blessings of Islam.”

The chapter continues to explain this obligation of violent jihad in the West in intimate detail. The only two exceptions to this rule are that Muslim leaders can enter into peace treaties with the infidel West but only if the West has been completely subordinated to Islam so that the infidels present no challenge whatsoever to Islam’s domination or in the event the Muslim is powerless to fight the infidel. In the latter case, this cessation of hostilities remains valid only until the Muslims have gained the requisite capabilities to once again go to war. Whatever else one says about this fatwa from Usmani, which he purposefully translated into the language of the Muslims in the West, one cannot claim that it is a marginal or radicalized or extremist Shariah opinion. Usmani stands heads and shoulders above almost all other Shariah authorities alive today and occupies a preeminent role in the industry we call Shariah compliant finance.

## **Slide 21**

This leaves us with the obvious question, now itself unquestionably serious and legitimate:

Is Sharia an innocuous, a-political, a-military religious or ethical grounding for financial products and services? Or, is it a rich, theological-political-legal-social construct that seeks to displace secular Western nation-states?

To avoid this issue in the context of disclosure for any Shariah compliant financial product is to risk enormous exposure; but most importantly, it is avoidance of an existential threat to our way of life if not our lives simply.

## Slide 22

Thank you for your attention and your diligence.

**[For information on sponsoring a seminar on Shariah-compliant finance, or for information on having Mr. Yerushalmi speak at your event, please go to [www.davidyerushalmilaw.com](http://www.davidyerushalmilaw.com) ('Contact Us' page)]**